

SCOTTISH LAW COMMISSION
(Scot Law Com No 181)

REPORT ON REAL BURDENS

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965
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e Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965¹ for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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Mr Patrick S Hodge QC
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¹Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).

SCOTTISH LAW COMMISSION

Item No 6 of our Fifth Programme of Law Reform

Real Burdens

To: Jim Wallace Esq QC, MSP, Deputy First Minister and Minister for Justice.

We have the honour to submit to the Scottish Ministers our Report on Real Burdens.

(Signed) BRIAN GILL, *Chairman*
PATRICK S HODGE
GERARD MAHER
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JOSEPH M THOMSON

NORMAN RAVEN, *Secretary*
29 September 2000

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ABBREVIATIONS

Agnew of Lochnaw, *Land Obligations*

Sir Crispin Agnew of Lochnaw, *Variation and Discharge of Land Obligations* (Edinburgh, 1999)

American Law Institute, *Restatement Third, Property (Servitudes)*

The American Law Institute, *Restatement of the Law, Property, Servitudes* (2 vols, St Paul, Minnesota, 2000)

BGB

Bürgerliches Gesetzbuch (German Civil Code)

Cusine & Egan, *Feuing Conditions*

D J Cusine & J Egan, *Feuing Conditions in Scotland* (The Scottish Office Central Research Unit, 1995)

Cusine & Paisley, *Servitudes*

D J Cusine & R R M Paisley, *Servitudes and Rights of Way* (Edinburgh, 1998)

Feudal Act

Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)

Gordon, *Scottish Land Law*

W M Gordon, *Scottish Land Law* (2nd edn) (Edinburgh, 1999)

Gray, *Elements*

Kevin Gray, *Elements of Land Law* (2nd edn) (London, 1993)

Halliday, *Conveyancing*

J M Halliday, *Conveyancing Law and Practice* (2nd edn, ed Iain J S Talman) vols I and II (Edinburgh, 1996 and 1997)

Halliday, *Opinions*

D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (Edinburgh, 1992)

Halliday Report

Report on *Conveyancing Legislation and Practice* by a Committee chaired by Professor J M Halliday (Cmnd 3118, 1966)

Law Com No 11

Law Commission, *Transfer of Land: Report on Restrictive Covenants* (Law Com No 11) (1967)

Law Com No 111

Law Commission, *Property Law: Rights of Reverter* (Law Com No 111) (1981)

Law Com No 127

Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Com No 127) (1984)

- Law Com No 201
Law Commission, *Transfer of Land: Obsolete Restrictive Covenants* (Law Com No 201) (1991)
- McDonald, *Conveyancing Manual*
A J McDonald, *Conveyancing Manual* (6th edn, by Stewart Brymer, Douglas J Cusine and Robert Rennie) (Edinburgh, 1997)
- Ontario LRC, *Covenants*
Ontario Law Reform Commission, *Report on Covenants affecting Freehold Land* (1989)
- 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* (Edinburgh, 1996) (being an updated reprint of the *Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993))
- Scot Law Com DP No 93
Scottish Law Commission, Discussion Paper No 93 on *Property Law: Abolition of the Feudal System* (1991)
- Scot Law Com DP No 102
Scottish Law Commission, Discussion Paper No 102 on *Leasehold Casualties* (1997)
- Scot Law Com DP No 103
Scottish Law Commission, Discussion Paper No 103 on *Penalty Clauses* (1997)
- Scot Law Com DP No 106
Scottish Law Commission, Discussion Paper No 106 on *Real Burdens* (1998)
- Scot Law Com No 160
Scottish Law Commission, *Report on Interpretation in Private Law* (Scot Law Com No 160) (1997)
- Scot Law Com No 162
Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162) (1998)
- Scot Law Com No 168
Scottish Law Commission, *Report on Abolition of the Feudal System* (Scot Law Com No 168) (1999)
- Silberberg & Schoeman, *Property*
Silberberg & Schoeman's *The Law of Property* (3rd edn by D G Kleyn & A Boraine) (Durban, 1992)
- Title Conditions Survey
Survey of Owner Occupiers Understanding of Title Conditions (George Street Research for The Scottish Executive Central Research Unit, 1999), reproduced in Appendix C
- Van Dijk & van Hoof, *Theory and Practice*
P van Dijk & G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn) (The Hague, 1998)

Yiannopoulos, *Predial Servitudes*

A N Yiannopoulos, *Louisiana Civil Law Treatise Volume 4: Predial Servitudes* (2nd edn) (St Paul, Minnesota, 1997)

Part 1 Introduction

Background to the report

1.1 This is the fifth in a series of reports on property law, a subject which was included in both our Fifth Programme of Law Reform¹ and in our Sixth Programme of Law Reform.² In the Fifth Programme we said that our aim was to submit,

“by the end of 1999, a report with draft legislation to abolish and replace the feudal system. In the course of that work we expect to identify further reforms which, though not essential to the primary reform, we may wish to pursue as a long-term project ...”.³

Our report on the abolition of the feudal system, with a draft bill, was submitted at the end of 1998,⁴ and on 6 October 1999 the Abolition of Feudal Tenure etc. (Scotland) Bill, substantially based on our bill, was introduced to the Scottish Parliament. The Bill duly completed its parliamentary stages, and received royal assent on 9 June 2000.

1.2 In the course of the preparation of our Report on feudal abolition we came to realise that the whole law of real burdens was in need of fundamental reform. Work on this topic began towards the end of 1997. Our preliminary ideas were tested at a seminar held in association with the University of Edinburgh on 24 June 1998.⁵ A discussion paper on real burdens was published in October 1998 and put out to consultation.⁶ We also commissioned two separate empirical studies. One, prepared by George Street Research on behalf of the Scottish Executive Central Research Unit, surveyed attitudes to real burdens in housing developments in seven locations: Glasgow, Edinburgh, Inverness, West Lothian, Dumfries, Perth, and Kirkcaldy.⁷ The other, conducted in-house, examined a substantial number of deeds of conditions of different vintages and from different locations.⁸ The results of these studies are given in, respectively, appendix C and appendix D. This report follows a reconsideration of the issues raised in the discussion paper in the light of these studies and of the large number of helpful responses received during the consultation period.⁹

¹ Scot Law Com No 159 (1997). The relevant item is Item No 6: Property. The earlier reports were on the law of the tenement (Scot Law Com No 162, 1998), on boundary walls (Scot Law Com No 163, 1998), on leasehold casualties (Scot Law Com No 165, 1998), and on abolition of the feudal system (Scot Law Com No 168, 1999).

² Scot Law Com No 176 (2000).

³ Scot Law Com No 159 para 2.35.

⁴ Scot Law Com No 168.

⁵ The following papers were presented: Professor Robert Rennie (University of Glasgow), “A reaction to the Scottish Law Commission’s proposals”; Professor Kevin Gray (University of Cambridge), “What should be done with existing burdens?”; and Professor Gregory Alexander (Universities of Cornell and Harvard), “The publicness of private land use controls”. The Commission’s proposals were introduced by Professor Kenneth Reid (University of Edinburgh and Scottish Law Commission). Revised versions of the papers by Professors Gray and Alexander have since been published in the *Edinburgh Law Review* (respectively at (1999) 3 ELR 229 and (1999) 3 ELR 176).

⁶ Scot Law Com DP No 106.

⁷ The account of this research, reproduced in appendix C, is referred to in this report as “Title Conditions Survey”.

⁸ We are grateful to the Registers of Scotland for giving us ready access to the property registers, for helping us track down deeds, and for making copies of deeds available.

⁹ A list of those who submitted written responses is in appendix B.

1.3 We are grateful to all those who responded to our discussion paper and who helped with information and advice.¹⁰ Special mention should be made of the Scottish Law Agents Society which took the trouble to devise a questionnaire for the *Scottish Law Gazette* and to provide us with a full analysis of the views of the 77 members who responded. We are also grateful to the members of our advisory group¹¹ who, in the course of two meetings, commented on a number of our proposals. In the later stages of the project we benefited from the comments and advice of Mr Scott Wortley of the University of Strathclyde.

What are real burdens?

1.4 A real burden¹² is an obligation affecting land or buildings. Generally it either restricts the way in which the property can be used, or imposes an affirmative obligation on its owner. Typical restrictions on use would be a prohibition on building on part of the property, a requirement that the property be used as a family home, or a prohibition on the keeping of livestock. A typical affirmative obligation would require the owner to contribute to the maintenance of some facility common to a number of properties – the roof of a tenement building, for example, or a private water supply. Like contracts, real burdens are privately created and privately enforced. Generally, they are created at the time the property is first sold as a separate unit, and they are conceived in the interests of the seller or of the purchasers of neighbouring properties. The burdens appear either in the deed of conveyance itself or in a separate deed, known as a deed of conditions, and they do not affect the property until the deed is registered in the appropriate property register.¹³

1.5 In common use since the end of the eighteenth century, real burdens have played an important role in controlling development, especially before the advent of the public regulation of modern times.¹⁴ Most properties are affected by real burdens to some degree. While, strictly, the real burden is unique to Scotland, similar devices are found in other countries. In the Anglo-American legal systems this is usually the restrictive covenant, while in civil law countries, such as the countries of Continental Europe, the Roman law servitude is used for this purpose.¹⁵ Scotland also has servitudes, although in a less developed form. Some of our recommendations affect servitudes as well as real burdens.¹⁶ In preparing first the discussion paper and then this report we have derived assistance from the experience of other countries.

¹⁰ We are grateful to all those who provided help or comments as our work proceeded and, in particular, to Mr Henning Brath; Mr Robin Edwards WS, member of the Lands Tribunal for Scotland; Mr Michael Greenwald, Deputy Director, American Law Institute; Professor George Gretton, University of Edinburgh; Professor A J McDonald; Lord McGhie, President of the Lands Tribunal for Scotland; Mr Nathaniel Sterling, Executive Secretary, California Law Revision Commission; Society of Local Authority Lawyers and Administrators in Scotland; Mr Alistair Rennie, Registers of Scotland; and Mr Neil Tainsh, Clerk to the Lands Tribunal for Scotland. Important contributions by others are acknowledged elsewhere in the report.

¹¹ Mr Stewart Brymer, Professor (now Sheriff) Douglas Cusine, Mr Ian Davis, Mr Bruce Merchant, Professor Roderick Paisley, Mr William Rankin, Professor Robert Rennie, Mr Roy Shearer, Professor John Sinclair and Mr Campbell White.

¹² For possible difficulties of terminology, see Scot Law Com DP No 106 para 1.1.

¹³ For a discussion of the property registers, see para 1.38.

¹⁴ For the development of real burdens see Reid, *Property* paras 376 to 385.

¹⁵ Scot Law Com DP No 106 paras 2.28 to 2.30.

¹⁶ See in particular part 12.

Benefited properties and burdened properties

1.6 Most rights in land – real rights, in technical language – are held in a personal capacity. So for example if A leases a house from B, the lease is held by A personally, and will continue to be so held until either the lease comes to an end or A decides to transfer it to someone else. With real burdens and servitudes the position is different. Both regulate land for the benefit of other, and neighbouring, land, and the benefit of the right is tied to the neighbouring land. Hence a real burden is held by the owner for the time being of the benefited land, and when the land changes hands, the new owner takes the place of the old as the holder of the right.

1.7 Traditionally, the land affected by a real burden or servitude is known as the “servient tenement” and the land which benefits as the “dominant tenement”. The usage is found in a number of other legal systems.¹⁷ Some consultees expressed the view that these labels were out of date and misleading. “Tenement” was said to suggest a flatted building, while “dominant” and “servient” implied a degree of oppression which is wholly absent from, say, an obligation to maintain a mutual fence or to refrain from the sale of alcohol. New legislation, it was argued, should not perpetuate such language, but the opportunity should be taken to introduce terms more in harmony with the times. We agree with these views. The traditional terms were used in the Abolition of Feudal Tenure etc. (Scotland) Act 2000, but only in the context of transitional provisions. In reforming and re-stating the whole law of real burdens, modern terminology seems appropriate. Indeed such terminology already exists. Part I of the Conveyancing and Feudal Reform (Scotland) Act 1970 uses the terms “benefited proprietor” and “burdened proprietor” in the context of applications to the Lands Tribunal for Scotland for variation and discharge of real burdens and other land obligations. In this report, and in the draft bill appended to it, we use the terms “benefited property” and “burdened property” instead of dominant tenement and servient tenement.¹⁸ The person entitled to enforce a burden is referred to as the “benefited owner” and the person against whom enforcement is made as the “burdened owner”.¹⁹

1.8 As the law currently stands, it is not possible to have a real burden unless there is a benefited property. That will change when the Feudal Act comes into force. Under transitional provisions in that Act, a superior granted the status of a conservation body is able to save any feudal real burden which is, in substance, a conservation burden. Following feudal abolition, such burdens are then held by the conservation body personally, and without a benefited property.²⁰ A similar arrangement is made for maritime burdens, defined as burdens enforceable by the Crown in respect of the sea bed or foreshore.²¹ And to these we would add “manager burdens” – burdens reserving the right to appoint a manager

¹⁷ Eg, England, South Africa, Italy (“fondo dominante” and “fondo servente”: see *Codice Civile* art 1072), Louisiana (“dominant estate” and “servient estate”: see Civil Code art 646), Quebec (“fonds dominant” and “fonds servant”: see *Code Civil du Québec* art 1177).

¹⁸ In the United States the recently completed Restatement on Servitudes uses the dual terminology of benefited or dominant estate, and burdened or servient estate. See American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 8 (§ 1.1(1)(b) and (c)).

¹⁹ These latter terms, though convenient, are slightly inaccurate. Negative burdens can be enforced against anyone and not merely against the owner of the burdened property. See paras 4.27 to 4.30. And all burdens can be enforced by a wider category than the owner of the benefited property. See paras 4.1 to 4.15. The terms are not used in the draft bill.

²⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 26 to 32.

²¹ *Ibid*, s 60.

of a development for a limited period, usually of ten years. These topics are explored later in the report.²² For present purposes it is merely necessary to note the existence of such burdens. They will not be common, and the rule which requires a benefited property will be substantially undisturbed.

Neighbour burdens and community burdens

1.9 Real burdens are mainly of two types.²³ “Neighbour burdens” affect one property for the benefit of another, neighbouring property. But the obligations operate in a single direction: only the burdened property is affected, and there are no corresponding obligations on the benefited property. By contrast, a “community burden” is wholly reciprocal. Each property in the community is subject to the burdens, but each holds a right of enforcement against the other properties. Each property is thus at the same time both a benefited and also a burdened property. Typical “communities” would be housing estates, or blocks of flats, or sheltered housing developments, or business parks. Although the burdens are reciprocal they may not always be identical. For example, in a mixed development, the use restrictions on residential properties will differ from those on commercial properties; but the sense of reciprocity remains.

1.10 Later we recommend that certain default rules should apply in the administration of community burdens, allowing majority decision-making for the carrying out of repairs, for the appointment of a manager, and for the variation and discharge of burdens. Community burdens are the subject of part 7 of the report. We have no special recommendations to make about neighbour burdens, and the term does not appear in the draft bill.

1.11 Occasionally the same obligation might be both a neighbour burden and also a community burden.²⁴ For example, in selling plots of land an owner might impose burdens which, as well as being mutually enforceable among the purchasers, were also enforceable by the seller as owner of land which was not being sold. From the viewpoint of the purchasers these would be community burdens, but from the viewpoint of the seller they would be neighbour burdens.

Feudal law and feudal abolition

1.12 For as long as the feudal system continues to exist, there remains a further category of real burden.²⁵ A “feudal burden” can be created whenever property is subfeued. The burden is then enforceable by the feudal superior (and any successor as superior) against the feudal vassal (and any successor as vassal). Although precise figures are unknown, it may be that as many as a half of all real burdens currently in place are feudal burdens. If the superior owns land in the immediate neighbourhood, such burdens may resemble neighbour burdens; for while, strictly, the right to enforce is tied to the superiority interest, the real purpose of the burden is often to protect the neighbouring property. This is

²² Paras 2.29 to 2.39 (manager burdens); paras 9.10 to 9.25 (conservation burdens); para 9.26 (maritime burdens).

²³ Scot Law Com DP No 106 paras 1.5 and 1.6. That is a classification by reference to enforceability. Real burdens can also be classified in other ways. A classification by function yields conservation burdens, maritime burdens, manager burdens, facility burdens, and service burdens – although many real burdens do not fall within any of these. A classification by type of obligation (affirmative or restrictive) yields affirmative burdens and negative burdens: see paras 2.1 to 2.3.

²⁴ Scot Law Com DP No 106 paras 1.9 to 1.11.

²⁵ Scot Law Com DP No 106 para 1.7.

recognised in the rule that, for a superior, ownership of neighbouring property is an important aspect of showing that there is, in a legal sense, an interest to enforce the burdens.²⁶ Conversely, if no land is owned in the neighbourhood, the burden – if it is enforceable at all²⁷ – operates much as if there were no benefited property. These differences are recognised in the Feudal Act.²⁸ If a real burden is in substance a neighbour burden, the superior can preserve it by registering a notice nominating the neighbouring property as a replacement benefited property. The effect of registration is that, following feudal abolition, the feudal burden is converted into a neighbour burden. In other cases real burdens cannot normally be preserved, unless they qualify as conservation or maritime burdens.

1.13 Once the transitional issues are disposed of, feudal abolition will greatly simplify the law of real burdens. Many real burdens will fall, and those that remain will be either (a) neighbour burdens or (b) community burdens or (c) conservation or maritime burdens. Former feudal burdens which have been converted into burdens of categories (a) or (c) will be subject to the same rules as ordinary burdens, and hence to the recommendations contained in this report. In short, this report is concerned with the law of real burdens in a post-feudal Scotland.

Should real burdens be abolished?

1.14 A more drastic simplification still would be the complete abolition of real burdens. Our task would then be an easy one. This issue was extensively canvassed in our discussion paper.²⁹ Different considerations seemed to apply to burdens of different kinds.

1.15 **Community burdens.** Our provisional view was that community burdens were necessary at least in the sense that they could not be abolished without something else being put in their place.³⁰ As the law currently stands, the self-regulation of housing estates and other developments requires the use of community burdens. And while in theory it would be possible to provide a special statutory regime for cases of this kind, there seemed little advantage in giving up a system which appeared to work well. This view was supported by most consultees. Some differentiated between (a) burdens directed at the management and maintenance of common facilities, and (b) burdens which placed use restrictions on individual properties and which were designed mainly for the benefit of close neighbours. A few consultees expressed doubts about burdens of the second category (which are, in effect, amenity burdens). For example one³¹ wrote:

“I find myself in the process of purchasing a new property currently under construction ... and have only a few days ago received deeds for the property via my solicitor. Having reviewed their contents, I was somewhat astounded to read some of the conditions within the document and further amazed to hear my solicitor tell me that these deeds are absolutely standard and typical of the type of development upon which we are purchasing. Whilst governments both local and central allow

²⁶ Reid, *Property* paras 407 and 408.

²⁷ It seems arguable that in the absence of neighbouring land there would be no interest to enforce.

²⁸ The provisions are contained in part 4. For the background to these provisions, see Scot Law Com No 168 part 4.

²⁹ Scot Law Com DP No 106 paras 2.1 to 2.34.

³⁰ Scot Law Com DP No 106 paras 2.2 to 2.7.

³¹ Mr J R Hudson.

developers and landowners to try and enforce such conditions as not allowing washing lines or poles to be erected or for garages to be solely used for the parking of a single car or motorcycle, then I can have no confidence in either the current or proposed solution.”

1.16 The strength of this view seems due, in part at least, to the petty nature of the restrictions quoted. Certainly our Title Conditions Survey suggested general satisfaction with the principle of amenity burdens. On the basis of 402 interviews conducted in housing estates in different parts of the country the Survey concluded that:³²

“Most [owners] were willing to subscribe to the benefits of title conditions in principle, although there was an appreciation that in practical terms their use might be more questionable. Nevertheless title conditions were generally regarded as useful by owner occupiers in the housing developments surveyed – 70% rated them as such.”

It was accepted, however, that not all burdens were of equal value.

1.17 **Neighbour burdens.** In our discussion paper we suggested that the position of neighbour burdens was less clear-cut.³³ Arguments could be mounted both for and against. The fact that neighbour burdens were non-reciprocal seemed to reduce their legitimacy and to make them more open to abuse. Nonetheless we concluded that, on balance, neighbour burdens performed a useful function and ought to continue to be allowed.

1.18 In responding, consultees tended to repeat and to develop the arguments set out in the discussion paper. A central issue was whether modern planning law had made neighbour burdens unnecessary. Views were divided along familiar lines. One solicitor consultee³⁴ urged us to

“make the conditions in deeds of conditions etc forcing people to seek superior or neighbour consent to alterations to their property void. The planning system is really sufficient to control development.”

Others doubted whether the planning system provides, or is intended to provide, the degree of regulation routinely and beneficially achieved by real burdens.³⁵ These arguments are of course equally applicable to community burdens insofar as they control amenity.

1.19 Non-reciprocity, the defining characteristic of neighbour burdens, was not regarded as a serious objection. One estate factor³⁶ commented that real burdens were

“both rational and ethical. The vendor sells, and in consequence inevitably at a lower market price than would be obtained if sold free of such condition, subject to some restriction on use that he feels to be necessary in order to preserve the value of his

³² See appendix C chap 3.

³³ Scot Law Com DP No 106 paras 2.9 to 2.34.

³⁴ Mrs Mary McIlroy Hipwell.

³⁵ For a forceful exposition of this view, see K Gray & S F Gray, “The Future of Real Burdens in Scots Law” (1999) 3 ELR 229.

³⁶ Mr S E Scammell.

retained property and/or to preserve the amenity or other interests of the community and the public at large. If he is not allowed to sell on that basis, clearly he will not sell at all.”

Not everyone would accept either that real burdens lead to a reduction in price or that a prohibition on neighbour burdens would reduce the availability of land in the manner suggested. But no doubt both would be true in at least some cases.

1.20 Very few consultees advocated outright abolition, and, taken as a whole, there was strong support for neighbour burdens. The results of a recent consultation carried out by the Land Reform Policy Group were also broadly supportive of real burdens.³⁷

1.21 **Reform not abolition.** Consultation revealed a case for reform rather than for abolition. Real burdens were thought to be valuable, but imperfect. Accordingly, we reaffirm our provisional conclusion and recommend that

1. **It should continue to be competent to create real burdens, and existing non-feudal burdens should remain enforceable.**

The case for reform is set out below.

The case for reform

1.22 In this section we consider a number of difficulties and weaknesses in the present law.

1.23 **Identification of benefited property.** In creating a real burden, only the property which is being burdened need be identified. If the constitutive deed is silent as to the identity of the benefited property, the silence is covered by rules developed by the common law.³⁸ So for example, if A disposes land to B, imposing real burdens, the law may imply that any land retained by A is a benefited property. Alternatively, if the disposition is one of a series of dispositions of land in the same neighbourhood, it may be implied that each plot conveyed is a benefited property in relation to the other plots – or in other words that the burdens are community burdens, mutually enforceable among the plots conveyed by A. The disadvantages of this method of proceeding are obvious. Those affected by real burdens are fortunate if they can tell from their own deeds where enforcement rights might lie. More usually they must research the circumstances surrounding the original grant of the constitutive deed, and then apply the relevant rule or rules of the common law. This is a skilled undertaking, beyond the resources of most laymen. In practice, it is sometimes so inconvenient and expensive that the attempt is not made at all, even by lawyers.

1.24 **Registration against benefited property.** Real burdens affect two properties, but need be registered against only one, the burdened property.³⁹ If a choice has to be made, this is clearly the right way round, for in acquiring property a person should be able to discover from the register whether or not it is subject to real burdens. But the fact that there is no registration against the benefited property means that the person entitled to enforce

³⁷ Land Reform Policy Group, *Identifying the Solutions* (1998) para 5.1.

³⁸ See paras 11.5 to 11.19.

³⁹ Para 3.3.

may have no idea as to his rights. No doubt this is one reason why applications for discharge by burdened owners are much more common than applications for enforcement by benefited owners.

1.25 Difficulties of variation and discharge. In principle, real burdens are perpetual. But a burden which is perpetual may easily become out-of-date, or prevent some unexceptionable use of the burdened property. Real burdens have been employed for 200 years, and not always with fine discrimination. Many properties in Scotland are affected by burdens from the Victorian period or earlier; and many seem over-regulated, or subject to burdens which are obsolete or of irksome triviality. If the use of land is not to be sterilised, there must exist proper mechanisms for the variation and discharge of burdens, which strike an appropriate balance between the interests of benefited and burdened owner. It may be doubted whether this is achieved by the present law.⁴⁰ Consensual discharge, by minute of waiver, is often defeated because the benefited owners cannot be identified, or turn out to be too numerous. The burdened owner is then left with the choice of risking a breach or making an application for variation or discharge to the Lands Tribunal for Scotland. Breaches remain open to enforcement for the twenty years of long negative prescription, although in some cases acquiescence will reduce this period. The Lands Tribunal procedure, though generally satisfactory, seems capable of improvement.

1.26 Abolition of the feudal system. The immediate implications for real burdens of feudal abolition are dealt with in part 4 of the Feudal Act. But longer-term considerations also arise. Although abused, particularly in the modern period, the feudal system provided a mechanism for imposing real burdens which proved highly convenient for local authorities in the sale of council houses, for builders engaged in the phased development of land, for those wishing to sell under reservation of development value, and for a number of other cases. No one would wish to re-create the feudal system. But it seems worth considering whether the general law of real burdens should be adjusted to allow it to perform some of the functions previously performed by feudal burdens.⁴¹

1.27 Uncertainty. The case law on real burdens, though substantial, exhibits confusion of thought at many points, and statutory intervention has hardly been more successful. As a result, there is much in the law that is uncertain. Can a deed of conditions be used between neighbours or only in cases of sale?⁴² Can it be granted by an unregistered owner?⁴³ Can real burdens replicate positive servitudes?⁴⁴ Can they impose obligations to pay for maintenance (as opposed to direct obligations to maintain)?⁴⁵ Can they provide for management schemes and managers?⁴⁶ Are pecuniary real burdens still competent?⁴⁷ How is liability divided when the burdened property changes hands?⁴⁸ Can real burdens be enforced against tenants?⁴⁹ Are real burdens extinguished if the benefited and burdened

⁴⁰ This issue is discussed more fully in part 5.

⁴¹ These issues are explored at various points in the report, most notably paras 2.29 to 2.38 and 9.27 ff.

⁴² Scot Law Com DP No 106 paras 7.32 to 7.36.

⁴³ Ibid paras 7.38 and 7.39.

⁴⁴ Ibid para 7.67.

⁴⁵ Ibid paras 7.20 to 7.24.

⁴⁶ Ibid para 7.49.

⁴⁷ Ibid para 9.14.

⁴⁸ Ibid paras 4.21 to 4.28.

⁴⁹ Ibid paras 4.12 to 4.20.

properties come to have the same owner?⁵⁰ Are they extinguished by compulsory purchase?⁵¹ The list of unanswered questions could easily be extended.

1.28 **Accessibility.** The scale of reform needed argues for a comprehensive restatement of the law, with appropriate changes, rather than merely an attempt to patch and mend. In addition, a restatement, if properly done, has obvious advantages of accessibility and clarity.⁵² In the draft bill annexed to this report much of part 1, in particular, is simply a restatement of the present law in clear statutory language. A key feature of our proposals is continuity with the law as it exists at the moment.

Our main recommendations

1.29 In this report we recommend new rules for the creation of real burdens. Under our proposals burdens must be created in writing, and registered in the property registers against both the benefited and the burdened properties.⁵³ No particular type of deed need be used, and the title of the granter need not be completed by registration.⁵⁴ The deed must use the term “real burden” (or equivalent), set out the terms of the burden in full, and identify both the benefited and the burdened properties.⁵⁵ Enforcement rights will no longer be capable of arising by implication.⁵⁶ As well as creating normal real burdens it will also be possible to create conservation burdens and (in the case of the Crown) maritime burdens.⁵⁷

1.30 We recommend that special rules should apply to community burdens.⁵⁸ These are burdens which govern a number of different properties, typically in a housing estate or block of flats, and which are mutually enforceable. Such burdens exist already, although not by name. We recommend the introduction of default rules which would allow majority decision-making for the carrying out of repairs, for the appointment of a manager, and for the variation and discharge of the burdens.⁵⁹ We also recommend the enactment of a model management scheme which would be available for new developments, whether in the form enacted or with appropriate variations.⁶⁰

1.31 Further recommendations will make it easier for real burdens to be varied or discharged. If a real burden is more than 100 years’ old, the owner of the burdened property can extinguish it at his own hands by serving a notice of termination on the owner of the benefited property or properties. The burden automatically lapses on registration of the notice unless, within a period of eight weeks, the benefited proprietor makes an application to the Lands Tribunal for Scotland for the burden to be renewed. Certain burdens are exempted from this rule, including burdens relating to common facilities.⁶¹ If a burden is less than 100 years’ old, it is for the burdened owner to apply to the Lands Tribunal, as

⁵⁰ Ibid paras 5.53 to 5.60.

⁵¹ Ibid paras 5.61 and 5.62.

⁵² A similar approach was adopted in our *Report on the Law of the Tenement* (Scot Law Com No 162, 1998).

⁵³ Para 3.3 to 3.10.

⁵⁴ Paras 3.11 to 3.19.

⁵⁵ Paras 3.20 to 3.33.

⁵⁶ Para 11.28.

⁵⁷ Paras 9.10 to 9.26.

⁵⁸ Part 7.

⁵⁹ Paras 7.31 to 7.47.

⁶⁰ Part 8.

⁶¹ Paras 5.18 to 5.57.

under the present law. However, if the application is not opposed, we recommend that it be granted automatically and without further inquiry.⁶² Other methods of extinction continue to be available, and some are covered by our recommendations. For example, we recommend that the period of negative prescription be reduced from twenty years to five years,⁶³ and we also recommend a clarification of the rules of acquiescence.⁶⁴

1.32 Other topics covered by recommendations include rights of pre-emption and redemption,⁶⁵ reversions under the School Sites Act 1841,⁶⁶ common interest,⁶⁷ pecuniary real burdens,⁶⁸ and some limited aspects of the law of servitudes.⁶⁹

1.33 In general, our recommendations are intended to apply to all real burdens, regardless of date of creation.⁷⁰ But the effect of existing juristic acts is preserved, so that a real burden which was validly created under the old law will remain a valid burden notwithstanding that it does not comply with the rules of creation set by the new law.⁷¹ Our recommendations on implied enforcement rights are, however, directed only at pre-legislation burdens. The proposal here is that properties currently holding the status of benefited property by implication and without express nomination should lose that status, but subject to a number of savings.⁷²

Conveyancing practice

1.34 Our impression of current practice is that real burdens are being used in greater numbers than ever before. The tendency for deeds of conditions to grow seems irreversible. This tendency is not entirely welcome. Deeds are not always drafted with sufficient regard to the development which they are intended to serve. Nor is the developer-client always consulted on the detail of the burdens. On the contrary, there is a temptation to use the standard set of burdens held on the word-processor from a previous development. If they seem too numerous, their use can always be justified as erring “on the safe side”. The developer is unlikely to object, and individual purchasers are not in a position to negotiate the terms of a standard deed of conditions which is already on the register. Many deeds of conditions are, of course, carefully drafted. But there is a fine line between the efficient regulation of a development and a charter for busybodies. Some deeds seek to regulate matters of the utmost triviality. Others impose broad general restrictions, not unreasonable in themselves, but which hit a much wider target than is really intended. For example, a prohibition on building is probably aimed at extensions and new double garages rather than at Wendy houses and fences. Yet, unless the burden attempts some discrimination, all are equally prohibited.⁷³ In practice the affected owner will probably build the Wendy house

⁶² For these and other recommendations in relation to the Lands Tribunal, see part 6.

⁶³ Paras 5.67 to 5.72.

⁶⁴ Paras 5.60 to 5.66.

⁶⁵ Paras 10.19 to 10.43.

⁶⁶ Paras 10.44 to 10.62.

⁶⁷ Para 13.31.

⁶⁸ Paras 13.29 and 13.30.

⁶⁹ Part 12.

⁷⁰ Draft bill s 107(9).

⁷¹ *Ibid* s 107(1).

⁷² Part 11.

⁷³ Unsurprisingly, the Title Conditions Survey (para 3.3) shows that, while more than half of respondents supported the use of real burdens to prevent an extension to a house, only 39% were prepared to support a prohibition on garden sheds.

anyway, either in ignorance of the burden or on the view that it would not be enforced.⁷⁴ In most cases this judgment would be sound. Nonetheless it is unsatisfactory that owners should be put in the position of having to act in deliberate disregard of the provisions in their titles.

1.35 Law reform can help in a small way by making burdens easier to discharge.⁷⁵ But even a simplified system of discharge involves trouble and, often, money. It is irksome to have to discharge a burden which should not have been there in the first place. In the development of a modern system of real burdens, changes in conveyancing practice will be as important as changes in the law. It is to be hoped that the latter will act as a spur to the former.

Title conditions

1.36 While mainly about real burdens, this report touches also on servitudes⁷⁶ and, in the part dealing with discharge by the Lands Tribunal,⁷⁷ on other analogous rights as well. A generic term seems required. The Conveyancing and Feudal Reform (Scotland) Act 1970 uses the unattractive “land obligations”,⁷⁸ which seems to over-play the importance of land (as opposed to buildings on land). “Real conditions” is used in some academic writing,⁷⁹ but the term is not fully established and does not in any event cover all the rights dealt with in this report. “Title conditions” – the suggestion of several consultees – gives a better idea of the nature of the rights, and, as a new term, has the advantage of being free of historical baggage.⁸⁰ We adopt it gratefully, both in this report and also in the draft bill, which is called the Title Conditions (Scotland) Bill. By “title conditions” we mean those rights which are capable of being discharged by the Lands Tribunal for Scotland. A more refined definition is given in part 6,⁸¹ but for present purposes it is sufficient to say that, as a general rule, title conditions comprise (a) real burdens (b) servitudes and (c) conditions in leases. The unifying factor is that they are all perpetual, or quasi-perpetual, rights which restrict the ownership⁸² of another, whether by imposing conditions on how that ownership may be exercised, by imposing an affirmative obligation on the owner, or by conferring on the right-holder an entitlement to make some limited use of the owner’s property.⁸³

Further definitions

1.37 **Constitutive deed.** By “constitutive deed” we mean the deed used to create a real burden. If current practice is continued into the future, this will usually be either a disposition or a deed of conditions.

⁷⁴ The Title Conditions Survey (table 2.7) shows that, of owners carrying out building work, 40% had not sought permission from anyone. In the nature of things this is likely to be an under-estimate. On the ground, therefore, real burdens are often ignored. This issue is discussed further in paras 5.59 ff.

⁷⁵ See parts 5 and 6.

⁷⁶ Part 12.

⁷⁷ Part 6.

⁷⁸ In part I of the Act.

⁷⁹ Notably Reid, *Property* chap 7.

⁸⁰ There are one or two previous appearances in print. See most notably A J McDonald, “The Enforcement of Title Conditions” (in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* pp 9 – 32).

⁸¹ Paras 6.26 to 6.36.

⁸² Or, as in the case of a condition binding a tenant, other real right in land.

⁸³ Para 2.1.

1.38 **Property register.** There are currently two property registers. The Register of Sasines, which dates from 1617, is in the process of being replaced by the Land Register for Scotland, which has been in operation since 1981. Existing legislation regulates which register is to be used in any particular circumstances,⁸⁴ and in this report we simply refer to registration in the “property register” without further specification. The Land Register is a register of rights in land and not of deeds⁸⁵ so that, strictly, it is incorrect to talk of registration of deeds, but the usage is convenient. The draft bill contains an appropriate translation provision.⁸⁶

1.39 **The appointed day.** By “appointed day” we mean the day on which the provisions of the draft bill would be brought into force. This replicates the device used in our *Report on Abolition of the Feudal System*⁸⁷ and hence in the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Since real burdens are dealt with extensively in both measures, there would be obvious advantages in fixing the same day as the appointed day for both, and the draft bill so provides.⁸⁸

The draft bill

1.40 A draft bill to give effect to our recommendations, and to deal with various consequential matters, is annexed to this report.⁸⁹

Which Parliament?

1.41 For the reasons set out in part 14 we consider that the draft bill is within the legislative competence of the Scottish Parliament.

⁸⁴ Until a registration county is “operational”, all registration takes place in the Register of Sasines. The majority of counties are already operational, and the remainder are due to be so by 2003: see 1997 SLT (News) 218. Once a county is operational, the issue of whether a deed is registered in the Land Register or Register of Sasines is determined by s 2 of the Land Registration (Scotland) Act 1979.

⁸⁵ Land Registration (Scotland) Act 1979 s 1(1).

⁸⁶ Draft bill s 113(1) (definition of “registering”).

⁸⁷ Scot Law Com No 168 para 1.23.

⁸⁸ Section 113(1) of the draft bill defines the “appointed day” as “the day appointed under section 71 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000”.

⁸⁹ See appendix A.

Part 2 Content

Types of obligation

2.1 **Affirmative burdens and negative burdens.** Under the current law, three main types of obligation may be constituted as real burdens. These are

- (i) an obligation on the burdened owner to do something, such as to use the property for a particular purpose, or to maintain a building;
- (ii) an obligation not to do something, such as to build on the property, or to use it for commercial purposes; and
- (iii) an obligation to allow the benefited owner some limited use of the property, such as to walk or drive over part of it, or to run a pipe through it.

Type (i) is a positive or affirmative obligation. Type (ii) is a restriction or negative obligation. Type (iii) is a passive obligation not to interfere while the benefited owner exercises some limited possessory right. Almost all real burdens are of the first two types, although in a modern unreported case type (iii) obligations were said to be competent.¹ In practice, type (iii) obligations are usually constituted, not as real burdens, but as (positive) servitudes. A further overlap with the law of servitudes is that type (ii) obligations can be constituted as (negative) servitudes if their effect is to prevent or restrict building on the burdened property.²

2.2 In the discussion paper we suggested that there were good reasons for assimilating negative servitudes to real burdens. The proposal was that negative servitudes would disappear, and that in future all negative obligations would require to be created as real burdens.³ We pursue that proposal later in this report.⁴ But we would now go further.⁵ There seems little advantage in allowing type (iii) obligations to continue to be created as real burdens. An obligation which allows a right of use is fundamentally different in character from the normal kind of real burden, and different policy issues arise in relation to how such a right should be constituted, exercised, and extinguished.⁶ Suitable rules already exist in the law of servitudes, and there seems no advantage in importing them into the law of real burdens. An altogether simpler approach is to export type (iii) obligations into the law of servitudes. However, if type (iii) obligations are to become servitudes, it will be necessary to alter the current rule which limits servitudes to certain known types. This too is considered later in the report.⁷

¹ *B & C Group Management v Haren* 4 December 1992. For this case see further Scot Law Com DP No 106 para 7.67. For a general review, see Reid, *Property* para 391.

² Cusine & Paisley, *Servitudes* paras 3.07, 3.34 and 3.40.

³ Scot Law Com DP No 106 paras 2.42 to 2.50.

⁴ Paras 12.2 to 12.14.

⁵ We were encouraged to do so by several consultees.

⁶ For example, while a 5-year negative prescription is appropriate for obligation of types (i) and (ii) (see paras 5.67 to 5.72), it would be completely inappropriate for obligations of type (iii). Positive servitudes are subject to the 20-year prescription.

⁷ Paras 12.21 to 12.24.

2.3 The result of our proposals would be to confine real burdens – as in practice they are already confined – to obligations of the first two types. It seems worth giving names to these burden-types. In this report, and in the draft bill, a type (i) burden is called an “affirmative burden”, and a type (ii) burden a “negative burden”.⁸ Our recommendation, therefore, is that

2. Subject to recommendation 3, a real burden should be either -

(a) an affirmative burden (that is to say, an obligation to do something)
or

(b) a negative burden (that is to say, an obligation to refrain from doing something).

(Draft Bill s 2(1), (2))

In one sense, of course, a type (iii) obligation is also an obligation to refrain from doing something. For if A has a right to make some use of property belonging to B, B must refrain from interfering with A’s use. But the restriction on B is incidental in character. The defining characteristic of a type (iii) obligation is that it confers a right of use. By “negative burdens” we do not mean to include a right of use.

2.4 One effect of our proposals will be a redrawing of the boundary between real burdens and servitudes. Obligations of types (i) and (ii) will be the exclusive province of real burdens. Obligations of type (iii) will be exclusively positive servitudes. Expressed in the new terminology this means that there will be (i) affirmative burdens (ii) negative burdens and (iii) positive servitudes. Negative servitudes will cease to exist. That is a simpler and more logical structure.

2.5 **Ancillary burdens.** In two respects our recommendation seems unduly narrow. First, it is sometimes necessary for a real burden to reserve a right of access or use. Typically this is required to allow the monitoring of other real burdens, or, in a case where the burdened owner has failed to carry out work, to allow the work to be carried out by the benefited owner. Such a right, however, falls within type (iii).

2.6 Secondly, in community burdens at least, provision is frequently made for management and administration. This may be no more than a rule empowering a majority of owners to carry out repairs, or allowing for the appointment of a manager. Or it may set up an elaborate management structure, with a residents’ association, a committee of management, general meetings, service charges, sinking funds and the like. Under the existing law there are doubts as to whether such provisions are sufficiently praedial to qualify as real burdens, a subject pursued below.⁹ For present purposes, however, the important point is that the provisions do not fit neatly into the types of obligation identified

⁸ In the United States the new Restatement on Servitudes uses the terms “affirmative covenant” and “negative covenant”. An affirmative covenant is defined as one which “requires the covenantor to do something”, and a negative covenant as one which “requires the covenantor to refrain from doing something”. See American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 23 (§ 1.3(2)).

⁹ Paras 2.15.

above. They are not restrictions, but nor are they affirmative obligations, at least in any simple sense. Special provision seems required.

2.7 Both of these are ancillary in nature. Access and use are required only in order to monitor affirmative burdens and negative burdens. There is no proposal to allow a freestanding access right to be constituted as a real burden. Rights of way belong to the law of servitudes and not to the law of real burdens. Similarly, the purpose of the management provisions is to allow the smooth administration of other real burdens, particularly those concerned with maintenance. The management is ancillary to the burdens.

2.8 We recommend that

3. It should be possible for an affirmative burden or a negative burden to include an ancillary obligation -

(a) to allow access to or use of the burdened property

(b) to promote management or administration.

(Draft Bill s 2(3), (4))

The praedial rule

2.9 **Introduction.** Real burdens must concern land. That is their whole justification. If real burdens were about persons and not about land, their purpose could be achieved under the ordinary law of contract. If A wants to bind B he need only make a contract. But if A wants to bind B's land a contract will not do, because B may sell and B's successor would then be free of the obligation. The privilege accorded to the real burden is that it runs with the land, but in exchange for that privilege it must concern the land. An obligation to repair a car or pay an annuity or write a song cannot be created as a real burden. An incoming purchaser should not be bound by obligations like that. This limitation on content is sometimes known as the "praedial rule": real burdens must be "praedial", by which is meant that they must concern property.¹⁰ The rule is the same in other countries, and in Scotland for title conditions of other kinds.¹¹

2.10 If the reported case law is any guide, there has been little reliance on the praedial rule in Scotland, and the rule is rather underdeveloped. Its purpose is the modest one of excluding the obviously personal, and it is not seen as the main filter for real burdens. If a real burden is invalid on grounds of content, this is more likely to be because it is contrary to public policy than because it is insufficiently praedial.¹² It has not been suggested to us that this flexible approach ought to be changed. Accordingly, in re-stating the praedial rule we have sought to do so in broad terms.

2.11 Since in a real burden there are normally two properties, the praedial rule has two separate aspects.

¹⁰ On the praedial rule see generally Scot Law Com DP No 106 paras 7.42 to 7.54.

¹¹ Scot Law Com DP No 106 para 7.42.

¹² There is, however, a close connection between the praedial rule and the policy-based rule that a real burden must not be in unreasonable restraint of trade. See paras 2.24 to 2.27.

2.12 Some relationship to the burdened property. In the first place, the rule requires that the burden relate in some way to the burdened property. If the burden is negative in character, that which is restricted must be some use of the burdened property. Typical restrictions are prohibitions on building, or on the keeping of certain categories of animal, or on business use. In the case of an affirmative burden the relationship with the burdened property may be similarly direct, as with an obligation to maintain a building erected on the property. An indirect relationship, however, is also acceptable. So it is possible to impose as a real burden an obligation to maintain a boundary fence even if the fence is situated on the benefited property, or an obligation to maintain a common facility which lies some distance from the burdened property. In such cases the relationship of burden to burdened property is that the property is served to some degree by the objects (the fence and the common facilities) which, in terms of the burden, are to be maintained. At this point, however, it is easy to fall into circularity. For just as an obligation runs with the land if it relates to the burdened property, so it may relate to the burdened property if it runs with the land. The very fact of being intended to run with the land may seem to make the obligation praedial.¹³ This kind of reasoning should be resisted. Pressed to its logical conclusion, it would allow *any* affirmative obligation to be constituted as a real burden, however personal its content. In attempting to define the relationship of burden to burdened property, therefore, it seems important to exclude the mere fact that the obligated person is the person who is the owner for the time being.

2.13 Some benefit to the benefited property. In the second place, there must also be benefit to the benefited property – as the very name suggests. The distinction being made here is between benefit to the property and benefit to the person who happens for the time being to be its owner. Most obligations confer both, and the fact that there is substantial personal benefit does not, of itself, mean that there is not praedial benefit as well.¹⁴ In a recent case it was doubted whether a prohibition on playing tennis on a Sunday conferred any more than personal benefit, reflecting, presumably, the religious views of the person originally imposing the burden.¹⁵ But even here there seems to be praedial benefit. Tennis can be a noisy sport. It disturbs the peace and quiet of the neighbourhood. Neighbours, in a residential area, are at home at weekends. A restriction which gives them one day of peace each week can readily be presented as concerned with amenity.

2.14 In practice, the main role of praedial benefit is to emphasise the importance of proximity. If one property is to benefit from a restriction placed on another the properties cannot be far apart. In *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*,¹⁶ the leading modern case, a distance of half a mile was thought to be too great. The decision should cause no surprise: often praedial benefit will be displaced by a considerably shorter distance, though much depends on the nature of the burden.

2.15 As the law currently stands, no account is taken of the special position of community burdens.¹⁷ No doubt a burden designed to benefit the community as a whole will usually confer benefit on the individual properties within that community. But this is an artificial way of looking at things, and we continue to support the suggestion made in the discussion

¹³ Scot Law Com DP No 106 para 7.45.

¹⁴ Scot Law Com DP No 106 paras 7.45 and 7.52.

¹⁵ *Marsden v Craighelen Lawn Tennis and Squash Club* 1999 GWD 37-1820.

¹⁶ 1939 SC 788.

¹⁷ For community burdens, see part 7.

paper that the praedial test should be satisfied, in the case of a community burden, if the burden confers benefit on the community or on any part of the community.¹⁸ One advantage of this approach is to remove any doubts about the praedial status of management obligations.¹⁹ For whatever may be the position of individual properties, it is clearly in the interests of the community as a whole that there should be management structures, that a manager should be employed and paid, that equipment should be bought, that the use of common facilities should be regulated, and that service charges should be levied.²⁰ Further, it is unobjectionable if direct enforcement rights are conferred on a residents' association or on a manager, because such third parties merely act on behalf of all the owners in the community.²¹ Special communities may legitimately have special needs. For example, a prohibition on occupation by residents under the age of 60, out of place in a normal housing estate, would be treated as praedial in a sheltered housing complex where the houses are specially adapted for elderly people, where the services of a warden are provided, and where the viability of the whole complex would be threatened by an influx of younger people.

2.16 The requirement of praedial benefit is a rule of constitution. If praedial benefit is absent, the real burden fails from the very beginning. In practice, however, the issue of benefit tends to be raised only at the point of enforcement where it becomes entangled with the idea of interest to enforce. We return to interest to enforce later in this report.²²

2.17 In the case of conservation burdens and maritime burdens, there is no benefited property and hence no requirement of praedial benefit.²³

2.18 In re stating the praedial rule we recommend that

4. (a) **A real burden should relate to the burdened property, whether directly or indirectly; but the relationship should not merely be that the obligated person is the owner of the burdened property.**
- (b) **Unless it is a community burden, a real burden should be for the benefit of the benefited property.**
- (c) **It should be sufficient if a community burden is for the benefit of the community or a part of the community.**

(Draft Bill s 3(1)-(4))

¹⁸ Scot Law Com DP No 106 para 7.53.

¹⁹ R Rennie, "The Reality of Real Burdens" 1998 SLT (News) 149 at pp 149-51.

²⁰ In our view this would be true of any burdens concerned with the management of a group of properties, even if the burdens were not, in the technical sense, community burdens.

²¹ The issue is touched on in *Dumbarton District Council v McLaughlin* 2000 HousLR 16. We are grateful to Dr Simon Halliday of the University of Strathclyde for making a transcript available before the case was reported. For further recommendations about management obligations see paras 2.29 ff and paras 7.31 to 7.47.

²² Paras 4.16 to 4.24.

²³ See further part 9.

Policy-based grounds of invalidity

2.19 In Scotland a wide praedial rule has tended to be brought into balance by the development of policy-based grounds of invalidity.²⁴ We have no proposals to change this approach. Two main categories of invalidity are recognised.

2.20 **Illegality.** A real burden must not be “contrary to law”.²⁵ So for example a real burden which prohibited ownership or residence by reference to race or gender would be unlawful by statute, and hence void.²⁶ The same is true of an obligation to make periodical payments in respect of the tenure or use of land, with some exceptions (including payment of rent in a lease or payments in defrayal of some continuing cost).²⁷ These are rules of the general law rather than of the law of real burdens.

2.21 **Contrary to public policy.** Like contracts, real burdens are regulated by general considerations of public policy. While not exhaustive of the possibilities, three doctrines have in practice dominated the field, namely (a) the rule that a burden must not be repugnant with ownership (b) the rule that a burden must not confer a monopoly, and (c) the rule that a burden must not be in unreasonable restraint of trade.

2.22 (a) *Repugnancy with ownership.* A burden must not be so severe that it negates the idea of ownership. According to Lord Young:²⁸

“[T]he general rule is, that conditions or limitations in a property title which are repugnant to the common legal notion of property and proprietary rights, shall be deemed invalid.”

An affirmative burden is more likely to be viewed as repugnant than a mere restriction. As has been observed, there is an obvious difference between an obligation not to sell alcohol (which is perfectly enforceable) and an obligation that alcohol must be sold (which almost certainly is not).²⁹ Somewhere between the two is an obligation that the property must be used for no purpose other than the sale of alcohol. Here at least the owner has a choice. He need not sell alcohol if he does not want to; but if he chooses not to, he cannot use the property at all. A restriction is most likely to be viewed as repugnant where it involves the prohibition of a juridical act, such as selling the property, or granting a lease over it. A qualified prohibition may fall into a different category.³⁰ For example, rights of pre-emption

²⁴ Scot Law Com DP No 106 paras 7.55 to 7.63. The provision recently recommended by the American Law Institute *Restatement Third, Property (Servitudes)* vol 1, 347 (§3.1) and quoted at para 7.55 is an instructive point of departure.

²⁵ *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296 at p 307 per Lord Corehouse.

²⁶ Sex Discrimination Act 1975 ss 30 and 77; Race Relations Act 1976 ss 21 and 72. See C Waelde (ed), *Professor McDonald's Conveyancing Opinions* (1998) pp 44-6.

²⁷ Land Tenure Reform (Scotland) Act 1974 s 2.

²⁸ *Earl of Zetland v Hislop* (1881) 8 R 675 at p 681.

²⁹ Reid, *Property* para 391.

³⁰ Compare here § 3.4 of the US *Restatement on Servitudes* (American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 440): “A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint.”

have been held enforceable.³¹ Similarly, a prohibition limited by time might be acceptable if the period was not too long.

2.23 (b) *Conferment of monopoly.* In *Tailors of Aberdeen v Coutts*³² it was observed that

“It was an early condition in feudal grants, that all the vassals should grind their corn at the superior’s mill, and pay a certain rate of multure for that service ... Two centuries ago there were other restrictions of a similar nature. Thus, it was often a condition in a feu charter that the vassal should bring all his malt to the superior’s brewery to be made into ale, and to have all his iron-work manufactured at the superior’s smithy. These conditions have fallen into disuse, but they have never been declared illegal by statute. The Court, however, at present refuses to enforce them, as being inconsistent with public policy; for it would be a plain injury to the community, if the proprietor of a piece of land could not employ the brewer or the smith most convenient for himself, or whose work he most approved.”

