Scottish Law Commission

promoting law reform

(SCOT LAW COM No 222)

Report on Land Registration

Volume One

report

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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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NOTES

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

SCOTTISH LAW COMMISSION

Item No 2 of our Seventh Programme of Law Reform

Report on Land Registration

To: Kenny MacAskill MSP, Cabinet Secretary for Justice

We have the honour to submit to the Scottish Ministers our Report on Land Registration.

(Signed) JAMES DRUMMOND YOUNG, *Chairman*
LAURA DUNLOP
GEORGE GRETTON
PATRICK LAYDEN
HECTOR L MACQUEEN

Malcolm McMillan, *Chief Executive*
24 December 2009

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1857 Act
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Land Registration (Scotland) Rules 1980, SSI 2006/485

ARTL
Automated registration of title to land

DMS
Digital Mapping System

DP 125
Scottish Law Commission, Discussion Paper on *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004)

DP 128
Scottish Law Commission, Discussion Paper on *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 128, 2005)

DP 130
Scottish Law Commission, Discussion Paper on *Land Registration: Miscellaneous Issues* (Scot Law Com DP No 130, 2005)

Henry Report
Scottish Home and Health Department, *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (1969, Cmnd 4137; chaired by Professor G L F Henry)

Keeper
The Keeper of the Registers of Scotland

Registration of Title Practice Book
Ian Davis and Alistair Rennie (eds), *Registration of Title Practice Book* (2nd edn, 2000)

Reid, Property

Kenneth G C Reid et al, *The Law of Property in Scotland* (1996) (being a revised reprint of the relevant part of The Laws of Scotland: Stair Memorial Encyclopaedia vol 18 (1993))

Reid Report

Scottish Home and Health Department, *Registration of Title to Land in Scotland* (1963, Cmnd 2032; chaired by Lord Reid)

Rules

References to "the Rules" are to the 1980 Rules or 2006 Rules (see above) as the context requires

Selective glossary

Actual inaccuracy. A Land Register entry that is false. Compare *bijural inaccuracy*.

Advance notice. An innovation recommended in this Report. The prospective granter of a deed can first grant an advance notice. When this enters the Land Register it gives to the prospective grantee a 35-day *protected period*. Provided that the deed itself is registered in this period, the deed has priority over unexpected entries in the Land Register or Register of Inhibitions.

***A non domino*.** This Latin term means "by/from a non-owner". In general a deed granted by a non-owner is invalid, and so an application to register such a deed should normally be refused. But there does exist a legitimate role for *a non domino* deeds, to enable irregular titles to be validated by the running of prescription. (This requires a registered deed plus possession plus the running of ten years.)

Application Record. The record of pending registration applications – in effect the Keeper's in-tray. Under current law it exists *de facto*. The draft Bill would give it legal recognition.

Archive Record. The record of documentation supporting a registration, such as copies of dispositions. Under current law it exists *de facto*. The draft Bill would give it legal recognition.

Ascertainment deed. In a new property development a *provisional shared plot* title sheet may be set up for the prospective common area. As and when the developer registers an ascertainment deed, the shared plot comes into existence, and becomes co-owned by the various owners in the development.

Assignation. The transfer of incorporeal property, such as lease or a standard security.

Automated registration of title to land (ARTL). ARTL is an online forum in which both the deed and the application form are electronic, and the acceptability of the application is assessed by software. Not all transactions can be done through ARTL. Access to ARTL is limited to authorised persons. ARTL is described by the Department of the Registers as "an alternative to the current paper-based system of land registration for dealings with whole, where registration is completed electronically via a secure internet connection." (http://www.ros.gov.uk/artl/index.html.) The draft Bill (section 77(3)) defines ARTL as "the computer system, managed and controlled by the Keeper, which enables (a) the creation of electronic documents, (b) the electronic generation and communication of applications for registration, and (c) automated registration."

Base map. The map used by the Keeper as an underlayer for the *Cadastral Map*. Under current law this is the Ordnance Survey map. In the new scheme there could be alternatives.

Bijuralism. The simultaneous application of two different systems of law: in the case of Scottish land registration these are (i) the special rules of registration of title and (ii) the ordinary rules of the law of property. Bijuralism, a feature of the 1979 Act, disappears in the new scheme.

Bijural inaccuracy. An entry in, or omission from, the Land Register which is inaccurate according to the ordinary law of property but not according to the rules of registration of title. Compare *actual inaccuracy.* In the new scheme there would be no bijural inaccuracies. Any inaccuracies would be actual inaccuracies.

Cadastral Map. A map of Scotland, based on the *base map*. It shows title boundaries. Under current law it exists *de facto* in the form of the DMS. The draft Bill would give it legal recognition.

Cadastral unit. In the new scheme the Cadastral Map is divided into "cadastral units". There is a one-to-one correspondence between cadastral units and plots of land.

Certificates of title. Official documents issued by the Keeper about title in the Land Register. There are two types: *land certificates* and *charge certificates*. In the new scheme they would disappear as a separate category. But official copies would still be issued.

Charge certificate. (A type of *certificate of title*.) An official copy of a registered standard security.

Completion of title. To complete a title is to acquire a real right to land by registration, in the Land Register or the Register of Sasines, whichever is applicable.

Core paths. The Land Reform (Scotland) Act 2003 requires local authorities to establish a network of "core paths". In some cases this can involve the making of a "path order" under section 22 of the Act.

Curtain principle. The principle that it should be possible to take a register of title at face value, so that there is no need to look at the deeds that lie behind it.

Dealing. This term is sometimes used to mean a transaction affecting property that is in the Land Register, as opposed to property that is still in the Register of Sasines. A "dealing with whole" means the transfer of the whole of a registered property, as contrasted with a "*transfer of part".*

Deferred indefeasibility. A system in which a title is unchallengeable by reason of *Register error* but not by reason of *transactional error*.

Department of the Registers of Scotland. Also called Registers of Scotland or simply RoS. A non-ministerial Government department (with a staff of about 1400) that is headed by the *Keeper.* It is responsible for sixteen registers including the *Land Register.*

Digital Mapping System. The DMS is the Keeper's IT system containing registered geospatial data.

Electronic signature. The authentication of an electronic document. "'Electronic signature' means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication." (E-Signatures Directive (1999/93/EC) article 2(1).)

Encumbrance. A real right that encumbers, or burdens, land, ie a right held over the land by someone other than the owner of the land. Also called a *subordinate real right*. Examples include *heritable securities* and *servitudes*. The concept of encumbrances can also include some public law rights such as public rights of way. Encumbrances appear in the C Section and the D Section of a *title sheet*.

First registration. First registration happens when a property is registered in the Land Register for the first time. It happens either when a property in the Register of Sasines is sold, or, when there is no transaction, when the owner of property in the Register of Sasines applies for first registration. (This is called *voluntary* registration.) The Keeper must register in the first case, but in the second case the Keeper has a discretion. Our recommendations would change the rules about first registration.

Forms. The Rules set out certain official forms. For example the standard application for registration is a "Form 2". A form that requests information generates a "Form XXX Report". For example a "Form 12 Report" gives an update to a land certificate.

Guarantee of title. Title in the Land Register is normally guaranteed against invalidity. The guarantee takes one or other of two forms. Either (i) the invalidity is denied effect (in which case the registered title cannot be changed, and whoever suffers thereby is compensated) or (ii) the invalidity is accorded effect (in which case the person who suffers thereby is compensated). The distinction exists under the 1979 Act. In the draft Bill the former is called *realignment* of rights so as to conform with the terms of the Register and the latter comes under the heading of the *Keeper's warranty*.

Heritable security. A security over land, commonly called a mortgage by non-lawyers. In modern law the only type in use is the "standard security".

Immediate indefeasibility. A system in which a title is unchallengeable on the grounds of either *Register error* or *transactional error*. The 1979 Act embodies a certain type of immediate indefeasibility. Contrast *deferred indefeasibility.*

Indemnity. The name given in the 1979 Act to the system of compensation by the Keeper in the event of losses suffered as a result of inaccuracies in the Register. The broad idea is continued in the draft Bill. But the term itself is not used.

Integrity principle. See *realignment.*

Keeper. The Keeper of the Registers of Scotland, in whose name all acts and decisions are made. The Keeper heads the *Department of the Registers of Scotland*. The Keeper is responsible for numerous registers, two of which are the Land Register and the Register of Sasines.

Keeper's warranty. In the new scheme, the Keeper would normally warrant the title of a registered grantee. In its broad outline, this corresponds to one aspect of the Keeper's indemnity under the 1979 Act.

Land. "Land" includes buildings. It also covers land covered by water, such as riverbeds and the seabed (within the territorial limits).

Land certificate. (A type of *certificate of title*.) An official copy of a *title sheet*.

Land Register of Scotland. Or "Land Register" for short. This is the register established by the 1979 Act to replace, on a phased basis, the *Register of Sasines*. The Land Register *de facto* consists of four parts: (i) the *Cadastral Map*, (ii) the *Title Sheet Record*; (iii) the *Application Record*; (iv) the *Archive Record*. The draft Bill gives formal recognition to these four parts.

Liferent. The right to use property for one's lifetime.

Long lease. A lease of over twenty years.

Midas touch. Under section 3 of the 1979 Act, entries in the Land Register cannot be void. If they are wrong they are *bijural inaccuracies*, and they may or may not be rectifiable, but they are not void. We call this effect the Keeper's Midas touch. There are a few exceptions to the Midas touch, where an inaccurate entry is void: this would be an *actual inaccuracy*.

Midcouple. A deed that can be used as basis for *completing title* by a *notice of title*. For example, Adam is sequestrated (declared bankrupt). The court appoints a trustee, Eve, and orders that Adam's property is vested in her for the benefit of his creditors. This itself does not give her the real right of ownership of any land he owns: for that registration is necessary. She can become owner by registering a *notice of title*, the midcouple being the court's order. The notice specifies the property in question, something the court order will not have done.

Mud or money. See *guarantee of title.* Case (i) is "mud" and case (ii) is "money".

Notice of title. A deed whereby title is *completed* on the basis of a *midcouple*.

Office copy. An official copy of a *title sheet*. Similar to, but not the same as, a *land certificate*.

Offside goals rule. If X contracts to transfer a right (eg ownership of land) to Y, but in fact transfers it to Z, and Z knew that X was acting in breach of the X/Y contract, then Z has scored an "offside goal", with the result that Y can have the X/Z transfer set aside. Thus Y's personal right prevails over Z's real right. The doctrine can apply not only to transfers but also to certain other types of transaction.

Overriding interest. An *encumbrance* constituted other than by registration. For example short leases are overriding interests, as are servitudes created by prescriptive use. The term is not used in the *new scheme*.

New scheme. We use this phrase to refer to the law as it will be if and when our recommendations are implemented.

Notice of title. A deed by which an *unregistered holder* can complete title.

Person. "Person" includes juristic persons such as companies.

Personal right. A right against a person as opposed to a real right in property. A typical example would be a contractual right.

Pertinent. A right attached to property. An example is the benefit of a servitude. If Blackmains has a *servitude* of way over neighbouring Whitemains, that is an encumbrance over Whitemains and at the same time a pertinent which benefits Blackmains. Pertinents appear in the A Section of a *title sheet*.

Plot of land. An area of land owned by one person, or one set of persons. *Separate tenements* such as salmon fishing rights and mineral rights are deemed to be plots of land. So are flats in tenements. In the new scheme there is a one-to-one correspondence between plots of land and *cadastral units.*

Proprietor. In the Report and the draft Bill this term means someone with a valid *completed* title to land. Thus it does not include *unregistered holders*.

Protected period. The 35-day period of priority following an *advance notice*.

Provisional shared plot. A shared plot that has yet to come into existence but which is entered provisionally in the Land Register. It comes into existence as a *shared plot* as and when the developer registers an *ascertainment deed*. Provisional shared plots do not exist under current law.

Real right. A direct right in land. (Or moveable property.) Real rights divide into (i) the right of ownership and (ii) the subordinate real rights, which are *encumbrances*. In contrast to a real right, a personal right is a right against a person. If Fergus owns land and enters into a contract of sale with Fiona, her right at this stage is a personal right. She acquires the real right of ownership later, on registration.

Realignment. In certain cases where there is a discrepancy between what the Register says and the actual rights of the parties, the latter may, under the draft Bill, be changed (realigned) so as to conform to what the Register says. Those who suffer as a result are compensated. A similar concept exists in current law. Realignment is what we called in the discussion papers the "integrity principle".

Register error. An inaccuracy which already affected the title sheet at the time of a transaction. Compare *transactional error.*

Register of Sasines. Established by the Registration Act 1617. It is a register of deeds rather than a register of title. It is being gradually replaced by the *Land Register.*

Registration of deeds. A property registration system in which deeds are registered. There is no official statement as to the effect the deeds have. The *Register of Sasines* is a register of deeds. Compare *registration of title.*

Registration of title. A property registration system in which there is an official statement, in relation to each property, what its boundaries are, who the owner is, and who has other rights (eg security rights) in that property. The *Land Register* is a title registration system. Compare *registration of deeds.*

The Rules. The Land Registration (Scotland) Rules 2006, and, earlier, the Land Registration (Scotland) Rules 1980. Both derive their authority from section 27 of the 1979 Act.

Separate tenements. Salmon fishing rights, mineral rights and certain other rights are classified as "separate tenements". That is, they are treated as *plots of land* in themselves, capable of being owned separately from the land itself.

Servitude. A *subordinate real right* in favour of one property over a neighbouring property. An example is a servitude of way. (A servitude of way is a private right of way. There are also public rights of way.)

Shared plot. A *plot of land* that is co-owned by the owners of neighbouring property, such as an amenity area in a housing development.

Short lease. A lease for twenty years or under. Short leases cannot be registered in the Land Register.

Standover. An application for registration is said to be in standover if processing is suspended for any reason.

Subordinate real right. See *real right*.

Tenement. A building in which not all the units are in the same ownership. The typical tenement is a building purpose-built for residential units. But a single large house that has been split into upper and lower units, separately owned, is also a tenement. Tenements can also involve non-residential property.

Title sheet. A document setting out the title to a plot of land, divided into four sections. The A Section identifies the property and any pertinents. The B Section identifies the owner/s. The C Section sets out any *heritable securities*. The D Section sets out any other *encumbrances*.

Title Sheet Record. The set of all title sheets.

Torrens system. A system of registration of title developed in the 1850s in South Australia by Robert Torrens. Systems based on the Torrens system (of which there are many round the world) are themselves often called Torrens or Torrens-type systems. It is a system of *registration of title* and thus in broad terms is similar to the Scottish system.

Traditional document. The name we give to a paper document, as opposed to an electronic document.

Transactional error. An inaccuracy on the Register resulting from the acquirer's own transaction (for example, a forged deed). Compare *Register error.*

Transfer of part. The transfer of part only of a registered property, as contrasted with a *dealing with whole.*

True owner. We use this term as shorthand. If the Register is inaccurate, the person who would appear in the Register as owner, had the Register not been inaccurate, is the "true owner". (In the 1979 Act a true owner is not the owner, because of the operation of the *Midas touch*.)

Uncompleted title. A title to land that has not yet been made real by registration but which is capable of being made real by application for registration by the *unregistered holder*. Thus an uncompleted title is different from, say, a right under missives.

Unregistered holder. The holder of an *uncompleted title.* Also sometimes called an uninfeft proprietor. An unregistered holder can *complete title* by registration, and can also, without being registered, grant certain deeds.

Voluntary registration. Voluntary registration happens if the owner of property that is still in the *Register of Sasines* applies for the property to be registered in the Land Register. It is a form of *first registration*. Under current law the Keeper has a choice whether or not to accept such an application. The draft Bill would remove the discretion to refuse.

Foreword

Land rights are important to individuals, to businesses and to the economy as a whole. The total value of land in Scotland runs to several hundred £billion. The annual value of sales is about £35 billion; if the value of secured transactions (mortgage transactions) is included the latter figure is much higher. All land rights, and all land transactions, are registered with the Department of the Registers of Scotland. Getting the law of land registration right is important: it affects every square inch of the country - every house, flat, farm, factory and office. It affects everyone who lives in Scotland and it affects the whole of Scotland's economic life. The Land Register is part of the national infrastructure.

Until recently, registration took place in the Register of Sasines. The Land Registration (Scotland) Act 1979 introduced a more advanced system, which was rolled out, area by area, beginning in 1981 and extending to the whole country in 2003. When a property is sold for the first time after an area has become "operational", the sale triggers a switch into the new register. There are roughly 2.2 million title units in Scotland and roughly 60% of them are now in the new register. The new register is much better than the old one. For the first time Scotland is being mapped according to title boundaries (see the pull-out maps in Appendix F) and for each title unit there is a "title sheet" setting out who the owner is and what other rights there may be in the property. "Who owns Scotland?" is a familiar question. The Land Register is now providing the answer.

The other great innovation of the 1979 Act was the introduction of a state guarantee of title, which removes much of the risk and uncertainty otherwise inherent in transacting with property.

The new register is a quantum leap forward. But it is not surprising that the ambitious legislation of 1979 was not free from defects. Conscious of the problems, the Department of the Registers of Scotland asked us to review the law. This Report is the final result of that process.

Our recommendations are evolutionary: the great achievements of the 1979 Act should be consolidated and developed. We think that the result should be one of the best land registration systems in the world. The details of our recommendations are lengthy and technical, and so cannot readily be summarised in this foreword. But a few salient points are as follows:

- *Acceleration* of the process of bringing properties into the Land Register: the aim should be 100% coverage of Scotland as soon as is reasonably possible.

- *Electronic conveyancing*, which at present is competent only to a very limited extent, would become competent in all cases.

- In an imperfect world, inaccuracies cannot be wholly avoided. But the 1979 Act's rules for handling *inaccuracies*, when they do occur, are unsatisfactory and generate many complaints. We recommend a radically revised system of handling inaccuracies, making it easier to put mistakes right.

- We recommend that the law should recognise a single title map of the whole of Scotland. (In a sense this has developed de facto but the 1979 Act fails to provide a legal basis for it.) To bring Scotland into line with international terminology this would be called the *Cadastral Map*. Appendix F shows a section of the current "index map". This gives a rough idea of how the Cadastral Map would look.

- Under the current law, there tends to be a "blind period" of a few days in which a buyer is at risk: a buyer may have paid the price but then finds that in the blind period there was a seller-related entry in the Land Register (or in the interlocking Register of Inhibitions), the effect of which is to blight the buyer's title. At present this risk is covered by a Heath Robinson system of "letters of obligation" which is widely accepted as unsatisfactory. We recommend the introduction of a system of *advance notices* which will protect buyers from potential entries in the blind period.

- Our recommendations and draft Bill pave the way for a complete, single, accessible national register of accurately mapped, guaranteed land titles.

Part 1 Introduction

Land registration law

1.1 Land registration law is law that is as important as it is inconspicuous. Indeed, to non-lawyers it is so inconspicuous as to be invisible: few even realise that it exists. There is no harm in that. Much law is like plumbing: useful but unexciting and seldom thought about except when it goes wrong. Visible or invisible, it is important. It is important for ordinary people, for commercial enterprises, for the agricultural sector and for the financial services industry. If Jack and Jill buy a house their title should be secure. If they wish to sell it they should be able to prove title to a buyer. If banks could not rely on an efficient title system before they give secured credit then the system of secured credit could not function. Development economists constantly stress the importance for developing countries of what they tend to call "land titling".[1] The absence of a functioning[2] land titling system is regarded as a brake on economic development. We are lucky that in this country we can take such things more or less for granted, like plumbing.

Land registration in Scotland

1.2 Scotland has long had a particularly good record, becoming one of the leaders when the Registration Act was passed in 1617, requiring the public registration of conveyancing deeds. Few other European countries introduced any form of registration until the 19th century and indeed in England and Wales some areas had no system of registration until 1990.[3] In such countries the lack of title transparency proved a problem that eventually had to be addressed.

1.3 The Register of Sasines, which was introduced in 1617, was advanced for its time. It was given a new lease of life in the late 19th century when, as well as being indexed by persons, it was also indexed by property units. But the fact is that it gradually fell behind the best standards. Title registration systems involve accurate mapping and allow a higher degree of reliance on what is registered than does a system of the Sasine type. Such title registration systems were developed first in German-speaking Europe and later in Australia and have gradually spread round much of the world, though many countries still have deeds-recording systems broadly comparable with our Sasine system. When in the 19th century the decision was made in England and Wales to introduce property registration, the choice was a title registration system.

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[1] The literature is too extensive to be mentioned here. The ideas are particularly associated with the Peruvian economist Hernando de Soto.

[2] Some developing countries have titling systems that exist on paper but do not function properly in practice. For an interesting if depressing study see John Mugambwa, "Transportation of the Torrens System to Developing Countries: Uganda and Papua New Guinea", in David Grinlinton (ed), *Torrens in the Twenty-first Century* (2003), p 115.

[3] In England and Wales there was no system of registering deeds, except in Middlesex and Yorkshire (other than York), for which counties it was introduced in the 18th century. Title registration was eventually introduced as an option but it was for individual local authorities to decide whether that option should be taken up for land in their area.

1.4 In Scotland a debate began about 1900 as to whether to shift from a deeds recording system (the Register of Sasines) to a title registration system. Finally the Land Registration (Scotland) Act 1979 was passed. It was rolled out county by county, the rule being that when a property was sold it would switch from the old register to the new one. The first county to come on stream was Renfrewshire in 1981 and the last were Banffshire, Caithness, Moray, Orkney and Shetland, Ross and Cromarty and Sutherland, all in 2003.[4] There are rather more than two million title units in Scotland, and thus far approaching 60% have been switched into the new register. But in terms of area the figure is much lower: only about 20% of Scotland is in the new register. This is because larger landward properties tend to be bought and sold less often than smaller urban ones.[5]

The need for reform

1.5 Even today the Sasine system is a better system than can be found in many countries in the developed world, not to mention the less-developed world. But there is no room for complacency and the decision taken in 1979 to move to title registration was a sound one, despite the transitional difficulties and costs that such a change inevitably brought with it. We now have a system that is in most respects excellent and is certainly a vast improvement over the Sasine system. But progress is always possible, and experience since 1979 has shown that the legislation had several design defects that can be and should be put right. These defects being not merely surface features but inherent in the design, the Report recommends that the system be stripped down and rebuilt so as to enable it to deliver according to high performance specifications. In addition, we recommend one technical upgrade, namely the system of advance notices. A version of such a system has been available in England and Wales and a number of other countries, in Europe and elsewhere, for many years – well before 1979 – and the fact has to be faced that, in not offering this facility, our law has not kept pace with the best land registration systems round the world.

1.6 It was at the suggestion of the Keeper of the Registers of Scotland that a review of the Land Registration (Scotland) Act 1979 was undertaken. Given the scale of the subject we issued three discussion papers:

- Discussion Paper on *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004).
- Discussion Paper on *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 128, 2005).
- Discussion Paper on *Land Registration: Miscellaneous Issues* (Scot Law Com DP No 130, 2005).

1.7 The proposals in these discussion papers were generally supported by respondents, and the Report and draft Bill follow those proposals closely. Inevitably, however, there are some departures, and moreover there are some new recommendations that were not

[4] The Land Register inherited from the Register of Sasines the traditional counties as they were before the Local Government (Scotland) Act 1973.

[5] Unsurprisingly, coverage varies from county to county. Renfrewshire, having been "operational" for the Land Register for the longest period, has the highest degree of coverage. Appendix D contains diagrams which illustrate coverage.

mentioned in the discussion papers. Although our recommendations are extensive, and although we recommend that the 1979 Act be repealed and replaced, the changes, if enacted, would be evolutionary, not revolutionary. The value of continuity has been present in our minds throughout the process. There would continue to be a Land Register and existing registered titles would be largely unaffected. The great achievements of the 1979 Act would be retained.

1.8 We believe that if our recommendations are implemented, Scotland would once again have one of the best land registration systems to be found anywhere in the world. Indeed, arguably it would be the best.[6]

Scot/LAND online

1.9 The 1979 Act was conceived of simply as a conveyancing statute. It aimed at making conveyancing simpler and therefore cheaper. And in that it has been successful. What was not realised was that it was more than just another conveyancing statute. Year by year more and more of Scotland is covered by the new registration system. And unlike the old system, the new one is accessible and transparent. In the past, to discover "who owns this property?" and "what non-ownership rights is it subject to, such as secured debt?" was possible, via the Register of Sasines, but it was slow and expensive and needed a conveyancing expert to turn the data into usable information. Moreover, boundaries were often uncertain. And all this remains true of properties that are still in the old register.[7] But the new register is different. Any intelligent person can understand a title sheet, at least in broad terms. It shows the property by means of a coloured plan.[8] It says who the owner is.[9] And it says what rights (if any) held by other parties burden the property.[10] Moreover, all this is available online.[11]

1.10 Though no one seems to have seen it this way in 1979, the effect is revolutionary. In the 19th century the detailed physical mapping of Scotland was carried out for the first time by the Ordnance Survey: an achievement of immense significance. But the Ordnance Survey mapped, and maps, only (a) physical features and (b) boundaries of public law, such as constituency boundaries. It does not map boundaries of private law, ie title boundaries. This task began when the new register went live in April 1981 and the process continues. The sooner it can be completed the better. Under current law completion can hardly be

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[6] For example, the recommendations solve the problem of "bijuralism". (For bijuralism see in particular Parts 13 and 17.) This problem has a tendency to arise in any title registration system and does in fact plague many such systems. Our solution is derived from German law. (A system that has been influential across much of Europe but which unfortunately was not studied before the passing of the 1979 Act.) But at the same time our recommended scheme is, we believe, superior to the German system in a number of respects, including the nature of the title guarantee that is given to those dealing in land.

[7] As mentioned above, about 40% of title units and about 80% of the surface area of Scotland are still in the old register.

[8] The A Section of the title sheet.

[9] The B Section of the title sheet.

[10] The C Section (heritable securities) and the D Section (other encumbrances).

[11] It is necessary to sign up. And there is a pay-per-hit charge. In practice it tends to be organisations that sign up, not least public-sector organisations such as local authorities. The benefits to local authorities of knowing *what properties* there are in their area, what their *boundaries* are, and *who owns* them, are immense. The BiGGAR Report (see para 1.11 below) at para 2.3 mentions better recovery of Council Tax as a benefit of land registration. The benefits run across the public sector, even if they cannot always be quantified in monetary terms. (For example the Land Register is often used by the police.) There are also obvious benefits to the private sector and to the third sector.

envisaged.[12] We recommend measures to bring about completion. When that happens the access revolution would be complete. Scot/LAND would be online.

Economic impact

1.11 At the beginning of this part we touched on the importance of effective land registration to a country's economic development. Early in 2009, the Department of the Registers of Scotland engaged professional economics consultancy firm, BiGGAR Economics,[13] to consider and to attempt to quantify the value of the Keeper's operations to the Scottish Economy. The initial report reinforces the value of Scotland's national property registers.[14]

1.12 Against this background, the Department of the Registers thought it important, both for its own purposes and for informing stakeholders and policy makers, to consider the economic impacts of our proposed reforms. Economic considerations are, of course, not the sole driver for law reform. But in a project such as this the likely macro- and micro- economic effects of the proposed reforms are important. Accordingly the Department of the Registers decided to commission a further economic impact assessment to consider the likely impact of our proposed reforms. This second report is reproduced at Appendix C.[15] In brief, this study indicates that the proposed reforms would not create negative economic impacts and notes a variety of positive economic impacts, particularly in relation to our proposals for bringing forward completion of the Land Register and in relation to electronic conveyancing.

What land registration can and cannot achieve

1.13 There are sometimes calls for the law to require owners of land to disclose their identity, or for this requirement to apply to those who own more than a certain amount of land. This idea does not need new legislation: the law has required this ever since the Registration Act 1617. It is not possible to acquire ownership of land in Scotland – whether a thousand-hectare estate or a flat in a city – without registration, and registration requires the disclosure of the identity of the acquirer. Secret ownership has been impossible in our law for almost 400 years.

1.14 What the Register does not reveal is the back story, if there is one. If Alan is the registered owner he might be merely the nominee for Beata. That does not mean that she is the proprietor. Alan is the proprietor: that is the whole point of the arrangement. If Alan is to own the property in her interest, then, self-evidently, it is necessary for him to own the property: he cannot own it in her interest if he does not own it in the first place. But it is Beata who calls the shots. It is not only in nominee cases that the background power may not appear from what is in the Register. Beata might set up a company of which she is the sole shareholder, and buy the land in the name of the company. Here the owner is the company

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[12] Transfer of properties into the new register happens on sale. There may be no sale for long periods, such as properties owned by companies or public authorities, or properties handed down the generations through the law of succession, which is not uncommon for landward properties. The 1617 Act required the recording of *any* transfer (not just transfers on sale) and yet four centuries later there are *still* properties that are not in that register because there has been no transfer since 1617. (These cases all involve state property, local authority property, and the property of our older universities.)

[13] http://www.biggareconomics.co.uk/

[14] This report is available on the Keeper's website. See http://www.ros.gov.uk/public/publications/RoS%20Economic%20Impact%20Report%2018aug09.doc

[15] With the permission of the Keeper and of BiGGAR Economics.

but again it is Beata who calls the shots. If she wishes, she can make it harder for anyone to find out about her by registering the company in an offshore jurisdiction where the local companies legislation does not require companies to disclose many details about themselves.[16] Again, a trust mechanism might be used, and sometimes a combination of mechanisms. For example the land might be owned by a company registered in the Republic of Taxhavenia, and the company itself might be owned by a trust.

1.15 The example of Beata is an example where secrecy is desired. (Secrecy as to who pulls the strings, not as to who owns the land, for the owner of the land appears in the Register.) But there are many cases where land is owned by trusts or companies where secrecy is not the motive. Consider, say, a shop in Aberdeen's Union Street owned by a household-name retailer. The reason that ownership of the property is vested in the name of that company is not to keep the identities of its countless shareholders secret. Edinburgh Castle is registered in the name of the Scottish Ministers,[17] but that fact is not a device to keep the names of the people of Scotland secret.

1.16 To require the disclosure of the person or persons "behind" the registered owner would thus not be simple, as a comparison of Beata's case with the shop in Union Street, or Edinburgh Castle, illustrates. But whether it is simple or not, it is not something that the land registration system deals with. The land registration system identifies the owner. That is what it is designed to do and it does it well. Those who wish to find out about the back story are thereby given an invaluable starting point. But the Register itself is about proprietary rights in land, not about back stories, and it would be difficult to see how it could realistically be adapted to be about them.

The structure of the Report

1.17 The Report is divided into discrete topics. Some parts are long, others short, according to the nature of the subject matter. Occasionally there is some repetition. This is deliberate: we felt that the Report being so long, not many people would read the whole of it, and those who did would not necessarily carry in the front of their minds everything they had already read. The Report is liberally illustrated by worked examples.

1.18 Part 2 gives more information about the history of land registration and the background to the project. The third part identifies some of the main issues in the Report: those who do not have time to read the whole Report will wish at least to look at that part. Part 37 (Some implications for conveyancing practice) looks at the implications of the recommendations from the standpoint of the conveyancer.

The structure and style of the draft Bill: anatomy, physiology, pathology

1.19 The draft Bill is not easy reading. On such a technical topic, easy reading is hardly possible. One device we have adopted which may make the draft Bill slightly less baffling is that its first seven parts deal successively with what may be called (i) anatomy, (ii) physiology and (iii) pathology. "Anatomy" is represented by the first two parts and sets out the bones etc of the Land Register. It is static in its approach. "Physiology" is

[16] There are many such offshore jurisdictions.
[17] Title number MID1. It was the first property in Midlothian to be registered in the new Register. (Edinburgh is no longer in Midlothian for local government purposes, but the Land Register, like the Register of Sasines, works with the counties as registration areas.)

represented by Parts 3 to 5. It is dynamic in its approach. It is about the registration of transactions – the day-to-day life of the register, taking in deeds through the post or through the e-conveyancing process and giving effect to those deeds in the register – deeds such as dispositions,[18] heritable securities,[19] servitudes, leases, assignations, discharges and others too numerous to mention here. The last of the "physiology" parts, Part 5, is about the Keeper's warranty of title, and thus points forward to the next group of parts (6 and 7) which are about "pathology", that is to say, what happens when things go wrong. In an ideal world a land registration statute would need no provisions about that complex subject. But on this planet the ideal does not exist - not even in Scotland.

1.20 One further organisational point is worth noting. Parts 2 to 7 of the Bill are drafted for a mature register, ie one in which all land is already in the Land Register. What is commonly called "first registration", ie the process of transferring land into the Land Register for the first time, is dealt with in Part 8. First registration is a transitory phenomenon, because for any plot of land it happens only once, and the time will come when all land is registered in the Land Register. (At which point in time Part 8 will have become "spent" and so repealable.) This approach is different from that of the 1979 Act, in which first registration is dealt with simultaneously with "dealings" ie transactions with registered land.[20]

1.21 Three other points are worth mentioning. The first is that schedule 3 contains some worked examples of the effect of advance notices. This is, we believe, a new development in statutory drafting in this country, though the method is used elsewhere.[21] We considered this to be appropriate because advance notices are a new concept in Scots law and to give a precise explanation in general language would verge on the impossible. The other point worth mentioning is the use of "overview" sections of the type pioneered by such pieces of legislation as the Income Tax Act 2007.[22] The third point is that the draft Bill is considerably longer than the 1979 Act. We offer no apology, but we do offer two reasons. The first is that the draft Bill covers a number of issues that at present are covered in the Rules, such as the internal structure of title sheets. These are basic matters that should be in the primary legislation. The second is that the 1979 Act was too brief and thus omitted much that should have been covered.[23]

The appendices

1.22 This Report has six appendices. They are as follows. Appendix A is the draft Bill, together with explanatory notes. Appendix B is a list of those who responded to the discussion papers. Appendix C, the BiGGAR Report, has already been mentioned. Appendix D shows the coverage of the Land Register. Appendix E gives examples of what a "shared plot title sheet" and a matching "sharing plot title sheet" might look like. (The concept of a shared plot title sheet is discussed in Part 6.) Appendix F illustrates what is currently the "index map". This provides an impression of what the Cadastral Map envisaged by this Report would look like, subject always to the qualification that no mere paper print-out could

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[18] Deeds transferring ownership of land, and hence the most important type of conveyancing deed.
[19] The layperson nowadays uses the English term, "mortgage".
[20] See for example s 2 of the 1979 Act. If there were a TV contest for the most impenetrable section in the Scottish statute book, s 2 of the 1979 Act might be worthy of being a contestant.
[21] In the UK statute book the Consumer Credit Act 1974 has some examples in Sch 2 but they are only to explain terminology.
[22] The overview sections in the draft Bill are s 44 and s 58.
[23] This issue is discussed more fully in Part 3, particularly paras 3.5 and 3.6.

do full justice to the rich data contained in the Cadastral Map. (Most obviously, this print does not show title numbers.)

Legislative competence and human rights

1.23 In terms of the Scotland Act 1998 the law of land registration is not a reserved matter, and so lies within the legislative competence of the Scottish Parliament. The same is true of those aspects of the draft Bill that are ancillary to land registration, namely electronic deeds and contracts, and advance notices.

1.24 The 1979 Act makes the Ordnance Survey Map the basis of the Land Register mapping system[24] and the Scotland Act reserves "the subject-matter of the Ordnance Survey Act 1841".[25] We recommend that it should be competent for the land registration system to cease to use the Ordnance Survey Map.[26] In our view this would be within the legislative competence of the Scottish Parliament because it would not affect "the subject-matter of the Ordnance Survey Act 1841." It would merely be about whether the use of OS data for land registration purposes should be compulsory.

1.25 The draft Bill is in conformity with the European Convention on Human Rights. The only aspects of the draft Bill that need mention in this connection are (i) section 21, which is about *a non domino* dispositions, and (ii) Part 6, which is about the realignment of rights following certain good faith transactions.

1.26 The draft Bill says (section 20) that where a disposition is granted by someone who lacks the power to grant it, the Keeper is to reject an application based on that disposition. Section 21 then states an exception, and the question is whether that exception is compatible with Article 1 of Protocol 1 (the property protection clause) of the ECHR. In our view it is compatible. In the first place, where section 21 does apply, the consequence of registration is merely to enable the prescriptive clock to begin to tick. It would then take another ten years before a prescriptive title could be acquired, and even then that would happen only if the other requirements for a prescriptive title, notably possession, were satisfied. The law about prescriptive title is not contained in this Bill: it is contained in the Prescription and Limitation (Scotland) Act 1973, and if there is anything ECHR-incompatible about the law of prescription the problem lies in that statute, not in this Bill. In the second place, the Grand Chamber of the European Court of Human Rights has held that prescriptive title to land is compatible with Article 1 of Protocol 1.[27] The narrow issue of whether the reforms we recommend to the 1973 Act might have ECHR implications is discussed in Part 35, where we come to the conclusion that there is no difficulty.

1.27 Although we think that the current legislation is already ECHR-compatible, we note here certain differences between the current legislation and the draft Bill, all of which would tend to reduce the possibility of an ECHR-based challenge. The 1979 Act has no general rule against the registration of invalid deeds. By contrast, the draft Bill says clearly that, subject to section 21, the Keeper should reject invalid deeds. Then the 1979 Act provides that on the registration of an invalid deed, the grantee acquires an *immediate* title, albeit one

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[24] 1979 Act, s 4(2) and s 6(1).
[25] Scotland Act 1998, Sch 5, Part II, Head L4.
[26] Draft Bill, s 4(5).
[27] *J A Pye (Oxford) Ltd v United Kingdom* [2007] ECHR 700. See further Part 35, below. On the basis of this decision we think that the provisions of the 1973 Act about positive prescription are ECHR-compatible.

that may be challengeable.[28] By contrast, under the draft Bill if the Keeper accepts an invalid deed under section 21, *no* immediate title emerges. Where the grantee already has possession the 1979 Act makes rectification normally impossible:[29] not so in the draft Bill. The current legislation generally forbids the Keeper to alert the true owner to what is happening:[30] not so the draft Bill.

1.28 The other issue concerns the realignment of rights, dealt with in Part 6 of the draft Bill. Under these provisions, a *bona fide* grantee can in some cases take a better title than the granter had. Similar rules (albeit not conceptualised in the same way) already exist in the current legislation. As in the current law, the person who suffers as a result of these rules is fully compensated. Given this right of compensation we consider that the realignment rules are ECHR-compatible. Indeed, even without such compensation they would probably be compatible, for there is a strong public interest in enabling people to rely on the accuracy of the Register.[31]

Acknowledgements

1.29 The advisory group for the project consisted initially of Professors Stewart Brymer, George Gretton, Roddy Paisley and Robert Rennie. After George Gretton was appointed as a Commissioner in place of Professor Kenneth Reid, the latter became a member of the advisory group, and also became the outside consultant to the project. We are very grateful to the members of the advisory group for their support over the long period that this project has taken. We would also wish to express our gratitude to HM Land Registry in England and Wales, and the Bundesnotarkammer in Germany.

1.30 The support of the Department of the Registers of Scotland has been of crucial importance. In England and Wales a comparable project, resulting in the Land Registration Act 2002, was a joint project between the Law Commission and the Land Registry. This project has not been a joint one as such. But the development of law in this area does need input from the department that has to run the system. It needs to draw on the expertise of that department, its knowledge of how the current system works in practice, of where the problem areas lie, and which solutions would be workable and which would not be. The Department's support has been generous and unflagging. In particular it seconded two staff members to work with the Commission, first Martin Corbett and later John Glover. In addition we have had numerous and valuable meetings with successive Keepers of the Registers and their staff. We cannot sufficiently acknowledge the value of this support.[32] Having said that, the project is not a joint one, and consequently it should not be assumed that everything in the Report and draft Bill necessarily reflects the views of the Department of the Registers of Scotland.

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[28] See Parts 12, 13 and 16.
[29] 1979 Act, s 9.
[30] This is not in the 1979 Act, but in rule 18 of the 2006 Rules.
[31] Some European systems, such as German law, have a similar realignment regime, but without the safeguard of possession, and without state compensation to those who lose as a result. It might be that such systems are in this respect not ECHR-compatible. But there has been no challenge. This being the case, we think that the chance of a successful ECHR-based challenge to Part 6, which, unlike its counterparts on the continent, has the safeguard of possession and is backed by a public compensation scheme, can be discounted.
[32] We should also mention that at the outset of this project the Department prepared and delivered to us a dossier – virtually a book – discussing the problems of the current legislation. This was of very considerable value to us.

Part 2 The background to the project

The public recording of property rights

2.1 The public registration of property rights goes back to the Registration Act 1617, which set up the Register of Sasines.[1] The system was[2] one of the recording of deeds.[3] There was no actual compulsion to record, but the rule was that recording was necessary to obtain a real right (proprietary right). So: no recording, no real right. If Jack owned Greymains and sold to Jill, unless and until the Jack/Jill deed was recorded in the Register of Sasines, Jack was still the owner.[4] Ownership passed on the recording of the deed, and the same was true of most subordinate rights such as security rights. The point of this rule – as the Registration Act 1617 itself states – was the protection of third parties. Anyone dealing with Jack could check the Register of Sasines and discover any deeds to which he had been a party. Had Jack transferred ownership of the property or any part of it to anyone else? If so, the deed would show up. Had Jack granted any security rights? Again, if he had then the deed would show up. The system thus enabled people to deal with Jack in the assurance that there were no secret deeds that could affect them. Of course, there might be unregistered deeds, but, being unregistered, they could have no proprietary (real) effect. Such deeds would bind Jack but not third parties.

2.2 What academic lawyers call the "publicity principle" is a principle underlying a good deal of law, namely that transactions which affect third parties should be discoverable by third parties. The publicity principle explains the idea of the public recording of rights in land. Nowadays most countries have some sort of system whereby third parties can check land titles from public registers: Scotland can take pride in the fact that it was among the first countries to introduce such a system.

2.3 The Sasine system was modified over the years by legislation.[5] One of the most important developments was extra-statutory. In the second half of the 19th century a system of "search sheets" was introduced. These indexed the Register of Sasines by property unit (there were already name indexes). So someone interested in 5 Harry Potter Loan could simply look at the search sheet for that property and pick up references to all the recorded deeds affecting it. Without the search sheet system, conveyancing would have been more expensive and less reliable.

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[1] It remains in force, though now of declining importance.
[2] The Sasine system has not yet wholly disappeared, as will be explained, but nevertheless we generally use the past tense in discussing it.
[3] One may speak either of registering or of recording a deed in the Register of Sasines. Conveyancers by tradition prefer the latter.
[4] For a well-known illustration see *Burnett's Trustee v Grainger* 2002 SC 580, aff'd 2004 SC (HL) 19.
[5] For the history of land registration, see L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942). See also G H Crichton, "The Introduction of Registration of Titles to Land in Scotland" (1922) 38 LQR 469.

Shortcomings of the Register of Sasines

2.4 The introduction of the search sheet system gave the Register of Sasines a new lease of life. But even after that change it had shortcomings. Perhaps the most serious was that there was no requirement that the recorded deeds should be map-based. That is understandable from a historical point of view. In 1617 there was no national mapping for deed plans to key into. That did not happen until the 19th century. By about 1900 it would have been feasible to introduce a rule requiring accurate deed plans but that did not happen. Indeed, deed plans were not recorded even if they existed. From 1924 duplicate plans could be accepted for recording.[6] Shortly after that, the practice of copying deeds by hand into the Register of Sasines was replaced by photocopying, the process including any plans.[7] But there was still no requirement that there should be plans, and if there was a plan there were no specifications as to scale or accuracy. Over the years many poor plans have entered the Register of Sasines.

2.5 The resulting uncertainty of many boundaries has had various consequences. One has been that the search sheets are never wholly reliable, for matching deeds to specific properties can never be achieved with absolute confidence.[8]

2.6 Another feature of the Register of Sasines was that whilst it protected third parties from unwelcome surprises (because a deed that is not in the Register cannot normally affect a third party), it gave no assurance that the deeds that it disclosed – the recorded deeds – were in fact valid. Suppose that Jill wished to buy from Jack. She could see from the recorded deeds that Jack had granted no deeds to anyone else, and she could also see that there was a recorded deed in favour of Jack. But she could not be sure that the latter was valid. A variety of property law rules,[9] combined with the generally high standard of conveyancing practice, ensured that the risk was a small one. Nevertheless there was a risk.

2.7 The existence of the Register of Sasines meant that conveyancing was simpler and cheaper than it would otherwise have been, but because of the issues just mentioned it was not as cheap as it could be. Moreover, the system had low accessibility. The Register of Sasines is a giant public warehouse of millions of private deeds.[10] Non-experts have little chance of being able to find for themselves reliable answers to such simple questions as "who is the proprietor of 5 Harry Potter Loan?" or "what security rights exist over it?" and so on. Even for experts the system is not easy to work, and it is slow.

Title registration systems

2.8 A title registration system goes beyond the recording of deeds. The register officially states who is the proprietor of the land and what other rights there may be in it, such as a security right, a right of way in favour of a neighbouring property, and so on. Those who rely on the register are generally protected : thus if the register says that Jack is the owner, and Jill then buys from him, she is protected against the danger that his title might be defective.

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[6] Conveyancing (Scotland) Act 1924, s 48.
[7] The Department of the Registers introduced photocopying in 1934: L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942), p 160.
[8] Cf *McCoach v Keeper of the Registers of Scotland* 19 December 2008, Lands Tribunal, discussed in Kenneth G C Reid and George L Gretton, *Conveyancing 2008* (2009), pp 121–133.
[9] In particular the law of positive prescription, introduced at the same time as the Register of Sasines: Prescription Act 1617.
[10] Since the introduction of digital scanning the warehouse is increasingly a digital one.

Whilst deeds registration systems do not necessarily demand accurate mapping – the Register of Sasines does not – title registration systems do.[11]

2.9 In the English-speaking world the origins of registration of title lie in two statutes of the mid-nineteenth century – the Real Property Act of 1861[12] in South Australia and the Land Registry Act of 1862 in England. The former was an immediate success, and was rapidly exported to other states and territories in Australia, to New Zealand, to the prairie provinces and territories of Canada, to parts of the United States of America, and ultimately to a number of other territories of the British Empire. The system came to be known by the name of its architect, Robert Torrens, who was registrar-general of deeds for South Australia. The English Act, by contrast, was a failure and was soon replaced, first by the Land Transfer Act 1875 (also a failure), then by the Land Transfer Act 1897,[13] and finally by the Land Registration Act of 1925, which remained in force until 2003, when it was replaced by the Land Registration Act 2002. The influence of the English model was correspondingly more modest, although a number of jurisdictions came to adopt versions of it, including Ireland, Nova Scotia, Ontario and, in 1979, Scotland.

2.10 Naturally the copies were by no means identical to the original or to one another. Nonetheless the most striking thing about all systems of registration of title, whether on the Torrens or English model, is their essential similarity.[14] The main point of difference concerns the effect of inaccuracy in the Register. A Torrens-type system forbids the correction of most kinds of error: ie a title once registered is in most cases immediately an indefeasible title. But under the English model a registered proprietor must first take possession before the title becomes indefeasible, whilst a proprietor not in possession and from whom the property is taken away has a claim for state indemnity. Under a Torrens-type system indemnity is paid only to the person who is prejudiced by the creation of an unrectifiable error.

2.11 That the systems should be broadly similar is unsurprising. They were devised at much the same time[15] and against the background of a similar law of property, and there was plainly a degree of mutual influence. For example the first Torrens statute, of 1858, was affected to some extent by the report of the Royal Commission in 1857 which recommended the introduction of registration of title in England.[16] The mutual influence continued after that time.

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[11] We do not attempt here to develop a full theoretical framework for classifying the different types of property registration systems. On that issue, including terminology, there can be disagreement. As an example, Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (2008), p 9 writes that "the fundamental reform introduced by the Torrens system was that the legal ownership of land could no longer be changed by private agreement between buyers and sellers, but only by the act of registration on a public register." On that basis the Register of Sasines would count as a Torrens system.

[12] Replacing the Real Property Act 1860, which in turn replaced the original Torrens statute, the Real Property Act 1858.

[13] It is with this statute that title registration in England and Wales began in earnest.

[14] Pamela O'Connor, "Registration of Title in England and Australia: A Theoretical and Comparative Analysis", in Elizabeth Cooke (ed), *Modern Studies in Property Law* vol II (2003), p 81.

[15] The middle of the 19th century was a time when property registration was the subject of international interest. For example in just one year, 1855, two jurisdictions introduced deeds registration. (France and Louisiana.) For this reason, the tracing of "pure" lines of influence is probably out of the question.

[16] *Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land* (1857, C 2215). For the history, see J Stuart Anderson, *Lawyers and the making of English land law, 1832-1940* (1992).

2.12 As well as mutual influence there are indications of common parentage.[17] The idea of registration of title long pre-dates both Torrens and the English Royal Commission. Already by the seventeenth century, systems of registration of title could be found in cities in German-speaking Europe, building on registers from an earlier period. Torrens, it is true, claimed that his system was modelled on nothing more than "the principles which regulate the transfer of shipping property" which he had encountered during a previous career in the Customs Service.[18] But modern research has shown that the picture is more complex and that there was an influence from the system of land registration in operation in Hamburg and which was mediated by a Hamburg lawyer resident in South Australia, Dr Ulrich Hübbe.[19] In England too there is evidence of Germanic influence. In 1896, for example, an "exhaustive and alluring"[20] report was made to Parliament by the Assistant Registrar of the Land Register (Charles Fortescue Brickdale[21]) on *The Systems of Registration of Title in Germany and Austria-Hungary*.[22] The system subsequently introduced to England by the Land Transfer Act of 1897 was, a Scottish commentator noted, "established to the greatest extent on the same lines as those which obtain on the Continent of Europe and in the Colonies".[23] Even today, both the Torrens and the English (and Scottish) systems bear a family resemblance to the system in operation in Germany.[24]

The origins of registration of title in Scotland

2.13 In England and Wales there was no tradition of recording property rights. Titles to land were dealt with by deeds, but the deeds were not recorded. Not only were there no public registers of land rights, but in the absence of a continental notarial system there were no copies held by notaries. So the change has been the long leap from nothing all the way to title registration.[25] The same was true in Australia and some other countries that adopted English law.[26] But by the time that title registration began to develop in England and Wales, Scotland already had a good system of deeds registration. So the starting point was very

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[17] Pamela O'Connor, "Registration of Title in England and Australia: A Theoretical and Comparative Analysis", in Elizabeth Cooke (ed), *Modern Studies in Property Law* vol II (2003), pp 81, 98: "It would not be surprising if English researchers were to find that the English and Torrens systems, far from being independent inventions, are the offspring of a common but unacknowledged German parent."

[18] Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties dealing, illustrated by Copies of the Books and Forms in use in the Lands Titles Office* (1859), preface and pp 9-10.

[19] See Antonio K Esposito, *Die Entstehung des australischen Grundstücksregisterrechts (Torrenssystem): eine Rezeption Hamburger Partikularrechts?* (2005) and Murray J Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) and sources cited in those works. For an earlier and shorter account of Esposito's position, see his "Comparison of the Australian ('Torrens') System of Land Registration of 1858 and the Law of Hamburg in the 1850s" (2003) 7 *Australian Journal of Legal History* 193. For a different view see Greg Taylor, "Is the Torrens System German?" (2008) 29 *Journal of Legal History* 253.

[20] (1904) 16 JR 316.

[21] He is a significant figure in the history of title registration. In some sources the name is hyphenated: Fortescue-Brickdale. The hyphenated form is always used for the artist Eleanor Fortescue-Brickdale. For her link to land registration see http://www1.landregistry.gov.uk/assets/library/documents/bhist-lr.pdf.

[22] Parliamentary Papers (1896, C 8139).

[23] J S Sturrock, "Registration of Title and Scottish Conveyancing" (1908-09) 20 JR 1, 3.

[24] And the many legal systems whose land registration law has been based on that of Germany.

[25] In the 18th century deeds recording was introduced to two counties, Middlesex and Yorkshire (except York). One might have expected that if the experiment had proved satisfactory, it would have been extended to the whole of England and Wales, and that if it had proved unsatisfactory it would have been abolished in those two counties. Neither happened: Middlesex and Yorkshire had deeds recording, and other counties did not, until the modern system of title registration arrived.

[26] But some adopted deeds registration, most notably the USA. Land registration there is a matter for state law. A few states have title registration, of a Torrens type, as an optional alternative to deeds registration, but the number of properties so registered is very small.

different. England and Wales needed to introduce a system of registering property rights and the only question was: what type?[27] Scotland already had such a system. It might well have retained that system to this day: many other advanced societies continue to use deeds registration systems of one sort or another, though had Scotland done so one hopes that further reforms would have taken place to improve its operation. But with title registration being introduced over the border it is not surprising that the question began to be looked at here too.

2.14 Already in the 1890s the Professor of Conveyancing at Edinburgh University was lecturing his students on the merits of the Torrens system, which he had examined during a visit to Manitoba, and of the systems found in Germany and Austria-Hungary.[28] In 1904 Glasgow Corporation issued a pamphlet advocating registration of title and urging town and county councils throughout Scotland to pass resolutions and make representations to Parliament in its support. A contemporary note in the *Juridical Review* set out the arguments in favour of registration of title: [29]

> "On all hands it is admitted that in point of simplicity, security, and cheapness, it is the ideal mode of dealing with the problem of land transfer. It avoids the wearisome examination of a whole progress of titles on the occasion of every transaction in land, and renders the transference of land as simple and expeditious a matter as the transference of property in ships or of stocks and shares; it gives the purchaser or mortgagee an indisputable title guaranteed by Government; and it reduces expense to a minimum."

Other contributions to the ensuing debate were less starry-eyed.[30]

2.15 In response to this growing interest a Royal Commission was set up in 1906 under the chairmanship of Lord Dunedin to enquire into "the expediency of instituting in Scotland a system of registration of title" but it failed to reach agreement and issued no fewer than four separate reports.[31] Thereafter the idea of registration of title lapsed to be revived only in the 1940s.[32] A committee on the topic set up by the Secretary of State for Scotland in 1948

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[27] The process of accepting the need for registration was long-drawn-out. Local decision-making was allowed and it was not until 1990 that every area in England and Wales abandoned private conveyancing. But the answer to the question "*if* registration is adopted, which system should it be?" was answered in the 19th century.

[28] J P Wood, *Lectures on Conveyancing* (1903), chs 5 and 6. The account of Germany and Austria-Hungary was based on Fortescue-Brickdale's report mentioned earlier. Wood's conclusion about Scotland, given in his preface, was that: "I suppose that nowhere is there to be found a better system of land titles by registration of deeds. But I am clear that the time has now come when this system should give place to the more excellent plan of registration of title.".

[29] "Land Transfer Reform in Scotland" (1904) 16 JR 316, 317. The author is not named but the reference to "mortgagee" suggests that it was not someone trained in Scotland.

[30] David Murray, *Land Registers and Registration of Title in Scotland* (1904, a pamphlet); David Murray, review of J E Hogg, *The Australian Torrens System*, (1905) 17 JR 166; J S Sturrock, "Registration of Title and Scottish Conveyancing" (1908-9) 20 JR 1. James Edward Hogg was a specialist in title registration. His *Registration of Title to Land throughout the Empire : A Treatise on the Law relating to Warranty of Title to Land by Registration and Transactions with Registered Land in Australia, New Zealand, Canada, England, Ireland, West Indies, Malaya* (1920) is still a work of reference. Murray, one of the founders of Maclay Murray & Spens, was a distinguished scholar.

[31] *Reports by the Royal Commission on Registration of Title in Scotland* (1910, Cd 5316).

[32] In a foreword to L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942), Dr E M Wedderburn commented that: "From time to time suggestions are made that the time is ripe for the introduction in this country of a system of registration of title in place of a system of registration of deeds. One view is that our present system is now so simple and affords such security in all transactions relating to land that nothing further is required. The other view is that the high state of development reached by our system of registration has prepared the way for the introduction of Registration of Title, without disturbance to our

ceased work on the death of its chairman, Lord Macmillan, but in due course a second committee was appointed under Lord Reid and reported in 1963.[33] This committee too was divided but a majority supported the introduction of registration of title. In the event this proved decisive. The Reid Committee recommended that there should be a second committee to consider the technical aspects of the proposed new system. This was chaired by Professor G L F Henry, and its report took the form of a draft bill with a draft set of rules.[34] A further ten years then elapsed between the report of the Henry Committee and the passing, in 1979, of the Land Registration (Scotland) Act.

2.16 The arguments that found favour with the majority of the Reid Committee were much the same as those aired half a century earlier. The Register of Sasines was "a practical system which works well".[35] But registration of title eliminated "the need to re-examine the validity of the title for each transaction"[36] and was accordingly simpler and cheaper to operate. If it could be introduced in such a way as to "prevent dislocation or substantial practical difficulties during the transitional period"[37] then the change was worth making. In the Committee's view such dislocation could reasonably be avoided.

2.17 The introduction of title registration was seen simply as a matter of making conveyancing cheaper. It was not seen that title registration would effect an information revolution.

The 1979 Act

2.18 The Land Registration (Scotland) Act 1979 was passed in the last days of the 1974 - 1979 Parliament.[38] We understand that Parliamentary time was allocated only for a Bill of 30 clauses. This explains the brevity of the Act, the shortest title registration statute in the world. We also understand that there was pressure for reform of the law relating to tenants-at-will, which would explain why two such disparate topics are to be found in the same statute. Conceivably without that issue, Parliamentary time would not have been allocated to the Bill, but this would be to speculate.

2.19 Over the years the 1979 Act has been subject to numerous amendments, but all have been minor. Much the same can be said of the changes to the Land Registration (Scotland) Rules 1980. They have now been replaced by the Land Registration (Scotland) Rules 2006, but apart from the introduction of ARTL[39] there have been no major changes to the Rules.

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conveyancing system and without much cost, and that transfer of interests in land would be greatly simplified thereby." See also T B Smith, "Registration of Title to Land" 1948 SLT (News) 67.

[33] Scottish Home and Health Department, *Registration of Title to Land in Scotland* (1963, Cmnd 2032) (hereafter "Henry Report"). The chairman was Lord Reid of Drem.

[34] Scottish Home and Health Department, *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (1969, Cmnd 4137) (hereafter "Henry Report").

[35] Reid Report, para 57.

[36] Reid Report, para 149.

[37] Reid Report, para 64.

[38] The no confidence motion was passed on 28 March 1979 and the ensuing dissolution took place on 7 April. The last batch of Bills, including the Land Registration (Scotland) Bill, received the Royal Assent on 4 April.

[39] See Part 34.

Roll-out of the 1979 Act

2.20 For registration purposes the Keeper divides Scotland into the traditional counties as they were before the Local Government (Scotland) Act 1973.[40] Whereas most countries have separate local land registers, here there is only one Register of Sasines and only one Land Register. The divisions are a matter for the Keeper's administrative convenience and there is nothing in either the 1979 Act or the draft Bill to require the Keeper to make use of the traditional counties. The 1979 Act allowed different divisions to become operational at different times. The table below shows the 33 divisions and the dates when they became operational.

Renfrew	6 April 1981	Berwick	1 October 1999
Dunbarton	4 October 1982	East Lothian	1 October 1999
Lanark	3 January 1984	Peebles	1 October 1999
Glasgow	30 September 1985	Roxburgh	1 October 1999
Clackmannan	1 October 1992	Selkirk	1 October 1999
Stirling	1 April 1993	Argyll	1 April 2000
West Lothian	1 October 1993	Bute	1 April 2000
Fife	1 April 1995	Midlothian	1 April 2001
Aberdeen	1 April 1996	Inverness	1 April 2002
Kincardine	1 April 1996	Nairn	1 April 2002
Ayr	1 April 1997	Banff	1 April 2003
Dumfries	1 April 1997	Caithness	1 April 2003
Kirkcudbright	1 April 1997	Moray	1 April 2003
Wigtown	1 April 1997	Orkney & Shetland	1 April 2003
Angus	1 April 1999	Ross & Cromarty	1 April 2003
Kinross	1 April 1999	Sutherland	1 April 2003
Perth	1 April 1999		

[40] But Glasgow has a division to itself: the Barony & Regality of Glasgow.

This project

2.21 The project to review the 1979 Act was undertaken on the suggestion of the Keeper of the Registers of Scotland.[41] More is said about the project in Part 1. This is the first time that the 1979 Act has been reviewed.

2.22 The discussion papers contain much material that is not duplicated in this Report. That is particularly true of the detailed analysis of the text of the 1979 Act. This Report is long enough as it is, and that is why much of the material in the discussion papers is not repeated here. The three discussion papers must be considered as being three invisible appendices to this Report.

[41] The project was announced in our *Sixth Programme of Law Reform* (Scot Law Com No 176, 2000), but we were not in a position to begin work until 2003. In effect therefore the project has taken six years. This is the same time that the Law Commission for England and Wales took to complete its own project: see Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century*: *A Conveyancing Revolution* (Law Com No 271, 2001), para 1.1.

Part 3 Overview

Introduction

3.1 This part outlines some of the reforms we recommend in this Report, together with the reasons why we think reform is needed. No attempt is made to cover everything: we merely pick out some highlights.

Continuity

3.2 "There is to continue to be a public register (known as the Land Register of Scotland) of rights in land in Scotland." These are the first words of the draft Bill.[1] The watchword is evolution, not revolution. There is no question of creating a new system of land registration. The system set up by the 1979 Act would continue. Any other suggestion would be absurd. The system of land registration created by the 1979 Act is of immense value.

Repeal of the 1979 Act

3.3 It was apparent to us from the outset that the 1979 Act needed to be taken to pieces and rebuilt. That meant repeal. But formal repeal does not always mean substantive repeal, and as we have already stressed, the system created by the 1979 Act would carry on with a new statutory basis. The draft Bill re-enacts a good deal of the 1979 Act, albeit often in different words.

3.4 The draft Bill is much longer than the 1979 Act. One reason lies in the extreme brevity of that Act, a brevity made possible by the way it simply did not cover all sorts of topics it should have covered. This issue is mentioned in the next section. The other reason for the length of the draft Bill is that some of the material currently covered in the Rules[2] is now dealt with in the draft Bill.

Pumping concrete into the foundations

3.5 The 1979 Act is the world's shortest title registration statute: 30 sections, plus four brief schedules.[3] By comparison, the Land Registration Act 2002 (England and Wales) runs to 136 sections plus 13 schedules. The German Land Registration Act runs to 144 sections.[4] The 1979 Act's brevity means that on numerous issues it is simply silent. Of course, no legislation succeeds in covering everything. There are always holes. But the 1979 Act is a Swiss cheese.

3.6 One consequence has been that the land registration system has to a remarkable extent been invented by the Department of the Registers of Scotland. In saying that we praise, not criticise. Given the silences of the legislation, such invention was necessary if the

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[1] Section 1(1).
[2] 2006 Rules.
[3] In substance fewer, because some sections are not about land registration.
[4] *Grundbuchordnung* (GBO). The figure is in effect higher when one includes the important provisions about land registration in the German Civil Code (BGB).

system was to be made to work. In carrying out our review, we have been struck time and again by the soundness of the decisions taken by the Department. It is only in a small number of cases that we think that the decision was, with the benefit of hindsight, not the best. So one of the tasks of the draft Bill is simply to provide, for the first time, a legislative foundation for what the Keeper actually does. Some examples of this underpinning process are given later in this part of the Report.

Completion of the Register

3.7 At present about 60% of title units, representing about 20% of the surface area of Scotland, are in the Land Register. Gradually the coverage increases, for whenever a property that is still in the Register of Sasines is sold it is transferred into the new register. Under current law the process threatens to go on indefinitely. Examples of properties that may not be sold for centuries include farms that are handed down the generations, and much public sector property. At present, Scotland has two different systems of property registration. This transitional period is unavoidable. But such a split is undesirable for very obvious reasons – and would be undesirable even if the Sasine system were better than it is. The transition period should be as short as is reasonably possible.

3.8 The Report has recommendations for how the process can be accelerated. The details are complicated, but four points may be mentioned here. In the first place, we recommend that after a certain date the current right of the Keeper to decline to accept an application for voluntary first registration would disappear. In the second place, we recommend that after a certain date the Register of Sasines would be closed to the recording of standard securities. That would mean that anyone with a Sasine title who wished to grant a standard security would first have to register in the Land Register. In the third place, we recommend that a date should come when the Register of Sasines would be closed to the recording of *any* deed. In the fourth place, we recommend that the Keeper should have the power to register any property that is not yet in the Land Register, even if the owner has not applied for registration. Details of our recommendations can be found in Part 33.

Advance notices

3.9 We recommend the introduction of a system that is – in one form or another – used in a number of countries round the world; advance notices. In this system an owner can agree to the making of an entry in the Land Register that guarantees the priority of the person named in the notice. For example, Arlene owns land and intends to sell it to Brendan. She could grant to him an advance notice. This would generate a "protected period" (in our scheme 35 days), which would mean that so long as Brendan registered his title within the protected period he would have priority over anyone else who registered a deed in that period. It would also protect him against entries in the Register of Inhibitions during the protected period. We think that the new system is likely to appeal to conveyancers – as has happened in other countries – and that the effect should be that letters of obligation, at least as we know them today, would cease to be necessary. As well as appealing to conveyancers, the system should benefit their clients, as offering something more direct and effective than the protection offered by a letter of obligation. Details of the new system can be found in Part 14.

Electronic conveyancing

3.10 Electronic conveyancing is quicker and cheaper than paper conveyancing. A substantial element of electronic conveyancing has been introduced in the form of the ARTL system. But the revolution is not complete. In the first place, only deeds that are used within the ARTL system can be in electronic form. An example of a deed that cannot be used in the ARTL system, and so cannot be in electronic form, is a split-off disposition. We recommend that all conveyancing deeds should be capable of being in electronic form, whether used in ARTL or not. We also recommend that land contracts (missives) should also be capable of being in electronic form. We do not, however, recommend compulsion. In our view those who wish to use paper documents should be entitled to do so. Details can be found in Part 34.

An end to bijuralism

3.11 The 1979 Act confers on the Keeper what we call the "Midas touch". If a deed purports to create, transfer, vary or extinguish a right in land, and the deed is registered, then the creation, transfer, variation or extinction necessarily takes place. That is of course absolutely fine if, as in the vast majority of cases, the deed is valid. But the same is true even if the deed turns out to be invalid. For example, suppose that the granter was not the owner of the property (or a part of it, because problems often arise in respect of small boundary areas), or the deed was signed by an identity thief, or the granter was incapax, and so on. Thus if Bruce owns a house and an identity thief signs a standard security to the X Bank, forging Bruce's signature, as soon as the deed is registered the security right comes into existence. Moreover, the Midas touch operates even if the Keeper excludes indemnity. The result is what we call "bijuralism" – the simultaneous application of two different systems of law, namely (i) the special rules of registration of title and (ii) the ordinary rules of the law of property. This produces an array of technical problems that often baffle even experts. Our recommendations would mean that bijuralism would disappear. This would bring about a welcome simplification of land law.[5] Of course, the end to bijuralism must not be allowed to prejudice those who have transacted in good faith, but that objective does not depend on the use of the complex conceptual structure of bijuralism.

Inaccuracies and their rectification

3.12 Inaccuracies in the Register are inevitable in an imperfect world. But when they happen the law should provide rational and effective ways of responding to them. One of the criticisms of the current law is that it does not deal satisfactorily with inaccuracies. Indeed, some inaccuracies are incapable of rectification, in the sense that *the law requires the Register to continue to be inaccurate* – a result as remarkable as it is unacceptable, which is one of the consequences of bijuralism. There are two policy drivers that go in different directions. On the one hand, inaccuracies should be put right. On the other hand, those who transact in reliance on the Register should not suffer if what they see turns out to contain an inaccuracy. The 1979 Act recognises the issue and provides a solution, but the solution is technically complex (involving bijuralism), and moreover does not achieve the best balance between the competing policy drivers, for it allows the rectification of inaccuracies in too narrow a range of cases. A member of the public, deprived of land in a case on which

[5] For bijuralism and its abolition see in particular Parts 13, 17 and 18.

representations have been made to us by a Member of Parliament, expressed to us this view:

> "I find it difficult to believe that a distinguished group[6] could concoct such a piece of legislation. In fact this is a thief's charter duly protected by the State."

3.13 We propose what we consider to be a fairer balance between the competing policy drivers. Under the recommended system there should be far fewer complaints about unjust loss of title. These issues are discussed in Parts 19 to 25.

3.14 Another change we recommend is that the Keeper should be under a positive duty to rectify any inaccuracy in the Register that comes to light. No such duty exists in the current law.[7] Nor does current law state the evidential standard needed to establish that the Register is inaccurate. If the matter is litigated, the standard is of course one of balance of probabilities. But if there is no litigation the Keeper in practice operates a high evidential standard. We think that this current practice is sound and the Bill gives it a statutory basis. For details, see Part 18.

The problem of the continuous memory-less present: the Archive Record

3.15 The Register of Sasines is a permanent archive of deeds. This fact can be useful to the historian. It can also be useful for current legal practice, because it is possible to discover not only the current state of titles[8] but also recent states of titles. For example, a trustee in sequestration who wishes to know what properties the debtor has owned in recent years can readily discover this from the Register of Sasines – for properties in that Register. But the Land Register was created as a sort of memory-less continuous present. It would give a guaranteed statement of current titles. But no more. The Act makes no provision for anyone to find out about the state of a title sheet as it was say three years ago. It makes no provision for anyone to obtain copies of the deeds on which present (let alone past) states of title sheets have been based.[9] Indeed, as far as the legislation is concerned the Keeper could shred all such deeds and all data about past states of title sheets.

3.16 In fact the Keeper does no such thing. As usual, the Keeper's practice is better than its legislative basis. Something called the Archive Record has come into being. The draft Bill gives it for the first time a legal basis and provides for what is to go into it and for the issue of data out of it. That includes the issue of extracts. (The importance of that fact is that extracts are officially authenticated and have an enhanced evidential value. Currently even if the Keeper does, on a non-statutory basis, issue a copy, it cannot have the status of an extract.[10]) For details see Parts 4 and 8.

The Application Record

3.17 The Application Record is the Keeper's in-tray: it is a record of pending applications. Like the Archive Record, it already exists *de facto*. Like the Archive Record, the draft Bill gives it for the first time a statutory foundation. Its importance should not be underestimated.

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[6] That is to say, those responsible for the framing of the 1979 Act.
[7] The Keeper is not bound to rectify an inaccuracy unless ordered to do so: 1979 Act, s 9.
[8] Subject always to the inherent limitations of the Sasine system.
[9] There is one exception, to be found in s 6(5) of the 1979 Act.
[10] Except for the case in s 6(5) of the 1979 Act.

If an application is accepted, the consequent change to the Register operates retrospectively to the date of the application.[11] So for third parties who consult a title sheet it is absolutely vital to know about pending applications. For details see Parts 4 and 12.

The Cadastral Map

3.18 The 1979 Act envisaged each title sheet having its own map. Since there are about two million title units, there would be about two million micro-maps. In reality that is not what happens. There is only one map of Scotland, kept in digital form, showing the title boundaries of all registered land. Each title sheet is keyed in to the relevant part of the data, and when a title sheet is to be printed off what happens is that the relevant part of the data is sucked out of the map database and squirted on to the paper. This totality of registered geospatial data has a standard international name: a cadastral map. We need a name, and that seems a good one. Apart from anything else it would give the Scottish system a better international profile. The introduction of the "Cadastral Map" is, we stress, a change of form rather than a change of substance. In substance it already exists. The subject is discussed further in Parts 4 and 5. Appendix F is a section of the current "index plan" and it gives a rough impression of what the Cadastral Map would be like.

Criteria for accepting or rejecting applications

3.19 The 1979 Act does not provide a framework for the crucial decision facing the Keeper whether to accept or reject an application for registration. Indeed, it is seriously open to doubt whether invalidity is a ground on which the Keeper can reject an application. In other words, it may well be the law that the Keeper must accept for registration deeds that are clearly invalid, and thus register the applicant as owner of land to which the applicant clearly has no right. This may be an astonishing conclusion: at this point we can do no more than refer to Part 12. In that part we recommend that the Keeper should not only be authorised to reject invalid applications, but be required to reject them, subject to the special type of case discussed in Part 16.

The one-shot principle

3.20 At present if an application is unsound the Keeper does not normally reject it but instead makes "requisitions" seeking to obtain further information or further documentation. This strikes us as a waste of public resources. It should not be for the Keeper to do the work that conveyancers are supposed to do themselves. Our view is that bad applications should simply be rejected – what we call the one-shot principle. Rejection does not prevent a second – and better – application being made. The one-shot principle does, however, have two safety valves. One is that the Keeper *may*, as a matter of discretion, choose to permit an application to be supplemented. The second is that the draft Bill allows rules to be made giving applicants in defined types of case the right to supplement their applications. For details see Part 12.

[11] This rule could of course be abolished. But we take the view that there are sound reasons for retaining it. See Part 12.

Expenses: the "claimant's charter"

3.21 The rule[12] about expenses in indemnity cases has been described to us as a "claimant's charter". The draft Bill has fairer rules about expenses.

Granting or excluding indemnity

3.22 The 1979 Act says that the Keeper can grant or exclude indemnity, ie can warrant titles or decline to warrant them. But nothing is said as to when indemnity/warranty should be granted or refused. Since indemnity/warranty is a core issue in our land registration system, this is a large hole. The draft Bill deals with the issue. For details, see Parts 12 and 22.

Duty of care

3.23 Does anyone owe the Keeper a duty of care? Another approach to the same issue is this: if the Keeper has to pay out compensation, is there a right to recover that sum from someone whose fault has given rise to the problem? The 1979 Act says that "on settlement of any claim to indemnity … the Keeper shall be subrogated to all rights which would have been available to the claimant to recover the loss indemnified."[13] That works in most cases but not all. Whilst the draft Bill retains the substance of the rule just quoted, it imposes a general duty of care on those involved in a registration, including the solicitors who act for the parties. On balance we think that the new rule does not change the law – ie that such a duty of care already exists – but we think it better for the doubt to be removed. One advantage of the new rule is that it should lead to the radical simplification of application forms. At present, application forms have a long list of questions. But if there is a clear duty of care, applicants will have in any case to disclose to the Keeper any problems they know about, or should reasonably have known about. The subject is discussed in Parts 12 and 24.

Turnaround deadlines

3.24 One of the problems of the land registration system, almost certainly not anticipated when the 1979 Act was passed, has proved to be backlogs in the registration process. In some cases applications have taken several years to be processed. In recent times there have been great improvements. Nevertheless the turnaround issue has not wholly disappeared. The draft Bill provides for turnaround deadlines to be set by Ministers, ie setting the maximum period during which an application can be in the Keeper's in-tray. Different periods can be set for different types of case: for example, a longer period could be set for first registrations or for "transfers of part" than for "dealing of whole". The issue is discussed in Part 12.

No registration without mapping

3.25 One of the objectives of a title registration system is that registered properties should be properly mapped. In general this has happened. But in the case of common areas in developments (eg amenity areas, parking areas, play areas and so on) the Keeper has tended to register these without mapping. We think that this has proved unfortunate, a view

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[12] 1979 Act, s 13(1).
[13] 1979 Act, s 13(2).

supported by the recent case of *PMP Plus Ltd v Keeper of the Registers of Scotland*.[14] The draft Bill makes it clear that there is in future to be no registration without mapping.

3.26 In a new property development, when the early sales take place the developer may not yet have decided on the boundaries of the common areas. Until *PMP Plus* it was common for the developer to purport to convey an undefined area, but this no longer happens as a result of *PMP Plus.* Various possible options are available to developers, none perfect. The draft Bill offers another possible solution. The details are complex, and can be found in Part 6, but the broad idea is that while the development is proceeding, a provisional title sheet is opened up for the common area/s, and when the development is complete the developer lodges with the Keeper an "ascertainment deed" fixing the boundaries of the shared area/s. This approach would be optional. If it proved popular it would have a significant effect on conveyancing practice.

3.27 Another change we recommend is that common areas created after the commencement of the new legislation should always have their own title sheet. This contrasts with the present practice whereby the common area is included in all the separate title sheets. We think that this would improve the transparency of the Register. Once again details can be found in Part 6.

[14] 2009 SLT (Lands Tr) 2.

Part 4 The structure and contents of the Register

Introduction

4.1 What does the Land Register consist of? Under current law, this question cannot be given a simple answer, for two reasons. In the first place, the law is not perfectly clear. In the second place, whatever the law may be, the reality is different. Something needs to be said of both the law and the reality. As for the future, we think that the law should be clarified, and that here, as in so many other aspects of this project, the law should follow the reality.

The *de jure* structure of the Land Register

4.2 The legislation provides for three elements: the Title Sheet Record,[1] the Index Map[2] and the Index of Proprietors.[3] The latter two are mentioned only in the Rules, and not in the Act itself. It is doubtful whether they can be regarded as legally parts of the Register, being guides to the Register rather than the Register itself.[4] As we wrote in DP 128: "What, then, is the Register? The answer, probably, is the totality of the title sheets and nothing else."[5] Thus under the current law the Land Register has only one part, the Title Sheet Record. The Rules also provide for the internal structure of title sheets.[6]

The *de facto* structure of the Land Register

4.3 *De facto* the Register consists of four parts:

(1) The Title Sheet Record

(2) The Application Record

(3) The Digital Mapping System (DMS), which contains the geospatial dataset

(4) The Archive Record (copies of all deeds and other documents presented for registration).

4.4 The Index Map does continue to exist but not independently: it is now a data subset in the DMS. The Index of Proprietors has virtually ceased to exist, having been replaced by digital searchability. Whilst searchability is of great importance, it can hardly be called a "part" of the Register. The Application Record and the Archive Record, though essential

[1] 1979 Act, ss 5 and 6. The name is the one used in current practice but it is not to be found in the legislation. The current legislation has no term for the set of all title sheets.
[2] 2006 Rules, rule 20.
[3] 2006 Rules, rule 20.
[4] DP 128, para 2.3.
[5] Para 2.3.
[6] 1980 Rules, Part II; 2006 Rules, Part II.

parts of the Register, exist without any legal basis at all.[7] The following table gives an overview of the current position, divided into two halves, the first being the position according to the legislation and the second being the position in practice.

Current position: in law		
	The Register	**Ancillary to the Register**
1	Title Sheet Record	
2		
3		Index Map
4		Index of Proprietors
5		Cited deeds[8]

Current position: in fact		
	The Register	**Ancillary to the Register**
1	Title Sheet Record	
2	Application Record	
3	DMS	Index Map
4		Search functionality
5	Archive Record	

In what follows we give more details of these various aspects of the system, but before doing so it may help to anticipate our conclusions by setting out our view of the future of the Register: it corresponds almost exactly with the Register as it exists *de facto*:

As recommended		
	The Register	**Ancillary to the Register**
1	Title Sheet Record	
2	Application Record	
3	Cadastral Map	
4		Search functionality
5	Archive Record	

[7] But for the purposes of the freedom of information legislation, the Application Record has received a measure of recognition: *MacRoberts and the Keeper of the Registers of Scotland* Scottish Information Commissioner's Decision of 1 March 2007, Decision 37/2007.
[8] In terms of s 6(5) of the 1979 Act.

Details 1: The Title Sheet Record

4.5 The 1979 Act provides that certain "interests in land"[9] are to have their own title sheet.[10] The totality of these title sheets makes up what is in practice called the Title Sheet Record. The 1979 Act is silent as to the internal structure of a title sheet, but the Rules provide that it is to be divided into four sections. The A Section, also called the Property Section, identifies the property. The identification is mainly by means of the title plan,[11] but the plan can be, and in practice always is, supplemented by verbal information, such as the postal address. The B Section, also called the Proprietorship Section, identifies the owner. The C Section, also called the Charges Section, sets out the heritable securities, if any, over the property. Lastly the D Section, also called the Burdens Section, sets out the other encumbrances,[12] if any, that affect the property, such as servitudes and real burdens.

4.6 The types of interests in land that could have their own title sheets were originally ownership, long lease and superiority. Superiorities were abolished by the Abolition of Feudal Tenure etc (Scotland) Act 2000, so that today only two types of real right have their own title sheet: ownership and long lease. Thus for registration purposes, rights can be divided into primary rights, which have their own title sheet, and secondary rights, which, though they appear in the Register, do not.[13] For example, W owns land and grants a standard security to X. The security appears on W's title sheet. W then grants a long lease to Y, and Y grants to Z a standard security over the lease. There would now be two title sheets, with one standard security appearing on each.

4.7 Even since the abolition of superiorities, there may be several title sheets for the same land. In the first place, there can be more than one registered long lease. For example, the holder of a 125 year lease grants a 25 year sublease. In that case there would be three title sheets for one area of land: the property title sheet, the head lease title sheet and the underlease title sheet. Indeed, since land can be sub-let without limit, there is no limit to the number of title sheets that may exist for the same land. In the second place, there are tenements, such as apartment buildings, in which the various units are separately owned, so that a single footprint of land correlates to several title sheets. In the third place there are "separate tenements", such as mineral rights and salmon fishing rights, which can be owned separately from the land.[14] All these special cases are considered further below.

4.8 Where two (or more) persons co-own land, it could be argued that section 5(1) of the 1979 Act means that there should be two title sheets, because there are two "interests in land". That was the interpretation set out in the first edition of the *Registration of Title Practice Book*, which at the same time noted that because of the inconvenience of the rule

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[9] There is a definition in s 28: " 'interest in land' means any right in or over land, including any heritable security or servitude but excluding any lease which is not a long lease; and where the context admits, includes the land." This is not easy going.

[10] Section 5(1)(a). The term "title sheet" was adopted from the English system. The commonest term internationally (including the English-speaking world) is "folio" or such variants as "real folio" and "real folium".

[11] For more about the title plan, see below.

[12] A right that enters the C Section or D Section is an encumbrance from the standpoint of the owner. Rights on the one hand and obligations and encumbrances on the other are (subject to some possible theoretical qualifications) two sides of the same coin. For example, a standard security is a right, and it is an encumbrance.

[13] See DP 128, paras 2.8-2.11.

[14] A "separate tenement" is a right in land that is not regarded as a secondary right but as if it were itself a plot of land. For separate tenements see William M Gordon and Scott Wortley, *Scottish Land Law* (3rd edn, 2009), ch 7 and Reid, *Property,* paras 207 ff.

the Keeper did not intend to comply with it, at least in most cases.[15] That remains the position today: section 5(1) has not been amended and the Keeper's practice remains what it was. Later we recommend that the primary unit of registration should be the plot of land,[16] and this would obviate the difficulty.

Details 2: The Application Record

4.9 The Application Record consists of pending applications for registration. It is the Keeper's in-tray. If all registration applications could be dealt with instantaneously, the Application Record would not need to exist. But instantaneous turnaround is out of the question. As soon as an application is received, the basic details are logged. But the decision as to whether to accept or reject the application, and, in the former case, on what terms, may take some time. At first sight it might seem that during this period the pending application is of no concern to third parties. In fact, it is. For if the Keeper in due course accepts the application, the registration is deemed to take effect as from the date of the application, not from the (later) date when the Land Register is changed. Thus while an application is in the Application Record, a "wait and see" period is running. A person who consults the Register cannot, therefore, rely on what appears on the title sheet, for the title sheet may later be altered with retrospective effect. Hence the Application Record is not merely an administrative matter. Without it the Register could not function, because third parties, consulting the Register, must be able to find out about any pending application in relation to the property they are interested in. The Application Record is thus an essential part of the Register.

Details 3: The Index Map

4.10 The original conception was that there would be as many title plans as title sheets: one title plan for each title sheet. Plans were paper plans, so that eventually, when the Register's coverage of Scotland was complete, the idea was that there would be more than two million separate paper title plans. To co-ordinate them all, the Rules provided that the Keeper was to maintain an Index Map. This was also paper. The digital revolution has meant that the old idea no longer makes sense. Paper is not now used. Instead of vast numbers of separate plans, there is a single database, called the Digital Mapping System (DMS). The "title plan" of a title sheet is merely a digital reference to a set of geospatial data in the DMS, being the set relating to that property. The "Index Map" is thus today just one data set that can be taken from the DMS, as are the individual title sheets. But it is of great importance. "It is the index map layer of the Keeper's digital mapping system which is the main key to the Land Register."[17]

Details 4: The Index of Proprietors

4.11 Rule 20 of the 2006 Rules, which provides for the Index Map, also provides for an Index of Proprietors, for the good reason that both were means of accessing the data in the Title Sheet Record.[18] As a result of the digital revolution, all that is needed is a search functionality. We understand that nowadays no index is in fact kept.

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[15] *Registration of Title Practice Book* (1st edn, 1981), para D.4.10.
[16] See para 4.46 below.
[17] *Registration of Title Practice Book*, para 4.3
[18] The equivalent of rule 20 of the 2006 rules was rule 23 of the 1980 Rules.

Details 5: The Archive Record

4.12 The Archive Record consists of copies of the deeds, such as dispositions, on which the terms of title sheets are based, together with other relevant documents, or copies of them, such as application forms. If a question arises as to whether the Register is accurate, the Archive Record is thus of crucial importance, for the documentation that underlies the Title Sheet Record is to be found there.

4.13 Like the Application Record, the Archive Record lacks a legislative basis, either in the Act or in the Rules. The only relevant provision is section 6(5) of the Act which provides that "the Keeper shall issue, to any person applying, a copy, authenticated as the Keeper thinks fit, of any title sheet, part thereof, or of any document referred to in a title sheet; and such copy, which shall be known as an office copy, shall be accepted for all purposes as sufficient evidence of the contents of the original." This presupposes that the Keeper has kept a copy of the cited deed. But there is no requirement that copies of other deeds, ie deeds other than cited deeds, must be kept. Non-cited deeds form the vast majority of deeds, and are often more important than cited deeds. As far as the legislation is concerned, the Archive Record could be shredded - or deleted, for nowadays copies are digital rather than paper.[19]

4.14 Originally the Keeper did not allow public access to the Archive Record, subject only to section 6(5) of the 1979 Act. Shortly before the advent of the modern freedom of information regime, practice changed, and since then access has been allowed. (Naturally, since the Archive Record has no statutory basis, both the original non-accessibility and the current accessibility are alike without statutory basis.) Although copies are issued, there is no basis for issuing official copies (extracts), that possibility being limited to the case governed by section 6(5). This inability to issue official copies is awkward, because unofficial copies do not have the same evidential status as extracts. This can cause practical problems for those who wish to have official copies and can even be a nuisance for the judicial process because what can be lodged in process does not have the status of an extract.

Evaluation and recommendations: the Title Sheet Record

4.15 The current position as to the Title Sheet Record is broadly satisfactory, and the provisions in the draft Bill are in general terms merely a re-enactment of the current provisions. One point of difference concerns title plans. Here we recommend that the law should recognise what is already in practice the position, which is that all the Register's geospatial data is held in a single record, and that accordingly the A Section (Property Section) of the title should simply contain a reference to the geospatial data that relates to that title unit. This issue is discussed below in relation to the Cadastral Map.[20] A proposal that we made in DP 128 was that the Charges Section (C Section) should be renamed the Securities Section.[21] Respondents were in general agreement.

4.16 Section 6(1)(a) of the 1979 Act requires the title sheet to state the area, unless it is under two hectares. We doubt the value of this provision. Even if there is a value in it we see no reason for it to be enshrined in primary legislation. If it were thought desirable secondary

[19] For the question of data retention, see below, paras 8.14-8.15.
[20] See paras 4.39 to 4.43 below. See also Part 5.
[21] Para 2.14 (recommendation 2(3)).

legislation could deal with the issue. In the draft Bill, the Keeper *may* state the area for any title sheet, whether two hectares or less.[22]

4.17 We recommend:

1. The system of title sheets is generally satisfactory and, apart from minor details, should continue.

Title plans as such should be discontinued and replaced by a reference to the relevant registered geospatial data.

The Charges Section (C Section) should be renamed the Securities Section.

Where there is a separate title sheet for a lease, the B Section (Proprietorship Section) should be known as the Tenancy Section.

(Draft Bill, s 2, ss 5 to 10 and s 92(5))

Designation

4.18 A modern land registration system seeks to set forth the various *rights* that *persons* have in defined *property*. The Land Register has transformed the accuracy with which properties are identified. But there has been no corresponding progress in identifying the persons who hold rights in those properties. The Keeper copies the designation from the deed. The deed follows the Sasine tradition. For natural persons there is name and address. For companies there is name and registered office, and, usually, though only in recent years, company number.

4.19 The purpose of a designation is identification. For companies, the registered number is essential.[23] Unlike names and addresses, which can be changed, a company's number is permanent. Companies can readily change names. Two companies can even swap names, and this sometimes happens in practice. That is particularly confusing when (as is typically the case in such swaps) the companies share the same address.[24] Addresses can also be changed. Changes of name and address must be notified to the Registrar of Companies, but it is obviously desirable for those using the Land Register to be able to identify the company from its designation in that Register. As we have said, in recent years it has become the usual practice for company deeds to include the number. Hence the draft Bill's requirement that the number be part of the designation[25] merely reflects modern good practice.

4.20 The current laxity as to standards of designation is particularly unsatisfactory for natural persons. The name may not be unique, and often is not. Whether unique or not, names can be changed at any time and, under our law, without any official process.[26]

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[22] This may be done as a matter of information: see section 6(5)(e) of the draft Bill.
[23] The concept of person includes both natural persons (individuals) and juristic persons (legal persons) such as companies. The draft Bill uses the term in that inclusive sense.
[24] For an example of a name swap see *F J Neale (Glasgow) Ltd v Vickery* 1973 SLT (Sh Ct) 88.
[25] See s 92(1) of the draft Bill.
[26] There is also an issue for some foreign names. In some cultures the final name is not the surname. Where the name is in a non-Roman script, such as Arabic, Chinese, Urdu etc, the Roman alphabet transcription is not always constant.

Addresses help as identifiers, but they are often changed, and often shared. The rule in company law, that changes of name and of address must be notified to the Registrar of Companies, has no parallel for natural persons. We have come to the conclusion that the standard of designation, in the Land Register, of natural persons should be improved if that improvement can be achieved without major difficulty. In fact, such an improvement can be achieved with virtually no difficulty.

4.21 Dates of birth, with their power of disambiguation, are regarded as standard in numerous different fields, both public and private. Ordinary citizens have to give their date of birth countless times in a lifetime. Dates of birth are part of the designation in the land registers of many countries and our recommendation would bring Scotland up to the best international standards.[27]

4.22 If a lax standard of designation was acceptable for the Register of Sasines, why should it not also be acceptable for the Land Register? It might be replied that in fact this was already a problem for the Register of Sasines. Be that as it may, the modern system of title registration is not, as the Register of Sasines was, a vast public warehouse of private deeds, deeds which people could make of what they wished. The modern system requires an official statement about who has what rights in what land. There can be no excuse of vagueness. A title sheet is a formal statement by the Keeper about *who* has which rights in *what* land. Identifying the "who" is as important as mapping the "what". The Register of Sasines had inadequate standards for both the "who" and the "what". Today we can do better.

4.23 Our recommendation is limited to designations in title sheets. It would not extend to designations in deeds. If a deed did not give the company number, or date of birth, of the grantee, it would always be possible to supply this to the Keeper in the application form.

4.24 Accordingly we recommend:

2. The designation of natural persons should include date of birth. The designation of companies should include the company registration number.

(Draft Bill, s 92(1))

What can appear on a title sheet? An open-door policy?

4.25 What rights and encumbrances should be capable of appearing on a title sheet? One possible answer might be "anything at all" – a completely open-door policy. On that view, if mother Morag and father Fergus persuade their teenage son Steven to agree to tidy up his bedroom every Saturday and they want that agreement noted in the title sheet, they should be allowed to, so long as the fee is paid. There is indeed a public register that has a completely open-door policy: the Books of Council and Session.[28] Should the Land Register be the same? The 1979 Act's answer to that question is in the negative, though that answer may not be particularly obvious on a quick reading. By allowing the entry of "overriding

[27] For data protection issues see Part 8.

[28] There is a requirement of form, namely that the document to be registered must be properly executed, but there is no requirement as to substance. Steven's promise to his parents, if in probative form, could be registered in the Books of Council and Session.

interests" and by a definition of that concept which would exclude some interests – such as Morag's and Fergus's interest in the agreement – the 1979 Act implicitly rejected the open-door policy. We think it was right to do so. The D Sections of many title sheets are already too cluttered, often running on for many pages. The practical utility of a title sheet would be damaged by an open-door policy. It would also increase conveyancing costs. On every conveyancing transaction a title sheet has to be scrutinised.[29] Longer D Sections mean higher conveyancing fees. Moreover there is the fact that any entry in the Land Register has the capacity to generate disputes, either about the validity of the right in the first place or about whether it has come to an end and so should be deleted. Disputes about a right or alleged right can become more complex if an entry in the Land Register is involved. Whether a particular type of right should be capable of entering the Register is a matter that has to be the subject of serious consideration.

4.26 We have no hesitation in saying that the approach of the 1979 Act was right: the policy should not be an open-door policy. Having said that, there are one or two particular issues that need to be looked at: overriding interests, contractual rights, occupancy rights and data from other public registers. We take each of these in turn.

Overriding interests

4.27 The subject of overriding interests is a complex one, and accordingly we deal with it separately in Part 7. In brief, our conclusion is that the 1979 Act allows too many types of overriding interest to be noted in the Register. In our view the list should be pared down to public rights of way, core paths created by order[30] and servitudes.

Purely contractual rights

4.28 By "purely contractual right" we mean rights that, though they relate to a particular property, are simply contracts and no more. Thus the category does not include leases, which, though they are contracts, normally have real (proprietary) effect. The 1979 Act by implication does not allow purely contractual rights to appear in the Register. Nevertheless in practice such rights all too often are allowed in, sometimes as encumbrances in the D Section and sometimes as pertinents in the A Section.

4.29 The Keeper's position is admittedly not always an easy one. For example, on a first registration the Keeper transposes the title conditions from the Sasine title to the new title sheet. In the Register of Sasines there has been no system of keeping out merely personal rights. Personal rights can and often do appear in Sasine writs. In some cases it may be uncertain whether a particular right conferred on, say, a neighbour in a Sasine writ does or does not amount to a valid real burden or servitude. The downside to the wrongful omission of a burden is worse than the downside of wrongful inclusion, and so it is understandable that in the Land Register the Keeper will include a burden over whose right of admittance to the Register there is a question mark. But even with that point in view, the fact remains that sometimes burdens are included in title sheets that are quite clearly personal only.

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[29] Failure to do so may result in a damages claim. For a remarkable case see *Henderson v Sayer* [2007] CSOH 183.

[30] Land Reform (Scotland) Act 2003, s 22.

4.30 Whilst recognising that the Keeper's position can be a difficult one, the fact remains that such entries clutter up title sheets, make them less accessible and, by increasing the time needed for title examination, push up conveyancing fees. And there is also another reason why the Keeper should show the "no admittance" card to purely contractual rights. What is nowadays commonly known as the "offside goals rule" says that a contractual right relating to property can in some cases bind a successor who is aware of it.[31] If a personal right is admitted to the Land Register then successors will know of it. That fact of itself does not necessarily engage the rule, because certain other preconditions must be met before the offside goals rule can operate. But buyers are put in a difficult position. The buyer (or other grantee) may wish to see an expert opinion before settling the transaction, to confirm that the offside goals rule is not engaged, or may wish to obtain title insurance. Purely contractual rights thus do not merely clutter up the Register, but they can impede free marketability and push up conveyancing costs.[32] This concern has been expressed to us by Professor Rennie and we agree with it.

4.31 We think it would help if the new legislation were to be clearer than the 1979 Act that the Keeper is not to enter on title sheets rights and encumbrances other than those authorised by legislation. Accordingly the draft Bill has a provision spelling this out. There is also a provision that if rights do for any reason appear on a title sheet other than those authorised by an enactment, their inclusion is to be considered as being of no effect.[33] So unauthorised entries are not to be made, and, if made, are to be disregarded. We recommend:

> **3. No rights and encumbrances should appear on the Register except as authorised by an enactment.**
>
> (Draft Bill, s 6(3))

Occupancy rights

4.32 Under current law occupancy rights do not enter the D Section (Burdens Section). That would remain the position in our scheme. But the Rules provide for a *negative* statement to be entered in the Proprietorship Section, ie a statement that there are no subsisting occupancy rights.[34]

> "The Keeper shall enter in the Proprietorship Section … a statement that there are in respect of the interest in land no subsisting occupancy rights– (i) in terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, of spouses of persons who were formerly entitled to the interest in land; or (ii) in terms of section 106 of the Civil Partnership Act 2004, of a non-entitled civil partner, if the Keeper is satisfied that there is no such subsisting right."

4.33 This provision is not in the 1979 Act itself and we have come to the conclusion that this is a matter better dealt with in rules rather than in primary legislation. It is arguable, moreover, that this is something that the Keeper should not be required to do. After all, a buyer runs a certain risk of a variety of off-register third-party rights, many of which are in

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[31] For the offside goals rule see Reid, *Property,* paras 695-700; and David A Brand, Andrew J M Steven and Scott Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004), ch 32.
[32] For the question of whether the offside goals rule should be abolished see paras 14.61-14.65.
[33] Draft Bill, s 6(4).
[34] 2006 Rules, rule 5.

real-life terms more serious than the risk of subsisting occupancy rights. Short leases are an example. But no one suggests that the Keeper should have to make a "no short leases" statement on title sheets. Moreover, the third-party impact of occupancy rights is, as a result of statutory reform, less than it was when these rights were first introduced. We offer no concluded view on these arguments, and merely note them. The draft Bill adheres to the current position (ie as found in the 1979 Act) in passing this matter over in silence.

Data from other registers

4.34 The question of whether data in other registers such as the Register of Inhibitions should also be carried across to the Land Register is considered in Part 30.

Evaluation and recommendations: the Application Record and the Archive Record

4.35 In DP 128 we proposed that the Land Register should be defined as comprising "the totality of the title sheets (but not including any deeds referred to in the title sheets)."[35] Although this received general support from respondents, further reflection has led us to a different conclusion, the reasons for which should be apparent from the foregoing discussion. We consider that the Application Record and the Archive Record are essential parts of the Register. Accordingly we recommend:

> **4. The Application Record and the Archive Record should be recognised as parts of the Register.**
>
> (Draft Bill, s 2, s 12(1) and s 13(1))

4.36 It might be objected that if the deeds themselves are in the Register, there has been a retreat from the ideals of title registration, and a partial return to the system of deeds registration on which the Register of Sasines is based. We think this concern misplaced. Recognition of the Archive Record as part of the Register does not of itself confer any effect on the deeds themselves. The effects of registration flow from the entry made in the Title Sheet Record. Again, it might be argued that to recognise the Archive Record as a part of the Register would be to derogate from the recommendation above, that purely contractual rights have no place in the Register, given that deeds usually do contain some purely contractual rights. In fact that recommendation concerned not the Register as a whole, but title sheets. Another objection might be that the "curtain principle" is endangered, ie the principle that third parties should be able to rely on the Title Sheet Record, supplemented by the Application Record, and should not have to examine the deeds that underlie the title.[36] But, as was mentioned above, for several years now the Archive Record has been open, and yet conveyancers have shown no inclination to inspect the deeds other than, very occasionally, for special reasons. No one has sought to argue that conveyancers are under a duty to examine them or that third parties have constructive knowledge of them. Hence we see no difficulty in the idea that the legislation should recognise the Archive Record as part

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[35] DP 128, para 2.7 (proposal 1(a)).

[36] For the curtain principle see DP 125, para 1.14. In a stronger formulation, the curtain principle says not only that the deeds do not have to be examined, but that they cannot be examined – they should not be available. In that stronger sense, the principle does not now apply, but we see no disadvantages from that, and indeed the possibility of consulting the Archive Record is a valuable one. In other words we do not support the curtain principle in its strong version, but we do support it in its weaker version.

of the Register. Nevertheless, in relation to the last issue (the curtain principle) we think that it would be useful for the legislation to make it clear that:

5. There should be no constructive knowledge of documents in the Archive Record.

(Draft Bill, s 12(6))

4.37 The draft Bill provides that the documents to go into the Archive Record are those that are relevant to the accuracy of the Register.[37] This is a broad description and we think it can be left to the Keeper to interpret it. It would include the registered deed itself, such as a disposition or standard security or notice of title. Where the deed has been signed by a mandatory, the mandate, or power of attorney, would also no doubt enter the Archive Record. Under current practice, ARTL mandates are sent to the Keeper *after* registration has happened.[38] We envisage that they too would enter the Archive Record, since they are relevant to the Register's accuracy. One advantage of this is that an extract of the mandate could be issued. We also envisage that the application form would enter the Archive Record.[39] We recommend:

6. The documents to go into the Archive Record are those relevant to the accuracy of the Register.

(Draft Bill, s 12(1)(a))

Evaluation and recommendations: the Index of Proprietors

4.38 The Index of Proprietors has effectively ceased to exist, having been replaced by the digital searchability of the Title Sheet Record. As in many other respects, the law should catch up with the reality. We think that the legislation should simply direct the Keeper to ensure that the Register is searchable. It should be up to the Keeper to decide how that is to be done. Were a reversion to a paper register to be decided on[40] then no doubt an actual index would be needed. The only substantive change we recommend is that the searchability should not be limited to proprietors, as at present,[41] but should include proper liferenters, registered lessees and heritable creditors. Users of the system would sometimes wish to make such searches and so this change would be a beneficial one.[42] Accordingly we recommend:

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[37] Section 12(1)(a).

[38] Deeds used in the ARTL system are usually digitally signed not by the granter but by the granter's solicitor, this happening by virtue of a paper mandate previously signed by the client. Whereas in non-ARTL cases the Keeper normally requires a mandate to be lodged as part of the application, in ARTL cases this is not required. What happens is that the mandate is lodged later, and when this happens it does so not by virtue of any requirement of the Keeper but by virtue of the requirements of the Law Society of Scotland.

[39] See DP 128, para 2.41.

[40] The Register has always been kept in digital form, except for the maps, though these too are now kept digitally. Whilst the digital format will no doubt continue to be used, the draft Bill leaves all such matters to the Keeper's judgment: see s 1(5).

[41] 2006 Rules, rule 20.

[42] See s 11 of the draft Bill. For registered lessees, this section should be read with s 92(5).

7. The Keeper should no longer be required to keep an Index of Proprietors. Instead, the Keeper should be required to ensure that the Register is searchable and, in the case of the Title Sheet Record and the Archive Record, is searchable for proprietors, registered lessees, proper liferenters and heritable creditors.

(Draft Bill, s 4(10) and (11), s 11, s 12(4) and (5), and s 13(2) and (3))

Evaluation and recommendations: the Index Map

4.39 The Index Map has effectively ceased to exist as a separate entity. Instead, it is a particular dataset of the Digital Mapping System. The same is true of title plans. This development goes beyond what was contemplated by the legislation. We think that the law should catch up with the reality.

4.40 The Ordnance Survey maps the country, in great detail and with great accuracy, according to its physical features. Some legal boundaries in *public* law are shown, such as constituency boundaries. But legal boundaries in *private* law are not shown. The Ordnance Survey has never attempted the vast task of mapping title boundaries. A map that shows such boundaries is known as a cadastral map.[43] Cadastral maps can be used for more than one purpose: the celebrated Napoleonic cadastral map was created for tax purposes, though later it came to be used for conveyancing purposes too. Until recently there has been no such map in Scotland.[44] The idea of building a cadastral map of Scotland was evidently not in the minds of those who introduced title registration, but in fact that is what the Land Register involves. Since the Register opened for business in 1981, the Department of the Registers of Scotland has been gradually creating the first cadastral map of Scotland. To begin with it was the Index Map that had that function rather than the title plans. Now there is the DMS, whose geospatial dataset constitutes the cadastral map. Of course, it is incomplete, but month by month its coverage continually expands.[45]

4.41 This single dataset, of which the title plans are subsets, needs a name. "Index Map" is not satisfactory. The present Index Map is only a subset of the whole dataset. The name could be transferred to the whole dataset, but even then the name would be unsatisfactory, because the dataset is not an index to anything. "Land Register Map" would be a reasonable possibility. But we prefer "Cadastral Map" as having an internationally-recognised meaning. It is a standard term among the Member States of the European Union and also elsewhere. If there is an objection, it is not so much to the word "cadastral" as to the word "map", for that word suggests a two-dimensional paper representation, whereas the Keeper's cartographic

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[43] For a discussion of the concept, see (for example) the "FIG Statement on the Cadastre International" available on the website of the International Federation of Surveyors (http://www.fig.net). Sometimes the term is thought to imply a fiscal function, but the term is not necessarily limited in that way. Again, sometimes the term is taken to imply the system of anchoring title boundaries to official "monumentation", involving, for example, iron posts inserted into the ground. Once again, a cadastral map does not necessarily involve monumentation of this type. In some countries official monumentation is used extensively. In the UK there is no official monumentation. (The nearest equivalent would be the OS trig points.)

[44] Though the "Old Extent", compiled in the time of Alexander III, could be regarded as a forerunner. Like the Napoleonic cadastre, the Old Extent was a valuation survey carried out for fiscal purposes, which later came to be used for conveyancing purposes. Conveyancers of long experience will recall occasionally having seen descriptions of properties in the Register of Sasines referring to the Old Extent. The classic work on the subject is Thomas Thomson, *Memorial on Old Extent* (ed J D Mackie, Stair Society Vol 10, 1946).

[45] For the final objective of the complete cadastral mapping of Scotland, see Part 33.

dataset cannot be fully represented as such. But a better noun is not easy to find, and "map" is a term readily understood.

4.42 The cadastral unit number and the title sheet number would of course correspond.[46] Of the two numbers, it is the cadastral unit number that would be primary. The title sheet would identify the property by referring to the cadastral unit.

4.43 Accordingly we recommend that:

> **8. The totality of registered geospatial data, to be known as the Cadastral Map, should be one of the parts of the Register.**
>
> **Its property divisions should be known as cadastral units (each unit representing one registered plot of land) and should be numbered.**
>
> **Title sheets should identify the property by referring to the relevant cadastral unit, with the title sheet number thus corresponding to the cadastral unit number.**
>
> (Draft Bill, s 2, s 3(1)(a) and (b), s 5(2) and s 7(1)(a)(i))

Other mapping issues

4.44 Because mapping is so central to the Land Register, and because a number of issues arise in connection with it, we devote a separate part of this Report, Part 5, to that topic.

"Plot of land"

4.45 The draft Bill uses the term "plot of land", or "plot" for short, because it is the traditional Scottish term.[47] Plots and cadastral units have a one-to-one relationship. The difference is that a cadastral unit exists in the Register but a plot exists on the ground: boots can get muddy in plots but not in cadastral units. For the avoidance of doubt, the draft Bill says that "a plot of land is an area all of which is owned by one person or one set of persons."[48] The question of whether (a) separate tenements or (b) registered leases are "plots" is considered below.[49] A separately-owned flat in a tenement building is a "plot".

Registration of "interests in land" or registration of "plots of land"?

4.46 The 1979 Act speaks of title sheets for "interests in land".[50] The draft Bill provides, instead, for title sheets for properties themselves, or, to use the language of the draft Bill, plots of land. The two ways of speaking amount to much the same thing. But the latter is, we

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[46] For the special cases of separate tenements and registered leases, see paras 4.48 to 4.51 below.

[47] Elsewhere in the English-speaking world the term generally used is "parcel". That term has occasionally been used in Scotland, for example where an English text has been copied. This can be seen by comparing the Lands Clauses Consolidation (Scotland) Act 1845, s 91 and the Lands Clauses Consolidation Act 1845, s 93. It would be possible to adopt the term here but it is not one that is familiar to conveyancers. It is admittedly awkward to call a tenement flat a "plot", though it may be noted that "land" has always been used in law to include tenement flats.

[48] Draft Bill, s 3(4).

[49] Paras 4.48 to 4.51.

[50] See in particular ss 5 and 6.

think, more accessible to the non-lawyer. Moreover we think it would bring with it some degree of conceptual simplification. The current system of separate primary interests, each having its own independent title sheet, would be replaced by one title sheet for each plot of land, a title sheet that would show, among other things, the subordinate real rights in that plot of land, including long leases. (Though it would continue to be possible for leases to have their own, subsidiary, title sheets.[51]) As from the commencement of the new legislation, title sheets in respect of the interest of ownership would be deemed henceforth to be plot title sheets.[52] This change, which is almost purely conceptual,[53] would not mean that the Land Register would cease to be a register of rights in land: it would be a register of rights that exist in plots of land. We recommend:

9. Title sheets should be title sheets of plots of land, but subsidiary title sheets for leases should continue to be competent.

(Draft Bill, s 5(2) and (6))

Combination and division

4.47 Under current law the Keeper has a discretionary power to divide and combine title sheets.[54] That should continue to be the case. Indeed, the importance of the point is such that we consider it should be in the primary legislation. Since we are not recommending any change in the law,[55] the point might not have been worth mentioning here. We do so to allay possible concern that the idea of a plot title sheet might lead to inflexibility. For example, suppose that an area of land owned by one person is subject to fifty registered leases of different parts. In such a case the Keeper would be free to have fifty cadastral units, each owned by the same person, so that there would be one registered lease for each cadastral unit. In the future, as at present, it comes down to convenience.

Separate tenements and long leases

4.48 The idea of one cadastral unit for each plot of land is subject to two complications. The first concerns long leases, discussed in the next paragraph, and the other concerns separate tenements, such as mineral rights and salmon fishing rights. Separate tenements are treated in general property law as plots of land in their own right.[56] As a result in one area of land there could be more than one plot. For example, Jack might own a farm but Jill might own the mineral rights under the farm: hence two "plots" in the same land. Since separate tenements are themselves treated as separate plots of land, they currently have their own title sheets.[57] Hence under current law, title plans can overlap. In our scheme, the same would apply. A separate tenement would have its own title sheet, and on the Cadastral Map

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[51] See Part 9.
[52] Draft Bill s 91(1), sch 6, para 3.
[53] One minor consequential change of a practical nature is about the grant of a standard security by a tenant where the property has been registered but not the lease: see Part 9. In the conceptual structure of the 1979 Act, a lease can be in the Land Register while the property itself is still in the Register of Sasines, a situation we regard as inconvenient.
[54] 2006 Rules, rule 8.
[55] Though in the new scheme the combination or division is of both cadastral units and title sheets. The difference is conceptual, not substantive.
[56] Whether this is the best way to conceptualise such rights as salmon fishing rights and mining rights is not something that can be discussed here. For the law of separate tenements see William M Gordon and Scott Wortley, *Scottish Land Law* (3rd edn, 2009), ch 7 and Reid, *Property*, paras 207 ff.
[57] For tenements within the meaning of the Tenements (Scotland) Act 2004, see paras 5.19 to 5.23 below.

the extent would be mapped and shown as a distinct cadastral unit. That of course implies "layering" on the Cadastral Map. But that already has to happen, and does happen, in the DMS.

4.49 Property law does not classify a long lease as a separate tenement. Hence one might have expected the 1979 Act to have treated long leases according to what they are: secondary rights. In fact that was not what the 1979 Act did. It treated long leases much as if they were separate tenements.[58] (Alternatively, the 1979 Act can be regarded as having treated long leases as if they were feu rights.) Thus a long lease has its own title sheet. That means that, like separate tenements, long leases are a source of overlapping. If an owner of a plot grants a long lease of it, there will be two title sheets for the same plot of land. If the owner stakes out the land into ten parcels and grants a long lease of each area to ten grantees, the plot ends up with eleven title sheets. As with separate tenements, this is not a serious problem either currently or in our proposed scheme.

4.50 However, because a lease is not a plot of land, and since there should be a one-to-one correspondence between cadastral units and plots of land, a long lease would not be represented by a cadastral unit. That does not mean that it would not be represented on the Cadastral Map. Take two cases. (i) The extent of the leased area is the same as the extent of the plot, as where, for example, Jack grants a long lease of all his land to Jill. Here the lease boundaries are the same as the plot boundaries and hence the same as the boundaries of the cadastral unit. (ii) Jack grants a long lease of part of his land to Jill. The Keeper will delineate the boundaries of the long lease on the Cadastral Map, but this does not amount to the creation of a new cadastral unit. The boundaries of cadastral units are ownership boundaries,[59] and a right of lease is a subordinate real right, not a right of ownership. This is, indeed, not the only type of case in which rights will be depicted on the Cadastral Map in this way. Wherever there is a registered subordinate real right with features that do not coincide with cadastral boundaries, the appropriate geospatial data will be entered into the Cadastral Map without the creation of a new cadastral unit. For example, the line of a servitude of way might be shown. Or it might be that a real burden affects only part of a plot of land: in that case that part of the cadastral unit would be marked appropriately. And so on.

4.51 We recommend:

10. (a) Separate tenements should have their own cadastral units.

(b) Where long leases and other subordinate real rights do not coincide with cadastral units, the relevant geospatial data should nevertheless be entered into the Cadastral Map.

(Draft Bill, s 3(1)(c), and s 4(1) and (2))

[58] The basis for this was the Henry Report, p 20 which defines separate tenement so as to include a lease.
[59] Because a cadastral unit represents a plot of land, and a plot of land is a tract of land all of which is owned by one person, or by one set of persons.

Recapitulation: plots of land, cadastral units and title sheets

4.52 It may be helpful at this stage to summarise certain points made above. In the draft Bill the term "plot of land" includes whatever is owned as a separate entity. That includes, for example, a flat in a tenement, mineral rights and salmon fishing rights. For each plot of land there is in the Cadastral Map a matching unit, called a cadastral unit. The Cadastral Map is thus like a jigsaw puzzle with the cadastral units being the pieces. Another analogy would be that it is like a political map of the world, showing international borders. Because tenement flats, mineral rights and so on can be owned separately, the Cadastral Map cannot be quite so simple as those analogies would suggest, and indeed the Cadastral Map cannot be perfectly represented by a paper print. Just as each plot of land is represented by one cadastral unit, so each cadastral unit has linked to it one title sheet. The number of the cadastral unit and the number of the title sheet are the same number. There is thus a one-to-one correspondence between plots of land, cadastral units and title sheets. To all this there is a qualification: a registered lease, though not regarded by general property law as a separate tenement capable of separate ownership, can have its own title sheet. Since every title sheet must have a number, a lease title sheet must have a number. But that number cannot be the same as the number of a cadastral unit. For example, if the land of Blackmains is cadastral unit REN1234567890, the title sheet will have the same number. If the owner of Blackmains, Jack, then grants a 50-year lease to Jill, and the lease is allocated its own title sheet, the new title sheet cannot be numbered REN1234567890, for if that were to happen the result would be that two title sheets would share a single number. The lease title sheet must be allocated a different number. In substance that is what already happens.

Shared areas

4.53 Sometimes an area of land is co-owned by the proprietors of a certain set of units. An example would be the communal area in a housing estate. The current practice is that the communal area does not normally have its own title sheet. Instead, the title sheets for each of the units include (i) the individual unit and (ii) a *pro indiviso* share of the communal area. As is explained elsewhere, the latter is in practice often not mapped.[60] We think that it would be better for the shared area to have its own title sheet, and own cadastral unit. The issue is discussed further in Part 6.

Quantum of *pro indiviso* share

4.54 Rule 5 of the 2006 Rules says that "the Keeper shall enter in the Proprietorship Section: (a) the name and designation of the person entitled to the interest in land; (b) the extent of that person's entitlement to the interest in land." What the second part of this means is arguable. The word "extent" suggests physical extent,[61] but the consideration of the provision as a whole excludes that possibility. Probably the meaning is that in the case of parties holding *pro indiviso* the Keeper is to set out what quantum of share is held. For example, where a man and woman own a house in common, the B Section (Proprietorship Section) should say that ownership is divided half and half, or as the case may be. Whatever Rule 5 means, the practice of the Keeper is to enter quantum into the Proprietorship Section if but only if the deed in question has a statement about quantum. In practice deeds normally do have such a statement, with one main exception. The exception is where a *pro indiviso*

[60] See Parts 5 and 6.
[61] That is the standard meaning of "extent" in the language of land registration.

share in a common area is disponed. In such cases the quantum is sometimes stated, but by no means always.

4.55 Where a deed does not state the quantum expressly, the law presumes that the intention is that the quantum is an equal share. Thus a disposition to X, Y and Z is presumed to be a disposition of a one-third share each. No doubt the same is true of a title sheet: if a title sheet names X and Y and Z as owners, the implied meaning is that their shares are equal, ie one third to each. In the case of both deeds and title sheets, what has just been said can apply only to ownership in common. In the case of joint ownership, the joint owners do not have separate shares. Thus if land is held by X and Y and Z as trustees, it would be improper for the Keeper to state on the title sheet that they had particular shares.

4.56 This default rule – that where the share of a common title is not expressly stated, the share is an equal share – might seem to mean that no problem can ever arise, for the quantum of share will always be clear, either from express statement or by implication of law. But that may not always be so. We quote Professor Reid:[62]

> "A well-drawn grant will indicate the respective sizes of the shares…. Where the grant is silent, there is a presumption of equality of shares, so that a conveyance of a house to 'A and B' will, in the absence of any indications to the contrary, confer on each of A and B a one half *pro indiviso* share. In large housing developments … the developer may face the difficulty of not knowing at the time when the first houses are sold how many houses the development will ultimately contain. In this situation it is particularly important to specify the size of the shares … even if the final result is that proprietors receive shares of different sizes, and a disposition which takes refuge in an unspecified grant of common property may fail *quoad* the common parts on the grounds that the granter did not know the size of the share he was granting and thus lacked the necessary intention to transfer ownership."

4.57 Thus in a development, a disposition of a share of unstated amount in the common areas may be invalid, and yet it is in just that type of case where silence as to quantum of share is most likely to be encountered.[63] As Professor Reid adds, no difficulty is caused to developers by this common law rule: a developer could dispone, say, a 1/400 share to each buyer until the time came when it is clear what the total number of houses will be: the last few dispositions could then convey larger shares, adding up to unity. From the standpoint of the buyers it matters little whether the share of the common parts is 1/400 or 1/40 or 1/4.

4.58 The substantive law of common property is not a matter for this project. But we think that (a) it is unsatisfactory if there are registrations in the Land Register that are invalid, a possibility that necessarily exists if the Keeper allows registration without specification, and (b) even in those cases where there is no question of invalidity it is in the interests of transparency if the Title Sheet expressly states the quantum of share. We are supported in this view by the fact that it is probably already the law.[64] We therefore recommend:

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[62] Reid, *Property,* para 22.
[63] See further Part 6.
[64] See the discussion of rule 5 above.

11. Where two or more persons hold title in common, the Proprietorship Section (B Section) of the Title Sheet should expressly state the quantum of the share of each, except for the pertinents in tenements.

(Draft Bill, s 8(1)(b) and s 15(2))

4.59 This recommendation is subject to an exception in the case of tenements. For example it would continue to be permissible for a title sheet to say that the common passage of a tenement is owned in common, without having to say what the precise shares are.

4.60 It should also be stressed that, like many of the changes that we recommend, it should not be retrospective, ie it does not call into question the validity of existing title sheets.

The seabed

4.61 Territorial waters extend to 12 nautical miles seaward from the coast.[65] The territorial seabed can be owned just like land onshore.[66] In practice there is little demand for registration in respect of the seabed. Almost always it is in the ownership of the Crown, and Crown grants are infrequent and tend to involve short leases or licences, which are unregistrable.[67] But there are exceptions. Older Crown grants of harbour sometimes included a grant of the seabed. Registrable (long) leases are not unknown and rights of coastal salmon fishing are common. The Title Conditions (Scotland) Act 2003 permits the creation of maritime burdens in respect of the seabed, and such burdens must be constituted by registration. As this last example suggests, it is possible that the registration of rights in the seabed will be more common in the future than they have been in the past; but it is still likely to be infrequent.

4.62 It is generally assumed that the land registration system includes the territorial seabed. But the point is not wholly beyond doubt.[68] In DP 130 we said that "if there is doubt on this point, it should be removed in the replacement legislation."[69] The draft Bill does this by providing expressly, in the interpretation section, that "land" includes the territorial seabed.[70] We recommend:

12. The legislation should make it clear that the land registration system extends to the territorial seabed.

(Draft Bill, s 92(1))

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[65] Territorial Sea Act 1987, s 1(1), and see also the Scottish Adjacent Waters Boundaries Order 1999 (SI 1999/1126). To be precise, the measurement is from "baselines". See further Scottish Law Commission, Report on *Law of the Foreshore and Sea Bed* (Scot Law Com No 190, 2003), para 2.3.

[66] It does not appear that this has ever been expressly decided, but the point is one that is universally accepted. Cf *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 SLT 166.

[67] For an account, see Scottish Law Commission, Discussion Paper on *Law of the Foreshore and Sea Bed* (Scot Law Com DP No 113, 2001), paras 3.5-3.8.

[68] For discussion see DP 130, para 2.29. And see *Argyll and Bute Council v Secretary of State for Scotland* 1977 SLT 33.

[69] DP 130, para 2.29.

[70] Draft Bill, s 92(1). For other issues about the seabed, see Part 5.

Trusts

4.63 "Keeping trusts off the register has come to be regarded as one of the objects of the Torrens system". That is the comment of the New Zealand Law Commission in a recent paper.[71] The idea is that only the individual names of the trustees should appear, so that the Register discloses no beneficial interests.[72] By contrast, the 1979 Act did not seek to keep trusts off the Register. The common law tradition, to which New Zealand law belongs, as do most other systems using Torrens-based systems, has two categories of proprietary interests, namely legal and equitable. The existence of the latter has long caused problems for land transactions by tending to cloud the title of buyers and other grantees, and it has in such countries been one of the objectives of land registration to facilitate land transactions by shielding buyers, and other grantees, from equitable proprietary interests and especially the interests of beneficiaries under trusts. The picture in Scotland is rather different. With a property law system based in the civilian tradition, there is nothing that really corresponds to the equitable proprietary interests of the common law tradition. Scots law recognises trusts, and in some cases the interests of beneficiaries under trusts can affect those taking a title from a trustee. But this is not generally regarded by conveyancers as a problem, in the sense of a problem that materially detracts from the marketability of land. One reason lies in section 2(1) of the Trusts (Scotland) Act 1961.[73] We do not think that there should be any complacency about the position here: beneficial rights in trusts have an intrinsic capacity to blight marketability, and it is not impossible that in the future the question of whether trusts should be kept off the Register might have to be considered. But at present the position can be regarded as satisfactory. Accordingly we recommend no change from the existing position.

Price and other information

4.64 The draft Bill allows the Keeper to enter "information".[74] That does not include rights and obligations, because they cannot be entered unless authorised by an enactment.[75] An example would be price. The draft Bill, following the 1979 Act, does not mention price.

Other changes

4.65 The 1979 Act was, as we noted earlier, the world's shortest land registration statute, and matters were left to the Rules which really should have been in the statute itself. We have throughout adopted a policy of locating in the draft Bill matters that seemed to us to be of a primary nature, and this policy has been applied in relation to the structure of the Register as in relation to other matters. In the course of restating provisions that are currently to be found in the Rules we have taken the opportunity thus presented of making appropriate revisions, whether by way of clarification or otherwise. These various revisions

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[71] New Zealand Law Commission, *Review of the Land Transfer Act 1952* (2008), para 8.1.

[72] In other words, the fact that a trust is not to appear on the register does not mean that registered property cannot be held in trust.

[73] "Where … trustees … enter into a transaction with any person (in this section referred to as "the second party"), being a transaction under which the trustees purport to do …an act of any of the descriptions specified in paragraphs (a) to (eb) of subsection (1) of section 4 of the Act of 1921 .. the validity of the transaction and of any title acquired by the second party under the transaction shall not be challengeable by the second party or any other person on the ground that the act in question is at variance with the terms or purposes of the trust: …" The "Act of 1921" is the Trusts (Scotland) Act 1921 and the paragraphs of the Act that are cited include sale of trust property.

[74] Draft Bill, s 6(5)(e).

[75] Draft Bill, s 6(3).

are too numerous and too minor to call for detailed comment here. Information can, however, be found in the explanatory notes.

Part 5 Mapping

Introduction

5.1 In Part 4 we recommended that the totality of registered geospatial data be categorised under the name of the Cadastral Map. In this part we consider certain specific mapping issues. Mapping is of central importance to the Land Register.[1]

5.2 It is one of the basic principles of property law that a real right can be created or transferred only in relation to that which can be specifically identified. A contract to sell 1000 tonnes of mild steel can be valid, even though no specific steel can be pointed to as being the steel to which the contract relates, but ownership of steel cannot pass unless the steel in question is identifiable. The academic name of this principle is the specificity principle. It applies to heritable property as it does to moveables.[2] A conveyancing deed must describe the land it deals with in such a way that the land can be identified. But it does not go so far as to require the deed to contain, or refer to, a plan. When the Register of Sasines was introduced in 1617,[3] no change was made, and that remains the position to this day: deeds in the Register of Sasines do not have to contain, or refer to, a plan. Put another way, titles in the Register of Sasines can be and often are unmapped titles. Indeed, until the Conveyancing (Scotland) Act 1924,[4] even if a deed did in fact contain a plan, there was no means of recording that plan together with the deed. The 1924 Act provided that if the deed plan was done in duplicate, one of the copies could be recorded in the Register. But it did not require such recording. As from 1934 photocopying replaced manual transcription: as a result the Register of Sasines automatically copied any plans annexed to deeds.[5] But even then there was, and is, no requirement of mapping. To this day there are many properties whose description is not plan-based.

5.3 In the second half of the 19th century the Keeper introduced, on a non-statutory basis, the "search sheet" system, whereby each property was allocated its own search sheet, a document that listed the deeds affecting that property. Whereas the Register of Sasines had previously been indexed only by persons, the search sheet system was an index by property. The search sheet was a forerunner of the modern title sheet. But no attempt was made to base these search sheets on plans.

5.4 By the end of the 19th century the Ordnance Survey had mapped Scotland with sufficient precision to allow the introduction of a map-based registration system. But that step was not taken until 1979.