The obligation to bring corn to the superior’s mill, known as thirlage, is formally extinguished by the Feudal Act.³³ It had long since disappeared in practice. Another monopoly, that the vassal must use a law agent chosen by the superior, was abolished in 1874.³⁴ The modern equivalent is the provision that property must be managed by a factor of the superior’s (or developer’s) choice. We return to that subject below.³⁵ Some private monopolies may be justifiable and hence lawful, as was originally the case with thirlage. For example if a block of flats has a common heating system which everyone is bound to use, or at least to pay for, the restriction may be justified as in the interests of all the owners.

2.24 (c) *Unreasonable restraint of trade.* The idea of unreasonable restraint of trade came into the law of real burdens from the law of contract, where a substantial case law has developed. It may be assumed that the basic rules are the same.³⁶

2.25 Often restraints on trade are unobjectionable. For example, the prohibition on trade routinely found in titles in housing estates seems a legitimate device to protect the residential character of the neighbourhood. The most difficult case is also the most common. A trader who sells one property while keeping another might seek to prevent the first property from being used for the same purpose as the second. Quite often, a restriction of this kind will fail the praedial test,³⁷ even in the generous form in which it applies in Scotland, for while the benefit to the owner is obvious, there may be none to his property. In *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*³⁸ a real burden prohibited the use of a theatre for the performance of certain kinds of entertainment. The real burden was

³¹ *Matheson v Tinney* 1989 SLT 535. Our recommendations for rights of pre-emption are contained in paras 10.21 to 10.41.

³² (1840) 1 Rob 296, 317-8 *per* Lord Corehouse. See also: *Yeaman v Crawford* (1770) Mor 14,527; *Campbell v Dunn* (1823) 2 S 341, (1825) 1 W & S 690.

³³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 55.

³⁴ Conveyancing (Scotland) Act 1874 s 22.

³⁵ Paras 2.29 to 2.39.

³⁶ For the rules in contract law, see W W McBryde, *The Law of Contract in Scotland* (1987) pp 588-609; P J Sutherland, “Contractual Restrictive Covenants”, in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* vol II (forthcoming). In England and Wales the doctrine of restraint of trade does not usually apply to restrictive covenants: see *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] AC 269.

³⁷ For the praedial test, see paras 2.9 to 2.18.

³⁸ 1939 SC 788.

held unenforceable, mainly on the basis that the benefited property, another theatre, was half a mile away. If, however, the praedial test is satisfied, the very fact that benefit is conferred on a property may be taken as an indication of the reasonableness of the restraint.³⁹ In *Co-operative Wholesale Society v Ushers Brewery*⁴⁰ a small shopping precinct had been constructed on a housing estate. There were only three units – a supermarket, a pub and a betting shop. Since the restrictions secured the economic viability of the precinct as a whole, they were treated both as praedial and as enforceable. Whether the result would be the same in the absence of a community interest is less certain.⁴¹ If property A is prevented from carrying out the business activity which is conducted on neighbouring property B, it may be difficult to show that anything more is being protected than the commercial interests of the owner of property B.⁴² The strongest case is where property B is specially adapted for the activity in question, so that it is likely to be used for the same purpose even by future owners. The restraint on property A would then be reflected in the value of property B. In the *Aberdeen Varieties* case it was argued, in favour of the burden, that its enforcement

“would be for the benefit of the dominant tenement as well as for the business carried on therein, in respect that it would tend to maintain or enhance the selling value of that tenement.”⁴³

The strength of this argument, however, remains untested.⁴⁴ It is, of course, possible that a burden might be treated as satisfying the praedial test but nonetheless be invalid as being an unreasonable restraint of trade.

2.26 Other legal systems face the same issues. In England it seems to be accepted that commercial benefit can be protected.⁴⁵ The position in Germany⁴⁶ and France⁴⁷ is similar, although subject to qualification. In the United States the effect of the restriction is as important as its purpose:

“The common law of unreasonable restraints on competition looks to the purpose, the geographic extent, and the duration of the restraint to determine whether it is reasonable. Covenants against competition that are tied to ownership of a particular parcel of land are seldom unreasonable because the impact is limited to one piece of land. The owner is free to engage in the activity elsewhere. However, if the restricted land is extensive, or it is the only land available in a community for a

³⁹ The relationship between the two is not easily disentangled: see *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1940 SC(HL) 52 at p 56 per Lord Thankerton.

⁴⁰ 1975 SLT (Lands Tr) 9.

⁴¹ For community interest see para 2.15.

⁴² *Phillips v Lavery* 1962 SLT (Sh Ct) 57; *Giblin v Murdoch* 1979 SLT (Sh Ct) 5. *Giblin* is unusual because it concerned (i) a temporary restriction (for 5 years) but (ii) one which was to apply, not merely to the property which had been acquired, but to any other property within a 3-mile radius. The restriction was contractual only, being contained in missives of sale.

⁴³ 1939 SC 788 at p 795.

⁴⁴ It has been accepted in England in less propitious circumstances: see *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd* [1952] Ch 286.

⁴⁵ Gray, *Elements* p 1145.

⁴⁶ *Münchener Kommentar zum BGB* art 1019, para 3.

⁴⁷ Cass Com 15 July 1987, D 1988 note Atias and Mouly; Cass Civ 3e 24 March 1993, RTDCiv 1993, 771, obs Zenati.

particular use, the restriction is unreasonable if it will tend toward a monopoly or substantially restrict competition in the relevant market.”⁴⁸

2.27 While consultees showed some enthusiasm for the American approach, we have concluded that restraint of trade as it applies to real burdens is not easily separable from restraint of trade in other areas of the law. A special rule would be difficult to justify. But in any event, questions of reasonableness seem best left to the courts to develop in the light of changing social and economic circumstances.⁴⁹

2.28 In re stating the rules on policy-based grounds of invalidity, we recommend that:

5. A realburden should not be -

(a) illegal, or

(b) contrary to public policy, as for example in unreasonable restraint of trade, repugnant with ownership, or (subject to our other recommendations) requiring the employment of a particular person as manager or as the provider of other services.

(Draft Bill s 3(6))

Manager burdens

2.29 **Appointment.** When a development is being sold – a housing estate, for example, or a block of flats – provision is often made for the appointment of a manager. Usually the idea is that the manager should instruct routine maintenance, particularly in relation to the common parts, and recover the cost from the owners. Sometimes there are more extensive powers, for example to arrange common insurance, or to organise a sinking fund.

2.30 The provision for appointment may take a number of different forms. Quite commonly, this is left to the owners themselves, but with a majority being given the power to reach a decision. Sometimes the developer helps matters on their way by nominating the first manager in the deed of conditions. In other cases the developer reserves a right of nomination during the early years of the development. The nominee may be the developer. Generally the right comes to an end when the last unit is sold, at which point the power of appointment passes to the owners, acting through a majority. The following, which comes from the sale of a council flat,⁵⁰ is typical:

“The Superiors [ie the council] for as long as they are proprietors of any of the houses in the building shall be entitled to act as Factors on such terms of remuneration as shall be determined from time to time by the Superiors (provided these terms do not exceed those currently operating in favour of professional firms of Factors in the area) and shall have power to attend to all mutual repairs (being repairs to any part of the building hereinbefore declared to be common property) which they reasonably

⁴⁸ American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 476.

⁴⁹ For the importance of social and economic change in this context, see *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* [1894] AC 535.

⁵⁰ This is the style used by Renfrewshire Council. We are grateful to Mr Terry Lynch for making it available to us.

consider necessary to have executed and to recover from the individual proprietors of all the remaining houses in the building their appropriate shares of the total cost of such repairs, together with any fees payable to the Superiors acting in their capacity as Factors. And in the event of the Superiors not being proprietors of any of the houses in the building, the proprietors of a majority of the said houses shall ... have power to appoint a Factor, on suitable terms of remuneration who shall have power to attend to all mutual repairs and to recover from the individual proprietors of all the houses in the building their appropriate shares of the total cost of such repairs.”

Occasionally the power of nomination is reserved without limit of time. In sheltered housing developments this is normal practice. Even if the rule is expressed as being that the power terminates once the developer ceases to own any part of the development, the fact that one or more units (such as a warden’s flat) is usually retained has the effect of conferring a permanent right.

2.31 It is open to question how far such powers of appointment are enforceable under the present law. There seems no difficulty with the nomination of the first manager. And the view has been expressed in the sheriff court that it is acceptable to reserve a power of nomination for as long as the developer holds unsold units.⁵¹ But a reservation which, in form or in substance, is perpetual seems another matter entirely. Probably the monopoly power is contrary to public policy, on the basis of principles already discussed; and a provision which has the effect of depriving owners of any power of management seems also invalid as repugnant with ownership.⁵²

2.32 At the very least, the law requires clarification. We entirely accept that, in the initial years of a development, it may make good practical sense for the manager to be appointed by the developer. A builder who is trying to sell houses has an even greater stake in the development than those to whom he has already sold. A badly maintained estate will discourage purchasers, and have an adverse effect on prices. Even if the builder does not wish to manage the estate himself, he will wish to ensure that it is managed by someone who knows his job. We think, therefore, that it should be made clear that a power of appointment can be reserved on that basis. In this report, and in the draft bill, a real burden which reserves such a power is referred to as a “manager burden”. In our view, however, a manager burden should be subject to limitations.⁵³

2.33 The first is that the right should cease to be exercisable on disposal of the last unit which is available for sale. In the case of sheltered housing, certain units may not be available for sale, such as a flat set aside for the warden. Continuing ownership of such a unit should not infer a continuing power of appointment. The monopoly powers in sheltered housing have come in for criticism,⁵⁴ and indeed seem difficult to justify. Further,

⁵¹ *Dumbarton District Council v McLaughlin* 2000 HousLR 16. The case was decided on other grounds (the burden was defectively expressed) and the view is *obiter*.

⁵² Paras 2.21 to 2.28.

⁵³ Compare here the (unimplemented) suggestion of the Law Commission in England and Wales that a developer might sometimes become the permanent manager. See Law Com No 127 para 7.19.

⁵⁴ Anne Stern, “Private Sheltered Housing – the need for regulation” 1991 SCOLAG 182. In a letter to us, the Sheltered Retirement Housing Owners’ Confederation pointed out that: “Where the position of Superior is held by the Factor, the flat owners are powerless to choose their own factor. In some cases this has led to mismanagement ... It would seem to us that we are perfectly capable of having a democratic system of majority decisions being taken by owners if and when necessary.”

the requirement is for ownership of a unit and not ownership of some other part of the development, such as an access road or ground set aside for recreation.

2.34 In the second place, there should be an outer limit of ten years beginning with the date of registration of the constitutive deed. After that period the manager burden would be extinguished even if the developer continues to own some of the units. Ten years would be sufficient to accommodate almost all new developments. It would of course be open to parties to provide for a shorter period in the constitutive deed. We considered whether the ten-year period should be extended, or even abandoned, in the case of housing stock sold by public authorities under the right-to-buy legislation.⁵⁵ Here the pattern of sales is often prolonged, and in many cases will extend considerably beyond ten years. Council practice is usually to retain factoring rights for as long as the council owns other houses which share the same common parts. Council factoring is a continuation by other means of the repairs service provided when the houses were still tenanted. From the council's point of view it is a way of ensuring that the housing stock remaining in public ownership does not become run down because of the neglect of that part which has been privatised. And from the point of view of the purchasers, the continued role of the council eases the transition from tenancy to ownership. A recent report by the Scottish Consumer Council was strongly critical of the factoring service provided by councils.⁵⁶ Almost a third of those who responded to a questionnaire wished to change from the council to a private factor, as compared to the quarter who expressed themselves content.⁵⁷ But on the other hand 57% were in favour of having a factor of some kind.⁵⁸ No doubt there may be room for improvement in the way in which councils factor properties. But if councils were to lose their rights altogether, it might be difficult, in a mixed public/private development, to secure the agreement necessary to appoint a replacement. For these reasons we think that a ten-year period is too short. But the council's rights should not be unlimited. As time goes on, an increasing number of houses will be privately owned; and the longer a house has been in the private sector, the less need there is likely to be for a repairs service which some owners will regard as paternalistic. We think that a reasonable balance might be struck by allowing a period of thirty years. In the case of properties acquired in the very first wave of council house sales in 1980, this would mean that the council's factoring rights would expire in 2010. The issues here, however, go well beyond the reform of real burdens, and our views are put forward with some hesitation. No doubt they will be scrutinised and debated by those with particular interest and expertise in this area.

2.35 A manager appointed under a manager burden could not be dismissed by the owners for as long as the burden was capable of being exercised. But once that period had expired, dismissal could take place at once, whether under a procedure set out in the titles, under the default rules for community burdens,⁵⁹ or under the residual rule proposed below, that the owners of two thirds of the units should always be able to dismiss the manager. This would be so even if the developer had given the manager a lengthy contract; but the right of dismissal would be without prejudice to any contractual claims which the dismissed manager might have, typically against the developer. A replacement manager could then be appointed. These provisions are intended as safeguards. If no dismissal

⁵⁵ Currently contained in the Housing (Scotland) Act 1987. Some 365,000 houses have so far been sold.

⁵⁶ Scottish Consumer Council, *In a Fix* (1999).

⁵⁷ *Ibid* p 34.

⁵⁸ *Ibid* p 45.

⁵⁹ See para 7.44. Dismissal by a simple majority of owners.

proceedings were instituted, the manager would remain in post, and continuity of management would be preserved. But a manager who was perceived as indolent, or expensive, could be dismissed and replaced.

2.36 As usual,⁶⁰ this rule is intended to apply to existing real burdens as well as to new ones. This will resolve any doubt concerning the validity of such burdens under the present law, while at the same time cutting off any period for nomination in excess of that now permitted. So an existing burden which provides for nomination in perpetuity will be given effect to only to the extent of allowing nomination for the period described above. If that period has already expired, the burden falls. The supporting maintenance burdens – referred to in this report as facility burdens – will also survive under proposals made later and will be enforceable by the developer for as long as he retains a unit which takes benefit from the common facilities.⁶¹

2.37 In practice the power to nominate is often reserved in a feudal burden, and it will have to be made clear that the power survives the abolition of the feudal system.⁶² In such a case the feudal burden – now, by force of statute, a manager burden – would be held by the former superior personally, and without reference to a benefited property. Indeed it seems inevitable that this should often be true even in the case of new manager burdens; for while it is a condition of the exercise of a burden that the developer owns a unit in the development, it would in practice be difficult to predict in advance which unit will be last to be sold. In many cases, therefore, the developer could not be expected to link the benefit of the burden to any particular unit. This means that, formally speaking, a manager burden will often be constituted in favour of a person and without reference to a benefited property.⁶³ In that respect it resembles conservation burdens and maritime burdens.⁶⁴ But, unlike those burdens, there must always be a property if the burden is to be exercised. In effect, if not in law, the right to a manager burden attaches to whichever units are for the time being owned by the developer or other holder of the burden. If all the units are disposed of, the burden ceases to be capable of exercise.⁶⁵

2.38 Sometimes a developer sells in mid-development. In that case the right to a manager burden should be capable of transfer along with the site. On general principles it would be transferred by assignation followed by intimation to the affected owners. Since the right is of such short duration, registration should not be necessary. Obviously the right could not be exercised unless the assignee also acquired ownership of one or more of the units.

2.39 We recommend that

6. (a) **It should be possible (and deemed always to have been possible) for a real burden to reserve or confer on a third party the right to nominate, and dismiss, the manager of a group of properties.**

⁶⁰ Para 1.33.

⁶¹ Paras 11.30 to 11.42. Section 23 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 already makes provision in respect of feudal burdens.

⁶² See draft bill s 53(1) and sched 7 para 3.

⁶³ Often but not always. There would of course be no objection to creating a manager burden as a standard real burden, attached to a specified benefited property.

⁶⁴ For which see part 9.

⁶⁵ Strictly, though it is not extinguished until the expiry of the 10-year period, for there remains the theoretical possibility that the developer might reacquire a unit.

- (b) Such a burden may be referred to as a “manager burden”.
- (c) It should be possible for a manager burden to be held by a person without reference to a benefited property.
- (d) A manager burden should be exercisable only if its holder owns one of the properties in question.
- (e) A manager burden should be extinguished on the expiry of –
 - (i) the period (if any) specified in the constitutive deed; or
 - (ii) the period of ten years beginning with the date of registration of the constitutive deed
 whichever is the shorter.
- (f) In the case of houses sold under part III of the Housing (Scotland) Act 1987 (or its predecessor legislation), the period mentioned in (e)(ii) above should be thirty years.
- (g) It should not be possible for the owners of the properties to dismiss a manager nominated under a manager burden during any period when the burden is exercisable.
- (h) The right to a manager burden should be capable of being assigned or otherwise transferred; the assignation or transfer should take effect on intimation without registration.

(Draft Bill s 53)

2.40 **Transitional continuity.** The recommendation just made will make clear, for the first time, which provisions for the nomination of managers are valid and which are not. As a result the appointment of some managers will be shown to have been made without due authority. This may be a particular issue for sheltered housing developments, where provision for perpetual nomination is common. Obviously it would not be satisfactory if suddenly, on the appointed day, all such communities were left without a manager. Often the manager will be perfectly satisfactory and the owners will have no wish to make a change. And even if a change is desirable in principle, it takes time to find someone else and to have the choice approved by the necessary majority of owners. In the meantime the property still needs to be managed. A transitional provision seems necessary. We recommend that

- 7. **Any person who, immediately before the appointed day, acts as manager of a group of properties by virtue of a provision contained in the title (whether or not that provision was valid) should be deemed to have been validly appointed.**

(Draft Bill s 55)

For reasons mentioned below, such a reprieve might turn out to be only temporary.

2.41 **Overriding power of dismissal.** Thus far we have concentrated on the power of developers and councils. But for the most part the appointment of a manager is a matter for the owners alone. To this principle our proposals allow only the three exceptions already mentioned. In the first place, the person who is to act as the first manager may be nominated by the constitutive deed.⁶⁶ Secondly, a developer can reserve the right to appoint the manager for as long as there are unsold units, but subject to a maximum period of ten years (or thirty years in the case of the sale of council houses). Lastly, a manager appointed under title provisions which are invalid can nonetheless continue to act after the appointed day, for the time being at least. These exceptions are balanced by the power of owners to dismiss the manager. A first manager can be dismissed at once and replaced with someone else. The same is true of a manager whose invalid appointment has been homologated. Only in the case of a reserved right of appointment must the owners put up with the developer's choice, for duration of the reserved period;⁶⁷ but once the period has expired, that person also may be dismissed.

2.42 The effectiveness of the balance depends on the ease of dismissal. Under the default code recommended later in this report for community burdens, a manager can be dismissed by the owners of a majority of units.⁶⁸ If a manager is not performing satisfactorily, a majority should not be difficult to assemble. But the default code is confined to community burdens. Further, it does not apply if the titles make their own provision about managers, as often they will. Such provision will not always be satisfactory. A developer who wished to retain control might, having first reserved a manager burden for the permitted period of ten years, go on to provide that a manager can be dismissed only by the unanimous vote of the owners. In view of the near-impossibility of obtaining unanimity, the developer's appointee would then remain in office for the foreseeable future. We do not think that the principle of owner-control should be capable of such ready evasion. And in any event it is necessary to provide some kind of residual rule. We suggest therefore that it should always be possible for the owners of two thirds of the units to dismiss a manager – except of course during the initial ten-year (or thirty-year) period. This right would override any more strenuous rule contained in the titles. But if the titles provide for dismissal by, say, a simple majority, such a provision would be unaffected. Similarly, the proposal is not intended to disturb the default code, in cases where that code applies.

2.43 If the manager had been appointed under a manager burden, any units owned by the holder of the (now extinguished) burden should be left out of account for the purpose of assembling the necessary two thirds majority. So for example if, in a ten-unit local authority development, a council had sold six units but retained four, the units retained by the council would be left out of account and the manager – in practice the council itself – could be dismissed by the owners of four of the six units which had been sold. Otherwise a council might retain its factoring rights long after the thirty-year period had expired.⁶⁹

⁶⁶ Paras 7.28 and 7.29. But while s 24(1)(d) of the draft bill expresses the power in the context of community burdens, there is no doubt that the power exists for all real burdens under the principle set out in s 1(5)(b).

⁶⁷ Para 7.36.

⁶⁸ Para 7.55.

⁶⁹ If, however, the development was a block of flats, and the council still owned a majority of flats, our recommendations on the law of the tenement, if enacted, would allow the council to control the appointment of a manager for the future. See Tenements (Scotland) Bill sched 1 (Management Scheme A) r 2.2(b) (annexed to Scot Law Com No 162).

2.44 We recommend that

8. (a) Notwithstanding any title provision to the contrary, a person appointed to manage a group of properties should be capable of dismissal by the owners of two thirds of those properties.
- (b) In the application of this recommendation to a manager appointed under a manager burden, there should be disregarded any property owned by the (former) holder of the burden.
- (c) This recommendation is subject to recommendation 6(g).
(Draft Bill s 54)

Part 3 Creation

Two properties

3.1 A real burden needs both a benefited property and a burdened property,¹ from which it follows that the creation of a burden must involve at least two distinct properties. Often there are more. When a volume builder sells houses in a housing estate subject to burdens contained in a deed of conditions, there may be 50 – or 100 – separate properties each of which is at the same time a benefited property and also a burdened property. But two properties form the minimum requirement. The properties need not, however, be in separate ownership.² In the initial stages, single ownership of both (or all) properties would be normal at least with community burdens, where developers register deeds of conditions before any development units have been sold. Apart from conceptual neatness,³ this rule also has practical advantages. No owner will enforce a burden against himself, of course; but if one of the units is leased rather than sold, the burdens could be enforced by or against the tenant. Under recommendations made later,⁴ rights and obligations under real burdens will not generally depend on ownership.

3.2 Where property is owned in common, an attempt may be made to use real burdens as a means of regulating the parties' rights. This raises the question as to whether a mere *pro indiviso* share can sustain a real burden. Usually the issue is avoided due to the fact that the common property is a pertinent of some other property which is itself separately owned. A standard example is common facilities in a block of flats or housing estate. *Pro indiviso* ownership of the facilities is accompanied by single ownership of the individual flats or houses. Sometimes, however, there is no other property, as for example in the case of a right of salmon fishings.⁵ The current law is uncertain;⁶ but in any event we do not think *pro indiviso* rights are well suited to real burdens. The division of a property into *pro indiviso* shares will, almost always, be a temporary affair. At any time the owners may sell out to a single person; or any one of the owners may exercise his right to division and sale.⁷ The main case where division and sale is excluded – where the common property is “a thing of common and indispensable use”⁸ – is the one case where the *pro indiviso* shares are not needed for the real burdens because, almost always, the “thing” in question is a common facility and held as a pertinent of some other property which is separately owned. We recommend therefore that

9. It should not be possible for a *pro indiviso* share to serve as either a benefited property or a burdened property.

(Draft Bill s 4(6))

¹ Except of course in the case of conservation burdens and maritime burdens, discussed in part 9.

² Contrast here the position of servitudes: see *Cusine & Paisley, Servitudes and Right of Way* para 2.07.

³ Later we resolve a doubt in the existing law by recommending that a real burden should not be extinguished by confusion. See paras 5.73 to 5.80.

⁴ See part 4.

⁵ This is the subject of a current controversy discussed in the *Journal of the Law Society of Scotland* for August 2000 at pp 38-9.

⁶ Reid, *Property* para 411.

⁷ *Upper Crathes Fishings Ltd v Bailey's Exrs* 1991 SLT 747 (salmon fishings).

⁸ Bell, *Principles* s 1082.

This recommendation is for the future only. If burdens in this form are effective under the present law, their validity would be unimpaired by our recommendation.⁹

Registration

3.3 **Registration against both properties.** Although real burdens affect two properties, under the current law they are registered against only one, the burdened property. Transparency is therefore incomplete. A search of the property register¹⁰ will disclose at once whether a property is subject to real burdens – an essential safeguard for a purchaser or other person wishing to acquire rights – but it will often fail to disclose whether the same property carries rights to enforce burdens against other property. This comes close to defeating the whole system of real burdens. For if the person entitled to enforce a burden has no knowledge of his right, then in practice real burdens will not be enforced, and compliance becomes a matter for the conscience of the burdened owner. The main incentive for compliance may be no more than the prospect of awkward questions by potential purchasers when the property comes to be sold. Naturally, the position is not always as bad as this. In the case of community burdens,¹¹ at least, the existence of mutual enforcement rights will usually be obvious from the register. But with neighbour burdens the title of the benefited property is often silent.¹²

3.4 Scotland has a modern and computerised system of land registration, and virtually all land is registered. Registration of burdens against both properties would be a simple matter as well as an effective reform. A proposal for dual registration in our discussion paper¹³ met with the unanimous approval of all those who responded to it. We adhere to the proposal here. While there would be some increase in registration costs, we understand that Registers of Scotland would charge the full registration fee only in respect of one of the properties and that the charge for each additional property would be relatively small. The new system was anticipated in our *Report on Abolition of the Feudal System*, where dual registration was recommended for notices by superiors converting feudal burdens into neighbour burdens.¹⁴

3.5 Existing legislation would govern which of the two property registers was to be used in any particular case. If both properties were already on the new Land Register, registration would take place there.¹⁵ If one was on the Land Register and the other still on the Register of Sasines, an application would have to be made to both registers. Sometimes there would be more than one burdened property and one benefited property, but the rule would remain the same with registration required against all of the affected properties. In the case of community burdens,¹⁶ registration would be required against the whole community, but in most cases this would not change current practice, which is for

⁹ Nothing in the proposed legislation is to invalidate a burden which was valid immediately before the appointed day. See para 1.33.

¹⁰ For the meaning of “property register”, see para 1.38.

¹¹ For community burdens and neighbour burdens, see para 1.9. Community burdens are the subject of part 7.

¹² So too, often, is the title of the burdened property, which may do more than disclose the fact of the burden’s existence without nominating the property which is to benefit. See para 3.30 to 3.33.

¹³ Scot Law Com DP No 106 paras 7.2 to 7.5.

¹⁴ Scot Law Com No 168 para 4.32. The relevant provision is s 18(3) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

¹⁵ Land Registration (Scotland) Act 1979 s 2(3)(iii).

¹⁶ See further part 7.

developers to register, usually, a single deed against the whole development at a time when it is still their property.¹⁷

3.6 In a case where dual registration is required, it should not be possible to register against only one of the properties. Otherwise a purchaser might seek to avoid the real burdens imposed in his disposition by registering against the burdened property alone. If that were competent, the result would be to confer ownership free of the burdens. It should be made clear that it is not competent.

3.7 There are two cases where dual registration would not be possible. One is in the case of conservation burdens and maritime burdens, where there is no benefited property.¹⁸ The other is where the benefited property is outside Scotland. In principle there seems no reason to exclude cross-border burdens.¹⁹ But since a (Scottish) real burden could not create rights over land in England, the burdened property would need to be in Scotland.

3.8 **Registration of what?** Not only must a real burden be created in writing,²⁰ but, as the law currently stands, the constitutive deed must be either a conveyance or a deed of conditions.²¹ Since the Register of Sasines is a register of deeds, and the Land Register a register of real rights, what must be registered, in the case of the Sasine Register, is the constitutive deed, and in the case of the Land Register the right which flows from that deed. Our proposals for constitutive deeds are given later.²²

3.9 **Date of creation.** Registration is both a necessary and also a sufficient condition for the creation of a real burden, from which it follows that the date of creation is normally the date of registration. But it should be possible to postpone the operation of a real burden to some later date, or to the date on which the first conveyance of the burdened property is registered. This could be provided for in the constitutive deed. If, however, the deed were silent the burden would take effect immediately on registration. A similar, though less flexible, system operates under the present law. By section 17 of the Land Registration (Scotland) Act 1979 a deed of conditions takes effect on registration, but if section 17 is disapplied the burdens become operational, in respect of individual properties, only when a conveyance of that property is registered.²³ It is not clear whether the constitutive deed can provide for a date other than the two just mentioned. Our survey of deeds of conditions shows that section 17 is disapplied in around 50% of all cases, usually to preserve the possibility of altering the burdens before the development is fully sold.²⁴

¹⁷ Since real burdens can only be created over property belonging to the grantor, the deed of conditions must necessarily be registered before any of the units are sold.

¹⁸ For these burdens, see part 9. To this list can be added most instances of manager burdens (for which see para 2.37).

¹⁹ Draft bill s 108. Similarly, cross-border servitudes are competent: *Cusine & Paisley, Servitudes* para 2.05.

²⁰ Requirements of Writing (Scotland) Act 1995 s 1(2)(b).

²¹ Reid, *Property* para 388.

²² Paras 3.11 ff.

²³ Conveyancing (Scotland) Act 1874 s 32.

²⁴ Appendix D paras 17 and 18.

3.10 We recommend that

10. (a) A real burden should be created by registration of a constitutive deed in the Land Register or Register of Sasines against both the burdened property and the benefited property.
 - (b) There should be no requirement of registration against the benefited property
 - (i) in the case of a conservation burden or maritime burden or
 - (ii) if the benefited property is outside Scotland.
 - (c) If a deed requires to be registered against both properties, it should not be competent for it to be registered against one property only.
 - (d) A real burden should take effect -
 - (i) on the date of registration, or
 - (ii) on such later date as may be specified in the constitutive deed (including the date of registration of some other deed).
- (Draft Bill, ss 4(1), (5) and 112)

The constitutive deed

3.11 **Which deed?** At present, real burdens must be created either in a conveyance or in a deed of conditions. Following the abolition of the feudal system, the only conveyance in regular use will be the disposition. At present neither deed operates with optimum flexibility.

3.12 *Dispositions.* A disposition can create burdens only over the property which is being conveyed. Sometimes this creates difficulties. Suppose, for example, that land owned by A is divided and a part sold to B. A fence separates the two plots, and in the disposition it is provided that the fence is to be maintained at the joint expense of both owners. Burdens of this kind are commonly encountered. Yet they are unenforceable in relation to the plot retained by A, for only the property which is being conveyed can be burdened. So B is bound but not A. There is good reason for this rule, as the law currently stands. In the example just given, the disposition would be registered on the title sheet or search sheet of the disposed property only, and there would be no matching entry on the title sheet or search sheet of the retained property. But since real burdens require to be registered against the burdened property, the retained property could not be such a property.

3.13 *Deeds of conditions.* It is uncertain whether deeds of conditions can be used as self-standing deeds. Such deeds rest on two statutory provisions, section 32 of the Conveyancing (Scotland) Act 1874 and section 17 of the Land Registration (Scotland) Act 1979. It is quite clear from section 32 that deeds of conditions were not originally intended as self-standing, and that they were merely a convenient method of incorporating real burdens into later conveyances. The standard case is the sale of a number of plots in the

same development. Prior to the 1874 Act each individual conveyance required to list the real burdens in full. After 1874 the burdens could be listed in advance in a separate deed of conditions which could then be incorporated by reference into the individual conveyances. Registration of the deed of conditions achieved nothing by itself. The burdens became effective only by incorporation into and registration of the conveyance. The position may have been altered by section 17 of the 1979 Act. This provides that, except where the deed says otherwise, a deed of conditions takes effect on registration. But while incorporation is thus dispensed with, it is not clear whether this removes the need for a conveyance. The governing provision remains section 32 of the 1874 Act, which requires that a deed of conditions contain the burdens under which the granter “is to feu or otherwise deal with or affect his lands”. Of course all property will in the end be conveyed, if only after the granter’s death. But it is not clear that a deed of conditions can be used if the granter does not have a conveyance in contemplation.²⁵ If that is correct, then it seems doubtful whether a deed of conditions can be used as a means of allowing one neighbour to grant real burdens to another. This difficulty is often overlooked in practice.²⁶

3.14 *Proposal for reform.* In the discussion paper we argued for the removal of these doubts and limitations by the introduction of a rule (a) that in a conveyance it should be possible to impose burdens on the property being retained, and (b) that a deed of conditions should be capable of use as a free-standing deed.²⁷ On consultation both proposals were unanimously approved. But we would now go further still. If, as recommended earlier,²⁸ there is to be dual registration, there seems no reason for confining real burdens to deeds of a particular type. The key requirement is registration, and for registration there must of course be writing, if only so that there is something which can be registered.²⁹ Beyond that, the type of writing used seems unimportant. We therefore recommend that

11. There should be no requirement that the constitutive deed take any particular form.

(Draft Bill s 4(2))

No doubt in practice dispositions and deeds of conditions will continue to be used, as at present. But there is no need to retain the statutory regulation of deeds of conditions,³⁰ which has proved difficult to interpret and also unduly restrictive.³¹ It is sometimes suggested that real burdens in dispositions must appear in the dispositive clause, but that rule – if indeed it is a rule³² – will not survive our proposed reform, although current practice is not likely to change.

²⁵ Even if, as in *Gorrie & Banks Ltd v Burgh of Musselburgh* 1974 SLT 157, that conveyance is to be a number of years hence.

²⁶ Use of deeds of conditions in a free-standing manner remains relatively unusual, however. Only 3.57% of the deeds reviewed in our survey fell into this category: see appendix D para 9, table 3.

²⁷ Scot Law Com DP No 106 paras 7.29 to 7.36.

²⁸ Paras 3.3 to 3.7.

²⁹ Even in the Land Register, which is a register of rights rather than deeds, the entitlement to the right must normally be evidenced by a deed.

³⁰ ie s 32 of the Conveyancing (Scotland) Act 1874 and s 17 of the Land Registration (Scotland) Act 1979. Their repeal is provided for in sched 9 of the draft bill.

³¹ Scot Law Com DP No 106 paras 7.33 to 7.35, 7.38 and 7.39, and 7.72.

³² On which see Reid, *Property* para 388.

3.15 **Who should grant?** Property can be burdened only by its owner, or by a person acting with the authority of the owner,³³ from which it follows that the constitutive deed should be granted by or on behalf of the owner of the burdened property. Where property is owned in common, all the *pro indiviso* owners must join in the grant.³⁴ Trustees lack implied power to grant a real burden³⁵ although, in theory at least, such a power might be contained in the deed of trust. The owner must subscribe in accordance with the Requirements of Writing (Scotland) Act 1995.³⁶ None of this departs from the current law.

3.16 Next there is the time at which ownership falls to be determined. The normal rule in the creation of real rights is that the granter must be owner at or immediately prior to registration. “Immediately prior to” takes account of the special position of dispositions, for registration of the disposition is the moment at which ownership passes from granter to grantee – the moment, in other words, at which the granter loses the property he is seeking to burden.³⁷ We see no reason to depart from this rule of the general law.

3.17 A related question is what is meant by ownership. Strictly, of course, a person can be owner only if a title has been completed by registration. But the current law allows some deeds to be granted by a person who “has right” to property but whose title has not been so completed.³⁸ A convenient, if inaccurate, term for such a person is an “unregistered owner”.³⁹ Unless the property is already on the Land Register,⁴⁰ the deed must contain a clause deducing title from the last owner. Of the two deeds currently in use for real burdens, one (the disposition) can be granted by unregistered owners while the other (the deed of conditions) probably cannot.⁴¹ The new law will not be deed-specific in this way, and it is necessary to have a general rule. To require a completed title would be to raise the level of formality in one case but reduce it in another. Convenience is in favour of allowing deeds by unregistered owners, and there are no overwhelming arguments of principle the other way. Usually, of course, the title of the granter is in fact completed and the issue does not arise.⁴²

3.18 We recommend that

12. (a) The constitutive deed should be granted by or on behalf of the person who, at the time of its registration, is owner of the burdened property.

³³ Reid, *Property* para 669.

³⁴ Reid, *Property* para 28.

³⁵ Real burdens are not included in the list of general powers contained in s 4 of the Trusts (Scotland) Act 1921.

³⁶ A requirement of writing is imposed by s 1(2)(b). Since the constitutive deed is to be registered, it must in practice be probative under s 3. See s 6.

³⁷ If the granter becomes owner only *after* registration, the grant would presumably be perfected by accretion: see Reid, *Property* para 677.

³⁸ See in particular s 3 of the Conveyancing (Scotland) Act 1924.

³⁹ The traditional feudal term was “uninfest proprietor”. The term is inaccurate because a person whose title is unregistered is not, in strict law, owner of the land.

⁴⁰ Land Registration (Scotland) Act 1979 s 15(3). For the proposed amendment to this provision, see the Abolition of Feudal Tenure etc. (Scotland) Act 2000 sched 12 para 39(6)(b).

⁴¹ D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) Opinion No 122, pp 517-9. The issue is fully discussed in Scot Law Com DP No 106 paras 7.38 and 7.39.

⁴² If “ownership” is used in this extended way, there will sometimes be two (or more) “owners”. Thus if A disposes land to B, until such time as B registers the disposition (thus divesting A) either A or B would be in a position to grant a deed creating a real burden. The same is true of the creation of other real rights.

(b) For this purpose “owner” includes a person who has right to the property but has not completed title; but, except in a case where section 15(3) of the Land Registration (Scotland) Act 1979 applies, such a person must deduce title in the constitutive deed.

(Draft Bill, ss 4(2)(b), 50(1) and 114)

3.19 **Tenants and heritable creditors.** On general principles, a deed granted by the owner will bind those holding lesser real rights, such as a standard security or lease. Occasionally there is prejudice, particularly to tenants. Under recommendations made later⁴³ tenants will be subject to negative burdens, so that if a landlord grants a deed of conditions in favour of a neighbour, the tenant might find his use of the property is subject to unexpected and unwelcome restrictions. Often there is a remedy. The landlord may be in breach of an express term in the lease, or there may be a breach of warrandice.⁴⁴ And as well as a remedy against the landlord, it may be possible to challenge the deed itself if the grantee knew of the breach.⁴⁵ In practice, if there is a serious risk of prejudice, the grantee may insist that the tenant signs the deed as a consenter. The present law seems broadly satisfactory and we have no proposals for change.⁴⁶

Content

3.20 If the deed itself is not to be prescribed, it is at any rate necessary to prescribe a minimum content.

3.21 **Terms.** Under the present law, the constitutive deed must set out the terms of the real burden or burdens. Precision is required. It is not enough that the original parties knew what the words meant. Burdens run with the land and are often enforced by and against successors who have no knowledge of the background circumstances.⁴⁷ Unavoidably, therefore, the rules for real burdens are stricter than the rules for contracts. A burden must be framed so that a successor can understand the nature and extent of the obligation imposed. We have no proposals for changing these sensible rules. In two respects, however, the present law seems unduly strict.

3.22 *Obligations to contribute towards a cost.* Maintenance obligations tend to be framed in one of two ways. Either there is a direct obligation to maintain, or there is an obligation to pay for the cost of maintenance. Both are common. The second presupposes that the maintenance will be carried out by someone else but paid for by the obligant, and is especially useful where the obligant does not own the thing which is to be maintained. A direct obligation to maintain is valid, but doubts have been expressed as to the validity of an obligation to pay for the cost of maintenance, on the basis that it is an obligation to pay an

⁴³ Paras 4.27 to 4.30.

⁴⁴ Absolute warrandice covers future acts prejudicial to the title, but the scope of this guarantee is unclear. See Reid, *Property* para 706. In the case of standard securities, an alternative ground of action is the common law rule against deeds prejudicial to the security. See: *Mitchell v Little* (1820) Hume 661; *Reid v McGill* 1912 2 SLT 246; and *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363.

⁴⁵ This is the so-called rule against offside goals, for which see Reid, *Property* paras 695 to 700.

⁴⁶ Similar issues arise with discharges granted by the owner of the benefited property: see para 5.11.

⁴⁷ See eg *Anderson v Dickie* 1915 SC(HL) 79.

uncertain sum of money.⁴⁸ Such an obligation, or so the argument goes, is insufficiently precise to run with the lands. A successor must know how much is to be paid. If the burden does not say, the burden is unenforceable. It may be doubted whether this is really the law, but the authorities, such as they are, are equivocal.⁴⁹

3.23 The issue is wider than maintenance costs. Service charges in modern developments may cover many other matters, including the provision of security, the management of recreational facilities, cleaning and gardening, and administrative costs. Since expenditure will vary from year to year, it would be impossible to give specific figures in the constitutive deed.

3.24 The doubts in the present law are not merely damaging but unnecessary. As a matter of legal policy, there seems no reason for insisting on specific figures in the deed provided that some basis is provided for calculating liability. On consultation there was strong support for the proposal in our discussion paper that obligations to pay should not fail as a real burden only on the ground that no definite amount is stated.⁵⁰ For example, the Property Managers Association Scotland Ltd, vastly experienced in this area,

“wholeheartedly supports this proposal. It is recognised that the major deficiency of the system of real burdens under the feudal system was the fact that it was not possible to enforce against a singular successor a real burden when it had been converted into an obligation to pay money.”

Our proposal does not extend to all obligations to pay. The obligation must be to defray or contribute towards some cost; and the cost, by virtue of the praedial rule discussed earlier,⁵¹ must relate in some way to the burdened property. Section 2 of the Land Tenure Reform (Scotland) Act 1974, while abolishing periodical payments in respect of land, expressly saves “a payment in defrayal of or a contribution towards some continuing cost related to the land”.

3.25 *Extrinsic material.* In general, a real burden must not rely on material extrinsic to the deed. The rule is that the full terms of the burden must be discoverable from the words of the deed, and hence from the register itself. Sometimes this rule seems too demanding. In *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*⁵² the Second Division was asked to rule on the validity of the following burden:

“It is hereby specially provided and declared that the subjects hereby disposed or any part or portion thereof shall not be used in all time coming for the performance of pantomime, melodrama or comic opera or any stage play which requires to be submitted to the Lord Chamberlain under the Act for regulating Theatres Sixth and Seventh Victoria Chapter Sixty Eight ...”

⁴⁸ Halliday, *Conveyancing* vol 2 para 34-28; R Rennie, “The Reality of Real Burdens” 1998 SLT (News) 149 at pp 151-2.

⁴⁹ They are reviewed in Scot Law Com DP No 106 paras 7.21 and 7.22, and in Reid, *Property* para 418(4).

⁵⁰ Scot Law Com DP No 106 paras 7.20 to 7.24. However the way in which they are arrived at must be specified: see draft bill s 5. For a case in which this standard was not reached, see *Grampian Joint Police Board v Pearson* 2000 GWD 15-610.

⁵¹ Paras 2.9 to 2.18.

⁵² 1939 SC 788.

The reference to an act of parliament was held to be fatal. A purchaser could not know the extent of the burden merely by reading the registered deed. If sound,⁵³ this decision appears to invalidate the numerous burdens which apportion liability for common repairs by reference to rateable value, for rateable value can only be determined by consulting the valuation roll. Apportionment by reference to feuduty is also probably invalid, unless the amounts of feuduty are repeated in the constitutive deed. Our report on the law of the tenement contains recommendations to solve this difficulty so far as tenements are concerned,⁵⁴ but there are wider issues. In the discussion paper we expressed the view that it would not be unreasonable to expect a purchaser – or, in practice, his advisers – to consult the statute book, the valuation roll, deeds registered in the property register, or other documents which were publicly and readily available, and that a burden should not be invalid merely because such consultation turned out to be necessary.⁵⁵ The suggestion, although welcomed by consultees, was thought too wide by some. In particular, unease was expressed at admitting any document which happened to be publicly available. A document should be registered if it contains part of a real burden, and public availability should not, in general, be an alternative. On reflection we are inclined to agree, and we think that the policy objectives of the proposal can be met without extending it to ordinary documents.

3.26 *Retrospectivity.* With only one dissent, consultees approved the further proposal that the changes suggested above be made retrospectively, at least in the sense that they be applied to existing burdens. In the case of obligations to contribute to costs, our proposal resolves an uncertainty in the current law, and may not change that law. Our second proposal, allowing limited use of extrinsic material, would change the law but in a manner which seems sufficiently justified. Almost all burdens disqualified by the use of extrinsic material relate to maintenance or other forms of shared expenditure. There is a public interest in the adequate maintenance of buildings. If burdens fail, property might deteriorate. It seems better to use the voluntary and targeted maintenance regime provided by titles than to leave local authorities with the burden of procuring maintenance by use of their statutory powers.⁵⁶ Our impression is that in practice owners give effect to maintenance burdens and overlook such technical deficiencies as may be thought to exist.

3.27 **Duration.** In the discussion paper we suggested (i) that a constitutive deed should state the duration of the real burdens being imposed and (ii) that there should be an outer limit on duration of, say, 80 years. A rule which limits duration is sometimes known as a sunset rule.⁵⁷ The responses of consultees were mixed, and on further reflection we have abandoned the idea that burdens should be extinguished automatically at the end of a fixed period, although we suggest that it should be possible to trigger extinction by the service of a notice on the benefited owner. This important subject is considered elsewhere in the report.⁵⁸ If, however, real burdens are to continue to be perpetual, there seems little

⁵³ In the most recent case, *Heritage Fisheries Ltd v Duke of Roxburghe* 2000 SLT 800, the clause under scrutiny imposed a maintenance obligation by reference to a statutory instrument, but the *Aberdeen Varieties* point was not taken.

⁵⁴ Scot Law Com No 162 para 5.61.

⁵⁵ Scot Law Com DP No 106 paras 7.69 and 7.70.

⁵⁶ The statutory powers are found in the Civic Government (Scotland) Act 1982 s 87 and the Housing (Scotland) Act 1987 s 108. There are also local statutes.

⁵⁷ Scot Law Com DP No 106 paras 7.6 to 7.14.

⁵⁸ Paras 5.18 ff.

advantage in requiring duration to be stated in the constitutive deed. Some of our consultees were sceptical, even against the background of a fixed duration. For example:⁵⁹

“I consider it is unlikely that, as a matter of practice, the duration of real burdens will be the subject of negotiation. All that will happen is that the maximum available period will be inserted in all deeds. The proposal simply increases the likelihood of a burden being drafted in a defective manner for no discernible gain.”

While we no longer think that a statement of duration should be a formal requirement, we think that parties should be entitled to agree to a shorter duration than is provided for under the general law. For example, neighbours might agree to enter into mutually enforceable restrictions for a period of, say, fifty years. If a durational limit is stated in the constitutive deed, the burden should lapse when the period comes to an end.

3.28 **The words “real burden”.** At present no special words need be used to create a real burden. This rule was fixed by the decision in *Tailors of Aberdeen v Coutts* in 1840:⁶⁰

“[W]ords must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone ... [although] it is not essential that any *voces signatae* or technical form of words should be employed.”

Since in 1840 real burdens were new, and no agreed name yet existed, the leniency as to terminology is hardly surprising. Today the normal practice is for the list of conditions being imposed to be preceded or followed by a string of explicative synonyms, for example:⁶¹

“... the subjects hereby disposed are so disposed always with and under the reservations, real burdens, conditions, obligations and others hereinafter contained ...”

3.29 In the discussion paper we suggested that in future the use of the term “real burden” should be a formal requirement of constitution. If the type of burden was given a special name in the legislation⁶² – community burden, for example, or conservation burden – that name could be used instead.⁶³ Most consultees agreed, including the Law Society of Scotland, a working party of members of the Society of Writers to the Signet, and the Faculty of Advocates. The arguments in favour seem strong. The use of the correct technical term makes for certainty. Otherwise it may be unclear whether a condition is intended to bind only the parties to it or whether it is intended to run with the land. This is especially so if, as recommended earlier,⁶⁴ real burdens can be created in a deed of any kind. A clear rule as to whether a real burden was intended or not is also necessary in the light of our later recommendation that real burdens should cease to have contractual effect.⁶⁵ Some

⁵⁹ The comment quoted is by Mr Robin T B Jack.

⁶⁰ (1840) 1 Rob 296 per Lord Corehouse at pp 306-7.

⁶¹ This is based on Halliday, *Conveyancing* vol 2, para 32-83.

⁶² It should be noted that “neighbour burden”, although used in this report, is not used in the draft bill and has no formal status. See para 1.9.

⁶³ Scot Law Com DP No 106 paras 7.15 and 7.16.

⁶⁴ Para 3.14.

⁶⁵ Paras 3.40 to 3.45.

consultees expressed opposition to the imposition of formalities without good reason. In our view, however, not only does sufficient reason exist, but the formality is not especially burdensome. A person wishing to grant a standard security must use the words “standard security”.⁶⁶ It seems not unreasonable that the grantor of a real burden should also have to use technical language.

3.30 Nomination and identification of benefited and burdened properties. Dual registration⁶⁷ presupposes that the constitutive deed both nominates and identifies the properties in question.⁶⁸ Here the present law is less demanding than it ought to be, for, while the burdened property must be identified, there is no equivalent obligation in relation to the benefited property. Sometimes, of course, the benefited property is in fact identified, as in the case of community burdens created by deed of conditions. But frequently the constitutive deed is silent on the subject, so that the identity of the benefited property depends on the common law rules, complex and obscure, on implied rights to enforce. As mentioned earlier, this is one of the most serious weaknesses of the present law.⁶⁹ It would be solved by a requirement to nominate the benefited property.⁷⁰ Later in this report⁷¹ we recommend abolition of the common law rules on implied rights to enforce, with the result that nomination will be the only means by which property can become a benefited property.

3.31 As well as being nominated, the properties will also require to be described. Ideally, this should be done by means of a plan, but we do not think that this should be a formal requirement. There will be some cases, such as tenements, where a plan would not be appropriate. It should be sufficient if the properties can in fact be identified. In practice most new real burdens will fall to be registered in the Land Register and will be subject to section 4(2)(a) of the Land Registration (Scotland) Act 1979, which provides that the Keeper must reject an application if

“it relates to land which is not sufficiently described to enable him to identify it by reference to the Ordnance Map ...”

The Keeper’s practice is usually to require a plan.⁷² Where property is already registered on the Land Register it will be sufficient to give the title number.⁷³

3.32 In the case of a conservation burden or maritime burden,⁷⁴ there is no benefited property to describe, and the equivalent requirement is that the person in whose favour the burden is created should be nominated and identified.⁷⁵ A maritime burden can only be created in favour of the Crown.

⁶⁶ Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2) and sched 2 forms A and B.

⁶⁷ Paras 3.1 to 3.4 above.

⁶⁸ Scot Law Com DP No 106 paras 7.25 and 7.26.

⁶⁹ See para 1.23.

⁷⁰ A similar recommendation was made by the Law Commission in Law Com No 127 paras 4.12, 8.16, 8.21 and 8.22, and by the Ontario Law Reform Commission in its *Report on Covenants affecting Freehold Land* (1989) pp 116 ff.

⁷¹ Para 11.28.

⁷² *Registration of Title Practice Book* para 8.16.

⁷³ Land Registration (Scotland) Rules 1980 r 25 and sched B.

⁷⁴ Or, often, a manager burden (see para 2.37).

⁷⁵ For conservation and maritime burdens, see part 11.

3.33 **Summary.** Summing up the preceding paragraphs, we recommend that

13. (a) **The constitutive deed should be required to –**
 - (i) **set out the terms of the real burden;**
 - (ii) **use the term “real burden” or equivalent; and**
 - (iii) **nominate and identify the burdened property and either the benefited property or, if there is none, the person in whose favour the burden is created.**
- (b) **The constitutive deed may also stipulate for a fixed duration.**
- (c) **In setting out the terms of a burden –**
 - (i) **it should be (and deemed always to have been) permissible to incorporate by reference any enactment, public register or public records which are readily available to the general public; and**
 - (ii) **it should not be (and should be deemed always not to have been) necessary to specify the amount payable in respect of an obligation to defray or contribute towards some cost provided that the way in which the amount can be arrived at is sufficiently specified.**

(Draft Bill ss 4(2)&(3), 5 and 6)

Entering the register

3.34 **Information on the register.** Registration in the Register of Sasines involves making a copy of the constitutive deed, which is then returned to the person who presented it.⁷⁶ Prescribing what should appear in the deed is thus, indirectly, a means of prescribing what should appear on the register, and hence be available to the public at large. The position is different in the Land Register. The deed itself is not reproduced. Instead the Keeper enters on the title sheet the terms of the burden, or a summary of the terms.⁷⁷ With the introduction of dual registration the entry will be made, not only in the D. (Burdens) Section of the burdened property, as at present, but also in the A. (Property) section of the benefited property.⁷⁸ The Keeper’s usual practice is to enter the burden in full.

3.35 **Defective deeds.** The constitutive deed may turn out to be defective. It might, for example, be granted by the wrong person.⁷⁹ The execution might be faulty.⁸⁰ It might fail to

⁷⁶ Titles to Land (Consolidation) (Scotland) Act 1868 s 142.

⁷⁷ Land Registration (Scotland) Act 1979 s 6(2). The summary is presumed to be correct.

⁷⁸ Land Registration (Scotland) Rules 1980 r 4(1)(c) and r 7(1)(a). Even under current practice the burdens will sometimes appear also in the A. Section of the benefited property.

⁷⁹ A constitutive deed must be granted by the owner: see paras 3.15 to 3.19.

⁸⁰ The execution must comply with the Requirements of Writing (Scotland) Act 1995.

comply with the rules of content, by omitting the words “real burden” or for some other reason.⁸¹ The obligations provided for might not be capable of being created as real burdens, due to non-compliance with the praedial rule,⁸² or because they are neither affirmative obligations nor restrictions.⁸³ What then? Is a deed, defective under the proposed new law, cured by registration?

3.36 In the case of the Register of Sasines the answer is clearly no. Registration is a necessary condition of validity but it is not a sufficient condition. If the constitutive deed is invalid, matters are not improved merely by the act of registration.

3.37 In the Land Register, title flows from the register itself and not from the deed which induced the act of registration. In principle, therefore, the mere fact of being entered on the Register overcomes any invalidity in the constitutive deed. The rule here is given in section 3(1) of the Land Registration (Scotland) Act 1979:

“Registration shall have the effect of ... (b) making any registered right or obligation relating to the registered interest in land a real right or obligation ...”

But this rule is to apply only

“insofar as the right or obligation is capable, under any enactment or rule of law ... of being made real ...”

Many obligations are incapable of being made real burdens, and would not be validated by registration.⁸⁴ In other respects, however, registration would be curative of defects. That is not always the end of the matter. If a burden is valid only because of the curative effect of section 3(1), the Register is inaccurate and can be rectified under section 9, subject to special protections for proprietors in possession.

3.38 The curative effect does not apply to burdens originally registered in the Register of Sasines but which now appear on the Land Register following first registration. Such burdens reach the Register, not by registration under section 2 of the 1979 Act, but by being “entered” under section 6(1).

3.39 The normal indemnity system is restricted in the case of real burdens. By section 12(3)(g) of the 1979 Act there is no entitlement to indemnity in respect of a loss where

“the loss arises from inability to enforce a real burden or condition entered in the register, unless the Keeper expressly assumes responsibility for the enforceability of that burden or condition ...”

In the *Registration of Title Practice Book*⁸⁵ this provision is explained as intended to cover supervening invalidity, but the wording seems sufficiently wide to cover initial invalidity also and, on one view, would exclude real burdens from the indemnity system altogether.

⁸¹ Paras 3.20 to 3.25.

⁸² Paras 2.9 to 2.18.

⁸³ Paras 2.1 to 2.3.

⁸⁴ See generally part 2.

⁸⁵ *Registration of Title Practice Book* para 7.24.

The provision merits reconsideration, and we hope to return to it in the review of land registration being undertaken as part of our Sixth Programme of Law Reform.⁸⁶

Continuing contractual effect

3.40 Even before registration, the burdens are effective at a contractual level, although successors would not be bound.⁸⁷ Contractual liability commences with acceptance of delivery of the disposition or other constitutive deed. Under the current law it is less clear when it terminates. Three views seem possible. Contractual liability may finish when real liability begins, so that once the deed is registered, the obligations bind only as real burdens and no longer as contractual terms. A second view is that, following registration, there is concurrent liability both as a contract and as a real burden, and that contractual liability remains for as long as the two properties are in the hands of the original parties. A variant on this view would be that contractual liability survives the departure of the original benefited owner, provided he assigned his contractual rights to his successor, but would not survive the departure of the original burdened owner. A third view is that contractual liability continues regardless of events, and will come to an end only under the normal rules of contract law. Thus the original parties would remain bound even after they had disposed of their respective properties.

3.41 It is not clear which of these views represents the current law. The third seems so obviously unmeritorious that it can probably be excluded.⁸⁸ Arguably there is an implied term that the obligations are to bind contractually only for as long as the original parties remain as owner. It is true that in *Scottish Co-operative Wholesale Society Ltd v Finnie*⁸⁹ the Second Division held that a disponent retains enforcement rights even where he does not own a benefited property; but in that case no benefited property had ever existed, so that the conditions were always contractual in nature. In an earlier case, a disponent who had sold the original benefited property was held to have no enforcement rights, although this was in a question with a successor of the original burdened owner and did not raise issues of contractual liability.⁹⁰ No definitive choice has ever been made between the second and the first views.

3.42 A choice now falls to be made. The provisional view taken in our discussion paper was in favour of the first view.⁹¹ The main benefit is simplicity, for if the same obligation were to be enforceable routinely both as a real burden and also as a contract, a certain amount of double-think would be needed to work out the respective rights of the parties. This is particularly so in relation to discharge. The burden might be discharged but not the contract, or the other way around. Often this result would be reached randomly, and without either party realising the true position. For example, as the law currently stands, a discharge granted by the Lands Tribunal would not affect contractual liability.⁹²

⁸⁶ Scot Law Com No 176 (2000) paras 2.13 to 2.17.

⁸⁷ Reid, *Property* para 392.

⁸⁸ The Law Commission recommended that it should not apply in England and Wales: see Law Com No 127 para 11.32.

⁸⁹ 1937 SC 835.

⁹⁰ *J A Mactaggart & Co v Harrower* (1906) 8 F 1101 at p 1105 per Dean of Guild.

⁹¹ Scot Law Com DP No 106 paras 7.73 to 7.77.

⁹² The Lands Tribunal can only discharge "land obligations": see Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2), (3).

3.43 On consultation, our proposal met both with support and with opposition. Some at least of the opposition was based on a misapprehension as to what was being proposed. The proposal is confined to the contractual effect of the disposition or other constitutive deed. It amounts simply to this, that once the deed has been registered and the obligation become a real burden, the same obligation should no longer be concurrently enforceable as a contract. Thus the proposal has no bearing on obligations contained in missives of sale; and it does not affect the rule, established by section 2 of the Contract (Scotland) Act 1997, that the missives continue in force notwithstanding delivery of the disposition. Nor does the rule have any bearing on other clauses of the disposition which are of a contractual nature. The rule would apply only to properly constituted real burdens: an obligation which purported to be a real burden but which did not satisfy the rules of constitution would continue to be enforceable contractually, as under the present law.⁹³ Finally, the intention is to eliminate contractual liability only where it arises incidentally. Parties remain free to make whatever bargain they choose. An obligation constituted as a real burden can be given concurrent contractual effect if express provision is made. In most cases it is hard to see why anyone would want to bother, although in some commercial situations this might be seen as a means of avoiding discharge by the Lands Tribunal. If the obligations are to be given contractual effect in this way, it is obviously desirable to stipulate whether they are to continue to be enforceable even after the parties have severed their connection with the land.

3.44 We continue to be of the view that our proposal is the best of the available solutions. We do not, however, suggest that it apply to burdens created before the legislation comes into force,⁹⁴ although usually in such cases the original parties will no longer own, and any contractual liability will long since have come to an end. This approach is consistent with the provision in the Feudal Act that contractual rights contained in a grant in feu should be preserved.⁹⁵

3.45 We recommend that

14. **Where an obligation in a disposition or other constitutive deed has become enforceable as a real burden, it should cease to have incidental validity as a contractual term.**

(Draft Bill s 51)

Repetition of burdens in future deeds

3.46 Once created, real burdens run with both benefited and burdened properties. The law imposes no requirement that the burdens be assigned or otherwise mentioned in individual conveyances.⁹⁶ They could not be severed from the property even if the parties so wished.⁹⁷ Nonetheless it was common at one time for the constituent deed to require that the burdens be repeated, or referred to, in all future transmissions of the burdened property, on pain of nullity. Failure to mention the burdens risked the invocation of the irritancy, although whether the irritancy was enforceable seems an open question. With the abolition

⁹³ Reid, *Property* para 392. However, as a “purported” real burden, it could be discharged by the Lands Tribunal under the recommendation made below, at paras 6.21 to 6.23.

⁹⁴ See draft bill s 111(6).

⁹⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 75.

⁹⁶ *Braid Hills Hotel Co Ltd v Manuels* 1909 SC 120. And see para 4.39.

⁹⁷ *Bannerman’s Trs v Howard & Wyndham* (1902) 10 SLT 2 at p 3 per Lord Moncreiff.

of irritancy, proposed elsewhere in this report,⁹⁸ it is difficult to see how this requirement could be enforced. It seems logical that the requirement should be removed, as has already been done by statute in the case of heritable securities.⁹⁹ Abolition could be accompanied by the repeal of sections 9(3) and 9(4) of the Conveyancing (Scotland) Act 1924 which make provision for curing titles in cases where burdens have been mistakenly omitted. Section 9(4) allows the recording of a deed of omitted conditions, while section 9(3) cures past omissions if the deed in favour of the current owner includes the burdens. Most consultees agreed with this proposal, which is for a change of law rather than of practice. In Sasine titles conveyances will have to carry on referring to burdens if the disponer is to avoid a claim in warrandice,¹⁰⁰ while in Land Register conveyances burdens are already omitted, on the basis that the conveyance incorporates the contents of the title sheet (including the burdens).¹⁰¹ We recommend that

15. (a) Any requirement in any deed that real burdens be repeated or referred to in future deeds should cease to have effect.

(b) Sections 9(3) and 9(4) of the Conveyancing (Scotland) Act 1924 should be repealed.

(Draft Bill s 57 and sched 9)

⁹⁸ Paras 4.71 to 4.73.

⁹⁹ Conveyancing (Scotland) Act 1924 s 9(1) and (2). These provisions could be repealed and replaced with a provision which applies to all deeds.

¹⁰⁰ Reid, *Property* para 396.

¹⁰¹ Land Registration (Scotland) Act 1979 ss 3(1)(a) and 15(2).

Part 4 Enforcement and Transmission

Title to enforce

4.1 To enforce a real burden the present law requires both title and interest. Except in the case of feudal burdens,¹ shortly to be abolished, the onus of proof is on the enforcer. Hence if title and interest are not averred and, if necessary, proved, the action fails. That is no more than the ordinary rule in litigation, which requires that pursuers prove their case. We have no proposal to alter the onus of proof,² except in one minor case mentioned later.³

4.2 Interest to enforce is considered below,⁴ and in this section we are concerned only with title.

4.3 **Possessory real rights.** A real burden is a right in one property, the burdened property, conceived for the benefit of another property, the benefited property.⁵ Accordingly, title to enforce implies some legal relationship with the benefited property.⁶ In the current law the only relationship recognised for this purpose is ownership.⁷ A person has title to enforce if and only if he is owner of the benefited property. Similarly, only an owner can grant a minute of waiver discharging a burden.⁸ Ownership here is being used in the strict sense, so that a person holding on an unregistered title would not qualify. If property is held in common, so that there are two or more owners, none has power to act without the other or others.⁹

4.4 Since the owner, and the owner alone, is the holder of a real burden,¹⁰ it is proper that he should have the primary role in its enforcement. Nonetheless the present rules seem unreasonably narrow. Many burdens, especially amenity burdens, benefit the person who is in occupation of the property. That need not be the owner. Of course, a non-owning occupier could ask the owner to intervene. A tenant can ask his landlord, or a liferenter his fiar. But at best this is inconvenient, and at worst, if the owner refuses to act, a deprivation of protection. If a lease has still 100 years to run, there may be little enthusiasm on the part of the landlord to embark on a course of litigation.

¹ Where interest (but not title) is presumed: see *Earl of Zetland v Hislop* (1882) 9R(HL) 40.

² Thus in Scot Law Com No 168 we recommended that in the case of former feudal burdens reallocated under s 18 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, interest to enforce should not be presumed: see para 4.86, and s 24 of the Act.

³ We recommend that in the case of conservation burdens and maritime burdens, interest to enforce should be presumed: see para 9.21.

⁴ Paras 4.16 to 4.23.

⁵ See s 1(1) of the draft bill.

⁶ For the special position of conservation and maritime burdens, where there is no benefited property, see para 9.21.

⁷ Scot Law Com DP No 106 paras 3.56 to 3.66.

⁸ Para 5.10

⁹ Gordon, *Scottish Land Law* para 15-17; Reid, *Property* para 29.

¹⁰ Section 1(1) of the draft bill expresses the rule that a real burden is “constituted in favour of the owner of other land in his capacity as owner of that other land”.

4.5 In the discussion paper, we suggested that the right to enforce be extended to tenants, liferenters,¹¹ and heritable creditors in possession;¹² and we would now wish to add to this list non-entitled spouses with occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The proposed addition is hardly necessary in the normal case where both spouses are in residence; but a spouse who obtains an exclusion order against a violent partner should not be deprived of the protection afforded by real burdens.¹³ Those mentioned so far all hold real rights which give an entitlement to possession.¹⁴ In our view it would go too far to extend enforcement rights to holders of non-possessory real rights, or to those in possession but without a real right. Real burdens should not be enforceable by squatters or by house guests. Consultees were generally in support of the proposed change. In the case of rights of pre-emption, redemption, and reversion, title to enforce should, for practical reasons, be restricted to owners.¹⁵

4.6 There is something to be said for allowing only registered rights. For otherwise a burdened owner cannot be sure where enforcement rights may lie. Departing, however, from the view expressed in our discussion paper,¹⁶ we have concluded that registration should not be required, whether in the case of ownership or of subordinate real rights such as leases. As consultees pointed out, there may be good reasons why those entitled to ownership choose not to register. Local authorities hold on a general statutory title the property formerly held by their predecessors.¹⁷ It would be a massive undertaking to complete title by registration. Some other public bodies are in a similar position. There are other examples. In a continuing trust, for instance, it is not usually worth the expense for assumed trustees to complete title. If title is not otherwise completed, there would be little enthusiasm for completing title merely in order to enforce real burdens; yet it would be an odd result if the burdens could be enforced by a tenant but not (due to lack of registration) by his landlord. We conclude therefore that a registered title should not be required.¹⁸ It may be doubted whether this is prejudicial to the burdened owner. It is for the person seeking to enforce a burden to prove his title and, if he cannot do so, the action will fail. If the property is in the course of changing hands, enforcement rights will lie with the seller up to, but not beyond, the delivery of the disposition. Once the buyer can enforce the seller cannot.¹⁹

4.7 In the case of ownership, the absence of a registered title means the absence of a real right. The enforcer would not be owner but rather the person “in right” of the property, with the entitlement to become owner.²⁰ By contrast, an unregistered lease may still confer a real right.²¹ In the case of leases of twenty years or less, registration is not competent and a real right is obtained by possession. It is not intended to extend enforcement rights to

¹¹ In *Newton v Godfrey* 19 June 2000, Stranraer Sheriff Court (unreported), it was held that a proper liferenter had title to enforce a right of common interest.

¹² Scot Law Com DP No 106 paras 3.59 to 3.63.

¹³ For example in a tenement the spouse might need to invoke real burdens to have the leaking roof repaired.

¹⁴ While an occupancy right under the 1981 Act functions in some respects as a real right, strictly it cannot be so classified: see Reid, *Property* para 10(2).

¹⁵ Paras 10.32 and 10.33.

¹⁶ Scot Law Com DP No 106 paras 3.57 and 3.61.

¹⁷ Local Government (Scotland) Act 1994 s 15; Local Authorities (Property Transfer) Order 1995 (SI 1995/2499).

¹⁸ This is consistent with our views on deeds of constitution (para 3.17) and on deeds of discharge (para 5.12).

¹⁹ Thus in allowing unregistered “owners” it is not our intention to increase the number of enforcers. In general there can only be one owner. See paras 13.4 and 13.5.

²⁰ See Conveyancing (Scotland) Act 1924 s 4.

²¹ Except where s 3(3) of the Land Registration (Scotland) Act 1979 applies.

tenants who do not hold a real right, but the real right need not have been obtained by registration.

4.8 If a tenant or liferenter is to be able to enforce, it would be difficult to deny enforcement rights to individual co-owners. The idea that a co-owner might act on his own in relation to real burdens was recognised by statute in 1970,²² in the context of applications to the Lands Tribunal, and we suggest that it should apply in the present context also.

4.9 No special provision is needed for insolvency. If the owner of a benefited property is sequestrated, the property passes to his trustee in sequestration, who can then enforce burdens as a person with right to ownership. The bankrupt loses his power to enforce.²³ Company liquidation, receivership, and administration produce a similar result but in a different way. The benefited property remains the property of the company, but the company falls to be administered by the liquidator,²⁴ receiver²⁵ or administrator²⁶ rather than by its board of directors. The position of heritable creditors in possession is considered later.²⁷

4.10 **Concurrence of enforcement rights.** Under our proposals one property might produce more than one enforcer. For example, if property was leased, both landlord and tenant could enforce. Or if it was owned by two people in common, both could enforce.

4.11 First, there is the question of fairness to the burdened owner. Here the position seems acceptable. The obligation has not changed, only the class of those entitled to enforce. The owner is not more burdened than he was before. The most that can be said is that, in some cases, the chances of actual enforcement may be increased. Of course it would be a different matter if an increase in enforcers meant a corresponding increase in the signatories required for a minute of waiver. But that is not our intention. Later we recommend that deeds of discharge should continue to be granted only by the owner.²⁸

4.12 Next there is the question of competition among enforcers. If more than one wishes to enforce, which is to be preferred? The issue seems hardly a live one. There is unlikely to be a race to litigate. If a tenant obtains interdict against the burdened owner, there are unlikely to be complaints from the landlord. In practice, not all those with title will have interest. If, for example, a tenant is out of pocket in respect of a common repair, only the tenant has interest to sue for the amount due. The question of interest to enforce is considered below.²⁹

4.13 The issue is more likely to arise the other way around. A person with enforcement rights might prefer that the burden remain unenforced. Here the effect of our proposals is to leave the owner in control, as under the current law. An owner can always grant a minute

²² Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(6).

²³ Bankruptcy (Scotland) Act 1985 s 32(8).

²⁴ *Stair Memorial Encyclopaedia* vol 4, para 757. And see Insolvency Act 1986 ss 91(2) and 103.

²⁵ *Imperial Hotel (Aberdeen) Ltd v Vaux Breweries* 1978 SLT 113, and *Independent Pension Trustee Ltd v LAW Construction Co Ltd* 1997 SLT 1105. But compare *Shanks v Central Regional Council* 1987 SLT 410. For powers of receivers to bring actions, see Insolvency Act 1986 s 55, sched 2 para 5.

²⁶ Insolvency Act 1986 s 14(1), (4), sched 1 para 5.

²⁷ Paras 13.7 and 13.8.

²⁸ Para 5.10.

²⁹ Paras 4.16 ff.

of waiver and, if he does so, that is the end of the matter. Any enforcement by a tenant or liferenter then falls away. This result seems acceptable. Even under the present law an enforcer might be defeated by a discharge granted by the Lands Tribunal.³⁰ And it may be assumed that a tenant would prefer a defeasible enforcement right to no enforcement right at all. In practice the issue is not likely to arise frequently; and it is always open to a tenant to restrict the landlord's power of discharge by an appropriate provision in the lease.

4.14 We recommend that

16. (a) A person should have title to enforce a real burden if, in relation to the benefited property, he is -

(i) its owner;

(ii) a tenant;

(iii) a proper liferenter; or

(iv) the non-entitled spouse of a person mentioned above, being a person holding occupancy rights.

(b) If a right mentioned at (a) is held as common property, each *pro indiviso* owner should have a separate title to enforce.

(Draft Bill s 7(2))

4.15 **Delegating enforcement.** Enforcement can be delegated to a factor or other manager, who can then sue in his own name. The delegation may either be general,³¹ or in respect of a particular litigation.³² Usually it is non-exclusive, so that the principal retains a right to enforce. In factored property such as tenements, managers commonly enforce maintenance burdens on behalf of the owners. Later we recommend that, in respect of community burdens, enforcement rights should be delegable by a majority of owners.³³ This may already be provided for in the deed of conditions, as it is in our Development Management Scheme.³⁴ But in any event, since each member of a community has an independent title to enforce, it would be sufficient for a manager to obtain the authority of a single owner.

Interest to enforce

4.16 **Meaning of interest.** Under the present law title must be supported by interest. The interest required is often characterised as being "patrimonial" or "praedial", by which is meant interest, not as an individual, but in the capacity as a right-holder in the benefited property. In general the property must be injured by the breach.³⁵ Sometimes it is difficult to separate interest to enforce from the praedial rule, that is to say, from the rule that, in

³⁰ The same situation arises where (i) co-feuars are given express rights to enforce but (ii) the constitutive deed expressly allows the superior to grant a unilateral waiver. See *Lawrence v Scott* 1965 SC 403.

³¹ *Park v Mood* 1919 1 SLT 170.

³² *Shinas v Fordyce* (1777) 5 Brown's Supp 572.

³³ Para 7.43.

³⁴ Development Management Scheme r 8(f). The scheme is set out in sched 3 of the draft bill.

³⁵ Reid, *Property* para 407.

order to achieve initial validity, a burden must affect one property for the benefit of another.³⁶ In principle, however, the two are quite distinct. The former is a rule of enforcement and the latter a rule of constitution. They operate at different levels of generality. The praedial rule is concerned with the general question of whether a burden is by its nature capable of conferring benefit on the benefited property or properties. The interest to enforce rule is concerned with a specific breach by a specific burdened owner at a specific time, and by the attempt to found on that breach by a specific person. The specificity makes all the difference. On the particular facts, the benefited and burdened properties may be too far apart for enforcement to be permitted; or the breach may be too trivial to impact on the benefited property; or the enforcer's right in that property may be too slight or temporary; or the neighbourhood may have changed in such a way that praedial benefit, present at the time of original constitution, has now largely disappeared. It follows that a burden which easily satisfied the praedial rule might turn out to be unenforceable in particular cases because of lack of interest to enforce. But probably it would not be unenforceable in all cases. The next breach might be more serious; or the dispute might lie between two properties which are closer together. For community burdens, in particular, proximity is often a decisive factor. Burdens can be enforced against the house next door, but not, usually, against the house at the opposite end of the estate.³⁷

4.17 There is little authority on interest to enforce. The small number of cases involving superiors can probably be disregarded, not least because they seem to admit interest of a non-patrimonial kind.³⁸ There are even fewer cases involving neighbours or members of a community. Probably no one would dissent from the general statement by Lord Wark in *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas Ltd)*³⁹ that "observance or non-observance of the condition" must have an "appreciable effect upon the amenity or enjoyment" of the benefited property. What is less clear is how "appreciable" the effect must be before an interest to enforce arises.⁴⁰ The obviously trivial can be excluded, of course,⁴¹ but beyond that the concept is intrinsically uncertain, and different courts at different times might, quite reasonably, arrive at different results. In practice, two factors have shown themselves as of particular importance. One is distance between the two properties. In the *Aberdeen Varieties* case enforcement failed mainly on the basis that the properties were a half mile apart. Not many burdens would survive so great a distance. Usually, interest to enforce requires contiguity or near-contiguity. But naturally this depends both on the nature of the breach and on the nature of the neighbourhood. In sparsely populated areas, distances will be greater than in towns. The second factor is the extent of the breach. A burden which in itself is of vital importance to the enforcer may be breached in such a manner that his interests are barely touched. An obligation not to build prevents rabbit hutches as well as five-storey blocks of flats. But it seems doubtful whether there is an interest to prevent the building of rabbit hutches, even on the part of an immediate neighbour.

³⁶ For the praedial rule, see paras 2.9 to 2.18.

³⁷ *Mactaggart & Co v Roemmele* 1907 SC 1318.

³⁸ *Menzies v Caledonian Canal Commissioners* (1900) 2 F 953.

³⁹ 1939 SC 788 at p 797. And see also Lord Justice-Clerk Aitchison at p 802.

⁴⁰ Compare *Stewart v Bunten* (1878) 5 R 1108 with *Maguire v Burges* 1909 SC 1283. See further Scot Law Com DP No 106 paras 4.3 and 4.4.

⁴¹ *Magistrates of Edinburgh v Macfarlane* (1857) 20 D 156 at p 171 per Lord Justice-Clerk Hope.

4.18 **A statutory restatement?** In the discussion paper we asked whether there was merit in a statutory restatement of interest to enforce.⁴² The following was proposed as a possible model.

- (a) A person has interest to enforce a burden if -
 - (i) failure to comply will result in detriment to the benefited property (and, where the enforcer's right is less than ownership, to that right also), or
 - (ii) the enforcer has incurred maintenance or other costs which the person enforced against is bound to reimburse.
- (b) For the purposes of assessing detriment, a court shall pay particular regard to -
 - (i) the distance between the benefited and burdened properties, and
 - (ii) the seriousness of the breach or proposed breach.

Opinion was divided. The Law Society and a working party of members of the Society of Writers to the Signet thought that a restatement would be useful. The Faculty of Advocates doubted whether this would be so. Among the others who responded, there was a more or less even division of views. The argument in favour of a restatement was that it would clarify the law in an area where there were few decided cases. The argument against was that the subject was intrinsically uncertain and could best be developed by the courts on a case by case basis.

4.19 A number of reasons have persuaded us that a restatement should be attempted. First, the extension of a right to enforce to tenants and holders of other limited real rights means that the current rules are in need of adjustment. It might be many years before this could be achieved by case law. Secondly, the introduction of conservation and maritime burdens requires a consideration of how interest will operate in the absence of a benefited property.⁴³ Thirdly, our overall approach to real burdens is in favour of a restatement.⁴⁴ Such a restatement would be strikingly incomplete if a place were not found for interest to enforce. Finally, interest to enforce is a concept of practical importance. There will be many cases where a person has title without having interest. For example, a developer who reserves a service strip as a means of imposing neighbour burdens will have title to enforce but is unlikely to have interest. It is important, both for enforcers and those enforced against, that the idea of interest should be made as clear as possible.

4.20 **Finding the words.** If a restatement is desirable in principle, the next issue is to find the right words. The key component in interest to enforce is the potential detriment to the benefited property through non-observance. Detriment will not, however, affect all enforcers in the same way. A tenant whose lease has only six weeks to run will be little troubled by a decline in amenity or value. But if the lease has an unexpired term of 100

⁴² Scot Law Com DP No 106 paras 4.5 to 4.10.

⁴³ See para 9.21.

⁴⁴ Para 1.28.

years, the position of a tenant is much like that of an owner. Any definition of interest to enforce must take account of the type of right held by the enforcer.

4.21 Burdens may exist to protect a community as a whole, rather than any particular property within it. This was recognised in our proposed reformulation of the praedial rule, which refers to burdens “for the benefit of the community or a part of the community”.⁴⁵ Nonetheless we would be reluctant to include a corresponding reference to the community in the restatement of interest to enforce. There should be no encouragement to enforce burdens which have nothing to do with the enforcer, under cover of protecting the broader interests of the community. Many community burdens are concerned with localised amenity and have little or no impact on the community as a whole. If a person builds a second garage, contrary to the burdens, it is reasonable that he should face enforcement from his close neighbours. But if they are content with the position, the garage should not be prevented by an action from an owner on the other side of the estate.⁴⁶ That approach was strongly supported by the results of our Title Conditions Survey.⁴⁷ Of course, sometimes even a remote breach might affect the interests of the community. The residential nature of the whole housing estate is disturbed if an owner starts trading in second-hand cars. But a breach which affects the community in a serious way will also affect its constituent units. There will be detriment even to properties which are physically remote, and hence there will be interest to enforce. In practice the person best placed to enforce for the community will often be a factor or manager who, by representing all of the owners, holds the accumulated interests to enforce of each.⁴⁸

4.22 A definition of interest by reference to detriment would not work in one, quite common, case. A person who pays for a repair or other shared expense must then recover the cost from the other owners in the community. But any detriment arising from a refusal to pay would be to his pocket rather than to his property. Any definition must take account of the problem of reimbursement, and also of the possibility that, at the time reimbursement is claimed, the claimant may no longer hold a right in the benefited property.⁴⁹

4.23 In re stating the rule on interest to enforce,⁵⁰ we recommend that

17. A person should have interest to enforce a real burden if -

- (i) failure to comply with the burden would cause material detriment to the value or enjoyment of the enforcer’s right in the benefited property, or**
- (ii) the enforcer has incurred or will incur maintenance or other costs which, in terms of the burden, fall to be reimbursed.**

(Draft Bill s 7(3))

⁴⁵ Para 2.18.

⁴⁶ The counter-argument is that breaches may spread, and should therefore be checked at the outset. Yiannopoulos, *Praedial Servitudes* 516 argues that “any landowner should be entitled to enforce the restrictions before they creep from distant parts of the subdivision to the property next door.”

⁴⁷ Appendix C para 4.3.

⁴⁸ For title to enforce by a factor or manager, see para 4.15.

⁴⁹ This final point is covered by s 7(2)(c) of the draft bill.

⁵⁰ Other than for conservation burdens and maritime burdens, for which see para 9.21.

4.24 The main difference from the version proposed in our discussion paper⁵¹ is the way in which “detriment” is glossed. Some consultees felt that to make express mention of particular factors – the earlier version had singled out the distance between the properties and the seriousness of the breach – was to be specific without being complete. Other factors might sometimes be equally important, or even more important, and it was better to leave the court with a free hand. On reflection, we are inclined to agree. If “detriment” is to be glossed, something more general seems to be required. In practice an enforcer is unlikely to have cause to complain unless the projected breach affects the value of his right, or, the value being unaffected, it affects the manner in which the right can be enjoyed. Detriment to value or enjoyment thus forms part of our reformulation.

Liability to comply

4.25 Just as the owner of the benefited property has title to enforce a real burden, so the owner of the burdened property has a corresponding obligation to comply with its terms. That much is settled in the existing law. What is less clear, however, is whether liability extends to other parties who are connected in some way with the burdened property. If a real burden can be enforced *by* a tenant of the benefited property, as we have recommended,⁵² the question arises as to whether it can be enforced *against* the tenant of the burdened property or against other non-owning occupiers.

4.26 A real burden, as has been seen,⁵³ is either negative or affirmative in character, and for present purposes each must be considered separately.

4.27 **Negative burdens.** In *Colquhoun’s Curator Bonis v Glen’s Tr*⁵⁴ a person in right of a negative burden sought interdict against both the owner of the burdened property and his lessee. Interdict was duly granted. In another case,⁵⁵ in which the burden was ultimately held not to be breached, interdict was again sought against both the owner and his lessee. It is not clear, however, that an action can be brought against the lessee alone. In a later case,⁵⁶ in which the issue did not arise for decision, it was said that:

“If a superior desires to take action in connexion with a breach of condition, it is the vassal, and no one else, who is under obligation to him and, whether the breach is committed by the hand of the vassal, or by the hand of a lessee, it is the vassal against whom the superior must proceed, although he may, no doubt, also convene the lessee. From the point of view of the superior, the lessee is merely the vassal’s agent.”

On this analysis, primary liability rests with the owner. A lessee is liable only by virtue of his relationship with the owner and has no independent liability. A possessor who had no relationship with the owner, for example a squatter, would presumably have no liability.

4.28 This grudging recognition of the liability of non-owners in real burdens may be contrasted with the rule for negative servitudes. A negative servitude is a real right in the

⁵¹ Para 4.18 above.

⁵² Para 4.14.

⁵³ Paras 2.1 to 2.3.

⁵⁴ 1920 SC 737.

⁵⁵ *Mathieson v Allan’s Trs* 1914 SC 464.

⁵⁶ *Eagle Lodge Ltd v Keir and Cawder Estates Ltd* 1964 SC 30 at p 45 per Lord Sorn.

fullest and strictest sense, and hence enforceable against anyone who would challenge it. A servitude *non aedificandi*, for example, is a right to prevent building operations, not merely by the owner of the burdened property, but by anyone at all. From a functional point of view, negative servitudes are indistinguishable from negative burdens, and later we recommend that negative servitudes be converted into negative burdens.⁵⁷ But this raises sharply the question of whether negative burdens should be a full real right, or whether, as at present, they should be enforceable against only a limited category of possessors.

4.29 The arguments in favour of universal enforceability seem beyond challenge. The present rule for negative burdens is unclear and incoherent. There seems no good reason for allowing enforcement against tenants but not against squatters. This is to favour the unlawful possessor over the lawful. Nor is there any strong reason why a landlord should be called as defender in cases where the breach is by his tenant. The landlord has neither a right to possess nor, unless the lease says otherwise, a right to enforce the burdens against the tenant. There is also a wider point. To be effective, a negative burden must be complied with by everyone. There is little value in being able to prevent unlawful building by the owner if the same work can be carried out unchallenged by his tenant, or a liferenter, or a squatter. At best, enforcement against the owner might lead, in an indirect way, to enforcement against the person who was carrying out the unlawful work. But in many cases the owner would have no better rights against such a person than the creditor in the real burden, and the work could not be stopped.

4.30 To allow universal enforceability is fair to the benefited owner without being unfair to the possessor. A lessee has the opportunity to check his landlord's title before he takes the let, while the lease will usually grant warrandice. A squatter deserves no sympathy. Almost all our consultees agreed with this proposal.⁵⁸ Accordingly we recommend that

18. A negative burden should be enforceable against an owner, tenant or anyone else who intrudes with the burdened property.

(Draft Bill s 8(2))

4.31 **Affirmative burdens.** If a negative burden is to be of value, it must be enforceable against everybody. By contrast, an affirmative burden can be performed only once, in relation to each occurrence, and needs only one debtor. If the owner is bound, there is no particular need to make the lessee bound also. Further, where, as often, the obligation consists of the payment of money, there is no reason why the debtor need be in possession of the burdened property. Non-possessors can still write cheques. These differences between affirmative and negative burdens are recognised, although not articulated, in the present law.⁵⁹ An affirmative burden is enforceable only against the owner of the burdened property. Those with lesser rights, or with no rights,⁶⁰ are not bound. In the words of Lord Kinneir:⁶¹

⁵⁷ Paras 12.6 to 12.14.

⁵⁸ Scot Law Com DP No 106 paras 4.13 to 4.16 and proposal 12(3).

⁵⁹ An underlying difficulty is that an obligation to do something is, necessarily, an obligation against a person and not an obligation in a thing. Hence it is a personal right (albeit of an unusual sort) and not a real right. See Reid, *Property* para 347.

⁶⁰ *Wells v New House Purchasers Ltd* 1964 SLT (Sh Ct) 2.

⁶¹ *Macrae v Mackenzie's Tr* (1891) 19 R 138 at pp 145-6.

“... I should certainly think it very difficult to suppose that a superior imposing an obligation to build houses upon his land should look to anyone for the performance of that obligation, excepting to the owner of the land for the time being. ... [T]hese are obligations or conditions of the grant binding upon the vassal who for the time being holds the land in terms of the grant, and upon nobody else.”

The reason is obvious. A person who rents a flat for a month should not be liable for the cost of putting a new roof on the tenement. Only the owner should have that liability.

4.32 Of course, not all examples are so clear-cut. If a person possesses under a long lease, or a liferent, there is an argument that expenditure of an income nature – routine maintenance, cleaning, gardening and the like – should be recoverable directly from him rather than from the owner. The law reform bodies which have considered this issue in other jurisdictions⁶² have usually concluded that lessees holding on long leases should be liable for some or all affirmative burdens. On balance, however, we do not support this solution. The most important thing is to have a clear rule. The parties can then make appropriate adjustments by contract. The rule laid down by the present law is both clear and well understood. It has been relied on in negotiations for existing leases, so that if the rule were changed, the effect of such leases would also be changed. Where a lease places liability on the tenant, as is common in the commercial world,⁶³ the benefited owner might have a right of direct action on the principle of *jus quaesitum tertio*; but in any event the landlord remains liable and can then recover his expenditure from the tenant. Similarly, a (proper) liferenter is liable to the fiar for any expenditure which is of an income nature.⁶⁴

4.33 If only the owner is to be liable, it is important to be clear as to the meaning of ownership. The present law does not, in this context, require registration: a person attracts the liability of an owner immediately on delivery of the conveyance.⁶⁵ We have no proposals to change this rule. Not only does it fit in with our approach elsewhere in this report,⁶⁶ but it seems essential if a seller of property is to be protected against future liabilities. For a seller loses control of the transaction as soon as the disposition is delivered and possession yielded up. Registration is then a matter for the purchaser. But a purchaser might choose never to register, and indeed might be tempted so to choose if registration brought liability.

4.34 Two difficulties should, however, be acknowledged. First, a rule which recognises unregistered “owners” can result in too wide a distribution of liability. For example, if A sells to B and B does not register, there are then two “owners” (as so defined) of the

⁶² The following is a list of publications by law reform bodies on the general issue of liability: Law Com No 127 part XI; Property Law and Equity Reform Committee, *Positive Covenants affecting Land* (1985) (New Zealand) para 28(a) (since implemented as s 64A of the Property Law Act 1952, inserted by the Property Law Amendment Act 1986, s 3); Ontario LRC, *Covenants* pp 122-4; New South Wales Land Titles Office, *Review of the Law of Positive Covenants affecting Freehold Land* (1994) paras 6.22 - 6.31; American Law Institute, *Restatement Third, Property (Servitudes)* vol 2, 16-26.

⁶³ M J Ross & D J McKichan, *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn, 1993) paras 7.28 and 7.29, and App 1 style P1 cl 5.6.4.

⁶⁴ W J Dobie, *Manual of the Law of Liferent and Fee in Scotland* (1941) pp 205-06. However, Dobie notes difficulties with remedies (p 243).

⁶⁵ *Hyslop v Shaw* (1863) 1 M 535 at pp 575ff per Lord Curriehill. In other words, “ownership” is not, in the strict sense, ownership at all.

⁶⁶ In general we recommend that person who has right to ownership but without completing a title should have the same rights as an owner. See paras 13.3 to 13.5.

property, A and B. Are they both to be liable, or only one of them (and if so which)? If B then sells to C, and C in turn does not register, there will be three “owners”. In this situation liability ought to attach only to the last person to acquire the right. That at least should be the normal rule.⁶⁷ Later we consider some exceptions.⁶⁸

4.35 The other difficulty concerns identification. If liability is to attach to unregistered “owners”, the enforcer may be unable to discover who they are. In the example given above, A is the only name disclosed by the register. But A has no liability. To sue A would be to sue the wrong person. Occasionally the confusion might even be deliberate. An energetic debtor could seek to avoid liability by disposing the property secretly to a second party, who might then dispose to a third party. The creditor would always be one step behind. Later we make proposals for joint and several liability in certain circumstances.⁶⁹ Another way of helping the creditor would be to place an obligation on any person who had at one time been owner of the burdened property to disclose the name and address of the current owner (if known) or any information which is relevant to establishing such name and address.

4.36 No special provision is needed for insolvency. If the owner of a burdened property is sequestrated, the property passes to his trustee in sequestration, who then attracts liability as the person with right to ownership. It does not matter that the trustee has not completed title by registration. If the burden is not complied with, the trustee might have difficulty in disposing of the property. Company liquidation, receivership, and administration produce a similar result but in a different way. The burdened property remains the property of the company, but the company falls to be administered by the liquidator,⁷⁰ receiver⁷¹ or administrator⁷² rather than by its board of directors. The position of heritable creditors in possession is considered later.⁷³

4.37 Quite often property is owned in common, for example by husband and wife. In that case, and adopting the solution used in our report on the law of the tenement,⁷⁴ each co-owner should have joint and several liability. It should be enough for the enforcer to identify one owner without having to identify both; and an affluent co-owner should not be able to shelter behind an impecunious one. However, the owner who is called upon to perform should have a right of relief against the other owner or owners, liability being divided according to the size of shares.

4.38 We recommend that

19. (a) Subject to recommendation 21, an affirmative burden should be enforceable only against the owner of the burdened property.

⁶⁷ See para 13.5.

⁶⁸ Paras 4.41 to 4.47.

⁶⁹ Paras 4.41 to 4.47.

⁷⁰ *Stair Memorial Encyclopaedia* vol 4, para 757. And see Insolvency Act 1986 ss 91(2) and 103.

⁷¹ *Imperial Hotel (Aberdeen) Ltd v Vaux Breweries* 1978 SLT 113, and *Independent Pension Trustee Ltd v LAW Construction Co Ltd* 1997 SLT 1105. But compare *Shanks v Central Regional Council* 1987 SLT 410. For powers of receivers to bring actions, see Insolvency Act 1986 s 55, sched 2 para 5.

⁷² Insolvency Act 1986 s 14(1), (4), sched 1 para 5.

⁷³ Paras 13.7. to 13.9.

⁷⁴ Scot Law Com No 162 para 5.80.

(b) By “owner” is meant the person who has right to the property whether or not title has been completed (and where there is more than one such person, the person who has most recently acquired such right).

(c) If the property is owned in common, each owner should be liable jointly and severally, but subject to a right of relief proportionate to the size of the shares.

(d) Any person who formerly owned the burdened property should be under an obligation to disclose to a person with title to enforce such information as he may have, directly or indirectly, as to the name and address of the current owner.

(Draft Bill, ss 5, 10 and 114)

Transmission of rights and liabilities

4.39 **The general rule.** It follows from what has just been said that, at least as a general rule, rights and liabilities in respect of real burdens will transmit according to the creation or extinction of rights in the relevant properties.⁷⁵ Thus if the benefited property is sold, the new owner can enforce in place of the old. No assignation of enforcement rights is needed.⁷⁶ And if a person ceases to hold a lease of the benefited property, whether because the lease comes to an end or because it is assigned, so he ceases to have title to enforce. If the lease was extinguished, the title to enforce is extinguished, while if the lease was assigned, the title to enforce passes to the assignee. The position is much the same in relation to the burdened property. Liability in respect of a negative burden depends on intromission with the property, and is lost when that intromission ceases. For a restriction on use presupposes current use. In the case of affirmative burdens, liability is determined by ownership. If A owns, A has liability. If A transfers to B, liability passes to B. Sometimes, however, this “floating” liability can crystallise and continue to attach to a particular person even after that person has ceased to be owner, a topic explored further below.⁷⁷

4.40 **Right to reimbursement.** Earlier we recommended that an interest to enforce should lie where the enforcer has incurred maintenance or other costs which, in terms of the burden, fall to be reimbursed.⁷⁸ A practical problem is that those owed money may be slow to take enforcement proceedings, particularly against neighbours, so that by the time proceedings are begun they may no longer own (or lease) the benefited property. On a strict view they would then have interest but no title, while their successors as owner (or tenant) would have title but no interest. The debtor should not escape liability on a technicality. Payment should remain due, and the proper creditor is the person who incurred the expenditure. We recommend therefore that, contrary to the general rule

20. A person who, at the time when a cost was incurred, had title to seek its reimbursement under a real burden, should not lose that title merely on the

⁷⁵ The current law is substantially the same.

⁷⁶ *Braid Hills Hotel Co Ltd v Manuels* 1909 SC 120.

⁷⁷ Paras 4.41 to 4.47.

⁷⁸ Para 4.23.

ground that he has ceased to hold the right in the benefited property on which the title was founded.

(Draft Bill s 7(2)(c))

4.41 **Liability for affirmative burdens.** Liability in respect of affirmative burdens rests with the owner for the time being of the burdened property.⁷⁹ Difficult questions arise, however, when ownership changes.⁸⁰ The current law is undeveloped, and rests largely on the decision of the First Division in *Marshall v Callander and Trossachs Hydropathic Co Ltd*.⁸¹ The burden in that case imposed an obligation to build a hydropathic establishment to the value of £15,000, and thereafter to maintain it. The burden then continued:

“... in case the said buildings are, or any part thereof is, destroyed, to rebuild the same or the part destroyed so as to maintain the total value of £15,000.”

When the buildings were destroyed by fire, the superior raised an action to require their reinstatement. The owners responded by transferring the property to a company without any assets. It was held that, once a burden has become prestable, liability cannot be avoided by transfer. While the new owner was also liable, this liability was held concurrently with the former owner.

4.42 Since it is far from clear when an obligation becomes “prestable” in the sense indicated in *Marshall*, we suggested in the discussion paper that a different approach might be considered.⁸² This would be for liability to be lost with ownership, so that an incoming owner would have sole liability for affirmative obligations, regardless of when they became due. This is similar to the rule which operates in French law,⁸³ and in legal systems based on French law.⁸⁴ Its main advantage is simplicity: the current owner will always be liable. But we suggested that this simple rule should not apply in relation to maintenance and similar costs which were shared with other properties. That would be unfair to purchasers, who might find themselves liable for common repairs which had been completed but not paid for and which were undetectable by visual inspection.⁸⁵ For shared costs we suggested the rule which we had previously recommended for tenements.⁸⁶ Primary liability would remain with the outgoing owner but, in a question with the enforcer, there would be concurrent liability in the incoming owner. In effect this was the rule in *Marshall*, but reduced to the status of an exception.

4.43 On reconsideration, there seems little to be gained from the change proposed. Even if *Marshall* were to become the exception rather than the rule, it would still be necessary to decide when an obligation becomes prestable. And since transmission of liability is rarely an issue unless there is shared expenditure, the effect of the change would be largely

⁷⁹ Paras 4.31 to 4.38.

⁸⁰ For the purposes of the draft bill, “ownership” changes on delivery of the disposition by seller to purchaser. See paras 13.3 to 13.5. The difficulties are, of course, confined to affirmative burdens. All possessors are liable in respect of negative burdens, and such burdens do not accumulate arrears.

⁸¹ (1895) 22 R 954. But see also *Rankine v Logie Den Land Co Ltd* (1902) 4 F 1074.

⁸² Scot Law Com DP No 106 paras 4.23 to 4.28.

⁸³ Code Civil art 699.

⁸⁴ Eg Louisiana Civil Code arts 746, 1764. See further A N Yiannopoulos, *Civil Law Property* (2nd edn, 1980) paras 139-43. The obligations are sometimes characterised as being *propter rem*.

⁸⁵ By contrast, in an ordinary repair, the liability to pay would not transmit as it would be merely contractual and due to a third party builder.

⁸⁶ Scot Law Com No 162 paras 8.12 to 8.16.

theoretical. The exception would be used much more often than the rule. We have also had second thoughts about the rule itself. All things being equal, it seems better that liability should not be discharged by the simple expedient of conveying the property to someone else. The opportunity for abuse is obvious. In *Marshall* the transfer was to a company with no assets.⁸⁷ We conclude, therefore, that the rule in *Marshall* should remain.

4.44 That leaves the difficulty of determining when an obligation becomes due (“prestable”) such that liability remains with the outgoing owner. We think that this should be restricted to clear and obvious cases. In order to become due, a clear date for performance should be provided for, either in the constitutive deed⁸⁸ or under the general law. So an obligation to build a wall within two years would become due on the expiry of the stipulated period. An obligation to rebuild, as in *Marshall*, would become due when the original building was destroyed. By contrast, a general obligation of maintenance would not become due without some triggering event. For common repairs that would normally be a decision by the affected owners to carry out a particular repair, taken in the manner provided for by the constitutive deed, or, if the deed was silent, a decision by a majority of owners under the provision recommended later in this report.⁸⁹ Under the Development Management Scheme, described in part 8, an instalment of service charge becomes due on the date stipulated in the notice requiring payment.⁹⁰

4.45 The incoming owner would also be liable, for liability runs with ownership of the burdened property.⁹¹ The liability would be joint and several, and an enforcer could sue either for the full amount. But primary liability would lie with the outgoing owner, and an incoming owner who was made to pay or otherwise perform would have a right of relief. The new owner is merely cautioner for an existing debt. No doubt in practice the issue would often be regulated in the missives of sale, as at present. Later we recommend that a purchaser of property regulated by the Development Management Scheme should be able to limit his liability for unpaid arrears by obtaining a certificate from the manager of the development.⁹²

4.46 Occasionally the position might be more complex. Thus suppose that within a short period of time A sells a property to B who then re-sells to C, and further suppose that, prior to the sale, A has a liability under an affirmative burden of £2000 and B a further liability of £1000. In a question with a person with title to enforce the burden, A would be liable for £2000 and B and C for £3000;⁹³ but if C has to pay he could recover the full amount from B or alternatively £2000 from A and £1000 from B. If B has to pay he could recover £2000 from A.

4.47 We recommend that

⁸⁷ Today a court today would probably lift the veil of incorporation, if the shareholder were also the seller. See eg *Jones v Lipman* [1962] 1 All ER 442.

⁸⁸ In the case of one-off obligations, this is a condition of initial validity: see *Gammell's Trs v The Land Commission* 1970 SLT 254.

⁸⁹ Paras 7.33 to 7.41. This would be an example of a date provided by the general law. But in fact this example is expressly catered for in the draft bill: see s 9(4).

⁹⁰ Development Management Scheme r 19.3. The scheme is set out in sched 3 of the draft bill.

⁹¹ Paras 4.31 to 4.38.

⁹² Para 8.51.

⁹³ B is liable, not only for his own £1000, but for the £2000 originally due by A. Both amounts were due at the time he ceased to be owner.

21. (a) Notwithstanding recommendation 19(a), a person who was owner of the burdened property at the time when an obligation under an affirmative burden became due (or was already due) should not cease to be liable for the obligation by virtue only of ceasing to be owner; but such liability should be held jointly and severally with any successor or successors as owner.
- (b) An obligation should be regarded as having become due on any date or on the occurrence of any event which was stipulated for its performance.
- (c) Where an owner performs an obligation for which a former owner remained liable under (a), he should have a full right of relief against that owner.

(Draft Bill, s 9)

4.48 **Damages for consequential loss.** Nothing in our proposals is intended to disturb the rule that a person who is in breach of an obligation may be liable in damages for consequential loss. Such liability is personal, and would not be transferred with ownership. Thus suppose that A(1) is in breach of a real burden of maintenance. As a result damage is caused to the benefited property, owned by B. A(1), having still failed to carry out the maintenance, then sells to A(2). Under the proposals made earlier, both A(1) and A(2) would be liable for carrying out the act of maintenance; but A(1) alone would be liable in damages to B. In practice it would be unusual for consequential loss to arise as a result of the breach of a real burden.

Division of benefited and burdened properties

4.49 The original benefited property in a real burden might be divided into two – or twenty or two hundred – separate plots and each sold separately. The same might occur with the burdened property. Division is common in practice and gives rise to a number of difficulties.

4.50 **Benefited property.** If the benefited property is divided into separate plots which pass into separate ownership, each plot becomes a benefited property in its own right. That, at least, is usually assumed to be the law, although the point has not been expressly decided.⁹⁴ Viewed from the burdened property, however, this result is scarcely satisfactory. An increase in benefited owners means an increased likelihood of enforcement, although in practice not all such owners may be able to show sufficient interest. A more serious objection is the difficulty of obtaining consensual discharge. If the benefited property is divided into fifty units, the burdened owner must seek out fifty signatures for a minute of waiver. In practice this can scarcely be done, in which case the owner is driven to applying to the Lands Tribunal for judicial discharge. It is hardly necessary to emphasise that these events are wholly beyond the burdened owner's control. In accepting property which is subject to a real burden, the owner is also accepting the possibility of a multiplication of benefited owners.

⁹⁴ Reid, *Property* para 409.

4.51 One way of dealing with this problem would be to say that, on division, only one successor part can acquire the status of a benefited property. It would be for the person carrying out the division to decide which that should be. Failure to nominate any of the parts would have the effect of extinguishing the burden. In the discussion paper we suggested this rule for rights of pre-emption and redemption,⁹⁵ and we repeat that suggestion now. By their very nature, rights of pre-emption and redemption can be exercised only by one person, and to allow a multiplication of enforcement rights would be to create insoluble issues of priority as between competing claims.⁹⁶ Other burdens are or may be in a different position. If a burden is designed to protect the amenity of an entire property, it seems unreasonable that, on division, a choice should have to be made as to which part is to be protected and which not. The force of this argument, however, varies with the extent of the original property, the size and location of the subdivided parts, and the nature of the burden. In the case of a small property which is divided into two equal parts, there is much to be said for allowing both parts to take the benefit of an amenity burden. The position is different if the property extends to 50 hectares, from which small and scattered plots are being sold over a long period of time.

4.52 A compromise seems possible. We suggest that the multiplication of benefited properties be discouraged without actually being forbidden. In routine conveyancing, a plot which is sold off from a larger whole should not receive the status of a benefited property. Only the part which is retained should have that status. But it should be possible for the break-off conveyance to provide otherwise. Thus it might be provided that both the part being sold and the part being retained would be benefited properties, or only the part being sold. We would be surprised if this were often done in a case where small plots are being sold from a much larger whole, if only because the owner of the retained land will wish to retain control over the granting of minutes of waiver. But the facility would be useful, and used, in cases of more modest properties and more equal subdivision.

4.53 The same principle would apply further down the line. If the original benefited property were divided into two, and appropriate provision made in the disposition, both parts would become benefited properties in their own right. A future transfer of such a property would have no effect on its status as a benefited property; but if part only were transferred, that part would cease to be a benefited property unless the disposition otherwise provided.