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[1] See generally *Registration of Title Practice Book*, ch 4.
[2] For the sale of corporeal moveables the specificity principle is declared by s 16 of the Sale of Goods Act 1979. Section 20A is a qualification to s 16 but not an exception to it, because it still requires identifiable property.
[3] Registration Act 1617.
[4] Section 48.
[5] Deed plans often identify areas by colouring. Since deeds are recorded in the Register of Sasines in monochrome, the result is that the plan is not fully recorded: there is a loss of data that can be so extensive as to render the recorded plan useless.

The Base Map – the Ordnance Map

5.5 The Ordnance Map has been used by the Land Registry in England and Wales since 1889,[6] and was the inevitable choice of the Henry Committee for the new Land Register in Scotland.[7] It is tied to the Ordnance Map by the 1979 Act itself. Section 6(1)(a) of the Act says that "the Keeper shall make up and maintain a title sheet of an interest in land in the register by entering therein (a) a description of the land which shall consist of or include a description of it based on the Ordnance Map …".[8] Section 4(2) of the 1979 Act provides that "an application for registration shall not be accepted by the Keeper if (a) it relates to land which is not sufficiently described to enable him to identify it by reference to the Ordnance Map." The expression "Ordnance Map" is defined as "a map made under powers conferred by the Ordnance Survey Act 1841",[9] and in practice the term may be taken as referring to the base survey from which Ordnance Survey products are extracted rather than to any particular digital or paper product created from that survey.[10]

5.6 Since the inception of the Land Register in 1981, the Keeper has included in every title sheet a plan based on the Ordnance Map showing, by lines or tints, both the extent of the property and also the land to which particular rights and burdens relate. Until 1993 the lines and tints were drawn by hand on Ordnance Survey prints, but title plans are now generated from a digital map base supplied by Ordnance Survey. Similarly, the Index Map was initially compiled by hand but is now stored as one of the layers on the same digital map base from which title plans are generated. The Keeper uses the best scale available for the area in question, which is to say 1:1250, 1:2500 or 1:10,000.[11] This is supplied with a service contract for regular updating of individual map tiles[12] within the database.

5.7 The Land Register is likely to be based on the Ordnance Map for the foreseeable future. Whether this should continue to be mandatory is, however, a different matter. The possibility of alternative sources of reliable geospatial data cannot be ruled out. New technologies may result in a different approach to mapping: in this respect aerial photography and satellite imagery are already significant developments. Further, being produced for different types of user, the Ordnance Map does not, in all respects, meet the specialised needs of Registers of Scotland. It may contain errors. It is not always fully up-to-date.[13] The available scale is sometimes too small. It does not cover much of the territorial seabed. These limitations can cause difficulties, not only for the Keeper, but also for

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[6] R B Roper, C West, M Dixon, D Fox, S R Coveney, S Wheeler and P Milne, *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (looseleaf), para 5.021.

[7] Henry Report, p 38.

[8] The word "include" has sometimes been misunderstood as permitting an alternative to an OS-based plan. In fact it simply means that the description does not have to consist *exclusively* of a plan based on the OS: the OS-based plan can be supplemented. In practice it is always supplemented by a verbal description, which is often simply the postal address. Occasionally the supplementation involves a "supplementary plan". For example, a flat in a tenement could be identified in this way, by the use of plans of the tenemental building itself, though in practice this is rare.

[9] Interpretation Act 1978, s 5 and Sch 1.

[10] Scottish Law Commission, Report on *Law of the Foreshore and Sea Bed* (Scot Law Com No 190, 2003), para 2.15.

[11] See *Registration of Title Practice Book,* para 4.22 which states: "Of the map data produced and maintained by Ordnance Survey, those on the following scales will be used by the Keeper, namely: 1:10000 mountain and moorland areas; 1:2500 villages, small towns and rural areas; 1:1250 cities and larger towns."

[12] A "map tile" is a set of digitised cartographic data representing a rectangle of ground.

[13] *Registration of Title Practice Book,* para 4.14 warns that "even with continuous revision by the Ordnance Survey, the latest map information available may not necessarily reflect the situation on the ground".

applicants who may on occasion be faced with a discrepancy between an accurate deed plan and an inaccurate Ordnance Map.

5.8 In Discussion Paper 130 we proposed that it should be open to the Keeper to replace the Ordnance Map with a different map provided that the map is made up in accordance with standards prescribed by Scottish Ministers.[14] There was general support for this from consultees, including the Ordnance Survey itself.[15] Accordingly we recommend:

13. It should be open to the Keeper to replace the Ordnance Map with a different base map provided that the map is made up in accordance with standards prescribed by Scottish Ministers.

(Draft Bill, s 4(5))

5.9 "Base map" is a new term, as far as legislation is concerned, though it is an established term within the Department of the Registers. In the 1979 Act the Ordnance Map is the base map, but no generic term was needed because the Ordnance Map was the only base map allowed. Since in our scheme that will no longer be the case, a generic term will be useful.[16]

5.10 The relationship of base map to Cadastral Map can be pictured in terms of the latter being a semi-transparent sheet lying on top of the base map. The base map provides the geographical data and the Cadastral Map provides the title data. Either can evolve while the other is, for the moment, unchanged. The Ordnance Map is not static. It is constantly being revised. The revisions may reflect changes on the surface of the earth – new buildings, new hedges or walls, and so on – or they may reflect better recording of what was already there. In the latter case the draft Bill provides that the Keeper may amend the register to realign a boundary depicted in the Cadastral Map.[17] Such realignment does not enlarge or lessen the title boundaries.

5.11 In suggesting that the Keeper should have the flexibility to change the mapping, we do not overlook the value of the present arrangements. In the typical case, the title plan in the Land Register is much more accurate and informative than the description, sometimes woefully inadequate, to be found in Sasine titles. Further, by linking the Land Register to the Ordnance Map, the legislation ensures that the maps employed by the Register are of a particular standard. In the event of that link being abandoned, a replacement standard would be needed.[18] This is partly in deference to the public interest in an accurate and informative Register, but a prescribed standard would be needed for other reasons as well. It would set the threshold for applications – for, as at present, an application would fall to be rejected if the land could not be identified on the official map. More important still, it would set the level of the official guarantee in respect of boundaries.

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[14] DP 130, para 2.5 (proposal 1).
[15] We should however record that the Ordnance Survey thought that para 2.3 of DP 130 rather overstated the shortcomings of the Ordnance Map.
[16] The 1979 Act comes close to the terminology by providing that the Register is to be "based" on the Ordnance Map.
[17] Draft Bill, s 4(6).
[18] As in the case of the Register of Community Interests in Land, which is directed to contain "a description of the land, including maps, plans or other drawings (prepared to such specifications as are prescribed). See Land Reform (Scotland) Act 2003, s 36(2)(f); Community Right to Buy (Specification of Plans) (Scotland) Regulations 2004 (SSI 2004/231).

Seabed

5.12 In Part 4 we recommend that the legislation should place it beyond doubt that the land registration system extends to the territorial seabed.[19] Here we consider the practical problem that the legislation requires that registration be done on the basis of the Ordnance Map, yet much of the seabed is not included in the Ordnance Map. In DP 130 we proposed that the rule be relaxed for the seabed. Respondents agreed. We recommend:

> **14. To the extent that a plot of land is outwith the base map, the Keeper should be able to adopt such other means of representing the boundaries as the Keeper thinks fit.**
>
> (Draft Bill, s 4(7))

Everything mapped once but not more than once

5.13 We consider that the logic of land registration requires that every plot of land should be mapped, but not mapped more than once. In other words, (i) every registered plot of land should be represented by a unit in the Cadastral Map, and (ii) it should not appear in more than one unit. This policy could be summarised by saying "no gaps and no overlaps". Current practice does not entirely implement this policy, and accordingly we think that there needs to be some tightening up. The issue is divided between the following sections, the first dealing with the "no gaps" issue (to which the subject of tenements is an addendum) and the second with the "no overlaps" issue.

No registration without mapping

5.14 As mentioned above, section 6(1)(a) of the 1979 Act says that a title sheet must contain "a description of the land which shall consist of or include a description of it based on the Ordnance Map". Nevertheless the Keeper's practice is to register without mapping in two types of case. The first is properties in tenements. This case is considered in the next section, where we take the view that the Keeper's practice is acceptable and should be authorised in the legislation. The other type of case is where a property is disponed together with a *pro indiviso* share of a common area, the common area not being identified by a plan in the deed. Here we think that the Keeper's practice has not been quite right. But the subject of common parts is complex and we devote a separate part to it, Part 6. To anticipate what we say there, we recommend the introduction, on an optional basis, of "provisional shared plot title sheets" which can be registered on a temporary basis without mapping.

5.15 The principle of "no registration without mapping" is not clearly stated by the 1979 Act. It needs to be stated clearly, together with the two exceptions we regard as appropriate, namely for tenements[20] and for provisional shared plot title sheets.[21] Accordingly we recommend:

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[19] See paras 4.61 and 4.62 above.
[20] See paras 5.19 to 5.24 below.
[21] See Part 6.

15. Land should not be registered without being mapped, subject to two qualifications: (i) tenements and (ii) provisional shared plots.

(Draft Bill, s 3(1)(b) and (c), s 15(1) and s 29)

5.16 This recommendation is, of course, prospective in its scope. It will not affect land already registered. In saying this, we express no view as to the validity or otherwise of existing unmapped registrations.

5.17 A title sheet we have seen is a good illustration of why registration without mapping is unsound policy. Someone bought a property in Skye. With the property came a share in a common area, but the common area – which was extensive – was not mapped. On first registration the title sheet was made up, with a plan of the principal property, plus a statement that there was a right in common to an area. The area was unmapped and though there was a verbal description it was of only slight value. Later the owner sold the principal property but retained the right in common. Now there had to be two title sheets in place of one. One of the new title sheets related to the mapped property and was unproblematic. The other had no plan at all and identified the property with a vague description that did not say very much more than that it was an area of ground in the Isle of Skye.

5.18 If land is registered without mapping, the objectives of the land registration system are defeated. The land registration system has as its objective to set out *who* has *what* rights in *which* land. We would add that one of the advantages of the map-based system is that users are enabled to search by means of the map. If areas are registered without mapping, such searches will give false negatives and erroneous registration of competing titles to the same area of ground becomes a possibility.

Tenements

5.19 Where a tenement building - an apartment building - is in single ownership, the occupiers being tenants, no specialities arise. But often the individual apartments are owned separately. In that case the building is subject to the Tenements (Scotland) Act 2004, and here we use "tenement" in that sense.[22]

5.20 The 1979 Act does not mention tenemental property, thereby suggesting that such property could be treated like other properties. That was perhaps to be expected, because in the Register of Sasines tenemental and non-tenemental properties are treated in the same way. But it was soon appreciated that in practice tenements had to be treated differently in the Land Registration system. It was regarded as impracticable to have three-dimensional mapping of the building.[23] In any case, the recorded deeds seldom had more than a general verbal description of the part of the building in question. A similar or even greater degree of generality was in practice found in the description of the parts of the building and ground attached that were (a) in the sole ownership of the owner of the particular unit or (b) in the common ownership of all the owners, or, in some cases, a subset of them. What the Keeper has tended to do, therefore, has been to map what is called the "tenement steading", which is to say the whole building including any land attached. Each flat's title sheet will thus have the same plan in its A Section. The various different properties are thus distinguished solely

[22] The 2004 Act defines "tenement" in s 26(1).
[23] This issue is returned to at the end of this part: see para 5.34.

by the verbal description. In some cases the Keeper has sufficient information to improve on that rather basic approach, but the fact remains that in practice tenemental properties in the Land Register are not individually mapped in the same sense as other properties.

5.21 Whether or not the Keeper's practice meets the requirement of the 1979 Act, we think that it was a sensible response to the realities of urban property in Scotland. We think that the legislation should make an express exception for tenemental properties in relation to the "no registration without mapping" rule. Accordingly we recommend:

16. A tenement may be depicted as a single extent on the Cadastral Map.

(Draft Bill, s 15(1))

5.22 A tenement includes not only the tenement building itself but land pertaining to it.[24] If the land pertaining to the tenement is so divided that different areas belong to different flats, our rule means that the Keeper does not have to depict these on the Cadastral Map. The Cadastral Map could just show a red edge around the whole steading, and leave it to the verbal description in each title sheet to refer to the individual areas of ground. This approach, though satisfactory in typical cases of tenements, becomes less satisfactory as the tenement ground becomes more extensive and extends further from the tenement building. We therefore think that a limit should exist. If the tenement ground extends beyond a certain number of metres beyond the building, then the relaxation about mapping should no longer be available in relation to the part that so extends. We think that 25 metres is the right figure.

5.23 Under current practice the Keeper applies no definite limit, and there are many tenements that are mapped as a single unit with some of the area being more than 25 metres from the tenement building. Revising existing tenement titles would be prohibitively costly. Accordingly the Bill provides that the 25 metre rule in effect applies only to new blocks of flats.[25] We recommend:

17. The relaxation for tenemental properties should include land pertaining to the tenement but not beyond 25 metres from the tenement building.

(Draft Bill, s 15(3))

The "subjects within" formula

5.24 In the verbal description of a tenemental property, the Keeper's practice is to say: "Subjects within….". We have reason to think that this expression is not always well understood: it is not always appreciated that this means "not the whole red-edged area but some part or parts within it – see below for details". Perhaps this should be obvious, but in reality is sometimes misunderstood even by the intelligent and well-informed. Of course, this is not a matter for primary legislation. We do not recommend any substitute formula, and indeed it might perhaps be that the present formula cannot readily be improved on. We merely recommend:

[24] Tenements (Scotland) Act 2004, s 26.
[25] Sch 6, para 36.

18. The Keeper should review the use of the "subjects within" formula in the description of tenemental properties, either with a view to replacing it, or with a view to ensuring that it is better understood by users.

Cadastral units should not overlap

5.25 The principle that there should be a one-to-one correspondence between cadastral units and plots of land implies both (a) that no registered land should be unmapped (for that would mean a plot of land without a cadastral unit), a point considered in the preceding section, and also (ii) that the same land should not be represented by more than one cadastral unit, ie that cadastral units should not overlap. The boundaries of cadastral units should dovetail. Usually, of course, that is what happens anyway. Yet there are three types of case where cadastral units are, in current practice, allowed to overlap, or (translated into the language of the current system) two or more title plan extents are allowed to overlap.[26]

5.26 The first is where there is a boundary dispute and the Keeper includes the disputed area in both title sheets, in which case the Keeper will exclude indemnity, in relation to the disputed area, in at least one of the title sheets. That practice is perhaps an understandable one. The Keeper does not wish to take sides in the dispute, and yet might be perceived as doing so if the decision were to include the disputed area in just one of the title sheets. Nevertheless we consider the practice to be undesirable. It amounts to a self-contradiction on the face of the Register. The Register says that the boundary area belongs to Jack. It also says that it belongs to Jill. It would be possible for both statements to be true in cases of joint ownership or ownership in common, but not otherwise. The value of the Register is diminished by such overlap registrations.[27]

5.27 In future, if the disputed area is in cadastral unit 1 it should not be included, at the same time, in cadastral unit 2. If it is clear that its inclusion in unit 1 is wrong (ie an inaccuracy) then the Keeper should transfer it to unit 2. If doubt exists, then instead of adding it to 2 without removing it from 1, the Keeper should decline to add it to 2.[28] If Jack, the owner of plot 2, is unhappy, he should go to court to establish - if he can - his right to the disputed area. Boundary disputes that cannot be resolved in any other way have to be resolved by the courts: including the disputed area in both titles helps nobody.

5.28 The second way in which the same area is included in more than one title sheet is where it is co-owned by the different parties. For example, two neighbouring properties are served by a single driveway. In terms of property law that can be handled in three ways. One is co-ownership, a second is ownership in one party with the other having a servitude, and the third is ownership up to the middle line combined with each party having a servitude over the other half. If the first is chosen, the Keeper's current practice is to include the driveway in both title sheets, with a suitable note explaining that the ownership is only *pro indiviso*. Where there are common areas in a large development the same area may be included in several hundred title sheets.[29] In such cases we think that the transparency of the Register

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[26] An example that reached the law reports is *Tesco Stores Ltd v Keeper of the Registers of Scotland* 2001 SLT (Lands Tr) 23 aff'd as *Safeway Stores Plc v Tesco Stores Ltd* 2004 SC 29.

[27] Under current law such overlap registration can also lead to the unhappy phenomenon of title shuttlecock, described in Part 13.

[28] In the new scheme, rectification presupposes that the fact of the inaccuracy is "manifest". See Parts 17 and 18.

[29] For example in *PMP Plus Ltd v Keeper of the Registers* 2009 SLT (Lands Tr) 2 there were 291 sharing properties.

would be enhanced if each co-owned plot of land were to be represented by a separate cadastral unit. That in turn would mean that each such plot of land would have its own title sheet. This would amount to a significant change in the Keeper's practice, and accordingly we do not propose that the new rule should have to be applied retrospectively.[30] One minor qualification is, however, worth mentioning. There can be boundary features that are co-owned, such as a boundary wall, that are too small to make it reasonably practicable for them to have their own cadastral unit. The feature will appear as a red line on the join between two units, and it will be necessary for text in the property sections of the two adjoining title sheets to explain the co-ownership.

5.29 The third way in which the same area is included in more than one title sheet is where there is a separate tenement, such as a right to minerals. A separate tenement necessarily exists separately from the ownership of the land, and must overlap it. This exception to the principle of "no overlapping cadastral units" is implied by our system of property law and our scheme accepts that it will continue.

5.30 Accordingly we recommend:

19. Cadastral units should not overlap except in respect of separate tenements. There should be a *de minimis* exception for small boundary features.

(Draft Bill, s 4(3) and (4))

Section 19 agreements

5.31 Section 19 of the 1979 Act introduced a new procedure for resolving what it called a "discrepancy" in boundaries. Unfortunately the provision proved to be obscure, and in DP 130 we consulted as to whether it should simply be repealed without replacement, or repealed and replaced with a new scheme. We reproduce that scheme here: [31]

> "(1) In the event that the answer to the question in proposal 9 is no, it should be possible to enter into a special type of contract of excambion (a "boundary excambion") for the purpose of clarifying or adjusting the boundary between two properties.
>
> (2) In a boundary excambion it should be sufficient words of conveyance of the land if –
>
> (a) the parties express agreement as to the line of the boundary; and
>
> (b) the boundary is shown on a plan annexed to the excambion.
>
> (3) Any new boundary which, following registration, is set by the excambion should be deemed to be the boundary for all purposes (including for the purposes of any subordinate real rights in the properties); but it should not affect any servitude.
>
> (4) Where, as a result of the new boundary, the value of a subordinate real right is materially reduced, the court, on application of the holder of the right, should be able

[30] See further Part 36.
[31] DP 130, para 3.49 (proposal 10).

to order that the right be restored to the previous boundary. The order should take effect on registration.

(5) Section 19 of the Land Registration (Scotland) Act 1979 should be repealed."

5.32 Respondents agreed that section 19 cannot survive in its present form, but they were divided as to whether it should be replaced with our alternative scheme or simply repealed without replacement. A majority favoured the replacement scheme: among the dissenters was the Keeper. After further reflection we have come to the conclusion that the Keeper's view is to be preferred, ie that section 19 should be repealed without replacement. The replacement scheme that we proposed does not attain anything that could not be attained by other means. Other means can involve complexity, but equally so could the replacement scheme.[32] Accordingly we recommend:

20. Section 19 of the 1979 Act should be repealed without replacement.

(Draft Bill, s 98, sch 9)

Water boundaries

5.33 Water boundaries – whether the water is fresh or salt – do not necessarily remain fixed for all time. For example, a boundary might be the middle line (*medium filum*) of a given river, but the riverbanks are in fact gradually moving, with the eastern bank being eroded, and the western bank increasing by the deposition of silt, in which vegetation establishes itself. This increase is known as alluvion. In such a case the general law of property says that the boundary remains the *medium filum*. With reference to the river, that is a fixed boundary. But by reference to latitude and longitude it is a creeping boundary. And that creep cannot be constantly tracked by the Land Register.

5.34 In DP 130 we explored this issue. We proposed that "where on a title sheet a boundary is described or shown as a natural water feature, the boundary should be taken to be that feature as altered from time to time by alluvion."[33] The effect of such a rule would be that when alluvion happens the Land Register is not to be regarded as becoming inaccurate; the boundary shown in the Register is deemed to creep. Although this proposal attracted support from respondents, we now think that it is capable of improvement. The Keeper's current approach is that the effect of alluvion is that the mapped boundary becomes inaccurate, and can be corrected by rectification.[34] This now seems to us a better way of looking at the situation. In DP 130 we were concerned about what would happen when the property that had lost ground changed hands. Would the grantee re-acquire the ground in question? If so, that would be an unsatisfactory result. Or, if not, would that person have a claim against the Keeper for *not* having acquired it? As to the first concern, in our scheme a grantee can acquire no better title than the granter had unless a number of requirements are met, one of which is that the granter be in possession, and in cases of ground lost by alluvion the granter would not be in possession of the lost ground. As to the second concern, the draft Bill provides that the Keeper does not warrant that boundaries have not been

[32] See eg sub-paragraph (4).
[33] DP 130, para 3.16. By "alluvion" we meant the whole process, rather than the narrow meaning of increase.
[34] *Registration of Title Practice Book,* para 6.101.

changed by alluvion.[35] We consider that the draft Bill delivers in substance, though not in form, what DP 130 proposed. Accordingly we recommend:

21. (a) Where title boundaries shift as a result of alluvial change, the effect should be to make the Cadastral Map inaccurate.

(b) The Keeper's warranty of title should not cover title boundary changes that result from alluvial change.

(Draft Bill, s 14(1) and s 39(1)(b)(ix))

5.35 DP 130 also asked whether adjacent proprietors should be able to contract out of boundary alterations arising as a result of alluvion. Most respondents agreed, and the Bill so provides. Such an agreement, on being registered, would have real effect, ie it would bind not only the immediate parties but also their successors in title.[36] Accordingly we recommend:

22. Where two properties are separated by a natural water feature it should be possible for the owners, by registration of an agreement, to fix the boundary line and thereby exclude alluvial change to the title boundary for the future.

(Draft Bill, s 14(2) and (3))

Rules for interpretation?

5.36 In paragraph 2.13 of DP 130 we proposed a set of rules dealing with the situation that arises where the title sheet contains, within itself, conflicting data as to boundaries. The three potentially conflicting elements are (a) the title plan, (b) any supplementary plan and (c) the verbal description. The proposed rules would provide a way of resolving the conflict. A majority of respondents agreed, but the Keeper did not, arguing that the issue is non-problematic in practice and that fixed rules might lead to difficulties. With some hesitation we have come to the conclusion that the proposed rules would not be of significant benefit. We think that the resolution of such cases can be left to common sense.

Obligation to carry forward supplementary data?

5.37 In DP 130 we proposed:[37] "In making up a title sheet, the Keeper should be bound to carry forward from the prior deeds such of the supplementary information mentioned at (2)[38] as would be of material assistance in the identification of the property; but information should not be carried forward if the Keeper has reason to question its accuracy." We went on to give further details. Respondents were divided. The Keeper did not support the proposal,

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[35] Draft Bill, s 39(1)(b)(ix).

[36] This is without prejudice to the possibility that such exclusion of legal boundary change through alluvial boundary change may already be competent. If X owns land and dispones part to Y, and the boundary is a river, what if the deed says that the title boundary is as shown in the deed plan and is to remain regardless of any change in the course of the river? The provision we recommend about anti-alluvion agreements is simply facilitative and is neutral as to the general law.

[37] DP 130, para 2.23.

[38] That is to say, any deed plan or any statement as to (i) area, (ii) lineal measurement or (iii) the location of a boundary in relation to a boundary feature.

and after some hesitation we have decided not to proceed with it. Though we do not recommend that there should be an obligation, we note that under current law, and equally under our scheme, the Keeper has the power to carry forward information from the prior titles.

Red edging

5.38 Earlier we noted that the "subjects within" formula used by the Keeper for tenements is not always well understood.[39] A similar issue arises as to the use of red edges. The red edge has a measurable thickness and users often are puzzled whether the boundary is the inner margin or outer margin or something in between. Again, we consider that this is not a matter for primary legislation,[40] and once again the fault may very well lie with the users, not with the Keeper.[41] We make no specific recommendation, except that:

23. The Keeper should ensure that the meaning of the red edge is reasonably clear to users.

New developments and the OS Map

5.39 Deed plans used in new development sales are, we understand, often derived from the estate plan drawn up before construction has begun, rather than being done by actual survey of the units as they have actually been constructed. The result is that the deed plans are all too often wrong. The Keeper's practice is to delay registering the dispositions until the Ordnance Survey has issued its updated survey for the area, the idea being that the title sheet plans can follow the physical boundaries as shown by the new Ordnance Survey. We understand why this practice has developed. But we think it incorrect. A split-off disposition should define the area being conveyed. With the partial exception of tenemental units, that means a plan. The plan is the measure of what is conveyed. If the boundaries shown on the plan coincide with the future physical boundaries as shown on the Ordnance Survey map, so much the better. But if they do not, the title sheet plans must follow the deed plans, not the physical boundaries as shown on the Ordnance Survey map. The Ordnance Survey does not, and does not purport to, show private law boundaries. Physical features such as hedges, walls and fences may coincide with title boundaries but they may not. If there is a difference between a deed plan boundary and a physical feature such as a hedge, wall or fence, the title sheet plan[42] must follow the former and not the latter.[43] This is clear from the existing legislation. The issue is thus not one of legislative reform but of registration practice. If the title plan erroneously follows some physical feature that is not the title boundary, the Register is inaccurate to that extent: thus the current practice leads to inaccuracy in the Land Register on a substantial scale. Moreover, as is noted in Part 12 the current practice is one of the causes of delays in registration. The ultimate source of the problem lies in conveyancing practice, namely the all-too frequent failure by developers to give correct deed

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[39] See para 5.24 above.

[40] We should perhaps note that it would be possible for Rules to make provision for both this issue and the previous one (the "subjects within") formula.

[41] Information about colouring and other conventions used on plans is available on the Keeper's website: http://www.ros.gov.uk/pdfs/plans_ref.pdf.

[42] Or, in the new scheme, the cadastral unit.

[43] These comments are about split-off dispositions by developers, ie cases where the title of the granter to the individual plots being sold is not normally in doubt. There can be cases where the granter's title to ground lying *beyond* a physical feature is bad, and in such cases the Keeper is justified in limiting the title sheet plan to the line of the physical feature.

plans to buyers. It should not be for the Keeper to do other peoples' jobs for them. The issues in this paragraph divide into two: the problem of poor deed plans (a problem that can arise in cases other than new developments) and the question of how the Keeper should deal with new developments. Taking the second first, we recommend:

24. The Cadastral Map should normally reflect boundaries as stated in deeds. Accordingly the Keeper should review the current practice of not mapping split-off deeds until a base map update has become available.

Quality of deed plans

5.40 The 1979 Act says that deeds must describe land in such a way as to enable the property to be identified on the OS map, and the draft Bill does the same.[44] But we think that it should be possible for rules to be prescribed laying down specific standards for deed plans. For example, suppose that a small property is conveyed in an area mapped by the OS only to a scale of 1:10,000. A deed plan at that scale might reasonably be regarded as inadequate. The draft Bill allows rules to be made.[45] It would be possible to go further and require that all deed plans submitted to the Keeper should be certified by a professionally-qualified surveyor. But this is not an issue that we have consulted on. An alternative would be a voluntary accreditation scheme. We recommend:

25. (a) There should be a power to prescribe specific standards that deed plans must meet.

(b) The Keeper should consider whether any further steps may be needed to ensure a high standard of deed plans submitted to the Land Register.

(Draft Bill, s 95(1)(j))

Electronic conveyancing

5.41 The current law requires deed plans to be in paper form. That is because all deeds must be in paper form except deeds that are eligible for ARTL, and ARTL is not available except for dealings with whole. Since nowadays deed plans are often created in electronic form, the result is that the electronic plan must be converted into paper form, and then reconverted into electronic form by the Keeper's staff when the deed is lodged for registration. In that process of double conversion there is a danger of data degradation (as well as wasted effort). In the new scheme all conveyancing deeds – and that includes deed plans - can take electronic form. This will constitute a small but we hope useful contribution to the problem. But of course the avoidance of data degradation is useful only if the original data is of good quality. Sometimes it is, but not always.

Discrepancies between deed plan boundaries and OS boundaries

5.42 The discussion above calls for a short excursus on the question of discrepancies between deed plan boundaries and OS boundaries. The discrepancy can be for three

[44] See for example s 20(3)(c)(ii).
[45] Draft Bill, s 95(1)(j).

possible reasons. (i) It may be that the deed plan boundary does indeed follow the physical boundary, and what has happened is that the OS is inaccurate. (ii) The deed plan boundary is correct and, for whatever reason, does not follow the physical boundary. Parties are perfectly free to fix a boundary at, say, a line running two metres parallel to a wall, hedge etc. (iii) The OS map is correct and the parties intended the boundary to follow the physical boundary but the deed plan was drawn up incorrectly. It is the last of these that is too common in new developments. But all three cases can and do occur in practice.

Three dimensions?

5.43 Land rights can exist in three dimensions. For many centuries, Scots law has permitted vertical divisions of ownership such as those between flats on different floors of a tenement building and between different strata of minerals. In current Land Register practice, the issue of verticality in tenements is usually dealt with by verbal description in the property section of the title sheet ("subjects westmost house on the first floor of the tenement …within the land edged red on the title plan …"). But in theory a cadastral map can exist in three dimensions.[46] The draft Bill permits the Cadastral Map to include boundaries in the vertical plane in the future, but does not require such a development to take place.

[46] For discussion see Jantien E Stoter and Peter van Ossterom, *3D Cadastre in an International Context: Legal, Organizational and Technological Aspects* (2006).

Part 6 Common areas

Introduction

6.1 Sometimes a group of properties has a common area, or set of common areas. For example, in a housing scheme there may be lawns, paths, plays areas and – not least important - parking areas.[1] Whilst common areas are particularly associated with residential developments, they also sometimes occur in commercial/industrial developments. These common areas are often co-owned by the various proprietors. Thus in a development of 50 houses, each house might have a 1/50 *pro indiviso* share of the common areas.

6.2 Sometimes the arrangement is rather more complicated, in that a development has more than one common area and the rights vary between the units. For example, a development might have 25 flatted units and 25 houses. The 25 flats might share a common garden, and the 25 houses (which have their own gardens) might have no share in the common garden. At the same time other common areas (such as paths) might belong to all 50 units.

6.3 In a commercial/industrial development, the units might be held on the basis of registered leases rather than ownership. In such a case the common areas would be co-tenanted rather than co-owned.

6.4 Although the typical common area involves a substantial number of units, there could be as few as two. For example, take the case of a driveway which is used for access to more than one property. Such a driveway might be owned by one person, with the others having servitudes of way along it. But it might be co-owned, and it might be that there are just two properties that it serves and thus just two co-owners.

6.5 Finally, some common areas are common as to use but not as to title. For example, title to a common area might be vested in a residents association. This part of the Report is not concerned with such cases: it is concerned only where common areas are intended to be co-owned or co-tenanted.

A common area should have its own title sheet (and cadastral unit)

6.6 In Part 5 we recommend that cadastral units (and title sheets) should not overlap. Any given bit of ground should be represented by one and only one cadastral unit. At present the Keeper's usual practice for common areas is to include them in *all* the sharing title sheets. Suppose that there are two neighbouring properties and between them there is an access driveway leading from the public road to the rear of the properties. This access driveway is co-owned. The Keeper would include it in both title sheets, albeit with a note indicating, for each, that the title to that part of the property was a *pro indiviso* title only. Again, if an amenity area is co-owned by 30 owners, it will be included in all 30 separate title sheets. Our new approach means that common areas should have their own cadastral unit

[1] Though in some developments each unit receives its own parking unit.

and their own title sheet. This is simply a different way of presenting the same data, but in our view it is a clearer and so better way. To require all existing registrations to comply would involve heavy costs. Accordingly the change would be prospective only: ie existing registrations are unaffected.[2] The Keeper would be free, over time, to convert existing cases so that common areas would have their own title sheets, but there is no requirement that that be done.

Shared plots

6.7 A separate cadastral unit and a separate title sheet for a common area carries with it a potential awkwardness. Every time one of the sharing plots changes hands, or every time a security is granted over one of the sharing plots, a change would have to be made to the title sheet for the common area, as well as to the title sheet of the sharing plot. That would give rise to double-handling costs. To prevent such costs, we recommend that the Keeper should be allowed to designate a common area title sheet as a "shared plot title sheet". That would engage certain special rules which would circumvent the double-handling issue. Such designation would be a matter for the Keeper's free decision, and any such plot could, if the Keeper so decided, be converted back into an ordinary title sheet.

6.8 In a "shared plot title sheet" the B Section (Proprietorship Section), instead of naming and designing the co-owners, would simply list the title numbers of the sharing plots. Thus when any sharing plot changed hands, no change would be needed to the shared plot title sheet. More generally, any registration affecting a sharing plot would (unless otherwise stated) automatically affect the *pro indiviso* share in the shared plot. As for the sharing plot title sheets, each would have in its A Section (Property Section) a reference to the title number of the shared plot. Mock-ups of shared plot title sheets and sharing plot title sheets are given as Appendix E to this Report. The draft Bill provides that any deed or other document that refers to a sharing plot title sheet is presumed also to refer to the *pro indiviso* share in the shared plot: thus if an offer were to be made to buy "the house at 1234 Voltaire Road, Portpatrick, title number WIG987654321" that would by implication include any share held in any shared plot referred to in the title sheet.

6.9 We recommend:

26. The Keeper should have the discretion to set up "shared plot title sheets" in which the B Section (Proprietorship Section) would list the title numbers of the sharing plots rather than the proprietors. In such a case the A Sections (Proprietorship Sections) of the sharing plots would refer to the title number of the shared plot title sheet. Registrations affecting a sharing plot would presumptively affect the share in the shared plot. The Keeper would have the power to convert a shared plot title sheet into an ordinary title sheet.

(Draft Bill, s 16)

[2] Draft Bill, s 91(1), sch 6, paras 7-11.

Leases

6.10 In commercial developments the same issues can arise where long leases are granted, rather than ownership being transferred. (This cannot happen in residential developments, for long leases cannot now be granted over residential property.[3]) The same should apply for co-tenanted areas as for co-owned areas. We recommend:

> **27. The previous recommendation should apply, *mutatis mutandis*, to cases involving registered leases.**
>
> (Draft Bill, s 16(11), sch 1)

Common areas: the Keeper's practice up to 2009

6.11 In practice, common areas have often been, and continue to be, sold without the common area being mapped in the disposition. Often a deed of conditions is used, in which the common areas are defined, and the disposition then refers to the deed of conditions. But this comes to the same thing: the deed of conditions usually does not give a map of the common areas, but merely "defines" them in general terms. Each disposition contains a plan of the property (eg house) sold, but as for the common area it merely has some such expression as "a right in common with the other proprietors in the said development to such other parts of the said development as shall not be disponed by us and our successors as individual dwellinghouses" or "a right in common with the other proprietors in the said development to such parts of the said development as may be laid out by us and our successors as paths and amenity areas". In *PMP Plus Ltd v Keeper of the Registers of Scotland*,[4] for example, the split-off dispositions disponed:

> "a pro indiviso share with all the proprietors of all other dwellinghouses and flatted dwellinghouses erected or to be erected on the Development known as Festival Park, Glasgow being the whole development of the subjects registered in the Land Register of Scotland under Title Number GLA69039 (hereinafter referred to as 'the Greater Development') in and to those parts of the Greater Development which on completion thereof shall not have been exclusively alienated to purchasers of dwellinghouses or flatted dwellinghouses, which said parts comprise or shall comprise inter alia the boundary walls, quay wall and jetty, walkways, railings, fences, hedges and other walls enclosing the Greater Development, footpaths, sewers, drains, water supply pipes, electric mains, underbridge, car parking areas, parking area accesses, lay-bys, any embankments and access steps, the entrance drives, service roads, pathways, ornamental garden ground, play areas and other areas of open space and others so far as these serve and are common to all dwellinghouses, flatted dwellinghouses or others erected on the Greater Development (hereinafter referred to as 'the said common parts') ..."[5]

6.12 From such a description the Keeper cannot map the common area. It has nevertheless been the Keeper's practice, at any rate until 2009, to accept such deeds for registration. *PMP Plus* was an example. The individual property could be mapped, and was mapped, in the Register. But the common area could not be mapped. The words in the deed

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[3] Land Tenure Reform (Scotland) Act 1974, Part II.
[4] 2009 SLT (Lands Tr) 2.
[5] For a simpler but less usual example, we have seen a title for a property in Dalgety Bay in Fife with these words in the A Section: "together with a right in common to the bleaching green and well lying to the east of the subjects in this title." This was some years ago. These words have since been removed from the title sheet.

were simply copied out in the A Section (Property Section) of the title sheet of the property being conveyed. It is arguable that on a proper interpretation of section 4(2)(a) and section 6(1)(a) of the 1979 Act, the Keeper should reject such an application, as far as the unmappable area is concerned. We express no concluded view on that point.[6]

The *PMP Plus* decision

6.13 In *PMP Plus* the common area was not merely unmapped in the deed and thereafter unmapped in the Register: the common area could not have been identified even by a Keeper endowed with omniscience, because its extent had yet to be determined by the developers. Thus it failed to conform to the specificity principle of the common law. The validity of personal rights to property does not necessarily depend on the present identifiability of any particular property. For example if a bicycle dealer accepts an order for a type of bicycle that it does not have in stock, but can and will obtain from the manufacturer, that is a perfectly valid contract between the dealer and the customer, even though the contract does not relate to any as-yet individually identifiable property. But it is otherwise for real rights. To transfer ownership of a thing, there has to be a thing being transferred. This is not a cumbersome and antiquated rule of property law: it is simply a matter of the meaning of "transfer".[7] Because of the failure to comply with the specificity principle, the Lands Tribunal held that no transfer of a share of the common area had taken place.[8]

Mapping the common area: the Keeper's practice since 2009

6.14 As a result of the *PMP Plus* case, in 2009 the Keeper's practice changed.[9] The new practice is that the Keeper will decline to register rights in common areas where to do so would be incompatible with the specificity principle. But this new practice does not go as far as a "no registration without mapping" rule. For cases where a share in a common area is conveyed without a deed plan showing the common area can be divided into two types of case. (i) The first type is where the reason there is no plan is that the parties themselves have not decided precisely where the common area is to be. (ii) The second type is where the extent of the common area is agreed by the parties to the deed, so that there *could* be a deed plan. It is merely that they have not annexed such a plan to the deed. The two cases could be dubbed the "unmapped and unmappable" case and the "mappable but unmapped" case. The former can and often does give rise to the latter, at a later stage. Suppose that in 2005 ABC Ltd, a developer, dispones a house in a development together with a share in an undefined common area. At this stage this is likely to be an "unmapped and unmappable" case. In 2010 the buyer re-sells. The 2010 disposition, like the 2005 disposition, has no plan of the common area. Nevertheless, by this time the common area is defined on the ground, and the parties to the 2010 deed thus have agreed what that area is. So the 2010 disposition is a case of "mappable but unmapped".

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[6] It might also be argued, on the basis of *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854, that such a deed ought not to be recorded in the Register of Sasines, but once again we express no view on this point.

[7] The same point applies to the constitution of real rights, as well as to their transfer.

[8] This was thus an exception to the Keeper's Midas touch. See further Part 13.

[9] See the statement on the Keeper's website at http://www.ros.gov.uk/pdfs/update27.pdf. The practice change took effect as from 3 August 2009. (But the Keeper's previous practice continues after that date, on a run-off basis, in respect of developments that were uncompleted on that date, the reason being that it would be unsatisfactory for properties *in the same development* not to be treated alike.)

6.15 Thus the Keeper's new practice is to reject the "unmapped and unmappable" cases, but to accept the "mappable but unmapped" cases. But the Keeper's statement also notes that, whilst the Lands Tribunal did not say that the "mappable but unmapped" cases should also be rejected, there are dicta in the case[10] which indicate that such might be the law.

No registration without mapping

6.16 The "no registration without mapping" principle is to be found in the 1979 Act.[11] As noted in Part 5, the Keeper's practice has been such that two qualifications to it have evolved, one about tenements and the other about common parts. The qualification about tenements seems to us reasonable, and elsewhere we recommend that the new legislation should have express provision on the point. But we take a different view about common areas. The non-mapping of common areas reduces the value of a land registration system. Whilst the change in the Keeper's practice in 2009 means that henceforth the registration of unmapped common areas will be unusual, it will still happen in some cases. In our view it should cease altogether.

6.17 Whilst that would be the new rule, there would remain a very large number of cases where a title sheet had been made up under the existing law, ie where Section A (the Property Section) includes, or bears to include, a *pro indiviso* share of an unmapped common area.[12] Such title sheets would be inconsistent with the new rule, and accordingly a transition rule is needed for such title sheets. However, what that transition rule should be is not easy to say at this stage, when the dust blown up by *PMP Plus* has yet to settle. One possible rule would be that when the first transaction takes place after the commencement date, the Keeper must either map the common area or delete the reference to the common area. A variant would be to have that rule but not to activate for a period, such as five years, after the commencement of the rest of the legislation: this would allow a breathing space in which existing title sheets could be left as they are. There may be other approaches. We have come to the conclusion that it would be premature at this stage to recommend a specific rule. Instead the draft Bill allows this issue to be determined by rules.

6.18 We recommend:

> **28. Common areas should not be an exception to the principle of no registration without mapping. As for title sheets that, on the commencement of the new legislation, already include a share of an unmapped common area, it should be competent for rules to be made as to how the Keeper should act.**
>
> (Draft Bill, s 95(1)(c))

The problem that faces developers

6.19 It would of course always be possible for a developer to decide, before the first sale, where each house, parking area, play area etc was to be. In that case the common area could be shown on the deed plan for each sale and accordingly the Keeper could map the

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[10] That is to say, the *PMP Plus* case.
[11] Sections 4(2)(a) and 6(1)(a).
[12] Most of these cases would be cases where the title sheet had originally been created before 3 August 2009.

common area. This does sometimes happen, and it normally happens in local authority sales under the "right to buy" legislation, for in such cases the estate layout is already complete. But in new-build developments the developer often wishes to have flexibility. The developer does not wish, at the stage of the earlier sales, to be pinned down to a specific estate layout. For example, it may be thinking of the possibility of persuading the local planning department to increase the number of houses that are permitted on the site. This desire for flexibility is the reason that it so often happens that a developer, in the split-off disposition, gives no plan of the common area.

6.20 As a result of *PMP Plus*, and as a result of the Keeper's 2009 practice statement,[13] it may be that the practice of developers will change. At the time of writing this Report the position is unclear. The present market downturn means that few new developments are happening. But the effect of the Keeper's statement will be that in most cases the Keeper will no longer register unmapped common areas, and in the new scheme that will not only remain the case but will be tightened up further. It could be argued that the result is to put developers into a difficult position. As against that view, it could be replied that developers still have options at their disposal. In the first place, they can simply finalise estate layout before the first sale. "Flexibility" is, it might be argued, merely a euphemism for having your cake and eating it too, for developers want to be paid for transferring to the buyer the share in the common area while at the same keeping it. Furthermore, it could be argued, if developers do wish to have this flexibility, they can achieve it in other ways, ie without the device of an unmapped and generally invalid conveyance. One method is, at the end of the development, to convey the common area (which by this time can be identified and mapped) to an association representing the community. Another – admittedly cumbersome and expensive – is to have a second round of conveyances. Thus if there are 40 buyers, there would be a second set of 40 dispositions, each conveying a 1/40 *pro indiviso* share of the (now identifiable and mappable) common area. Another that has been suggested is for the first buyer to be given exclusive ownership of the principal property being bought, plus a *pro indiviso* share of the whole of the rest of the development. At the same time the buyer would give a power of attorney to the developer in respect of that share, thereby enabling the developer to give a good title to the second buyer, and so on.[14]

A scheme

6.21 We have developed an optional scheme which would be a blend of (i) the traditional practice of including a conveyance of the common parts in the split-off disposition and (ii) the "second round" technique.[15]

6.22 Our proposed scheme has various elements, which we take in turn, broadly following events chronologically.

Stage 1: the opening of the provisional shared plot title sheet

6.23 The first stage is that the developer would apply to the Keeper for the opening of a new title sheet for the unmapped area. This would be called a *provisional shared plot title*

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[13] See paras 6.13-6.15 above.
[14] This was suggested in *PMP Plus*. We have reservations about how practical it would be.
[15] In developing the scheme we consulted the Lands Tribunal for Scotland (Lord McGhie and John Wright QC), Homes for Scotland, the Conveyancing Committee of the Law Society of Scotland, Property Professional Support Lawyers Group, and Scottish Property Federation. We are grateful to them for their assistance.

sheet. Unlike other title sheets, it would not identify the area. (If it could, it would not be needed in the first place.) If there is to be more than one common area, it is for the Keeper to decide if more than one title sheet is required. If the development site has been put together by the developer by the acquisition of different plots, it may be appropriate for the Keeper, as a first step, to consolidate all the plots into a single plot.

Stage 2: the progress of the development

6.24 Each split-off disposition would contain a conveyance of a share in the shared plot. The Keeper would register the individual property in the usual way. At the same time, the Keeper would (i) enter into the title sheet of that property a reference to the provisional shared plot title sheet and (ii) vice versa, enter into the latter a reference to the title sheet of the individual unit (the sharing plot). But at this stage no real right in the shared area is transferred.

Stage 3: registration of the ascertainment deed

6.25 On completion of the development the developer lodges with the Keeper a plan of the common area. (This would be part of a deed called an ascertainment deed.[16]) The effect would be to vest *pro indiviso* ownership of the now-mapped area in each of the individual owners. In other words, the effect is the same as a second round of conveyances.[17] But it would, obviously, be simpler and cheaper: one deed instead of, say, 40.[18] The Keeper, on receiving the plan, would (i) delete the area in question from the developer's title sheet and (ii) make the provisional shared plot title sheet an ordinary shared plot title sheet.

Time limit

6.26 It would be unsatisfactory if a provisional shared plot title sheet could exist indefinitely. That would be incompatible with the objective of maximising the transparency of the Land Register. Accordingly we think that there should be a maximum period, and we think that nine years would be about right as a maximum. If at the end of that period no ascertainment deed had been registered the provisional title sheet would simply be deleted. Nine years is a long period, but it is only a longstop: in practice we imagine that missives would require the developer to lodge the deed considerably sooner than that. But there are occasionally cases of large developments that will inevitably be slow, which is why we think that up to nine years should be available. The draft Bill enables the period to be reduced by secondary legislation, in case it is proved by experience to be inappropriate.

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[16] The Bill provides a style in sch 2.

[17] The draft Bill does not put it this way, but instead says that the effect is to make the *pro indiviso* share in the common area a pertinent. An example will explain the reason. Suppose that one of the owners, Ross, delivers a disposition to Tara on 15 May. The ascertainment deed is registered on 16 May. The disposition to Tara is registered on 17 May. If the rule were that the ascertainment deed operated as a disposition to the proprietor, the result would be that Ross would acquire it, not Tara. Another problem case would be if an owner were to die immediately before the registration of the ascertainment deed.

[18] In the *PMP Plus* case there were 291 properties, so that this method would have involved a second round of 291 separate conveyances.

Some comments on the scheme

6.27 The new scheme would be optional. If it turned out that developers and their customers did not like it, it would not be used, and nothing would be lost. If it were adopted no doubt missives would have a clause dealing with it.[19]

6.28 Our reason for stressing the fact of optionality is that the scheme has its drawbacks. It does not protect buyers against an unreliable developer. The developer might sell the land it still owns to a commercial buyer.[20] Or the developer might become insolvent and the land it still owns might be sold as a result.[21] Ideally the scheme would protect buyers from such risks. But to give buyers a real right (before the ascertainment deed) is precisely what cannot be done. If it could be done the problem would not exist in the first place. It is precisely because no real right can be obtained before the development is complete that the problem exists. Moreover, other solutions tend to have the same drawback. For example, if the developer retains title until the development is finished, and at that stage dispones the common area to a representative association, or to all the owners, the same problem exists: before that final stage takes place the developer might sell to someone else or might become insolvent. The only way to confer complete protection is for the buyers to acquire a valid real right in the common area at the time of purchase. As far as the law is concerned, that can readily be achieved, but in practice developers are seldom willing to offer this solution.

6.29 Another drawback to the scheme is that even if the developer does not become insolvent and does not sell to some other party, it might fail to co-operate. It might simply fail to lodge an ascertainment deed with the Keeper. Or it might do so but the terms might be unacceptable to the various owners. As far as the legislation goes, the question of what the ascertainment deed says is up to the developer. Indeed, the legislation does not impose any obligation to register an ascertainment deed at all. The only control would be any obligations it had granted – which in practice means the terms of the missives.

6.30 At one stage we considered the possibility of conferring on the Lands Tribunal a power to intervene in cases where no ascertainment deed was lodged or where, though lodged, its terms were objected to. Further reflection convinced us that this would create complexity and uncertainty. To give such a power would imply that the developer had an anterior duty that had been breached. But that would depend on the missives. A developer that breaches the terms of missives is liable under general law anyway.

6.31 Another possible risk that has been suggested to us is that in some cases the developer might in the ascertainment deed allocate not too little but too much land, this happening if the developer found that some of the land was contaminated land. This risk seems to us a fairly remote one.

6.32 Thus we are aware that the scheme is imperfect. But the same can be said of all the other ways of dealing with the issue. Developers have a menu of options, none of them perfect, each with its own positive and negative points. It is for them to choose, bearing in

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[19] See further Part 37.
[20] As happened in *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2.
[21] As happened in *Turnberry Homes Ltd v Keeper of the Registers of Scotland* 11 June 2008, Lands Tribunal.

mind of course the reactions of their customers. Our scheme simply adds one more item – like the others imperfect – to the menu.

6.33 We recommend:

29. An optional scheme should be introduced whereby a developer could request the Keeper to open a provisional shared plot title sheet in respect of the proposed common area. Each split-off disposition would convey a provisional share in the provisional area, but no real right would pass at that stage. On the common area becoming mappable, the developer would register an ascertainment deed, the effect of which would be that *pro indiviso* shares would be acquired by the individual properties and the shared title sheet would cease to be provisional. Until that time, the existence of the provisional title sheet would have no real effect.

(Draft Bill, ss 29 to 31 and sch 2)

The offside goals rule

6.34 Although the existence of a provisional shared plot title sheet does not (for the time being) confer on the sharing owners any real right, it does amount to notice to third parties that such a real right may later arise. Hence if the developer were to sell or grant a security over the common area in a manner inconsistent with its status as a common area, that fact might, it could be argued, engage the offside goals rule.[22] If so, that fact would enhance the position of the sharing owners until such time as the ascertainment deed is granted. We mention this idea for the sake of completeness, but would also note that the applicability of the offside goals rule is subject to a number of preconditions and it is open to debate whether all those preconditions would be satisfied. We will mention only one specific issue: the offside goals rule presupposes that there has been a breach of an obligation to grant a real right. The existence of a provisional shared plot title sheet does not, in and of itself, imply that such an obligation exists. The procedure is facilitative. There may be an obligation contained in the missives, and we would expect that in practice that would be the case, but the draft Bill does not require any obligation to exist.

[22] For the offside goals rule see the glossary. For further details of the rule see Reid, *Property*, paras 695-700; and David A Brand, Andrew J M Steven and Scott Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004), ch 32.

Part 7 Overriding interests and off-register rights

Introduction

7.1 The category of "overriding interests" was borrowed by the 1979 Act from English law.[1] It means, roughly speaking, an encumbrance that is (i) valid notwithstanding that it does not appear in the Register and is (ii) nevertheless capable of being noted in the Register. Such noting is a matter of information only: the encumbrance is as valid unnoted as it is noted. Such an interest is said to "override" for precisely that reason: overriding interests override registered interests and so such an interest is effective even though unnoted. An example of an overriding interest is a servitude of way that has come into being by prescriptive usage. If such a servitude has come into being over Blackmains in favour of the neighbouring Whitemains, and Bruno buys Blackmains, the servitude may be noted on the Blackmains title sheet,[2] but equally it may not, and so when buying Blackmains he cannot assume that the property is unencumbered by any servitude merely because the D Section (Burdens Section) of the title sheet is silent.[3] The servitude "overrides" Bruno's title even though it does not appear in the Register. That does not mean that he is not owner, but it does mean that his title is subject to the servitude. By contrast, if the C Section (Charges Section) is blank, Bruno can be sure that he will take free of any standard security.

7.2 This part of the Report is about the concept of overriding interest and considers which off-register rights (using that term in roughly the same sense as overriding interests) should be capable of being noted in the Land Register.

The current law

7.3 Section 3(1)(a) of the 1979 Act provides that registration has:

> "the effect of vesting in the person registered as entitled to the registered interest in land a real right in and to the interest …. subject only to the effect of any matter entered in the title sheet of that interest under section 6 of this Act so far as adverse to the interest or that person's entitlement to it and to any overriding interest whether noted under that section or not."

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[1] Land Registration Act 1925, s 70. In England and Wales the term as such has since disappeared. The Land Registration Act 2002 refers to "unregistered interests which override first registration" (Sch 1) and to "unregistered interests which override registered dispositions" (Sch 3), but the concept remains the same.

[2] In the D Section (Burdens Section). If a property is encumbered by an overriding interest, and if the Keeper notes it, it is in the D Section that the note will appear.

[3] But since a real burden cannot be created without registration against the servient property, the silence of the D Section indicates that no real burden encumbers the property.

7.4 The broad idea of rights held by other parties that are valid even though not registered[4] is one that already existed in the Register of Sasines and indeed exists in the property registration systems of other jurisdictions too. The 1979 Act made two innovations.

7.5 The first innovation is that the Act gave a definition of overriding interests. The definition, running to about 600 words, is to be found in section 28 of the 1979 Act. The definition takes the form of a long enumeration of categories of overriding interests, some broad and general, such as "the right or interest… of… any person, being a right which has been made real, otherwise than by the recording of a deed in the Register of Sasines or by registration"[5] and others narrow and specific, such as "the right or interest… of… the operator having a right conferred in accordance with paragraph 2, 3 or 5 of Schedule 2 to the Telecommunications Act 1984."[6]

7.6 The second innovation made by the 1979 Act was to provide that, with three exceptions, overriding interests could be noted in the Register. It also provided that in some cases such interests *must* be noted. Noting is a for-information-only entry in the Register: if an interest exists it has the same force and effect whether noted or not, and that is true even if an interest that must be noted is not in fact noted. This facility of "noting" was unavailable in the Register of Sasines.[7] In contrast to noting, the entry of rights into the Register by *registration* is normally a necessary condition for the proprietary effect of the right. If Sarah owns Greymains and delivers to Terry a standard security, the entry of the standard security into the Greymains title sheet is not merely a matter of information. Until that entry (as a registration) the standard security is not a real right.

7.7 The three exceptions, ie the cases where the 1979 Act forbids an overriding interest to be noted, are the interests of "(i) a lessee under a lease which is not a long lease; (ii) a non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981; and (iii) a non-entitled civil partner within the meaning of section 106 of the Civil Partnership Act 2004."[8] As for interests that *must* be noted, the rule is: "Any overriding interest which appears to the Keeper to affect an interest in land … shall be noted by him in the title sheet of that interest if it has been disclosed in any document accompanying an application for registration in respect of that interest."[9] The emphasis in this sentence falls on the word "document". If the Keeper learns of an overriding interest in any other way, the rule is that the interest *may* be noted – ie the Keeper has a discretion.

The double function of the concept

7.8 Thus in the 1979 Act the concept of overriding interest has a double function. In the first place it says (we paraphrase) that "rights in the list of overriding interests are effective

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[4] That is, not registered in the property register. The encumbrance may appear in another public register. Many examples could be given. Two such registers in the Keeper's stable are the Register of Sites of Special Scientific Interest and the Register of Community Interests in Land. And there are numerous other property-relevant registers that are not in the Keeper's stable. In many cases each local authority is to keep its own register, so that there are as many registers as there are local authorities. A recent example is the Register of Flood Protection Schemes set up by s 62 of the Flood Risk Management (Scotland) Act 2009.

[5] 1979 Act, s 28(1)(h).

[6] 1979 Act, s 28(1)(ee).

[7] Subject to certain qualifications. For example, deeds recorded in the Register of Sasines would sometimes narrate the existence of a servitude that had come into being off-register.

[8] 1979 Act, s 6(4).

[9] 1979 Act, s 6(4)(a).

notwithstanding that the Register is silent." In the second place it says "overriding interests can (with some exceptions) be noted in the Register on an information-only basis".

Critique

7.9 Some of the listed overriding interests are problematic. For example, one might expect overriding interests in private law to be confined to subordinate real rights, and not to extend to ownership itself, for otherwise there could be no assurance that land shown on the Register as belonging to A does not in fact belong to B. Yet one of the listed overriding interests is "the right or interest … of … any other person under any rule of law relating to common interest or joint or common property, not being a right or interest constituting a real right, burden or condition entered in the title sheet of the interest in land under section 6(1)(e) of this Act or having effect by virtue of a deed recorded in the Register of Sasines." The meaning is obscure.[10] It is possible that the qualifying words "under any rule of law" confine its scope to *pro indiviso* rights which arise by implication of common law – as for example rights of common property in the passage and stair of tenements under the common law of the tenement (now replaced by the Tenements (Scotland) Act 2004).[11] Certainly if the provision is wider it has implications both for the existence of a rival title to registered land and, as with servitudes, for the availability of indemnity.

7.10 But criticisms of specific points in the definition are really beside the point. What is misconceived is the project itself, ie the project of seeking to list all rights that are to be effective notwithstanding that they exist off-register. Since 1979, the list has from time to time been amended, and has grown in length. But long though the definition is, there are many omissions. Here are some examples:[12]

- Health Services and Public Health Act 1968 s 73
- Health and Safety at Work Act 1974 s 20
- Control of Pollution Act 1974 s 91
- Water (Scotland) Act 1980 s 38
- Civic Government (Scotland) Act 1982 ss 5, 6, 60, 99
- Environment Act 1995 s 108
- Deer (Scotland) Act 1996 s 15
- Town and Country Planning (Scotland) Act 1997 s 269
- Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 s 76
- Planning (Hazardous Substances) (Scotland) Act 1997 s 33

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[10] For different views see Kenneth G C Reid, "Registration of Title: The Draftsman's Part" (1984) JLSS 212, 215 and the Keeper's reply, 216-217.
[11] *Registration of Title Practice Book*, para 5.68. But if this is correct, it is difficult to see why it was necessary to make the right an overriding interest.
[12] Taken from DP 130, para 5.16.

- Tenements (Scotland) Act 2004 s 17.

7.11 Probably such encumbrances are caught by one or other of two very broad provisions in the definition of "overriding interest." One is that "overriding interest" includes the interest of "the Crown or any Government or other public department, or any public or local authority, under any enactment or rule of law, other than an enactment or rule of law authorising or requiring the recording of a deed in the Register of Sasines or registration in order to complete the right or interest."[13] The other is that "overriding interest" includes the interest of "any person, being a right which has been made real, otherwise than by the recording of a deed in the Register of Sasines or by registration".[14] It is certainly to be hoped that one or other of these general provisions applies to the sorts of examples just mentioned, for otherwise the unacceptable result would seem to be that a buyer would take free from such encumbrances.

7.12 As we pointed out in DP 130,[15] in practice it would be impossible to list all overriding interests, and even if by a herculean labour the task were somehow achieved, the achievement would be no more than momentary, for the list would almost immediately become out of date. It would become out of date because legislative developments happen all the time, and many of them relate to heritable property.[16] Indeed, the common law of property itself develops, albeit far more slowly than statute law, so that there is no guarantee that one could list all the common law overriding interests. In fact, just this happened in the shape of the case of *Bowers v Kennedy*.[17] That case was decided in 2000, but the list of overriding interests has not been updated to take account of it.

The first function of the concept: our recommendation

7.13 In DP 130 we said of overriding interests that "a name, and definition, may turn out to be unnecessary".[18] We have come to the conclusion that this is indeed the best approach. As mentioned above, in the 1979 Act the concept has a double function. In the first place it says "rights in the list are effective notwithstanding that the Register is silent." But that is needed only because the Act makes the prior mistake of saying "anything the Register is silent about is ineffective". Do away with that mistake and the need to say "rights in the list are effective notwithstanding that the Register is silent" vanishes.

7.14 What is needed, in other words, is simply the omission of any legislative formula that says "a buyer takes free of all off-register rights". Provided that there is no such formula, there is no need to add a qualification (as in section 3 of the 1979 Act) saying "except for overriding interests". But something rather similar is still needed. A registered grantee should

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[13] Para (e) of the definition of "overriding interest" in s 28 of the 1979 Act. One oddity is that if an enactment authorises, but does not require, registration of the interest, it is not – at least as far as para (e) is concerned – an overriding interest. That seems to create a logic loop: if the enactment in question authorises, but does not require, registration, then registration *is* required, because if there is no registration the interest does not override.

[14] Para (h) of the definition of "overriding interest" in s 28 of the 1979 Act. The term "real" might be a source of difficulty. There are those who argue that real rights exist only in private law, ie that public law rights should not be categorised as real, even if they are absolute in the sense of binding the owner of land from time to time. On this view, which is the predominant one in European systems, whilst all real rights are absolute, not all absolute rights are real.

[15] DP 130, paras 5.16 and 5.18-5.19.

[16] Public statutes, local and private statutes, and subordinate legislation. These may emanate from London or from Edinburgh. There is also EU legislation.

[17] 2000 SC 555. See DP 130, para 5.19.

[18] DP 130, para 5.29.

(subject to certain qualifications) be protected from encumbrances that *should* have appeared in the Register but do not.[19] This issue is explored in Part 23. What we recommend there is, in brief, that a good faith buyer should take free of encumbrances that should appear on the Register but do not, subject to one or two exceptions. Those exceptions function in a way that can be compared with overriding interests under current law.

7.15 Accordingly we recommend:

30. The concept of overriding interest is one that is not needed in the legislation and should not be used.

Which off-register rights should be capable of being noted?

7.16 The second function of the concept of overriding interest is that it is used to identify the rights that can be noted on the Register on an information-only basis. That is an issue that must be dealt with even after the concept of overriding interest is discontinued.

7.17 The 1979 Act, by allowing the noting of (most though not all) overriding interests, implicitly excludes the noting of other rights. To that extent we think its policy was sound. But the list of interests capable of being noted is so broad that remarkably little is excluded. We think, in contrast, that in general off-register rights should not be noted. If an enactment creating a statutory right affecting land is silent as to the Land Register, the presumption must be that entry in that register was not intended. It is not for a land registration statute to alter such decisions. Particularly problematic is the inclusion in the list of overriding interests of any interest of "the Crown or any Government or other public department, or any public or local authority"[20] a provision so broad that it covers the whole of public law in so far as it affects property, which is to say a very great deal of public law. It is no doubt fortunate that the possibility of noting this vast class of rights and obligations is more or less ignored in practice.

7.18 In DP 130 we proposed drastic pruning of the off-register rights and obligations that can be noted.[21] We suggested reducing the list to (a) servitudes, (b) public rights of way, (c) certain short leases and (d) the occupancy rights of non-entitled spouses and civil partners. Respondents were generally in agreement.

7.19 After further consideration, we have concluded that (a) servitudes and (b) public rights of way should be capable of being noted. But we do not now think that (c) unregistered leases and (d) the occupancy rights of non-entitled spouses and civil partners should be noted. Whereas servitudes and public rights of way are long-term - indeed potentially perpetual - encumbrances, short leases[22] and occupancy rights are relatively short-lived. Allowing them to be noted thus entails relatively frequent changes to the Register. There is also the problem that once noted, removing the note once the rights have expired may be difficult and costly in terms of staff time, and could drag the Keeper into disputes. We think that the drawbacks of allowing noting in such cases exceed the benefits. We therefore think

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[19] Example: X owns land subject to a standard security to Y. X forges and registers a discharge. X then sells to Z, who buys in good faith. Z is entitled to assume that, since the title sheet discloses no security, there is no security.

[20] 1979 Act, s 28(1)(e).

[21] DP 130, para 5.61.

[22] A short lease is a lease of not more than twenty years.

that short leases and occupancy rights should not be capable of being noted. Despite this restrictive approach, we do think that one of the rights listed in the current definition should be saved even though we had previously not identified it as meriting preservation. Section 22 of the Land Reform (Scotland) Act 2003 amended the 1979 Act to add certain "core paths" namely those made by order, to the list of overriding interests. Such paths are very like public rights of way and it seems appropriate that they should continue to be notable. Accordingly we recommend that:

31. Servitudes, public rights of way and core paths should be capable of being noted and should be the only such rights capable of being noted.

(Draft Bill, s 10(1)(a), (c) and (d))

Mechanics of noting and the required evidential standard

7.20 DP 130 proposed a mechanism for noting.[23] In the first place, the owner of the encumbered property would be under an obligation to disclose it to the Keeper. And the beneficiary of the overriding interest could call on the Keeper to note it, a call that would trigger a procedure whereby the Keeper would notify the allegedly burdened owner to allow the latter to object. The Keeper was not happy with this scheme. On further reflection, we agree with the Keeper's views. The scheme was complex and gave the Keeper too central a role. The validity of servitudes, public rights of way and core paths created by order is the same whether they are noted or not. An invalid right does not gain validity from being noted and a valid right is just as valid even if it is not noted. Noting is for information only. That being the case, we think the Keeper should not note an off-register right unless its existence is beyond doubt. Otherwise the Keeper is going to clutter up the Register with rights, many of which will turn out to be invalid, and – a crucial point – without any real countervailing benefit. There is a sharp contrast here with registration decisions. If the Keeper refuses to *register*, the consequences for the applicant are drastic. The applicant cannot obtain the right sought.[24] By contrast, if the Keeper refuses to *note*, the holder of the off-register right in question is not prejudiced. For the existence of the right does not depend on whether it appears in the register. The Keeper should not be noting off-register rights whose existence is open to dispute.

7.21 In Part 18 we recommend that the Keeper should not rectify an inaccuracy unless the fact of inaccuracy is virtually certain, or, to use the language of the draft Bill, "manifest". This is the same test. Hence a significant measure of simplification is possible. The draft Bill simply provides that certain matters are to appear in the title sheet, and that the Register is inaccurate in so far as it omits such matters.[25] Those matters include title conditions (and hence servitudes), public rights of way and core paths created by a path order.[26] Since the Keeper has an active duty to rectify inaccuracies, it follows that there is no need for any procedure for applying to the Keeper to note an off-register right.

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[23] DP 130, para 5.47.

[24] Though there are one or two cases where legislation provides for something to be registered (not merely noted) even though non-registration seems not to affect validity.

[25] Draft Bill, s 53(1)(b). This provision covers both rights arising from registration and rights that are merely noted.

[26] Draft Bill, s 10(1)(a), s 10(1)(c) and s 10(1)(d). The 1979 Act provides for the noting, not of all core paths, but only those made by order. See the definition of "overriding interest" in s 28 of the 1979 Act, read with s 6(4). The draft Bill simply follows the 1979 Act on this point.

7.22 As far as evidential standard is concerned, what we now recommend will in practice come to much the same as what we provisionally proposed in DP 130. For if there is real doubt about the existence of the overriding interest, the allegedly burdened owner, on being notified, would be highly likely to object to its entry in the Register. Thus in practice only those overriding interests whose existence was not open to dispute would have been noted on the Register under our earlier proposals. What we now recommend will thus achieve much the same results but do so without any complex procedural mechanism.

May and must

7.23 Section 6(4) of the 1979 Act says that the Keeper *may* note an overriding interest[27] and *must* do so "if it has been disclosed in any document accompanying an application for registration" in relation to the encumbered property. In the new scheme "may" disappears. The off-register rights in question must be noted: there should be no discretion.

Noting and rectification

7.24 Under the 1979 Act "noting" is the term used for the entering of an overriding interest in the D Section (Burdens Section). There is no provision for noting an overriding interest as a pertinent, an issue that arises in connection with servitudes that have come into existence other than by registration, for example, a prescriptively-created servitude. In the new scheme off-register rights which are pertinents can be noted in the A Section (Property Section) of the benefited title sheet. Thus a servitude arising by prescription would be noted in both title sheets: servient and dominant. The inclusion of the servitude would presumptively engage the Keeper's warranty, not as at the time of noting, because the Keeper's warranty is engaged only upon a registration,[28] but as at the *next* registration. For example, Malcolm owns Greenmains. The Keeper notes on the A Section a prescriptive servitude in favour of Greenmains over neighbouring Yellowmains. The Keeper's warranty is not at this stage engaged. But if Malcolm now sells Greenmains to Norah, the Keeper's warranty to Norah will, unless qualified, include the benefit of the servitude. That is acceptable. It must be borne in mind that the servitude could not have been noted if its existence had not been manifest.

7.25 One other difference from the 1979 Act is mainly terminological. Although we speak here of "noting", strictly in the new scheme what happens is rectification. Suppose that a servitude is created by prescription, by twenty years of usage. At the end of that period the servitude is constituted and accordingly at that moment the Register becomes inaccurate because it fails to show the servitude. (Both the title sheets in question become inaccurate.) When the Keeper notes the servitude, in fact what is happening is rectification of an inaccuracy.

Effect of inclusion or omission

7.26 As under current law, the noting of an off-register right is an information-only entry. An overriding interest has the same effect whether it is noted or not.

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[27] Except for the three cases specified in s 6(4). See para 7.7 above.
[28] See Part 22.

A summary

7.27 It may help to summarise the key differences between the 1979 Act and the new scheme. (i) Instead of the long and unstable list of overriding interests in the 1979 Act, the draft Bill has a short list, and one that we expect to be changed seldom, if ever. (ii) The term "overriding interest" disappears. (iii) Noting requires a high evidential standard to be met. (iv) The current distinction between overriding interests that must not be noted, that may be noted, and that must be noted, disappears. In the new scheme if there is an off-register right of the defined type the Register is inaccurate if it does not show it and therefore should be rectified.

7.28 We recommend:

32. (a) Certain off-register rights (servitudes, public rights of way and core paths created by an order under section 22 of the Land Reform (Scotland) Act 2003) must be noted in the Register.

(b) The noting would be for information only. The validity or otherwise of the right would be the same whether it was noted or not.

(c) Noting should take place via the scheme for rectifying inaccuracies.

(Draft Bill, s 7(1)(b), s 10(1)(a), (c) and (d), s 53(1)(b) and s 54)

Information from the Register of Sasines

7.29 On the first registration of a property, the Keeper transfers to the new title sheet any pertinents benefiting the property, and any encumbrances over the property, that were created in the Register of Sasines. Failure to do so would result in an inaccuracy. (Assuming that the omitted pertinent or encumbrance was valid in the first place.) There are thus close parallels with the noting of off-register rights. Neither has been created by registration in the Land Register: both are supposed to be noted in the Land Register. But there are also differences. The omission of a Sasine-originating right would indeed have consequences. Suppose that Silvio owns Blackmains on a Sasine title. He applies for voluntary registration and the title is duly registered. There is a standard security over Blackmains, but by mistake the Keeper omits it from the new title sheet. Silvio keeps quiet about this, quickly sells to Rebecca, and disappears. She knows nothing of the mistake and pays the full price, ie without any deduction to reflect the amount secured. The problem then comes to light. The standard security is an encumbrance that should have been on the title sheet but was not. The effect is that the standard security is extinguished on the day that Rebecca is registered.[29] Hence whilst there are similarities between off-register rights and Sasine-created rights, there are also differences.

[29] See Part 23. The heritable creditor is entitled to compensation from the Keeper for any loss suffered as a result of the non-consensual extinction of the security right. This may be zero, because the extinction of the security does not affect the debt, and in most cases the creditor will still recover the debt from the debtor.

Part 8 Extracts, data, fees, privacy

The existing legislation as to information provision

8.1 The current legislation provides for the Keeper to issue information about the contents of the Register in the following ways.[1]

8.2 (1) **Certificate of title (a): Land certificate**. A land certificate[2] is an extract of the title sheet issued to a grantee when a disposition (or lease) is registered. It is a species of the general class of "certificates of title", the other being the charge certificate. Subject to certain exceptions, only one land certificate can be issued for each property. Until the 2006 Rules, the land certificate normally had to be submitted to the Keeper when a registration application was made.[3] That rule no longer applies.

8.3 (2) **Certificate of title (b): Charge certificate**. A charge certificate[4] is like a land certificate but it provides information only about a standard security. A charge certificate gives both less and more information than a title sheet (and hence than a land certificate). It gives only rudimentary information about the property and none about the burdens; but it gives the full text of the security itself. By contrast the title sheet gives only the merest summary of any security.

8.4 (3) **Office copy**. An office copy[5] is like a land certificate, but it can be issued to anyone. It is "sufficient evidence of the contents of the original".[6] In other words, it is an extract. Since the abolition of the requirement to submit a land certificate with a registration application, there has been no real difference between land certificates and office copies.

8.5 (4) **Form 12 Report**. A Form 12 Report[7] is a report on *changes* to a title sheet since a stated date. In practice it is requested to check any changes to the Register since the date of issue of the current land certificate, and its use is in conveyancing transactions: a buyer will expect to see the land certificate plus a Form 12 Report. The same result could be achieved by requesting an up-to-date office copy, but that seldom happens in practice.

8.6 (5) **Form 13 Report**. A Form 13 Report[8] is a report that extends a Form 12 Report for a further period. For example in a conveyancing transaction by the time that settlement approaches the Form 12 Report may have become slightly out of date.

8.7 (6) **Direct access**. Since the Register is public, anyone can turn up at one of the Keeper's service desks (Edinburgh and Glasgow) and, on paying the fee, ask to inspect a title sheet. Since title sheets are kept in electronic form, the inspection happens through a

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[1] See generally *Registration of Title Practice Book*, ch 3.
[2] 1979 Act, s 5(2); 2006 Rules, rule 15.
[3] 1980 Rules, rule 9(3).
[4] 1979 Act, s 5(3); 2006 Rules, rule 16.
[5] 1979 Act, s 6(5); 2006 Rules, rule 21.
[6] 1979 Act, s 6(5).
[7] 2006 Rules, rule 21.
[8] 2006 Rules, rule 21.

computer. Not surprisingly for the 21st century, this can also be done online, through the "Registers Direct" system.[9]

8.8 Until 2006 there was also the Form 8. By means of a Form 8 a land certificate could be updated, ie made to reflect any changes that there may have been since the land certificate was issued. The 2006 Rules dropped Form 8, which was little used in practice.

Only current title sheet data is available

8.9 The provisions just mentioned cover only current title sheet data. There is no requirement that the Keeper must produce, or even retain, data about past states of title sheets. The Register as contemplated by the legislation is non-historical. The same is true of the Archive Record. With one exception, there is no obligation on the Keeper to retain or produce copies of deeds submitted. Indeed, as was noted in Part 4, the legislation does not even recognise the existence of the Archive Record. The exception is the "cited deed" exception, where a title sheet in its current form refers to a deed. In that case, and in that case alone, the Keeper must produce a copy if requested.[10]

Should there be an obligation to provide past data? (i) the Title Sheet Record and Cadastral Map

8.10 The non-historical nature of the Land Register is unfortunate. There can be many situations in which there may be a need to know the state of a title sheet a year ago, or twenty years ago. One example is where someone has been sequestrated and the trustee in sequestration wishes to discover what the debtor's property was in the years leading up to the sequestration, in order to discover gratuitous alienations. Scotland's property records have never been limited to those who need the data because they are entering a transaction relating to the land in question. They have always been regarded as a public source of land rights information, whether in respect of current rights or in respect of land rights in the past. It is an irony that the 1617 system has generated an invaluable archive of land information, but that a modern system cannot ensure the same. Fortunately the practice has been better than the theory:[11] to a large extent there has been data retention. But this needs to be set on a statutory footing. Moreover, even if the Keeper does provide information as to the past state of a title sheet, there is no power to issue an extract, for "office copies"[12] can be given only for the current state of a title sheet. The absence of a document with the evidential status of an extract can make life more difficult for users of the system.

8.11 The duty to retain data should apply as from the commencement of the new legislation.[13] As for superseded data in respect of earlier periods, ie since the Register began to operate in 1981, the Keeper's obligation should evidently be limited to what is in practice possible. For instance, if data has in fact been deleted – data which there was no obligation to retain – the Keeper cannot be expected now to produce it.

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[9] 2006 Rules, rule 22.
[10] 1979 Act, s 6(5). In practice common types of "cited deed" are (i) standard securities and (ii) deeds constituting real burdens.
[11] A constant theme of this Report.
[12] The draft Bill uses the term "extract". We think it is a term better understood in the legal profession than "office copy".
[13] The scheme of the draft Bill is that superseded data from the Title Sheet Record passes into the Archive Record. Thus what the Title Sheet Record contains is *current* land information.

8.12 To issue extracts of title sheets at any given date in the past, the Keeper would not need to make daily digital copies of every title sheet. The data stored in the Archive Record in relation to any given title sheet would be enough to reconstruct that title sheet as at any specified date. We understand from the Department of the Registers of Scotland that the recommendation is unlikely to give rise to difficulty.

8.13 We discussed these issues in DP 128 and proposed that past title sheet data should be retained.[14] Respondents agreed. Accordingly we recommend:

33. The Keeper should be obliged to issue extracts of title sheets (including plans) in their past as well as present states. But in relation to data prior to the commencement of the new legislation the obligation should be limited to what is reasonably practicable.

(Draft Bill, s 70(1)(a) and (b), and s 91(1), sch 6, para 20)

Should there be an obligation to provide past data? (ii) the Archive Record

8.14 Similar, though not identical, issues arise in connection with the Archive Record. At present the Archive Record has no legal existence[15] and the Keeper is not required to retain copies of deeds submitted, other than deeds referred to in a title sheet.[16] In fact the Keeper does maintain a non-statutory Archive Record and retains copies of all such deeds, and of all application forms, and in recent years has opened the Archive Record to public access.[17]

8.15 In Part 4 we recommended that the Archive Record be given a statutory basis. In DP 128 we proposed that "the Keeper should make available, on request, a copy of any deed or document held by him in respect of an application to the Register" and most respondents agreed.[18] In Part 4 we noted that the Keeper's inability to issue extracts – ie copies with formal evidential status – is inconvenient to those who wish to have extracts and indeed inconvenient to the judicial process. We therefore now recommend:

34. The Keeper should be obliged to issue, on request, extracts of deeds and other documents in the Archive Record. But in relation to deeds and documents received prior to the commencement of the new legislation the obligation should be limited to what is reasonably practicable.

(Draft Bill, s 70(1)(c) read with s 91(1), sch 6, para 21)

Paper and electronic extracts

8.16 We think that extracts should be issuable in either paper or electronic form, at the option of the applicant. This policy should apply equally to deeds from the Archive Record. We understand that not only is it possible to issue electronic extracts of electronic deeds and

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[14] DP 128, paras 2.45-2.49 (proposal 5).
[15] See Part 4.
[16] 1979 Act, s 6(5).
[17] Cf *Registration of Title Practice Book,* para 5.88.
[18] DP 128, para 2.49 (proposal 5(1)).

paper extracts of paper deeds, but it is equally possible to issue electronic extracts of paper deeds and paper extracts of electronic deeds. We recommend:

35. Extracts should be available in paper or electronic form at the option of the applicant.

(Draft Bill, s 70(3))

Should certificates of title be retained?

8.17 In DP 128 we discussed whether certificates of title (land certificates and charge certificates) should continue to exist, and proposed that they should not.[19] Most respondents agreed. One development worth noting since we issued that discussion paper is that the Keeper no longer requires to see the certificate of title when an application for registration is made.[20] The result is that no real difference exists any longer between land certificates and other extracts ("office copies") of title sheets. The concept of a certificate of title is not one with much to recommend it. What matters is what the Register says, ie the title sheet. If an applicant for registration wishes the Keeper to issue a formal copy of the title sheet following registration, what is needed is simply an extract. Accordingly we recommend:

36. Certificates of title (ie land certificates and charge certificates) should be discontinued.

Reports and other data

8.18 In the current system certificates of title and office copies are mentioned in the primary legislation. Form 12 and 13 Reports are not, but are dealt with in the secondary legislation, which also sets out details about certificates of title and office copies. The division of labour seems to us sensible. Accordingly the Bill mentions extracts, but nothing more. Details can be added in secondary legislation. Likewise, secondary legislation can provide for Form 12 and 13 Reports, if they are thought desirable, or any successors. Section 90(1)(b) of the draft Bill authorises the Keeper to provide information and has a rule-making power.

P16 Reports (property definition reports)

8.19 A P16 Report is a comparison between (a) the Ordnance Map and (b) a description in a deed. It has no specific statutory basis.[21] Its effect is to disclose whether the title boundaries as shown in the deed do or do not coincide with physical boundaries as shown on the OS Map,[22] and it is used mainly in first registrations.[23] It appears to work satisfactorily. If thought desirable, it could be given statutory status through secondary legislation.

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[19] DP 128, para 4.66 (proposal 17).
[20] 1980 Rules, rule 9(3) was dropped from the 2006 Rules.
[21] Unlike the other reports issued by the Keeper, which are based on the Rules. The term "property definition report (PDR)" is used by a leading independent firm of searchers of records and is quite often used by conveyancers.
[22] It is sometimes supposed that a P16 compares the boundaries in a deed with the physical boundaries on the ground. That is not correct. Of course, in most cases the physical boundaries on the ground will be correctly shown on the OS map.
[23] A P16 Report is not a statement that the Sasine title is good to the whole extent shown, or indeed to any extent. It simply maps what the deed covers, whether validly or invalidly. See further *McCoach v Keeper of the*

Official reports and independent reports

8.20 There was once a system of official searchers for the Register of Sasines and Register of Inhibitions. It is now obsolete in practice. In functional terms, the role has been taken over by the Keeper as far as the Land Register is concerned, and also for the Register of Inhibitions when that register is to be searched in connection with a Land Register transaction. Accordingly section 19 of the Land Registers (Scotland) Act 1868 no longer has a function and should be repealed.[24]

8.21 When the Land Register was set up it was contemplated that nobody except the Keeper would issue data. But the Register is a public one and independent firms of searchers, who have long been active in relation to other registers, also provide data from the Land Register. They offer reports that match the various reports offered by the Keeper. In our scheme the Register would continue to be a public one and so there would be no reason why independent search firms should not continue their activities. Naturally, they would have to pay the requisite fees, as they do now.

Online access and other forms of access to registered data

8.22 The Keeper provides online access to the Land Register, the service being called Registers Direct. It is necessary to register to use this service, and there is a charge per hit. The practical value of the service is great. At present the service is subject to very light regulation by the Rules.[25] We have no recommendations to make concerning online access. Nor have we recommendations to make concerning other forms of access. The Register is public,[26] so the fundamental principle is that anyone has a right of access, on paying the appropriate fee. There could be scope for disputes as to just when, how and under what conditions such access is given, but we think that the Department of the Registers of Scotland can be expected to act reasonably. If difficulties do arise, secondary legislation is always possible.

Regulation of data provision and fees

8.23 At present, fees in the Land Register, and in other registers in the Keeper's stable, are regulated by section 25 of the Land Registers (Scotland) Act 1868. Section 25 provides for registration fees, and also for fees for the provision of information. But, being limited to fees, it has no provision for the regulation of data provision itself. For example, neither section 25 nor, it seems, any other statutory provision, regulates, or enables Ministers to regulate the types of data that the Keeper may or must provide – for instance how data may or must be bundled, or whether data may be, must be, or must not be, made available online. The draft Bill repeals section 25 and replaces it with a new section,[27] that makes, we think, improved provision about fees and also has provisions for the regulation of data-provision. We recommend:

Registers of Scotland, 19 December 2008, Lands Tribunal, discussed in Kenneth G C Reid and George L Gretton, *Conveyancing 2008* (2009), pp 121-133.

[24] Draft Bill, s 98, sch 9.

[25] 2006 Rules, rule 22.

[26] Draft Bill, s 1(1).

[27] Draft Bill, s 90.

37. Section 25 of the Land Registers (Scotland) Act 1868 should be repealed and replaced by a modernised version that deals with data provision as well as fees.

(Draft Bill, s 90)

Data protection

8.24 Public registration has a long history in Scotland. Many personal and business documents enter the public domain by being registered in the Books of Council and Session. Land transactions have been open to the public since 1617.[28] There has never been any suggestion that only conveyancers have a legitimate interest in inspecting the Register of Sasines or the Land Register. Others may inspect it, and in practice do so. The property registers have long been an information resource for genealogists, local historians, criminal investigators, local authorities, tax authorities, journalists and so on. They constitute a valuable national data archive. We recognise the multi-functional nature of the Land Register and there is deliberately nothing in the draft Bill to limit its role to being solely a facilitator of conveyancing transactions.

8.25 There is inevitably a tension between the tradition of open access on the one hand and new ideas of data protection and privacy. In extreme cases public data can be used for criminal purposes, for example by terrorists, or by violent spouses or cohabitants trying to track down the partner who is seeking to escape them, or by fraudsters who are laying the basis for an identity theft. Whilst open access to title data has been a principle since 1617, the digital revolution has meant that obtaining such information is easier now than it used to be. In November 2007 the Land Registry of England and Wales discontinued online access to deeds (as opposed to title sheets) because of public concern that fraudsters could thereby pick up personal information. That particular issue does not currently arise here, because online access to the Archive Record is not available, but it could if the Keeper chose to add the Archive Record to the Registers Direct service. Our conclusion that designations of natural persons should include date of birth[29] could enhance concerns about data protection.

8.26 In DP 128 we discussed these issues, and asked whether access should be restricted, for example in relation to the Index of Proprietors.[30] Respondents were generally opposed to any restriction. We have come to the conclusion that a case has not been made out for any restrictions on public access. Moreover, attitudes towards privacy and data protection are far from static and we cannot foretell what they might be in the future. We think that the draft Bill should leave this subject alone. To the extent that there are issues, they could to a large extent be handled by the practice of the Keeper. For example, the Keeper is free now, and would be free under the new scheme, to limit the amount of data available online (ie the Registers Direct service). For example, at present the Archive Record is not available online, and that could become a settled policy.[31] Again, the Keeper would be free to offer two versions of Registers Direct, one being available to a limited class of

[28] Registration Act 1617, establishing the Register of Sasines.
[29] Draft Bill, s 8(1)(a) and s 91(1) definition of "designation". See Part 4.
[30] DP 128, paras 2.18-2.36.
[31] The Archive Record contains copy deeds. Deeds contain signatures and other data not available on title sheets.

persons such as solicitors, and the other a version with more limited information,[32] which would be available to the public at large. This would not place an actual limit on the data available to members of the public: for example, a member of the public would still be free to write to the Keeper to ask for a copy of title sheet REN1234567890, and the Keeper would provide a complete copy. All it would mean would be that there would be a limit to data available *online*. All this is not a matter for primary legislation. It can be left to Keeper's practice or, if necessary, to secondary legislation. The draft Bill's provisions about data provision contain a proviso that any secondary legislation must respect the public nature of the Register.[33] We think that the draft Bill contains the necessary mix of firmness and flexibility: firmness to ensure that the Land Register remains a public register, but flexibility to ensure that there is scope for reasonable adjustments to be made to meet data protection concerns.

Use of public sector information

8.27 We have described how property information has been in the public domain since 1617, involving two registration systems, the Register of Sasines (established in that year) and the Land Register (established 1979/1981). The former was at first in fact a set of registers, with the General Register of Sasines covering the whole country, but with local registers as well (the Particular and Burgh Registers), the choice of central or local registration being at the option of the applicant. Today only the General Register of Sasines[34] continues in existence, and the Land Register has from the outset been a single national register. Information held by government, or governmental agencies, in other matters has not always followed this "public and centralised" approach. But in recent years there has been a quiet revolution. In the first place, there has been an acceptance, through the freedom of information regime, that the public should generally be entitled to access data that has been collected for public purposes. In the second place it has come to be accepted that joining up data-sets can enhance their value. In the third place it has come to be accepted that it is not only legitimate but economically efficient to permit the private sector to re-use information collected by public bodies.

8.28 In this connection, notice can be taken of two European Directives. The first is the Re-use of Public Sector Information Directive,[35] which has been implemented by the Re-Use of Public Sector Information Regulations 2005.[36] The Department of the Registers of Scotland is subject to these Regulations and indeed is accredited as a full member of the Office of Public Sector Information's Information Fair Trader Scheme.[37] These developments have not required any modification to the 1979 Act and likewise it does not appear to us that any specific provision is required in the new Registration Bill. It can of course be expected that any orders relating to information provision made under the power delegated to Scottish Ministers in section 90 of the draft Bill would cohere to broader public policy concerning

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[32] For example, the online version available to the public at large could omit the Archive Record and, in the Title Sheet Record, the date-of-birth "field" could be redacted out.
[33] Draft Bill, s 90(3).
[34] The General Register of Sasines has its county divisions. But these are merely internal divisions of a unitary register. The same is true of the Land Register.
[35] Directive 2003/98/EC of the European Parliament and of the Council of 17 November 2003 on the re-use of public sector information.
[36] SI 2005/1515.
[37] See http://www.opsi.gov.uk/ifts/ifts-members.

public sector information. The other Directive to be noted is the INSPIRE Directive.[38] This will have implications for map-based data and other data held by the Keeper. However implementation is still in the early stages and is not programmed to be completed until 2019. At present, we think it would be premature to attempt to anticipate whether any specific new statutory provisions might be needed. Insofar as any need for provision may emerge in future, legislative vehicles such as regulations under section 2 of the European Communities Act 1972 are likely to be available.

[38] Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community. See generally http://inspire.jrc.ec.europa.eu/.

Part 9 Leases

Introduction

9.1 A lease is a contract. The common law, following the Roman law, regards a lease as no more than a contract. But by statute a lease of heritable property can have effect against third parties, provided that certain conditions are met.[1] In practice most leases of heritable property do have real effect. The minority that do not are still valid leases.

9.2 A lease as a real right is different from other real rights. In the first place, it is a contract, and its proprietary nature is a non-essential feature, ie a valid lease can exist even if it does not engage any of the statutory provisions.[2] In the second place, other subordinate real rights are pure encumbrances, in the sense that they necessarily tend to lessen the value of the encumbered land. The owner would, in principle, prefer to be free of them. By contrast, a lease is an encumbrance but also a benefit, because it gives rise to an income stream. The encumbrance may outweigh the benefit or it may be the other way round. For example, a lease for 999 years, created in, say, 1800 at a fixed rent of £10 per annum, is from the standpoint of the 21st century landlord almost pure encumbrance. By contrast, a 25-year commercial lease granted in 2000 at a full market rent, reviewable every five years on an upward-only basis, is, from the landlord's standpoint, at least as much benefit as encumbrance and indeed may well be more benefit than encumbrance.[3] Property lawyers, who think of subordinate real rights as encumbrances, can sometimes overlook this.

9.3 The shorter a lease is, the more obvious is its contractual nature. The longer a lease, the more it looks like a feu right. In a 999 year lease[4] the tenant is functionally a feuar and the landlord is functionally a superior. In our Report on *Conversion of Long Leases*[5] we recommended that the same policy as has been applied to the feudal system should be applied to ultra-long leases, which is to say conversion into ownership. The recommendation, if implemented, would bring benefits for land registration, as did the abolition of superiorities, because ultra-long leases, like feus, are a nuisance – not an insuperable nuisance, but nevertheless a nuisance – from a land registration point of view. But even if that report is implemented, there would still be many registered leases in existence, and the land registration system would still have to deal with them.

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[1] The statutory regimes are discussed below. The relevant statutes are the Leases Act 1449, the Registration of Leases (Scotland) Act 1857 and the 1979 Act.

[2] This was the position for all leases before 1449. It sometimes happens today also. For example an unregistered 25-year lease is a valid lease but lacks real effect. See below.

[3] The market downturn of 2008 has meant that many commercial properties are now worth a good deal more with sitting tenants than they would have been with vacant possession.

[4] A 999-year lease could not today be granted. Leases of residential property for more than 20 years have been incompetent since the Land Tenure Reform (Scotland) Act 1974. Leases of any kind for more than 175 years have been incompetent since the Abolition of Feudal Tenure etc (Scotland) Act 2000, this provision being without prejudice to the shorter period applicable to residential property. The reason for these reforms was concern about the danger of "feudalism by the back door". But neither the 1974 Act nor the 2000 Act affected leases already in existence. Thus there still exist leases for more than 175 years, and most of these are leases of residential property.

[5] Scottish Law Commission, Report on *Conversion of Long Leases* (Scot Law Com No 204, 2006).

The current law, with historical background

9.4 The Leases Act 1449 provided that a lease has real effect provided that certain conditions are met, the most important of these being that the tenant has possession. In practice these conditions usually are met. The 1449 Act remains in force though, as will be seen shortly, it no longer applies to new long leases.

9.5 For reasons which it is not necessary to enter into here, granting a security over a lease used to be technically very difficult, and indeed almost impossible. The Registration of Leases (Scotland) Act 1857 was passed to deal with this issue. It provided that long leases[6] could be recorded in the Register of Sasines, and if that happened a security could be granted by a recorded deed. Thus the legislation was not motivated by a wish that long leases be recordable, but by a wish that they should be capable of being used as collateral for loans. This may explain why the drafting is better on the security issue than on the more basic issue of the registration of the lease itself. Keen to get to the ice cream, they were perfunctory about the main course.

9.6 The 1857 Act provided that a recorded lease would have real effect,[7] but it did not affect the 1449 Act. Thus after 1857 a tenant could obtain a real right in two ways: either under the 1449 Act or under the 1857 Act. This fact perhaps illustrates the Act's purpose. Had there been concern that a thousand year lease – virtually a feu right – could exist without any public registration, then the 1857 Act would no doubt have provided that long leases must be recorded to have real effect, thus limiting the scope of the 1449 Act to short leases. But that was not done.

9.7 Section 3(3)(a) of the 1979 Act provides: "A lessee under a long lease … shall obtain a real right in and to his interest as such only by registration." Thus any new long lease granted after the relevant county became operational for land registration would, unless registered, simply be a common law lease, and so lacking in real effect. Put another way, section 3(3) disapplied the 1449 Act to long leases.[8] The reason for this is not easy to discover. The Reid Report and the Henry Report had little about leases.[9] The rule that the 1449 Act would be disapplied to long leases is not explained.[10] Presumably the reason is protection of third parties: the longer a lease is, the greater its significance is to, eg, a buyer of the land, and so the longer a lease is, the stronger the case for its appearance on a public register. To this issue we now turn.

The disapplication of the 1449 Act to registrable leases

9.8 As was mentioned above, the Leases Act 1449 is in modern law disapplied to registrable leases. This disapplication happened progressively, county by county, as the land registration system was extended. Thus a 50-year lease granted over property in Midlothian in 1985 could have acquired real effect either under the 1449 Act or by recording in the Register of Sasines under the 1857 Act. But a similar lease granted in the same year in Renfrewshire could have attained real effect only by registration in the Land Register.

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[6] In the Act as passed the period was 31 years: later this was amended to 20 years.
[7] Oddly, it says so twice: s 2 and s 16.
[8] As for assignations of long leases, they too must be registered in the Land Register: 1979 Act, s 2(1)(a)(v).
[9] For the Reid Report, see paras 118-119. For the Henry Report, see pp 36-37.
[10] It is announced without explanation in the Henry Report, p 37.

9.9 The exclusion of the 1449 Act in relation to long leases is one we raise merely for the sake of giving a complete picture. We see the matter as primarily a matter for the law of leases and not for the law of land registration, and so outwith the scope of the present project. It is worth adding that no suggestion has been made to us that the law is unsatisfactory. The draft Bill provides for the continued disapplication of the 1449 Act to registrable leases.[11]

How long should a long lease be?

9.10 In England and Wales the duration at which a lease requires registration has recently been reduced from 21 years to seven.[12] In some jurisdictions the period is even less.[13] In DP 130[14] we took the view that any change in the line of demarcation between long (registrable) and short (unregistrable) leases was a matter for the law of leases and not for the law of land registration, and so outwith the scope of the project. We remain of that view. As and when there is a review of the law of leases that issue can be considered.

Noting of short leases

9.11 Under current law short leases[15] are not registrable, nor can they be "noted" on the title sheet,[16] except, probably, for (a) crofting leases (b) cottar's leases (c) statutory small tenancies and (d) small landholdings.[17] In DP 130 our provisional proposal was that short leases should be capable of being noted, though we said that there would have to be some exceptions.[18] On further reflection we have concluded that short leases should not appear on the Land Register. The subject forms part of the broader topic of overriding interests, discussed in Part 7.

The relationship of the 1857 Act to the land registration system

9.12 At present the relationship of the 1857 Act to the land registration system is not as clear as it might be. The 1857 Act refers only to the Register of Sasines.[19] Turning to the 1979 Act, one finds that section 29 applies some sections of the 1857 Act to the Land Register but not others. One of the sections not applied is section 16, no doubt on the basis that that section deals with the *effect* of recording a lease, a matter that is dealt with in the 1979 Act itself, in section 3. But section 2 of the 1857 Act, which also deals with the effect of

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[11] See sch 4, para 18 which adds a new section 20C to the 1857 Act. The new provision replaces the first part of s 3(3) of the 1979 Act.

[12] Land Registration Act 2002, Sch 1, para 1, Sch 3 para 1. See Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century*: *A Conveyancing Revolution* (Law Com No 271, 2001), paras 8.9 and 8.50.

[13] See eg Real Property Act 1900, s 42(1)(d) (New South Wales); Land Titles Act, s 61(1)(d) (Alberta); Land Title Act 1994, s 185(1)(b), sch 2 (Queensland). In New Zealand, a lease must always be on the register, whether by registration or by caveat, if it is to affect acquirers. The length is irrelevant. See G W Hinde and D W McMorland, *Butterworths Land Law In New Zealand* (1997), para 5.040. By contrast, in Germany (as in many other civil law countries) an ordinary lease is not classified as a real right and cannot be registered. Nonetheless acquirers are affected by it. See M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003), pp 214 and 267.

[14] DP 130, para 5.25.

[15] A "short" lease is one for not more than 20 years.

[16] 1979 Act, s 6(4).

[17] Although by s 6(4) noting is not permitted in respect of "the interest of a lessee under a lease which is not a long lease", this probably refers only to the rights mentioned in para (a) of the definition in s 28(1).

[18] DP 130, para 5.61.

[19] Except for s 3, where amendments introduced by the Title Conditions (Scotland) Act 2003 now bring in a reference to the 1979 Act.

recording, and which largely duplicates section 16, *is* applied to the Land Register. The overall result is seriously confusing.

9.13 Our policy in this project is that it is, generally speaking, not for the land registration legislation itself to determine what is registrable, what is not registrable, and, in the former case, what the respective consequences are of registration or non-registration. All such matters are within the province of other legislation.[20] Hence the topic of which leases are registrable and which are not, the effect of registration and non-registration, and corresponding issues about the registration of alterations of leases and so forth should be governed by the legislation on leases. Hence the draft Bill amends the 1857 Act in two ways. The first is essentially presentational: it becomes clear from the amended text that the 1857 Act applies to the Land Register, and not only to the Register of Sasines. (And it also makes it clear which particular sections of the 1857 Act do *not* apply to Land Register cases.) The amended text of the 1857 Act will not be attractive, but it is not attractive at present. It needs a thoroughgoing overhaul - indeed it probably needs wholesale repeal and replacement. But such a task would belong to a review of the law of long leases.

9.14 The second way in which the draft Bill amends the 1857 Act is that the question of the substantive consequences of registration and non-registration in the Land Register would be set out in the 1857 Act. (As will be explained below, that means shifting certain provisions currently in the 1979 Act into the 1857 Act.) The result would be that the 1857 Act would be equal-handed as between the Register of Sasines and the Land Register: in respect of both registers the 1857 Act would state what is registrable, what the consequences are and so forth. Accordingly we recommend:

> **38. (a) The Registration of Leases (Scotland) Act 1857 should be amended so that references to the Register of Sasines are supplemented, where appropriate, by references to the Land Register.**
>
> **(b) The Registration of Leases (Scotland) Act 1857 should be amended so as to set out the consequences of registration of a lease in the Land Register, as it does for the consequences of registration in the Register of Sasines.**
>
> (Draft Bill, s 83(1), sch 4)

Alterations to registered leases: (i) What can be registered?

9.15 In the following sections of this part we attempt to analyse the law about alterations to registered leases. We have found this subject difficult; our treatment is necessarily to some extent speculative and may not command agreement. The reason we have thought it appropriate to set out the analysis at some length is to justify the conclusion at which we arrive, which is that the law is uncertain, and that the policy behind the law is also uncertain, and that since a review of the substantive law of leases is outwith the scope of this project, the existing legislative provisions should, with some qualifications, simply be re-enacted, thus preserving the current state of uncertainty.

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[20] For this policy, see in particular Part 4.

9.16 We use the expression "alteration" in a broad sense to include any agreement or any event that alters its terms, including the termination of the lease. Examples of alteration in this broad sense would include: (a) a mutually-agreed extension of duration; (b) a mutually agreed early termination; (c) a mutually agreed alteration of the rights and obligations of the parties, eg as to repairing obligations; (d) irritancy by the landlord; (e) rescission for breach.[21]

9.17 The issues are: (i) Can a given type of alteration be registered? (ii) If so, what is the effect of such registration? (iii) If an alteration is registrable but it is not registered, what is the effect of the alteration, or, put the other way round, what, if any, are the legal consequences of the lack of registration? (iv) Should the 1857 Act be amended in relation to these issues?

9.18 The 1857 Act provided for the recording of renunciations[22] and of reductions.[23] But it was silent as to the *effect* of the recording, and as to the effect of the non-recording, of these types of alteration. In other words, it did not say whether a recorded renunciation, or reduction, was in any way different in its effects from one that was unrecorded. As to ordinary deeds of variation (including extension) or irritancies, whether accompanied by decree or not, the 1857 Act was silent.[24]

9.19 The 1979 Act applied to the Land Register the provisions of the 1857 Act about renunciations and reductions.[25] In addition, section 2(4) of the 1979 Act contained a provision, applicable across the board, and thus including leases:

> "There shall … be registrable … any other transaction or event which (whether by itself or in conjunction with registration) is capable under any enactment or rule of law of affecting the title to a registered interest in land but which is not a transaction or event creating or affecting an overriding interest."

9.20 This probably means that any alteration to a lease can competently be registered, at least if the altered term is *inter naturalia*.[26] If so, it goes further than the 1857 Act which provides for the registrability of only two kinds of alteration, namely renunciation and reduction.[27] On the other hand, the fact that the provisions of the 1857 Act mentioned above also apply to the Land Register[28] is an argument against a broad construction of section 2(4)(c) of the 1979 Act. After all, it would be odd to say in one breath "(i) all types of alteration can be registered *and* (ii) two types of alteration can be registered."

Alterations to registered leases: (ii) What is the effect of registration?

9.21 Section 3(1) of the 1979 Act provides:

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[21] Rescission might be by either party. Arguably rescission by the landlord is the same as irritancy, but we will not discuss that question here.
[22] Section 13.
[23] Section 14.
[24] According to Angus McAllister, *Scottish Law of Leases* (3rd edn, 2002), para 7.15, irritancies can be recorded. Whilst we must hesitate to dissent from any view expressed in that admirable work, we think that at this point there is a conflation of decrees of reduction and decrees of irritancy.
[25] 1979 Act, s 29.
[26] A term that is not *inter naturalia* will in principle not affect transferees. (On this difficult subject see eg *Advice Centre for Mortgages Ltd v McNicoll* 2006 SLT 591.) If a term is not *inter naturalia* it could be argued that it is not "capable under any enactment or rule of law of affecting the title".
[27] 1857 Act, ss 13 and 14.
[28] 1979 Act, s 29(2).

"(1) Registration shall have the effect of-

(a) vesting in the person registered as entitled to the registered interest in land a real right in and to the interest and in and to any right, pertinent or servitude, express or implied, forming part of the interest, subject only to the effect of any matter entered in the title sheet of that interest under section 6 of this Act so far as adverse to the interest or that person's entitlement to it and to any overriding interest whether noted under that section or not;

(b) making any registered right or obligation relating to the registered interest in land a real right or obligation;

(c) affecting any registered real right or obligation relating to the registered interest in land,

insofar as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or, as the case may be, of being affected as a real right."

9.22 This provision applies across the board, not only to the registration of alterations of leases. In general terms, it seems to mean that a registered alteration has effect in relation to third parties. It carries with it the "Midas" effect of registration.[29] If a lease were renounced by someone who did not have a good title to it, and the renunciation were then registered, the lease would, it seems, be extinguished, odd though that conclusion may appear.[30] Section 3 may apply to all alterations, though it could be argued – see above - that since the 1979 Act incorporates the alterations regime of the 1857 Act, and that regime applies only to two types of alteration (renunciations and reductions), it was not intended to apply to other types of alteration (ie irritancies and ordinary variations).

9.23 How the provision should be construed in relation to terms that are not *inter naturalia* of the lease is unclear, for under the general law of leases such terms do not normally have effect against third parties. Perhaps the section's fullout[31] means that the subsection does not apply to such terms.

Alterations to registered leases: (iii) What is the effect of non-registration?

9.24 It might be supposed that the "registered alterations have third-party effect" rule (which appears to be contained in section 3(1) of the 1979 Act) implies "unregistered alterations have no third-party effect". But of course such an argument would be logically unsound. "If X then Y" does not imply "if not X then not Y". Indeed, an illustration of this lies to hand: until recently the rule was "a long lease recorded in the Register of Sasines has third-party effect" but it did not follow that an unrecorded long lease lacked third-party effect: such effect could be attained not only by recording under the 1857 Act but also by possession in terms of the 1449 Act.

9.25 Section 3(3) of the 1979 Act provides:

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[29] See Part 13.

[30] Since the change to the Register would be an inaccuracy, there would in principle be the possibility of a subsequent rectification, with the result that the lease would later come back into existence. But under the 1979 Act it is in many cases impermissible for inaccuracies to be rectified. See further Part 17.

[31] The words "insofar as…"

"(3) A--

(a) lessee under a long lease;

(b) proprietor under udal tenure,

shall obtain a real right in and to his interest as such only by registration; and registration shall be the only means of making rights or obligations relating to the registered interest in land of such a person real rights or obligations or of affecting such real rights or obligations."

9.26 One reading of the final words ("and registration shall be" to "such real rights or obligations") is that registration is the only way of conferring third-party effect on an alteration. For example, suppose that a decree of irritancy and removing is pronounced and extracted, the tenant is removed, and the landlord sells the property to someone else. The extract is not registered. On this view, the lease is terminated, but it still remains in effect as a real right. Whether that idea is a coherent one is open to debate. The possibility of a lease that is valid but lacks real effect is a familiar one: it is the rule of Roman law and hence our common law and it can still happen in certain cases today. But the converse is hard to imagine: a smile lasting after the Cheshire cat has gone.

9.27 A more restrictive reading of these words in section 3(3) is that they are only about standard securities and title conditions.[32] The reasons for a narrow reading are as follows. In the first place, section 3(3) is about "rights or obligations relating to the registered interest" rather than about the registered interest itself. In the second place, the wording follows quite closely the similar wording in section 3(1), and that wording is probably, though by no means certainly, about standard securities and title conditions. Thirdly, if the policy had been that "what can be registered, must be registered" (ie, to attain third-party effect) one would have expected the wording to track the wording of the "what is capable of being registered" provision in section 2(4)(c). It does not.[33]

Alterations to registered leases: conclusions and recommendations

9.28 Were it the case that, though the legislative provisions are obscure, the underlying policy is not, the present project would be an excellent opportunity to ensure that the underlying policy was, for the first time, properly implemented. But unfortunately it appears to us that the underlying policy is not clear. The Reid and Henry Reports did not address the issue of alterations. The 1979 Act thus had no clear policy behind it about lease alterations. We incline to think that the same criticism can be made of the 1857 Act.[34] Whilst the present project can effect the occasional reform on the periphery of the topic of land registration, it seems to us that the subject of alteration of leases is a large and difficult one, and one that is inextricably tied up with the general fabric of the law of leases, a subject we cannot broach in this project. These issues could be satisfactorily addressed only in the context of a project on the law of leases. We therefore consider that the law should be, for the time being,[35] left as it is. Given that there is some uncertainty as to the meaning of the current provisions, the new

[32] See further DP 128, para 5.6.
[33] All this presupposes that any alteration can competently be registered in the first place. As mentioned above, it is not quite certain that that is so.
[34] As mentioned earlier, the focus of interest in 1857 was on the use of leases as collateral for loans.
[35] In the longer term there should be a review of leases as real rights, which would mean review of the rules about the registration of leases.

legislation should keep close to the current wording, so as not to change the law inadvertently. Of course, to re-enact such provisions, provisions that we have strongly criticised in the discussion papers, is unsatisfactory, but we have reluctantly come to the conclusion that this is what should be done.[36] The current provisions do not appear to be causing major problems in practice. Accordingly, the Bill, whilst repealing the provisions of the 1979 Act discussed in the foregoing paragraphs, re-enacts them for leases, and does so by placing the re-enacted provisions in their natural home, the 1857 Act.

9.29 But there is one qualification. An important theme of this Report is that the Keeper's Midas touch is unfortunate and should no longer exist.[37] Hence when re-enacting this provision, the Midas effect should be excluded.

9.30 Accordingly we recommend:

> **39. (a) The rules about the registrability of lease alterations in the Land Register should be stated in the Registration of Leases (Scotland) Act 1857, as far as possible using the wording used in the 1979 Act.**
>
> **(b) The provisions about the effect of the registration of lease alterations, currently contained in section 3(1) of the 1979 Act, should be stated in the Registration of Leases (Scotland) Act 1857, as far as possible using the wording used in the 1979 Act. But the Keeper's Midas touch should be excluded.**
>
> **(c) The provisions contained in section 3(3) of the 1979 Act relating to the alteration of registered leases should be stated in the Registration of Leases (Scotland) Act 1857, as far as possible using the wording used in the 1979 Act.**
>
> (Draft Bill, s 83(1), sch 4, paras 16 and 18)

Registered leases and the guarantee of title

9.31 The guarantee of title has two prongs: "mud" and "money".[38] In Part 23 we consider under what circumstances leases should attract the "mud" guarantee. We deal with the "money" issue here. The only special issue concerns – inevitably – off-register alterations. To what extent it is competent for registered leases to be altered[39] off-register is not clear: see above. But at all events in so far as there is a competent off-register alteration, the Keeper's warranty should not be engaged. For example, suppose that a lease is altered so as to transfer from the landlord, Alan, to the tenant, Beatrice, certain repairing obligations. The alteration is not registered. Assume (what is uncertain) that the alteration is fully valid, not only between the parties but also in relation to successors. If the tenant, Beatrice, now assigns the lease to Clara, who is unaware of the alteration, Clara would normally have a remedy against Beatrice, but she should not have a remedy against the Keeper for breach of warranty. In our view, it is not reasonable for the Keeper to assume liability for alterations

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[36] The re-enactment of unclear provisions is sometimes done deliberately in consolidating legislation, and in effect this is what we are doing here.
[37] For the Keeper's Midas touch, see Part 13.
[38] See generally Parts 19 to 25.
[39] Using this term in a broad sense: see para 9.16 above.

which, being off-register, should be known to the parties but are unlikely to be within the Keeper's sphere of knowledge.[40] The rule does not place successors in an impossible position, because it is normally possible to check the position in advance of settlement. Indeed, it is arguable that the rule is already encompassed in the more general rule that the Keeper's purse is not to suffer for losses which could have been avoided by reasonable diligence.[41]

Principal and subsidiary title sheets

9.32 The 1979 Act divided "interests in land" into two classes: primary interests, that would have their own title sheet, and secondary interests, that would be registered on one of the primary title sheets. Thus for a given plot of land there might be numerous different title sheets, all independent of each other. Originally there were three types of primary interest, being ownership, superiority (and there could be numerous superiorities at different levels in the feudal hierarchy) and registered lease (and here too there could be several, with a head lease, underlease and so on).[42] Superiorities have disappeared,[43] but long leases remain. In Part 4 we recommend a rather simpler approach, of one title sheet for each plot of land. That might appear to mean that separate title sheets for leases would cease to exist. More accurately, it means that they would no longer *have* to exist. They could exist, as subsidiary title sheets.[44] In our view this should be a matter for the Keeper's discretion.[45] It is a question of administrative convenience. If a lease is registered, then it makes no difference to the substantive rights of anyone whether the lease appears solely on the title sheet of the plot of land or whether there is also a separate, subsidiary, title sheet. Given that the principal title sheet is the plot title sheet, and that that sets forth the subordinate real rights in that land,[46] there is no technical need for a separate lease title sheet. The sorts of issues that arise for leases also arise for standard securities, and yet they do not have their own title sheet. For example, standard securities can be assigned. It is competent for there to be a standard security over a standard security. All such matters are handled on a single title sheet, and the same possibility is available for leases. The rights of the parties involved are the same regardless of whether there is a separate title sheet or not. Further we propose abandoning the concept of Certificates of Title and thus the illusory feeling of security arising from holding a Land Certificate for tenanted subjects would no longer be an issue.[47]

9.33 In practice it would no doubt be convenient to have a separate lease title sheet in some cases, though we stress that in our scheme such a title sheet would always have a subsidiary status, the plot title sheet being the principal one. For example, a 999-year lease is virtually a feu right, living a life more or less separate from the right of ownership, and here a separate lease title sheet would make sense.[48] Another example would be where a single plot is subject to numerous leases of different sub-areas. Another would be where there is a

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[40] See s 39(1)(b)(vii) of the Bill.
[41] Draft Bill, s 40(d).
[42] See Part 4.
[43] Abolition of Feudal Tenure etc (Scotland) Act 2000.
[44] In theory there could be separate title sheets for other subordinate real rights as well, but there is no demand, and a separate title sheet brings with it an extra complexity that is unjustified except for leases.
[45] Draft Bill, s 5(6). We have thus departed from the tentative view expressed in DP 128, para 2.14 (proposal 2). At that stage we had not developed the idea of plot title sheets.
[46] Subject to certain exceptions.
[47] See Part 8.
[48] Such ultra-long leases will disappear if the proposals contained in Scottish Law Commission, Report on *Conversion of Long Leases* (Scot Law Com No 204, 2006) were implemented.

nested set of head leases and subleases. But as we say, whether to have separate title sheets should, in our view, be a matter for the Keeper's discretion. We think it likely that, at least to begin with, the Keeper would continue to have separate title sheets, at least for the many leases already registered under the 1979 Act. That is what everyone is used to, and as far as the draft Bill is concerned, such a practice could continue indefinitely. However, it may well be that the future trend of policy at the Department of the Registers would be against having separate title sheets for long leases. But this would be a matter for the Keeper's discretion. By way of background, since 1974 it has not been possible to create leases of residential property for periods of more than 20 years,[49] and since 2000 it has not been possible to create leases of other types of property for periods of over 175 years.[50] And if our Report on *Conversion of Long Leases*[51] is implemented, a large proportion of existing long leases would be converted into ownership.

9.34 Where there is a lease title sheet, it would, as at present, have its own title number. But lease title numbers would differ from other title numbers. Plot title sheets would match the number of the cadastral unit to which they relate. A lease is not a plot, and since cadastral units would exist for registered plots, there would be no cadastral unit for a lease. But this is merely a technical, not a substantive, point. The Cadastral Map would show the lease title number.[52] The boundaries of the lease, if different from plot boundaries, would be on the Cadastral Map, and this would be true whether or not the lease had its own title sheet.[53]

9.35 We therefore recommend:

40. (a) Registered leases need not have their own title sheet.

(b) But there may be subsidiary title sheets for such leases, at the Keeper's discretion.

(c) If they do have their own title sheets, the number must appear on the Cadastral Map.

(d) Whether they have their own title sheets or not, the boundaries must appear on the Cadastral Map.

(Draft Bill, s 3(1)(c), and s 5(6) and (7))

Other implications of the concept of plot registration

9.36 One implication of the concept of plot registration has just been mentioned: leases would not have to have their own title sheets and, if they did they would have a subsidiary status. There are also some further implications.

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[49] Land Tenure Reform (Scotland) Act 1974, Part II.
[50] Abolition of Feudal Tenure etc (Scotland) Act 2000, s 67.
[51] Scottish Law Commission, Report on *Conversion of Long Leases* (Scot Law Com No 204, 2006).
[52] Draft Bill, s 5(7).
[53] Draft Bill, s 3(1)(c).

9.37 Under the 1979 Act system, property and lease are independent of each other. The property may be registered in the Land Register, and the lease[54] still in the Register of Sasines, or *vice versa*. In the new scheme, once a plot has been registered,[55] the idea that a lease over it is "unregistered" would no longer have a meaning. The lease would appear on the plot title sheet, and that is all the registration that there could be. Put another way, and using the concepts of the 1979 Act, where a plot had been registered, every lease that at the day of commencement of the new legislation was an unregistered lease within the meaning of the 1979 Act would be deemed to be a registered lease. This would not involve any change on the commencement day to those pre-existing title sheets which were subject to long leases, as these would already contain a schedule of leases giving sufficient detail of the recording or registration of each lease to allow the lease to be regarded as being incorporated by reference into the title sheet.[56]

9.38 This reconceptualisation might at first seem a little odd to those used to the 1979 Act, but in fact it would be a simplification. There would be few practical consequences, in the sense that conveyancers and the Keeper would need to do things differently. Only one such consequence is worth mentioning. Under current law, if a lease is in the Register of Sasines, and the tenant grants a standard security over the lease, the security goes into the Register of Sasines, not into the Land Register. In our scheme, that would no longer be true. The standard security would go into the Land Register. In the tables below, this case is covered by boxes (10), (12), (22) and (24).

9.39 At present, if the property is still in the Register of Sasines, and a long lease is granted, the lease is registered in the Land Register, but the property remains for the time being in the Register of Sasines. In the new scheme, by contrast, the grant of the lease would trigger registration of the plot.[57] (That would equally be so if the new lease were a long sublease.) However, where at the date of commencement there are leases that are registered while the property is still in the Register of Sasines, we recommend that an assignation of the lease should not trigger registration of the plot (case (13) in the tables below). This is to ensure that the Keeper can continue "business as usual" with such assignations, handling them as straightforward "dealing of whole" transactions that are ARTL-compatible.

9.40 The following table shows what happens when the holder of a long lease that is in the Register of Sasines or the Land Register assigns the lease, or grants a sublease, and grants a standard security over the lease.

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[54] For simplicity, we use the singular. A glance at the chart below shows that even with one long lease matters are complicated enough. In reality there may be a long sublease, or even more than one.

[55] Property title sheets that exist on the day of commencement will automatically become plot title sheets: see Part 36.

[56] Draft Bill, s 6(2).

[57] See "Long leases granted by proprietors holding on a Sasine title" below.

The current law

	Property is in GRS. Lease is in LR	**Property is in LR. Lease is in GRS**	**Both are in LR**	**Neither is in LR**
Tenant assigns	(1) Assignation registered in LR	(2) Assignation registered in LR	(3) Assignation registered in LR	(4) Assignation registered in LR
Tenant grants long sublease	(5) Sublease registered in LR	(6) Sublease registered in LR	(7) Sublease registered in LR	(8) Sublease registered in LR
Tenant grants standard security	(9) Standard security registered in LR	(10) Standard security recorded in GRS	(11) Standard security registered in LR	(12) Standard security recorded in GRS

Our scheme

	Plot is unregistered. Lease is registered	**Plot is in LR. Lease is in GRS**	**Both are in LR**	**Neither is in LR**
Tenant assigns	(13) Assignation registered in LR. Plot is not registered in LR for time being, unless Keeper so chooses.	(14) Assignation registered in LR.[58] Keeper has option to create new title sheet.[59]	(15) Assignation registered in LR. It is for the Keeper's discretion whether to retain the existing separate tenancy title sheet.	(16) Assignation registered in LR. Keeper to register plot in LR. Keeper has option to create either one or two new title sheets.

[58] What is registered is not the lease but the assignation of the lease. Because the plot is already in the Land Register, the lease is already there as well. In our new scheme the "registration of a lease" means the registration of a new lease.

[59] The assignation must refer to the plot title number. If the Keeper chooses to open a new title sheet then *future* deeds will refer to *that* title sheet.

Tenant grants long sublease	(17) Sublease registered in LR. Keeper to register plot in LR.	(18) Sublease registered in LR. Keeper has option to create new title sheets for lease and sublease.	(19) Sublease registered in LR. Keeper has option whether to create a new title sheet for the sublease.	(20) Sublease registered in LR. Keeper to register plot in LR. Keeper has option to create additional title sheets for lease and sublease.
Tenant grants standard security	(21) Standard security registered in LR. Plot is not registered in LR for time being, unless Keeper so chooses.[60]	(22) Standard security registered in LR. Keeper has option to create new title sheet.	(23) Standard security registered in LR.	(24) Standard security registered in LR. Keeper to register plot in LR.

9.41 We recommend:

41. The table above should have effect. In particular, where a plot is registered, deeds affecting long leases should be registrable in the Land Register, not the Register of Sasines.

(Draft Bill, s 5(6), s 20, s 61, and s 62(1)-(4), (9) and (10))

Long leases granted by proprietors holding on a Sasine title

9.42 Under current law, if a proprietor with an unregistered title grants a long lease, the lease is registered in the Land Register but the landlord's interest (ie the right of ownership) remains, for the time being, unregistered. The logic of our position requires that in such a case the plot be registered.

9.43 In cases (17) and (20), where the tenant grants a long sublease, the plot is registered by the Keeper without any application from the proprietor. But in the present case (ie leases granted by proprietors, not by tenants) we think it preferable that there should be a voluntary registration, that is to say, an application by the proprietor. In Part 33 it is explained that in the new scheme, applications for voluntary registration must be accepted by the Keeper. But it is also provided that the present rule, whereby the Keeper has a discretion to refuse to accept an application for voluntary registration, should continue for an interim period. Clearly, if a proprietor with a Sasine title who wishes to grant a long lease could not first

[60] Eventually the Register of Sasines will be closed to all new standard securities. When that happens, and a standard security is granted, the Keeper must register the plot, unless that has already happened.

register the land, the lease could not be registered, and that would be unacceptable. Hence the Keeper's temporary right to refuse a first registration should not apply in such cases.

9.44 Accordingly we recommend:

42. A lease granted by the proprietor of an unregistered plot should not be capable of being registered in the Land Register or recorded in the Register of Sasines. In such a case the Keeper's temporary right to reject an application by the proprietor for voluntary registration should not apply.

(Draft Bill, s 60 and s 64)

Fishing and shooting leases

9.45 The Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003, provides:

> "Any contract entered into in writing for a consideration and for a period of not less than a year whereby an owner of land to which a right of fishing for freshwater fish in any inland waters pertains or the occupier of such a right authorises another person to so fish shall be deemed to be a lease to which the Leases Act 1449 (c.6) applies."[61]

9.46 There is no mention of either the 1857 Act or the 1979 Act. The question is accordingly whether such a lease for a period of more than twenty years (a) *can* be registered and (b) *must* be registered to attain real effect. As to (a) the Keeper's practice is to accept such leases for registration.[62] As a matter of policy, it is difficult to see why any distinction should be made between such leases and ordinary leases. Of course it is strange that a lease of non-salmon fishings can be an independent real right whilst non-salmon fishings themselves cannot be. By contrast, salmon fishings themselves can be a separate real right as well as a lease of salmon fishings.[63] But such is the law, and if it is to be reconsidered that is not a matter for the present project. Given that such leases can exist, with real effect, the longer the lease, the stronger, in policy terms, is the case for registration. We incline to think that the lack of mention of the 1857 and 1979 Acts may have been an oversight. Possibly it was thought that the reference to the 1449 Act would bring in the 1857 and 1979 Acts by inference. But we think that such an inference would be an uncertain one. Turning back to question (b), it would follow that long fishing leases would have to be registered in order to have real effect. This would apply both to new leases and to the assignations of existing leases.

9.47 Accordingly we recommend that:

43. Fishing leases (in the sense of section 66 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) should be subject to the Registration of Leases (Scotland) Act 1857.

(Draft Bill, s 83(1), sch 4, para 18)

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[61] Section 66(1), re-enacting s 4 of the Freshwater and Salmon Fisheries (Scotland) Act 1976.
[62] *Registration of Title Practice Book*, para 5.60.
[63] Cf Reid, *Property*, para 208.

9.48 Lastly, leases of shootings. According to *Palmer's Trustees v Brown*,[64] a lease of shootings is like a lease of heritable property and so subject to the 1449 Act and (if a long lease) the 1857 Act. On the basis of this decision the Keeper is prepared to register long shooting leases.[65] Nevertheless we have come to the conclusion that this is not a matter on which the Bill should have a provision. Whereas the real effect of non-salmon leases is stated in statute, there is no statutory provision about shooting leases, and *Palmer's Trustees* is only a first-instance decision. We do not think it can be regarded as settling the law beyond all doubt. The question of whether shooting leases should have real effect is a question outwith the scope of this project and accordingly we think it would be inappropriate for the Bill to contain any provision on this subject.

[64] 1989 SLT 128.
[65] *Registration of Title Practice Book*, para 5.60.

Part 10 Servitudes and real burdens

Introduction

10.1 Servitudes and real burdens are mentioned in numerous different parts of this Report. The present part deals with some particular issues.

Servitudes: introduction

10.2 Servitudes are classified as overriding interests,[1] but they have certain special features. In the first place, unlike other overriding interests, noting is not the only way that they can enter the Register. They may also enter the Register by registration. Indeed, the modern rule is that new servitudes must be registered.[2] There are exceptions, in particular servitudes created by prescriptive usage. In the second place, unlike other overriding interests, two[3] properties are involved, the servient and the dominant.[4] In the third place, disputes about servitudes seem to occupy more of the Keeper's time than disputes about other overriding interests.