4.54 The suggested rule presupposes that, on division, one part is sold and the other part retained. That would almost always be the case, for even if the owner intends to dispose of both parts, there is likely to be a period, if only of a few days, during which one remains in his ownership. In the unlikely event that both dispositions were registered on the same day, there would be two simultaneous disposals and no retention, in which case the right to enforce would be lost unless the dispositions provided otherwise.

4.55 Community burdens should be excluded. Such burdens are conceived for the benefit of the entire community, regardless of the number of units into which it comes to be

⁹⁵ Scot Law Com DP No 106 paras 8.42 to 8.47. A similar suggestion was made in relation to formerly feudal burdens which had been converted into neighbour burdens under s 18 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. See Scot Law Com No 168 paras 4.48 to 4.50. In the event the recommended provision was dropped from the Bill as introduced to Parliament. The intention now is that all neighbour burdens should be treated in the same way, regardless of provenance.

⁹⁶ See para 10.32.

divided. In a community each unit is both a benefited and a burdened property, and division should affect neither the right nor the obligation. An exclusion is also necessary for properties which are identified as benefited properties under the transitional provisions recommended later for implied enforcement rights.⁹⁷ This is because the basis of identification is already the importance for those properties of the burdens in question. Subject to these exceptions, however, the rule should apply to all real burdens regardless of when they were created, but only in respect of divisions taking place after the coming into force of the legislation.

4.56 We recommend that

22. (a) **Where part of a benefited property is conveyed, that part should, on registration, cease to be a benefited property unless different provision is made in the conveyance.**
- (b) **Where different provision is made in the case of a right of pre-emption, redemption or reversion, the part retained should cease to be a benefited property.**
- (c) **This recommendation does not apply to community burdens, or to a property which is a benefited property only by virtue of recommendations 89 to 92.**

(Draft Bill s 11)

4.57 In cases where no contrary provision is made, the result will be to reduce the extent of the benefited property. That affects, not only the benefited property, but the burdened property also. Even today the entry on the register for the burdened property may give details of the benefited property. For real burdens created under the new legislation, that will become standard practice. In registering a conveyance of the benefited property, therefore, the Keeper should be given power to make any necessary alterations to the title sheet of the burdened property.⁹⁸

4.58 **Burdened property.** Three issues arise. First, there is the effect of division on negative burdens. This is straightforward. If, as usually, the burden affects the entire property, each constituent part will continue to be affected after the division. A burden is not discharged merely by selling off part of the affected property. This result follows from the very nature of real burdens,⁹⁹ and no special provision is needed. Each part then becomes a burdened property in its own right.¹⁰⁰ If, however, the burden affects part of the property only, other parts, sold separately, would not be subject to the burden. A more accurate way of analysing this situation is to say that only the part actually affected by the restriction was the burdened property in relation to that particular burden.

4.59 Next there is the effect of division on affirmative burdens. If those with enforcement rights are not to be prejudiced, the owner of each subdivided part should remain liable for

⁹⁷ Paras 11.48 to 11.67.

⁹⁸ Draft bill s 97.

⁹⁹ Reid, *Property* para 414.

¹⁰⁰ See s 12 of the draft bill. This status as a separate burdened property is sometimes of importance, eg in relation to the applications to the Lands Tribunal for discharge, which can only be made (s 84(1)(a)) by the owner of a burdened property.

the whole obligation. An enforcer would then have a choice of debtors. That is the current law.¹⁰¹ The person from whom performance was obtained would then have a right of recovery against the other owners *pro rata*. At present the basis of recovery is unclear. The simplest measure of apportioning liability would be by superficial area, and we suggest that this be used unless some alternative provision is made either in the constitutive deed or in the deed effecting the division. In the case of a tenement flat, measurement would be by floor area.¹⁰² Occasionally the nature of an affirmative burden is such that it can be performed in one part of the burdened property only. In that case the other part, if separated, should not be subject to the burden. For example, if the original burdened property comprised a house and a garden, and the garden was sold separately, the owner of the garden should not be liable for the maintenance of the house. Once again, this situation can be analysed as one in which the true burdened property was the house alone, and not the combined house and garden. We recommend that

- 23. (a) Where a burdened property is divided, the owner of each constituent part should be jointly and severally liable for the performance of any affirmative burden.**
- (b) There should be a right of relief among the owners -**
- (i) on the basis specified in the constitutive deed or deed effecting the division, or**
 - (ii) if no such basis is specified, proportionate to the respective areas of the constituent parts.**
- (c) (a) should not apply to a constituent part on which the burden in question could not be performed.**

(Draft Bill s 12)

4.60 Finally, there is the issue of implied enforcement rights. As the law currently stands, division of the burdened property may have the effect of conferring enforcement rights on each of the constituent parts. This means that, as well as remaining burdened properties, they may also become benefited properties. Division of the burdened property is the second of the two situations identified by Lord Watson in *Hislop v MacRitchie's Trs*¹⁰³ as giving rise to implied enforcement rights. In part 11 we recommend a qualified abolition of this rule.¹⁰⁴ Here it is only necessary to note that enforcement rights will continue to follow division in the case of community burdens, not on the basis of the rule just described, but because each unit in the community is a benefited property as well as a burdened property.¹⁰⁵

Interpretation

¹⁰¹ Reid, *Property* para 414.

¹⁰² So in mixed development of flats and villas, liability would be apportioned by a mixture of floor area and superficial area. For a discussion of floor area in the context of tenements, see Scot Law Com No 162 para 5.65.

¹⁰³ (1881) 8 R(HL) 95. See para 11.6.

¹⁰⁴ The rule will survive only in respect of burdens registered before the appointed day, and then subject to a maximum distance of four metres between the two properties. See in particular paras 11.48 to 11.56.

¹⁰⁵ Earlier we recommended a special rule for community burdens following the division of the benefited property: see para 4.55.

4.61 There is in principle a difference between (i) the identification of the text which is to be interpreted and (ii) the method of interpretation which is then to be applied, although this difference is sometimes blurred in practice. So far as (i) is concerned, the rule is that the full terms of a burden must appear in the constitutive deed, and hence on the register. In interpreting these words, the courts cannot seek out additional words. Thus, for this purpose at least, extrinsic evidence is inadmissible. The reason for the rule is to protect third parties who rely on the register. Earlier we suggested some modifications to this rule, but for the most part it is both unexceptionable and satisfactory.¹⁰⁶ In this section we are concerned only with (ii), the method of interpretation.

4.62 Real burdens, like servitudes, are interpreted by reference to a presumption in favour of freedom.¹⁰⁷ The rule in other countries is usually the same.¹⁰⁸ But in Scotland, this presumption has become the basis of an interpretative style which verges on hostility. Rather than seeking to make the burden work, the courts have sometimes been more concerned with uncovering ambiguity and vagueness. They have not been disappointed. The drafting of burdens is frequently indifferent; but even where it is well done, the intrinsic uncertainty of language, when combined with the difficulty faced by any draftsman of predicting the particular facts which have actually occurred, have given the courts ample scope for action. Many burdens, of course, survive this interpretative scrutiny; but there are also numerous cases in which apparently blameless burdens have either been stripped of much of their effect, or declared void from uncertainty.¹⁰⁹ It is not hard to understand the reasons for this approach, which dates from the last thirty years of the nineteenth century. By that time many real burdens were already seventy or eighty years old, and showing signs of age. But, until 1970,¹¹⁰ no judicial mechanism was available for their extinction. In its absence the courts seem often to have operated a system of extinction by interpretation. Judicial hostility, however, was confined to real burdens. Servitudes, as a much more confined class of restriction, were treated with considerable leniency. This difference in approach has been judicially acknowledged, although not justified.¹¹¹

4.63 If the true objection to real burdens is that they are too restrictive, or too long-lasting, or too out-of-date, it seems better to tackle these issues directly.¹¹² Here the introduction of the Lands Tribunal jurisdiction was an important first step, and the recommendations in this report, if implemented, would carry matters a great deal further. But if interpretation is no longer to be used as a means of extinction, it becomes necessary to consider more carefully what the applicable rules ought to be.

4.64 In our *Report on Interpretation in Private Law*, we recommended that the following general rule should apply in the interpretation of documents and other juridical acts:¹¹³

¹⁰⁶ Paras 3.24 and 3.25.

¹⁰⁷ This is number (8) of the rules of preference identified in appendix B to Scot Law Com No 160.

¹⁰⁸ Eg, Louisiana Civil Code art 783; C G van der Merwe & M J de Waal, *The Law of Things and Servitudes* (1993) para 218.

¹⁰⁹ There is a substantial case law, which is reviewed in Reid, *Property* paras 415 ff.

¹¹⁰ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1.

¹¹¹ *McLean v Marwhirn Developments Ltd* 1976 SLT (Notes) 47. And compare *Axis West Developments Ltd v Chartwell* 1999 SLT 1416 with *Heritage Fisheries Ltd v Duke of Roxburghe* 2000 SLT 800.

¹¹² Scot Law Com No 160, para 7.5.

¹¹³ Private Law (Interpretation) (Scotland) Bill, sched, rule 1 (in Scot Law Com No 160, appendix A).

“(1) Any expression which forms part of a juridical act shall have the meaning which would reasonably be given to it in its context; and in determining that meaning regard may be had to -

- (a) the surrounding circumstances; and
 - (b) in so far as they can be objectively ascertained, the nature and purpose of the juridical act.
- (2) For the purposes of this rule the surrounding circumstances do not include -
- (a) statements of intention;
 - (b) instructions, communings or negotiations forming part of the process of preparation of the juridical act;
 - (c) conduct subsequent to the juridical act.”

There is no bar as such on the admission of extrinsic evidence,¹¹⁴ but subrule (2) excludes subjective material. Since real burdens often relate to physical objects, the admission of some extrinsic evidence is already established practice.

4.65 The considerations affecting the interpretation of provisions imposing real burdens do not seem obviously different from those which affect other provisions in deeds relating to land and intended for registration. If that is correct, the same general rule should apply. It should be emphasised that the rule suggested is objective in nature. It pays regard to what the parties said, and not to what they intended to say.¹¹⁵ An objective approach is essential in the case of real burdens, which run with the land and may come to affect many others apart from the original parties.

4.66 The presumption for freedom would remain. So would other applicable rules of preference, such as the *contra proferentem* rule.¹¹⁶ But rather than founding a whole system of interpretation, these rules would be used only in cases of doubt, where the general rule had failed to produce a clear result.¹¹⁷ The *contra proferentem* rule would continue to be of use for neighbour burdens, but does not seem applicable to community burdens.¹¹⁸

4.67 If the policy goal seems reasonably clear, it is less clear how it is to be achieved. In our discussion paper we identified three possibilities.¹¹⁹ One was to do nothing, and wait for legislation implementing our report on interpretation. A second approach was to incorporate the general rule of interpretation into the proposed legislation on real burdens. It would then apply to real burdens but not to other juridical acts. A third possibility was to include in the real burdens legislation some very general statement, such as that provisions imposing real burdens are to be interpreted in the same manner as other provisions in deeds relating to land and intended for registration. We did not favour the second approach, on the basis that the rules of interpretation should not be changed for real burdens alone. The first approach seemed to carry risks. There might be a long delay in implementing our report on interpretation. Meanwhile there could be no guarantee that the courts would

¹¹⁴ Ibid s 2, explained in part 8 of the report.

¹¹⁵ Scot Law Com No 160, part 2.

¹¹⁶ This is number (2) of the rules of preference identified in appendix B to Scot Law Com No 160.

¹¹⁷ Scot Law Com No 160, part 6.

¹¹⁸ Reid, *Property* para 415; American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 501.

¹¹⁹ Scot Law Com DP No 106 paras 4.31 to 4.37.

adopt a more indulgent approach to real burdens. On this point the message from recent case law is rather mixed.¹²⁰ Our provisional view, therefore, was that the third approach was to be preferred. Consultees agreed. Accordingly, we recommend that

24. Provisions imposing real burdens should be interpreted in the same manner as other provisions in deeds relating to land and intended for registration.

(Draft Bill s 13)

Remedies

4.68 For cases of breach, the usual armoury of remedies is available, including interdict, damages and implement.¹²¹ At one time real burdens in the sense discussed in this paper tended to become confused with pecuniary real burdens, which have as their exclusive and distinctive remedies poiding of the ground and real adjudication. In *Wells v New House Purchasers Ltd*¹²² an owner who had paid certain repairs and insurance costs sought to recover a share from his neighbour by an action for payment. The action was defended on the basis that a real burden could be enforced only by poiding of the ground or real adjudication, and that a personal action was incompetent. The defence was repelled and decree granted. In the court's view the defender had confused real burdens in the modern sense with pecuniary real burdens, which were now obsolete. Even before *Wells* the law was not in doubt. Later we make proposals for the final abolition of pecuniary real burdens.¹²³

4.69 In the course of its very full examination of the law of restrictive covenants, the Law Commission of England and Wales recommended that it should be possible for the deed creating a land obligation which involved the carrying out of works to give the benefited owner a right, in the event of non-compliance, to enter the burdened property and carry out the work himself. The cost could then be recovered.¹²⁴ This is probably already the law in Scotland,¹²⁵ and clauses of this kind are sometimes encountered in practice; but the matter is put beyond doubt by a recommendation made earlier in this report.¹²⁶

4.70 Apart from the use of irritancy, which is considered below, the existing law in relation to remedies seems satisfactory, and we have not been made aware of any calls for its reform.

Irritancy

4.71 By irritancy we mean the forfeiture of the burdened property as a penalty for breach of a real burden. We are not concerned here with an arrangement which brings the burden itself to an end on the occurrence, or non-occurrence, of a particular event, such as the expiry

¹²⁰ *Lothian Regional Council v Rennie* 1991 SLT 465; *Meriton Ltd v Winning* 1995 SLT 76; *Heritage Fisheries Ltd v Duke of Roxburghe* 2000 SLT 800; *Grampian Joint Police Board v Pearson* 2000 GWD 15-610.

¹²¹ Reid, *Property* para 423.

¹²² 1964 SLT (Sh Ct) 2.

¹²³ Paras 13.29 and 13.30.

¹²⁴ Law Com No 127, paras 6.16(c) and 13.28 - 13.31.

¹²⁵ *Borland & Co's Tr v Paterson* (1881) 19 SLR 261. However, this was a case between the original parties.

¹²⁶ Paras 2.5 to 2.8.

of a period of time.¹²⁷ Such arrangements, though uncommon, are usually perfectly lawful.¹²⁸

4.72 There is no legal irritancy for real burdens, as there is for feuduty, but traditionally a grant in feu would include a conventional irritancy. Feudal irritancies will disappear with the abolition of the feudal system.¹²⁹ In non-feudal grants irritancy clauses are rare, although not unknown. Doubt has been expressed as to their validity due to the absence of any contractual or other nexus between successors of the original parties.¹³⁰ A practical problem is that a non-feudal benefited property – by contrast to a superiority – can be fragmented into different parts, making it unclear which of the owners is to receive the benefit of the irritancy. But even if irritancies are competent and workable, we see no case for their retention. The remedy is usually out of all proportion to the wrong. In the case of a lease, it may be perfectly reasonable for a landlord to be restored to his property if the tenant does not pay the rent.¹³¹ But an owner who sells his property outright should not have it back without payment just because the purchaser keeps a dog as well as a cat. No doubt the prospect of irritancy encourages compliance. But, as Professor Rennie has pointed out:¹³²

“[T]his type of argument has about as much merit in principle as the suggestion that capital punishment should be reintroduced for those who drop litter. The streets of Scotland might certainly be cleaner but that would hardly justify the punishment.”

Irritancies can, of course, often be purged, but there is no automatic right to purge a conventional irritancy, and the attitude of the court has varied.¹³³

4.73 Consultees supported the proposal in our discussion paper that irritancy for real burdens be abolished. We recommend, therefore, that

25. Any irritancy clause which relates to real burdens should cease to have effect.

(Draft Bill s 56)

¹²⁷ For a discussion of such arrangements in the context of servitudes, see *Cusine & Paisley, Servitudes* para 16.29.

¹²⁸ See para 3.27.

¹²⁹ *Scot Law Com No 168* para 4.89.

¹³⁰ See the discussion in Reid, *Property* para 424.

¹³¹ However, irritancies in leases may also operate unfairly and are to be reviewed as part of our Sixth Programme of Law Reform (*Scot Law Com No 176*, paras 2.5 to 2.8).

¹³² R Rennie, “The Theory and Ethics of Irritancy” 1994 JR 283 at p 290.

¹³³ *Ardgowan Estates Ltd v Lawson* 1948 SLT 186; *Anderson v Valentine* 1957 SLT 57; *Precision Relays Ltd v Beaton* 1980 SC 220.

Part 5 Extinction

Introduction

5.1 In principle, real burdens last forever. That is both a strength and a weakness. It is a strength because the relationship of land to land is, in its nature, a permanent one. If the use of property A is to be restricted for the benefit of property B, the restriction would be of little value if it were lost every time that ownership happened to change. The value of a real burden does not depend on the identity of individual owners. Hence the praedial rule, described earlier.¹³⁴ But permanence is also a weakness. Over time the condition of the properties is likely to change. A rural enclave may become a busy suburb. A residential area may become a centre of commerce. A building which a burden was designed to preserve may have fallen into decay and no longer be capable of economic repair. And social and economic habits change also. The boiling of horses and the manufacture of tallow are not as common as once they were. The sale of alcohol is more widespread. Today its prohibition may seem picturesque or, as the case may be, irksome.¹³⁵ Of course not all burdens are so susceptible to the ravages of time. Burdens preserving amenity in a residential part of a Victorian suburb may be as relevant today as when first imposed 150 years ago. But in the end all burdens are likely to become out of date, and when they do the result is to prevent the efficient utilisation of the affected land.

5.2 Long before burdens can be classified as obsolete, their usefulness will probably have diminished. Sometimes this is because the process of change described above has begun but not yet been completed. But it may also be because the burden is of little value to the benefited owner. In real burdens, personal benefit and praedial benefit are not easily separated. A real burden may comply with the praedial rule, and yet be primarily a means of satisfying the idiosyncratic preferences of the person who imposed it. When that person ceases to own, the burden may lose its value. The result is the same if the current owner happens to place a low value on the amenity which the burden seeks to preserve. A common complaint about feudal burdens was that the superior was indifferent to compliance, and concerned mainly with the revenue generated by minutes of waiver. If the vassal was willing to pay then, very often, the superior was willing to grant a discharge. As burdens become less useful, the balance of burden and benefit begins to change, until the point is reached where the burden on the affected property is disproportionate to any benefit which might be conferred by insisting on compliance.

5.3 It follows from what has been said that an efficient system of real burdens requires an efficient system of discharge, and further, that the system should be linked in some way to the passage of time. Burdens should not survive beyond the point where they have ceased to be useful; and even before that stage is reached, it should be possible to remove those burdens which interfere with the reasonable use of the affected property.

5.4 Under the current law, the normal method of extinguishing a real burden is to approach the person or persons with enforcement rights with a request for a discharge. The conveyancing deed used for this purpose is a minute of waiver. The request does not always succeed. The benefited owners may turn out to be unyielding or greedy or impossible to contact or simply too numerous to make a waiver a practical proposition. In such cases the burdens live on, and the burdened owner must comply or risk the consequences. With feudal burdens, in particular, there is sometimes a ransom element in

¹³⁴ Paras 2.9 to 2.18.

¹³⁵ *Manz v Butter's Trs* 1973 SLT (Lands Tr) 2.

waivers, by which a person who may be perfectly indifferent as to whether a burden survives can name his price for its removal. The position was greatly improved by the introduction, in 1970, of a special jurisdiction in the Lands Tribunal for Scotland for the variation and discharge of burdens.¹³⁶ This provides an alternative to protracted negotiations with an obdurate superior or neighbour and has been much used. It also provides a helpful context for such negotiations, and has probably served to contain the cost of minutes of waiver. But the Lands Tribunal is often not a practical alternative to seeking a waiver. A judicial process does not produce instant results. Overall costs may turn out to exceed the costs of a waiver, particularly if the application is opposed. And above all there is a risk of failure. Although many more applications succeed than fail,¹³⁷ there can be no guarantee of success.

5.5 The difficulties should not be overstated. Real burdens, in a post-feudal world at least, are not random impositions. They protect properties or communities of properties. If benefited and burdened owners are in dispute as to the continuation of a burden, it should not be assumed that the former are always in the wrong. The burden may have been designed precisely to stop the kind of activity which it is now proposed be carried on.

5.6 The fact that a burden must be registered means that no one buying a property should be in ignorance of the burdens which affect it. The reality, however, appears to be otherwise. Only 62% of those who took part in our Title Conditions Survey claimed to know that their property was affected by real burdens.¹³⁸ Of those, around three quarters (ie just under half of all those surveyed) knew about the burdens before moving into the house. Detailed knowledge of the burdens was not especially high, although a majority of those with some previous knowledge thought that a copy of the deed of conditions could be found somewhere in the house. These figures suggest that most purchasers do not weigh carefully the package of real burdens before deciding whether or not to buy. Typically they buy with little in the way of detailed knowledge. Slightly over half of those surveyed bought without any knowledge of the burdens at all. This has some bearing on the approach to be adopted to discharge. Except in a question between the original parties, burdens are not contractual in nature.¹³⁹ They have not been freely entered into. A purchaser who does not want the burdens must give up the house, a solution so drastic that it is rarely chosen. But more usually there is no knowledge and hence no choice. In the matter of real burdens, owners are conscripts rather than volunteers.

5.7 This, then, is the background against which reform of the law must be considered. On the one hand the law permits the use of real burdens, and hence their enforcement. But on the other hand it seeks to limit and control that use by allowing for the extinction of burdens in cases where it is appropriate to do so. The introduction of the Lands Tribunal jurisdiction had the effect of easing discharge, both directly and, through its impact on minutes of waiver, indirectly. The abolition of the feudal system will remove the category of burden which was subject to the most criticism. In this part of the report we make further proposals for facilitating the extinction of real burdens.

¹³⁶ Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 and 2.

¹³⁷ Para 6.5.

¹³⁸ See generally part 2 of the Title Conditions Survey (reproduced in appendix C). It may be assumed that their solicitors knew.

¹³⁹ For the argument that feudal burdens were, in a technical sense, contractual, see Reid, *Property* para 393. The argument disappears with the abolition of the feudal system.

Methods of extinction

5.8 Real burdens may be varied or extinguished in a number of different ways. In this part of the report we consider variation and extinction arising by (i) minute of waiver¹⁴⁰ (ii) notice of termination¹⁴¹ (iii) acquiescence¹⁴² (iv) negative prescription¹⁴³ and (v) confusion.¹⁴⁴ (vi) The role of the Lands Tribunal is considered separately, in part 6. (vii) Certain specialities affecting community burdens are discussed in part 7. (viii) The effect of compulsory purchase is considered in part 13.¹⁴⁵ We have no proposals in relation to the following, relatively unimportant, methods of extinction: (ix) loss of interest to enforce¹⁴⁶ (x) physical changes affecting either property¹⁴⁷ (xi) mutuality principle¹⁴⁸ and (xii) failure to appear on the Land Register, following first registration.¹⁴⁹ Apart from the first, they are not mentioned again in this report.

Minute of waiver

5.9 As already mentioned, the standard method of varying or discharging a real burden is by minute of waiver granted by the benefited owner or owners and registered in the Land Register or Register of Sasines. In research by Cusine and Egan this was found to be the route chosen in 64% of the cases examined.¹⁵⁰ This compares with a mere 3% in which applications were made to the Lands Tribunal.¹⁵¹ An informal letter of consent can be used in place of a minute of waiver if the burden does no more than prohibit an activity “without the consent of” the benefited owner.¹⁵² Usually a charge is made for minutes of waiver, and in addition the burdened owner will be expected to pay the legal expenses of both sides.

5.10 **Who must grant?** Obviously the device of minute of waiver should remain, though the actual term need not be used, either in the deed itself or in the proposed legislation.¹⁵³ The rule is simply that a real burden is discharged, in whole or in part, by an appropriate deed granted by or on behalf of the owner of the benefited property. This re-states the current law. In practice partial discharge is much more common than full discharge, if only because the less that is asked the more likely it is to be granted. An owner can only discharge in respect of his own property, and if there is more than one benefited property the burden is not fully discharged unless the owner of each signs the deed. But on the other

¹⁴⁰ Paras 5.9 to 5.17.

¹⁴¹ Paras 5.22 to 5.57.

¹⁴² Paras 5.60 to 5.66.

¹⁴³ Paras 5.67 to 5.72.

¹⁴⁴ Paras 5.73 to 5.80.

¹⁴⁵ Paras 13.10 to 13.28.

¹⁴⁶ Reid, *Property* para 430.

¹⁴⁷ *Ibid*, para 434.

¹⁴⁸ *Ibid*, para 435.

¹⁴⁹ *Ibid*, para 437.

¹⁵⁰ Cusine & Egan, *Feuing Conditions* chap 4 paras 7 and 11 ff, and table 4.7. These figures include 5% who bought the superiority, which is a functional equivalent of minutes of waiver.

¹⁵¹ *Ibid*, chapter 4 para 14.

¹⁵² Cusine & Egan (chap 4 paras 9 and 10, and table 4.4) found that a “letter of comfort” (ie informal consent) was obtained in 22% of all cases. It is unlikely that so high a figure can be wholly accounted for by cases where the consent of the benefited owner is required, and it seems that such letters are also being used as cheap and informal minutes of waiver.

¹⁵³ Consistently with the terminology in the rest of the draft bill, s 14 uses the term “deed of discharge”. But conveyancers remain free to continue with “minutes of waiver”, and there is no reason why the deed should not continue to “waive” a burden rather than to “discharge” it.

hand, the discharge by an owner is effective for all purposes affecting that (benefited) property. This is important because, in future, enforcement rights will extend from the owner of the benefited property to those holding possessory real rights – tenants, liferenters and the like.¹⁵⁴ The new enforcement rights, however, are conceived as parasitic on the primary right held by the owner, so that if the owner discharges the burden the ancillary rights fall away. It is no part of our proposals that a tenant or liferenter should have to sign a minute of waiver.

5.11 Something should be said about the position of heritable creditors.¹⁵⁵ As a general rule the debtor in a security must not put at risk the position of his creditor. The distinction is between ordinary acts and prejudicial acts. A prejudicial act can be set aside if the creditor did not consent.¹⁵⁶ We doubt whether the granting of a routine minute of waiver could be regarded as an act prejudicial to the creditor. The creditor's consent is not, therefore, required, and is rarely found in practice.¹⁵⁷ But there may sometimes be special cases. A debtor/owner who, against a payment of £30,000, discharges the burden protecting his glorious view is likely to cause a significant reduction in the value of the security subjects, and hence prejudice his creditor. Such examples will be rare, admittedly, but they suggest that the protection afforded by the common law should not be taken away from creditors.¹⁵⁸ We have no proposals for change.

5.12 **Unregistered granters.** In a modern case it was suggested that a servitude could be discharged by an owner whose title had not been completed by registration.¹⁵⁹ The position for real burdens has not been judicially considered, but the cautious view is that a registered title is required, if only because this is not one of the cases where statute provides for deduction of title.¹⁶⁰ If that is the law, we think it should be changed. Our policy in this report has been to enfranchise unregistered owners,¹⁶¹ and in the case of minutes of waiver the arguments seem compelling. Often a minute of waiver requires to be granted quickly and at short notice. The precipitating event is frequently a sale of the burdened property, and the sale may be lost altogether if the waiver is not obtained in time. If a waiver has a number of granters, there is a reasonable chance that one or more will not have a registered title. The need to complete title can add to the delays. It may even lead to an argument with the granter, and to a lengthy correspondence. In some cases a person may be perfectly willing to grant a waiver but at the same time deeply reluctant to complete his title. Executors and trustees might fall into this category. The difficulty is solved if a registered title is not required for minutes of waiver.¹⁶² In Sasine titles, however, the granter who had not registered would require to deduce title in the usual way.¹⁶³

¹⁵⁴ Paras 4.3 to 4.9.

¹⁵⁵ For the special position of heritable creditors *in possession*, see paras 13.7 and 13.8.

¹⁵⁶ *Mitchell v Little* (1820) Hume 661; *Reid v McGill* 1912 2 SLT 246; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363.

¹⁵⁷ Much the same position obtains if the debtor/owner *grants* areal burden: see para 3.19.

¹⁵⁸ Here we depart from the provisional view adopted in our discussion paper: see Scot Law Com DP No 106 paras 5.30 and 5.32 (proposal 18(1)).

¹⁵⁹ *McLennan v Warner & Co* 1996 SLT 1349 at p 1353 I-L. For a discussion of this case, see G L Gretton, "Servitudes and Uninfert Proprietors" (1997) 2 SLPQ 90.

¹⁶⁰ The main provision on deduction of title is s 3 of the Conveyancing (Scotland) Act 1924.

¹⁶¹ See eg para 3.17.

¹⁶² In the draft bill, this is achieved by the definition of "owner" in s 114.

¹⁶³ Draft bill s 50(1). For Land Register titles the midcouples would be submitted to the Register. See Land Registration (Scotland) Act 1979 s 15(3).

5.13 **Who is the grantee?** Under our proposals, negative burdens can be enforced, not merely against the owner of the burdened property (as in the case of affirmative burdens), but also against a tenant, liferenter, or other person who makes use of that property.¹⁶⁴ At the moment, waivers are sought exclusively by owners, and it is unclear whether a non-owner could be the grantee. The doubt should be resolved. In the first place, it should be made clear that a discharge does not require a grantee as such. By contrast to a deed of constitution, there is nothing for a grantee to receive. All that is happening is that an existing right is being extinguished. But of course there would be no objection if a grantee were named, in the traditional way. In the second place, a discharge should be available to anyone against whom the burden is enforceable. A person should not be made subject to burdens without being given the means of seeking their removal.¹⁶⁵ A tenant, for example, should be able to negotiate, and if necessary pay for, a discharge, rather than having to operate through his landlord. For the duration of the lease, the burden affects the tenant and not the landlord; and there is no possible prejudice to the landlord in the removal of an encumbrance. A replacement real burden, however, would require the signature of the landlord, in the usual way.¹⁶⁶ Since there may be no grantee, the rule is best expressed by a statement that a discharge can be registered by an owner of the burdened property or by any other person against whom the real burden is enforceable.

5.14 **Registration.** As under the current law, the minute of waiver must be registered against the burdened property,¹⁶⁷ and the date of discharge is the date of registration. In cases where the burden was registered against the benefited property also¹⁶⁸ the Keeper would be empowered to make a consequential amendment to the title sheet of that property.¹⁶⁹

5.15 **Replacement burdens.** Sometimes the discharge of one burden is conditional on the imposition of another. A replacement burden cannot, as the law currently stands, be included in a minute of waiver, so that two separate deeds are required.¹⁷⁰ The difficulty is removed by the recommendation, made earlier, that it should be possible to create a real burden in any deed which contains the relevant information.¹⁷¹ But in such a case the minute of waiver would need to be signed by the burdened owner as well as by the benefited owner, and there would have to be dual registration.

5.16 **Recommendation.** We recommend that

26. (a) **A real burden should be discharged, as respects any benefited property, by registration of a deed granted and subscribed by or on behalf of the owner of that property.**

¹⁶⁴ Paras 4.27 to 4.30. The rule is the same for ancillary burdens (for which see paras 2.5 to 2.8).

¹⁶⁵ Later we recommend that the same principle should apply in relation both to notices of termination (para 5.30), and applications to the Lands Tribunal for discharge (para 6.47).

¹⁶⁶ Para 5.15.

¹⁶⁷ Land Registration (Scotland) Act 1979 s 18. For possible doubts as to whether registration is mandatory, see Scot Law Com DP No 106 para 5.31.

¹⁶⁸ This would be mandatory for new burdens: see paras 3.3 to 3.10.

¹⁶⁹ Para 13.32.

¹⁷⁰ Reid, *Property* para 388.

¹⁷¹ Paras 3.11 ff.

(b) A real burden may be discharged wholly or in part.

(c) A deed of discharge should not require a grantee; but it could be presented for registration by or on behalf of an owner of the burdened property or any other person against whom the burden was enforceable.

(d) For the purpose of this recommendation “owner” includes a person who has right to the property but has not completed title; but, except in a case where section 15(3) of the Land Registration (Scotland) Act 1979 applies, such a person must deduce title in the constitutive deed.

(Draft Bill ss 14, 58(1)&(2), and 114)

5.17 The overall effect of this, and other, recommendations, should be to make minutes of waiver easier to obtain than at present.¹⁷² For new burdens, the requirement of dual registration for deeds of constitution means that the benefited property will always be disclosed on the register.¹⁷³ So the extent of enforcement rights will be immediately apparent. For existing burdens, our proposals for implied enforcement rights will both help to identify the benefited properties while also reducing their number to manageable levels.¹⁷⁴ Special provision is made later for community burdens, which are to be discharged either by the manager of the community or by the owners of a majority of the benefited properties.¹⁷⁵ In all cases the person granting the discharge need not have completed title by registration. Further, the availability of other methods of extinction of burdens – set out in this and the following part of the report – should have the effect both of encouraging consensual discharge and of reducing its cost. In any event, a neighbour is much less likely to ask for payment than a superior, and it may be that the abolition of the feudal system will largely bring to an end the practice of payment for minutes of waiver. These are important improvements to the current position. Nonetheless cases will remain where minutes of waiver are, in practical terms, unavailable. There may be too many benefited owners; or a particular benefited owner may be unyielding; or it may simply be that other methods of discharge¹⁷⁶ are more attractive. Some of these other methods will be considered shortly, but first it is necessary to say something about the problem of ageing burdens.

Ageing burdens

5.18 **The nature of the problem.** Scotland, almost uniquely,¹⁷⁷ has had real burdens for 200 years. Most properties are affected by burdens of one kind or another, and many are affected by two or three different sets, of different vintages. Many of these burdens are out of date. All conveyancers are familiar with the Victorian building charter, which, in the sale of land for development, imposes detailed conditions about how the land is to be used. Nothing is left to chance. Only certain types of buildings can be erected. The plans must be approved in advance. The height, the building line, the type of stone and slate are all specified. Elaborate provision is made for roads and sewage. Today these burdens are spent. The Victorian development was duly built. Probably it was built in accordance with the charter, but even if it was not the right to complain has long since been lost, by

¹⁷² For difficulties under the current law, see Scot Law Com DP No 106 para 5.5.

¹⁷³ Paras 3.3 to 3.10.

¹⁷⁴ Paras 11.29 ff.

¹⁷⁵ Paras 7.48 ff.

¹⁷⁶ Particularly discharge by notice of termination: see paras 5.26 ff.

¹⁷⁷ A similar problem arises in England and Wales. Other countries came later to restrictive conditions.

acquiescence or by negative prescription. Yet these provisions – long-winded, poorly punctuated, and in faded copperplate – continue to clutter up the titles of many houses in Scotland.

5.19 Another familiar Victorian burden is the nuisance clause containing, in the words of Lord Shaw of Dunfermline, “the usual grotesque enumeration of noxious and offensive businesses and trades”.¹⁷⁸ The example litigated in one modern case¹⁷⁹ prohibited the carrying on of

“... any soap work candle work tan work slaughter house cattle mart skin work dye work oil work lime work distillery brewery or other manufacture or chemical process of any kind nor to deposit nauseous materials thereon nor to lay any nuisance or obstructions on the roads or streets adjoining said ground nor to do any other act which may injure the amenity of the place and neighbourhood for private residences ...”.

Many of the listed trades no longer exist, but even if they did it is difficult to believe that planning permission would be given for the change of use.

5.20 When a title is registered for the first time in the Land Register, the opportunity is taken to delete burdens which are obviously obsolete or unenforceable. But in matters of this kind the Keeper is bound to be cautious, because his indemnity fund is at stake.¹⁸⁰ And while registration of title has improved matters by eliminating some spent burdens, it has also made the problem of those remaining more obvious by bringing all the burdens together in the one place. The result is not attractive. It reflects little credit on our system that the section of the title sheet dealing with burdens (the D Section) is usually longer – sometimes very much longer – than the rest of the title sheet put together. This suggests, misleadingly, that the most important aspect of owning land in Scotland is the extent to which the use of that land is restricted. The position can only get worse. A hundred years from now the burdens of the nineteenth century are unlikely to seem any more inviting or more useful than they do today.

5.21 Yet it should not be supposed that the relationship between age and usefulness is straightforward. That there is *some* relationship seems self-evident.¹⁸¹ All things being equal, an old burden is more likely to be obsolete than a new one; and, as was mentioned earlier, all burdens will in the end become out of date.¹⁸² But burdens plucked freshly from the word processor can be foolish, just as burdens from a previous age may be wise. Research by Cusine and Egan shows no strong correlation between the age of a burden and

¹⁷⁸ *Porter v Campbell's Trs* 1923 SC(HL) 94 at p 99.

¹⁷⁹ *Mannofield Residents Property Co Ltd v Thomson* 1983 SLT (Sh Ct) 71.

¹⁸⁰ If the Keeper omits a real burden which was previously live, the burden is extinguished but the Register is inaccurate, with the result that indemnity may have to be paid under s 12(1) of the Land Registration (Scotland) Act 1979. The Keeper's practice is explained thus in the (official) *Registration of Title Practice Book* para 7.24: “In terms of section 6(1)(e) the Keeper must enter in the title sheet any subsisting real burden or condition. If the Keeper is satisfied that any real burden or condition no longer subsists, it will be omitted. Prescription or obsolescence may apply, but the Keeper would not necessarily be aware this was the case.”.

¹⁸¹ It is for this reason that the age of a burden is included as one of the factors to which the Lands Tribunal is directed to have regard in considering applications for discharge and for renewal: see para 6.79.

¹⁸² Para 5.1.

the desire of an owner to have it discharged.¹⁸³ The position varies from burden to burden, making generalisations hazardous. Some generalisations must, however, be attempted. Roughly speaking, elderly burdens fall into one of three groups. These are:

- (a) *Obsolete but harmless.* Obsolete burdens are often harmless. If the Victorian house has been built, it may not matter very much that the obligation to carry out the work remains on the register. Similarly, a prohibition on “soap work” is unlikely to disturb the sleep of most homeowners (and may be welcome to their children). The objection to the continuing presence on the register of burdens of this kind is partly aesthetic and partly a wish to avoid unnecessary transactions costs.¹⁸⁴
- (b) *Obsolete and harmful.* Almost as often a burden which is obsolete, or at least obsolescent, inflicts positive harm by preventing or obstructing some reasonable use of the burdened property. Here burden and benefit have become or are becoming out of balance. Sometimes this means that the benefited owner will willingly relinquish his rights. But it may also encourage obduracy coupled with a demand for payment. It is true, of course, that a person affected by burdens which are obviously out of date will usually enjoy success at the Lands Tribunal.¹⁸⁵ But most people do not make applications to the Lands Tribunal, and litigation does not seem a satisfactory method of dealing with obsolescence.
- (c) *Of continuing value.* A third, and probably much smaller, group comprises those burdens which are of continuing value. Here age has made no difference. In a settled residential area, a prohibition on trade or on certain types of building work may make as much sense today as when first imposed 150 years ago. There is no reason why burdens of this kind should not be allowed to survive.

The difficulty lies in devising a scheme which, without imposing an unacceptable work load on either the Keeper or on individual owners, manages to extinguish burdens falling into the first two groups whilst preserving those falling into the third.

5.22 A sunset rule? The response in some jurisdictions has been to introduce a “sunset rule”, that is to say, a rule which provides that when a burden reaches a certain age, it should automatically cease to have effect. In Massachusetts, for example, a law of 1961 provides that all existing restrictive conditions are to cease to have effect after 50 years, while no new condition can be created with a life of more than 30 years.¹⁸⁶ Ontario limits covenants to 40 years.¹⁸⁷ In England and Wales the Law Commission recommended a limit

¹⁸³ Cusine & Egan, *Feuing Conditions*, tables 3.8 and 5.6. Around one third of the burdens in respect of which discharge was sought were less than 40 years old.

¹⁸⁴ On the latter point the English Law Commission (Law Com No 201, para 2.9) has commented that: “[E]very time property which is subject to such covenants is acquired the prospective new owner or his professional adviser must consider and advise upon the covenants in detail. He may conclude that they are of no importance, but the need for that work adds time and expense to the conveyancing process ... With covenants continuing indefinitely, that inconvenience recurs regularly in relation to the same covenants.”

¹⁸⁵ See generally part 6.

¹⁸⁶ Massachusetts General Laws ch 184 ss 27 and 28 (inserted by an Act of 1961 ch 448).

¹⁸⁷ Land Titles Act c 230 s 118(9); Registry Act c 445 ss 104 & 106. And see also Ontario LRC, *Covenants* pp 56-7.

of 80 years although this recommendation was not accepted by the then government.¹⁸⁸ The Law Reform Commission of Western Australia has recently considered, but rejected, the idea of a sunset rule.¹⁸⁹ A sunset rule is invariably accompanied by an opportunity for renewal at the end of the period of initial validity. Sometimes the renewal period is shorter than the initial period. In Massachusetts, for example, burdens are valid for an initial period of 30 years, but may thereafter be renewed for 20 years at a time.¹⁹⁰ Usually there is no limit to the number of times a burden can be renewed. Renewal is by the benefited owner alone, either by registration of a notice,¹⁹¹ or by application to a court or tribunal.¹⁹²

5.23 In our discussion paper we put forward for consideration a possible sunset scheme for Scotland.¹⁹³ We distinguished between existing real burdens, and real burdens created after the legislation came into force. The period of initial validity for existing real burdens would be in the range of 100 to 150 years. At the end of that period the burdens would be automatically extinguished unless the benefited owner was able to persuade the Lands Tribunal of their continuing usefulness, in which case they would be renewed for up to 100 years. No further renewal would be possible. New burdens would be treated less favourably, with a shorter period of validity (in the range of 80 to 100 years) and no possibility of renewal. Some burdens would be exempt from the sunset rule, most notably those concerned with the maintenance and use of common facilities. As we pointed out, a sunset rule has obvious advantages as well as obvious disadvantages.¹⁹⁴ The main advantages are simplicity and certainty. The main disadvantage is that there is inadequate discrimination between burdens which are obsolete and those which are of continuing value.

5.24 On consultation, these proposals met with a mixed reception. While many consultees were in favour of some kind of sunset rule, many others were opposed, including the Faculty of Advocates, a working party of members of the W S Society (but not the Law Society or the Scottish Law Agents Society), and the Royal Institution of Chartered Surveyors. Those opposed emphasised two points. First, there was the fact that “it seems contrary to experience that the mere passage of any period of time renders a condition redundant unless there have been changes in other surrounding circumstances”.¹⁹⁵ No doubt the passage of time will often be accompanied by such change; but in the absence of change the burdens remain of value. Secondly, there was the danger of burdens being lost by inadvertence. As the Faculty of Advocates noted:

“[A]ny scheme for renewal requires a perhaps unrealistic degree of vigilance on the part of the benefited proprietor. The importance of a particular real burden will become apparent to him probably only when he is faced with some development on his neighbour’s property which interferes with his amenity or is otherwise harmful

¹⁸⁸ Law Com No 201, Part III. And see Hansard HL 17 Oct 1995 WA 91. The Law Commission is to return to the subject of restrictive covenants as part of its seventh programme of law reform: see Law Com No 259.

¹⁸⁹ Law Reform Commission of Western Australia, *Report on Restrictive Covenants* (Project No 91) (1997) paras 5.15 and 5.16.

¹⁹⁰ Massachusetts General Laws ch 184 s 27(b) (inserted by an Act of 1961 ch 448).

¹⁹¹ This is the model favoured in North America.

¹⁹² This was the model recommended by the Law Commission in respect of England and Wales: see Law Com No 201 paras 3.34 - 3.75.

¹⁹³ Scot Law Com DP No 106 paras 5.73 to 5.82 and 7.6 to 7.14.

¹⁹⁴ Scot Law Com DP No 106, paras 5.70 and 5.71.

¹⁹⁵ The quotation is from the response by Mr David A Johnstone.

to the enjoyment of his property. It is in that context that he is likely to look to his title. In practice, he is unlikely to have become aware when the burdens in his title were in danger of imminent expiry by passing over the horizon by the sunset rule and accordingly may well have lost rights the importance of which to himself (and indeed perhaps to other neighbours) only becomes apparent in specific circumstances.”

5.25 We accept these criticisms, but think that they can be met by a modification to the scheme. Under our revised proposals a burden would not be extinguished without intimation to the benefited owner, generally by service and registration of a notice (to be known as a notice of termination). An automatic sunset would thus be replaced by a triggered sunset. If no notice were registered, the burden would continue as before, even although the period of initial validity had expired. A notice of termination would be challengeable before the Lands Tribunal on the ground that the burden remained of value. This means that if the usefulness of a burden was a matter of dispute, the issue would be resolved by the Lands Tribunal rather as under the present law. The difference is that the application would have to be brought by the benefited owner and not, as at present, by the burdened owner. However, the existing Lands Tribunal route would continue to be available and in some cases might be preferable.¹⁹⁶ The scheme proposed may be characterised as a form of self-assessment. In preparing a notice of termination the burdened owner comes close to stating that the burden has ceased to be of value. If that assessment is accurate, the burden will be extinguished. If the assessment is, or may be, inaccurate, the notice may be challenged. We turn now to the details of the proposed scheme.

Termination procedure in outline

5.26 **Duration.** The first question to determine is the length of the period of initial validity. The provisional preference stated in our discussion paper was 150 years for community burdens and 100 years for neighbour burdens, with slightly shorter periods for new burdens. Most consultees who commented on this issue were opposed to the idea of different periods. Simplicity required a single period for all real burdens, and the period most commonly suggested was 100 years. We are content with this approach. Unless the differences are large, there is not a strong case for different periods. Further, the move from automatic to triggered sunset allows for a shorter period than was originally proposed. We suggest that the period of initial validity should be 100 years. That is still a substantial period: if the benefit of a burden has been enjoyed for as long as 100 years it seems not unreasonable that its continuation should be subject to the possibility of review. The effect of our proposal would be that the termination procedure could be used in respect of all burdens imposed in the Victorian period or earlier. Some exceptions are mentioned below.

5.27 The 100 years would begin to run as at the date when the burden was first created. Normally this will be the date of registration of the constitutive deed or, in the case of a break-off conveyance incorporating a deed of conditions by reference, the date of registration of the conveyance.¹⁹⁷ The position would not be affected by subsequent variation. For example, if a burden was created in a disposition registered in 1897, and if

¹⁹⁶ See further part 6.

¹⁹⁷ However, in a case where s 17 of the Land Registration (Scotland) Act 1979 applies, the relevant date will be the date of registration of the deed of conditions.

thereafter the burden was waived in part by a minute of waiver registered in 1934, the relevant date would be 1897 and not 1934. The same would be true if the variation was the result of an order by the Lands Tribunal.

5.28 Excluded burdens. It is possible to identify certain classes of burden which are so little affected by the passage of time that they should not be subject to the termination procedure. The most obvious example is facility burdens, that is to say, burdens which regulate the maintenance, management, reinstatement or use of a common facility (such as shared amenity ground or a private water system). Consultees were in agreement that burdens of this kind should be excluded. However, a maintenance burden should not survive where the obligation has been taken over by a local authority or other public body. So Victorian burdens about streets and sewers would not be saved. The exclusion of facility burdens is consistent both with our proposals in relation to implied enforcement rights¹⁹⁸ and also with the saving in the Feudal Act for burdens which regulate common facilities.¹⁹⁹ The effect of this exclusion is, more or less, to restrict the termination procedure to burdens concerned with amenity.²⁰⁰

5.29 We suggest four further exclusions. A burden which binds the owner of land to provide services, from that land, to some other land, is not sensitive to the passage of time and should be excepted. Such ‘service burdens’, though uncommon, are of considerable importance to the benefited owner. Our proposal here is consistent with the treatment of service burdens elsewhere in this report²⁰¹ and also in the Feudal Act.²⁰² A number of consultees supported a second exception for conservation burdens,²⁰³ on the ground that it was illogical to provide for the automatic extinction of a burden which might be designed to preserve historical integrity. History does not become out of date. The counter-argument is that some conservation burdens will be concerned with environmental matters, which are subject to rapid scientific and social change. On balance, however, we are inclined to support an exemption for conservation burdens.²⁰⁴ If such a burden had ceased to be appropriate, it would remain open to the burdened owner to seek a waiver or make an application to the Lands Tribunal in the usual way. Thirdly, we would add maritime burdens, which regulate the foreshore and seabed in the public interest.²⁰⁵ Both conservation burdens and maritime times are accorded special treatment in the Feudal Act.²⁰⁶ Finally, there should also be excluded the narrow class of burdens already excluded from the jurisdiction of the Lands Tribunal in respect of applications for discharge.²⁰⁷

5.30 Terminator. As real rights, real burdens are capable of affecting not merely owners but also tenants, liferenters and other persons who come to make use of the burdened property. Earlier we recommended that non-owners who were affected by a real burden should be able to seek a minute of waiver.²⁰⁸ A similar rule will operate for applications to

¹⁹⁸ Paras 11.34 to 11.42.

¹⁹⁹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(1). The definition of “facility burden” is the same in all three cases.

²⁰⁰ For the distinction between facility burdens and amenity burdens, see paras 11.30 and 11.31.

²⁰¹ Para 11.40.

²⁰² Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(2).

²⁰³ For conservation burdens, see paras 9.10 ff.

²⁰⁴ This departs from the provisional view expressed in para 5.77 of Scot Law Com DP No 106.

²⁰⁵ For maritime burdens, see para 9.26.

²⁰⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 26 to 32, and 60.

²⁰⁷ Listed in sched 6 of the draft bill. See further paras 6.37 to 6.43.

²⁰⁸ Para 5.13.

the Lands Tribunal for discharge.²⁰⁹ For consistency, the same rule should operate here also, although in practice we imagine that the termination procedure would be used mainly by owners. A person using the termination procedure is referred to in this report, and in the draft bill, as “the terminator”. If the original burdened property had come to be divided, each part would be treated as a separate burdened property, and a notice registered in respect of one part would have no effect on the other.

5.31 Two stages. We envisage two distinct stages. First, the terminator would give formal intimation of an intention to register a notice of termination. This would alert the benefited owner or owners, and give the opportunity to apply to the Lands Tribunal for renewal of the burden. If no application were made by a specified date, the terminator could then proceed to the second stage, which is the execution and registration of a notice of termination. The effect of registration would be to extinguish the burden.

5.32 Value of procedure. Intimation and registration are innovations. Our original proposal was that burdens would lapse automatically at the end of the statutory period unless they had been renewed. The revised scheme, more cumbersome in nature, may be thought to resemble too closely the existing procedure for discharge by the Lands Tribunal. Indeed, if a Tribunal application is unopposed and so granted as of right,²¹⁰ it may sometimes be both cheaper and quicker. Nonetheless there seem good reasons for introducing the new procedure. A Tribunal application involves a court process. For that reason alone it will be unattractive to many owners. The termination procedure will rapidly become familiar to solicitors. Usually it will be straightforward to operate, and hence quick and relatively cheap. In current practice, applications to the Lands Tribunal are infrequent, and are typically restricted to a specific variation to allow land to be used for a particular purpose. In all other respects the burdens remain in force. The termination procedure could be used in this way too, of course, but it could also be used for the once and for all extinction of all burdens affecting the property (subject to the exceptions mentioned earlier). As practice evolves, it may become common for owners to cleanse the title of burdens before offering property on the market – or for purchasers to require that this be done. In this way many antiquated burdens would be removed from the register. Finally, a choice will remain. An owner who prefers to make an application to the Lands Tribunal will be free to do so. The termination procedure is an additional facility. There is no requirement that it be used. Some other factors are mentioned later.²¹¹

Stage 1: intimation

5.33 To whom? Intimation must be given to the owner of any benefited property and, where the terminator is not the owner (or is only one of the owners), to the owner of the burdened property also. Two practical difficulties arise. In the first place, the terminator may be uncertain as to the identity of the benefited properties. For the first 100 years of the scheme, all of the burdens being dealt with will have been created before the passing of the legislation, and hence before the introduction of dual registration. Not only will the burden often be registered against the burdened property alone, but the entry may give little or no indication of the benefited properties. Proposals made later in this report will help clarify

²⁰⁹ Para 6.47.

²¹⁰ Under proposals made later: see paras 6.13 to 6.17.

²¹¹ Para 5.57.

the position;²¹² but nonetheless the terminator may feel uncertain that he has successfully identified all of those to whom intimation should be made. Secondly, even if accurate identification proves possible, the result may be to disclose an unworkably large number of properties. In a housing estate with express enforcement rights, a burden might be enforceable by all of the houses in the estate. Individual intimation to each and every one of those houses would be expensive and time-consuming. It would also, largely, be pointless, for the owners of more distant properties are likely to be indifferent as to whether the burden survives or falls, and in many cases would not have an interest to enforce.

5.34 We suggest that individual intimation should be mandatory only in the case of close neighbours. The rule in planning law is that planning applications must be notified to those with rights in “neighbouring land”, and for this purpose “neighbouring land” means land within four metres, subject to some qualifications.²¹³ The same rule might conveniently be adopted here. If a close neighbour, individually notified, is content with the terms of the notice, it is likely that those further away would be similarly content. The four-metre rule also forms the basis of our solution to the problem of implied enforcement rights for burdens imposed under a common scheme,²¹⁴ so that, in that case at least, there would be a coincidence of enforcement rights and the requirement of individual intimation. The distance of four metres would be measured on a horizontal plane, on the hypothesis that both properties were on the same level. So in a mixed estate comprising villas and blocks of flats, the distance between a flat and a villa would be measured without regard to the difference in levels. As in planning law, roads (ie carriageways but excluding verges)²¹⁵ would be disregarded unless at least 20 metres in width. No account would be taken of pertinents (such as common rights held in a private road or recreational ground), and the measurement would be from property to property. In appropriate cases the intimation could be made at the same time as neighbour notification for planning purposes. Strictly, of course, intimation is necessary only in respect of properties which carry enforcement rights; but in practice the terminator might find it easier, and safer, to intimate to all properties within a four-metre radius rather than attempt to identify from a search of the register which properties qualify as benefited properties. The owner of property to which intimation was made but which was not a benefited property would have no standing to apply to the Lands Tribunal.

5.35 The four-metre radius might not exhaust the benefited properties. In that case the terminator would have a choice. There could be individual intimation to the remaining benefited properties; or a newspaper advertisement would be sufficient. The method selected is likely to depend on the number of properties involved, and on whether it is possible to identify them accurately. Individual intimation would, however, be mandatory in the case of other owners (if any) of the *burdened* property.

5.36 **How?** Individual intimation would be effected by sending a copy of the proposed notice of termination.²¹⁶ As a matter of formal validity there seems no reason to insist on registered post or recorded delivery; but we imagine that one of these methods will usually

²¹² Paras 11.28 ff.

²¹³ Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224 art 2(1).

²¹⁴ Para 11.50.

²¹⁵ See draft bill s 113(1) (definition of “road”). Compare here the definition in s 151(1) of the Roads (Scotland) Act 1984. The exclusion is for practical reasons: the extent of a verge is not always easy to determine.

²¹⁶ “Sending” means delivery, whether by post or otherwise, or sending by electronic means. See draft bill s 115(2).

be adopted in practice, if only to provide evidence of intimation to the Keeper in respect of the Land Register.²¹⁷ As will be seen, however, not all notices will in the end be registered. If the name of the owner is unknown, it should be sufficient to address the notice to “The Owner” or synonym.²¹⁸ The notice must be as complete as possible.²¹⁹ In particular, it must contain a list of the names and addresses of all those to whom individual intimation is to be made. This is crucial information for the recipient of the notice, allowing him to contact others similarly affected and to consider the possibility of a joint challenge. The notice would be accompanied by an explanatory note, in statutory form, setting out in simple language the purpose of the notice and the action now open to the recipient.²²⁰

5.37 Where intimation is made by newspaper advertisement, the advertisement must (i) identify the burdened property (ii) set out the terms of the burden in full or by reference to the constitutive deed²²¹ (iii) give the name and address of a person from whom a copy of the notice of termination can be obtained and (iv) warn that the burden may be extinguished unless an application for renewal is made to the Lands Tribunal. A copy of the advertisement should be retained for production to the Keeper.

5.38 **Form and content of notice.** A statutory form of notice would be provided.²²² The notice would identify both the burdened property and the real burden or burdens. The same notice could be used for a number of burdens provided that they were contained in the same constitutive deed; and the notice could seek complete termination or termination in part only. A notice of termination could thus be used in different ways. A person prevented by a real burden from building an extension or a garage might seek to have the burden terminated only to the extent of allowing the building in question. Here a notice of termination would be being used in much the same way as a minute of waiver or an application to the Lands Tribunal for discharge. Notices of this kind are likely to be common, if only because the more modest the request, the higher the chance that the notice will not be challenged. Alternatively the notice might seek the complete discharge of the burden, or the discharge of all of the burdens. A notice which turned out to be over-ambitious and to attract opposition could always be withdrawn and replaced by a more modest version.²²³

5.39 The notice would specify the date – known as the “renewal date” – by which time applications to the Lands Tribunal must normally be made. This should not be earlier than eight weeks beginning with the date of intimation.²²⁴ Since the renewal date must appear in the incomplete notice which is sent for the purposes of intimation, it will be necessary to anticipate the date of intimation and, probably, to err on the side of caution. A terminator

²¹⁷ Since an unintimated notice of termination is not legally effective, the Keeper may be unwilling to remove a burden from the Land Register unless he has satisfactory evidence as to intimation. Note 7 of the Notes for completion in sched 1 of the draft bill warns that: “Since evidence of posting may be required at the time of registration in the Land Register, it is recommended that the notice be sent by recorded delivery or registered post.”

²¹⁸ Draft bill s 115(1)(b).

²¹⁹ Draft bill s 19(2)(a). See below for the content of a notice of termination. Since the notice must specify the date of intimation, it cannot in practice be completed in all respects. Obviously it would not yet be signed.

²²⁰ For the recommended form of explanatory note, see sched 1 to the draft bill.

²²¹ The alternative is to prevent advertisements of unmanageable length – and cost.

²²² It is set out in sched 1 of the draft bill.

²²³ For withdrawal of notices, see para 5.55.

²²⁴ Intimation occurs on the date of sending: see s 115(3) of the draft bill. If intimation took place on several dates, the relevant date would be last.

who envisages negotiation may wish to allow a period longer than eight weeks. Once intimation has occurred the details must be recorded in the notice.

Stage 2: execution and registration

5.40 When a notice of termination has been drawn up and intimated, four responses seem possible. One is silence. The benefited owners have no strong views, and the termination is unopposed. A second is universal opposition. The owner of the benefited property applies to the Lands Tribunal for renewal, or, if there is more than one such property, all the owners apply (in practice acting together and sharing expenses). A third is partial opposition. The owners of some benefited properties apply to the Lands Tribunal. Others do not. The final possible response is negotiation. Neither party wishes to litigate, and a compromise is successfully brokered. These four possible outcomes are now considered in turn.

5.41 **No opposition.** Once intimation has taken place, the owners²²⁵ of the benefited properties have a minimum period of eight weeks in which to make an application to the Lands Tribunal. The precise date – the renewal date – is set out in the notice of termination. If the terminator has judged the situation correctly, no such application will be made. In that case he is free to execute and register the notice.

5.42 Since the contents of the notice will, to some extent, be taken on trust, the terminator should be required to swear or affirm before a notary public that the information contained in the notice is true, to the best of his knowledge and belief. A similar requirement is imposed in respect of notices served under the Abolition of Feudal Tenure etc. (Scotland) Act 2000.²²⁶ As with that Act, the oath or affirmation would require to be made personally and not through a solicitor or other agent.²²⁷ In the case of a juristic person, the oath or affirmation would be given by a person authorised to sign on its behalf.²²⁸ The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. After execution the notice would be registered, against the burdened property.²²⁹ No warrant of registration is required.²³⁰

5.43 The effect of registration would be to extinguish the burden in the manner and to the extent provided for in the notice of termination. In order that the Keeper has satisfactory evidence that no application for renewal has been made, we suggest that the notice of termination contain a certificate to that effect signed by a member of the Lands Tribunal or by its clerk. It is assumed that the Tribunal will charge a fee for this service.²³¹ Thus the procedure would be for the terminator to wait eight weeks, after which he could send the notice to the Tribunal to have the certificate endorsed. Once this had been done the notice

²²⁵ Only owners may apply: see para 6.50.

²²⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 18(4), 20(15), and 33(3). Similar provision is made later in this report in relation to notices of preservation (para 11.75) and notices of converted servitude (para 12.12).

²²⁷ However, where an individual is unable to swear or affirm by reason of a legal disability (such as nonage) or incapacity (caused, for example, by mental disorder), this could be done by a guardian, a curator bonis, a person acting under a continuing power of attorney or other similar representative. See draft bill s 20(2)(a).

²²⁸ Draft bill s 20(2)(b). The principal rules are set out in sched 2 to the Requirements of Writing (Scotland) Act 1995.

²²⁹ The Keeper would, however, be able to make consequential amendments to the title sheet of the benefited property: see para 13.32.

²³⁰ Warrants of registration are abolished on the appointed day by s 5(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

²³¹ Section 21(3) of the draft bill confers the necessary power.

could be registered. It would not be competent to register in the absence of a certificate. The whole procedure, from beginning to end, would have taken around two months.

5.44 In practice, difficulties with real burdens often come to light when property is being sold, and it is reasonable to assume that a common use of notices of termination will be during a sale transaction. Given the time periods involved, it is likely that a notice of termination initiated by the seller will frequently fall to be registered by the purchaser, to whom ownership has now passed. The legislation will need to make clear that a purchaser has power to register a notice which was originally drawn in the name of the seller.²³²

5.45 **Universal opposition.** By “universal opposition” we mean that the notice is opposed (i) by the owners of all the benefited properties and (ii) in respect of all of the burdens listed in the notice. Sometimes, of course, there will only be one of each. A notice is opposed by making an application to the Lands Tribunal for renewal of the burden. The application must normally²³³ be made by not later than the renewal date. The procedure is discussed in part 6 of the report. Usually the application for renewal will itself be opposed by the terminator. If it is not, we think that the applicant should be entitled to a renewal without further inquiry.²³⁴ The effect of renewal is, in any event, relatively slight. A matching recommendation is made later in respect of applications for discharge.²³⁵ A contested application for renewal will in practice be barely distinguishable from a contested application for discharge. The parties and the issues are the same, and in both cases the Tribunal would reach its decision having regard to the same criteria. These are discussed in part 6. The only difference – in practice largely a formal one – is that the onus of proof rests on the party seeking to prevent the burden from being discharged.

5.46 An application for renewal has three possible outcomes. Either it is granted, or it is refused, or it is granted but subject to qualifications.

5.47 *Application granted.* It would be possible to provide that renewal operates for a specified period, such as 50 years, during which time no new notice of termination could be served. But this would be complex to operate without, perhaps, being of much value in practice. Many – perhaps most – notices will seek partial termination only. But partial termination means partial renewal; and the part of the burden which had not been renewed would, under a 50-year rule, continue to be subject to notices of termination. Thus a person who had failed to terminate a prohibition on building to the effect of allowing a building of type X could not be prevented from seeking to terminate the same prohibition to the effect of allowing a building of type Y. With experience, a 50-year rule would be routinely evaded by framing notices of termination in terms which were increasingly narrow. This problem would be avoided if the rule became that even a partial renewal gave the whole burden a 50-year exemption; but such a rule would hardly be fair to the burdened owner, and would make notices of termination unattractive.

5.48 We suggest instead that the effect of renewal should simply be to prevent registration of the notice of termination, and therefore extinction of the burden. In theory there would be nothing to prevent the immediate service of a new notice in the same terms.

²³² Draft bill s 18(2).

²³³ But see para 5.55.

²³⁴ Consultees were divided on this point. For discussion of the issue, see Scot Law Com DP No 106 para 5.74.

²³⁵ Paras 6.13 to 6.17.

But such a notice would achieve nothing. It would not go unchallenged, and the Lands Tribunal would not depart from its previous ruling. Further, it may be assumed that expenses would be awarded against the party sending the notice.²³⁶ In practice a successful renewal is likely to discourage further notices of termination in respect of the same burden for many years in the future – much in the same way as, under the present law, an unsuccessful application to the Lands Tribunal for discharge discourages further such applications.²³⁷

5.49 *Application granted subject to qualifications.* Another possible outcome is that the application for renewal is granted, but only in part. There are various ways in which this might come about.²³⁸ The Tribunal might renew some burdens but not others; or it might renew a burden but only in qualified form; or again it might substitute a new burden for those in respect of which renewal is sought.²³⁹ To the extent that burdens are not renewed by the Tribunal they will be formally discharged.²⁴⁰ The combined discharge and renewal then takes effect on registration of the extract order of the Tribunal, which may be requested by either party.²⁴¹ Once an application for renewal has been considered by the Tribunal it ceases to be possible to register the notice of termination, regardless of the outcome.²⁴²

5.50 *Application refused.* If the application for renewal is refused, the Lands Tribunal must formally discharge the burdens in respect of which the application was made. On registration of the extract order the burdens are extinguished.

5.51 *Compensation.* An unsuccessful application means a loss of rights. If, as often, the reason for failure is that the burden was obsolete and of no value, there will be no financial loss to the applicant. But in the balancing of the statutory criteria the Lands Tribunal may sometimes refuse an application even where some residual value remains. Issues of compensation then arise. Under the present law, a variation or discharge of a burden by the Lands Tribunal can be accompanied by an award of compensation under one (but not both) of the following heads:²⁴³

- “(i) a sum to compensate for any substantial loss or disadvantage suffered by the proprietor as such benefited proprietor in consequence of the variation or discharge; or
- (ii) a sum to make up for any effect which the obligation produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the interest in land affected by it.”

We suggest that the same heads of compensation be available where an application for renewal is refused. This would put the parties in the same position as if the burden had

²³⁶ In case the burdened owner sought to avoid an award of expenses by failing to become a party to the application, s 92(4) of the draft bill gives the Tribunal a discretion to award expenses against him in such circumstances.

²³⁷ Of course this is not always the case. See *Miller Group Ltd v Gardners' Exrs* 1992 SLT (Lands Tr) 62; *Miller Group Ltd v Cowie* 1997 GWD 26-1330. As these cases show, much depends on the reasons given by the Lands Tribunal for the original failure.

²³⁸ Section 85(1)(b) of the draft bill confers on the Lands Tribunal power to renew a burden “wholly or partly”.

²³⁹ For the substitution of new burdens, see paras 6.85 to 6.91.

²⁴⁰ Draft bill s 85(1).

²⁴¹ Draft bill s 96(2). See further para 6.92.

²⁴² Draft bill s 21(1).

²⁴³ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(4).

been brought to an end by a successful application for its discharge.²⁴⁴ If current practice is any guide, compensation would be awarded only occasionally. In cases where it was, a terminator might sometimes prefer the continuation of the burden. The benefit of freedom may be attractive only where it is free of charge. We think that the terminator should be given the choice. If he is unwilling to pay compensation he should have the option of accepting in its place the renewal of the burden.²⁴⁵

5.52 **Partial opposition.** If there is more than one benefited property, not all may be represented in the application for renewal. Or the application may not be brought in respect of all of the burdens listed in the notice of termination; for if burdens are obviously spent, the benefited owner or owners may be quite content that they should be extinguished. An application for renewal is confined to its terms. A successful application on behalf of property X does not renew the burden in respect of property Y;²⁴⁶ and burdens included in the notice of termination but omitted from the application cannot be renewed. It follows that, except insofar as covered by the application for renewal, the notice of termination remains effective and may be registered. In such cases the certificate endorsed by the Lands Tribunal must specify the burdens and the properties to which the application for renewal relates.²⁴⁷ These are then excluded from the scope of the notice. Registration is not affected by the outcome of the application and may take place at once. If, later, the application is refused and the remaining burdens discharged (or, as the case may be, discharged in relation to the remaining properties), the extract order can be registered in turn.²⁴⁸

5.53 In practice, partial opposition may smooth the path to negotiation. If an application for renewal is made by only one out of twenty possible owners, the other nineteen can be eliminated by registration of the notice of termination. It may then be possible to reach agreement with the owner who remains. Negotiation is the subject of the next section.

5.54 **Negotiations.** A notice of termination may be the trigger for negotiations. Here much depends on the value of the burden as seen from the benefited property. An owner who is indifferent as to the continuation of the burden may seek payment in return for withdrawal of opposition. That opens the way for registration of the notice. Conversely, an owner for whom the burden remains of importance may offer payment in exchange for its retention, or its retention in a weakened form. The agreement can be given expression in a minute of waiver, or in a combined minute of waiver and deed of constitution. The notice of termination would not then be registered. Sometimes the agreement may be to retain some burdens but to discharge others.

5.55 Negotiations could not always be completed within the eight weeks allowed for a notice to be challenged. For that reason we suggest that it should always be open to the terminator to extend the renewal date. Otherwise the benefited owner might find, after negotiations have broken down, that it is too late to seek renewal. In practice, he might

²⁴⁴ Compensation will continue to be available where a burden is extinguished by application by the burdened owner: see paras 6.85 to 6.91.

²⁴⁵ Draft bill s 85(7).

²⁴⁶ Section 85(1)(b) of the draft bill provides for renewal by an owner of a benefited property 'in relation to that property' (only).

²⁴⁷ If there is more than one such application, the certificate must state the cumulative effect of all applications. See s 21(1) of the draft bill.

²⁴⁸ Alternatively if, later, an agreement is reached with the applicant and the application is withdrawn, the notice of termination can be re-registered with an appropriate certificate. See draft bill s 22(2).

want an advance undertaking that the date will be extended. Another possible difficulty is that, even after agreement has been reached, the notice of termination (unless successfully opposed) remains live and could be registered. Often this would undermine the agreement. For the protection of the benefited owner, we suggest that it should be possible for the terminator to withdraw a notice of termination by intimation, in writing, to the Lands Tribunal. This would only be possible if the Tribunal's certificate had yet to be added. Once a notice had been withdrawn, there could be no certificate,²⁴⁹ and hence no registration.

Recommendation and evaluation

5.56 **Recommendation.** We summarise our proposals on the termination procedure in the form of a recommendation:

27. (a) **A real burden should be extinguished by the execution and registration of a notice of termination by an owner of the burdened property or by any other person against whom the burden is enforceable ("the terminator").**
- (b) **This recommendation applies only to real burdens which are at least 100 years old and are not**
 - (i) **conservation burdens**
 - (ii) **maritime burdens**
 - (iii) **facility burdens**
 - (iv) **service burdens**
 - (v) **burdens of the kind listed in recommendation 37.**
- (c) **A notice of termination would have to**
 - (i) **identify the burdened property;**
 - (ii) **set out the real burden or burdens and, if appropriate, the extent of the termination;**
 - (iii) **specify the renewal date (ie the date by which applications for renewal must normally be brought), being a date not less than eight weeks after intimation of the proposed termination;**
 - (iv) **specify the date and means of intimation; and**
 - (v) **set out the name and address of each person to whom, in the course of intimation, the proposed notice is sent.**

²⁴⁹ Draft bill s 21(2).

- (d) A proposal to execute and register a notice of termination should be intimated to the owner of each benefited property and to any other owner of the burdened property.
- (e) The proposal should be intimated to
 - (i) the owner of any benefited property within four metres of the burdened property (but disregarding pertinents, and roads if of less than 20 metres in width);
 - (ii) any other owner of the burdened property

by sending a copy of the proposed notice, together with an explanatory note in statutory form.

- (f) The notice should be intimated to the owner of any other benefited property
 - (i) by sending a copy of the proposed notice, together with an explanatory note in statutory form, or
 - (ii) by advertisement in a newspaper circulating in the area.

(g) Any owner of a benefited property should be able to challenge the proposed termination as it affects that property by applying to the Lands Tribunal for renewal of the burden or burdens.

(h) Unless the terminator agrees otherwise, an application to the Lands Tribunal must be made by not later than the renewal date.

(i) A notice of termination should be of no effect to the extent that it is subject to an application to the Lands Tribunal (unless the application is withdrawn). This rule should apply regardless of the outcome of the application.

(j) In executing the notice the terminator should swear or affirm before a notary public that all the information contained there is true to the best of his knowledge and belief.

- (k) It should not be possible to register a notice of termination unless
 - (i) there has been due intimation; and
 - (ii) the notice is endorsed with a certificate executed by a member of the Lands Tribunal, or its clerk, to the effect that no application for renewal has been received, or that any

application received does not relate to all of the burdens (or, as the case may be, to all of the benefited properties).

(1) It should be possible to withdraw a notice of termination by written intimation to the Lands Tribunal given at any time before the notice has been endorsed with a certificate; and where a notice has been withdrawn, it should cease to be competent to endorse a certificate.

(Draft Bill ss 18 to 22)

5.57 **Evaluation.** If unopposed, the termination procedure is a simple, and reasonably swift, method of bringing burdens to an end. A notice of termination is like a minute of waiver,²⁵⁰ but granted by the debtor; and compared to minutes of waiver, at least as they operate in practice, it has the advantage that a single notice can be used for all of the burdens affecting the property (with some exceptions). One routine use of notices of termination may be to clear the title of burdens. Many of the advantages of the procedure are lost, however, if the benefited owner makes an application for renewal. There may then be little difference between an opposed notice and a direct application to the Lands Tribunal for discharge, for in both cases the Tribunal must adjudicate on the worth of the burden. Nonetheless some points of distinction remain. The onus of proof is on the benefited owner. A burden which is younger than 100 years is saved unless extinguished by the Tribunal, while a burden of 100 years or more is extinguished unless saved by the Tribunal. It is for the benefited owner to demonstrate the grounds on which a burden should be saved. Another difference is that the burdens are extinguished to the extent that no application for renewal is made. A notice of termination is worth serving if it results in the extinction of some of the burdens in relation to some of the benefited properties. The land is less encumbered than before, and the issues are focused for future discharges.

Extinction by breach

5.58 Both minutes of waiver and notices of termination involve the burdened owner in active steps. Quite often, however, no such steps are taken. The owner simply breaches the burden, the breach is ignored by those with enforcement rights, and life carries on as before. Our Title Conditions Survey found that as many as 40% of those who had carried out alterations had not troubled to obtain even informal consent; and that of the others there was little evidence of formal minutes of waiver.²⁵¹ This finding can be explained in a number of different ways. Quite often owners do not know about burdens, or, if they know about them in principle, are vague as to the details.²⁵² Sometimes the breach is trivial. Owners are understandably reluctant to incur lawyers' fees and other expenses in respect of relatively minor works. And casualness is encouraged by the fact that burdens are rarely enforced in practice – partly, no doubt, because the benefited owner is often unaware of his rights. Whatever the reasons, however, it is clear that real burdens are frequently breached without prior leave.

²⁵⁰ It also resembles an unopposed application to the Lands Tribunal for discharge. In that case there is an automatic entitlement to discharge. See paras 6.13 to 6.17. But a notice of termination is less formal, and, usually, cheaper; and there is no need for the burdened owner to justify the discharge.

²⁵¹ Title Conditions Survey (appendix C) para 2.7.

²⁵² Ibid paras 2.1 ff.

5.59 Often this does not matter. The activity constituting the breach may be perfectly acceptable to those holding enforcement rights. In such cases the fault may lie more with the unrealistically restrictive terms of the burden than with the breach itself. Difficulties can arise, however, when the defaulting owner comes to sell his property. At that stage the title will be scrutinised and the breach may come to light. The owner will then be called upon to demonstrate that the burden has been extinguished. This raises the question of whether, and if so to what extent, a burden can be extinguished merely by its breach. The two doctrines relevant here are acquiescence and negative prescription.

Acquiescence

5.60 The right to enforce a real burden may be lost by acquiescence. Acquiescence involves the following elements.²⁵³ In the first place there must be breach of a burden. Secondly, the activity constituting the breach must be known to the benefited owner or other person with enforcement rights.²⁵⁴ He need not, however, know that the activity breaches a burden. Thirdly, that person or persons must take no steps towards enforcement. Fourthly, the activity constituting the breach must involve significant expenditure.²⁵⁵ And finally, the nature of the expenditure must be such that its benefit would be lost if the burden were now to be enforced. In practice acquiescence cases invariably involve building operations. If a neighbour sees the work going on but does not object, it is too late to object once the work is complete, or substantially complete.

5.61 In practice, breaches of burdens are frequently covered by acquiescence. Nonetheless the doctrine remains unsatisfactory in a number of respects. One is the status of constructive knowledge. If the activity constituting the breach is obvious to the eye, it might be taken that any reasonably close neighbour must know about it. There would then be no need to show actual knowledge. The same seems true if the activity requires planning permission and neighbour notification has been duly sent.²⁵⁶ Yet the admissibility of constructive knowledge has not been definitely approved in any reported decision.²⁵⁷ In re-stating the common law it should be made clear that constructive knowledge is sufficient.

5.62 Another difficulty is the level of objection required for acquiescence to be defeated. As with negative prescription (discussed below), the raising of a court action is clearly sufficient. But less will probably do. Opposition to the breach might be expressed in a letter, or even by words exchanged over the garden fence. A particular difficulty is whether, in objecting, the neighbour must know of, and make reference to, the real burden. Suppose, for example, that planning permission is obtained for an extension to a house. The immediate neighbour objects to the planning application but is unsuccessful. The work then goes ahead. Later it turns out that the extension was contrary to a real burden enforceable by the neighbour. Can the burden still be enforced or is the neighbour barred by acquiescence? In one sense there has indeed been acquiescence. For at no time did the neighbour object *on the basis of the real burden*. The right on which he now seeks to rely was not insisted on at a time when it might have been used to prevent the work, and the

²⁵³ Gordon, *Scottish Land Law* paras 22-75 to 22-77; Reid, *Property* paras 427 and 428.

²⁵⁴ Tenants, for example, can enforce: see paras 4.3 to 4.14. In the case of a conservation burden, the person with enforcement rights is the conservation body (or Scottish Ministers).

²⁵⁵ For a case where this requirement was not met, see *Johnston v The Walker Trs* (1897) 24 R 1061.

²⁵⁶ See *McGibbon v Rankin* (1871) 9 M 423.

²⁵⁷ Gloag's support for the doctrine (*Contract* (2nd edn) p 253) was however quoted with approval by Lord President Clyde in *Ben Challum Ltd v Buchanan* 1955 SC 348 at 355-6.

consequential expense. Now, it may be argued, it is too late. But on the other hand, a neighbour who objected to the whole project from beginning to end may be surprised to be told that he is deemed to have given his consent. Practical considerations favour a broad approach. The building project which constitutes the breach may be over and done with in a matter of days. A neighbour is much more likely to express general objections than to reach for his title deeds or consult a lawyer. In some cases there might not even be time for consultation or research. In our view, a bare objection should be sufficient, and it should not be necessary to refer to the breach of the real burden.²⁵⁸

5.63 Proof is often problematic. For acquiescence to operate, those with title to enforce must have known of the activity yet have taken no action. But this is difficult to verify as positive fact. When the defaulting owner comes to sell he may assure the purchaser of the (non enforcing) neighbours' state of knowledge. But the purchaser is unlikely to accept his word. Nor are the neighbours likely to be willing to swear an affidavit. It was presumably difficulties of this kind which led to the concession of counsel, in a modern case, to the effect that acquiescence could not be relied upon for the purposes of a good and marketable title on sale in the absence of a judicial declarator.²⁵⁹ The position would be eased considerably by a shift in the burden of proof. In a case where the activity constituting the breach had been completed, or substantially so, it might usefully be presumed that (i) those entitled to enforce knew of the activity but (ii) did not object. The presumption would be rebuttable, of course. In seeking to enforce the burden it would be open to a benefited owner to show either that he did not know (and could not have known) of the breach, or that he objected at the time when the work was being carried out. But such cases would be rare in practice. Neighbours enforce burdens immediately or not at all. Enforcement four years after the event is uncommon, and after five years would be excluded by negative prescription. From the point of view of the purchaser, the presumption offers an equivalent comfort to the presumption provided, in relation to execution of deeds, by the doctrine of probativity.²⁶⁰ If a purchaser is willing to accept, without positive proof, that the deeds in the seller's progress of title have been properly executed, so he should also be willing to accept that acquiescence has cured a breach of a burden incurred by building. In either case, of course, he might be wrong; but the risk in practice is not great.

5.64 Some 44% of those questioned in our Title Conditions Survey and who had carried out alterations claimed to have obtained their neighbours' consent.²⁶¹ In most cases it may be assumed that the consent was informal and that there was nothing in writing. The effect of oral consent is unclear. Usually consent is ineffective unless it is reduced to writing, signed, and registered – unless, in other words, it takes the form of a proper minute of waiver. Nor can absence of form be cured by the statutory equivalent of *rei interventus*.²⁶² In general this rule seems sound. Registration publicises to the world that the burden has been discharged. In its absence, the burden should remain. However, in circumstances where acquiescence would otherwise operate, we can see no grounds for distinguishing between (i) *actual* consent, informally given and (ii) *constructive* consent, implied by inaction. A neighbour who tells the owner he can go ahead should not be in a stronger position than one

²⁵⁸ This is consistent with our proposal, in para 5.64, that express consent to the activity should be sufficient to extinguish the real burden, even if the person giving the consent is unaware of the burden's existence.

²⁵⁹ *McLennan v Warner & Co* 1996 SLT 1349.

²⁶⁰ Now contained in s 3 of the Requirements of Writing (Scotland) Act 1995.

²⁶¹ Title Conditions Survey para 2.7.

²⁶² Requirements of Writing (Scotland) Act 1995 s 1(3) confines *rei interventus* to the obligations listed in s 1(2)(a). A deed of extinction falls within s 1(2)(b).

who merely watches but says nothing. Informal consent should be a proper basis for acquiescence. In practice, publicity for the discharge of the burden is usually achieved by the visibility of the works.

5.65 A final difficulty is the effect of acquiescence. On one view, acquiescence is no more than a form of personal bar, and is not properly extinctive of the burden.²⁶³ In the leading modern case, however, it was taken for granted, without argument, that successors were bound by the acquiescence of a predecessor in relation to building works.²⁶⁴ We think that the doubt should be resolved in favour of an extinctive effect. Acquiescence would be of little practical value if it could not be founded on in a question with a successor of the original benefited owner. A burden is, however, only extinguished to the extent of the breach,²⁶⁵ an important qualification which is discussed in the next section.²⁶⁶ Further, a burden is not extinguished to any extent if an objection is made – even if the objection comes from only one of a number of possible enforcers.²⁶⁷

5.66 We recommend that

28. (a) Where -

- (i) a real burden is breached by an activity involving material expenditure;**
- (ii) the benefit of the expenditure would be substantially lost if the burden were to be enforced; and**
- (iii) the person (or persons) by whom the burden is enforceable either consented to the activity or, being aware of it (whether actually or constructively), had failed to object by the time that the activity was substantially complete;**

the burden should be extinguished to the extent of the breach.

(b) In a case where the activity is substantially complete it should be presumed, unless the contrary is shown, that the person (or persons) by whom the burden is enforceable knew of the breach but failed to object.

(Draft Bill s 15)

Negative prescription

5.67 Real burdens are subject to negative prescription.²⁶⁸ The period is twenty years,²⁶⁹ and burdens fall within section 7 rather than section 8 of the Prescription Act.²⁷⁰ Under

²⁶³ For a discussion, see J M Halliday, “Acquiescence, Singular Successors and the Baby Linnet” 1977 JR 89.

²⁶⁴ *Ben Challum Ltd v Buchanan* 1955 SC 348.

²⁶⁵ *Stewart v Buntin* (1878) 5 R 1108.

²⁶⁶ Paras 5.70 and 5.71.

²⁶⁷ The rule is the same for negative prescription: judicial enforcement by one person saves the burden for all. See Prescription and Limitation (Scotland) Act 1973 s 9(1), as read with draft bill s 16(3)(a)(iii).

²⁶⁸ Gordon, *Scottish Land Law* para 23-20; Reid, *Property* para 431. It is sometimes doubted whether feudal burdens prescribe: see Gordon para 22-82.

section 7 a burden is extinguished if it has been breached for twenty years²⁷¹ without the breach having been judicially enforced.²⁷² Breach includes a failure to perform an affirmative obligation (such as to pay for maintenance) and also a failure to observe a restriction (such as a restriction on building).²⁷³ Prescription is interrupted if the owner complies with the burden, or makes an unequivocal written acknowledgement that the burden subsists.²⁷⁴ A reference to the burden in a disposition of the property is not an unequivocal written acknowledgement.²⁷⁵ The running of prescription does not appear to be affected by a change in the ownership of either property, so that, like the burden itself, prescription runs with the land.

5.68 There seems a strong case for shortening the period of prescription. To do so would be helpful to the burdened owner without being unfair to the benefited owner. Ordinary contractual obligations prescribe after five years.²⁷⁶ In our *Report on the Law of the Tenement* we recommend that maintenance and other obligations affecting a tenement should prescribe after five years.²⁷⁷ Five years would give a reasonable opportunity to enforce breaches, and a neighbour who delays beyond this point may not deserve to be protected. In the discussion paper we invited views as to whether the period might be further reduced to two years in the case of negative burdens.²⁷⁸ On the whole, this second suggestion was not supported. Some consultees felt that two years did not give sufficient time for enforcement, or might force parties into litigation when they felt inclined to negotiate. Others were willing to support such a reduction only on the basis that the period did not begin to run until the benefited owner was aware of the breach – a subjective element which would deprive prescription of much of its value. Others again were opposed to having two different periods for real burdens. Most consultees, however, were content with the idea of a five-year prescription, although reference was made to a possible difficulty facing owners in cases where the benefited property was leased.

5.69 We agree with the view that burdens should prescribe after five years, and that no distinction should be made between negative and affirmative burdens. In the former case, the burden may in any event be extinguished by acquiescence long before the prescriptive period has run. When the previous prescriptive periods were reduced by the Prescription and Limitation (Scotland) Act 1973 it was provided that

²⁶⁹ As an obligation relating to land, it is excluded from the quinquennial prescription by sched 1 para 2(e) of the Prescription and Limitation (Scotland) Act 1973. For the meaning of this exclusion, see *Barratt Scotland Ltd v Keith* 1994 SLT 1337 and 1343, and *University of Strathclyde (Properties) Ltd v Fleeting Organisation Ltd* 1992 GWD 14-822.

²⁷⁰ David Johnston, *Prescription and Limitation* (1999) para 7.14(4). Section 8 only applies where s 7 does not. Section 7 applies to the extinction of “obligations” and correlative rights. A real burden is an “obligation” in this sense.

²⁷¹ Not “relevantly acknowledged”, in the terminology of the Act: see s 10(1).

²⁷² In the terminology of the Act, without a “relevant claim” having been made: see s 9. Any person holding enforcement rights can make a relevant claim including, for example, a tenant of one of the benefited properties. See draft bill s 16(3)(a)(iii).

²⁷³ Prescription and Limitation (Scotland) Act 1973 s 10(1)(a), (4).

²⁷⁴ *Ibid*, s 10(1)(b).

²⁷⁵ *Graham v Douglas* (1735) Mor 10745.

²⁷⁶ Prescription and Limitation (Scotland) Act 1973 s 6 and sched 1 para 1(g).

²⁷⁷ Scot Law Com No 162, para 8.23.

²⁷⁸ Scot Law Com DP No 106 para 5.44. Louisiana has a two-year period for breaches of restrictions: see Louisiana Civil Code art 781. The further suggestion, that burdens which mirror positive servitudes should not prescribe until 20 years had elapsed, falls with the proposal (para 12 .15) that such burdens should be treated as servitudes.

“time occurring before the commencement of this Part of this Act shall be reckonable towards the prescriptive period in like manner as time occurring thereafter ...”²⁷⁹

We think that a similar transitional arrangement should be made in respect of the proposed reduction from twenty years to five years. Otherwise the change would be delayed by five years. Hardship would be avoided by the fact that the reduction will not come into effect until the appointed day, likely to be at least a year after royal assent. A breach which had been unchallenged for more than five years could continue to be founded on during this intermediate period. If, however, by the appointed day no steps had been taken for enforcement, the burden would be extinguished on that day.

5.70 An unresolved question in the law of negative prescription is whether a breach of a burden in one respect has the effect of extinguishing the burden in all respects. The issue arises quite commonly. For example, a burden which prohibits all building on a certain area may be breached by the construction of, say, a garden shed. If the breach continues for the prescriptive period, the right to object to the shed is lost. But is the burden wholly extinguished, leaving the owner free to build a house alongside the shed? Or does the burden survive except insofar as it relates to that particular shed? The same issue arises with burdens which prohibit particular uses, such as commercial use. On one view use for the prescriptive period for piano lessons would free the property of the whole burden, so that thereafter the owner could open a fast-food shop or a factory. Similarly, it could be argued that a failure to pay £20 for a minor repair would have the effect of extinguishing any obligation of maintenance. Surprisingly, issues of this kind seem never to have been litigated.²⁸⁰ Nor can any help be obtained from the language of the Prescription Act, which provides simply for the extinction of “obligations” without elucidating the relationship between the obligation and its breach. The law is in need of clarification.

5.71 In our view a minor breach should not extinguish an entire burden. As with acquiescence, a burden should be extinguished only to the extent of its breach. In a case of total or substantial breach, the whole burden would fall. For example, a general prohibition on building work should not survive the construction of a building, unchallenged for five years, on all or most of the affected land. It is a different matter if part only of the land is built on. That particular part should be free of the burden, of course; and this would allow, not only the building which caused the breach, but any replacement building as well. But the rest of the land would continue to be subject to the burden. In the case of an affirmative burden, due for performance partly now and partly later, a breach of the obligation due now would have no effect on the obligation due later. For if an obligation is not due, it cannot be breached; and if it has not been breached, prescription cannot run. So a failure to carry out, or pay for, common repairs today could have no effect on the future liability for common repairs. Later, however, we recommend a special rule for rights of pre-emption.²⁸¹

5.72 We recommend that

²⁷⁹ Prescription and Limitation (Scotland) Act 1973 s 14(1)(a). The provision continues: “but subject to the restriction that any time reckoned under this paragraph shall be less than the prescriptive period”, but this caveat seems directed at positive prescription only: see David Johnston, *Prescription and Limitation* (1999) para 16.44.

²⁸⁰ However in *Walker's Exr v Carr* 1973 SLT (Sh Ct) 77 the view was taken that non-use of a servitude of way by vehicles for the prescriptive period did not of itself extinguish the right to use the same way for pedestrians. The issue is touched on in David Johnston, *Prescription and Limitation* (1999) para 2.11(4). See also Yiannopoulos, *Predial Servitudes* p 524 for a discussion of the position in Louisiana, where there are contradictory authorities.

²⁸¹ Para 10.41.

29. (a) The period for negative prescription of real burdens should be reduced from twenty years to five years.

(b) A burden should be extinguished only to the extent of the breach which induced the prescription.

(Draft Bill s 16)

Confusion

5.73 If the benefited and burdened properties come to be owned by the same person, in the same capacity, the burden ceases to be enforceable.²⁸² A person cannot enforce a burden against himself. But it is unclear whether the burden is extinguished outright, or merely suspended pending some future separation of the properties. The latter view is supported by Professor Gordon:²⁸³

“[I]t does not appear that the mere fact that the same person owns the land removes the conditions from the titles or deprives them of all effect. The better view is that the conditions are dormant, until some action is taken to remove them, or to destroy them by acting in contravention of them, because the acquirer of one property from the person who happens to hold both titles ought to be able to rely on the records or the register ...”.

We are inclined to agree with Professor Gordon that, as a matter of policy, ownership of both properties should not have as its automatic consequence the extinction of burdens; and, if that is correct, the opportunity of legislation should be taken to put the law beyond doubt. A number of factors supports this conclusion.

5.74 First, if extinction occurred automatically on acquiring both properties, the Land Register would be inaccurate in continuing to show the burdens. In some cases the Keeper might realise what had happened and alter the Register accordingly, but in many cases he would not. Whilst inaccuracy on the Register is sometimes unavoidable,²⁸⁴ this is an occasion in which it can readily be avoided. If the owner of the combined properties wishes to have the burdens removed, he should be required to take some active step, such as the registration of a minute of waiver.²⁸⁵ In practice the issue is most likely to arise when he comes to sell the burdened property, and whether any steps are then taken may depend on the views of the purchaser.

5.75 Secondly, as Professor Gordon indicates, the register should not mislead a purchaser; and since, in future, burdens will be mentioned in the title sheet of the benefited property,²⁸⁶ this includes purchasers of the benefited as well as of the burdened property. If extinguished burdens remain on the register, a purchaser is likely to assume that they are still in existence. He will have no reason to open investigations as to whether, at any time

²⁸² The same issue arises, in relation to conservation and maritime burdens, if the burdened property comes to be owned by the person in whose favour the burden was created.

²⁸³ Gordon, *Scottish Land Law* para 23-18. And see also Reid, *Property* para 433.

²⁸⁴ For example, in the case of real burdens which have been extinguished by negative prescription.

²⁸⁵ The obvious parallel in the current law is the need, with feudal burdens, to register a minute of consolidation.

²⁸⁶ Paras 3.3 ff.

since the burdens were first created, the two properties were united in single ownership; and even if he chose to do so, he would find that historical excavation is not possible in the Land Register, which keeps no public records of previous ownership.

5.76 Thirdly, under recommendations made elsewhere in the report, real burdens would be enforceable both by and against certain tenants and other categories of possessor.²⁸⁷ Here automatic extinction would produce awkward results. For example, if the owner of the benefited property acquired the burdened property at a time when it was leased he would discover that burdens, which formerly were enforceable against the tenant, were extinguished by his very act of purchase.²⁸⁸

5.77 Fourthly, automatic extinction creates difficulties for community burdens. If two units in a community come to be owned for a time by the same person, the burdens are extinguished as between these units. This results in what has been described as “pockets of immunity”.²⁸⁹ The units continue to be affected by the burdens. The owners of the units continue to have enforcement rights in respect of the other units in the community. But mutual enforcement rights as between the two units have been lost.

5.78 Fifthly, while it is probably²⁹⁰ the law that automatic extinction applies in the case of servitudes, there are important differences between real burdens and servitudes which suggest that, in this instance at least, they should not be treated in the same way. One difference is the fact that servitudes often do not appear on the register, so that the integrity of the register is not a policy concern. Another is the fact that positive servitudes can be created of new by implication on the eventual separation of the two properties, which in practice removes much of the effect of automatic extinction. By contrast, real burdens cannot be created by implication in this way.

5.79 Finally, real burdens created in a deed of conditions are, by statute, immediately effective even though, at the relevant time, all the units – the benefited and the burdened properties – are still in the ownership of the granter.²⁹¹ The rule is useful in practice and we have no proposals to alter it. Thus in defining real burdens earlier we did not impose a requirement that the two properties be in separate ownership.²⁹² But if confusion were to operate here, the burdens would be extinguished at the very moment they are first created. The deed of conditions would be self-defeating.

5.80 Most of those consultees who expressed views on the issue were in agreement that confusion should not operate in relation to real burdens. We recommend therefore that

30. A real burden should not be extinguished only because the same person is owner of the benefited and the burdened property.

²⁸⁷ Paras 4.3 to 4.14 and 4.27 to 4.30.

²⁸⁸ See P O'Brien, “The extinction of servitudes through confusion” 1995 SLT (News) 228. In England and Wales the Law Commission has recommended that automatic extinction should not occur for as long as the obligation benefits or binds a person with a lesser proprietary interest. See Law Com No 127 para 16.7.

²⁸⁹ By the Law Commission: see Law Com No 127 para 16.8. The Law Commission recommended that community burdens (“development obligations”) should be excepted from automatic extinction.

²⁹⁰ Gordon, *Scottish Land Law* paras 24-96 - 24-98; Cusine & Paisley, *Servitudes* para 17.22.

²⁹¹ The Land Registration (Scotland) Act 1979 s 17 provides that (unless excluded in the deed) the effect of registration is for the burdens to become “real obligations”.

²⁹² Para 3.1. And see draft bill s 1(1).

Effect of extinction on current enforcement procedures

5.81 It will be unusual for a burden subject to current litigation to be extinguished, but if so the burden should of course cease to be enforceable. A burden which is extinguished in part should cease to be enforceable in relation to that part. If a burden is extinguished in relation to one benefited property but not in relation to another, it would remain enforceable in respect of the second property. Decrees from earlier enforcement procedures should also fall: a burden which has been extinguished should not be perpetuated by, for example, an interdict granted at an earlier period. But there should be an exception for pecuniary claims, such as claims for damages or payment. We recommend that

31. If a real burden is extinguished -

- (i) no proceedings for enforcement should be competent;**
- (ii) all existing proceedings (other than for payment of money) should be deemed abandoned; and**
- (iii) any decree or interlocutor already pronounced (other than for payment of money) should fall.**

(Draft Bill s 49)

This mirrors a provision in the Feudal Act concerning the extinction of real burdens as a result of feudal abolition.²⁹³

²⁹³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 17(2)&(3).

Part 6 The Lands Tribunal for Scotland

Applications for variation and discharge of burdens

6.1 Until 1971 no judicial mechanism existed for the variation or discharge of real burdens. This meant that, in the normal case,¹ discharge could be obtained only by opening negotiations with the benefited owner or owners for a minute of waiver. It was a one-sided negotiation. If the benefited owner refused a waiver, his refusal could not be challenged. If he asked for a substantial payment, the choice was to pay or to abandon the project which was prevented by the burden. The position was changed by the Conveyancing and Feudal Reform (Scotland) Act 1970, following on a recommendation by the Halliday Committee.² Under the 1970 Act power to vary or discharge “land obligations” is given to the Lands Tribunal for Scotland. “Land obligations” include real burdens, servitudes, and conditions in long leases,³ but in practice most of the applications to the Tribunal have concerned real burdens.

6.2 The Lands Tribunal was set up under powers contained in the Lands Tribunal Act 1949. It comprises a President and such other members as the Lord President of the Court of Session may determine. Usually two members of the Tribunal sit at any one time although members may sit singly. However, on a major case, or in order to review a previous decision, a full Tribunal will sit and a decision is taken by majority.⁴ Although based in Edinburgh, the Tribunal is peripatetic and tends to hold hearings near the *locus*. Under its rules the Tribunal may regulate its procedure as it sees fit.⁵ The procedure is similar to that of the Court of Session or a sheriff court, but without rigid adherence, and the Tribunal aims to be as flexible as possible.⁶ Almost always a hearing is followed by a site inspection.

6.3 The number of applications is not large, around 60 a year, of which as many as half might later be withdrawn.⁷ Research by Cusine and Egan found that Lands Tribunal applications accounted for only 3.4% of cases in which variation or discharge of burdens was thought to be required.⁸ Many applications are unopposed. A survey of 40 recent applications, mainly from 1997, showed that 50% were unopposed.⁹ This figure includes cases where there was initial opposition which was subsequently withdrawn, whether because of negotiations or for some other reason.

¹ But of course a burden might be extinguished for other reasons, such as negative prescription. See generally part 5.

² Halliday Report paras 25 to 27.

³ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2).

⁴ *Stair Memorial Encyclopaedia* sv “Courts and Competency” (Lord Elliott) vol 6 para 1140. And see generally, on the Lands Tribunal, Agnew of Lochnaw, *Land Obligations* chap 2.

⁵ Lands Tribunal for Scotland Rules 1971 (SI 1971/218) r 20.

⁶ Douglas Pentland, “Procedure in the Lands Tribunal for Scotland” 1993 3 Property Law Bulletin 3 at p 3; *Stair Memorial Encyclopaedia* sv “Courts and Competency” (Lord Elliott) vol 6 para 1152.

⁷ Unless otherwise stated, all statistics in this part of the report were provided by the Lands Tribunal. We wish to express our thanks to the Clerk to the Tribunal, Mr Neil Tainsh, for making the figures available.

⁸ Cusine & Egan, *Feuing Conditions* chap 4, para 14.

⁹ Similarly, the study by Cusine & Egan (chap 5, para 18) produced a figure of 48% for unopposed applications.

6.4 Where an application is unopposed the Tribunal will normally dispense with a hearing¹⁰ and dispose of the case on the basis of the applicant's written submissions. In theory an unopposed application might still fail, because the Tribunal might not be satisfied that the statutory grounds have been made out, but in practice failure is rare. All 20 unopposed applications in the recent survey were granted. The survey shows the average time taken between submission of the application and the making of the Tribunal order as 14 weeks. However, this figure requires to be interpreted. A number of the applications were returned for amendment or further information, typically by way of deeds or plans or neighbouring proprietorship details. In certain cases questions of competence and jurisdiction required to be considered. Some applications began life as opposed cases. The Lands Tribunal considers that an unopposed application which is properly prepared and fully documented can be disposed of within 8 weeks. In the case of opposed applications the same study disclosed an average time of 37 weeks.

6.5 Applications to the Lands Tribunal are much more likely to succeed than to fail. The available statistics are striking. The recent study shows an overall success rate of 85%. The figure includes those cases – 20 out of the 40 – in which the application was unopposed; but even in opposed cases the success rate was 70%. A slightly older study shows a similar pattern.¹¹ Of the 33 cases examined, the application was granted in 29, a success rate of 88%. For opposed cases the success rate was 76%.¹²

6.6 The fee for an initial application to the Lands Tribunal is currently £130. A further £88 is payable on the making of an order at the end of the case. Thus the total fee for an unopposed application is £218.¹³ There may also be incidental costs. Advertising, for example, is quite expensive and is charged to the applicant.¹⁴ A further fee will be due to the solicitor who prepared the application. Nonetheless a minute of waiver might not be significantly cheaper.¹⁵ Costs rise, however, if the application is opposed and a hearing becomes necessary. The daily fee during a hearing is £155. In addition there are legal expenses, both for preparation of the case and for representation at the hearing. The Tribunal has a discretion in respect of expenses,¹⁶ but will not usually award expenses against an objector. As the Tribunal has explained:¹⁷

“This departure from the normal rule [ie the rule that expenses follow success] is on the basis that an objector is entitled to try to protect his legal rights: *British Steel plc v Kaye* 1991 SLT (Lands Tr) 7. The tribunal is not being asked to establish or declare a right but to exercise a discretion to discharge or vary an undoubted right.”

This means that if the applicant fails he must pay the expenses of both sides, and that even if he succeeds he remains liable for his own expenses. However, this exception to the normal rule will not apply in all cases. The Tribunal's analysis continues:

¹⁰ Lands Tribunal for Scotland Rules 1971 r 31.

¹¹ Cusine & Egan, *Feuing Conditions* Table 5.11.

¹² One of the cases included here as refusal actually involved a partial grant of the application.

¹³ The Lands Tribunal fees are set out in sched 2 to the Lands Tribunal for Scotland Rules 1971 (as substituted by SI 1996/519).

¹⁴ For the need for advertising, see para 6.58.

¹⁵ Figures for the cost of minutes of waiver are contained in Cusine & Egan, *Feuing Conditions* Tables 4.8 and 4.9.

¹⁶ Lands Tribunal for Scotland Rules 1971 r 33(1).

¹⁷ *Pender v Sibbald Properties* 21 December 1998 (unreported, LTS/LO/1998/6).

“We are in no doubt that this exception must be applied with caution. The practice of the tribunal has been described as being to make no award against benefited proprietors except where they have acted unreasonably or vexatiously: *Erskine v Douglas* 1993 SLT (Lands Tr) 56. We think that there is a risk that this does not give adequate weight to the ‘normal’ principle unless it is recognised that the tribunal will exercise a very broad test of reasonableness.”

6.7 No very definite conclusions are suggested by this account. The fact that so few applications are made seems, on the whole, a sign of success rather than of failure. Usually negotiation is preferable to litigation; and the very availability of the Tribunal is a spur to negotiation and to consensual discharge. The substantial case law accumulated over a period of 30 years makes for predictability and certainty. And doubtless the benefited owner will bear in mind that the Tribunal only rarely awards compensation.¹⁸ In practice, however, the implied threat to go to the Tribunal is sometimes a hollow one. A standard example is when, on the sale of property, the purchaser queries a past breach of a real burden. Here the seller needs speed and certainty. Neither can be provided by a process of litigation. If he were to apply to the Lands Tribunal, the application would probably, although not certainly, succeed. But his success would come too late. The purchaser will not delay his acquisition for the months necessary for a contested application; nor, usually, will he proceed without the matter having been properly resolved. The seller has then no choice. He must go to the benefited owner and pay the price demanded. But if this is the main difficulty raised by the current operation of the Lands Tribunal, it is also the one least amenable to solution.¹⁹ No process of litigation which pays proper regard to human rights could be completed within the time scale of a normal conveyancing transaction. However, the position is, or may be different, if the discharge is unopposed; and a useful reform would be one which tended to discourage speculative opposition while at the same time providing for a more rapid disposal of unopposed applications. To this subject we now turn.