10.3 Like other overriding interests, a servitude does not have to enter the D Section (Burdens Section) of the encumbered title sheet in order to bind successive owners. Conversely, if the benefited title sheet does not mention a servitude as a pertinent, it is nevertheless a valid pertinent, and as such will transmit to a subsequent owner. This latter principle – that a servitude, being a pertinent, passes with the benefited property – is a common law one, and is confirmed by section 3(1)(a) of the 1979 Act. (The draft Bill does not have an express provision on this point: we regard the common law as being sufficiently clear.)

Double noting of servitudes

10.4 When an off-register servitude is noted on the Land Register,[5] it is, we think, obvious that it should be noted on both title sheets: the dominant and the servient. Yet at present this does not always happen in practice. The problem arises chiefly on first registrations, when the Sasine title of a property contains a statement of an alleged servitude over a neighbouring property. What usually happens is that this is transcribed into the A Section (Property Section) of the title sheet, and no matching entry is made in the title sheet of the servient property. We think that that practice should change. The issue arises also in connection with certain older servitudes that were created by single registration.[6] In such cases we think that the servitude should be noted in the matching title sheet. And in each

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[1] For overriding interests see Part 7.
[2] Title Conditions (Scotland) Act 2003, Part 7. Before that Act registration was optional.
[3] At least two. There can be three or more, as where a servitude of way runs across several different properties.
[4] Also known as the burdened and the benefited properties. This quality of involving two properties is also shared by most types of real burden, but real burdens are not overriding interests.
[5] See Part 7 for the noting of off-register rights.
[6] The modern law is that servitudes normally have to be registered to be created, and that the registration must be dual, ie simultaneous registration against the titles of both the servient and the dominant properties: Title Conditions (Scotland) Act 2003, Part 7.

case the entry should itself identify the *other* title sheet,[7] in so far as this is possible, ie a counterpart statement.

10.5 We recommend:

44. (a) Where property is benefited by a servitude, the servitude should appear on the dominant title sheet, and when a property is encumbered by a servitude, the servitude should appear on the servient title sheet.

(b) The dominant title sheet should identify the servient title sheet and vice versa (counterpart statements).

(Draft Bill, s 7(1)(b) and s 10(1)(a))

Extinction of servitudes

10.6 The discharge of servitudes is generally done by registration of the discharge against the title to the servient property.[8] Assuming that the servitude was also registered[9] or noted against the dominant title, the result will be that the latter title sheet will thereby become inaccurate – because the dominant title will say "servitude" whilst the servient title says "no servitude". Under our scheme the Keeper is bound to rectify inaccuracies, on becoming aware of them. Accordingly when the discharge is registered against the servient title, the Keeper is bound at the same time to delete the servitude from the dominant title sheet. Something similar would be the case if a servitude is extinguished by negative prescription.[10] Once the prescriptive period is completed, the servient and dominant title sheets are inaccurate in showing the servitude,[11] and so the Keeper becomes bound to rectify them both, by deletion.

Alleged prescriptive servitudes of way

10.7 Most properties have a boundary with a road, street or other public right of way. But access to some properties is through someone else's land, on the basis of a servitude of way.[12] In some cases these servitudes are based on prescriptive use. Traditionally, when such a property was sold, the fact that no express servitude existed was seldom regarded as a problem by the conveyancer acting for the buyer, so long as it was clear that there had been long usage.

10.8 After the introduction of the new land registration system, the Keeper developed a practice whereby the servitude would be entered as a pertinent in the A Section (Property Section) of the dominant property, provided that affidavits were supplied to vouch

[7] So the dominant title sheet should name the servient title sheet and vice versa.
[8] Title Conditions (Scotland) Act 2003, s 78.
[9] As will typically be the case for modern servitudes: Title Conditions (Scotland) Act 2003, Part 7.
[10] A servitude is extinguished by disuse for a period of 20 years.
[11] Assuming that they did show the servitude. For one reason or another that might not be the case.
[12] There is also a third category of properties to which there is no legal access except by water. These are rare. Also rare is the fourth category, properties to which access is by the type of right first recognised in *Bowers v Kennedy* 2000 SC 555.

prescriptive possession. But in 1997 this practice was discontinued. We quote the second edition of the *Registration of Title Practice Book*:[13]

> "Affidavit evidence submitted to the Keeper with respect to a dominant tenement represents a one sided version of events. There is little or no risk for deponents by either being selective or exaggerating the position. There is also scope for more innocent misrepresentation by the deponent of the position on the ground. On numerous occasions the Keeper has been the recipient of subsequent contrary evidence from proprietors of putative servient tenements to the effect that no servitude had ever been constituted. The Keeper would then find himself in the middle of a dispute that he had no power to resolve. In addition his indemnity could be at risk should it transpire the affidavit evidence was less than accurate."

10.9 The Keeper's practice since 1997 has been that an alleged prescriptive servitude will not normally be noted as a pertinent in the A Section (Property Section) of the allegedly dominant title sheet unless supported by a declarator. The same applies to servitudes that have allegedly come into being on the footing of implication. The Keeper's current policy is thus almost the same as our proposed "manifest" standard for the noting of off-register rights.[14]

10.10 This post-1997 practice proved controversial. When acting for buyers of properties for which servitude access is needed, conveyancers had become, in Land Register cases, used to expecting to see the alleged servitude mentioned as a pertinent in the A Section (Property Section). If it was not so mentioned, the marketability of the property was questioned. The result, since 1997, has been that such properties have become harder to sell: sometimes a title insurance policy is demanded by the buyer. Experienced conveyancers have asked us to ensure that in the new legislation the Keeper would have to revert to the pre-1997 practice, or something like it.

10.11 We have given this issue the most careful attention, but have concluded that the Keeper's post-1997 practice is sound. In Part 7 we express the view that off-register rights (overriding interests) should not be noted unless their existence is "manifest" and not merely probable. That is effectively the Keeper's current approach. We give our reasons.

10.12 In the first place, the Keeper's post-1997 practice puts buyers in no worse a position than they were in for titles in the Register of Sasines. In the older practice, the lack of an express servitude did not affect the marketability of the title if satisfactory evidence of prescriptive usage was available.

10.13 In the second place, the silence of the Land Register does not mean that there is no servitude. Noting a servitude is simply irrelevant to the existence or non-existence of the servitude. We think that some conveyancers – not all of course – may not have perfectly understood the law about pertinents, and have mistakenly supposed that a pertinent will not enure to the benefit of a buyer if there is no mention of it in the title sheet. But the law of Scotland is that if a pertinent, such as a servitude, exists, the buyer will take the benefit of it.

10.14 In the third place, conveyancers sometimes argue with the Keeper on these lines: "The existence of this servitude on the footing of prescriptive usage is indisputable. So why

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[13] *Registration of Title Practice Book*, para 6.55. The section on servitudes is contained in paras 6.51 to 6.61 and contains a good deal of important details.
[14] See Parts 7 and 18.

do you decline to note it on the dominant title sheet?" The answer to that is twofold. (i) If the existence of the servitude is indisputable, why does the buyer doubt its existence? In real life, the pressure comes on the Keeper to note the servitude in precisely those cases where the servitude's existence is *not* indisputable, though of course the seller will typically assert indisputability with every appearance of confidence. (ii) In our new scheme, the Keeper *must* note the servitude if its existence *is* indeed indisputable.[15]

10.15 In the fourth place, it could be argued that the Keeper should note servitudes even if their existence is not indisputable, making some appropriate statement on the title sheet that the validity of the servitude is uncertain. For example: "The Keeper notes that there may be a servitude of way in favour of Blackmains over Whitemains to the B987654 Elgin/Kirkcudbright public road but the existence of this servitude is uncertain and accordingly is not warranted by the Keeper." The legislation could indeed provide for that. But we think it would be self-defeating. Any buyer who doubts whether there is a valid servitude of access would not be re-assured by a statement of the sort we have just given.

10.16 In the fifth place, if the existence of a servitude is indisputable, its confirmation by declarator will in the typical case be swift and inexpensive. The servient owner would be highly unlikely to defend, because to do so would merely result in an inevitable[16] and costly defeat. Decree will thus typically pass in absence, in a matter of weeks.[17] Indeed, if the existence of the servitude is indisputable, the typical servient owner would be willing, in exchange for a modest *ex gratia* payment, to sign a corroborative deed of servitude: to do so gives up nothing, and gains something – the *ex gratia* payment. The reason that allegedly servient owners do not always so agree, and the reason that allegedly dominant owners are often unwilling to approach their neighbour in the first place, and are reluctant to raise an action of declarator, is all too often that the existence of the servitude is – despite protestations - *not* indisputable. In many of these cases the underlying reality is an old-fashioned neighbour dispute.

10.17 In the sixth place, and lastly, conveyancers have in practice focused on the issue from the standpoint of the title sheet of the allegedly dominant property. But for every dominant property there is a servient property. Where the existence of a servitude is indeed indisputable, the servient owner should not be unhappy to find a servitude suddenly appearing in the D Section (Burdens Section) of his or her title sheet. But if it is not indisputable, the contrary is likely to be the case.

10.18 Accordingly we recommend:

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[15] At present the Keeper normally requires a declarator. In future the test will be whether the existence of the servitude is "manifest". It is for the Keeper to interpret that standard (though of course caselaw could fine tune the concept) and we expect that in the typical case a declarator will continue to be required. But the legislation will not limit the manner in which the "manifest" standard can be evidenced. It may be that in particular cases the evidential standard might be met without declarator. An example would be where the servient owner confirms the existence of the servitude. Although we are not adopting the formal procedure that we suggested in DP 130, there is in our scheme no reason why the Keeper should not approach the allegedly servient owner.

[16] Inevitable, because the presupposition of this type of case is that existence of the servitude is indeed indisputable.

[17] Strictly speaking, a decree of declarator obtained in absence is imperfect evidence, because in some cases it can be opened up again. This is a complication that the draft Bill does not touch on. Our expectation is that in future, as in the past, the Keeper will, at least in the normal case, regard an extract decree as sufficient evidence, and will not disregard it merely because it was obtained in absence.

45. Servitudes said to have arisen by prescriptive use should be treated in the same way as other off-register rights[18] and should be noted only if their existence is manifest.

(Draft Bill, s 7(1)(b), s 10(1)(a), s 53(1)(b) and s 54)

Real burdens: section 58 of the Title Conditions (Scotland) Act 2003

10.19 Section 58 of the Title Conditions (Scotland) Act provides as follows –

> "The Keeper of the Registers of Scotland –
>
> (a) during that period of ten years which commences with the appointed day, may; and
>
> (b) after the expiry of that period, shall,
>
> where satisfied that a real burden subsists by virtue of any of sections 52 to 56 of this Act or section 60 of the 2000 Act (preserved right of Crown to maritime burdens), enter on the title sheet of the burdened property –
>
> (i) a statement that the real burden subsists by virtue of the section in question; and
>
> (ii) where there is sufficient information to enable the Keeper to describe the benefited property, a description of that property,
>
> and where there is that sufficient information the Keeper shall enter that statement on the title sheet of the benefited property also, together with a description of the burdened property."

10.20 The draft Title Conditions (Scotland) Bill was produced by this Commission and published with our Report on *Real Burdens*.[19] Section 58 as enacted is in substance the same as section 48 of the draft Bill.[20] The draft Bill sought to improve the publicity surrounding constitution of new burdens by introducing dual registration, ie registration against both burdened and benefited properties. The policy behind section 48 was to bring about, so far as reasonably possible, better on-register information about pre-existing (and so mostly not dual-registered) burdens.

10.21 Our intention was that the Bill would lead to a substantial cull of pre-existing burdens. Only certain categories would survive, the most important being (a) burdens whose constitutive deed expressly conferred enforcement rights on someone other than the feudal superior; (b) burdens within common schemes if (i) the constitutive deed gave notice of the common scheme and (ii) there was another property subject to like burdens within four metres (the "four metre rule"); (c) common burdens in tenements; and (d) facility and service burdens.

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[18] See Part 7.
[19] Scottish Law Commission, Report on *Real Burdens* (Scot Law Com No 181, 2000).
[20] Except that the fullout is a later addition. Our original provision did not address counterpart statements on benefited title sheets.

10.22 Our recommendations were developed with input from the Department of the Registers of Scotland as to what was practically possible and beneficial. In particular, the Department had carried out a trialling exercise of title cleansing (as it has come to be called), putting our recommendations to the test on numerous title sheets. One particularly noticeable result was that it became possible to delete swathes of amenity burdens from title sheets. Rambling D Section (Burdens Section) entries spanning pages of text could often be deleted in their entirety or slimmed down to a few facility burdens with readily identifiable benefited properties. The view we shared with the Department was that whilst title cleansing and the addition of statements under section 48 of the draft Bill (section 58 of the Act) would be difficult and not practically possible in every case, the tasks were justified by great improvement to the precision and transparency of the burdens sections of title sheets. The aspiration was reflected in paragraph 11.85 of the Report –

> "The decision to remove or not to remove will involve an evaluation of burdens. There should be no difficulty for the Keeper in respect of conditions (i) to (vi) mentioned above [expressly conferred third party enforcement rights and burdens preserved by registration of notices], for it will be immediately obvious from the Register if these apply. Conditions (vii) to (xii) [facility, common scheme, service and maritime burdens], however, may sometimes be more challenging and involve further enquiry... If the Keeper is satisfied that any of the conditions in (vii) to (xii) apply he should have a duty to make a statement to that effect on the title sheet; and where he has sufficient information to do so, should add a description of the benefited property or properties. For example, if his researches disclose that condition (x) is satisfied (common scheme burdens), there should be shown on the title plan, or a supplementary plan, the properties which lie within four metres and which are subject to the same burdens. In this way the Register will move towards full transparency even in respect of burdens created before the appointed day. After a number of years the position will be transformed. The D section (ie the burdens section) of title sheets will be much shorter than at present. Only live burdens will be listed. Often –and always with new burdens – the listing will disclose who has title to enforce; and often there will be a mirror entry in the title sheet to the benefited property. For the first time the Land Register will give an accurate picture in relation to real burdens."

10.23 We also pointed out that we were not expecting the Keeper to do the impossible; the explanatory note to section 48 of the draft Bill said –

> "This section is designed, so far as possible, to make the new implied enforcement rights apparent from the Land Register … The provision is modelled on rule 5(j) of the Land Registration (Scotland) Rules 1980 (statement about occupancy rights), and is not intended to impose a more arduous duty than under that provision. For resources reasons, no duty is imposed at all in the first ten years after the appointed day."

10.24 The 2003 Act as enacted was different from our draft Bill in two ways relevant to the current topic. In the first place, the four-metre rule was dropped. In the second place, and perhaps more importantly, what became section 53 of the Act was added. It applies where there is a *de facto* common scheme of burdens (the existence of which need not be ascertainable from the terms of the progress of titles to any given property) amongst a group of "related properties" in which at least one unit was burdened prior to commencement of the relevant parts of the 2003 Act. In such a case, a burden imposed on one unit became enforceable by all of the related properties and thus continued to subsist. The implications for the policy and practicality of the duty imposed on the Keeper by section 58 may not have been fully considered.

10.25 The effect of these changes was that large numbers of burdens which would have been culled under our proposals were preserved and, under section 53, title to enforce was conferred upon parties who in very many cases would not have had title to enforce under the common law.

10.26 Since the commencement of the Title Conditions (Scotland) Act 2003 at Martinmas 2004, the Department of the Registers has been attempting to comply with section 58, but the practicably realisable results have fallen far short of the original vision of transparency. It may be in part that the original vision was too optimistic, but section 53 has contributed in several ways. In the first place, many burdens that would otherwise have been culled (had it not been for section 53) were saved. In the second place, it is in practice almost impossible to determine that any given burden does not fall within a section 53 common scheme. In the third place, where a burden is or may be preserved by section 53, accurate identification of the benefited properties is typically very difficult. These issues are compounded by the fact that the crucial terms "common scheme" and "related property" are under-defined. As a result where title sheets do have section 58 statements, the result in most cases has been that the statement has been virtually useless. In particular identification of the benefited properties has seldom been possible.

10.27 We think that these failings in section 58 statements reflect no ineptness on the part of the registration officers responsible. They conform to the Keeper's policies developed from experience of what is practically achievable without requiring totally disproportionate expenditure of resource. We accept the view that the Keeper has expressed to us that it has proved impossible at realistic cost to create section 58 statements which make any worthwhile improvement to the transparency of pre-appointed day burden information given in title sheets. We are conscious that the effort that goes into framing even such vague statements as can in practice be achieved requires to be funded from registration fees and diverts staff time from more valuable activities.

10.28 Aside from this cost/benefit issue, there is a further reason why even a well-crafted section 58 statement will not have the value originally intended. Under our original proposals for pre-appointed day burdens, for any given burden the *title* to enforce and the *interest* to enforce would have been closely aligned. In particular under the four-metre rule only immediate neighbours would have had *title* to enforce amenity burdens. Section 53 as enacted appears to confer title to enforce liberally across whole estates and housing schemes. It appears inevitable that the jurisprudence on interest to enforce will continue to develop separately, restricting the numbers of people with actual ability to enforce. Against that background, a statement appearing on a title sheet which is only about title to enforce is not only of limited value, but may actively mislead members of the public.

10.29 On the basis of practical experience and very considerable efforts, the Keeper's conclusion is that section 58 as it stands is unworkable. For the present, the Keeper is empowered but not compelled to enter section 58 statements, so the issue is manageable. But the current legislation will, as from Martinmas 2014, turn the discretion into an absolute duty. The Keeper is accordingly anxious that section 58 be amended well in advance of 2014, and the draft Bill is a suitable legislative vehicle. The Keeper has discussed the issue with the Law Society of Scotland, and we understand that the Society accepts the Keeper's position. We have concluded that the change requested by the Keeper should be made.

10.30 The precise amendment that the Keeper has suggested is that there should be a power, but not a duty, to enter a section 58 statement. But at the same time a person having an interest should be able to apply to the Keeper for a section 58 statement to be made, and in that case the Keeper would have a duty to make such a statement. In this situation there would be a co-operative and fee-paying applicant and accordingly the position would be wholly different from the present position, or, rather, from the position as it would be as from 2014 unless section 58 can be amended. We recommend:

46. Section 58 of the Title Conditions (Scotland) Act 2003 should be amended so that the Keeper will not, as from 2014, have the obligation to enter section 58 statements, except where an application has been made to that effect.

(Draft Bill, s 79)

Part 11 How the Register is changed

Introduction

11.1 The purpose of this brief part of the Report is not to make specific recommendations but rather to clarify, in relation to the new scheme, something that is not as clear as it should be in the current legislation, namely how title sheets can be changed. Since it deals only with changes, it does not cover first registration, where title sheets are created for the first time.

11.2 Entry to the Register of Sasines is only possible by means of registration. The position of the Land Register is different: as well as registration an entry can be made on the Register as a result of rectification,[1] by noting (of overriding interests),[2] and by the making up and maintenance of a title sheet (generally on first registration).[3] We do not recommend any major changes.

Registration

11.3 Registration happens when a deed is submitted to the Keeper in terms of an enactment that authorises its registration.[4] The Keeper enters the application in the Application Record, and thereafter changes the title sheet (or titles sheets) in question, makes any necessary changes to the Cadastral Map, and files the deed, together with any supporting documentation, in the Archive Record. All this happens at present, though the draft Bill gives much of it a legislative basis for the first time.[5] In the new scheme, decrees of reduction of voidable deeds, and decrees rectifying documents under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, would be handled by registration, not rectification.

11.4 In general, the act of registration alters the rights of those involved. For example, if Laura owns property and dispones to Mark, it is on registration that the real right of ownership passes from her to him. But occasionally an enactment may authorise a registration that does not change the rights of those involved. For example, a fixed-sum standard security is extinguished by full payment.[6] Registration of a discharge evidences that extinction, but the extinction has already happened before registration. (The registration of a discharge of an all-sums standard security is different.) Another example, though of a very different type, is a guardianship order under the Adults with Incapacity (Scotland) Act 2000.[7] This is registrable in the Land Register but in itself makes no change to any proprietary right.

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[1] 1979 Act, s 9.
[2] 1979 Act, s 6(4).
[3] 1979 Act, s 6(1).
[4] It may also *require* registration, and indeed that is generally the case.
[5] See further Parts 4 and 12.
[6] *Rankin v Arnot* 8 July 1680 Mor 572; *Cameron v Williamson* (1895) 22 R 293.
[7] Section 61.

Rectification

11.5 Rectification presupposes an inaccuracy to be rectified. The inaccuracy may be one of law or of fact. An example of the latter would be where the postcode was stated wrongly, or, though it was stated correctly it has subsequently been changed. Another is where the owner's name has changed. The inaccuracy may have existed from the time of registration, or it may be a supervening inaccuracy, as in the examples just given. An inaccuracy may be an actual mis-statement or it may be a wrongful silence (omission of something that should have been included but is not).

11.6 In certain cases the Keeper is required by Part 2 of the draft Bill to enter off-register rights, either as pertinents in the A Section of the benefited property's title sheet (for example the benefit of a prescriptive servitude) or as encumbrances in the D Section of the encumbered property's title sheet (the same example will serve).[8] In such a case as soon as the prescriptive servitude comes into existence, the Register becomes inaccurate because it does not yet show it. Thus when the Keeper does enter such a servitude, this happens by way of rectification. So what is under current law conceptualised as the "noting of overriding interests" (in the title sheet of the encumbered property) in the new scheme becomes rectification. Such rights, though they enter the Register, are not "registered".

11.7 Likewise, if either (a) a registered right or (b) a right that appears on the register otherwise than by registration is extinguished off-register, the register at once becomes inaccurate, and should be rectified. An example would be where a servitude is extinguished by negative prescription. It is worth noting that what has been said is true equally of servitudes that were created by registration and of servitudes that were created by prescription. In either case the off-register extinction by prescription creates an inaccuracy. A curious hybrid case is where a servitude is discharged by a deed by the dominant owner. In that case the discharge must be registered against the servient title.[9] Registration against the title of the dominant property is not necessary. But once registration (on the servient title sheet) has taken place, the dominant title sheet immediately becomes inaccurate and the Keeper therefore would, under the new scheme, come under an obligation to rectify it by deletion.[10]

11.8 Under current law, rectification of an actual inaccuracy changes no rights, because what happens is simply that the Register is changed to reflect the actual position. By contrast, the rectification of bijural inaccuracies does cause changes in the rights of the parties concerned.[11] In the new scheme the only inaccuracies will be actual inaccuracies and accordingly rectification will never change rights. Suppose that the Register has two adjacent plots of land and it places the boundary between them in the wrong place. The Keeper rectifies the register so as to show the true boundary. This does not subtract from the rights of one party or add to the rights of the other. Rectification brings the Register into line with what the ownership rights of the parties *already* are. It is only upon *registration* that the rights of parties can, in the new scheme, be altered.

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[8] See further Parts 7 and 10.
[9] Title Conditions (Scotland) Act 2003, s 78.
[10] This assumes that it appears in the dominant title sheet in the first place. In principle all modern servitudes should appear in both the dominant and the servient title sheets (Title Conditions (Scotland) Act 2003 Part 7) but older servitudes are not subject to this rule.
[11] For the two types of inaccuracy see Part 17 read with Part 13.

Miscellaneous

11.9 The Keeper has a variety of other powers to alter the Register, for example, adding information to a title sheet,[12] such as a house name, and dividing or combining title sheets.[13]

The registration/rectification overlap

11.10 Under current law there exists an overlap between registration and rectification, because section 2(4)(c) of the 1979 Act allows rectifications to enter the Register as registrations.[14] In our scheme this overlap disappears.[15] In general there should be no overlap between registration and rectification. However, some small overlap seems to be inevitable.[16] An example is a fixed-sum standard security where there has been full payment. Such a security is extinguished when full payment is made. The Conveyancing and Feudal Reform (Scotland) Act 1970 provides for the registration of a discharge, and that is in practice what happens. But such registration merely evidences something that has already happened. The Register became inaccurate when the debt was paid off. Hence the Register could be changed by rectification as well as by registration. There may be other examples, where an enactment provides that an event is fully effective though it happens off-register, but at the same time allows for the registration of that event.

[12] Draft Bill, s 6(5)(e).
[13] Draft Bill, s 4(8) and (9).
[14] On this overlap see eg DP 128, paras 3.20-3.23.
[15] See further Part 12.
[16] In DP 128, while we argued that overlap is undesirable, we accepted, at para 3.23, that "some marginal overlap would not lead to difficulties in practice."

Part 12 Registration of transactions

Introduction

12.1 This part deals with the day-to-day life of the Land Register in the new scheme: the registration of transactions. It does not deal with rectifications of the Register. Nor does it deal with first registration, ie the opening of a new title sheet for land that was previously unregistered. First registration is a one-off event, and the time will come when all land has been registered.

Meaning of "registration"

12.2 Once a plot of land is already in the Land Register, "registration" means the registration of a transaction, such as a disposition or a standard security. But "registration" also has another meaning, namely "first registration", when a plot of land enters the Land Register for the first time. It is in that sense that there is a distinction between "registered" and "unregistered" land. So there is (i) the registration of a transaction and (ii) the (first) registration of a plot of land. The registration of a plot happens once and once only: it is the extension of the Land Register to an area of land. But once a plot is registered, the registration of transactions will continue into the future without limit, so long as there are transactions to be registered. If Adam owns land, on a Sasine title, and sells to Eve, both kinds of registration take place. If Hamish owns land, on a Sasine title, and does not sell it, but decides that he wants his plot registered, that is a voluntary registration, and there is registration of the land, but not of a transaction, for there is no transaction to be registered. Hamish was the owner before the registration and he is the owner afterwards as well. His rights – and the rights of other parties (eg those holding subordinate real rights in the land, such as securities and servitudes) - are unchanged by the registration. So there can be (a) registration of a plot only, (b) registration of both plot and transaction, and (c) registration of a transaction only. The first two can happen only on a first registration. The latter is what happens after a plot has been registered. Eventually, once the coverage of the Land Register has been completed, only registrations of type (c) will happen.

12.3 Essentially the same distinction (registration of land, and registration of transactions) is present already in the 1979 Act, though rather disguised. Section 2(1) speaks of the registration of "interests", whilst subsection (3) speaks of the registration of a "creation" of a right and subsection (4) speaks of the registration of a "transfer … absorption … transaction or event". Section 2(1) is about what the draft Bill calls the registration of plots of land.

12.4 As was noted in Part 8, the 1979 Act makes it difficult for users to find out about transactions.[1] There is no requirement for the Keeper to retain copies of deeds and, if they are retained, there is no requirement that users should be able to see them.[2] Nor is there any requirement to make previous states of title sheets available to users. Thus whilst the 1979 Act conceives of transactions being registered, all that in fact appears on the Register

[1] As opposed to current rights. They can be seen on the face of the relevant title sheet.
[2] Except for the case in s 6(5) of the 1979 Act.

is the Cheshire cat's smile, not the Cheshire cat itself. The draft Bill provides for copy deeds to be retained and made available, and for past states of title sheets to be retained and made available. The whole cat is there. Whether the 1979 Act can be regarded as involving the registration of deeds is arguable,[3] but in the draft Bill it is clear that registration includes the registration of the relevant deeds.

12.5 Because the 1979 Act made no provision for the keeping of deeds, one cannot, strictly speaking, refer to a deed as having been registered in the Land Register. That is inconvenient, and in practice that expression continues to be used. Because the draft Bill directs the Keeper to retain copy deeds in the Archive Record, and because it defines the Archive Record as one of the four constituent parts of the Register, it will in future no longer be incorrect to speak of a deed registered in the Land Register.[4] But of course a deed in the Application Record is not, or at least is not yet, a registered deed.

Advance notices

12.6 In our scheme, registration can be preceded by an advance notice. This is a new development, and accordingly we have devoted a separate part of this Report to explaining it.[5]

What can be registered?

12.7 The 1979 Act contains a translation provision, or importation provision, so that references to recording in the Register of Sasines in the pre-1979 statute book are read as including registration in the Land Register, subject to certain exceptions.[6] The draft Bill does the same.[7] The innumerable pre-1979 enactments that provide for the recording of particular types of deed in the Register of Sasines are thus extended to the Land Register.

12.8 This having been done, nothing more was needed. Nevertheless section 2 of the 1979 Act provides for the registrability of (a) the transfer of a registered interest in land, (b) the creation of a subordinate real right over such an interest[8] and (c) "any other transaction or event which (whether by itself or in conjunction with registration) is capable under any enactment or rule of law of affecting the title to a registered interest in land but which is not a transaction or event creating or affecting an overriding interest".[9] As to (a) and (b) these merely duplicate the imported rules about registrability in the Register of Sasines. The third category, a residual category, goes further.

12.9 According to the *Registration of Title Practice Book*, the reason for the third, residual category, lies in the broad role conceived for registration. The residual category, it is said, "allows a much wider range of deeds and other documents to be registered in the Land Register than can be recorded in the Sasine Register ... Moreover, an event may be

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[3] For discussion see DP 128, paras 3.1-3.13.
[4] See draft Bill, s 2(c) and s 12(1)(a).
[5] Part 14.
[6] 1979 Act, s 29(2) and (3).
[7] Draft Bill, s 94. The technique is slightly different, in that those pre-1979 enactments which are not to be taken as referring to the Land Register are amended by the draft Bill so that that fact appears in the enactment itself. By contrast, the 1979 Act left those enactments unamended, merely listing them in Sch 3.
[8] 1979 Act, s 2(3). The term is not used by the provision, which applies to (i) a heritable security, (ii) a liferent, and (iii) an incorporeal heritable right. Puzzlingly, (iii) includes (i) and (ii). In (ii) liferent clearly means proper liferent.
[9] 1979 Act, s 2(4)(c).

registrable where there is no transaction or deed at all."[10] The examples given are the following:[11]

(i) deed of assumption and conveyance (of trustees);
(ii) minute of resignation of trustees;
(iii) minutes of meeting appointing new trustees where the statutory provisions as to the continuing infeftment of ex officio trustees do not apply;
(iv) certificate of incorporation on change of name of company;
(v) docket in terms of section 15(2) of the Succession (Scotland) Act 1964;
(vi) confirmation in favour of executors;
(vii) the operation of negative prescription; and
(viii) death of a co-proprietor holding under a survivorship destination.

Further examples are added in the annotations to section 2(4)(c) in the original version of the *Registration of Title Practice Book*:[12]

(ix) minute of waiver;
(x) deed of declaration of conditions;
(xi) notice of payment of improvement grant;
(xii) forestry dedication agreement; and
(xiii) tree preservation order.

12.10 The list, however, is puzzling. Of the items mentioned, three - (i), (v) and (vi) - are transfers and so are registrable, not under the residual category, but under the nominate category for transfer;[13] four - (ii), (iv), (vii) and (viii) - involve correction of an existing entry following a change which has already occurred and so are properly classified as rectification and not as registration; and five - (ix) to (xiii) - are already the subject of express provision in special legislation.[14] In other words, in respect of three of the examples the residual category is inapplicable, in respect of four it overlaps with rectification, and in respect of five it is unnecessary.

12.11 The enactment in section 2 of a complete statement of what is registrable, done in terms of broad categories, had the logical consequence that post-1979 legislation would never have to say, when introducing some new deed, that it was registrable. Nevertheless, the legislative practice since 1979 has been the same as it was before 1979, namely that where the intention is that a new type of deed is to be registrable, to state that expressly.[15]

12.12 The main practical difficulty caused by the section 2 list lies in the overlap between registration and rectification.[16] The 1979 Act has separate regimes for registration and

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[10] *Registration of Title Practice Book,* para 2.12.
[11] The following is a paraphrase rather than a quotation.
[12] *Registration of Title Practice Book* (1st edn, 1981), para C.15.
[13] That is to say, under s 2(4)(a) and not s 2(4)(c). It is true that none of these documents is registrable in the Register of Sasines, but this is due only to the absence of a proper description. They are registrable in the Land Register not because of s 2(4)(c) but because of the generous interpretation of s 4(2)(a) by which the title number can be marked on the document. See *Registration of Title Practice Book*, para 2.12.
[14] That leaves only (iii). The standard view is that the mere appointment of a trustee – even (outside the special statutory provisions) of a trustee ex officio – has no effect on the title to land. See Reid, *Property*, para 35; W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995), para 20-16. If that is correct, the example appears to be wrong, and s 2(4)(c) would not apply.
[15] Anyone familiar with modern legislation on property law can cite examples.
[16] For a fuller discussion, see DP 128, paras 3.20-3.23.

rectification: for example there are special rules preventing rectification in certain types of case, and it would be strange if those rules turned out to be meaningless because the same result could be attained by registration. This overlap played a major part in one of the most protracted litigations turning on the 1979 Act, *Short's Trustee v Keeper of the Registers of Scotland.*[17]

12.13 In our view, no generalised list of what is registrable, of the kind to be found in section 2 of the 1979 Act, is appropriate. It is unnecessary, for the question of what is registrable is in any case regulated by other enactments. And it is mischievous, as the previous paragraph noted.

12.14 In DP 128 we proposed that "registration should be competent only if authorised by some other enactment"[18] and respondents were in agreement.

12.15 We took the view, however, that the new legislation should add one broad category to those found in other enactments. We proposed that "where a subordinate real right in land is constituted by registration, there should be registrable any (a) transfer (b) variation or (c) extinction of that right which is effected by deed or other juridical act."[19] The idea was not merely that these transactions should be registrable as a matter of information, but that registration should be made a condition of their effectiveness.[20] Whilst that proposal received support from respondents, we have now reconsidered it. It could be regarded as involving too great an encroachment on areas of substantive law. If a registered right is transferred, varied or extinguished, and there exists no rule saying that that must be registered to take effect, we think that there must be a strong presumption against what is merely a land registration statute from meddling in the settled rule. If the law is said to be unsatisfactory it should be reviewed in the appropriate context. It is true that one could legislate to say that such transactions are registrable on an information-only basis. But that result is in any case virtually achieved by the draft Bill through another route. For if there is a valid off-register transfer, variation or extinction, the Register thereby becomes inaccurate, and under our scheme the Keeper would be obliged to rectify it to reflect the change. Thus the transfer, variation or extinction ends up on the Register. A drawback from the Keeper's standpoint is that the cost of rectifications cannot be recovered, but the volume of rectifications arising in this way is unlikely to be substantial.

12.16 Our present view is therefore that the draft Bill should not contain a general provision about subordinate real rights. There is, however, one exception. As a matter of practice it has always been accepted that free-standing ranking agreements in relation to standard securities are registrable. However, it is not entirely clear that the relevant statute, the Conveyancing and Feudal Reform (Scotland) Act 1970, authorises such registration.[21] We have come to the conclusion that the 1970 Act should be amended to ensure that it says what it is in practice assumed to say. The amendment does not say that registration is required or what the effects of registration or non-registration are. If there are uncertainties in this area they are uncertainties arising from the 1970 Act itself. The intention is the

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[17] 1994 SC 122 aff'd 1996 SC (HL) 14. This case is mentioned more than once in this Report. See in particular Part 20.
[18] DP 128, para 3.25 (proposal 6(1)).
[19] DP 128, para 3.25 (proposal 6(2)).
[20] DP 128, para 3.26.
[21] Section 13 is headed "Ranking of standard securities" but seems not to cover the issue. Section 16 deals with variations, and a ranking agreement might be considered a variation, but s 16(4) gives rise to difficulty.

minimalist one of ensuring that the current practice of registering free-standing ranking agreements can continue without being called into question.

12.17 Gathering these points together, we recommend:

47. (a) Registration should be competent if and only if authorised by an enactment.

(b) The Conveyancing and Feudal Reform (Scotland) Act 1970 should be amended to confirm that free-standing ranking agreements can be registered.

(Draft Bill, s 17(1)(a) and s 34)

Effect of registration

12.18 The effect of registration is set forth by section 3 of the 1979 Act. The results are unsatisfactory. We devote a separate part of this Report to the effect of registration.[22]

Ranking

12.19 Section 7 of the 1979 Act is heading "ranking". Its core is subsection (2) which says: "Titles to registered interests in land shall rank according to the date of registration of those interests."[23] Just as the 1979 Act's attempts to answer the "what is registrable?" and "what is the effect of registration?" questions seem to us to have been misguided, so too we think that its attempt to answer the "how do rights rank?" question was misguided, and for reasons which are, though not precisely the same, very similar.

12.20 Section 7(2) seeks to re-state the common law. But it conflates date of registration with date of creation of a real right – the machinery with the legal effect. Real rights can in some unusual cases be created later than the date of their registration.[24] Hence to provide that real rights rank by date of registration is to give an example and not a rule. The rule is that real rights rank by the dates of their creation as real rights. The provision could, of course, be amended to make it a more accurate statement of the common law.[25] But we do not so recommend. The provision is a pointless one. Section 7(1) contains an overriding provision, saying that subsection (2) is subject to all statutory rules and to all rules of common law. Subsection (2), even if amended, could never amount to more than a statement that says "prior real rights trump later ones, except when they don't" which is true but not of much use. However one might shape or reshape section 7, these issues are issues of general property law. They are out of place in legislation concerned only with the mechanics of land registration.

12.21 In DP 128 we proposed that section 7 should not be matched by any corresponding provision in the new legislation.[26] Most respondents agreed. The main exception was that the

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[22] Part 13.
[23] It is not clear to us whether the meaning would be changed if the opening two words ("titles to") were to be omitted. The provision may be about the ranking of titles or of interests or of both.
[24] This can be true of title conditions: Title Conditions (Scotland) Act 2003, s 4(1) (real burdens) and s 75 (servitudes).
[25] Though such a task might not be entirely straightforward.
[26] See DP 128, paras 5.51-5.58.

Court of Session Judges thought that a statement on the lines of section 7(2) could be useful in practice as a reminder to litigants and their legal representatives in cases involving property law. They pointed out to us that the Real Rights Act 1693 had played that useful role in cases involving properties in the Register of Sasines. We think that there is great force in that observation. Over the years the 1693 Act has had what might be called an educative and indeed symbolic function. We have hesitated as to whether to follow the advice of the judges. Ultimately, and not without hesitation, we have come to the conclusion that our original proposal should be retained, albeit fully recognising that the educative and symbolic effect of a provision on the lines of section 7 will thereby be lost. Accordingly we recommend:

48. The principle that, in a competition, real rights are preferred by order of creation, should be left to the general law.

12.22 For the same reasons, in DP 128 we proposed the repeal of the Real Rights Act 1693. On this we have had second thoughts. The 1979 Act disapplies the 1693 Act to the Land Register.[27] Though the 1693 Act applies to the Register of Sasines, that is a moribund register. In this project we are reluctant to touch the Register of Sasines except in so far as to do so cannot be reasonably avoided. Hence the draft Bill does not repeal the 1693 Act. It only amends it so as to disapply it to the Land Register.[28]

Date of receipt = date of application = date of registration

12.23 The draft Bill provides that the date an application is made is the date it is received, subject to the proviso that if it is received outwith business hours, it is deemed to be received the next business day.[29] Thus if an application is posted on Monday but does not arrive until Friday, that may be unfortunate for the applicant, but Friday is nevertheless the date of application. Thus the date of an application is not necessarily the date written on the application form: it may be later.

12.24 What has just been said concerns the date of *application*. A more important issue is the date of *registration*, assuming that the application proves successful. If the Keeper were able to make instantaneous decisions on every application, no distinction between date of application and date of registration could exist. But the reality is different. Whether because of pressure of business, or because the application is a complex one requiring careful consideration by expert staff members, there may in practice be considerable delay between the date of an application and the Keeper's decision to accept the application or reject it. The current law is that the date of registration draws back to the date of application.[30] If Cornelius grants a disposition of Greymains to Anastastia and she lodges it for registration on 1 June, and the Keeper registers it on 1 July, Anastastia is deemed to have been registered on 1 June. (Of course, that is true only if the accept/reject decision is favourable to her, as is normally the case. If her application is rejected, she never acquires title.) Thus there is a wait-and-see period. From 1 June to 30 June the question "does Anastastia today own Greymains?" cannot be answered. All that can be said, until June is over, is that the owner of Greymains is *either* Cornelius *or* Anastasia. But as from 1 July the answer can be given,

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[27] 1979 Act, sch 3.
[28] Section 97, sch 8, para 1.
[29] Section 19(1)-(3).
[30] 1979 Act, s 4(3).

and can *then* be given for any day of June. Thus if the Keeper does accept the application, from 1 July the question "who owned Greymains on (say) 15 June?" can be answered: "Anastasia owned Greymains".[31]

12.25 This period of indeterminacy of title is inconvenient, but provided that it is relatively short the inconvenience is limited. (Later we consider the problem of excessive delay.[32]) Third parties can ascertain the position from the Application Record. Thus a third party who searches the Register on 15 June will know that the owner on that day is either Cornelius or Anastasia.

12.26 In DP 128 we considered whether the law should continue to be that the date of registration is deemed to be the date of application, and concluded that it should.[33] It means that the date of Anastasia's acquisition of title does not depend on the mere accident of how long her application happens to take to process. Moreover, the current rule is well-established. Respondents agreed. Accordingly we recommend:

49. The date of registration should continue to be the date on which the application is received.

(Draft Bill, s 19(1)-(3) and s 23(1))

The hour of registration

12.27 So much for the date of registration. There is also the question of the time, during the day, when registration happens. Unlike date of registration, this is generally a matter of little importance. Nevertheless, it can occasionally cause difficulty. The current legislation cannot be regarded as satisfactory.

12.28 Under the 1979 Act registration is by day, and not by time of day, so that all deeds arriving on the same day are treated as registered at the same time.[34] Whether this is entirely fair or not is arguable. If one deed is received on Monday and a rival deed is received on Tuesday, the two rank by date, so that the Monday deed has priority: *prior tempore, potior jure*.[35] Yet if one deed is received at 9 am and the rival deed at 3 pm, they are treated as having been received simultaneously. That rule may be justified by administrative convenience, but few would dispute that in an ideal world "earlier" means earlier.

12.29 We understand that a change to the current rule would at present not be welcomed by the Keeper.[36] We accept that. But it may be that in future some improvement would be possible, such as shifting from day units to hour units, or even shifting all the way to real-

[31] If Anastastia were to die during June, that would be irrelevant, for an application should be judged by the state of the legal universe as at the date of the application. See paras 12.61-12.69 below.
[32] See paras 12.86-12.94 below.
[33] DP 128, para 4.3 (proposal 10).
[34] 1979 Act, ss 4(3) and 7(2).
[35] Of course there may be other factors at work, so that this simple solution does not always apply without qualification.
[36] Registration systems and processes have been developed on the basis of the current rule, and a change would involve significant re-engineering.

time priority, so that an application received at 9.42 am would have priority over one received at 9.43 am. In DP 128[37] we proposed:

> "Scottish Ministers should be able to provide by statutory instrument that the time of registration is, instead, the time at which the application is received."

12.30 Respondents agreed. We now see that the proposal was limited to real-time priority and thus would not permit a half-way house with shorter units, such as one hour.[38] So what we now recommend includes that possibility.[39]

12.31 So long as the day-unit system continues, there is the question of what time in that day that registration is deemed to happen. On this the current legislation is silent. The point seldom matters, but on occasion it does. In DP 128 we proposed that a time be fixed, and that that time should be the beginning of the day.[40] We continue to think that so long as the "day unit" rule continues, a particular time should be specified during that day. However, our choice of the beginning of the day now seems to us inappropriate. It would mean, for example, that ownership could pass before the disposition was delivered, or even signed. We now think that the time of registration should be later on during the registration day. But midnight would be unnecessarily late. In current practice, the Keeper closes the Application Record at 4pm on each business day. That now seems to us the obvious moment to choose. That would ensure that no deed could be deemed to have been registered even before it had reached the Keeper's hands, while at the same time making the time of registration as early as possible.

12.32 The Keeper's current practice is to regard any application submitted in the hours after the closing of the Application Record as being received the next business day. (The typical example is a digital application made through the ARTL system, but a paper application might be hand-delivered after 4 pm.) That practice, though it lacks a statutory foundation, makes sense and should be retained.[41] In some cases, it means a delay of more than one day. Suppose an ARTL application is received at 5 pm on 24 December. Christmas Day and Boxing Day are not business days, so under current practice the deed is considered as being received on 27 December. The draft Bill follows that approach, and would specify the time as receipt as being 4 pm on that day. The deed – assuming it to be valid - would be treated as registered then. The draft Bill contains a provision for rules to be made fixing the closing of the Application Record.[42]

12.33 The rule that applications received on the same day are treated as simultaneous in some cases is technically satisfactory but in other cases causes insoluble problems. If Constantine grants two standard securities, one to Dafydd and the other to Egeria, and they are lodged for registration on the same day, the rule creates no technical problems: the two securities rank equally.[43] Another case: John grants two real burdens to neighbours Kenneth

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[37] DP 128, para 5.69 (proposal 23(2)).
[38] It is noteworthy that the Register of Sasines used to work with one hour units. The change to day units was made by Sch 2 para 1 of the 1979 Act.
[39] For our recommendation see para 12.39 below.
[40] DP 128, para 5.69 (proposal 23(1)).
[41] It is doubtful whether it conforms to section 4(3) of the 1979 Act, so this would be another example of giving legislative blessing to current practice.
[42] Draft Bill, s 95(1)(f).
[43] Subject to any ranking agreement. We say that no *technical* problem exists, because of course at a *policy* level it may be desirable that the application received earlier in the day should have priority.

and Linda, both burdens preventing building on a certain part of John's land.[44] These are compatible. No question of ranking arises.

12.34 But in some types of case technical problems can arise. For example, if Hortense grants a disposition to Justinian and also a disposition to Lucia, both dispositions bearing to convey exactly the same property, and the two deeds are presented for registration on the same day, what happens? Does each disponee take a half share? What if one deed is a disposition and the other a standard security? Is the standard security valid over a half share? What about a disposition and a servitude? In DP 128 we proposed:[45]

> "Where –
>
> (a) two or more applications are received on the same day, and
>
> (b) having regard to the nature of the rights in question, one could not be given effect without excluding the other
>
> the Keeper should be bound to reject both applications, and any future application in respect of the same deeds."

12.35 This proved controversial. The Keeper and the Scottish Law Agents Society in particular argued forcefully against it. We have come to the conclusion that their criticisms were well-founded. The rule we proposed would have penalised two parties both of whom would typically have been in good faith. It would have given an unmerited benefit to the granter, who would now be unexpectedly able to deal with the property free of the deeds granted. It also could have given a windfall gain to third parties, such as creditors or the recipients of other deeds. We have accordingly come to the conclusion that another solution is necessary. The solution we recommend is that, in the absence of evidence to the contrary, the applications that are mutually incompatible should be presumed to have been received in the order they appear in the Application Record, and that accordingly whichever is the second should fall to be rejected. For example, Linda fraudulently grants a long lease to Mark and a long lease of the same property to Noreen, and both are lodged for registration on the same day. Mark's lease precedes Noreen's in the Application Record. They are mutually incompatible deeds. The Keeper should accept Mark's and reject Noreen's. But had the two deeds not been leases but standard securities, the Keeper would have accepted both, and the result would have been *pari passu* ranking (subject always to any ranking agreement).

12.36 The concept of incompatibility ("one could not be given effect without excluding the other") is not one that we attempt to define in the draft Bill. The compatibility of property law transactions is a matter of common law.[46]

12.37 Lastly on the subject of time of registration, in DP 128 we proposed:[47]

> "Where, on the same day, applications are received in respect of –

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[44] At common law this is a servitude *non aedificandi* but such rights have now been reclassified as real burdens. See the Title Conditions (Scotland) Act 2003, ss 79 and 80.
[45] DP 128, para 5.69 (proposal 23(3)).
[46] The subject is not free from difficulty and our discussion in Part 5 of DP 128 is not the last word.
[47] DP 128, para 5.69 (proposal 23(4)).

(a) the transfer of property, and

(b) a deed by the person in whose favour the transfer is being made

and the applications are accepted by the Keeper, the transfer should be deemed to be registered immediately before the registration in respect of the deed."

12.38 An example would be where Angharad dispones land to Amadeus, and the latter at the same time grants a standard security over the land, to finance the purchase. The disposition by Angharad and the standard security by Amadeus are lodged with the Keeper on the same day. The disposition is to be regarded as being received first and so registered first. The result is that the standard security is granted by someone who is already the owner, albeit by a mere *scintilla temporis*. That resolves the awkwardness of the current law, in which the disposition and standard security are regarded as simultaneous. Respondents supported this proposal.

12.39 Gathering the discussion together, we make the following recommendations, which are, with the qualifications mentioned above, based on proposal 23 in DP 128:

50. (1) Registration should be deemed to occur when the Application Record next closes. The closing of the Application Record should be subject to regulation by statutory instrument.

(2) But Scottish Ministers should be able by statutory instrument to make different provision.

(3) Where (a) two or more applications are received on the same day, and (b) having regard to the nature of the rights in question, one could not be given effect without excluding the other, they should be treated, absent evidence to the contrary, as having been received in the order in which they appear in the Application Record and should be accepted or rejected accordingly.

(4) Where, on the same day, applications are received in respect of (a) the transfer of property, and (b) a deed by the person in whose favour the transfer is being made, and the applications are accepted by the Keeper, the transfer should be deemed to be registered immediately before the registration in respect of the deed.

(Draft Bill, s 23(2) and (3), s 24(1)-(3) and (5), and s 95(1)(f))

12.40 It should be added that the draft Bill has a proviso making the simultaneity rules subject to any advance notice.[48] For example, if W were to grant an advance notice to X on 1 May and another to Y on 2 May, and the deeds in favour of X and Y were to be presented for registration at the same time, X's would be treated as having been presented first.

[48] Section 24(4).

Order in which applications are taken

12.41 If two applications are in the Application Record at the same time, relating to the same property, the Keeper takes them in turn, ie the earlier one first. Any other practice would make no sense. That rule is one of the many sound practices that have been developed by the Department of the Registers of Scotland which lack a statutory basis. The draft Bill gives this important rule a statutory foundation. We recommend:

> **51. Applications relating to a given property should be dealt with in the order of their receipt.**

(Draft Bill, s 18)

The criteria for acceptance: validity

12.42 At present, the word "accept" is sometimes in practice used to mean acceptance into the Application Record. In the 1979 Act it is used (admittedly not as clearly as might have been wished) to mean the decision to accept an application *for registration*.[49] In this sense an application that has been taken into the Application Record has not yet been accepted, and might never be accepted. The draft Bill, and this Report, use the term in this latter sense. In other words, the term is used in the draft Bill in the same sense as in the 1979 Act.

12.43 The accept/reject decision is the central one of the land registration process. The Reid Report said:[50]

> "For the purposes of registration, the requisites of a writ are (1) that it is adequately stamped; (2) that it bears a valid warrant of registration in statutory form; (3) that it relates to heritable subjects; and (4) that the subjects are identifiable. The Keeper of the Registers may decline to register a writ which fails to comply with one of these requirements. He has, however, no power to refuse registration for any other reason."

12.44 Thus invalidity was not seen as a ground for rejection. This approach is confirmed elsewhere in the Reid Report. For example, there is discussion of a situation where an application is made for the registration of an area of land, part of which has been registered to somebody else. "We recommend that … the Keeper should not have power, where such circumstances come to his notice, to refuse"[51] to register the applicant for the whole area, including the area already registered to the other person. The Henry Report is less forthright but it gives a list of grounds on which the Keeper may reject an application, and invalidity is not among them.[52]

12.45 The 1979 Act is not perfectly clear on this point – ie on whether the Keeper is to reject invalid deeds. In the first edition of the *Registration of Title Practice Book*, issued in 1981, an example was given where A dispones to B ten acres, but one of these acres is in

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[49] See, for example, s 4(3)(a).
[50] Reid Report, para 23.
[51] Reid Report, para 104.
[52] Henry Report, p 23.

fact owned by M. It is said that the Keeper should register B as owner of all ten acres, with exclusion of indemnity for the acre owned by M.[53]

12.46 Further support for this view comes from a work by Professor A J McDonald published in 1986:[54]

> "The Keeper will not refuse to register a title which patently competes or conflicts with an existing registered title, or with an existing Sasines title. No doubt he will enquire as to the reasons for the conflict; and he would undoubtedly, in most cases, exclude indemnity. But, notwithstanding the obvious competition of interests, he is obliged to accept an application for registration under the Act."

12.47 Such was the Keeper's initial practice. But the practice later changed so that if a deed is invalid, the decision will normally be to reject. The Keeper's difficulty has been in finding a basis for that in the 1979 Act. Section 4(1) says that "an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require."[55] That could be interpreted as meaning that the Keeper has a discretionary power, if feeling so inclined, to insist that the deed must actually be valid. Section 4(2) has certain cases where the Keeper *must* reject. That is firmer ground. One of the cases is where the application is "frivolous or vexatious".[56] What this phrase was intended to mean is unclear.[57] The only instance given in the first edition of the *Registration of Title Practice Book* was that "an application to register a private citizen's interest in Holyrood Palace would be viewed with some suspicion by the Keeper."[58] No doubt that is true. But it is hard to see why this is an example of a "frivolous or vexatious" application. It is not for the law of *land registration* to determine whether historical national assets, such as Holyrood House, should be sold off. If the deed is a valid deed then registration ought to go ahead, however distasteful that may be to those – no doubt the vast majority – who think that Holyrood Palace should stay in state ownership. If the deed is forged or otherwise invalid then the application should be rejected. But that is as true of a deed relating to 1 High Street Anyburgh as it is of a deed relating to Holyrood Palace.

12.48 Today the Keeper uses the "frivolous or vexatious" provision as the basis for rejecting applications based on invalid deeds, thus using it in a way that was almost certainly not contemplated when the Act was passed. In *David W S Mackay v Keeper of the Registers of Scotland*[59] an application for registration was made and rejected by the Keeper on the grounds of invalidity, citing the "frivolous or vexatious" provision. The applicant appealed. The Lands Tribunal, in upholding the Keeper's decision, said that the application could not be categorised as frivolous or vexatious, but did not specify any other provision of the 1979 Act as the basis for the Keeper's lawful rejection. The law is thus in the curious and unsatisfactory state in which it is unclear whether any statutory basis exists for the Keeper to reject applications on the basis that the deed is invalid.

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[53] *Registration of Title Practice Book* (1st edn, 1981), para H.3.06. This para runs over many unnumbered pages. The example can be found under the sub-head "Registration of Title" and is Case I there.
[54] A J McDonald, *Registration of Title Manual* (1986), para 10.11.
[55] 1979 Act, s 4(1).
[56] 1979 Act, s 4(2)(c).
[57] It derives from the Henry Report, p 23: an application is to be rejected "if it appears to the Keeper that the application is vexatious or is in form or substance inconsistent with the principles on which the Register is to be kept". The Henry Report does not explain further and no examples are given.
[58] *Registration of Title Practice Book* (1st edn, 1981), para C.32.
[59] 1 February 2006, Lands Tribunal, unreported.

12.49 In DP 128 we recommended that the legislation should say that applications based on valid deeds should be accepted, provided that the additional criteria, discussed in the next section, are satisfied.[60] Respondents agreed.

12.50 A little more difficult is the case where the application is invalid. In DP 128 we wrote: "If the deed is invalid, however, and none of the mandatory grounds for rejection applies, our proposals leave the position open. Here we are content that the Keeper should have a discretion."[61] In other words, in DP 128 we suggested three cases: (a) cases where the Keeper must accept, (2) cases where the Keeper must reject and (c) cases where the Keeper should have a discretion. Although most respondents agreed, our view of matters has subsequently changed slightly. We now think it inappropriate to leave the Keeper with a discretion. Apart from the fact that a discretion in such an important matter would be an open invitation to litigation, we do not think that there is really any need for a discretion. Good applications should be accepted and bad applications should be rejected. As for cases in which there is a "merely technical" defect in title, either the defect is fatal to the title or it is not. If it is not fatal then the application can be and should be accepted. If it is fatal the Keeper should reject, subject always to the *a non domino* rules about to be mentioned. After all, if a defect is fatal, that means that the property does not belong to the applicant, and if it does not belong to the applicant it does belong to someone else.

12.51 But as we recognised, there should be scope for the Keeper to accept for registration a certain class of invalid deeds. This is a topic of such importance that a separate part of this Report is devoted to it.[62] Here we merely note that the rules we recommend for *a non domino* cases are non-discretionary. In summary, what we recommend is that (a) valid deeds should be accepted,[63] (b) invalid deeds should be rejected, but, as an exception, certain *a non domino* deeds should be accepted. In all cases the decision should not involve discretion.

"Valid"

12.52 In DP 128 we said that a deed is valid if the result of registration would be to confer (or, as the case may be, vary or extinguish) the right in question.[64] That test now seems to us very slightly too narrow. Take the case of a fixed-sum standard security. The debtor repays the whole sum and asks for a discharge, which is duly granted. The (former) debtor applies to the Keeper for the registration of this discharge. Since a fixed-sum standard security is extinguished upon full payment, the registration of the discharge does not alter any right. Its function is to preserve and make public evidence of something that has already taken place off register.[65] Other examples could be given, for example involving notices in public law. Hence we have come to the conclusion that the class of deeds that should be regarded as being "valid" for the purpose of registration should include registrable deeds that are declaratory of an event that has already taken place off-register.

12.53 A deed that is voidable is a valid deed. What matters is the position *now* – at the time of the application - and not with the position as it may be in the future. A voidable deed is

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[60] DP 128, para 4.24 (proposal 12).
[61] DP 128, para 4.58
[62] See Part 16.
[63] Provided that the other criteria, discussed in the next section, are met.
[64] DP 128, paras 4.22 and 4.24 (proposal 12(2)).
[65] See eg *Rankin v Arnot* 8 July 1680 Mor 572 and *Cameron v Williamson* (1895) 22 R 293.

good unless or until it is reduced. If it is reduced, it then *becomes* invalid. Reduction may never happen, in which case the deed's validity is never affected. Since a voidable but unreduced deed is a valid deed, voidability is no reason to refuse or delay registration.[66] We mention this point merely for completeness. The law seems to us so clear that no legislative provision is necessary. The issue is also covered by the "state of the legal universe at application date" principle, discussed below.

12.54 Finally, partially valid deeds. This is an issue we did not discuss in the discussion papers. For example, there is a disposition of land and the Keeper notes that the granter's title to a small boundary area is bad. In our view the appropriate rule would be that the Keeper should register the grantee in respect of the area to which the granter had a good title. Another example would be where a standard security to a bank is submitted for registration seemingly granted by the two co-owners, X and Y. After the application is submitted but before acceptance, it emerges that Y's signature is a forgery. Unless the bank withdraws its application, the Keeper should accept it in relation to X's share. The result would be that X's *pro indiviso* share of the property would be encumbered by the security, but that Y's would not be.

12.55 We recommend:

52. (a) The Keeper should accept an application for registration to the extent that it appears that the deed on which the application is based is valid.

(b) The Keeper should reject an application for registration to the extent that it appears that the deed on which the application is based is invalid.

(c) A deed is valid if by the registration applied for a right would be acquired, varied or extinguished, or if the deed is declaratory of an acquisition, variation or extinction that has already happened off-register.

(d) These recommendations are subject to (a) the requirement that the application be in order and (b) the rules about prescriptive claimants.

(Draft Bill, s 20(1)-(5) and (8), s 21(1)-(3) and s 92(2))

The criteria for acceptance: other matters

12.56 In DP 128 we considered the other matters that an applicant must get right, as well as lodging a valid deed, in order for the Keeper to accept the application. Our proposals were accepted by respondents and the provisions of the draft Bill generally follow those proposals. We recommend:

[66] It is of course otherwise if the deed has already been reduced before the application for registration. Such a deed has ceased to be valid and so should be rejected by the Keeper.

53. (a) The deed must be correctly executed.[67]

(b) It must include the title number of each title sheet to which the application relates.

(c) If it deals with only part of a registered plot it must have an adequate plan or description, subject to qualifications for tenement properties and for pipe/cable servitudes.

(d) It must not be a souvenir plot.[68]

(e) It must not be a transfer prohibited by an enactment.[69]

(f) The application form must be in order.

(g) The registration fee must have been paid or the Keeper must be satisfied that it will be.

(h) It must enable the Keeper to comply with the requirements of Part 2 of the draft Bill.[70]

(Draft Bill, s 20(3)–(5) and (8))

Formalities of execution

12.57 Section 6 of the Requirements of Writing (Scotland) Act 1995 says that a deed cannot be recorded in the Register of Sasines, the Books of Council and Session or the Sheriff Court Books unless it is in probative form. The section does not mention the Land Register, this silence being in keeping with the lack of rules about when an application for registration in the Land Register should be accepted. In our view there should be clear rules about the acceptability of applications, and once that principle has been accepted it is evident that probativity should be required for the Land Register as well. The draft Bill amends the 1995 Act accordingly.[71]

Evidence: (i) the evidential burden

12.58 The 1979 Act does not say clearly that the onus rests on the applicant to satisfy the Keeper that the application should be accepted. But that is how the Act is interpreted in practice.[72] We agree with that approach, and the draft Bill requires that the applicant "satisfies" the Keeper that the application should be accepted.

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[67] See the next paragraph.
[68] Souvenir plots are considered in paras 12.82-12.85 below.
[69] One example is s 79 of the Finance Act 2003. For another see ss 37(5)(e) and 40(1) of the Land Reform (Scotland) Act 2003.
[70] For example as to quantum of *pro indiviso* share.
[71] Draft Bill, s 83(2), sch 5, para 21, inserting s 10A (Registration of document) into the 1995 Act.
[72] For example: "The onus is on… the submitting agent to ensure that he meets the Keeper's requirements…" *Registration of Title Practice Book*, para 5.18.

Evidence: (ii) the evidential standard

12.59 The 1979 Act says nothing about the evidential standard that the application should meet. Nor is there any express provision in the draft Bill. But our intention is that the evidential standard should be the balance of probabilities, and we think that is sufficiently implied. If the Keeper were to think that the balance-of-probability standard is met but that there nevertheless remains significant doubt, the correct approach would be to accept the application but to qualify the warranty of title.[73] By contrast, in the case of inaccuracies, we recommend a higher evidential standard: the Register should not be rectified merely because there is a balance of probabilities that an entry is wrong. The fact of the inaccuracy must be manifest.[74] That point leads into a qualification of the rule that the evidential standard for applications is the balance of probabilities. It occasionally happens that an application is made which, if accepted, would require the register to be rectified. In such a case the evidential standard has to be the higher one that is applicable for rectifications. Were it otherwise, the result would be that the Register would be rectified on a mere balance of probabilities, which is contrary to our policy in such matters.[75] We recommend:

54. (a) It should be for the applicant to satisfy the Keeper that the application ought to be accepted.

(b) The evidential standard should be one of balance of probabilities, except where the acceptance of the application would imply that the Register contains an inaccuracy, in which case the higher evidential standard applicable to rectifications should apply.

(Draft Bill, s 20(1))

The absence of a notarial system

12.60 In many countries conveyancing transactions must be done through a notary.[76] This tends to add to expense, but it also helps to protect the integrity of the system.[77] In Scotland no notary is required. Do-it-yourself conveyancing is lawful. Even though most conveyancing transactions are in fact handled by solicitors, and most solicitors are also notaries, a solicitor in a conveyancing transaction is not acting *qua* notary. And even where a solicitor is involved, deeds are often not signed before the solicitor,[78] so forgery is more of a risk here than in countries where conveyancing deeds must be signed before a notary. We do not suggest the introduction of a notarial system, but merely point out that its absence necessarily imposes on the Keeper rather heavier duties than exist in countries which do have a notarial system. In those countries the registry officials also have a duty of verification: the point is not so much as to the nature of the duty as to its intensity. We also think that the absence of a notarial system necessarily means that the Keeper must have the right to scrutinise different applications differently. If the first application of the day is submitted by a well-known firm of solicitors, a firm whose name is a byword of respectability,

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[73] Draft Bill, s 39(2)(b)(ii).
[74] Draft Bill, s 54(1). See further Part 18.
[75] This qualification is not reflected in any specific provision in the draft Bill. We consider that it is sufficiently implied.
[76] This was also once the position in Scotland, because (subject to certain qualifications)), every conveyancing transaction required a notarial instrument of sasine.
[77] This works better in some countries than others.
[78] Deeds are often posted out to the client for signature.

and is for an ordinary transfer on sale of an ordinary house, and the second application received that day is a do-it-yourself application for a conveyance, as a gift to the applicant, of Glasgow City Chambers, it is right that the Keeper should have the power to bestow less intense scrutiny on the former than the latter. The draft Bill has, however, no specific provisions on this subject. We think that the matter can be left, as the 1979 Act leaves it, to the Keeper's judgment.

The "state of the legal universe at application date" principle

12.61 The Keeper's decision should be made on the basis of the facts as they exist on the date of application – what might be called the state of the legal universe as at that date. That approach is inevitable given that the registration, when made, is deemed to have taken place at the date of application. So events that take place after the date of application should not be taken into account.[79] Whether this principle is implicit in the 1979 Act is arguable. As will be seen there is a provision in the 2006 Rules which seems inconsistent with it. The draft Bill makes the matter clear. The principle is one that sometimes benefits an applicant and sometimes does the opposite. A few examples may serve to illustrate the issues.

12.62 *Example (i)* Jack dispones to Jill. Jill submits her application on 1 May. She dies on 2 May, and the Keeper is informed. The Keeper at that time has not yet decided whether to accept or reject the application. That decision is made on 1 June. The decision must disregard the fact that the applicant is dead. Assuming that the deed is valid and the application is in order, the Keeper must register Jill as owner as at 1 May.

12.63 *Example (ii)* Jack Ltd dispones to Jill Ltd. Jill Ltd submits its application on 1 May. On 2 May Jack Ltd goes into insolvent liquidation and the liquidator immediately raises an action to have the disposition reduced as a gratuitous alienation. The action is intimated to the Keeper. The Keeper should proceed to register Jill Ltd, assuming that the disposition is valid and the application is in order. Even assuming that the disposition was in fact a gratuitous alienation, such an alienation is not void but only voidable. The deed is valid unless and until reduced.

12.64 *Example (iii)* The same. The Keeper is not in a position to make the accept/reject decision until 1 October. By that time the liquidator has been successful in the action and has extracted a decree of reduction. The Keeper must still go ahead and register Jill Ltd. As at the relevant date, 1 May, there was a valid disposition.[80]

12.65 *Example (iv)* Jack Ltd dispones to Jill Ltd. Jill Ltd submits its application on 1 May. On 2 May Jack Ltd goes into insolvent liquidation and the liquidator immediately raises an action to have the disposition reduced as having been signed by persons who had no authority to sign. The action is intimated to the Keeper. If what the liquidator says is true, the disposition is not voidable but void. Suppose that the Keeper makes the accept/reject decision on 1 October and by that time the liquidator holds an extract decree of reduction.

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[79] By this we mean new juridical acts, or new juridical facts, happening after the date of application. We do not mean changes in the law, ie new legislation.

[80] We recommend that in future decrees of reduction of voidable deeds should take effect upon registration – see Part 28. But even if the liquidator were on 30 September to lodge an application to register the extract decree of reduction, ie the day before the Keeper makes the decision whether to register Jill Ltd, the decision should still be affirmative. The final result would be that Jill Ltd would have acquired ownership on 1 May and lost ownership on 30 September.

That will establish the nullity of the deed as at 1 May. The Keeper must reject the application. But suppose that the Keeper makes the decision on 1 June at which time the action of reduction is still in court. The Keeper must decide on a balance of probabilities whether the deed is valid or not. (But of course that is what must be done in the case of *every* application.)[81] In such a case the Keeper may wish to delay the accept/reject decision pending the outcome of the litigation. But litigations can be slow. Disputes about property are sometimes disposed of swiftly, but can sometimes last as many as ten years, or even longer.[82] In our view the Keeper should normally not wait.

12.66 In any case where the Keeper is satisfied on a standard of balance of probabilities, but nevertheless significant doubt remains, the solution is to accept but to exclude warranty.[83] In the new scheme it would be easier for the Keeper to go down that route in future than it is at present. At present the Keeper's Midas touch is such that if a title is registered, that title becomes an actual title, albeit that it may be rectifiable.[84] In the example of the deed allegedly signed by the wrong persons, under current law if the Keeper registers the deed the result will be that Jill Ltd will acquire ownership – even if it turns out that the deed was void. It is not surprising, therefore, that in practice the Keeper may hesitate to act. In such cases the Keeper must often wish that the Midas touch did not exist. The draft Bill removes the Midas touch. Under the draft Bill, if the deed were void then Jill Ltd would not, on being registered, acquire ownership, and the act of registration accordingly would not expropriate the liquidator.[85]

12.67 The 2006 Rules provide:[86]

> "… Where an application for registration is not accepted by the Keeper on the grounds that it does not comply with section 4(1) or (2)(a) or (d) of the Act, but has not been rejected by the Keeper or withdrawn by the applicant, the Keeper may return any document relating to the application to the applicant for amendment in order that the application may be made so to comply."

12.68 This would cease to be the case under our scheme. Since the change might be regarded as an inconvenience by conveyancers, explanation is needed. The rule deals with the case of a document that is so defective that the application is unacceptable. An extreme example would be a disposition by Adam to Eve that has not been signed, and the Keeper returns it for signing. The original application date – say 1 May – is retained.[87] We understand that in such a case the Keeper would be more likely to reject the application altogether, but nevertheless it seems that the legislation would allow this example to happen. The effect is that Eve is registered as becoming owner on 1 May on the basis of a disposition signed by Adam *after the transfer has already happened as a result of that deed*. That result, in which the cause follows, rather than precedes, the effect, seems to us unacceptable. The draft Bill is inconsistent with such a possibility and so would prevent any equivalent of rule 12 being re-enacted.

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[81] See para 12.59 above.
[82] Many modern examples could be given, such as *Bain v Bain* [2006] CSOH 142 and [2006] CSOH 198; and *Sexton and Allan v Keeper of the Registers* 17 August 2006, Lands Tribunal, unreported. See Kenneth G C Reid and George L Gretton, *Conveyancing 2006* (2007), p 39.
[83] In the terminology of the 1979 Act, exclude indemnity.
[84] See Part 13.
[85] Or, to speak with greater precision, the company. Normally there is no vesting in a liquidator.
[86] Rule 12. Rule 11 made similar provision in the 1980 Rules.
[87] Cf *Registration of Title Practice Book*, para 5.17.

12.69 We recommend:

> **55. The Keeper's decision on registration should be taken on the basis of the state of the legal universe as at the date of the application.**
>
> (Draft Bill, s 20(1))

12.70 For the avoidance of doubt, this principle would not preclude the Keeper from taking account of new *information* coming to notice between the date of the application and the date of the decision, in so far as that information was about the state of the legal universe *at the date of application*.

The "one shot" principle

12.71 The 2006 Rules provide:[88]

> "Where the applicant, having been requested by the Keeper to supply documents and evidence in accordance with section 4(1) of the Act or to amend a document in accordance with rule 12, fails to do so, the Keeper after the expiry of such reasonable period of time as may be fixed by the Keeper and intimated to the applicant, being not less than 60 days, may either complete registration, subject to exclusion of indemnity, or reject the application."

12.72 In DP 128 we discussed the issue and concluded:[89]

> "An application for registration should continue to be made in a manner to be prescribed and the Keeper should continue to have power to requisition such further evidence as is available and as he may reasonably require."

12.73 Although this was supported by respondents, we now think that what was proposed in the second part of the sentence can be improved on. Earlier it was said that the burden should rest on the applicant. If the applicant fails to satisfy the Keeper we now think that the application simply falls to be rejected. The burden should not be on the Keeper to make requisitions. It is not for the Keeper to do the job that conveyancers are supposed to do. The requisitions system represents a waste of public resources. It leads to delays in registration and it encumbers the Application Record – from which third parties may suffer because of the unnecessarily prolonged uncertainty as to title. If the case involves some point of difficulty, a solicitor can always ask, before submitting the application, for the Keeper's view, and this practice of making pre-application enquiries in difficult or unusual cases is a common one, permitting any concerns to be overcome, not only before the submission of the application, but even before settlement of the transaction. However in the great majority of applications it is perfectly obvious what the Keeper will need to see. In our view if an application is defective it should be rejected. We call this the "one shot" rule, but of course there could always be a second application. If that were to happen, and the new application were to be successful, the registration date would be later. In most cases that would harm no one. Occasionally it would mean that some third party would take priority, but if that is what happened then that would be the right result. A third party should not be prejudiced by the fact that a defective application has been accepted with effect from a date on which *it ought by law not to have been accepted*. The Keeper should not prejudice third parties in that

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[88] Rule 13. Rule 12 made similar provision in the 1980 Rules.
[89] DP 128, para 4.18 (proposal 11).

manner. The Keeper's role is not that of a fairy godmother, and, as we have just noted, to play the fairy godmother to one party is to play the wicked witch to another. It is up to applicants to submit valid deeds and meet any other requirements of law, such as filling in the application form correctly. It should be considered that do-it-yourself conveyancing, though lawful, is rare.[90] The reality is that conveyancing in this country is done by those who are professionally qualified, who are remunerated for what they do, and who are insured against liability for negligence. Some conveyancers are more diligent than others and the current system is virtually a subsidy to the latter at the expense of the former. Moreover the current system could even be said to encourage sloppiness.

12.74 If an application is rejected, the sooner this is done the better. In part that is simply that the applicant will wish to know the position. But if a second – and it is to be hoped valid – application is made, the sooner that can be done the better. This is true under the existing system: the sooner a rejection is intimated to the applicant, the better. But in our new scheme rejections may become commoner[91] and so the need for promptness on the Keeper's part would become more important. The question of delays in making the accept/reject decision is considered further below.[92]

12.75 The one-shot rule would bind the applicant but not the Keeper: that means that the applicant would have no right to have a second shot (except by making a second application), but the Keeper would nevertheless have the power to allow the applicant to correct the application. But (see above) the correction could only be evidential as to the state of affairs as at the date of application. The Keeper would not have the power (to take one example) to accept a disposition that had been amended in any way since the date of the application. Thus rule 12's provision that "the Keeper may return any document relating to the application to the applicant for amendment" would no longer apply.[93]

12.76 Whilst the one-shot rule is the default rule that we recommend, it could be argued that in some types of case, notably first registrations, a different and less strict rule should prevail. We express no concluded view on this, but the draft Bill does allow rules to be made that would allow relaxation for first registrations.

12.77 We recommend:

56. (a) The Keeper should have the power to reject defective applications without first making requisitions. Hence the current "requisition" procedure should cease.

(b) But it should be possible for Rules to allow derogations from the general principle stated in (a).

(Draft Bill, s 20(6) and (7), s 59(7) and (8), and s 60(5) and (6))

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[90] And rarer than in England & Wales.
[91] At least, that may be so for a transitional period, before conveyancers become used to the new scheme. Once it is generally appreciated that bad applications will be rejected, it can be expected that bad applications will become rarer, with resulting efficiency gains to the system.
[92] See paras 12.86-12.94 below.
[93] See para 12.67 above.

Death and dissolution

12.78 Although the effect of death (of natural persons) and dissolution (of juristic persons) is not an issue we consulted on, it has become apparent that there exists some uncertainty as to their effect, if they happen in the course of a conveyancing transaction. In such matters the existence of clear rules is as important as their content, and it seemed to us sensible to take the opportunity to lay down clear rules. The rules we recommend are probably implied by the "state of the legal universe" principle discussed above, but nevertheless we think it would be useful for them to be set out separately.

12.79 The first case is where the grantee of a deed dies before the application for registration is made. Or, in the case of a juristic person, the entity is dissolved before the application is made. We think that the current law is clear: a person who is dead, or a juristic person that has been dissolved, cannot apply for registration. Nevertheless, given the uncertainty that seems to exist in practice, we think it worth spelling the point out. The deceased person's executor can carry out the registration, using the delivered but unregistered deed as a midcouple, and registering a notice of title.[94] (In that case both the notice of title and the disposition enter the Archive Record.) If the grantee dies *after* the application has been made, that fact is irrelevant. Assuming that the deed is valid and the application in order, the registration, once made, is deemed to have been made on the day of the application, when the granter was still alive (or the juristic person was not yet dissolved).

12.80 The current law on the second point - the effect of the death or dissolution of the *granter* in the interval between delivery and registration - is not quite so clear.[95] The general view appears to be that the granter's death makes no difference.[96] We think that the law should be declared to be what it is generally thought to be.

12.81 Accordingly we recommend the enactment of two rules:

> **57. (1) An application is incompetent if the applicant has died, or has been dissolved, before the date of the application.**
>
> **(2) An application is not incompetent merely because the granter of the deed has died, or has been dissolved, after the delivery of the deed.**
>
> (Draft Bill, s 28)

Souvenir plots

12.82 There are businesses that offer for sale small plots of land in remoter areas of Scotland, usually accompanied by the promise that buyers will be "entitled" to call themselves "lairds". Plot sizes vary but may be one square metre or even less. Usually buyers are assured that they will acquire ownership of the plot, though in the advertisements

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[94] For notices of title see Part 15.

[95] A full discussion would occupy much space. Among the sources requiring mention would be three late 17th century statutes, 1690 c 26 (APS c 56), 1693 c 35 (APS c 74) and 1696 c 39 (APS c 41), and Stair's discussion (perhaps not wholly convincing) of the second of these in the Appendix to the second edition of his *Institutions* (1693).

[96] See eg Reid, *Property*, para 648.

we have seen there is no explanation of how that could happen given the terms of the 1979 Act, discussed in the next paragraph. The websites sometimes show the type of deed that a buyer will receive. The style used is generally English or American.

12.83 Section 4(2)(b) of the 1979 Act forbids the Keeper to accept souvenir plots for registration in the Land Register. Even if the land were unregistered, a conveyance of a souvenir plot could not be recorded in the Register of Sasines, because it would be a conveyance for value. Accordingly it is difficult to see how customers could acquire ownership of souvenir plots. We have seen it suggested that the non-registrability of souvenir plots means that ownership in them passes by simple contract. That is not so.

12.84 In DP 128 we noted that the corresponding provision in England and Wales had been repealed by the Land Registration Act 2002, and we proposed that the same should happen in Scotland.[97] This proved controversial. Some respondents agreed, while others, including the Keeper and the Scottish Law Agents Society, disagreed. We have come to the conclusion that a sufficient case for repeal has not been made out. The definition of "souvenir plot" (see below) is admittedly rather vague, but the rule seems to have worked in practice over the years.

12.85 We also argued that, if, contrary to what we were then suggesting, the rule were to remain in force, certain minor changes to the definition of "souvenir plot" should be made.[98] These changes are implemented in the draft Bill. We have added another change as well. It is possible that a souvenir plot *already* exists as a separate plot. Thus suppose that in 1978 a souvenir plot was sold and the disposition recorded in the Register of Sasines. If the owner were now to wish to dispone it to someone else, the case for allowing the transfer seems strong, and indeed it might be argued that to refuse registration in such a case would be to infringe Article 1 of Protocol 1 to the European Convention on Human Rights. So in one respect we recommend a loosening of the rule, by exempting from it souvenir plots that already exist as separate plots. We would add, however, that registration requires mapping. If a souvenir plot cannot be mapped within the Cadastral Map then the Keeper will be unable to register it, even if it falls within the exemption we are proposing. We recommend:

58. The rule against the registration of souvenir plots should continue, but with a revised definition of "souvenir plot". However, souvenir plots that already exist as legal title units should not be subject to the rule.

(Draft Bill, s 20(3)(d) and (8), s 59(4)(e) and (9), and s 60(3)(d) and (7))

Delays in registration

12.86 Delays in registration have been of particular concern to conveyancers. Delays of months have been common. In some cases the delays have been for several years. We considered the issue in DP 130,[99] and noted that efforts were being made to improve the situation. Since that time further progress has been made.[100] Moreover, since delays have

[97] DP 128, para 4.34.
[98] DP 128, para 4.36.
[99] DP 130, paras 6.17-6.19.
[100] The Keeper's targets for 2009-10 include processing 80% of dealing-of-whole applications within 30 working days. The Corporate Plan 2009-2014 discloses an aim, by March 2011, to have no pending applications of any

been disproportionately related to first registrations, as the number of first registrations declines, so that source of delay will continue to decline. Nevertheless all is not satisfactory.

12.87 Delay is a source of inconvenience to all concerned. It is hardly acceptable that if Jack, some years after having bought a property, sells to Jill and has to tell her that the registration of his own purchase has still not been completed. The sheer inconvenience of extended delay involves the law firms concerned, their clients and the Department of the Registers itself, especially where transaction piles up on transaction, each incapable of being finalised by the Department until the previous one in the queue has been finalised. And extra costs tend to be generated, both to the clients (the conveyancing fee may be higher as a result) and to the Department of the Registers (in terms of staff time). Moreover, if an application is to be rejected, it is vital that those concerned should know that as soon as possible.

12.88 But delay is not only a problem for those immediately concerned – the parties, their solicitors and the Department of the Registers. There is another side to the problem. It follows from the fact that a decision to accept an application draws back to the date of the application. Suppose that Bill grants a disposition to Ben and Ben applies for registration on 1 May. On 15 May, by which time the Keeper has as yet made no decision, a third party consults the Register. The title sheet shows Bill as owner. The Application Record discloses Ben's application. The third party thus knows that the owner of the property on 15 May is either Bill or Ben: Bill if the application is rejected and Ben if it is accepted. The third party might be HM Revenue and Customs. It might be a ordinary creditor of Bill's (or Ben's) who is considering the possibility of diligence. It might be a trustee in sequestration of either. It might be a public authority needing to know who the owner is for the purposes of, say, environmental law. It might be a local amenity association concerned about the use of the property. It might be a court considering some matter to which the title to the property is relevant. It might be a tenant who has been paying rent to a factor but who now wishes to discover who the landlord is. To all of these the only answer that can safely be given to the question "does Bill or Ben own this property?" is "impossible to say: wait and see".

12.89 The shorter the wait-and-see period is, the less likely is it to cause real problems to third parties. As the period grows longer, the less acceptable it becomes. Consider title number ANG11868. We mention this case not because it is unique but because it has featured in more than one litigation.[101] An application for registration was submitted to the Keeper on 12 February 2001 by a company called 3052775 Nova Scotia Ltd. At the time of completing this Report at the end of 2009 no decision had yet been made by the Keeper: the application was still pending. There may be good reasons for the delay in terms of the current system,[102] but it nevertheless seems an unacceptable state of affairs. In this case it may be that the fact of the various litigations has contributed to the continuing non-decision. We do not know. But the effect is that when the courts – and others - have to consider this land, they must do so without being able to know the most basic of legal facts about it: who owns it?

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type over 6 months old. See page 13 footnote 3 of the Corporate Plan, which is available online at http://www.ros.gov.uk/public/publications/business_plan.html.

[101] One of these cases reached the House of Lords: *3052775 Nova Scotia Ltd v Henderson* 2006 SC (HL) 85.

[102] Given the "Midas touch", the view taken by the Keeper is that a decision cannot be reached on the registration of a deed that is subject to an as-yet unproved allegation of defectiveness, on the ground that to do so would embroil the Keeper in that dispute.

12.90 In *Morrison & Mutch Property Investments (No 2) Ltd v Taylor Shepherd Homes Ltd*[103] a company owned some property and disponed part of it to the pursuer in the action. The application for registration was submitted in May 2007. The pursuer raised an action about a boundary wall. One line of defence was that the pursuer was not the owner, because by the time the case was heard, in July 2009, the disposition was still in the Application Record. This defence was upheld. We will not discuss the merits of the decision, but merely point out the awkwardness of the situation. If the application for registration is eventually accepted, the pursuer will turn out to have been the owner of the property in question since 2007. In that case the decision will in one sense turn out to have been incorrect. Conversely, if the Keeper eventually rejects the application, the decision will turn out to have been correct. Cases of this type cannot be satisfactorily decided unless the Scottish Court Service can supply reliable time machines to the judiciary. The problem is bound to exist if the rule is that registration, when it takes place, operates retrospectively to the date of application. But the shorter that period the smaller the problem.

12.91 The reforms we put forward in this Report should make it easier for the Keeper to speed up registrations. The "one shot" rule should help. So should the clarification of the rules about the criteria for the acceptability of an application. Again, our recommendations about the Keeper's warranty of title should help because it would be made clear that the warranty would not cover matters that were essentially personal to the applicant. The abolition of the Keeper's Midas touch should also help especially in difficult cases, for the Keeper would be able to carry out registration without prejudicing a third party right. In other words, in the new scheme the Keeper would be able to register an application "for what it may be worth" – something that cannot be done under existing law.

12.92 Notwithstanding the points so far made, we consider that the issue of delay should still be addressed, and we have two recommendations. The first lacks teeth, but may have a certain value. For the Register of Sasines there is a statutory rule that the Keeper must act "with all due despatch".[104] No remedies are specified in the event of breach, but the provision seems a good one and we see no reason why the "with all due dispatch" rule should not also apply to the Land Register.

12.93 We also think that it should be possible for Scottish Ministers to prescribe a maximum length of time that an application could be in the Application Record without a decision being made. An application should not be allowed to stay in the Application Record for year after year after year.[105] What that maximum should be is not for us: it would be a matter to be determined only after consultation with the Keeper, taking into account the staff resources available. Moreover, different periods might be appropriate for different cases. It may be, for example, that a longer maximum would be appropriate for first registrations than for other cases. The period, or periods, should not be very short because the Keeper needs elbow room. For example, if there were to be a sudden increase in turnover – reflecting changed economic conditions – it would not be possible to hire and train new staff overnight. The result would inevitably be that for a time the registration queue would be longer than it was when turnover was low. It would be unfortunate if the Keeper had to run to the Scottish

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[103] 14 July 2009, Forfar Sheriff Court (Sheriff Veal), unreported. We are grateful to Professor Robert Rennie for drawing this case to our attention.

[104] Titles to Land Consolidation (Scotland) Act 1868, s 142. We spell "despatch" as in the Act itself.

[105] We do not suggest that it is common for this to happen. It is not. But the fact that it happens at all shows that there is a problem that needs a solution.

Ministers to ask for immediate secondary legislation to allow longer maximum turnaround periods. So the periods should be long enough to handle intake upsurges.

12.94 We recommend:

59. (a) The Keeper should be under a duty to handle applications without unreasonable delay.

(b) The Scottish Ministers should have the power to set a maximum period for which an application can be in the Application Record, with power to fix different periods for different types of case.

(Draft Bill, s 26 and s 95(1)(k))

Three special cases

12.95 In current practice there are three types of case where an application may be deliberately put into standover, ie kept in the Application Record without a decision being made. These are (a) where an Ordnance Survey update is awaited, (b) where there is pending litigation and (c) where the applicant has asked that the application be put in standover. We doubt whether any of these has any solid basis under current law. The new scheme would not recognise them. We consider each in turn.

12.96 The Ordnance Survey is engaged in the continuous updating of its database and the Keeper buys such updates on a rolling basis. The Keeper will sometimes put applications into standover until an update for that area has been received. This tends to happen in new housing developments: the Keeper wishes to see the Ordnance Survey plan of the new development before completing the registrations. In our view this type of delay is not justified. Assuming that the disposition granted by the developer is accompanied by a plan of sufficient quality – and if it is not, the application falls to be rejected anyway[106] - the plan is the measure of what is being transferred. If it turns out that there is a discrepancy between what is transferred and what has been built on the ground, that indeed is a problem. But it is not the Keeper's problem. Such discrepancies will inevitably happen from time to time, and the ultimate cause is negligence. The solution is not for the Keeper to try to cover up that negligence by registering the applicant for an area that is not what was conveyed. To do so is contrary to law. The basis of a registration is what the deed says. If the Keeper does what the law requires the result is not an inaccuracy in the Register. Indeed, to the contrary, it is the Keeper's current practice that leads to inaccuracies in the Register, for if title sheets fail to reflect the deeds on which they are based, the title sheets are to that extent inaccurate. All this is a matter for Keeper's practice: the legislation strikes us as already clear in this respect and we see no way in which it could be improved. In making these remarks we do not wish to sound too critical of the Department of the Registers. The practice, though wrong, is understandable.[107]

12.97 The fact that there is pending litigation is not in itself a ground for delaying the accept/reject decision. If the action is for the reduction of an allegedly voidable deed, that is

[106] 1979 Act, s 4(2)(a). The rule is the same in the draft Bill: see s 20(3)(c)(ii).
[107] This issue is also mentioned in Part 5.

not relevant, as was pointed out above.[108] Even if it is true that the deed is voidable, such a deed is valid unless and until actually reduced. If the action seeks to establish that a deed is void, the position is more difficult. If the deed really is void, then registration should be refused. But of course the mere fact that an action has been raised is not determinative of the outcome of that action. The action may succeed or it may fail. What should happen under current law is not wholly clear. But under the new scheme the Keeper would have to make a decision on the information available and should do so, in cases of uncertainty, on the basis of a balance of probabilities.[109] Whether the decision is to accept or reject, the decision should be made within the turnaround deadline. In such a case the decision would no doubt often be to accept but with exclusion of warranty. If that happens, two points are worth making. The first is that the new scheme allows warranty upgrades, and so if the action fails the Keeper would be free to upgrade the grantee's warranty. The second is that the abolition of the Midas touch[110] would make it possible for registration to be done on a "for what it is worth" basis.

12.98 Lastly, there is the case – rare but not unknown – where the applicant asks the Keeper to delay the accept/reject decision. We see no reason why the Keeper should accede to such a request. An applicant is free to withdraw an application and resubmit it later. That is true under current law and it would continue to be true under the new scheme.

12.99 If these three types of case are no longer allowed to hold up registration applications that will in itself help to reduce overall turnaround times.

Wrongful rejection

12.100 Cases of wrongful rejection[111] are very rare in practice. If one does happen, and if loss results, then in our view the general law imposes on the Keeper an obligation to make good that loss. The draft Bill has no specific provision on this, because we do not think it appropriate for this statute to attempt to codify, just for the Land Register, a more general principle of public law.

Duties owed to the Keeper

12.101 The accuracy of the Land Register depends in part on the care with which the Keeper's staff carry out their duties. But they in turn depend on others, and in particular on those involved in a conveyancing transaction, whether as party or as conveyancer. What is the effect of negligence, or, worse, fraud? Sections 12(3)(n) and 13(4) of the 1979 Act provide that the Keeper may plead a claimant's fraud or carelessness as a defence to an indemnity claim. But these are merely negative provisions: shields not swords. They impose no positive liability in favour of the Keeper. And yet the Keeper will often suffer loss where the Register has become inaccurate, because of the duties to compensate.

12.102 We think it likely that a duty of care exists under general law. For example, an identity thief, Adam, impersonates the owner of property, Boris, and borrows money from C Bank, the money being advanced against a security that Adam grants over the property, forging Boris's signature. C Bank is unaware of the fraud. Later the facts come to light. The Register

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[108] Para 12.63.
[109] See 12.59 above.
[110] See Part 13.
[111] Which would include failure to determine an application within the maximum permitted period.

is rectified by the deletion of the security from the title sheet.[112] The Keeper pays compensation to C Bank. We think it likely that the Keeper has a direct claim against Adam to recoup the loss. Since in practice it is likely that Adam has vanished, or, if traceable, cannot be made to pay, the question arises whether the law firm that acted for Adam might be liable. Of course, there could be no liability without fault. But suppose that the law firm had failed to make the standard checks on the identity of the person who claimed to be Boris? It seems likely that the law firm owes a duty of care to the Keeper, and so if it was negligent the Keeper has in principle a direct claim against it. But we are not aware of any decision of the courts on the question of a duty of care in such cases, and we doubt whether the law can be regarded as certain.[113] As we have said, the 1979 Act is silent. As a matter of general policy, we think that a duty of care ought to exist. If the law firm that acted for the fraudster caused the Keeper's loss by its negligence, it seems to us right that the law firm should be liable. We have illustrated the issue by an example involving fraud by the granter and negligence by the granter's solicitor, but there could also be cases where negligence (or even fraud) on the part of the grantee or the grantee's law firm might lead to loss on the Keeper's part. We think that the current position (in which there is probably a duty of care under general law, but the point has not been expressly decided, and the legislation is silent) is unsatisfactory, and that it should be confirmed by legislation that a duty of care is owed to the Keeper.

12.103 We stress that the duty would be no more than a duty to take reasonable care. What counts as reasonable would depend on the circumstances, and what counts as meeting that standard could change over time. As far as conveyancers are concerned, the standard itself would not be that of the *best* practice. It would not be appropriate, and we do not suggest, that law firms involved in conveyancing transactions should be in any sense absolute guarantors for their clients or their client's titles.[114] The provision that we are suggesting would not, in our view, raise the standard of what is required of a conveyancer. If something goes wrong and the Register becomes inaccurate as a result, the law firm would not be liable unless it had fallen below the standard of reasonable care. As for the parties themselves, they too would owe a duty of care to the Keeper, but they are not themselves conveyancers and so it would be unusual for them to breach the duty of care, except in the case of actual dishonesty

12.104 The provision that we recommend is that of a duty to take reasonable care that the Keeper does not make the Register *inadvertently* inaccurate. If the Keeper makes the Register inaccurate, but does so *advertently*, ie with eyes open, the duty of care has not been breached.[115] In such a case there would also be a lack of causality: any breach of the duty of care would not have led to the inaccuracy. Nevertheless we think it better to make the point an express one, rather than having to rely on a causality argument.

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[112] Both under current law and under the new scheme the Register is rectifiable in this type of case.
[113] Though see *McCoach v Keeper of the Registers of Scotland*, 19 December 2008, Lands Tribunal, discussed in Kenneth G C Reid and George L Gretton, *Conveyancing 2008* (2009), pp 121-133.
[114] Far from taking that approach, elsewhere in this Report (Part 14) we recommend changes which should have a substantial effect on the use of letters of obligation. In general we think that the conveyancing system should not expect law firms to accept liability on behalf of conveyancing clients, except where there has been fault (*culpa*) on the part of the firm.
[115] An example is where there is an *a non domino* disposition. The application makes the nature of the deed clear. If the Keeper decides to register the deed, the Register is now inaccurate, but the Keeper has acted with open eyes. For *a non domino* cases see Part 16.

12.105 Suppose that the applicant, or the applicant's solicitors, were to learn something detrimental to the title after settling the transaction but before lodging the application with the Keeper?[116] That might, in a sense, be bad luck, but a deliberate failure to disclose to the Keeper detrimental information, known to the applicant at the time of application, would be a breach of duty. That view of matters was supported by most respondents.[117] It might also happen that *after* an application has been submitted to the Keeper, and while the Keeper is still considering it, the applicant, or the applicant's solicitors, learn some fact that bears on the decision the Keeper is about to make. The situation is a rare one but it could happen and if it did the question would arise as to whether the new evidence should be disclosed to the Keeper. In DP 125 we suggested that the relevant date should be the date of application.[118] Most respondents agreed. The question is difficult and a strong case could be made for extending the duty to the date when the Keeper makes the registration decision. One argument in the opposite direction would be to compare paper transactions with ARTL transactions. Someone who applies for registration through the ARTL system will normally be registered almost instantly. An identical transaction effected with a paper deed, sent in by Royal Mail or by courier service in the traditional way, is likely to take some weeks to be processed. It could be argued that the temporal reach of the duty of care should be the same in the two cases. With some hesitation we have concluded, by a majority, that the temporal reach of the statutory duty of care should end when the application is submitted.[119] The draft Bill so provides. But we would note that there might still be an argument that any underlying common law duty of care might have a longer temporal reach than the statutory duty: on this we express no view.

12.106 A parallel issue arises in respect of the granter and the granter's solicitors: how long does the duty last? Though in this case too there is the possibility of differing views, on balance we think that the statutory duty of care should end when the deed is delivered. If, for example, the granter's solicitors learn of some negative fact after settlement, we do not think that they should be placed by the Bill under a statutory duty to disclose it to the grantee's solicitors or direct to the Keeper.[120]

12.107 We recommend:

60. The Keeper should be owed a duty of care by the granter and grantee and their solicitors. The duty of the granter and the granter's solicitors should end at settlement and that of the grantee and the grantee's solicitors should end on application.

(Draft Bill, s 27)

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[116] A case that occasionally happens: a deed by X and Y is delivered to Z. Immediately afterwards Z, or Z's solicitors, are contacted by Y to say that her or his signature of the deed is a forgery by X. At this stage Z has paid the price (or in a secured transaction advanced the loan) but has not yet lodged the deed with the Keeper.

[117] The issue was discussed in DP 128, Part 7. For respondents' views see DP 128, para 7.43.

[118] DP 125, para 7.20 (proposal 13(b)).

[119] Mr Layden favoured the continuation of the duty. He considered that there is a general public interest in the accuracy of the Register, and that this is the rationale for the imposition of the duty. If the granter or the applicant, or their respective representatives, become aware of something detrimental to the application, at any point before the Keeper actually makes a decision on the application, they should continue to be under a duty to inform the Keeper.

[120] But see footnote 119 above.

12.108 The duty of care has a close connection with the Keeper's subrogation rights under section 13(2) of the 1979 Act. We consider the issue of the Keeper's rights to recover from third parties when compensation has been paid in Part 24.

12.109 Finally, the statutory duty of care that we recommend is without prejudice to any other basis of liability to the Keeper. There could be cases where false information is given to the Keeper but which are not covered by the new statutory duty of care. In such cases the ordinary common law would apply.[121]

Application forms

12.110 The 1979 Act provides for the style of application forms to be prescribed.[122] The draft Bill does the same.[123] The forms currently prescribed by the Rules have a long set of questions[124]. Here are some examples:

> "Is the transaction to which the deed gives effect one to which section 322A of the Companies Act 1985 applies? YES/NO"
>
> "Could the subjects be a matrimonial home within the meaning of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or a family home within the meaning of the Civil Partnership Act 2004? YES/NO"
>
> "Where any party to the dealing is a company registered under the Companies Acts
>
> Has a receiver or liquidator been appointed?"

12.111 These questions are designed to force disclosure of any problems relevant to the Keeper's decision. But we are inclined to think that the system does not work well. There can be no assurance that the questions will cover every danger. As with the use of any forms, there is the risk that people will say "since you asked numerous questions but did not ask about such-and-such I assumed you weren't interested in such-and-such."[125] For example, the question about liquidation is limited to companies registered under the Companies Acts, ie statutes passed by the Westminster Parliament. It thus fails to cover most of the world's registered companies – and dealings with heritable property in Scotland by non-UK companies[126] are common. Moreover, since the application forms are prescribed by statutory instrument, it takes time for the forms to catch up with changes in the law. For example, taking the first question quoted above, section 322A of the Companies Act 1985 has been repealed and replaced by section 41 of the Companies Act 2006, but at the time of the writing of this Report the application forms had not yet been changed. Finally, the forms may

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[121] Again Mr Layden dissented. He considered that, in relation to the duty to the Keeper, it should be made clear whether it extends to the time at which the Keeper actually makes the decision on registration. If the policy is that it should not so extend, then it should be provided that there is no duty. The Parliament should make the policy decision, and state it in the legislation.

[122] 1979 Act, s 27(1)(d).

[123] Draft Bill, s 95(1)(d).

[124] Although the questions were updated somewhat in the 2006 Rules, they remain largely as in the original 1980 Rules.

[125] Though the application forms do have a sweeping-up question at the end.

[126] Including companies registered in jurisdictions such as Guernsey, Jersey, Man and the Republic of Ireland.

not work in a practical sense, because there seems to be a certain tendency to tick the "right" boxes automatically.[127]

12.112 If there is, as we have recommended above, an express duty of care, the questions in application forms should, we think, be dispensed with. If acceptance of the application would mean that the Register might become inaccurate, the ingiving solicitor should either not submit the application at all or should submit it with a disclosure of whatever the problem is. That would discharge the solicitor's duty of care. If the Keeper then went ahead and registered, and the result was inaccuracy, the solicitor would have no liability. In this Report we make no specific recommendation as to the contents of application forms. That is a matter for Rules to be made in future. But we think that our recommendation about duty of care should make it possible for application forms to be radically simplified.

Notification of the Keeper's decision

12.113 The 2006 Rules provide:[128]

> "(1) A decision of the Keeper on any matter affecting registration shall be notified by the Keeper to any person whose interest appears from the register to be affected by that decision.
>
> (2) Notification shall not be made under paragraph (1) where notification would have the effect of informing the person entitled to the interest in land of the existence of a recorded deed or a registration upon which possession adverse to his interest may be founded in terms of section 1 of the Prescription and Limitation (Scotland) Act 1973.
>
> (3) A notification under paragraph (1) shall be made in such form as the Keeper shall think fit and shall be sufficiently made if sent by post to the person's last address shown on the register."

12.114 In practice the Keeper normally notifies the applicant by issuing a certificate of title,[129] which is in any case an obligation under section 5 of the 1979 Act.[130] Cases where the Keeper makes a notification by virtue of rule 18 alone seem unusual in practice and it may be that rule 18 is in practice not fully complied with. For example, if Jack dispones to Jill and the Keeper registers the disposition, Jack would seem to be a "person whose interest appears from the register to be affected by that decision". Yet the practice of the Keeper is not to notify granters when registration takes place. Again, suppose that a property is subject to two standard securities, the first held by Superior Bank plc and the second by Inferior Bank plc. A discharge of the first is granted and is registered. The result is an improvement of rank: Inferior's security is now first-ranked. So Inferior would seem to be a "person whose interest appears from the register to be affected by that decision". But it is not the Keeper's practice to notify Inferior.

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[127] It is said, we do not know with what truth, that some firms use breakfastfood cartons in which holes have been cut with a razor so that when the card is laid over an application form the clerical assistant just pokes a pen though the holes and thus creates the "right" answers. If the application forms undergo graphic redesign, consternation results.

[128] Rule 18. Rule 21 made similar provision in the 1980 Rules.

[129] Rejections are of course also intimated.

[130] In practice the certificate is usually sent not to the applicant but to the applicant's solicitor. This is sufficient compliance, for the solicitor is the applicant's agent.

12.115 In the new scheme there will no longer be certificates of title.[131] An applicant may ask for an extract, but that is optional. Hence we think a rule is needed for notifying the applicant that registration has taken place. We also think that the granter of the deed should be notified, for two reasons. One is that the acceptance of the application changes the position of the granter. Jack loses ownership. The other is that such notification operates as an anti-fraud device. It is not a perfect one but in some types of fraud it may have some value. We envisage that in the typical case notification will be by email.

12.116 The Keeper should, we think, have a general power to notify anyone else. And since notification is an area of law where over time, and in the light of changing circumstances, views may alter, we think that there should be a power to modify the rules by means of secondary legislation.

12.117 As mentioned in practice notification is now usually made to the solicitor, as agent, and that will no doubt continue to be the position in future. The draft Bill does not expressly provide for this: we consider that the issue is covered by the general law.

12.118 We recommend:

61. (a) The Keeper's decision to accept or reject an application should be notified to the applicant and also to the granter of the deed being registered, and may be notified to anyone else.

(b) The rules about notification should be capable of modification by secondary legislation.

(Section 25, and s 95(1)(g) and (h))

Keeper's warranty (indemnity)

12.119 The Keeper guarantees titles, or at least most titles. That is true under current law and will be equally true in our new scheme. In current law, the issue is conceptualised as an aspect of the law of inaccuracy. In our new scheme, warranty is something that the Keeper grants on registration. Hence in a sense it belongs to this part of the Report. But the topic is inseparable from the subject of inaccuracy and the guarantee of title, and so is treated separately, in Part 22.

[131] See Part 8.

Part 13 Effect of registration

Introduction

13.1 Section 3 of the 1979 Act defines the effect of registration. The definition gives rise to two sets of problems. The first concerns what happens if the deed in question – the disposition or standard security or whatever – was in fact invalid. Most of this part of the Report is concerned with that question. The other problem has nothing to do with the issue of the validity of the deed, and in fact comes into focus most strongly where the deed is fully valid. This second problem is that section 3 has a one-size fits all definition, and the reality is that one size does not fit all. Our discussion of this second problem is briefer. Both problems result in a single recommendation which will, we think, resolve both problems.

The 1979 Act: title flows from the Register

13.2 The 1979 Act has a provision about the effect of registration. Section 3(1) says:

> "Registration shall have the effect of-
>
> (a) vesting in the person registered as entitled to the registered interest in land a real right in and to the interest and in and to any right, pertinent or servitude, express or implied, forming part of the interest, subject only to the effect of any matter entered in the title sheet of that interest under section 6 of this Act so far as adverse to the interest or that person's entitlement to it and to any overriding interest whether noted under that section or not;
>
> (b) making any registered right or obligation relating to the registered interest in land a real right or obligation;
>
> (c) affecting any registered real right or obligation relating to the registered interest in land,
>
> insofar as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or, as the case may be, of being affected as a real right."

13.3 This means, among other things, that registration creates, transfers, varies or extinguishes a real right, regardless of whether the deed on which the registration was based was valid or invalid. For example, if Adam is the owner of land and Brian impersonates him and dispones to Carla, and Carla is registered, then Carla acquires ownership. Title flows from the Register. It is sometimes supposed that if Carla is registered subject to an exclusion of indemnity then the position is otherwise. That is not so. Section 3 of the 1979 Act applies regardless of whether indemnity is or is not excluded. It is also sometimes supposed that good faith is needed. That is not so. The result would be the same even if Carla were Brian's accomplice. Rights in land are what the Register says they are

and the Register says what the Keeper decides it should say. The Keeper giveth and the Keeper taketh away.[1]

13.4 In such cases the result is an *inaccuracy* in the Register, and sometimes inaccuracies can be rectified. The topics of inaccuracy and rectification are dealt with elsewhere:[2] here we consider simply the immediate consequences of registration in property law terms.

13.5 In the Register of Sasines the general rule was that recording was a necessary condition for obtaining a real right, but not a sufficient condition. In other words, whilst "if no recording then no real right" was true, "if recording, then real right" was not true. Thus the recording of a deed that was void would give no real right. That pattern merely reflected the general approach of general property law. That general approach says that some act or event (delivery, for example) is needed to acquire a real right, but that this fact or event, though necessary, is not sufficient. But in the Land Register, registration is not only a necessary condition for obtaining a real right, but is a sufficient one as well. In the Land Register there are no void titles. That is, at least, the general position. There are some minor exceptions, which are mentioned in the next section.

13.6 The rule that title flows from the Register is not an essential aspect of a title registration system. Some other systems of title registration have it while others do not.[3] Thus in some systems Carla would not be the owner and accordingly the Register could be rectified.

Inaccuracies: actual and bijural

13.7 In the scheme of the 1979 Act, inaccuracy is a conceptually difficult area. This is a result of the current positive system with its "bijuralism".[4] There are two types of inaccuracy under the 1979 Act, which we called in the discussion papers "actual" inaccuracy and "bijural" inaccuracy.[5] An inaccuracy is *actual* if what the Register says is simply *untrue*. An inaccuracy is *bijural* if what the Register says is false in terms of general law, but true for the purposes of the Act. In the example above, involving Adam, Brian and Carla, under the general principles of property law Adam remains proprietor, whereas registration law (section 3(1)(a) of the 1979 Act) makes Carla proprietor. In so doing, the Register is bijurally inaccurate. Carla is owner (because the Register says that she is), but in showing her as owner the Register is in error. Where there is a bijural inaccuracy, what the Register says *is* true but *should not* be true.

13.8 There can also be *actual* inaccuracies, where what the Register says *is not true*. For example, if land were registered in the name of a company that did not exist, the registration would be void. Again, if a company that owns land is dissolved, the Register becomes

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[1] That s 3 has this effect does not seem to have been expressly decided in any reported case. For relevant *dicta* see *Short's Trustee v Keeper of the Registers of Scotland* 1994 SC 122 at 130C *per* Lord Coulsfield and 138E and 141A *per* Lord President Hope; *Stevenson-Hamilton's Exrs v McStay* 1999 SLT 1175 at 1177D *per* Lord Kingarth; *M R S Hamilton v Keeper of the Registers of Scotland* 2000 SC 271 at 277E *per* Lord President Rodger. But that this is its meaning has gradually become a matter of universal consensus.

[2] Parts 17 and 18.

[3] For example it exists in the land registration system of England and Wales but not in that of Germany. For the former see the Land Registration Act 2002, s 58(1).

[4] For bijuralism see Part 17.

[5] See in particular DP 125. This distinction is not drawn expressly in the 1979 Act itself.

actually inaccurate in showing that company as the owner:[6] that is a case where (unlike the previous example or the next example) the Register starts off as accurate but becomes actually inaccurate as a result of an off-register event. (This is a case of supervening inaccuracy.) Another example is where unidentifiable land is registered. Whilst there have been numerous cases in which a court has held the Register to be bijurally inaccurate, there is only one reported case where a court has held there to be an actual inaccuracy, ie that a registered title was void, and that case involved unidentifiable land.[7] Another example of an actual inaccuracy would be where the registered right is of a type that cannot be a real right.[8]

Terminology

13.9 In the discussion papers, we called this the "positive" system of registration, and we called the alternative system, in which registration is a necessary but not a sufficient condition, the "negative" system.[9] Thus in a negative system Carla would not be the owner. Subsequently we have found that this terminology has sometimes been misunderstood, and moreover we have found that the positive connotations of the word "positive" and the negative connotations of the word "negative" have tended to mislead. But we have not been able to arrive at a better pair of terms. Elsewhere in this Report, for the positive system we tend to use a term which we used in the discussion papers as an image: the Keeper's Midas touch.[10] Everything that the Keeper touches turns to valid.

A question of technique

13.10 The fact that everything that the Keeper touches turns to valid is not quite as unsatisfactory as it seems at first sight, because inaccuracies can (sometimes) be put right, ie rectified. As we noted in DP 125, "the difference between a positive and a negative system is a difference of technique and not of policy… [It is] a choice of convenience, to be determined by criteria such as simplicity, efficiency, and coherence."[11] The most important issues in practice are about (a) rectifiability of mistakes and (b) compensation, and whatever rules are regarded as desirable on either of those two topics can be made to work both with and without the Midas touch. Still, the "Midas or not" question does require an answer.

The problems of the Midas touch[12]

13.11 The main advantage of the Midas touch is that the person shown as owner (or holder of some other right) is indeed the owner – even if, on a wider view of things, the Register is inaccurate and vulnerable to rectification. The principle is to some extent intuitively attractive. If issues of ownership (and other rights) can be determined merely by a glance at the Register, that is a gain both for facility of transfer and for legal certainty; and the person holding a land certificate has the reassurance of a good title.

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[6] In practice if a company is going to be dissolved steps are normally taken to dispose of its assets in advance, but occasionally a mistake is made and a company is dissolved still holding assets.
[7] *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2.
[8] This is the effect of the proviso towards the end of s 3(1) of the 1979 Act: "insofar as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or, as the case may be, of being affected as a real right."
[9] See DP 125 *passim*.
[10] DP 125, para 5.34.
[11] DP 125, para 5.7.
[12] This section draws heavily on Part 5 of DP 125.

13.12 This advantage is, however, rather slight. In a negative title registration system, cases where the Register says "X is owner" whereas in fact Y is owner are rare. This is because someone who acts in good faith in reliance on the Register normally acquires a good title anyway. (In this Report, we call this the "integrity principle" or "re-alignment principle".) Furthermore, even under a positive system such as that operated by the 1979 Act, the Register is not always right, for, as we have mentioned, there can be actual inaccuracies even in a positive system.

13.13 As previously mentioned, a positive system is of its nature bijural, that is to say that it makes simultaneous use of two different systems of property law. In the first instance transactions under the 1979 Act are governed by the special rules of land registration and in particular by the rule that registration, of its own force, confers title. But in order to determine the status of the resulting entry on the Register the sequence must be re-run by reference to the ordinary rules of property law. If the result is the same, the Register is accurate and the title of the acquirer unchallengeable. If the result is different, the Register is inaccurate and the title of the acquirer is challengeable and may prove to be rectifiable. By contrast, a negative system works with ordinary property law alone.

13.14 Bijuralism is complex and awkward to use, and, sometimes, hard to understand and to explain. By operating with two different systems of law, moreover, it leaves uncertain the relationship between them. In Australia, for example, this has led to a substantial, and growing, case law, and there is every sign that the same will be true of the 1979 Act.

13.15 A simple example illustrates some of the problems. Suppose that Adam is the registered proprietor of land. Carla is then registered as proprietor in Adam's place on the basis of a disposition on which (unknown to Carla) Adam's signature was forged by Brian. Sometime later Carla dispones the land to Dora, who is registered as owner in place of Carla. At one level the position is straightforward. As the registered proprietor, Dora is the owner of the land. That is the result according to the rules of land registration. Nonetheless a number of difficulties arise. The first is the status of Dora's title. In showing Dora as owner, is the Register accurate or inaccurate? There could be two answers to this question. The first would be that accuracy or inaccuracy of the Register has to be judged by general property law, and according to general property law Dora's title would be void. On this view, the Register, in showing Dora as owner, is inaccurate and hence in principle vulnerable to rectification. The second answer would be that even though general property law would not have awarded ownership to Carla, the fact remains that Carla was owner and that Dora took title from Carla. According to ordinary property law a person acquiring from the owner becomes owner in turn. It follows, on this second view, that the Register is now accurate.

13.16 Which approach is correct? After nearly thirty years of registration of title the answer has not been conclusively settled. The first would apply property law to the entire chain of events from the time the defect (the forgery) first appeared. The second would confine its application to the most recent transaction on the basis that ordinary property law is itself affected by the rules of land registration. At the time of the discussion papers we regarded the question as being an open one.[13] We have since come to the conclusion that in this case the Register remains inaccurate, for the following reason. If Adam applies for the rectification of the Register then he will be unsuccessful (assuming that Dora is in possession).[14] If he is

[13] DP 125, para 5.19.
[14] 1979 Act, s 9(3).

not entitled to indemnity from the Keeper[15] that would, we suggest, be an absurd result, and would subvert the policies of the Act. But if he *is* entitled to indemnity, that would imply that the Register must be inaccurate, for without inaccuracy the possibility of indemnity could not arise. Put another way, the Keeper cannot be liable in indemnity for declining to rectify the Register in cases where the Register is accurate. The conclusion cannot, we think, be avoided that the Register remains inaccurate even after subsequent transactions.[16] It is worth noting, however, that this conclusion can itself generate further oddities. For example, suppose that Justin is the registered owner of Blackmains but that the Register is inaccurate and the person who should be the registered owner is Marcus. Justin, who is in possession, grants a standard security to Bank X. The Register cannot be rectified against Justin. But since the standard security is an inaccuracy (for the reason just given) and since Bank X is not a "proprietor in possession", the Register is rectifiable against Bank X. The strange result seems to be that Justin keeps the property but the standard security that he has granted disappears.

13.17 The case could be simplified, by omitting the transfer to Dora. Other problems would remain. Take the position of Adam. Adam ceased to be owner on the registration of Carla's title. But the Register is inaccurate and can, in principle, be rectified at the instance of Adam. What then is the nature of Adam's right? If it is a personal right, who is the obligant? The Keeper? Carla? If it is a real right, what is its nature? Is it transferable and, if so, by what means? Can it be attached by creditors? Is it affected by Carla's bankruptcy? These questions are not only unanswered but, in the absence of a robust conceptual model, unanswerable short of litigation. The position of Adam may be the same, or different, if the potential inaccuracy at issue is not ownership but a subordinate real right. The issue of a successor's right to indemnity in respect of a lease has been litigated.[17]

13.18 In practice Carla is likely to be in possession, in which case rectification will normally be impossible.[18] Instead Adam will have a claim for indemnity from the Keeper. It is unclear, however, whether payment of indemnity changes the underlying position. Does the Register not remain inaccurate, as before? Or if it does not, by what legal mechanism has Carla's title ceased to be voidable? Does the fact that Adam was paid indemnity prevent an application for rectification in the event that Carla comes to lose possession? And if rectification is granted, must the indemnity be repaid?

13.19 In time such questions could be answered, whether by the accumulation of case law or by legislation. But it is likely that they would be replaced by others like them, for bijuralism is an improvisation in search of principles.

13.20 Elsewhere in this Report we recommend that Adam can recover his property until such time as it has been transferred by Carla, and even then only if certain conditions are satisfied.[19] That is because the Brian/Carla transaction involved "transactional error" (the Register was correct in showing Adam as owner, and the problem was an invalid deed) whereas in the Carla/Dora transaction, the problem was the Register's inaccuracy, and we consider that a grantee such as Dora should not be prejudiced by an inaccuracy in the

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[15] 1979 Act, s 12(1)(b).
[16] And *Dougbar Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513 can be cited in support of this view.
[17] *M R S Hamilton Ltd v Keeper of the Registers of Scotland (No 1)* 1999 SLT 829.
[18] 1979 Act, s 9(3).
[19] Parts 17, 18 and 23.

Register. In short, we recommend what is called by comparative lawyers a "deferred indefeasibility" model. Under that model, and assuming possession, a *bona fide* acquirer is affected only by transactional error, that is, by mistakes in his or her own transaction. Take the case of a forged disposition. If the model were operated as a positive system, the acquirer would become owner immediately on registration, and despite the forgery. In a negative system ownership would remain with the "true" owner. In both cases the Register would show the acquirer as owner, and in both the Register would be inaccurate and vulnerable to rectification. In both cases the ultimate fate of the property would depend on whether the "true" owner sought rectification before either the acquirer sold on or positive prescription had run, at which point the defect would be washed out of the title.[20] In both cases if the "true" owner sought rectification in time, the property would be restored. On this example the difference between a positive and negative system lies merely in the status of the property during what may be called a transitional period which begins with the registration of the forged disposition and ends with the curing of the defect or the restoration of the property. Does the property, during this period, belong to the acquirer (the result of a positive system) or to the "true" owner (the result of a negative)? Or to put the same question in a different way, is the title of the acquirer voidable or void? The maximum duration of the transitional period is ten years, being the length of time required for prescription to run. Often it will be shorter.

13.21 If there are good reasons for leaving ownership with the "true" owner during the transitional period, there are no countervailing reasons for conferring ownership on the acquirer. On the contrary, for as long as the acquirer's position is at risk it seems reasonable that ownership should be withheld. Assuming good faith, the acquirer would remain entitled to the fruits of the period of possession.[21] A third party taking from the acquirer would receive a good title, rather as under section 25(1) of the Sale of Goods Act 1979. And if the acquirer possessed for ten years, ownership would be conferred by prescription.[22] But to confer ownership at once, without possession, seems too great a reward for the mere act of registration.

13.22 Like this Report, the Reid Report had recourse to the idea of "true" ownership.[23] The phrase is revealing. The "true" owner is the person who ought to be owner, and who would be owner but for the positive system of land registration. A negative system would allow the inverted commas to be removed.

13.23 Turning everything to gold sometimes has unwelcome consequences. An example is the *a non domino* conveyance. The Keeper is aware of the defect of title but chooses to register in order to allow the prescription to start to run.[24] Indemnity, naturally, is excluded. Nonetheless the grantee becomes owner, not at the end of ten years' possession, *but at once*; and there is a matching and immediate expropriation of the property of the "true" owner. The result is unsatisfactory but also unavoidable, for prescription requires registration and registration, under a positive system, involves the conferral of ownership.

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[20] Under the current law, positive prescription does not normally run on a registered title. We recommend that it should: see Part 35.
[21] Reid, *Property*, para 171.
[22] Under current law positive prescription runs only on unindemnified titles. But in the new scheme positive prescription would run on all titles (assuming possession). See Part 35.
[23] Reid Report, para 115.
[24] For the current practice see *Registration of Title Practice Book*, para 6.4. For *a non domino* conveyances in the future, see Part 16.

13.24 A similar difficulty can exist for parts and pertinents. On first registration it is normal practice for such pertinents as are mentioned in the Sasine writs to be listed in the A Section (Property Section) of the title sheet. Sometimes, however, these "rights" are of doubtful validity. The mention of a servitude, for example, might have been a result of wishful thinking and not of a grant by the servient proprietor or of possession for the twenty years of prescription. Or rights in common might contradict other rights in common held on other titles, or might otherwise have no proper basis for existence. Under the Sasine system such "rights" were null. On registration in the Land Register they are infused with life, with unpredictable results. A negative system takes rights as they are. A positive system must choose between not registering at all and the indiscriminate conferral of validity.

13.25 Overlapping titles are particularly troublesome. In *Safeway Stores plc v Tesco Stores plc*[25] Safeway was registered as the owner of certain land. Shortly afterwards Tesco was registered as the owner of adjacent land, but including a strip which was also in the Safeway title. The Keeper, aware of the overlap, excluded indemnity on the Tesco title, narrating that the disputed strip "was registered under Title Number REN56654 [the Safeway title] on 8 October 1997 and ranks prior to the Disposition to Tesco Stores Limited registered 14 May 1998 on which the entitlement of the said Tesco Stores Limited was founded". The intention seems to have been (i) to confirm for the time being the title of Safeway to the strip but (ii) by including the same area within Tesco's title, to allow for the possibility of prescriptive acquisition. And under a negative system that indeed would have been the result (assuming that the Safeway title was good in the first place). A positive system, however, operates in a different way. Safeway, of course, became owner on 8 October 1997, for registration must always lead to ownership. But for the same reason Tesco became owner on 14 May 1998. The result requires close attention. Property law is unititular, meaning that for any one thing at any one time there can only be one right of ownership. That is a doctrine of the civil law, relative title on the English model not being accepted in Scotland.[26] There can be no question therefore of a ranking of ownership, in the same way as there is, for example, a ranking of heritable securities.[27] If Safeway and Tesco were both registered as owner, it was not the case that one was the first-ranking owner and the other the second. Instead one was owner and the other was not owner. When Tesco's title was registered on 14 May 1998, Tesco became owner, for that is the unavoidable effect of a positive system; and if Tesco became owner, it follows that, simultaneously, Safeway was divested of ownership.

13.26 The result is to turn the ordinary law on its head. Under that law the rule is "earlier in time, stronger in right".[28] Under a positive system the rule is later in time, stronger in right,[29] a rule which is not only unfair but also unstable in its operation. For whereas there can only be one "first", there is a new "last" every time there is a new transaction. Thus if Safeway were now to sell to a third party, the third party would become owner on registration and Tesco would be divested. And if Tesco were in turn to dispone to a fourth party, the fourth party would acquire ownership and the third party would be divested. The sequence would continue indefinitely unless or until the Keeper decided to refuse registration in respect of

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[25] 2004 SC 29. For a detailed discussion of the case at first instance, see Kenneth G C Reid and George L Gretton, *Conveyancing 2001* (2002), pp 108-15.
[26] For a discussion of the difference, see T Honoré, *Making Law Bind* (1987), pp 186-7.
[27] Section 7, the ranking provision of the 1979 Act, is directed mainly at heritable securities. It is not about ownership.
[28] *Prior tempore potior jure.*
[29] Reid, *Property*, paras 684 and 685.

one of the competing lines of title. Once again, the example places in doubt the suitability of a positive system for jurisdictions where the law of property is based on civil law.

Subordinate real rights

13.27 The discussion thus far has taken as its focus the ordinary transfer of ownership. But similar issues arise for the creation, or variation or discharge, of subordinate real rights. For example, a case that sometimes happens in practice is that the owner of a property that is subject to a standard security forges a deed of discharge. When this is registered in the Land Register, the effect is that the security is extinguished, and so the creditor is now an unsecured creditor in respect of the unpaid debt.[30]

Evaluation of the Midas touch

13.28 From what has been said it will already be clear that we think that the negative approach is better than the positive one. That is the provisional conclusion we arrived at in DP 125 and respondents were in general agreement. It is, however worth re-emphasising that the choice is one of technique and not of policy. The respective substantive protections afforded to acquirers and "true" owners could be made the same, or almost the same, on either approach. The change from positive to negative – the abolition of the Midas touch - would affect neither conveyancing practice nor practice at the Department of the Registers. Indeed, to the outside world the switch would be invisible, for the change is "under the bonnet", a matter merely of engineering. Yet if the cost is slight the benefits, in our view, are considerable. It would result in legislation which was clearer, simpler, more principled, and a great deal less prone to accident. In a Scottish context a negative system is, quite simply, better engineered than the alternative in current operation.

Section 3's one-size-fits-all problem

13.29 As well as the Midas touch, section 3's attempt to define the effect of registration gives rise to other difficulties. We are not here concerned with the problem that the deed being registered may be invalid. In this section we will suppose that it is indeed valid.

13.30 Just as the 1979 Act's attempt to answer the "what is registrable?" question seems to us to have been unwise,[31] so too we think that its attempt to answer the "what is the effect of registration?" question was likewise misguided, and for the same reason. Other enactments, just as they deal with registrability, also normally say, whether expressly or by implication, what is the effect of registration – and of non-registration. For example:

- Ownership of land is transferred on registration of a conveyance.[32]
- A standard security is created on registration of the appropriate deed.[33]

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[30] In the new scheme the security would not be extinguished by the forged deed. But in fact in this case the ultimate result would typically be similar to the ultimate result under the 1979 Act. The reason is as follows. In practice the aim of the fraudster is to sell the property immediately to a buyer who, unaware of the security, pays the full value of the property. The fraudster will then disappear with the money. In the new scheme, though the security would not be extinguished on registration of the forged deed of discharge, it *would* be extinguished on the *next* registration, namely the registration of the disposition to the *bona fide* buyer, for in the new scheme someone who acquires in good faith is protected from encumbrances that should be in the Register but are not. See Part 6 of the draft Bill.

[31] For this see Part 12.

[32] Abolition of Feudal Tenure etc (Scotland) Act 2000, s 4(1).

- A proper liferent is created on registration of the appropriate deed or on such later date as the deed may specify.[34]

- A servitude is created on registration of the appropriate deed or, if later, when the benefited and burdened properties come to be separately owned.[35]

- A real burden is created on registration of the appropriate deed or on such later date as the deed may specify.[36]

13.31 In each case it is clear from the legislation that without registration there is no real right. These examples expose another difficulty with the idea of a general rule as to effect of registration. Section 3(1) of the 1979 Act is supplemented by section 3(4) which provides that "the date at which a real right or obligation is created or as from which it is affected under this section shall be the date of registration." Unfortunately the position is too diverse to be encapsulated in a single rule. Whether something takes effect as at the date of registration, or later, or indeed earlier, is a matter for the individual enactment. It is true that a disposition takes real effect on registration, and neither earlier[37] nor later.[38] But whilst that is what could be described as the default rule, there are exceptions. Three have been mentioned above, where the real effect can happen at a date later than registration. In some cases the law provides for the registration even when the real effect has already taken place before registration. An example is the registration of the discharge of a fixed-sum standard security where there has been full payment. Such a security is extinguished when full payment is made. Registration of the discharge merely evidences something that has already happened.[39]

13.32 Various enactments provide for the registration of miscellaneous orders, notices and so on that relate to matters wholly or mainly concerned with public rather than private law. Here are some random examples: tree preservation orders,[40] suspension orders in relation to mineral workings,[41] orders applying the code for the management of houses let as lodgings or occupied by members of more than one family, and control orders (and notices of revocation of such control orders) in relation to such houses,[42] and suspended forfeiture orders and forfeiture certificates in respect of the proceeds of crime.[43] One single section of

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[33] Conveyancing and Feudal Reform (Scotland) Act 1970, s 11(1).
[34] Abolition of Feudal Tenure etc (Scotland) Act 2000, s 65(1).
[35] Title Conditions (Scotland) Act 2003, s 75. This is the rule for servitudes created in writing, but a servitude can also be created by implication or by positive prescription.
[36] Title Conditions (Scotland) Act 2003, s 4(1).
[37] *Sharp v Thomson* 1995 SC 455. This Inner House stage of the case contains a clear exposition of the law. The reversal by the House of Lords at 1997 SC (HL) 66 is now considered as being on a different point. The case must be read in the light of *Burnett's Trustee v Grainger* 2002 SC 580, aff'd 2004 SC (HL) 19. See further Scottish Law Commission, Report on *Sharp v Thomson* (Scot Law Com No 208, 2007).
[38] For an illustration see *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2.
[39] See eg *Rankin v Arnot* 8 July 1680 Mor 572 and *Cameron v Williamson* (1895) 22 R 293. The discharge of other standard securities is more than merely evidential.
[40] Town and Country Planning (Scotland) Act 1997, s 161(2).
[41] Town and Country Planning (Scotland) Act 1997, Sch 8 para 8.
[42] Housing (Scotland) Act 1987, ss 159, 178 and 186.
[43] Proceeds of Crime (Scotland) Act 1995, ss 21(10)(b) and 24(6).

the Housing (Scotland) Act 2006[44] specifies no fewer that six types of document that must be registered in the Land Register.[45]

13.33 Such legislation often directs registration to take place without indicating what the respective consequences of registration and non-registration are to be. In some cases registration may be purely as a matter of information about something that is already in force. The one-size-fits-all approach of section 3(1) of the 1979 Act is as awkward here as it is for transactions in private law.

Recommendations

13.34 In DP 125 we discussed the Midas touch and proposed: "Registration should not always result in the conferral of a real right. Whether a real right is conferred should depend on the ordinary rules of the law of property (as amended by proposal 7(b))."[46] Respondents were in general agreement. In DP 128 we considered the second problem about section 3 and proposed that "there should be no general rule as to the effect of registration."[47] Again, respondents were in general agreement.

13.35 Pulling these two proposals together, we recommend:

> **62. (a) The land registration statute should set out no general rule as to the effect of registration.**
>
> **(b) Accordingly the effect of registration, or of non-registration, should be determined by the relevant legislation and the general principles of property law.**
>
> (Draft Bill, s 17)

13.36 To this recommendation there is one qualification. The draft Bill provides that in certain cases the registration of an invalid deed will confer on a good faith grantee an unchallengeable right. This is the "integrity principle" or "realignment principle". It is set out in Part 6 of the draft Bill and is discussed in Part 23 of this Report.

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[44] Section 61.

[45] Repairing standard enforcement orders, notices of decisions to vary or revoke repairing standard enforcement orders, certificates granted by private rented housing committees, property maintenance orders, property maintenance plans and notices of revocation of maintenance plans.

[46] DP 125, para 5.44 (proposal 9). Proposal 7(b), contained in DP 125 para 4.52, was: "The title of a bona fide acquirer should be immune from rectification in respect of Register error provided that, for a prescribed period prior to registration of the acquirer's title, the property was possessed by the person from whom he acquired (or from a predecessor of that person)." We have brought this proposal forward as a recommendation in this Report: see Part 23.

[47] DP 128, para 5.50 (proposal 21).

Part 14 Advance notices

Introduction

14.1 The object of a normal conveyancing transaction is that the grantee receives a real right[1] from the granter, and the granter receives money, or other consideration, from the grantee. In most cases there is a single moment, settlement, when the consideration is given to the granter and the deed is delivered to the grantee. This apparent simultaneity of exchange is, however, deceptive. The delivery of the deed does not of itself confer a real right. Only registration does that, and there may be a delay, albeit brief, between delivery and registration. Hence for the grantee a "gap risk" may be involved. That risk divides into (a) insolvency risk, ie the risk that the granter is sequestrated, put into liquidation etc, and (b) competing deed risk, ie the risk that the granter grants a deed to another party, and that deed reaches the Land Register first.[2] The second risk may involve a fraudulent scheme by the granter.

14.2 To the possible gap between delivery of the deed and its registration must be added the possible gap (perhaps a couple of days) between the date of the search of the registers on which the grantee relies and the date of settlement. Efficient conveyancing can cut down these two gap elements but experience shows that it is hardly possible to eliminate the problem altogether.

14.3 The problem has been alleviated recently, in part by section 17 of the Bankruptcy and Diligence etc (Scotland) Act 2007, and in part by the advent of ARTL. Valuable as these developments have been, they do not provide a complete solution. In particular, section 17 does not protect a grantee from "competing deed" risk. The introduction of ARTL has helped. But in the first place ARTL is optional, and its takeup is as yet limited. And in the second place, ARTL can only be used for certain types of transaction. In particular, it cannot be used for sales that will bring about changes to the A Section (Property Section) or D Section (Burdens Section) of a title sheet. So ARTL is not available for split-off dispositions or dispositions creating servitudes or real burdens. Two of the best-known conveyancing disputes in recent years, *Sharp v Thomson*[3] and *Burnett's Trustee v Grainger,*[4] were sales of new properties, and accordingly had ARTL been available at the time,[5] its use would not have been possible.

Letters of obligation

14.4 The traditional way of covering the gap risk is for there to be a letter of obligation by the granter's solicitors in favour of the grantee. This is a guarantee, binding the firm, which covers the gap period. Letters of obligation are the oil that lubricates this particular joint in

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[1] We oversimplify for the sake of simplicity of exposition. In some cases there may be a variation or extinction of an existing real right.
[2] A trust deed for behoof of creditors straddles the two categories.
[3] 1994 SC 503, aff'd 1995 SC 455, rev'd 1997 SC (HL) 66.
[4] 2002 SC 580, aff'd 2004 SC (HL) 19.
[5] In both cases the conveyancing transaction that led to the litigation happened in the 1990s.

the conveyancing system. Scotland is, as far as we know, the only country in which such oil is used. Law firms insure against the risk they incur on such obligations. The premiums[6] are a cost of doing conveyancing, and so are passed on to clients through conveyancing fees, though not separately itemised. Ultimately it is therefore clients who pay for this system. The system is unpopular with the legal profession. To many it seems unreasonable that they should incur personal liability in this way, even if ultimately any claims can be recovered from the insurers. Since full insurance cover is available only for "classic" letters of obligation, firms have to take trouble checking whether each letter is "classic" or not and this costs time.[7] If a claim is made on a letter of obligation, expensive staff time has to be taken up dealing with it.

The alternative: advance notices

14.5 A solution that has been developed in some other systems is a registered advance notice. The basic idea – details of course vary - is that a notice is placed on the register saying that the owner (X) is intending to grant a deed to Y. This notice does not confer on Y a real right. What it means is that if a deed is in due course granted to Y and registered, then anything in the Register in favour of another party (Z) that is registered between (i) the date of the advance notice and (ii) the date of the registration of the deed to Y is postponed to the latter. This is not unfair to Z, because third parties can search the Register and thus see the position.

The Reid Report and the Henry Report

14.6 The Reid Report considered the idea very briefly, and rejected it.[8] It seems that there were two reasons. One was that it would be a "considerable innovation", perhaps a curious reason in a report recommending the revolutionary change of replacing the centuries-old system of deeds registration by registration of title. The other was that the system of letters of obligation meant that everything was satisfactory. The Henry Report noted that the English system allowed for "notices, cautions, restrictions and inhibitions" protecting "the rights of creditors, beneficiaries, purchasers under a contract of sale and generally persons claiming the right to restrict or prohibit the registered proprietor from dealing with the property."[9] It did not single out the third of these (purchasers under a contract of sale) for any discussion and indeed it mentioned neither gap risk nor letters of obligation. Legal systems other than English law were unfortunately not considered by the Reid and Henry Committees, while the English system of registering "notices, cautions, restrictions and inhibitions" was summarily dismissed as inappropriate to Scotland. The treatment in both reports is limited to a few words.

DP 130 and responses

14.7 The first discussion in Scotland of advance notices was in DP 130[10] in which we noted that they are a common feature of systems of registration of title worldwide, including

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[6] No separate premium is charged: a single premium covers all the insured risks of the law firm. But the total insurance premium reflects the total insured risk.

[7] For the concept of a "classic" letter of obligation see the Law Society of Scotland's website at http://www.lawscot.org.uk/Members_Information/rules_and_guidance/guides/Rules/LetterObligation/Letters_of_Obligation_FAQ.aspx#question%201.

[8] Reid Report, para 99.

[9] Henry Report, p 47 note 1.

[10] Part 7. The term we used was "priority notice".

systems where, like Scotland, the underlying property law is based on the civilian tradition rather than on the English tradition.[11] We sketched out how such a system might work, and discussed the benefits and drawbacks. We asked whether such a system should be introduced in Scotland. The balance of responses was against the introduction of such a system. Those who took that view included the Law Society of Scotland. But its views were soon to change.

Subsequent developments

14.8 In 2008 the Law Society of Scotland approached us to say that the system of letters of obligation was coming under pressure. There appeared to be increasing reluctance among law firms to grant such obligations, especially in certain types of transaction. There was also a question of whether insurance cover would continue to be available indefinitely at reasonable terms, especially given fears that fraud might be on the rise. The Society took the view that unless the gap itself could be eliminated, a system of advance notices should be made available.

14.9 On a matter of this sort the views of the Law Society of Scotland must have considerable weight. Following the approach, we looked at the topic again. We paid particular attention to the systems of advance notices that are in operation in England and Wales and in Germany.[12] In this connection we thank both HM Land Registry and the Bundesnotarkammer[13] for their generous assistance. The scheme that we have developed derives in part from English law and in part from German law. There are also some minor features that are to be found in neither.

14.10 In the process of re-examination, we concluded that in DP 130 we had somewhat overstated the drawbacks of an advance notice system. In the first place, we had expressed concern about costs and complexity.[14] Further study of land registration practice in England and Wales has now led us to believe that the system is likely to be relatively straightforward to operate, both from the standpoint of conveyancers and from the standpoint of the Department of the Registers, and that the registration costs would be modest: see below. In the second place, the prototype system that we sketched in DP 130 would have meant backdating the grantee's real right to the date of the advance notice. That would have involved, we observed, "the passing of ownership before settlement of the transaction, before the date of entry, and even, in some cases, before conclusion of missives."[15] Such a result would not be easy to justify, or indeed even to explain. But further study of German law, where advance notices have long existed and where the theory has been thoroughly developed, has satisfied us that this awkward result is not a necessary one.[16]

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[11] DP 130, para 7.1.

[12] The English law is to be found in the Land Registration Act 2002, especially s 72, as supplemented by the Land Registration Rules 2003. The German law is to be found mainly in § 883 – 888 of the German civil code (BGB).

[13] In particular we thank Dr Thomas Diehn and Dr David König.

[14] DP 130, para 7.31. In practice complexities would result in costs to the client, so "costs" captures the issue.

[15] DP 130, para 7.34.

[16] There is ample material on the German system: whole monographs are produced on this subject. A work meriting particular mention is Dorothea Assmann, *Die Vormerkung* (1998). Other recent works include Josef Rieder and Stefan Rieder, *Vormerkung und Widerspruch im Grundstücksverkehr* (2005); Bernd Steup, *Grundbuchrang und Grundbuchvormerkung* (2003); and Jürgen Stamm, *Die Auflassungsvormerkung* (2003). By contrast, the law in England and Wales has received little attention.

14.11 In short, since DP 130 the balance has shifted: the case for them now appears stronger and the case against them now appears weaker. Accordingly we have come to the conclusion that a system of advance notices should be introduced. The scheme we present below is in general terms based on the outline scheme we put forward in DP 130, but is not only more detailed but also departs in certain important respects from that outline scheme.

Complexity

14.12 The length of this part of the Report may give a misleading impression of the complexity of the advance notice system. Information from HM Land Registry makes us believe that from the Keeper's view the system should be relatively straightforward to operate, a fact that should be reflected in the fee charged by the Keeper. From the standpoint of conveyancers we think that the system should be relatively straightforward to operate. Advance notices would be standardised documents whose form would be prescribed, and there would only be four variables: the designation of granter, the designation of grantee, the property, and the type of deed. Complications could indeed arise when a third party deed is registered within the protected period. But such cases in practice will be rare, just as deeds that trigger liability under a letter of obligation are rare, and when such cases happen we think that the rules in the Bill should provide unambiguous answers.

Cost

14.13 The "official search with priority" system in England and Wales at present costs £4 in a standard case.[17] Since what is provided is both a search and, in the terminology of this Report, an advance notice, the cost attributable to the latter is less than £4. We think it unlikely that such a remarkably low figure would be achievable here, and moreover the capital start-up costs would have to be recovered over a period of years, thus increasing the fee level in the early years. Nevertheless, whilst at this stage no detailed costings have been carried out, it appears that the fee charged by the Department of the Registers for an advance notice would be modest.

Optionality

14.14 In both England and Wales and in Germany the use of advance notices is optional. The system we recommend for Scotland would likewise be optional. Conveyancers would be free not to use it. Nevertheless in both England and Wales and Germany the use of such notices is standard, at least in ordinary cases, and our expectation is that the same would happen here.

Terminology

14.15 In England and Wales the term "official search with priority" is used,[18] and in Germany "*Vormerkung*", which has been variously translated, eg as "caution" or "pre-notation". In DP 130 we used the term "priority notice". The Bankruptcy and Diligence etc (Scotland) Act 2007 has a somewhat similar system in relation to floating charges called the

[17] Schedule 3 Part 3 of the Land Registration Fee Order 2009 (SI 2009/845).

[18] An advance notice cannot be obtained without a search. (No doubt this is the reason why, rather inconveniently, there is actually no term in England and Wales for "advance notice".) We would not follow this example. To search the register is one thing and to lodge an advance notice is another. Either should be competent without the other.

"advance notice".[19] Although there are important differences between that scheme and the one recommended here, we think the name a good one. We have come to prefer it to "priority notice" because it does not necessarily confer priority.

Types of protectable transaction

14.16 What types of deed should be protectable by an advance notice? In England and Wales most but not all deeds are covered.[20] In Germany no restriction exists.[21] In this respect we consider the German approach preferable.

Should there be a time limit?

14.17 In England and Wales the protected period is 30 "business days".[22] If Y does not register within that period, there is no priority. By contrast, the German system is open-ended. There is no limit. Indeed, in the German system a short time-limit would make no sense, because the aims of the German system are not limited to the gap-risk in conveyancing transactions. In the German system an advance notice is available to secure *any* obligation to grant a registrable deed. We return to this idea below.[23] Given that our recommendation that advance notices be introduced solely for the purpose of covering the gap risk, there is no need for an open-ended notice, and moreover open-endedness could perhaps cause certain complications. Hence we recommend following the English model of having a short protected period. (Later we mention the possibility of a more ambitious scheme.)

If so, how long?

14.18 As already mentioned, the period in England and Wales is 30 business days.[24] On the basis of five business days in a week that period equals 42 days, though the period will sometimes be longer because of public holidays: for example a priority period starting on 24 December could last 45 days. In DP 130 we wrote: "We think that four weeks would probably be a sufficient duration for priority notices, and in any event doubt whether the period should be longer than five weeks or six."[25] A balance needs to be struck. The grantee needs a reasonable time between settlement and registration, but on the other hand the longer the period, the greater the impact on third parties. Five weeks – 35 days - lies in the

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[19] Section 39.

[20] The rules are complex. An official search with priority may be applied for by a purchaser in respect of a "protectable disposition". (Land Registration Rules 2003 rule 147(1).) A "protectable disposition" is "a registrable disposition… of a registered estate or registered charge made for valuable consideration". (Land Registration Rules 2003 rule 131.) As for "registrable disposition", that is defined in s 132 of the Land Registration Act 2002 as "a disposition which is required to be completed by registration under s 27". Section 27 is too long to be quoted here. A short-cut to the answer can be found in official forms OS1 and OS2 which require applicants to specify the reason for the application, with the three options being purchase, lease or charge. These terms have a broad meaning, to cover for example the grant (but only for valuable consideration) of an easement. See generally the Land Registry Practice Guide 12 on Official Searches (November 2009, available online at http://www1.landregistry.gov.uk/assets/library/documents/lrpg012.pdf). It is also necessary to mention the Land Registration Rules 2003 rule 54 which provides for the creation of a four-day "reserved period" following on an "outline application" in certain types of case where an official search with priority is not competent.

[21] The German Civil Code (BGB) § 883(1) sets out, in very general language, the list of protectable transactions. In effect any registrable transaction is protectable.

[22] Land Registration Rules 2003, rule 131.

[23] See paras 14.58-14.60.

[24] Or 36 days depending on whether Saturdays have been declared to be business days or not: see Land Registration Rules 2003, rule 216(3).

[25] DP 130, para 7.35.

middle of the range that we had in mind and is what we now recommend. But the draft Bill enables the period to be varied by secondary legislation. We think that the period should be defined as so many actual days or weeks and not as "business" days. The latter approach seems to us to make the calculation unnecessarily complicated and indeed it could give rise to disputes as to which days are to be regarded as business days.

Property still in the Register of Sasines?

14.19 The scheme we have devised is for property in the Land Register. Should it also be available for first registrations? The argument in favour is simply that if the scheme is desirable, it is desirable in all cases. The Law Society of Scotland takes that view. As against that, there is the fact that if it were extended to first registrations that would cause legislative complications and also practical difficulties to the Department of the Registers, thus pushing up costs. Moreover, if a property is still in the Sasine Register the possibility is always open to the owner to apply, before the sale, for voluntary registration. Furthermore, properties still in the Register of Sasines represent a declining minority of all properties. Those whose titles are in the old register lack many of the benefits of the Land Register and this may be one of them. The view of matters is supported by the fact that in substance the same is true in England and Wales. The draft Bill represents a compromise approach. In the draft Bill as it stands the advance notice system applies only to registered properties, but there is a power to the Scottish Ministers, if they see fit, to extend it to first registrations.

Must there already be a contract between the parties?

14.20 The outline scheme in DP 130 allowed advance notices to be granted whether or not missives had been concluded.[26] In practice we doubt whether that would be commonly done. The grantee would typically wish the protected period to begin not long before settlement so as to maximise the time available to complete title. Thus an advance notice granted before missives would seldom be of any value, because it would typically have expired before the registration of the protected deed. Nevertheless, there is no reason for the law to make conclusion of missives a requirement, and there may be cases where, for special reasons, it is convenient for the advance notice to precede the missives.[27]

Form

14.21 The notice would identify the parties, the property and the type of deed (eg disposition, standard security, servitude etc). The draft Bill so requires.[28] But we do not think it necessary for the Bill itself to enter into detail. Matters of form could be regulated by the future Rules. It would be possible to have (a) a notice signed by the granter and (b) a separate application form in respect of that notice. But it may prove simpler to have a single document that doubles as (i) the notice and (ii) the application to the Keeper to take the notice into the Application Record.[29] Rules could also provide for the form of authentication.

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[26] DP 130, para 7.16.

[27] In German law an advance notice can be granted even before the conclusion of a contract: "*Die Eintragung einer Vormerkung ist auch zur Sicherung eines künftigen oder eines bedingten Anspruchs zulässig*." (BGB § 883(1).)

[28] Draft Bill, s 35(1), (3) and (4).

[29] In other land registration transactions there are two juridical acts: the delivery of the signed deed, which is a joint juridical act of granter and grantee, and the act of the grantee in applying for registration. (Whether the Keeper's act of registration is also to be regarded as a juridical act might be open to debate.) In an advance notice there is no juridical act by the beneficiary of the notice. The granter grants the notice and also applies for it

We envisage that in practice advance notices would generally be electronic. But our policy, for all matters relating to land registration, is that those who wish to use paper should continue to be able to do so, and accordingly we envisage that the Rules would allow paper.

Who should be able to grant an advance notice?

14.22 In the typical case the advance notice would be granted by the party named as proprietor in the title sheet. But other possibilities could also arise. For example, an advance notice might be granted by a person assigning a standard security. Or it might be granted by a heritable creditor enforcing a standard security by sale. Or it might be granted by someone in a representative capacity, such as an executor or a judicial factor or a mandatory. In all such cases the granter is someone who, though not heritable proprietor, could validly grant the deed in question. There could occasionally be other cases. For example, X sells property to Y, and Y intends immediately thereafter to grant a long lease to Z. Z requests Y to grant an advance notice in respect of the lease. At this stage Y may have no real right and possibly may not even have concluded missives with X. It may be inconvenient for the grant of the notice by Y to Z to await the time when Y becomes able to grant the lease. Accordingly the rule we favour is that an advance notice to be valid must be granted by either (a) a person who could validly grant the deed in question or (b) any other person, so long as the notice bears the consent of the person just mentioned.

14.23 In England and Wales the granter's consent is not required. As we understand it, anyone could pay £4 and thereby create a 30-day title freeze on any property. In Germany an advance notice requires the owner (or other entitled party) to consent. We prefer the German approach.

Application Record – title sheet – Archive Record

14.24 Advance notices would be short-lived. Because of that we have come to the conclusion that it makes no sense to require them to be *registered*, ie to appear on the title sheet. Indeed, since an application for registration can sit in the Keeper's in-tray – the Application Record - for some time, it could easily happen that an advance notice would expire while it was in the Application Record. Hence whilst an advance notice must clearly enter the Land Register, we have come to the conclusion that it should not be registered in the title sheet. Instead, it should simply enter the Application Record. Hence it is never "registered". Once it has expired, it should be transferred to the Archive Record. That is important because the fact that it was once in force needs to be a matter of public record. Nevertheless the need to know about an expired advance notice will seldom arise. By contrast, the need to know about a subsisting notice will always be of interest to those who are considering transacting in relation to the property. And they can discover it by an ordinary search. It should be borne in mind that whereas the current law suffers from the defect that the Application Record, despite its importance, has no existence recognised by the legislation, in our scheme it is one of the four parts of the register.[30]

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to be entered in the Register. This is probably best analysed as one juridical act rather than two, being a single request to the Keeper to make a certain entry. (As a point of comparison, if in future ordinary deeds such as dispositions are merged into application forms, so as to make a single physical or digital document, that would not alter the juridical acts involved from the present system of handling ordinary deeds.)

[30] See paras 4.9 and 4.35 above.

Would an advance notice freeze the register?

14.25 In DP 130 we wrote that "a notice would not prevent the registration of rival deeds, as in some other countries (though that might sometimes be the result in practice)."[31] In other words, the fact that a notice had been entered into the Register, and the protected period was still running, would not mean that the Keeper could not, during that period, accept other deeds relating to that property. Such "freezing" would, we consider, be disproportionate in its effect. The benefit of a notice should be worked out by means of priority, so that a deed in favour of another person registered during the protected period would be liable to be *subject to* the deed protected by the notice. That is all that is needed to make advance notices work. To go beyond that would be an unjustifiable interference with the transactional freedom of other parties. Indeed, a "freeze" rule could even open the door to abuse of the law. In a nutshell, the approach would be "priority yes, freeze no." However, if other deeds can be registered (a) during the currency of the advance notice, ie during the protected period, and (b) before the registration of the deed protected by the notice, then evidently a question arises as to precisely how the two deeds rank in relation to each other.

Some relatively unproblematic situations

14.26 Before turning to that situation, by way of background we first deal with three types of case, in all of which there is an advance notice, but in all of which the advance notice does not, for one reason or another, make any difference.

14.27 *Situation (i).* The deed to Z is a standard security and the deed to Y is a disposition. The chronology is: first the registration of Z's deed, next the entry of Y's notice, and lastly the registration of Y's deed. Both deeds will be accepted by the Keeper and the final result is that Y is the owner but that the title is encumbered by Z's security. Had both deeds been dispositions, the Keeper would have accepted Z's but rejected Y's. The deed registered in favour of Z *before the advance notice* has priority, simply by virtue of the general principles of property law.

14.28 *Situation (ii).* Here the deed in favour of Z is presented for registration *after the registration of Y's deed*. Z's deed is subject to Y's. But that is not because of the advance notice. Its priority is simply due to the general principles of property law.[32]

14.29 *Situation (iii).* Here Z's deed is registered during the currency of Y's advance notice. Y later presents his deed for registration but does so *after the expiry of the notice*. This case too is straightforward. Because the notice is no longer in force by the time Y lodges the deed for registration, it has no effect. Y's deed is subject to Z's deed.

The notice's protective effect

14.30 The benefit of an advance notice appears if Y's deed is duly lodged for registration *within the protected period*, and Z's deed is registered also *within that period*,[33] and is registered *before Y's deed*. The effect is that Z is postponed to Y. This case is the core case, the case which advance notices are "all about". Yet how can this result be achieved?

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[31] DP 130, para 7.17.
[32] This example presupposes that no advance notice is in force in favour of Z, an issue considered below.
[33] Assuming again that no advance notice is in force in favour of Z.

14.31 Section 155 of the Titles to Land Consolidation (Scotland) Act 1868 and section 39 of the Bankruptcy and Diligence etc (Scotland) Act 2007[34] both provide for advance notices, one for inhibitions and the other for floating charges. The way they work is that if the inhibition or charge itself is duly lodged within a stated period (21 days in both cases) then it is deemed to take effect as at the earlier date. For example, if an advance notice of a floating charge is registered on 2 May and the charge itself is registered on 10 May, it takes effect as at 2 May. (But if it had been registered on 30 May it would take effect only as from that date, because the 21-day period would have elapsed.) When we devised the outline scheme in DP 130 we had the same approach in mind, but we were conscious of the drawbacks of that approach as applied to land registration.[35] Thus at paragraph 7.34 we wrote:

> "The attribution to the deed of the date of registration achieved by the notice is not without its difficulties. Under the present law, registration is backdated to the date on which the application for registration is received by the Keeper. To push it back still further is to provide for the passing of ownership before settlement of the transaction, before the date of entry, and even, in some cases, before conclusion of missives. A secure right is achieved only at the cost of its premature acquisition. As owner before settlement, the grantee would be immediately entitled to the fruits of ownership (eg rent) but immediately subject to its liabilities (eg maintenance costs). His right could be attached by heritable diligence. It is unlikely that these are the only unwanted consequences of what is an *ad hoc* and improvised arrangement."

14.32 We agree that the objections indicated in this paragraph are serious, and perhaps fatal.[36] But an alternative is available. We added this footnote: "No doubt priority could be achieved in other ways, eg by providing that no rival deed registered during the period between the notice and the disposition could be opposed to the disposition. Non-opposability would thus replace backdating. But any priority arrangement is likely to involve difficulties." At that time we did not explore that possibility but we have since done so, with the benefit of a study of the German system, and have concluded that it is in fact fully workable.

14.33 If the deed to Z is presented to the Keeper before the deed to Y has been presented, but during the protected period, and the deed to Y is also presented within the protected period, then the effect of the latter is what it would be if the deed to Z had not been registered. But except in so far as is needed to satisfy that principle, the deed to Z is unaffected. Thus the deed to Y achieves priority without the legal fiction – which we consider in this context would be unacceptable – of conferring retrospective effect on Y's deed. The idea here outlined is explained more fully below, and also in the statutory examples in schedule 3 to the Bill.

No inaccuracy arises

14.34 If X grants an advance notice to Y, and Y registers the deed within the protected period, and Z has also done so, before Y's deed, then the effect of the notice is that Y has priority over Z, notwithstanding the order of registration of the deeds. But that does not mean that the registration of Z's deed made the Register inaccurate. The register was perfectly

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[34] Not yet in force.
[35] The issues are not the same for inhibitions and floating charges.
[36] In developing the advance notice system, two of our design criteria have been: (i) that the notice should not freeze the Register during the protected period and (ii) that the priority conferred by the notice should not be delivered by a backdating of the date of registration to the date of the notice. At first sight it might appear that such criteria would be unachievable. In fact the system we recommend achieves them.

accurate in showing Z's title.[37] The Keeper was both entitled and indeed obliged to accept Z's deed for registration.

More than one advance notice for same transaction

14.35 Although the draft Bill does not expressly so provide (because it would have been unnecessary to do so), a granter could grant successive advance notices to the same grantee. For example, sometimes it happens that an anticipated settlement has to be rescheduled. In such a case it might well make sense for a second advance notice to be granted. A new notice would not extend the original period, but would create a new period. Thus on 1 March an advance notice by X to Y is entered in the register. Settlement was expected on 3 March but it does not take place. On 30 March a second notice is entered and settlement finally takes place on 5 April, with the deed by X to Y being lodged for registration on 10 April. The deed is protected by the second notice, though not by the first. (Thus if a competing deed to Z had been registered on 4 March, it would have had priority over the deed to Y.)

A theoretical point

14.36 Suppose that on 1 May X grants an advance notice to Y in respect of a disposition. X then fraudulently grants a disposition to Z, and then a disposition to Y. The applications for registration of the dispositions are on 8 and 15 May respectively. Z becomes owner on 8 May and ownership then passes from Z to Y on 15 May. On 15 May, when Y applies, the deed in favour of Y is now an *a non domino* deed, because the granter (X) is not now (15 May) the proprietor. We merely note this as a point of theoretical interest.

Competing advance notices

14.37 It could happen that X grants advance notices to two different parties. In that case the first to be entered in the Land Register has priority over the other. That does not necessarily mean that the party with the first notice will ultimately achieve priority of title. For example P, a fraudster, grants advance notices to Q and R, both for prospective dispositions, and they are entered on 1 and 4 August respectively. Q's deed is presented for registration on 28 September, outwith the protected period. If R's deed has been presented for registration at any time before 28 September, Q's application will be rejected by the Keeper.[38] Suppose however that the application for the registration of Q's deed is on 28 August. In that case it has priority over R's deed, regardless of when that is presented for registration.

Competition between an advance notice and an application for registration

14.38 It might occur that an advance notice by X in favour of Y is submitted to the Keeper on the same day as a deed by X in favour of Z. Bearing in mind that in the typical case Z has already paid consideration to X, we think that the only workable rule in such a case is for Z's application to be unaffected by the advance notice, and the draft Bill so provides.[39] In

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[37] Assuming of course that no other cause of inaccuracy is involved.
[38] The example involves two dispositions. Had the two deeds both been standard securities the priority would take effect not by rejection but by ranking.
[39] Draft Bill, s 37.

practice, however, it can be expected that Z's deed will itself be protected by an earlier advance notice, and so in such a case Z would be safe in any event.

Keeper's powers

14.39 Under our scheme, where an advance notice does bring about priority over another deed, the Keeper is to give direct effect to that priority. That might seem obvious, but we mention it because this is one of the points on which English and German law diverge, and here we prefer the English solution. In German law, if the advance notice achieves priority for Y over Z, the result is merely that Z is under an obligation to give his consent in favour of Y's deed.[40] If Z refuses, Y can seek a court order in lieu. So the Land Register Department[41] does not act until it has seen either consent or decree.[42] We think that in the context of Scots law the benefits of such a rule would be outweighed by its drawbacks. It would be somewhat cumbersome and would tend to increase cost and delay. We think that in almost all cases it would be apparent to the Keeper what effect, if any, an advance notice had, and the Keeper could be trusted to act (or not to act) accordingly. If the decision arrived at were to be regarded as wrong by one of the parties concerned, litigation would always be possible so as to achieve a proper judicial determination of the point in dispute.

The Register of Inhibitions

14.40 Entries in the Register of Inhibitions are seldom a source of gap risk. Settlement takes place after conclusion of missives, and concluded missives trump a subsequent inhibition. Hence by the time the grantee gives the money to the granter, any inhibition against the latter is normally irrelevant. Nevertheless occasionally this register can be the source of gap risk and accordingly letters of obligation cover it.[43] We therefore consider it appropriate that it should likewise be covered by the system of advance notices. The last of the statutory examples illustrates the protection in a case involving an inhibition.

Sequestrations

14.41 As for sequestrations, an advance notice could provide protection. For example, X grants Y an advance notice on 1 May. On 3 May X delivers the deed and Y presents it for registration on 4 June, just within the protected period. Suppose that X is sequestrated with effect from 4 May and that X's trustee in sequestration, Z, registers title on 3 June. In this situation the advance notice protects Y. However, this case would be unusual. Section 17(1) of the Bankruptcy and Diligence etc (Scotland) Act 2007[44] protects Y anyway for 28 days after 4 May, so an advance notice could give Y only a few days more protection than the law gives in any case.

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[40] BGB § 888.
[41] The *Grundbuchamt*.
[42] This rule is part of a general principle in German land registration law – not limited to advance notices – that the Register should be altered only by reason of consent or decree.
[43] Usually referring to it by its unofficial but common name, the Personal Register.
[44] Amending s 31 of the Bankruptcy (Scotland) Act 1985.

14.42 If X delivered the deed to Y *after* the effective date of sequestration, the deed would be invalid, unless the trustee signed as consenter.[45] An advance notice could not negative the effect of supervening incapacity.

Trust deeds for behoof of creditors

14.43 Section 17(1) of the Bankruptcy and Diligence etc (Scotland) Act 2007 applies to sequestrations but not to trust deeds for behoof of creditors. In such a case an advance notice would have a larger role to play, for a trust deed is a voluntary disposition of the owner's heritable property. Suppose that X grants to Y an advance notice on 1 May and delivers the deed on 3 May. Suppose that X grants a trust deed to Z on 6 May. Z seeks registration on 10 May and Y on 12 May. Here Y prevails, but *only* because of the advance notice. Had this been a case of sequestration Y would have prevailed because of section 17(1) of the Bankruptcy and Diligence etc (Scotland) Act 2007.

Limitations to the protection

14.44 In broad terms, an advance notice would cover the risks covered by a typical letter of obligation. It would aim to protect the grantee who hands over the money in exchange for a disposition in respect of entries appearing in the Land Register or Register of Inhibitions before completion of title, and would do so on the condition – a condition that also exists in letters of obligation - that the grantee must complete title within a reasonable time. Just as there are risks that letters of obligation do not cover, so there would be risks that an advance notice would not cover. One of the statutory examples[46] is of a short lease granted by X to Z after the advance notice to Y has been entered into the register. The lease is unaffected by the advance notice. (Had it been a long lease, it would have been affected by the notice.) Again, suppose that X concludes missives of sale with Y. When settlement day arrives X fails to deliver a disposition. Even though Y has not parted with the price,[47] Y may still suffer loss by reason of X's breach of contract, and here an advance notice would be of no help. Equally a letter of obligation does not cover such a case.

14.45 The advance notice system would give the same type of protection against corporate insolvency as does the system of letters of obligation, which is to say only limited protection. Like a letter of obligation, it would protect a grantee from section 25 of the Titles to Land Consolidation (Scotland) Act 1868[48] and also against section 145 of the Insolvency Act 1986, because in both those a deed must be registered in the Land Register. Like a letter of obligation it would not protect against other aspects of corporate insolvency.

Exceptions to the protection

14.46 We think it clear that an advance notice should have no effect as against a notice of potential liability for costs.[49] Although this is the only type of deed registered in the Land

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[45] Bankruptcy (Scotland) Act 1985, s 32(8). There are certain exceptions, the most recent having been added by s 17(2) of the Bankruptcy and Diligence etc (Scotland) Act 2007.
[46] Sch 3, example 9.
[47] Like letters of obligation, the advance notice system is designed for the case where the consideration is given in exchange for the deed. A grantee who pays the consideration in advance, as occasionally happens, is evidently subject to further risks. See eg *Gibson v Hunter Home Designs Ltd* 1976 SC 23.
[48] We have recommended the repeal of this section: Scottish Law Commission, Report on *Sharp v Thomson* (Scot Law Com No 208, 2007).
[49] Under s 10(2A) of the Title Conditions (Scotland) Act 2003 or s 12(3) of the Tenements (Scotland) Act 2004.

Register that is exempted, it is conceivable that there might be others and accordingly the draft Bill enables the Scottish Ministers to add other exceptions.

The "offside goals rule"

14.47 The system of advance notices has some likeness to the "offside goals rule" under which if X grants a right to Z, and does so in breach of an existing personal right held by Y, and Z knows of that breach, Y may be able to challenge Z's right.[50] But the preconditions of the two systems differ,[51] and the consequences likewise differ. There could be cases in which Z's right is affected both by an advance notice and by the offside goals rule. Equally there could be cases in which the two pull in opposite directions. For example, X contracts to sell to Y. Then X contracts to sell the same property to Z, who knows about the contract with Y. An advance notice in favour of Z is entered on 10 May. On 15 May X delivers a disposition to Y. It is registered on 16 May. On 17 May X delivers a disposition to Z who presents it for registration on 18 May. In accordance with the law of advance notices, the Keeper will now delete Y's name and substitute Z's. But the fact remains that Z scored an "offside goal" against Y, by having bought in the knowledge of Y's prior personal right to acquire the property, and hence Y has the possibility of seeking to reduce Z's title.[52]

The statutory examples

14.48 Because the ideas involved are novel, the unusual step has been taken of providing worked examples in a schedule to the draft Bill.[53] As the draft Bill itself makes clear, they are illustrative only, and non-exhaustive. There is a power to add new examples by statutory instruments. The use of statutory examples is rare in the United Kingdom tradition of legislative drafting, but there are many examples in other legal systems.[54] An interesting recent one is the New Zealand Personal Property Securities Act 1999, where the introduction of new concepts was felt to call for statutory examples.[55] For the same reason we think that statutory examples of the advance notice system are appropriate.

The race to the register

14.49 The phrase "race to the register" captures the idea that in a competition, the first person to acquire a real right prevails. So if the means of obtaining a real right is registration, the first to register prevails. Advance notices would change that to a certain degree. It would remain the case that the first person to register would prevail, but with the possibility of the result being changed if that registration happened during the currency of a notice in favour of another person.

14.50 Would the proposed system merely substitute one race for another? Instead of a race to register the deed, would there in future be a race to enter the notice? And if so,

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[50] This is merely a sketch of the rule. See further Reid, *Property*, paras 695-700; and David A Brand, Andrew J M Steven and Scott Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004), paras 32.52-32.62.

[51] For example, the offside goals rule presupposes an existing personal right in favour of Y. An advance notice can be granted to Y even before conclusion of missives.

[52] For further discussion of the offside goals rule, see paras 14.61-14.65 below.

[53] See s 38 and sch 3.

[54] Perhaps the most notable example is India.

[55] Here is an illustration, taken at random. Section 36 lays down a general rule, and then continues: "Example. Person A sells a motor to person B. The invoice relating to the sale of the motor contains contractual terms, including a retention of title clause. Person B has not signed the invoice. Person A has a security interest in the motor which is enforceable against person B, but is not enforceable against anyone else."

would there really be any benefit? In fact, that would not be the result. Advance notices mean, not that there is a different, and earlier, race, but that there is (at least in the typical case) no race. Suppose, for example, that two notices, one to Q and the other to R, are granted by P and entered into the Application Record on 12 and 14 June respectively. When the time comes, perhaps a week or two later, for either transaction to settle, each party can see from the register the notice in favour of the other and can act accordingly. And they both know that they have nothing to fear from a deed in favour of an unknown S slipping on the register at the last minute.

Conveyancing practice

14.51 The prospective grantee of the disposition, or other deed, should ensure that the advance notice is entered on the register a reasonable time before the intended settlement date. Then on the eve of settlement the Register can be checked to confirm the entry of the notice, to confirm that no competing deed has been registered and to confirm that no potentially competing advance notice has been entered. Assuming a clear search, the grantee can settle the transaction with a quiet mind. After settlement there is plenty of time to register the deed. If the eve-of-settlement search does not disclose the position as above, then the prospective grantee can decide what to do in the light of the information. The key point is that the grantee still has the money safely in the bank. (Assuming the ordinary practice whereby the price is paid at settlement and not before.) There would be no need, as there is in current practice, to time the final search to be as near to the settlement date as possible, because the search-to-settlement gap will be covered. For example, suppose that the advance notice enters the Application Record on 1 March. On 8 March the Register is checked and is clear. The transaction settles on 24 March and the registration application is on 1 April. The 16-day search-to-settlement gap looks worryingly wide from the standpoint of current practice. (The 8-day settlement-to-application gap is also rather wide but would be covered by a classic letter of obligation.) But in the new scheme the buyer is protected from any nasties appearing in the Register in either of these gaps.

14.52 Since the use of advance notices would be entirely optional, grantees who wish to have them should stipulate for them in the missives. (Though as we have mentioned it is not necessary for there to be missives for an advance notice to be granted.)

14.53 Conveyancers should take care that the data in the advance notice (parties, property, deed type) matches the data in the deed. If there is a material discrepancy the result would be that the deed is unprotected by the notice. The Bill contains no specific provision on the consequences of discrepancy: we think that this is merely part of the more general issue of failure to follow statutory requirements. Disputes as to how material a discrepancy has to be in order to be fatal to the notice can if necessary be resolved by the courts.

14.54 Suppose that D is selling to E. Before settlement E sees that in the Register there is an advance notice granted by D to F in respect of the same property. Although E is protected by an advance notice, the notice in favour of F is earlier. If when settlement date arrives, the notice in favour of F is spent, ie more than 35 days have passed, that notice can be ignored. In our view it would not make D's title unmarketable. But suppose that when settlement date arrives the notice in favour of F is not yet spent, then in our view that would mean that D could not, at that date, give E a marketable title, with the result that E would be entitled to decline to settle the transaction on that day.

The future of letters of obligation

14.55 Whether the use of advance notices will displace the use of letters of obligation[56] will be a matter for solicitors to determine as a matter of conveyancing practice. But that is the intention.

14.56 One qualification concerns discharges of standard securities. The normal practice is for a buyer to pay full price and, correspondingly, for any existing standard securities to be discharged.[57] Often the seller's lender will sign a deed of discharge and send it to the seller's solicitors, who in this matter are also acting for the lender, under the condition that it is to be held for the lender until settlement. At settlement the deed is handed over to the buyer's solicitors. But this arrangement does not always work. Some lenders are unwilling to co-operate. And even where (as is usually the case) the lender is willing to co-operate, the signed deed of discharge may not actually be in the seller's solicitors' hands by the time that settlement day dawns. In such cases what normally happens is that an additional clause is added to the letter of obligation, binding the seller's solicitors to deliver the deed of discharge within a stated period.[58] An advance notice would not, and could not, deal with this issue.

14.57 Hence the use of some form of letter of obligation might persist, at least in those cases where a signed discharge cannot be obtained from the seller's lender in time for settlement. Electronic conveyancing promises to make the handling issues easier. It may be added that the same issue arises in England and Wales where the practice is similar: a "solicitor's undertaking" is given in respect of the mortgage discharge.

A wider role for advance notices?

14.58 It has been put to us by some solicitors working in the field of commercial property that under the current law it is difficult for some types of agreement about land to be protected. An example is the land option agreement. Such an agreement can, indeed, be secured by a standard security.[59] But the principal method of enforcement of a standard security is sale. Sale results in the transfer of the property to someone else, which is just what the option was intended to prevent. In England and Wales it is possible, we understand, to protect a land option agreement by a registered "restriction".[60] The German *Vormerkung* system also covers such cases, and arguably does so in a way that, to a Scottish eye, looks technically preferable. It may be that other technical solutions would be possible, eg a form of heritable security.

14.59 We think that there may well be a case for exploring such ideas. But to do so would be outwith the scope of the present project and accordingly, with reluctance, we do not

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[56] In ordinary cases. There could always be the possibility of letters of obligation being used in special cases.

[57] The discharge of any security right is an implied term of the contract of sale. The contract can vary the default term, so that the security will continue in place, and the price will be correspondingly lower, but that almost never happens.

[58] For an example see the third clause of the style letter of obligation in John Henderson Sinclair and Euan Fitzpatrick Sinclair, *Handbook of Conveyancing Practice in Scotland* (5th edn 2006), p 142. Clause 3 reads: "We also undertake to deliver to you within 21 days of this date [ie date of settlement] the duly executed discharge of the existing standard security granted by our client with our forms 2 and 4 thereanent and our cheque made payable to the Keeper for the registration dues thereof."

[59] The Conveyancing and Feudal Reform (Scotland) Act 1970, s 9(8) provides that a standard security for an obligation *ad factum praestandum* is competent. In substance such a security is a monetary security, securing the damages due in the event of breach of the obligation.

[60] Land Registration Act 2002, ss 40-47.

consider the matter further here, other than to remark that if the advance notice system that we recommend were to be introduced, and if it were to prove successful, it might, as in Germany, prove to be the starting point for development of a system to protect such arrangements as land option agreements.

14.60 It may be that these ideas should be addressed in any future review of the law of heritable security, given that advance notices, though their inner logic is different from the inner logic of heritable security, have a comparable function of securing a right.

Abolition of the offside goals rule?

14.61 It has been suggested to us, when the present project was nearly finished, that the introduction of the advance notice system would allow the offside goals rule to be abolished, and that such abolition should be included in the draft Bill.[61] The suggestion has two elements. The first is that the offside goals rule is a bad rule. It complicates land transactions. Despite a large body of caselaw, many of its details are still open to debate, thus generating uncertainty in an area – conveyancing – where certainty has a particularly high value. Where the rule is invoked, it normally gives rise to litigation, typically expensive and protracted. The rule is understandably unpopular with many conveyancers. Caselaw over the past thirty years has shown a tendency to extend the scope of the doctrine.[62] Those who do not like the doctrine have not regarded these decisions with any enthusiasm. "The rule has got out of hand" and "has the potential to undermine registered titles" was the comment of one member of our advisory group. Another member, Professor Rennie, has written:[63]

> "The extensions to the offside goals rule as set out in *Rodger (Builders) Ltd v Fawdry* are not in themselves justified by existing law and, frankly, are undesirable. Moreover each time there is a new decision which appears to "advance" the rule, the door is opened wider for more general applications of individual equity or fairness as against the certainty afforded by a registration system and a coherent system of property law."

14.62 It is clear that many conveyancers would wish that the offside goals rule should either be severely pruned or abolished altogether, at least as applied to heritable property.[64] Two members of our advisory group, Professors Reid and Rennie, favour complete abolition.

14.63 The system of advance notices that we recommend covers much of the ground covered by the offside goals rule, and, moreover, does so better. In the first place, whereas the offside goals rule gives protection only against such third parties who happen to know of the prior right, advance notices protect against third parties in general. In the second place, the advance notice system delivers an automatic solution, without the need for litigation.[65] In so far as the offside goals rule overlaps with the advance notice system it is redundant and indeed worse than redundant. If buyers (etc) wish to be protected, they should make use of the advance notice system.

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[61] For the offside goals rule, see para 14.47 above.
[62] Though the picture is complex. *Advice Centre for Mortgages Ltd v McNicoll* 2006 SLT 591 is an example where the doctrine was reined in.
[63] Robert Rennie, "Marching towards equity – blindfolded" 2009 SLT (News) 187.
[64] The doctrine can also apply to moveable property.
[65] Which is not to say that there would never be litigation about the effect of an advance notice. There can be litigation about the effect of anything.

14.64 Were these considerations all, we would be minded to recommend the abolition of the offside goals rule. But there is a further consideration. The protected period under an advance notice, in the scheme that we have developed, is short: 35 days. The offside goals rule has no time limit. Thus to abolish the rule would be to take away a common law protection, without replacement, in some types of case.

14.65 This further consideration could be met in two ways. The first would be to argue that it is undesirable for the offside goals rule to have this open-ended scope. The second would be to say that advance notices should be capable of lasting longer than 35 days and perhaps should have no time limit at all, just as standard securities have no time limit, and just as the offside goals rule itself has no time limit. This is the German approach, and as far as we can see it works well in that country.[66] But either of these two approaches would require detailed study and also some degree of public consultation. At the late stage in the project when we received this suggestion, it was not possible to undertake such study and consultation. Accordingly we have come to the conclusion that we have to leave this issue open. If the law of heritable security is reviewed, and if that review includes the topic of advance notices, considered as a form of heritable security, it might be that one outcome might be a recommendation for the offside goals rule to be abrogated in relation to heritable property. But this is to speculate.

Conclusion

14.66 Drawing this part of the Report to a close, we recommend:[67]

63. (a) A system of advance notices should be introduced.

(b) A notice should be competent even if missives have not been concluded.

(c) An advance notice to be valid must be granted by either (a) a person who could validly grant the deed in question or (b) any other person, so long as the notice bears the consent of the person just mentioned.

(d) An advance notice should give priority over other deeds registered within the protected period, but only if the protected deed is itself registered within that period.

(e) The protected period should be 35 days or such other period as may be prescribed.

(f) The protection should extend to entries within the protected period that appear in the Register of Inhibitions.

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[66] It is noteworthy that the *Vormerkung* system has its basis not in the Land Registration Act (*Grundbuchordnung*) (though that statute does of course have some provisions on the subject) but in the Civil Code. That is because it is seen as an institution of civil law, alongside ordinary security rights, rather than simply as a lubricant for the axles of conveyancing transactions.

[67] These are the main points. For brevity some of the minor points mentioned earlier are not repeated here.

(g) Ministers should have the power to apply the scheme to first registrations.

(Draft Bill, ss 35 to 38 and sch 3, and s 67)

Postscript: the view as it might be seen from the Department of the Registers

14.67 In this section we attempt to give a Keeper's-eye-view of the system. From the Keeper's perspective, advance notices would fall into two categories: those protecting a proposed dealing with the whole of a registered title and those protecting a proposed dealing with part only (typically a transfer of part by split-off disposition.) We consider each of these in turn.

14.68 An application for an advance notice over the whole of a registered property could take a very simple form, for it would need to convey only four simple pieces of information: the title number, the names and designations of the parties and the nature of the deed. It may well be that the Department of the Registers of Scotland would be able to develop a process for online application that would be quick and efficient for users and could also automatically populate the Application Record in the majority of cases. Whether the application were made electronically or on paper,[68] and whether or not the process were to be automated, the task for the Keeper would simply be to make an entry on the Application Record against the relevant title number. For the system to operate as intended, it would be necessary for the Keeper to process advance notice applications promptly. In England and Wales "official search over whole" applications are routinely processed on the day of receipt and, whilst it would not be essential for the Keeper to achieve a same-day turnaround, it would be desirable for advance notices to be processed within two or three days of receipt. It should be up to the applicant to get the application right. If it is in some way defective the Keeper should simply reject it forthwith, leaving the applicant free to apply afresh. The scheme does not admit any notion of a pending application for entry of an advance notice. The 35-day period begins not when the Keeper receives the application, but when the entry is made on the Application Record.

14.69 Following the expiry of the protected period - and whether or not the protected deed or any other deed has followed – the advance notice should be deleted from the Application Record. The deletion would not need to be immediate, for it would do no harm if once in a while a search were to disclose an expired advance notice. The process could, it is to be hoped, be automated, and the process design may dictate whether it is more efficient to carry out the deletions individually on day 36 or, for example, in batches at the end of each month.

14.70 At point of deletion, the Bill requires the Keeper to enter the details of the advance notice into the Archive Record.[69] In practice, it may be more efficient for the Keeper to make the principal Archive Record entry at the same time as making the Application Record entry, simply adding the date of deletion to the archive record at a later stage. There would be no objection to the Keeper taking this approach. What matters is that there should be archived the terms of the notice and the date on which it was entered on to the Application Record.

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[68] The draft Bill is silent on this point but we envisage that there would be a paper/electronic option.
[69] Draft Bill, s 35(7)(b).

14.71 In the case of an advance notice protecting a proposed dealing with part only of a registered title, the draft Bill requires the applicant to provide the Keeper with an adequate description to allow that part to be mapped onto the Cadastral Map (subject to an exception for break-offs of tenement flats where the new title would be mapped on the steading approach). The Keeper is then, before making the entry on the Application Record, to delineate the boundaries of the part on the Cadastral Map. In this way parties who obtain a search against a parent title that discloses one or more extant advance notices would be able to ascertain the affected areas. Once the mapping had been carried out, the advance notice could be entered on to the Application Record and the protected period would begin. Once again, it would be up to the applicant to provide a plan or description of adequate quality to permit the Keeper to map the area in question without delay. The Keeper should not entertain any negotiation or dialogue over inadequate plans or descriptions but should instead promptly reject the application, leaving the applicant free to apply afresh with a sufficient plan or description.

14.72 The mapping of an advance notice over part of a title would not normally represent additional work for the Keeper. Rather it would simply bring forward in time the mapping which would in any event be undertaken after receipt of the protected deed. The same deed plan would be used both for the advance notice application and the disposition which follows.[70] Even if the disposition did not follow within 35 days it would be likely that a further advance notice and disposition relating to the same area would follow some time later. Accordingly the draft Bill does not require the Keeper immediately to remove the mapping from the Cadastral Map if the 35 days expire without a disposition appearing. The mapping may be retained for re-use in the future. Aside from these mapping issues, there would seem to be no other differences between advance notices relating to dealings with part of a plot and those relating to dealings with whole.

14.73 A few words are appropriate as to the implications of extant advance notices on the Keeper's processing of subsequent registration applications. In the case of the first registration application following entry of an extant advance notice, the Keeper could simply disregard the notice; whether the deed received is the protected deed or some other deed, it should simply be processed as usual. Even if the deed competed with the anticipated protected deed, there would be no implications for the Keeper's warranty, for the warranted right would have been duly acquired at the point of registration of the first deed. The right could be lost or varied if the protected deed were to arrive within the protected period, but in the new scheme the Keeper warrants only that a right is duly acquired and not that it will be retained.

14.74 If two potentially competing registration applications were to be made within the 35-day period, the implications would depend upon whether each deed sought to transfer an existing real right or to constitute a new real right. There would seem to be four primary permutations; (a) a transfer deed followed by a protected transfer deed; (b) a transfer deed followed by a protected constitutive deed; (c) constitutive deed followed by protected constitutive deed; and (d) constitutive deed followed by protected transfer deed. By a "transfer deed" is meant a disposition or assignation. By a "constitutive deed" is meant a

[70] Otherwise that would normally constitute a material mismatch between the notice and the deed, thereby depriving the latter of the protection of the former.

deed that creates a new real right such as a new lease or standard security. (There is also the possibility of extinctive deeds.)

14.75 Considering first permutation (a), ie two competing transfer deeds, on day 1 seller Susie enters an advance notice in respect of a disposition to Alfred. She then grants a competing disposition to Bertie, who applies for registration on day 10. Processing of Bertie's application is completed on day 20 and the title sheet is updated to show Bertie as proprietor. Alfred applies for registration of the disposition in his favour on day 30. At first blush it would appear that Alfred's disposition should be rejected as *a non domino* given that Susie by that time was no longer proprietor. However before rejecting, the Keeper should check back on applications against the given title in the preceding 35 days to see if there has been the combination of an advance notice in Alfred's favour followed by a disposition to another party. In principle, the position is the same for a protected transfer of a registered subordinate real right such as an assignation of a lease or of a standard security.

14.76 The position is the same for permutation (b), ie a transfer deed followed by a protected constitutive deed. For example, on day 1 owner Oliver enters an advance notice in respect of the grant of a new long lease to Rebecca. He then dispones to Barbara, who applies for registration on day 10 and is duly registered as proprietor. On day 30 Rebecca's lease is presented. It will appear to be *a non domino* at first sight but the Keeper should not reject it without first checking to see if (a) the lease is protected and (b) there has been a transfer of title within the preceding 35 days.

14.77 Permutation (c) involves two competing deeds constituting new real rights. The most likely case in practice would be where the owner, Ola, grants standard securities to two creditors, one, or both, protected by an advance notice. For example on day 1, Ola enters an advance notice in relation to the grant of a security to Alison. Ola then grants another security to Bill, who applies for registration on day 10. Registration is completed on day 20 and Bill is entered into the C Section as secured creditor. On day 30 Alison makes her registration application. Her security should be registered, and would correctly appear after Bill's security in the C Section, for its date of creation is after that of Bill's security. But the effect of the advance notice is to reverse the ranking of the two securities, and it would be appropriate for the Keeper to add a note to this effect to the C section.

14.78 The question arises as to how the Keeper is to know when such a note falls to be added, particularly if Alison makes an ARTL application. The occurrence of two competing securities with an advance notice altering ranking would be extremely unusual and it would be inefficient to add an additional human check to every application for registration of a security. However it would appear possible to develop a set of rules that would allow the registration system automatically to highlight for human examination the very small percentage of cases in which ranking might be altered by advance notice. The filter rules could be, for example, to highlight only those cases in which (i) the instant application is for registration of a constitutive deed; (ii) as at the date of application there was an extant advance notice for a constitutive deed of that type; and (iii) another constitutive deed had been registered against that title with a registration date less than 36 days in the past.

14.79 Permutation (d) involves two constitutive deeds. The owner, Octavia, enters an advance notice in respect of a disposition to Alexandra on day 1. Octavia then grants a standard security to Bob, who applies for registration on day 10. Alexandra applies for registration of her disposition on day 30. Bob's security is a valid security from day 10 to day 30. It then becomes invalid and should be deleted from the Register.[71]

[71] This example is similar to the fourth example in sch 3 to the draft Bill.

Part 15 Uncompleted titles

Background

15.1 Before 1979, an uninfeft proprietor could complete title by recording in the Register of Sasines a notice of title.[1] This was signed by a solicitor and narrated the last recorded title, and also the midcouples (also called links in title) linking the uninfeft proprietor with the party last infeft. This latter clause, narrating the midcouples, was called the clause of deduction of title. For example, suppose that Kevin was sequestrated. His trustee in sequestration, Andromeda, could record a notice of title, setting out his title and also setting out the court order vesting his property in her. On the recording of the notice, ownership would pass from Kevin to Andromeda, the latter of course owning the property not for her own behoof but in trust for Kevin's unpaid creditors. Alternatively, Andromeda could, instead of completing title, dispone to someone else. The disposition would contain similar provisions, ie narration of the last infeftment, ie Kevin's title, and deducing title from that infeftment through the court's order in favour of Andromeda. On recording the disposition, ownership would pass from Kevin to the disponee. All this remains the position today where the last title is in the Register of Sasines, though the expression "uninfeft proprietor" has been replaced, as a term used in legislation, by "unregistered holder."

15.2 The 1979 Act made two changes where the property is registered property. In the first place, Andromeda can complete title without needing to use a notice of title.[2] She simply applies for registration, submitting to the Keeper the midcouple that vests in her the bankrupt estate. In the second place, if she dispones without having first completed title, the disposition does not have to include a clause of deduction of title.[3] In both cases it is still the law that the necessary midcouples must exist: the change is one of procedure rather than of substantive property law.

Clauses of deduction of title

15.3 Under current law, a clause of deduction of title is still needed in a deed inducing first registration. We consider that this is unnecessary and accordingly we recommend:

> **64. A clause of deduction of title should no longer be required in a deed to be registered in the Land Register, provided that the deed is one that can be competently granted by a person with an uncompleted title.**
>
> (Draft Bill, s 68)

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[1] The law is to be found chiefly in the Conveyancing (Scotland) Act 1924.
[2] 1979 Act, s 3(6). There is an exception for completion of title under ss 74 or 76 of the Lands Clauses Consolidation (Scotland) Act 1845.
[3] 1979 Act, s 15(3).

Notices of title

15.4 Whereas the decision in the 1979 Act to abolish clauses of deduction of title proved a success, and should be extended, we do not think the same of the other change, the abolition of notices of title in respect of registered property. In a normal conveyancing transaction the deed inducing registration will identify the property. Thus: (a) in a first registration the disposition will normally contain a sufficient description; (b) a disposition of the whole of a registered property will identify it by title number; (c) a split-off disposition of registered property will identify it by a plan plus a reference to the title number of the parent title. But if, using the example above, Andromeda applies for registration, there is no deed. There is of course the midcouple, but often a midcouple is a "general conveyance" that does not specify any particular property adequately, or at all. That is true, for example, in sequestrations, where the trustee is simply vested in the whole of the bankrupt estate without any specification of what items of property, moveable or immoveable, make up that estate. Hence the application form that Andromeda lodges still has to do the work of a notice of title: it is an assertion of right to land which identifies the land in question. So the abolition of notices of title has not brought with it much benefit.

15.5 Furthermore, the conceptual approach of the draft Bill involves the registration of a deed, which is an approach different from that of the 1979 Act. Although in theory there could be an exception for unregistered holders, where there would be no registered deed, that would generate conceptual complications (including textual complications) that would have no real-world value.

15.6 An objection might be that a notice of title requires professional assistance whereas section 3(6) of the 1979 Act enables someone to complete title without such assistance. It would in theory be possible to respond to this objection by providing that the new notice of title could be self-certified by the applicant. But that would open up a gap with notices of title in the Register of Sasines. Moreover experience has shown that personal applications by persons claiming to be unregistered holders (uninfeft proprietors) are quite often flawed,[4] and whilst the Keeper can reject them, a professionally-certified notice of title operates as a useful initial filter. This was no doubt the reason why self-certification was not adopted when notices of title were first introduced. Finally, the circumstances when notices of title are used are normally circumstances when there is likely to be professional legal involvement in any case, such as trusts, executries and sequestrations, so that the requirement for professional certification is not an onerous one. Thus in practice section 3(6) applications are almost always made through solicitors anyway.

15.7 The existing provisions about notices of title[5] are, to a modern eye, rather fussy and complex, and involve no fewer than five separate forms.[6] Accordingly we have provided a single new and simple statutory form for use in cases of registered property.

15.8 Accordingly we recommend:

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[4] This can of course also happen where the applicant is represented by a solicitor. But an application made through a solicitor is much more likely to be in order.
[5] Conveyancing (Scotland) Act 1924, s 4.
[6] Conveyancing (Scotland) Act 1924, sch B.

65. Notices of title should again be required, but with a new and simplified statutory style.

(Draft Bill, s 69(1) and (3), and s 97, sch 8, para 12(8))

15.9 Where title is still in the Register of Sasines, under current law an unrecorded holder has to complete title in that Register. We think that an unrecorded holder should normally complete title in the Land Register, so as to accelerate the completion of the Land Register. But we recognise that in some cases that might be inconvenient. Thus Andromeda is appointed as Kevin's trustee in sequestration. He owns land but his title is in the Register of Sasines. She wishes to complete title as soon as possible because she is involved in a potential "race to the Register".[7] If she were to complete title in the Land Register that would require an accurate plan of the property. The existing title may not have a good plan, and to obtain a new one from a surveyor would take time. Hence we consider that an unrecorded holder who seeks to complete title to property that is still in the General Register of Sasines should be entitled to choose which Register in which to complete title. We limit this suggestion to the situation where the last recorded title is in the *General* Register of Sasines. Very rarely a party may need to complete title where the last recorded deed is in a *Burgh* Register of Sasines or a *Particular* Register of Sasines;[8] in that situation the title should go directly into the Land Register. Accordingly we recommend:

66. Where title is still in the General Register of Sasines, an unregistered holder should have the right to complete title either in that Register or in the Land Register.

(Draft Bill, s 69 and s 97, sch 8, para 12(8))

15.10 But this option would not last for ever. As will be seen below, a time should eventually come when the Register of Sasines would be closed to all deeds, of whatever type. That is part of the strategy of completing the Land Register.

15.11 Notices of title have never been limited to cases where the title to be completed is one of ownership. For example, a notice of title can also be used to complete title to a lease or a standard security. That would remain the case.

Use of notices of title to evade policy about completion of the Register

15.12 We recommend elsewhere[9] that after the commencement of the new legislation it should not be competent to record a disposition in the Register of Sasines: that is a tighter rule than is to be found in the 1979 Act. It might be possible to evade the policy in the following way: where a title is still in the Register of Sasines, the disponee, instead of seeking to record the disposition (which would not be competent), prepares a notice of title, using the unrecorded disposition as a midcouple, and records the notice of title in the Register of Sasines. It might be thought that this loophole is hardly worth closing. But we

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[7] Speed of registration is seldom of much importance for notices of title. Sequestration can be an exception. For an example of the race to the Register involving a trustee in sequestration, see *Burnett's Trustee v Grainger* 2002 SC 580, aff'd 2004 SC (HL) 19.

[8] Formerly there was a choice as to whether to record a deed in (a) the General Register of Sasines or (b) the local Register of Sasines. The last of the local registers (Dingwall) closed in 1963.

[9] Part 33.

have reason to believe that there are those who are reluctant to submit their titles to the Land Register, because of the scrutiny to which applications are subject, and who therefore prefer to use the Register of Sasines. They prefer the ill-lit to the well-lit street. We think that there are those who would make use of this loophole if it were left open. Accordingly, we recommend:

67. Where it is competent to register a disposition in the Land Register it should not be competent to complete title in the Register of Sasines by means of a notice of title.

(Draft Bill, s 69(3))

Part 16 *A non domino* dispositions

Introduction

16.1 If a disponer has no title to grant a disposition, there are three possible outcomes to an application for registration by the disponee. The *first* is that the Keeper does not realise that there is a problem. In such a case, the application will simply be accepted, since as far as the Keeper is aware there is no reason why it should not be. As a result the Register will be inaccurate. The *second* possible outcome is that the Keeper is aware that the disponer has no title and accordingly rejects the application. The *third* possibility is that the Keeper might, despite knowing of the disponer's lack of title, decide to accept the application. It is with that third case that we are concerned in what follows. It will be convenient to have labels, and so we will call the first of these cases the "inadvertent" *a non domino*[1] case and the third the "advertent" *a non domino* case.

16.2 Before the introduction of the modern land registration system, the advertent/inadvertent distinction did not exist. In the Sasine system the Keeper accepted any disposition provided that it met certain requirements of form, for instance that it was validly executed and that it identified the property in question with reasonable precision.[2] It was not for the Keeper to judge the deed's substantive validity or invalidity. This approach was eventually changed, but that happened well after the establishment of the Land Register.[3] In the Land Register the practice at first was to accept all *a non domino* applications.[4] The practice in respect of both registers changed about the mid-1990s.

***A non domino* cases and the 1979 Act**

16.3 The policy behind the 1979 Act was that the Keeper was to operate an open door policy: the Keeper was not to reject invalid deeds.[5] But this policy did not come out clearly in the way the Act was finally drafted, section 4 being generally vague as to the criteria for acceptance or rejection of applications.[6]

Three possibilities: door open, door shut, and door slightly ajar

16.4 If the Keeper knows a deed to be *a non domino*, there are in principle three possibilities. The first would be to reject. That is the rule in a number of legal systems. (That

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[1] This Latin expression means "from/by a non-owner" and has long been a standard one. Strictly speaking it is imperfect, because the question is not whether the granter of the deed is owner, but whether the granter has power to grant it. Some non-owners have that power (eg a bank enforcing a standard security), just as some owners lack it (eg someone suffering from senile dementia).

[2] *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854. The degree of precision required for the Register of Sasines was a low one compared to what is required for the Land Register, but nevertheless there was a minimum standard.

[3] The change happened in the 1990s and applied both to the Land Register and to the Register of Sasines. For the latter see Alec M Falconer and Robert Rennie, "The Sasine Register and dispositions *a non domino*" (1997) 42(2) JLSS 72.

[4] See paras 12.45-12.46.

[5] See Part 12.

[6] Section 4 does have some specific rules about rejection, for instance where the application relates to a souvenir plot. But on the issue of invalid deeds it is vague.

does not, however, mean that in such systems there is no scope for prescription, because there will still be cases where an invalid deed is inadvertently accepted for registration.[7]) The second would be an open-door policy – to accept all such deeds. The third would be a middle course, whereby the presumption would be for rejection, but with the possibility of acceptance in certain cases. Using the Keeper's terminology, the distinction would be between "legitimate" and "speculative" cases. As has been seen, the second of these three possibilities appears to have been the policy behind the 1979 Act. No guidance can be obtained from the legislation on prescription, namely the Prescription and Limitation (Scotland) Act 1973, for that Act merely says that *if* an invalid deed is registered and there ensues a period of possession of ten years *then* (provided that certain other conditions are met) a good prescriptive title emerges. It does not say whether the Keeper should ever deliberately register an invalid deed.[8] The 1973 Act is compatible with any of the three possibilities just mentioned.

16.5 Some legal systems allow a prescriptive title to be acquired purely through possession. Our law does not: in our law the possession must be combined with, and must follow, a registered title. Hence if the Keeper were to adopt the first of the three possibilities, ie the shut door policy, the effect would be to make it impossible to acquire a prescriptive title, except in those cases where the application is accepted because the invalidity was not noticed. An example of a "legitimate" use of an *a non domino* disposition would be where land (in practice typically a farm) is passed down in a family over the generations.[9] Nobody has ever gone to see a lawyer and the property registers are a mere blank. The current "owner" wishes this irregular title to be regularised. That would make it possible, after ten years, to sell the property, or to raise money on the security of it.[10] There is a case for saying that the regularising of irregular titles is not only a benefit to those holding such titles but also a public benefit, in that it makes it possible for such land to become marketable, and so must ultimately tend to promote the efficient use of Scotland's resources. Those who in effect abandon their land to others cannot reasonably expect that the title to the land in which they show no interest should be protected for ever. Of course, for everyone who gains a title by prescription there must logically be someone who loses, and there are those who argue that "prescription is theft". We offer no view here on these basic issues. The fact is that prescription is part of our law and it is not for this project to question it. A shut-door policy, blocking the possibility of prescription, would be contrary to the assumptions on which the successive enactments on the law of prescription have been based. The possibility of regularising irregular titles by prescription has long been a settled part of our system of property law. The Keeper has not adopted a shut-door policy and we could not recommend such a policy.

16.6 The second possibility would be an open-door policy. As has been mentioned, that was the policy behind the 1979 Act, and (see below) the Keeper initially adopted it. We think that it is self-evident that such an approach would be unacceptable. Its tendency would be to reduce the Register to a shambles. It would absolutely contrary to the objective of a transparent land registration system.

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[7] This is, for example, the position in German law.

[8] Its silence on this point was originally a silence about the Register of Sasines, for in 1973 that was the only register. When the 1973 Act was amended by the 1979 Act, the silence became a silence about both registers.

[9] In such a case the current "owner" would be granted a disposition by a friend. The disposition would be gratuitous and of course would exclude any guarantee of title.

[10] Or the "owner" might sell before the end of the ten year period, with the buyer's title being supported by a title insurance policy, the premium for which would be paid by the seller.

16.7 That leaves the third approach, which is that of the Keeper. Clearly it should be continued. What is needed is a review of its details, plus the creation of a statutory basis for it.

Current practice[11]

16.8 The Keeper's policy is to enable those *a non domino* deeds which are considered to serve a legitimate purpose to obtain the benefit of registration, whilst rejecting applications which are considered speculative in nature.[12] How this policy is applied depends upon the reason for which the registration is sought. Where the applicant asserts that the proprietor cannot be ascertained with any certainty, evidence of this is required, such as appropriate searches in the Register of Sasines. Where the applicant has identified a proprietor but indicates that the attempts to establish the whereabouts of the proprietor, or successors, have failed, the Keeper's staff seek evidence of those endeavours. In addition, where the property may have fallen to the Crown, evidence is sought that Queen's and Lord Treasurer's Remembrancer has no interest in the property. Unless there are special circumstances, the expense of obtaining a title by the usual method is not considered a justifiable basis for acceptance of an *a non domino* disposition.

Our overall approach

16.9 To take stock at this point, we think that the Keeper's current "door ajar" policy is sound. But it lacks a statutory basis. Moreover we think it capable of being improved upon in its details. The criteria are not precise. Admittedly precision is not always possible in the law, but we think that here greater precision should be possible. Moreover the criteria seem to narrow the class of "legitimate" cases too much: the door is almost shut. The criterion of land whose rightful owner cannot be traced suffers from the difficulty that in the final analysis there can logically be no such land, for land that can be claimed by nobody else belongs to the Crown, either because it is land that has never been alienated by the Crown at any time since Scotland has been Scotland, or because it has fallen to the Crown either under the *bona vacantia* doctrine or under the *ultimus haeres* doctrine. It is true that the Crown may agree not to assert its rights, but that is equally true of any owner. Prescriptive title should not have to depend on agreement.

16.10 Accordingly, we recommend that:

68. Applications based on *a non domino* deeds should normally be rejected. But where they are legitimate in their purpose they should be accepted so as to enable prescription to begin to run.

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[11] This paragraph is based on information given to us by the Department of the Registers. See further *Registration of Title Practice Book*, para 6.4, and also Alec M Falconer and Robert Rennie, "The Sasine Register and dispositions *a non domino*" (1997) 42(2) JLSS 72. To what extent there has been complete consistency of policy or practice since about the mid-1990s we are unable to say.

[12] This division into "legitimate" and "speculative" is of course not free from difficulty. See below.

The approach taken in Discussion Paper 128

16.11 In Discussion Paper 128 we made the following proposal,[13] which attracted general support from consultees. As will be seen it is a development of the Keeper's practice.

> "15. (1) The Keeper should be bound to reject an application for registration in respect of a deed where or to the extent that –
>
> (a) the person granting the deed did not have title to do so; and
>
> (b) a person who would have had such title can be identified.
>
> (2) But there should be no duty to reject if it appears to the Keeper that the person with title has ceased to assert that title."

16.12 But turning that proposal into a precise legislative format has not proved easy, especially because, as some of our respondents, such as the Law Society of Scotland, rightly pointed out, the concept of "ceasing to assert title" is an elusive one. The Keeper has stressed to us the need for rules that would be reasonably straightforward to apply in practice. The decision of the European Court of Human Rights in *Pye*,[14] though eventually favourable to positive prescription, has made us conscious of the need to keep a margin of safety between the system to be adopted and the risk of a Convention-based challenge, especially bearing in mind the narrowness of the majority in that case.

16.13 Another element in developing our thinking has been the fact that land that belongs to no one else belongs to the Crown. Though the point is trite law, it is one that we perhaps did not take sufficiently into consideration in the Discussion Papers. Indeed, we think that until recently it may not have been sufficiently appreciated by the Keeper.

The task

16.14 The task is to frame a system that starts with the default rule that the Keeper should reject an application that is known to be based on an invalid deed, but to allow, in exceptional cases, the Keeper to depart from that default rule, in order to allow the applicant to be able to start running a course of prescription. That means a filter, or set of filters, to remove unmeritorious cases. Our recommendations about *a non domino* cases do not involve changes to the substantive law of prescription. They deal with a different issue: the Keeper's accept/reject decision. The aim is to provide, for the first time, a legislative basis for the accept/reject decision in the context of *a non domino* cases.

16.15 Before discussing the filters, it is necessary to mention two pre-conditions before the question of the deliberate acceptance of an invalid deed can even arise. In the first place, advertent *a non domino* registration should be possible only if the deed is invalid *by reason of lack of title*. If a deed is invalid for some other reason, such as incapacity, then no question of advertent *a non domino* registration can arise. This filter is, indeed, implied by the very term "*a non domino*". In the second place, advertent *a non domino* registration should be possible only for dispositions. There is little demand for the deliberate acceptance of other deeds granted on an *a non domino* basis, and this limitation to dispositions helps to

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[13] See DP 128, para 4.57.
[14] *J A Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3; *J A Pye (Oxford) Ltd v United Kingdom* [2007] ECHR 700. See further Part 35.

prevent unnecessary complexity.[15] In the case of a servitude of way the simple fact of usage is enough to create (after twenty years) a legal right: no preliminary registration is needed anyway. Thus in the case of a servitude the argument that "the Keeper should not prevent the possibility of prescription" does not apply.

The two filters

16.16 The first filter is that the owner should have been out of possession for a very substantial period. We have selected seven years. The figure is of course arbitrary and accordingly the draft Bill provides that it can be varied by subordinate legislation if experience proves it to be either too long or too short. But a period of several years seeks to capture the idea of "ceasing to assert title". Non-possession does not mean mere non-occupation. For example, if X leases land to Y, who occupies, X still has civil possession. Suppose, for example, that Marius owns land and grants a 15-year lease to Natasha. After seven years Natasha gets a friend, Orlando, to grant her an *a non domino* disposition. The application would fail at the first filter, because Marius has been and still is in possession.[16]

16.17 The first filter focuses on the owner. The second focuses on the applicant. It should not be enough that the owner is out of possession: if that were all, any speculator could, on identifying such property, make an *a non domino* application. The aim of positive prescription is that possession can, in appropriate cases, mature into good title. We think that prior possession by the applicant (or the applicant's author in title) should be a pre-condition for acceptance of an *a non domino* application. If the period required were seven years, that would merge into the first filter. But we do not think it should be so long. Whilst mere momentary possession would be too flimsy a basis for an *a non domino* application, we propose a period of a year. (This period too would be variable by subordinate legislation.) Thus an *a non domino* applicant would need to satisfy the Keeper about both filters.

16.18 We do not think it necessary to set out rules as to how the Keeper is to be satisfied as to possession. In practice affidavit evidence may be considered acceptable.

16.19 As for the nature of the possession, the draft Bill has two relevant provisions. The first is that the possession must be had "openly, peaceably and without judicial interruption".[17] That ties in with the concept of possession in the prescription legislation.[18] The second is that possession is defined as including civil possession: here again there is a tie-in with the concept of possession in the prescription legislation.[19]

16.20 We have considered whether there should be a further filter in the shape of a requirement that the title sheet in question should have been inactive for a specified period, the idea being that an owner who is dealing with the title of the property is still asserting that title. In German law there is a double filter, one being possession and the other being activity on the title sheet.[20] But since a "title inactivity" rule would involve certain complications, and

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[15] This does not mean that positive prescription can run only in respect of dispositions. In so far as other deeds are capable of being the basis of positive prescription, prescription can still run on them, but only in case of inadvertent registration.
[16] Assuming at least that she has been paying rent to him. If a landlord ceases to collect rent then there may be a basis for arguing that civil possession does not exist. This is an issue that does not need to be explored here.
[17] Draft Bill, s 21(1)(b)(ii).
[18] Prescription and Limitation (Scotland) Act 1973, s 1.
[19] Prescription and Limitation (Scotland) Act 1973, s 1.
[20] German Civil Code (BGB) § 927.

since in any case we think that the filters proposed above, coupled with the notification rule set out below, are sufficient to achieve the policy objectives, we have decided not to proceed with a title inactivity rule.

16.21 Accordingly, we recommend that:

69. (a) An *a non domino* application should not be accepted by the Keeper unless both:

(i) The owner has been out of possession for at least seven years, and

(ii) There has already been possession for at least a year by the applicant or the applicant's author.

(b) These periods should be variable by subordinate legislation.

(Draft Bill, s 21(1) and (13)(a) read with s 20)

Notification or advertisement?

16.22 Under current law, the Keeper is positively forbidden to notify the owner about an *a non domino* application.[21] There is, however, one exception, namely for foreshore,[22] where notice must be given to the Crown.[23] The Crown is not given any protection in respect of non-foreshore property. Nor are non-Crown foreshore owners protected.[24] The result is that this special rule is neither person-specific nor property-specific, but rather a mixture of the two.

16.23 We think that this special rule about the foreshore was, in part, a justifiable one. Owners of the foreshore do not ordinarily possess it in the way that other land is possessed, and accordingly might not be aware of somebody else seeking to obtain prescriptive possession.[25] We think that the policy behind section 14 is therefore a sound one, and should be carried forward into the new legislation, though that could certainly be done in a simpler manner than section 14 itself. We therefore recommend that in the case of foreshore notice must always be given. However, we can see no reason why the rule should be limited to foreshore owned by the Crown. It should extend to all foreshore, regardless of the identity of the owner. Moreover, we consider that the underlying principle requires that the same provisions should extend to the seabed.

16.24 But apart from the foreshore and seabed, we adhere to the view expressed in DP 128 that the legislation should not have a requirement for notification. At the same time, we would not go as far as the current legislation, which prohibits notification. The Bill as drafted

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[21] 2006 Rules, rule 18(2).
[22] Foreshore is land that is underwater at high tide, but not at low tide. See generally our Report on *Law of the Foreshore and Seabed* (Scot Law Com No 190, 2003), paras 2.8-2.11.
[23] 1979 Act, s 14. The section is not easy reading.
[24] Much of the foreshore is in Crown ownership, but by no means all. (It may be noted in passing that public rights in the foreshore exist regardless of who the owner happens to be.) Udal law means that in Orkney and Shetland the foreshore is normally owned by the owner of the adjacent land, not by the Crown. Thus in those counties s 14 is effectively a dead letter. Although udal law does not apply elsewhere, in practice there are, we understand, some parts of northern Scotland where Crown ownership of the foreshore is the exception.
[25] By the same token, obtaining prescriptive possession of foreshore is not easy. But it is not impossible.

permits notification by the Keeper without requiring it. Moreover, this is a matter which can be regulated by secondary legislation.

16.25 The suggestion has been made to us that any *a non domino* application should be put in the public domain in some way, for example by advertisement in the local newspaper or in the way that planning applications are made known. This would help alert those having a better right to the property in question to act in their own interest. Printing a plan of the area in question would involve some expense, but without such a plan those with an interest would very likely not realise the significance of the application. But our main doubt about the idea concerns not the question of expense, but whether there would be much value in such a procedure anyway. The Keeper is not to accept an *a non domino* application unless the owner has been out of possession for seven years and the applicant (or predecessors) has been in possession for a year. This in itself constitutes notice. It is arguable, indeed, that the best notice is possession, for if someone else is in possession, the owner is not. That is something not easy to overlook. Furthermore, the applicant could obtain no title without a further ten years of exclusive possession, ie a further ten years during which the owner is excluded from the land in question. The total period of non-possession must therefore be at the very minimum seventeen years. We think that this is enough notice, even to the sleepiest owner.[26]

The consequences of an *a non domino* registration

16.26 In the Register of Sasines the recording of an *a non domino* disposition has, of itself, no effect on anyone's rights. If land is owned by X and an *a non domino* disposition in favour of Y is recorded, X remains the owner and Y acquires no real right. It is true that Y does, as a result of the recording of the deed, obtain the possibility of acquiring ownership if ten years of possession ensue. But that does not alter the fact that the recording of the deed in itself has no proprietary effect. The 1979 Act does not permit neutral registration of that type. Because of the Keeper's Midas touch,[27] if Y is registered as owner, Y is owner, albeit subject to the possibility of losing ownership following rectification.[28] This is so even if Y is registered with exclusion of indemnity.

16.27 In the new scheme, there would be no Midas touch, and accordingly the acceptance of an *a non domino* application would have no immediate effect on anyone's real rights. (That fact is an illustration of the many benefits of discontinuing the Midas touch.) Although that follows from the nature of the new scheme, the draft Bill spells the point out, for the avoidance of doubt.[29] It also follows that the Keeper should not alter any existing registration. The entry in favour of the prescriptive claimant[30] should state that the entry is a provisional one. The prescriptive claimant should also not have the benefit of the Keeper's warranty.

16.28 The result would be that an *a non domino* registration would mean two names on the B Section (Proprietorship Section), for a certain period of time. That would track current practice, but whereas the effect of such double registration under current law is obscure[31] in

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[26] *Vigilantibus et non dormientibus jura subveniunt.*
[27] See Part 13.
[28] Cf DP 128, para 4.46.
[29] Draft Bill, s 21(7).
[30] A term is needed, and this seems as good as anything else.
[31] See Kenneth G C Reid, "*A Non Domino* Conveyances and the Land Register" 1991 JR 79; George L Gretton and Kenneth G C Reid, *Conveyancing* (3rd edn, 2004), para 7-12.

the new scheme it would be clear. Unless and until prescription has run, the prescriptive claimant would have no real right. Up to that time, the entry in favour of the prescriptive claimant, being an inaccuracy in the Register, would be capable of being removed by means of rectification.[32] Thereafter, it would be the other name that would be the inaccuracy, and in that case it would be removable by rectification.

16.29 Accordingly we recommend:

70. (a) An entry in favour of a prescriptive claimant is to be marked as provisional.

(b) It should have no effect on the rights of any person.

(c) The prescriptive claimant will not have the benefit of the Keeper's warranty.

(Draft Bill, s 21(2)(a), (4) and (7), and s 39(2)(a))

Successors

16.30 A prescriptive claimant may wish to dispone. The general law of prescription says that in such a case the periods of possession are added together (provided that the requirements of continuity, peacefulness etc are met). Thus if Alice is a prescriptive claimant and after four years of possession she dispones to Bill, and he possesses for six years, the full ten years will then have been accomplished. This principle would be frustrated were the Keeper not to accept applications from successors. Since the default rule for registration is that if the Keeper knows that a deed is invalid the application must be rejected, and since, in the example, the Alice/Bill deed is invalid (because Alice is not the proprietor), the default rule must be disapplied in such cases. That is the Keeper's current practice. Moreover, the practice in such cases is not to impose the same requirements as when a first *a non domino* application is made. Accordingly we recommend that the Keeper should accept such applications, provided of course that they are acceptable in other respects (proper execution, payment of fee etc). The same applies to subordinate real rights granted by prescriptive claimants or their successors. As for terminology, all such successors would themselves also be prescriptive claimants. Finally, deeds directed against a prescriptive claimant should in general be registrable, such as an adjudication or its successor, the land attachment.[33]

16.31 Accordingly we recommend:

71. (a) Unless and until the Register is rectified, the Keeper should accept deeds granted by a prescriptive claimant, provided that the applications are in other respects correct.

(b) The same should apply to deeds granted by successors.

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[32] In Parts 17 and 18 we recommend that the Keeper should be under a duty to rectify inaccuracies. That principle would, taken by itself, mean that advertent *a non domino* registrations would be futile, because as soon as they were made they would have to be deleted again. Hence in Part 18 we recommend a qualification to the general principle.

[33] Bankruptcy and Diligence etc. (Scotland) Act 2007, Part 4 (not yet in force).

(c) It should also apply to deeds against prescriptive claimants.

(d) Entries in the Register are to be marked provisional.

(Draft Bill, s 21(3) and (4))

Two final comments

16.32 It has already been explained that the recommendations made in this part of the Report do not affect the law of prescription, but the importance of the point make it worth repeating.[34] What we have recommended in this part of the Report is simply a set of rules as to when the Keeper should or should not agree to allow an application to engage the law of prescription in the first place. If an affirmative decision is made, then the general law of prescription takes over.

16.33 The other point we would stress is that the rules about possession *before* registration serve a different function from the rules, contained in the 1973 Act, about possession *after* registration. Possession after registration will eventually provide a good prescriptive title, assuming that there is no judicial interruption etc. The state of possession before registration is irrelevant for computing the prescriptive period. The two possession-based filters that we recommend would be relevant to a different question: whether the Keeper should allow the prescriptive clock to start to tick.

[34] See Part 35 for the changes we recommend to the law of prescription. The most important is the recommendation that prescription should be capable of running in relation to a warranted title, but that is irrelevant for present purposes, for in *a non domino* cases the title would be unwarranted anyway.

Part 17 Inaccuracy in the Register

Introduction

17.1 Few areas of the land registration system have caused so much difficulty as the subject of inaccuracy, together with its associated subject of rectification. There has been some public dissatisfaction. Public confidence in the land registration system may even have been slightly dented. Not all of this dissatisfaction has been justified. In a deeds registration system, such as the Register of Sasines, there is no official evaluation of land titles, unless there is litigation. In a title registration system, such as the Land Register, the department responsible evaluates land titles. There will inevitably be those who are pleased at the outcome, and likewise those who are disappointed, and the latter will often complain, just as those disappointed in litigation will often complain. Nevertheless after nearly 30 years of practical experience it is clear that the legislation is capable of some degree of improvement.

17.2 In practice the likeliest time that an inaccuracy will occur is on first registration, when the Keeper has to interpret a Sasine title.[1] Sasine titles are sometimes hard to interpret and so it is not surprising that inaccuracies sometimes occur. But a majority of titles have now gone through the process of first registration, and even more will have done so by the time that any legislation based on our recommendations could come into force. Thus the rate at which inaccuracies are entering the Register is already on a downward curve.

17.3 The topic of inaccuracy is inextricably connected with several others. But to keep this part from being unmanageably big, many connected topics are dealt with in separate parts.[2]

17.4 Finally, it should be said that the attention given to inaccuracy and connected topics in this Report should not lead the reader to suppose that the Land Register is a mass of inaccuracy, that conveyancers do not understand their business, that fraud is rife, or that the staff at the Department of the Registers are less than competent. Far from it. There are problems, and there are indeed concerns that conveyancing fraud may be on the rise, but the Scottish public have much to be grateful for: those who doubt this should look at the property registration systems of some other countries. Physicians study pathology, and rightly so, but one would get a false impression of ordinary life from turning the pages of a textbook of pathology. Likewise a project on the law of land registration must deal with inaccuracy, but the size of the problem should not be judged from the amount of attention it must necessarily receive in a report of this nature.

Inaccuracies under the 1979 Act

17.5 The 1979 Act has provisions about inaccuracies, and how they are to be dealt with.[3] But given the Midas touch it is not obvious how the Register can be inaccurate.[4] If, on the basis of an invalid deed, Jack is registered as the owner of Blackmains, then section 3(1) of

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[1] See further DP 125, paras 2.26 ff.
[2] See Part 18, on rectification, and Parts 19 to 25 on the guarantee of title. See also Part 13.
[3] Chiefly in s 9.
[4] For the Keeper's Midas touch see Part 13.

the 1979 Act means that Jack *is* the owner of Blackmains. That being the case, how could it be that the Register, in showing him as owner, is inaccurate?

Inaccuracies: actual and bijural

17.6 The 1979 Act says rather little – too little – about inaccuracies. In fact it uses that term to describe two different types of case. There are two types of inaccuracy, which may be called "actual" inaccuracy and "bijural" inaccuracy.[5] An inaccuracy is actual if what the Register says is simply untrue. An inaccuracy is bijural if what the Register says is false in terms of general law, but true within the scheme of the Act.

Bijural inaccuracies

17.7 For example, a disposition by Adam to Carla is registered, so that Carla is entered as proprietor in the B Section (Proprietorship Section) of the title sheet. It subsequently emerges that Adam's signature on the disposition was forged by an identity thief and that the deed is therefore void. As far as general property law is concerned, a void deed is not a basis on which ownership can pass. But the 1979 Act makes Carla proprietor.[6] This is the Keeper's Midas touch. Carla is owner but should not be, the force of the "should not be" deriving from general law. It is because of that "should not be" that the title sheet is inaccurate.[7] If the allocation of ownership effected by registration in terms of the 1979 Act were the whole story, the statement that "the Register is inaccurate in showing Carla as owner" would have no basis. Admittedly, the 1979 Act does not say "the question of accuracy or inaccuracy is to be judged by general property law", but the 1979 Act is silent about a great deal. It does not say what "inaccuracy" means: that has to be worked out, and the account just given has been developed by the courts and by academic writers and can now be accepted as settled law. The reason that we call such inaccuracies "bijural" is that two parallel systems have to be applied: registration law (to determine who is owner) and general law (to determine whether the answer given by registration law constitutes an inaccuracy). Which prevails? That depends. Sometimes "registration law" prevails over general law, and in that case the Register has to remain unrectified – ie the law requires the Register to continue to be inaccurate, and sometimes the general law prevails over registration law, and in such cases the law requires the Register to be rectified. In other words, if general law says that the answer given by registration law constitutes a bijural inaccuracy, that does not necessarily mean that the Register will in fact be rectified: to answer *that* question requires the application of a further set of complex rules. We return to this issue below.

17.8 Bijural inaccuracies can be initial or supervening. Carla's case is one of initial inaccuracy: the inaccuracy happened at the time of registration. There can also be supervening bijural inaccuracy. That happens if the registration was accurate but becomes inaccurate as a result of an off-register event. One example is where a registration is made on the basis of a deed that is not void but voidable. If later the deed is reduced, the Register thereby becomes inaccurate. Whether that inaccuracy is bijural or actual is a difficult question, on which the 1979 Act of course gives no clear guidance. But it appears to be a

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[5] This distinction is not apparent in the 1979 Act itself. For our terminology see DP 125.
[6] 1979 Act, s 3(1)(a).
[7] This is an example where an inaccuracy concerns a single title sheet. It is easy to assume that this is always the case: Form 9 (application for rectification) of the 2006 Rules makes that assumption. But often an inaccuracy will involve two title sheets. (Occasionally more.) Boundary disputes are one example. Servitudes are another.

bijural inaccuracy: ie the Register, notwithstanding the reduction, remains actually accurate. That is the implication of *Short's Trustee v the Keeper*.[8]

17.9 If the Register is bijurally inaccurate, it follows that it is actually accurate. That is another way of expressing the Midas touch: the Register says Carla is the owner, and is therefore inaccurate, because as far as the general law is concerned she should not be the owner, but what the Register says is nevertheless *true*: what the Register says prevails (unless and until rectification happens) over general law.

Actual inaccuracies

17.10 As well as bijural inaccuracies, there can also be "actual" inaccuracies. For example, if land were registered in the name of a company that did not exist, the registration would be void.[9] The Keeper's Midas touch can confer ownership even on someone with no right at all to the property, but it cannot confer ownership on *no one*, which is what registration in favour of a non-existent person is. This is a case where the actual inaccuracy arises at the time of registration. Another example of actual inaccuracy is where unidentifiable land is registered, and indeed the only case where a court has held a registered title to be void involved unidentifiable land.[10] Another case of actual inaccuracy would be where the registered right is of a type that cannot be a real right.[11] Our law recognises a set of nominate real rights. In contract law there are the recognised nominate contracts, but parties are free to create their own innominate contracts. In property law, by contrast, there are no innominate real rights, and if the Keeper were to accept an innominate real right for registration, the fact of registration could not infuse proprietary life into a right that cannot exist except as a personal right.

17.11 Like bijural inaccuracies, actual inaccuracies can be initial or supervening.[12] An example would be where a company is correctly registered as the owner of property, but later the company is dissolved. When a company is dissolved, its existence as a juristic person ends. Thus the off-register event of dissolution means that the Register becomes actually inaccurate in showing that company as the owner.[13] Another case. Blackmains and Whitemains are neighbouring properties. A servitude of way is registered, and enters both title sheets.[14] In fact it is never used and consequently after 20 years it is extinguished by the operation of negative prescription.[15] Both title sheets are now inaccurate. Whether the inaccuracy is actual or bijural is not certain, but the predominant view is that it is actual. On

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[8] *Short's Trustee v Keeper of the Registers of Scotland* 1996 SC (HL) 14. In fact this was only one of three litigations. For more about this important case see Part 20. On reduction in relation to the Land Register see Part 28.

[9] This can happen. One example is where there is a disposition to a company that did exist but has been dissolved. Another is where there is a disposition to a company that has never been incorporated, though those involved may have thought that they had incorporated it. Such cases involve gross errors, but gross errors can happen.

[10] *PMP Plus Ltd v Keeper of the Registers of Scotland* 2009 SLT (Lands Tr) 2.

[11] This is the effect of the proviso towards the end of s 3(1) of the 1979 Act: "insofar as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or, as the case may be, of being affected as a real right." It is arguable that *PMP Plus Ltd v Keeper of the Registers of Scotland*, 2009 SLT (Lands Tr) 2, mentioned above, is an example.

[12] In the new scheme, the only possible inaccuracies would be actual inaccuracies. And inaccuracies would continue to fall into one or other of the two categories of initial or supervening.

[13] In practice if a company is going to be dissolved steps are normally taken to dispose of its assets in advance, but occasionally a mistake is made and a company is dissolved still holding assets.

[14] Title Conditions (Scotland) Act 2003, Part 7.

[15] Prescription and Limitation (Scotland) Act 1973, s 8.

this basis it appears that actual inaccuracies can be divided into two classes; initial actual inaccuracies, which are thus exceptions to the Midas touch, and supervening actual inaccuracies, which are not.

Voidability

17.12 As a matter of general law, property rights may be absolutely good (and of course that is usually the position), or they may be voidable, or they may be void. A voidable right is a right that exists, and may never be challenged. Even if it is challenged, and challenged successfully, it is good until that time. So the registration of a voidable right does not constitute an inaccuracy, either actual or bijural.[16] The question of voidability is discussed further in Parts 20 and 28.

Rectifiability: the current law

17.13 It might be supposed that if the Register is wrong, it should be put right. That is almost always the attitude of those who suffer as a result of an inaccuracy, and they are generally baffled, and sometimes incredulous and even irate, when told that the law says that the Register is not to be put right, but, rather, is to remain inaccurate. To what extent this lay response is something we agree with will appear in due course.

17.14 Section 9(1) of the 1979 Act says:

> "…. [T]he Keeper may, whether on being so requested or not, and shall, on being so ordered by the court or the Lands Tribunal for Scotland, rectify any inaccuracy in the register."

17.15 This general provision is, however, prefaced by the words "subject to subsection (3) below" and that subsection severely restricts rectifiability:

> "(3) …. If rectification … would prejudice a proprietor in possession--
>
> (a) the Keeper may exercise his power to rectify only where--
>
> (i) the purpose of the rectification is to note an overriding interest or to correct any information in the register relating to an overriding interest;
>
> (ii) all persons whose interests in land are likely to be affected by the rectification have been informed by the Keeper of his intention to rectify and have consented in writing;
>
> (iii) the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession; or
>
> (iv) the rectification relates to a matter in respect of which indemnity has been excluded under section 12(2) …;
>
> (b) the court or the Lands Tribunal for Scotland may order the Keeper to rectify only where sub-paragraph (i), (iii) or (iv) of paragraph (a) above applies or the rectification is consequential on the making of an order under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985."

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[16] For some discussion of this point, in relation to *Higgins v North Lanarkshire Council* 2001 SLT (Lands Tr) 2, see Kenneth G C Reid and George L Gretton, *Conveyancing 2000* (2001), pp 110–111.

17.16 The pith of this provision is as follows.[17] Inaccuracies are rectifiable, except if rectification would prejudice a proprietor in possession. This exception is itself subject to an exception: even as against a proprietor in possession the Register is rectifiable if the inaccuracy has been caused wholly or substantially by the proprietor's fraud or carelessness. Section 9 always allows rectification of *actual* inaccuracies, for the rectification of an actual inaccuracy *changes* the rights of no one, and so the question of "prejudice" does not arise.

17.17 But the rectification of *bijural* inaccuracies is restricted. The underlying policy is that acquirers who take possession should, in general, be protected against rectification. Since buyers almost invariably take possession, that means that buyers are almost invariably protected against rectification, unless the "fraud or carelessness" exception applies, which is rare.[18]

17.18 Section 9(1) of the 1979 Act says that "the Keeper may, whether on being so requested or not, and shall, on being so ordered by the court or the Lands Tribunal for Scotland, rectify any inaccuracy in the register." Thus unless there is a rectification order from the court or Lands Tribunal, section 9 confers on the Keeper a discretion whether the Register should or should not remain inaccurate.[19] But this is subject to the exception concerning the proprietor in possession, where correction of the Register is not allowed.

A cross-table

17.19 Since the effect of the 1979 Act is that inaccuracies may be classified as bijural or actual, and also as rectifiable and non-rectifiable, the result is that there are potentially four categories. Whether the actual/unrectifiable category is in fact permitted under the 1979 Act is arguable.

	Actual	**Bijural**
Rectifiable	✓	✓
Unrectifiable	**?**	✓

The effect of rectification

17.20 Whilst the Act spells out in some detail the effect of registration,[20] it is silent as to the effect of rectification. But the effect can be worked out. If what is being rectified is an actual inaccuracy, rectification has no effect, ie no effect on the proprietary rights of the persons concerned. It merely makes the Register reflect the actual state of affairs. But if the inaccuracy is bijural, rectification makes sense only if it does affect the proprietary rights of the persons concerned. If the Register is so rectified as to delete Carla's name from the B

[17] For its origins, and connections with English law, see DP 125, para 7.2.
[18] An example is *McCoach v Keeper of the Registers of Scotland*, 19 December 2008, Lands Tribunal, discussed in Kenneth G C Reid and George L Gretton, *Conveyancing 2008* (2009), pp 121-133.
[19] Assuming that the inaccuracy is one that can competently be rectified.
[20] 1979 Act, s 3.

Section (Proprietorship Section) and replace it with Adam's name, the only rational interpretation of that act is that she loses ownership and he re-acquires it.

17.21 A difficult question is whether the Midas touch applies to rectification as it applies to registration. The issue could arise only in the case of wrongful rectification, which seldom happens. An example is *McCoach v Keeper of the Registers of Scotland*,[21] where the Register was rectified and the persons against whom it was rectified, though conceding that the Register had been inaccurate in showing them as the owners of the land in question, argued before the Lands Tribunal that the rectification had been unlawful. They therefore sought an order against the Keeper requiring that the Register be made inaccurate again. They were unsuccessful, but had the Tribunal decided in their favour the issue would have been brought into focus: were the appellants the owners in the substantial period of time between the rectification of the Register and the time of the Tribunal's decision? This is one of the many puzzles about the Land Registration system, generated by the excessive effect attached to statements in the Register.

17.22 As the *McCoach* case illustrates, wrongful rectification can happen in two ways – both rare in practice. One is where the Keeper mistakenly thinks that the Register is inaccurate, and rectifies it, but in fact the Register never was inaccurate, so that the "rectification" has made what was accurate inaccurate. The other is where the Register is indeed inaccurate, and the Keeper rectifies it to make it accurate, but does so contrary to the interests of a proprietor in possession. It is the second type of wrongful rectification that the appellants were claiming had taken place.

The effect of non-rectification

17.23 If there is an inaccuracy, but it is not rectified because section 9 forbids rectification, what is the consequence? The consequence is that the Register remains inaccurate. It might have been supposed that the 1979 Act would have sought to achieve its objective of protecting good faith possessors by saying that the Register is not inaccurate, that in showing Carla as owner the Register is not inaccurate, and that Adam is to be compensated for the loss of the property.[22] But that is not what the Act does. The Register remains inaccurate and prohibition against rectification is not necessarily a permanent one. Rather than speaking of prohibition, one should perhaps speak of suspension. The wronged party's right to rectification is suspended for as long as the other party has possession. If Carla loses possession, the bar against rectification disappears and Adam can require rectification. One is reminded of those drugs which, if they are taken every day, keep the patient asymptomatic, but which are unable to eradicate the virus from the body. If the patient stops taking the drugs, the protection ceases and the symptoms reappear.

17.24 An illustration can be found in *Kaur v Singh*.[23] Here a married couple owned a flat. The husband wished to sell it without his wife's consent. He signed the disposition. His wife's signature was forged. The buyer took possession. The Register was inaccurate to the extent of a one-half share.[24] Because the buyer (the defender, Singh) was in possession,

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[21] 19 December 2008, Lands Tribunal.

[22] In our proposed scheme this would be the solution in those cases where a good faith acquirer is to be protected.

[23] 1999 SC 180.

[24] It was accurate in respect of the half share that had belonged to the fraudulent husband, for his signature on the deed was genuine.

rectification was precluded. But at one stage when the defender happened to be absent, the wife simply resumed possession. And thereby the statutory bar to rectification instantly disappeared.

17.25 It was said above that "if Carla loses possession, the bar against rectification disappears." This statement needs some discussion. Supposes that Carla had sold on to Dora. Does Dora need to hang on to possession as a bar to rectification? That depends on whether the Register continues to be inaccurate after the Carla/Dora disposition. Is that the position? We discuss this issue in Part 13, where the conclusion arrived at is that inaccuracy does not disappear as a result of a subsequent dealing.[25] Hence it appears to be the case that the Register is (bijurally) inaccurate in showing Dora as owner.

17.26 It could be argued that if and when Adam is paid compensation (indemnity) by the Keeper the effect is that the Register thereby ceases to be inaccurate. That may well be correct, but the Act has no provision to that effect and other solutions are possible. For example, it could be that the Register remains inaccurate notwithstanding payment of compensation, and that if thereafter the Register is rectified the sum paid in compensation falls to be repaid to the Keeper.

17.27 The statement that "the Register is admittedly inaccurate but the legislation forbids rectification and expressly requires the Register to remain in error" is one that, experience shows, makes non-lawyers incredulous and sometimes irate. And we think that the non-lawyers are at least partly right. It is true that a balance has to be struck, and that those who rely on the Register should in general be protected, but the solution cannot be the head-in-the-sand one of refusing to correct mistakes when they come to light. Logically the tendency of section 9 is that over time the Register becomes less and less accurate, for the outflow of errors from the pool must always be less than the inflow of errors into the pool, for only some types of error can be put right, ie can pass through the outflow pipe.[26]

Register error and transactional error

17.28 In the discussion papers, we drew a distinction between what we called "Register error" and "transactional error".[27] Though the terms are new ones, the concepts are not. Under the general law, a newly-acquired title can be void either (i) because of a defect in the granter's title,[28] or (ii) because whilst the granter's title is good the process of transfer is not: something has gone wrong with the transaction. As applied to land, the former is what we call "Register error" meaning that the title as it appears in the Register is wrong, and the latter is "transactional error". The distinction is relevant from the standpoint of a grantee.

17.29 If, for example, the Register shows the owner as being A whereas the "true" owner – the person who, under the general law of property, would be owner – is B, then there is a Register error. Similarly, if the Register fails to disclose a standard security which, nonetheless, exists as a matter of the general law, then there is Register error. Register error may be either a bijural or an actual inaccuracy, though most commonly it is the former.

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[25] See paras 13.15-13.16.
[26] But if payment of indemnity eliminates bijural inaccuracy – which as we have indicated is a point of uncertainty – the quantity of inaccuracies in the pool may achieve an equilibrium.
[27] See in particular DP 125.
[28] In Ulpian's well-known words, *nemo plus juris ad alium transferre potest, quam ipse haberet* (D. 50.17.54). The same idea is often expressed as *nemo dat quod non habet*.

17.30 A transactional error is any error which is not a Register error. It is connected with the transaction itself and not with the existing state of the Register. Examples are deeds by persons who are incapax, deeds by companies signed on their behalf by persons who have no power to sign for the company, and deeds where the granter's signature has been forged. A special sub-category of transaction error is administrative mistake, which is discussed below.[29]

17.31 A transactional error, assuming that registration goes ahead, turns itself into a Register error. For example, Jack owns Blackmains, and Fred steals his identity and forges his signature on a disposition to Harry. That is transactional error. On the basis of the disposition Harry is registered as owner. There is now Register error. For although Harry is now the owner of Blackmains, because of the Keeper's Midas touch,[30] the entry in his favour is an inaccuracy.

17.32 The distinction between Register error and transactional error is not made in the 1979 Act. The two cases are treated alike. We draw the distinction here because we consider that the two cases are different and should be treated differently.

Bijural inaccuracies

17.33 Bijural inaccuracies exist only because of the Keeper's Midas touch. They result from the registration of invalid deeds.[31] Under general law, invalid deeds cannot have proprietary effect, but the Midas touch confers a proprietary effect by the very act of registration. In short, [invalid deed] + [Midas touch] = [bijural inaccuracy]. We recommend the abolition of the Midas touch[32] and as a result in the new scheme bijural inaccuracies will disappear. We think that there will be few mourners.

17.34 The disappearance of bijural inaccuracies does not mean the disappearance of inaccuracies. Alas, no legislation can achieve that desirable objective: in an imperfect world there will always be inaccuracies. The consequence of the abolition of bijural inaccuracies will be that in future any inaccuracy will be an actual one.

17.35 The rectification of an actual inaccuracy alters the rights of no party: it merely makes the Register state those rights correctly. Therefore the rectification of an actual inaccuracy can prejudice no party. Hence the disappearance of bijural inaccuracies means that the logic behind the 1979 Act's prohibition of rectification disappears. There is no need to protect anyone from rectification if rectification is harmless. The warped logic whereby the Register is required by law to be inaccurate falls away. All this results from the abolition of the Midas touch, recommended in Part 13. In DP 128 we proposed that "where the Register is inaccurate, rectification should be available without restriction"[33] and respondents were in general agreement. Accordingly we now recommend:

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[29] Paras 17.45-17.46.
[30] See para 17.7 above.
[31] Whether they could ever arise in another way is a matter for argument. For example, if the Keeper rectifies the Register but the result is itself an inaccuracy, it may be that the result is a bijural inaccuracy. But any such cases are of marginal significance from a practical point of view.
[32] Part 13.
[33] DP 128, para 6.32 (proposal 24(1)).

72. If the Register is inaccurate, it should be rectified.

(Draft Bill, s 53 and s 54)

17.36 This statement looks like mere common sense. Indeed, it is mere common sense. We think it will represent a major improvement in the law. It does not mean that the guarantee of title, which is such an important part of the present system, will be lost. Titles will continue to be guaranteed.

The continuing guarantee of title

17.37 In broad terms, guaranteed title can be delivered in three ways. (i) Whatever the Register says is final. If it is wrong then it just has to stay wrong. Those who lose as a result are compensated in money. Example: X owns land and there is a forged disposition to Y and Y is registered. The Register must not be rectified but instead X is compensated.[34] (ii) The opposite. Any error is put right. Those who lose as a result are compensated in money. Example: X owns land and there is a forged disposition to Y and Y is registered. The Register must be rectified. Y is compensated.[35] (iii) A mixture of the first two. In some types of case the register is rectified and in others it is not, and in any event those who lose are compensated.

17.38 The 1979 Act delivers the mixed system.[36] So does the new scheme. But the details differ. And in those cases where the Register is *not* to be rectified, our technical method of attaining that result is different from the 1979 Act. As has been seen, in such cases the 1979 Act says that the remedy of rectification is merely suspended. The inaccuracy remains. Our solution is that in such cases the inaccuracy disappears, and the Register becomes accurate. For example, X owns land and there is a forged disposition to Y and Y is registered. Later Y dispones to Z, who is registered. At this stage – when Z is registered – our new scheme says that the Register ceases to be rectifiable and that accordingly the Register becomes *accurate*. The rights of the parties are at this stage realigned to reflect what the Register says they are. X is compensated.

17.39 The details of the new scheme are explored in Part 23, but some brief notice is appropriate here, to show that the new rule, that all inaccuracies should be rectifiable, does not prejudice the guarantee of title.

In the new scheme, what is an inaccuracy?

17.40 The 1979 Act does not say what an inaccuracy is, and we think it would be useful if the new legislation were to do so. In our scheme "inaccuracy" means actual inaccuracy, for the category of bijural inaccuracy will disappear. In broad terms, the Register is inaccurate if, and only if, it fails to reflect the true legal position.[37] That can come about in more than one way. For example the Register may list a right which has come to be extinguished; or it may list inaccurately a right which still exists. The error may be trivial or of fundamental importance; and it may be present at the time the entry is made or it may arise from

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[34] This is called "immediate indefeasibility", and is the rule in a majority of Torrens jurisdictions.
[35] This is a perfectly workable system but as far as we know has never been enacted anywhere.
[36] As do a number of other systems, including that of England and Wales.
[37] Much the same expression is used in respect of the negative system of registration of title in Germany. See § 894 BGB: "… *mit der wirklichen Rechtslage nicht im Einklange* …".

supervening events, such as the extinction of a right by prescription. In DP 128 we proposed that "the Register is inaccurate where, in respect of an entry or omission, it fails to state the actual legal position. But the Register is not inaccurate where it omits an overriding interest."[38] Respondents were in general agreement.

17.41 Thus a title sheet may be inaccurate by what it says or by what it does not say – its wrongful utterances and its wrongful silences. An example of the former would be where the title sheet says that the property is encumbered by a standard security when it is not. An example of the latter would be a blank C Section, when in fact there does exist a standard security. Some inaccuracies might be regarded as having both aspects. For example if a title sheet says that Peter is owner when in fact the owner is Wendy, the title sheet is inaccurate both by its silence (omitting her name) and by its utterance (including his).

17.42 The concept of inaccuracy depends on what the Register is supposed to cover. For example, the Register is not supposed to cover short leases, and so if a title sheet does not mention a short lease it is not inaccurate, even though the property is encumbered by that lease. As for what the Register *is* supposed to cover (so that omission would be an inaccuracy), the answer is that the Register is to include whatever any enactment says it is to include. That is one of the underlying themes of our approach: it is in vain for a land registration statute itself to attempt a complete enumeration of what is or is not to be covered. On the whole, what is to go into the Register is covered by *other* enactments, though Part 2 of the Bill itself also has one or two requirements.[39] For example, suppose that a servitude of way comes into existence by prescriptive use in favour of Blackmains over Whitemains. As soon as that happens, the Register is inaccurate in not showing it. The Keeper should rectify both the Whitemains title sheet, by showing the servitude as an encumbrance, and the Blackmains title sheet, by showing the servitude as a pertinent.[40] Finally, a title sheet is also inaccurate if it includes a right or obligation which, though it does indeed exist, is not one that should enter the Register. For example, suppose that Blackmains is subject to a 10-year lease. If the Keeper were to enter that lease on the Blackmains title sheet, that would be an inaccuracy, not because the lease does not exist (it does exist) but because there is no statutory basis for the entering of short leases on title sheets. The title sheet should be rectified by deletion of the reference to the lease. Summing up, we recommend:

73. In the new scheme a title sheet is inaccurate if and in so far as it misstates what the position is in law or in fact, omits anything required, by or by virtue of an enactment, to be included in it, or includes anything the inclusion of which is not expressly or impliedly permitted by, or by virtue of, an enactment.

(Draft Bill, s 53(1)(a)-(c))

Voidable titles

17.43 Under current law the Register is not inaccurate in showing a voidable right, and clearly that should continue to be the law. The more difficult question is how to handle the

[38] DP 128, para 6.32 (proposal 24(2)).
[39] See Part 7.
[40] For more on servitudes constituted by prescription see Part 10.

position where a voidable title is reduced. Under current law that results in inaccuracy. For example, if Jack dispones gratuitously to Jill when he is already in balance sheet terms insolvent, that disposition, being to the prejudice of his creditors, is voidable. Suppose that he is sequestrated and his trustee in sequestration raises an action of reduction and is successful. Under current law the decree makes the title sheet inaccurate (bijurally). Whether the title sheet can then be rectified is another matter. Our policy is that the court's decision should in future be given effect to in the Land Register by registration of the decree. Thus Jack's trustee in sequestration would extract the decree and register it. This is the reason why section 53(3)(a) of the draft Bill says the reduction of a voidable deed does not of itself render the Register inaccurate. It should be noted that section 53(3)(a) is limited to the reduction of *voidable* deeds. The reduction of *void* deeds is different. Such a reduction is simply declaratory of a state of affairs that already exists. Such a reduction therefore presupposes the existence of an inaccuracy. The subject of voidable deeds and reduction is explored in more detail in Parts 20 and 28. But it may be helpful to include recommendations at this point:

74. (a) The Register should not be regarded as being inaccurate in showing a voidable right.

(b) The Register should not be regarded as becoming inaccurate by reason that a voidable registered deed has been reduced.

(c) The reduction of a voidable registered deed should take proprietary effect upon registration of the extract decree of reduction.

(Draft Bill, s 32 and s 53(3)(a))

Law Reform (Miscellaneous Provisions) (Scotland) Act 1985

17.44 Section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 allows the court to rectify errors in deeds. If the deed has been registered in the Land Register, the Register is made to reflect the court's decision by way of rectification. Our policy – as for the reduction of voidable deeds – is that the court's decision should in future be given effect to in the Land Register by registration of the decree. This is the reason why section 52(3)(b) says that the rectification of a deed under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 does not in itself render the Register inaccurate. The subject is explored in more detail in Part 29.

Administrative mistake

17.45 Because of an administrative mistake at the Department of the Registers, the entry made on the Register might not give proper effect to a transaction. There might be over-registration, in which more land is registered to the disponee[41] than was actually contained in the deed. There might be under-registration, in which less land is registered to the disponee than is included in the disposition. The omission of an encumbrance such as a standard security would in a sense be over-registration, and conversely the omission of a pertinent would in a sense be under-registration. And so on. Mistakes of this kind differ from other

[41] Over-registration could happen not only in the case of a disposition but also in some other types of transaction. The most obvious case would be a lease but there are other possibilities as well.

types of transactional error. An administrative mistake is a mistake of implementation. Typically, but not invariably, these are errors of first registration. Often the ingiving solicitor will notice the error when the land certificate is issued, and draw the Keeper's attention to it, but this does not always happen.

17.46 The 1979 Act makes no distinction between administrative error and error of any other kind. This causes anomalies for the Keeper's indemnity. For example, if someone applies to be registered as owner of an area of land extending to half a hectare, and by administrative mistake is registered not only for that area but also for an adjacent boundary area of a hundred square metres, the Keeper's indemnity is *prima facie* engaged for the whole registered area. This anomaly is discussed in Part 22. For present purposes we wish merely to discuss administrative mistake with reference to the concept of inaccuracy. We offer a few examples.

(i) More land is registered to a disponee than is included in the disposition. This is over-registration. The Register is inaccurate. The disponee's title to the extra area is void.

(ii) Less land is registered to a disponee than is included in the disposition. This is under-registration. The Register is not inaccurate. This may at first sight seem surprising, so a few words of explanation are called for. The Register is inaccurate when there is a discrepancy between what the Register says and the actual state of affairs. But in this case there is no such discrepancy. The Register says that the disponee is not the owner of the omitted bit of land, and the Register is right in so saying. Registration being a necessary condition for acquiring ownership of land, the grantee has not acquired the ownership of the area in question. So the Register is accurate: it does not utter an untruth. The Register is indeed in error, but "error" is a broader category than "inaccuracy." For this error there is a remedy: not rectification, but supplementary registration. If the applicant suffers loss as a result of the error, the Keeper is liable under general principles of law.[42] In this respect the position is in substance the same as if the Keeper rejects an application, and does so wrongly. That does not make the Register inaccurate.

(iii) Jack owns Blackmains and sells part to Jill. The disposition includes the grant of a servitude over the retained area. The Keeper fails to register the servitude. Here, the servitude has never been constituted. Hence the Register is not inaccurate in failing to show it. The position is akin to the previous example.

(iv) Jack dispones Blackmains to Jill. Blackmains is the dominant property in an existing servitude over Whitemains. That servitude is included in the A Section (Proprietorship Section) of Jack's title sheet. By mistake the Keeper omits it when registering Jill. A pertinent by its nature attaches to the property. It could not remain with the disponer. So the disponee, Jill, now has it, notwithstanding the silence of the title sheet. The Register is inaccurate. This

[42] Like the 1979 Act, the draft Bill sets forth certain specific grounds on which the Keeper is liable, but again like the 1979 Act it does not seek to restate the general law about the liability of public officials and bodies. See further Part 27.

case is in a sense under-registration, but unlike the simple case of under-registration, it does result in inaccuracy.

Which parts of the Register can be inaccurate?

17.47 The parts of the Register that can be inaccurate are the Title Sheet Record and the Cadastral Map. They are the parts of the Register in which the Keeper can assert the existence or non-existence of rights. In the other two parts, the Application Record and the Archive Record, the Keeper does not assert the existence or non-existence of rights. If, for example, the Archive Record contains a deed that turns out to be a forgery, that does not mean that the Register is inaccurate and so the question of rectification does not arise *in relation to the Archive Record*. Suppose that the deed is a disposition to Y purportedly by X on the basis of which Y was registered as owner. X raises an action of reduction and is successful. The result will be that the inaccuracy in the Title Sheet Record will be rectified (by deleting Y's name and replacing X's). And a copy of the extract decree of reduction will be added to the Archive Record. But the forged deed is not torn up. It remains in the Archive Record as a historical fact, however regrettable, which provides the explanation of why the Title Sheet Record was, for a time, wrong.

Part 18 Rectifying the Register

Introduction

18.1 In Part 17 we discuss the questions of inaccuracy and the rectifiability of the Register. In this part we consider not the substantive question of rectifiability, but rather its procedural and evidential aspects.

Current law and practice

18.2 Under the existing law, the road to rectification crosses three bridges. (i) The fact of the inaccuracy has to be established. (ii) The inaccuracy has to be of a type that is rectifiable.[1] (iii) The third bridge is set out in section 9(1) of the 1979 Act:

> "Subject to subsection (3) below, the Keeper may, whether on being so requested or not, and shall, on being so ordered by the court or the Lands Tribunal for Scotland, rectify any inaccuracy in the register…."[2]

18.3 This third bridge has three lanes over it. They are:

- The Keeper, acting unprompted, so decides. This is a matter of pure discretion: the Keeper is equally free not to rectify.
- The Keeper so decides following an application for rectification. This is a matter of discretion: the Keeper is equally free not to rectify.
- The Keeper is ordered to rectify by the court or the Lands Tribunal. Here the Keeper has no discretion.

18.4 In other words, except where there is an order from the court or Lands Tribunal, the Keeper has a discretion whether or not to rectify.[3] The Keeper can *know* the Register to be inaccurate, and yet can choose that it should remain inaccurate. The 1979 Act says nothing else about rectification as a process.

18.5 The Rules add nothing except to say that "an application to the Keeper, under section 9(1) of the Act, for the rectification of the register shall be on Form 9."[4] It is the Keeper's practice to add such applications to the Application Record, and since applications (whether for registration or for rectification) are dealt with in order of receipt that means that no registration application can be processed until a rectification application has been dealt with. Often an application relates to two title sheets (for example an application to rectify an alleged inaccuracy about a boundary) but this may not always be immediately apparent to the Keeper's staff (because the Form 9 will often specify only one title number) and so in practice a rectification application may appear in the Application Record only in relation to

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[1] For the distinction between rectifiable and non-rectifiable inaccuracies see Part 17. In the new scheme all inaccuracies would be rectifiable.
[2] 1979 Act, s 9(1).
[3] Assuming that rectification is not barred by s 9(3). See Part 17.
[4] 2006 Rules, rule 17. Rule 20 made similar provision in the 1980 Rules.

one title sheet. The Form 9 asks only for the title number of one property. There is nothing on the Form saying something like "where the rectification sought would necessitate the rectification of another title sheet, give the number of that title sheet".

18.6 Almost always an application for rectification will, if given effect to, prejudice some other person – typically a neighbour. If that other person agrees to the rectification, then well and good, and the rectification can go ahead. But of course that consent may not be forthcoming. Often the position boils down to simple assertion and counter-assertion. Sometimes the dispute is about the law, sometimes about the facts, and sometimes both. In some cases the Keeper can see that the Register is indeed inaccurate and then rectification can go ahead, albeit over the protests of the person against whom the rectification is made. But often the Keeper feels unable to rectify, not because it is clear that the Register is accurate, but *because it is not clear that the Register is not accurate*. In other words, if the matter is doubtful, no rectification happens. If the person seeking rectification is unhappy, an appeal to the Lands Tribunal is possible, or an action in the ordinary courts. The Keeper is not well placed to hear and determine disputes – very often neighbour disputes – either in relation to law or in relation to facts. The Keeper is not a member of the judiciary. There is no power to cite witnesses or to compel the production of documents. In a nutshell, the Keeper's position is that the Department of the Registers of Scotland is not a court of law.

18.7 The legislation says nothing as to who may apply for rectification. The matter has been considered judicially once, in *Wilson v Keeper of the Registers of Scotland*.[5] Here the Scottish Development Agency was the registered owner of property. Inverclyde District Council was the trustee of a trust, and certain beneficiaries of that trust considered that the property really belonged to the Council (as trustee) and not to the Scottish Development Agency. They raised an action for rectification. It was held that they had no title to sue. Only the Council had the right to apply for rectification. It is however worth noting that this was a case of (alleged) bijural inaccuracy, so that if the Register had been rectified, ownership would have passed from the Agency to the Council, and this was evidently a major factor in the court's decision. By contrast, under our new scheme there would be no bijural inaccuracies, only actual inaccuracies, and the rectification of an actual inaccuracy alters no rights.

Our provisional proposals in DP 128

18.8 In DP 128 we proposed some modifications to the current law. There would be two bridges to cross, rather than three, before the Register could be rectified. One bridge would disappear because in our new scheme all inaccuracies – not just some – would be rectifiable. As for the third bridge, there would be still be three lanes, but one of them – the second – would be different from the 1979 Act:[6] We proposed:

- In the absence of an order by the court or Lands Tribunal, and in the absence of an application for rectification, the Keeper would have a discretion as to whether to rectify or not.

- In the case of an application, the Keeper would be bound to rectify.

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[5] 2000 SLT 267.
[6] DP 128, para 6.32 (proposal 24).

- In the case of an order from the court or the Lands Tribunal, the Keeper would be bound to rectify.

18.9 We also proposed rules about who could apply for rectification:

> "Only the following should be able to apply for rectification –
>
> (a) the person who holds the right in respect of which the application is being made; and
>
> (b) any person who holds a real right in the same land or who has a right to acquire such a real right."[7]

The way forward: procedure

18.10 Although these proposals were broadly supported by respondents, further study of the issues has led us to the conclusion that, whilst these proposals would certainly represent an improvement, a more radical approach is possible and is to be preferred, not least for its simplicity. The Keeper ought to maintain an accurate Register. That implies that inaccuracies should be rectified.[8] That being the case, there seems to us to be no basis for any discretion in the Keeper to choose to retain an inaccuracy. In turn, that means that we see no role for applications to rectify inaccuracies. That in turn means that there is no need for rules to determine who may apply for rectification. It means that there is no place for any official form that has to be submitted to the Keeper, though it may be that a non-official form will be made available as a convenient method of informing the Keeper about alleged inaccuracies.