Unopposed applications

6.8 **Regulating opposition.** Currently applications to the Lands Tribunal are opposed in around 50% of all cases. Where an application is opposed, the opposition is successful in between one quarter and one third of cases; but even where it is not successful it is usually brought in good faith. We would not wish to discourage such opposition. Often real burdens protect the essential interests of neighbours, while applications for their discharge may be thoroughly unmeritorious. The former indeed is a rising trend. With the abolition of the feudal system, and hence of feudal superiors, those left with enforcement rights will usually have a close interest in the burdened property. But not all opposition is principled and justified. Sometimes it may be largely speculative in nature. Opposing an application has a certain nuisance value. It costs the applicant time and trouble. It also costs him money because, even if the application is eventually granted, his own expenses are usually irrecoverable. Faced with the prospect of a prolonged dispute, applicants will often seek some sort of accommodation with their opponent. In that case the initial show of opposition may yield a handsome sum for a minute of waiver.

¹⁸ Gordon, *Scottish Land Law* paras 25-30 ff.

¹⁹ However, the issue is tackled in a different way through our proposals for notices of termination, acquiescence and negative prescription: see paras 5.26 ff.

6.9 Earlier we proposed that real burdens created more than 100 years ago should be capable of being extinguished by service and registration of a notice of termination.²⁰ The notice can be resisted by means of an application to the Lands Tribunal for renewal of the burdens. But such resistance involves the expense and trouble of initiating litigation and at the ensuing hearing it is for the applicant to justify the continuation of the burdens. Thus the renewal process is likely to be attractive only to those with a strong case. Indeed one effect of our proposals may be largely to remove from Lands Tribunal practice real burdens which are older than 100 years. Certainly a notice of termination is likely to be the usual first choice of a burdened owner.

6.10 For burdens under 100 years the problems remain. In our discussion paper we made two suggestions which were designed to discourage speculative opposition.²¹ First, we suggested that a fee should be payable for lodging objections. This would bring the Lands Tribunal into line with other courts.²² Secondly, we questioned the current practice of the Tribunal by which the applicant is usually liable for his own expenses even in a case where he has been successful. This means that a person can oppose an application safe in the knowledge that, if his opposition fails, he will only have to meet his own costs. Again we suggested that the practice might be brought in line with the practice in other courts where, as a general rule, expenses follow success.

6.11 The first suggestion was generally supported on consultation and accordingly we recommend that

32. A fee should be payable by a person who wishes to object to an application.

Fees are set by the Secretary of State for Scotland with the approval of the Treasury, and no new legislation is required.²³ We express no view as to the level at which the fee be set.

6.12 While the second suggestion, on expenses, was also supported on consultation, it attracted a certain amount of criticism. In particular the Faculty of Advocates warned that

“Objections are sometimes made by individuals without the benefit of legal advice; it does not necessarily follow that such objections are without merit. The expenses of such objectors would be relatively low. If an objector acted unreasonably, then an award of expenses could be made against him. It is readily understandable that a person whose rights might be taken away should choose to defend them particularly where those rights are recently created in an arm’s length transaction. An application to the Lands Tribunal for variation or discharge of a land obligation is not on all fours with a court action for payment, damages, implement or reduction, where the object is to redress a perceived breach or wrong on the part of the

²⁰ Paras 5.26 to 5.57. But the procedure does not apply to conservation burdens, maritime burdens, facility burdens, and service burdens.

²¹ Scot Law Com DP No 106 paras 6.8 to 6.12.

²² In the sheriff court, for example, a person who wishes to defend an action must pay the same fee, currently £45, as was paid by the pursuer to lodge the initial writ. See Sheriff Court Fees Order 1997 (SI 1997/687) sched 1, paras 6 and 20.

²³ Lands Tribunal Act 1949 s 3(6), (11); Transfer of Functions (Lord Advocate and Secretary of State) Order 1999 (1999/678) s 2(1).

defender. We consider that the Lands Tribunal is sufficiently astute to be able to determine circumstances where an award against an objector would be appropriate.”

The formal position at present is that the Lands Tribunal has, under its rules, a discretion as to expenses.²⁴ We do not suggest that the position be changed. There will be occasions – possibly quite frequent occasions – in which it will be inappropriate to award expenses against an unsuccessful objector. It might be thought, for example, that a group of neighbours who attempt to resist an application by a property developer should not have to meet the substantial expenses which the developer may have chosen to incur. But it seems undesirable to start from the position that an objector should not normally be liable for expenses. We recommend therefore that

33. In determining any question of expenses the Lands Tribunal should have regard to the extent to which the application, or any opposition to the application, is successful.

(Draft Bill s 96)

The discretion of the Tribunal would, however, remain as before.

6.13 **Automatic discharge.** The 1970 Act makes no distinction between opposed and unopposed applications. In both cases the Lands Tribunal is bound to consider the merits of the proposal, and may grant the application only where it is satisfied that the statutory grounds for variation and discharge have been properly made out.²⁵ For unopposed applications the normal practice of the Tribunal is to dispense with a hearing and to make a decision on the basis of the written application.²⁶ It would be unusual for the application not to succeed.²⁷ Generally an unopposed application can be processed quickly, and its consideration will not take up a great deal of the Tribunal’s time. Nonetheless, as we pointed out in our discussion paper,²⁸ there would be savings, both of time and of resources, if the Tribunal were no longer required to consider the merits of applications in cases where they are unopposed. This would also be attractive to potential applicants, especially where time was short.

6.14 On consultation the suggestion that unopposed applications should be granted as of right was generally welcomed, and we adhere to it here. It is necessary to be clear what is meant by ‘unopposed’. Under the current law (and we have no proposals for change)²⁹ a person who wishes to oppose an application must make representations within a stipulated period, usually 21 days,³⁰ of being notified by the Tribunal. If this timetable is not met, the chance to object is lost,³¹ unless the Tribunal is willing to grant an extension.³² We suggest that an application should be classified as unopposed if no representations are made within the 21-day period, or any extension of that period granted, exceptionally, by the Tribunal.³³

²⁴ Lands Tribunal for Scotland Rules 1971 r 33.

²⁵ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(3).

²⁶ Agnew of Lochnaw, *Land Obligations* para 4-10.

²⁷ All of the unopposed applications in the survey mentioned in para 6.3 were granted.

²⁸ Scot Law Com DP No 106 paras 6.13 and 6.14.

²⁹ See para 6.54.

³⁰ It cannot be shorter than 14 days. See Lands Tribunal for Scotland Rules 1971 r 4(2).

³¹ Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(2).

³² Under r 28 of the Lands Tribunal for Scotland Rules 1971.

³³ Para 6.54. Representations could not, however, be admitted after the application had been disposed of; and in practice applications may be disposed of shortly after the 21-day period has expired.

Further, only representations by an owner should count.³⁴ Although someone with a lesser interest in the benefited property is entitled to be heard by the Tribunal,³⁵ he should not be able to block an application for discharge. This is consistent with our overall policy that discharge is a matter for the owner alone.³⁶ An application should also be classified as unopposed if representations are subsequently withdrawn. An expression of opposition may be a spur to negotiations. Indeed one of the reasons for using the Tribunal may be to identify where the opposition lies.

6.15 Automatic discharge should not be available for facility burdens, that is to say, for burdens which regulate the maintenance, management, reinstatement or use of a common facility.³⁷ Such burdens generally affect a number of properties, and discharge in respect of one might have unacceptable consequences for the others. The Tribunal should investigate the position before agreeing to a discharge. For much the same reasons, service burdens should also be excluded.³⁸ Both are excluded from the notice of termination procedure.³⁹

6.16 Even in cases of automatic discharge the Tribunal continues to have a role to play. It must receive the initial application, and notify the appropriate owners. It must ensure that the application has been properly made.⁴⁰ And finally, no representations having been received, it must grant the appropriate order discharging the burden. By contrast with the position in opposed applications however, it should not be able to award compensation or impose a substitute burden⁴¹ – a proposal which would change the law but not the practice.

6.17 We recommend that

- 34. (a) An application for discharge of a real burden which is not opposed should be granted as of right.**
- (b) In such a case it should not be competent for the Lands Tribunal to award compensation nor to impose a substitute real burden.**
- (c) For the purposes of (a) an application is unopposed in a case where no representations were made by an owner of a benefited property, or any representations so made were later withdrawn.**
- (d) This recommendation does not extend to facility burdens or service burdens.**

(Draft Bill s 92)

³⁴ In the case of conservation burdens and maritime burdens, this translates as representations by the holder of the burden.

³⁵ Para 6.52.

³⁶ Paras 4.13 and 5.10.

³⁷ Draft bill s 113(1), (3)&(4).

³⁸ For the meaning of service burdens, see s 113(1) of the draft bill.

³⁹ Paras 5.28 and 5.29.

⁴⁰ The draft bill (s 92(1)) uses the term “duly made”. As the Faculty of Advocates pointed out, the Tribunal should continue to consider “what we loosely describe as the competency of the application. By this we do not mean only competency in its strict sense but also whether the application truly focuses on the correct obligation; and, in relation to an application for variation, whether the precise terms of the proposed variation make sense”.

⁴¹ For compensation and substitute burdens, see paras 6.85 to 6.91.

It is perhaps unnecessary to say that the purpose of the recommendation is to save time and resources rather than to favour one party to a real burden over another. We have already made a matching recommendation in respect of unopposed applications for renewal, following intimation under the termination procedure.⁴²

6.18 **Other title conditions.** Our recommendations are confined to real burdens. It is beyond the scope of the present exercise to consider whether an equivalent rule should apply to other title conditions. It should not be assumed that the arguments are the same.

Jurisdiction

6.19 **Validity of burdens.** Not all burdens which appear on the register are enforceable. A real burden may be too vague to enforce; or there may be a defect in the constitutive deed; or again there may be no subsisting benefited property. Where a burden is unenforceable, it cannot under the present law be varied or discharged by the Lands Tribunal. The power of the Tribunal is limited to valid burdens. A burden which is invalid does not require to be varied or discharged.⁴³ But while sound in theory, this rule is awkward in practice. The Tribunal has no formal power to pronounce on the validity of burdens. Only the ordinary courts can do that. Accordingly, if the Tribunal decides that a burden is unenforceable, the only course open to it is to dismiss the application. This result is unlikely to satisfy the applicant. As the Tribunal put it in one case:⁴⁴

“Dismissal may not be regarded by the parties as a satisfactory or helpful outcome to this application, particularly as our disposal of the matter is not in the form of a declarator that there is no subsisting burden.”

A formal declarator that the burden is unenforceable can only come from the ordinary courts. But an applicant who has funded one litigation is likely to shrink from funding a second.

6.20 In the discussion paper we pointed out that two reforms would transform the situation.⁴⁵ Firstly, and most obviously, the Tribunal could be given power to determine the validity of burdens, including issues of applicability, enforceability and construction. That would be a change of form rather than of substance, for in substance the Tribunal already

“have to explicate their statutory jurisdiction under s 1 of the 1970 Act by deciding whether they are confronted by an enforceable land obligation which they can then vary or discharge in terms of s 1(2) of that Act.”⁴⁶

The power to determine validity has been conferred on the Lands Tribunal both in England and Wales⁴⁷ and in Northern Ireland.⁴⁸ It is difficult to see why it should be denied to the

⁴² Para 5.45.

⁴³ *Murrayfield Ice Rink Ltd v Scottish Rugby Union* 1972 SLT (Lands Tr) 20; *Solway Cedar Ltd v Hendry* 1972 SLT (Lands Tr) 42.

⁴⁴ *McCarthy & Stone (Developments) Ltd v Smith* 1995 SLT (Lands Tr) 19 at p 26B.

⁴⁵ Scot Law Com DP No 106 paras 6.63 to 6.66.

⁴⁶ *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105 at p 109A. An example of this process is *Co-operative Wholesale Society v Ushers Brewery* 1975 SLT (Lands Tr) 9.

⁴⁷ Law of Property Act 1925 s 84(2).

⁴⁸ The Property (Northern Ireland) Order 1978 (SI 1978/459) art 4(1).

Lands Tribunal in Scotland. The ordinary courts would continue to have jurisdiction, exercised concurrently.

6.21 Secondly, the Tribunal could be empowered to discharge a burden, or apparent burden, without regard to questions of validity. This is more important than it sounds. It would allow applications to be made on two separate bases, the applicant arguing both that the burden is unenforceable, and alternatively that it should be discharged. And it would allow the alternative argument to be brought first, at the option of the applicant. Sometimes it might be easier to make the case for discharge than to satisfy the Tribunal on some abstruse point of the law of constitution of real burdens. If the burden is duly discharged, the applicant is unlikely to be troubled by the thought that it was invalid all along.

6.22 All those who commented on these proposals were in favour of them. Only one qualification seems necessary. While it is obviously convenient that the Tribunal should be able to consider issues of validity in tandem with issues of discharge, it is less important that it should be able to consider issues of validity on their own. A person who wishes a ruling on the validity of a burden could just as well make an application to the ordinary courts; and there is a danger that the Tribunal could become over-stretched with declaratory cases. In those circumstances we think that the Tribunal should have a right to hear applications concerned solely with validity, but not a duty. In appropriate cases it could choose to decline jurisdiction.⁴⁹ This approach has the support of the current members of the Lands Tribunal.

6.23 We recommend that

35. (a) The Lands Tribunal should be empowered -

- (i) subject to recommendation 37, to discharge any title condition or purported title condition;**
- (ii) to determine any question as to the validity, applicability or enforceability of a real burden or as to how it is to be construed.**

(b) An application made under both (i) and (ii) above may be combined; and the Tribunal should have a discretion to decline jurisdiction in the case of an application made under (ii) alone.

(Draft Bill s 85(1)(a)&(9))

6.24 **Enforcement of burdens.** At the moment burdens are enforced in one court but discharged in another. Sometimes this may be inconvenient. If the true defence to an enforcement action, brought in the ordinary courts, is that the burden should be varied or discharged, the action will require to be sisted in order to allow an application to the Lands Tribunal. In the discussion paper we invited views on whether enforcement and discharge should be brought together, either by allowing enforcement in the Lands Tribunal or by allowing discharge in the ordinary courts.⁵⁰ Consultees were divided. The Court of Session

⁴⁹ For a precedent, also involving the Lands Tribunal, see Lands Tribunal Act 1949 s 1(3B) (appeals under the Valuation Acts).

⁵⁰ Scot Law Com DP No 106 paras 6.67 to 6.69.

judges favoured allowing enforcement in the Lands Tribunal but did not support giving the ordinary courts jurisdiction in respect of discharge. The Faculty of Advocates took the opposite view. Some consultees thought that there should be concurrent jurisdiction in both courts. Others were in favour of the *status quo*. In the discussion paper we set out some of the difficulties in extending the existing jurisdictions, and suggested that the balance of argument might lie against change. On the whole, that view has been reinforced by consultation. We do not therefore recommend an extension of jurisdictions in this regard.

Restatement with modifications

6.25 We have no other proposals which bear on real burdens alone. But the changes already recommended are sufficiently far-reaching to require that the existing statutory provisions, in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970, be repealed and replaced. This in turn provides the opportunity to make a number of other changes in the operation of the Lands Tribunal jurisdiction. In the rest of this part we consider the manner in which the existing rules should be restated, and the extent of any change. The modifications proposed will affect all title conditions and not merely real burdens; and they will apply to applications for renewal⁵¹ and to declaratory applications⁵² as well as to applications for discharge.

Title conditions and land obligations

6.26 **Introduction.** In this report, and in the draft bill which accompanies it, the term “title condition” replaces “land obligation”.⁵³ But, as will be seen, the change is not merely one of nomenclature.

6.27 The term “land obligation” was introduced by the 1970 Act as the generic term for those obligations which could be discharged by the Lands Tribunal. Not absolutely all land obligations can be so discharged, however. Those which cannot are listed in a schedule to the Act⁵⁴ and are excepted from the Lands Tribunal jurisdiction – an approach which is convenient in practice⁵⁵ and is adopted in our draft bill. In this section of the report we consider, first, the definition of “title condition”, and then the list of exceptions.

6.28 **Meaning of “title condition”.** In the 1970 Act “land obligation” is defined (incorporating here the amendments made prospectively by the Abolition of Feudal Tenure etc. (Scotland) Act 2000) as:⁵⁶

⁵¹ That is to say, renewal of real burdens following intimation under the termination procedure. See paras 5.45 to 5.53.

⁵² Paras 6.19 and 6.20.

⁵³ Para 1.36.

⁵⁴ Conveyancing and Feudal Reform (Scotland) Act 1970 sched 1.

⁵⁵ Mainly because the exceptions cut across the categories laid down in the principal definition and could not easily be accommodated as part of that definition. A subsidiary reason is that the provisions in the draft bill on rights of pre-emption apply to all title conditions and should not be artificially restricted on grounds which are relevant only to Lands Tribunal applications. Finally, the list of exceptions can also be used to limit the use of notices of termination: see para 5.32.

⁵⁶ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2), as amended prospectively by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 sched 12 para 30(2)(a). If this report is implemented in the manner suggested, s 1(2) will be repealed before the prospective amendments can take effect.

- “(a) an obligation relating to land which is enforceable by a proprietor of land or of a real right in land, by virtue of his being such proprietor, and which is binding upon a proprietor of that or other land, or of a real right in that or other land, by virtue of his being such proprietor;
- (b) a conservation burden; or
- (c) a maritime burden.”

Paragraphs (b) and (c) enumerate, in a straightforward way, certain burden types. But paragraph (a) is couched in general terms and is not easy to understand. The essential idea is that there should be two distinct properties, or at least real rights in land, one of which is the benefited property and the other the burdened property. The two properties can be physically distinct, as in a servitude. Or they can be different rights in the same property, as in the case of conditions between landlord and tenant in a lease. After 30 years experience in the Lands Tribunal it is possible to state with reasonable precision the obligations which fall within this definition. The paradigm example of a land obligation is a real burden, including a real burden constituted as a right of pre-emption.⁵⁷ The other main land obligations are servitudes,⁵⁸ and conditions in a lease, whether binding on the landlord or on the tenant.⁵⁹ A condition created directly by statute is not a land obligation.⁶⁰ Nor probably is a condition created by common law, such as an obligation of common interest,⁶¹ although the point remains untested. In formulating a definition of “title condition” it would seem helpful to reduce the 1970 definition to a list of particular obligation-types; and the opportunity may also be taken to add to or subtract from the current list.

6.29 Any list of title conditions must begin with the three most prominent land obligations: real burdens, servitudes, and conditions in a lease. Something more should be said about the last of these. Only registrable leases qualify, that is to say leases for more than 20 years.⁶² The policy justification seems to be that long leases take on some of the features of ownership and should be subject to a similar regime in respect of discharge of conditions. There is no requirement that the lease actually be registered. There are two further limitations. First, like all land obligations, the conditions must relate to the land in some way.⁶³ And secondly, there is excluded an obligation to pay rent, or an obligation of relief relating to any such payment.⁶⁴

6.30 Closely analogous, but requiring special enumeration, are conditions imposed in the assignation of a registered lease under section 3(2) of the Registration of Leases (Scotland) Act 1857.⁶⁵

⁵⁷ *Banff & Buchan District Council v Earl of Seafield's Estate* 1988 SLT (Lands Tr) 21.

⁵⁸ eg *Devlin v Conn* 1972 SLT (Lands Tr) 11.

⁵⁹ In practice applications, where they are brought at all, are likely to be brought in respect of obligations on the tenant. See *McQuiban v Eagle Star Insurance Co* 1972 SLT (Lands Tr) 39.

⁶⁰ *Macdonald* 1973 SLT (Lands Tr) 26.

⁶¹ But compare Reid, *Property* para 374.

⁶² Registration of Leases (Scotland) Act 1857 s 1.

⁶³ A land obligation is “an obligation relating to land ...”: Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2). For discussion, see *George T Fraser Ltd v Aberdeen Harbour Board* 1985 SLT 384.

⁶⁴ Conveyancing and Feudal Reform (Scotland) Act 1970 sched 1 para 1. Para 5 of the same schedule excludes agricultural holdings and crofts, but it is convenient to leave these as part of the exclusions (see para 6.42) rather than as part of the principal definition.

⁶⁵ This includes conditions contained in a deed executed under s 3(2A) of the 1857 Act (as inserted by sched 8 para 1 of the draft bill). The way in which these conditions operate is not straightforward. See Reid, *Property* para 352.

6.31 In a servitude restrictions are sometimes imposed on the holder. There are then two matching obligations. First there is the obligation created by the servitude itself; and then there is the obligation placed on the servitude holder.⁶⁶ This means that the benefited owner in respect of the first obligation is also the burdened owner in respect of the second. While, however, the first obligation (the servitude proper) is a land obligation and capable of being discharged, the second obligation (the servitude condition) is not. That was decided in *Mackay v Lord Burton*,⁶⁷ where the grant of a servitude of access was qualified by the condition that it was to be used only “for all necessary and usual agricultural purposes”. Subsequently the servitude holder sought to have the restriction removed. The application was refused. As well as being technically correct,⁶⁸ the decision seems correct on policy grounds also. A jurisdiction which is designed to limit or remove servitudes should not be used as a means of increasing their scope. To do so is to protect the wrong party. We would not, therefore, advocate that servitude conditions should, in general, be classified as title conditions. But there is one case where it might be appropriate to do so. Sometimes the condition imposed on the servitude holder is, not a restriction, but an affirmative obligation.⁶⁹ Most typically this is an obligation to maintain a road or some other part of the burdened property. An affirmative obligation is freestanding, in the sense that it has no impact on the manner in which the servitude is exercised. The obligation could equally be constituted as a real burden, and it may be a matter of chance whether it was a real burden or a servitude condition. In time an affirmative obligation might become unduly burdensome or otherwise unreasonable. If it were constituted as a real burden it could be discharged by the Lands Tribunal. We think that the rule ought to be the same for affirmative obligations constituted as servitude conditions.

6.32 In part 8 of this report we set out a model management scheme, known as the Development Management Scheme. Provisions of this scheme, whether as enacted or as amended, are intended to be title conditions and to be capable of being discharged by the Lands Tribunal.⁷⁰ In applying the relevant part of the legislation, scheme provisions are to be treated as if they were community burdens, to which they have a strong functional resemblance.⁷¹

6.33 The definition of “land obligation” makes express mention of conservation burdens, but as a type of real burden they are already included in the proposed definition of “title condition”.⁷² If, however, conservation burdens are to be discharged by the Lands Tribunal, it would be difficult to continue to exempt agreements made by the National Trust for Scotland under its own special legislation.⁷³ Such agreements should, therefore, be included in the definition of “title conditions”.

⁶⁶ For a pioneering discussion of these ‘servitude conditions’, see *Cusine & Paisley, Servitudes* chaps 13 and 14.

⁶⁷ 1994 SLT (Lands Tr) 35. See also *Reid v Stafford* 1979 SLT (Lands Tr) 16.

⁶⁸ A servitude is not itself an interest in land which can be held separately, as the 1970 Act requires. So a condition affecting the holder of such a right seems not to be a land obligation. See 1994 SLT (Lands Tr) 35 at 37H-L. Compare however *Halliday, Opinions* p 624.

⁶⁹ *Cusine & Paisley, Servitudes* para 14.06. For the distinction between restrictions and affirmative obligations, see para 2.1 above. An affirmative obligation cannot be imposed on the burdened owner.

⁷⁰ Para 8.80. But the (non-variable) part 2 of the Scheme is excluded.

⁷¹ Para 8.81.

⁷² The same is true of maritime burdens. The only reason for their separate enumeration in the prospective definition of “land obligation” is that there is no benefited property.

⁷³ National Trust for Scotland Order Confirmation Act 1938 s 7. For the current position, see *Agnew of Lochnaw, Land Obligations* para 3-13.

6.34 In the discussion paper we invited views as to whether planning agreements entered into under section 75 of the Town and Country Planning (Scotland) Act 1997 should also be subject to discharge by the Lands Tribunal.⁷⁴ As might be expected, opinion was divided. Local authorities were strongly opposed. A number of solicitors were strongly in favour. The Court of Session judges and the Faculty of Advocates did not support the proposal. Two main arguments were put forward against any extension of jurisdiction. First, it was pointed out that the current role of the Lands Tribunal is to adjudicate on matters of private right. This suggested that the Tribunal as at present constituted would not be well-equipped to determine matters of public policy, particularly those which might have a political dimension. Secondly, it was thought that such a change should not be introduced as a by-product of a review of the law of real burdens. The change would have important implications for planning law as a whole, and would require to be considered in that wider context. We have found this a difficult matter to decide. As the law currently stands, a condition in a planning agreement can be removed only if the planning authority consents. There is no appeal procedure. Yet a planning condition may become out-of-date, and inhibit development, in much the same way as a real burden. On the other hand we accept that there are difficulties in extending the Lands Tribunal's powers, at least at the present time. In England and Wales a special procedure for planning agreements was introduced in 1991 involving an application to the local planning authority, with the possibility of an appeal to the Secretary of State.⁷⁵ It may be that this provides a better model. Alternatively the mechanism described in the next paragraph would allow Scottish Ministers to extend the Lands Tribunal jurisdiction to planning agreements at some later date and after appropriate consultation. With some hesitation, therefore, we do not recommend at present that planning agreements should be capable of discharge by the Lands Tribunal.⁷⁶

6.35 New kinds of restrictions on land may be developed in the future, which might appropriately be discharged by the Lands Tribunal; and, as just mentioned, it may be decided that the Lands Tribunal is a suitable forum for planning agreements and other similar burdens. Flexibility is preserved here by giving Scottish Ministers the power to add to the list of title conditions by statutory instrument.

6.36 We recommend that

36. "Title condition" should be defined to mean -

- (a) a real burden;**
- (b) a servitude;**
- (c) a servitude condition constituted as an affirmative obligation;**
- (d) a condition relating to land in a registrable lease, whether the condition is binding on the landlord or on the tenant, but excluding an**

⁷⁴ Scot Law Com DP No 106 paras 6.70 and 6.71.

⁷⁵ Town and Country Planning Act 1990 ss 106A and 106B (as inserted by s 12 of the Planning and Compensation Act 1991).

⁷⁶ Nor therefore would we recommend that the Lands Tribunal jurisdiction be extended to other, similar agreements, such as agreements made by Scottish Enterprise or Highlands and Islands Enterprise under s 32 of the Enterprise and New Towns (Scotland) Act 1990.

obligation to pay rent or any obligation of relief relating to any such payment;

(e) a condition imposed under section 3(2) or section 3(2A) of the Registration of Leases (Scotland) Act 1857;

(f) a rule of the Development Management Scheme (other than part 2);

(g) a condition in an agreement entered into under section 7 of the National Trust for Scotland Order Confirmation Act 1938; and

(h) such other condition relating to land as Scottish Ministers may prescribe by statutory instrument.

(Draft Bill s 113(1))

6.37 **Conditions excepted from Lands Tribunal discharge.** Schedule 1 to the Conveyancing and Feudal Reform (Scotland) Act 1970 excludes various conditions from the jurisdiction of the Lands Tribunal in respect of variation and discharge.⁷⁷ With one exception,⁷⁸ we think that the list can be carried forward into the proposed new legislation. A brief discussion of each condition follows.

6.38 *Obligations to pay rent, feuduty etc.* The exclusion of an obligation to pay rent has already been worked into the definition of "title condition".⁷⁹ The remaining obligations fall with the abolition of the feudal system.⁸⁰

6.39 *Obligations relating to minerals.* Schedule 1 excludes obligations relating to the right to work minerals, and any ancillary right in relation to minerals within section 2 of the Mines (Working Facilities and Support) Act 1966. Ancillary rights listed under section 2 include the right to let down the surface and the right to enter and use the surface for various purposes. Rights relating to minerals are usually created as part of the process of separating ownership of minerals from the surface, and do not fit easily into standard classifications of conditions on land.⁸¹ At any rate they will rarely be title conditions, as defined above, except in the case of a mineral lease. The exemption does not seem to have caused difficulties in practice and it has not been suggested to us that it should be removed.

6.40 *Obligations for the protection of royal parks, gardens or palaces.* The origins of this exception lie in a provision in the equivalent English legislation.⁸² In England its purpose is to exempt restrictions imposed by the Secretary of State on land adjoining royal parks and gardens under powers contained in section 137 of the Law of Property Act 1922.⁸³ Since this

⁷⁷ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(1).

⁷⁸ Obligations for the protection of royal parks etc, discussed at para 6.40.

⁷⁹ Para 6.29.

⁸⁰ Sched 1 of the 1970 Act is prospectively amended to this effect by sched 12 para 30(22) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

⁸¹ Reid, *Property* para 266.

⁸² Law of Property Act 1925 s 84(11).

⁸³ Law Com No 127 para 18.31.

provision has no equivalent in Scotland, the exception seems without content, and we suggest that it be removed.⁸⁴

6.41 *Obligations created for military or civil aviation purposes.* The exclusion applies only to the extent that the obligations are enforceable by the Crown or by a public or international authority. This provision too was taken from the equivalent English legislation.⁸⁵ We are told that an example of an obligation created for military purposes would be a restriction on building conceived in favour of an adjoining telecommunications or radar installation. If such restrictions were vulnerable to discharge by the Lands Tribunal, it would be necessary for the Secretary of State for Defence to safeguard the position by acquiring the land in question. Similar issues arise in relation to obligations created for civil aviation purposes. The exemption is conditional on public ownership and ceases if the benefited property is sold into private hands. We propose no change to the current position.⁸⁶

6.42 *Obligations created in an agricultural holding, croft etc.* To some extent these obligations come within the jurisdiction of the Land Court. Again we have no proposals for change.

6.43 We recommend that

37. The power conferred on the Lands Tribunal in terms of recommendation 35(a)(i) should not include a power to discharge –

- (a) an obligation relating to the right to work minerals or to any ancillary right in relation to minerals;**
- (b) an obligation enforceable by the Crown or a public or international authority and created for military or civil aviation purposes; and**
- (c) an obligation created in a lease of an agricultural holding, small landholding or croft.**

(Draft Bill s 85(2) and sched 6)

Who can apply?

6.44 The effect of our proposals is to create three separate jurisdictions for the Lands Tribunal. There is, first, the existing jurisdiction to discharge⁸⁷ land obligations – now recast as title conditions. Secondly, there is the declaratory jurisdiction allowing the Tribunal to determine issues of validity and scope in relation to real burdens (only).⁸⁸ And finally, there is the jurisdiction to renew a real burden which is more than 100 years old following

⁸⁴ In reaching this view we have benefited from the comments of Mr Alan Menzies WS, Crown Estate Solicitor (Scotland), and Mr David Stewart WS, Solicitor to Her Majesty the Queen in Scotland.

⁸⁵ Law of Property Act 1925 s 84(11), (11A).

⁸⁶ The conclusion of the English Law Commission was the same: Law Com No 127 para 18.31.

⁸⁷ “Discharge” is used in place of the traditional “variation and discharge”. This is partly for consistency with the rest of the report and the draft bill. But it is also an acknowledgement that “variation” in the context of land obligations amounts merely to partial discharge, and does not include the idea of imposing new obligations (although this can be done under separate powers). Thus a “variation” of a burden to the extent of allowing the building of a conservatory is in fact a partial discharge, to that extent. By contrast, where “variation” is used in our draft bill it carries with it the idea of the imposition of new obligations. See the definition of “variation” in s 113(1).

⁸⁸ Paras 6.19 and 6.20.

intimation of a notice of termination.⁸⁹ Often it will be possible to provide common rules for all three, but the rules for the making of applications are necessarily subject to differences.

6.45 **Discharge or declarator.** Under the present law an application for discharge can be made only by the “burdened proprietor”, that is to say, by the owner of the burdened property.⁹⁰ If the property is owned in common, any *pro indiviso* owner can apply.⁹¹ It is thought that the applicant must have a registered title, and certainly there is nothing in the legislation to suggest that “proprietor” does not carry its normal meaning. In practice, questions about burdens often arise at the time when property is being sold, in which case any application to the Tribunal must be made in the name of the seller, unless the purchaser has already become owner; but if ownership then changes, the seller can withdraw from the proceedings in favour of the purchaser.⁹²

6.46 We suggest two changes to the existing rules. First, it should be possible to apply even without a registered title. This is consistent with our general approach to the meaning of “owner”.⁹³ But the applicant would require to hold a delivered conveyance. A purchaser under missives would not be able to apply, unless he qualified under the next paragraph.

6.47 Secondly, a change is necessary to take into account the extension of enforceability recommended earlier.⁹⁴ A person who is subject to a real burden should have the means of procuring its discharge. For as long as a real burden is enforceable against the owner of the burdened property alone, only that owner should be able to apply for its discharge. But if enforceability is to be available against others, such as tenants, those others too should have a right of application.⁹⁵ A similar rule was recommended earlier in relation to minutes of waiver.⁹⁶ The proposed change would also affect servitudes which are already, under the current law, enforceable against tenants and others in possession of the burdened property.⁹⁷ In practice most applications are likely to continue to be brought by owners; and it seems improbable that a person with a wholly transient interest in property would go to the trouble and expense of applying to the Lands Tribunal. Only a discharge or partial discharge could be obtained: a new obligation would require the consent of the burdened owner.⁹⁸

6.48 The same rules should apply in respect of applications seeking a ruling as to validity or scope. In practice, an application under this head may often be brought in conjunction with an application for discharge.⁹⁹

⁸⁹ Paras 5.45 ff.

⁹⁰ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(3).

⁹¹ *Ibid*, s 2(6)(i).

⁹² Lands Tribunal for Scotland Rules 1971 r 26 and 27.

⁹³ Para 13.3.

⁹⁴ Paras 4.25 ff.

⁹⁵ Here we depart from the provisional view expressed in the discussion paper (Scot Law Com DP No 106 para 6.51).

⁹⁶ Para 5.13.

⁹⁷ *Cusine & Paisley, Servitudes* para 1.62.

⁹⁸ Para 6.88. There should therefore be no prejudice to the owner of the burdened property. It is possible in theory that a servitude (but not a real burden) might actually be favourable to the burdened owner on account of a maintenance condition imposed on the benefited owner. Discharge would then be against his interests. But if such a case were ever to arise, it may be assumed that the Lands Tribunal would exercise its discretion with particular care. The owner would of course receive notification of the application and would be entitled to make representations.

⁹⁹ Para 6.21.

6.49 Later we suggest an additional rule for community burdens.¹⁰⁰

6.50 **Renewal.** An application for renewal should be available to any owner potentially affected by the termination procedure, that is to say, to any owner of a benefited property. It should not, however, be available to others who hold enforcement rights – tenants, for example – but are not owners.¹⁰¹ This is consistent with the view that the continuation of a burden is a matter for owners and not for others.¹⁰² As before “owner” includes a person whose title has not yet been completed by registration.

6.51 We recommend that

38. (a) An application for discharge, or for a ruling on validity or scope, should be available to any owner of the burdened property and to any one else against whom the title condition is enforceable.

(b) An application for renewal should be available to any owner of a benefited property.

(Draft Bill s 85(1))

Who can make representations?

6.52 Once an application is made, it is open to others to make representations. A representation need not be hostile to the application. Not everyone is, or should be, entitled to make representations. This should be restricted to those who have title¹⁰³ to enforce the condition, or against whom the condition can be enforced. That, more or less, is the present law,¹⁰⁴ although the class of those with rights and obligations is larger under the proposed new law. So if an application for discharge is made by a *pro indiviso* owner of the burdened property, representations could be made by the owner of the benefited property (or properties, if there is more than one), and also by a tenant or any other person holding a possessory real right in that property.¹⁰⁵ Representations (presumably in support) could also be made by a co-owner of the burdened property, and by a tenant of such property. Similarly, representations in relation to an application for renewal could be made by the owner or tenant of the burdened property, as well as by the owner or tenant of any other benefited property.¹⁰⁶

6.53 The present law also recognises a category of “affected proprietors”, comprising such other persons as appear to the Tribunal to be affected by the application – in practice close

¹⁰⁰ Paras 6.95 and 6.96.

¹⁰¹ Paras 4.3 ff.

¹⁰² Paras 4.13 and 5.10. If a non-owner could apply for renewal, the burdened owner would be in a worse position than if, instead of sending a notice of termination, he had applied for a discharge: see para 6.14.

¹⁰³ Even if there is no interest. See Scot Law Com DP No 106 para 6.57. However, absence of interest affects the notification procedures: see para 6.58.

¹⁰⁴ Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(2).

¹⁰⁵ Holders of possessory real rights have a title to enforce: see paras 4.3 ff. However, if the only representation is by a non-owner, the application is treated as unopposed, and, in relation to most classes of real burden, the applicant is entitled to a discharge without further inquiry. See para 6.14.

¹⁰⁶ However, the owner of a benefited property who did not himself apply for renewal is likely to lose his rights, and hence cease to qualify, following registration of the notice of termination. See para 5.52.

neighbours and the like.¹⁰⁷ The admission of representations from affected proprietors is within the discretion of the Tribunal, but in practice is quite often exercised in their favour. In the discussion paper we suggested that this special status was a legacy of the feudal system.¹⁰⁸ While feudal burdens generally benefit neighbours, they are often enforceable only by the superior. Hence, in the absence of special status, those most affected by an application for discharge would have no say in its disposal. In a post-feudal world the position will be different. Feudal burdens will be extinguished as such. Burdens which survive will be scrupulously attributed to a particular benefited property. Their purpose will be to protect those private interests, and no others. There does not seem a strong case for giving special rights to those whose interests the burdens are not intended to protect. On consultation there was overall support for ending the special status of affected proprietors.

6.54 The mechanics of the current system can remain in place. Representations must be made within 21 days of notification of the application¹⁰⁹ or such longer period as may be specified.¹¹⁰ The Tribunal has a discretion to accept late representations. Representations are made in writing, and an ordinary letter is sufficient.¹¹¹ As mentioned earlier,¹¹² the representations require to be accompanied by payment of the appropriate fee.

6.55 We recommend that

- 39. (a) The persons entitled to make representations in relation to an application should be –**
- (i) any person who has title to enforce the title condition; and**
 - (ii) any person against whom the title condition is enforceable.**
- (b) Representations should be in writing and accompanied by payment of the appropriate fee.**
- (c) Representations should be made within 21 days of notification (or such later date as may be specified), but the Lands Tribunal should be able, at its discretion, to accept representations made after this date.**

(Draft Bill ss 90 and 91)

Notification

6.56 **To whom?** Representations are preceded by notification. Here the present law seems broadly satisfactory. On receiving an application for discharge the Lands Tribunal must notify the owner of the benefited property or properties, as well as any other owner of the burdened property.¹¹³ In the case of title conditions without a benefited property,¹¹⁴ it

¹⁰⁷ Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(2).

¹⁰⁸ Scot Law Com DP No 106 para 6.55.

¹⁰⁹ For notification, see paras 6.56 ff.

¹¹⁰ The current minimum period is 14 days (Lands Tribunal for Scotland Rules 1971 r 4(2)) but the practice is to allow 21 days.

¹¹¹ Lands Tribunal for Scotland Rules 1971 r 4(2).

¹¹² Paras 6.10 and 6.11.

¹¹³ Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(1).

will be necessary to notify the person in right of the condition. It seems neither practical nor necessary¹¹⁵ to notify the non-owners who, under our proposals, have a right to make representations. But the Tribunal should have a discretion to notify non-owners in cases where it seems appropriate to do so.

6.57 The position is different in relation to applications for renewal. An application follows intimation of the termination procedure to the owners of the benefited properties.¹¹⁶ There is no need to intimate for a second time. A benefited owner who fails to apply for renewal is on the point of losing his rights.¹¹⁷ It will, however, remain necessary for the Tribunal to notify the owner of the burdened property and the terminator, if different.¹¹⁸

6.58 **How?** The current law is that notification must normally be in writing. However, it may also be given by advertisement or other method in respect of owners who cannot by reasonable inquiry be identified or found.¹¹⁹ The complexity of the rules on implied rights to enforce means that reasonable inquiry is sometimes not sufficient to identify all of the benefited owners; and even where identification is possible, the numbers involved may be so large as to make individual notification impracticable. In both cases, a newspaper advertisement is used instead. Where numbers are unreasonably large, the Tribunal's practice is determined by a consideration of interest to enforce. Individual notices are served on those properties lying within an area of enforceability drawn by the Tribunal. Properties lying outside this area must make do with a newspaper advertisement.¹²⁰ It is not clear that this sensible practice is sanctioned by the current legislation. Subject to clarifying this last point, we suggest that the present rules be retained. Proposals made later in respect of implied rights to enforce should make it easier to identify the benefited owners;¹²¹ and partly for that reason we do not persevere with the suggestion in the discussion paper that special provision might be needed for cases where notification failed to take place.¹²²

6.59 The notice, whether given individually or by advertisement, should summarise the application, specify the date by which representations must be made,¹²³ state the fee, and, in appropriate cases, indicate that if the application is unopposed it may be granted without further inquiry. Notices given individually may be delivered or sent,¹²⁴ and the current practice is to use recorded delivery. Since unregistered "owners" are not detectable by a search of the property register, it may be prudent to qualify the name of the apparent owner with an expression such as "or current owner".¹²⁵

¹¹⁴ Conservation burdens, maritime burdens, conditions in an agreement entered into under s 7 of the National Trust for Scotland Order Confirmation Act 1938, and, sometimes, manager burdens.

¹¹⁵ It is not necessary because the enforcement rights of a non-owner are secondary to those of the owner. Only an owner can discharge a real burden, and only representations from an owner prevent an application from being classified as unopposed.

¹¹⁶ Paras 5.33 to 5.39.

¹¹⁷ Para 5.52.

¹¹⁸ The terminator is the person seeking to bring the burden to an end by use of the termination procedure. He need not be the owner of the burdened property: see para 5.30.

¹¹⁹ Lands Tribunal for Scotland Rules 1971 r 4(1)(a). A newspaper advertisement is the normal alternative, but there are also other possibilities. One consultee recalled an application being posted on a village notice board.

¹²⁰ We owe this information to the Lands Tribunal's response to Scot Law Com DP No 93.

¹²¹ See generally part 11.

¹²² Scot Law Com DP No 106 para 6.60.

¹²³ See para 6.54.

¹²⁴ Draft bill s 115(2).

¹²⁵ Draft bill s 115(1)(b). This is a new problem. Under the current law only proper - ie registered - owners need be notified.

6.60 We recommend that

40. (a) On receipt of an application for discharge, or for a ruling on validity or scope, the Lands Tribunal should give notice of the application to any person (not being the applicant) who appears to be -
- (i) an owner of the burdened property;
 - (ii) an owner of any benefited property; and
 - (iii) in a case where there is no benefited property, a person in right of the title condition.
- (b) On receipt of an application for renewal, the Lands Tribunal should give notice of the application to the terminator and to any (other) person who appears to be an owner of the burdened property.
- (c) The Lands Tribunal may also give notice of the application to any other person.
- (d) Normally the notice should be sent, but it may be given by advertisement or other means if -
- (i) given to a person who cannot, by reasonable inquiry, be identified or found;
 - (ii) the person to whom it is given does not appear to have any interest to enforce; or
 - (iii) so many people require to be given notice that individual notification is not reasonably practicable.
- (e) The notice should -
- (i) summarise the application;
 - (ii) specify the date (being not less than 21 days after notification) by which representations must be made;
 - (iii) specify the fee; and
 - (iv) contain a warning that an unopposed application may be granted without further inquiry.

(Draft Bill ss 88 and 89)

Disposal of applications

6.61 Unless an application is unopposed, it will be necessary for it to be considered on its merits. Normally this involves both a hearing and a site visit.¹²⁶ Consideration on the merits is also required for certain unopposed applications, namely those seeking (i) a ruling on validity and scope and (ii) the discharge of title conditions other than real burdens, and (iii) the discharge of facility burdens or service burdens.¹²⁷

6.62 Currently applications are evaluated by reference to three statutory grounds. In terms of the Act¹²⁸ a discharge may be granted if, and only if, the Tribunal is satisfied that

“(a) by reason of changes in the character of the land affected by the obligation or of the neighbourhood thereof or other circumstances which the Tribunal may deem material, the obligation is or has become unreasonable or inappropriate; or

(b) the obligation is unduly burdensome compared with any benefit resulting or which would result from its performance; or

(c) the existence of the obligation impedes some reasonable use of the land.”

The grounds are alternative and not cumulative, and the Lands Tribunal can grant an application on the basis of a single ground.¹²⁹

6.63 The grounds have different purposes. Ground (a) is primarily concerned with obsolescence.¹³⁰ Where circumstances change, a burden may become obsolete. If so, it confers no benefit and should be discharged.¹³¹ Ground (c) shifts the focus from the benefited to the burdened property by examining the use which the burdened owner wishes to make. Owners, it implies, should not be prevented from making reasonable use of their property.¹³² Ground (c) is exclusively concerned with restrictions. Its counterpart for burdens in the form of affirmative obligations is ground (b), although that ground has also been used in cases involving restrictions.¹³³ Ground (b) is directed at obligations (and especially at maintenance obligations) which have become unduly burdensome for one

¹²⁶ However, with the consent of the parties the Tribunal may dispose of an application without a hearing. See Lands Tribunal for Scotland Rules 1971 r 31.

¹²⁷ A consideration on the merits is not required in respect of applications for the discharge of other kinds of real burdens. See paras 6.13 to 6.17. Nor is it required in respect of applications for renewal. See para 5.45.

¹²⁸ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(3).

¹²⁹ For a discussion of the way in which these grounds have been applied, see Halliday, *Conveyancing* paras 34-76 to 34-88; Gordon, *Scottish Land Law* paras 25-13 to 25-26; Agnew of Lochnaw, *Land Obligations* chap 6.

¹³⁰ This is made explicit both in the Halliday Report para 26 (“that by reason of changes in the character of the property or the neighbourhood or other circumstances which it may deem material, the condition or servitude has become obsolete or inappropriate or of little practical value to the person or persons entitled to enforce it”) and in s 84(1)(a) of the Law of Property Act 1925, on which Halliday’s recommendation was based.

¹³¹ Eg, *Sinclair v Gillon and Another* 1974 SLT (Lands Tr) 18.

¹³² Eg, *Bachoo v George Wimpey & Co* 1977 SLT (Lands Tr) 2.

¹³³ Eg, *Murrayfield Ice Rink Ltd v Scottish Rugby Union* 1972 SLT (Lands Tr) 20.

reason or another, such as the poor state of repair of the thing which is to be maintained, or the unavailability of a stipulated building material.¹³⁴

The case for reformulating the statutory grounds

6.64 If there is a case for reformulating the grounds for variation and discharge, it does not rest on broad matters of policy, for, judged by that criterion, the existing grounds seem satisfactory enough. But the form in which the rules are presented creates some difficulties, and in any event some adaptation is required as a result of proposals made elsewhere in this report. The case for a reformulation can be summarised under two headings.

6.65 **Existing grounds are self-contained.** Each of the three statutory grounds is self-contained and, if pled, must be considered separately by the Lands Tribunal. There is no question of balancing the grounds one against the other. If the applicant succeeds under ground (c) it does not matter that he previously failed under ground (a). Success under one ground means success for the whole application. This is artificial. Ground (a) is directed particularly at the position of the benefited owner and ground (c) at the position of the burdened. The two cannot readily be separated. In practice most applications are taken, and granted, under ground (c), which is the widest of the three grounds.¹³⁵ Yet ground (c) requires that the Tribunal consider only whether some reasonable use of the land is impeded. On a narrow reading, the interest of the benefited owner is not relevant;¹³⁶ and in assessing reasonableness the Tribunal has, understandably, tended to focus on the position of the neighbourhood as a whole. The current structure of section 1(3) does not seem well designed for balancing competing, and disparate, considerations.

6.66 **Existing grounds overlap.** There is an overlap among and between the existing three grounds. Grounds (b) and (c), for example, may both involve considerations of general amenity.¹³⁷ While ground (b) requires, in terms, that the interests of the burdened owner be weighed against those of the benefited, this may also occur in ground (c). The change of circumstances required for ground (a) may also determine the reasonableness, or otherwise, of the use proposed under ground (c).¹³⁸ This overlapping is related to the structural weakness identified earlier, for if each ground is to be considered in isolation, it is inevitable that there should be encroachment on to the territory of the others. Since an applicant can succeed on a single ground, he should not be able to succeed on too restricted a view of the issues. The overall effect, however, is unattractive. It means that arguments will tend to be repetitious, imposing additional work both on the parties and on the Tribunal.

6.67 **Proposal for reform.** As we pointed out in our discussion paper,¹³⁹ these problems are easily solved. The grounds could be taken out of their self-contained compartments and treated as a series of indicators as to the reasonableness or otherwise of granting the application. On this approach there would be a single ground for granting an application,

¹³⁴ Eg, *West Lothian Co-operative Society Ltd v Ashdale Land and Property Co Ltd* 1972 SLT (Lands Tr) 30.

¹³⁵ Cusine & Egan, *Feuing Conditions* table 5.9 found that 61% of applications were made on ground (c).

¹³⁶ But see *Murrayfield Ice Rink Ltd v Scottish Rugby Union Trustees* 1973 SC 21 per Lord Justice-Clerk Grant at pp 29-30

¹³⁷ Eg, *McArthur v Mahoney* 1975 SLT (Lands Tr) 2.

¹³⁸ Eg, *Manz v Butter's Trs* 1973 SLT (Lands Tr) 2.

¹³⁹ Scot Law Com DP No 106 para 6.23.

such as reasonableness; but in assessing reasonableness the Tribunal would require to have regard to a number of specific factors. This approach is already found in the legislation which applies to Northern Ireland.¹⁴⁰ Its basis is proportionality. In each case the Tribunal must evaluate all of the relevant factors to determine whether the balance of argument lies in favour of, or against, discharge. In substance this may not be very different from the approach which is currently adopted in Scotland.

6.68 A more radical solution would be to dispense with factors altogether. Factors may be less useful than at first sight appears. For if factors point in different directions, no guidance is provided as to how they are to be weighted; and there is in any event nothing to stop the court from taking into account factors which are not included on the list. From this it is possible to argue that a list of factors is at best unhelpful and at worst misleading, and that a general discretion does not benefit from further explanation. Nonetheless consultees supported our provisional view¹⁴¹ that factors were valuable, in this particular context at least. Factors are used in the current law, and so are familiar, both to the Lands Tribunal and to those who appear before it. They are also thought to assist in the formulation of argument and to give a good indication of the issues which are likely to be viewed as of importance.

6.69 On the broader question of replacing the compartmentalised grounds with a unified test, the response on consultation was strongly favourable. The Faculty of Advocates, for example, expressed itself as

“in favour of the proposal. We agree that the three statutory grounds have created difficulties of the type highlighted by the Commission, particularly in relation to overlap. From a practical point of view, this can create difficulties in preparation and presentation as well as in relation to advice as to which ground provides the best prospect of success. The approach based on reasonableness, having regard to a number of identified factors, with the flexibility to take into account other material circumstances, has a number of practical advantages. Identification of what may be regarded as the more important factors makes the evaluation of the merits of an application easier; and therefore easier to advise on the prospects of success; the existence of statutory factors should focus the presentation of evidence.”

Consultees also supported the particular list of factors put forward in the discussion paper.¹⁴² To that list we now turn.

Proposed factors

6.70 Following the discussion paper with only slight modifications, we propose that a title condition should be discharged, or renewed,¹⁴³ by the Lands Tribunal if, in all the circumstances, it is reasonable to do so. In reaching its decision the Tribunal should have regard to eight statutory factors. Sometimes the factors will all point towards the same

¹⁴⁰ The Property (Northern Ireland) Order 1978 (SI 1978/459) art 5. For a commentary on this provision, see Norma Dawson, “Modification and Extinguishing of Land Obligations under the Property (NI) Order 1978” (1978) 29 NILQ 223.

¹⁴¹ Scot Law Com DP No 106 para 6.41.

¹⁴² Scot Law Com DP No 106 paras 6.27 to 6.43.

¹⁴³ The grounds apply equally to renewal. They have no place, obviously, in relation to the Tribunal’s declaratory jurisdiction.

result, but in cases where they do not, some evaluation will be required by the Tribunal, and a view taken as to their relative weight and importance. In preparing a list of factors, we have been influenced mainly by two considerations. In the first place, the list should not be too long. The factors are to help the Tribunal reach a view on reasonableness. They are not intended to circumscribe its discretion, or to encourage prolonged debate. Secondly, each factor must be clear and relatively narrow. So far as possible there should be no overlap between them.

6.71 **(1) Change of circumstances.** A strong ground for discharging a title condition (or refusing to renew it) is that, the condition having been created with one set of circumstances in mind, those circumstances have now changed so that the condition no longer operates in the manner originally intended. Often this means that the condition has become obsolete, or at least obsolescent, and serves no useful purpose. In other words there is limited benefit to the benefited property, or perhaps no benefit at all. In the case of an affirmative obligation, a change of circumstances may mean that the obligation can no longer sensibly be performed. For example, if a tenement has become derelict and been demolished, an obligation to maintain its roof could not be complied with. Our proposal, therefore, is that the Tribunal should have regard to

any change in circumstances since the condition was first created, including changes in the character of the benefited and burdened properties and of the neighbourhood thereof.