18.11 The Keeper may discover inaccuracies in all sorts of way. Information from those directly concerned is one. Another is when work is done, for any reason, on a title sheet and an inaccuracy comes to light. The way in which the truth is discovered is irrelevant: if an inaccuracy comes to light the Keeper must rectify. The draft Bill thus simply provides that the Keeper must rectify inaccuracies. The question of what happens if the Keeper declines to rectify and someone is aggrieved by that decision is considered below.

18.12 Occasionally it might not be clear what form the rectification should take. In that case we consider that the solution should be for the Keeper not to rectify the Register but instead to add a note to it explaining the position. The effect of such a note would be that anyone then dealing with property would know of the inaccuracy. That is relevant both in relation to the Keeper's warranty[9] and in relation to the realignment rules.[10]

18.13 In DP 128 we were concerned that an unqualified duty to rectify would create problems in relation to cases where positive prescription is running.[11] The issue is indeed a genuine one. Our approach is that in such cases the Keeper must not rectify unless there has been a decree, or there is consent.[12]

18.14 We recommend:

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[7] DP 128, para 6.32 (proposal 24(5)).
[8] For the evidential standard to be applied by the Keeper in forming a judgment as to whether there is an inaccuracy, see paras 18.16 to 18.25 below.
[9] See Part 22.
[10] See Part 23.
[11] DP 128, para 6.26.
[12] Draft Bill, s 54(5) and (6).

75. (a) The Keeper should be under an obligation to rectify any inaccuracy in the Register, without being so requested.

(b) But where it appears to the Keeper that rectification would prevent the acquisition of a prescriptive title, rectification should not take place unless there has been a judicial determination of the fact of the inaccuracy.

(c) Where an inaccuracy has been identified but it is not yet clear what the correct entry should be, the Keeper should not at that stage rectify but should add an explanatory note.

(Draft Bill, s 54(1), (5) and (6))

18.15 Where rectification takes place the question of compensation arises. That issue is considered in Part 22.

The way forward: the evidential standard

18.16 It was noted above that over time the Keeper has gradually come to apply a high evidential standard to applications for rectification. We think that the approach is a sound one.[13] Almost all applications for rectification involve title disputes. Such disputes belong in the courts. Only the courts have the means to hear and determine such disputes. The Department of the Registers of Scotland is not a court and simply lacks the capacity to hear and determine disputes about land titles. When there is a title dispute the Keeper's role should be that of scorekeeper, not umpire. We would stress that the high evidential standard that the Keeper applies *de facto* at present and would apply *de jure* under our recommendations has no implications for the evidential standard in civil litigation. That standard would be unaffected: it would continue to be balance of probabilities.

18.17 At one stage we considered the possibility of providing that the Keeper must *never* rectify the Register unless the fact of inaccuracy has been judicially determined (or unless there is the consent of those concerned). However, that seems too rigid a position. There are sometimes cases where the fact of inaccuracy is so clear that to require the issue to be settled by litigation[14] would be too formalistic and would give rise to unnecessary expense. Accordingly, we think that the rule should be more or less what it has de facto become in recent years: the Keeper should rectify an alleged inaccuracy only where the fact of the inaccuracy is perfectly clear, or not reasonably disputable. The term the draft Bill chooses is "manifest", an adjective that has occasionally been used in other enactments.[15]

18.18 A court will determine a title dispute – as other disputes in civil law – on a lower evidential standard, that of a balance of probabilities. But once the court has made its decision, the matter is settled, and from the standpoint of the Keeper a matter which was, before the litigation, uncertain, is now certain.[16] In short, a decree is a good basis for

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[13] The issue of evidential standard was not raised in the discussion papers.
[14] In those cases where it can be settled by the consent of those concerned there is of course no problem.
[15] For example the Adults with Incapacity (Scotland) Act 2000, sch 3, para 6, the Child Abduction and Custody Act 1985, Sch 1, Art 27, the Treasury Bills (Amendment) Regulations 1998 (SI 1998/1450), reg 2 and the Environmental Information (Scotland) Regulations 2004 (SSI 2004/520), reg 10(4).
[16] Suppose that Claudia and Vincent have a boundary dispute. The disputed area is currently in Vincent's title sheet. And suppose that if the Keeper were to apply a balance-of-probability test, the area would be transferred

rectifying an inaccuracy. That does not mean that the decree has to take the external form of an order for rectification. A decree in such terms would, it is true, remain possible. But any decree which clearly (whether expressly or not) said that the Register was inaccurate would normally amount to evidence at the "manifest" standard. For example, there is a boundary dispute. Luke claims that a certain area that is in his neighbour Martha's title sheet belongs to him. He raises an action of declarator to that effect. He is successful. Even though the decree does not state in terms that the Register is inaccurate, the decree implies that, and on seeing the extract decree the Keeper must rectify the Register.

18.19 It is true that even an extracted decree may not always be unchallengeable, especially if the decree is not granted *in foro*. The draft Bill does not enter into the question of what does or does not meet the "manifest" standard. Our expectation is that the Keeper would normally regard any extracted decrees as meeting that standard.[17] Otherwise a person aggrieved by an inaccuracy might be in an impossible position. That person could raise an action of declarator, but the proper contradictor could stymie the rectification by the simple ruse of not entering appearance. That would be an absurd situation.

18.20 The need for the high evidential standard for rectification is supported by another point. If the evidential standard to be applied by the Keeper were merely one of balance of probabilities then a title sheet could become a seesaw, according to how the balance tipped from time to time.

18.21 Experience shows that those dissatisfied with what the Register says often seek to apply considerable pressure on the Keeper to rectify the Register in their favour. But such cases usually represent title disputes, very often between neighbours.[18] The use of rectification applications as a backdoor way of avoiding the proper resolution of title disputes in open court is inappropriate.[19] It is true that litigation can be slow and costly. But that is a general issue for the civil justice system, an issue that arises for disputes of all sorts, not only disputes about land titles. Whether the civil justice system is slow or quick, dear or cheap, the Department of the Registers of Scotland is not a court of justice and the Keeper is not a judge.[20]

18.22 The evidential standard for *registration* decisions should be the balance of probabilities. That follows existing practice. Thus the existing difference between the evidential standards for registration and for rectification will continue.[21] We consider that to

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to Claudia's title sheet. But her case does not meet the higher evidential standard. Accordingly the Keeper must leave things as they are. Now suppose that Claudia raises an action against Vincent. The test to be applied is that of balance of probability. The result will be decree for Claudia or decree for Vincent. Suppose that the result is decree for Claudia. The effect is that *now* her position has been established to the higher evidential standard, and accordingly the Register must be rectified.

[17] There could be exceptions. Suppose that three properties meet at a corner, the owners being Albert, Charlotte and Werther. Albert raises an action of declarator against Werther that an area at the corner belongs to him, Albert, and obtains decree in absence. In fact the area is registered to Charlotte, who has not been called as a defender. Such a decree would not be a good basis for the Keeper to rectify the Register by transferring the area in question from Charlotte's title sheet to Albert's.

[18] The commonest reasons are (a) boundary disputes and (b) disputes over private rights of way (servitudes of way).

[19] For the specific issue of the recognition on the Register of servitudes said to have been constituted by prescriptive use, see Part 10.

[20] For the Keeper's position in litigation see Part 31.

[21] The 1979 Act is silent as to the evidential standards in both cases. The draft Bill sets out the standard expressly for *rectification*. It is, like the 1979 Act, silent as to the evidential standard for *registration*. It is our view

be appropriate. To make the registration standard a high one would be to make the system too difficult to operate in practice. And in cases where the Keeper, after considering an application for registration, concludes that it is on balance a valid one, but some doubt exists, there is a procedure in place: the application is to be accepted but subject to a qualification of the warranty. Finally, there are occasionally cases where the acceptance of an application would imply that the Register is in some way inaccurate. In such cases there may be a conflict of the two evidential standards. The registration decision is to be made on a balance of probabilities, but the rectification decision is to be made on the higher evidential standard. Such cases will happen seldom, but they are possible. Here is one. Janet owns Whitemains, her title being in the Register of Sasines. There is a standard security over it, held by Keith. Janet sells to Larry. By human error the existence of the security is not noticed by the Keeper or by Larry's solicitors.[22] Later Keith assigns the standard security to Morag and she applies for the registration of the assignation. If the Keeper accepts this application - a decision to be taken on balance of probabilities - that would require rectification by inserting of the security into the C Section - a decision to be taken at the high evidential standard. The obvious solution to the conflict is that the higher (manifest) evidential standard has to be applied to the registration application.[23] We think this sufficiently apparent and so the draft Bill does not have an express provision on the point.

18.23 It has been suggested to us that if the inaccuracy arose on first registration (ie when the property switched from the Register of Sasines to the Land Register), the evidential standard for rectification should be the lower one, ie the balance of probabilities. The argument is that first registration is a major source of errors, and that it is unfair to expect those who suffer to have to litigate to vindicate their rights. For example there are two neighbouring properties, Yellowmains and Greenmains, both in the Register of Sasines. Yellowmains is then registered in the Land Register. The registered boundary is one that the owner of Greenmains disagrees with. We have some sympathy with this view of matters, but nevertheless do not think that an exception should be made for inaccuracies that arose on first registration. It is indeed unfair to the owner of Greenmains that litigation should, in the absence of an amicable settlement, be required, but that is merely one aspect of an imperfect world: it is always unfair to those who are wronged that they should have to seek the aid of the courts to vindicate their rights. That is true whether the error arises on first registration or not. It is also true in contexts other than property law. If the "manifest" standard is right, then we consider that there is no basis for distinguishing between inaccuracies according to the occasion on which they arose.

18.24 Finally, a few words to recapitulate the logic. The higher evidential standard is a sufficient condition for rectification (if the inaccuracy *is* established on the higher standard, then the Keeper *must* rectify) but also a necessary condition (if the inaccuracy is *not* established to the higher evidential standard, then the Keeper *must not* rectify).

18.25 We recommend:

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that the point is too clear to need any express statutory provision. Where statutory clarification is needed – to back up the Keeper's practice – is in relation to rectification.

[22] The latter may well have relied on the Keeper's search of the Register of Sasines.

[23] In the example given no doubt Morag could satisfy the Keeper at that higher standard.

76. The Keeper's obligation to rectify the Register where there is an inaccuracy should arise only where the fact of the inaccuracy is manifest.

(Draft Bill, s 54(1))

Litigation

18.26 If the Keeper does not rectify an alleged inaccuracy, it will of course always be possible for someone who is aggrieved thereby to go to court to compel the Keeper to rectify, calling the Keeper as defender. But in practice such an action will seldom make sense. The complaint will almost invariably prove to have been made against the wrong person and will be dismissed accordingly. If a title dispute between X and Y goes to court, for instance about the ownership of a boundary area, the proper parties are X and Y, not X and the Keeper. In other words, if X is unhappy about what the Register says, and thinks that it is inaccurate, and thus that it should be rectified, the solution is (in the absence of an amicable settlement) to litigate the substantive dispute itself, ie the boundary dispute. That means litigating it with Y. If that is done, and if X is successful, the decree will constitute manifest evidence of the fact of the inaccuracy, and the Keeper will rectify accordingly. The stronger X's case is (and the Xs of this world usually assert their case to be irrefragable) the more likely that Y will agree to an amicable settlement. If Y refuses such a settlement, then that in itself is often evidence that X's case is not quite so strong as is confidently asserted in X's letters to the Keeper.

18.27 There could in theory be cases where the fact of inaccuracy had been established to the higher evidential standard but the Keeper nevertheless refused - unlawfully - to rectify. In such cases an action against the Keeper would be appropriate and would be successful. But such cases would tend to be cases where X is saying "I have offered you evidence meeting the high standard" and the Keeper is saying "high, perhaps, but not high enough". The obvious way to resolve such cases is simply for X to litigate the title dispute with Y, and we think that that is what courts would expect X to do.

Prescription

18.28 The question of whether the Keeper's duty to rectify an inaccuracy should be subject to negative prescription is considered in Part 35.

Intervention by the Keeper

18.29 In Part 31 we recommend that in any litigation in which the accuracy of the Register is called into question the Keeper should have the right to appear and be heard.

Part 19 The guarantee of title: (A) general

Overview of this group of parts

19.1 This is the first part of a group of parts dealing with the title guarantee in the new scheme. The present part is introductory. The next (Part 20) considers the title guarantee as it applies to voidable titles. The next (Part 21) considers the difficult question of when the guarantee should mean (i) that an error should not be reversed, but instead the rights of the parties should be made to conform to what the Register says they are (with compensation to those who suffer loss as a result), or (ii) that the Register should be put right and compensation paid. These options we dub "mud" or "money" and the conclusion is that sometimes the guarantee should take the one form and sometimes the other. The following part (Part 22) discusses the details of the money side of the guarantee. Part 23 then discusses the mud side of the guarantee. Part 24 looks at the Keeper's right of recovery in the event that compensation has to be paid out. And finally Part 25 gives some worked examples.

Defects in title: the general law

19.2 When someone buys something,[1] there is always a risk – generally a very small risk - of some defect in the title. That is true whether what is bought is corporeal moveable property, such as a car or a painting or a loaf of bread, or heritable property, or incorporeals such as company shares or bonds or intellectual property rights. The defect may be in the seller's title, or it may be created by the sale itself. As an example of the first, Fiona owns a bicycle. Gordon steals it and sells it to Harriet. Harriet's title is void.[2] As an example of the second, Robert owns a car. He succumbs to senile dementia and when in that condition sells the car to Susan. Susan's title is void. The problem in this latter case is not that there was anything wrong with the seller's title: Robert's title was perfectly good. The problem arises from the transaction being defective. The distinction between these two cases is the same as the distinction drawn in Part 17 between Register error and transactional error.

19.3 The general law says that good faith does not protect Harriet or Susan against such nullities. But there are exceptions. One of these is section 25 of the Sale of Goods Act 1979 which in some cases enables a good faith buyer to acquire a valid title from a non-owning seller. We mention this particular exception because, as will be seen, it has had an influence on our thinking about land registration.

19.4 Where the seller's title is not void, but merely voidable, good faith does protect the grantee. If Donald owns a car and Eve by fraud induces him to sell it to her, and she then sells it to Fred, and he is in good faith, his title is perfect.[3] The reason is that Eve's title is not void but voidable, and assuming that it has not been avoided by the time she sells to Fred,

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[1] For simplicity we speak of sale, but parallel issues arise for other transactions.
[2] Sale of Goods Act 1979, s 21. This states for the sale of goods the general principle of property law, that *nemo plus juris ad alienum transferre potest, quam ipse haberet* (D 50.17.54 (Ulpian)), one of the foundation stones of property law. The same proposition is often expressed as *nemo dat quod non habet*.
[3] This is general law, and for the sale of goods it is confirmed by s 23 of the Sale of Goods Act 1979.

his good faith protects him. Had he been in bad faith, he still would have acquired ownership from her, but his title would have been voidable.

19.5 These principles apply equally to property in the Register of Sasines. A good faith buyer is protected from voidability in the seller's title, but not from its invalidity, nor from the invalidity of the transfer itself.

19.6 Although a deeds registration system, such as the Register of Sasines, gives no positive guarantee of title, it offers a valuable negative guarantee. If a title is in the Register of Sasines, a buyer can check that register and know that only deeds that appear in it have to be reckoned with.[4] This was the reason why the Register was set up in the first place,[5] for without it a buyer is faced with the problem that the property may be affected by unknown deeds. Inevitably, there are some exceptions, ie cases where a buyer *is* affected by an unrecorded deed,[6] but in its main outlines the negative guarantee works well.

19.7 Another form of title defect is the omitted encumbrance. Suppose that Fay owns land worth £300,000 and it is subject to a standard security that secures a debt of £100,000. Fay forges a discharge of the security and registers it. She then immediately sells the property to Gary. He acts in good faith and the price he pays her is the unencumbered value, namely £300,000. She pockets the whole £300,000 and vanishes, gaining £100,000 by her fraud. As far as the general law is concerned, the discharge, being a forgery, is a nullity, and so the bank's security still encumbers the property.[7] In the Register of Sasines Gary's position is therefore unenviable.

Defects in title: the general law about compensation

19.8 Under general law, and hence in the Sasine system, a buyer who suffers as a result of a title defect will normally have a personal claim against the seller, based either on the contract of sale or on the clause of warrandice in the deed. In some cases there may also be a claim against prior owners.[8] The claim is typically a damages claim, but can be a claim based on the law of unjustified enrichment.[9] If the buyer's solicitors are at fault, there would also be the possibility of a claim against them. Given that title defects are not common and, where they exist, are likely to be detected by the buyer's solicitors, and given the right to compensation in the rare cases where a title defect did emerge, in practice buyers have been reasonably well protected. Another factor to be mentioned is the excellence of the indexing system in the Register of Sasines, superior to the indexing in the deeds registration systems of many other countries. The indexing system means that the chances of overlooking a recorded deed are slight.[10]

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[4] The Register is well indexed.
[5] Registration Act 1617.
[6] For example short-term leases.
[7] We are dealing here with the general law. The general law was modified by s 41 of the Conveyancing and Feudal Reform (Scotland) Act 1970, but that modification applies only to discharges more than five years old and will not be considered here.
[8] The latter because of the doctrine of the transmission of warrandice. If X dispones to Y, with warrandice, and Y dispones to Z, Y's warrandice right against X is normally assigned to Z. See eg Reid, *Property*, para 712.
[9] If Susan has to return the car to Robert, she is entitled to be repaid the price. This is not a damages claim.
[10] But it does occasionally happen, either because of the inherent limitations of indexing in a system that is not map-based, or because of human error.

19.9 Nevertheless, the protection for the buyer is imperfect. The fact that a seller is in principle obliged to give full and prompt compensation to a buyer if there is a title defect does not mean that in reality such compensation is always in fact paid, especially if there is a question over the seller's solvency. And the buyer's solicitors have no liability except for fault. Some title defects, such as a forged signature, may be undetectable even by the best conveyancer, and there is no fault in failing to detect the undetectable. In summary, cases where a buyer suffers from a title defect are rare, and in those rare cases compensation is likely to be available, but nevertheless it can very occasionally happen in the Sasine system that a title defect causes uncompensated loss.

Title insurance from commercial insurers

19.10 In the USA, where deeds registration prevails,[11] title insurance is used almost universally. It is used as a matter of routine, not only where some problem has been identified. The same is true in some other jurisdictions. In the Sasine system insurance is taken out only where there is an identifiable title defect. This happens only in a very small minority of cases.[12]

The 1979 Act

19.11 We give here a mere outline of the 1979 Act's guarantee of title: details are discussed in subsequent parts. Under the 1979 Act, titles are normally guaranteed. The guarantee has two barrels. Either (a) the person registered keeps the property itself,[13] notwithstanding the title defect, or (b) is compensated for its loss by the Keeper. In brief, the registered grantee is sure of either "the mud or the money".[14] Whether a person keeps the mud or takes the money depends on possession. A person in possession keeps the mud. A person who does not have possession receives compensation. We say that titles are "normally" guaranteed because there are certain exceptions,[15] but these are fairly unusual in practice: the vast majority of titles are fully guaranteed.

19.12 If the registered grantee keeps the mud then the true owner[16] loses it, and the 1979 Act provides that the Keeper is to compensate that person.[17] If the registered grantee loses the property, the Keeper must compensate that person.[18] So in a typical case the Keeper must compensate *someone* – either the person who suffers because a registration is reversed, or the person who suffers because it is *not* reversed. "Whoever wins, the Keeper loses" is a saying that comes fairly close to the truth.[19]

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[11] Land registration is a matter for state law. A few states have title registration, of a Torrens type, as an optional alternative to deeds registration, but the number of properties so registered is very small.
[12] For more about title insurance see Part 26.
[13] To be precise: keeps the registered right. That right may be a right of ownership or it may be another right, such as a lease.
[14] This expressive phrase is the brainchild of the Canadian scholar, Thomas W Mapp, in his important work *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (1978), para 4.24.
[15] 1979 Act, ss 9 and 12.
[16] Here and elsewhere we use the phrase "true owner" as shorthand. In some cases the right in question might not be ownership but a lesser right.
[17] 1979 Act, s 12(1)(b).
[18] 1979 Act, s 12(1)(a).
[19] It is not wholly accurate. There are cases where the Keeper is not liable to anyone. For example someone who caused the problem by fraud or carelessness has no claim against the Keeper.

19.13 In the case of an omitted encumbrance, keeping the mud means keeping the property free from the encumbrance. So in the case of Fay and Gary,[20] if he keeps the mud he keeps the property free of the standard security. The alternative would be to accord the standard security full effect, but to compensate Gary.[21] Either way the Keeper must pay £100,000 to someone – either to the bank or to Gary. But admittedly the term "mud" does not fit such cases so well, because whatever happens Gary has and keeps the mud, the question being whether the encumbrance is re-instated or not. Nevertheless "mud or money" is useful shorthand and we make use of it through this Report.

19.14 The positive guarantee of title does not free from liability those who would otherwise have been liable for a title defect. For example, Chloe owns land. Davina impersonates her and sells to Edna. Edna (assuming that she is in possession etc) keeps the property and Chloe is entitled to compensation from the Keeper. But that does not let Davina off the hook. Davina is liable in delict to Chloe for having deprived her of the property. If Chloe, instead of claiming from Davina, claims from the Keeper, then Davina is still not off the hook, for the Keeper is, on paying Chloe, subrogated to the latter's claim against Davina.[22]

When the title guarantee does not apply

19.15 If the title problem is caused by "fraud or carelessness", that results in the forfeiture of the guarantee, in both of its forms.[23] For example in *McCoach v Keeper of the Registers of Scotland* [24] a seller disponed more land than she owned. The Keeper did not notice the error and registered the buyer as owner of the whole property described in the disposition. When the error came to light it was held that the Register was to be rectified and that the buyer was not entitled to compensation from the Keeper, because she knew that there was at least a question mark over the seller's title to the extra ground, and by not mentioning the issue at the time of the application for registration she herself had caused the inaccuracy.

19.16 The title guarantee is also inapplicable where the Keeper excludes indemnity.[25] The 1979 Act does not say when the Keeper is or is not to exclude indemnity. In practice exclusion is uncommon.

Title guarantee and title registration systems

19.17 All land registration systems give some guarantee to a buyer. A deeds registration system such as the Register of Sasines gives a negative guarantee, ie a guarantee against off-register deeds. The Land Register also gives that negative guarantee, but it goes further: a buyer can (subject to certain exceptions) be sure of the mud or of the money.

19.18 A title registration system could provide that monetary compensation is to be the *sole* guarantee given by the system. Thus the ordinary rules of law would apply, and if those rules say that Z's title is void, it is void and X recovers the property. Z is compensated by the Registration Department. As far as we know, no title registration system has adopted that

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[20] The case in which Fay forged a deed of discharge.
[21] In fact that is not the approach taken either by the 1979 Act or by the new scheme.
[22] 1979 Act, s 13(2).
[23] 1979 Act, s 9(3)(a)(iii) removes the mud guarantee. Section 13(4) removes the monetary guarantee.
[24] 19 December 2008, Lands Tribunal, discussed in Kenneth G C Reid and George L Gretton, *Conveyancing 2008* (2009), pp 121-133.
[25] 1979 Act, s 9(3)(a)(iv) excludes it as far as the mud is concerned and s 12(2) for the money.

solution, though we can offer no reason for that fact: it would be a workable system.[26] Alternatively, a title registration system could provide that good faith acquirers always keep the mud. The various Torrens systems come close to that approach.[27] As was said in a Canadian case, "indefeasibility is the heart of a Torrens system."[28] If a good faith acquirer takes the mud then the issue of compensation does not disappear, for the question arises as to whether the person who suffers as a result is entitled to compensation from the Registration Department. Here the answers vary according to the system: for example in the European system the rule tends to be that the Registration Department is liable for loss caused by its fault but not otherwise.

19.19 The 1979 Act system, like the English system on which it was, broadly speaking, based, is a compromise: sometimes mud and sometimes money. And where the registered grantee takes the mud, the person who suffers is compensated. The Keeper's liability is absolute, not fault-based. It is perhaps worth recalling at this stage that the Land Register is self-financing: the income received from registration fees, and certain other income sources, notably data supply, meet the costs of running the Register, including compensation payments. Hence compensation payments are not met by the taxpayer. The system is thus similar in some respects to a mutual insurance society.

Title insurance and the Land Register[29]

19.20 Earlier we mentioned the role that commercial title insurance plays in Sasine transactions. At first sight it might appear that there could be no role for commercial title insurance in respect of Land Register titles. In fact, such a role does exist. Where the Keeper excludes indemnity from a title, the effect is that the registered grantee does not have the benefit of the title guarantee, either in respect of mud or of money. For example, Fraser dispones land to Gloria. The Keeper is doubtful about title to a boundary area, and although Gloria is registered for the whole area disponed, indemnity is excluded for the boundary area. It later emerges that the boundary area should have been included in the title sheet of the neighbour, Harry. What will now happen is that the boundary area will be removed from Gloria's title sheet (she loses the mud) and, when this happens, she will receive no compensation from the Keeper.

19.21 It is in cases such as this that commercial title insurance may be used. Gloria, on buying the property, may take out a title policy in respect of the boundary area. As in other cases of commercial title insurance, the premium (normally a one-off premium) is calculated on the basis of the value of the property insured, the scale of the risk as perceived by the insurer, and so on.

Evaluation

19.22 The title guarantee that exists in the modern land registration system is a remarkable one. Nothing quite like it exists for other types of property, and in a majority of countries in

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[26] At first sight it might seem more costly. That is not so. If the registered grantee keeps the mud, that does indeed save the Keeper's purse, but only momentarily, for the Keeper must then compensate the person who suffers from the non-rectification.

[27] As do most European title registration systems. The difference here between the typical Torrens system and the typical European system is that indefeasibility in the former is immediate and in the latter it is deferred. This distinction is discussed in a number of places in this Report including Parts 13, 21 and 23.

[28] *Re Cartlidge and Granville Savings & Mortgage Corp* (1987) 34 DLR (4th) 161 (Manitoba CA).

[29] For further discussion of title insurance, see Part 26.

the world buyers of land are not so well protected.[30] But there has been no suggestion that the basics of our law should be changed. In principle it would be open to us to recommend a reversion to an unguaranteed title system, but we have no doubt that such a change would be regarded as unacceptable. It would also be possible to move to a system in which compensation was the only form that the title guarantee took – money, not mud. We said above that such a system would be workable. But no one has suggested it to us and there seems to be no compelling reason to make such a major change. Indeed, there are positive reasons for thinking that in some types of case the guarantee should take the form of mud rather than money: we refer to Part 21 of this Report.

19.23 In DP 125 we proposed:[31]

> "2. (a) The title of a *bona fide* acquirer should continue to be guaranteed in respect of Register error.[32]
>
> 3. (a) The title of a *bona fide* acquirer should continue to be guaranteed in respect of transactional errors arising out of the invalidity of the conveyance in the acquirer's favour."

19.24 Respondents supported this view. Though proposing to continue the rules in broad terms, we also proposed modification of the details of the title guarantee system. One such modification we particularly urged was that the test in the 1979 Act for determining when a registered grantee should take the mud and when, on the other hand, there should be monetary compensation, should be adjusted: in some types of case where at the moment the grantee takes the mud we argued that monetary compensation would be more appropriate. And we proposed certain other adjustments. These adjustments will be set forth in detail in the following parts of the Report. For the present it is sufficient simply to state that we consider that the broad principle created by the 1979 Act of guaranteed title has proved successful and should be retained.

19.25 The Keeper has commissioned research as to the comparative cost-effectiveness of (a) the current system which is in effect a compulsory mutual insurance system and (b) a system in which most buyers take out title insurance from commercial insurers, as in the USA and certain other countries. The results indicate that our system delivers title guarantee more cheaply.[33]

19.26 We recommend:

> **77. The title of a *bona fide* acquirer should continue to be guaranteed in respect of Register errors.**

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[30] In broad terms, where the land registration system is one of deeds registration, the only guarantee is the negative guarantee. Some title registration systems offer a protection that is comparable to what exists here, but others do not: the typical European system of registration of title offers rather less.

[31] DP 125, paras 3.20 (proposal 2(a)) and 3.34 (proposal 3(a)).

[32] For the distinction between Register error and transactional error see Part 17.

[33] See Appendix C. As already indicated, that does not mean that there is no role for title insurance from a commercial insurer in special cases. Special cases exist under the current system and will continue to exist in the new scheme. For title insurance generally see Part 26.

The title of a *bona fide* acquirer should continue to be guaranteed in respect of transactional errors arising out of the invalidity of the conveyance in the acquirer's favour.

(Draft Bill, Parts 5 and 6)

No requirement of actual reliance

19.27 In practice a grantee will almost invariably check the Register and so will actually rely on what it says. But this is not a requirement in the new scheme any more than it is a requirement under the 1979 Act. Nor is it a requirement in at least most other title registration systems round the world. What is protected is not the actual trust of the particular grantee, but the dependence of legal transactions on the reliability of the Land Register in general. Making an exception for those who do not actually rely on the Register would have little effect since almost everyone does in fact rely. Moreover, it would drag the system into messy and expensive disputes as to whether there had been actual reliance in any given case. We think that the approach of the 1979 Act was right.

19.28 In the next paragraph we consider the position of donees and other gratuitous grantees. In practice gratuitous grantees do not rely on the Register while onerous grantees do. But whilst the onerous/gratuitous distinction in practice tends to be much the same as the relier/non-relier distinction, they are nevertheless not the same.

Donations and other non-onerous transactions

19.29 Should the guarantee of title be limited to buyers, and others who give value, or should it extend to gratuitous grantees? The 1979 Act makes no distinction. We discussed in detail the arguments both for and against in DP 125,[34] and asked consultees firstly whether the guarantee of title should apply to donees and others who do not give value, and, secondly, if the title guarantee is to apply, whether the rules should be the same as for onerous grantees or whether the guarantee should be monetary only. Of those who responded a majority took the view that no distinction should be drawn between gratuitous grantees and onerous grantees. We accept that view. We would add that if a different view were to be taken then presumably the registration fees for gratuitous grantees would have to be reduced to reflect the fact that they would not be benefiting from the title guarantee. We recommend:

78. No distinction should be made, as far as the guarantee of title is concerned, between gratuitous and onerous grantees.

[34] DP 125, paras 7.21–7.35. An argument that we did not mention which runs against making a distinction between donees and others is that such a distinction is sometimes difficult to draw and so could be productive of expensive litigation.

Part 20 The guarantee of title: (B) voidable titles

Introduction

20.1 Should a voidable title benefit from either form of the title guarantee? Or, to put the question in other words, in so far as a title is voidable should it be protected by either form of the title guarantee? At first sight the answer might appear to be affirmative, because if in general void titles are guaranteed (and in most cases they are and will continue to be) why should not merely voidable titles have a similar protection? And that conclusion is supported by the fact that under current law voidable titles are, at least in principle, guaranteed. In fact matters are more complicated than they appear and our conclusion is that titles should not be guaranteed against the possibility of voidability. The present part overlaps to some extent with Part 28 and should be read in conjunction with that part.

The mud guarantee

20.2 A voidable title is one that is subject to the possibility of a future challenge. Unless and until it is set aside, it is valid. Suppose that Fraser fraudulently induces Gail to dispone land to him. Fraser has a voidable title, but that does not alter the fact that he is, for the time being at least, the owner, for the effect of fraud is voidability, not nullity. If Gail decides to take up her right of challenge, and reduces his title, then as far as general law is concerned ownership will pass back to her as a result. But that does not happen with retrospective effect, or, to put the point in academic language, the reduction takes effect *ex nunc* and not *ex tunc*.[1] In practice the option to reduce is sometimes not exercised. Among other reasons, a voidable transaction[2] occasionally proves to have been advantageous to the person who has the option to set it aside, so that reduction would be counter-productive.[3] Since a voidable title is a valid title, unless and until it is set aside, *voidability does not make the Register inaccurate*. In the example, unless and until Gail reduces the deed, the Register is accurate. It says Fraser is the owner and it is correct in so saying, for he is.

20.3 If a voidable deed is reduced, the Register becomes inaccurate,[4] but under current law that does not necessarily mean that the Register can be rectified. That depends on whether or not the registered owner (here Fraser) is in possession and whether or not the inaccuracy was caused by his fraud or carelessness. In Fraser's case, there was fraud, and so once Gail has succeeded in her action of reduction, the Register can be rectified. But in some cases of voidability the position is different: it may be that the inaccuracy created by the decree of reduction has not been caused by the owner's fraud or carelessness. In one of the leading cases on the 1979 Act, *Short's Trustee v Keeper of the Registers of Scotland*,[5]

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[1] In some legal systems the effect is retrospective, such the German Civil Code (BGB) §142(1). At one time it was arguably retrospective here too. But the standard view of the modern law is as stated in the text.
[2] A voidable transaction results in a voidable title.
[3] If a transaction is *void* that fact can be asserted by either party.
[4] Under current law. Under the new scheme the position would be different.
[5] 1996 SC (HL) 14.

Mr Short, when already insolvent, disponed some properties to Mr Chung and did so at undervalue. Mr Chung then disponed them gratuitously to Mrs Chung. Mr Short having been sequestrated, the trustee in sequestration sought to recover the properties. The trustee raised an action to reduce the dispositions and was eventually successful.[6] He applied for the decrees to be implemented in the Register by registration (not by rectification) but the Keeper refused. The trustee raised an action to compel the Keeper to register the decrees, but was unsuccessful. The reason that the trustee sought registration rather than rectification may have been because it would have been difficult to show "fraud or carelessness" on Mrs Chung's part. However, had the trustee sought rectification and had the application been refused on the ground of lack of "fraud or carelessness", then the trustee could have sought indemnity from the Keeper under section 12(1)(b) of the 1979 Act. According to anecdotal evidence the Keeper intended to resist such a claim and this, if true, may explain, at least in part, why the trustee in the third stage of the struggle[7] took a different approach. He called on Mrs Chung to dispone the properties to him, and when she did not comply he raised an action to compel her to do so. In this action he was successful.[8] Thus the barriers erected by the 1979 Act to protect the person registered as owner were ultimately overcome.

20.4 This final outcome (recovery of the properties by the trustee in sequestration) seems to us right in terms of legal policy. The insolvency legislation has over the centuries[9] developed a set of rules about what happens if someone who is insolvent deals with property in such a way as to prejudice creditors. There is no reason for those rules to be turned upside down as a sidewind of land registration law. If the policy of the law is that someone in Mrs Chung's position ought to return the properties, then it should not at the same time place obstacles to that happening, and certainly it should not depend on the accident of which register the title happens to be in. The "fraud or carelessness" test is a workable (albeit imperfect) device for regulating the fate of *void* titles. That it should apply also to *voidable* titles seems to have been no more than a conceptual accident: the 1979 Act did not draw the void/voidable distinction. Indeed the disaggregation of void and voidable titles would meet a key argument that found favour in *Short's Trustee*, namely that to allow the registration of a reduction of the latter would defeat the operation of the Act in respect of the former.[10]

20.5 It might be argued that, since the problem created by the 1979 Act can be circumvented, as happened in the third stage of *Short's Trustee*, there is no problem that needs to be solved. In a sense that is true. But there are several reasons for ensuring that reduction can be given effect to in relation to Land Register titles. (i) It is not certain that the route successfully taken by the trustee in the third stage of *Short's Trustee* could be taken in every type of voidable transaction. It might be so, but at this point matters become speculative, and the law in this area should not be left to speculation. (ii) Suppose that the trustee had, after the second stage, applied for rectification, and suppose that the application had failed. In that case the Keeper would presumptively have been bound to pay the trustee compensation, whereas in the event the trustee took a different route and the Keeper did not

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[6] *Short's Trustee v Chung* 1991 SLT 472.
[7] The first stage was the reduction of the dispositions. Here the trustee succeeded: *Short's Trustee v Chung* 1991 SLT 472 (IH). The second stage was the attempt to register the decrees. Here the trustee failed: *Short's Trustee v Keeper of the Registers of Scotland* 1994 SC 122 aff'd 1996 SC (HL) 14. The third stage was the action to have the properties conveyed to him. Here the trustee succeeded: *Short's Trustee v Chung (No 2)* 1999 SC 471 (IH).
[8] *Short's Trustee v Chung (No 2)* 1999 SC 471.
[9] Our law is ultimately based on the Roman *actio pauliana*.
[10] *Short's Trustee v Keeper of the Registers of Scotland* 1994 SC 122 at 141C *per* Lord President Hope.

have to pay him compensation. This difference, depending on the free choice of the trustee, seems an odd result. (Though, had this happened, the Keeper might have been able to recover from Mrs Chung by means of a claim based on section 13(2) of the 1979 Act.) (iii) If the 1979 Act does not in fact protect voidable titles, there is no rational basis for not allowing reductions to take effect.

20.6 It might be argued that reduction of a voidable transaction is itself an unsatisfactory mechanism, and that the remedies of a person who challenges a voidable transaction should be either (a) a reconveyance by the grantee or (b) compensation from the grantee. On that view, the current situation is actually in policy terms the right situation. This is a topic of some complexity and we cannot here enter into it. For present purposes we must accept the general law of reduction as it stands.

20.7 In DP 125 we proposed that there should be no barrier to reductions of voidable deeds being given effect to in the Land Register.[11] Most respondents agreed and we make a formal recommendation to that effect in Part 28. This being the position, a person with a registered title does not benefit from the "mud" guarantee.

The money guarantee

20.8 There is also the "money" side of the guarantee of title. In other words, if a person with a voidable title loses that title as a result of reduction, should compensation be payable by the Keeper? For the same reasons as have been sketched above, in DP 125 we proposed that "as a general rule indemnity should not be paid in respect of rights lost by reduction of a voidable deed"[12] and again most respondents agreed.

20.9 Once again, in many cases this is already the law because of the "fraud or carelessness" rule. And again, even where there is no fraud or carelessness the person registered cannot rely on "money" protection, as *Short's Trustee* once again illustrates. Mrs Chung had to return the properties, and obtained no compensation from the Keeper. In fact, there are one or two special types of case where a person holding on a voidable title could claim indemnity under the current law, but that merely shows up the incoherence of the current law. Thus suppose that Mrs Chung had not been in possession of the properties. In that case she would not have been a "proprietor in possession" and so there would have been no bar to rectification. And if the Register had been rectified Mrs Chung would have been compensated. Such a result would, we think, be arbitrary.[13]

20.10 Accordingly we recommend:

79. Indemnity should not be payable in respect of rights lost by reduction of a voidable deed.

(Draft Bill, s 39(1) and (2))

20.11 This recommendation can be regarded as being merely a special case of the more general recommendation, made in Part 22, that the Keeper's warranty of title should warrant the title as at the date of registration – the "only for today" principle. Subsequent events

[11] DP 125, para 6.18 (proposal 10).
[12] DP 125, para 6.23 (proposal 11).
[13] See DP 128, para 7.7.

should fall outwith the scope of the warranty. And here the void/voidable distinction comes into sharp focus. If a title is void, then a subsequent decree of reduction is simply declaratory of that fact, a fact that already existed at the date of registration. But if a title is voidable, a subsequent decree of reduction is quite different in its effect.

Is the result paradoxical?

20.12 The result might at first sight seem paradoxical: in the new scheme registered grantees will usually be protected against the risk of void deeds but not against the risk of voidable ones – protection against the greater risk but not the lesser one. But in our view that is the sound approach. In the first place, if a title is voidable, a subsequent good faith buyer is protected *by the general law* and that will continue to be true: for example if, before Gail acts, Fraser sells to Hilary, Hilary's title is not voidable, assuming good faith. Thus under general law good faith protects against voidability in a way that it does not in the case of nullities. In the second place, under the general law voidability strikes against the *unmeritorious* acquirer and there is no reason why land registration law should protect those whom general law has identified as unmeritorious. Land registration law should protect those who, though deserving, are unprotected by the general law. It should not enhance the protection of those whom general law already deals with fairly.[14]

Is the doctrine of notice a threat to land registration objectives?

20.13 The needs of other jurisdictions may be otherwise. The introduction of title registration in some jurisdictions was motivated in part because the general law was thought to be unsatisfactory. The first Torrens statute, of 1858, began with the explanation that "the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants".[15] Among the perceived difficulties were equitable interests, numerous and liable to affect innocent acquirers by reason of an overly expansive doctrine of constructive notice.[16] Torrens statutes sought to remove the problem by protecting acquirers except in the case of actual "fraud" – the remote original, it may be, of the term in the 1979 Act. Something of the same pattern can be detected in the development of the legislation in England and Wales, where it has been said that:[17]

> "Above all, the system [of land registration] is designed to free the purchaser from the hazards of notice – real or constructive – which, in the case of unregistered land, involved him in inquiries, often quite elaborate, failing which he might be bound by equities … The only kind of notice recognised is by entry on the register."

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[14] For further discussion, see DP 125, Part 6.

[15] Torrens himself was more forthright still, castigating the law of real property as something which "could not be patched or mended: the very foundation was rotten therefore the entire fabric must be razed to the ground and a new super-structure substituted. Like a blundered calculation on a slate, it was in too much confusion for correction, so he would take a sponge and rub the whole out." See *Torrens' Printed Speeches*, p 8, quoted in Peter Butt, *Land Law* (4th edn, 2001), p 621.

[16] See eg Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No 69, 1993), Vol 1 p 62.

[17] *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 503F *per* Lord Wilberforce.

20.14 In Scotland, however, the position was different. There are no equitable proprietary interests. In DP 125 we wrote that "the doctrine of constructive notice is narrow and does not seem to have caused difficulties in practice."[18] (By the doctrine of notice we were referring to what is sometimes called the "offside goals rule" whereby a real right can be defeated by a prior personal right if known to the acquirer of the real right.[19]) We now recognise that the position is not as satisfactory as we thought. Distinguished conveyancers have since said to us that the doctrine does cause problems in practice and have gone so far as to suggest that it should be abolished. We consider this issue in Part 14, where we suggest that it might be possible to develop the system of advance notices in such a way as to allow the offside goals rule to be abolished. But such abolition cannot be done as part of the present project.

20.15 The draft Bill does offer some assistance. It provides that the matters that enter the Register are (a) such matters as are authorised by an enactment and (b) such other matters as the Keeper thinks fit to enter, but the latter is subject to an important proviso: the additional matters that the Keeper may enter *must not include rights*.[20] That will not fully satisfy those who are concerned that the doctrine of constructive notice has gone too far. But it provides some comfort. By excluding from the Register merely personal rights, it reduces the scope for arguing that a registered right is challengeable. This is probably already the law,[21] but the draft Bill puts the matter beyond doubt.[22]

Voidability: the general law and the Keeper's liabilities

20.16 As a matter of general law, if X has a voidable title and transfers that title, or grants a subordinate real right to Y, and Y is in good faith,[23] Y's title is protected. If Fraser by fraud induces Gail to dispone to him, his title is voidable. If he then dispones to Hilary her title is not voidable, assuming good faith. In such a case the Keeper is not liable to Gail. She has lost her power to recover the property not by virtue of any rule of land registration law but by virtue of the general law. (Her right to claim damages for fraud from Fraser remains.)

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[18] DP 125, para 6.14.
[19] For the offside goals rule see Reid, *Property*, paras 695-700; and David A Brand, Andrew J M Steven and Scott Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004), paras 32.52-32.62.
[20] Draft Bill, s 6(3) and (5)(e).
[21] See in particular *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105.
[22] The issue discussed here is also mentioned in paras 4.28-4.31.
[23] For whether value is also required see Reid, *Property*, paras 692 and 699.

Part 21 The guarantee of title: (C) the mud or the money

Introduction

21.1 In Part 19 we discussed the way that the guarantee of title works under the 1979 Act. We noted that it takes two forms, which we dubbed "mud" and "money". In the first case, an error in the Register cannot be undone, and compensation is payable to the other party who suffers thereby. In the second case, an error in the Register can be undone, and here it is the person against whom it is rectified who receives compensation. We took the view that the title guarantee should continue, and that it was appropriate that in some cases it should be "mud" and in others "money". But we indicated that reform was needed as to the balance between the two. In the present part of the Report this is the issue we look at: given that the title guarantee applies, should it, in given types of case, take the form of mud or of money? We stress the words "given that the title guarantee applies". Thus as we have said in the previous part, we think that voidable titles should not be within the scheme of guaranteed title. And this part is limited to the mud/money choice: details of the two forms of title guarantee are discussed in Parts 22 and 23.

21.2 The mud/money contrast is slightly misleading, because in fact in almost every case where the guarantee of title is engaged, both elements are involved. Suppose that Theseus is registered as owner of Greymains, including a boundary area that is within the Greymains title sheet but which should really have been in the title sheet of neighbouring Whitemains, which belongs to Rose. Possibility 1: the two title sheets are rectified so that the area in question is taken out of the Greymains title sheet and added to the Whitemains title sheet. Here Theseus will normally be entitled to compensation: money. The mud is Rose's. Possibility 2: there is no rectification. Theseus keeps the mud and Rose will normally be entitled to compensation. So whichever solution is adopted, both mud and money are involved. Still "mud" and "money" are a convenient shorthand. If a registered grantee keeps what the title sheet says, then that is title guarantee by way of "mud" and if the registered grantee does not keep it but is compensated instead, that is title guarantee by way of "money".

Immediate indefeasibility in the Torrens systems

21.3 The importance of the Torrens systems is such that a few words seem appropriate.[1] To begin with, it was unclear whether the Torrens system, in any of its forms, gave protection only against Register error, or whether protection was also given against transactional error.[2] In *Gibbs v Messer*,[3] decided by the Privy Council in 1891 on appeal from the Australian state of Victoria, the idea that a good title might flow from a forged deed was

[1] For a valuable recent discussion, see Pamela O'Connor, "Deferred and immediate indefeasibility: bijural ambiguity in registered land system titles" (2009) 13 EdinLR 194.
[2] For this distinction see Part 17.
[3] [1891] AC 248.

rejected. In the advice, given by a Scottish Lord of Appeal, Lord Watson, the view was expressed that:[4]

> "Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register; and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration."

21.4 *Gibbs* was, however, distinguished in 1967 in another Privy Council decision, *Frazer v Walker*,[5] a New Zealand case. The result of the decision was to protect the acquirer against forgery and other transactional error. At first the decision in *Frazer* was the subject of heated debate.[6] The matter was referred by the New Zealand Government to its Law Revision Committee, which concluded that:[7]

> "it was divided on the intrinsic merit of the two alternatives, but that, in accordance with the principle of law reform that there must be a compelling reason for changing an established rule of law, it had reached the … conclusion that the present law as expounded in *Frazer v Walker* did not call for any alteration."

21.5 *Frazer v Walker* represents what has come to be known as the doctrine of "immediate indefeasibility". The principle supported by *Gibbs v Messer* is, by contrast, known as "deferred indefeasibility". Immediate indefeasibility has come to be the dominant position in Torrens jurisdictions.[8] But opposition to it continues, to some extent in Australasia[9] and more so in Canada.[10]

21.6 In Canada immediate indefeasibility has been questioned by Professor Mapp,[11] an authority on title registration, and by the Joint Land Titles Committee for Alberta, British Columbia, Manitoba, Northwest Territories, Ontario, Saskatchewan and Yukon.[12] During recent years some change has been triggered by the unwelcome growth of fraud, starting with the *Lawrence* case. A fraudster impersonated Ms Lawrence and mortgaged her Toronto home to a bank. The fraudster pocketed the loan moneys and vanished. The bank then

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[4] At 255.
[5] [1967] AC 569.
[6] Roy A Woodman, "The Torrens System in New South Wales: One Hundred Years of Indefeasibility of Title" (1970) 44 ALJ 96; Warrington Taylor, "Scotching *Frazer v Walker*" (1970) 44 ALJ 248; G W Hinde, "Indefeasibility of Title since Frazer v Walker", in G W Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971), p 33, 40-51.
[7] Property Law and Equity Reform Committee, *Report on the decision in Frazer v Walker* (1977), para 21.
[8] See eg Sir Anthony Mason, "Indefeasibility – Logic or Legend", in David Grinlinton (ed), *Torrens in the Twenty-first Century* (2003), p 3; and Peter Blanchard, "Indefeasibility under the Torrens System in New Zealand", in David Grinlinton (ed), *Torrens in the Twenty-first Century* (2003), p 29. See also *Breskvar v Wall* (1971) 126 CLR 376.
[9] Pamela O'Connor, "Registration of Title in England and Australia: A Theoretical and Comparative Analysis", in Elizabeth Cooke (ed), *Modern Studies in Property Law* vol II (2003), p 81; Law Reform Commission of Victoria, *The Torrens Register Book* (Report No 12, 1987), para 16. The New Zealand Law Commission have also considered whether immediate indefeasibility should be modified, or even abandoned: see New Zealand Law Commission, *Review of the Land Transfer Act 1952* (2008), ch 2.
[10] And there are frequent attempts to circumvent indefeasibility, for instance through equity. See for example Matthew Harding, "Barnes v Addy claims and the indefeasibility of Torrens title" (2007) 31 Melbourne University Law Review 343; and Tang Hang Wu, "Beyond the Torrens mirror: a framework of the *in personam* exception to indefeasibility" (2008) 32 Melbourne University Law Review 672.
[11] Thomas W Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens System (*1978), paras 6.109 ff.
[12] *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990), pp 25–26.

sought to enforce the mortgage. When Ms Lawrence pointed out that the mortgage deed was a forgery the bank replied that it had acted in good faith and that since Ontario law operated on the basis of immediate indefeasibility it was entitled to enforce.[13] The bank succeeded at first instance. There was public uproar. Ms Lawrence appealed, and the Court of Appeal allowed the appeal.[14] The Ontario legislature then backed up this decision by amending the land registration legislation to give the principle of deferred indefeasibility a statutory basis.[15] A similar case in British Columbia also resulted in a decision in favour of the defrauded owner.[16]

21.7 In those Torrens jurisdictions – the majority - that have immediate indefeasibility, such indefeasibility is excluded if there is fraud on the part of the transferee. In most Torrens jurisdictions mere negligence does not undermine the title. As for possession, it is irrelevant. Had the facts of the *Lawrence* case happened in England and Wales or in Scotland, the bank's argument that its title was indefeasible would have been a non-runner because of the lack of possession.

21.8 Where a person loses property as a result of the Torrens system, there is a right to compensation. That parallels the rule under the 1979 Act.[17] Our new scheme also provides for compensation for those who lose rights as a result of the good faith acquisition by somebody else.[18]

21.9 Finally, it is worth noting that the Torrens jurisdictions generally have not developed a system for compensating grantees for loss caused by transactional error. The reason is simple: such grantees normally stand in no need of such compensation, because of the doctrine of immediate indefeasibility. Thus whereas in Scotland, and in England and Wales, monetary compensation by the registration department can be payable either (i) to grantees where there is transactional error, or (ii) to those who are the victims of indefeasibility, in most Torrens jurisdictions the former is generally inapplicable.

England and Wales

21.10 The basic approach in England and Wales is similar to the approach in the 1979 Act, which is unsurprising since the latter was modelled on the former. The main difference is about discretion. English law often formulates private law rights by means of a default rule plus a judicial discretion to vary the default rule in particular cases. That type of approach is

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[13] This would have left Ms Lawrence with a compensation claim against the Ontario Land Titles Assurance Fund. As we have mentioned, it is a characteristic of title registration systems in most of the English-speaking world that those who lose rights in this way are to be compensated by the registration department even if the latter has not been at fault. By contrast in most European title registration systems the registration department pays compensation only if the loss was caused by its fault. But it must be borne in mind that in those systems indefeasibility happens only on a *deferred* basis, so that it is harder for a true owner to stand in need of compensation than it is in most Torrens jurisdictions.

[14] *Lawrence v Maple Trust Co* (2007) 84 OR (3d) 94. An interview with the victim can be found at http://www.youtube.com/watch?v=KKXCoDT18tY. See further *Reviczky v Meleknia* (2008) 88 OR (3d) 699. Whether, before *Lawrence*, Ontario law embraced immediate or deferred indefeasibility seems to be a matter of controversy.

[15] The legislative vehicle for the amendments was the Ministry of Government Services Consumer Protection and Service Moderation Act 2006.

[16] *Gill v Bucholtz* 2009 BCCA 137.

[17] 1979 Act, s 12(1)(a).

[18] Draft Bill, s 51.

adopted for the mud/money issue. The default rule is essentially the same as the rule in the 1979 Act, but there is a judicial discretion to vary it.[19]

The 1979 Act

21.11 The 1979 Act, like the Torrens systems, confers protection on all grantees, thus taking no note of the distinction between Register error and transactional error. In that respect it differs from the German and most European title registration systems, which generally confer protection only against Register error.[20] But whereas the Torrens systems generally protect all grantees by means of a "mud" guarantee, the 1979 Act protects some acquirers by mud and others by money. The rule is that an inaccuracy should not be rectified (ie indefeasibility) where to do so would be prejudicial to a proprietor in possession.[21] In any other case the title guarantee takes the form of monetary compensation. In broad terms, that means that the title guarantee takes the form of the mud guarantee for those buying property[22] (probably including those acquiring long leases[23]), and this applies regardless of whether the error is Register error or transactional error, but that for other parties (eg standard security holders) the title guarantee takes the form of monetary compensation. Another difference from the Torrens systems is that whereas they deny indefeasibility only in cases of fraud, the 1979 Act denies indefeasibility (and also monetary compensation) where there is "fraud or carelessness".[24]

21.12 Both these points (that mud protection is limited to the proprietor in possession, and that the title guarantee is forfeited not merely in case of the grantee's fraud but also in case of the grantee's carelessness) were adopted from English law, with little consideration of the policy issues. There is no evidence that the Henry Committee, which sat from 1965 to 1969, was aware of *Frazer v Walker* (decided by the Privy Council in 1967) or of the controversy that it generated. The provision recommended by the Henry Committee was no more than a copy of the equivalent provision in the English legislation of 1925.[25] When, after the Henry Committee had reported, that provision was found, south of the border, to be defective and was replaced, it was the replacement provision which was used in the 1979 Act.[26] Whatever the reasons for its adoption, however, the solution of the 1979 Act offers a middle way between the unqualified rejection of protection for transactional error in the German system and its unqualified acceptance in Torrens.

21.13 As originally introduced into Parliament, the Bill that became the 1979 Act went even further in following English law conferring a discretion exercisable by the Keeper or, as the

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[19] Land Registration Act 2002, Sch 4, paras 2, 3 and 6.
[20] Thus it may be that Ontario and British Columbia (see above) are moving in a European direction.
[21] 1979 Act, s 9.
[22] Because such parties generally take possession. But there can be exceptions. An example is where X buys land and is registered as owner of a disputed boundary area. This boundary area is physically part of the neighbouring property and hence X does not take possession of it. Here X is "proprietor" of the boundary area (because registered as its owner) but is not "in possession". In such a case the inaccuracy can be rectified, ie X's title to the boundary area is not indefeasible.
[23] The reason for the doubt is that s 9 of the 1979 Act protects "proprietors in possession". A tenant does not own the land and so is not a proprietor. There is a view, on which we express no opinion, that *all* those who have a right in land are proprietors, on the basis that though they do not own the land they own their right.
[24] 1979 Act, s 9(3)(a)(iii) and s 12(3)(n).
[25] The Henry Report, p 48 provided that a proprietor in possession should be protected from rectification "unless such proprietor shall be a party or privy or shall have caused or substantially contributed by his act, neglect or default to the fraud, mistake or omission in consequence of which such rectification is sought". This was almost an exact copy of the Land Registration Act 1925, s 82(3)(a).
[26] 1979 Act, s 9(3)(a)(iii).

case may be, by the courts. This would have allowed rectification to prejudice a proprietor in possession if "the circumstances of the case are such that it is unjust that the interests of the proprietor in possession be preferred to those of another person."[27] This originated in the Henry Report.[28] But the Law Society of Scotland feared that it "might open up the possibility of the exercise of an equitable jurisdiction which however appropriate in England would be an unwelcome addition to the law of Scotland"[29] and as a result the provision was dropped.

The mud/money question

21.14 Usually an acquirer prefers to keep the property. It may have a special value to the acquirer, and at all events the acquirer chose it and, unless there has been a change of mind, will wish to retain it. Further, the alternative of compensation has the potential for difficulty. A claim must be made to the Keeper. There may be a dispute as to quantum or even as to merits. At best there will be delay and at worst litigation. It may be a long time before a replacement property can be acquired, even assuming that a suitable replacement can be found. In short, compensation is likely to be seen as second-best: as with any form of indemnity, most people would prefer that the loss had not occurred in the first place. The relative unattractiveness of indemnity should not, however, be exaggerated. The property was not "truly" the acquirer's and yet the acquirer is fully compensated for its loss. The acquirer has only good faith as an argument and yet that good faith is handsomely rewarded. Further, indemnity is better than no indemnity – the position under the Sasine system or in the purchase of any property other than land. The discussion so far has assumed that the right in question is ownership. If it is another type of right, the factors involved may be rather different. For example, a standard security is a financial right, and monetary compensation should fully suffice.

21.15 One of the core values of title registration systems is transactional facility. That means that it must be possible to buy property (or otherwise deal with it) with confidence, and that in turn means that a grantee should be secure against unknown third-party claims relating to the property. From that point of view a rule of immediate indefeasibility has a strong attraction. But it also faces two difficulties. First, it tends to give insufficient weight to the interests of the true owner; and secondly it results in insecurity of title for everyone, *including the acquirer*.

The first difficulty: the position of the true owner

21.16 To award the property to the acquirer is not a neutral act. If the acquirer becomes owner, then, necessarily, ownership is lost by someone else. It is a growing criticism[30] of systems of registration of title that they tend to see matters only from the perspective of the acquirer and so overlook the position of the true owner, of the person at whose expense the acquirer is taking. Yet the balancing of the interests of those parties is, as Lord Rodger has expressed it, a "profound" issue of legal policy.[31] The dilemma, he explains:

> "is no less fundamental for being simple to state. A owns land and, for example, B forges A's signature on a disposition to C who purchases in good faith and for value.

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[27] Land Registration (Scotland) Bill, cl 8(2)(a)(iv).
[28] Henry Report, p 48.
[29] As summarised by Lord McCluskey in the House of Lords. See Hansard HL, vol 398 (1979) col 1455.
[30] Especially in Canada: see above.
[31] *Kaur v Singh* 1999 SC 180 at 188.

> C registers his title. Should the law support the claim of A, the 'true' owner of the land, or the claim of C who has the registered title? If the law supports the claim of the 'true' owner, then it will provide for the register to be rectified by deleting C's name and substituting A's name. C will be left with a claim for indemnity from the Keeper for any loss which he suffers as a result of the destruction of his registered title. If, on the other hand, the law supports the claim of the registered proprietor, it will refuse A's claim for rectification and he will simply have to claim indemnity from the Keeper for his loss of the ownership of the land."

21.17 There is a tendency to assume, without argument, that the position of the acquirer – of C in the example – should always be preferred. Yet the true owner – A in the example - also has strong claims on the property. Not only was A first to register but A has not validly consented to the transfer. Under the general law, a careful distinction is maintained between deeds that are void – the case currently under consideration – and those that are voidable. In a voidable deed the granter gives consent, even if that consent might have been induced by unfair means. In void deeds there is no valid consent. As a result, ownership passes in the first case but not in the second, for it is a strong principle that a person is not to be deprived of property without consent. If, under registration of title, the acquirer under a void deed is not merely to be compensated, but to be awarded the property itself, the distinction between void and voidable is eroded, and with it the policy basis – on one view, a principle of fundamental importance – on which it rests. Of course, a true owner who loses the property is entitled to indemnity in turn, as Lord Rodger noted. But the relative disadvantages of compensation which were described earlier apply as much to the true owner as to the acquirer. The acquirer may want this particular property, but so may the true owner. Monetary compensation is likely to be a second-best solution for an acquirer, but equally it is likely to be a second-best solution for the true owner. If the true owner's connection with the property has been long and that of the acquirer short, it is likely to be of greater value to the former than to the latter.

The second difficulty: insecurity of title ("easy come, easy go")

21.18 To prefer the acquirer over the true owner is to prefer a system where acquisition of title is easy over one where it is more difficult. But what has been easily acquired may just as easily be lost. In other words, the very set of circumstances which allowed the acquisition of the property would, if repeated, lead to its loss. If C acquires A's property through the forgery of B, so E might now acquire C's property through the forgery of D. "Easy come", as Professor Mapp observed, leads inexorably to "easy go": [32]

> "A registered title cannot be indefeasible against errors occurring both before and after its creation; no legislature can work this miracle ... To whatever extent ... [a person] can acquire an interest from a predecessor through error, he is vulnerable to losing that interest to a successor through the same error repeated after his registration."

[32] Thomas W Mapp, *Torrens Elusive Title: Basic Legal Principles of an Efficient Torrens System (*1978), paras 3.13 and 4.26.

21.19 The conclusion that a Land Register title is less secure than a Sasine title is both uncomfortable and also unavoidable.[33] As an English commentator has expressed the position: [34]

> "[D]eeds registration is a Rolls-Royce system, designed to offer absolute security of title. Title registration is a much more down-market system, where security comes from break-down insurance rather than good workmanship."[35]

21.20 This is not an argument for abandoning the 1979 Act and returning to the Sasine system. But it is an argument for considering whether title under the 1979 Act is too easily acquired - and too easily lost again.

21.21 Titles should be secure but at the same time easily acquired. There should, in other words, be both security of ownership and also facility of transfer, or, to use other words, static security and dynamic security.[36] But, as just seen, these principles are irreconcilable and it is necessary either to choose between them or to arrive at a compromise under which security of ownership is sometimes preferred and sometimes facility of transfer. Traditional property law, naturally, opts for static security. The Sasine system therefore does likewise. In what must have seemed at the time a revolutionary change, the Torrens system threw up property law in favour of facility of transfer, creating in the process "a mile-wide exception to the principle *nemo dat quod non habet*".[37] The English system of registration of title, and following it the Scottish system,[38] proceeds more cautiously and adopts a compromise based mainly on who has possession. In our view a compromise is the best approach and is much to be preferred to the immediate indefeasibility adopted by a majority of the Torrens jurisdictions. The question is whether the compromise contained in the 1979 Act is capable of improvement. We think that it is.

The "proprietor in possession" test of the 1979 Act: some difficulties

21.22 At least three difficulties affect the "proprietor in possession" test of the 1979 Act. The first concerns a matter which is remote from the present discussion and may be disposed of quickly. The Act makes no distinction by type of error. Yet while possession has a valuable role to play in choosing between an acquirer and the "true" owner, it seems unhelpful in cases where the title to the property is not at issue. If, for example, the error is that a real burden was mistakenly omitted on first registration, the law must choose between (i) restoring the burden and compensating the acquirer for the lessening of the value of the property caused by the burden or (ii) extinguishing the burden, by its continued omission

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[33] Strictly one should say less secure than the Sasine system *formerly* was, for the introduction of registration of title has left Sasine titles vulnerable on first registrations.

[34] Jean Howell, "Deeds Registration in England: a Complete Failure?" (1999) 58 CLJ 366, 391.

[35] There is perhaps an element of overstatement here. The "absolute security of title" is an absolute security of a title *once it has been validly acquired*. The problem in a deeds registration system is being sure that the title has been validly acquired in the first place.

[36] The contrasting concepts of static and dynamic security go back at least to René Demogue, *Les notions fondamentales du droit privé* (1911), ch 2 (*la sécurité statique et la sécurité dynamique*).

[37] Bruce Ziff, *Principles of Property Law* (4th edn, 2006), p 445.

[38] As was stated in *Kaur v Singh* 1999 SC 180 at 188G *per* Lord Rodger, "The [Reid] committee give us no glimpse of their thinking, but simply state that the dilemma should be resolved for Scotland by adopting the same rule as in England."

from the Register, and compensating its (ex-)holder. Such a choice is not assisted by considering the state of possession.[39]

21.23 The second difficulty is about self-help. The 1979 Act allocates property and indemnity by reference only to the *current* state of possession – almost an invitation to self-help. In *Kaur v Singh*[40] a flat was owned by a married couple. While the wife was out of the country the husband sold the flat. His signature on the deed was genuine, but that of his wife was forged. The buyer was duly registered as owner, and took possession, in March 1996. In May 1996, on her return to Scotland, the true owner (to the extent of her half share) recovered possession by the services of a locksmith. In December 1997 the buyer did the same, thereby regaining the status of "proprietor in possession". This seesaw might have continued indefinitely had the wife not eventually decided to accept the loss of her home and to claim indemnity instead.[41] Another seesaw case was *Safeway Stores plc v Tesco Stores plc*[42] where, in a dispute over the ownership of a small, but commercially important, section of riverbed, one of the parties employed divers to place underwater marker posts, the response of the other party being to employ its own divers to remove them.[43] In another example drawn to our attention, eventually resolved without litigation, the possession of a disputed part of a mutual boundary was asserted by the planting of flowers, contradicted by their removal at dead of night, and reasserted by the erection of a fence when the other party was on holiday.

21.24 The use of possession as a way of achieving a compromise between the undoubted interests of the true owner and the undoubted interests of the acquirer is fundamentally a good one. What is unsatisfactory is that ownership should depend on the state of possession *at the time when rectification happens to be sought*. Nor is it clear precisely what that time is. Potential dates include the date (i) of application for rectification (ii) that litigation on the issue is initiated (iii) of decree in that litigation or (iv) of rectification being effected by an appropriate change in the Register. If, for example, the acquirer possesses at the time of the initial application and again at the time rectification is to be effected, but not in between, is that person a proprietor in possession such that rectification is barred? And must the Keeper send out staff to check the current state of possession every time it is proposed to change the Register? In *Safeway Stores plc v Tesco Stores plc* it was suggested that possession might be relevant "over an appropriate tract of time preceding" the date of application for registration,[44] but this leaves much uncertain, including the length of the tract of time and the position where possession changes hands.

21.25 Just as serious is the apparent incentive to take the law into one's own hands, by taking possession. The suggestion that the 1979 Act "seems to have revived the priority rules of the Stone Age" is no doubt an overstatement but it has an element of truth.[45] If parties are sufficiently determined, self-help can in some cases become the arbiter of title. It is true that the problem may be soluble even under the present law through an action of spuilzie, for a person who is dispossessed without consent is, in general, entitled to be

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[39] See also para 21.41 below.
[40] 1999 SC 180.
[41] *Kaur v Singh* (No 2) 2000 SLT 1323.
[42] 2004 SC 29.
[43] Whether possession of a riverbed can in fact validly be achieved by underwater marker posts is a point that does not need to be considered here.
[44] *Safeway Stores plc v Tesco Stores plc* 2004 SC 29 at 60 *per* Lord Hamilton.
[45] Commentary on *Kaur v Singh* at 1998 SCLR 863.

restored to that possession.[46] But to a person recently dispossessed litigation may be as unattractive as a further round of self-help.

Lack of notice in the current system

21.26 There can be many ways in which a true owner is vulnerable to loss of property through the land registration system. We mention two here as examples. One is where property is conveyed by a forged deed. The other is where, on the first registration of a neighbouring property, an error is made about the line of the boundary and as a result some land is included by mistake in the title sheet of the neighbour. What is objectionable in such cases is not merely the loss of property. It is accepted that, in certain circumstances and for good reasons, it may be justifiable for property to be taken from a person involuntarily and given to someone else. Familiar examples in private law and public law respectively are positive prescription and compulsory purchase.[47] Further, it is also accepted that facility of transfer might sometimes be just such a good reason. For if a system of simple and efficient conveyancing requires that, occasionally, the interests of a true owner be sacrificed to that of a good faith acquirer, then the loss to one person can be justified in the name of the greater good. The fundamental objection, therefore, is not so much the loss of property, regrettable as that is, but, rather, the *manner* in which it is lost. Under the 1979 Act property may be lost *without notice*.[48] The true owner is not party to a forged disposition, or to the registration of the neighbouring property. Indeed, it is provided by the Land Registration Rules that the true owner is *not* to be notified if the acquirer's title is one which requires to be fortified by prescription.[49] It is true that possession by the acquirer is itself notification. But this notification (ie by the fact of possession) is automatically too late, so it can never work. In the very act of taking possession, the acquirer assumes the mantle of "proprietor in possession" and so deprives the true owner of the possibility of getting the property back. Under the 1979 Act, possession and irrevocable loss of title are concurrent events.[50]

21.27 Conversely, if possession is not taken, as may quite commonly occur in the second of the two situations mentioned above (a boundary area included in a neighbour's title), the true owner may continue to use the land for many years to come, unaware that it now belongs to someone else. But that is not an issue about indefeasibility but rather about the Midas touch.[51]

21.28 The shortcomings of the 1979 Act in this area have become increasingly apparent. In a written submission, the Department of the Registers of Scotland emphasised to us the difficulties of cases of this kind:

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[46] Reid, *Property*, paras 161-166; William M Gordon and Scott Wortley, *Scottish Land Law* (3rd edn, 2009), ch 14.

[47] These are very different of course, in that the latter does, but the former does not, involve compensation. In the land registration system involuntary loss is normally compensated.

[48] By "loss" we here mean a combination of two aspects of the current legislation. There is the immediate loss caused by the Keeper's Midas touch (see Part 13). But on its own that does not amount to an unconditional loss because in some cases the loss can be undone, through rectification. The second aspect is the fact that rectification is normally incompetent as against a "proprietor in possession" (s 9 of the 1979 Act) so that the Midas effect is not only immediate but also (usually) irreversible.

[49] 2006 Rules, rule 18(2). Rule 21(2) was the equivalent in the 1980 Rules. This is a standard case, for if the neighbour's title to the area in question is bad then either (a) the Keeper will refuse registration or (b) will agree to register because the neighbour is in possession but on the footing of excluded indemnity, with the result that prescription will run. (On the last point see the Prescription and Limitation (Scotland) Act 1973, s 1(1)(b).)

[50] Unless, the "true" owner seeks to dispossess the acquirer by direct action, as in *Kaur v Singh* (see para 21.23 above). And of course there is the "fraud or carelessness" exception.

[51] For the Keeper's Midas touch see Part 13.

> "The effect of section 9 [of the 1979 Act] can be to disadvantage proprietors, thereby giving rise to perceived injustices. For example, the loss, to a proprietor whose interest is held on a title recorded in Sasines, of a right or area of land contained in their recorded deed, following an inaccuracy in the registration of a neighbouring interest in land in the Land Register. Proprietors disadvantaged in this way are understandably upset. Experience shows that they do not accept the explanation that the system of registration in Scotland forbids rectification of the Register except in the circumstances specified in section 9 … On these occasions, the remedy of indemnity, or of an *ex gratia* payment, is not always seen as equitable. In the eyes of an injured proprietor, the enforced loss of land, or of amenity, or of an incorporeal right, does not necessarily lend itself to reparation in monetary terms. The inability of the Keeper to rectify the register to restore the title sheet to the position that ought to have obtained but for his error is a major failing in the rectification provisions."

21.29 A true owner, deprived of land in a case on which representations have been made to us by a Member of Parliament, was more forthright still:

> "I find it difficult to believe that a distinguished group could concoct such a piece of legislation. In fact this is a thief's charter duly protected by the State."

The need for notice

21.30 The solution to this difficulty lies in notice. If property is to be lost, it should not be lost wholly by stealth. Instead the true owner should be given notice and, following such notice, should have a reasonable period in which to challenge the person now registered as proprietor. Only if and when that period has passed without a challenge should the acquirer have a title free from the possibility of rectification. Since possession is itself a powerful form of notice, what this boils down to is that the possession needs to have been for a certain period of time before indefeasibility can set in.

21.31 Registration is also a form of notice, because the Register is public. Under current law it does not function sufficiently well because the true owner may lose title *as soon as the wrongful registration happens*. But in the new scheme that will never be the case. In the new scheme the true owner can lose the property, if at all, only on the *second* registration.[52]

Outline recommendation about Register error

21.32 Our conclusion is that in the case of Register error a title should become indefeasible only if there is possession, and that it should be a reasonable period of possession. In DP 125 we asked whether the period should be a year, or two years, or some other period.[53] From the responses we received no clear view emerged. We think that one year should suffice. That is enough time for a person to become aware of the problem, seek legal advice and, if necessary, raise an action in court.

21.33 In DP 125 we took the view that the possession should be that of the seller.[54] But as the result of views expressed by some respondents,[55] in DP 128 we modified our position so

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[52] X is owner. A forged disposition to Y is registered. Under current law X loses ownership immediately ("Midas effect"), and, assuming Y is in possession, irreversibly ("proprietor in possession" rule). Under the new scheme X remains owner. It is only if Y later dispones to Z (the "second registration") that X could lose ownership.
[53] DP 125, para 4.52 (proposal 7(e)).
[54] DP 125, para 4.52 (proposal 7(b)).
[55] Notably the Keeper of the Registers of Scotland and Donald B Reid.

as to allow straddling possession, ie that the possession of the acquirer could supplement that of the granter.[56] For example, if the granter had possessed for nine months, a further three months of possession by the grantee would bring about indefeasible title. That remains our position.

21.34 We recommend:

80. A *bona fide* disponee should acquire good title free of Register error provided that the requirement of one year's possession is satisfied.

(Draft Bill, Part 6)

21.35 This in itself is only an outline recommendation. Further details are considered below and also in Part 23.

The mud should be real mud

21.36 One of the technical problems with the way that the 1979 Act handles inaccuracy is that in those cases where it gives the registered grantee the mud, it does so merely by suspending the rectifiability of the Register. The rights of the parties are thus a tangle: (i) the registered grantee is owner (the Midas touch) but (ii) as against that, the register is inaccurate and therefore is rectifiable, but (iii) as against that, the rectifiability is suspended so long as possession lasts and (iv) it may or may not be that the suspension becomes permanent once indemnity is paid. It is not surprising that even conveyancers find all this hard to grasp. The mud is only quasi-mud. One consequence of the new scheme is that where the grantee takes the mud, it will be real mud. Suppose that Honoria is wrongly registered as owner. Under the 1979 Act she is owner but should not be: the Register is bijurally inaccurate. She then dispones to Aeneas. Under the 1979 Act the position after the Honoria/Aeneas disposition is even more complex. Under the new scheme the position would be fairly straightforward. Assuming that the requirements as to good faith and possession had been satisfied, the Register would be, not "inaccurate but unrectifiable for the time being" but simply accurate. What would have happened would be that the rights of the parties would have been realigned so as to conform with what the Register said that they were. Aeneas would be the proprietor and the Register, in identifying him as such, would not be inaccurate.

21.37 Thus in the new scheme, if an entry is inaccurate, then either (a) it must be changed by the Keeper so as to make the Register conform to the actual rights of the parties, or (b) the rights of the parties are changed to make them conform to what the Register says that they are. But in either case what is happening is clear. The almost impenetrable complexities of (i) bijural inaccuracy and (ii) suspended rectifiability will disappear.

Protecting the grantee: the curtain principle

21.38 If, as we recommend, the balance should be adjusted in the direction of security of title, this can be done only at the expense of facility of transfer. Property that is harder to lose is also property that is harder to acquire. Yet the acquirer's burden should not be increased by more than a modest amount. Facility of transfer is an important aspect of registration of

[56] DP 128, para 5.30 (proposal 18(3)(a)).

title, and the so-called "curtain principle"[57] is, for many, a non-negotiable feature of the system. No model is tenable, therefore, that necessitates going behind the Register and inspecting prior conveyances. The new scheme preserves the curtain principle. Title is guaranteed, and whilst the guarantee will sometimes take the form of money rather than mud, that is already true of the current law.[58] To confirm the curtain principle the draft Bill contains a provision – not to be found in the 1979 Act – that there is to be no constructive knowledge of anything in the Archive Record.[59]

Discretion?

21.39 As mentioned earlier, some legal systems have an element of judicial discretion in the mud/money decision. As mentioned above, a form of discretion was included in the Land Registration (Scotland) Bill but was removed as a result of representations from the Law Society of Scotland. No suggestion has been made to us that discretion should now be introduced, and we would not support the idea. Judicial discretion within private law is a common theme of English law but the tradition of Scots law has generally been against such discretion, though admittedly some exceptions exist.[60] We recommend:

81. The mud/money decision should be a matter for fixed rules rather than for discretion.

Terminology: the integrity principle and realignment of rights

21.40 In the discussion papers we used the term "integrity principle", defining it thus: "the principle that an acquirer in good faith can rely on the integrity of the Land Register. As a result, such an acquirer takes the property free of Register error." We have now come to think that the term "integrity principle" can be improved upon. After all, it is the policy that a grantee should be able to rely on the Register *even where the result will be money not mud*. For example, suppose that a standard security is assigned by Edwina to Fred but the assignation is invalid. Fred then assigns to Geri. Under both the current law and under the new scheme, Geri, on taking the assignation, was entitled to rely on the Register, and is protected by the guarantee of title, but under both current law and the new scheme the form of the title guarantee is money not mud, ie when it turns out that the Edwina/Fred assignation was invalid, the Register is rectified against Geri. So this is not an example of "integrity" as we defined it, yet it is in the broader sense an example of the principle of the integrity of the Register. Accordingly we have come to the conclusion that it would be better to say that when the title guarantee takes the form of mud, the rights of the parties are realigned, meaning that they are made to conform with what the Register says they are. Hence what in the discussion papers we called the integrity principle we now call the realignment of rights.

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[57] The "curtain principle" is the principle that the Register can be taken at face value, and that there is no need to look at the deeds which lie behind it. See DP 125, para 1.14.
[58] In those cases where the "proprietor in possession" rule does not apply.
[59] Draft Bill, s 12(6). See further Part 4.
[60] See Niall R Whitty "From Rules to Discretion: Changes in the Fabric of Scots Private Law" (2003) 7 EdinLR 281.

Subordinate real rights

21.41 The discussion thus far has considered only the case where the wrong person is registered as owner, with a subsequent disposition to a *bona fide* disponee. But there can also be cases involving subordinate real rights. For example: (i) The wrong person is registered as owner and that person then grants a subordinate real right, the grantee being in good faith. (ii) The wrong person is registered as the holder of a subordinate real right and that person then assigns that right, the grantee being in good faith. (ii) The right person is registered as owner, and that person grants a disposition, the grantee being in good faith, and it turns out that an encumbrance was omitted from the title sheet.[61] All these are cases of Register error, but are different from the standard case.[62] We consider such cases further in Part 23. Here we will merely say two things. The first is (to anticipate) that in Part 23 we recommend that in such cases sometimes the *bona fide* grantee should receive the mud but that in other cases the title guarantee should be monetary. The second is to note that in these cases involving subordinate real rights the requirement for one year's possession does not always make sense.[63] For example, X owns a house and borrows money from Y on the security of the house. Later X, without having repaid the loan, forges a deed of discharge, registers it, and promptly sells to Z, who is in good faith. Possession is not a sensible criterion in such a case. (Though the registration of the fake discharge is a public one, so some element of notice is necessarily involved.)

Transactional error

21.42 Under current law transactional error in some cases results in immediate indefeasibility (it does so in favour of a proprietor in possession) and in other cases results in monetary compensation. In DP 125 we proposed that in the new scheme it should never result in immediate indefeasibility, but should (subject to certain qualifications) lead to monetary compensation. In short we proposed that in the case of transactional error the form the title guarantee should take should be money, not mud.[64] Most respondents agreed. In transactional error the grantee has not been misled by any inaccuracy in the Register. There are two main reasons for saying that transactional error should not be protected by "mud". In the first place, the error is in the transaction to which the grantee is a party and so the grantee is in the best position to determine whether a problem exists. In the second place, one of the main objectives of a title registration system is to facilitate transactions by saying to those thinking of dealing in land "you can rely on what the Register says". Transactional error does not fall within that justification, and it is not surprising that for that reason many title registration systems give no protection against transactional error. Although we think that protection against transactional error should continue, we see no reason to accord to it the stronger of the two forms of title guarantee. Accordingly we recommend:

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[61] For example, X owns a house and borrows money from Y on the security of the house. Later X, without having repaid the loan, forges a deed of discharge, registers it, and promptly sells to Z, who is in good faith. Here the law reform options are either (i) that the security survives, to Z's detriment, or (ii) the security perishes, to Y's detriment.

[62] That is to say, where the wrong person is registered as owner and that person then disponees to a bona fide grantee.

[63] See also paras 21.22 above.

[64] DP 125, paras 4.45 and 4.52 (proposal 7).

82. In cases of transactional error, the form of title guarantee available to the grantee should be monetary compensation. The Register should be rectifiable.

(Draft Bill, Part 5)

21.43 Further details of the scheme of monetary compensation for cases where it turns out that the Register is inaccurate can be found in Part 22.

Is the money/mud choice neutral from the standpoint of the Keeper's purse?

21.44 One issue that has not so far been mentioned is the effect of the mud/money choice on the Keeper's purse. If there were to be a differential effect, that would be significant for the formation of policy. But it seems that the choice is a neutral one. Either way, the Keeper is liable. (Albeit that there may be a right to recoup the loss from another party.) For example if there is a disposition by X to Y and it turns out that the land belongs to Z, then either (i) the property goes to Y and the Keeper compensates Z or (ii) the property goes to Z and the Keeper compensates Y. Either way the Keeper is liable for the property's value.

Retrospective

21.45 Some difficult terrain has been traversed in this part of the Report and it may be helpful to look back and sum up a few selected points.

21.46 "Immediate indefeasibility" means that the position of a grantee is necessarily what the Register says it is. Most Torrens jurisdictions adopt this approach across the board. There is no requirement as to possession and there is no limitation as to type of transaction. The rule applies as much to transactional error as it does to Register error. In Torrens jurisdictions indefeasibility is excluded by the grantee's fraud but not by carelessness. Compensation is payable to victims of indefeasibility. A minority of Torrens jurisdictions take a less absolute approach. The European title registration systems generally adopt "deferred indefeasibility" whereby the mud guarantee applies only to Register error. In the latter systems the title guarantee does not apply to transactional error. Moreover where the mud guarantee applies, the victim receives no state compensation unless the problem was caused by the fault of the registration department.

21.47 The English and Scottish systems have a modified form of immediate indefeasibility, and have it both for transactional error and for Register error. Compensation is payable to victims. But titles are indefeasible only if there is possession. Moreover, indefeasibility is excluded not only by fraud but also by carelessness on the part of the grantee. Where immediate indefeasibility does not operate (which is to say in some cases of transactional error and also in some cases of Register error) the grantee receives compensation. In English law, but not Scots law, there is an element of judicial discretion about indefeasibility. In Scots law the legal nature of indefeasibility, involving bijuralism and suspended rectifiability, is complex and to some extent obscure.

21.48 The new scheme retains the two forms of title guarantee, and also retains compensation for the victims of realignment. But it changes the balance between the two forms of guarantee. Transactional error is protected only by money, not by mud. As for Register error, some cases that under current law attract mud protection would under the scheme attract money protection. Thus there would be no "immediate indefeasibility" but in

some cases (not all) there would be "deferred indefeasibility". The current tangle of bijural inaccuracy and suspended rectifiability would be swept away and the result would be simpler and more in harmony with general property law. Voidable titles would cease to be guaranteed. But the ultimate outcome of *Short's* case showed that the guarantee against voidability is in any case illusory even under current law.[65]

[65] *Short's Tr v Chung (No 2)* 1999 SC 471. See para 20.3.

Part 22 The guarantee of title: (D) the Keeper's warranty of title

Introduction

22.1 The two aspects of the guarantee of title are "mud" and "money".[1] In this part we look at the latter, ie cases where an inaccuracy is rectified and as a result compensation is to be paid. In current law this comes under the heading of "indemnity" though that term is used in a broad sense to cover not only (a) cases where the Register is rectified and those who suffer thereby are compensated but also (b) cases where the Register is not rectified and those who suffer by the fact of non-rectification are compensated.[2] The present part corresponds roughly with the first of these.[3]

Current law and its drawbacks

22.2 Section 12(1) of the 1979 Act says: "… A person who suffers loss as a result of (a) a rectification of the register … shall be entitled to be indemnified by the Keeper in respect of that loss." Those who responded to DP 125 supported the retention of monetary indemnity in respect of both Register error and transactional error. But the current law is defective in a number of respects and would in any event require some adjustment in order to fit with our other recommendations. We discussed the shortcomings of section 12 in DP 128, and we will not repeat everything we said there. The core of the problem is that section 12 says that compensation is payable to anyone who suffers loss because of rectification. The formula is too broad, and its excessive breadth is the main reason for the long list – running to a couple of densely printed pages – of exceptions.[4] What is given with one hand is thus often removed with the other. Some of these exceptions are complex and even obscure. Indeed, in *Short's Trustee v Keeper of the Regisers of Scotland*[5] the House of Lords struggled with the exception relating to gratuitous alienations. It may be added that some of the exceptions may be unnecessary, because they do not deal with potential *inaccuracy*. (The issue of rectification comes into question only if the Register is or becomes inaccurate.) A more efficient, and transparent, approach would be to limit the guarantee at the outset; in other words, instead of a guarantee against any future rectification, to have a guarantee by the Keeper that the Register is accurate at the time of registration. In DP 128 we developed a "Keeper warranty" scheme[6] and respondents generally supported it.

22.3 One difference is that the 1979 Act approach is remedy-based, whereas the new approach is right-based. In other words, the 1979 Act says[7] "if the Register is rectified then

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[1] See Part 19.
[2] 1979 Act, s 12(1).
[3] The second is considered in Part 23.
[4] 1979 Act, s 12(3).
[5] 1996 SC (HL) 14.
[6] DP 128, Parts 8 and 9. Those parts also dealt with other grounds of liability for the Keeper. The present part of this Report is narrower in that it deals only with the Keeper's warranty that the Register is accurate on the day of registration.
[7] We paraphrase.

the Keeper must compensate…" whereas the new scheme says "the Keeper guarantees to the registered applicant that the Register is accurate…". Another difference (which flows from the one just mentioned) is that in the new scheme the guarantee is given to a specified person. A third difference is that the guarantee is a single event that happens at a particular date (registration).

22.4 Another benefit from the warranty-based approach as opposed to the indemnity-based approach can be seen in the case of *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP*.[8] Here a fraudster, pretending to be the owner of certain property in Fife, granted a standard security, in exchange for a large loan. The security was duly registered in the Land Register. Later the fraudster forged a deed of discharge and this in turn was duly registered. The case does not indicate whether an attempt was made by the creditor to claim indemnity from the Keeper, but any such claim would seem to face considerable difficulty. Suppose that the creditor had sought rectification of the Register so as to reinstate the security, on the basis that the discharge was a forgery. Such an application would presumably have been refused on the ground that the Register, in showing no security in the C Section, was accurate.[9] And if it was accurate, it would follow that there could be no rectification under s 9 and no indemnity under s 12(1)(b). That the creditor should be deprived of its protection by a forged deed seems an unsatisfactory result.[10] If the approach just suggested is correct,[11] the new scheme would, on these facts, produce a different outcome. The Keeper on registering the security, would have granted warranty, the content of the warranty being that the security was validly constituted, and the later forged discharge could not take away that warranty.

The warranty's two prongs

22.5 A title sheet may be inaccurate because of what it says or because of what it does not say – its wrongful utterances and its wrongful silences. An example of the former would be where the title sheet says that the property is encumbered by a standard security when it is not. An example of the latter would be a blank C Section, when in fact there does exist a standard security.[12]

22.6 Accordingly the warranty of title needs two prongs, positive and negative.[13] The positive is that the rights as shown on the Register are correctly stated: what you see is what you get. The negative is that no rights[14] have been omitted that should have been included: what you don't see you don't get. The positive prong concerns the A Section (Property Section). The warranty includes incorporeal pertinents, such as the benefit of servitudes and

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[8] [2009] CSOH 165.

[9] Following the registration of the standard security the Register was bijurally inaccurate. Following the subsequent registration of the forged discharge, the Register was not actually inaccurate. Nor, we think, was it bijurally inaccurate. If that is right, it was not inaccurate in either manner, from which it would follow that it was accurate, from which it would follow that neither s 9 nor s 12 would be engaged.

[10] Had the true owner, immediately after the registration of the security, applied for the Register to be rectified by deletion, the creditor would presumptively have been entitled to indemnity under s 12(1)(a) of the 1979 Act.

[11] We stress the word "if" at the beginning of this sentence. This aspect of the story was not dealt with in the case itself (which was about whether the fraudster's law firm was liable to the creditor). The issues are complex and what is said here is no doubt not the last word.

[12] See paras 17.40-17.42 above.

[13] DP 128, paras 7.28 and 7.29 (proposal 29).

[14] Throughout this Report "right" includes encumbrance. For example a standard security is a right, and it is an encumbrance, from the owner's perspective. The same is true for all potential entries in the C Section (Securities Section) and D Section (Burdens Section).

real burdens. So for example if a title sheet says that the property has the benefit of a servitude of way over a neighbouring property, the existence of the servitude is warranted, though as will be seen below there are certain qualifications. The negative prong concerns the C Section (Securities Section) and D Section (Burdens Section). Here the warranty is that nothing that should have been mentioned in those sections has been omitted. (The warranty is not against all encumbrances, but only against those that should have been entered. For example a short lease is an encumbrance, but because short leases do not enter the Register there is no warranty against their existence.)

22.7 In Part 23 we recommend that a disponee should normally have "mud" protection against omitted encumbrances, ie that if an encumbrance that should have been on the title sheet is omitted, a good faith disponee should take free of it. That being so, the question may be asked whether there is any need for the Keeper's warranty to apply to such cases, for there is no need for the Keeper to compensate someone who does not suffer. (And the disponee does not suffer because the encumbrances have been extinguished.) The answer is that the "mud" protection does not apply in all cases. In particular it applies only to disponees and not to other grantees.

Limitations on the Keeper's warranty

22.8 Below we go through the exceptions and limitations to the Keeper's warranty. The list looks long and the false impression may be given that the warranty is so hedged about with exceptions and qualifications that it is of little value. That would be a mistake. The Keeper's warranty remains, as it is under current law, an extensive one. Inevitably there has to be some small print, and there is under existing law, but the small print is actually relatively minor.

Warranty only on *registration*

22.9 The warranty should be granted on registration. It should guarantee the accuracy of the Register as it stands in consequence of the registration. What it should not cover is entries made other than by registration. Such non-registration entries under current law fall into three main categories: (i) rights entering by rectification; (ii) rights entering by noting; and (iii) rights constituted by deeds recorded in the Register of Sasines and which are entered on the Land Register on first registration. In the new scheme the second category is also regarded as rectification.

22.10 Under the current law, the rectification of a bijural inaccuracy has the same effect as registration, that is to say, it results in the creation, transfer, variation or extinction of real rights. The rectification of an actual inaccuracy is wholly different: it merely brings a title sheet into line with what is *already the case*. Under the new scheme the category of bijural inaccuracy would disappear. Hence all inaccuracies would be actual, and therefore rectification would have no substantive proprietary effect. The right would *already* have been created, transferred, varied or extinguished as a matter of the general law. That is why in the new scheme rectification can be allowed without restriction. Its purpose is merely to bring the Register into line with the actual legal position. But if no right is being transferred, varied or extinguished, there is no place for a warranty by the Keeper. The same may be said of the noting of overriding interests. A real right falling into this category exists independently of registration. The purpose of noting is merely to publicise a right that was created previously by other means. A warranty to its holder would be out of place. The present law is the same:

no indemnity is payable under the 1979 Act in respect of overriding interests.[15] (In the new scheme there would no longer be a category labelled "overriding interests" but the kinds of rights currently so labelled would still exist.[16])

22.11 On first registration the Keeper must make up a title sheet in which subsisting rights (considered as encumbrances) that affect the property are included.[17] Such rights might include title conditions (D Section) or, less commonly, heritable securities (C Section).[18] By entering such rights (encumbrances) in the title sheet, the Keeper is entering them in the Register but is not *registering* them within the meaning of section 2 of the 1979 Act or Part 3 of the draft Bill. No application for registration is made by the beneficiary of the encumbrance, such as the holder of a real burden or the creditor in a standard security. The fact that they have been created other than by registration in the Land Register means that pre-existing Sasine-created rights resemble overriding interests. And like overriding interests, they are, in effect, excluded from the indemnity system under the current law. We propose no change. If a creditor registers a standard security in the Land Register and the security turns out to be void, it is proper that indemnity (compensation) should be paid if loss results.[19] But if the security was originally recorded in the Register of Sasines but is now in the Land Register, indemnity would be difficult to justify. A right previously created by the registration of a deed in the Register of Sasines is not created again merely by being entered in a title sheet on first registration of the land to which it relates.[20]

22.12 Another argument for excluding from the Keeper's warranty such rights that enter the Register other than by registration[21] is that no fee is paid. In registration a fee is paid, and an element of that fee goes towards meeting the Keeper's liabilities. This element in the fee has often been compared to an insurance premium, and the analogy, though not perfect, is a good one. Those who do not pay cannot expect cover.

22.13 As will be seen in Part 33, the new scheme authorises the Keeper to register unregistered land without any application to that effect. The owner takes the benefit of a registered title without having to pay. By the same token the title is not a warranted one. This is no prejudice to the owner, whose title was not warranted in the first place, having been a Sasine title.[22]

22.14 We recommend:

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[15] 1979 Act, s 12(3)(h).
[16] See further Part 7.
[17] 1979 Act, ss 5(1)(a)(i) and 6.
[18] Heritable securities are usually discharged on sale, the seller using the sale price to pay off the secured loan. The discharge of any securities that there may be is an implied term of contract for the sale of heritable property. But a transferee may be prepared to accept a title with an undischarged security over it and this occasionally happens. As a matter of property law, the existence of a security does not prevent the transfer.
[19] There may be no loss. Here standard securities differ from other registered rights. A standard security secures an obligation, and if that obligation is performed, as it usually is, any invalidity in the security right matters not.
[20] The *Registration of Title Practice Book*, para 5.29 says that a Sasine-recorded standard security can be registered in the Land Register once the property itself has been registered in that Register. It seems to us that this may be open to question. There is no transaction to be registered because the security has already been created. And the security already appears on the C Section. But the point does not need to be pursued.
[21] Using that term in its narrow sense.
[22] Or in very unusual cases, a title that was not even in the Register of Sasines.

83. The Keeper's warranty should only be in respect of rights entering the Register by registration.

(Draft Bill, s 39(1)(a))

Warranty in whose favour?

22.15 Section 12(1) of the 1979 Act is open-ended as to the person or persons to be indemnified. In the new scheme the idea is of a warranty to the applicant. That idea is straightforward, but as with all rights there is the question of whether there can be derivative claims. To take a simple example, the applicant after registration might die. Is the warranty enforceable by the executor? Or by the intestate applicant's relict to whom the property has passed by the law of intestate succession? What if the registered applicant is sequestrated? What if the registered applicant sells? This issue was not ventilated in the discussion papers, but we have come to the conclusion that the rule should simply be that the benefit of the Keeper's warranty should enure to anyone to whom the benefit of warrandice would enure – that is to say, warrandice in the deed in favour of the registered applicant.

22.16 We recommend:

84. The warranty should be in favour of the applicant only, though it should also pass to anyone to whom the benefit of deed warrandice would pass.

(Draft Bill, s 39(1), (2) and (9))

Title warranted as at which date?

22.17 Above we observed that a criticism of the current law is that the section 12 guarantee is undefined as to its extent in time. The better approach is that the title should be warranted by the Keeper to be correct *as at the date of registration*. In DP 128 we called this the "only for today" approach.[23] The label is useful, but it is perhaps open to misunderstanding. What is "only for today" is not *the warranty* but *what is warranted*: the state of the Register. The warranty has no limit in time; it could be invoked after, say, thirty years.[24] What would be warranted would be the correctness of the Register as at the day of registration.

22.18 Thus there would be no guarantee that the title might not be affected by later events. If Jack were to be registered as owner of Blackmains together with the benefit of a servitude of way over neighbouring Whitemains, the servitude would be warranted. Now suppose that for the next 20 years Jack did not make use of the servitude. The result would be that at the end of that period the servitude would be extinguished by prescriptive disuse.[25] At that point the Register would become inaccurate, for the Register would say that the servitude existed but that would no longer be true. Why should the Keeper compensate Jack? What the Keeper warranted was that the Register, in showing the servitude, was accurate *at the date of registration*. The subsequent off-register event (prescriptive disuse) should not be within the scope of the warranty. In this respect the Keeper's warranty, as we envisage it, would

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[23] DP 128, para 7.38.
[24] Particular claims arising out of breach of the warranty are subject to negative prescription: see draft Bill, s 97, sch 8, para 21(10).
[25] Prescription and Limitation (Scotland) Act 1973, s 8.

follow the approach of section 3(1) and not section 12(1)(a) of the 1979 Act, for the Midas effect of section 3(1) is limited to the day of registration.[26] (Title normally continues after that day, but section 3 does not so state.)

22.19 Following on from what has just been said, the warranty would merely be that the right in question was acquired (or, as the case may be, varied or extinguished). The title would be warranted not to be void. But it might be voidable, for a voidable title is good unless or until it is reduced. Most consultees supported the view expressed in our first discussion paper that voidable titles should be left to the general law, and should be neither upgraded nor indemnified by the legislation on land registration.[27]

22.20 Another illustration of the principle can be drawn from advance notices.[28] Consider the first statutory example in schedule 3 to the draft Bill. In that example Z is registered as owner on 8 May, but one week later is ousted by Y. If the Keeper granted warranty to Z, the ouster on 15 May would not constitute a breach of that warranty.

22.21 We recommend:

85. Title should be warranted only as at the date of registration.

(Draft Bill, s 39(1) and (2))

22.22 The date to which the warranty would apply would not necessarily be the date when that warranty was given. In the normal case the Keeper would, indeed, give that warranty at the date of registration. But the draft Bill allows an upgrade of warranty at a later time.[29] But if there were to be such an upgrade, it would still refer to the state of the title on the day when registration took place.

Warranty only against inaccuracy

22.23 The Keeper would warrant the title against inaccuracy. That may sound obvious, and indeed it is obvious – in most cases. But sometimes it may not be quite so obvious and so the point is worth stressing. For example, suppose that a property is subject to a short lease, ie a lease for under 20 years. Such a lease is a real right, so that it is effective against singular successors.[30] Being a short lease, it is not supposed to appear on the title sheet anyway. So its omission is not an inaccuracy. (Indeed, to the contrary, its inclusion would have been an inaccuracy.) Hence the omission cannot give rise to any claim against the Keeper for breach of warranty.

What is not warranted: windfall caused by administrative error

22.24 The draft Bill lists a number of matters that would automatically fall outwith the Keeper's default warranty.[31] One is a title windfall caused by administrative mistake. The Keeper might over-register a grantee, ie register the grantee for more than the deed provides for. In DP 125 we suggested that the title guarantee should not apply to such a

[26] For the Midas effect see Part 13.
[27] DP 125, Part 6. For further discussion of voidable titles see Parts 20 and 28.
[28] For advance notices see Part 14.
[29] Draft Bill, s 39(5) and (6).
[30] Assuming that the Leases Act 1449 applies, which in most cases it will.
[31] But for super-warranty, see paras 22.36–22.40 below.

case and so the acquirer should be entitled neither to retain the windfall gain nor to indemnity for its loss.[32] Respondents favoured this approach and we remain persuaded of its merits. For present purposes it means that the Keeper's warranty as to title should not apply insofar as registration results in an acquisition (or variation or discharge) more extensive than was sought by the applicant.[33] We recommend:

86. The Keeper's warranty as to title should not apply insofar as registration results in an acquisition (or variation or discharge) more extensive than was sought by the applicant.

(Draft Bill, s 39(1)(b)(viii))

What is not warranted: freedom from off-register rights

22.25 Another exclusion of warranty concerns off-register encumbrances that the Keeper is supposed to enter on the title sheet – what are currently called overriding interests.[34] There are three such types of encumbrance: public rights of way, servitudes created other than under section 75(1) of the Title Conditions (Scotland) Act 2003, and core paths (section 22 of the Land Reform (Scotland) Act 2003). It would be unreasonable for the Keeper to have to guarantee the non-existence of such encumbrances.[35] (Here we are dealing with servitudes as encumbrances, not as pertinents.) We recommend:

87. The Keeper's warranty should not extend to the non-existence of public rights of way, of core paths under section 22 of the Land Reform (Scotland) Act 2003, or of servitudes created other than under section 75(1) of the Title Conditions (Scotland) Act 2003.

(Draft Bill, s 39(1)(b)(i)-(iii))

22.26 We would stress that the reason that these three categories are picked out is that they are encumbrances that are supposed to appear in the Register, with the result that their omission would constitute an inaccuracy. There are many types of encumbrance which are not supposed to appear in the Register. A short lease would be an example. The omission of such an encumbrance could not constitute an inaccuracy. Hence it would make no sense to say that the Keeper's warranty does not extend to such encumbrances: *the Keeper's warranty can be engaged only by an inaccuracy.*

What is not warranted: that registered pertinents are of a registrable type

22.27 A more difficult issue is whether the Keeper should warrant that what appears on the A Section of a title sheet as a pertinent (typically the benefit of a servitude or the benefit of a real burden) is of a type capable of being a valid pertinent. In practice conveyancers sometimes seek to create rights that are not valid as real rights, or whose validity as real rights is at least doubtful. Such cases can put the Keeper in a difficult position, because

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[32] DP 125, paras 3.35–3.41.
[33] See further Part 17 where both types of administrative mistake - over-registration and under-registration - are discussed.
[34] See Parts 7 and 10.
[35] See s 39(1)(b)(i)-(iii) of the draft Bill. The same issue arises in connection with the realignment of rights. See s 46(1) and (3)(a)-(c) of the draft Bill and paras 23.19-23.23.

determining their validity (as real rights) may be difficult. Of course, the Keeper can always exclude warranty in this or other cases.[36] But because this type of case is in practice often problematic we think it preferable for the default level of warranty to say, concerning pertinents, not "the pertinent is valid" but, more subtly, "if this right is of a type that can validly be created as a pertinent, then it is a valid pertinent". What that would mean in practice is that if a particular pertinent was important to a buyer, and there was a question as to whether it was of a *type* that was capable of being a valid pertinent, then the buyer's legal adviser would have to give a view, and it will not be possible to hold the Keeper responsible if it later turned out that the purported pertinent was not of a type that could be validly constituted as a pertinent. We stress the word "type". For example, suppose that the title sheet said that there was a servitude of way over the neighbouring property. That is a type of pertinent which is – to state the obvious - recognised by law as a real and registrable right. This *particular* example of that type might be invalid for some reason, and if it were invalid then *prima facie* the Keeper's warranty would be engaged. What the Keeper should not warrant is the proposition of Scots law that "rights of type X are real and registrable rights". For example, until very recently it was uncertain whether the right to park could be a servitude.[37] Suppose that the Keeper had registered such a right and suppose that later it had been held that the law did not recognise such a right as a servitude or real burden.[38] In that case the Keeper would not (under our recommendations) have been liable under the warranty. We recommend:

88. The Keeper should not be taken as warranting that a purported pertinent is of a type that can be validly constituted as a pertinent.

(Draft Bill, s 39(1)(b)(iv))

What is not warranted: that a pertinent has not been extinguished off-register

22.28 It can happen that a pertinent is extinguished off-register, for example by prescriptive disuse. Suppose that Bonnie's title sheet says, correctly, that her property, Greenmains, holds a servitude of way over the neighbouring property, Redmains. She does not use the servitude and as a result after twenty years it is extinguished (prescriptive disuse). The Keeper does not know about this and so the title sheet is not rectified by deletion of the servitude. Bonnie now sells to Adam. The question whether the servitude should be revived if Adam thought it still existed is discussed in Part 23 where we come to the conclusion that it should not.[39] That being so, should Adam nevertheless have the benefit of the Keeper's warranty, so that the Keeper would be liable to Adam when it emerges that the servitude does not now exist? In DP 130[40] we argued that the warranty should not cover this type of case and respondents were in general agreement. Variation of a pertinent raises the same issues as extinction. We recommend:

89. The warranty does not mean that a pertinent has not been varied or extinguished off-register.

(Draft Bill, s 39(1)(b)(v))

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[36] Where the right is clearly not a real right it should simply be kept off the Register. See draft Bill, s 6(3).
[37] See *Moncrieff v Jamieson* 2008 SC (HL) 1.
[38] In fact it is now settled that there can be a servitude of parking.
[39] Paras 23.33 and 23.34. This represents a change in our view as expressed in DP 130.
[40] DP 130, para 4.26 (proposal 11(2)(b)).

22.29 Earlier in this part[41] we gave the example of Jack who held a servitude that was later extinguished by negative prescription, and we said that he should have no claim against the Keeper because as at the date of warranty the servitude did exist. Although that case also involved off-register extinction, that case is different from the one just discussed, because in the latter the extinction had happened *before* the warranty, not *after* it.

Servitudes and real burdens: an overview

22.30 It may help to give an overview of servitudes and real burdens in relation to the Keeper's warranty, according to what we recommend.

- On registration of a new servitude or burden, the Keeper should normally warrant to the holder of the right that it has been validly created.

- Where a servitude or burden appears as a pertinent, and the benefited property is transferred, the Keeper should normally warrant these pertinents to the acquirer.[42] In the event of invalidity, the acquirer's right should be limited to warranty: the "integrity principle" (realignment of rights) would not operate.

- If the servitude or burden has been entered *not* by registration, but because the right came into existence in the Register of Sasines or in some other way (for example a prescriptively-created servitude) then the Keeper should grant no warranty when it is first entered in the Register. But when the benefited property is transferred, the servitude or burden being entered as a pertinent in the title sheet of the property in question, the Keeper's warranty should normally be engaged,[43] as just explained.

- Although servitudes and real burdens created since Martinmas 2004 are dual registered, ie registered against both the benefited and the burdened properties,[44] servitudes and real burdens created before that time may not appear on the benefited title sheet. We recommend that they should,[45] but the process of making this happen will take a great many years. So long as they appear solely on the burdened title sheet, the Keeper's warranty does not apply to them. But this is subject to the next point.

- In so far as under current law the right of the holder of a servitude or burden is indemnified,[46] it should continue to be warranted.[47]

Mineral rights

22.31 Mineral rights can be owned separately from the land itself. A title sheet to the land could (i) expressly include the minerals (ii) expressly exclude them or (iii) be silent. In the last of these cases the question is left open: if nobody else owns the mineral rights, they are part

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[41] Para 22.18.
[42] Subject to the qualifications previously mentioned.
[43] Subject to the qualifications previously mentioned.
[44] Title Conditions (Scotland) Act 2003, Parts 1 and 7. There are minor exceptions (for servitudes but not for real burdens).
[45] Draft Bill, ss 7 and 10.
[46] We do not here enter into the difficult question of the current law in this area, which we discussed in DP 130, Part 4, though we would note that under current law real burdens appear to be wholly outwith the indemnity system: see DP 130, para 4.43.
[47] Draft Bill, s 91(1), sch 6, paras 26 and 27.

of the title to the land itself, while if somebody else owns the mineral rights, they are not part of the title to the land itself. In case (i) it is obvious that the Keeper's indemnity is engaged. In case (ii) it is obvious that it is not engaged, though in such a case the Keeper may exclude indemnity.[48] In case (iii) the rule is that indemnity is automatically excluded.[49] We think that this approach is sound, given (a) the current law on mineral rights as an object of separate ownership and (b) the fact that in practice it is often hard to be sure who owns the mineral rights.[50] Accordingly we recommend:

90. Where a title does not expressly mention mineral rights, title to such rights should not be warranted.

(Draft Bill, s 39(1)(b)(vi))

Alluvion

22.32 In Part 5 we discuss the effect of alluvion in altering physical boundaries. There we recommend that the Keeper's warranty of title should not cover title boundary changes that result from by alluvial change.[51] Thus suppose that Rhadamanthus buys Redmains. The eastern boundary as shown in the Cadastral Map has become inaccurate because alluvion has altered the course of a burn and the title boundary tracks the burn. The result is that Redmains is a few square metres smaller than it appears on the Cadastral Map. The Keeper has no liability to Rhadamanthus.

Leases

22.33 In Part 9 we recommend that there be no warranty that a registered lease has not been varied or terminated without the variation or termination having been registered.[52]

***A non domino* cases**

22.34 The practice of the Keeper is to exclude indemnity in *a non domino* cases. The draft Bill makes this a rule.[53]

Caveats

22.35 The Keeper's warranty should not apply in so far as a title sheet is subject to a caveat. Caveats are discussed in Part 32.

Default warranty, sub-warranty and super-warranty

22.36 Under current law if the title sheet is silent, the Keeper's indemnity applies. We think that that should continue to be the case. If the title sheet is silent, then the warranty is deemed to be granted. So the Keeper warrants, but warrants silently. As has been seen, there are certain implied limits to the scope of the warranty. The Keeper is nonetheless to be free to go beyond those limits, ie to warrant *more* than is implicitly warranted. In such cases

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[48] On this see *Registration of Title Practice Book*, para 6.93.
[49] 1979 Act, s 12(3)(f).
[50] Proving a good title to minerals is often problematic, for reasons that cannot be entered into here.
[51] See paras 5.33-5.34 above.
[52] See para 9.31.
[53] Draft Bill, s 39(2)(a).

an express statement on the title sheet will be needed. Conversely, the Keeper may, by express statement on the title sheet, warrant *less* than would otherwise be warranted. In short: the rules about the scope of the warranty are merely default rules, and the Keeper can, by *express* statement, grant a greater or lesser warranty than the default rules would provide – sub-warranty or super-warranty.

22.37 Under current law "the Keeper may on registration in respect of an interest in land exclude, in whole or in part, any right to indemnity under this section in respect of anything appearing in, or omitted from, the title sheet of that interest."[54] There are no rules about the reasons for excluding indemnity. It is left to the Keeper's discretion. In practice indemnity is seldom excluded.

22.38 In conveyancing practice, any exclusion of indemnity by the Keeper is of high significance. In contracts of sale, it is a standard term that the buyer's title, when registered, will contain no exclusion of indemnity, so that if this happens there is breach of contract on the part of the seller. If a title has an exclusion of indemnity, that has a negative effect on the marketability of the property, and also on its availability as collateral for a loan, for banks may hesitate to take security over a property which is subject to such an exclusion.[55]

22.39 In our view to leave so important a matter as the granting or withholding of warranty (indemnity) unregulated by legislation, as is the current position, is a mistake. The practice of the Keeper is in broad terms that indemnity is excluded only if there is material doubt about some aspect of the title. The draft Bill has an express provision to that effect. If the title is not merely subject to doubt but is actually bad (on balance of probabilities), the application for registration should not be accepted in the first place. Of course, there is scope for a mixed response from the Keeper. For example, an application might be for the registration of a property with two boundary areas, title to which is open to debate. For the main property (ie not counting the two disputed areas) the Keeper would register with no exclusion of warranty. For one of the disputed areas the Keeper could register with exclusion of warranty. And the application could be rejected in so far as the third area is concerned. (The draft Bill allows for partial acceptance of an application.)

22.40 We recommend:

91. The rules outlined in the previous recommendations form a set of default rules, which would apply where the title sheet was silent. The Keeper should also be able to grant a lower or higher level of warranty. In the former case the test should be the degree of doubt about the title.

(Draft Bill, s 39(1)–(3))

Warranty upgrade

22.41 The Keeper's practice is that an exclusion of indemnity can subsequently be removed.[56] We think that that power should continue and should be given a statutory basis.

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[54] 1979 Act, s 12(2).

[55] Where there is an exclusion of indemnity, title insurance may be purchased and that often succeeds in restoring the marketability of the title. Here everything depends on the facts and circumstances of the case.

[56] For the Keeper's practice see *Registration of Title Practice Book*, para 7.34. There seems to be no basis for this practice either in the 1979 Act or in the either the 1980 or 2006 Rules.

In the conceptual framework of the new scheme, this would be an upgrade. An upgrade would typically be from sub-warranty to default warranty. But in theory it could be to super-warranty. And of course an upgrade could refer to one aspect of the title but not to another.[57]

22.42 We recommend:

92. The Keeper may, at a date later than the date of registration, upgrade the warranty.

(Draft Bill, s 39(4)-(6))

Warranty downgrade

22.43 Just as the current law fails to give an answer to the question of whether there can be an indemnity upgrade, so it fails to give an answer to the question of whether there can be an indemnity downgrade. But in the new scheme the Keeper gives a warranty of title to a particular person at a particular time, and so the question of downgrade cannot arise. The Keeper cannot walk away from the guarantee, once it has been given, any more than any other guarantor can. (That is not to say that the Keeper may not have defences to a claim made on the basis of warranty.)

If warranty is given to one person, must it be given to a successor?

22.44 If warranty is given to one person, must it be given to a successor? Thus if Maria has a warranted title and sells to Nick, and Nick is registered, must the Keeper also give Nick a warranted title? The current law gives no answer to that question. This is a slightly different question to the question raised above, about downgrade. If the Keeper declines to indemnify Nick's title, that is not a downgrade. Maria's indemnity was not downgraded. In the new scheme the decision on warranty should be made at each registration and is made in relation to each person registered. The fact that Maria had a warranted title does not necessarily mean that Nick's will be warranted. On each registration a fresh decision is made. But in each case the rules to be applied are the same and it is highly unlikely that the Keeper would have legal grounds for granting Nick any lesser degree of warranty than was previously granted to Maria. Even in the very unlikely case where that did happen, the benefit of Maria's warranty would in the normal case transmit to Nick anyway.[58]

When liability crystallises

22.45 The Keeper warrants to the applicant the accuracy of the Register. The question arises as to when the Keeper's liability to make financial compensation crystallises. The natural answer is that it should crystallise when the inaccuracy is rectified. In theory the Keeper could seek to evade payment of compensation by neglecting to rectify the Register. We see no real difficulty here. The whole land registration system is framed on the assumption that the Keeper can be trusted to act properly. It could be framed in no other way. And of course if the Keeper for any reason fails to act properly, the doors of the courts are always open, as they are whenever any public official or public body is alleged to have failed to act according to the law.

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[57] Upgrade would also cover the case of a prescriptive claimant and a provisional entry that becomes final.
[58] See paras 22.15 and 22.16 above.

22.46 We recommend:

93. The Keeper's liability to pay compensation should arise when the inaccuracy in question is rectified.

(Draft Bill, s 42(1))

Compensation for rectification?

22.47 Under the 1979 Act, compensation is payable for loss caused by rectification.[59] That means that compensation is payable for the rectification of a bijural inaccuracy, but not for the rectification of an actual inaccuracy.[60] In the case of an actual inaccuracy, rectification can cause no loss, for the rectification of an actual inaccuracy *changes no rights*. It is only the rectification of a bijural inaccuracy that changes rights and hence it is only the rectification of a bijural inaccuracy that can cause loss. By contrast, in the new scheme the troublesome category of bijural inaccuracy disappears, so that if there is an inaccuracy it can only be an actual one. That being the case, in the new scheme it would make no sense for the Keeper to be obliged to compensate anyone for a loss caused by rectification. Rectification is not the cause of loss. The cause of loss is the inaccuracy, not the rectification.

Quantification of compensation: introduction

22.48 We think that it would be unwise for the legislation to make detailed provision as to quantification of claims based on the Keeper's warranty. The core idea is straightforward: the Keeper's warrants the applicant's title, and so if it turns out that the title is not good the Keeper must pay compensation. If necessary the courts can determine the quantum of payment, as they do for other compensation disputes in other areas of law. Accordingly the draft Bill makes only a few provisions dealing with particular matters. These are discussed below.

Quantification of compensation: A ceiling to claims?

22.49 Hitherto, very large claims have been unknown in Scotland, but it is easy to see that they could arise. The land in question might be of great value; or its value, modest at the time of registration, might undergo a substantial increase due to building or re-zoning or the discovery of valuable minerals. If the property were then lost – if, for example, an acquirer was the victim of forgery or some other transactional error – the Keeper would be liable for its value.[61] No limit is set by the 1979 Act: the Keeper must pay whether the loss is £10,000, £100,000, £1 million, £10 million or £100 million.

22.50 Although unusual, limits on liability are not unknown in other systems of registration of title. For example, in the legislation proposed by the Joint Land Titles Committee for Canada, there is power to set a "maximum amount or amounts payable for compensation".[62]

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[59] 1979 Act, s 12(1)(a).
[60] For this distinction see Part 17.
[61] No doubt someone else would also be liable, from whom the Keeper could recover in theory. But recovery in theory is one thing and recovery in practice is another.
[62] Joint Land Titles Committee for Alberta, British Columba, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and Yukon, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990), p 58 (s 2.3(f)).

The attractions are obvious. By setting a limit the Keeper – and the public who must ultimately fund the system – would be protected against the risk of very high claims; and yet, as the Joint Land Titles Committee explained, "[t]he imposition of a limit on individual claims would not be destructive of a compensation system so long as the limit is high enough to cover the great bulk of land transactions."[63] At present in Scotland the fee for registration (including consequential indemnity cover) is capped at £7,500, which is payable for a transaction with a consideration exceeding £5 million.[64] As a result, a company that buys land for £60 million pays the same fee as a company that buys for £6 million; but the indemnity cover is ten times greater. If the notional indemnity premium is capped in this way, that is an argument for capping indemnity itself. A person with a high-value transaction is free to buy additional insurance from the private sector.

22.51 But there are arguments the other way. If indemnity is capped or otherwise restricted, there may be pressure to buy private title insurance even in routine transactions. Whilst there is a role for title insurance from commercial insurers, it is our view that its use as a routine feature of ordinary conveyancing transactions should not be encouraged.[65]

22.52 In DP 128 we asked whether claims should be capped.[66] Those who responded were opposed to the idea[67] and accordingly we do not recommend it. But two points must be borne in mind. The first is that the risk of a disastrously large claim, though very low, is not zero. If such a claim were to happen, and if the Keeper were unable to recover the loss from a third party, the consequences would be serious. Since the Department of the Registers of Scotland is self-financing, registration fees might have to rise. At a theoretical worst, reserves might be exhausted by the claim so that the Keeper would have to go cap in hand to the Scottish Government for emergency funding. We do not wish to scare-monger: the chances of a disastrous claim are very slight, and as we note in Part 27, the sums paid out by the Keeper over the years have in fact been remarkably small. As far as we are aware, there has never been a catastrophic claim in any other legal system. (Though we are aware of a handful of cases where a sum running to several million pounds had to be paid.)

22.53 The other point is that the practice of capping the registration fee at £7500 may not be justifiable. It is true that the element of the fee that represents a notional one-off title insurance premium is very small. But it is not non-existent. We think that since the Keeper's liability is not capped, it is arguable that fees should not be capped either, but should continue to rise as the value of the property being registered rises, albeit by small increments, without any maximum. Otherwise the company involved in the £6 million transaction is arguably subsidising – albeit only to a small extent – the company involved in the £60 million transaction,[68] and the Keeper is risking public funds without thereby generating a matching income. Moreover, if fee levels were uncapped, that would generate additional income that could be used to reduce general fee levels for all applicants. But we

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[63] Joint Land Titles Committee for Alberta, British Columba, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and Yukon, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990), p 32.

[64] Fees in the Registers of Scotland (Amendment) Order 2006 (SSI 2006/600). The fee is lower for ARTL transactions.

[65] On this issue see Part 26.

[66] DP 128, para 9.42.

[67] Perhaps it should be mentioned that this question was one on which the Keeper expressed no view, either for or against.

[68] By the same logic, Mr Everyman and Ms Everywoman when buying ordinary flats or modest houses are subsidising the big company.

recognise that the picture is a complex one, for there also seems to be a subsidy running the other way. Registration fees rise with the value of the property, yet the cost to the Keeper in terms of staff resources does not rise in the same way. The cost of registering the transfer of a £10,000,000 property may, depending on the circumstances, be the same as the cost of registering the transfer of a £100,000 property. Accordingly we merely raise the question, and make no recommendation, other than that the matter be reviewed. In the future, as at present, fees would be a matter for secondary legislation.[69]

22.54 We recommend:

94. (a) There should be no cap to the Keeper's potential liability under the warranty.

(b) The question of whether there should continue to be a cap to the registration fee should be reviewed.

Quantification of compensation: when?

22.55 The value of a property at the time of registration may not be the same as its value at the time of rectification. Should the compensation be based on the value of the property at registration or at rectification? A case can be made for either, and no doubt claimants will always prefer the one that is most beneficial to them. In DP 128 we proposed the former. Those who responded were divided in their views. We have come to think that the date of rectification is the most appropriate date. We recommend:

95. For the purpose of calculating compensation, properties should be valued as at the date of rectification.

(Draft Bill, s 43(1)(a))

Compensation: scope

22.56 Under current law, the Keeper's indemnity extends to consequential losses. In DP 128 we asked if this should continue to be the case.[70] All those who responded agreed that it should. We also proposed that interest should accrue on the sum due until payment, and again respondents agreed.[71] The question of legal expenses, whether incurred before or during litigation, is discussed in Part 27. We recommend:

96. The Keeper's warranty should cover consequential losses. Interest should accrue on the sum due until payment.

(Draft Bill, s 43(1)(b)(ii) and (2))

First port of call?

22.57 Under current law there is no requirement that a person should have to exhaust other remedies before making a claim to the Keeper for indemnity. So if fraudster Fred

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[69] See draft Bill, s 90.
[70] DP 128, para 9.24 (proposal 39).
[71] DP 128, para 9.13 (proposal 37(c)).

impersonates owner Oliver and sells to buyer Brenda, and the Register is subsequently rectified by removing Brenda's name and reinstating that of Oliver, Brenda can claim immediately from the Keeper. (Who, having paid Brenda, has the right to recover from Fred.[72]) She does not have to show that she has already tried without success to recover from Fred. In DP 128 we proposed that this should remain the position and most respondents agreed.[73] We recommend:

97. There should continue to be no requirement that a person exhausts other remedies before making a claim to the Keeper for indemnity.

(Draft Bill, s 42(2))

Non-patrimonial loss

22.58 The Keeper's practice is to refuse claims for non-patrimonial (non-pecuniary) loss, such as emotional distress, though occasionally an *ex gratia* payment is made. Whether this is a correct interpretation of the current law is unclear. Some guidance may perhaps be obtained from *Palmer v Beck*,[74] a case on warrandice. There the buyer's claim in respect of a defective title included, not only patrimonial losses, but also £10,000 of solatium. As a result of the defect the buyer had moved out of the house and was said to have suffered considerable anxiety and stress over a long period of time and to have required medical treatment. Her claim was rejected. According to the Lord Ordinary (Kirkwood):[75]

> "[A]s the pursuer's claim would be for indemnification, she is not entitled to an award of damages for solatium for the anxiety and distress which she allegedly suffered as a result of the breach of warrandice. While Lord Morison appeared to express the view in Watson[76] that a claim for damages for breach of warrandice could include a claim for solatium, I was not referred to any case in which an award of solatium had been made to a pursuer in an action for breach of warrandice. In my opinion, a breach of warrandice only entitles the pursuer to be indemnified in respect of the financial loss which has been sustained in consequence of the breach."

22.59 We think that this approach should apply equally to warranty (indemnity). Warranty, like warrandice, does not depend on fault, and in the absence of fault it seems reasonable to restrict the Keeper's liability to losses of a patrimonial nature. This is what we proposed and respondents agreed.[77] We recommend:

98. The Keeper's warranty should not extend to non-patrimonial (non-pecuniary) loss.

(Draft Bill, s 40(f))

Failure to mitigate

22.60 It is a general principle of the law of damages that a claimant cannot claim for losses that were reasonably avoidable. That is to say, a failure to "mitigate", to use the technical

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[72] See Part 24.
[73] DP 128, para 8.25.
[74] 1993 SLT 485.
[75] 1993 SLT 485 at 492D.
[76] *Watson v Swift & Co's Judicial Factor* 1986 SC 55.
[77] DP 128, para 9.38 (proposal 40).

term, is something that the claimant must accept responsibility for: the person liable cannot be expected to foot the bill for reasonably avoidable losses. The 1979 Act does not spell this out in relation to claims against the Keeper, though probably it is implied. In DP 128 we proposed that this should be the rule and respondents agreed. We think it would be desirable for it to be set forth expressly in the legislation. We recommend:

99. The Keeper should not be liable for reasonably avoidable losses.

(Draft Bill, s 40(d))

Remoteness

22.61 A loss cannot be recovered if it is too remote. Arguably this is implicit in section 12. Ruoff and Roper[78] comment on the parallel provision in England and Wales that:

> "The Act does not specifically provide any rules of remoteness which govern the outer limits of the registrar's responsibility for the losses resulting from the initial mistake or failure. It would seem appropriate, however, that the registrar should only be liable to indemnify the claimant for those kinds of loss which were reasonably foreseeable as following from the initial mistake or failure. This should be the case even though the ground of indemnity need not depend on proof that the registrar has been negligent."

22.62 The effect of the Scottish provision is, we think, the same. As Ruoff and Roper imply, the obvious parallel is with remoteness of damage in the law of reparation, remoteness being determined by a test of reasonable foreseeability. If that is a correct analysis of the current provision, we would not propose any change; but in DP 128 we suggested that there would be value in giving expression to the rule in the legislation.[79] We recommend:

100. The Keeper should not be liable for unduly remote losses.

(Draft Bill, s 40(e))

Inaccuracy caused by breach of duty of care

22.63 In the new scheme when there is an application for registration the applicant and the applicant's solicitor would owe a duty of care to the Keeper.[80] The duty would be to take reasonable care not to cause the Keeper to make the Register inaccurate. Were there to be a failure in that duty of care and as a result the Register became inaccurate, the applicant should not be allowed to lay the resulting loss at the Keeper's door. We recommend:

101. The Keeper should not be liable to the extent that the loss is attributable to a breach of the duty of care.

(Draft Bill, s 40(c))

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[78] R B Roper, C West, M Dixon, D Fox, S R Coveney, S Wheeler and P Milne, *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (looseleaf), para 47.018.
[79] DP 128, para 9.31.
[80] See Part 12.