This replicates, more or less, the existing ground (a), thus preserving a ground of discharge which is well understood and on which there is a developed jurisprudence. As compared to some of the other grounds, change of circumstance has the advantage of being relatively concrete, and hence relatively easy to evaluate.

6.72 **(2) Extent of private benefit.** A change of circumstances may lead to a reduction in the benefit conferred. But even if nothing has changed, a condition may still confer little or no benefit. The condition may have been pointless, or almost so,¹⁴⁴ from the very start. It is unusual for real burdens at least to be negotiated individually. Often a deed of conditions is registered before the property is marketed. Thereafter it is too late to demand change. The purchaser must either accept the conditions or give up the property. In any event, a subsequent purchaser has no opportunity to negotiate. Thus real burdens should not be viewed in the same light as contracts individually negotiated and freely entered into.¹⁴⁵ Nor should it be assumed that burdens are written with the particular property in mind. Sometimes they owe more to a conveyancer's bank of styles than to the wishes of the original parties or the needs of the property. A style may have been used inappropriately or unwisely. In our view, a burden which was always pointless should not be treated more favourably than one which once had a purpose which has now disappeared. Accordingly, we suggest that the Tribunal should have regard to

the extent to which the condition confers benefit on the benefited property.

¹⁴⁴ A real burden which was pointless would be unenforceable for lack of praedial benefit: see paras 2.9 to 2.18.

¹⁴⁵ The importance of individual negotiation of terms is recognised in the Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083, which apply only to terms which were not individually negotiated.

6.73 Only a modest degree of benefit is required for interest to enforce.¹⁴⁶ But unless a burden confers benefit which is reasonably substantial, there does not seem a strong case for resisting its discharge. A similar approach is taken in England and Wales, where the statutory test is expressed as being that the burden does not secure “practical benefits of substantial value or advantage”.¹⁴⁷ It does not follow that a finding of substantial benefit would always save a burden. It is just one of the factors which the Tribunal would have to take into account in reaching a view on reasonableness. Other factors might suggest a different conclusion. In appropriate cases compensation might be payable to the benefited owner.¹⁴⁸

6.74 Sometimes there is more than one benefited property. If so, the Tribunal could have regard to all the properties, in an application for discharge, and not merely to the particular property owned by the objector.¹⁴⁹ For if an objection is successful, the burden is saved for all properties and not just for one. In the case of community burdens, the Tribunal will wish to consider the position of the community as a whole, or in other words the totality of benefited properties.¹⁵⁰ The position is different in applications for renewal. A burden is renewed only in respect of the applicant’s own property, and is extinguished as respects the others by registration of the original notice of termination.¹⁵¹ In practice this means that the Tribunal will have regard only to the property belonging to the applicant.¹⁵²

6.75 **(3) Extent of public benefit.** Three¹⁵³ title conditions have no benefited property, *viz* conservation burdens,¹⁵⁴ maritime burdens,¹⁵⁵ and conditions in an agreement entered into under section 7 of the National Trust for Scotland Order Confirmation Act 1938.¹⁵⁶ The conditions are enforceable, respectively, by a conservation body (or Scottish Ministers), by the Crown, and by the National Trust for Scotland. The benefit conferred by such conditions is public and not private. Accordingly in considering an application in respect of a condition falling into this (small) category, the Tribunal should have regard to

the extent to which the condition confers benefit on the public.

¹⁴⁶ Paras 4.16 ff.

¹⁴⁷ Law of Property Act 1925 s 84(1A)(a) (as inserted by the Law of Property Act 1969 s 28(2)). And see also The Property (Northern Ireland) Order 1978 (SI 1978/459) art 5(5)(e) (“whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit”).

¹⁴⁸ For compensation, see paras 6.85 to 6.91.

¹⁴⁹ Here we depart from the provisional view put forward in the discussion paper: see Scot Law Com DP No 106 para 6.30.

¹⁵⁰ In view of the change mentioned in the previous note, it is no longer necessary to express this as a separate factor, which was the original suggestion in the discussion paper: see para 6.39.

¹⁵¹ Para 5.52.

¹⁵² An application for renewal is not even intimated to the owners of the other properties: see para 6.57. Of course, as soon as the notice of termination has been registered, such properties lose the status of benefited properties.

¹⁵³ Or four if manager burdens (paras 2.29 to 2.39) are included. Manager burdens are of such short duration that they are unlikely to be the subject of a Lands Tribunal application. If they were, the Tribunal would probably determine reasonableness by reference to additional factors not listed here: see para 6.82. By contrast to other title conditions without a benefited property, manager burdens are not conceived in the public interest.

¹⁵⁴ Paras 9.10 ff.

¹⁵⁵ Para 9.26.

¹⁵⁶ Para 6.33.

6.76 **(4) Condition impedes enjoyment.** A consideration of the benefit conferred on one property must be balanced by a consideration of the burden imposed on the other. Thus the Tribunal should have regard to

the extent to which the condition impedes enjoyment of the burdened property.

This is an approximate equivalent to the existing ground (c). As many applications are made with a particular use in mind – indeed the application is typically for a partial discharge only, to the extent of allowing the proposed use – it is natural that particular regard will be paid to that use. But, departing from the present law, we do not think that it should be necessary to consider whether that use is reasonable. Reasonableness is difficult to evaluate without straying into broader considerations of public policy;¹⁵⁷ and this leads in turn to the difficulty of an obligation which was conceived for the protection of a private interest being evaluated by reference to the public interest.¹⁵⁸ Furthermore, a requirement to consider reasonableness seems to put that concept in the wrong place.¹⁵⁹ The central issue is the reasonableness of the condition rather than of the use. Whether a proposed *use* is reasonable or unreasonable seems unimportant. In general, an owner can use his property as he wishes, provided that no harm is done to anyone else. If he chooses to act selfishly, or foolishly, it is perhaps not for the Lands Tribunal to stop him.

6.77 Of course a condition should not be discharged *only* because it imposes a substantial impediment on the burdened property. The condition may be recent. Nothing may have changed since it was first imposed. Substantial impediment to the burdened property may be balanced, or even outweighed, by substantial advantage to the benefited property. Taking all the circumstances into account, the condition may be reasonable, and hence its discharge unreasonable.

6.78 **(5) Cost and practicability of compliance.** In the case of affirmative obligations, and particularly obligations of maintenance, the problem may be one of practicalities. As buildings cannot last for ever, a perpetual obligation to maintain will at some stage cease to be appropriate. Similar considerations arise if the cost of repair has become disproportionate to the value of that which is to be repaired. We propose therefore that the Tribunal should have regard to

the cost and practicability of compliance.

Our suggested wording is an adaptation of wording recommended for the same purpose by the English Law Commission.¹⁶⁰

6.79 **(6) Age of the condition.** The age of a condition is taken into account by the Tribunal at the moment. A condition which was recently imposed is less likely to be discharged than

¹⁵⁷ Scot Law Com DP No 106 para 6.43.

¹⁵⁸ The position is different, of course, in respect of conditions which are created to protect the public interest. See para 6.75.

¹⁵⁹ Compare here ground (a).

¹⁶⁰ See Law Com No 127 para 18.48. The wording is: “as a result of changes in circumstances, performance of the obligation (a) has ceased to be reasonably practicable, or (b) has become unreasonably expensive when compared with the benefits it gives”. Almost identical wording was subsequently recommended by the Ontario Law Reform Commission: see Ontario LRC, *Covenants* p 142.

one imposed 100 years ago.¹⁶¹ That is as it should be. A recent condition deserves the benefit of the doubt,¹⁶² particularly if the original parties remain in place. But a condition which has already burdened the land for many years has perhaps run its course. The reasonable expectations of the original parties have been fulfilled. The Tribunal should hesitate before it agrees that the land should be burdened for a further period. Earlier we recommended a special regime for real burdens which are more than 100 years old.¹⁶³ Such burdens are extinguished by service and registration of a notice of termination unless the benefited owner persuades the Tribunal that they should be renewed. The onus is on the person seeking renewal to demonstrate why the burden should survive. In determining this issue, the Tribunal should have regard, among other things, to the age of the burden; and age should also be a factor in ordinary applications for discharge. Our proposal, therefore, is that the Tribunal should have regard to

the age of the condition.

Age may often lead to obsolescence,¹⁶⁴ although that issue is perhaps best focused under some of the other factors already mentioned.

6.80 **(7) Planning and other consents.** Sometimes planning permission has been granted for the use proposed by the applicant, but the development cannot go ahead unless the title condition is discharged. The grant of planning permission should not have, as an automatic consequence, the discharge of a title condition.¹⁶⁵ Different interests are at stake. The fact that the public interest in orderly planning is satisfied should not, of itself, override the private interests of close neighbours. Nonetheless it should have some influence in a judicial application for discharge of the condition. This is expressed in the legislation of a number of countries. For example, in Northern Ireland¹⁶⁶ the legislation provides that the Lands Tribunal should take into account -

“(c) any public interest in the land, particularly as exemplified by any development plan adopted under Part III of the Planning (Northern Ireland) Order 1972 for the area in which the land is situated, as that plan is for the time being in force;

(d) any trend shown by planning permissions (within the meaning of that Planning Order) granted for land in the vicinity of the land, or by refusals of applications for such planning permissions, which are brought to the notice of the Tribunal ...”

These provisions are modelled on English provisions of 1969.¹⁶⁷ Similar provisions are found in other jurisdictions, including Alberta,¹⁶⁸ New Brunswick¹⁶⁹, Queensland,¹⁷⁰ Victoria,¹⁷¹ and Tasmania.¹⁷²

¹⁶¹ Agnew of Lochnaw, *Land Obligations* paras 5-11 to 5-13.

¹⁶² If, of course, there is doubt. Sometimes even a new condition is of so little value that it should be discharged. See para 6.72.

¹⁶³ Paras 5.26 ff.

¹⁶⁴ However, the relationship between age and usefulness is not straightforward. See para 5.21.

¹⁶⁵ The only jurisdiction which comes close to taking that approach is New South Wales. See s 28 of the (NSW) Environmental Planning and Assessment Act 1979.

¹⁶⁶ The Property (Northern Ireland) Order 1978 art 5(5).

¹⁶⁷ Law of Property Act 1925 s 84(1A), (1B) (as inserted by the Law of Property Act 1969 s 28(2)).

6.81 Although no mention is made of planning permission in the 1970 Act, the position in Scotland is broadly similar. The Lands Tribunal in practice treats the granting of planning permission as evidence that the existence of the obligation impedes a reasonable use of the land within ground (c). In *Cameron v Stirling*¹⁷³ the position was put like this:

“With regard to the case under s 1(3)(c) the tribunal ... are prepared to regard a grant of planning permission as evidence that a proposed development is reasonable; but not as conclusive. A refusal of planning permission however is probably conclusive evidence that the relevant land obligation does not of itself impede the proposed new use of the land.”

In practice, an application which is supported by a grant of planning permission will usually succeed.¹⁷⁴ It is likely to be refused only where there would be substantial prejudice to the benefited owner or where planning policy can be shown to have changed.¹⁷⁵ An example of the former is *Bachoo v George Wimpey & Co*¹⁷⁶ where the applicant had received planning permission for a two-storey extension which would completely obstruct a neighbour’s view. The application was refused.¹⁷⁷

6.82 We think that the Tribunal’s current practice of treating planning consent as a factor of varying materiality should be elevated into a formal statutory criterion. And to planning consent may usefully be added other consents from regulatory bodies, for example in relation to fire safety or liquor licensing. In the discussion paper we suggested that the rule might be confined to specific grants of planning permission, and so would not cover cases where a general planning permission exists under the General Permitted Development Order.¹⁷⁸ On further reflection, however, we are inclined to agree with the Society of Local Authority Lawyers and Administrators in Scotland that

“if Parliament has taken the view that [individual] planning permission is not required and that certain developments should be permitted, then this is a factor to be considered ... albeit that less weight would be attached to these by virtue of the

¹⁶⁸ Land Titles Act RSA 1980 s 52(3).

¹⁶⁹ Land Titles Act 1981 s 48(2)(b).

¹⁷⁰ Property Law Act 1974 s 181(2).

¹⁷¹ Planning and Environment Act 1987 s 60(1)(b)(ii). And see also Law Reform Commission of Victoria, *Easements and Covenants* (DP No 15) (1989) para 49.

¹⁷² Conveyancing and Law of Property Act 1884 s 84C(1).

¹⁷³ 1988 SLT (Lands Tr) 18 at p 20I.

¹⁷⁴ See generally, E Young, “Land Obligations, Planning Permission and the Lands Tribunal for Scotland” (1988) 33 JLS 434, and Agnew of Lochnaw, *Land Obligations* para 6-27. The principal reported decisions are: *Main v Lord Doune* 1972 SLT (Lands Tr) 14; *Gorrie & Banks Ltd v Musselburgh Town Council* 1974 SLT (Lands Tr) 5; *Robinson v Hamilton and Others* 1974 SLT (Lands Tr) 2; *Ness v Shannon and Others* 1978 SLT (Lands Tr) 13; *Ross and Cromarty District Council v Ullapool Property Co Ltd* 1983 SLT (Lands Tr) 9; *British Bakeries (Scotland) Ltd v City of Edinburgh District Council* 1990 SLT (Lands Tr) 33; and *Ramsay v Holmes* 1992 SLT (Lands Tr) 53.

¹⁷⁵ *Mercer v Macleod and Others* 1977 SLT (Lands Tr) 14 is an example of the latter.

¹⁷⁶ 1977 SLT (Lands Tr) 2.

¹⁷⁷ See also: *Solway Cedar Ltd v Hendry* 1972 SLT (Lands Tr) 42; *Sinclair v Gillon* 1974 SLT (Lands Tr) 18; and *McArthur v Mahoney* 1975 SLT (Lands Tr) 2.

¹⁷⁸ Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223). This mirrors the approach currently taken by the Lands Tribunal: see *Stoddart v Glendinning* 1993 SLT (Lands Tr) 12 at p 17A-B.

fact that the specific development has not been considered by the planning authority.”

We suggest therefore that the Tribunal should have regard to

whether appropriate consents (including deemed consents) from planning or other regulatory authorities have been given.

6.83 **(8) Other material circumstances.** The list of factors is not intended to be exhaustive. In reaching an assessment of the reasonableness of an application, the Tribunal should also be able to take into account

any other material circumstances.

This is not intended to be limited to matters *ejusdem generis* with those which precede it.

6.84 We now put the various factors together in the form of a recommendation. We recommend that

41. **In considering the merits of an application for discharge, or renewal, of a title condition, the Lands Tribunal should grant the application if it is reasonable to do so having regard to -**
 - (a) **any change in circumstances since the condition was first created, including changes in the character of the benefited and burdened properties and of the neighbourhood thereof;**
 - (b) **the extent to which the condition confers benefit on the benefited property;**
 - (c) **in a case where there is no benefited property, the extent to which the condition confers benefit on the public;**
 - (d) **the extent to which the condition impedes enjoyment of the burdened property;**
 - (e) **the cost and practicability of compliance;**
 - (f) **the age of the condition;**
 - (g) **whether appropriate consents (including deemed consents) from planning or other regulatory authorities have been given; and**
 - (h) **any other material circumstances.**

(Draft Bill ss 93 and 94)

Ancillary orders

6.85 Under the present law the discharge of a condition can be accompanied by two ancillary orders. One is to pay compensation to the benefited owner.¹⁷⁹ The other is to replace the discharged condition with a substitute condition.¹⁸⁰ Neither is common. We propose that the existing rules be retained, but subject to five minor changes.

6.86 First, the ancillary orders should be available in respect of the new jurisdiction for renewal of a real burden. Extinction of a burden by refusal to renew is not different from extinction by the grant of a discharge. Clearly the power to award compensation, or impose substitute conditions, should be available in both cases.¹⁸¹

6.87 Secondly, as already mentioned,¹⁸² the ancillary orders should not be available where an application in respect of real burdens is unopposed and there is no consideration of the merits.

6.88 Thirdly, the new legislation should make clear that an ancillary order cannot be made without the consent of the affected person¹⁸³ - although if consent is refused the consequence may be that the condition is not discharged. The affected person is the person against whom an award of compensation is to be made or, in the case of a substitute burden, the owner of the burdened property. Now that applications for discharge can be made by non-owners, the consent of the owner is an important safeguard.¹⁸⁴

6.89 Fourthly, the new legislation should clarify the juridical nature of the substitute condition.¹⁸⁵ We propose that the new condition should itself require to be a title condition,¹⁸⁶ and hence subject to discharge by the Tribunal.

6.90 Finally, we suggest discarding the current proviso by which the Tribunal may refuse to grant a discharge under ground (c)

“if they are of the opinion that, due to exceptional circumstances related to amenity or otherwise, money would not be an adequate compensation for any loss or disadvantage which a benefited proprietor would suffer from the variation or discharge.”

This seems to put the emphasis in the wrong place by implying that compensation is the norm, which it is not. Indeed it is the occasional availability of compensation - and not its more customary absence - which is likely to weigh with the Tribunal. But no special provision is needed.¹⁸⁷

6.91 We recommend that

¹⁷⁹ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(4).

¹⁸⁰ Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(5).

¹⁸¹ The issue is discussed further in paras 5.49 and 5.51.

¹⁸² Para 6.16.

¹⁸³ Under the 1970 Act this is made explicit only in relation to substitute burdens.

¹⁸⁴ Para 6.47.

¹⁸⁵ The current law merely talks of substituting “any such provision ... as appears to the Lands Tribunal to be reasonable”: Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(5).

¹⁸⁶ Albeit one created by Lands Tribunal order and not in the usual way. So in the case of real burdens, for example, s 4 of the draft bill would not apply.

¹⁸⁷ This can be considered under the heading of any other material circumstances: see para 6.82.

42. Where an application for discharge or renewal is considered on its merits, the Lands Tribunal should continue to have power to award compensation or to impose a substitute condition; but –

(a) the power should not be exercised without the consent of the person against whom compensation is awarded or, as the case may be, the owner of the burdened property;

(b) any substitute condition should be classified as a title condition.

(Draft Bill s 85(4)-(8))

Burden of proof

6.92 When a real burden is more than 100 years old, the effect of the termination procedure is to place the burden of proof on the person seeking its retention.¹⁸⁸ In other cases the burden of proof is on the person seeking a discharge. Consultation showed no support for changing the rule in such cases, and we suggest that matters be left as they are.¹⁸⁹

Registration

6.93 As under the present law, the final step in the procedure is registration of the extract order in the property register against the burdened property.¹⁹⁰ Registration will only be used in practice if the condition is ordered to be discharged – if, in other words, either an application for discharge is granted or an application for renewal is refused.¹⁹¹ The effect of registration is to extinguish the condition in whole or, as the case may be, in part, and also to create any substitute condition which may be provided for in the order. An order declaratory of the validity or scope of a real burden is not registrable. We recommend that

43. On registration of an order of the Lands Tribunal discharging a title condition, the title condition should be extinguished in whole or in part, in accordance with the terms of the order.

(Draft Bill s 97(2))

Recent title conditions

6.94 In the discussion paper we suggested that, if the age of a condition was to be a formal criterion for the Tribunal,¹⁹² it might no longer be necessary to have a rule which prevented applications from being brought in the first two years of a condition's life.¹⁹³ There is no such rule in England. In practice the Tribunal would be most unlikely to discharge a condition at so early a stage, but a discretionary rule seemed better than a fixed one. A

¹⁸⁸ Para 5.45.

¹⁸⁹ For a discussion of the issues, see Scot Law Com DP No 106 paras 6.48 and 6.49.

¹⁹⁰ The Keeper may wish to make a consequential amendment to the title sheet of the benefited property: see para 13.32.

¹⁹¹ An order refusing renewal includes a discharge of the burden. See para 5.50.

¹⁹² Para 6.79.

¹⁹³ Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(5). See Scot Law Com DP No 106 para 6.37 and proposal 28.

number of consultees disagreed. There was concern that, in the words of one solicitor,¹⁹⁴ “a party might well negotiate terms and then forthwith apply for a variation”. And it was thought that the sale of units in large developments might be impeded if there was a danger of an early purchaser seeking changes in the deed of conditions. We accept these criticisms, but think that they can be met by a provision, borrowed from Norwegian law,¹⁹⁵ which would allow the constitutive deed to stipulate for an initial period, not exceeding five years, during which no application to the Lands Tribunal could be brought. For commercial developments this would be an improvement on the current position. In other cases the facility might not be much used. The fixed two-year period would cease to apply. We recommend that

- 44. The rule that no application for discharge can be made to the Lands Tribunal for an initial period of two years should cease to have effect; but it should be possible to provide in the constitutive deed for an initial period, not exceeding five years, during which no application could be made.**

(Draft Bill s 87)

Community burdens

6.95 In *Mrs Young and Others*,¹⁹⁶ 93 out of the 120 owners of flats in a double crescent in Edinburgh applied to the Lands Tribunal for variation of a burden regulating upkeep of a shared central garden. The burden, which dated from 1877, imposed an obligation to contribute to upkeep but limited to £2 in any one year. The maximum which could be raised was thus £240, while the annual expenditure was now £800. The main purpose of the application was to have the £2 limit removed. The application was refused, on the basis that the 93 owners could not competently seek variation on behalf of the remaining 27 owners. A burden could be varied only on the application of the owner of the affected property – a principle sound enough in itself and one which, in a revised form,¹⁹⁷ will continue to apply in the proposed new legislation.

6.96 The particular difficulty disclosed by *Young* is solved by the recommendation made in the next part that, in respect of community burdens, a majority of owners can grant a deed of variation or discharge so as to affect the entire community.¹⁹⁸ But it seems desirable to go further. In the discussion paper we suggested that, for community burdens, variation or discharge by the Lands Tribunal should be available on the application of a smaller number of owners.¹⁹⁹ “Variation” as used here includes the imposition of a new burden, as in *Young*.²⁰⁰ Owners would then have a choice. If a majority could be assembled they could act on their own and register a deed of variation. If numbers were lower than this they could make an application to the Lands Tribunal. While consultees generally approved of the principle of a Lands Tribunal application, many felt that the suggested threshold – 10%

¹⁹⁴ Mr J S Hodge.

¹⁹⁵ (Norwegian) Servitude Act 1968 s 7. The period is 10 years.

¹⁹⁶ 1978 SLT (Lands Tr) 28.

¹⁹⁷ Revised in respect that those with lesser rights in the burdened property will also be able to apply. See para 6.46. But a person with a right in property X cannot apply for the discharge of a burden affecting property Y.

¹⁹⁸ Paras 7.68 ff.

¹⁹⁹ Scot Law Com DP No 106 para 6.52.

²⁰⁰ Draft bill s 113(1) (definition of “variation”). A normal application is for discharge only. See para 6.43. This is because it is already in the power of the applicant, if an owner, to impose fresh burdens on his own land. Furthermore, the Tribunal is empowered to impose substitute conditions: see paras 6.85 to 6.91.

of owners – was set too low. On reflection we are inclined to agree. If one half of the owners can execute a voluntary deed, it seems a reasonable rule that one quarter should be able to seek judicial variation. We recommend therefore that

- 45. The Lands Tribunal should be empowered to vary or discharge a community burden for all or any part of the community on the application of the owners of 25% of the units.**

(Draft Bill s 86)

Part 7 Community Burdens

Introduction

7.1 **Communities and their regulation.** “Community burden” is a new name for an old idea. In towns and cities people often live or work in premises which, in a legal sense, form part of some larger community. Examples of such communities are blocks of flats (whether in residential or in business use), sheltered housing complexes, and housing estates. Usually a community involves the pooling of facilities. In a block of flats the owners of individual flats share the benefit of the roof, the external walls, the rhones and down pipes, and so on. In housing estates there may be shared roads, gardens, parking areas and recreational facilities. In sheltered housing there is a pooling, not only of facilities but also of services, in particular the services of a warden.

7.2 Common facilities require common regulation. Some provision must be made for maintenance. Rules may also be required about use. In Scotland, the solution adopted for the regulation of communities has been the real burden; and much the same approach is found throughout the common law world, including England and Wales,¹ the United States, Canada, Australia and New Zealand.² The defining characteristics of such “community burdens” are, first, that they impose a common regulatory scheme on the units which comprise the community, and, secondly, that they are mutually enforceable by the owners of those units.

7.3 Not all “communities” affected by burdens conform to the pattern just described. A community may be much bigger, or smaller. A feu in the 1840s of half of north Edinburgh creates a community of sorts, provided that the feu is made subject to uniform burdens which are mutually enforceable (generally by implication). That was a familiar pattern in the Victorian period. Today 1000 houses may be built on the original feu, so that the community has become unmanageably large and diverse. But the community burdens remain nonetheless. Thus, as some consultees pointed out, the mere presence of community burdens should not be taken as indicating the corresponding presence of a meaningful community. Whether there is a proper community is likely to depend on other factors as well, in particular the number of units, and the presence or absence of shared facilities. Sometimes, therefore, the term “community burden” is apt to mislead. Later we make recommendations to prevent the proliferation of enforcement rights which have arisen by implication, with the result that many sets of common burdens will cease to be community burdens.³

7.4 “Communities” may also be very small. A Victorian house converted into two flats is a “community” if, at the time of the conversion, the flats were made subject to uniform

¹ Gray, *Elements* pp 1159 ff.

² The decision in *Elliston v Reacher* [1908] 2 Ch 374 has been influential in a number of these jurisdictions. The United States goes further still by, in certain cases, *implying* covenants for communities where none have been provided in the titles. See Lawrence Berger, “A Policy Analysis of Promises Respecting the Use of Land” (1970) 55 *Minnesota Law Rev* 167 at pp 197 ff, and American Law Institute, *Restatement Third Property (Servitudes)* vol 1, 179, §2.14. The equivalent of real burdens is also used in some of the mixed legal systems, such as Louisiana (see *Louisiana Civil Code* arts 775-83) and South Africa (see Silberberg & Schoeman, *Property*, chap 18).

³ Paras 11.28 ff.

burdens. Communities as small as this do not require special statutory regulation, and it is not intended that the recommendations in this part of the report should apply to communities of fewer than four units.⁴

7.5 Need for special arrangements. Community burdens are a type of real burden, and the rules described earlier in respect of creation, enforcement and extinction apply to community burdens as they apply to other real burdens. Community burdens, however, are affected by special problems which make further regulation desirable.

7.6 First, there is the problem of management. In modern deeds of conditions, community burdens are usually supported by a management structure which allows for the appointment of a manager, for the carrying out of repairs, for the recovery of maintenance and other costs, and so on. Sometimes these arrangements are extremely sophisticated. But with older communities often no provision has been made. This may not matter if the burdens are directed at protection of amenity. A neighbour can police a prohibition on business use as well, or better than, a manager; and each owner has an independent right to enforce which does not depend on the prior agreement of the others. The position is different, however, if there are common facilities to be maintained. In the absence of a mechanism for decision-making, it is rarely practicable to go ahead with a repair unless all owners have given their consent.⁵ This creates an obvious difficulty. A requirement of unanimity is unrealistic in all but the smallest communities. In other cases it may often prevent the repair from being carried out at all. One of the objects of reform, therefore, should be to provide a rudimentary management scheme in cases where none currently exists.

7.7 Secondly, there is the problem of variation and discharge. On general principles, consensual discharge requires that all benefited owners should give their consent.⁶ So as the law currently stands, an owner in a housing estate who wants to build a garden shed contrary to the common burdens must arrange for the minute of waiver to be signed by the owners of the 199 other houses on the estate. In practice this could hardly be done, and is not attempted. The frustrated gardener must either apply to the Lands Tribunal for judicial discharge or else build the shed and take the risk. Usually, as our Title Conditions Survey shows,⁷ he takes the risk. Yet it is unsatisfactory that owners wishing to use their properties in innocuous ways should be forced into breaches of title conditions, for want of a flexible system of discharge. Any reform should attempt to find a solution to this problem.

7.8 A related issue is variation of the burdens as they affect the whole community. Burdens become out-of-date and need to be changed. A community should not be bound in perpetuity by burdens created 100 years ago or more. But under the present law no mechanism exists for altering community burdens other than with the agreement of all the owners.

7.9 Thirdly, there is the problem of developer control. In the course of laying out an estate, whether for residential or commercial use, developers usually sell some units before

⁴ Para 7.20.

⁵ In theory, any one owner could enforce the maintenance obligation against his fellow owners, but in practice he is likely to be met with the argument that the proposed repair is unnecessary.

⁶ Para 5.10.

⁷ Appendix C para 2.7.

they have completed work on others. Depending on the size of the estate, they may remain on-site for a number of years after the first units were sold. During this period developers have a legitimate interest in the management of the estate as a whole. The prospects for the sale of the later units depend to some extent on the condition of those sold earlier. Developers will be concerned to ensure that amenity burdens are enforced, that necessary maintenance is carried out, and that the estate is properly managed. Whether such temporary control can be achieved under the existing law seems open to doubt.⁸

7.10 Finally, there are a number of other issues which would not, on their own, justify marking community burdens as a separate class but on which special provision may usefully be made. These include the permitted content of community burdens,⁹ specialities in the application of the praedial rule,¹⁰ and the effect of division of a unit.¹¹

Meaning of “community burdens”

7.11 If community burdens are to be subject to special regulation, they must first be defined. We propose both a general and also a special definition.

7.12 **General definition.** The outlines of a general definition were given earlier. Community burdens in the sense used in this report are burdens imposed (i) on a number of units of property¹² (ii) under a common scheme and (iii) which are mutually enforceable in respect of each of the units. The totality of the units comprises the “community” which is regulated by the burdens. All three criteria must be met.

7.13 The idea of a common scheme (criterion (ii)) is familiar from the rules on implied enforcement rights.¹³ Usually, but not always, the burdens will originate from a common author.¹⁴ While burdens in a common scheme are often identical, this is not a formal requirement. For example, in a mixed development of residential and commercial units, the burdens on the former will not be identical to those on the latter. Or within a tenement, different flats may be made responsible for the maintenance of different parts, or, if responsible for the same parts, the extent of liability may be different. But if burdens are not identical, there must at least be a sense of equivalence. An example comes from the deed litigated in *Co-operative Wholesale Society v Ushers Brewery*.¹⁵ Here three units, feued by a common author, were used as a supermarket, a pub, and a betting office. As well as a number of amenity burdens, the titles of each prohibited the particular use which was enjoyed by the others. While not identical, these prohibitions were clearly intended as equivalents, designed for the prosperity of the development as a whole.

7.14 Common burdens must be matched by common enforcement rights (criterion (iii)). The essence of a community burden is reciprocity of both right and obligation. Each unit is

⁸ The feudal system, of course, gives the opportunity for permanent control, subject to possible problems with showing interest to enforce.

⁹ Para 7.27.

¹⁰ Para 7.29.

¹¹ Para 4.56.

¹² “Unit” is defined in s 113(1) of the draft bill (discussed in para 7.34).

¹³ Paras 11.6; 11.48 to 11.56.

¹⁴ Or in other words, the units will originally have belonged to one person (the “author”), who imposed the burdens as part of the process of sale.

¹⁵ 1975 SLT (Lands Tr) 9. And see also *Lees v North East Fife District Council* 1987 SLT 769.

at the same time a burdened property and also a benefited property, and while each must comply with the burdens, each has a corresponding right to ensure compliance by others. In existing burdens this criterion is often not met. More particularly, where common scheme burdens were imposed as part of a feudal grant, the superior often reserved an exclusive right of enforcement.¹⁶

7.15 Earlier in the report, community burdens were contrasted with neighbour burdens.¹⁷ Neighbour burdens are non-reciprocal in character. The benefited property can enforce against the burdened property but not the other way around. Following the abolition of the feudal system, almost¹⁸ all burdens which are not community burdens will be neighbour burdens. Thus for most practical purposes the class of real burdens can be divided into community burdens and neighbour burdens. We propose no special rules for neighbour burdens, however, and the term does not appear in the draft bill.

7.16 Occasionally the same obligation might be both a neighbour burden and also a community burden. For example, in imposing community burdens, the developers might also provide for the burdens to be enforceable by the owner of some other piece of ground, retained by them, and which is not itself subject to the burdens.¹⁹ Such combined burdens are perfectly familiar under the present law, the combination of feudal burdens and community burdens being the most common.²⁰ Where two burden types are combined in this way, each falls to be treated separately and, insofar as the obligations are community burdens, they will be governed by the recommendations contained in this part of the report. Obligations which are varied and discharged as community burdens are unaffected as neighbour burdens and, in that capacity, can continue to be enforced according to their original terms.²¹

7.17 **Facility burdens and service burdens.** In part 11 we recommend that where a facility burden or a service burden was created in a constitutive deed registered before the appointed day,²² enforcement rights should attach to the land benefited by the facility or, as the case may be, to the land to which the services are provided.²³ The idea is to fill a gap which might otherwise follow from the abolition of implied enforcement rights. A facility burden is a burden which regulates the maintenance, management, reinstatement or use of a facility which constitutes, and is intended to constitute, a facility of benefit to other land.²⁴ Standard examples include recreational facilities, the common parts of a tenement, and

¹⁶ Appendix D para 13.

¹⁷ Paras 1.9 to 1.11.

¹⁸ However, the definition of “community burdens” does not include absolutely all cases of reciprocal burdens. For example it excludes (a) communities comprising three units or fewer (see para 7.20), and (b) communities of immediate neighbours carved out of much larger communities by s 44 of the draft bill (see para 7.19).

¹⁹ In such a case there may not always be interest to enforce the neighbour burden. Combined community and neighbour burdens can also occur on a temporary basis in the course of the sale of a development. Thus suppose that a development comprises 100 units and the burdens are not to become live for any unit until it is sold. The deed of conditions provides that the burdens are to be enforceable by all the units. If the developer sells 30 units, this creates a community of 30 units, but with the burdens also enforceable at the instance of the 70 units still owned by the developer. Since these units are not themselves (yet) subject to the burdens, their right to enforce refers to a neighbour burden. Once all the units are sold, the element of neighbour burden disappears.

²⁰ Scot Law Com DP No 106 paras 1.9 to 1.11.

²¹ See draft bill s 52.

²² The appointed day is the day on which most of the provisions in the draft bill are to come into force. See para 1.39.

²³ Paras 11.34 to 11.42.

²⁴ Draft bill s 113(1), (3)&(4).

boundary walls. A service burden is one which relates to the provision of services to other land.²⁵ So far as facility burdens at least are concerned, the effect of our recommendation will often be to create community burdens. This is because the obligation to maintain a facility is usually placed on precisely those properties which take benefit from it. Already burdened properties, they will become benefited properties also, so that the obligation will fall within the general definition of community burden given above. This is of some practical importance given the proposals which follow in relation to majority decision-making.²⁶

7.18 Special definition. In part 11 we recommend, as a transitional measure, that burdens imposed on a common scheme in sheltered housing developments by a deed registered before the appointed day should be mutually enforceable within the development.²⁷ In sheltered housing it is common practice for the developer to reserve ownership of one of the units to provide accommodation for a warden. Under our proposals such a unit would be a benefited property but not a burdened property, leaving the burdens insofar as they apply to that unit outside the general definition of community burdens. The result would be awkward. The community would consist of all of the units bar one (the warden's unit); and while that community could make decisions by majority, the decisions would not bind the single unit lying outside the community, giving the unit a veto on change. This result is avoided by a rule that all common burdens which fall within the recommendation for sheltered housing should be treated as community burdens.

7.19 There is also an exclusion. In part 11 we further recommend that, where burdens were imposed under a common scheme by a deed registered before the appointed day, the class of those entitled to enforce should in general²⁸ be limited to close neighbours, defined as those owning property within four metres.²⁹ The effect will be to transform a previously large community, with mutual enforcement rights, into a series of small and overlapping communities in which each unit has enforcement rights and obligations within a four metre radius. The rules we are about to recommend for community burdens would not work properly in a group of overlapping communities. Nor are they necessary. In any given case the number of people holding enforcement rights will be sufficiently small to make majority rule unnecessary. We suggest, therefore, that burdens falling into this category are excluded from the definition of community burdens. It is important to understand that the exclusion affects mainly burdens concerned with amenity.³⁰ Burdens directed at common maintenance will qualify as facility burdens under the rule mentioned earlier,³¹ and hence, usually, as community burdens also.

7.20 Exclusion for communities of fewer than four units. Since the main thrust of our proposals is to provide for a form of majority rule, we would exclude entirely burdens which affect fewer than four units. Majority rule has no place in a community of two, and we would be reluctant, in a community of three, to allow the owner of one unit to be

²⁵ Draft bill s 113(1).

²⁶ Where facility burdens are not community burdens, majority decision-making would often be inappropriate. Such burdens remain enforceable by the owner of the benefited property or properties in the usual way.

²⁷ Paras 11.65 to 11.67.

²⁸ The recommendation is subject to the terms of the deed. For example it does not overrule any express enforcement rights which may be conferred.

²⁹ Paras 11.50 to 11.56.

³⁰ This in turn means that common management is unimportant: see para 7.6.

³¹ Para 7.17.

outvoted by the owners of the other two. In so small a community, unanimity seems a reasonable protection against possible abuse of power and collusion. This is consistent with the recommendations made in our *Report on the Law of the Tenement*.³² The minimum majority possible under our proposals would therefore be three units.

7.21 We recommend that

46. “Community burden” should be defined to mean –

(i) burdens imposed under a common scheme on four or more units in circumstances where each unit is both a benefited and a burdened property, and

(ii) burdens affected by recommendation 92;

but under exclusion of –

(iii) burdens affected by recommendation 90.

(Draft Bill s 23)

7.22 This definition brings in both existing burdens and also burdens created after the passing of the legislation.³³ While some of the proposals which follow (for example on management) are particularly targeted at existing burdens, we begin with the question of how community burdens are to be created of new.

Creation

7.23 In general, community burdens are created in exactly the same way as other real burdens.³⁴ But some specialities may be mentioned.

7.24 **Identification of the community.** In part 3 we recommended that the constitutive deed should nominate and identify both the benefited and the burdened properties.³⁵ In a community burden, however, each benefited property is also a burdened property, the totality of such properties being the community. Although not strictly necessary, we think it would be helpful to make clear that, in relation to community burdens, the requirement of nomination and identification is satisfied by the nomination and identification of the community to which the burdens are to apply.

7.25 **Use of term “community burden”.** In creating a real burden, the constitutive deed must use either the term “real burden” or the name of one of the nominate burdens, such as “community burden” or “conservation burden”.³⁶ We think it would be of assistance to conveyancers if the use of the term “community burden” had the additional effect of making the burdens mutually enforceable among the units in the community. It would then be unnecessary to make express provision on this subject. The point is made more important

³² Scot Law Com No 162 para 5.27.

³³ Draft bill s 111(9).

³⁴ For which see part 3.

³⁵ Paras 3.30 to 3.32.

³⁶ Paras 3.28 and 3.29.

because of the recommendation made later that enforcement rights should no longer be capable of arising by implication.³⁷

7.26 It is important to be clear about the use of “community burden”. On the one hand, burdens are not community burdens merely because the term is used. Burdens are community burdens only if they satisfy the definition given earlier. This they might fail to do, for example because there is no common scheme, or because there are fewer than four affected units. On the other hand, the fact that the constitutive deed refers to “real burdens” and not “community burdens” does not disqualify the burdens from being community burdens. Any burden, however described, is a community burden if it meets the terms of the definition.

7.27 **Permitted content.** Earlier we recommended that a real burden should be either an affirmative burden or a negative burden, but that, ancillary to both, it should be possible to impose burdens which promote management or administration.³⁸ This was intended to resolve the doubt sometimes expressed as to whether management arrangements could competently be created as real burdens. Since management is mainly an issue for communities, it may be helpful to gloss this recommendation in the particular context of community burdens. A non-exhaustive list of management issues which might usefully be the subject of community burdens is –

- the mechanism for appointing and dismissing a manager;
- the nomination in the constitutive deed of a person to act as the first manager;³⁹
- a statement of the manager’s powers and duties, including the delegation of powers held by the owners, such as the power to vary burdens and the power to enforce them;
- the procedures for making decisions – for example, a requirement to hold meetings, the manner in which meetings are to be called and conducted, the number of votes required for a decision to be carried, and so on;
- the subject matter on which decisions may be made – for example, the carrying out of repairs and improvements, the employment of a manager and other persons, the amount of service charge to be collected, and the making of rules for the use of recreational facilities provided as part of the development;
- the resolution of disputes, for example by recourse to arbitration.

7.28 We recommend that

47. (a) It should be sufficient compliance with recommendation 13(a)(iii) in the case of community burdens if the community is nominated and identified in the constitutive deed.

(b) Where burdens affecting units of property are declared to be community burdens, each unit should have the dual status of benefited and burdened property.

³⁷ Para 11.28.

³⁸ Paras 2.1 to 2.8.

³⁹ See para 8.17 for the appointment of the first manager under the Development Management Scheme. And see paras 2.29 ff for the right of a developer to be appointed as manager during the initial stages of a development.

(c) A community burden should be able to make provision for any of the following

- (i) the appointment and dismissal of a manager;
- (ii) the nomination of a person to act as the first manager;
- (iii) a statement of the powers and duties of the manager;
- (iv) the procedures for making decisions;
- (v) the subject matter on which decisions may be made; and
- (vi) the resolution of disputes concerning community burdens.

(Draft Bill ss 24 and 25)

7.29 **Praedial rule.** Another aspect of the content of burdens is the praedial rule, that is to say, the rule that a real burden must relate to the burdened property and confer benefit on the benefited property. We merely note here our earlier recommendation that, in relation to community burdens, it should be sufficient if the benefit is conferred on the community as a whole or on any part of the community.⁴⁰

Developer control

7.30 The subject of developer control was mentioned earlier.⁴¹ For as long as developers remain on site, completing the development, they have a legitimate interest in exercising a degree of control, even in respect of those units which have been sold. To some extent the problem solves itself. Ownership of a unit – even one which is unsold – is likely to confer enforcement rights, although this may depend on the terms of the deed of conditions.⁴² If that is so, developers can participate in decision-making and, where necessary, take independent action to enforce the burdens. If the deed stipulates for decisions to be taken by a majority of owners, the developers retain effective control for as long as they retain more than half of the units. Developers wishing to retain control beyond this point could make special provision in the deed of conditions. For example, a “golden” vote might be conferred on a particular unit, or on all units still owned by the developers, so that no decision could be taken against the developers’ wishes. Whether such an arrangement would be attractive to potential purchasers is a matter for developers to decide. Earlier we recommended that developers should be able to reserve a power to appoint the manager for as long as they continued to own units in the development, but subject to a limit of ten years. This is achieved by a “manager burden”.⁴³ The issue of variation and discharge of burdens is discussed separately below.⁴⁴

⁴⁰ Para 2.15.

⁴¹ Para 7.9.

⁴² If burdens only become live when a unit is sold – contrary to the general rule set out in s 4(1) of the draft bill – the unsold units would not be part of the community, and their rights would depend on the terms of the deed of conditions.

⁴³ Paras 2.29 ff.

⁴⁴ Paras 7.48 ff.

Default code

7.31 **Introduction.** Today it would be unusual to find no provision for management in a deed of conditions, and sometimes the provision is quite ornate, as in the case of large communities with substantial common facilities. In part 8 of this report we set out a detailed management scheme, known as the Development Management Scheme, which is intended as a possible model for large developments. Practice in earlier times was different, and deeds which imposed community burdens were often silent on the question of management. In this section of the report we set out a small number of default management rules which are intended to apply to the extent that the titles do not otherwise provide. In practice they will affect mainly older properties. The rules are modelled on rules set out in our *Report on the Law of the Tenement*, known as Management Scheme A,⁴⁵ which were intended to perform a similar role in relation to tenements. But they are more rudimentary. Communities are potentially much more diverse than tenements; and, in some cases at least, the units of property are united only by the accident of sharing a common and mutually enforceable burden. In the face of such diversity it would be unwise to provide more than a small number of rules.

7.32 The main topics covered by the rules are (i) the carrying out of shared maintenance and (ii) the appointment of a manager. Later on provision is also made for (iii) variation and discharge of community burdens.⁴⁶ Initially the rules are intended to apply to tenements⁴⁷ as to other communities. But if our *Report on the Law of the Tenement* is implemented, tenements would be governed by the more sophisticated regime provided by Management Scheme A, and the default rules disapplied by statute.

7.33 **Shared maintenance.** In community burdens, provision for shared maintenance is not always accompanied by provision on how decisions are to be reached. Strictly, such provision might seem unnecessary, for if maintenance needs to be done, any owner could take steps to enforce the relevant obligation against the others. But in practice the question of whether maintenance is necessary is one on which reasonable people may differ, and few owners are willing to test the issue by litigation. Instead an attempt is made to reach agreement. The task can be a difficult one. Particularly in larger communities there will often be at least one owner who is unwilling to commit the necessary funds. The dissenting owner can then, in effect, override the wishes of the overwhelming majority. As a result, shared facilities may be denied essential maintenance because of the persistent veto of a single owner. In our *Report on the Law of the Tenement* we recommended that unanimity should be replaced by majority decision-making,⁴⁸ and the rule seems appropriate for non-tenemental property also. If a majority determines that a repair is necessary, the repair should be carried out.⁴⁹ By majority we mean an absolute majority of property units rather than a majority of those owners who take the trouble to make their views known. It does not seem helpful to prescribe a voting procedure. Often a meeting will be convened, but a

⁴⁵ Scot Law Com No 162 part 5. Scheme A is set out in sched 1 to the draft Tenements (Scotland) Bill which is reproduced at the end of the report.

⁴⁶ Paras 7.48 ff.

⁴⁷ Real burdens in tenements are usually community burdens (para 7.19 above), with the result that tenements are usually "communities" in the sense used in this part of the report. The other recommendations in this part are likely to continue to apply to tenements even after the passing of a Tenements (Scotland) Act.

⁴⁸ Scot Law Com No 162 paras 5.12 - 5.18 and 5.27.

⁴⁹ Of course, there might still have to be litigation, if the dissident minority refused to pay its share. But in that case recovery would be a mechanical affair, and the need for the maintenance would be beyond challenge.

majority could also be assembled by going around knocking on doors. If substantial expenditure is contemplated, it would obviously be prudent to have a meeting with formal minutes.

7.34 “Unit” here, as elsewhere in the report, means any land which is designed to be held in separate ownership, whether so held or not.⁵⁰ So if a developer builds 100 houses and has sold 50, all 100 would be treated as units. But a plot on which it was intended to build a further 50 houses but on which nothing had so far been built would count as one unit and not as 50. In practice, of course, any development now in the course of being built is likely to have its own detailed deed of conditions which will supersede those of our recommendations which involve majority rule. The vote for each unit is cast by its owner. If a unit is owned in common, any of the *pro indiviso* owners can cast the vote. In the unlikely event that the owners disagree, the vote should not be counted.

7.35 The original proposal in our discussion paper was that majority rule should be available, not only for maintenance, but for “other costs”.⁵¹ This was challenged by the Royal Institution of Chartered Surveyors in Scotland:

“[W]e do not fully agree that ‘other costs’ should be included. We are concerned that ‘other costs’ could relate to expensive improvements and could therefore incur substantial costs for the minority who voted against the improvement. Many of those who voted against may be unable to pay their share. While we agree that there is a need to remove the requirement for unanimity in relation to maintenance, we are not convinced of the argument in relation to improvements.”

We accept this view. Improvements were excluded from majority rule in our proposals for tenements,⁵² and they should be excluded here also.⁵³ In practice maintenance may involve an element of betterment, but incidental improvement of this kind seems unobjectionable and would be covered by a normal real burden providing for maintenance.

7.36 Obviously, majority rule should apply only to those maintenance obligations which are shared with others. If, as quite commonly, each owner is taken bound to maintain his own house, it is a matter for that owner to determine when maintenance is required, though prompted, if necessary, by the possibility of enforcement by a neighbour. In practice a shared obligation is likely to relate to a common part or facility. Further, majority rule should apply only if the community burden disposes of the full liability for the shared maintenance. Occasionally this will not be so. For example, a local authority might sell four houses under the right-to-buy legislation but retain a further four houses forming part of the same group and sharing the same facilities. In practice each of the houses would have been sold under an obligation to pay a one eighth cost of maintenance, and the remaining houses, not having been sold, would be free of the burden. Until further houses were sold, the “community” would comprise only the four sold houses. In such a case the owners of a majority of the sold houses should not be able to bind the local authority in its capacity as owner of the unsold houses.

⁵⁰ Draft bill s 113(1). One reason for using a functional definition is to prevent an owner dividing his property into artificial plots, each separately owned, in order to boost his voting power. Even after such division there would only be a single unit.

⁵¹ Scot Law Com DP No 106 para 9.8.

⁵² Scot Law Com No 162 para 5.42.

⁵³ Under the Development Management Scheme r 13.1 a special majority is required for improvements.

7.37 We turn now to the details of the proposed rule. If maintenance is to be carried out effectively, a majority of owners must be able to make decisions on at least three separate matters.⁵⁴

7.38 In the first place, there is the initial decision that maintenance needs to be done. At first this may be no more than a decision in principle, pending the production of suitable estimates. There will then be a further decision to go ahead and instruct the work. Occasionally the work may be within the capabilities of one of the owners, in which case that owner could be authorised to carry it out.

7.39 Next there is the question of payment. Except where a repair is very small, contractors are often unwilling to start work without a firm assurance that they will be paid. They are unlikely to be satisfied by the signature on the contract of a single owner, or perhaps even of a majority of owners; and for their part individual owners may be reluctant to sign unless the other owners sign also. Sometimes the best method of proceeding is simply to collect the whole money in advance and to hold it in a bank account pending completion of the work. Under the present law, however, this is not possible except by unanimous agreement, and attempts at repairs may fail because such agreement cannot be reached. The difficulty is solved by giving a majority of owners the power to require payment in advance of the estimated cost of a repair.

7.40 Finally, there is the possibility of a change of mind. Having authorised a repair, the owners might later decide that it should not go ahead. They should not be tied to their earlier decision. In practice the change of mind may be prompted by a change in ownership. While an incoming owner is bound by decisions already taken,⁵⁵ he may seek to have them reversed by securing a majority against them. The question of the liability of incoming owners was considered earlier.⁵⁶

7.41 We recommend that

- 48. (a) Where a community burden imposes a shared obligation to maintain some part of the community or to contribute towards its maintenance, the owners of a majority of units affected by the obligation should be able to -**
- (i) decide when maintenance is to be carried out, and instruct or carry out that maintenance;**
 - (ii) require each owner to deposit in advance a sum of money not exceeding a reasonable estimate of that person's share of the cost; and**
 - (iii) modify or revoke any decision made under (i) or (ii).**

⁵⁴ Here we broadly follow our earlier recommendations on the law of the tenement: see Scot Law Com No 162 paras 5.52 and 5.77.

⁵⁵ Para 7.47.

⁵⁶ Paras 4.41 to 4.47.

(b) If a unit is owned by two or more persons, either person should be able to exercise the vote for that unit, but if they disagree the vote should not be counted.

(c) The rule in (a) should not apply if -

- (i) the burdens affecting the community make alternative provision for decision-making; or
- (ii) the obligation does not account for the entire liability for maintenance.

(Draft Bill s 27)

7.42 If maintenance needs to be done but a majority cannot be assembled, it would remain open to an owner to enforce the burden against those less keen than himself. Whether such enforcement would succeed would then depend on whether the court was satisfied that the work needed to be done. A different point is that our recommendation is confined to community burdens, and is not intended to affect cases of shared maintenance which arise under the general law of common property, without reference to real burdens.⁵⁷ Nor is it intended to disturb the rule of common property which allows any one *pro indiviso* owner to carry out necessary maintenance and to recover the cost. By contrast to our recommendations for tenements,⁵⁸ we are not seeking to provide a single regime for maintenance.

7.43 **Appointment of manager.** Whether a community needs a manager (or factor) is likely to depend on a number of considerations such as size, the presence and extent of common facilities, and the inclinations of those who are currently owners. Modern deeds of conditions often provide for a manager but this is unusual in older deeds except, sometimes, in tenements. It seems a modestly useful reform to allow a majority of owners, if they wish, to appoint a manager.⁵⁹ The manager might be one of the owners, or alternatively a professional property manager or a firm of such managers. The manager could thus be either a natural person or a juristic person such as a firm or a company. The terms of the appointment would be a matter for the owners, and the manager's remuneration would be a shared expense. Once appointed, the manager would exercise whatever powers the owners chose to delegate. These could include some or all of the powers exercisable by a majority of owners in terms of the community burdens or the proposed legislation. In the case of the latter, this amounts to the power to carry out maintenance⁶⁰ and the power to vary or discharge burdens.⁶¹ There could also be delegated the power which each owner has to enforce the community burdens. The powers delegated might be qualified. For example, the manager might be given a discretion to carry out routine maintenance but subject to an upper limit, so that for larger repairs he would have to revert to the owners. Or again he might be given authority to waive certain community burdens but not others; or authority to waive burdens in respect of individual units but not in respect of the community as a whole.