Bad faith

22.64 Bad faith should exclude a claim. In most cases such a rule merely duplicates the rule just mentioned. But there could be cases without such duplication. For example, suppose that the Register is inaccurate in including a boundary area, which in truth belongs to the neighbour. The property is sold. The buyer knows that the boundary area should not have been included in the title sheet. Later the Register is rectified, by the transfer of the boundary area from the title sheet in question into the neighbour's title sheet. Can the buyer claim compensation? In such a case the buyer has not been in breach of the duty of care, which is a duty to take reasonable care to prevent the Keeper making the Register inaccurate. In this case the Register was *already* inaccurate. Under current law the buyer does have a claim against the Keeper.[81] In the discussion papers we criticised that result and proposed that there should be a good faith test. Respondents agreed. Accordingly we recommend:

> **102. The Keeper should not be liable for an inaccuracy in the Register immediately before the registration, if it was, or ought to have been, known to the applicant.**
>
> (Draft Bill, s 40(b))

Inaccuracy due to fault in base map

22.65 Section 12(3)(d) of the 1979 Act says that the Keeper is not liable if:

> "the loss arises as a result of any inaccuracy in the delineation of any boundaries shown in a title sheet, being an inaccuracy which could not have been rectified by reference to the Ordnance Map, unless the Keeper has expressly assumed responsibility for the accuracy of that delineation."

This sensible rule is retained in the draft Bill, albeit expressed rather differently.[82]

> **103. The Keeper should not be liable for an inaccuracy consequent upon an inexactitude in the Cadastral Map if that error was made in reasonable reliance upon the base map.**
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> (Draft Bill, s 40(a))

[81] *Dougbar Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513.
[82] Draft Bill, s 40(a).

Part 23 The guarantee of title: (E) indefeasibility (realignment of rights)

INTRODUCTION

Background

23.1 In Part 21 we make recommendations as to when the title guarantee should take the form of "mud" and when it should take the form of monetary compensation. In the present part we consider the details of the first of these cases. In other words, this part considers the realignment of rights so as to conform with what the Register says they are.

Indefeasibility deferred, not immediate

23.2 Under current law, a title may be indefeasible both in the case of transactional error and in the case of Register error. As explained in the previous part, in the new scheme the title guarantee in relation to transactional error would take the form of money, not mud. So if Alastair is the owner, and there is a void disposition to Penelope, her title is void, and so she has in principle a right to be compensated on the basis of the Keeper's warranty. In other words, in the new scheme immediate indefeasibility would disappear. The system we recommend would be one of deferred indefeasibility, subject to certain exceptions, coupled with a compensation scheme.

The issues: an overview

23.3 The main case to consider is the disposition, ie the transfer of the right of ownership of land or buildings. Deferred indefeasibility has two aspects. One is the validation of a defective title. The other is the extinction of omitted encumbrances. We consider dispositions first, and later consider other cases where the doctrine of deferred indefeasibility should operate.

DISPOSITIONS: (1) VALIDATION OF A DEFECTIVE TITLE

The granter

23.4 The first condition for the realignment of rights[1] is that the granter of the disposition in question is not the owner but is registered as owner. We think that deferred indefeasibility should also be capable of operating where the disposition is signed by someone who has power to act for the person registered as owner. For example, suppose that Lorna is registered as owner, but is not owner. She appoints Menelaus as her mandatory and he signs a disposition for her. Such a case should be covered just as much as the case where the deed is signed by Lorna herself. Again, suppose that she grants a standard security to a

[1] Or, in the language of the discussion papers, the "integrity principle".

bank, and defaults, and the bank sells. We think that a disposition granted by the bank should be covered just as much as if the disposition had been granted by Lorna herself. Other examples would be where she dies and the disposition is by her executor, or she is sequestrated and the disposition is by her trustee in sequestration. So our first recommendation is that:

104. The realignment principle should be capable of applying not only to dispositions granted by the person registered as owner but also by persons who, had that person been the true owner, would have had power to dispone.

(Draft Bill, s 45(1))

Disposition to be valid in other respects

23.5 To be eligible for the operation of the realignment principle, the disposition in question should be valid in other respects, ie in respects other than the defect in the granter's title. In other words, the disposition should be such that, were it not for that defect, the disponee would acquire a good title. The draft Bill so provides.[2]

Possession

23.6 As we said in an earlier part of the Report,[3] we consider that possession should be a necessary element. The granter or grantee, or both together, should have possession for at least one year. That ensures that the true owner has enough time to act. Here are two examples. (i) Philip is owner. There is an invalid disposition to Quintus, duly registered. Quintus possesses for two years and then dispones to Rosamund. She is in good faith and is registered. On the day of her registration, ownership passes to her from Philip. (ii) Peter is owner. There is an invalid disposition to Quentin, duly registered. Quentin possesses for nine months and then dispones to Ruth who is in good faith and is registered. She takes possession. Three months after Ruth's registration, ownership passes to her from Peter.[4] We recommend:

105. (a) The realignment principle should require possession for a year.

(b) Straddling possession should be recognised for this purpose.

(Draft Bill, s 45(4))

23.7 As for the nature of the possession, the draft Bill has two relevant provisions. The first is that the possession must be had "openly, peaceably and without judicial interruption".[5] That ties in with the concept of possession in the prescription legislation.[6] The second is that possession is defined as including civil possession; here again there is a tie-in with the concept of possession in the prescription legislation.[7]

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[2] Draft Bill, s 45(3)(b).
[3] Part 21.
[4] This may be described as a case of straddling possession.
[5] Draft Bill, s 45(4).
[6] Prescription and Limitation (Scotland) Act 1973, s 1.
[7] Draft Bill, s 92(1); Prescription and Limitation (Scotland) Act 1973, s 1.

"Fraud or carelessness" or bad faith?

23.8 Another condition should be, in broad terms, that the disponee should not have been aware of the title problem. The aim is to protect the innocent, but only the innocent. Under current law, the test is "fraud or carelessness". Experience has exposed the shortcomings of this test. There is uncertainty as to the meaning of "carelessness" which, as the Law Commission in England and Wales once noted, is not "a technical expression familiar to conveyancers."[8] More importantly, the test is an unexplained and unexpected departure from the common law, under which the protection of acquirers turns on questions of good faith. In 1987 the Law Commission in England went so far as to recommend that the general law be reinstated:[9]

> "We consider that it would make for greater consistency with the general… principles of property law and conveyancing if the apparent protection against rectification conferred by section 82(3) were to be redrafted so as to benefit registered proprietors who were prudent purchasers for value in good faith …"

23.9 But in England and Wales, as in jurisdictions which operate the Torrens system, a good faith test would reawaken the doctrine of notice and so risk subjecting acquirers to those equitable proprietary interests that it was one of the objects of registration of title to defeat. In its most recent review, therefore, the Law Commission recommended the retention of the criterion of fraud and carelessness, and the Land Registration Act 2002 so provides.[10] In Scotland the position is different. On the one hand, good faith is the traditional and well-understood test; and on the other hand, equitable proprietary interests are unknown. Here, as in some other places in the 1979 Act, the departure from the ordinary law seems more a result of accident than of any special requirement of registration of title.

23.10 The choice would not matter if each test were in substance the same. And certainly there is much common ground between the act or omission required for fraud or carelessness and the knowledge which is the basis of bad faith. Thus a title defect caused by a fraudulent or careless act of the acquirer must be known to – that is, be within the actual knowledge of – the acquirer who perpetrated the act. Similarly, a title defect caused by careless omission – typically an omission to attend to normal conveyancing procedures – is likely to be within at least the acquirer's constructive knowledge. The position, however, is different in respect of defects caused by the act or omission of a third party. Here the acquirer might, or might not, know of the defect, but in any event it did not arise as a result of the acquirer's fraud or carelessness.

23.11 The leading illustration is *Dougbar Properties Ltd v Keeper of the Registers of Scotland*.[11] By mistake a right was included as a pertinent in the title sheet. Thereafter the pursuers bought the property, in the full knowledge of the mistake. As it happened the buyer did not have possession so the Keeper could and did rectify the Register by deleting the right from the title sheet. The pursuer claimed indemnity. The court held that indemnity was payable.[12] Mere knowledge, it was said, was not carelessness; and the knowledge in this

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[8] Law Commission, *Property Law: Third Report on Land Registration* (Law Com No 158, 1987), para 3.14.
[9] Law Commission, *Property Law: Third Report on Land Registration* (Law Com No 158, 1987), para 3.15.
[10] Land Registration Act 2002, Sch 4, paras 3(2)(a) and 6(2)(a), and Sch 8, para 5.
[11] 1999 SC 513.
[12] The report deals only with the principle, not with the amount. The claim against the Keeper was for £1.39 million.

case was not accompanied by an act or omission which could itself be characterised as careless. In the absence of carelessness (or fraud), therefore, the Keeper was bound to indemnify the pursuer for its loss. As a matter of policy, the result seems unsatisfactory. The pursuer was not misled by the Register. It had read the entry and it knew it to be wrong. Nonetheless it was held entitled to compensation for the loss of a right to which, as it knew, there was no true entitlement. A simple good faith test would have avoided the difficulty. It is instructive to compare *Dougbar* with a German case decided a few years earlier.[13] A restrictive title condition which had been registered previously was, by human error, deleted from the title sheet. A subsequent acquirer knew of the title condition, and that it had been omitted from the title sheet by mistake. Under German law the land register is deemed conclusively correct in favour of an acquirer in good faith.[14] It was held that an acquirer who knows that the register is wrong is not in good faith, and hence the statutory guarantee of title did not apply.

23.12 *Dougbar* was a case of "money" not "mud". But had the pursuer been in possession, it would have kept the mud, because the "fraud or carelessness" test applies across the board. We cite it here because of what *would* have been held *if* the case had been a mud case. The question of compensation for breach of the Keeper's warranty is discussed in Part 22 of this Report.

23.13 It may be added that the "fraud or carelessness test" is rather messier than a good faith test. First, the legislation must select the event to which the fraud or carelessness is supposed to lead, and second, there is a requirement of a causative link. Both points can cause difficulties. The events selected by the 1979 Act are the inaccuracy on the Register, in the case of rectification, and the loss itself, in the case of indemnity. Almost certainly the fit is not perfect, because a loss may be attributable to factors other than those which cause the inaccuracy on the Register. More serious is the problem of causation. Even where the fraud or careless act or omission was by the acquirer, as opposed to a third party, it may be open to question whether the act or omission caused the inaccuracy or, as the case may be, the loss. Take, for example, the case of a defective conveyance leading to an inaccurate entry on the Register. Even if the acquirer, through carelessness, caused the defect in the conveyance, that does not necessarily mean that the carelessness caused the inaccuracy in the Register. The Keeper has the opportunity to examine deeds, and the decision to register is the Keeper's. Arguably the resulting inaccuracy could be regarded as caused by the Keeper and not the acquirer. This line of reasoning was advanced in *McCoach v Keeper of the Registers of Scotland*.[15] It failed, but only on the specific facts of the case.

23.14 We recommend:

106. Good faith should be a precondition for the operation of the realignment principle.

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[13] (1993) MittRhNotK 159, a decision of the Oberlandesgericht at Hamm.
[14] German Civil Code (BGB) § 892.
[15] 19 December 2008, Lands Tribunal, discussed in Kenneth G C Reid and George L Gretton, *Conveyancing 2008* (2009), pp 121-133.

Timing

23.15 Good faith should exist at the time of application.[16] However, because we now think that the acquirer's possession should be capable of being aggregated with that of the granter, modification is needed. For example, suppose that Charles is the registered owner, but his title is in fact invalid. After being in possession for seven months he dispones to Doris. She then possesses. She possesses for five months and at the expiry of those five months ownership passes to her. In theory the rule here could be that her good faith is to be determined as at the time of application. But that would lead to the odd result that if four months after registration she discovers that Charles' title was invalid, she still acquires ownership provided that she can, cutlass in hand, repel all boarders for another month. It seems to us that where the period of one year's possession has not yet been completed by the time of her registration, the relevant date for good faith is the date when the period is completed. So in the example just given, she would not acquire ownership at all. But had she learnt of the problem with Charles' title six months after her registration, that knowledge would then be irrelevant, because her title would already have been perfected (a month before the acquisition of the information). Accordingly we recommend:

107. The date for determining good faith should be the date of application for registration or, if later, the date on which the period of one year's possession is completed.

(Draft Bill, s 45(3)(a) and (4))

Caveats and exclusions of warranty

23.16 If there is a relevant caveat, that should exclude the possibility of deferred indefeasibility. For example, two months before Charles sells to Doris, the guardian of the previous registered owner, Beata, raises an action to reduce the Beata/Charles disposition as having been granted by an incapax. On the dependence of this action a caveat is registered. A caveat does not block the registration of a deed, but it does block the operation of deferred indefeasibility. The caveat means that Doris takes such title as Charles had, but not a better title. This effect on Doris is, no doubt, covered by the rule that she must be in good faith, but the draft Bill nevertheless has a specific provision about caveats.[17]

23.17 Likewise the operation of the realignment principle should be excluded to the extent that the title is subject to an exclusion of warranty. The point is too clear to need justification. Indeed, arguably the general requirement of good faith would automatically mean that realignment is excluded in cases of restricted warranty.

23.18 We recommend:

108. The realignment principle should be subject to any relevant caveat and any limitation of warranty.

(Draft Bill, s 45(3)(c)(i) and (d))

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[16] Which is deemed to be the date of registration. See draft Bill, s 23(1)(a).
[17] Draft Bill, s 45(3)(c)(i).

DISPOSITIONS: (2) OMISSION OF ENCUMBRANCES

Introduction

23.19 Deferred indefeasibility has two prongs, positive and negative. The positive prong is that the acquirer from someone who is registered as owner (but is not owner) should acquire ownership, provided that various conditions are satisfied. The negative prong is that someone who acquires property should take free of encumbrances that should appear on the title sheet but do not. For example, Eugene is owner. There is a standard security over the property to X Bank. Eugene forges a discharge, which is registered. He then dispones to Fraser, who pays the full market value of the property, ie without any deduction to reflect the outstanding secured debt. Fraser is in good faith. In the period between the registration of the forged discharge and Fraser's registration as the new owner, the security is not extinguished, notwithstanding that it has disappeared from the title sheet. At this stage there is only transactional error. But after Fraser's registration as owner, the position has changed into one of Register error. The security is extinguished on the day that Fraser is registered as owner.

23.20 The positive and negative prongs could be engaged in the same transaction. Thus in the previous example, had Eugene's title to the property been bad, Fraser would have nevertheless acquired ownership (positive prong) unencumbered by the security right (negative prong).

Good faith and possession

23.21 Protection against omitted encumbrances presupposes good faith: here what has been said above applies equally. But there is no possession requirement. The possession requirement exists to alert the true owner. In the case of omitted encumbrances there is no true owner to be alerted.

Which encumbrances?

23.22 The encumbrances that the acquirer is protected against should be the same as those covered by the Keeper's warranty.[18]

Interaction with Keeper's warranty against omitted encumbrances

23.23 It might be supposed that if omitted encumbrances are extinguished on a transfer to a good faith acquirer, there could be no role for the Keeper's warranty that there are no omitted encumbrances.[19] That will often be true, but not always, ie there will be cases where a grantee is protected from omitted encumbrances only by the Keeper's warranty, and not by realignment of rights. Here is one example. Charlotte owns land, over which there is a standard security in favour of X Bank. Charlotte forges a discharge and registers it. She then borrows money from Y Bank, granting a standard security. Y Bank acts in good faith. The first standard security is not extinguished, because Y Bank is not a disponee. But Y Bank still has the benefit of the Keeper's warranty against omitted encumbrances.

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[18] See Part 22.
[19] For which see Part 22.

LEASES

23.24 In DP 125, in considering invalid grants, we wrote: "Under the 1979 Act long leases are, for good reasons, treated in the same way as ownership; and, following that principle, the question of whether the lessee retains the land or must give it up against payment of indemnity should be governed by the model discussed above."[20] Further study of the issue has revealed that the position is more complex than we had at first appreciated.

23.25 In the case of the right of ownership, there is only one type of case to be considered: a deed purporting to transfer ownership, but which is in fact invalid. In the case of long leases there are three types of case:

(i) The *a non domino* grant of a new long lease. For example, Adam is the registered owner, but in fact he is not the owner. Zak is the owner. Adam grants a long lease to Brenda, who is in good faith. She registers.

(ii) The transfer of a long lease which exists on the face of the Register but which in fact does not exist. Example: Carla is registered as the holder of a lease. The landlord has obtained decree of irritancy, but the extract decree has not been registered,[21] and Carla is still in occupation. Carla assigns to David, who is in good faith. He registers.

(iii) The transfer of a long lease, being a valid lease, but which is not vested in the granter. Example: Erasmus is the registered holder of a valid lease. In fact Fraser is the true tenant. Erasmus assigns to Grace, who is in good faith. She registers.

23.26 It is the third of these that matches the ordinary case of a disposition: the *transfer* of an *existing* right. In this case we think that the same rules should apply as apply to an invalid disposition (ie a deed purporting to transfer the right of ownership).

23.27 More difficult are cases (i) and (ii). It can be argued that if the realignment principle is not extended to cases (i) and (ii), then the only way that a grantee could be absolutely certain of obtaining a valid lease would be to carry out an examination of the prescriptive progress of title, and one of the objectives of the modern system of land registration is to obviate such a need – the "curtain principle". The non-extension of the realignment principle to cases (i) and (ii) could, it might be argued, cause concerns among conveyancers, since it could involve some degree of change of practice. Long leases are in some cases (eg a 999-year lease) functionally similar to feu rights and so should, it could be argued, be treated in the same way. Moreover, something like the realignment principle operates under the 1979 Act, so that grantees of long leases in future would be in slightly worse a position than now.

23.28 On the other hand it can be argued that the realignment principle should not apply to cases (i) and (ii). Taking (ii) first, one of the underlying policies of this project is that off-register changes in rights – in so far as such changes are allowed by law – are risks that the system cannot be expected to protect grantees against.[22] Indeed, even if a grantee *were* to

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[20] DP 125, para 4.54. And see also DP 128, para 5.31. The "model discussed above" was the integrity principle.
[21] In this example we assume that a registered lease is validly terminated for all purposes by a decree of irritancy, even if the decree is not registered. But it seems to us that in this area the law is in fact not certain: see Part 9.
[22] If that result is regarded as unsatisfactory, the remedy is to reduce the scope for off-register change of rights. That would be a matter for the substantive area of law in question, such as leases, servitudes etc.

investigate the title behind the curtain, it would not disclose off-register events anyway, so there is no disturbance to the curtain principle.

23.29 As for (i) the following four points can be made. In the first place, whilst the grantee of an invalid deed will generally prefer to receive the property itself rather than compensation,[23] the grantee does still have the protection of the Keeper's warranty. In the second place, in short leases (leases of 20 years or under) a prospective lessee would not obtain the protection of the realignment principle under *any* scheme, and so for most new leases the curtain principle cannot operate in any event, most new leases being short leases. The conveyancer who acts for a prospective new lessee will in most cases have to go behind the curtain anyway if the client wants to make absolutely sure of getting the property. So a decision that realignment of rights should not apply to grants of new leases would not in fact have a large impact on conveyancing practice. In the third place, to extend the realignment principle to case (i) would give rise to difficult technical problems. A contract of lease would come into being. Who is the contractual counterparty? Is it Adam? If so, Adam would be entitled to the rents and Zak, the owner, would not. And Adam would be bound to perform the landlord's obligations even though he would be unable to do so. Or is it Zak who is the contractual counterparty? In that case a contract has been imposed on him non-consensually - a bold step to take in a statute about land registration. And would that mean that Adam would not be bound by the contract he had signed? That would be unsatisfactory. In theory a scheme could be developed to cope with such problems, but at the cost of considerable complexity in exchange for a very doubtful benefit. In the fourth place, to apply the realignment principle to case (i) would raise difficult issues in relation to interposed leases.

23.30 Bearing in mind that cases (i) and (ii) will still have the benefit of the Keeper's warranty, we recommend that:

109. (a) Realignment of rights should happen in the case of an invalid assignation of an existing lease.

(b) But it should not happen in the case of an assignation of a non-existent lease.

(c) Nor should it happen in the case of an invalid grant of a new lease.

(Draft Bill, s 48)

23.31 Apart from that, the assignation of a lease should, in relation to the realignment principle, be treated in the same way as a disposition.[24]

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[23] This argument is most acute in respect of residential property which is to be the grantee's home. Such property can no longer be the subject of a new long lease. Grantees of future void commercial leases may be more content with monetary compensation.

[24] Draft Bill, s 48 and s 49.

SERVITUDES

23.32 Above we considered the extinction of a servitude by reason of its omission from the servient title sheet. In this section we consider the validation of servitudes. In DP 130 we proposed:[25]

> "11. (1) The integrity principle[26] should apply in relation to –
>
> (a) the creation of servitudes by registration, and
>
> (b) the transmission, as pertinents, of servitudes entered in the title sheet of a benefited property (other than servitudes noted as unregistered real rights).
>
> (2) But neither the integrity principle nor the Keeper's warranty as to title should apply where –
>
> (a) the right is not capable of being a servitude; or
>
> (b) the servitude has been extinguished."

23.33 Those who responded agreed. Our thinking has subsequently changed in relation to proposal 11(1)(b). Suppose that Edwin owns Greymains. The title sheet states, incorrectly, that the property benefits from a servitude over neighbouring Redmains, owned by Rufus. Edwin now sells Greymains to Fiona. In DP 130 we said that "[a] person buying the benefited property does so in reliance on the servitudes set out in the title sheet."[27] But in fact this cannot be true in an unqualified way. For the second part of the proposal itself recognises that if a servitude has been extinguished off-register, typically by negative prescription, it should not be revived by the transfer of the property that was formerly the benefited (dominant) property. Hence a buyer such as Fiona knows that servitudes that appear in the A Section (Property Section) as pertinents benefiting the property may in fact not exist. That fact seems to us now to remove the rationale for applying the integrity principle (realignment of rights) to cases where an ostensibly dominant property, such as Greymains, is disponed. Moreover, the rule that we originally proposed would have resulted in the non-consensual imposition of a servitude over Redmains, and it is not apparent that the benefit to Fiona ought to outweigh the detriment to Rufus.

23.34 It is worth mentioning that a similar issue is subject to conflicting authority in current law.[28] (It cannot be regarded as precisely the *same* issue because under current law the issue turns on the concept of "proprietor in possession" and moreover is potentially applicable both to transactional error and to Register error.)

23.35 The requirements of good faith and possession would apply. But we see no reason why there should be a requirement for the dominant (benefited) owner to be in possession of

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[25] DP 130, para 4.26.
[26] That is to say, deferred indefeasibility – the realignment of rights.
[27] DP 130, para 4.18.
[28] See *Yaxley v Glen* 2007 SLT 756 and cases cited therein. For discussion of *Yaxley*, see Kenneth G C Reid and George L Gretton, *Conveyancing 2007* (2008), pp 121 ff.

the servitude. The only requirement would be that the servient owner should be in possession of the servient (burdened) property.[29]

23.36 Accordingly we now recommend:

> **110. (a) Realignment of rights should happen where a person registered as owner, but who is not the owner, grants a new servitude.**
>
> **(b) But it should not apply where an invalid servitude is an ostensible pertinent of property that is disponed. (Regardless of whether the invalidity is original or supervening.)**
>
> (Draft Bill, s 50)

COMPENSATION

The right to compensation for those who suffer from realignment

23.37 The 1979 Act provides for the Keeper to pay compensation to those who suffer if an inaccuracy in the Register is not rectified.[30] In DP 125 we proposed that the substance of this rule should continue to be the case, and those who responded agreed.[31] Such a rule is not a necessary part of a title registration system: most European title registration systems impose on the registration department an obligation of compensation only where the loss has been caused by the department's *fault*. By contrast, under the 1979 Act the Keeper's liability is strict - albeit subject to certain defences. Support for the existing rule is strong and it is clear that it should be retained.

When the right emerges

23.38 Under the current law, the right to compensation is triggered when the Keeper declines to rectify an inaccuracy.[32] The possibility of an unrectifiable inaccuracy will disappear in the new scheme. Instead, compensation becomes payable when rights are realigned to the prejudice of the person to be compensated.[33]

Quantum and defences

23.39 The subject of quantum of compensation, and defences available to the Keeper, is discussed in Part 22 in relation to claims against the Keeper for breach of the warranty of title. We take the substantially same approach to compensation for those who suffer from realignment. Re-imbursement of expenses is discussed in Part 27 and what we say there is also applicable in this context.

23.40 Nothing further needs to be said, though one example may be helpful to illustrate a particular type of case. Susie holds a servitude over Blackmains. The owner, Oliver, forges a

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[29] DP 130, para 4.21.
[30] 1979 Act, s 12(1)(b).
[31] DP 125, para 4.52 (proposal 7). We say "the substance" because in the new scheme the conceptual approach is different.
[32] 1979 Act, s 12(1)(b). Since such a refusal can later be overridden by the court or Lands Tribunal the odd consequence seems to be that compensation must be paid before it can be known whether it is payable.
[33] Draft Bill, s 51.

discharge and has it registered. Later Oliver sells to Petra, who buys in good faith. As a result the servitude is extinguished. Susie can claim against the Keeper without first claiming against Oliver. However, suppose that Susie had been aware of the forgery but had done nothing, and the sale to Petra took place a year after she learnt of the forgery. There might be good reasons for such inaction – perhaps Susie was seriously ill during this period – but in the absence of such an explanation the fact of her inaction would found a defence for the Keeper. (Such a defence would not, of course, prevent Susie from claiming against Oliver.)

23.41 This approach is substantially in accordance with the current law and it generally met with the approval of those who responded to DP 128. Accordingly we recommend:

111. (a) The Keeper should compensate those who suffer from the realignment of rights. The claimant should not be obliged to exhaust remedies against other parties.

(b) But the Keeper should not be liable to the extent:

- **That the loss is too remote;**
- **That the loss is non-patrimonial;**
- **That the claimant has not taken reasonable steps in mitigation.**

(Draft Bill, s 51 and s 52)

Heritable security

23.42 If a heritable security is extinguished, the heritable creditor is entitled to compensation from the Keeper for any loss suffered as a result of the non-consensual extinction of the security right. But this may be zero, because the extinction of the security does not affect the debt, and in most cases the creditor will still recover the debt from the debtor.

Part 24 The guarantee of title: (F) Keeper's rights of recovery

Introduction

24.1 If the Keeper has to pay compensation, should that sum be recoverable from someone else? Or should the loss lie with the Keeper? That question has both a theoretical and a practical side. Even if as a matter of theory the Keeper has the right to recover, that right may in practice be worthless, for example where the person in question is a now-vanished fraudster whose true identity is unknown, or where a person can be identified but is unable to meet any decree for payment. The practical problems of recovering debt are universal. In this part we look only at whether as a matter of law the Keeper is entitled to recover.

The current law

24.2 If an insurance company pays up on a policy to cover loss culpably caused by a third party, it normally has the right to recover from that third party. For example if a motorist has comprehensive insurance, and the vehicle is damaged by a third party's negligence, and the insurer pays the insured motorist for the repair of the vehicle, the insurer succeeds to the insured motorist's reparation rights against the wrongdoer. The Keeper's role in land registration is comparable to that of an insurer, and the 1979 Act adopts a similar approach. Section 13 provides:

> "(2) On settlement of any claim to indemnity under … section 12, the Keeper shall be subrogated to all rights which would have been available to the claimant to recover the loss indemnified.
>
> (3) The Keeper may require a claimant, as a condition of payment of his claim, to grant, at the Keeper's expense, a formal assignation to the Keeper of the rights mentioned in subsection (2) above."

24.3 It may be that section 13(2) is using the term "subrogation" in the same sense as in insurance law. In insurance law there is a kind of deemed assignation by the insured to the insurer of the insured's claim against the third party. But, unlike an actual assignation, intimation is not necessary, and unlike an actual assignation the subrogee (the insurance company) sues the wrongdoer in the name of the insured. Subsection (3) adds an obligation to assign.

24.4 As well as section 13, under the general law of delictual liability there is probably also a duty of care owed to the Keeper by at least some parties, in at least some situations.[1]

[1] See Part 12.

Two examples under current law

24.5 (i) Adam impersonates the owner of property, Boris, and borrows money from C Bank, the money being advanced against a security that Adam grants over the property, forging Boris's signature. C Bank is unaware of the fraud. Later the facts come to light. The Register is rectified by the deletion of the security from the title sheet.[2] The Keeper pays compensation to C Bank. Does the Keeper have a right to recover from Adam? Had the Keeper not compensated C Bank, the latter would have had a claim against Adam. So the Keeper can claim against Adam by virtue of section 13(2). The Keeper probably also has a direct delictual claim against Adam.

24.6 If the law firm that acted for Adam was negligent in failing to check his identity, the same arguments apply. If Bank C would have had a delictual claim against the law firm, the Keeper will be subrogated to the claim. And the Keeper may well have a direct claim as well.

24.7 (ii) Ada impersonates Brenda and sells her land to Cedric, who is duly registered. When the problem comes to light the Register cannot be rectified because Cedric is in possession. The Keeper compensates Brenda. Does the Keeper have a right to recover from Ada? That depends on whether Brenda had a claim against Ada. Had the Keeper not compensated Brenda, the latter would have had a claim against Ada. So the Keeper can claim against Ada by virtue of section 13(2). The Keeper may also have a direct delictual claim against Ada.

24.8 If the law firm that acted for Ada was negligent in failing to check her identity, the same arguments apply. If Brenda would have had a delictual claim against the law firm, the Keeper will be subrogated to the claim. And the Keeper may well have a direct claim as well.

Evaluation: the two bases of claim

24.9 Under current law the Keeper has a derivative claim (via section 13(2)) and may have a direct claim as well. Our recommendation in Part 12 would mean that the uncertainty about the direct claim would be removed, but apart from that clarification the law would remain essentially the same.

24.10 The two types of claim – direct and indirect – duplicate each other to a high degree, and it might be that either could be abandoned without adverse consequences. But we are not certain that this would be so. We think it possible that there could be cases in which the Keeper could recover by means of the direct claim but not the indirect, or the other way round. Hence we think that the two types of claim should be retained. The fact that there are two types of claim does not mean that there could be double recovery; as a comparison, in general law a person may have claims founded in contract and in delict in respect of a single loss, and in such cases there is no double recovery.

24.11 We recommend:

[2] Both under current law and under the new scheme the Register is rectifiable in this type of case.

112. The Keeper's right, on paying compensation, to pursue a derivative claim to recover what has been paid out, should continue, without prejudice to the right to pursue a direct claim based on the duty of care.

(Draft Bill, s 42(3), s 51(3) and s 55(3))

Might the wrong person end up suffering the loss?

24.12 One issue that at one stage concerned us is the following. When the Keeper is subrogated, the claim in question may be a warrandice claim. Liability in warrandice is not fault-based. The Keeper thereby acquires a claim against a third party that is enforceable without regard to whether the latter was in any way at fault. Yet that party will often be someone who was previously protected by the Keeper's indemnity (or, in the new scheme, by warranty). Suppose that Bank X lends Jack money, secured by a standard security over property owned by Jack and Jill. Jack signs his name on the standard security and forges Jill's name. The security is registered and later Bank X assigns the loan and the security for the loan to Bank Y. The assignation contains a clause of warrandice.[3] Bank Y is registered as the new holder of the security. The truth now comes to light. The Register is rectified. (On these facts it is rectifiable both under current law and under the new scheme.) Jack is now bankrupt and cannot repay the debt. Bank Y claims against the Keeper. The Keeper pays and as a result is subrogated to Bank Y's warrandice claim against Bank X. Yet if Bank X must pay the Keeper that seems wrong. After all, Bank X, while it held the security, was fully protected by the guarantee of title. Had the truth come to light while Bank X still held the security, it would have been compensated by the Keeper. The guarantee of title is supposed to protect users of the system. But if the Keeper's powers of recovery are too strong, the protection is in danger of eating itself up.

24.13 In the case just given, suppose that Bank Y, instead of claiming from the Keeper, had claimed from Bank X under the latter's warrandice. Here again it seems that the loss might fall on Bank X. Yet the logic of the title guarantee is that the loss should fall on the Keeper. (Assuming that Jack cannot be made to pay.)

24.14 Under current law, the problem can probably be solved under section 12(1)(a) which provides that "a person who suffers loss as a result of a rectification of the register" can recover from the Keeper. If the Keeper, having compensated Bank Y, were to claim against Bank X (via a section 13(2) derivative claim) then Bank X could presumably argue that such a claim would be a "loss as a result of a rectification of the register" with the consequence that the Keeper's claim against Bank X would be self-defeating. Likewise, if Bank Y, instead of claiming against the Keeper, claims against Bank X, it seems likely that Bank X could in turn claim against the Keeper under section 12(1)(a).

24.15 In the new scheme the same logic would apply. The fact that Bank X has transferred the security to Bank Y does not alter the fact that the Keeper warranted to Bank X that the security was good. Thus if Bank Y were, instead of claiming from the Keeper, to claim against Bank X, the latter would be entitled, under the warranty provisions, to recover from

[3] Curiously, the statutory style does not contain such a clause: see Conveyancing and Feudal Reform (Scotland) Act 1970, Sch 4. But such a clause might well be used in practice, and even if it were not it is likely that the contract that is implemented by the assignation would guarantee the validity of the security to be assigned.

the Keeper.[4] Our conclusion is that when fully analysed the position is satisfactory and that accordingly it would be pointless for the draft Bill to contain any special provisions dealing with the issue.

Evaluation: the mechanics of the derivative claim

24.16 As has been seen, section 13(2) has both (a) a provision for what it calls "subrogation" and also (b) a provision for what it calls "formal assignation". As was mentioned above, what precisely is meant by "subrogation" in section 13(2) is perhaps not certain. If the word is used in the same sense as in insurance law, the result is rather complex. It would mean that the subrogated claim is transferred to the Keeper for some purposes but not for others. A cleaner solution would be to say that the claim is assigned to the Keeper by force of law and that no intimation is needed to complete the title to the claim. But that solution, though technically cleaner, runs into the objection that it is not clear why the Keeper should have a privilege that other assignees do not have, namely the privilege of not having to intimate. It is of course arguable that Scots law should adopt the approach taken in a number of other legal systems of abolishing altogether the requirement that assignations need to be intimated as a matter of completing title.[5] That is an issue we are considering in our project on the assignation of, and security over, incorporeal moveable property. We express here no view on how, if at all, our law should be reformed in that respect. What we do think is that so long as Scots law does require intimation, a case has to be made out for special exemptions, and we are not aware of any reason for exempting the Keeper from the requirements of the general law. In short, we do not like the approach of section 13(2) for three reasons: it is uncertain whether "subrogation" is to be taken in the sense of insurance law; that if it is to be so taken it generates technical complications that we think undesirable; and lastly, that we see no reason to exempt the Keeper from the general law. Hence we think that the approach of section 13(3) of the 1979 Act is preferable to that of section 13(2). The draft Bill accordingly has a provision broadly based on section 13(3) of the 1979 Act.[6] We recommend:

113. The Keeper's derivative claim should take the form of a right to an assignation.

(Draft Bill, s 42(3), s 51(3) and s 55(3))

[4] Assuming of course that the general requirements of a warranty claim were satisfied.

[5] In such systems intimation is still a sensible *precaution*, because a debtor who pays the original creditor in ignorance of the assignation is discharged. But in Scots law intimation is not merely a precaution, but a requirement: just as title to land does not pass without registration of the disposition, so title to a claim does not pass without intimation of the assignation.

[6] One difference is that the word "formal" does not appear. We are unclear what is meant by that word in this context. An assignation is an assignation.

Part 25 The guarantee of title: (G) some worked examples

25.1 In this part of the Report we give some worked examples of the guarantee of title, in each case showing how a given set of circumstances would be dealt with under current law and how it would be dealt with under the new scheme. The reasons for the various outcomes are given in the preceding parts of the Report.

25.2 Of necessity, these are mere thumbnails, lacking nuances and qualifications. For example, when it is said that "compensation is payable to XYZ" that has to be taken subject to the proviso that exists (albeit in different forms) in both the current law and in the new scheme that a person who fails to act to prevent or minimise loss may partially or wholly forfeit the right to compensation.

CASE 1	Alan is the registered owner. The disposition in his favour purports to have been granted by Zeb, the last registered owner but, unbeknownst to Alan, Zeb's signature was forged: the deed is therefore void. (This is an example of transactional error).
Current law	On registration of the disposition Alan becomes owner but the Register thereby becomes inaccurate. Zeb may apply for rectification, so as to be restored to ownership. If Alan is not in possession at that time, the Keeper may rectify (and must do if ordered by the court) and thereby make Zeb owner again. If that happens, Alan has an indemnity claim against the Keeper. If Alan is in possession, or otherwise if the Keeper decides not to rectify, Zeb has an indemnity claim.
New scheme	Zeb remains owner. The Register, in showing Alan as owner, is inaccurate and must be rectified by deleting Alan's name and restoring Zeb's. Zeb is entitled to compensation for any loss arising from the fact that the Register inaccurately showed someone else as owner, and for any expense incurred in securing rectification. (Compensation for beneficiaries of rectification.) At point of registration, the Keeper has warranted to Alan that Alan has become owner. As this is not true, there is a breach of warranty. Upon rectification Alan becomes entitled to monetary compensation for the value of the property: this is compensation for breach of warranty. Alan is not being compensated for a loss; he never had the right of ownership and so by rectification he does not lose that right. He is being compensated for the value of what he thought he had acquired, but in fact did not acquire, on registration.

CASE 2	The same as Case 1, but before the invalidity of the deed to Alan comes to light, Alan has possessed the property for a year or longer and has then sold on to Beth, who has in turn been registered as owner. Beth has acted in good faith and without negligence. (This is an example of Register error.)
Current law	Beth becomes owner on registration, but the Register is inaccurate. Zeb may apply for rectification to be restored to ownership. If Beth is in possession at that time, rectification must be refused, but Zeb is entitled to monetary indemnity. If Beth is not in possession the Register may be rectified to show Zeb as owner, in which case Beth is entitled to monetary indemnity.
New scheme	Beth becomes owner at the point of registration of the disposition in her favour. (The integrity principle, ie realignment of rights.) The Register is therefore not inaccurate in showing Beth as owner. Thus the question of rectification does not arise. When Beth acquires ownership, Zeb loses it. Zeb becomes entitled to monetary compensation for the value of his loss. (Compensation for victims of the integrity principle, ie realignment of rights.)

CASE 3	The same as Case 1, but before the invalidity of the deed from Zeb to Alan has come to light, Alan has sold on to Beth. Beth, who has acted in good faith and without negligence, appears on the Register as owner. Any possession by Alan and Beth has been for less than a year.
Current law	Beth becomes owner on registration, but the Register is inaccurate. Zeb may apply for rectification, whereby ownership would be restored to him. If Beth is in possession at that point, rectification must be refused, but Zeb is entitled to monetary indemnity. If she is not in possession then the Register may be rectified to show Zeb as owner, in which case Beth is entitled to monetary indemnity.
New scheme	The integrity principle, ie realignment of rights, does not operate (because the requirement for a year's possession is not met.) Zeb is therefore still owner and the Register is inaccurate in showing Beth as owner. When the inaccuracy comes to light it must be rectified. Zeb is entitled to compensation for any losses arising from the fact that the Register inaccurately showed someone else as owner, and for any expense incurred in securing rectification. (Compensation for beneficiaries of rectification.) At point of registration, the Keeper has warranted to Beth that she has become owner. As this is not true, there is a breach of warranty. Upon rectification Beth becomes entitled to monetary compensation for the value of the property. (Compensation for breach of warranty.)

CASE 4	The same as Case 1, but before the invalidity of the deed by Zeb to Alan comes to light (i) Alan, having possessed for three months, dispones to Beth, who is duly registered as proprietor; (ii) Beth then possesses for a further nine months; (iii) at the end of the period Beth is still in good faith.
Current law	Beth becomes owner on registration, but the Register is inaccurate. Zeb may apply for rectification, whereby ownership would be restored to him. If Beth is in possession at that point rectification must be refused but Zeb gets monetary indemnity. If Beth is not in possession at the point of the rectification application, the Register may be rectified to show Zeb as owner, in which case Beth is entitled to monetary indemnity.
New scheme	When Beth is registered she does not become owner and so the Register is inaccurate in showing her as such. But ownership passes to her (from Zeb) nine months after the registration. The Register therefore ceases, at that time, to be inaccurate in showing her as owner. So no issue of rectification arises. In giving Beth ownership, the integrity principle, ie realignment of rights, removes ownership from Zeb. Zeb becomes entitled to monetary compensation for the value of his loss. (Compensation for victims of the realignment principle.)

CASE 5	The same as Case 2, but Beth knows before applying for registration of the disposition in her favour that the disposition by Zeb to Alan was a forgery. (Establishing Beth's state of knowledge may in practice require litigation, both here and in other cases.)
Current law	Beth becomes owner on registration, but the Register is inaccurate. Though in bad faith, Beth is probably not fraudulent or careless; and even if she is, she has, it seems, not caused the inaccuracy in the register. (*Dougbar v Keeper of the Registers of Scotland* 1999 SC 513.) On that basis, rectification to restore Zeb to ownership is only possible if Beth is not in possession, in which case she is entitled to monetary indemnity. If Beth is in possession rectification is not permitted and Zeb gets monetary indemnity.
New scheme	Beth is in bad faith and so there is no realignment of rights. The entry of Beth as proprietor is therefore an inaccuracy. The Register must be rectified. The fact that Alan had been in possession for more than a year is on these facts irrelevant: the one year period is not a prescriptive period. Zeb is entitled to compensation for any losses arising from the fact that the Register inaccurately showed someone else to be owner, and for any expenses incurred in securing rectification. (Compensation for beneficiaries of rectification). Although Beth has been registered without exclusion of warranty, the warranty in her favour is ineffective because of her bad faith.

CASE 6	The same as Case 2, with Beth becoming aware that the disposition by Zeb to Alan was a forgery *after* registration of the disposition in her favour.
Current law	Beth becomes owner on registration, but the Register is inaccurate. Zeb may apply for rectification to be restored to ownership. If Beth is in possession rectification must be refused but Zeb gets monetary indemnity. If Beth is not in possession the Register may be rectified to show Zeb as owner, in which case Beth is entitled to monetary indemnity.
New scheme	Beth is not in bad faith. So she gets the benefit of realignment and thus becomes owner at the point of registration of the disposition in her favour. The Register is not inaccurate in showing her as owner and thus the question of rectification does not arise. In giving her ownership, the operation of realignment takes ownership from Zeb. He becomes entitled to monetary compensation for the value of his loss. (Compensation for victims of the realignment principle.)

CASE 7	The same as Case 4, but Beth becomes aware that the disposition is a forgery before expiry of the year's possession.
Current law	Beth becomes owner on registration, but the Register is inaccurate. If she is in possession the inaccuracy cannot be rectified and so Zeb gets monetary indemnity. If she is not in possession, rectification is possible, in which case she is entitled to monetary indemnity.
New scheme	Beth is not in good faith *at the relevant time* and so the realignment principle does not operate. Thus she never becomes owner and the Register is inaccurate in showing her as such. When the fact of the inaccuracy comes to the Keeper's attention the Register must be rectified. Zeb is entitled to compensation for any losses arising from the fact that the Register inaccurately showed someone else to be owner, and for any expenses incurred in securing rectification. (Compensation for beneficiaries of rectification.) Beth has been registered without exclusion of warranty. At the time of registration she was in good faith. Thus she is entitled to monetary indemnity. If she becomes aware of the problem while her application is still in the Application Record, she has no duty to inform the Keeper.

CASE 8	As Case 7, except that the Keeper learns of the problem while the application is in the Application Record, ie before the accept/reject decision is made.
Current law	As Case 7 (probably).
New scheme	If the quality of evidence is such that the inaccuracy is established to the "manifest" standard the Keeper should reject Beth's application and rectify the Register by restoring Zeb's name. If (as would typically be the case in practice) the evidence does not meet that standard, the Keeper's choice is (a) to register, but with exclusion of warranty or (b) to reject.

CASE 9	The Keeper registers a disposition to Alan and thus enters Alan as proprietor. Zeb then alleges that his signature on the disposition is a forgery. The Keeper is unable to determine whether or not this allegation is true. Zeb therefore raises court proceedings to have the disposition reduced and, while the court proceedings are pending, asks the court to place a caveat on the register. The Register is duly caveated. Alan now dispones to Beth, and Beth is registered as proprietor. The court then grants decree of reduction.
Current law	As the 1979 Act has no concept of caveating the register, this exact situation cannot arise, although noting the existence of court action under Rule 17(2) has some similarities. On registration Beth becomes owner, and the Register is therefore inaccurate (although the inaccuracy is not clear until the court later grants decree). Following the decree, rectification is only possible if Beth is not in possession. (Unless the Rule 17(2) note makes Beth fraudulent or careless but that is doubtful: Cf *Dougbar v Keeper of the Registers of Scotland* 1999 SC 513.) If rectification is not possible, Zeb is entitled to monetary indemnity. If Beth is not in possession and the Register is rectified to show Zeb as owner, in principle Beth is entitled to monetary indemnity. (But possibly the Keeper may have excluded indemnity when processing Beth's registration application.)
New scheme	Realignment does not operate in relation to a caveated title sheet. Beth should be registered as proprietor whilst the court proceedings are pending, but once decree has been granted it becomes apparent that there is an inaccuracy. The Register should be rectified to show Zeb as owner. Zeb is entitled to compensation for any losses arising from the fact that the Register inaccurately showed someone else to be owner, and for any expenses incurred in securing rectification. Since Beth acquired subject to the caveat, she is not entitled to warranty, and thus cannot claim compensation from the Keeper if the Register is then rectified on account of the caveated matter.

CASE 10	Arthur is registered as owner of eight hectares. This was the result of human error at the Department of the Registers, for in fact the disposition conveyed (and purported to convey) only seven hectares, the final hectare being the property of Zach.
Current law	Arthur becomes owner of all eight hectares on registration, but the Register is inaccurate as regards the eighth hectare. If he is not in possession the Register can be rectified and indemnity is payable to him. If he is in possession rectification is not permitted and indemnity is payable to Zach.
New scheme	Zach remains owner of the eighth hectare and the Register is therefore inaccurate in showing Arthur as owner. The inaccuracy must be rectified. Zach is entitled to compensation for loss caused by the wrong person having been named on the Register as proprietor of the additional hectare, and to be reimbursed any expenses incurred in securing rectification. Arthur cannot claim compensation because there is no right to warranty where the title sheet inaccurately showed an acquisition more extensive than the deed inducing registration bore to effect.

CASE 11	The same as Case 10, but, before the inaccuracy comes to light, (i) Arthur possesses the additional hectare for a year and (ii) then sells it (whether or not with the other seven hectares) to Brenda, who is duly registered as owner. Brenda is in good faith.
Current law	Brenda becomes owner of all eight hectares on registration, but the Register is inaccurate as regards the additional hectare. If she is not in possession the Register can be rectified and indemnity is payable to her. If she is in possession rectification is not permitted and so indemnity is payable to Zach.
New scheme	Realignment operates and so Brenda becomes owner on registration. Zach loses ownership of the additional hectare at that moment and becomes entitled to monetary compensation as a victim of the realignment of rights.

CASE 12	The same as Case 11, except that the additional hectare has not been possessed for the required period.
Current law	Brenda becomes owner of all eight hectares on registration, but the Register is inaccurate as regards the additional hectare. If she is not in possession the Register can be rectified and indemnity is payable to her. If she is in possession then rectification is not permitted and indemnity is payable to Zach.

New scheme	Realignment does not operate, because the requirement of possession for a year has not been satisfied. Zach therefore remains owner of the additional hectare and the Register is inaccurate insofar as it shows Brenda as owner. The inaccuracy must be rectified. Zach is entitled to compensation for losses caused by the wrong person having been named on the Register as proprietor of the additional hectare, and to be reimbursed any expenses incurred in securing rectification. Brenda is entitled to compensation for breach of warranty. (The disposition by Arthur to Brenda, unlike that to Arthur, will have borne to include the additional hectare.)

CASE 13	Zelda is the registered owner of property. By fraudulent misrepresentation Abel induces her to sign a disposition in his favour. This deed is therefore voidable (but not void). Abel is registered as owner. Later Zelda obtains a decree of reduction of the disposition.
Current law	Abel becomes owner and the Register is accurate in showing him as such. On grant of the decree of reduction he continues to be owner but the Register has become inaccurate. The inaccuracy can be rectified in Zelda's favour whether or not Abel is in possession, as it has been caused by his fraud. He receives no compensation.
New scheme	Abel becomes owner on registration. The decree of reduction of a voidable deed does not make the Register inaccurate. So the Register is not alterable by means of rectification. Instead, the extract decree is registrable. When Zelda registers it, she becomes owner again. Abel receives no compensation. (The Keeper warranted that Abel acquired ownership. That warranty was true. The Keeper did not warrant that Abel would necessarily continue to be the owner thereafter.)

CASE 14	The same as Case 13, but before Zelda can reduce, Abel sells on to Bill, who is registered as owner. Bill knows of the original fraud. Hence Zelda can reduce both the Zelda/Abel disposition and the Abel/Bill disposition.
Current law	Bill becomes owner, but the Register, accurate at the time of his registration, becomes inaccurate as a result of the reduction. Although in bad faith, Bill probably cannot be regarded as having caused the inaccuracy by fraud or carelessness within the meaning of the 1979 Act. (*Dougbar v Keeper of the Registers of Scotland* 1999 SC 513.) So if he is in possession the Register cannot be rectified. Hence monetary indemnity is payable to Zelda. If Bill is not in possession, rectification is permitted, in which case indemnity is payable to Bill.

New scheme	Abel becomes owner on registration. Subsequently Bill becomes owner on registration. Both the Zelda/Abel and Abel/Bill dispositions are voidable. Reductions of voidable deeds are given effect by registering the extract decree. When Zelda does this, she becomes owner again. Bill receives no compensation.

CASE 15	Zuma, the registered owner, dispones to Alice. Alice is registered and takes possession. The disposition was gratuitous. A few days later Zuma is sequestrated. Zuma's trustee in sequestration obtains decree reducing the disposition as a gratuitous alienation. The trustee wishes the Keeper to give effect to the decree.
Current law	The decree cannot be registered: *Short's Trustee v Keeper of the Registers of Scotland* 1996 SC (HL) 14. The Register became inaccurate when decree was pronounced. The trustee could apply for rectification but probably this would be refused. The trustee could probably then claim indemnity under s 12(1)(b).
New scheme	The Register is not made inaccurate by the decree. The trustee can register the decree. When that happens, Alice loses ownership. She receives no compensation. When she was registered, the Keeper warranted her title. There has been no breach of that warranty.

CASE 16	As Case 15, except that Alice has disponed to Bonnie, gratuitously, and Bonnie is in possession. This is the situation in *Short's Trustee v Keeper of the Registers of Scotland* 1996 SC (HL) 14.
Current law	As Case 15.
New scheme	As Case 15.

CASE 17	Oliver, the registered owner of land, seeks a minute of waiver of a real burden. By mistake, the waiver is obtained, not from the owner of the benefited property, but from the owner of another nearby property. On the waiver being registered the Keeper deletes the burden.
Current law	The burden is extinguished on registration, but the Register is inaccurate in now showing Oliver's property as unencumbered by the burden. Presumably Oliver has been careless in obtaining a waiver from the wrong person and that carelessness has caused the inaccuracy. If that is so, then the Register can be rectified in favour of the owner of the benefited property so as to restore the burden to the title sheet. No indemnity is payable to Oliver.

New scheme	The minute of waiver being void, it does not extinguish the burden. The Register can and must be rectified in favour of the owner of the benefited property. When the minute of waiver was registered, the Keeper warranted Oliver's title as being free of the burden. Whether compensation is payable for breach of warranty depends on whether Oliver was in breach of his duty of care to the Keeper. Since he obtained a discharge from the wrong neighbour it would seem that he did breach the duty of care. If so, compensation is not payable to him.

CASE 18	The same as Case 17 but Oliver re-sells to Perpetua who is registered as owner. Perpetua is in good faith.
Current law	The burden is extinguished on the initial registration of the minute of waiver, but the Register continues to be inaccurate. If Perpetua is in possession, the Register cannot be rectified, and indemnity is payable to the owner of the benefited property. If Perpetua is not in possession, the Register can be rectified and compensation is payable to her.
New scheme	With the transfer to Perpetua a transactional error has morphed into a Register error. (Because, at the time Perpetua acquired, the Register did not include the burden). Realignment operates so as to make the waiver good. Thus the burden is extinguished on the day that Perpetua acquires the property. The Register is therefore now accurate. Compensation is payable to the owner of the benefited property.

CASE 19	H and W own a property. A standard security is granted to Bank X. On this deed H's signature is genuine but W's signature is forged, the forgery being by H. The security is registered. Bank X is in good faith.
Current law	On registration Bank X obtains a real right in security but the Register is inaccurate to the extent of half the property. Bank X is not a proprietor in possession and so the Register can be rectified. On rectification compensation is payable to Bank X.
New scheme	Registration does not make a bad security good. The security is void to the extent of a half share. The Register is inaccurate and can be rectified. On rectification compensation is payable to Bank X for breach of warranty.

CASE 20	The same as Case 19 but Bank X assigns the security to Bank Y, which is duly registered as the holder of the security right. Bank Y is in good faith.
Current law	As before. Indemnity is payable to Bank Y.
New scheme	Although the assignation converts a transactional error into a Register error, standard securities are not validated by the re-alignment principle. Thus the security is bad (to the extent of a half share) and compensation for breach of warranty is payable to Bank Y.

CASE 21	As Case 1, but before the inaccuracy comes to light Alan grants a standard security to Bank X.
Current law	As Case 1 as far as Alan is concerned. If the Register is rectified against Alan it will also be rectified against Bank X. If the Register is not rectified against Alan it would be strange to rectify against Bank X but that is what the 1979 Act seems to require, since the entry in favour of Bank X is inaccurate and X is not a proprietor in possession.
New scheme	The titles of Alan and Bank X are void and the Register will be rectified against both. Compensation is payable to both.

CASE 22	Lissa is the registered holder of a 999-year lease. Morag forges her signature on an assignation to Noreen, who is in good faith, takes possession and is registered.
Current law	As Case 1. (Assuming that a leaseholder can be regarded as a "proprietor in possession".)
New scheme	As Case 1.

CASE 23	As Case 22. But before the invalidity of the deed comes to light, Noreen has possessed for a year or longer and has then sold on to Ola, who is in good faith. Ola takes possession and is registered.
Current law	As Case 1. (Assuming that a leaseholder can be regarded as a "proprietor" in possession.)
New scheme	As Case 2.

CASE 24	As Case 1, but before the inaccuracy comes to light Alan grants a 21-year lease to Bertie, who is in good faith, takes possession and is registered.
Current law	Alan becomes owner on registration and Bertie acquires the right of lease on registration. The Register is inaccurate in relation to both Alan and Bertie. It cannot be rectified against Bertie, assuming that a leaseholder can be regarded as a "proprietor in possession". Whether it can be rectified against Alan is arguable, the answer depending on whether he can be considered as being in possession.
New scheme	The titles of both Alan and Bertie are void and can be rectified. Compensation is payable to both.

CASE 25	As Case 1, but before the inaccuracy comes to light Alan grants a 15-year lease to Brendan, who is in good faith and takes possession.
Current law	The lease is valid as a real right. It is unclear whether Zeb can rectify. If there is rectification it is unclear whether Brendan has a claim against the Keeper.
New scheme	Brendan's lease is void as a real right. Brendan is not eligible for compensation from the Keeper because he has no registered title.

CASE 26	As Case 1, but before the inaccuracy comes to light Alan grants a servitude to his neighbour, Bertrand. Alan has been in possession for a year. Bertrand is in good faith. The servitude is registered.
Current law	The servitude comes into being on registration, but it is an inaccuracy. There is a conflict of authority as to whether Bertrand can veto rectification on the basis of the "proprietor in possession" rule. (See *Yaxley v Glen* 2007 SLT 756 discussed in Part 23.)
New scheme	Realignment operates. The servitude is valid and unrectifiable. Zeb, the true owner, is entitled to compensation.

CASE 27	Adamnan is the owner. A servitude appears as a pertinent on the B Section (Property Section). It was copied from the GRS title, where it had been invalid. Adamnan dispones to Basil. Basil is in good faith and is registered.
Current law	The servitude exists as a real right but is an inaccuracy. There is a conflict of authority as to whether Basil can veto rectification on the basis of the "proprietor in possession" rule. (See *Yaxley v Glen* 2007 SLT 756 discussed in Part 23.)

New scheme	The servitude is invalid. Basil is entitled to compensation for breach of warranty.

CASE 28	Ewan is owner. There is a standard security over the property to X Bank. Ewan forges a discharge, which is registered. He then dispones to Fraser. Fraser is unaware of the forgery and pays the full market value of the property, ie without any deduction to reflect the outstanding secured debt.
Current law	The security is extinguished when the forged discharge is registered. But even after Fraser has become owner the title sheet is bijurally inaccurate in not showing the security. The title sheet can be rectified, and thus the security can be brought back into existence, unless Fraser is in possession. Assuming that he is in possession, the rectifiability is suspended. The bank has an indemnity claim against the Keeper if it suffers loss.
New scheme	In the period between the registration of the forged discharge and the registration of Fraser as the new owner, the security is not extinguished, notwithstanding that it has disappeared from the title sheet. At this stage there is only transactional error. Once Fraser is registered as owner, the position has changed into one of Register error. The security is extinguished on the day that Fraser is registered. The bank has a right to compensation.

Part 26 Title insurance

26.1 By "title insurance" we mean title insurance provided by commercial insurers, rather than the Keeper's warranty of title. Something has been said in Part 19 about the use of title insurance in the current system. In brief, the current practice is that title insurance is seldom purchased except where the Keeper has excluded indemnity.

26.2 The home of title insurance is the USA.[1] The only exception is Iowa, where it is unlawful, though subject to certain exceptions.[2] In the USA deeds-recording is the norm. In Europe title insurance tends not to be used except in special cases: ie the Scottish practice seems to be fairly typical. Beginning in the 1990s title insurance began to spread to Canada, an interesting development since in the Canadian provinces title registration systems predominate,[3] and accordingly it is in Canada that some of the discussion most relevant to Scotland has been taking place.[4]

26.3 "Title insurance" is in fact too narrow a description of what title insurers sell. To quote the joint report of the Manitoba and Saskatchewan Law Reform Commissions:[5]

> "The term 'title insurance' is something of a misnomer, since coverage is not limited strictly to title matters. Title insurance provides coverage for actual monetary loss arising from problems with a buyer's ability to use and occupy land, as well as from defects in title and off-title matters such as survey defects, non-compliance with zoning, outstanding taxes or charges, or lack of access."

26.4 In Canada it is argued by many that commercial title insurance merely results in double coverage, for a Torrens-type system provides cover anyway. Effectively people pay twice. The Iowa State Bar Association published a tract called *Title Insurance: A Fleecing of America*[6] arguing that title insurance is a "rip-off".

26.5 Insurers reply that title insurance covers matters not covered by the public system. They also have other arguments. One is that they settle claims faster than the land registration departments do. Another is that where there is title insurance it is easier to bundle up and sell mortgages on the financial markets. A third is that title insurance

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[1] For a valuable account, including some history, see Bruce Ziff, "Title Insurance: the big print giveth but does the small print taketh away?", in David Grinlinton (ed), *Torrens in the Twenty-first Century* (2003), pp 371, 373.

[2] An attempt to have the Iowa legislation held unconstitutional failed: *Chicago Title Insurance Co v Huff* 256 NW2d 17 (1977). But the state itself offers title insurance through the Title Guaranty Division of the Iowa Finance Authority. It appears that the premiums charged are much lower than those charged in comparable circumstances by commercial title insurers in other states of the USA.

[3] Canada is not alone in seeing the growth of title insurance even though most provinces have Torrens-type systems of land registration. Title insurance has been offered to lenders in Australia since 1998, and is also growing in prevalence in New Zealand.

[4] See in particular the joint report of the Manitoba Law Reform Commission and the Law Reform Commission of Saskatchewan, *Private Title Insurance* (2007). See also Bruce Ziff, footnote 1 above. For Australia, see New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Report No 76, 1996), paras 4.11-4.14.

[5] Page 31.

[6] 2003, available online at http://www.iowabar.org/MiscDoc.nsf/2b85a4ea12f4bfac8625669d006e27ab/3260df54a8f7f5fa86256cb80070ee4f/$FILE/Title%20insurance%202.pdf.

facilitates the conveyancing process. One aspect of this is that insurance can cover the "registration gap period" between completion (what in Scotland is called settlement) and the time when registration of the buyer's title takes place.

26.6 We are not in a position to offer a conclusive evaluation of these issues. But the economic evidence available to us suggests that title insurance as a standard feature of conveyancing transactions would not be cost-effective for titles in the Land Register, because the Keeper's indemnity (or, in the new system, the Keeper's warranty) delivers comparable benefits at a much lower cost. A report commissioned by the Keeper from an economics consultancy firm compared Scotland and California, when title insurance is standard.[7] The comparison revealed that in California property transactions costs are far higher, and that this is due essentially to title insurance premiums.[8]

26.7 We are not persuaded by the "prompter payment" argument, though certainly the Keeper should always bear in mind the importance of settling well-founded claims promptly. The "registration gap" issue is one that is currently handled in Scotland mainly by letters of obligation. Moreover this Report recommends a new system of advance notices which should cover the registration gap.[9] It is true that the Keeper's warranty does not cover all risks that a purchaser may encounter. But commercial title insurance policies also have their exceptions.[10]

26.8 Title insurance has a very valuable role in non-standard cases, especially where the Keeper has excluded or limited indemnity/warranty, or where some risk is of especial concern to a buyer but is outwith the Keeper's cover.[11] We would wish such cover to continue to be available and no doubt insurance companies can run profitable businesses by assessing risks and charging appropriate premiums. But we think it would be unfortunate if it came into routine use for ordinary titles.[12] Had Scotland retained a deeds recording system (as in the USA) then the position might be different. But Scotland has not retained a deeds recording system, and one of the many benefits of a title registration system is that it can deliver guaranteed title cheaply.

26.9 In the USA the effect of the advent of title insurance has tended to be that lawyers have disappeared from the conveyancing process, that process being handled by estate agents (realtors) who generally charge 6% and who arrange title insurance. In North

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[7] This is on the Keeper's website. The URL is http://www.ros.gov.uk/public/publications/RoS%20Economic%20Impact%20Report%2018aug09.doc. A second report, dealing with the possible economic impact of the draft Bill, gives the same data. It is reproduced in Appendix C to the present Report.

[8] The figures actually underestimate the total difference because in the USA the standard estate agency fee for residential property is 6%. Some people in Scotland have a vague idea that our conveyancing system is expensive. By international standards it is inexpensive. (We ignore property transaction taxes, which in the UK take the form of SDLT. Such taxes vary greatly from country to country and from time to time.)

[9] See Part 14.

[10] For example, Benito Arruñada, "A transaction-cost view of title insurance and its role in different legal systems" (2002) 27(4) *The Geneva Papers on Risk and Insurance: Issues and Practices* 582 points out that overriding interests are often excluded from standard international (ie non-US) title insurance policies.

[11] One example among many is where site assembly for a new development runs into a title problem for what may be just a small part of the development but which puts in question the viability of the whole development. Here title insurance may unlock social and economic benefits. And see David Cabrelli, "Overcoming practical problems: the law of encroachment and the function of title insurance" (2001) 6 SLPQ 137.

[12] These views are similar to those expressed by the Manitoba Law Reform Commission and the Law Reform Commission of Saskatchewan, *Private Title Insurance* (2007), p 46; and the New South Wales Law Reform Commission, *Torrens Title: Compensation for Loss* (Report No 76, 1996), para 4.14.

America the contest has tended to be a contest for business between insurance companies and lawyer associations, with the former generally getting the upper hand, Iowa being an exception. Each side claims to be acting in the best interests of the customers. As a law reform body we are of course neutral in such matters. If we conclude, as we do, that title insurance as a routine part of the conveyancing system is not in the interests of the users of the system, and especially of consumers, that conclusion is not reached by reason of any favour towards the legal profession.

26.10 Protection for consumers against inappropriate insurance is nowadays a familiar theme in the United Kingdom.[13] There is, happily, no evidence of any current problem with title insurance in this country. But if title insurance were to show signs of becoming standard practice such issues might perhaps arise.

26.11 Since the tone of this part has been against title insurance we would repeat once more that in some types of case it can be highly appropriate. Scottish buyers of heritable property are fortunate that the market makes title insurance available.

[13] The problem of inappropriate insurance has been considered by both the Office of Fair Trading and the Competition Commission in recent years in the context of payment protection insurance (PPI) and extended warranties on goods (commonly known as "white goods insurance"). The Competition Commission's *Report on the Supply of Extended Warranties on Domestic Electrical Goods within the UK* (2003, Cm 6089) was followed by the introduction of a 45-day cooling-off period: Supply of Extended Warranties on Domestic Electrical Goods Order 2005 (SI 2005/37). The Competition Commission has produced a report called *Market Investigation into Payment Protection Insurance* (2009), available online at http://www.competition-commission.org.uk/rep_pub/reports/2009/fulltext/542.pdf.

Part 27 The Keeper's liabilities

An overview of the Keeper's statutory liabilities

27.1 The provisions on indemnity in section 12 of the 1979 Act follow closely those in the Henry Report, which were in turn modelled on section 83 of the Land Registration Act 1925 (England and Wales).[1] It may be helpful at the outset to set out in tabular form the different ways in which the Keeper is subject to a statutory duty of compensation, both under the 1979 Act (chiefly but not solely section 12) and under the new scheme. After the table, each of the five heads of liability will be considered in turn.

1979 Act	Current law	Draft Bill	Proposed new scheme
Section 12(1)(a)	Compensation for the rectification of an inaccuracy. (To the party against whom the rectification is made.)	**Section 39**	Similar, but reconceptualised as compensation for breach of the Keeper's warranty of title.
Section 12(1)(b)	Compensation for the non-rectification of an inaccuracy. (To the party whose application for rectification has been refused.)	**Section 51**	Similar, but reconceptualised as compensation for the victims of the realignment of rights.
Section 12(1)(c)	The loss or destruction of documents.	**Section 73**	The same.
Section 12(1)(d)	The issue of erroneous information.	**Section 72**	The same.
Section 13(1)	"The Keeper shall reimburse any expenditure reasonably and properly incurred by a person in pursuing a *prima facie* well-founded claim under section 12, whether successful or not."	**Section 43(1)(b)(i)** **Section 52(1)(b)(i)** **Section 55(1)(a)** **Section 55(1)(b)**	(i) The Keeper should not be liable for judicial expenses, other than under the general law of expenses.[2] (ii) Compensation should be payable to the party in whose favour rectification is made, in respect of loss caused by the temporary inaccuracy of the Register.

[1] Henry Report, pp 48-50 (particularly note 1). The present part of the report does not deal with the exceptions to liability listed in s 12, but these too are based on the 1925 Act.

[2] The draft Bill does not state this expressly. Rather it is silent, leaving the matter to the general law of judicial expenses.

Compensation for the rectification of an inaccuracy (breach of Keeper's warranty of title)

27.2 This subject, currently covered in section 12(1)(a) of the 1979 Act, is dealt with in Part 22 and nothing further will be said here.

Compensation for the non-rectification of an inaccuracy (compensation for the victims of the realignment of rights)

27.3 This subject, currently covered in section 12(1)(b) of the 1979 Act, is dealt with in Part 23 and nothing further will be said here.

Compensation for the loss or destruction of documents

27.4 Section 12(1)(c) provides that the Keeper is to be liable for "the loss or destruction of any document while lodged with the Keeper." The liability is strict rather than fault-based. In DP 128 we called this rule uncontroversial and proposed its retention.[3] Respondents agreed. Accordingly we recommend:

> **114. Loss caused by the loss or destruction of any document while lodged with the Keeper should continue to be indemnified by the Keeper.**
>
> (Draft Bill, s 73)

Compensation for the issue of erroneous information

27.5 If the Keeper supplies information that is wrong, that misinformation could cause loss. Typically there would be liability under general law, assuming that there was negligence in the provision of the information.[4] The general law imposes liability only if there is fault. By contrast, the statutory liability is not fault-based but strict. Unlike its counterpart for England and Wales,[5] section 12(1)(d) is expressed rather generally, applying to "any information given by the Keeper in writing"; but since errors are unlikely to be made in the reproduction of existing documents and data,[6] the provision is in practice concerned with documents which have been newly prepared for the person seeking the information. Almost always these are reports, such as a Form 10 Report.[7] The number of claims is significant: more than a quarter of the total amount paid in indemnity is attributable to errors in reports, typically the omission of an inhibition or a standard security. It seems uncontroversial that reports and other information should continue to be covered by the Keeper's indemnity. In

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[3] DP 128, para 7.63 (proposal 33).
[4] Cf *Runciman v Borders Regional Council* 1987 SC 241.
[5] Which applies only to official searches and official copies: see Land Registration Act 2002, Sch 8, paras 1(1)(c) and (d). The equivalent provision of the Land Registration Act 1925 (s 83(3)) was confined to official searches.
[6] The reference in s 12(1)(d) to errors in land and charge certificates has been interpreted as meaning only an error in reproduction: *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271. Land and charge certificates would be discontinued under our proposals: see Parts 4 and 8.
[7] A report on the Register of Sasines and Register of Inhibitions, made in advance of a first registration application.

DP 128 we proposed that the existing rule should be preserved,[8] and respondents agreed. We recommend therefore that:

115. Loss caused by errors in reports and other information supplied by the Keeper should continue to be indemnified by the Keeper.

(Draft Bill, s 72)

27.6 In DP 128 we did not consult on whether the "in writing" proviso should be retained. Our view is that it should be.[9] A person who claims to have suffered loss as the result of the provision of alleged inaccurate information given orally would still have the possibility of making a claim based on the general law.

Re-imbursement of expenses

27.7 Section 13(1) of the 1979 Act says that "the Keeper shall reimburse any expenditure reasonably and properly incurred by a person in pursuing a *prima facie* well-founded claim under section 12… whether successful or not." This provision has given rise to considerable dissatisfaction on the part of the Department of the Registers of Scotland. The Department has described it to us as a "claimant's charter" and we agree.

27.8 The topic of expenses can be divided in more than one way. It can be divided as between litigation expenses and non-litigation expenses (including pre-litigation expenses). It can be divided into successful claims and unsuccessful claims. It can also be divided according to the subject matter of the claim, and in particular expenses incurred in securing rectification and claims incurred in securing payment of compensation.

27.9 The main problem with the provision in section 13(1) is that it requires the Keeper to meet litigation expenses. For example, there is a boundary dispute. Each side has a stateable claim to the area in question. Section 13(1) says that whatever the result of the litigation, the Keeper has to write a cheque for the expenses of the action. In a submission to us the Keeper expressed the matter in this way:

> "In this interpretation, section 13(1) ... has lent itself to being used by claimants as a tool for bargaining against the Keeper. The Keeper may offer a settlement which is based on impartial valuation advice ... The claimant's response to this may be that, in terms of section 13(1), he has nothing to lose by taking the matter to the court or Lands Tribunal. The Keeper must then weigh the consequences on the public purse of standing by his offer and facing possible court action, or settling the section 12 claim at more than its realistic value. In short, there are claimants who argue that section 13(1) puts the Keeper and the public funds under his stewardship over a barrel."

27.10 In DP 128 we discussed the origins of section 13(1) and concluded that it was simply a mistake.[10] We proposed that "no special provision should be made as to the expenses of litigation (whether successful or unsuccessful)" and respondents generally agreed. The ordinary law of litigation expenses should apply in such cases as it does in other disputes that end up in court. If the Keeper is a party to any such litigation (for instance if one

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[8] DP 128, para 7.62 (proposal 32).
[9] Though with a power to set by rules the form in which the data is provided.
[10] DP 128, paras 9.43-9.46.

neighbour sues the other and brings the Keeper in as a second defender), the same should apply – ie the general law. We recommend:

116. No special provision should be made as to the expenses of litigation (whether successful or unsuccessful).

27.11 We also proposed that where the Keeper is liable to pay compensation, the compensation should include the reasonable expenses of the claimant, other than litigation expenses. Respondents agreed. But we were less sure whether the same rule should apply if the expenses were pre-litigation expenses.[11] Respondents were divided. Our view now is that there is no reason to differentiate between expenses according to whether it happens that litigation follows. Hence we recommend that:

117. Where compensation is payable it should include reasonable legal expenses, other than litigation expenses.

(Draft Bill, s 43(1)(b)(i), s 52(1)(b)(i) and s 55(1)(a))

27.12 In DP 128 we asked: "Where indemnity is refused but the claim seemed initially well-founded, should the Keeper be liable for such extra-judicial expenses as were reasonably and properly incurred?"[12] Respondents were divided. We think that the presumption must be against such liability and we do not think that that presumption has been overcome. Accordingly we recommend:

118. No expenses should be payable by the Keeper to those who make unsuccessful claims.

Compensation to those in whose favour an inaccuracy is rectified

27.13 If the Register is inaccurate, and it is rectified, the person in whose favour it is rectified will be happy. Nevertheless even though rectification has happened there may have been some loss as a result, not of the rectification, but as a result of the pre-rectification inaccuracy. Expenses may have been incurred obtaining legal advice. There may even be the problem of a lost sale, for an inaccuracy may well come to light only when there is a sale with a consequent checking of the title by the buyer before the purchase is settled. It is a criticism of the current law that such losses are not recoverable. In 1997 the English legislation was amended in order to allow recovery:[13]

> "if, notwithstanding the rectification, the person in whose favour the register is rectified suffers loss by reason of an error or omission in the register in respect of which it is so rectified, he also shall be entitled to be indemnified."

27.14 In DP 128 we suggested that a similar provision would be desirable in Scots law and respondents agreed.[14]

27.15 Accordingly we recommend:

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[11] DP 128, para 9.56 (proposal 42(3)).
[12] DP 128, para 9.56 (proposal 42(4)).
[13] Land Registration Act 1925, s 83(1)(b), as substituted by the Land Registration Act 1997, s 2. The current provision is wider in scope: Land Registration Act 2002, Sch 8, para 1(1)(b).
[14] DP 128, para 7.59 (proposal 30).

119. Where an inaccuracy is rectified, the person in whose favour the rectification is made should be indemnified by the Keeper for loss caused by the inaccuracy.

(Draft Bill, s 55)

27.16 This recommendation is not limited to claimants whose title is in the Land Register. It includes those whose title is still in the Register of Sasines. For example, John owns land and his title is still in the old register. He sells to Kate. Before settling, Kate checks the title and it emerges that part of John's garden has been wrongly included in the title sheet of the neighbour, Lactantia. She is approached but does not co-operate.[15] John can raise an action of declarator but this will take some time. Kate aborts the transaction. John may suffer financial loss as a result. This example has been chosen because it tends to be on first registration that boundary errors are made in the Land Register, and Lactantia's title was first-registered while John's was still in the Register of Sasines.

Other grounds of liability

27.17 The listing of specific grounds of liability is not intended to exclude other possible grounds of liability. For example, if the Keeper wrongfully rejects an application,[16] or carries out an under-registration, and loss results, then *prima facie* the Keeper is liable. We see this as a matter of general law. The 1979 Act adopted the same approach. There is no point in re-inventing the wheel by attempting to set out the general law, and indeed any such attempt as well as being useless would be likely to become out of date.

Indemnity statistics

27.18 We are grateful to the Department of the Registers of Scotland for providing the following note on compensation payments over the past ten years. We reproduce the note verbatim. The only comment we would add is that the claims record is reassuringly low.

27.19 Over the 10-year period running from 1 April 1999 to 31 March 2009 the Department has paid out £3,155,603.83 in indemnity payments, an average of just over £315,000 per annum. There has been a general rise in the number of payments over the last few years as would be expected as more and more titles are registered, and because the overall trend of property prices has been upward. In the last year the amount paid out was £673,556.97 over a total of 99 payments, giving an average of approximately £6800 per claim paid. This represents an increase in the amount of payments and the total amount of indemnity paid. The total number of claims (99) represents 0.03% of the total number of Land Register cases dispatched last year (359,137) and the total amount paid (£673,556.97) represents 1.72% of the registration fees (£39,072,509) received for Land Register applications for the same time period.

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[15] She could have co-operated either (a) by granting John a disposition of the area in question or (b) telling the Keeper that she agreed that her title sheet was inaccurate. That would put the inaccuracy beyond dispute, thus making immediate rectification possible. Her non-co-operation might happen for various reasons, including bad blood between herself and John, bad legal advice, or a belief that she could make money out of the situation. Or she might be abroad, or she might be suffering from some infirmity making it difficult for her to attend to business.

[16] In the new scheme, as well as actual wrongful rejection there is also the possibility of deemed wrongful rejection, when the Keeper fails to make a decision on an application within the maximum period allowed for the decision to be taken. See draft Bill, s 26 and paras 12.86-12.94 above.

27.20 In the last 10 years the amounts claimed and the payments made have been as follows:

Year	Amount claimed	Payments made	Number of claims Paid
1999/0	£482,438.65	£73,347.47	44
2000/1	£386,167.84	£320,320.11	67
2001/2	£327,985.02	£86,076.31	54
2002/3	£850,291.37	£76,725.10	53
2003/4	£709,905.97	£410,416.68	86
2004/5	£2,371,912.34	£446,977.77	77
2005/6	£619,569.20	£394,174.45	83
2006/7	£635,820.59	£398,492.19	88
2007/8	£1,495,727.55	£275,516.78	80
2008/9	£772,206.81	£673,556.97	99
Last 10 years	£8,652,025.34	£3,155,603.83	731

Part 28 Challengeable deeds: (A) reduction

Introduction

28.1 A deed may be challenged by an action of reduction, or by rectification under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. The latter is considered in the next part of this Report. In either case, if the deed is one that has been registered in the Land Register difficult issues may arise.

28.2 The process of reduction is competent both for void deeds and for voidable deeds. In respect of the former, the decree does not alter the actual legal positions of the parties, for if a deed is void before decree, it is without effect before decree, and so decree does not deprive it of effect. A decree of reduction of a void deed is declaratory of a state of affairs that already existed before the decree. A reduction of a voidable deed is different. A voidable deed is, unless and until reduced, valid. If it is reduced, the decree of reduction will therefore *change* the legal rights of the parties.

Reduction of voidable deeds and the Register of Sasines

28.3 At common law, the rule is that if a deed that deals with heritable property is voidable and is reduced, the reduction has real effect (proprietary effect). That rule operates in the Register of Sasines. Thus suppose that Ian is the owner of land, and Jane by fraud induces him to dispone to her. She records the deed in the Register of Sasines. A deed induced by fraud is voidable, but not void, so she becomes owner at the time of recording. Ian then raises an action of reduction and is successful. Ownership passes back to him by force of the decree alone, even though no entry is made in the Register of Sasines.

28.4 An important modification to this rule was made by section 46 of the Conveyancing (Scotland) Act 1924, which provided that Ian was to record the extract decree. If he neglected to do so, he would still re-acquire ownership by force of the decree alone. But the ownership thus reacquired would be a precarious one. This is because section 46 provided that if Jane (though no longer owner) were, before the recording of the decree, to dispone to a third party (Leena), then Leena, on recording the deed in her favour, would become owner, provided that she was in good faith and gave value.[1] In such a case, therefore, the right of ownership would have moved along the following track. First it was in Ian, until Jane recorded her deed. Then it was in Jane, until Ian obtained decree. Then it was in Ian, until Leena recorded her deed. Then it was in Leena. So the final result is what it would have been had the 1924 Act simply said that Ian does not reacquire ownership until he records his decree. The 1924 Act thus went much of the way to saying that a decree of reduction is not to have real effect until recorded, but it did not go all the way. The conceptual system it adopted was rather complex, and perhaps unnecessarily so.

[1] If Jane had disponed to Leena before the reduction, then Leena's title would be immune to attack, assuming that she was in good faith and gave value. That is a matter of the common law of voidable titles.

Reduction of voidable deeds and the Land Register: the current law

28.5 The interaction of reduction and the Land Register was not clearly dealt with by the 1979 Act and it has needed extensive litigation to achieve what is still today only a limited degree of clarification of the law. In *Short's Trustee v Keeper of the Registers of Scotland*[2] it was held that an extract decree of reduction of a voidable deed cannot be registered in the Land Register, but that the effect of such a decree is to render the Register bijurally inaccurate.[3] In some cases that inaccuracy will be a rectifiable one and in some cases it will not be. Whether it is rectifiable will depend on the circumstances of the case: the 1979 Act provides that an inaccuracy is not normally rectifiable against the interests of a "proprietor in possession."[4] If the inaccuracy is unrectifiable then indemnity will normally be payable in terms of section 12(1)(b). Thus in the example given above, involving Ian and Jane, the Register would be inaccurate from the date of the decree of reduction.[5] But because of the positive effect of registration, Jane would remain owner unless and until the Register is rectified. Because the inaccuracy was her fault, section 9 would allow rectification. On the day that the Keeper rectifies the Register, ownership passes from Jane back to Ian. When rectification happens, its effect is *ex nunc*, not *ex tunc*, ie it is not retroactive.[6]

28.6 In many types of case section 9 will bar rectification of the inaccuracy.[7] In DP 125 we proposed that "reductions of voidable deeds should be given effect as of right by an appropriate entry on the Land Register".[8] Almost all those who responded were in agreement. At that time we envisaged such reductions leading to a change in the Register by means of rectification, on the basis that a reduction meant that the Register was inaccurate,[9] whereas now we think that registration is the preferable route (see below), but we continue to adhere to the substance of the proposal.[10] But before going further we formally recommend:

> **120. Reductions of voidable deeds should be given effect as of right by an appropriate entry on the Land Register.**
>
> (Draft Bill, s 32)

Reduction of void deeds and the Land Register: the current law

28.7 The common law principle is that a void deed leads to a void title and that a voidable deed leads to a voidable title. That principle operates in the Register of Sasines but it does not currently operate in the Land Register. Thus if Ruth owns land, title being in the Land

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[2] *Short's Trustee v Keeper of the Registers of Scotland*, 1993 SLT 1291, aff'd 1994 SC 122, aff'd 1996 SC (HL) 14. See further *Short's Trustee v Chung* 1991 SLT 472; and *Short's Trustee v Chung* (No 2) 1998 SC 105, aff'd 1999 SC 471.

[3] Section 29 of the 1979 Act applies s 46 of the 1924 Act to the Land Register. The tension between s 29 of the 1979 Act and the decision of the House of Lords will not be discussed here.

[4] See s 9(3). There are certain exceptions. See further Part 17.

[5] Not from the date of the registration of the voidable deed. A voidable deed is effectual to confer a real right and so the registration was perfectly proper, and would have been proper even if the Keeper had known of the fraud.

[6] *Stevenson-Hamilton's Exrs v McStay* 1999 SLT 1175; *Keeper of the Registers of Scotland v MRS Hamilton Ltd* 2000 SC 271.

[7] As in *Short's Trustee* (see footnote 2 above).

[8] DP 125, para 6.18 (proposal 10).

[9] In DP 128, para 6.32 (proposal 24(1)), we formulated the more general position that "where the Register is inaccurate, rectification should be available without restriction." Most respondents agreed.

[10] Using the language of DP 125, para 6.18 (proposal 10), we now think that the "appropriate entry" would be by way of registration rather than by way of rectification.

Register, and Susan forges her signature on a disposition to Tim, and Tim's title is registered in the Land Register, the real right of ownership passes from Ruth to Tim, even though the disposition was simply a nullity. The Register is bijurally inaccurate, and was bijurally inaccurate from the beginning.[11] Whether it is rectifiable depends on possession and whether one of the exceptions in section 9 is applicable. Thus the position at this stage is the same as in the case of the voidable deed that has been reduced.[12] If rectification does happen, ownership then passes from Tim to Ruth.[13]

28.8 As just mentioned, under current law the Keeper may be forbidden by section 9 to rectify an inaccuracy. In DP 128 we proposed that "where the Register is inaccurate, rectification should be available without restriction."[14] That continues to be our position: the subject is more fully explored in Parts 17 and 18.

Should the reduction of a voidable deed result in an inaccuracy?

28.9 The abandonment of the Keeper's "Midas touch"[15] would, if taken by itself, mean that the common law rule about the reduction of a voidable deed would be restored. Thus in the case of Ian and Jane, ownership would revert to Ian when he obtains the decree of reduction, and so the Register, in showing Jane as owner, would be inaccurate. It would in due course be rectified.[16] That would represent a change from the current law, in which Ian does not re-acquire ownership until rectification takes place. In DP 128[17] we assumed that in the new system the old rule[18] would revive. But we have come to the conclusion that in this respect the existing law – ie the law as it operates under the 1979 Act - should be retained. Off-register transfers of ownership are not consistent with the policies that underlie the land registration system. Changes of ownership should, unless there is a cogent reason to the contrary, happen on-register, where they are visible: this is an aspect of the publicity principle. That is the position under the 1979 Act, and even for the Register of Sasines the 1924 Act achieved a result not far short of that.

28.10 Implementing that policy is, however, not straightforward, because of our view that the Keeper's Midas touch should no longer exist.[19] The abrogation of the Midas touch would, taken by itself, mean that a decree of reduction of a voidable deed would make the Register actually inaccurate, and so the decree would have real effect without registration. As we have said, that would be unsatisfactory. To retain the benefits of the current law as it stands under the 1979 Act, ie to ensure that the real effect of a decree of reduction of a voidable deed happens when the Register is altered as a result of the decree, it will be necessary to provide that such a decree does not, of itself, have real effect, and hence does not result in the inaccuracy of the Register. Instead, the real effect is to be achieved by registering the extract decree. The means of entering the Register would be, as has just been said,

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[11] But actually accurate. By contrast, in the case of a voidable deed the Register is fully accurate prior to reduction.
[12] On forged deeds and the Land Register see *Kaur v Singh* 1998 SC 233, aff'd 1999 SC 180. For the sequel, see *Kaur v Singh* (No 2) 2000 SCLR 187 aff'd 2000 SLT 1323.
[13] See DP 128, para 6.8.
[14] DP 128, para 6.32 (proposal 24(1)).
[15] See Part 13.
[16] Though if, before rectification, Jane disponed to a third party, that third party would be protected if the requirements of the integrity principle (realignment of rights) were satisfied. See Part 23.
[17] DP 128, para 6.24.
[18] Ie that decree of reduction of a voidable deed has real effect even without registration.
[19] See Part 13.

registration rather than rectification. Although we did not formally propose this idea in the discussion papers, we did raise it as a possibility.[20]

28.11 The rule we recommend is limited in its scope to the law of land registration. We do not recommend any change to the effect of the reduction on the deed reduced. Nor would the rule have any effect on the reduction of deeds that have never been registered in the Land Register. Finally, it would not apply to reductions of void deeds.[21]

28.12 A set of four examples will illustrate our thinking. Example 1A involves a voidable deed, and applies the law as it is under the 1979 Act. Example 1B has the same facts but applies the new scheme. Example 2A involves a void deed, and applies the law as it is under the 1979 Act. Example 2B has the same facts but applies the new scheme.

28.13 *Example 1A.* Here the applicable law is the 1979 Act. Ian is owner, and by fraud is induced to dispone to Jane. The disposition is thus voidable. Jane seeks and obtains registration in the Land Register. Ian then succeeds in an action of reduction of the deed. As a result of the decree, the Register has become inaccurate. The inaccuracy is bijural, rather than actual. That being so, Jane is still the owner. The Register can be rectified. (Since the inaccuracy was Jane's fault, she is unprotected.) When rectification happens, ownership passes from Jane back to Ian.

28.14 *Example 1B*. Here the applicable law is the new scheme. The facts are the same as in Example 1A up to the time when Ian obtains final decree. The Register does not become inaccurate at that moment. Ian can, however, apply for registration of his decree. When that registration happens, ownership passes to him from Jane.

28.15 *Example 2A*. Here the applicable law is the 1979 Act. Fiona is owner. Gina steals her identity and signs Fiona's name on a disposition to Harry. The disposition, being a forgery, is void. Harry seeks and obtains registration in the Land Register. Fiona then raises an action to reduce the deed and is successful. The decree proves an inaccuracy that already existed. The inaccuracy is bijural, rather than actual. That being so, Harry is still the owner.[22] The Register may or may not be rectified, depending on whether Harry is protected under section 9 of the 1979 Act. If it is rectified, ownership at that point passes from Harry to Fiona. If it is not rectified, Harry remains owner.

28.16 *Example 2B*. Here the applicable law is the new scheme. The facts are the same as in Example 2A. But Harry never becomes owner. Because the deed is void, Harry's title is void. The Register does not become inaccurate as a result of the decree of reduction, because it was always inaccurate. The decree of reduction will be given effect not by registration but by rectification. The rectification does not mean that ownership passes from Harry to Fiona, because Fiona was owner all along: one cannot acquire what one already has.

28.17 The question may arise as to what would happen if Jane (in example 1B) or Harry (in example 2B) were to dispone to somebody else, or were to grant a subordinate real right

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[20] "If proposal 10 is accepted, it is a matter for future decision whether reductions should enter the Register by rectification, as at present, or by registration, as sought in *Short's Tr*." (DP 125, para 6.19.)

[21] For void deeds, see para 28.19 below.

[22] Up to this point it makes no difference, from the standpoint of property law, whether Harry was in good or bad faith.

such as a standard security, before the Register was altered so as to restore Ian/Fiona to the B section of the title sheet. It is assumed that the new grantee has given value and is in good faith. In example 1B, the grantee would be protected. That protection would simply follow from the general law about voidable titles rather than from any special provision of the draft Bill. For Jane was owner and so could give a good title to a *bona fide* grantee. In example 2B, Harry is not owner, and so under general law cannot give a good title, even if the new grantee is in good faith. But (i) the grantee from Harry may, depending on the circumstances, benefit from the realignment principle and (ii) if the realignment principle does not apply will normally still have the protection of the Keeper's warranty. Could Ian or Fiona protect themselves, while the reduction action is in court, from the possibility of a grant by Jane/Harry? The answer is yes: they could seek warrant from the court to place a caveat on the title sheet.

Section 46(1) of the Conveyancing (Scotland) Act 1924

28.18 Section 46(1) of the Conveyancing (Scotland) Act 1924 has been discussed above. In the new scheme the protection that it gives to third parties would be superfluous. The protection presupposes that a decree of reduction will, of itself, have real effect. It then protects from that effect certain third parties who transact after the decree and are unaware of it. In our new scheme, the presupposition would no longer be true. Decrees of reduction of voidable deeds would, of themselves, have no real effect. Accordingly there would be nothing to protect third parties from. That does not mean that section 46(1) could simply be repealed, for it applies also to the Register of Sasines. The provision that is required is simply to disapply it to cases where the reduced deed is one that was registered in the Land Register.

Reductions of void deeds

28.19 Where a deed is void, the resulting entry in the Land Register is an inaccuracy. That is the current law, and we consider it satisfactory. Because there is an inaccuracy, the way that the Register is put right should continue to be by rectification and not by registration.[23] In the new scheme, inaccuracies are always rectifiable. No off-register transfers are involved. If, in the example above, Fiona obtains a decree of reduction and the Register is then rectified, there is no off-register transfer to Fiona, because the real right of ownership never had left her in the first place.[24]

Ownership and other rights

28.20 The discussion so far has been in terms of dispositions, which is to say the actual or purported transfer of the right of ownership of heritable property. The same rules apply to other deeds and other rights, and our recommendations for reform would apply in the same way to those other deeds and other rights.

28.21 Accordingly we recommend:

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[23] In current law, there will be some cases where rectification is barred under s 9. In the new scheme, all inaccuracies without exception will be rectifiable. However, where the integrity principle (realignment of rights) operates, the effect would be to convert an inaccurate entry into an accurate one.

[24] Cf DP 128, para 7.65.

121. (a) When a voidable deed has been registered in the Land Register, its reduction should not make the Register inaccurate. So when the Register is changed to give effect to such a decree, the change should be by way of registration, not rectification.

(b) The real effect of the registration should take place at the time of registration.

(c) Section 46(1) of the Conveyancing (Scotland) Act 1924 should be disapplied to the Land Register.

(d) An entry in the Land Register founded on a void deed should continue to be regarded as an inaccuracy and accordingly the means of putting it right should continue to be rectification. (But this should be subject to the rules about the realignment of rights.[25])

(Draft Bill, s 32, s 53(1)(a) and (3), s 54 and s 97, sch 8, para 12)

[25] For these rules see Part 6 of the draft Bill, discussed in Part 23.

Part 29 Challengeable deeds: (B) rectification

Judicial rectification: introduction

29.1 The previous part of this Report dealt with one response to faulty deeds: reduction. This part considers another response: rectification. In 1983 we published our Report on *Rectification of Contractual and Other Documents*,[1] which was implemented by sections 8 and 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.[2] Section 8 empowers the court to alter the terms of a document so as to give effect to the real intentions of the parties, and to do so with retroactive effect.[3] This is called "rectification", and in the context of the present project it is necessary to distinguish it from rectification in the sense of rectification of the Land Register. Rectification under the 1985 Act can, indeed, lead to rectification of the Land Register, if a title sheet derives any of its terms from a deed that has subsequently been rectified. Nevertheless the two types of rectification are distinct. One is the rectification of a document, and is done by the order of a court, under the 1985 Act. The other is the rectification of a register, and is done by the Keeper, under the 1979 Act.[4] We will use the terms "document rectification" and "Register rectification" to distinguish the two meanings of "rectification".

29.2 As well as the provisions contained in sections 8 and 9 themselves, the 1985 Act made certain consequential amendments to other legislation, including the 1979 Act.[5]

The 1985 Act

29.3 Section 8 of the 1985 Act, read short, provides:

> "(1) Subject to section 9 … where the court is satisfied … that—
>
> (a) a document intended to express or to give effect to an agreement fails to express accurately the common intention of the parties … at the date when it was made; or
>
> (b) a document intended to create, transfer, vary or renounce a right, not being a document falling within paragraph (a) above, fails to express accurately the intention of the grantor of the document at the date when it was executed,

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[1] Scottish Law Commission, Report on *Rectification of Contractual and Other Documents* (Scot Law Com No 79, 1983).
[2] In this part of the Report we refer to this as the 1985 Act.
[3] These recommendations were based on similar provisions developed in English equity. The part of the Act containing s 8 is headed "Provisions relating to other contracts and obligations", the word "other" referring back to the previous part, which was about leases. The reason we mention this point is that this part of the Act was thought of as being about "contracts and obligations".
[4] For rectification of the Register by the Keeper in the new scheme, see Part 18.
[5] Among the other changes were the insertion of a new s 46(2) into the Conveyancing (Scotland) Act 1924, and a new s 41(5) into the Conveyancing and Feudal Reform (Scotland) Act 1970. Within the framework of the present project we make no recommendation for any amendment to s 41(5).

it may order the document to be rectified … to give effect to that intention.

(3) Subject to section 9 … in ordering the rectification of a document … the court may … order the rectification of any other document …. which is defectively expressed by reason of the defect in the original document.

(4) Subject to section 9(4) … a document ordered to be rectified under this section shall have effect as if it had always been so rectified."

Section 9, read short, provides:

"(1) The court shall order a document to be rectified … only where it is satisfied … that the interests of a person to whom this section applies would not be adversely affected to a material extent …

(2) This section applies to a person … who has acted or refrained from acting in reliance on the terms of the document or on the title sheet of an interest in land registered in the Land Register … being an interest to which the document relates, with the result that his position has been affected to a material extent.

(4) Notwithstanding subsection (4) of section 8 … the court may, for the purpose of protecting the interests of a person to whom this section applies, order that the rectification of a document shall have effect as at such date as it may specify.

(6) …. [T]he court may require the Keeper … to produce such information as he has … relating to any persons who have asked him to supply details with regard to a title sheet …

(7) Where a person to whom this section applies was unaware, before a document was ordered to be rectified under section 8 …, that an application had been made … for the rectification of the document, the Court of Session …may … reduce the rectifying order….

One of the consequential amendments to the 1979 Act effected by the 1985 Act was the insertion of a new section 9(3A):[6]

"(3A) Where a rectification of an entry in the register is consequential on the making of an order under section 8 of the said Act of 1985, the entry shall have effect as rectified as from the date when the entry was made: Provided that the court, for the purpose of protecting the interests of a person to whom section 9 of that Act applies, may order that the rectification shall have effect as from such later date as it may specify."

These provisions raise difficult issues for land registration.

Retroactivity

29.4 It will be noted that section 8(4) of the 1985 Act speaks of rectification having retroactive effect.[7] If a deed that has been registered in the Land Register is retroactively altered, then the Keeper is directed to effect a retroactive alteration of the Register as well.[8]

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[6] The 1985 Act also amended s 9(3) and s 12(3) of the 1979 Act.
[7] "Subject to s 9(4) … a document ordered to be rectified under this section shall have effect as if it had always been so rectified."
[8] 1979 Act, s 9(3A).

(By contrast, Register rectification in *other* types of case is *not* retroactive.[9]) Thus when an order for document rectification is submitted to the Keeper, and the Keeper alters the Register accordingly, the Register is deemed never to have been other than it now is.[10] An example will illustrate the idea. A typical case of a document rectification involving a conveyancing deed is where the deed has conveyed either more or less than the parties really intended. Suppose that in 2002 Jack, the owner of a hectare of land, sells 0.79 hectares to Jill. By error, perhaps an error in preparing the plan, the disposition is disconform to the missives, and includes only 0.75 hectares. She registers her title. In 2009 she wakes up to the problem. Attempts to resolve the matter amicably fail. She goes to court to seek document rectification.[11] The court accepts her version of events, and grants the order she seeks. The disposition is thereby re-written so as to include the missing area. The disposition is deemed never to have been in the erroneous form. So the disposition that was presented to the Keeper in 2002 is deemed to have included, *at that time*, the missing area. And when, in 2009, the Keeper effects a Register rectification,[12] that rectification takes effect from 2002. Ownership passes to Jill in 2009, but it does so in 2002. The past itself is deemed to have been altered.[13] Or there are two pasts, the real one, Pastworld I, and the deemed one, Pastworld II.

29.5 Unless and until the document rectification is given effect to by a Register rectification, Jack continues to be the owner of the disputed area. Hence the transfer of ownership of the disputed area to Jill is an on-register transfer and happens when the Register is changed, in 2009. But in another sense it is an off-register transfer, for ownership is deemed to have passed in 2002 even though the Register in that year said nothing about it.

29.6 To give a complete picture, something needs to be said about the accuracy of the Register in a case of this sort. Section 9(3A) of the 1979 Act says that a document rectification order is (in cases involving registered land) to be given effect to by a Register rectification. Since Register rectification can be effected only in order to rectify an *inaccuracy* in the Register, it follows that in such a case the Register is, immediately before the Register rectification, inaccurate. When the registration happened in 2002, the Register was accurate.[14] When the document rectification order is made, in say May 2009, the Register becomes inaccurate. It does so not merely from the date of the order, but retrospectively. When the Register rectification is effected, the retrospective inaccuracy is removed, and is removed retrospectively, because the Register has become retrospectively accurate in its altered form. Thus in the example, from 2002 to May 2009 the Register was accurate in showing Jack as owner of the disputed area. (Because the registration correctly reflected the terms of a valid deed submitted to the Keeper.[15]) Then in the period between the making of the document rectification order and the Register rectification, in say July 2009, the Register became inaccurate in showing him as the owner. Thus the Register became inaccurate in

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[9] *Stevenson-Hamilton's Exrs v McStay* 1999 SLT 1175; *Keeper of the Registers of Scotland v MRS Hamilton Ltd* 2000 SC 271.

[10] It seems to follow that the Register rectification is itself deemed not to have happened. But this thought need not be pursued further here.

[11] She could also go to court to have Jack ordained to complete the performance of his contractual obligations by disponing to her the missing bit.

[12] This will mean changing two title sheets: Jack's and Jill's.

[13] Though this is subject to the added complication that the rectification decree itself may be reducible: 1985 Act, s 9(7). See para 29.9 below.

[14] It properly reflected the terms of the deed submitted to the Keeper by Jill.

[15] A registration based on a valid but challengeable deed is an accurate registration.

2002, in 2009. The inaccuracy is bijural rather than actual. Then when the Register rectification takes place, the Register is deemed always to have shown Jill as the owner of the whole 0.79 hectares, and in doing so has always been accurate, so that the retrospective bijural inaccuracy which came into existence on the making of the document rectification order is retrospectively rectified when the Register itself is rectified. There are thus three states. (i) The Register in the period from 2002 to May 2009 is accurate from 2002 to May 2009. (ii) From May 2009 to July 2009 it is (bijurally) inaccurate from 2002 to July 2009. (iii) From and after July 2009 it is accurate from 2002. The first and third accuracies are different, for the first consists in showing Jack as owner from 2002 to 2009, while the third consists in showing Jill as owner from 2002 to 2009.

29.7 The account just given has been simplified for ease of exposition. The system is in fact rather more complex, for the rule that a Register rectification that implements a document rectification has retroactive effect is subject to the second part of section 9(3A) of the 1979 Act, which refers to the scheme set out in section 9 of the 1985 Act, the purpose of which is to ensure that certain third parties are unaffected by retroactivity. To this we must now turn.

Limiting retroactivity and protecting third parties

29.8 While introducing document rectification, the 1985 Act also made provision for the protection of certain third parties from the effects of rectification. In brief, a third party who has relied in good faith on the unrectified document, or on an unrectified title sheet, is to be protected. The detailed rules are not simple. There are two sets. In the first place, there are rules, contained in section 9 of the 1985 Act, protecting such parties from being prejudiced by document rectification itself. Then the proviso to section 9(3A) of the 1979 Act contains provisions protecting such parties from Register rectification.

29.9 The first of these sets of rules[16] itself divides into two sub-sets. One sub-set requires an attempt to be made at pre-order identification of third parties, ie identifying such third parties before the document rectification order is made, so that their rights can be protected by the terms of the order itself. The other sub-set deals with post-order identification, and provides that if the defined types of third party emerge at a later stage they can require the reduction of the rectification, or compensation in lieu of reduction.

29.10 If a relevant third party is identified in advance, the court will protect that party by making the document rectification less than fully retroactive. An example, using the case of Jack and Jill referred to above, will illustrate the idea. On 29 June 2004 Jack grants a standard security over the property that he still owns, including the 0.04 hectares. The grantee is a bank, B, and the security is registered on 29 June 2004. B falls within the protected class. When 2009 arrives and the court orders rectification, it will backdate it only to 30 June 2004, so as to protect B. Thus the mechanism for protecting third parties is the time-limiting of retroactivity. As applied to the Land Register, our reading of the provisions is that the court must make two matching orders: it must order that the document rectification is

[16] That is to say, s 9 of the 1985 Act.

not fully retroactive[17] and it must at the same time order that the Register rectification to be made by the Keeper is not to be fully retroactive.[18]

29.11 These mechanisms for protecting third parties may not always achieve their aim. For example, suppose that in 2003 Jack granted a servitude of way to neighbour Norah, the route running through both (i) the 0.21 hectares retained by him, about which there is no dispute, and also (ii) the disputed 0.04 hectares. Norah was not in good faith. Yet it seems that Norah's servitude will nevertheless be protected by the court, for the whole length of its route, because the rectification (both of the document and of the Register) will be retroactive only to a date *later* than the grant of the servitude, namely 30 June 2004. There is thus over-protection, Norah being undeservedly protected.[19]

29.12 As well as protecting the undeserving, the rules may not protect those who have in fact relied on the Register. For example, suppose that Bank B, instead of lending on the footing of a standard security, makes an unsecured loan, having, however, first checked the Land Register to verify Jack's title as part of "due diligence" concerning his creditworthiness. If Bank B is intended to be within the protected class of third parties, the protection mechanism seems to fail, because however late the court dates the rectification, it will not help Bank B.[20]

29.13 Retroactivity thus has a double function in the existing law. It is used to change the rights of the parties. But it is also used as a mechanism for protecting some third parties but not others, this being achieved by the particular date of retroactive effect that the court selects when making its order.

29.14 The rules about pre-order identification are not free from difficulty. There seem to be three such difficulties. The first is that the Keeper is under no obligation to keep records of all persons who have consulted the Register. Whilst this was in fact done at the time of the 1985 Act, it is no longer done.[21] The second is that information has wings. Only one person may consult a title sheet, but the information may reach others.[22] The third difficulty is the advent of the digital revolution. Nowadays the Land Register is accessible online. We have come to the conclusion that the system of pre-order identification is unworkable. Nor do we consider that the rules about post-order identification, rules which open up the possibility of

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[17] 1985 Act, s 9(4).

[18] 1979 Act, s 9(3A). We read the word "rectification" in the proviso to s 9(3A) to refer to Register rectification rather than to document rectification.

[19] A case might possibly be made for the view that the court could decide on different dates for different purposes, so that the disposition could be rectified as from 2002 in relation to the servitude but as from the later date in relation to the standard security. If so, then the Register rectification would have to track that, the result being an even greater number of "superposed" states of the Register. Again, it might perhaps be argued that the court could use its 1985 Act, s 8(1) power of "consequential rectification" to rectify the servitude but not the standard security. But such arguments would not be easy to reconcile with the structure of the 1985 Act, ss 8 and 9.

[20] Possibly it might be otherwise if B had proceeded to diligence.

[21] We understand that the change happened in or about 2000 with the introduction of online access to the Land Register.

[22] It is possible that the class of protected reliers is limited to those who obtain the information direct, but that interpretation would generate other problems. For instance someone who relies on a land certificate would only be a protected relier if he or she had been directly issued the certificate. Of course in the real world of conveyancing all sorts of people may rely on a land certificate. Moreover, information from the register is commonly obtained via independent firms of professional searchers of the public records.

reduction of the document rectification, are appropriate.[23] We stress once again that our comments are limited to the context of the modern land registration system.

Which third parties?

29.15 Section 9 of the 1985 Act protects:

> "(2) … [A] person (other than a party to the agreement or the grantor of the document) who has acted or refrained from acting in reliance on the terms of the document or on the title sheet of an interest in land registered in the Land Register … being an interest to which the document relates, with the result that his position has been affected to a material extent.
>
> (3) This section does not apply to a person--
>
> (a) who, at the time when he acted or refrained from acting as mentioned in subsection (2) above, knew, or ought in the circumstances known to him at that time to have been aware, that the document or (as the case may be) the title sheet failed accurately to express the common intention of the parties to the agreement or, as the case may be, the intention of the grantor of the document; or
>
> (b) whose reliance on the terms of the document or on the title sheet was otherwise unreasonable."

29.16 In short, that means a third party who has relied on the title sheet.[24] The provision was considered in *Jones v Wood*,[25] in which a third party who acted in good faith was held to be unprotected because of non-reliance. In that case a farm was sold in two parts. By mistake, an area extending to about an acre that should have been included in the disposition of part A was omitted from it and included in the disposition of part B. Part B was later sold on. It was held that it was not enough for the buyer to have known that the acre was included in part B: to retain title the buyer must have positively relied on its inclusion, and it was held on the facts that no such positive reliance had occurred.

The 1924 Act

29.17 The 1985 Act inserted a new section 46(2) into the Conveyancing (Scotland) Act 1924, providing that a third party who recorded a deed in the Register of Sasines, and who acted in good faith and for value, would be unaffected by a rectification order that had been granted but not yet recorded in the Register of Sasines. The test set forth in section 46(2) of the 1924 Act is not the same as the test in section 9 of the 1985 Act and in particular there is no requirement for positive reliance. There is no matching provision for the Land Register.[26] It is not clear to us why the section 46(2) test is different from the test in section 9 of the 1985 Act, or what the consequences may be of that difference. Nor are we clear why section

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[23] For the sake of brevity we will not consider the question of how the reduction of a document rectification order is given effect to in the Land Register.

[24] Although the singular is used, more than one title sheet may be involved. Perhaps the Interpretation Act 1978, s 6(c) covers the difficulty.

[25] 2005 SLT 655. For discussion see Kenneth G C Reid and George L Gretton, *Conveyancing 2005* (2006), pp 134-138.

[26] See s 29 of the 1979 Act. That section applies to the Land Register all pre-1979 statutory references to the Register of Sasines, subject to certain exceptions. Section 46(2) is thus not covered.

46(2) of the 1924 Act applies to the one register and not to the other, or what the consequences may be of that difference.

Evaluation of the positive reliance test

29.18 In our view the requirement of positive reliance is not consistent with the way that the Land Register is intended to operate either now or in the new scheme. It weakens the protection of those holding a title in the Land Register. Its tendency can only be to detract from public confidence in registered titles. By introducing the subjective element of reliance the rule reduces the transparency of the Register and means that litigation will more often be needed to determine title. Of course, title cannot always be clear and there must inevitably be cases where disputes will have to be settled by courts, but in matters of property law and not least land registration law it has always been recognised that certainty is a factor of great weight, and we think that the loss of certainty generated by the positive reliance test is not justified by other benefits which may perhaps flow from it.

Evaluation of retroactive alterations to the Register

29.19 Retroactive document rectification will be complex in any event, but the level of complexity that ensues where the rectified document is one that was registered in the Land Register is surely excessive. Retroactive alteration of the Register seems inconsistent with land registration principles and might almost be said to amount to deliberate falsification, albeit for the best of motives.[27] As Lord Rodger has said, "within a system where the register is intended to reveal the current state of the title, retrospective rectification is, almost by definition, anomalous."[28] The manner in which third parties are or are not prejudiced by a Register rectification (consequent on a document rectification) seems unsatisfactory in that it will in some types of case protect those who, on any view, do not merit protection.[29] In other types of case it will prejudice those who, on land registration principles, do merit protection. Since any title sheet can be called into question by a subsequent document rectification action, every title sheet is in a state of potential indeterminacy.

29.20 Enough has perhaps been said to show that there is scope for improving the "fit" between the document rectification provisions and the land registration system. The changes that appear to be required are as follows.

The adjustments that are needed

29.21 We think that several adjustments are needed to ensure a functional interface between the 1985 Act and the Land Register.

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[27] Since an ordinary registration, if accepted, is deemed to take effect as at the date of application, even though the acceptance by the Keeper may not actually happen until some weeks (or longer) later, it might be said that retroactivity is present in the system anyway. But in the interval between an application and its acceptance, the application is itself in the Register (in the Application Record) and thus public. In that time the Register is not saying "X is owner" but is saying "X or Y is owner". By contrast, where a document rectification order is given effect to by a Register rectification, the Register had previously said "X is the owner", and it said it truly, but the effect of the Register rectification is that it said it untruly.

[28] *Keeper of the Registers of Scotland v MRS Hamilton Ltd* 2000 SC 271 at 280. Earlier on the same page Lord Rodger reserves his opinion as to whether the 1985 Act's implications for land registration had been fully thought through.

[29] For example the case of Norah, para 29.11 above.

(i) No retrospective alteration of the Register

29.22 When a document rectification order is registered, the alteration to the Register should not happen in the past but in the present, following the making of the order. The effects should not precede the cause, and previous states of the Register should not be falsified. However, no change would be made to the principle that a document rectification order has retroactive effect.

29.23 Document rectification can assist in reducing tax liability, as in *Re Colebrook's Conveyances*,[30] a case that had some influence on this Commission's thinking in the 1983 Report (above).[31] But for tax purposes the time of completion of title is not normally relevant: thus if X delivers a disposition to Y on 20 March and Y completes title on 20 April, the property is normally treated as Y's *for tax purposes* as from 20 March.[32] So the retrospective rectification of the deed should suffice of itself for tax purposes.

(ii) Notional date of document rectification should not be determinative of third party protection

29.24 Given that there would no longer be retrospective alteration of the Register, the link that the existing law has between the notional date of document rectification and the protection of third parties should be broken. The reason is simple. The mechanism that the current system uses against those third parties who do not merit protection is the mechanism of the dating of the retroactivity. Against the undeserving third party, the sword of retroactivity strikes; against the deserving third party, the sword of retroactivity does not strike. If retroactive changes to the Register cease to be competent, as we recommend, that means that some other way has to be found to deal differently with the deserving and the undeserving.

(iii) Third parties in good faith to be protected

29.25 As mentioned earlier, we think that a test of active reliance is inappropriate in relation to registered titles. The protected class of third parties should be those who have registered in good faith.

29.26 The draft Bill would amend the 1985 Act to provide, in section 8, that "if a document is registered in the Land Register ... in favour of a person acting in good faith, then … it is not competent to order its rectification under subsection (3) above." Subsection (3) is about consequential rectification to other documents. For example, if X dispones to Y and Y grants a standard security to Z, a rectification of the disposition might be accompanied by a rectification of the standard security. Under the 1985 Act as it stands, the standard security is protected, if at all, by section 9, but the proposed amendment is a simpler solution. Section 9 would be irrelevant to deeds registered in the Land Register.

29.27 As pointed out earlier, the mechanism used by section 9 is clumsy because it will in some cases lead to the protection of the undeserving, such as Norah in the servitude case. An advantage to our suggested change is that the undeserving cannot hide, like Norah,

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[30] [1972] 1 WLR 1397.
[31] As did *Hudson v Hudson's Trustees* 1978 SLT 88.
[32] See *Thomas v Inland Revenue Commissioners* 1953 SC 151.

behind the coat tails of the deserving. In Norah's case, the court would rectify the deed of servitude by deleting from it that portion of the route lying over the 0.04 hectares. That would be contained in the same order as the rectification of the disposition of 2002, and thus would be presented to the Keeper at the same time. The Keeper would then (a) remove 0.04 hectares from Jack's title sheet and add it to Jill's, making the corresponding changes to the Cadastral Map, and (b) delete the servitude from the part transferred to Jill. These changes would happen in 2009, and not notionally in 2002, but the policy objective of ensuring that neighbour Norah is not protected would be achieved. Moreover, this mechanism does not suffer from the problems inherent in the mechanism used by the current law. For example, in the case discussed above of the servitude to Norah followed by the standard security to bank B, the servitude could be rectified but the standard security left unrectified.

(iv) All parties with an interest to be called

29.28 Section 9 of the 1979 Act requires the court to protect certain third parties but it does not require them to be called so that they could assert their interests. Possibly that is implied, though we note that Chapter 73 of the Rules of Court, which regulates procedure in such cases, is also silent on this matter.[33] We think that the legislation should expressly provide that all parties having an interest must be called.

29.29 We suggest that as a matter of general principle an order would be without effect against any person not called. For example, suppose that X dispones land to Y and Y grants to Z a standard security over it. Later X raises a rectification action, arguing that part of the land should not have been included in the disposition. Z's security extends over the whole property. We think that if Z is not called, any rectification order would be without effect in relation to the standard security. The amendments to the 1985 Act that we recommend do not cover this issue, which is one that raises its head in other types of litigation as well, such as actions of reduction.

(v) How the rectification order should enter the Land Register

29.30 The making of a document rectification order should not be considered as rendering the Register inaccurate. Our reasons are the same as for the parallel recommendation for reductions of voidable deeds: off-register transfers are undesirable.[34] That implies that what we have so far called Register rectification would, under the new scheme, no longer be classified as rectification, because rectification implies the existence of an inaccuracy. Instead, it would be classified as registration. We are not proposing any change to the rule that *document rectification* is normally retroactive. That fact could, taken by itself, in certain types of case imply retrospective inaccuracy. Take the following example. Whereas the Jack and Jill example was a case of too little disponed, this example is one where too much is disponed. In 2002 Romeo dispones 0.4 hectares to Juliet. In 2009 he obtains the rectification of the deed so that it conveys only 0.3 hectares. Since that document rectification is retroactive, the deed submitted to the Keeper is deemed never to have included the extra 0.1 hectare. In the negative system,[35] the inference would be that Juliet retrospectively ceases to be the owner of the 0.1 hectares. Ownership thus passes back to Romeo retrospectively, and does so as soon as the court order is made, without any change to the

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[33] Rule of Court 13.12 would seem to require intimation to a heritable creditor, but not to other parties.
[34] See Part 28.
[35] Meaning a system that does not have the Midas touch. See Part 13.

Register. That is not an acceptable result from the standpoint of land registration policy.[36] Hence the new legislation makes it clear that document rectification, as such, does not make the Register inaccurate, and the provision in the 1985 Act about retroactivity of document rectification is made subject to that principle.[37]

(vi) Section 46(2) of the Conveyancing (Scotland) Act 1924

29.31 We see no role, in the new scheme, for section 46(2) of the Conveyancing (Scotland) Act 1924. In the new scheme these parties would not be at risk anyway. Accordingly the provision should be disapplied to cases where the deed in question has been registered in the Land Register.[38]

Our recommendations

29.32 These adjustments are limited in scope and technical in nature. As such, they do not involve any substantial departures from the policy of the 1985 Act. We do not propose a change in the principle that document rectification under the 1985 Act should be, in the normal case, retroactive. That would be to stray beyond the subject of land registration. Indeed, our recommendations would mean that in cases where the rectified deed is one that was registered in the Land Register, retroactivity would apply without exception, whereas under current law that is not the case. Nor do we propose any change in the interaction of the 1985 Act with other registers, such as the Register of Sasines. Thus the amendments to the 1985 Act that we recommend are limited to those cases involving the Land Register. The existing provisions would continue to apply, in their unamended form, to other cases. Whilst it may be that a case could be made out for a more general review of sections 8 and 9 of the 1985 Act, in the light of more than 20 years of experience,[39] this is not the place for such a review. Our approach therefore thus seeks to be a minimalist one, seeking to change only what seems to us essential to be changed for the purposes of the present project. Finally,

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[36] What is unacceptable is a transfer in 2009 in 2002. Actually, the facts in the example could be approached in a different way. Where too much is included in the disposition, there is an argument that the disponee never acquires the excess anyway (except in so far as the "Midas touch" operates), and that this is so even though no document rectification ever happens. General property law requires mutual intention: the transferor must have the *animus transferendi dominii* and the acquirer must have the *animus acquirendi dominii*. In the absence of such intention there can be no transfer. (And in cases of this sort, the intention in respect of the 0.1 hectare must have been absent, in order for it to be the sort of "mis-expression" case to which the 1985 Act applies.) An example is one of the cases that prompted the legislation, *Anderson v Lambie* 1954 SC (HL) 43. There it was held that more had been included in a disposition than either party had intended. It seems to have been accepted that the grantee was the owner, albeit that he should not have been. But it is not clear that that was so. Arguably the grantee's title was void *quoad excessum*. If that argument is right (and we merely speculate) then document rectification, had it been available at that time, would have been of no assistance anyway as far as real rights are concerned. If this line of reasoning is correct, and such a case were to occur in our new scheme, the result would be that the Register would indeed be inaccurate in relation to the 0.1 hectare, and that inaccuracy would be put right by Register rectification. No retroactivity would be involved. No rights would change in the past. That result would be acceptable, because there is no retroactivity. There is an asymmetry between the under-conveyance and over-conveyance cases, as this analysis shows. Common law principles may make an over-conveyance void *ex tunc* in respect of the excess, but the failure of an under-conveyance to transfer the missing bit cannot itself be a nullity in the sense that there *is* a transfer.

[37] See draft Bill, s 33(1) and (2), and s 53(3).

[38] We have considered whether s 41(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970 should be disapplied in the same way, but have come to the conclusion that it should be left as it is, at least until the whole of s 41 can be reviewed.

[39] And also in the light of changes in the law. For example, the Contract (Scotland) Act 1997 removed difficulties about requiring a person who has conveyed too little to perform the contractual obligation in full by conveying the remaining land, while the revival of the law of unjustified enrichment has reminded Scots lawyers that a person to whom too much is conveyed is under an obligation to return the excess.

we do not envisage that the practical consequences of these reforms would differ to any significant extent from the current position.

29.33 We now can gather these adjustments into the form of a recommendation. We recommend:-

122. (a) When a deed has been registered in the Land Register, its rectification under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 should not make the Register inaccurate.

(b) Hence when the Register is changed to give effect to the document rectification order, the change should be by way of registration, not rectification. Section 8(4) of the 1985 Act should be made subject to this provision.

(c) The consequences of the registration of a document rectification order should not precede that registration. Accordingly the real effect of the registration should take place at the time of registration.

(d) Where a deed to be rectified is a deed registered in the Land Register, section 9 of the 1985 Act should not apply. Section 8(3) is sufficient protection to third parties, though it should be amended to make clear that no such deed can be rectified unless all parties having an interest in it have been called.

(e) Section 8 of the 1985 Act should provide that a rectification of a document registered in the Land Register is not to be ordered if the person in whose favour it was registered was in good faith, unless that person consents to the rectification.

(f) Section 46(2) of the Conveyancing (Scotland) Act 1924 should be disapplied to cases involving the rectification of deeds that have been registered in the Land Register.

(Draft Bill, s 33, s 53(3) and s 97, sch 8, para 12)

Keeper's warranty

29.34 Section 12(3)(p) of the 1979 Act provides that "there shall be no entitlement to indemnity under this section in respect of loss where the loss arises from a rectification of the register consequential on the making of an order under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985." The policy expressed in this provision seems sound. Our approach to the Keeper's warranty is that it should be a guarantee that the title has been acquired, but not a guarantee against future events.[40] No specific provision is included in the draft Bill on the lines of section 12(3)(p) of the 1979 Act because we think none is necessary. That is because a rectification under the 1985 Act would enter the

[40] See further Part 22.

Register through the doorway headed "registration", not through the doorway headed "rectification".

Part 30 Interaction with other registers

INTRODUCTION: PROPERTY REGISTERS AND PERSONAL REGISTERS

30.1 The Land Register and the Register of Sasines are commonly called the "property registers". They can be contrasted with another group of public registers where registration is primarily by person and not by property. When conveyancers use the term "personal register" they mean the Register of Inhibitions.[1] But there are other personal registers which, like the Register of Inhibitions, are potentially relevant to sales[2] of heritable property, most notably the Companies Register,[3] the Register of Insolvencies and the new Register of Floating Charges.[4]

30.2 Traditionally there was little in the way of overlap between the property and the personal registers. Each register had its own function, and each required to be consulted, as appropriate, in order to discover the information which it was its responsibility to record. In particular there was absent from the property register – the Register of Sasines – information as to inhibitions, insolvency, liquidation, floating charges or other matters to which publicity was given in the personal registers. To a limited extent the position has now changed. Like the Register of Sasines, the Land Register says nothing of matters which can be found in the Companies Register[5] or the Register of Insolvencies. But by section 6(1)(c) of the 1979 Act, the Keeper is bound to :

> "… make up and maintain a title sheet of an interest in land in the register by entering therein ... any subsisting entry in the Register of Inhibitions adverse to the interest".

REGISTER OF INHIBITIONS

Scope of section 6(1)(c)

30.3 The Bankruptcy and Diligence etc (Scotland) Act 2007[6] inserted a proviso into section 6, saying:

> "The Keeper shall enter an inhibition registered in the Register of Inhibitions in the title sheet only when completing registration of an interest in land where the interest has been transferred or created in breach of the inhibition.".

30.4 This proviso, which follows our recommendation in another project,[7] clarifies the law as far as inhibition is concerned. But the law remains unclear in relation to other entries in

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[1] Previously called the Register of Inhibitions and Adjudications. The name is changed by the Bankruptcy and Diligence etc (Scotland) Act 2007, s 80, though at the time of writing that section is not yet in force.
[2] And other transactions, such as leases and security rights.
[3] The Companies Acts do not use this term: the register unfortunately exists without any name.
[4] Part 2 of the Bankruptcy and Diligence etc (Scotland) Act 2007. At the time of writing Part 2 had not yet been brought into force.
[5] Except that floating charges can be noted as overriding interests: 1979 Act, s 28(1)(f). In practice this seldom happens.
[6] Section 167.
[7] Scottish Law Commission, Report on *Diligence* (Scot Law Com No 183, 2001), paras 6.133 and 6.134 (proposal 96).

the Register of Inhibitions. At the time that DP 130 was published, this proviso was in the Bill that became the 2007 Act. In that discussion paper we analysed the law in considerable detail,[8] and proposed that the same approach should be adopted for all entries in the Register of Inhibitions, and respondents agreed.[9] Accordingly we recommend:

123. The proviso to section 6 of the 1979 Act (which requires the Keeper to enter on the Land Register an inhibition only where it impairs the validity of a deed which is being registered) should be extended to other entries in the Register of Inhibitions.

(Draft Bill, s 6(1) and (5)(c))

30.5 Occasionally an entry in the Register of Inhibitions can be overlooked by the Keeper at the time of registration, so that the requirement is not complied with. The result then depends on whether the acquirer knew of the inhibition. If the acquirer did not know – if, in other words, the search in the Register of Inhibitions yielded nothing – then the acquirer is protected by section 159 of the Bankruptcy and Diligence etc (Scotland) Act 2007, which says that "an inhibition ceases to have effect (and is treated as never having had effect) in relation to property if a person acquires the property … in good faith and for adequate consideration." Even if accidental, therefore, the Keeper's *subsequent* omission of the inhibition will be fully justified. If, however, the acquirer knew or should have known of the inhibition, it continues to subsist, and its omission from the Register is an inaccuracy which can be rectified.[10] But unless rectification takes place before the property is sold on, a subsequent acquirer (who will search only against the seller and so will not find the inhibition) is protected by section 159 and the inhibition is extinguished. As section 159 is a rule of the general law and not a special rule of registration of title,[11] no compensation is payable to the inhibitor, unless the Keeper's failure to note the inhibition was a culpable one, in which case there might be liability under general law. We have no proposal to change the position.

OTHER PERSONAL REGISTERS

Introduction

30.6 The Register of Inhibitions is not the only personal register of interest to conveyancers. If land is being acquired from a company it is necessary to consult the Companies Register and, perhaps, the Register of Insolvencies as well.[12] To these will shortly be added the Register of Floating Charges.[13] If the company is registered in England and Wales, the search must be conducted in Cardiff and not in Edinburgh, while for overseas bodies corporate a search will be needed in a register in the jurisdiction in question. What might such searches disclose? The Companies Register gives details of liquidation,[14] striking off,[15] receivership,[16] administration,[17] and company voluntary

[8] DP 130, Part 8.
[9] DP 130, para 8.20 (proposal 20). Our recommendation omits the second part of the proposal, not because we disagree with it but because we think that it is not necessary for the legislation to spell this out.
[10] Under our scheme rectification is available without restriction; but even under the current law rectification may be available by virtue of s 9(3)(a)(iii).
[11] It applies for example to Sasine transactions.
[12] George L Gretton and Kenneth G C Reid, *Conveyancing* (3rd edn, 2004), para 25-06.
[13] Bankruptcy and Diligence etc (Scotland) Act 2007, Part 2.
[14] Insolvency Act 1986, ss 84(3) and 130(1); Insolvency (Scotland) Rules 1986 (SI 1986/1915), rule 4.2(1).

arrangement.[18] Information as to liquidation is also available from the Register of Insolvencies. An overseas register might be expected to give information about insolvency.

Acquirer's duty to search

30.7 At present, conducting searches in these other registers is a matter for the acquirer. There is no equivalent of section 6(1)(c), and the Keeper does not search the registers in question, far less add matching entries in the Land Register. Rather reliance is placed on the applicant. The current application forms have specific questions:[19]

> "Where any party to the dealing is a company registered under the Companies Acts
>
> Has a receiver or liquidator been appointed?
>
> If YES, please give details.
>
> If NO, has any resolution been passed or court order made for the winding up of the company or petition presented for its liquidation?
>
> If YES, please give details."

30.8 An affirmative answer is likely to produce an exclusion of indemnity. A negative answer, if false, amounts to carelessness or even fraud, so that the Register can be rectified against the applicant without restriction and without payment of indemnity.[20] The position is generally satisfactory, though in Part 12 we suggest that the questions in the application forms do not work well and should probably be scrapped, for the duty of care does essentially the same job and on the whole does it better. An applicant who knew that a party to the dealing was in liquidation – whether that party was incorporated under the laws of Scotland or under the laws of Austria, Brazil, China, Denmark, England, France or anywhere else – would either disclose that fact or run the risk of being held in breach of the duty of care to the Keeper.

Third parties

30.9 The position is less satisfactory, at least from the Keeper's point of view, where the property is transferred before rectification can occur. The new acquirer is unlikely to know about an insolvency process which affected, not the immediate author in title, but the body corporate from whom the immediate author in title acquired. The name of that body corporate will not appear on the title sheet. Quite properly the acquirer will be given an unassailable title. But the Keeper may then be obliged to indemnify the liquidator (or other official).

30.10 In so far as there is a problem, solutions, or at least partial solutions, could be found. One would be possibly to scrap the curtain principle and thus expect every acquirer to check earlier states of the title sheet so as to uncover parties to be searched against. A variant

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[15] Companies Act 2006, s 1000.
[16] Insolvency Act 1986, ss 53(1) and 54(3).
[17] Insolvency (Scotland) Rules 1986 (SI 1985/1915), rule 2.2. Administration is also registered in the Register of Inhibitions and Adjudications.
[18] Insolvency (Scotland) Rules 1986 (SI 1985/1815), rule 1.17(5).
[19] Form 2 Q 2. Similar questions can be found in forms 1 and 3.
[20] 1979 Act, ss 9(3)(a)(iii) and 12(3)(n).

would be for the Keeper to supply an acquirer with a list of previous owners. Another variant would be to impose on the Keeper a duty on the lines of the duty under section 6(1)(c) of the 1979 Act in relation to the Register of Inhibitions. But such solutions would be unsatisfactory. They would impose significant costs and would not survive a cost/benefit analysis. In DP 130 we concluded that the law should be left as it is, and that the Keeper should continue to bear the risk of undisclosed insolvency affecting a previous corporate owner.[21] Those who responded agreed.

30.11 Further reflection has confirmed us in this conclusion. If the Keeper has to indemnify the liquidator (or other official), the sum so paid would presumptively be recoverable from the solicitor who acted in the purchase from the company, who should have checked the company's status, and thus presumably failed in the duty of care owed to the Keeper. Moreover, cases where a transaction is purportedly entered into by a company, but it is invalid because of the opening of an insolvency process, are comparable to the routine cases where a company that is *not* subject to an insolvency process transacts, or purports to transact, but the wrong persons have acted in the name of the company: for example, a disposition by XYZ Ltd is signed by two persons who have no power to sign for that company. Such cases involve the Keeper in a risk as well. The analysis is the same: assuming that the buyer from XYZ Ltd should have taken reasonable steps to check that the right persons signed for the selling company, then failure to do so would amount to breach of the duty of care and so if the Keeper does have to pay compensation the sum in question is presumptively recoverable from the negligent buyer or the negligent buyer's solicitors.

Floating charges

30.12 In DP 130 we put this case.[22] Suppose that A Ltd, having granted a floating charge over its whole property and undertaking to X Bank, dispones certain land to B Ltd, and further suppose that, before the disposition is delivered, the floating charge attaches (crystallises) and becomes a fixed security.[23] The disposition to B Ltd is invalid because, following receivership or liquidation, the directors of A Ltd would have been unable to act for the company by granting a disposition. B Ltd then dispones to C Ltd which is registered as owner. Assuming good faith etc, C Ltd would have an unchallengeable title *as owner*, both under current law and under the new scheme. But under current law a floating charge is an overriding interest and presumably therefore continues to affect the land.[24] It does not appear that there is anything in the 1979 Act to protect C. We proposed that C, if in good faith, should be protected.[25] Respondents generally agreed. The draft Bill protects the acquirer from prior unknown floating charges. Accordingly we recommend:

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[21] DP 130, para 8.28.
[22] DP 130, para 8.29.
[23] If the floating charge crystallises *after* delivery it does not attach the land: *Sharp v Thomson* 1997 SC (HL) 66.
[24] Part (but only part) of the underlying problem is that under current law a floating charge can attach without any way of third parties finding out except later. Accordingly we recommended that a floating charge should not attach until notice to that effect is registered in the Register of Floating Charges: see Scottish Law Commission, Report on *Sharp v Thomson* (Scot Law Com No 208, 2007). This has so far not been implemented.
[25] DP 130, para 8.30 (proposal 21).

124. A registered disponee acting in good faith should take free of any floating charge granted by a predecessor in title of the disponer, being a charge that has attached.

(Draft Bill, s 47)

Part 31 Litigation about land titles: the position of the Keeper

Introduction

31.1 This part of the Report is about the Keeper's role in litigation about land titles. To a large extent what is said here is merely consequential upon changes that we recommend elsewhere, in relation to inaccuracies and their rectification. But the issue's practical importance is such that it merits separate discussion.

The Keeper as litigant: the influence of the Midas touch

31.2 Under the 1979 Act system, titles to land are, in a sense, in the Keeper's gift. If the Keeper declines an application for registration, the rejected deed has no effect on title. If the Keeper accepts an application for registration, then there is an effect on title, even if the application should not have been accepted because it was based on a void deed.[1] Thus if an identity thief forges the owner's signature on a disposition, the disponee, on registration, acquires ownership, and does so even if in bad faith. Of course, wrongful registrations are sometimes[2] capable of being undone by rectification, and rectification, like registration, is a means of changing titles to land.[3] But here again the power lies in the Keeper's hands. The rights of the parties hang, like puppets, from threads held by the Keeper. If the Keeper denies a right, the right is denied, and if the Keeper confers a right, the right is conferred. The Keeper giveth and the Keeper taketh away. Title flows from the Register, and the Register is written by the Keeper. Of course, the Keeper must act in accordance with the law, and is always subject to review by the courts. But what has been said is nevertheless the position.

31.3 Hence it is hardly surprising that parties dissatisfied with the state of the Register should tend to direct their fire *at the Keeper*. Suppose that Elfrieda and Wilbur are neighbours and are in dispute about a boundary area. At present the area is in Wilbur's title sheet. That means that regardless of whether the area should be his or not, it *is* his, and so it is *not* Elfrieda's.[4] The only way that Elfrieda would be able to acquire ownership of it is if the Keeper were to delete it from Wilbur's title sheet and add it to Elfrieda's. The obvious course of action for Elfrieda is therefore to seek to persuade the Keeper to make those two matching changes to the Register, and, if the changes are not made, to sue the Keeper. Under the 1979 Act, therefore, the Keeper is what may be called *the natural defender* in

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[1] This is what we called the Keeper's Midas touch. See Part 13.
[2] Not always. See s 9 of the 1979 Act. The issues are discussed in Parts 17 and 18.
[3] In the case of bijural inaccuracies. See DP 128, para 6.8. Whether the Keeper's Midas touch extends to rectification as well as to registration is uncertain. The issue would come into focus if the Keeper were to make a wrong rectification. In practice the working assumption is that the Midas touch does so extend. See further para 17.21 above.
[4] In some cases the Keeper includes the disputed area in *both* title sheets. The consequences are obscure, but probably title rests on the most recent entry. That can result in title shuttlecock, for if the most recent entry was in Elfrieda's title sheet, and Wilbur then sells, the result will be that Wilbur's title sheet has the most recent entry. For discussion of this "title shuttlecock" see Part 13. In the new scheme overlap registration is not allowed.

disputes about land titles.[5] Whilst Elfrieda will also convene Wilbur, the practice is to name the Keeper as a defender and typically as first defender since the primary conclusions are directed against the Keeper: the pursuer requests the court to order the Keeper to rectify the Register. Indeed, it is not clear that it is strictly necessary, under current law, for Wilbur to be convened at all.

31.4 If the Keeper has declined Elfrieda's request to rectify, she can, instead of raising an action in the ordinary courts, with the Keeper as defender, appeal to the Lands Tribunal against the Keeper's refusal to rectify.[6] The same remarks apply. The Keeper is the respondent and whilst the practice is to call Wilbur, it is the Keeper who is procedurally at the centre of matters, and indeed even if Wilbur is called he may not take part in the proceedings. (In the same way, if the matter is handled by action in the ordinary courts Wilbur may choose not to enter appearance.) As an example, take *Sexton and Allan v Keeper of the Registers*.[7] This was part of a dispute that had been going on for more than 30 years about the ownership of two properties in Coatbridge. The Keeper eventually registered X and Y as co-owners of both properties. The two rival claimants then sought rectification. When the Keeper declined to rectify, they appealed to the Lands Tribunal. X and Y did not participate to defend their rights. The result is that a dispute between two people, or rather sets of people, about the ownership of certain properties, is handled procedurally *not* as a dispute between the two sets of rival claimants, but as a dispute between one set of claimants and the Keeper. That this is an unsatisfactory state of affairs seems to us self-evident. It is a topsy-turvy way to do justice. And the costs to the Keeper in staff resource required and litigation expenses are substantial.

31.5 Section 9(1) of the 1979 Act says, moreover, that "the Keeper may, whether on being so requested or not, and shall, *on being so ordered by the court or the Lands Tribunal for Scotland*, rectify any inaccuracy in the register…" Not many statutes say that a public official has to obey the orders of the court, this being regarded as simply self-evident. Whatever the reasons for the inclusion of the italicised words, they have in practice re-inforced other aspects of the legislation in encouraging those disappointed with what the Register says to sue the Keeper.

Taking the Keeper out of the line of fire: the new scheme

31.6 In the new scheme the Keeper's decisions will naturally continue to be subject to the jurisdiction of the courts of Scotland (and also subject to the Lands Tribunal). But disputes about land titles are almost invariably disputes between two parties – commonly neighbours – and we think that if such disputes have to be resolved by litigation, the proper parties to the litigation are the parties to the dispute. The Keeper's role should simply be to give effect to whatever decisions the courts arrive at. The Keeper has, under the draft Bill, a duty to rectify any inaccuracy that comes to light.[8] Take for example the dispute between Elfrieda and Wilbur over a boundary area. In the new scheme it would be pointless for Elfrieda to convene the Keeper as first defender, or as a defender at all. Her course is to raise an action against Wilbur with whatever conclusions may be appropriate, such as declarator and

[5] Having said that, it occasionally happens that a summons is signetted that contains conclusions directed against the Keeper but without calling the Keeper as defender. This seems to us inept.
[6] 1979 Act, s 25(1).
[7] 17 August 2006, Lands Tribunal, unreported. See Kenneth G C Reid & George L Gretton, *Conveyancing 2006* (2007), p 39.
[8] Draft Bill, s 54(1).

reduction, very much as for disputes about titles in the Register of Sasines.[9] We give some examples.

31.7 (i) Charles is registered as owner of property following a gratuitous disposition from Beth. A guardian is then appointed to Beth and the guardian raises an action to reduce the disposition on the ground that Beth was incapax at the time she signed. Charles denies that Beth was incapax. There is no need for the Keeper to be a party to the action. If the action succeeds, the result will be that the court has determined that the disposition was void, for a deed granted by someone without capacity is void. That being so, ownership never passed to Charles. (Under the 1979 Act, it would pass. But in our scheme the Midas touch would disappear and the ordinary rules of property law would apply.[10]) Hence the decree would mean that the Register was inaccurate in showing Charles as owner. The Keeper would therefore now be bound to rectify the Register, by deleting Charles' name and re-instating Beth's. That alteration of the Register would not divest Charles and would not re-invest Beth: it would merely bring the Register into line with the never-changed rights of the parties. The summons would be in much the same style as if the disposition had been recorded in the Register of Sasines.

31.8 Before going further, one or two procedural notes. In the first place, the decree obtained by the guardian could contain a declaratory finding that the Register was inaccurate. That, though advisable, would not be necessary. If it is apparent from the decree that the disposition was not merely voidable but void, then it follows that the Register was inaccurate from the outset. In the second place, the decree does not need to contain an order for rectification: any such order would be pointless.[11] In the third place, what if the decree is merely a decree in absence? That would equally be a good basis for rectification.[12]

31.9 (ii) The same as above, but the summons does convene the Keeper as defender and does contain conclusions directed against the Keeper requiring rectification of the Register. Even if the action succeeds, there would be likely to be an award of expenses against the pursuer in favour of the Keeper, the reason being that the pursuer has sued the Keeper without any reason.[13] Why? Because the Keeper's obligation to rectify an inaccuracy is engaged only if the high evidential standard of "manifest" inaccuracy exists. In other words, the Keeper is not to rectify the Register if it appears merely more likely than not that some entry is inaccurate. That means that in any *genuine* dispute about land titles, the Keeper is *not* to rectify the Register. The duty to rectify is not engaged until the fact of inaccuracy has been clearly established, typically by decree, or by the agreement of the parties involved. So at the time when the guardian raises the action, the Keeper's conduct in refusing rectification was correct - the conduct required by law. The Keeper's job is to await the outcome of the litigation,[14] and then, if the pursuer succeeds, to rectify. If the pursuer brings the Keeper in as defender before the *substantive* issue has been determined by

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[9] In disputes about titles in the Register of Sasines the Keeper is not a party. Indeed, in the past hundred years there has only been one reported case in which the Keeper has been convened as a defender in respect of Sasine recording: *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854. The contrast with the Land Register is striking.

[10] See Part 13.

[11] Though it would not be incompetent for there to be such a conclusion, it would necessitate calling the Keeper as defender, which would be likely to result in an award of expenses against the pursuer. See below.

[12] See para 18.19 above.

[13] Awards of expenses are a matter for judicial discretion, but an award is normally made where a party has been convened without good reason.

[14] Or the agreement of the parties, if that happens.

decree, the pursuer has jumped the gun, and like other pursuers who convene unnecessary defenders can expect to be found liable in expenses. This is true whether or not the action is defended by Charles. If the action is undefended by Charles, decree will pass against him, but the Keeper can be expected to have entered appearance and will seek expenses against the pursuer.

31.10 Whether Charles enters appearance or not, the Keeper's pleadings will typically be "not known and not admitted" in relation to the articles of condescendence that deal with the substantive dispute. As far as the conclusion for rectification directed against the Keeper is concerned, the plea will be that the pursuer's case is irrelevant, in that unless and until the alleged inaccuracy has been established to the required "manifest" standard, the Keeper is bound not to rectify the Register. Of course, if the pursuer succeeds in the substantive case, the Keeper will at that point come under an obligation to rectify (and could have no objection to doing so), but the pleadings are to be directed to the situation as at the raising of the action.

31.11 (iii) The previous examples involved a void deed. The next involves a voidable one. The facts are the same, but the guardian's case is not that Beth was wholly incapax, but that Charles obtained the deed from her by facility and circumvention. This, if true, means that the disposition is voidable, and the action of reduction has as its aim the avoidance of the deed. Suppose that the guardian is successful and the disposition is reduced. No question of the accuracy of the Register arises. In our scheme, decrees of reduction of voidable deeds enter the Register not by rectification but by registration.[15] The procedure is for the pursuer to extract the decree and submit it, together with a registration application form, to the Keeper. The Keeper will accept the application, delete Charles' name and replace it with Beth's. The action of the Keeper is, in its externals, the same as in the previous examples, but this is a registration not a rectification. Once again there is no point in convening the Keeper as a defender in the action. The summons should be in much the same style as if the disposition had been recorded in the Register of Sasines.

31.12 (iv) The same as (iii) but the pursuer does convene the Keeper as a defender. The pursuer has a conclusion for rectification of the Register. That conclusion is irrelevant, or perhaps incompetent, because in the new scheme the reduction of a voidable deed cannot be given effect to by rectification, but only by registration. As in example (ii) above, the Keeper will enter appearance and can expect to be awarded expenses against the pursuer regardless of the outcome of the case on the merits.

31.13 (v) The guardian raises an action of reduction on the grounds of incapacity, with an *esto* case that if Beth was not incapax, the deed should be reduced on the grounds of facility and circumvention. Here again the Keeper should not be convened, and if convened should seek dismissal of the action – in so far as directed against the Keeper - plus expenses against the pursuer.

31.14 (vi) Dan and Dick are neighbouring owners. Dick applies for voluntary first registration and is duly registered. Dan, who still holds on a Sasine title, claims that Dick has been registered as owner of too much, ie that a boundary area included in Dick's title sheet belongs to Dan. In the absence of an amicable settlement, Dan should raise an action of

[15] Decrees of reduction of void deeds enter the Register by rectification, as in the first two examples.

declarator that he is the owner of the disputed area. If he succeeds, the Keeper will rectify the Register.[16] There is no reason for the Keeper to be called as defender.

31.15 (vii) Goldie applies for registration of a disposition. The area disponed overlaps slightly with a neighbouring property. Goldie's position is that the Register is inaccurate in so far as it includes the overlap area in the neighbour's title sheet. The Keeper accepts Goldie's application except for the overlap area, in respect of which it is rejected. She appeals to the Lands Tribunal. How should the Tribunal deal with her appeal? Her application in relation to the overlap area should be accepted by the Keeper only if the neighbour's title sheet is inaccurate, and would involve rectification of the Register by the removal of the area from the neighbour's title sheet. The Keeper cannot do that unless the inaccuracy is established to the "manifest" standard. Unless the neighbour agrees that her title sheet is inaccurate, it is highly unlikely that the "manifest" standard could be attained without a decree against the neighbour. Accordingly if Goldie appeals to the Lands Tribunal against the Keeper's decision, her appeal will almost certainly fail. That would be true even if the Tribunal tended to agree with her about the title. For the question before the Tribunal would not be "who would succeed if there were to be litigation with the neighbour about the disputed area?" but "did the Keeper correctly apply the rules about the accept/reject decision?"

31.16 We make no specific recommendations at this point because in this section we have merely been exploring the implications, in relation to civil proceedings, of recommendations made elsewhere in this Report.

Intervention by the Keeper

31.17 Whilst in the ordinary case there is no reason for the Keeper to be involved in property litigations in which one party asserts that the Register is inaccurate, we consider that there should be an option to intervene. A precedent can be found in the Trade Marks Act 1994, which provides that "in proceedings before the court involving an application for (a) the revocation of the registration of a trade mark, (b) a declaration of the invalidity of the registration of a trade mark, or (c) the rectification of the register, the registrar is entitled to appear and be heard…"[17] Our provision is shorter than the provision in the Trade Marks Act, because we envisage that details would be regulated by court rules.[18] The only specific rule that we recommend is that the Rules of Court should require intimation to the Keeper, for without intimation the Keeper may be unaware of relevant actions. Accordingly we recommend:

> **125. The Keeper should have the right to appear and be heard in any action in which the accuracy of the Register is in dispute. The appropriate procedure (which should include provisions for intimation to the Keeper) should be determined by rules of court.**
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> (Draft Bill, s 57)

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[16] This could be done by (a) deleting the disputed area from Dick's title sheet, and nothing more or (b) deleting it and at the same time constituting it as a new title sheet with Dan named as the owner in the B Section or (c) registering the whole of Dan's property including the disputed area. In our new scheme the Keeper can register unregistered property without the need for the owner's consent.

[17] Section 74.

[18] Cf Rules of Court 13.12, providing for intimation to heritable creditors.

31.18 Though the Keeper should have this power, we would not expect it to be exercised in ordinary cases.

Implications for the Keeper's purse

31.19 Taking the Keeper out of the line of fire should result in savings in legal expenses. There might be the opposite concern. When the Register is rectified, the Keeper will usually have to pay compensation to someone. That is so under the current legislation[19] and will also be the position in the proposed new legislation.[20] Take this case. Horatio sues Jemima alleging that her title to a registered area is void and he is successful. Either the decree states that the Register is inaccurate, or the inaccuracy of the Register is a necessary implication from the terms of the decree. The Keeper must now rectify the Register. If Jemima must now be compensated, does that not open the door to the danger that actions will not be properly defended? So should not the Keeper be a party to such actions to protect his/her own interests?

31.20 In our view there is, at least in the typical case, no such danger. The draft Bill provides that the Keeper is not liable for losses caused by the claimant's failure to act in a reasonable manner.[21]

Actions against the Keeper: still possible?

31.21 The draft Bill does not say that actions against the Keeper to require rectification of the Register are incompetent. What it implies is that in most cases they are likely to be irrelevant. They will be relevant only in such cases where the pursuer can aver that the Keeper is in breach of the duty to rectify a manifest inaccuracy. We think that the Keeper will seldom be in breach of that obligation.

[19] 1979 Act, s 12(1)(a).
[20] Draft Bill, s 39.
[21] Draft Bill, s 40(d).

Part 32 Litigation about land titles: caveats

Introduction

32.1 This part is about how information about certain types of pending court action should be integrated into the land registration system. We say "pending" because if a decree has been granted, the question of how that decree is to be dealt with in the Register is considered elsewhere.[1] We begin by outlining the various mechanisms that exist in current law.

Notice of summons of reduction: section 159 of the 1868 Act

32.2 If an action of reduction is raised, the pursuer can register in the Register of Inhibitions a notice of summons of reduction.[2] The reason for this facility is to protect the pursuer against the possibility that the defender might, before decree can be obtained by the pursuer, grant a deed to a third party. The effect of the notice is that the fact of the depending action of reduction will be known to any such third party in advance, for the simple reason that the Register of Inhibitions is a public register, and is in practice always searched in the course of a conveyancing transaction. For example, if X concludes missives to sell to Y, the latter, before paying the price, will search against X's name in the Register of Inhibitions. Such a search will show up a variety of potential show-stoppers such as inhibitions (from which the register takes its name) and sequestrations.

32.3 Though section 159 of the 1868 Act applies to all actions of reduction, including actions of reduction *ex capite inhibitionis*, in practice it is hardly relevant to the latter, because the inhibition itself will have brought about litigiosity.[3]

32.4 Actions of reduction can be in respect of a void deed or of a voidable deed. In the former case the decree is merely declaratory of a state of affairs that already existed before the decree: the deed reduced was void *ab initio*, ie it was void even before reduction. In the latter case it is valid until reduced. If a deed is void, a notice of summons of reduction is strictly speaking unnecessary, for if the defender's title is void, the defender is incapable of granting any right to a third party. It is where the deed being attacked is voidable rather than void that the notice of summons of reduction comes into its own. For example, Ross holds

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[1] If the decree is for the reduction of a voidable transaction, we recommend that it be given effect by registration. If it is for the reduction of a void transaction it is given effect by rectification: see Part 28. If it is for the rectification of a document under s 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 it is given effect to by registration: see Part 29. If the decree is a declarator that the Register is inaccurate that would be given effect to by rectification.

[2] Titles to Land Consolidation (Scotland) Act 1868, s 159 read with Conveyancing (Scotland) Act 1924, s 44(2)(a).

[3] Litigiosity means the voidability of a transaction on the ground that it would tend to prejudice the claims of a pursuer in a pending litigation. Sections 155 and 159 of the Titles to Land Consolidation (Scotland) Act 1868 established the rule that for heritable property registration in the Register of Inhibitions was required to create litigiosity. (The common law rule that litigiosity for heritable property could arise without public registration had been strongly criticised: see eg J G Bell, *Commentaries on the Law of Scotland* (7th edn, ed J McLaren, 1870) ii, p 144.) The interaction of the law of litigiosity with the *general* law about voidable titles has, we think, never been fully explored and some tensions may exist.

on a voidable title[4] and transfers to Kirsty. She acquires title (because Ross had title, albeit voidably) and the question is whether her title is voidable or not. If, as is usually the case, Kirsty has taken for value and in good faith, her title is not voidable. But if she has taken in bad faith or gratuitously, the title is voidable. The effect of the registration of a notice of summons of reduction is that she cannot plead ignorance of the fact of the depending action of reduction, and so cannot plead good faith.

32.5 The description just given represents the law as it applies to titles in the Register of Sasines. For Land Register titles the position is more complicated because reductions work differently in that Register. We discuss the topic of reductions and the Land Register elsewhere,[5] but in brief under current law titles in the Land Register are almost never void, because of the Keeper's Midas touch.[6] Moreover, the rules in section 9 of the 1979 Act forbid the rectification of the Register in many circumstances, with the result that an action of reduction, even if successful, may not lead to any change in the title. If our recommendations were to be implemented, reductions in relation to Land Register titles would work rather more closely to the way they work in relation to titles in the Register of Sasines.

Notice of summons of reduction: section 159A of the 1868 Act

32.6 As well as section 159 of the 1868 Act there is section 159A, inserted by the Bankruptcy and Diligence etc (Scotland) Act 2007.[7] This is also about the registration of notices of summons of reduction, and in some respects it overlaps with section 159, while in other respects it does not. Like section 159 it is about registration of notices of summons of reduction. Whereas section 159 applies to all actions of reduction, section 159A applies only to summons *ex capite inhibitionis*. In respect of such actions both sections appear to be applicable. Whereas section 159 is permissive,[8] section 159A is mandatory.[9] Whereas section 159 provides only for registration in the Register of Inhibitions, section 159A requires double registration, once in the Register of Inhibitions and once in the Land Register.[10] And whereas section 159 specifies the effect of non-registration, namely that the property is not subject to litigiosity, section 159A does not specify the effect of non-registration.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1985

32.7 An applicant for an order under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985[11] may register a notice of litigiosity in the Register of Inhibitions.[12] The law is probably that the existence of such a notice has also to be noted on the title sheet.[13]

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[4] A voidable *deed* makes the resulting *title* voidable, but a title can also be voidable even if the immediate underlying deed is not voidable: this can sometimes happen, as the text explains, where the title of the granter of that deed was itself voidable.
[5] See Part 28.
[6] See Part 13.
[7] Section 162. Many of the provisions of the 2007 Act had their origins in our Report on *Diligence* (Scot Law Com No 183, 2001) but this is not one of them.
[8] "It shall be competent…"
[9] "The pursuer shall…"
[10] Or Register of Sasines if the property is still in that register.
[11] We discuss this provision in Part 29.
[12] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 8(7).
[13] 1979 Act, s 6(1)(c).

Land Registration (Scotland) Act 1979 section 6(1)(c)

32.8 Section 6(1)(c) of the 1979 Act requires the Keeper to note on the relevant title sheet any adverse entry in the Register of Inhibitions. The meaning of this provision is not wholly clear,[14] but it may require the noting of entries that are made in the Register of Inhibitions under (i) sections 159 and 159A of the 1868 Act, and (ii) under section 8 of the 1985 Act.

The Land Registration Rules 2006, Rule 17(2)

32.9 The Rules provide:[15]

> "Where it appears to the Keeper that proceedings in the court or the Lands Tribunal for Scotland may result in an order for rectification of the register under section 9(1) of the Act, the Keeper shall note the existence of such proceedings on the title sheet of the interest in land to which the proceedings relate."

32.10 The legal effect of such a note is not stated. Section 44(2)(a) of the Conveyancing (Scotland) Act 1924 provides that a title cannot acquire the status of litigiosity unless there has been registration of a notice in the Register of Inhibitions, so at least the negative fact is clear that a rule 17(2) note does not produce litigiosity. With some hesitation our conclusion is that a rule 17(2) note probably has no legal effect, for although it would alert third parties (eg a potential buyer), bad faith as such has no adverse consequences in the 1979 Act scheme, and indeed it has been held that acquirers can rely on the rights appearing on a title sheet even where they know or suspect them to be inaccurate.[16] Possibly a rule 17(2) note might be relevant for notices under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, but such notices are to be noted on the title sheet under section 6(1)(c) of the 1979 Act. There is no indication of how rule 17(2) interacts with section 6(1)(c) of the 1979 Act.

Evaluation of the current law

32.11 Three criticisms might be made of the current law. In the first place, notices end up in two registers rather than one. It would be simpler and cheaper if only one register were to be involved. Since the types of action in question are property-specific, the obvious choice is the Land Register.[17]

32.12 The second criticism is that the current law enables notices to be registered concerning certain types of action (reductions and rectifications) but not others, notably declarators. For example, if Serafina raises an action of declarator that a certain area belongs to her and not to her neighbour Tobias, to whose title sheet the disputed area is at present allocated, she cannot register a section 159 notice. The fact of the pending action may appear on Tobias's title sheet through a rule 17(2) notice.

32.13 The third criticism is that the current law allows such notices to appear without judicial authority and so without the need to establish a *prima facie* case. There might be ECHR issues here. In *Karl Construction v Palisade Properties*[18] it was held that the ECHR

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[14] For discussion, see DP 130, Part 8, and also Part 30 of this Report.
[15] 2006 Rules, rule 17(2). Rule 20(2) made similar provision in the 1980 Rules.
[16] *Dougbar Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513.
[17] The Register of Inhibitions works well for non-specific cases, such as sequestration or inhibition.
[18] 2002 SC 270.

could be infringed by diligence on the dependence. The existence of a warning notice on a title makes it much harder for the owner to deal with that property. The effect is not legally the same as that of an inhibition on the dependence, but it is in substance comparable. An action of reduction, or an action for rectification under the 1985 Act, could be raised without any real merit and the consequences for the defender of a warning notice on the title could be very serious. The defender might know that the action was baseless, but third parties would not necessarily know that. A conveyancer, acting in a purchase, who sees that the title sheet has on it a section 159 notice or a section 8(7) notice is likely to advise the buying client: "don't settle", in much the same way as that advice would be given if a search were to disclose an inhibition on the dependence.

32.14 As against the third criticism, it might be replied that a section 159 notice or a section 8(7) notice is merely a way of informing third parties of a simple truth: that a certain action has been raised, and that there can be no objection to the dissemination of factual information.

32.15 On balance we think that the current law is indeed unsatisfactory in all three respects and below we sketch out a reformed system.

Unification

32.16 We think that the current law has too many different ways of notifying third parties. It would be preferable if there were to be a single system.

Name?

32.17 At present only one of the notices we have mentioned has a name of its own: a notice of summons of reduction, also called a notice of litigiosity. We think it would be convenient if all such notices went by a single name, and we propose "caveat". The word has been used in many legal systems for different purposes: in Scots law it is used in civil procedure, such as the caveat against interim interdict.[19] The word is Latin and simply means "let him/her be warned". We do not think that there would be a risk of confusion between the use of the term in land registration and the use of the term in the law of interdict. "Caveat" is used in some other legal systems in a sense broadly comparable to what we recommend.[20]

Which register?

32.18 Such a notice could, in principle, either enter the Register of Inhibitions or the Land Register or both. Traditionally, a notice of summons of reduction entered only the Register of Inhibitions. As mentioned earlier, section 159A of the Titles to Land Consolidation (Scotland) Act 1868 as inserted by section 162 of the Bankruptcy and Diligence etc (Scotland) Act 2007 now provides that it is to enter both. By contrast, pending actions under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 enter only the Register of Inhibitions. Rule 17(2) entries are only in the Land Register, though they may duplicate an entry in the Register of Inhibitions, as may section 6(1)(c) notes. Since the actions we are considering

[19] See further the Rules of the Court of Session, chapter 5, and the Act of Sederunt (Sheriff Court Caveat Rules) 2006 (SSI 2006/198).
[20] For example, see Part 19 of the Land Title Act of British Columbia.

are property-specific, we think that the notice should appear in the Land Register. If that is right, separate entry in the Register of Inhibitions is of doubtful value, and indeed could be criticised as merely increasing expense without good reason.

Warrant

32.19 Warrant to register the caveat would be required. In the wake of *Karl Construction*[21] the Bankruptcy and Diligence (Scotland) Act 2007 set out rules about warrant for diligence on the dependence.[22] The pursuer has to show a *prima facie* case, and has to show a risk of prejudice if the warrant is not granted. There is an overall reasonableness requirement. We think that the approach is one that should be followed for caveats, and the draft Bill so provides.[23] Further details can be supplied by Rules of Court.

Extinction

32.20 Matters relating to the discharge (by the pursuer) or recall (by the court) can, we think, be left for Rules of Court. There is one exception. A caveat would have a blighting effect on a title and so it is important that caveats do not persist after they have become inappropriate. But discharge or recall might take a considerable time. Accordingly we take the view that a caveat should self-destruct after a fixed period, such as a year, but with the possibility of renewal. Thus if litigation proved lengthy, a pursuer could keep a caveat alive by periodic renewal.

Effect?

32.21 As already mentioned, the existence of a caveat would exclude a grantee from playing the good faith card. That effect is produced by the mere fact of the notice's appearance on the title sheet or title sheets in question.[24] Nevertheless the draft Bill expressly states that a grantee takes subject to a caveat, both in relation to title[25] and in relation to the Keeper's warranty.[26] Those provisions do not extend to the common law rule, mentioned above, about the interaction of voidability and good faith. That rule is best left to common law.

Recommendation

32.22 Drawing these considerations together, we recommend:

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[21] 2002 SC 270. See para 32.13 above.
[22] Section 169.
[23] Draft Bill, s 78(1)-(5).
[24] We use the plural because more than one title sheet might be affected.
[25] Draft Bill, s 45(3)(c)(i), s 48(3)(d) and s 50(4)(a)(ii).
[26] Draft Bill, s 41.

126. **(a) Where there is (i) a pending action for the reduction of a registered deed on the ground that it is voidable, or (ii) a pending action with conclusions (or craves) that would result in a judicial determination that the register is inaccurate, or (iii) an action seeking an order that would be registrable under section 8 (as prospectively amended by the draft Bill) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, the court or Lands Tribunal should have the power to grant warrant for a caveat to be placed on the relevant title sheet(s).**

(b) The rule applicable to warrant for diligence on the dependence should be the model for caveats.

(c) Caveats should expire automatically after one year (or such other period as may be prescribed) but without prejudice to the competency of renewal by a further warrant.

(d) Rules of Court should regulate caveats in relation to such matters as recall.

(e) Sections 159 and 159A of the Titles to Land Consolidation (Scotland) Act 1868 would thus become inapplicable to the Land Register.

(f) Both the Keeper's warranty and the operation of the principle of the realignment of rights should be subject to any caveat.

(Draft Bill, s 41, s 45(3)(c)(i), s 48(3)(d), s 50(4)(a)(ii), s 78, and s 97, sch 8, para 8(2) and (3))

32.23 These recommendations apply only to the Land Register. Thus sections 159 and 159A of the Titles to Land Consolidation (Scotland) Act 1868 would continue to apply to titles in the Register of Sasines.

Part 33 The completion objective: Scot/LAND online

Introduction

33.1 The current law says that unregistered property enters the Land Register as and when it is sold.[1] As explained below, there are also certain other routes to registration, but sale is the main one. By this means approaching 60% of all title units[2] are now in the Land Register.[3] Calculated by area, the figure is less impressive, with only approaching 20% of the surface of Scotland being in the new register.[4] The reason for the discrepancy is that first registration in the Land Register happens on sale, and seldom happens except on sale,[5] and smaller properties (typically urban) tend to be sold more often than larger (typically landward) properties. If these figures seem low for a statute passed in 1979, it must be borne in mind that the first county did not become operational until 1981,[6] and that the final counties did not become operational until 2003.[7] As a result the proportion of registered to unregistered properties varies from county to county.[8]

33.2 In the following sections we discuss the current rules for bringing property into the new register, under the three headings of (i) registration triggered by an event, typically sale, (ii) registration at the request of the owner, and (iii) top-down registration. In very broad terms the current law seems to us satisfactory. Our recommendations are limited to matters of detail. They are, however, informed by a belief that the process of change should be accelerated, and that the objective should now be the registration of all land in Scotland and the closure of the Register of Sasines. Land law is perching awkwardly between two stools, called the Register of Sasines and the Land Register. The sooner it can get itself wholly on to the new stool the better.

The current law: triggered registration

33.3 The process of bringing unregistered land into the Land Register is currently governed by section 2 of the 1979 Act. Section 2(1)(a) sets out five circumstances in which an unregistered "interest in land" must be registered. By "must" we mean "must if the grantee wishes to obtain a real right". The five cases are:[9]

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[1] 1979 Act, s 2.
[2] A title unit is anything from a flat in a city to a large rural estate. There are rather more than two million title units.
[3] *Registers of Scotland Corporate Plan 2009-2014* (available online at http://www.ros.gov.uk/pdfs/cp09-14.pdf), p 20.
[4] *Ibid.*
[5] For the details of the current system, see paras 33.3-33.8 below.
[6] Renfrewshire.
[7] Banff, Caithness, Moray, Orkney and Shetland, Ross and Cromarty, Sutherland.
[8] See Appendix D.
[9] Until feudal abolition, subinfeudation was a sixth.

"(i) on a grant of the interest in land in long lease, but only to the extent that the interest has become that of the lessee;[10]

(ii) on a transfer of the interest for valuable consideration;[11]

(iii) on a transfer of the interest in consideration of marriage; [12]

(iv) on a transfer of the interest whereby it is absorbed into a registered interest in land;

(v) on any transfer of the interest where it is held under a long lease[13] or udal tenure."[14]

33.4 These five circumstances are sometimes called the triggers for first registration,[15] though "trigger" is not a statutory term. From a practical point of view, the main trigger is sale. It is worth noting one or two events that are *not* triggers. Perhaps the most important is succession. If James owns a farm and his title is in the Register of Sasines, and he dies and leaves the farm to his daughter Kate, that is not a trigger. She completes title by an entry in the Register of Sasines.[16] The same is equally true if land passes not by legacy but by intestate succession. Properties sometimes stay in the same family for generations, occasionally for many centuries. Had the Land Register been introduced in, say, 1500, some properties would still be unregistered because they have never changed hands except by succession. Another transaction that is not a trigger is a transfer by way of gift. In families that hold the same property over many generations, gifts sometimes appear, for example where land is not handed down to the next heir but is donated to another near relative. Either way the property stays in the family and either way the transfers would not trigger first registration. The same is true of trusts, which are common among landowning families. Title to land may be vested in a family trust, and may remain in that trust indefinitely. If the trust's title is in the Register of Sasines, first registration might, given the scope of the current triggers, be an event that will not take place until the remote future.[17]

33.5 We are here speaking only of triggers for first registration. Once a property is in the new register it stays there and any transactions affecting it are registered in that register. So if James' title had been in the Land Register, his daughter Kate would have completed title in the Land Register, not in the Register of Sasines. Once a property has been registered in the Land Register, the doors of the Register of Sasines are closed for deeds relating to that property.

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[10] So if someone owns land, the title being in the Register of Sasines, and grants a 25-year lease, the lease is registered in the Land Register, but the property itself continues for the time being in the Register of Sasines.

[11] In practice this normally means sale. But it also covers other non-gratuitous transfers, such as swaps of land (technically called excambion).

[12] This rule (for which we are unable to offer any explanation) seems to make its first appearance in the Henry Report, p 25, where no explanation is given. The rule has not been extended to the transfer of an interest in consideration of civil partnership.

[13] What is registered here is not the land (though that may already have been registered) but the lease. In this case, and also in the case of udal ownership, it is irrelevant whether the transfer is for consideration or not.

[14] Udal titles exist in Orkney and Shetland. They are non-feudal. As a result of the Abolition of Feudal Tenure etc (Scotland) Act 2000, land elsewhere in Scotland is now owned in a way that is substantially the same as udal ownership.

[15] For the expression "first registration" see para 33.22 below.

[16] The entry would, according to circumstances, be a disposition or a notice of title.

[17] A qualification concerns property held on udal title, which applies only in Orkney and Shetland. Section 3(3) of the 1979 Act says that "a … proprietor under udal tenure shall obtain a real right in and to his interest as such only by registration." That means that since Orkney and Shetland have been "operational" for the Land Register, any transfer of udal property – even a gratuitous transfer – is registrable in the Land Register.

33.6 The rule that non-onerous dispositions are not triggers for first registration follows the recommendation of the Reid Report, in which two reasons are given. One was that "it would unduly increase the work of the staff in the Register House" and the other was that it would not "be reasonable to require an owner to incur the expense of registration except on such a transfer [ie for value], when the title will have to be examined in any event, and therefore the additional expense involved in registration of title will be small."[18] The first reason, if it ever had any force, has no force now. As for the second reason, registration fees are no higher for first registrations than they are for "dealings" (registrations in relation to registered properties) or for recording in the Register of Sasines.

33.7 Transactions with subordinate real rights, such as the grant of a standard security, are not triggers, except for leases, which are discussed below.[19] For example, Adam owns land, his title being in the Register of Sasines. He borrows money from Eve and grants to her a standard security. The land remains (for the time being) in the Register of Sasines and the standard security is recorded in that register. But once land has been registered, subordinate rights over it can no longer be created by Sasine recording; the relevant deed may be registered only in the Land Register.[20]

The current law: voluntary registration

33.8 Section 2(1)(b) of the 1979 Act provides that an unregistered interest in land may also be registered without any trigger event. What happens is simply that the owner applies for the property to be registered in the Land Register. Such an application does not have to be accepted by the Keeper, and a rejection is not subject to appeal.[21] If the Keeper does accept it, the result is what is called a "voluntary registration."[22] An example where an application might be accepted is the case of an area of land which is shortly to be developed for housing.[23] Historically the Keeper has been reluctant to accept voluntary registration applications, as they compete for staff resource with those registrations which have to be accepted under paragraph (a). However due to – amongst other things – the desire to extend Land Register coverage and the current downturn in the market, the Keeper is now more likely than hitherto to consider it expedient to accept a voluntary registration application and indeed we understand that the idea of voluntary registration is now being suggested to some large land holders such as the Forestry Commission.

Section 2(5) of the 1979 Act

33.9 Section 2(5) says that the Scottish Ministers may "by order made by statutory instrument, provide that interests in land of a kind or kinds specified in the order, being interests in land which are unregistered at the date of the making of the order other than

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[18] Reid Report, para 92.
[19] Paras 33.20 and 33.21.
[20] 1979 Act, ss 2(3) and 8(4).
[21] 1979 Act, s 25(4).
[22] The term is imperfect, because it suggests that other registrations are involuntary, ie compulsory. We have ourselves sometimes referred to "compulsory" registration (eg DP 128, para 3.28) but do not do so in this Report. If Johnnie sells land to Julia, the law is, and has been since 1617, that Julia must register in order for ownership to pass to her. The expression "must register" is, however, potentially misleading because there is no obligation to do anything, any more than there is an obligation on a testator to sign at the foot of the will. The law merely says "if you wish to acquire ownership of land, this is how you do it" just as it is saying "if you wish to make a will this is how you do it". If Julia does not register she commits no wrong. Nobody can require her to register, and if she does not register she loses nothing. (Though she fails to gain something.)
[23] *Registration of Title Practice Book,* para 2.9.

overriding interests, shall be registered." The idea was that once a certain stage had been reached when most properties had been registered, a top-down process could be initiated, in which unregistered properties would simply be registered by the Keeper, outwith the context of any transaction, and without the need for any application by the owner.

33.10 The provision cannot, however, be used to add new triggers: its wording does not cover that possibility. Thus under current law the only triggers are those mentioned above, and no new triggers could be added, except by primary legislation.

33.11 The section 2(5) power has not been used. In 1999 the Scottish Executive took the view that registration under section 2(5):

> "would be very costly in the short term. After 10 to 15 years of the operation of Registration of Title in any country, most properties will have been registered on sale. That will be the right time to consider what additional measures could be put in place to ensure that all land is contained in the Land Register." [24]

33.12 The first county to become operational was Renfrewshire in 1981, so that the "10 to 15 years" period for Renfrewshire was 1991 to 1996, and had thus already elapsed by the time the 1999 paper was written. The last batch of counties became operational in 2003, so that for those counties "10 to 15 years" would be 2013 to 2018. But what "additional measures" were in contemplation were not specified.

The aim: completion of the Land Register

33.13 The Register of Sasines was established in 1617 and the rule was that any transfer of title thereafter had to enter that Register. That was a more comprehensive rule than the rule for the Land Register, for the 1979 Act provides that some transfers, notably transfers on death and also transfers by way of gift, do not trigger first registration. Yet even today, almost four hundred years later, there are still some properties that have not yet made their first appearance in the Register of Sasines because there has been no deed in that time. That is because there are some properties acquired before 1617 by owners who have never sold and have never died. This group includes the three oldest universities,[25] and the Crown. Local authorities in substance belong to this group too.[26] These examples show that land can stay in the same hands for long periods – even centuries.[27]

33.14 In DP 128 we made three proposals for speeding up the process of first registrations. The first was that first registration should be triggered by any disposition, not just a disposition for value.[28] The second was that there should be a power, by secondary legislation, to create new triggers.[29] The third was that the Keeper's current discretionary power to decline to accept applications for voluntary registration should cease.[30] We

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[24] Scottish Executive, *Land Reform: Proposals for Legislation* (SE/1999/1), para 6.3.
[25] St Andrews, Glasgow and Aberdeen. Edinburgh, founded in 1583, also predates the Register of Sasines, but the land it acquired then (Old College) was to begin with held in the name of the City Council.
[26] Local authorities have changed over the years and so there have been transfers as between one local authority and its successor. But such transfers have not always been recorded, the current local authority relying on the successive enactments linking it with the original local authority.
[27] The land registration system applies just as much to public bodies such as local authorities, and public persons such as the Crown, as it does to ordinary people and to private-sector entities such as companies.
[28] DP 128, para 3.34 (proposal 7(a)).
[29] DP 128, para 3.34 (proposal 7(b)).
[30] DP 128, para 3.38 (proposal 8(b)).

proposed that section 2(5) should remain as in the 1979 Act.[31] Those who responded were generally in agreement.[32]

33.15 We have since worked on the details of how to reach the objective of completion of the Land Register, an objective that we dub "Scot/LAND online" because it would mean that all land would have been mapped in terms of title boundaries, with the title data available online. What we now recommend varies in two ways from what we proposed in DP 128. The first is that we now think that a programme for completion needs to be set forth more clearly and in more detail. The second is pace: we think the process needs to be as fast as reasonably possible.

33.16 If the present system of first registration (trigger events plus the occasional voluntary first registration) continues, the coverage of the Land Register will continue to grow. But even in another 400 years it is unlikely to be complete: completion has still not taken place under the 1617 Act even though that Act's triggers were more extensive than those of the 1979 Act. In what follows, therefore, we propose a threefold strategy for moving towards completion of the Register. This strategy is in many ways similar to what we proposed in DP 128, but it is more radical. The three elements of the completion programme are as follows.

- Removal of the Keeper's power to decline to accept applications for voluntary registration.
- More triggers. These should be specified in the primary legislation rather than being left to rules.
- A power of top-down registration of any unregistered land at any time.

Why is completion desirable?

33.17 Why is completion so desirable? The short answer is that the Land Register is better than the Register of Sasines.[33] That is true even under the 1979 Act: it will, we think, be even more so in future. It is in the public interest that all land be brought into this better system, and the sooner that can be achieved the better. The Land Register is better for those involved in property transactions, whether in relation to residential property, commercial property, agricultural property or property of other kinds. It gives more certainty as to title and more certainty as to boundaries. It delivers cheaper conveyancing.[34] But it has benefits that extend beyond property transactions. It is true that the reason for the 1979 Act was that conveyancing should be simpler and so cheaper, and that other benefits were not considered. But land registration has had unanticipated benefits beyond the world of conveyancing. The Register of Sasines delivers information that can be understood by experts, but it is largely impenetrable to others, and even with the help of experts, getting information out of the register is slow and expensive. There is no requirement for any mapping for Sasine titles, and even where there is a plan, it is often not accurate. The Land Register is different. It is based on reasonably accurate mapping. Any reasonably intelligent

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[31] DP 128, para 3.45 (proposal 9).
[32] The only dissent worth noting was the Keeper's in relation to the proposal about voluntary registration. We return to this in para 33.24 below.
[33] We mean that it is better on balance, not that it is better in every respect.
[34] Of course, there are also other elements in conveyancing expenses. Moreover, first registration generates costs, so that the benefits of the new system are long-term. But those long-term benefits are substantial.

and educated person can understand it, at least as far as the fundamentals are concerned. And conveyancers are not the only people with an interest in land. The range of people and organisations with an interest in the question "who has what rights in which land?" is broad. It includes planning authorities, environmental authorities, tax authorities and numerous other public bodies. It includes prospective lenders and unpaid creditors. It includes local amenity associations and pressure groups and investigative journalists. Conveyancers have long been used to information on land titles being a private world into which non-lawyers almost never stray. Those days are gradually ending. Ultimately the Land Register's Cadastral Map will, we anticipate, have a facility rather like Google Maps. The user would be able to zoom in and see all title boundaries. To achieve that, the Cadastral Map must be completed. To change the metaphor, at the moment the Cadastral Map is like a jigsaw of more than two million pieces, of which over a third have yet to be fitted in.

33.18 Even if the Land Register were not superior – even if the incoming system had proved itself to be no better than the outgoing one - it would still be desirable to complete the Register as soon as reasonably possible, for the simple reason that it is inefficient to have two property registration systems running at the same time in the same fairly small country. It is confusing for the public and it is a burden on conveyancers, who have to learn, and work with, two systems. Indeed, experienced conveyancers have expressed to us concern that the time is coming – may indeed already be at hand in those parts of the country which were the first to become operational in respect of the Land Register – when ordinary conveyancers, especially younger ones, will not have a sufficiently good knowledge of the way that Sasine titles work. They will be like technicians who are familiar with internal combustion engines but not with steam engines. That will not be in the public interest, either because mistakes will be made or because cases involving Sasine titles will have to be sent to specialists, in either case giving rise to additional expense. Such a phase, which as we have said may already be at hand, is inevitable, but the shorter it is, the better. In 2001 the Law Commission for England and Wales wrote that "it is absurd to continue to maintain two separate systems of conveyancing… Unregistered conveyancing must be given its quietus as soon as possible."[35] The same is equally true north of the border.

33.19 We recommend:

127. The primary legislation should contain a robust completion programme.

(Draft Bill, ss 58 to 67)

A note on leases in the current system

33.20 In our new scheme, the unit of land registration is the property itself – the plot. Either the property is registered or it is not, and if it is registered then it will show the main subordinate real rights, including long leases. But the 1979 Act treats ownership and lease as distinct and independent rights in land. So "first registration" in current law has two meanings: (i) the first registration of an interest by way of ownership, and (ii) the first registration of an interest by way of lease. Either can be first-registered with the other still being in the Register of Sasines. Thus all four boxes in the diagram are competent possibilities:

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[35] Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century*: *A Conveyancing Revolution* (Law Com No 271, 2001), para 2.6.

	Lease registered	Lease unregistered
Property registered	✓	✓
Property unregistered	✓	✓

33.21 In fact it can be more complicated than that, for there may be more than one long lease of the same property. There could be two or even three (or in theory even more). For example, the property could be registered, the head lease unregistered, the intermediate lease registered and the underlease unregistered. It should be noted, however, that any lease that either (i) came into existence since the county became operational or (ii) though created before that time, has thereafter been assigned, is necessarily a registered lease.[36]

Registration: concepts and terminology

33.22 Conveyancers speak of "first registration", meaning the bringing of a property into the Land Register for the first time. Likewise they speak of property in the Land Register being "registered" property, and other property as "unregistered". In this Report we use these terms in the same way, even though arguably they are not entirely satisfactory.[37] But this part of the Report has "completion" in its heading rather than "first registration" because the latter is the means, whereas the former is the end.

33.23 Once a plot of land is already in the Land Register, "registration" means the registration of a transaction, such as a disposition or a standard security. But "registration" also has another meaning, namely first registration, when a plot of land goes into the Land Register *for the first time*. It is in that sense that one speaks of "registered land" and "unregistered land". So there is (i) the registration *of a deed* and (ii) the registration *of a plot of land*.[38] First registration typically involves both: Belisarius, the owner of land on a Sasine title, dispones to Julia. The plot of land will now be registered for the first time. And moreover the disposition is registered. But first registrations do not always involve the registration of a deed. Suppose that Belisarius, instead of disponing to Julia, applies for a voluntary registration. His land is now registered for the first time, but there is no deed to be registered. Belisarius was the owner before the registration and he is the owner after it: no proprietary right has changed. Conversely, once a plot is registered, thereafter all registration is the registration of deeds.

The first element in the strategy: voluntary first registration

33.24 As mentioned above, under current law it is for the Keeper's discretion whether to accept an owner's application for voluntary registration, and in practice such applications have seldom been accepted. In DP 128 we proposed that "the Keeper should cease to have

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[36] Leases are considered further in paras 33.68 to 33.70 below.

[37] The origin of this usage is English. In England, land that is not registered is wholly unregistered. (Except for Middlesex and Yorkshire.) In Scotland, by contrast, land that is unregistered in the Land Register is, subject to a few exceptions, already registered in the Register of Sasines. For that reason there are those who object to the usage as being misleading and as reflecting English, rather than Scots law. But the usage, albeit perhaps unsatisfactory, has established itself.

[38] Whether this distinction is implicit in the 1979 Act is arguable. The concept of "registration of an interest in land" tends to blur the distinction.

a discretion to refuse such an application merely on the basis that it is voluntary."[39] Though most respondents agreed, the Keeper did not, expressing concerns about staff resources. Since the publication of DP 128 the Keeper has begun to be more interested in accepting voluntary registration applications. Nevertheless, in deference to the Keeper's concerns, the draft Bill provides that there may be a transitional period, after the legislation comes into force, during which the Keeper would retain the current right to decline to accept an application for voluntary registration. The date of the ending of the transitional period is not specified in the draft Bill, but would be for the Scottish Ministers to decide after consultation with the Keeper.[40] We think that this procedure should ensure that the "open door" rule for voluntary registration will not come into force before the Keeper is ready for it. It should be borne in mind that the number of unregistered properties will continue to decline in the years between the date of this Report and the date when the open-door policy comes into operation.

33.25 The open-door policy for first registrations has a double aspect. In the first place it is desirable in itself. The objective is to complete the Land Register, and so those who own land on a Sasine title and wish to register it in the Land Register should, as a matter of principle, be encouraged to do so.[41] In the second place, under our scheme the time will come when the Register of Sasines is closed to new deeds. Thus suppose that Perseus is the owner of unregistered land and some years into the future wishes to grant a standard security to Andromeda. By this time the Register of Sasines has been closed to new standard securities.[42] Obviously Perseus has the right to grant a standard security. Therefore he must have the right to have his land registered so as to enable him to do so.

33.26 There is one small qualification to our policy on voluntary registration. Under current law the holder of an unregistered long lease can apply for voluntary registration. But if a plot of land is registered then any lease over it that was created by Sasine recording will automatically be listed in the title sheet to the property. If, however, the plot of land is as yet unregistered, then the separate registration of the lease would be contrary to our view that the basis of the Land Register should be plot registration. In this one respect, therefore, what we propose is a narrowing of voluntary registration: where a property is unregistered, and is subject to a long lease, the long leaseholder would not be able to seek a first registration just of the lease. But the narrowing is slight. Voluntary registration of long leases is in reality very rare. In the new scheme unregistered leases will come into the Land Register fairly quickly in any event.

33.27 We recommend:

128. (a) The Keeper should cease to have a discretion to refuse applications for voluntary registration.

(b) But this change should not necessarily take place immediately upon commencement of the new legislation. It should happen when an

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[39] DP 128, para 3.38 (proposal 8(b)).
[40] If the Keeper so wished, the order removing the Keeper's veto could be made so as to coincide with the commencement of the new legislation, so that there would be no transitional period.
[41] In England & Wales the Land Registry now offers discounted fees in an effort to encourage voluntary first registrations. It may be that a similar approach should be adopted here too.
[42] See para 33.34 below.

order to that effect is made by Scottish Ministers, after consultation with the Keeper.

(Draft Bill, s 60(1) and (2))

33.28 The draft Bill provides that the application is to be by the proprietor.[43] If an application is made by someone who is not the proprietor it will be rejected. The Bill also provides that if there are co-owners the application can be made by just one of them. If that happens the result will be the registration of the plot of land as a whole, not merely of the applicant's *pro indiviso* share of it. This follows from the concept of plot registration rather than interest registration.

The second element in the strategy: transaction-linked first registration

33.29 In DP 128 we proposed that the existing system of triggers should continue, with two important changes. In the first place, every transfer of ownership of unregistered land (whether or not for valuable consideration) would trigger first registration. That would close a significant gap in the current system, whereby gratuitous transfers do not trigger first registration. In the second place, we proposed that there should be a power given to the Scottish Ministers to add further triggers.[44] Respondents were in general agreement.

33.30 There are always a significant number of gratuitous dispositions, such as gifts between family members, and transfers by executors and trustees to beneficiaries. If these dispositions are of unregistered property, they fall to be recorded in the Sasine Register. Such dispositions would induce first registration in our scheme. The result would be to accelerate the extension of the Land Register's coverage. Moreover, we understand that the rule that non-onerous dispositions of unregistered land still go into the Register of Sasines is being exploited by some who do not wish their title to be exposed to the scrutiny which will, or at least should, happen in a Land Register case. The disposition, though for value, is framed so as to appear gratuitous. The Keeper, if aware of the true situation, will refuse to record the deed in the Register of Sasines.[45] But since the true facts do not appear on the face of the deed, in practice it is likely that the deed, though in truth not gratuitous, will be accepted for Sasine recording.[46] This is evidently unsatisfactory, and the practice will cease once the rule is that all dispositions of unregistered land trigger first registration, even if they bear to be gratuitous.

33.31 The eventual objective is the progressive closing of the Register of Sasines to *all* types of deeds, with a final stage being reached, in the not too distant future, when it would be closed to deeds of every type. We see this happening in the following steps.

Closure Step I

33.32 As from the commencement of the new legislation, the Register of Sasines would be closed to (a) dispositions, including gratuitous dispositions and transfers by way of

[43] In the draft Bill (s 92(1)) "proprietor" is defined as someone who has a valid completed title as proprietor. Thus an uninfeft proprietor (to use the old term) is not a proprietor.
[44] DP 128, para 3.34 (proposal 7(c)).
[45] 1979 Act, s 8(4).
[46] If a disposition for value is recorded in the Register of Sasines in this manner, the belief of those who thus hide the truth from the Keeper is, one must presume, that the deed is validly recorded. Whether that belief is correct is not a matter that can be considered here.

compulsory purchase,[47] (b) new leases and (c) assignations of leases. It would also be closed to (d) all deeds dealing with registered property. The last three are already the law. The first is in part the present law: the change is the extension to all dispositions.

33.33 Where there is a notice of title in respect of property that is still in the Register of Sasines, the grantee should have the option of recording it in the Register of Sasines or in the Land Register. We think it necessary to allow the former option for the time being[48] since there may be cases where the grantee may wish to complete title quickly without having to obtain a plan of the property. This option might be taken advantage of by those who wish to evade the "no dispositions recordable in the Register of Sasines" rule, for they could use a disposition of unregistered property as a midcouple, and then record the notice of title. Such evasion would be unacceptable and accordingly the draft Bill has a provision blocking it.[49]

Closure Step II

33.34 As from a later date, to be fixed by statutory instrument, the Register of Sasines would be closed to all new standard securities. (This rule, being limited to new standard securities, would not apply to deeds relating to standard securities already in existence in the Register of Sasines, such as discharges and assignations.) An owner with an unregistered title who wished to grant a standard security would have to make an application to register the property: see below.

Closure Step III

33.35 Closure Step III would mark the final padlocking of the door of the Register of Sasines. By the time this stage is reached it can be expected that there would be few remaining unregistered properties. After Closure Step III no deed could ever again be recorded there. Registration could only be in the Land Register.

Progressive opening of the Land Register in tandem with closing the Register of Sasines

33.36 In this progressive closure of the Register of Sasines there would have to be a parallel opening of the Land Register, for it is no good saying that deeds of such-and-such a type cannot be recorded in the Register of Sasines unless they can be registered in the Land Register. But that could not be done merely by saying "deeds no longer recordable in the Register of Sasines are registrable in the Land Register". The Land Register is not merely a register of deeds. Unless a title sheet exists, no transaction can be registered. So the question is this: as the Register of Sasines is progressively closed, how are the plots in question to be registered so that the deeds can be registered? Our scheme uses three different mechanisms.

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[47] Schedule conveyances, notarial instruments and GVDs.
[48] Only for the time being. When – see below – the Register of Sasines is finally closed to all deeds, this exception would disappear.
[49] Draft Bill, s 69(3).

33.37 The first would apply to dispositions and to notices of title.[50] Here it would be for the disponee to apply for registration of the plot. That is in substance the same as the current law.

33.38 The second mechanism would apply to standard securities (except standard securities over leases), and also to the case where the owner of land grants a long lease.[51] Here the mechanism we propose is not that the *grantee* would apply for registration of the plot. Rather, the *owner* would go down the route of a voluntary first registration in order to be able to grant the security or lease. If Brendan owns unregistered land and, after Closure Step II, grants to Claudia a standard security, and she presents it for registration in the Land Register, her application would fail. The standard security could, after Closure Step II, neither be recorded in the Register of Sasines (because it would be closed to new standard securities) nor registered in the Land Register (because the property itself would not yet have been registered). This may seem harsh but the solution is simple: if Brendan wishes to grant a standard security he should apply for voluntary first registration. (This of course presupposes that the time has come when the Keeper's right to decline voluntary registrations has ended, and the draft Bill so provides.) We do not think that this rule – that, after Closure Step II, standard securities should not be grantable over unregistered property - would cause substantial inconvenience. In the first place, by the time that Closure Step II arrived the proportion of properties that were still unregistered properties would be fairly small.[52] In the second place, Brendan can apply for voluntary first registration not only before, but also at the same time as, granting the security. As soon as he has applied, the Keeper will allocate a title number and Claudia's security can enter the Application Record.

33.39 This second mechanism could in theory also be applied to dispositions, so that if Craig owns unregistered land and wishes to sell it, he would have to apply for voluntary first registration. But that would be a departure from current practice and, to minimise disturbance, we think that the present method of dealing with dispositions of unregistered land should continue.

33.40 The third mechanism would apply where the first two mechanisms did not apply. It would still be transaction-triggered, but the registration of the land would happen without an application by either owner or disponee. The registration of the land would be done by the Keeper so as to make possible the registration, in the Land Register, of the deed in question. We give some examples.

33.41 (i) A plot of land is unregistered, but a long lease of it is registered.[53] The lessee grants a long underlease. The grantee applies for registration of the underlease in the Land

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[50] And to the three equivalents in the law of compulsory purchase, namely schedule conveyances, notarial instruments and general vesting declarations. (The conveyancing aspects of the law of compulsory purchase, like many other aspects of the law of compulsory purchase, stand in need of review, but the issues cannot be considered in this project.)

[51] The case where *a lessee* grants a long underlease, the plot itself being unregistered, is handled through the third mechanism.

[52] And it should be noted that the draft Bill allows for the stages to take place at different dates in different areas. Thus Closure Step II would, one may presume, take place later in (eg) Caithness than it would in (eg) Renfrewshire, because the latter became operational for the Land Register 22 years before the former, and so a much higher proportion of properties there are in the Land Register.

[53] This situation is possible under the 1979 Act. It will not be possible, except transitionally, under our scheme.

Register.[54] The Keeper is to register the plot (and the underlease). This would be the rule as from Closure Step I.

33.42 (ii) A plot of land is unregistered. There is a long lease that is recorded in the Register of Sasines. The lease is assigned and the assignee applies for registration in the Land Register.[55] The Keeper is to register the plot,[56] which will include entering the lease into the title sheet as an encumbrance, and of course will register the assignation. This would be the rule as from Closure Step I.

33.43 (iii) Bruno holds a long lease recorded in the Register of Sasines. The land itself is also unregistered. Bruno grants a standard security over the lease to Charlotte. The Keeper must now register the land, as well as registering the standard security (in the Land Register).[57] This would be the rule as from Closure Step II.

33.44 (iv) Janet is the owner of unregistered land. A creditor, Charlotte, holds decree for payment and wishes to register diligence[58] against the land. Charlotte applies for registration of the diligence. The Keeper must now register the land, and of course the diligence as well. This would be the rule as from Closure Step III.

33.45 As will be seen below, in the new scheme, Keeper-led registration would also be possible even where there is no transaction to be registered.

33.46 We recommend:

129. (a) As from the commencement of the new Act, no disposition (whether onerous or gratuitous) should be recordable in the Register of Sasines.

(b) As from a date to be fixed by secondary legislation, no standard security should be recordable in the Register of Sasines.

(c) As from a later date, to be fixed by secondary legislation, no deed of any kind should be recordable in the Register of Sasines.

(d) It should be competent, in relation to (b) and (c), for different dates to be set for different areas.

(e) In the case of dispositions of unregistered property, application for registration of the plot should be by the grantee. In cases of standard securities and long leases granted by the owner, the application for registration of the plot should be by the granter. In other

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[54] An application for recording in the Register of Sasines would not be competent: Closure Step 1, and draft Bill, s 64(3).
[55] An application for recording in the Register of Sasines would not be competent: Closure Step 1, and draft Bill, s 64(4).
[56] For the situation where the Keeper cannot identify the proprietor, see para 33.53 below.
[57] In the new scheme an additional process of "registering the lease" would not exist, for in the new scheme if the land itself is registered any relevant lease is automatically a registered lease.
[58] As and when the relevant provisions of the Bankruptcy and Diligence etc (Scotland) Act 2007 are commenced, land attachment will replace the current diligence of adjudication.

cases the Keeper should register the plot without any application for its registration.

(Draft Bill, s 59, s 60, s 62, s 64 and s 66)

The third element in the strategy: the Keeper's power to register land outwith the context of any transaction

33.47 The final padlocking of the door of the Register of Sasines - Closure Step III - would be an important development, but it would not mean the end of Sasine titles, and would not mean the completion of the Land Register. The reason for this is that when the final padlocking happens, it is almost certain that there will still be some unregistered properties. As already explained, the rules outlined above would not necessarily achieve completion of the Land Register within any finite time, because it can happen that a property continues indefinitely without any deed affecting it that needs to be registered.

33.48 As mentioned above, the 1979 Act allows secondary legislation to be enacted under which any remaining unregistered properties could be registered.[59] But it provides no details, and in 1979, when not even a single property had yet been registered, the prospect was still a distant one. But matters are different today. Already a majority of title units are registered, and by the time that the draft Bill, if enacted, comes into force the number of unregistered properties will have shrunk from a substantial minority to a much smaller one. The time when full completion should happen is now beginning to come into sight.

33.49 The draft Bill accordingly makes provision for the final completion of the Register. The Keeper would simply be empowered to register any unregistered property. In practice the Keeper would usually have enough information to make up the title sheet – information about boundaries, information about the identity of the owner, and information about any subordinate rights to be entered in the C and D Sections as encumbrances or in the A Section as pertinents. After all, when a title is registered in the Land Register, it is not (with very rare exceptions) moving out of the private realm.[60] Title is already in another of the Keeper's registers, the Register of Sasines.

33.50 One difference between Keeper-led first registrations and other first registrations is that the registration would not be accompanied by the Keeper's warranty to the proprietor. Warranty is given to successful *applicants*, and in Keeper-led registration there would be no applicant. It should be borne in mind that in these cases the proprietor is paying no registration fee, and that an element in a registration fee represents what is in effect a one-off insurance premium, the premium being for the Keeper's warranty. The natural consequence is that the Keeper gives no warranty. The proprietor is no worse off: the title as it stood before the registration was equally unwarranted by the Keeper.

33.51 Registration would not affect the rights of the parties concerned. If Aeneas owns Greenmains on a Sasine title, he would be just as much the owner after registration in the Land Register. If the property was encumbered by a subordinate real right, the right would exist after registration as it existed before. If the Keeper registered Aeneas with the wrong

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[59] 1979 Act, s 2(5).

[60] By contrast, in England and Wales as-yet unregistered properties are *wholly* unregistered (except for Middlesex and Yorkshire).

boundaries, the same would be true. For example, if some ground were omitted, Aeneas would still own it, on his Sasine title. And if he were registered for too much ground, his title to the excess would be a nullity, because in the new scheme there would be no Midas touch. Owners and others having rights in land would have nothing to fear from Keeper-led registration.

33.52 Whilst Keeper-led registration would confer no immediate benefit (or detriment) on the current proprietor, it would have significant wider benefits. The source of information about the given title would be moved from the muddy waters of the Register of Sasines to the clear waters of the Land Register. The next transfer of title would become a simple "dealing of whole" as opposed to a first registration. It would also be ARTL-compatible.[61]

33.53 Occasionally the Keeper might be unable to determine the identity of the proprietor, and in such cases the draft Bill says that the title sheet should reflect the uncertainty.[62] (But such cases would be unusual. In the typical case the proprietor of unregistered land can be identified, mainly from data in the Register of Sasines.) As and when it becomes clear who the proprietor is, the Register can be changed. For example, if the last infeftment was in, say, 1909 it may be that someone can establish a right of succession, and complete a title by the normal routes. In this connection it is worth pointing out that even if the Keeper could identify the person who could establish a right by succession, but that person had not in fact done so, then that person would not be the proprietor and so ought not to be identified as such in the B Section (Proprietorship Section). That person may or may not wish to take up his or her succession rights. And even if s/he does, there are procedures to be followed, such as confirmation. It is not the Keeper's function to short-circuit the rules about how those who claim succession rights are to establish their rights.

33.54 Some of the cases where no proprietor can be ascertained may prove to be of interest to the Queen's and Lord Treasurer's Remembrancer, because property for which no other owner can be ascertained belongs to the Crown, either under the doctrine of *ultimus haeres* or under the doctrine of *bona vacantia*. [63]

33.55 Where no proprietor could be ascertained, an alternative possibility that we considered would be for the Keeper to register the Crown as owner, in trust for those having right to the property, if such could be found. This would have the benefit of establishing a person – the Crown – who would have a completed title and who could deal with the property, for instance by sale.[64] Such a scheme would, we think, be compatible with the ECHR because the statutory trust would protect all beneficial interests. But we think that some might see such a provision as representing an unjustifiable state intervention into property rights. We express no definite view. We merely note that, if it were thought desirable, a scheme on these lines could certainly be developed.

33.56 It might be argued that the Keeper's right to register any plot that is still unregistered, even if not so requested, ought not to be commenced until the Keeper's right to reject an application from the proprietor for voluntary first registration has disappeared. It would be

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[61] Assuming that the transaction is of a type covered by the ARTL scheme.
[62] Draft Bill, s 65(4).
[63] The Queen's and Lord Treasurer's Remembrancer is the official who represents the Crown in relation to property that falls to the Crown under either of these doctrines.
[64] Such property would be administered on behalf of the Crown by the Crown Estate Commissioners: see the Crown Estate Act 1961.

anomalous, it might be urged, if the Keeper could say "I reject your application for registration and I shall nevertheless register". As against this, it could be replied that the economics of Keeper-led registration of all the unregistered parts of a given tenement or a given development, as a programmed exercise, differ from having to respond to one-off voluntary registration applications. By way of background, in the early years Keeper-led registration would inevitably be restricted to straightforward cases where a voluntary application would likewise be acceptable. On balance we think that the reply is persuasive.

33.57 As has already been mentioned, in the new scheme there would be two types of Keeper-led registration. The type we describe here is Keeper-led registration outwith the context of any transaction. The Keeper would be able, so to speak, to pin the Cadastral Map on to the wall, and, while sipping a cup of tea, choose a blank area for registration.

33.58 We recommend:

130. (a) The Keeper should have the power to register any unregistered plot of land, without any application being made.

(b) If the proprietor cannot be determined, the title sheet should so state.

(Draft Bill, s 61 and s 65(4))

How the three elements fit together

33.59 Something now must be said about how the three elements – the second itself having three steps – fit together. This is the sequence, the elements operating cumulatively:

(i) First stage

33.60 The first stage would begin when the new Act comes into force. From that day Closure Step I would apply to the Register of Sasines. That is to say, no disposition (whether onerous or gratuitous) could be recorded there, nor could any long lease. In addition, the Keeper would acquire the right to register any unregistered plot, even if not so requested (Keeper-led registration).

(ii) Second stage

33.61 The second stage would begin when, by statutory instrument, the Keeper's right to decline an application from the proprietor for voluntary first registration disappears.

(iii) Third stage

33.62 Closure Step II would happen, ie the Register of Sasines would be closed to the recording of standard securities. Thus by this stage, any Sasine owner who wished to grant (a) a long lease or (b) a standard security would have to apply for voluntary first registration (but the application could be contemporaneous with the deed). But Sasine recording would still be possible in certain special cases. For example, suppose that land were still in the Register of Sasines and a creditor wished to register diligence. The diligence would be registered in the Register of Sasines.

(iv) Fourth stage

33.63 Closure Step III would happen, ie the Register of Sasines would be completely closed to the intake of deeds. No deed could henceforth be recorded in it.

33.64 In this fourth stage – the final transition stage – any Sasine owner who wished to grant (a) a long lease or (b) a standard security would have to apply for voluntary first registration (but the application could be contemporaneous with the deed). As for *other* types of deed affecting Sasine land,[65] the rule would be that whenever an application was made for the registration of such a deed, there would be an immediate Keeper-led registration of the land coupled with registration of the deed in question.

The stages in real time

33.65 The three closure steps could happen at the same time for all registration areas, or they could happen at different times. Twenty-two years separate the first operational area (1981) from the last (2003). It is arguable that Closure Step II (Closure of the Register of Sasines to new standard securities) is already appropriate for the first, but, be that as it may, we would suggest that it would not yet be appropriate for the last. On the other hand, for counties to be out of step with each other could prove awkward. This question, ie the question whether the three closure steps should happen at the same time for all counties or should happen separately, is one that does not need to be decided in this Report.

33.66 We offer an itinerary but no specific schedule. If the view were to be taken that Closure Step II would be appropriate about 25 years after a county became operational and Closure Step 3 about 40 years after a county became operational, and if the counties were taken separately, that means that the Register of Sasines would be finally closed for Renfrewshire around 2021 and for Sutherland around 2043. We offer these figures only for illustrative purposes.

33.67 When would all properties finally be in the Land Register? That would depend on how vigorously the Keeper made use of the power of Keeper-led registration. And that in turn would no doubt depend, at least to a large degree, upon the resources available to the Keeper for that purpose.

Leases: general

33.68 We have already said something about leases, but a few more words would be appropriate. In our scheme, the unit of registration would be a plot of land, and for that plot there would be a title sheet setting out the rights held in that land, and identifying the holders of those rights. Completion of the Register means the registration of all plots of land, ie no plot of land anywhere in Scotland would still be unregistered.[66] Hence in our scheme there would be no role for the first registration of a long lease. If a plot is registered, all subordinate real rights affecting that property would automatically be entered.[67] This approach differs from that of the 1979 Act mainly at a conceptual level – and we think it offers a better conceptual structure, especially from the standpoint of the non-lawyer. But occasionally the

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[65] For example, diligence, or a charging order, or a tree preservation notice, or the grant of a proper liferent, and so on.
[66] A plot of land is an area of land all of which is owned by one person or by the same set of persons.
[67] With certain exceptions such as short leases.

approach would also bring about a practical outcome that was different from the outcome under current law. The matter is explored in more detail in Part 9, dealing with leases, but something needs to be said here, to explain why in the new scheme long leases would not play the special role they play at present.

33.69 Suppose that under current law a plot of land is owned by Moira, her title being in the Register of Sasines, and there is a 50-year lease, also in the Register of Sasines, held by Nick. If Moira sells the land to Oliver, his interest will be registered in the Land Register, and although the lease will appear in his title sheet,[68] the lease is regarded, under current law, as still not being "in" the Land Register.[69] So, for example, if Nick were to grant a standard security over the lease, the standard security would be recorded in the Register of Sasines. Thus at present the law treats long leases differently from other subordinate real rights. Again, suppose that Moira had not sold the land to Oliver, but that Nick had sold his lease to Paula. Under current law this would lead to the "first registration of the lease", while the property itself would remain, for the time being, in the Register of Sasines.

33.70 With the shift to the idea of plot registration, these complications would disappear. In future, first registration would mean first registration of a plot of land. A title sheet for a registered plot would show the rights in that plot, including registered leases.[70] In our scheme, therefore, the concept of "first registration of an existing lease" would have no meaning, just as "first registration of an existing standard security" would have no meaning. Nevertheless, the fact has to be accommodated that when the legislation comes into force all the four types of case mentioned above would be in existence.[71] Further details, including formal recommendations, are given in Part 9.

Neighbour notification?

33.71 Since first registrations began in 1981 there have been many complaints that a property has been registered with too large an area, meaning that the property *as registered* encroaches on an as-yet unregistered property owned by a neighbour. Such complaints are sometimes justified and sometimes unjustified. That depends on the facts of the individual case. But concern has been expressed that such alleged over-registrations happen without the affected neighbour knowing what is happening. The affected neighbour may not find out until years later, perhaps when s/he is selling, and as a result of searches in the Land Register it comes to light that part of the land that the neighbour believes to be his/hers is in fact registered to someone else. It is sometimes urged that a first registration should involve service of notice on neighbours, so that they have the opportunity to challenge the alleged boundaries of the property being registered.

33.72 The reason that notification was not made a requirement is that such a rule would "encourage litigation".[72] It would also increase expense, not least because many neighbours would, on receiving the recorded-delivery official-looking envelope containing legal

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[68] In current practice it will appear in a schedule of leases in the property section and also be the subject of an entry in the burdens section.
[69] Because under the 1979 Act it is not properties that are registered but "interests in land".
[70] A registered lease can have its own title sheet, but that is a matter for the Keeper's discretion.
[71] See para 33.20 above. The four cases are (a) property registered and lease registered, (b) property registered and lease unregistered, (c) property unregistered and lease registered and (d) property unregistered and lease unregistered.
[72] Reid Report, para 104.

documents whose meaning would, in many cases at least, be unclear to them, and a plan which they might well find difficult to compare with what they think they own, be likely to go to a solicitor to ensure that their title was not under threat. That might be good news for solicitors but the concern would be that neighbour notification in every case would cause worry and give rise to legal expense, and yet the worry and expense would be needless in the vast majority of cases. In only a fairly small minority of cases is there much real doubt about the boundary. The interpretation of the prior Sasine title, and its mapping, is carried out by trained and impartial staff, and so is likely to be accurate. We have decided against making neighbour notification a requirement in the primary legislation, for several reasons. One is the reason just given. The second is that our new scheme about inaccuracies would make it easier for the Register to be rectified when there is an inaccuracy, ie the consequences of inaccuracy would be less dramatic.[73] The third is that the new scheme makes clear, what is not clear under the current legislation, that on receipt of a first registration application the Keeper is to check the title,[74] and that implies checking the boundaries. Fourthly, the Keeper would have the power to notify in appropriate cases.[75] Fifthly, the delegated rule-making power is sufficiently wide to permit neighbour-notification on first registration to be introduced by the Rules if the case for it can be made out.[76] And sixthly, an innovation in the draft Bill is that if there is an inaccuracy and it is rectified, the person in whose favour it is rectified can claim compensation from the Keeper for loss caused by the inaccuracy.[77] So for example, suppose that the neighbour sells the property but the buyer calls the deal off when it emerges that the registered boundary is wrong. If that causes loss, the Keeper is in principle liable.

[73] See Part 17.
[74] Draft Bill, s 59 and s 60.
[75] Draft Bill, s 25 and s 63.
[76] Draft Bill, s 95(1)(g).
[77] Draft Bill, s 55. See Part 27.

Part 34 Electronic conveyancing

Meanings of electronic conveyancing

34.1 Electronic conveyancing[1] is a phrase that can have a range of meanings. Its core meaning is that conveyancing documents should be capable of being in electronic form. Thus an offer to buy land could be sent as an email attachment, and the same for the subsequent deed of transfer, the disposition.[2] Electronic conveyancing in this first sense is discussed below under the following main heads: (a) how an electronic document can be valid, (b) how an electronic document can be probative, (c) how an electronic document can be registrable and (d) how an electronic document can be delivered. These matters fall mainly within the province of the Requirements of Writing (Scotland) Act 1995. Also entering the story are certain pieces of Westminster legislation and Brussels legislation.

34.2 In a broader sense, "electronic conveyancing" can mean an online conveyancing process that uses electronic documents but which is more than the use of such documents. In England and Wales, Part 8 of the Land Registration Act 2002 not only provides for electronic conveyancing documents, but also provides for the establishment of a "Land Registry Network" within which conveyancing transactions will take place, including not only deeds but also contracts for the sale of land. It is not yet in operation.

34.3 In Scotland, a less ambitious online system has been created under secondary legislation and is already in operation, called Automated Registration of Title to Land (ARTL). It is a system whereby registration applications are handled by means of software. There is normally no human involvement on the part of the Department of the Registers of Scotland. It does not encompass contract formation or funds transfer between the parties. (Both of these are covered in the planned English system.) But it does cover funds transfer from the parties to the Keeper (ie fee payment) and to HM Revenue and Customs (ie for payment of Stamp Duty Land Tax (SDLT)). Whether ARTL should be called "electronic conveyancing" is arguable: it may be that it is best described by its own name: "automated registration". Although the software is designed to identify problem cases and to reject them from the automated process – such cases are then handled by staff – ARTL does involve a higher degree of trust being placed in applicants than the non-automated system. Hence there have to be gate controls to ensure that only trusted parties can use the system. Of this, more later.

The story so far: the 2006 package

34.4 A limited degree of electronic conveyancing was made possible by secondary legislation passed in 2006, and its use in practice has now begun, though thus far the take-up has been limited. The secondary legislation was passed partly under powers contained in the 1979 Act but mainly under powers contained in the Electronic Communications Act 2000, which itself was a response to the requirements imposed upon member states by the

[1] On this subject in general see Robert Rennie and Stewart Brymer, *Conveyancing in the Electronic Age* (2008).
[2] And likewise for leases, standard securities etc.

E-Commerce and E-Signatures Directives. The initiative for this legislative package – we will call it the 2006 package - came from the Department of the Registers of Scotland.

34.5 The package was made up of the following elements. (i) The Automated Registration of Title to Land (Electronic Communications) (Scotland) Order 2006.[3] This was the centrepiece of the reform. (ii) The Land Registration (Scotland) Rules 2006. The 1980 Rules needed to be amended to take account of ARTL and it was decided to take the opportunity to make some other changes, and also to carry out a full consolidation at the same time. (iii) The Bankruptcy and Diligence etc (Scotland) Act 2007 section 222. This was about the registration of electronic standard securities in the Books of Council and Session to enable the creditor to employ summary diligence. (iv) The Stamp Duty Land Tax (Electronic Communications) (Amendment) Regulations 2006.[4] This made it possible for stamp duty land tax (SDLT)[5] to be settled within the ARTL system. Another measure to be noted was the Solicitors (Scotland) (ARTL Mandates) Rules 2006. Most clients do not have their own electronic signatures, so that what currently happens is that the client gives a mandate to the solicitor to sign electronically on behalf of the client. These rules lay down professional requirements in relation to ARTL mandates.[6]

Why the 2006 package is not enough

34.6 The package of legislative reform effected in 2006 was a bold and valuable step forward, but in itself it is by no means sufficient. Even at the time, the reform was regarded as merely an interim measure, and it was generally agreed that the whole issue would need to be revisited by way of primary legislation. That opportunity has now arrived.

34.7 It is necessary to list what the 2006 package did *not* bring about. To do so is not to criticise that package, but it is necessary to explain how much more needs to be done if Scotland is to enter the age of true electronic conveyancing.

34.8 (i) The package did not provide for electronic conveyancing outwith the framework of the ARTL system. ARTL is a members-only system. If Ursula owns land and wishes to dispose it to Vernon using an electronic disposition, that is not possible unless the ARTL system is used. And the ARTL system cannot be used unless both (a) Ursula or her law firm is a member of the ARTL system and (b) Vernon or his law firm is a member of the ARTL system.

34.9 (ii) The ARTL system can be used only for certain types of deed. There are numerous exceptions. One is the deed to be registered in the Land Register of property that is, until the application, still in the Register of Sasines. Another is the split-off disposition. (A split-off disposition, is one in which only part of the title unit is transferred, as where, for example, a developer buys land, builds houses, and sells them off one by one.) If a deed is of a type that is ineligible for ARTL, the consequence is not only exclusion from ARTL. Such deeds are also excluded from being in electronic form *at all*. So, for example, split-off

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[3] SSI 2006/491. We shall refer to this in this part as the "ARTL Order".
[4] SI 2006/3427.
[5] In practice the name "stamp duty" is often used to refer to SDLT, but in fact they are not the same. Stamp duty was formerly the tax applicable to conveyancing transactions but it was replaced by SDLT: see Part 4 of the Finance Act 2003.
[6] For ARTL mandates see para 34.62 below.

dispositions *must* be in paper form. Deed plans have to be in paper form.[7] There is no reason in principle why this should be so. There is no reason in principle, that is to say, why all types of deed (including deed plans) should not be capable of being in electronic form,[8] whether or not they are to be used in the ballroom. The current rule simply derives from the interim nature of the 2006 package.

34.10 (iii) From the fact that only ARTL-eligible documents can take electronic form follows another consequence, namely that unregistrable conveyancing documents cannot take electronic form either. In particular that means land contracts (missives) and short leases (leases for no longer than twenty years).

34.11 (iv) Conveyancing documents are sometimes registered in the Books of Council and Session. This is true not only of some documents that are not registered in the Land Register, but also, in some special types of case, of documents that are also registered in the Land Register. But the Books of Council and Session is open only to paper deeds. The 2006 package changed that rule to allow registration of paper copies of electronic standard securities. All other types of deed are excluded from the Books of Council and Session unless the deed itself is in paper form.

34.12 (v) Whilst the Register of Sasines is a moribund register, it is not dead yet. Deeds intake will continue[9], albeit at a declining rate, for many years. There is no reason in principle why such deeds should not be in electronic form if the parties so wish. The 2006 package does not include the Register of Sasines.

Requirements of form: general

34.13 Our law requires that certain significant juridical acts must be in writing and signed. Such "requirements of form", as they are sometimes called, can be found in other legal systems as well, though of course details vary. For Scotland the law is currently contained in the Requirements of Writing (Scotland) Act 1995,[10] which implements this Commission's 1988 Report on the subject.[11] The 1995 Act, like the older legislation it replaced, requires that among the juridical acts that must be in writing and signed are "a contract or unilateral obligation for the creation, transfer, variation or extinction of a real right in land" and "the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law."[12] In a nutshell that means deeds and contracts that relate to title to land – land deeds and land contracts.

34.14 At the time of our 1988 Report, the digital age was in its infancy. Few could have imagined how developments in electronic document processing and communication over the following two decades would open up possibilities for new methods of transacting.

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[7] This is a particularly unsatisfactory limitation. The Keeper converts a paper plan into digital data. The plan itself may have been prepared from digital data, so that there is a digital-paper-digital process that can generate errors.

[8] Split-off deeds need a plan attached. But that can be done electronically.

[9] Increasingly discharges of standard securities, which lend themselves to e-enablement, will predominate.

[10] We shall refer to this as the 1995 Act.

[11] Scottish Law Commission, Report on *Requirements of Writing* (Scot Law Com No 112, 1988).

[12] 1995 Act, s 1(2). The section also specifies certain other types of juridical act that must be in writing, such as testaments.

34.15 The original terms of the 1995 Act were such that those juridical acts to which a requirement of form was applied had to be in what might now be termed "traditional writing" with the words being written (whether by means of handwriting, typewriting or printer) on a physical surface such as paper. Thus the Act prevented the development of electronic conveyancing.

Demand for e-enablement

34.16 An electronic document, authenticated by a secure electronic signature, can be as good as a paper document with a "wet" (pen-and-ink) signature. Indeed, it can be better, both in its own right and as an enabler of more efficient business processes. As a result we are aware of a demand amongst stakeholders for broader "e-enablement" of the 1995 Act to allow land contracts to be concluded electronically and allow land deeds outwith the ARTL system to be in electronic form. For example it is anomalous that Scots law currently allows property to be conveyed (in some types of case) by electronic disposition whilst still requiring the missives (contract) for that conveyance to be formed on paper. Further e-enablement would also be consistent with EU and domestic policy on encouraging development of e-commerce.

Scope of e-enablement

34.17 Full e-enablement of the 1995 Act in every respect would go beyond the scope of the present project. In particular, the e-enablement of testamentary documents would be beyond scope. It would involve different stakeholders and different policy considerations from those applicable to land contracts and land deeds.[13] Accordingly our recommendations, and the provisions in the draft Bill, are limited to e-enabling land contracts and land deeds. But, as already indicated, they are not limited to deeds that are registrable in the Land Register. They would apply to, and bring the benefits of electronic communication to, all types of land deeds and contracts including varieties which do not normally go near any of the Keeper's registers, such as missives and short leases.[14] Even this is, strictly speaking, to go beyond the scope of a project labelled "land registration". But our view is that it would be unacceptable to provide for electronic conveyancing in general but then to stop short and leave such documents as missives and short leases stranded in the pre-digital world.

Optional or compulsory?

34.18 We take the view that whilst the electronic option should be available, there should be no legislative compulsion to take that route. Those who wish to use traditional documents should remain free to do so. However beneficial e-commerce approaches may be to what sociologists would call repeat players, such as law firms with a substantial conveyancing business, there will always be situations – particularly where members of the public are acting without professional agents[15] – in which it would be convenient or even necessary to use paper. Indeed, deeds written by hand with pen and ink remain lawful. It is true that for the Department of the Registers of Scotland electronic deeds are cheaper to handle than

[13] It may well be that this subject has become ripe for review.
[14] That is to say, leases for not more than twenty years.
[15] This is rare – rarer than in England and Wales. But it is perfectly lawful for members of the public to do their own conveyancing and we think that there is nothing in our recommendations that would place obstacles in the path of anyone who wished to do so.

traditional deeds.[16] But the answer to that lies in adjusting the fees structure, not in prohibiting the use of paper deeds. Indeed, the registration fee for a deed in the ARTL system is already lower than for the same deed as a paper document. If those using the services of the Department of the Registers are prepared to pay a higher fee for paper deeds, and if that differential sufficiently covers the Keeper's extra handling costs, then it is difficult to see a public interest in prohibiting the use of paper deeds. Indeed, there is a public interest in allowing them, for there are those who may not have ready access to the technology needed for electronic deeds.[17] Electronic deeds are cheaper for users, both from the point of view of lower registration fees and from the point of view of the user's own handling costs. If users do not take advantage of such internal savings, that is their concern. Moreover, it must be considered that in practice people understandably take time to adjust to technological change.[18]

The background of EU legislation: (a) the E-Signatures Directive

34.19 The E-Signatures Directive[19] introduced the concept of "electronic signature", defined as "data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication."[20] The other key concept is that of "certification", which is about third-party attestation either of an electronic signature, or of the mechanism by which an electronic signature is created. Certification enhances the probative value of an electronic signature and is functionally similar to the witnessing of a pen-and-ink signature of a paper document, although the similarity is not a perfect one.

34.20 The E-Signatures Directive seems to have been predicated on the assumption that use of a particular technology would establish itself. This technology is a form of asymmetric key-pair "public key infrastructure" (PKI) involving a trusted third party "certification service provider" (CSP.)[21] The details of the arrangement are complex, as are the questions of liabilities amongst signatories, relying parties and the CSP, and in practice it is very costly to operate such an infrastructure. Accordingly whilst a number of specialist private sector companies provide what might be described as wholesale certification services, there is no current "retail" market providing digital certificates suitable for use in Scottish conveyancing transactions. In introducing ARTL, the Department of the Registers of Scotland found it

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[16] Especially if used within the ARTL system.

[17] First there is the question of access to a computer plus a broadband internet connection. Not everyone has this nor does the law require anyone to have it. And in the second place even those who have such facilities may not have the type of high-grade electronic signature necessary for conveyancing transactions. At present hardly any ordinary citizens have such a signature.

[18] Two examples from conveyancing history. (i) Typewritten deeds came into general use only about 1920, by which time the typewriter had been in use for decades. (ii) The Department of the Registers of Scotland did not begin to photocopy deeds (as opposed to copying them by hand) until 1934. That the Keeper should adopt photocopying had first been proposed in 1893: see L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942), p 159.

[19] Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures.

[20] Article 2(1).

[21] The E-Signatures Directive defines "certification-service-provider" as an entity or legal or natural person who issues certificates or provides other services in relation to electronic signatures. In the Directive scheme, where a party seeks to obtain an electronic signature, the CSP carries out identity checks and, once satisfied that the party is who they claim to be, creates a "key pair" which are two extremely large numbers which bear a complex mathematical relationship. Someone with access to the public key can know to an exceptionally high degree of probability that data has been operated on by the related private key without however finding out the actual value of the private key. The private key is given to the signatory, who keeps it secure and uses it to create electronic signatures. The CSP makes the public key publicly available in the form of a certificate, which confirms that signatures created by the private key were created by the identified individual.

necessary to set up its own Certification Authority. The fact that the Keeper in any event guarantees the accuracy of the Land Register removed many of the liability issues, issues that have elsewhere inhibited the development of such systems.

The background of EU legislation: (b) the E-Commerce Directive

34.21 There is also the E-Commerce Directive.[22] Article 9(1) provides : -

> "Member States shall ensure that their legal system allows contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made by electronic means."

34.22 Article 9(2) permits Member States to derogate from this in respect of certain categories of contract, one of these being "contracts that create or transfer rights in real estate, except for rental rights."[23] There is room for debate as to the meaning of this exception,[24] including the exception to the exception,[25] and as to what extent Scots law may be disconform to the Directive.[26] We express no view. If there is any element of non-implementation, our recommendations would deal with the problem. In any event, we consider that the main reason for allowing electronic land contracts and land deeds is that the users of the system wish to have that possibility.

Background: UK response to the EU directives

34.23 The main UK response was the Electronic Communications Act 2000.[27] Section 7 provided that electronic signatures and certificates are admissible as evidence as to the authenticity and integrity of electronic communications. Authenticity is defined in section 15(2) as meaning whether or not the electronic document has been electronically signed by the given person. Integrity is defined as meaning whether or not there has been any tampering with or modification of the document. An advantage of some types of electronic signature, such as those used in ARTL, is that they can actively identify whether a document

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[22] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of Information Society Services, in particular electronic commerce, in the internal market.

[23] As usual the official English text is drafted in terms of English law. The French text is "les contrats qui créent ou transfèrent des droits sur des biens immobiliers à l'exception des droits de location", and the German text is "Verträge, die Rechte an Immobilien mit Ausnahme von Mietrechten begründen oder übertragen".

[24] In Scots law and in many (but not all) other European countries, contracts create rights but do not transfer them. Rights are transferred by disposition, assignation etc. But dispositions, assignations etc are not contracts, or at least primarily not contracts.

[25] That is to say "rental rights". We quote that standard work, George Watson (ed) *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, 1890): "A rental right (which is now almost unknown in practice) was a lease granted by the landlord for a low and favourable tackduty, to those who were either presumed to be lineal descendents of the ancient possessors of the land, or were persons whom the landlord wished to favour." This cannot be the meaning. But what then is the meaning? The French and German texts refer to *location* and *Miete* respectively, both of which can be fairly rendered in English as "lease" or "tenancy", but those words have been avoided in the English text. It is not easy to discover the precise meaning of the provision, on the hypothesis that it has one. If it is saying "leases must be capable of being constituted in electronic form" then it seems that Scots law does not conform, because leases for more than one year cannot be so constituted. (1995 Act, s 1(7). For an exception see s 1(3).)

[26] See Robert Rennie and Stewart Brymer, *Conveyancing in the Electronic Age* (2008), para 4-09; and George L Gretton and Kenneth G C Reid, *Conveyancing* (3rd edn, 2004), para 3-05.

[27] Also to be mentioned are the Electronic Signatures Regulations 2002 (SI 2002/318), implementing aspects of the E-Signatures Directive concerned with regulation of "certification-service-provider". These regulations are not relevant for present purposes.

has been altered after execution. In this respect it is better than a witnessed paper deed.[28] The twin concepts of authentication and integrity are carried into the 2000 Act's definitions of electronic signature and certification, which we have followed in the draft Bill in preference to those in the E-Signatures Directive, both because the Act is more technologically neutral than the Directive and also because of the specific reference to integrity.

34.24 It was recognised that despite the general pre-compliance of the UK with the Directive, there might be some specific cases where there were formalities that would need to be modified. For such cases, section 8 of the 2000 Act permits modification of domestic enactments, including Acts of Parliament, by subordinate order. It was under this power that the 1995 Act was amended by the ARTL Order. The ARTL Order achieved what was tactically required but only with some difficulty; it is evident that the drafter of the delegating power in the 2000 Act did not have the specific case of the 1995 Act in mind. Being intended to be made by Act of the Scottish Parliament, our recommendations for the amendment to the 1995 Act can proceed on a more principled basis. We therefore propose to undo most of the changes made to the 1995 Act by the ARTL Order, but we should stress that this would not affect the use of ARTL in practice: what we recommend would cover everything that the ARTL order covered, and more.

Our approach to amending the 1995 Act

34.25 We begin with two observations about the 1995 Act. The first is that it is codal in the sense that everything that needs to be said is within the four corners of the Act. The only delegating power – to prescribe forms of testing clause[29] - has never been used. The second is that (except for the provisions about personal bar) the Act has attracted little judicial attention. The ideas of putting words on paper, of signing, of having someone witness that signature, and appending their own signature are familiar to almost everyone. The "technology" is settled and static. But in the case of electronic documents and signatures the technology is new and moreover is far from static. It is evolving all the time. Even if we were capable of hard-wiring into the new legislation all the norms that may be necessary,[30] for reasons of technological neutrality and future-proofing, it would not be appropriate to do so. Accordingly the new provisions that we recommend depart from the current scheme of the 1995 Act by making extensive use of delegated powers to allow Scottish Ministers to set standards by Regulations. But the departure is limited to electronic documents.

"Written documents"

34.26 We consider that written documents, currently treated by the 1995 Act as a unitary class, should in future become a genus with two species; "traditional documents," being those produced on paper etc,[31] and "electronic documents" being those in electronic form.

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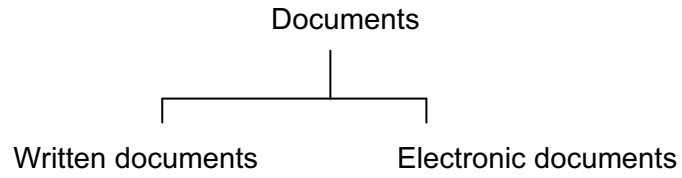
[28] This is particular true since in the case of deeds running to more than one sheet of paper, only the last sheet is signed and witnessed. (A partial exception applies to testamentary deeds, where each sheet must be signed, though only the last page must be witnessed.) That means that the unsigned page or pages can be removed and replaced after execution, without the fraudster having to go to the trouble of forging a signature. Our law of execution of deeds is lax by international standards.

[29] 1995 Act, s 10.

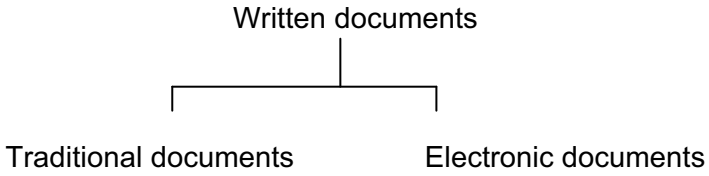
[30] That is to say, necessary as to what is or is not an acceptable electronic document, electronic signature or certification of that signature for any given purpose.

[31] The reason for the "etc" is that there has never been a requirement that traditional documents be written on paper. For example, though parchment is nowadays never used (though some types of paper are sometimes called "parchment") its use remains legally competent. This is why the draft Bill does not say "paper document", for that would be too narrow. An alternative approach would have been to use the word "paper" but then to define

Our approach here departs from that of the ARTL Order, which drew the line of division between "written documents" and "electronic documents". Thus the approach of the ARTL Order was:



Our approach, by contrast, is this:



34.27 The issue is merely one of conceptualisation, but we think that our approach is preferable. In our view the concept of writing should apply to electronic documents as well as to paper documents.[32]

Ancillary clauses

34.28 The 1995 Act provides that "writing shall not be required for the constitution of a contract, unilateral obligation or trust."[33] That would be unchanged. Also unchanged would be the five exceptions to that rule,[34] namely:

a) Land contracts
b) Gratuitous unilateral obligations
c) Truster-as-trustee trusts
d) Land deeds
e) Testamentary documents

34.29 Each of those five cases would continue to be satisfied by a formally valid traditional document - a paper deed with a wet (pen-and-ink) signature. The recommended amendment would provide that in cases (a) and (d) the requirement for writing could *also* be satisfied by

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it to include non-paper. Such a definition would not be straightforward. It would be a curious question of theory whether a conveyancing deed could be carved into a 20-tonne block of granite, engraved signatures and all. Or written on a cow. One of the cases in A P Herbert, *More Misleading Cases in the Common Law* (1930), is *Board of Inland Revenue v Haddock*, in which a cheque to the taxman is written on a cow. According to Mr Justice Lightman, in the (real) case of *Victor Chandeler International Ltd v Commissioners of Customs and Excise* [1999] EWHC Ch 214 at para 11, "the repository of information must be inanimate: neither a person nor A P Herbert's 'negotiable cow' … can constitute a document." But this remark is *obiter*.

[32] For example people say that "he wrote in his blog that… " or "she wrote in her email that …".

[33] 1995 Act, s 1(1).

[34] 1995 Act, s 1(2).

a formally valid electronic document. The draft Bill does not alter cases (b), (c) or (e). As already indicated, that would be outwith the scope of this project and raise issues far removed from land registration.

34.30 However, missives and land deeds sometimes contain ancillary provisions falling under heads (b), (c) or (e). If such deeds could not be in electronic form, that would be a serious derogation from the usefulness of the reform, and moreover it would be an elephant trap. If an electronic deed happened to contain such an ancillary clause, the clause would be *pro non scripto* even though the deed as a whole would be valid. The intentions of the parties would be defeated by a technicality. Conveyancers would have to ask themselves for each and every electronic deed, "is this a deed with a clause that requires paper?" and if the answer were "yes" then they would need to prepare a separate deed. Extra costs would be incurred, even by the fact that the question would have to be asked on every occasion.

First recommendation

34.31 Drawing the discussion so far together, we recommend:

> **131. (a) The Requirements of Writing (Scotland) Act 1995 should be amended so as to permit (but not compel) the use of electronic documents for land contracts and land deeds.**
>
> **(b) The same should apply to other acts in relation to which the 1995 Act imposes a requirement of writing, but only to the extent that the act is contained within, and is ancillary to, a land contract or a land deed.**
>
> (Draft Bill, s 83(2) and sch 5)

34.32 Under current law, parties to a contract often wish it to be in probative form even though it has nothing to do with land. The law allows that. In other words, the law does not say that probative status is available only for documents of a certain type. The same would be true for electronic documents. If two parties entered into a contract that was electronically authenticated, that would be probative, even though it had nothing to do with land.

Re-structuring the 1995 Act

34.33 In its present form, the 1995 Act is not divided into parts. When it was amended by the ARTL Order, the provisions about electronic deeds were inserted into the existing structure alongside the provisions about paper deeds. The idea mentioned above, of having a genus of "written documents" with two species of "traditional documents" and "electronic documents" at once suggested a different way of structuring the 1995 Act. The amendments proposed in the draft Bill would divide it into four parts thus:

1) When a written document is required
2) Traditional documents
3) Electronic documents
4) Provisions of general application

34.34 In the proposed Part 2 of the 1995 Act the substance of the existing norms that are specific to traditional documents would be unchanged, except that provisions applying to both traditional and to electronic documents would appear in the proposed Part 4. By way of

setting the scene for the new provisions in Part 3, we recall two principal features of the scheme for traditional documents. First, a traditional document is formally valid if it is signed by the granter (or, where more than one, each granter.) Second, a traditional document is presumed to have been signed by a granter if that granter's signature bears to have been witnessed (the benefit of this presumption being commonly called "probativity" or "self-proving-status"). We now turn to the substance of the proposed Part 3, which would apply solely to electronic documents.

Electronic documents: formal validity

34.35 A difference should be noted between traditional signatures and electronic signatures. A signature is a unique act. It may be forged, but a forgery and a true signature are distinct, in their inner reality if not always in outward appearance. But the genuine/forged distinction does not work so easily with electronic signatures. An electronic signature involves the use of a set of data, which could, in the event of a security lapse, be used by someone else. For a traditional signature there is nothing equivalent to a security lapse. The ARTL Order took this difference into account and added to the requirements for formal validity in the case of an electronic document a requirement that the electronic signature was created by the person by whom it purports to have been created. This seems to us sound and we think it should be retained.

34.36 The norms for traditional documents are solely about signatures; the law says nothing about the attributes of the physical document itself. It does not, for example, specify that in order to be formally valid a document must not be written on paper that has a propensity to disintegrate, or to catch fire spontaneously, nor that a document cannot be written in vanishing ink, or in a script or language that no-one will be able to understand in a year's time.[35] No doubt if any such issues were to arise, answers would have to be found, but with the settled technology of paper deeds, there is in practice no need to address questions such as durability and legibility. But with electronic documents these are issues that have to be considered. Format supersession is a well-known problem in the digital world. Durability and future accessibility and legibility are amongst the policy reasons for having requirements of writing in the first place. It would be unfortunate if we were to find ourselves in the position where medieval conveyancing deeds are and will continue to be readable but that an electronic deed of say 2020 might be unreadable in 2050.

34.37 The ARTL Order did not address this issue for the simple reason that it did not need to. The ARTL system is a closed system in which the Keeper has complete control of the form of electronic documents and electronic signatures used. But now that the Act is to be opened up to potentially any type of electronic document, we consider that a power to set standards is a necessary safeguard. For example, we doubt that it would be appropriate for

[35] With one exception, we are unaware of any *statutory* rule requiring registrable deeds to be in English. The practice dating back hundreds of years has been for conveyancing deeds to be in English, other than Crown deeds ("Crown writs" to use the traditional term), which were in Latin. Section 90 of the Titles to Land Consolidation (Scotland) Act 1868 said that henceforth Crown writs were to be in English. Nor are we aware of any statutory rule that requires the use of the Latin script. The possibility of using a language other than English, such as Gaelic, could also arise in legal areas other than conveyancing. There may be a political dimension here and the draft Bill is silent on such issues. We understand that the Keeper's position is that there is a common law requirement for registrable deeds to be in English, and in the Latin script, except for those instances where there is legislative provision for a foreign language deed, accompanied by a certified translation, to be registered in the Books of Council and Session. But all this is to digress from the subject of electronic conveyancing.

it to become possible to conclude a land contract by a communication as informal and transient as an SMS text message.

34.38 Format regulation is an issue that becomes more important as one moves up the level of formality. Once one reaches the level of registrability, format regulation is of the highest importance, and we mention it again in that context. It would be possible for Ministers to prescribe the same format rules for all three levels (validity, probativity, registrability). Alternatively they could set different rules.

34.39 The electronic signatures used in ARTL are highly secure but the generic concept of "electronic signature" is not limited to such signatures. Section 7 of the Electronic Communications Act 2000 says:

> "An electronic signature is so much of anything in electronic form as—
>
> (a) is incorporated into or otherwise logically associated with any electronic communication or electronic data; and
>
> (b) purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data, or both."

34.40 Simply typing one's name at the end of an email is probably an electronic signature within this definition, but this would not, in our view, be a sufficiently robust form of authentication to qualify for formal validity. Accordingly we consider that a power should be delegated to the Scottish Ministers to set by regulations the minimum standards necessary for an electronic signature to be able to confer formal validity on an electronic deed.

34.41 We recommend

> **132. That an electronic document should be formally valid if –**
>
> **(a) It is authenticated by the electronic signature of each granter;**
>
> **(b) Each such electronic signature has been created by the person by whom it purports to have been created;**
>
> **(c) The document itself satisfies such requirements as may be prescribed by Scottish Ministers; and**
>
> **(d) Each electronic signature satisfies such requirements as may be prescribed by Scottish Ministers.**
>
> (Draft Bill, sch 5; proposed new section 9B of the 1995 Act)

Electronic documents: probativity

34.42 The ability to achieve a presumption that a document has been signed by its ostensible granter is of great importance to conveyancing practice. Probativity is a condition for registration of a deed in the Register of Sasines and Books of Council and Session.[36] For

[36] 1995 Act, s 6.

the Land Register probativity is not a requirement in law but it is in practice and the draft Bill turns that practice into a legal requirement.

34.43 Whilst there is no legal requirement for missives to be probative, in modern practice they invariably are. Accordingly, in seeking to bring forward electronic conveyancing, it is important that we allow electronic documents to achieve the benefit of an equivalent presumption.

34.44 Two initial conditions for achieving the presumption can be copied over from the equivalent provision for traditional documents in section 3(1) of the 1995 Act. The first is that the document must bear to have been authenticated by the granter in question. (In a given document, the presumption may apply as respects some granters but not others.) The second is that nothing in the document or in the authentication should indicate that it was not so authenticated.

34.45 The third condition for probativity of a traditional document is that it be witnessed. In the electronic world, certification is a functional equivalent to witnessing and a simple approach would simply be to make certification the condition for electronic documents. But, for reasons which we shall come to, we think that it should be possible in some circumstances for an electronic document which has been authenticated by a suitably strong electronic signature but which is not certified to be given the benefit of the presumption.

34.46 We pause here to comment on the position at present in ARTL. The electronic signatures applied to electronic deeds created within the ARTL system are certified, and the deeds are probative. The one does not, however, follow from the other. The Directive's definition of certification is that it is a third party attestation but not necessarily an attestation of the act of associating the electronic signature to the electronic document. It may instead be an attestation about the means by which the electronic signature is created. Whereas paper witnessing must take place at or after the time at which a granter signs a document, a digital certificate can predate the electronic signature that it certifies. This is what in fact happens in the PKI system used for ARTL; system users are issued with a certificate in which the Keeper, as CSP, confirms (by providing the public key) that a particular private key is associated with that individual. The private key is then used in the process of creating electronic signatures on individual deeds. In the ARTL process it is accordingly impossible for an electronic deed to be digitally signed but not also certified. In view of this, a tactical decision was taken during the preparation of the ARTL Order to include the requirement for certification in the conditions for achieving formal validity rather than those for achieving probativity. But in the wider e-enablement which we are now undertaking it is appropriate to consider certification only as a condition for probativity and not as a condition for formal validity.

34.47 Our general recommendation is that certification should be a condition for probativity. For future-proofing and technological neutrality, we wish to employ a wide definition of certification which might encompass, as well as very strong types of certification such as that used in ARTL, types of certification in which the added evidential value is too low to justify reversing the burden of proof. (For example, there are some online electronic signature services in which certificates are issued on the strength of an email address with no verification of who the person behind the address is.) Accordingly, as with electronic documents and electronic signatures, we consider it appropriate to permit Ministers by

secondary legislation to set standards as to those types of certification which will confer a presumption of authenticity.

34.48 As has been mentioned, the E-Signatures Directive was predicated on the belief that an effective market in PKI based Certificates and electronic signatures would emerge. In practice this has not happened and, as we have noted, in order to launch ARTL, Registers of Scotland found it necessary to set themselves up as a CSP. It is apparent that amongst the barriers to greater practical uptake of electronic signatures are issues revolving around the costs and liabilities associated with certification service provision. The great value of this approach to electronic signature is its ability to allow two people who know nothing about each other to know, and prove to a very high probability, the identity of the other and the fact of their having undertaken some juridical act.

34.49 There are other approaches to electronic signature which do not involve a trusted third party but which can be effective to authenticate communications between parties who already know each other. The Scottish conveyancing profession is small and to a considerable extent practitioners at least know of each other if not actually knowing each other. Accordingly, at least for authenticating missives, there seems some scope for a simpler approach to electronic signature to be adopted. We therefore consider that it should be possible for an electronic signature which is not certified to nevertheless achieve a presumption as to authentication if it is used in such circumstances and if it satisfies such requirements as may be laid down by Regulations.

34.50 We recommend:

133. An electronic document should be rebuttably presumed to have been authenticated by a granter if –

(a) it bears to have been authenticated by the electronic signature of that granter;

(b) nothing in the document or authentication indicates that it was not;

(c) the electronic signature is of such a type and meets such requirements as Scottish Ministers may prescribe; and

(d) either (or both) –

(i) the electronic signature is certified by a certificate meeting such requirements as Scottish Ministers may prescribe; or

(ii) the electronic document and electronic signature are used in such circumstances as may be prescribed and meet such requirements as may be prescribed.

(Draft Bill, sch 5; proposed new section 9C of the 1995 Act)

Registrability of electronic documents

34.51 We now come to the third and highest level of document formality: registrability. The proposed new Part 4 of the 1995 Act would contain various provisions applying to both traditional and electronic documents. Of these, only one involves new policy requiring discussion here. This is proposed new section 10A on the conditions for registration in certain public registers. The current section 6 of the 1995 Act provides that (subject to certain exceptions), in order to be registered in the Register of Sasines, Books of Council and Session or sheriff court books, a traditional document must be probative.[37] In practice the rule is the same for the Land Register, as the Keeper normally requires deeds submitted to that register to be probative too. As we have noted, the current provisions of the 1995 Act say nothing about the physical format of traditional deeds, and they do not need to because practice is so well settled. In the past few decades there has been a shift from use of imperial paper sizes to almost universal use of A4, and a move away from stitched deeds with hard backings to stapled deeds with soft backings. But there has been no radical change in what the Keeper of the Registers or sheriff clerks are being asked to handle.

34.52 The position is however different in the electronic world. Many different and mutually incompatible formats of electronic document exist. These tend to evolve rapidly from version to version, with the software suppliers ceasing to support older versions after only a few years. It is not realistic to expect the Keeper and sheriff clerks to be able to process every format and version of electronic document that might be produced. Likewise it is not realistic to expect these registrars to be able to make sense of every possible type of electronic signature and of certification. Accordingly we conclude that, for electronic documents, a mechanism is needed to control what formats are and are not registrable in these public registers. As before, the desire to keep primary legislative material technology-neutral and future-proof lead us to conclude that the details need to be delegated to regulations. Whilst we recommend that the delegation be to Scottish Ministers to be exercised by normal statutory instrument, its plainly essential that it be subject to a precondition of consultation with the Keeper and the Lord President of the Court of Session.

34.53 We recommend

134. That an electronic document should not be registrable in the Land Register, Register of Sasines, Books of Council and Session or sheriff court books unless –

(a) the document itself;

(b) the electronic signature authenticating it; and

(c) any certification of that electronic signature

[37] When and if the relevant part of the Bankruptcy and Diligence etc (Scotland) Act 2007 is brought into force, this will also be the rule for registration of deeds (but not notices) in the Register of Floating Charges.

are in such forms as may be prescribed by the Scottish Ministers after consultation with the Keeper of the Registers of Scotland and the Lord President of the Court of Session.

(Draft Bill, sch 5; proposed new section 10A of the 1995 Act)

Electronic documents: further delegated powers

34.54 The 1995 Act has detailed provisions about authentication of alterations to traditional documents and also about execution by and on behalf of juristic persons.[38] The ARTL Order did not attempt to mirror these provisions for two reasons. In the first place the ARTL system does not allow a deed to be altered after execution, and in the second place the ARTL Certification Authority only issues digital certificates to natural persons. In opening up the validity of electronic documents and electronic signatures outwith the confines of the ARTL system, these questions may require to be addressed. However it is impossible to predict what provisions would be appropriate to meet future developments in both technology and conveyancing practice. Accordingly we have included within the draft Bill a delegation of power to the Scottish Ministers to make provision on these two issues as and when it becomes apparent what is needed.

Electronic documents: delivery

34.55 For most transactions the law does not impose any requirement of form. Most contracts could be entered into by telephone, for example. Communication is needed but the issue of delivery does not usually arise, unless the communication itself happens to take the form of delivery, such as a letter sent by post. But where the law imposes a requirement of writing, the question of delivery does arise. "This type of transaction requires a signed document" does not imply "this type of document takes effect solely by signing." If it did, an offer to buy a house would be binding as soon as signed, even if the seller knew nothing about it. The rules about delivery of traditional documents are governed by common law and have developed without statutory intervention.

34.56 In recent years questions have arisen as to whether the requirement for delivery could be satisfied by sending a copy of a traditional document by electronic means, such as fax. In *McIntosh v Alam*[39] it was held that a faxed missive letter – not followed up by a hard copy in the post – had been delivered. On the strength of this it had been argued that a traditional document could also be delivered by scanning it and sending the electronic image as an attachment to an email.[40] But in a later case *Park, Petitioners*[41] it has been held that a letter concluding a contract for the assignation of a lease cannot validly be delivered by fax.

34.57 These decisions relate to documents created and executed as traditional documents but then transmitted as an electronic copy. The courts have not so far addressed the means by which an electronic document may be delivered. This point was considered in an opinion commissioned by the Keeper in the development of ARTL,[42] which took the view that

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[38] 1995 Act, s 5 and Schs 1 and 2.
[39] 1998 SLT (Sh Ct) 19.
[40] Robert Rennie and Stewart Brymer, *Conveyancing in the Electronic Age* (2008), para 4-06.
[41] 2009 SLT 871.
[42] By Professors Stewart Brymer, George Gretton, Roddy Paisley and Robert Rennie. It was published at 2005 JR 201.

electronic documents could be electronically delivered. The 2006 package presupposes that this view of the law is correct. That package could not have done otherwise: none of the powers under which the 2006 package was passed would have extended to an alteration of the common law of delivery. The draft Bill being primary legislation, it can deal with the law of delivery. Whilst we think that no doubt exists that an electronic deed can be electronically delivered, we think it would be convenient for that to be stated expressly. Accordingly, we recommend

135. There should be an express statement that an electronic document may be delivered electronically.

(Draft Bill, sch 5; proposed new section 9E of the 1995 Act)

The ARTL system

34.58 No rules are needed about who can make *non*-ARTL applications.. What is involved in such cases boils down to writing a letter to the Keeper to say "Dear Keeper, I enclose the undernoted paper/deed. Please register it", or sending an email to say "Dear Keeper, I attach the undernoted electronic deed. Please register it."[43] It is up to the Keeper to decide whether to register it or not. But ARTL is different, and has to be different if it is to work. Its underlying presumption is that applications made through the system will be in order. So the ARTL system must have entry control. It is an online dance-floor that needs bouncers. Involving, as it does, a high degree of trust, it presupposes that those who use it are both honest and reasonably competent. Arguably it also presupposes that those who use it have professional insurance. Under current law users must be authorised by the Keeper. The Keeper is the obvious gatekeeper.

34.59 It might be asked whether ARTL involves an unlawful abdication of the Keeper's responsibilities. We agree with the view expressed in the professorial opinion mentioned earlier that there is no such unlawful abdication. Something depends, indeed, on how the system is run. Were it to turn out that the ARTL system generated an unacceptably high level of inaccuracies, then the Keeper would be bound to improve the system, and if that could not be done, would be bound, in our view, to discontinue it. But that is not the situation. (For that matter it would be an abdication of responsibility if the Keeper were to handle non-ARTL cases through incompetent staff, with an unacceptably high level of inaccuracies as a result.)

34.60 ARTL is lawful, but it presupposes, as we have said, rules about who can use the system and how they can use it, rules that are for the most part unnecessary for non-ARTL cases. And as we have said, the legislative underpinning is at present inadequate. The legislation merely says that the Keeper is to authorise users. There is nothing about what criteria are to be applied. (Can the Keeper exclude those with fraud convictions? One hopes so.) Nothing is said about the way in which those authorised are to use the system. There is nothing about the suspension or revocation of rights of access, and so on. Not only are there no such provisions, but it is doubtful to what extent there exists power to lay down such provisions by secondary legislation. Proper legislative underpinning is needed, not least for

[43] Of course we oversimplify (though not much). An application form must be filled in and signed and the fee must be paid.

the benefit of the Keeper, who in the current system is at constant risk of judicial review.[44] We recommend:

136. (a) The Keeper should continue to be the person who authorises access to the ARTL system.

(b) Secondary legislation should prescribe criteria about who can be authorised by the Keeper to access the system, about suspension and revocation of access, and about the terms and conditions of use.

(Draft Bill, s 77(1) and (3), and s 95(1)(q))

34.61 Certain other aspects of the ARTL system are mentioned in the draft Bill. No material change is made to the existing position.[45]

ARTL mandates

34.62 Most clients do not have an electronic signature, or at least do not have the type of high-security digital signatures needed to authenticate ARTL deeds. The practice has accordingly developed whereby the client grants a mandate to the solicitor to sign, the solicitor using his or her own electronic signature to sign the deed. The practice is subject to professional regulation through the Law Society of Scotland's Solicitors (Scotland) (ARTL Mandates) Rules 2006. These require the mandated solicitor (a) to keep the mandate on file and (b) to send a copy of it to the Keeper. It should be noted that the mandate is received by the Keeper *after* the transaction has happened, and that it is not the Keeper's practice to scrutinise the mandate.

34.63 The system is perhaps not perfect. Traditionally when a deed is signed by a mandatory the Keeper expects sight of the mandate[46] *before* registration. And a copy is kept in the Archive Record, so that if the question later arises as to whether the deed was lawfully granted, a copy of the authorisation can be produced and examined. In ARTL cases there is no pre-registration check by the Keeper, and if the solicitor fails to send a copy, the Archive Record will contain no copy. One might argue that deeds signed under mandate should be excluded from the ARTL system. The difficulty with that approach is practical: at present few clients have the necessary electronic signatures. As a result, electronic conveyancing is not yet paperless conveyancing.

34.64 Whilst the system is not perfect, the practical reasons for it seem persuasive, and we have no recommendations to change it, except one. At present, the only obligation to send a copy of the mandate to the Keeper is contained in the Law Society rules, mentioned above. We think it should also be a requirement of the use of the ARTL system. In other words, we think that the ARTL access rules should say that those using ARTL must lodge ARTL mandates with the Keeper within a certain period of registration.[47] We recommend:

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[44] We thank Professor Pamela O'Connor (Victorian Law Reform Commission) for convincing us that the ARTL rules should be based on legislation rather than on contract.

[45] See s 77.

[46] The term "power of attorney" is also used, though in practice the term "mandate" is exclusively used in ARTL cases.

[47] The Law Society's requirement is 14 days: Solicitors (Scotland) (ARTL Mandates) Rules 2006, rule 4(1).

137. The secondary legislation mentioned in the previous recommendation should include a requirement about the lodging of copy mandates.

Postscript: about electronic signatures

34.65 "Electronic signature" has been the subject of various different legal definitions.[48] (The draft Bill follows that used in the Electronic Communications Act 2000, which can be paraphrased as being "data speaking toward the authenticity or integrity of other data."[49]) A common feature of these definitions is that they leave the reader with little idea of what, in practice, an electronic signature is. The analogy is sometimes drawn between an electronic signature and a seal; both are things which one person has in order to authenticate documents which are to be read and relied upon by others. At its simplest, an electronic signature may be something as basic as typing one's name at the end of an email, or of appending to an email a scanned copy of one's paper-and-ink signature. For some purposes this may be all that is needed; as with shaking hands, there are situations where signature is more about symbolism than any serious enhancement of evidential value. However such basic electronic signatures could clearly be forged very readily.

34.66 A rather more secure approach might involve some secret password or code shared between the intended signatory and the intended relying party. This of course would need to be agreed in advance. If the same secret is used time and again it becomes more likely to become known to third parties, who might misuse it. But pre-planned arrangements can be made to change the secret by messages that will be meaningless to an intercepting third party; electronic signature and cryptography have much in common and the history of the latter provides many examples of such arrangements.

34.67 Reliability can also be enhanced by adding to the number of factors required to achieve identification. For example, the combination of a bank card and knowledge of the PIN number is much more secure than either factor in isolation. Highly secure digital identity management – at present probably too complex for routine use in conveyancing – may involve biometric factors such as data derived from the signatory's fingerprint or an iris scan.

34.68 The difficulty with any sort of conventional shared secret is that it needs to be known to both the signatory and the relying party; this puts the relying party in a position to impersonate the signatory. This difficulty is overcome in public key infrastructure (PKI) technology. Here there are two "keys" (in fact extremely large random numbers) which bear a complex mathematical relationship. The signatory holds the private key which is used to perform an operation on the data to be signed. The relying parties (there can be any number of them) can use the public key, which is accessible to them, to confirm that the data was signed by the private key but in doing so they do not learn the value of the private key.

34.69 Amongst parties who already know each other this may be all that is needed. Abigail knows Brian, Caroline and Derek. She generates a key-pair and passes the public key to each of them. Each of them can now know that documents are electronically signed by Abigail, but none of them has the ability to reproduce her signature. However Erica does not know Abigail. She receives an electronically signed message purporting to come from Abigail. She has access to the public key. But how does she know that the sender actually

[48] See, for example, http://en.wikipedia.org/wiki/Electronic_signature#Legal_definitions.
[49] Section 7. The definition is quoted in para 34.39 above.

is Abigail? One possibility is that Derek knows both Erica and Abigail; he is accordingly in a position to reassure Erica that messages which can be unlocked with the public key that purports to be associated with Abigail do in fact come from her. A development beyond this is where the key-pair numbers are generated by a trusted third party who has been at pains to ensure that the private key has been issued to the person who actually is Abigail, and is prepared to guarantee that fact to those who wish to place reliance on electronic signatures created with that private key.

34.70 A few words about electronic signatures as they are currently used in the ARTL system. Signatures are held by individuals, rather than by firms. The digital signature is effected by the combined use of a card and a password. A card-reader is plugged into a USB port of the computer that is being used, and the card is inserted into the card-reader while the password is keyed in when the right screen appears. The signature then works like a seal or a watermark over the whole electronic document. The private key number is embedded in the card and exists nowhere else, not even in the records of the certification authority. The cardholder will in practice not know what the number is either, since it is unimaginably large and is embedded into the card by electronic means. It is a number that no one knows.

Part 35 Prescription and registered titles

Introduction

35.1 Most legal systems have rules whereby a person who has had long-term possession of property, but who does not have a legally valid title, can eventually be protected by the law. Put the other way round, most legal systems say that paper owners who do not possess their property may find that a time will eventually come when the law will no longer protect their title. In Scotland this bundle of rules goes by the name of positive prescription. It is regulated by the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). As applied to the Register of Sasines, the basic rule is that a person can acquire land by meeting two main requirements. The first is the recording in the Register of Sasines of a disposition.[1] If the disposition is valid, then positive prescription is irrelevant anyway. But if it is not valid, it would nevertheless become protected from challenge, if the disponee then could meet the second requirement, namely that of possessing the land for ten years. The ten years must come after the recording of the deed: possession before that time is irrelevant. Certain other requirements also have to be met, such as that the deed has the appearance of validity.[2] As for the Land Register, we consider the situation below.

35.2 Positive prescription is, as such, not a topic that forms part of this project on land registration. It is an area of substantive law in its own right, underpinned by policy decisions made over time. Reform would require an independent project. Nevertheless, there are certain aspects which cannot be avoided in the context of the present project. The question of when the Keeper should accept *a non domino* dispositions is discussed in Part 16. The present part of the Report deals with amendments to the 1973 Act.

Is positive prescription needed in the Land Register?

35.3 In the current scheme of land registration, positive prescription does not run unless the Keeper has excluded indemnity.[3] In DP 125 we argued that this was an oversight in the drafting of the 1979 Act and we proposed that, as in the Register of Sasines, positive prescription should be capable of running on any title.[4] Respondents were in agreement. If there is to be a system of positive prescription, there can be no good reason why it should apply to unindemnified (unwarranted) titles but not to indemnified (warranted) titles.[5] Of course, a title that is warranted is unlikely to stand in need of positive prescription anyway. But occasionally it will. We therefore recommend:

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[1] Positive prescription can run on other deeds, but for simplicity we mention only dispositions.
[2] Not "invalid *ex facie*" is how it is put in the 1979 Act, s 1.
[3] 1973 Act, s 1(1)(b) as inserted by the 1979 Act, s 10.
[4] DP 125, Part 3.
[5] In our new scheme, prescription is not the only means by which a defective title may be made good. The other is the integrity/realignment principle. The latter can validate a title more quickly than the former, but operates only if certain conditions are met. Hence there is scope for both.

138. Positive prescription should apply to all titles registered in the Land Register.

(Draft Bill, s 86(1))

Changing registers

35.4 Does the transfer of a property from the Sasine Register to the Land Register interrupt the running of prescription? Current law is unclear on this, though it is understood that the view taken by the Registers of Scotland has always been that there is no interruption.[6] In DP 125 we proposed that it should be made clear that the running of positive prescription is not interrupted by change of register.[7] Respondents agreed. Accordingly we recommend:

139. Positive prescription running on a deed recorded in the Register of Sasines should not be considered as interrupted by first registration in the Land Register.

(Draft Bill, s 86(1))

"Exempt from challenge"

35.5 Legislation on positive prescription has never expressly stated that the effect is that the right in question is *acquired* when the period of prescription has been completed. The current legislation says only that the result is that the possessor's title is "exempt from challenge."[8] There is a certain division of opinion on what this means. Reid takes the view that the effect of prescription is that the right in question is acquired, ie that positive prescription confers title,[9] while Johnston concludes that "the effect of completing prescription upon a sufficient title is… nothing to do with acquisition of ownership."[10] On this latter theory, if Alice owns land but positive prescription runs in favour of Bob, then Alice continues to be the owner.[11]

35.6 The uncertainty exists only where positive prescription operates on a void title. Where positive prescription operates on a voidable title, matters are clearer: the right to reduce is lost.[12] Indeed, the "exempt from challenge" formula fits in better with voidable titles than with void ones.

35.7 Although the scope of the present project does not extend to a general examination of the law of prescription, we have come to the conclusion that as far as the Land Register is

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[6] See *Registration of Title Practice Book* (1st edn, 1981), para H.1.07. Although this passage is not repeated in the second edition (2000), the Keeper's interpretation of the law remains the same: see Registers of Scotland In-House Legal Manual, available online at http://www.ros.gov.uk/foi/legal/Frame%7EHome.htm.

[7] DP 125, paras 3.10 and 3.11 (proposal 1(b)).

[8] 1973 Act, s 1(1).

[9] Reid, *Property*, para 674.

[10] David Johnston, *Prescription and Limitation* (1999), para 14.14. He comments that this result is "inelegant" in para 14.13.

[11] A third theory is that once the period has run, the possessor is deemed always to have been the owner: the deed in the possessor's favour is retrospectively validated. This theory, by re-writing of the past, undermines the integrity of the register. We do not think this theory sound and note that it was disapproved in *Hamilton v Dumfries and Galloway Council* [2007] CSOH 96.

[12] On the basis of the view that voidability is indeed covered by the rules on positive prescription.

concerned the uncertainty as to the effect of positive prescription on void titles is undesirable. It undermines the main function of the Register, which seeks to set forth what rights there are in any given plot of land at any given time and who has those rights. It is not necessary to consider here which theory is correct in respect of current law, but rather to determine which is the better theory from the point of view of sound policy. The answer seems self-evident. The second theory dooms the Register to an ever-increasing number of unrectifiable inaccuracies. Moreover, the person against whose title prescription has run, being still the proprietor, is presumably still able to dispone and grant subordinate real rights. That possibility does not cohere with modern land registration principles. Hence we have come to the conclusion that the law should be that the effect of positive prescription on a void title is to validate that title as from the completion of the prescription. The type of right will vary from case to case. It may be a right of ownership or it may be a subordinate real right such as a servitude.

35.8 We do not suggest that the "exempt from challenge" formula should be replaced. We do not wish to meddle with the 1973 Act more than is necessary for the purposes of this project. Our recommendation is simply that the formula should be supplemented with a further provision to the effect that where the title is void, the "exempt from challenge" formula means that the title is validated as from the expiry of the prescriptive period. As a result it will be clear that positive prescription is, to use international terminology, acquisitive prescription. For consistency we think that the same clarification should apply generally to the first three sections of the 1973 Act: to limit it could be a source of confusion.

35.9 Accordingly we recommend:

140. In sections 1 to 3 of the 1973 Act, the effect of positive prescription in relation to a void title should be to validate it as from the time when the prescriptive period is complete.

(Draft Bill, s 86(2))

Prescriptibility of the Keeper's obligation to rectify

35.10 Under the current law, the right to have an inaccuracy rectified probably prescribes negatively after 20 years.[13] In form this is a negative prescription, but in substance it seems to be a positive one. A person who is wrongly registered obtains, after 20 years, what is in effect a title exempt from challenge. Possession is not required. This back-door positive prescription seems to us unsatisfactory at best and at worst capable of working injustice. Suppose that the Register shows John as owner of a boundary strip. The Register is bijurally inaccurate and the neighbour Iona is the "true" owner. She is in possession. The Register is rectifiable because John is not a "proprietor in possession". Yet apparently she loses the property after 20 years.[14]

35.11 Underlying the issue is the conception, which pervades the 1979 Act, that rights in land are in the Keeper's gift: the Keeper giveth and the Keeper taketh away. In this conception Iona's ownership is transmuted into just a personal right against the Keeper. She

[13] The issue has not been before the courts, but this is the standard view. See eg David Johnston, *Prescription and Limitation* (1999), para 3.04.
[14] Unless her possession somehow prevents negative prescription from running.

has no real right, and she can acquire a real right only if the Keeper gives it to her. In the new scheme Iona is the owner as well as the possessor of the boundary area and it is the Keeper's duty to ensure that the Register reflects that fact. The Keeper and the Register take on what we consider to be their proper (if more modest) role. We recommend:

141. The obligation to rectify an inaccuracy should be imprescriptible.

(Draft Bill, s 97, sch 8, para 21(11))

Prescriptibility of the Keeper's obligation to compensate

35.12 Under current law, a claim for indemnity may be extinguished by prescription after 20 years.[15] If so, by the standards of other countries that is relatively generous. In England and Wales the limitation period is six years after the claimant knew or ought to have known of the claim.[16] The model legislation proposed for Canada allows only two years.[17] The limitation period in other Torrens systems tends to begin with the date of the loss and not with the, often much later, date of its discovery. In New South Wales, for example, the right to claim compensation is extinguished six years after the loss.[18] On the whole, however, we are content with the rule currently operating in Scotland. It was a matter of deliberate choice by the Henry Committee.[19] It is the same as the rule for warrandice. It gives a reasonable, but not excessive, opportunity to make a claim, particularly when it is borne in mind that the 20 years runs from the date of the loss and not from the date of its discovery. A period of five years – the only alternative offered by the 1973 Act – would be too short unless special provision were made postponing its start to the date when the loss was, or ought to have been, discovered.[20] Respondents agreed with our proposal that "a claim for indemnity should continue to be subject to the 20 year negative prescription."[21] As we mentioned above, we now think – as we did not when we published DP 128 – that there might be some element of doubt about the existing law, and accordingly we think that the 20-year period should in future be stated expressly in the 1973 Act. But on one particular matter we now think that the short negative prescriptive period (five years) would be appropriate. The draft Bill provides that when the Register is rectified *in favour of* someone, that person should be entitled to compensation for loss caused by the fact that the Register was temporarily inaccurate.[22] The typical case is where an owner comes to sell but it then comes to light, at the last minute, that the Register is inaccurate, so that the sale has to be abandoned. The disappointed

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[15] 1973 Act, s 7. The 5-year prescription is excluded if the Keeper's obligation to pay is an "obligation relating to land": see Sch 1, para 2(e). But the scope of the phrase "obligation relating to land" is not certain. See David Johnston, *Prescription and Limitation* (1999), para 6.58.

[16] Land Registration Act 2002, Sch 8, para 8; R B Roper, C West, M Dixon, D Fox, S R Coveney, S Wheeler and P Milne, *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (looseleaf), para 47.025.

[17] Joint Land Titles Committee for Alberta, British Columba, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and Yukon, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990), pp 33–4 and 125 (s 7.3).

[18] Real Property Act 1900, s 131(2) as inserted by the Real Property Amendment (Compensation) Act 2000, s 3 and sch 1, para 12.

[19] Henry Report, p 50, note 4.

[20] Such a provision can already be found in the 1973 Act but only in respect of obligations to make reparation for loss caused by an act, neglect or default: see s 11(1) and (3). It is thought that an obligation to pay indemnity would not normally fall within this definition. For a discussion, see D Johnston, *Prescription and Limitation* (1999), paras 4.17–4.22.

[21] DP 128, para 9.38 (proposal 40(3)).

[22] Draft Bill, s 55.

seller should be able to obtain compensation for the lost sale.[23] The short negative prescription seems ample for such cases.

35.13 The Keeper is also liable under the draft Bill, as under the 1979 Act, for losing documents and for issuing extracts that are not true copies or providing information as to the contents of the register that is inaccurate.[24]

35.14 We recommend:

142. In relation to compensation for breach of the Keeper's warranty,[25] and to compensation for losses arising from the realignment provisions[26] the period of negative prescription should be twenty years. But the period should be five years for other cases.

(Draft Bill, s 97, sch 8, para 21(9) and (10))

Transitional issues

35.15 Issues concerning transition from the system currently operating under the 1979 Act to that which would operate under our recommendations are discussed in Part 36. But it makes sense to discuss at this point the transitional aspects of our recommendations about positive prescription. Our recommendations would result in a small change in the treatment of cases where less than 20 years before commencement of the new provisions, registration of a void deed in the Land Register had been secured by the fraud or carelessness of the applicant for registration. A series of examples will serve to illustrate this point; to show the interaction of our proposed amendments to the 1973 Act with our transitional provisions on inaccuracies in the Register as at the date of commencement of the new scheme. The examples assume that the new provisions would be commenced on 3 January 2014.

A: prescriptive periods completed pre-commencement

35.16 *Example 1.* Aesculapius holds on a void deed recorded in the Register of Sasines on 1 June 2003. He possesses continuously from that date. On 1 June 2013 his title is validated by section 1(1)(a) of the 1973 Act. Forgery aside, any element of fraud or carelessness on his part is irrelevant to the result. The law has always been, for good or ill, that positive prescription is capable of operating even if there has been bad faith or negligence.

35.17 *Example 2.* Benedicta holds on a void deed registered in the Land Register on 1 July 2003, subject to exclusion of indemnity. She possesses continuously from that date. On 1 July 2013 her title is validated by section 1(1)(b) of the 1973 Act and the Register thereby ceases to be bijurally inaccurate. The result is the same whether or not there has been any fraud or carelessness on her part.

35.18 *Example 3.* Cliff holds on a void deed registered in the Land Register on 1 August 1993 without exclusion of indemnity. He possesses from that date and so is a "proprietor in possession" for purposes of section 9(3) of the 1979 Act. He is not fraudulent or careless.

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[23] For this ground of liability, see Part 27.
[24] Draft Bill, ss 72 and 73.
[25] See Part 22 and draft Bill, Part 5.
[26] See Part 23 and draft Bill, Part 6.

Nothing happens on 1 August 2003, for under current law positive prescription does not run on an indemnified title. The Register continues to be (i) bijurally inaccurate but (ii) unrectifiable. On 1 August 2013 any possibility of rectification is (probably[27]) extinguished by long negative prescription and, whilst the Register remains bijurally inaccurate, Cliff can now safely go out to the shops.[28]

35.19 *Example 4.* Diane holds on a void deed registered in the Land Register on 1 September 1993 without exclusion of indemnity and possesses from that date. She caused the inaccuracy by her fraud or carelessness.[29] Her title is vulnerable to rectification until 1 September 2013 and after that it remains bijurally inaccurate, but becomes invulnerable to rectification.[30]

B: straddling periods – effect of schedule 6 paragraphs 28 and 33

35.20 Paragraph 28 of schedule 6 to the draft Bill provides for pre-existing rectifiable inaccuracies[31] in the Register (ie inaccuracies on the eve of the designated day) as follows:

> "If there is in the register, immediately before the designated day, an inaccuracy which the Keeper has power to rectify under section 9 of the 1979 Act (rectification of the register) then, as from that day—
>
> (a) any person whose rights in land would have been affected by such rectification has such rights (if any) in the land as that person would have if the power had been exercised, and
>
> (b) the register is inaccurate in so far as it does not show those rights as so affected."

35.21 *Example 5.* Ethelred holds on a void deed registered in the Land Register on 1 July 2005 subject to exclusion of indemnity. He is in possession. On the eve of the designated day (2 January 2014), the Keeper has power to rectify because of the exclusion of indemnity.[32] On 3 January 2014 Ethelred ceases to be proprietor (as the "true" owner has been reinstated as proprietor) and the Register becomes *actually* inaccurate[33] in continuing to show him as proprietor.

35.22 *Example 6.* Fiona holds on a void deed registered in the Land Register on 1 August 1995 without exclusion of indemnity. She is in possession. She caused the inaccuracy by fraud or carelessness and thus on 2 January 2014 the Keeper has power to rectify. On 3 January 2014, by virtue of paragraph 28, she would cease to be owner and the Register

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[27] It is probable but not settled that the right to rectification is extinguished by long negative prescription. See para 35.10 above.
[28] Whilst there is no case directly in point, it appears from the developing case law on the 1979 Act, such as *Kaur v Singh* 1999 SC 180, and *Safeway Stores plc v Tesco Stores plc* 2004 SC 29, that even if Cliff has possessed continuously for the first ten years, he will be vulnerable to rectification between years 11 and 20 if at any stage he is out of possession (perhaps only momentarily) and so not a "proprietor in possession" for purposes of section 9(3) of the 1979 Act.
[29] A proprietor in possession who has by fraud or carelessness caused the inaccuracy is not protected from rectification: 1979 Act, s 9(3)(a)(iii).
[30] On the assumption that negative prescription operates.
[31] There is also the issue of unrectifiable inaccuracies. The schedule also deals with those: see below.
[32] 1979 Act, s 9(3)(a)(iv).
[33] Whereas hitherto it has been bijurally inaccurate.

would become actually inaccurate. However, as will be seen, positive prescription comes into play in this case.

35.23 Paragraph 33 of schedule 6 provides as follows for pre-existing unrectifiable inaccuracies:

> "If there is in the register, immediately before the designated day, an inaccuracy which the Keeper does not have power to rectify under section 9 of the 1979 Act, then on that day it ceases to be an inaccuracy."

35.24 *Example 7.* Gordon holds on a void deed registered in the Land Register on 1 September 1995 without exclusion of indemnity. He is in possession and neither fraudulent nor careless. On 2 January 2014 the Keeper is powerless to rectify. On 3 January 2014 the Register ceases to be bijurally inaccurate.

C: straddling periods – operation of new 1973 Act sections 1A and 1B

35.25 Section 86(1) of the draft Bill inserts new sections 1A and 1B into the 1973 Act. Section 86(3) provides that these provisions do not apply in relation to a continuous period which has expired before the coming into force of the section. The provisions do apply to a continuous period which has commenced but not expired.[34]

35.26 *Example 8.* Hester holds on a void deed recorded in the Register of Sasines on 1 July 2005 and is in possession. On 1 July 2015 the new section 1B of the 1973 Act operates to confer title. Section 1B operates whenever a ten-year period ends on or after 3 January 2014, even if it is partly before that date. The practical result is unchanged from that reached under old section 1(1)(a) – see example 1 above.

35.27 *Example 9.* Iain holds on a void deed registered in the Land Register on 1 August 2005 subject to exclusion of indemnity. He is in possession. On 3 January 2014 he ceases to be proprietor by virtue of schedule 6 paragraph 28 but he remains entered on the Register. The Register ceases to be bijurally inaccurate and becomes actually inaccurate. On 1 August 2015 the new section 1A operates to confer title and hence the Register ceases to be actually inaccurate. Section 1A operates whenever a ten-year period ends on or after 3 January 2014, even if it is partly before that date. The practical result is unchanged from that reached under old section 1(1)(b) – see example 2 above.

35.28 *Example 10.* Janet holds on a void deed registered in the Land Register on 1 September 2005 without exclusion of indemnity and is in possession. She caused the inaccuracy by fraud or carelessness and thus on 2 January 2014 the Keeper has power to rectify. Accordingly on 3 January 2014 by schedule 6 paragraph 28 she ceases to be owner and the Register becomes actually inaccurate. However she continues to be entered as proprietor on the title sheet. On 1 September 2015 the new section 1A operates to confer title and make the Register accurate. In contrast to example 4, Janet's right has been perfected after 10 years whereas under the old law it would have remained liable to rectification until 2025.

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[34] This is consistent with s 14(1) of the 1973 Act, providing that, on commencement of that Act, time which had run prior to the commencement date would be reckonable toward prescriptive periods ending after commencement.

35.29 *Example 11.* Kevin holds on a void deed registered in the Land Register on 1 September 1995 without exclusion of indemnity and he is in possession. He caused the inaccuracy by fraud or carelessness. Nothing happens on 1 September 2005. On 2 January 2014 the Keeper has power to rectify. On 3 January 2014, under schedule 6 paragraph 28, Kevin would cease to be owner and the Register would thus become actually inaccurate. But simultaneously the new section 1A operates (in respect of the ten year period from 4 January 2004 to 3 January 2014 inclusive) to validate the title and so the Register becomes accurate, with Kevin's right having become unchallengeable. In contrast, under the old law (example 4), Kevin's right would have been vulnerable to rectification until September 2015.

Retrospectivity?

35.30 If the provisions were fully retrospective, in the circumstances set out in example 11, Kevin's title would be perfected back in time to the tenth anniversary of the original registration, ie to 1 September 2005. But this is not what section 86(3) says. Between 1 September 2005 and 2 January 2014 Kevin's registered title is – and always was – rectifiable. There would be no change to parties' rights at dates prior to the commencement of the provisions.

Prejudice?

35.31 Could our recommendations cause anyone any prejudice? In substance the answer is negative. The only prejudice would be that in certain types of case the new legislation would mean that the Register would cease to be rectifiable earlier than would be the case if the current law remained in force. Take Kevin's case. Under current law Octavia has (probably) until 2015 (twenty years after the original registration) to insist on rectification of the Register. Under our recommendations her right would be lost in 2014. We think that this result is a sound one. The normal rule of our law is that title is lost as a result of ten years of prescriptive possession in favour of another party, and thus the current position given in example 4 above is an anomaly. Assuming that Benedicta in example 2 was fraudulent or careless, there is no valid reason for examples 2 and 4 to produce different results as a result of the essentially arbitrary point of whether or not the Keeper chose to exclude indemnity.[35] As the current law is open to criticism for being arbitrary and creating uncertainty, we consider it good policy to restore it to a state of coherence. We return to this point again in our discussion of human rights considerations at the end of this part. It should be stressed that nothing in our recommendations would suddenly deprive Octavia of her right to have the Register rectified. After the draft Bill's enactment there would be a further period on top of the time since 1995 that she has already had for her to act.

Postscript: J A Pye (Oxford) Ltd v UK

35.32 Policy arguments for and against positive prescription are not matters for the present project. However, the European Court of Human Rights has recently considered the subject, and it is thus appropriate to say something about the human rights dimension.

[35] If the Keeper is suspicious of the deed and decides to exclude indemnity, the true owner loses the right of action sooner than where the Keeper's suspicions are not aroused.

35.33 In the *Pye* case, the Court considered whether a system corresponding broadly with our system of positive prescription was compatible with Article 1 of the First Protocol to the European Convention on Human Rights.[36] J A Pye (Oxford) Ltd owned about 50 acres in rural Berkshire. It was a property developer, and the area was part of its land bank, to be made use of as and when planning permission could be obtained. Neighbouring farmers, Mr and Mrs Graham, used the land for grazing, without paying rent, and after 12 years[37] they claimed that they had acquired title. (Unlike Scots law, English law does not require any prior registration to be effected before time can begin to run.) They then applied for the company's name to be deleted in the Land Registry and their own substituted. Litigation between the company and the farmers ensued, in which the latter were successful.[38] The company then claimed that its rights under Article 1 of the First Protocol had been breached, and sought £10,000,000 compensation, plus the £800,000 legal costs incurred in the unsuccessful litigation with the farmers, from the UK Government. The Court held in favour of the company by a 4/3 majority.[39] The UK Government then sought to have the case reheard in the Grand Chamber. This request was granted. The result of the rehearing was a 10/7 majority decision in favour of the UK Government.[40] The details of the competing views are too complex to be usefully summarised here, but in essence the majority in the Chamber considered that the company's loss of the property was an unjustifiable breach of its rights while the majority in the Grand Chamber considered that the legislation fell within the state's margin of appreciation: "Even where title to real property is registered, it must be open to the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration."[41] "Such arrangements fall within the State's margin of appreciation, unless they give rise to results which are so anomalous as to render the legislation unacceptable."[42]

35.34 Had the initial decision been upheld, an immediate review of our law of prescription might well have been necessary. In the light of the Grand Chamber decision, that is not now required. Although the English system which was ultimately upheld is not the same as the Scottish system, its similarity means that we have little doubt that the latter is also ECHR-compatible as judged on the basis of the majority opinion. Nevertheless, the narrowness of the result, combined with the fact that the Court is not bound by its own precedents, means that there is no room for complacency. In devising the new statutory framework for the Keeper's accept/reject decision,[43] we have been conscious of the ECHR dimension.

35.35 We have also considered the ECHR implications of the narrow transitional issue noted above. In that unusual case, a "true owner" such as Octavia who under current law might have the power, by seeking rectification under section 9 of the 1979 Act, to regain ownership for up to twenty years after registration of an adverse deed could under our

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[36] The system in question was English law as it was before the Land Registration Act 2002. Major changes to English law were effected by that Act.
[37] At that time the relevant period in England. It has since been reduced to ten.
[38] *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.
[39] *J A Pye (Oxford) Ltd v United Kingdom* (2006) 43 EHRR 3. For Scottish reactions to the Chamber decision see David Johnston, "*J A Pye (Oxford) Limited v United Kingdom*: deprivation of property rights and prescription", (2006) 10 EdinLR 277; Ken Swinton, "Prescription, Human Rights and the Land Register: *Pye v UK*", (2005) 73 Scottish Law Gazette 179; George L Gretton, "Pye: A Scottish View", (2007) 15 European Review of Private Law 281.
[40] *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45. For discussion of the Grand Chamber decision from a Scottish standpoint, see George L Gretton, "Private Law and Human Rights" (2008) 12 EdinLR 109.
[41] *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 at para 74 of the majority opinion.
[42] *J A Pye (Oxford) Ltd v United Kingdom* (2008) 46 EHRR 45 at para 83 of the majority opinion.
[43] See Part 16.

recommendations lose that power after ten years' prescriptive possession by the grantee of that deed.

35.36 The Grand Chamber decision in *Pye* held that loss of property without compensation occurring as a result of a competing party obtaining title through prescriptive possession does not in itself involve a breach of Article 1 of Protocol 1. Might this particular case be treated differently?

35.37 Article 1 says:

> "Every natural or legal person is entitled to the peaceful enjoyment of their possessions. No one shall be deprived of their possession 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 use of property in accordance with the general interest or to secure the payment of taxes or other contributions or payments."

35.38 The ECtHR jurisprudence on this Article is that it has three distinct rules, matching the three sentences. We are concerned here with the second, which covers deprivation of possession and is subject to conditions. It is not impossible that Octavia's loss of the right to seek rectification could be regarded as "deprivation" of a "possession". The question would then be whether it was a deprivation that could be justified under the exception in the second rule. Clearly it would be a "deprivation" that would be "by law" given that the change would have been made by statute.

35.39 Would the "deprivation" be "in the public interest"? The Strasbourg caselaw indicates that Member States enjoy a wide margin of appreciation on this point. It is also clear that deprivation of one individual in favour of another individual (eg deprivation of Octavia in favour of Kevin) may be in the "public interest" if it occurs by reason of a wider societal purpose. As noted, the law applying to this narrow situation is currently unsatisfactory and arbitrary. The societal purposes in (i) bringing about, as soon as possible, a consistent ten year positive prescriptive period in all cases and (ii) simplifying the law are, we think, sufficient to justify the deprivation as being in the public interest.

35.40 In addition, the test of proportionality must be satisfied. The court asks if any individual has been required to bear an excessive and individual burden. It might be argued that Octavia is subjected to such a burden. That can however be countered in two ways. Firstly, the court has already decided in *Pye* that loss without compensation to an adverse possessor is not such a burden. Secondly, Octavia is not being subjected to an individual burden but is instead to be subject to the same burden which applies to other proprietors who fail to possess their property.

35.41 We are therefore of the view that the relevant provisions of the draft Bill are ECHR-compliant. Finally, we would observe that the change to Octavia's rights would not occur without notice and time to react. Section 86(3) of the draft Bill provides that the new positive prescription provisions in the 1973 Act do not apply in relation to a continuous period which has expired before the designated day. This would guarantee that anyone who might be affected would have time to raise an action, because the designated day cannot be less than six months after Royal Assent. (And in reality can be expected to be more than a year.)

Part 36 Transition: switching over from the 1979 Act

Introduction

36.1 This part of the Report deals with the process of replacing the 1979 Act by the new legislation. The change would not represent any discontinuity in the Register, any more than there is discontinuity when a new Companies Act is passed and the previous Companies Act repealed. Just as existing company registrations continue notwithstanding such legislation, so existing property registrations would also continue. But nevertheless the differences between the new legislation and the 1979 Act mean that some legislative provisions are needed to cover the change. These provisions are mainly to be found in schedule 6 of the draft Bill. On the whole they do not need much comment. Perhaps the most important provisions are about what happens to inaccuracies in the Register that exist on the eve of the commencement of the new legislation.

Making existing title sheets conform to new scheme

36.2 Where an existing title sheet does not conform to the requirements of the new legislation, the Keeper should have the power to make it so conform. Examples would be information about quantum of share or about pertinents (eg the benefit of a servitude acquired by prescription) or encumbrances (eg the burden of a servitude acquired by prescription). But whilst the Keeper should clearly have the power to make existing title sheets conform, we think that in general there should be no compulsion, because of the potential costs that might be involved.

36.3 There are one or two exceptions. One concerns overlaps, and is considered below.[1] Another exception is that the C Section (Charges Section) of existing title sheets is renamed the Securities Section. That will happen for new title sheets, and the cost of making the change for existing title sheets should be very limited and accordingly the Keeper is required to make the change as soon as reasonably possible. A parallel requirement applies to the B Section of lease title sheets. At present this is called the Proprietorship Section, but in future will be called the Tenancy Section. That change can also be made quickly and cheaply to existing title sheets and so the Keeper is required to make the change as soon as reasonably possible. We recommend:

> **143. The Keeper should have the power to make existing title sheets conform to the requirements of the new legislation. But there should be no obligation to do so except to change the name of the C Section to "Securities Section" and the name of the B Section of lease title sheets to "Tenancy Section."**
>
> (Draft Bill, s 91(1), sch 6, paras 1 to 6)

[1] Para 36.5.

Common areas

36.4 The present practice is that a common area is included in the title sheet of each of the sharing properties. For example, if an amenity area is shared by twenty houses, the area is included in each of those twenty houses. The draft Bill requires the common area to have its own title sheet. The Keeper is not required to do this in relation to existing common areas – though the power to do so exists. The requirement would apply only to the registration of new developments. What would happen if, when the new legislation came into force, a development were to be half-complete? Or if there were a completed development in which some of the titles were still in the Register of Sasines? In such cases it would be inappropriate for the title sheets created after the new legislation comes into force to have to differ from the existing ones, and accordingly an exemption applies in such cases. We recommend:

144. The requirement that a common area must have its own title sheet should apply only to developments beginning after the new legislation comes into force.

(Draft Bill, s 91(1), sch 6, paras 7 to 11)

Conflicting title sheets

36.5 The draft Bill would forbid the overlapping of cadastral units. The same land, in other words, should not be included in two title sheets.[2] One such case where this happens in current practice is where there is a common area: that is the case discussed in the previous section. Another, very different, type of case is where there is a boundary problem and the Keeper simply includes the area in question in both title sheets. Here the draft Bill would require the Keeper, within ten years, to identify all such overlap cases, and to create each overlap area as a separate cadastral unit with its own title sheet. We recommend:

145. Within ten years, overlap areas should be assigned their own title sheet.

(Draft Bill, s 91(1), sch 6, paras 12 to 18)

Pending registration applications

36.6 On any given day there are many pending registration applications, ie applications that have been submitted but that have not yet been determined by the Keeper. The draft Bill provides that these would be unaffected by the new legislation. The Keeper would be obliged to treat them according to the law in force at the time of the application, namely the 1979 Act (and the 2006 Rules). We recommend:

146. Applications for registration that are pending on the day that the new legislation comes into force should be determined by the Keeper according to the law in force at the date when the application was made.

(Draft Bill, s 91(1), sch 6, para 24)

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[2] There are exceptions, discussed in Part 4, notably in relation to separate tenements.

Pending rectification applications

36.7 The position for pending rectification applications should be different. In the new scheme, rectification applications would no longer have a role,[3] for the Keeper would in any case have a duty to rectify inaccuracies. Hence any pending rectification application would lapse and be removed from the Application Record.[4] That would not affect the applicant's position. The applicant's right that the inaccuracy should be rectified, and the Keeper's duty to rectify, would be unchanged.

Vested indemnity payment rights

36.8 Clearly, if anyone has a vested right against the Keeper for payment of an indemnity claim under section 12(1) of the 1979 Act, that right should be unaffected by the new legislation. Whilst this would no doubt be implied anyway, the draft Bill has a specific provision confirming that that would be the position.[5]

Inaccuracies

36.9 All actual inaccuracies[6] in the Register would continue to be actual inaccuracies unless and until rectified. That is simple. Less simple is the question of bijural inaccuracy.[7] The new scheme abandons the idea of bijuralism, and with it a great deal of law that is unattractive, unprincipled, and uncertain. In abandoning bijuralism the legislation must also abandon the concept of bijural inaccuracy; and where such an inaccuracy is to be found in existing titles, it must either be deemed to cease to be an inaccuracy, or be re-conceptualised as an actual inaccuracy. In DP 130 we developed an approach that was supported by respondents, and it is set forth in the draft Bill.[8] The starting point is that some bijural inaccuracies should be treated in the one way (ie cease to be inaccuracies), and others in the other (ie become actual inaccuracies).

36.10 The criterion is whether, on the eve of the commencement of the new legislation, a particular inaccuracy could in fact have been rectified under the rules in section 9 of the 1979 Act. If the answer is yes, then the bijural inaccuracy should be converted automatically into an actual inaccuracy. In the new scheme all inaccuracies would be rectifiable, and so this class of inaccuracies, already rectifiable before the commencement of the new legislation, would continue to be rectifiable thereafter. In effect, therefore, there would be no change – except for re-conceptualisation.

36.11 But if the answer is no - if the bijural inaccuracy were to be one that could not be rectified under the rules in section 9 of the 1979 Act – then the solution we recommend is for the inaccuracy to cease to be an inaccuracy, ie for the rights of the parties concerned to be realigned so as to conform to what the Register says they are.

36.12 In both cases, the result would be continuity in substance if not in form. A title that was vulnerable to rectification would remain vulnerable to rectification; one that was

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[3] See Part 18.
[4] Draft Bill, s 91(1), sch 6, para 25.
[5] Draft Bill, s 91(1), sch 6, para 26.
[6] For "actual inaccuracy" see Part 17.
[7] For "bijural inaccuracy" see Part 17.
[8] DP 130, Part 9.

invulnerable (typically because rectification would have prejudiced a proprietor in possession) would be free from the possibility of rectification in the future. In view of the crucial role of possession under the current law, and in order to minimise problems of evidence, especially after the passage of time, the provision would include a presumption that the proprietor of the land was in possession immediately before the designated day; but the presumption would be weak and could readily be rebutted by evidence of contrary possession.

Worked examples of inaccuracies

36.13 We reproduce here some worked examples.

(1) A is registered as owner of land and takes possession. The disposition in his favour purports to be granted by Z, the last registered owner but, unbeknownst to A, Z's signature has been forged.

> *On the eve of the commencement of the new legislation.* A is owner and the Register is inaccurate,[9] but rectification is prevented by the fact of A's possession.[10] An application for rectification by Z would be met by a refusal and by payment of indemnity.[11]
>
> *On and after the commencement of the new legislation.* A remains owner and the Register ceases to be inaccurate. Z is entitled to compensation by the Keeper.
>
> *Comment.* A's voidable title has been converted into one that is absolutely good, but in substance the parties' positions remain the same.

(2) A is registered as owner of eight hectares. In fact the disposition conveyed only seven hectares, the missing hectare being Z's. Immediately before the designated day Z continues in possession of the hectare in question.

> *On the eve of the commencement of the new legislation*. A is owner of all eight hectares but the Register is inaccurate in respect of the additional hectare.[12] As A is not in possession, Z could demand rectification.[13] Indemnity would be payable to A.[14]
>
> *On and after the commencement of the new legislation*. The Register, in showing the hectare as belonging to A, becomes actually inaccurate and is rectifiable. Z acquires ownership of the hectare. Compensation is payable to A.[15]
>
> Unless and until there is rectification, no compensation is due to A. If, rectification not having happened, A were to dispone all eight hectares to B, B would become owner of only seven. That is because A only owns seven. In the new scheme, the

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[9] 1979 Act, s 3(1)(a).
[10] 1979 Act, s 9(3).
[11] 1979 Act, s 12(1)(b).
[12] 1979 Act, s 3(1)(a).
[13] 1979 Act, s 9(1).
[14] 1979 Act, s 12(1)(a).
[15] This is because payment of indemnity would have been due under the 1979 Act. But in the new scheme the rule about compensation following on inaccuracies caused by administrative mistake is different: see Part 17.

integrity principle (realignment of rights[16]) requires a year of possession, and A does not have possession. The same would be true for any subsequent acquisition, provided possession is retained by Z.

Comment. A's voidable title to the additional hectare has been converted into one which is void, but in substance the parties' positions remain the same. The bijural inaccuracy before the designated day has become an actual inaccuracy after that day.

(3) A fraudster impersonates the owner, Z, and grants to Bank A (which acts in good faith) a forged standard security in return for a loan. The security is registered.

On the eve of the commencement of the new legislation. Bank A holds a standard security but the Register is inaccurate.[17] As the heritable creditor is not a "proprietor in possession",[18] Z, the owner of the security subjects, could demand that the Register be rectified by deletion of the standard security.[19] Indemnity would be payable to Bank A.[20]

On and after the commencement of the new legislation. The standard security is extinguished. The Register, in continuing to show it on the title sheet, is inaccurate. It is rectifiable, and as and when rectification takes place compensation would be payable to Bank A.

Comment. Bank A's voidable title to the standard security has been converted into one that is void, but in substance the parties' positions remain the same. The bijural inaccuracy before the designated day has become an actual inaccuracy after that day but in either case the Register is rectifiable.

(4) A dispones to B. The disposition is voidable. B is registered as owner of the land and takes possession. Later the disposition is reduced by Z but as yet the Register does not reflect that reduction.

On the eve of the commencement of the new legislation. B is owner and, as a result of the reduction, the Register is inaccurate. But rectification is prevented by the fact of B's possession.[21] Z is entitled to indemnity.[22]

On and after the commencement of the new legislation. B remains owner and the Register ceases to be inaccurate. The question of rectification can no longer arise. Compensation is payable to Z.

Comment. B's voidable title has been converted into one that is absolutely good, but in substance the parties' positions remain the same.

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[16] Draft Bill, Part 6.
[17] 1979 Act, s 3(1)(a).
[18] *Kaur v Singh* 1999 SC 180.
[19] 1979 Act, s 9(1).
[20] 1979 Act, s 12(1)(a).
[21] 1979 Act, s 9(3).
[22] 1979 Act, s 12(1)(b).

(5) Z dispones to A, and A is registered as owner of the land and takes possession. Z was induced to dispone by A's fraud. Later the disposition is reduced by Z but as yet the Register does not reflect that reduction.

On the eve of the commencement of the new legislation. A is owner and, following the reduction, the Register is inaccurate. Although A is in possession, the effect of A's fraud is that the Register can be rectified. No indemnity is payable to A.

On and after the commencement of the new legislation. A ceases to be owner and the Register remains inaccurate. Z could rectify. No indemnity is payable to A.

Comment. A's voidable title has been converted into one which is void, but in substance the parties' positions remain the same. The bijural inaccuracy before the designated day has become an actual inaccuracy after that day.

(6) A is the owner of land encumbered by a standard security in favour of Bank Z. A forges a discharge of the security and dispones to B, who acts in good faith.

On the eve of the commencement of the new legislation. The standard security is extinguished. The Register is inaccurate, but rectification is prevented by the fact of B's possession. An application for rectification by Bank Z would be met by a refusal and payment of indemnity.

On and after the commencement of the new legislation. The standard security remains extinguished and the Register ceases to be inaccurate. Bank Z is entitled to indemnity.

Comment. The standard security is now irrevocably extinguished, but in substance the parties' positions remain the same.

(7) A is the owner of Whitemains. Whitemains is burdened by a servitude of way in favour of Blackmains. The servitude is shown on the title sheets of both properties. Subsequently it is extinguished by negative prescription.

On the eve of the commencement of the new legislation. The servitude having been extinguished, the Register is inaccurate. As this is an actual inaccuracy (ie the servitude was extinguished by ordinary property law), A could rectify the Register and have the servitude removed from both titles. No indemnity would be paid to Z, the owner of Blackmains (and former holder of the servitude).

On and after the commencement of the new legislation. The position is unchanged.

36.14 These examples have been taken, with only minor changes, from DP 130.[23] One of the examples given there has, however, been omitted. It was example 4[24] and was about a case in which a title sheet was bijurally inaccurate in stating that the property in question had the benefit of a servitude over a neighbouring property. At that time the law appeared to be that servitudes are not protected by the "proprietor in possession" rule in section 9 of the

[23] DP 130, Part 9.
[24] DP 130, para 9.16.

1979 Act. The law on this point is now less clear than we thought it was.[25] As a result on the facts of that example it is difficult to say whether the bijural inaccuracy would be rectifiable or not. That uncertainty will carry forward, intact, to the new scheme.

Recommendations about inaccuracies

36.15 We therefore recommend:

147. (a) Actual inaccuracies should be unaffected by the new scheme, ie they should continue as actual inaccuracies and accordingly continue to be rectifiable.

(b) A bijural inaccuracy that is, in terms of the 1979 Act, a rectifiable inaccuracy should be automatically converted, on the commencement of the new legislation, into an actual inaccuracy. The inaccuracy should accordingly continue to be rectifiable. The rights of the parties concerned should automatically be realigned.

(c) A bijural inaccuracy that is, in terms of the 1979 Act, an unrectifiable inaccuracy should cease to be an inaccuracy.

(d) A person who is prejudiced should be compensated by the Keeper.

(e) For the purposes of determining whether an inaccuracy could have been rectified, it should be presumed (unless the contrary is shown) that the proprietor of the land was in possession.

(Draft Bill, s 91(1), sch 6, paras 28 to 35)

[25] See *Yaxley v Glen* 2007 SLT 756 and Part 23 of this Report.

Part 37 Some implications for conveyancing practice

Introduction

37.1 The reforms put forward in this Report are predominantly under-the-bonnet reforms. The aim has been to improve the performance and reliability of the engine and to keep to a minimum the new things that the driver will have to learn. But inevitably there will be some new things for drivers to become acquainted with. Some of them – possibly not all – should be welcome, at least when the unfamiliarity has worn off.

37.2 Every change recommended in this Report has potential relevance to the conveyancer: it could not be otherwise. This part of the Report merely seeks to highlight a few changes that are likely to be more prominent than others from the standpoint of the conveyancer.

Deeds and missives to be e-enabled[1]

37.3 At present, deeds can be in electronic form, but only if used within the ARTL system. In the new scheme all conveyancing deeds would be capable of being electronic, whether used in the ARTL system or not. Electronic deeds would be capable of registration in the Books of Council and Session. There would be no compulsion to move to electronic deeds: in the future paper deeds would remain competent, as they are today. The fee differential, already applicable to ARTL transactions, is likely to continue.

37.4 At present missives have to be in paper form. In the new scheme electronic missives will be competent. As with deeds, the new scheme does not require the move to e-conveyancing. Paper missives will continue to be competent.

37.5 In the case of both deeds and missives, details about such matters as digital signatures will be set out in subordinate legislation. But the draft Bill does lay out a structural point that may deserve mention here. Under current law, there are two levels of formality: (i) a signed document and (ii) a signed and witnessed document. Signing serves for validity, but the higher status of probativity requires witnessing. Subject to certain qualifications, a deed has to have the higher status to be accepted by the Keeper.[2] For electronic deeds there would in future be three levels of formality: validity, probativity and registrability. The difference, in this respect, from paper deeds would thus be that an electronic deed that was probative would not necessarily have a sufficiently high status for registrability.

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[1] See Part 34.
[2] For the Register of Sasines and the Books of Council and Session this rule is statutory: Requirements of Writing (Scotland) Act 1995, s 6. For the Land Register it is the Keeper's policy.

First registrations accelerated[3]

37.6 The ultimate objective is that all properties should be in the Land Register and that the Register of Sasines should be closed. That was also the objective of the 1979 Act, but the new scheme would accelerate the process. The details are complicated, and what is said below is selective.

37.7 In the first place, in the new scheme no disposition would be capable of being recorded in the Register of Sasines. Here are two examples. (i) Joyce owns a house, her title being in the Register of Sasines. She dispones her half share to Luke, gratuitously. Under current law this disposition would be recorded in the Register of Sasines and thus would not trigger first registration. In the new scheme, if the disposition were to be presented for recording in the Register of Sasines the Keeper would reject it. The only way that Luke could acquire title is through first registration in the Land Register. (ii) Kieran owns a house, his title being in the Register of Sasines. He dies, bequeathing it to his daughter Kate. His executor obtains confirmation and dispones to Kate. Under current law this disposition would not trigger first registration but would be recorded in the Register of Sasines. In the new scheme, if the disposition were to be presented for recording in the Register of Sasines the Keeper would reject it. Kate should present the disposition for registration in the Land Register.[4]

37.8 In the second place, under current law the Keeper has a discretion whether or not to accept an application for voluntary first registration. In the new scheme that discretion would disappear. (Though the Keeper could be allowed a transitional period in which the discretion could be retained.)

37.9 In the third place, in the new scheme the Keeper would have the power to register any as-yet unregistered property, without any application being made. If Fergus owns a house, and the title were still in the Register of Sasines, the Keeper could simply register the house in the Land Register. This process would change no one's rights, for Fergus was the owner before and he would continue to be the owner. The same would be true if the Keeper were to make a mistake as to boundaries and register him for too little. The unregistered land would still belong to Fergus. His Sasine title to that unregistered land would be unaffected. If the converse happened, and Fergus were to be registered for too much land, at the expense of his neighbour Nigel, that would not transfer ownership of anything from Nigel to Fergus. (That would indeed be the effect under current law, but in the new scheme the Keeper's "Midas touch" would disappear.[5]) The same would be true of any subordinate rights in the property, such as a standard security. The Keeper would enter the security on the new title sheet. But whilst the registration would change no one's rights, it would nevertheless have significant practical benefits. The source of information about the title would be moved from the opaque Register of Sasines to the transparent Land Register. The next transfer of title would become a "dealing with whole" as opposed to a first registration, simplifying the conveyancing and making the transaction ARTL-compatible.

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[3] See Part 33.
[4] But if, instead of having received a disposition from the executor, she had received a docket transfer, she would have the option of completing title in either register. See the discussion of completion of title below.
[5] See Part 13.

No land certificates or charge certificates[6]

37.10 The need to submit the land certificate with an application for registration disappeared with the Land Registration (Scotland) Rules 2006. Land certificates are now effectively the same as office copies (extracts) of the title sheet. In the new scheme they disappear, as do charge certificates. This change is a change of form rather than substance. Usually buyers will still want to have an official copy of the land certificate, and such copies will continue to be issued (called extracts). In the case of standard securities, what can be issued is an extract of the title sheet plus an extract of the security deed itself.

The duty of care owed to the Keeper[7]

37.11 The question of the duty of care owed to the Keeper has not been developed in the courts, and so the draft Bill has some specific provisions. It provides that (a) the applicant and (b) the applicant's solicitors would owe to the Keeper a duty of care, ie a duty to take reasonable care to ensure that the Register does not become inaccurate. The same duty would be owed by the granter of the deed and the solicitors acting for the granter. On balance it is likely that this duty of care already exists under general law, but any doubt would be removed. Conveyancers, when acting for an applicant for registration, tend to approach the application with the aim of obtaining a land certificate with no exclusion of indemnity, and that is wholly understandable. But at the same time the Keeper has the right to be dealt a full hand. The Keeper should be entitled to assume that the applicant's solicitors have acted with ordinary competence and that any title problems will be disclosed. If the applicant's solicitors have not acted with ordinary competence, or do not disclose problems that should have been disclosed, the result, in the short term, may indeed be a land certificate with no exclusion of indemnity.[8] But short-term gain may be long-term pain.[9] In the new scheme, where there has been a breach of the duty of care, then the legislation spells out two consequences. The first is that the Keeper's title warranty is to that extent invalidated. The second is that if the Keeper has to pay someone else compensation as a result of that breach of the duty of care, the negligent solicitors may find themselves liable in turn.

37.12 Conveyancers should not be particularly concerned about these provisions. It is doubtful whether they are significantly different from the current law. But since they are set out in black and white they are harder to forget about – which in the long run is a good thing. It must be borne in mind that the draft Bill does not impose on solicitors a higher standard of competence than the existing professional standard: reasonable care.

Application forms

37.13 The style of application forms is set by subordinate legislation and that would continue to be the case. No doubt new styles would be introduced as and when the new legislation is passed and comes into force. Our expectation is that the new forms would be shorter then the present ones, because the existence of the express statutory duty of care

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[6] See Part 8.
[7] See Part 12.
[8] "Without exclusion of warranty" in the new terminology. And in the new scheme the land certificate will be called an extract of the title sheet.
[9] Cf *McCoach v Keeper of the Registers of Scotland*, 19 December 2008, Lands Tribunal, discussed in Kenneth G C Reid and George L Gretton, *Conveyancing 2008* (2009), pp 121-133.

would mean that the questions to be found in the present forms would, in our view, be for the most part unnecessary.

Advance notices and letters of obligation[10]

37.14 What is potentially one of the most significant changes introduced by the draft Bill is the system of advance notices. We say "potentially" because it would be an optional system and what impact it would have would depend on the takeup. If it were to prove popular it would change conveyancing procedures and would mean that the current system of letters of obligation would be superseded. (But in those cases where the discharge of the seller's standard security was unavailable for settlement, some form of undertaking by the seller's solicitors to cover this issue might still be required. That is the position in England and Wales, even though our system of letters of obligation is unknown there.)

37.15 An advance notice could be granted by a seller to a buyer at any time before settlement. It could even be granted before conclusion of missives. Its use would not be confined to sales: it could be used in relation to any transaction that led to the registration of a deed. The notice would go on to the Register and it would create a priority period of 35 days. So long as the deed was duly registered within that "protected period", the grantee would have nothing to fear from any rival deed that might be registered first. An exception would be if a rival deed itself were protected by an *earlier* advance notice, but even that would not be a risk, because it would show up in the pre-settlement search. As well as covering entries in the Land Register, an advance notice would also protect the grantee from entries in the Register of Inhibitions during the protected period, ie 35 days.

37.16 Here is an example of how it might work. Tara makes an offer to buy property from Susan on 1 May. There is a qualified acceptance on 4 May. Susan grants to Tara an advance notice and this enters the Land Register on 8 May. Missives are concluded on 10 May. On 20 May a search shows no unexpected entries in the Land Register[11] or the Register of Inhibitions. Settlement happens on 3 June and the disposition to Tara is registered on 8 June. Tara is protected from any adverse entry, in either the Land Register or the Register of Inhibitions between 8 May and 8 June. If Tara is granting a standard security to V Bank plc, the bank's position is protected by the Susan/Tara advance notice. In this example it should be noted that the 14-day search-to-settlement gap looks long when viewed from the standpoint of current practice but in the new scheme it is not a problem. Any nasty that appears in the Register between 8 May and 8 June is deflected by the force of the advance notice.

37.17 A possible exception would be the following. Susan grants an advance notice to Ursula which enters the Land Register on 7 May, and the disposition to Ursula is registered on 2 June. (Susan is acting fraudulently.) That deed would trump Tara's if (a) it is registered first and (b) it is itself protected by a priority period that pre-dates Tara's priority period. But in fact Tara need not fear a case of this sort, because when she searches on the eve of settlement the search will disclose Ursula's advance notice. Tara will refuse to settle. What if Ursula's advance notice was put in the Register so late that Tara's search misses it? That is not a danger, for if Ursula's notice is so late, it will be later than Tara's.

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[10] See Part 14.
[11] It will of course show the advance notice itself.

37.18 We have said that Tara would be entitled to refuse to settle. The draft Bill does not deal specifically with this point. It would be a matter for the general law relating to good and marketable title. Our view is that the existence in the Register of an advance notice to a third party, which is still running,[12] would mean that the title was not a good and marketable one.

37.19 Advance notices thus deal with the awkward "blind period" between (a) the latest date of search and (b) the date when the disposition is registered, a period that is in the current system usually covered by a letter of obligation.

37.20 Use of the advance notice system would be wholly optional. If conveyancers did not like it they would not need to use it. As far as the draft Bill is concerned, a seller would be under no obligation to grant a notice, but of course missives could impose such an obligation, and if the system proves attractive to conveyancers, no doubt a missive clause about advance notices would become standard.

37.21 What the takeup of advance notices would be can only be a matter of speculation at this stage. One factor would be cost. In England and Wales (where use of the equivalent system is routine and where letters of obligation are not used), the equivalent is bought as single package together with a search,[13] and the total cost of the package in a standard case is £4. For various reasons we think it likely that the cost of an advance notice would be significantly higher than that, at least in the early years, but nevertheless we think it likely that advance notices would prove attractive. The protection would also, we think, prove superior, from the client's point of view, to the protection afforded by a letter of obligation. In the first place, what the buyer wants is a good title and wants it on registration. A letter of obligation does not ensure that there will be a good title on registration. It ensures that eventually (but not necessarily on registration) there may be a good title and that if there is not then there will be compensation.[14] From the client's standpoint that is good but by no means best. In the second place, the way a letter of obligation is worded can sometimes provide a basis for disputing liability on the part of the seller's solicitors.[15]

37.22 The fine details of the advance notice scheme would be laid down by the future Land Registration (Scotland) Rules. We would anticipate that both paper and electronic notices would be permitted. But the draft Bill itself sets out the main points, and conveyancers may wish to look at the statutory examples in schedule 3 to see how advance notices would work. Of course, in practice such cases would no doubt be unusual, just as in practice claims on letters of obligation are unusual.

37.23 The system as framed in the draft Bill presupposes that the granter's title is in the Land Register. But the draft Bill also enables the system to be extended, by statutory instrument, to cover first registrations as well, if, when the pros and cons are put in the balance, it is thought that that would be desirable.

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[12] An expired notice is irrelevant.

[13] For the avoidance of doubt, the English "package" approach would not be followed here. In other words, an advance notice could be used without any search.

[14] Although the "classic" form of letter of obligation undertakes to clear the register of adverse entries, it is not in the direct power of the law firm that granted the letter to achieve this. Thus when a letter of obligation comes into play it is usually not by performance of the obligation, but by breach of it.

[15] It might be said that if this is so then the wording should be improved. No doubt that is true. But perfect wording is surprisingly difficult to attain.

37.24 Finally, three words of warning about the practical operation of the system. The first is that if the deed were not registered within 35 days of the advance notice then it would not be protected by it. Having said that, there would be nothing to stop a seller granting to the buyer more than one notice, and this would make sense where an anticipated settlement date had to be postponed – something that of course quite often happens, not least in commercial transactions. The second word of warning is about the contents of the advance notice. An advance notice would have to specify four matters: granter, grantee, type of deed (disposition, lease etc) and property. A notice would protect only a deed that was *in the same terms*. For example, in a split-off case a plan would be needed, and that would mean *a plan precisely matching the deed plan*. The third is that to be useful, the system would need to operate slickly (as does the system in England and Wales). The Keeper would have to be able to take an immediate decision whether or not to accept an advance notice. It follows that applications that were in any way substandard would be rejected out of hand.

Shared plot title sheets[16]

37.25 The Keeper's current practice is that a common area is included in the title sheets of the sharing properties. For example, if in a new development there is a co-owned amenity area, that area is included in all the title sheets in that development. The draft Bill provides that such common areas should have their own title sheets. If that were all, the result would be extra work for the Keeper, who would have to alter the title sheet for the common area every time that one of the properties changed hands, or every time a security was granted over such a property – which would be very often. Instead of altering one title sheet, the Keeper would have to alter two. To avoid that, the draft Bill allows the Keeper to designate such a title sheet a "shared plot title sheet". In such a title sheet the B Section (Proprietorship Section) does not identify the proprietors directly. Instead, it identifies the sharing plots. As a result, when there is a transaction affecting a sharing plot, such as sale, no change has to be made to the shared plot title sheet. As for the sharing plot title sheet, its A Section (Property Section) refers to the shared plot title sheet.[17]

37.26 The draft Bill provides that "unless the context otherwise requires, any reference in a document to a sharing plot is to be taken to include a reference to the share in the shared plot which attaches to the sharing plot." So missives, dispositions, standard securities etc can simply identify the property in the ordinary way and that will automatically include the share in the shared plot. This reform should be viewed in the context of a world beyond land certificates: in the new scheme the fact that a co-owned area is in a separate title will not be an obstacle to information about the principal subjects and about the shared area being packaged together.

37.27 This recommendation is framed so as not to require the Keeper to change *existing* titles to the shared plot system. That would result in considerable cost. The way it will work is that the new system will apply to new common areas created after the new legislation comes into force. Although the Keeper will have the power to convert existing common areas into the new system, there will be no obligation on the Keeper to do so.

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[16] See Part 6.
[17] Examples of shared plot and sharing plot title sheets are given in Appendix E.

New developments: provisional shared plot title sheets

37.28 In a new development there is often a common area, or more than one. In a residential development the common areas may include parking areas, paths, amenity areas, playparks and so on. Commercial developments too may have common areas. In some cases the estate layout is already finalised by the time of the first sale. If so, there is no problem about mapping the common area. Even the very first split-off disposition can simply have (a) a plan of the unit sold and (b) a plan of the common area. But often by the time of the first sale the developer has yet to decide exactly where the common area is to be. The developer wishes to retain flexibility for as long as possible. But that gives rise to a problem. How can the developer convey a share of an unidentifiable area?

37.29 One solution to this problem is to finalise the estate layout before the first sale. Another is to convey only the individual units until the development is complete, and at that stage to convey the common area – which can by now be mapped - to some entity that represents the various owners. A third possibility is to wait until the development is complete, and then convey a *pro indiviso* share of the common area to each of the owners. There are drawbacks to all of these approaches. As for the third, there is the additional trouble and expense of a further round of dispositions. It may be workable in a small development of, say, half a dozen units, but it is much less workable in a large development.

37.30 A "solution" widely adopted until 2009 has been that each split-off disposition has contained words conveying a *pro indiviso* share in the unmapped common area. Because it is not identified in the deed, when the Keeper registers the deed the common area cannot be identified in the Register. In *PMP Plus Ltd v Keeper of the Registers of Scotland*[18] it was held that such a title is to that extent invalid. That is to say, the title is valid as far as the primary unit (eg house) is concerned, but not valid for the share of the unidentified common area. Following that decision the Keeper's practice has changed.[19] The practice now is that if the split-off deed by its terms shows that the boundary of the common area has, at the time of the deed, not yet been settled, the application for registration will be rejected in respect of the common area.

37.31 The draft Bill offers a new approach. It would work like this.[20] The developer would apply to the Keeper for the opening of a "provisional shared plot title sheet" for the (as yet unmappable) common area.[21] Each split-off disposition granted by the developer would include a share in that area. When the time came when the developer could map the common area, it would do so and lodge the plan[22] with the Keeper. The effect would be that, at that moment, each of the various owners would acquire a *pro indiviso* share of that area, and the provisional shared plot title sheet would cease to be provisional. The deed lodged by the developer would be called an "ascertainment deed".[23] Once the provisional shared plot title sheet had been created, the clock would begin to tick: if the ascertainment deed had not been registered within nine years it could not be registered at all, and the provisional shared

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[18] 2009 SLT (Lands Tr) 2.
[19] The Keeper's practice statement can be found at (2009) 54 JLSS August 17.
[20] This is an outline. Further details can be found in Part 6.
[21] The draft Bill presupposes that this is part of a single plot owned by the developer. In the case of site assembly, the common area may straddle more than one plot. If that happens the solution is simply for the Keeper to merge the plots into a single plot.
[22] In fact a plan is only necessary where the common area is not co-extensive with the balance of the developer's title.
[23] The draft Bill gives a style ascertainment deed in sch 2.

plot title sheet would be removed from the Register. The Register could not host such provisional title sheets indefinitely.

37.32 The new approach would allow a developer to retain flexibility as the development evolves. At the same time it would vest co-ownership in the various buyers without the need for a further round of supplementary dispositions on completion of the development. But like other approaches it would have its drawbacks. One would be that it would not be proof against the developer's supervening insolvency. For example, if the developer were to go into insolvent liquidation before the ascertainment deed had been registered, the buyers might find that the liquidator would refuse to grant the deed. That is equally a problem for any approach that does not give the buyer a real right in the common area at the outset – which is to say all the current approaches, other than that in which the estate layout is already fixed by the time of the first sale.

37.33 The new approach would be entirely optional. Uptake would be a matter for market choice. If developers decided that they did not like the scheme, it would not be used, and presumably the same would be true the other way round: if buyers did not like it, it would not be used. At the time of writing, it is still unclear how the new-build conveyancing market will respond to the Lands Tribunal's decision in *PMP Plus Ltd v Keeper of the Registers of Scotland*.[24]

37.34 Where the new system is used, provision in the missives would be needed. What such a provision would say would depend very much on the circumstances of the case, and no doubt styles would develop over time. Since in a new development the usual practice is for the developer to insist on a standard form of contract that the developer itself – or rather its law firm – has prepared, the provision may, like so many other terms in "builders' missives", be pro-developer, though of course it cannot be assumed that "builders' missives" will never change in their overall approach. A provision that was fairly even-handed might (a) impose an obligation on the developer to register an ascertainment deed,[25] (b) set a time-limit for so doing and (c) provide that the deed will give a good title. Perhaps the trickiest issue would be (d) location and extent. At the time of the missives the developer could not state the precise location and extent – if that were possible then the approach would be unnecessary anyway – but on the other hand reasonable buyers would be reluctant to give the developer *carte blanche*, ie to hand over, at the end of the development, any old scrap of land.[26] Even-handed missives would have a general description that on the one hand would not be so precise as to rob the developer of flexibility and on the other would not be so vague as to be meaningless. Such a balance is not impossible: sales of goods by general description are standard in the world of commerce, and it is a question of fact in each case whether the goods as delivered do or do not meet the general description as set out in the contract. In the case of common areas there could be (*inter alia*) a statement in the missive clause giving the maximum and minimum square metres to be included in the ascertainment deed, a statement that the parking area would have spaces for not fewer than such-and-such a number of vehicles, being vehicles not longer than 4.5 metres. And so on.

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[24] 2009 SLT (Lands Tr) 2.
[25] The draft Bill does not state that when a provisional shared plot title sheet has been opened the developer comes under an obligation to register an ascertainment deed.
[26] Yet current practice often comes near to this.

37.35 To what extent one could expect an even-handed missive clause to emerge is not a matter for this Report: the whole question of builders' missives is one that cannot be considered within the framework of a land registration project. If there is concern that builders' missives are not always as even-handed as they should be, that is a general problem.

37.36 Since the buyer would not be receiving a real right in the common area at the time of the settlement of the purchase, it would be natural for a part of the price to be retained, and paid only on the registration of the ascertainment deed. But in practice it would normally be unworkable for the developer to ingather these sums when the development was complete, except possibly in small developments. There might be other ways to deal with the risk of non-performance by the developer. One would be to develop the "road bond" system. Of course, the ideal solution would be for the buyer to obtain a real right from the outset. But it is precisely because in most cases the developer is not prepared to offer that that the problem exists in the first place.

Quantum of share[27]

37.37 Some uncertainty exists as to whether there can be a valid title to an indeterminate share.

> "In large housing developments … the developer may face the difficulty of not knowing at the time when the first houses are sold how many houses the development will ultimately contain. In this situation it is particularly important to specify the size of the shares … even if the final result is that proprietors receive shares of different sizes, and a disposition which takes refuge in an unspecified grant of common property may fail *quoad* the common parts on the grounds that the granter did not know the size of the share he was conferring and thus lacked the necessary intention to transfer ownership."[28]

37.38 Just as the draft Bill would require every plot to be mapped, so it would require the size of a *pro indiviso* share to be stated.[29] If the Keeper could not determine the size of the share, registration would be refused.[30] Whether that would represent a change in the law is open to debate: the 2006 Rules contain a rule (rule 5(b)) whose interpretation is uncertain.

37.39 A developer may not know, at the time of the early sales, what the total eventual number of units will be. That is not a problem. The early buyers can be given a very small specified fraction (eg 1/400). That leaves the developer with future flexibility. As far as the individual buyers are concerned, the exact quantum seldom matters. A 1/400 share is just as good as a 1/40 share when it comes to, say, pushing one's children on the swings in the playpark. Moreover the share of maintenance obligations imposed by real burdens does not need to be proportionate to the share of ownership.

37.40 The requirement to state the size of the *pro indiviso* share in the title sheet is not retrospective, ie it would not apply to existing title sheets. But of course that still leaves open

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[27] See Part 4.
[28] Reid, *Property,* para 22.
[29] Draft Bill, s 8(1)(b).
[30] This rule would not apply retrospectively.

the question of whether such indeterminate shares are valid in the first place. The issue here is similar to the issue in *PMP Plus Ltd v Keeper of the Registers of Scotland*.[31]

Designation[32]

37.41 The current legislation has no rules about designation, apart from the simple requirement that there be a designation.[33] In Part 4 we argue that some tightening-up is desirable, not least to bring our law up to the best practice at an international level. In the case of registered companies, the older practice was to give name and registered address. The modern practice is to add the registered number, which makes sense because the name and the address can change, and only the number is a unique identifier. Companies can not only change their address and also their name: they can swap names with each other so that X Ltd takes the name Y Ltd and Y Ltd at the same time takes the name X Ltd.[34] The draft Bill would require the Keeper to include the number as part of the designation. That change in the law would not be a significant change in practice, because modern practice is already in line with that requirement. Where there would be a significant change is in the designation of natural persons – ie individuals. In numerous matters, date of birth is already a requirement – such as loans, passports, tax matters and so on. Many countries require date of birth as part of the designation in conveyancing matters too. The draft Bill would require the Keeper to include the date of birth in the designation. These new requirements would be about what appears in the *title sheet*, not about what appears in *deeds*. But since the Keeper would need this information the most convenient way of providing it would probably be to include it in the deed. In the case of an individual, the designation would simply be something like this: "Alice Aleesha Alison, born 1 January 1949, residing at….".

Getting it right first time[35]

37.42 In the current system if an application is unsatisfactory the Keeper operates a system of "requisitions" in which the applicant is asked to improve the application. It is only if the applicant fails to do so that the application is rejected.[36] There are three objections to this system. The first is that it wastes the time of the staff at the Department of the Registers. (And, indeed, that of the law firm.) Time is money, and the unnecessary costs generated by double-handling ultimately have to be paid for by the users of the system. The second problem is that the current system means that the Application Record is cluttered up with applications whose fate is uncertain,[37] which may be nuisance to those searching the Register.

37.43 The third problem is that the system does not merely allow the applicant to provide more evidence to support the application. It allows the applicant to produce new documentation that is dated *after the date of the application*. Yet the registration still takes effect from the date of the original application. That this is wrong is self-evident. Suppose an application is lodged on 1 March. The Keeper accepts the application on 1 July, on which

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[31] 2009 SLT (Lands Tr) 2. See above.
[32] See Part 4.
[33] Rule 5 of the 2006 Rules merely requires the Keeper to enter "the name and designation of the person entitled to the interest in land."
[34] For a disturbing illustration see *F J Neale (Glasgow) Ltd v Vickery* 1973 SLT (Sh Ct) 88.
[35] See Part 12.
[36] This is a slight overstatement. In some cases bad applications are rejected without requisition.
[37] The Keeper's published figures for turnaround times excludes applications that are in "standover" pending response to a requisition.

day the title sheet is changed, or, in a first registration, the title sheet is created. The 1979 Act says that the date of registration is deemed to be 1 March, and the new scheme does not change that rule. So if the title depends on an event that happens *after* 1 March (eg some title-relevant deed is signed after that date), the applicant is registered as at 1 March without a legal basis. That matters in theory, but does it matter in practice? It does. If there is no competing party, it does not matter, but equally if there is no competing party it would not hurt the applicant for the registration date to be postponed until after the relevant deed has been signed. But if there *is* a competing party, that party would be unjustifiably prejudiced by what has happened.

37.44 Rejection would not prevent a second application. Of course, a second application will inevitably be later than the first, rejected, application, and occasionally that will have consequences for priority. Alan grants standard securities to Beata and to Colin. Beata applies first and Colin second. Beata's application is invalid and Colin's is valid. If Colin's security is registered first, to describe this as a "loss of priority" for Beata would be inaccurate. Beata had no priority to lose. Colin has won the race to the Register. It is the current system, by the favour it shows to invalid applications, that causes a loss of priority, and it is Colin who loses.

37.45 As time goes on, Land Register applications will increasingly be dealings with whole, for which there should normally be no difficulty to get it right first time. More complex first registrations can need dialogue and (without offering a view as to whether it might be better that such dialogue be conducted pre-registration and pre-settlement) the draft Bill provides[38] that cases such as complex first registrations could, by Rules, be excepted from the one-shot rule.

The new rules for *a non domino* cases[39]

37.46 Over the years the Keeper's practice in relation to *a non domino* cases has changed. Since there is no guidance in either the 1979 Act or the Rules this is perhaps not surprising. The silence of the legislation makes matters difficult both for the Keeper and for those making *a non domino* applications. The draft Bill provides, for the first time, rules as to when such an application should be accepted. In a nutshell, the true owner must have been out of possession for at least seven years and the applicant (or the disponer) must have at least one year's possession. There are special rules for cases involving the foreshore and seabed (as there were in the 1979 Act[40]). We think that the new rules would bring greater clarity to a contested area, and would make it easier than it is now for "non-speculative" *a non domino* applications to be accepted.[41]

Maximum in-tray period

37.47 One of the complaints that conveyancers have about the Land Register is that applications can take excessively long to process. The Department of the Registers is aware of the problem and matters have improved very substantially. Nevertheless we consider that there is still an issue that should be addressed, and our recommendation is that there should

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[38] Section 20(7), s 59(8) and s 60(6).
[39] See Part 16.
[40] 1979 Act, s 14.
[41] For details see Part 16.

be a maximum period during which an application can be in the Keeper's in-tray, ie in the Application Record. Before the end of that maximum period the Keeper should be required to make the accept/reject decision.[42]

37.48 The draft Bill does not lay down any specific period. It would allow the period to be set by statutory instrument and it would allow different maximum periods to be set for different types of case. For example, first registrations tend to require a good deal of staff time and so it may be that for them the maximum period should be longer than for, say, an ordinary disposition of an already-registered property. Again, a "transfer of part" is almost always more demanding in terms of staff time than a "dealing with whole". As the volume of first registrations continues to decline, it can be expected that turnaround times will continue to improve, and no doubt the maximum periods can gradually be trimmed. For conveyancers who face the question from purchasers, and from secured lenders, asking "how long until the land certificate is issued?" an answer should be possible.[43] And for the lenders who ask such questions for risk-management reasons, the risk assessment can be enhanced.

Uncompleted titles[44]

37.49 The 1979 Act provided that where property is registered in the Land Register, a deed granted by an uninfeft proprietor (unregistered holder) does not need to contain a clause of deduction of title.[45] But it did not change the rules either (a) as to the types of deed that can validly be granted by an uninfeft proprietor (unregistered holder)[46] or (b) the need for valid midcouples in relation to such deeds. The draft Bill adopts the same approach, with one change. Under the 1979 Act, the test for whether there should be a clause of deduction of title is whether the property is registered in the Land Register. In the new scheme the test is whether the deed is registrable in the Land Register. In other words, in the new scheme a disposition inducing first registration, and granted by someone with a Sasine title, would not need to contain a clause of deduction of title. Since under the draft Bill no disposition (whether onerous or gratuitous) would in future be capable of being recorded in the Register of Sasines, the effect would be that in future it would never be necessary for a disposition to contain a clause of deduction of title. But the other rules just mentioned (about types of deed, and the requirement that the relevant midcouples must exist) would be unchanged.[47]

37.50 Another change that the new scheme would introduce is the use of notices of title for registered properties. This backtracks on the policy of the 1979 Act, which made notices of title unnecessary for registered properties. We think that that policy has proved unwise and we think that the re-introduction will not significantly increase costs. To make things easier, instead of the several different types of notices of title used in Sasine conveyancing, each of

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[42] For details see Part 12.

[43] Though in the new scheme there would no longer be land certificates as a separate category. A buyer would simply obtain an extract (paper or electronic) of the title sheet.

[44] See Part 15.

[45] 1979 Act, s 15(3).

[46] For example an unregistered holder can grant a disposition. But a long lease granted by an unregistered holder would be rejected by the Keeper.

[47] It has been suggested to us that the class of deed that can be validly granted by an unregistered holder be enlarged so as to include, for example, servitudes and registered leases, which under current law can be granted only by a person with a completed title. (Though such deeds would still have personal effect.) We express no view as to whether such enlargement would be desirable – or indeed as to the opposite possibility, that the classes of deed should be narrowed. This matter is outwith the scope of the present project.

them complex, the draft Bill provides a single all-purpose and simple form for use in the Land Register.[48]

37.51 Where an unregistered holder (uninfeft proprietor) wishes to complete title and the last recorded title is in the General Register of Sasines, the draft Bill offers the option of completing title either in the old register or in the new. Of course, in the latter case the higher standards for identifying the property will apply.

Examining title

37.52 Under the 1979 Act, examining title to a registered property is a good deal simpler than examining a Sasine title. In particular, there is no need to examine a prescriptive progress. What matters is what the title sheet says. This is the so-called "curtain principle". (Though of course what the title sheet says may have to be supplemented by data from other registers such as the Companies Register.) Indeed, until recently even if a buyer's solicitors wished to see the prior writs, the Keeper did not normally allow access to the Archive Record. Nowadays the Keeper does allow access to the Archive Record, but of course a buyer's solicitors do not, except in the most unusual of cases, wish to see copies of prior writs. In the new scheme nothing would change. The Archive Record would, it is true, be legally recognised for the first time, and for the first time there would be a statutory right of access to it – and a right to obtain extracts of deeds that are in it. But there would be no more reason than there is at the moment for buyers' solicitors to ask to see prior writs. Indeed, the draft Bill goes further in this respect than the 1979 Act, because it contains a statutory recognition of the curtain principle, by providing that no one is deemed to have knowledge of any thing in the Archive Record.[49]

The one-year rule[50]

37.53 There is one footnote to what has been said, which is about how long the seller has been in possession – whether the period has been more or less than a year. Suppose, for example, that the seller's title is invalid in respect of a boundary area. And suppose that the seller has been in possession for less than a year.[51] In that case the buyer would receive a title fully warranted by the Keeper,[52] but a title that would be, for the moment, subject to the same defect. If the title were to be successfully challenged, therefore, the buyer could claim against the Keeper. But any risk of challenge would normally be short-lived, because buyers would be allowed to add on their own possession to make up the year. Thus suppose that a seller were in possession for nine months. The buyer could complete the one-year period after another three months. The significance of the one-year period is that if there had been possession for that time, a good faith buyer would take free from the defect in title.[53]

37.54 Regardless of whether the seller has been in possession for more or less than a year, the buyer will obtain a fully guaranteed title, so the issue is a relatively small one. We see no reason why examination of title, or any other aspect of conveyancing practice, should change. Some buyers may wish to add a missive clause whereby the seller warrants that

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[48] For further discussion see Part 15.
[49] Draft Bill, s 12(6).
[50] See Part 23.
[51] The relevant possession is of the boundary area rather than of the rest of the property.
[52] At least in the normal case. It would be otherwise if the Keeper had become aware of the title problem.
[53] The issues discussed in this paragraph are complex. See further Parts 19, 21 and 23.

there has been a year's possession but it seems doubtful whether this would achieve anything. The seller normally warrants good title anyway. In any event even if both (a) it turns out, after settlement, that the title is bad and (b) that there has not been a year of possession, the guarantee of title still applies, though here it would take the form of "money" rather than "mud", compensation by the Keeper. If a buyer wishes to be absolutely certain of the mud, and not merely the money, it would be necessary to check, by some means other than the seller's say-so, that there has in fact been a year of possession. It is worth noting in this connection that in transactions in the Register of Sasines conveyancers have traditionally been relaxed about verifying the much longer period of ten years of possession necessary to guarantee a good title. And in Sasine conveyancing there was no Keeper's promise of compensation.

Transitional issues[54]

37.55 If the draft Bill is enacted, on the day it comes into force there would be numerous pending applications for registration. The draft Bill provides that these should be determined according to the law in force at the time of application, ie the 1979 Act.[55] The draft Bill also provides that the new legislation would have no effect on any existing indemnity claim.[56] Pending applications for rectification would be dismissed.[57] That sounds draconian, but the dismissal should have no substantive effect. Under the new scheme the Keeper would have a duty to rectify inaccuracies without the need for any application. (For further discussion of transition issues see Part 36.) It may be that the Keeper would introduce a non-statutory form to enable those alleging an inaccuracy to inform the Keeper of their views.

Prescription

37.56 The draft Bill would make a number of amendments to the Prescription and Limitation (Scotland) Act 1973. The most important change would be that in future positive prescription could run on any title whether indemnified or not. Under current law positive prescription cannot run on an indemnified title. See further Part 35.

Alluvion agreements

37.57 The draft Bill would allow neighbouring owners to agree that a title boundary that is a water boundary – eg the *medium filum* of a river – would be fixed so that future changes in the river's course would not affect the boundary.[58] For discussion see Part 5.[59]

Some new terminology

37.58 Lastly, there is some new terminology - not a great deal, but some. The new system of "advance notices" gives rise to some new terms. So does the new system of "provisional shared plots". Both of these have been mentioned above. One or two others are worth mentioning. One is that in the current system there is some uncertainty about whether one can correctly speak of "registering a deed" in the Land Register. In the new scheme it will not

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[54] See Part 36.
[55] Draft Bill, s 91(1), sch 6, para 24.
[56] Draft Bill, s 91(1), sch 6, para 26.
[57] Draft Bill, s 91(1), sch 6, para 25.
[58] Draft Bill, s 14.
[59] Para 5.35.

be incorrect to speak of registering in the Land Register a disposition or standard security or whatever. Next, when the Keeper accepts an application, the title would normally be "warranted", ie it would come with the Keeper's warranty. That would correspond roughly to indemnity in the current law. Occasionally the warranty would be excluded, corresponding to exclusion of indemnity under current law. A minor change would be that the C Section, currently called the Charges Section, would be renamed the Securities Section. Lastly, a foreign-sounding term: "Cadastral Map". Although the 1979 Act contemplated each title sheet with its own plan, so that the completed Register would consist of more than two million separate plans, the reality is that there is only one plan, a megaplan, an electronic plan of the whole of Scotland showing registered properties and their boundaries. The plan attached to a land certificate is just an extract from that single megaplan, that single map of Scotland. That map does not exist as a paper map, of course, but it exists nonetheless. The new scheme would recognise the reality, and a name is needed. "Cadastral Map" is at present an unfamiliar term to most Scots lawyers, but it is an international term, and we think it would send the right message.

Part 38 Miscellaneous

Introduction

38.1 This part deals with miscellaneous matters. Being miscellaneous they have no particular connection and are dealt with in random order.

Repeals

38.2 The draft Bill repeals three statutes in their entirety. First, and most important, is the 1979 Act itself. That repeal would be straightforward if the 1979 Act dealt solely with the law of land registration. But in fact five of its sections are on other subjects. These are:

- Section 16. This says that clauses of assignation and relief are henceforth implied in deeds.
- Sections 20, 21 and 22. These are about tenants-at-will.
- Section 22A. This is about the tenant's remedies for one type of breach of contract by the landlord. It is a general provision and has no particular connection with leases that happen to be registered.

38.3 Lacking a connection with land registration, we were reluctant to include them in the draft Bill. But to leave them in the 1979 Act, when the land registration provisions would have been repealed, would mean that a statute called "the Land Registration (Scotland) Act" would contain nothing about land registration. Ideally these provisions would be found a home in other statutes but no obvious homes suggested themselves and in the end we concluded that the least bad solution would be to re-enact them in a schedule to the new legislation.[1] Ideally there would at some time in the future be some degree of consolidation and rationalisation of statutory provisions about property law, leases and conveyancing and as and when that happens better homes could be found for these provisions. Whether sections 20, 21, 22 and 22A have a long-term future is perhaps uncertain anyway. Tenancies-at-will are, at least nowadays, rare. It has even been suggested that they may be extinct, the reason being that the provisions of the 1979 Act allow tenants-at-will to upgrade to ownership for a price that is little more than nominal. It is not easy to imagine a tenant-at-will who would not have already chosen to upgrade. But we express no definite view. As for section 22A, it covers a specific type of breach of contract, for which other remedies are available. We know of no case in which section 22A has been applied.

38.4 Next, the draft Bill repeals the whole of the Burgh Registers (Scotland) Act 1926. Formerly it was competent to record a deed that related to property in a burgh either in the General Register of Sasines in Edinburgh or in the Register of Sasines for that burgh, each burgh having its own register. The 1926 Act provided for the gradual closure of the 65 Burgh

[1] Draft Bill, s 96, sch 7.

Registers of Sasines. The process was completed in 1963 when the last surviving Burgh Register[2] was closed. The 1926 Act is spent and can now be repealed.

38.5 Thirdly, the draft Bill repeals the Land Registers (Scotland) Act 1995. This is about fees in the Register of Sasines. The substance of the 1995 Act is re-enacted as section 90(6) of the Draft Bill.

38.6 Lastly, the draft Bill repeals certain provisions of the Land Registers (Scotland) Act 1868. Sections 13 and 25 are about fees and are thus superseded by section 90 of the draft Bill. Section 19 is about official searchers. Nowadays there are no official searchers and there is no reason to think that the system of official searchers will be ever re-introduced. The role that was once played by the official searchers is now played by the Keeper. Section 19 is thus spent.

References to the Register of Sasines in older legislation

38.7 Section 29(2) of the 1979 Act provided that "any reference … in any enactment passed before, or during the same Session as, this Act or in any instrument made before the passing of this Act under any enactment to the Register of Sasines or to the recording of a deed therein shall be construed as a reference to the [land] register or, as the case may be, to registration." But this was subject to a list of exceptions set out in Schedule 3 to the Act, listing statutes where references to the Register of Sasines were *not* to be read as being references to the Land Register.

38.8 Many of these earlier statutory provisions – whether or not listed in Schedule 3 to the 1979 Act – have since 1979 been repealed. As for those that remain in force, we have taken a modified approach. In the first place, section 94 of the draft Bill broadly follows section 29 of the 1979 Act by providing that references to the Register of Sasines in older legislation are to be taken, unless the context otherwise requires, to include references to the Land Register.[3] In the second place, the draft Bill contains no equivalent to Schedule 3 to the 1979 Act. Instead, the draft Bill amends the relevant statutes so that these statutes themselves make it clear that the relevant provisions do not apply to the Land Register.[4] In the third place, we have taken the view that two particular statutes, the Registration of Leases (Scotland) Act 1857 and the Conveyancing and Feudal Reform (Scotland) Act 1970 merited separate treatment. We took the view that all references in those statutes to the Register of Sasines should be expressly amended to include (where appropriate) references to the Land Register.[5] The effect, we think, is to make those statutes easier to understand, especially by those who do not happen to be specialists in property law.

The office of Keeper: casual vacancies

38.9 Section 1(6) of the Public Registers and Records (Scotland) Act 1948, as amended, provides that "[i]n the event of a vacancy in the office of either of the Keepers appointed

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[2] Dingwall.
[3] It might be wondered why all such references could not be identified, and appropriate amendments made. It is doubtful whether the benefit would justify the labour. The task of identifying them all would be great, bearing in mind that references to the Register of Sasines are to be found not only in public general statutes but also in private statutes, local statutes, and the whole corpus of statutory instruments.
[4] Draft Bill, s 97, sch 8, paras 1, 2, 7, 8, 9, 10, 12, 13, 14, 20 and 21.
[5] Draft Bill, s 83(1), sch 4 and s 97, sch 8, para 20.

under this section[6] or in the absence of either of them from any cause his functions shall be performed by such member of his staff or such other person as may be authorised by the Scottish Ministers." This is a useful provision but not necessarily sufficient. Even if the Ministers were quick to act it is likely that registrations would have happened during the interregnum. The incoming Keeper, or acting Keeper, would no doubt ratify them, but it is open to question whether there is a sufficient legal basis for an invalid registration being validated by ratification. In the eyes of the law, every registration is done by the Keeper. (And likewise every rectification.) It can be done by those to whom authority is delegated, so that staff members can effect registrations on behalf of the Keeper. But if one person acts on behalf of another that presupposes that there *is* another on whose behalf the acts are done. As well as the problem of casual vacancy, there might also be debate as to whether any valid registration could be effected during any period during which the office-holder was unable to act. It would be unfortunate if it proved necessary for the Scottish Parliament to have to enact emergency legislation following an unexpected vacancy in the office.

38.10 The Department of the Registers has accordingly asked that the draft Bill include a provision covering the issue. We recommend:

148. If there is a vacancy in the office of the Keeper of the Registers of Scotland, or the Keeper becomes incapable of acting, then any act or decision made on behalf of the Keeper which, had the vacancy not happened, or had the Keeper not become incapable of acting, would have been an act or decision of the Keeper, and is done before a new Keeper is appointed, or before an appointment is made under section 1(6) of the Public Registers and Records (Scotland) Act 1948, should be of the same effect as if the office had not become vacant, or as if the Keeper had not become incapable of acting.

(Draft Bill, s 75)

Keeper's consultancy powers

38.11 Section 105 of the Land Registration Act 2002 authorises HM Land Registry to engage in remunerated consultancy work. We think it would be appropriate for the Scottish legislation to do the same and thus ensure that no question could arise as to *vires*. We recommend:

149. The Keeper should be expressly authorised to engage in remunerated consultancy work.

(Draft Bill, s 87)

Subordinate legislation

38.12 The 1979 Act provides that subordinate legislation can be made "after consultation with the Lord President of the Court of Session."[7] The draft Bill provides instead for consultation with the Keeper. In reality such consultation happens anyway, and indeed to a

[6] The other is the Keeper of the Records of Scotland.
[7] 1979 Act, s 27.

large extent subordinate legislation under the 1979 Act has been initiated by the Keeper. We think that the legislation should expressly include the Keeper. At the same time we do not see any compelling reason for the Lord President to be included as a statutory consultee. There is, however, one exception. The Books of Council and Session, though kept by the Keeper, belong to the Court of Session. The rules we recommend in Part 34 about the registrability of electronic documents apply to the Books of Council and Session as well as to the Land Register and the Register of Sasines. Clearly the Lord President has to be involved in the approval of delegated legislation on matters relating to registrability.

38.13 The 1979 Act has a general rule-making power.[8] The draft Bill has a range of specific powers supplemented by general powers.[9]

Land held on udal title

38.14 Udal titles exist in Orkney and Shetland. Originally ownership of such land could be transferred without deed. When the Registration Act 1617 was passed, creating the Register of Sasines, it did not apply to transfers of land held on udal title. Whether deed-less transfers have in fact happened in modern times we do not know. When the Requirements of Writing (Scotland) Act 1995 provided that a deed is necessary for the transfer of land, no exception was made for property held on udal title.[10] The 1979 Act provides that land held on udal title is transferred by registration in the Land Register.[11] The draft Bill confirms this.[12] Hence the draft Bill makes no changes to the law of udal property as such.

Exceptions for the Crown etc?

38.15 The current law of land registration applies to the Crown, central government bodies, local authorities, the Church of Scotland and so on. In other words, there are no exceptions. It has not been suggested to us that the position is unsatisfactory, and on the contrary we think that the approach taken by the 1979 Act in this respect was the only reasonable one. Otherwise Scotland would be doomed to suffer for ever from an uncompleted Land Register. Therefore the draft Bill, like the 1979 Act, would apply to the Crown etc as it applies to anyone else. For example, the Keeper's power to register unregistered land, discussed in Part 33, would apply equally to land owned by the Crown, local authorities and so on. We recommend:

150. The law of land registration should apply equally to land held by the state and other public bodies. The legislation should bind the Crown.

(Draft Bill, s 99)

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[8] 1979 Act, s 27.
[9] Draft Bill, s 91 and s 95. The power in s 91 is modelled on that in s 128 of the Title Conditions (Scotland) Act 2003.
[10] Requirements of Writing (Scotland) Act 1995, s 1(2).
[11] 1979 Act, s 3(3).
[12] Draft Bill, s 80.

Part 39 List of recommendations

1. The system of title sheets is generally satisfactory and, apart from minor details, should continue.

   Title plans as such should be discontinued and replaced by a reference to the relevant registered geospatial data.

   The Charges Section (C Section) should be renamed the Securities Section.

   Where there is a separate title sheet for a lease, the B Section (Proprietorship Section) should be known as the Tenancy Section.

   (Para 4.17; Draft Bill, s 2, ss 5 to 10 and s 92(5))

2. The designation of natural persons should include date of birth. The designation of companies should include the company registration number.

   (Para 4.24; Draft Bill, s 92(1))

3. No rights and encumbrances should appear on the Register except as authorised by an enactment.

   (Para 4.31; Draft Bill, s 6(3))

4. The Application Record and the Archive Record should be recognised as parts of the Register.

   (Para 4.35; Draft Bill, s 2, s 12(1) and s 13(1))

5. There should be no constructive knowledge of documents in the Archive Record.

   (Para 4.36; Draft Bill, s 12(6))

6. The documents to go into the Archive Record are those relevant to the accuracy of the Register.

   (Para 4.37; Draft Bill, s 12(1)(a))

7. The Keeper should no longer be required to keep an Index of Proprietors. Instead, the Keeper should be required to ensure that the Register is searchable and, in the case of the Title Sheet Record and the Archive Record, is searchable for proprietors, registered lessees, proper liferenters and heritable creditors.

   (Para 4.38; Draft Bill, s 4(10) and (11), s 11, s 12(4) and (5), and s 13(2) and (3))

8. The totality of registered geospatial data, to be known as the Cadastral Map, should be one of the parts of the Register.

Its property divisions should be known as cadastral units (each unit representing one registered plot of land) and should be numbered.

Title sheets should identify the property by referring to the relevant cadastral unit, with the title sheet number thus corresponding to the cadastral unit number.

(Para 4.43; Draft Bill, s 2, s 3(1)(a) and (b), s 5(2) and s 7(1)(a)(i))

9. Title sheets should be title sheets of plots of land, but subsidiary title sheets for leases should continue to be competent.

(Para 4.46; Draft Bill, s 5(2) and (6))

10. (a) Separate tenements should have their own cadastral units.

(b) Where long leases and other subordinate real rights do not coincide with cadastral units, the relevant geospatial data should nevertheless be entered into the Cadastral Map.

(Para 4.51; Draft Bill, s 3(1)(c), and s 4(1) and (2))

11. Where two or more persons hold title in common, the Proprietorship Section (B Section) of the Title Sheet should expressly state the quantum of the share of each, except for the pertinents in tenements.

(Para 4.58; Draft Bill, s 8(1)(b) and s 15(2))

12. The legislation should make it clear that the land registration system extends to the territorial seabed.

(Para 4.62; Draft Bill, s 92(1))

13. It should be open to the Keeper to replace the Ordnance Map with a different base map provided that the map is made up in accordance with standards prescribed by Scottish Ministers.

(Para 5.8; Draft Bill, s 4(5))

14. To the extent that a plot of land is outwith the base map, the Keeper should be able to adopt such other means of representing the boundaries as the Keeper thinks fit.

(Para 5.12; Draft Bill, s 4(7))

15. Land should not be registered without being mapped, subject to two qualifications: (i) tenements and (ii) provisional shared plots.

(Para 5.15; Draft Bill, s 3(1)(b) and (c), s 15(1) and s 29)

16. A tenement may be depicted as a single extent on the Cadastral Map.

(Para 5.21; Draft Bill, s 15(1))

17. The relaxation for tenemental properties should include land pertaining to the tenement but not beyond 25 metres from the tenement building.

(Para 5.23; Draft Bill, s 15(3))

18. The Keeper should review the use of the "subjects within" formula in the description of tenemental properties, either with a view to replacing it, or with a view to ensuring that it is better understood by users.

(Para 5.24)

19. Cadastral units should not overlap except in respect of separate tenements. There should be a *de minimis* exception for small boundary features.

(Para 5.30; Draft Bill, s 4(3) and (4))

20. Section 19 of the 1979 Act should be repealed without replacement.

(Para 5.32; Draft Bill, s 98, sch 9)

21. (a) Where title boundaries shift as a result of alluvial change, the effect should be to make the Cadastral Map inaccurate.

(b) The Keeper's warranty of title should not cover title boundary changes that result from alluvial change.

(Para 5.34; Draft Bill, s 14(1) and s 39(1)(b)(ix))

22. Where two properties are separated by a natural water feature it should be possible for the owners, by registration of an agreement, to fix the boundary line and thereby exclude alluvial change to the title boundary for the future.

(Para 5.35; Draft Bill, s 14(2) and (3))

23. The Keeper should ensure that the meaning of the red edge is reasonably clear to users.

(Para 5.38)

24. The Cadastral Map should normally reflect boundaries as stated in deeds. Accordingly the Keeper should review the current practice of not mapping split-off deeds until a base map update has become available.

(Para 5.39)

25. (a) There should be a power to prescribe specific standards that deed plans must meet.

(b) The Keeper should consider whether any further steps may be needed to ensure a high standard of deed plans submitted to the Land Register.

(Para 5.40; Draft Bill, s 95(1)(j))

26. The Keeper should have the discretion to set up "shared plot title sheets" in which the B Section (Proprietorship Section) would list the title numbers of the sharing plots rather than the proprietors. In such a case the A Sections (Proprietorship Sections) of the sharing plots would refer to the title number of the shared plot title sheet. Registrations affecting a sharing plot would presumptively affect the share in the shared plot. The Keeper would have the power to convert a shared plot title sheet into an ordinary title sheet.

(Para 6.9; Draft Bill, s 16)

27. The previous recommendation should apply, *mutatis mutandis*, to cases involving registered leases.

(Para 6.10; Draft Bill, s 16(11), sch 1)

28. Common areas should not be an exception to the principle of no registration without mapping. As for title sheets that, on the commencement of the new legislation, already include a share of an unmapped common area, it should be competent for rules to be made as to how the Keeper should act.

(Para 6.18; Draft Bill, s 95(1)(c))

29. An optional scheme should be introduced whereby a developer could request the Keeper to open a provisional shared plot title sheet in respect of the proposed common area. Each split-off disposition would convey a provisional share in the provisional area, but no real right would pass at that stage. On the common area becoming mappable, the developer would register an ascertainment deed, the effect of which would be that *pro indiviso* shares would be acquired by the individual properties and the shared title sheet would cease to be provisional. Until that time, the existence of the provisional title sheet would have no real effect.

(Para 6.33; Draft Bill, ss 29 to 31 and sch 2)

30. The concept of overriding interest is one that is not needed in the legislation and should not be used.

(Para 7.15)

31. Servitudes, public rights of way and core paths should be capable of being noted and should be the only such rights capable of being noted.

(Para 7.19; Draft Bill, s 10(1)(a), (c) and (d))

32. (a) Certain off-register rights (servitudes, public rights of way and core paths created by an order under section 22 of the Land Reform (Scotland) Act 2003) must be noted in the Register.

(b) The noting would be for information only. The validity or otherwise of the right would be the same whether it was noted or not.

(c) Noting should take place via the scheme for rectifying inaccuracies.

(Para 7.28; Draft Bill, s 7(1)(b), s 10(1)(a), (c) and (d), s 53(1)(b) and s 54)

33. The Keeper should be obliged to issue extracts of title sheets (including plans) in their past as well as present states. But in relation to data prior to the commencement of the new legislation the obligation should be limited to what is reasonably practicable.

(Para 8.13; Draft Bill, s 70(1)(a) and (b), and s 91(1), sch 6, para 20)

34. The Keeper should be obliged to issue, on request, extracts of deeds and other documents in the Archive Record. But in relation to deeds and documents received prior to the commencement of the new legislation the obligation should be limited to what is reasonably practicable.

(Para 8.15; Draft Bill, s 70(1)(c) read with s 91(1), sch 6, para 21)

35. Extracts should be available in paper or electronic form at the option of the applicant.

(Para 8.16; Draft Bill, s 70(3))

36. Certificates of title (ie land certificates and charge certificates) should be discontinued.

(Para 8.17)

37. Section 25 of the Land Registers (Scotland) Act 1868 should be repealed and replaced by a modernised version that deals with data provision as well as fees.

(Para 8.23; Draft Bill, s 90)

38. (a) The Registration of Leases (Scotland) Act 1857 should be amended so that references to the Register of Sasines are supplemented, where appropriate, by references to the Land Register.

(b) The Registration of Leases (Scotland) Act 1857 should be amended so as to set out the consequences of registration of a lease in the Land Register, as it does for the consequences of registration in the Register of Sasines.

(Para 9.14; Draft Bill, s 83(1), sch 4)

39. (a) The rules about the registrability of lease alterations in the Land Register should be stated in the Registration of Leases (Scotland) Act 1857, as far as possible using the wording used in the 1979 Act.

(b) The provisions about the effect of the registration of lease alterations, currently contained in section 3(1) of the 1979 Act, should be stated in the

Registration of Leases (Scotland) Act 1857, as far as possible using the wording used in the 1979 Act. But the Keeper's Midas touch should be excluded.

(c) The provisions contained in section 3(3) of the 1979 Act relating to the alteration of registered leases should be stated in the Registration of Leases (Scotland) Act 1857, as far as possible using the wording used in the 1979 Act.

(Para 9.30; Draft Bill, s 83(1), sch 4, paras 16 and 18)

40. (a) Registered leases need not have their own title sheet.

(b) But there may be subsidiary title sheets for such leases, at the Keeper's discretion.

(c) If they do have their own title sheets, the number must appear on the Cadastral Map.

(d) Whether they have their own title sheets or not, the boundaries must appear on the Cadastral Map.

(Para 9.35; Draft Bill, s 3(1)(c), and s 5(6) and (7))

41. The table above should have effect. In particular, where a plot is registered, deeds affecting long leases should be registrable in the Land Register, not the Register of Sasines.

(Para 9.41; Draft Bill, s 5(6), s 20, s 61, and s 62(1)-(4), (9) and (10))

42. A lease granted by the proprietor of an unregistered plot should not be capable of being registered in the Land Register or recorded in the Register of Sasines. In such a case the Keeper's temporary right to reject an application by the proprietor for voluntary registration should not apply.

(Para 9.44; Draft Bill, s 60 and s 64)

43. Fishing leases (in the sense of section 66 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003) should be subject to the Registration of Leases (Scotland) Act 1857.

(Para 9.47; Draft Bill, s 83(1), sch 4, para 18)

44. (a) Where property is benefited by a servitude, the servitude should appear on the dominant title sheet, and when a property is encumbered by a servitude, the servitude should appear on the servient title sheet.

(b) The dominant title sheet should identify the servient title sheet and vice versa (counterpart statements).

(Para 10.5; Draft Bill, s 7(1)(b) and s 10(1)(a))

45. Servitudes said to have arisen by prescriptive use should be treated in the same way as other off-register rights and should be noted only if their existence is manifest.

(Para 10.18; Draft Bill, s 7(1)(b), s 10(1)(a), s 53(1)(b) and s 54)

46. Section 58 of the Title Conditions (Scotland) Act 2003 should be amended so that the Keeper will not, as from 2014, have the obligation to enter section 58 statements, except where an application has been made to that effect.

(Para 10.30; Draft Bill, s 79)

47. (a) Registration should be competent if and only if authorised by an enactment.

(b) The Conveyancing and Feudal Reform (Scotland) Act 1970 should be amended to confirm that free-standing ranking agreements can be registered.

(Para 12.17; Draft Bill, s 17(1)(a) and s 34)

48. The principle that, in a competition, real rights are preferred by order of creation, should be left to the general law.

(Para 12.21)

49. The date of registration should continue to be the date on which the application is received.

(Para 12.26; Draft Bill, s 19(1)-(3) and s 23(1))

50. (1) Registration should be deemed to occur when the Application Record next closes. The closing of the Application Record should be subject to regulation by statutory instrument.

(2) But Scottish Ministers should be able by statutory instrument to make different provision.

(3) Where (a) two or more applications are received on the same day, and (b) having regard to the nature of the rights in question, one could not be given effect without excluding the other, they should be treated, absent evidence to the contrary, as having been received in the order in which they appear in the Application Record and should be accepted or rejected accordingly.

(4) Where, on the same day, applications are received in respect of (a) the transfer of property, and (b) a deed by the person in whose favour the transfer is being made, and the applications are accepted by the Keeper, the transfer should be deemed to be registered immediately before the registration in respect of the deed.

(Para 12.39; Draft Bill, s 23(2) and (3), s 24(1)-(3) and (5), and s 95(1)(f))

51. Applications relating to a given property should be dealt with in the order of their receipt.

(Para 12.41; Draft Bill, s 18)

52. (a) The Keeper should accept an application for registration to the extent that it appears that the deed on which the application is based is valid.

(b) The Keeper should reject an application for registration to the extent that it appears that the deed on which the application is based is invalid.

(c) A deed is valid if by the registration applied for a right would be acquired, varied or extinguished, or if the deed is declaratory of an acquisition, variation or extinction that has already happened off-register.

(d) These recommendations are subject to (a) the requirement that the application be in order and (b) the rules about prescriptive claimants.

(Para 12.55; Draft Bill, s 20(1)-(5) and (8), s 21(1)-(3) and s 92(2))

53. (a) The deed must be correctly executed.

(b) It must include the title number of each title sheet to which the application relates.

(c) If it deals with only part of a registered plot it must have an adequate plan or description, subject to qualifications for tenement properties and for pipe/cable servitudes.

(d) It must not be a souvenir plot.

(e) It must not be a transfer prohibited by an enactment.

(f) The application form must be in order.

(g) The registration fee must have been paid or the Keeper must be satisfied that it will be.

(h) It must enable the Keeper to comply with the requirements of Part 2 of the draft Bill.

(Para 12.56; Draft Bill, s 20(3)–(5) and (8))

54. (a) It should be for the applicant to satisfy the Keeper that the application ought to be accepted.

(b) The evidential standard should be one of balance of probabilities, except where the acceptance of the application would imply that the Register contains an inaccuracy, in which case the higher evidential standard applicable to rectifications should apply.

(Para 12.59; Draft Bill, s 20(1))

55. The Keeper's decision on registration should be taken on the basis of the state of the legal universe as at the date of the application.

(Para 12.69; Draft Bill, s 20(1))

56. (a) The Keeper should have the power to reject defective applications without first making requisitions. Hence the current "requisition" procedure should cease.

(b) But it should be possible for Rules to allow derogations from the general principle stated in (a).

(Para 12.77; Draft Bill, s 20(6) and (7), s 59(7) and (8), and s 60(5) and (6))

57. (1) An application is incompetent if the applicant has died, or has been dissolved, before the date of the application.

(2) An application is not incompetent merely because the granter of the deed has died, or has been dissolved, after the delivery of the deed.

(Para 12.81; Draft Bill, s 28)

58. The rule against the registration of souvenir plots should continue, but with a revised definition of "souvenir plot". However, souvenir plots that already exist as legal title units should not be subject to the rule.

(Para 12.85; Draft Bill, s 20(3)(d) and (8), s 59(4)(e) and (9), and s 60(3)(d) and (7))

59. (a) The Keeper should be under a duty to handle applications without unreasonable delay.

(b) The Scottish Ministers should have the power to set a maximum period for which an application can be in the Application Record, with power to fix different periods for different types of case.

(Para 12.94; Draft Bill, s 26 and s 95(1)(k))

60. The Keeper should be owed a duty of care by the granter and grantee and their solicitors. The duty of the granter and the granter's solicitors should end at settlement and that of the grantee and the grantee's solicitors should end on application.

(Para 12.107; Draft Bill, s 27)

61. (a) The Keeper's decision to accept or reject an application should be notified to the applicant and also to the granter of the deed being registered, and may be notified to anyone else.

(b) The rules about notification should be capable of modification by secondary legislation.

(Para 12.118; Section 25 and s 95(1)(g) and (h))

62. (a) The land registration statute should set out no general rule as to the effect of registration.

(b) Accordingly the effect of registration, or of non-registration, should be determined by the relevant legislation and the general principles of property law.

(Para 13.35; Draft Bill, s 17)

63. (a) A system of advance notices should be introduced.

(b) A notice should be competent even if missives have not been concluded.

(c) An advance notice to be valid must be granted by either (a) a person who could validly grant the deed in question or (b) any other person, so long as the notice bears the consent of the person just mentioned.

(d) An advance notice should give priority over other deeds registered within the protected period, but only if the protected deed is itself registered within that period.

(e) The protected period should be 35 days or such other period as may be prescribed.

(f) The protection should extend to entries within the protected period that appear in the Register of Inhibitions.

(g) Ministers should have the power to apply the scheme to first registrations.

(Para 14.66; Draft Bill, ss 35 to 38 and sch 3, and s 67)

64. A clause of deduction of title should no longer be required in a deed to be registered in the Land Register, provided that the deed is one that can be competently granted by a person with an uncompleted title.

(Para 15.3; Draft Bill, s 68)

65. Notices of title should again be required, but with a new and simplified statutory style.

(Para 15.8; Draft Bill, s 69(1) and (3), and s 97, sch 8, para 12(8))

66. Where title is still in the General Register of Sasines, an unregistered holder should have the right to complete title either in that Register or in the Land Register.

(Para 15.9; Draft Bill, s 69 and s 97, sch 8, para 12(8))

67. Where it is competent to register a disposition in the Land Register it should not be competent to complete title in the Register of Sasines by means of a notice of title.

(Para 15.12; Draft Bill, s 69(3))

68. Applications based on *a non domino* deeds should normally be rejected. But where they are legitimate in their purpose they should be accepted so as to enable prescription to begin to run.

(Para 16.10)

69. (a) An *a non domino* application should not be accepted by the Keeper unless both:

(i) The owner has been out of possession for at least seven years, and

(ii) There has already been possession for at least a year by the applicant or the applicant's author.

(b) These periods should be variable by subordinate legislation.

(Para 16.21; Draft Bill, s 21(1) and (13)(a) read with s 20)

70. (a) An entry in favour of a prescriptive claimant is to be marked as provisional.

(b) It should have no effect on the rights of any person.

(c) The prescriptive claimant will not have the benefit of the Keeper's warranty.

(Para 16.29; Draft Bill, s 21(2)(a), (4) and (7), and s 39(2)(a))

71. (a) Unless and until the Register is rectified, the Keeper should accept deeds granted by a prescriptive claimant, provided that the applications are in other respects correct.

(b) The same should apply to deeds granted by successors.

(c) It should also apply to deeds against prescriptive claimants.

(d) Entries in the Register are to be marked provisional.

(Para 16.31; Draft Bill, s 21(3) and (4))

72. If the Register is inaccurate, it should be rectified.

(Para 17.35; Draft Bill, s 53 and s 54)

73. In the new scheme a title sheet is inaccurate if and in so far as it misstates what the position is in law or in fact, omits anything required, by or by virtue of an enactment, to be included in it, or includes anything the inclusion of which is not expressly or impliedly permitted by, or by virtue of, an enactment.

(Para 17.42; Draft Bill, s 53(1)(a)-(c))

74. (a) The Register should not be regarded as being inaccurate in showing a voidable right.

(b) The Register should not be regarded as becoming inaccurate by reason that a voidable registered deed has been reduced.

(c) The reduction of a voidable registered deed should take proprietary effect upon registration of the extract decree of reduction.

(Para 17.43; Draft Bill, s 32 and s 53(3)(a))

75. (a) The Keeper should be under an obligation to rectify any inaccuracy in the Register, without being so requested.

(b) But where it appears to the Keeper that rectification would prevent the acquisition of a prescriptive title, rectification should not take place unless there has been a judicial determination of the fact of the inaccuracy.

(c) Where an inaccuracy has been identified but it is not yet clear what the correct entry should be, the Keeper should not at that stage rectify but should add an explanatory note.

(Para 18.14; Draft Bill, s 54(1), (5) and (6))

76. The Keeper's obligation to rectify the Register where there is an inaccuracy should arise only where the fact of the inaccuracy is manifest.

(Para 18.25; Draft Bill, s 54(1))

77. The title of a *bona fide* acquirer should continue to be guaranteed in respect of Register errors.

The title of a *bona fide* acquirer should continue to be guaranteed in respect of transactional errors arising out of the invalidity of the conveyance in the acquirer's favour.

(Para 19.26; Draft Bill, Parts 5 and 6)

78. No distinction should be made, as far as the guarantee of title is concerned, between gratuitous and onerous grantees.

(Para 19.29)

79. Indemnity should not be payable in respect of rights lost by reduction of a voidable deed.

(Para 20.10; Draft Bill, s 39(1) and (2))

80. A *bona fide* disponee should acquire good title free of Register error provided that the requirement of one year's possession is satisfied.

(Para 21.34; Draft Bill, Part 6)

81. The mud/money decision should be a matter for fixed rules rather than for discretion.

(Para 21.39)

82. In cases of transactional error, the form of title guarantee available to the grantee should be monetary compensation. The Register should be rectifiable.

(Para 21.42; Draft Bill, Part 5)

83. The Keeper's warranty should only be in respect of rights entering the Register by registration.

(Para 22.14; Draft Bill, s 39(1)(a))

84. The warranty should be in favour of the applicant only, though it should also pass to anyone to whom the benefit of deed warrandice would pass.

(Para 22.16; Draft Bill, s 39(1), (2) and (9))

85. Title should be warranted only as at the date of registration.

(Para 22.21; Draft Bill, s 39(1) and (2))

86. The Keeper's warranty as to title should not apply insofar as registration results in an acquisition (or variation or discharge) more extensive than was sought by the applicant.

(Para 22.24; Draft Bill, s 39(1)(b)(viii))

87. The Keeper's warranty should not extend to the non-existence of public rights of way, of core paths under section 22 of the Land Reform (Scotland) Act 2003 or of servitudes created other than under section 75(1) of the Title Conditions (Scotland) Act 2003.

(Para 22.25; Draft Bill, s 39(1)(b)(i)-(iii))

88. The Keeper should not be taken as warranting that a purported pertinent is of a type that can be validly constituted as a pertinent.

(Para 22.27;Draft Bill, s 39(1)(b)(iv))

89. The warranty does not mean that a pertinent has not been varied or extinguished off-register.

(Para 22.28; Draft Bill, s 39(1)(b)(v))

90. Where a title does not expressly mention mineral rights, title to such rights should not be warranted.

(Para 22.31; Draft Bill, s 39(1)(b)(vi))

91. The rules outlined in the previous recommendations form a set of default rules, which would apply where the title sheet was silent. The Keeper should also be able to grant a lower or higher level of warranty. In the former case the test should be the degree of doubt about the title.

(Para 22.40; Draft Bill, s 39(1)–(3))

92. The Keeper may, at a date later than the date of registration, upgrade the warranty.

(Para 22.42; Draft Bill, s 39(4)-(6))

93. The Keeper's liability to pay compensation should arise when the inaccuracy in question is rectified.

(Para 22.46; Draft Bill, s 42(1))

94. (a) There should be no cap to the Keeper's potential liability under the warranty.

(b) The question of whether there should continue to be a cap to the registration fee should be reviewed.

(Para 22.54)

95. For the purpose of calculating compensation, properties should be valued as at the date of rectification.

(Para 22.55; Draft Bill, s 43(1)(a))

96. The Keeper's warranty should cover consequential losses. Interest should accrue on the sum due until payment.

(Para 22.56; Draft Bill, s 43(1)(b)(ii) and (2))

97. There should continue to be no requirement that a person exhausts other remedies before making a claim to the Keeper for indemnity.

(Para 22.57; Draft Bill, s 42(2))

98. The Keeper's warranty should not extend to non-patrimonial (non-pecuniary) loss.

(Para 22.59; Draft Bill, s 40 (f))

99. The Keeper should not be liable for reasonably avoidable losses.

(Para 22.60; Draft Bill, s 40(d))

100. The Keeper should not be liable for unduly remote losses.

(Para 22.62; Draft Bill, s 40(e))

101 The Keeper should not be liable to the extent that the loss is attributable to a breach of the duty of care.

(Para 22.63; Draft Bill, s 40(c))

102. The Keeper should not be liable for an inaccuracy in the Register immediately before the registration, if it was, or ought to have been, known to the applicant.

(Para 22.64; Draft Bill, s 40(b))

103. The Keeper should not be liable for an inaccuracy consequent upon an inexactitude in the Cadastral Map if that error was made in reasonable reliance upon the base map.

(Para 22.65; Draft Bill, s 40(a))

104. The realignment principle should be capable of applying not only to dispositions granted by the person registered as owner but also by persons who, had that person been the true owner, would have had power to dispone.

(Para 23.4; Draft Bill, s 45(1))

105. (a) The realignment principle should require possession for a year.

(b) Straddling possession should be recognised for this purpose.

(Para 23.6; Draft Bill, s 45(4))

106. Good faith should be a precondition for the operation of the realignment principle.

(Para 23.14)

107. The date for determining good faith should be the date of application for registration or, if later, the date on which the period of one year's possession is completed.

(Para 23.15; Draft Bill, s 45(3)(a) and (4))

108. The realignment principle should be subject to any relevant caveat and any limitation of warranty.

(Para 23.18; Draft Bill, s 45(3)(c)(i) and (d))

109. (a) Realignment of rights should happen in the case of an invalid assignation of an existing lease.

(b) But it should not happen in the case of an assignation of a non-existent lease.

(c) Nor should it happen in the case of an invalid grant of a new lease.

(Para 23.30; Draft Bill, s 48)

110. (a) Realignment of rights should happen where a person registered as owner, but who is not the owner, grants a new servitude.

(b) But it should not apply where an invalid servitude is an ostensible pertinent of property that is disponed. (Regardless of whether the invalidity is original or supervening.)

(Para 23.36; Draft Bill, s 50)

111. (a) The Keeper should compensate those who suffer from the realignment of rights. The claimant should not be obliged to exhaust remedies against other parties.

(b) But the Keeper should not be liable to the extent:

- That the loss is too remote;
- That the loss is non-patrimonial;
- That the claimant has not taken reasonable steps in mitigation.

(Para 23.41; Draft Bill, s 51 and s 52)

112. The Keeper's right, on paying compensation, to pursue a derivative claim to recover what has been paid out, should continue, without prejudice to the right to pursue a direct claim based on the duty of care.

(Para 24.11; Draft Bill, s 42(3), s 51(3) and s 55(3))

113. The Keeper's derivative claim should take the form of a right to an assignation.

(Para 24.16; Draft Bill, s 42(3), s 51(3), and s 55(3))

114. Loss caused by the loss or destruction of any document while lodged with the Keeper should continue to be indemnified by the Keeper.

(Para 27.4; Draft Bill, s 73)

115. Loss caused by errors in reports and other information supplied by the Keeper should continue to be indemnified by the Keeper.

(Para 27.5; Draft Bill, s 72)

116. No special provision should be made as to the expenses of litigation (whether successful or unsuccessful).

(Para 27.10)

117. Where compensation is payable it should include reasonable legal expenses, other than litigation expenses.

(Para 27.11; Draft Bill, s 43(1)(b)(i), s 52(1)(b)(i) and s 55(1)(a))

118. No expenses should be payable by the Keeper to those who make unsuccessful claims.

(Para 27.12)

119. Where an inaccuracy is rectified, the person in whose favour the rectification is made should be indemnified by the Keeper for loss caused by the inaccuracy.

(Para 27.15; Draft Bill, s 55)

120. Reductions of voidable deeds should be given effect as of right by an appropriate entry on the Land Register.

(Para 28.6; Draft Bill, s 32)

121. (a) When a voidable deed has been registered in the Land Register, its reduction should not make the Register inaccurate. So when the Register is changed to give effect to such a decree, the change should be by way of registration, not rectification.

(b) The real effect of the registration should take place at the time of registration.

(c) Section 46(1) of the Conveyancing (Scotland) Act 1924 should be disapplied to the Land Register.

(d) An entry in the Land Register founded on a void deed should continue to be regarded as an inaccuracy and accordingly the means of putting it right should continue to be rectification. (But this should be subject to the rules about the realignment of rights.)

(Para 28.21; Draft Bill, s 32, s 53(1)(a) and (3), s 54 and s 97, sch 8, para 12)

122. (a) When a deed has been registered in the Land Register, its rectification under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 should not make the Register inaccurate.

(b) Hence when the Register is changed to give effect to the document rectification order, the change should be by way of registration, not rectification. Section 8(4) of the 1985 Act should be made subject to this provision.

(c) The consequences of the registration of a document rectification order should not precede that registration. Accordingly the real effect of the registration should take place at the time of registration.

(d) Where a deed to be rectified is a deed registered in the Land Register, section 9 of the 1985 Act should not apply. Section 8(3) is sufficient protection to third parties, though it should be amended to make clear that no such deed can be rectified unless all parties having an interest in it have been called.

(e) Section 8 of the 1985 Act should provide that a rectification of a document registered in the Land Register is not to be ordered if the person in whose favour it was registered was in good faith, unless that person consents to the rectification.

(f) Section 46(2) of the Conveyancing (Scotland) Act 1924 should be disapplied to cases involving the rectification of deeds that have been registered in the Land Register.

(Para 29.33; Draft Bill, s 33, s 53(3) and s 97, sch 8, para 12)

123. The proviso to section 6 of the 1979 Act (which requires the Keeper to enter on the Land Register an inhibition only where it impairs the validity of a deed which is being registered) should be extended to other entries in the Register of Inhibitions.

(Para 30.4; Draft Bill, s 6(1) and (5)(c))

124. A registered disponee acting in good faith should take free of any floating charge granted by a predecessor in title of the disponer, being a charge that has attached.

(Para 30.12; Draft Bill, s 47)

125. The Keeper should have the right to appear and be heard in any action in which the accuracy of the Register is in dispute. The appropriate procedure (which should include provisions for intimation to the Keeper) should be determined by rules of court.

(Para 31.17; Draft Bill, s 57)

126. (a) Where there is (i) a pending action for the reduction of a registered deed on the ground that it is voidable, or (ii) a pending action with conclusions (or craves) that would result in a judicial determination that the register is inaccurate, or (iii) an action seeking an order that would be registrable under section 8 (as prospectively amended by the draft Bill) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, the court or Lands Tribunal should have the power to grant warrant for a caveat to be placed on the relevant title sheet(s).

(b) The rule applicable to warrant for diligence on the dependence should be the model for caveats.

(c) Caveats should expire automatically after one year (or such other period as may be prescribed) but without prejudice to the competency of renewal by a further warrant.

(d) Rules of Court should regulate caveats in relation to such matters as recall.

(e) Sections 159 and 159A of the Titles to Land Consolidation (Scotland) Act 1868 would thus become inapplicable to the Land Register.

(f) Both the Keeper's warranty and the operation of the principle of the realignment of rights should be subject to any caveat.

(Para 32.22; Draft Bill, s 41, s 45(3)(c)(i), s 48(3)(d), s 50(4)(a)(ii), s 78, and s 97, sch 8, para 8(2) and (3))

127. The primary legislation should contain a robust completion programme.

(Para 33.19; Draft Bill, ss 58 to 67)

128. (a) The Keeper should cease to have a discretion to refuse applications for voluntary registration.

(b) But this change should not necessarily take place immediately upon commencement of the new legislation. It should happen when an order to that effect is made by Scottish Ministers, after consultation with the Keeper.

(Para 33.27; Draft Bill, s 60(1) and (2))

129. (a) As from the commencement of the new Act, no disposition (whether onerous or gratuitous) should be recordable in the Register of Sasines.

(b) As from a date to be fixed by secondary legislation, no standard security should be recordable in the Register of Sasines.

(c) As from a later date, to be fixed by secondary legislation, no deed of any kind should be recordable in the Register of Sasines.

(d) It should be competent, in relation to (b) and (c), for different dates to be set for different areas.

(e) In the case of dispositions of unregistered property, application for registration of the plot should be by the grantee. In cases of standard securities and long leases granted by the owner, the application for registration of the plot should be by the granter. In other cases the Keeper should register the plot without any application for its registration.

(Para 33.46; Draft Bill, s 59, s 60, s 62, s 64 and s 66)

130. (a) The Keeper should have the power to register any unregistered plot of land, without any application being made.

(b) If the proprietor cannot be determined, the title sheet should so state.

(Para 33.58; Draft Bill, s 61 and s 65(4))

131. (a) The Requirements of Writing (Scotland) Act 1995 should be amended so as to permit (but not compel) the use of electronic documents for land contracts and land deeds.

(b) The same should apply to other acts in relation to which the 1995 Act imposes a requirement of writing, but only to the extent that the act is contained within, and is ancillary to, a land contract or a land deed.

(Para 34.31; Draft Bill, s 83(2) and sch 5)

132. That an electronic document should be formally valid if –

(a) It is authenticated by the electronic signature of each granter;

(b) Each such electronic signature has been created by the person by whom it purports to have been created;

(c) The document itself satisfies such requirements as may be prescribed by Scottish Ministers; and

(d) Each electronic signature satisfies such requirements as may be prescribed by Scottish Ministers.

(Para 34.41; Draft Bill, sch 5; proposed new section 9B of the 1995 Act)

133. An electronic document should be rebuttably presumed to have been authenticated by a granter if –

(a) it bears to have been authenticated by the electronic signature of that granter;

(b) nothing in the document or authentication indicates that it was not;

(c) the electronic signature is of such a type and meets such requirements as Scottish Ministers may prescribe; and

(d) either (or both) –

(i) the electronic signature is certified by a certificate meeting such requirements as Scottish Ministers may prescribe; or

(ii) the electronic document and electronic signature are used in such circumstances as may be prescribed and meet such requirements as may be prescribed.

(Para 34.50; Draft Bill sch 5; proposed new section 9C of the 1995 Act)

134. That an electronic document should not be registrable in the Land Register, Register of Sasines, Books of Council and Session or sheriff court books unless –

(a) the document itself;

(b) the electronic signature authenticating it; and

(c) any certification of that electronic signature

are in such forms as may be prescribed by the Scottish Ministers after consultation with the Keeper of the Registers of Scotland and the Lord President of the Court of Session.

(Para 34.53; Draft Bill, sch 5; proposed new section 10A of the 1995 Act)

135. There should be an express statement that an electronic document may be delivered electronically.

(Para 34.57; Draft Bill, sch 5; proposed new section 9E of the 1995 Act)

136. (a) The Keeper should continue to be the person who authorises access to the ARTL system.

(b) Secondary legislation should prescribe criteria about who can be authorised by the Keeper to access the system, about suspension and revocation of access, and about the terms and conditions of use.

(Para 34.60; Draft Bill, s 77(1) and (3), and s 95(1)(q))

137. The secondary legislation mentioned in the previous recommendation should include a requirement about the lodging of copy mandates.

(Para 34.64)

138. Positive prescription should apply to all titles registered in the Land Register.

(Para 35.3; Draft Bill, s 86(1))

139. Positive prescription running on a deed recorded in the Register of Sasines should not be considered as interrupted by first registration in the Land Register.

(Para 35.4; Draft Bill, s 86(1))

140. In sections 1 to 3 of the 1973 Act, the effect of positive prescription in relation to a void title should be to validate it as from the time when the prescriptive period is complete.

(Para 35.9; Draft Bill, s 86(2))

141. The obligation to rectify an inaccuracy should be imprescriptible.

(Para 35.11; Draft Bill, s 97, sch 8, para 21(11))

142. In relation to compensation for breach of the Keeper's warranty, and to compensation for losses arising from the realignment provisions the period of negative prescription should be twenty years. But the period should be five years for other cases.

(Para 35.14; Draft Bill, s 97, sch 8, para 21(9) and (10))

143. The Keeper should have the power to make existing title sheets conform to the requirements of the new legislation. But there should be no obligation to do so except to change the name of the C Section to "Securities Section" and the name of the B Section of lease title sheets to "Tenancy Section."

(Para 36.3; Draft Bill, s 91(1), sch 6, paras 1 to 6)

144. The requirement that a common area must have its own title sheet should apply only to developments beginning after the new legislation comes into force.

(Para 36.4; Draft Bill, s 91(1), sch 6, paras 7 to 11)

145. Within ten years, overlap areas should be assigned their own title sheet.

(Para 36.5; Draft Bill, s 91(1), sch 6, paras 12 to 18)

146. Applications for registration that are pending on the day that the new legislation comes into force should be determined by the Keeper according to the law in force at the date when the application was made.

(Para 36.6; Draft Bill, s 91(1), sch 6, para 24)

147. (a) Actual inaccuracies should be unaffected by the new scheme, ie they should continue as actual inaccuracies and accordingly continue to be rectifiable.

(b) A bijural inaccuracy that is, in terms of the 1979 Act, a rectifiable inaccuracy should be automatically converted, on the commencement of the new legislation, into an actual inaccuracy. The inaccuracy should accordingly continue to be rectifiable. The rights of the parties concerned should automatically be realigned.

(c) A bijural inaccuracy that is, in terms of the 1979 Act, an unrectifiable inaccuracy should cease to be an inaccuracy.

(d) A person who is prejudiced should be compensated by the Keeper.

(e) For the purposes of determining whether an inaccuracy could have been rectified, it should be presumed (unless the contrary is shown) that the proprietor of the land was in possession.

(Para 36.15; Draft Bill, s 91(1), sch 6, paras 28 to 35)

148. If there is a vacancy in the office of the Keeper of the Registers of Scotland, or the Keeper becomes incapable of acting, then any act or decision made on behalf of the Keeper which, had the vacancy not happened, or had the Keeper not become incapable of acting, would have been an act or decision of the Keeper, and is done before a new Keeper is appointed, or before an appointment is made under section 1(6) of the Public Registers and Records (Scotland) Act 1948, should be of the same effect as if the office had not become vacant, or as if the Keeper had not become incapable of acting.

(Para 38.10; Draft Bill, s 75)

149. The Keeper should be expressly authorised to engage in remunerated consultancy work.

(Para 38.11; Draft Bill, s 87)

150. The law of land registration should apply equally to land held by the state and other public bodies. The legislation should bind the Crown.

(Para 38.15 ;Draft Bill, s 99)

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