⁵⁷ Routine maintenance of common property is a shared obligation as a matter of general law: see Reid, *Property* para 25.

⁵⁸ See in particular Scot Law Com No 162 para 10.30.

⁵⁹ For the equivalent recommendation for tenements, see Scot Law Com No 162 paras 5.71 to 5.73.

⁶⁰ Paras 7.33 to 7.41.

⁶¹ Paras 7.48 to 7.72.

Prudence suggests that the powers delegated should be set out in writing, although we make no formal recommendation.

7.44 A power of appointment should be balanced by a power of dismissal. Normally this would simply be a matter of not renewing an appointment at the end of the stipulated term. The power of dismissal should extend to a manager appointed other than by the owners⁶² – for example a manager originally appointed by the developer.⁶³ It will be borne in mind that dismissal during the currency of a contract might prompt a claim for breach of contract.

7.45 These are default rules only and are excluded where the community burdens already make provision for the appointment and dismissal of a manager.⁶⁴

7.46 We recommend that

- 49. (a) The owners of a majority of units in a community should be able to –**
- (i) appoint a manager;**
 - (ii) delegate to the manager any of their powers; and**
 - (iii) dismiss a manager.**
- (b) Liability for the manager’s remuneration should be shared equally among the owners on the basis of one share per unit.**
- (c) If a unit is owned by two or more persons, either person should be able to exercise the vote for that unit, but if they disagree the vote should not be counted.**
- (d) The rules in (a) and (b) should not apply if the burdens affecting the community make alternative provision.**

(Draft Bill ss 26 and 29)

Successors bound by decisions

7.47 Since personnel may change quite rapidly, it is important that incoming owners are bound by the actions of their predecessors, whether under the mechanism set out in the titles or under the default scheme described above. For otherwise the smooth management of the community is threatened every time a unit changes hands. An incoming owner might, for example, refuse to pay for a share of a repair which had already been agreed, or decline to acknowledge the role or authority of the manager. The current law, however, is unclear. We recommend that

⁶² Draft bill s 26(4).

⁶³ Paras 2.29 ff.

⁶⁴ Always assuming such provision is valid. Under proposals made earlier, it is not valid for the developer to reserve a power to appoint a manager except (a) the first manager and (b) subsequent managers for as long as the developer owns one of the units, but subject to a limit of 10 years. See paras 2.29 ff. By contrast, provisions for the appointment of a manager by the owners (typically by a majority) will be valid without limit of time.

50. **Anything done (including any decision made) by the owners of a community in accordance with the community burdens or with recommendations 48 and 49 should be binding on all the owners and on their successors as owners.**

(Draft Bill s 28)

But while an incoming owner would be bound by a decision, he could seek to have it reversed, by assembling the necessary majority.

Variation and discharge: in general

7.48 Like other burdens, community burdens may need to be varied or discharged. “Discharge” is used here, as elsewhere in the report,⁶⁵ to mean the extinction of a burden, whether in whole or in part. So a waiver of a burden to the extent of allowing the building of a greenhouse would be a partial discharge. In this section we are concerned only with voluntary discharge, by minute of waiver or equivalent. Other methods of discharge were considered in parts 5 and 6 of the report. By contrast with “discharge”, community burdens are “varied” if something new is added.⁶⁶ This may involve no more than an alteration to an existing burden, or it may involve the imposition of a new burden or burdens.

7.49 Community burdens may be said to exist at two different levels. There is the burden as it affects a particular unit; and there is the burden as it affects the community as a whole. This difference is reflected in variation and discharge. A burden can be varied or discharged in respect of a single unit only (or a group of such units), or in respect of the community as a whole; or, in other words, variation and discharge can be individual or universal in character. For the purposes of formulating proposals we have defined individual discharge as any discharge affecting fewer than 50% of the units, and universal discharge as a discharge affecting 50% or more of units. But in practice individual discharges rarely affect more than a single unit, while universal discharges – uncommon as they are – affect the entire community. We begin with individual discharge.

Individual variation and discharge

7.50 In considering the issue of individual variation and discharge, it is helpful to distinguish new burdens from burdens which are already in existence at the time the proposed legislation comes into force.

7.51 **Existing burdens.** In the discussion paper we mentioned two difficulties affecting the voluntary discharge of existing burdens.⁶⁷ The first was the difficulty of identifying those with enforcement rights – or, in other words, of discovering the full extent of the community. Sometimes enforcement rights are disclosed in the constitutive deed, and hence on the register. In that case identification is a simple matter. But more commonly the deed is silent and enforcement rights are a matter of legal implication. Identification may then be a task beyond all but the most energetic inquirer. In part 11 of this report we make detailed recommendations in relation to implied enforcement rights.⁶⁸ In most cases enforcement

⁶⁵ See generally parts 5 and 6.

⁶⁶ Draft bill s 113(1).

⁶⁷ Scot Law Com DP No 106 para 5.7.

⁶⁸ Paras 11.28 ff.

rights are to be confined to properties lying within a radius of four metres. The effect, in relation to any particular property, is that only close neighbours will be able to enforce; and the burdens will cease to be community burdens⁶⁹ and so will not be subject to the recommendations contained in this part of the report. For this approach there are a number of reasons, discussed later, but they include a desire to bring enforcement rights into line with the expectations of owners as disclosed by our Title Conditions Survey. There are to be two exceptions. First, facility and service burdens will be enforceable by those properties which take benefit. As a result facility burdens at least are likely to be community burdens.⁷⁰ Secondly, burdens in tenements and in sheltered housing developments are to be mutually enforceable. So they too are community burdens. For present purposes, the overall effect of these proposals is to reduce enforcement rights, and to allow for the accurate identification of those which remain.

7.52 The other difficulty was the difficulty of size. A community can be five properties or five hundred, but however big it may be, a minute of waiver must be signed by all its members. In practice, this is rarely attempted, except in very small estates. In cases where burdens were imposed in association with a grant in feu, the practice is often to ask the superior for a discharge,⁷¹ but this has no effect on neighbours' rights, and the community burdens remain in place.⁷² Against this background it is perhaps not surprising that owners often go ahead with work without troubling to seek any consent at all. Our Title Conditions Survey suggests that this occurs in around 40% of all cases.⁷³ The problem will become more apparent when the abolition of the feudal system removes the (often false) comfort of a superior's minute of waiver. The situation is improved somewhat by our proposals for implied enforcement rights, summarised above. But the problem caused by size remains in respect of (i) community burdens created with express⁷⁴ enforcement rights (ii) tenements and (iii) sheltered housing, and is most acute in relation to the first of those.

7.53 Two solutions seem possible. One is to allow discharges to be granted only by close neighbours. For the sake of uniformity with the rule for implied enforcement rights, a close neighbour could be defined as one within four metres of the burdened property. The other solution is to allow discharges to be granted by the owners of fewer than the total number of units. Various figures might be used. In our discussion paper we suggested that discharges could be granted by a simple majority, with the figure falling to 35% in the case of communities in excess of 30 units, or in the case of burdens which are more than 40 years' old.⁷⁵ Consultees suggested other figures, such as two thirds, or three quarters.

7.54 We do not feel able to recommend the first of these solutions. To allow discharges by close neighbours is to override the enforcement rights of those whose properties are more distant. It extinguishes enforcement rights by the back door. This does not seem acceptable in the case of rights expressly conferred.⁷⁶ There may be good reasons for the conferral of such rights, but in any event the rights appear on the register and are part of the express

⁶⁹ Para 7.20.

⁷⁰ Para 7.17.

⁷¹ *Cusine & Egan, Feuing Conditions* chap 4, paras 15 to 17, and tables 4.12 and 4.13.

⁷² *Dalrymple v Herdman* (1878) 5 R 847.

⁷³ Title Conditions Survey para 2.7.

⁷⁴ As already mentioned, where enforcement rights were originally implied rather than expressed, they are now to be confined to close neighbours within four metres.

⁷⁵ Scot Law Com DP No 106 para 5.13.

⁷⁶ Para 11.61.

terms on which the property is held. The same objections apply even to weaker versions of the proposal, which might allow discharges by close neighbours in the case of certain categories of burdens, such as restrictions on alterations. And there would then be the additional difficulty of determining, and defining, the burdens which were to be accorded special treatment.

7.55 We conclude, therefore, that reform must proceed on the basis of the second solution. Not all consultees accepted the case for reform. A working party of members of the Society of Writers to the Signet expressed the view that

“discharge of community burdens by less than the whole community involves serious issues of unfairness and ... all such discharges should be dealt with by the Lands Tribunal in the absence of unanimous consent.”⁷⁷

The Faculty of Advocates was also unconvinced:

“The proprietor of a property which has the benefit of (and is itself burdened by) community burdens has purchased his property on the footing that the value (both subjective and objective) of his property is protected by those burdens. It is one thing to provide that he may lose that benefit by virtue of the decision of an independent judicial body such as the Lands Tribunal after a hearing at which he may state his objections. It is quite another to provide that the majority of his neighbours may deprive him of the benefit.”

While, however, it may be true that some people purchase in reliance on community burdens, it seems doubtful that this is at all common. Our Title Conditions Survey suggests that many people buy property without the slightest knowledge that burdens exist.⁷⁸

7.56 These views, though strongly expressed, were not typical. Most consultees supported the principle of discharge by a percentage of owners. A common justification was the difficulty, mentioned earlier, of dealing with large numbers of owners. For example, one solicitor⁷⁹ wrote that

“My main concern as a practitioner is that if some form of burdens remain on property by way of community burdens, then a quick and easy way of having these varied or discharged should be available. In practice it is very often the case that superior’s consent has currently to be sought for various alterations, changes of use etc. This usually involves dealing with one party or his solicitors. It would be impracticable and something of a nightmare to have to deal with a multitude of parties who may have a common interest to enforce community burdens.”

7.57 If the principle is accepted, decisions remain to be taken on the details. Consultees seemed generally disposed to accept discharge by a bare majority although some would have preferred a higher figure. There was less support for the suggestion that, in certain

⁷⁷ They added, however, that: “Where something which is expressed as a community burden is really a neighbourhood burden (eg prohibition on building a conservatory) and does not involve maintenance of a common asset it should be made clear that the consent of adjoining affected proprietors only is required not consent of the whole community.”

⁷⁸ Title Conditions Survey chap 2.

⁷⁹ Mr David R Adie.

cases, the figure might be reduced to 35%. We adhere, therefore, to our original proposal that a community burden should be capable of discharge by a majority of owners. This corresponds both with the rule proposed in our exercise on tenements,⁸⁰ and also with the rule adopted in the default code in respect of other matters.⁸¹

7.58 The next issue is how the majority is to be counted. As we pointed out in our discussion paper,⁸² this could be done either by land or by number of properties.⁸³ Land area is fairer. Properties can vary considerably in size, and even properties which began as uniform may come to be combined, or divided. A counter-argument, as one of our consultees pointed out,⁸⁴ is that “each plot no matter what the size is ‘home’ to one owner” so that in a sense each has an equal stake in the community. The main difficulty with land area, however, is its complexity. It is easier to count out properties than to measure out land. For some consultees this factor was decisive. Our original inclination was in favour of land area, but on further reflection we have decided to support measurement by number of units. For this there are a number of reasons. One, as already mentioned, is simplicity. A second is uniformity with what has already been proposed for the default code, and with our previous recommendations for tenements. A third is that measurement by number of units seems sufficiently fair in the context of a rule which is itself rather rough and ready. Majority rule is intended as a practical solution rather than as a refined one.

7.59 If a management structure is in place for the community, a decision to discharge burdens would probably be taken in the normal course of business. In other cases there might or might not be a meeting to consider the issue. Certainly none should be required. What are required, however, are the signatures of the owners of a majority of units on the minute of waiver. If a unit is owned in common, all the *pro indiviso* owners must sign, on general principles. For Sasine titles, deduction of title would be allowed, so that a person could sign without having completed title by registration.⁸⁵ There is no reason why the person seeking the waiver should not count as part of the majority.⁸⁶ After execution the waiver would then require to be registered, against the affected property.⁸⁷

7.60 As they stand, our proposals might allow a majority of owners who would not be affected by the discharge to overrule those who are. It is easy to support a proposal for waiver if the affected property is at the other end of the estate. In our discussion paper we put forward for consideration the idea that the majority who execute a discharge must include all close neighbours.⁸⁸ This idea met with a mixed reaction. Some consultees saw it as an essential protection. Others were concerned that a person who had succeeded in persuading a majority of owners to sign could be blocked by a single close neighbour with whom relations happened to be bad. A compromise seems possible which takes both views into account. We suggest that those signing a discharge should always include at least one

⁸⁰ Scot Law Com No 162 paras 5.12 to 5.18.

⁸¹ Paras 7.33 and 7.43.

⁸² Scot Law Com DP No 106 para 5.12.

⁸³ A third possibility, unattractive in practice, would be market value.

⁸⁴ Renfrewshire Council.

⁸⁵ Para 5.12.

⁸⁶ He would thus be a granter. Earlier (para 5.13) we suggested that it should not be necessary for a discharge to have a grantee.

⁸⁷ In some cases the Keeper may make consequential changes to the title sheets of other properties in the community. See para 13.32.

⁸⁸ Scot Law Com DP No 106 para 5.25.

close neighbour.⁸⁹ In the interests of consistency with other proposals in this report,⁹⁰ a close neighbour would be defined as a person owning a unit within four metres of the affected unit. This offers some protection for close neighbours without placing an undue burden on the person seeking a discharge. If there was more than one affected unit, a matching number of neighbouring units would be required. But where two affected properties were separated by less than four metres, the owner of each could sign as a neighbour to the other.

7.61 We do not now support the further refinement, suggested in the discussion paper, that, in relation to a particular burden, there can be counted towards the required majority any unit in respect of which the burden has already been discharged.⁹¹ Any benefit seems outweighed by the likely complexity. There is the difficulty of how to count partial discharges. If a burden has been discharged for a particular unit to the extent of allowing use X, being a trivial breach, it is not self-evident that this should contribute towards the majority required for a discharge for another unit for the purposes of use Y, being a breach which is serious and intrusive. Further, as a practical matter, the Keeper might not accept cases of informal discharge, especially acquiescence, in the absence of a court declarator – which suggests that the proposal may be neither easier nor cheaper than a direct application to the Lands Tribunal for discharge.⁹²

7.62 As we indicated in the discussion paper, discharge by a majority is intended as a default rule only and is subject to contrary provision in the titles.⁹³ There is, however, no current practice of making provision in relation to variation and discharge.

7.63 Under the default code⁹⁴ a majority of owners can appoint a person as manager and delegate such powers as they wish. Similar provisions may be made in the titles. In a large community, where discharges are difficult to obtain, it may be sensible to include among those powers a power to grant discharges.⁹⁵ The power could be qualified as thought necessary. For example the manager might be authorised only in relation to individual discharges,⁹⁶ or to individual discharges of certain types of burden. If the Keeper is to be satisfied as to the manager's position, the authority ought to be given in writing. A manager should not be required to deduce title, even if some of the owners whom he represents do not have a completed title.⁹⁷ The signature of the manager would require to be supplemented by the signature of one close neighbour, on the basis already described.⁹⁸ Any authority given to a manager could, of course, be recalled; and the fact that the manager had authority to grant discharges would not, of itself, prevent a majority of owners combining to grant a discharge in a particular case.

⁸⁹ Assuming that there is one. Occasionally the units may be scattered in such a way that no unit is within four metres of any other unit. Or again the affected unit may be in a neck of land at the end of the community, and surrounded by property which is not itself part of the community.

⁹⁰ Paras 5.34 and 11.50.

⁹¹ Scot Law Com DP No 106 para 5.50.

⁹² For which see part 6.

⁹³ Scot Law Com DP No 106 para 5.15.

⁹⁴ Paras 7.31 to 7.46.

⁹⁵ In the United States homeowners' associations are often empowered to vary burdens, thus avoiding the high transaction costs of contacting large numbers of owners. See Richard A Posner, *Economic Analysis of Law* (5th edn) (1998) p 75.

⁹⁶ The subject of the present section. For universal discharges, see paras 7.68 to 7.75.

⁹⁷ And nor, in a Land Register case, should he be required to present midcouples to the Keeper. See draft bill s 50(2).

⁹⁸ Para 7.60.

7.64 Except where a manager has authority to grant, consensual discharge is likely to remain impracticable in the case of large communities. If a majority means 50 signatures – or even 20 – the signatures may prove impossible to collect. It should not be forgotten, however, that there are other ways of procuring discharge. Changes recommended elsewhere in this report are designed to facilitate the operation of existing doctrines such as negative prescription, acquiescence, and discharge by the Lands Tribunal, while a new procedure is recommended for burdens which are more than 100 years old.⁹⁹ Further, it would remain open to an owner to seek a standard discharge of the type described in part 5,¹⁰⁰ which might be advantageous in a case where only close neighbours had an interest to enforce, and were willing to give their consent.¹⁰¹

7.65 **New burdens.** Burdens tend to be imposed without much thought as to how they are to be varied and discharged. If the general law on discharge were satisfactory in all cases, that would be a reasonable position to take. In the case of community burdens, however, the general law is not always satisfactory, even in the revised form outlined above. This suggests that there would be merit in making express provision in the constitutive deed. This could be tailored to the particular burdens in a way which could not be done by a general law. For example, the deed might stipulate that one group of burdens, designed for the amenity of immediate neighbours, could be discharged by those neighbours alone, while other burdens could only be discharged by all the owners in the community or by a percentage of those owners. We would suggest only one statutory limitation. The class of those empowered to grant a discharge should be restricted to owners¹⁰² or a manager acting on behalf of owners. In particular it should not be possible for developers to reserve to themselves an exclusive right of discharge, exercisable even after they have ceased to own any of the units. No doubt many deeds of conditions will continue to be silent on the subject of discharge, in which case the general law will apply.

7.66 **Variation.** While discharge implies the extinction of a burden, in whole or in part, in variation a burden is supplemented or replaced. Variation thus involves the imposition of new obligations. The rule here is provided by the general law: the creation of a new burden requires the signature of the owner of the affected property.¹⁰³ This means that a deed which effected variation as well as discharge would require to include among its signatories the owner of the burdened property. Otherwise it would be ineffective to the extent that it imposed new burdens. In view of the special rule proposed below for universal variations, there may be an advantage in re-stating this requirement in the legislation.

7.67 **Recommendation.** Drawing the various proposals together, we recommend that

51. (a) A community burden should be varied or discharged in relation to a single unit (or a number of units, not exceeding one half of the community) by registration against the affected unit (or units) of a deed granted and subscribed –

(i) by the owners of a majority of units;

⁹⁹ See generally parts 5 and 6.

¹⁰⁰ Paras 5.9 to 5.17.

¹⁰¹ The more distant neighbours, if they did not sign the discharge, would retain their title to enforce, but they would have no interest and so could not prevent the breach from taking place.

¹⁰² Thus s 30(2)(a) of the draft bill refers to a deed “granted by the *owners* of such units as may be specified”.

¹⁰³ Para 5.15.

- (ii) by the owners of such units as is provided for in the constitutive deed; or
 - (iii) where he is empowered to do so, by the manager.
- (b) The persons subscribing under (a) should include -
- (i) except where (ii) applies, the owner of a unit within four metres of the affected property measuring along a horizontal plane (the width of any road being disregarded if of less than twenty metres);
 - (ii) if the deed has the effect of imposing a new burden, the owner of the affected unit (or units).

(Draft Bill s 30)

Universal variation and discharge

7.68 **Execution and registration.** As communities change, so community burdens may need to change also. In the course of time a community might wish to introduce a management structure,¹⁰⁴ or set up a sinking fund, or modify a bar on trade so as to allow working from home. Deeds with universal effect are not common, but when they occur they are likely to involve variation as well as discharge.

7.69 The rules set out above can readily be adapted for use here. A deed of discharge should be granted by (i) the owners of a majority of units or (ii) the owners of such units as may be specified in the constitutive deed or (iii) the manager, if authorised to do so. In practice we imagine that it would be unusual for a manager to have authority to grant deeds with universal effect, other than perhaps as a mere attorney for the purposes of execution. The rules for variation should be the same, if only because it would be impractical to require each owner to sign.¹⁰⁵ But under proposals discussed below a deed of variation or discharge would be subject to challenge.

7.70 Registration would be required against all of the affected properties, which in practice means all of the units in the community. The digital mapping system in the Land Register makes it possible to streamline the registration process. Using the description in the deed of variation and discharge, the boundaries of the community can be plotted on the digital map. Often this would already have been done in response to the original deed of conditions. Thereafter it is possible to generate automatic entries on the title sheets of the affected properties.

7.71 The discussion paper raised the issue of developer control.¹⁰⁶ It was pointed out that in the early stages of a development a developer would continue to own a majority of units and hence be in a position to make unilateral alterations to the burdens which would affect even those who had already bought. This was thought to be undesirable. To prevent it from happening it was suggested that the requirement of a majority be supplemented by a

¹⁰⁴ Such as the Development Management Scheme set out in part 8.

¹⁰⁵ Compare here the rules for individual variation described in para 7.66.

¹⁰⁶ Scot Law Com DP No 106 para 5.12.

requirement that the signatories include the owners of 20% of the units, such units all being in separate ownership. Thus some at least of the first purchasers would have to be in agreement with the developer. Those who commented on this proposal were mainly opposed to it. It was emphasised that developers sometimes change their plans in mid-development. If the market turns out to be for houses of type A and not for flats of type B, a developer may decide to build fewer flats and more houses. Or if part of the ground is unsuitable for building, the developer may be forced to reduce the number of units. In cases such as this, the deed of conditions will require to be amended, if only to alter the percentages of liability for common maintenance. In the light of these responses we have decided to make no recommendation. A developer-led variation which was prejudicial to the first purchasers could be challenged judicially under proposals mentioned below.¹⁰⁷

7.72 Notification. As a number of our consultees pointed out, the burdens affecting a person's property should not be altered without that person being notified. For otherwise there might be inadvertent breaches. The difficulty here arises directly out of our proposal to allow deeds to be executed by a majority of owners, or by a manager on behalf of the owners. A person who is not a signatory may be unaware that a deed has been registered. The difficulty, however, seems easily solved. A deed of variation or discharge should not be registrable until such time as it has been sent to the owners of the affected units (other than an owner who granted the deed). Notification would also trigger the period for judicial challenge, discussed below, and should include information about the right of challenge. Since notification is to be a prerequisite of registration, those involved in preparing a deed of variation and discharge will be mindful of the need to satisfy the Keeper that notification has taken place, and this may mean sending the documentation by recorded delivery.

7.73 Reduction. Occasionally the majority may behave unwisely, or even unfairly.¹⁰⁸ A determined individual might persuade a majority to sign up to a change which was in his own interests but not in the interests of anyone else. Or a developer who still owned a majority of the units might propose alterations which were unacceptable to those who had already bought. A change which benefited the community as a whole might be unfair to some of its members. For example, a person who had acquired a unit for the purposes of carrying on a business would be prejudiced by the introduction of a burden which prohibited business use. Yet the effect of such a prohibition might be generally beneficial. Again, the redistribution of maintenance obligations would prejudice those whose liability was increased.

7.74 It seems obvious that the actions of the majority should be subject to some kind of review. In our *Report on the Law of the Tenement* we recommended that decisions taken by a majority under a management scheme should be capable of being annulled by the sheriff if either they were not in the best interests of the owners or if they were unfairly prejudicial to one or more owner. Decisions required to be notified to all owners as they were taken, and a period of 21 days was set aside for applications to the sheriff.¹⁰⁹ A similar recommendation is made later in this report in respect of the Development Management Scheme.¹¹⁰ It is desirable that the review procedure for tenements should not be different from that for other

¹⁰⁷ Paras 7.73 to 7.75.

¹⁰⁸ In deeds with universal effect, all owners are equally affected by the changes, and protection is required for the disaffected minority. By contrast, in deeds with individual effect, protection is required for close neighbours. See para 7.60.

¹⁰⁹ Scot Law Com No 162 paras 5.19 - 5.25.

¹¹⁰ Paras 8.40 to 8.44 and 8.90.

properties, and a tenement should not be subject to two different procedures depending on whether the act reviewed concerns a management scheme or a real burden. In fact the model proposed for tenements can readily be adapted for real burdens. Since what is being reviewed is a deed rather than a decision, the appropriate sanction would be reduction. Reduction¹¹¹ is normally reserved to the Court of Session, but there seems no particular difficulty in giving the sheriff jurisdiction in this limited case. The grounds for review would be the same as for tenements. An application to the sheriff should be competent within eight weeks¹¹² of notification of the deed.¹¹³ Obviously the applicant must not be a signatory to the deed (or a successor in title of such a signatory). Reduction would not be retrospective in effect. An extract decree would be registrable.¹¹⁴

7.75 **Recommendation.** We recommend that

52. (a) **A community burden should be varied or discharged in relation to all units (or a lesser number, but not less than one half of the community) by registration against the affected units of a deed granted and subscribed -**
- (i) **by the owners of a majority of units;**
 - (ii) **by the owners of such units as is provided for in the constitutive deed; or**
 - (iii) **where he is empowered to do so, by the manager.**
- (b) **A deed should not be registrable unless the owner of every affected unit (other than an owner who granted the deed) has been given or sent a copy of the deed and informed of his right to apply for reduction under (c).**
- (c) **If, in relation to such a deed, the court is satisfied that -**
- (i) **the deed is not in the best interests of the community, or**
 - (ii) **the deed is unfairly prejudicial to one or more of the owners**
- the court should be able to make an order reducing the deed in whole or in part.**
- (d) **An application under (c) should be available to any person who -**
- (i) **owns an affected unit, and**
 - (ii) **did not grant, or agree to grant, the deed.**

¹¹¹ Other than *ope exceptionis*.

¹¹² A number of consultees felt that 21 days, our original suggestion, was too short.

¹¹³ For notification, see para 7.72.

¹¹⁴ Thus avoiding, in relation to the Land Register, the difficulties encountered in *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

(e) An application must be brought not later than eight weeks after the owner received a copy of the deed under (b).

(f) An extract decree of reduction should be registrable.

(g) By “court” is meant the Court of Session or the Sheriff Court.

(Draft Bill ss 31 and 32)

Part 8 Development Management Scheme

Managing shared facilities

8.1 “Communities”, as already mentioned, vary greatly both in nature and in extent.¹ Many are merely a collection of individual units, without shared facilities. Traditional housing estates are often like this. But in modern developments, shared facilities are common. Sometimes this amounts to no more than a shared garden, or parking area, but it may also include recreational facilities such as a swimming pool or gymnasium or health club, or, as in sheltered housing, medical and care facilities. The trend is towards an increased number and range of shared facilities. In the United States, housing communities can sometimes resemble small municipalities, with their own security guards, sports facilities, and shops.²

8.2 Shared facilities require to be managed and maintained. Doubts as to whether this could be achieved by real burdens will be removed by proposals made earlier.³ A developer can thus make appropriate provision in the deed of conditions, and no doubt most will continue to do so. In our *Report on the Law of the Tenement*, however, we offered an alternative in the form of a model management scheme.⁴ The idea was partly to provide what we hoped would be an example of good practice in this area, and partly to enable an owners’ association to be formed as a body corporate. The scheme was intended to be statutory only in the sense that Tables A to E of the companies legislation are statutory.⁵ In other words, the scheme provides a template, with statutory backing. It can be used or not used, as the developer sees fit; and if used it can be freely adapted to the particular circumstances of the development. As originally conceived the scheme is, of course, confined to tenements,⁶ but it could readily be adapted for use in other developments with shared facilities. In our discussion paper on real burdens we asked whether the scheme should be so adapted, and included as part of the proposed legislation. Almost all consultees who responded expressed support for the idea, and we have taken it forward. A model management scheme – to be known as the Development Management Scheme – is set out in schedule 3 of the draft bill appended to this report. A summary is given in the accompanying explanatory notes. In this part of the report we explain in greater detail how such a scheme is intended to work.⁷

Structure and scope

¹ Paras 7.1 to 7.4.

² American Law Institute, *Restatement Third, Property (Servitudes)* vol 2, 68-9.

³ Paras 2.15 and 7.27.

⁴ Scot Law Com No 162 paras 3.17 - 3.20, and part 6. The scheme – known as Management Scheme B – is set out in sched 2 to the draft Tenements (Scotland) Bill.

⁵ Companies (Tables A to F) Regulations 1995, SI 1995/805.

⁶ Tenements (Scotland) Bill s 5(1)-(3) (reproduced in appendix 1 to Scot Law Com No 162). For a much earlier attempt at providing a statutory framework for management, see the Dwelling Houses (Scotland) Act 1855 (now repealed).

⁷ Since the Title Conditions Bill is likely to be enacted before the Tenements Bill, one result of this approach will be to allow the excision of Management Scheme B. The Development Management Scheme would of course be available for tenements, as for property of other types. The remaining management scheme in the Tenements Bill (Management Scheme A) could then be re-named the Tenement Management Scheme.

8.3 The scheme charges the owners' association with the management of the whole development for the benefit of the owners.⁸ The detailed rules, however, are not so ambitious. The development is divided into "scheme property" and other property. "Scheme property" is a matter for definition in the deed which brings the scheme into force but in practice is likely to be confined to shared facilities. The distinction is thus between (i) the individual units and (ii) the shared facilities ("scheme property").⁹ The scheme as set out in the draft bill is almost exclusively concerned with the latter. It provides for the maintenance and regulation of the scheme property; and it provides a management structure. Individual units, however, are unaffected. If this seems like only half a scheme, the omission is deliberate. That developers will wish to impose restrictions on individual units is, of course, recognised; but there seemed little advantage in trying to second-guess what these might be. Provisions which are appropriate for one development might be wholly out of place in another. And while, in current practice, deeds of conditions often show strong similarities, there can also be striking differences. The matter seems best left to developers and their legal advisers. Since the scheme is, for the most part, freely variable, there is no difficulty in adding appropriate provisions. The method by which this can be done is considered later.¹⁰ In reading the scheme and considering its effect, therefore, it should be borne in mind that one important part is missing.

8.4 The scheme is set out in four parts. Some key definitions are given in part 1. Part 2 contains a number of basic provisions about the establishment of an owners' association, its powers, its internal governance, and its winding up. Part 3 is concerned with the management structure and part 4 with financial matters. Amenity burdens and the like could be added in a new part 5.

8.5 In drawing up the scheme we have derived considerable help both from deeds of conditions in current use, and from the statutory management schemes which have been introduced in many other countries over the past thirty or forty years.¹¹ A review of these sources shows extraordinary variety in both length and complexity. There is almost no legal problem, or so it seems, which might not arise in the course of community living and, in some cases, almost no lengths to which the draftsman might not go for its solution. The influential New South Wales scheme, for example, consists of 43 rules and is appended to an act on strata titles which consists of 160 sections and runs to 158 printed pages.¹² By contrast, the deeds of conditions employed by Scottish conveyancers, though often wordy, are much less ambitious in scope. For the most part we have favoured the local model. Partly this is for the practical reason that a long and complex scheme is unlikely to commend itself to conveyancers and might lie on the statute book unused. Partly too it is because of the belief that a secure set of general principles is sometimes better than intricate elaboration. The common sense of owners will then do the rest. Finally, we doubt whether a long and detailed scheme is sufficiently accessible to ordinary property owners. Our model scheme comprises only 21 rules. It is longer than many deeds of conditions used in current practice¹³ but not, we hope, unacceptably long. It is drafted

⁸ Development Management Scheme r 3.1.

⁹ The two categories may, however, overlap to some extent. In a block of flats, for example, the external walls (which are often part of the individual units) may be made scheme property so that they can be commonly maintained. The same might be true of other parts of the block.

¹⁰ Paras 8.85 ff.

¹¹ On the latter see eg the Uniform Condominium Act 1977 (USA), the Strata Titles Act 1973 (New South Wales, replacing an earlier Act of 1961), and the Sectional Titles Act 1986 (South Africa, replacing an earlier Act of 1971).

¹² Strata Titles Act 1973. The provisions on commonhold for England and Wales, contained in the draft Commonhold and Leasehold Reform Bill published on 21 August 2000, amount to 52 clauses and five schedules and take up 31 printed pages. An earlier version, published in July 1996, was considerably longer. For a discussion, see Peter Smith, "Caveat Commonholds", in Paul Jackson and David C Wilde (eds), *Property Law: Current Issues and Debates* (1999) 117.

¹³ Or rather, while such deeds are frequently longer, this is because of the enumeration of amenity conditions. Such conditions have yet to be added to the Development Management Scheme.

in as simple a style as is consistent with legal certainty. The intention is that the scheme should be no harder to use than the rules of a golf club, and that owners should be able to operate it with the minimum of legal or other professional assistance. The text is accompanied by explanatory notes written in non-technical language.¹⁴

8.6 For the most part, the scheme put forward here is the same as the scheme originally produced as part of our draft Tenements (Scotland) Bill. The change from tenements to developments of other kinds has led to some changes in terminology and to the omission of some rules. We have also taken the opportunity to make a number of other changes, some of them prompted by valuable comments on the earlier version made by the Royal Institution of Chartered Surveyors in Scotland. If further changes turn out to be required, whether in the light of experience or because of changing development patterns, we think that it should be possible for Scottish Ministers to vary the scheme by statutory instrument. Such changes, however, would apply only to new developments and would have no effect in cases where the scheme was already in force.

Application

8.7 The Development Management Scheme will not apply unless it is brought into effect by the registration of an appropriate deed, referred to in the draft bill as a deed of application. Registration is against the affected land.¹⁵ No special words are required, and no statutory form is provided: a deed of application simply declares that the scheme is to apply to specified land. The deed is granted and executed by the owner of the land in question, typically the developer. In theory there is nothing to stop the scheme from being adopted by a development already in existence, but the deed would then need to be signed by the owner of each unit. For that reason, but not only for that reason, the scheme is likely to be used only for new developments.

8.8 Unavoidably the scheme contains a number of blanks which fall to be completed in the deed as part of the process of customising the scheme to the particular development. These are:¹⁶

- the definition of ‘development’, ie a description of the whole land which is to be affected by the scheme;
- the definition of ‘scheme property’, ie a description of the part or parts of the development – in practice usually the shared facilities – which are to be maintained and regulated under the scheme;
- the definition of ‘unit’, ie the component properties – houses, flats and so on – which are in separate ownership;
- the name of the association – in practice “The Owners’ Association of” followed by the address of the development or other identifying feature;
- the name and address of the person who is to act as the first manager.

8.9 This information is necessary for the proper functioning of the scheme, and in its absence the deed is not legally effective.¹⁷ In practice the deed may also contain modifications and additions to the scheme. Depending on the number of changes being made, this might take the form of particular

¹⁴ These will be found in appendix 1, on the pages facing the text of the scheme.

¹⁵ There is no benefited property as such and hence no requirement of dual registration.

¹⁶ Development Management Scheme rules 1, 2.2 and 7.3.

¹⁷ Draft bill s 60(2).

alterations to particular rules, or alternatively, and preferably, the deed of conditions might reprint the scheme in full with the variations duly incorporated.¹⁸

8.10 Normally the scheme will take effect on registration of the deed of application. But it should be possible to provide for a later date. That might either be a specific date (eg 1 April 2004) or a date fixed by reference to the registration of some future deed or deeds – in practice the break-off deeds of the individual units.¹⁹ It is possible, though perhaps not desirable, to bring the scheme into effect for different units at different times. Thus it could be provided that the scheme is to apply to a particular unit only on the registration of a break-off conveyance which incorporates the deed of application. Unsold units would not then be subject to the scheme, and, if circumstances changed, it would be possible to sell units free of the scheme.

8.11 Drawing together the various matters touched on so far, we recommend that

- 53. (a) There should be an optional scheme for the management of properties (“units”), to be known as the “Development Management Scheme”.**
- (b) The scheme should apply to land if a deed of application is granted and registered by its owner.**
- (c) The deed of application should contain the information required in order to complete the scheme.**
- (d) The scheme should take effect**
- (i) on the date of registration, or**
- (ii) on such later date as may be specified in the deed (including the date of registration of some other deed).**
- (e) It should be possible for the scheme to take effect at different times for different units.**
- (f) Scottish Ministers should have the power to alter the scheme, as enacted, by statutory instrument, but such alterations should not apply to any application of the scheme by virtue of a deed executed before the coming into force of the instrument.**

(Draft Bill ss 60 and 70)

Owners’ association

8.12 The defining feature of the scheme is that management is entrusted to an owners’ association consisting of all owners of units in the development. This is not, of course, a new idea. Owners’ associations are a standard feature of management schemes in other countries, and they are often found in the more sophisticated of the deeds of conditions used in this country. The idea is that the association comes into existence at the same time as the scheme, and that all owners are automatically

¹⁸ For variations to the scheme, see further paras 8.85 to 8.88.

¹⁹ This is the same rule as operates for the creation of real burdens: see para 3.9.

members.²⁰ On ceasing to be owner they lose their membership, and the incoming owner becomes a member in turn. In cases where a unit is co-owned (for example, by a husband and wife), each co-owner is a member.

8.13 In Scotland owners' associations are always unincorporated associations. In theory it would be possible to incorporate an association as a company under the Companies Acts, but the degree of formality and regulation involved are out of scale with the relatively humble functions which the association performs. By contrast, in most countries with modern legislation in this field the owners' association is a body corporate *sui generis*, incorporated under the legislation and regulated with a minimum of formality. The idea is to bestow the advantages of incorporation but without the formality which would be imposed by company law. The advantages of incorporation arise from the fact that, unlike an unincorporated association, a corporation is a separate legal person. Thus it can enter into contracts, owe and be owed money, sue in its own name, and so on; and there is a clear division in law between the association on the one hand and the owners of the units, who are its members, on the other. The technical superiority of incorporation seems clear enough. But we recommend it here not only for that reason but also to give developers a choice. Under the present law incorporation is not, in practical terms, available. Under our proposals a developer would be able to opt for incorporation and the Development Management Scheme. Alternatively he could, in effect, use the scheme but without incorporation by detaching parts 1, 3 and 4 and using them as the basis of a different management scheme.

8.14 A body corporate requires functions and powers, and any act lying beyond these powers is *ultra vires* and void. We think that the functions and powers of an owners' association should be narrowly defined. An owner should have the reassurance that the association will not embark on the manufacture of ball bearings or on a career of property speculation; and the special informality which we are proposing for owners' associations should not be available for corporations which are engaged in trade. We suggest that the function of an association should be no more than to manage the development for the benefit of the owners. It does not seem necessary to add a long list of supporting powers. As a juristic person the association would have all powers which are necessary in order to carry out its designated function. Thus for example the association could enter into contracts and enforce them in its own name. Nonetheless it is convenient and, for the owners, perhaps reassuring, to give a non-exhaustive list of the powers which the association might normally wish to exercise. First and foremost, the association will wish to maintain the scheme property. In certain limited circumstances it might also wish to carry out improvements, or even demolition.²¹ It might want to insure the development, or part of it, and for that purpose would require to be given an insurable interest. It will sometimes be necessary to hire employees or agents – gardeners, cleaners and the like. From time to time some item of moveable property may need to be purchased – a lawnmower, for example, or cleaning materials. In order to pay for those costs the association will require to levy money from the owners. A bank account will require to be opened and, in appropriate cases, money may need to be invested so as to generate income. Occasionally the association may need to borrow money, if only in the form of a temporary overdraft pending payment by the owners of their next instalment of service charge. The association should be able to own property within the development, for example recreational and other facilities. The deed of application might make additions to this list, but we suggest that it should not be possible to include a power to acquire land outwith the development or to carry on any trade. As already mentioned, the list of powers is not exhaustive but

²⁰ For the meaning of "owner", see paras 13.1 to 13.9.

²¹ See paras 8.57 and 8.58.

includes those powers which we regard as central to the association's role and which we would expect to be used most frequently.²²

8.15 We recommend that

- 54. (a) An owners' association should come into existence on the day on which the Development Management Scheme takes effect.**
- (b) The association should be a body corporate but not a company.**
- (c) The members of the association should be the owners for the time being of the units in the development.**
- (d) Where two or more persons own a unit both (or all) of them should be members.**
- (e) The function of the association should be to manage the development for the benefit of the owners.**
- (f) The association should have power to do anything necessary for the carrying out of its function and in particular should be able to -**
- (i) carry out maintenance, improvements or alterations to, or demolition of, scheme property;**
 - (ii) enter into a contract of insurance in respect of the development (and for that purpose the association should have an insurable interest);**
 - (iii) purchase or otherwise acquire moveable property;**
 - (iv) require owners to contribute by way of a service charge to association funds;**
 - (v) open and maintain an account with any bank or building society;**
 - (vi) invest any money held on its behalf;**
 - (vii) borrow money;**
 - (viii) engage employees or appoint agents; and**
 - (ix) own, or acquire ownership of, any part of the development.**
(Development Management Scheme rules 2.1, 2.3, 3.1, and 3.2)

Manager

²² Later (paras 8.61 and 8.62) we discuss a further express power, to make regulations in relation to recreational facilities.

8.16 **Appointment.** Experience shows that owners are often reluctant to attend meetings or otherwise to play an active part in the management of a development. Such reluctance is understandable; but it suggests that the owners as a body should not be given a day-to-day role in the running of the development. In our view the Development Management Scheme is unlikely to work efficiently unless one person – and one person alone – is charged with executive responsibility for management. Such a person may be designated as the “manager”. The manager would be the executive arm of the association and hence the equivalent of the board of directors in a company. He could be one of the owners or he could be an outside professional, such as a property manager or indeed a firm of property managers. If the manager was an owner he would be able to appoint an outside professional to assist him.²³ The manager would normally be appointed by the association at a general meeting of its members. He would serve for such period of time as the owners wished. Usually he would be paid. It would be possible for the developer to vary the scheme so as to reserve a power to appoint the manager;²⁴ but, on principles discussed earlier, such a power would have a maximum life of ten years, and would terminate earlier if the developer had disposed of all the units.²⁵

8.17 The deed of application should nominate a person to act as first manager, to cover the period until the first general meeting can be held.²⁶ The nominee would be eligible for reappointment. In the absence of agreement to the contrary he would be entitled to reasonable remuneration for his initial period of office.

8.18 **Powers and duties.** The manager would exercise the powers vested in the association.²⁷ But he would also be subject to a number of duties. Above all he would have the duty of managing the development for the benefit of the owners.²⁸ We imagine that it would be helpful both to the owners and also to the manager if some specific duties were also listed, and these are mentioned later.²⁹ Additional duties may of course be laid down in any contract entered into between the manager and the association.

8.19 The validity of a manager’s actings should not be affected by a technical irregularity in the appointment process.³⁰ In order to satisfy contractors and other third parties, provision should be made for the manager’s appointment to be evidenced by a formal certificate signed both by the manager and by a member acting on behalf of the association. Like a director of a company, the manager would be an agent of the association. This both empowers and restrains him. On the one hand he can incur liabilities and acquire rights on behalf of the association. But on the other hand he owes fiduciary duties to the association. Thus he must exercise his powers in good faith and in the best interests of the association. He must not make a secret profit. He must not, for private reasons, favour one contractor at the expense of others who might do the work just as well and at a lower cost. A manager who breached his fiduciary duties would be liable in damages to the association.

²³ Under rule 3.2(i) of the scheme.

²⁴ The relevant rule, r 7, is in part 3 of the scheme and so is freely variable. See para 8.94.

²⁵ Paras 2.29 to 2.39. This would be done by a management burden.

²⁶ The first general meeting must take place within a year of the establishment of the association, and in many cases will take place sooner: see rule 9.1, discussed in para 8.31.

²⁷ See para 8.14.

²⁸ This is the counterpart of the function of the association (r 3.1, discussed in para 8.14), which function is exercised on behalf of the association by the manager.

²⁹ See in particular paras 8.22, 8.34, 8.38, 8.46, 8.53, 8.55, 8.77, and 8.78.

³⁰ This is modelled on s 285 of the Companies Act 1985.

8.20 The manager will usually be appointed for a fixed period of time, although his appointment would be renewable and in practice might often be renewed. But we think that it should be possible for the members to dismiss a manager at any time by a vote taken at a general meeting and without the need to satisfy any particular criterion.³¹ If a manager is thought not to be performing satisfactorily, or if he is abusing his power, there should be no delay in replacing him. However, a dismissal which could not be justified would attract a claim by the manager under his contract.

8.21 We recommend that

- 55. (a) In an owners' association executive responsibility should be vested in a manager, who may but need not be a member of the association.**
- (b) The manager should be appointed by the association at a general meeting, and on such terms and conditions as the association may decide.**
- (c) However, the first manager should be nominated in the deed of application, and should serve until the first annual general meeting, be entitled to reasonable remuneration, and be eligible for reappointment.**
- (d) The actings of a manager should be valid even if there is an irregularity in the way he was appointed.**
- (e) Within a month of a manager's appointment a certificate should be prepared recording the making of the appointment and its duration, and the certificate should be signed by the manager and, on behalf of the association, by a member.**
- (f) The manager should have the duty to manage the development for the benefit of the members.**
- (g) The manager should be an agent of the association.**
- (h) The association should be empowered to dismiss the manager at a general meeting before his term of office has expired.**

(Development Management Scheme rules 4.1 to 4.4, 7 and 8)

Advisory committee

8.22 Under our proposals executive power rests, not with a committee of members and still less with the members as a body, but rather with a single manager. But while doubting the value of management by committee, we accept that there may still be a role for a committee of members to act in an advisory capacity. We have in mind an informal arrangement whereby a small group of members would be nominated as advisers to the manager. They would meet from time to time with the manager and offer advice on current issues. They would have a special role in relation to relaxations of amenity restrictions and other conditions in favour of individual owners.³² The

³¹ An equivalent right exists in company law: see s 303 of the Companies Act 1985. The relevant rule (r 4.2) is in part 2 and so is non-variable, rather in the same way that, for real burdens, s 54 of the draft bill (overriding power to dismiss manager) is non-variable.

³² Para 8.92.

manager would be bound to listen to the advice tendered although he would not be bound to follow it, for in the end the manager is answerable to all of the members and not merely to a small number of them, who may turn out to be unrepresentative. However, a majority of members of the advisory committee should be entitled to requisition a general meeting at which, if necessary, the manager could be taken to task.

8.23 We do not think that an advisory committee should be mandatory. Owners may think it is not worth the trouble, and in small developments, at least, there may be no need for a separate group of members. But in a larger development the manager, especially where he is an outsider, may be grateful for the opportunity to discuss matters informally with a number of the owners.

8.24 We recommend that

56. (a) At a general meeting the association should be entitled to elect an advisory committee of members to provide advice to the manager.

(b) If an advisory committee is appointed, the manager should be bound to consult it from time to time, but should not be bound to follow its advice.

(c) A majority of members of the advisory committee should be entitled to requisition a general meeting.

(Development Management Scheme rules 9.3(c) and 15)

Internal governance

8.25 The two organs of the association are the members in general meeting and the manager. Both are entitled to exercise all the powers of the association, subject, of course, to the other rules of the scheme.³³ But since general meetings will usually take place only once a year, executive power will in practice be exercised by the manager, and the general meeting is likely to need its powers only in cases where, for some reason, there is no manager in place. However, ultimate authority should lie with the general meeting. We have already recommended that the general meeting should be able to dismiss the manager before the expiry of his term.³⁴ Furthermore, the general meeting should be empowered to give the manager instructions or to impose restrictions on his authority.³⁵ Later we recommend specific controls by the general meeting in relation to financial and certain other matters.³⁶

8.26 The rules of the scheme are, and should formally be declared to be, binding on the association, its members and on the manager.³⁷ An incoming owner becomes a member automatically and hence is bound by the scheme and by decisions already taken on behalf of the association by its

³³ Thus for example the general power to raise money from members conferred by rule 3.2(e) is qualified by the procedural safeguards contained in rules 18 to 20.

³⁴ Para 8.14 and r 4.2.

³⁵ As in company law: see Table A (SI 1985/805) article 70.

³⁶ See paras 8.45 to 8.47, 8.57, 8.61, 8.89 to 8.91, and 8.97.

³⁷ For the parallel provision in company law, see s 14 of the Companies Act 1985.

manager or the general meeting.³⁸ A non-owning occupier, such as a tenant, would be subject to any amenity conditions³⁹ and to any other rules in the form of restrictions on use.⁴⁰

8.27 In a conventional deed of conditions containing community burdens, enforcement rights are held by individual owners. The Development Management Scheme operates in a different way. Normally enforcement is a matter for the manager alone, acting on behalf of the association. Indeed, we consider that the manager should be under a positive duty to enforce both the provisions of the scheme,⁴¹ and also any obligations owed by any person to the association, whether under the scheme or otherwise. Thus if an owner does not pay his service charge, it is the duty of the manager to take appropriate measures for its recovery. The owners may also enforce, but only in the sense that residual control of the association lies with its members, at a general meeting. Individual owners have no enforcement rights as such, although no doubt the scheme will sometimes be varied to confer such rights in relation to amenity conditions. Often the absence of enforcement rights seems a positive advantage. No one wants to sue a neighbour. It is easier, and more efficient, to telephone the manager. A manager can remonstrate in an official capacity and, if litigation should prove necessary, has the resources of the association behind him.

8.28 Under the management scheme a heavy burden of responsibility rests on the manager. If the manager is efficient, the development will run well. But some managers may not be efficient because they are too busy or too disorganised. Occasionally a manager may behave dishonestly. For cases of inadequate performance it is necessary to decide where the title to complain should lie. We see no reason why the various duties placed on the manager by the scheme should not be owed to the individual members as well as to the association. It is true that in company law directors generally owe duties to the company rather than to its members, and further that the Scottish equivalent of the rule in *Foss v Harbottle*⁴² will usually prevent individual members from enforcing the rights which the law vests in the company. But we shrink from introducing *Foss v Harbottle*, a difficult and elaborate rule,⁴³ into the law governing residential and other developments. The usual justification for *Foss v Harbottle* is that it prevents the multiplication of law suits, but the danger seems slight in the case of an owners' association. Owners are lethargic rather than litigious. Where a breach of duty affects the development as a whole, they will be all too willing to leave enforcement to collective action, decided on at a general meeting. Individual action is likely only where the general meeting declines to take matters further, and the owner is not satisfied with the decision. Such cases will not be common. The position is different where the breach affects a particular owner individually and uniquely. A standard example would be where the manager falls down on his duty of inspection,⁴⁴ and an individual unit is damaged because of the resulting deterioration in the condition of an item of scheme property. For example, in a block of flats dry rot might spread from the roof timbers, or there might be water damage from a leaking pipe. In situations such as these it seems only just that the owner affected should have a direct right of action against the manager, and indeed in such cases the loss has been incurred by the owner and not by the association.

³⁸ See paras 4.41 to 4.47 for a discussion of the liability of an incoming owner for costs incurred or to be incurred under the scheme.

³⁹ The amenity conditions themselves will be an addition to the scheme as enacted. See para 8.3.

⁴⁰ This is equivalent of the rule set out, for real burdens, in s 8(2) of the draft bill.

⁴¹ Subject however to considerations of reasonableness. See r 8.1(f). The breach may be too trivial to make enforcement a sensible option. Or the grant of a waiver may seem appropriate (for which see para 8.92).

⁴² (1843) 2 Hare 461.

⁴³ The Law Commission for England and Wales has recommended the replacement of the rule by a new statutory remedy for shareholders: see *Shareholder Remedies* (Law Com no 246, 1997).

⁴⁴ For the manager's duty of inspection, see para 8.55 and r 8(a).

8.29 Usually, of course, it will not come to litigation. A manager whose performance is unsatisfactory can be summoned to a general meeting and required to account for himself. He can be given instructions as to his future conduct. If the members are still not satisfied he can be dismissed and replaced by someone more competent or more trustworthy. The opportunity for members to exercise control in this way occurs with reasonable frequency. Under the management scheme, general meetings must be held annually, and additional meetings may be requisitioned by a majority of members of the advisory committee or by the owners holding 25% of the total votes for the development.⁴⁵ Provided that members are reasonably vigilant the development should be managed well.

8.30 Summing up this whole discussion, we recommend that

57. (a) The powers of the association should be exercisable by the association in general meeting and by the manager, but subject in both cases to the other rules of the scheme.

(b) In the exercise of these powers the manager should be subject to any directions given by the association at a general meeting.

(c) The rules of the Development Management Scheme should be binding on the association, its members and on the manager.

(d) Rules in the form of restrictions should also be binding on tenants and other persons having use of a unit.

(e) The association should be entitled to enforce any rule of the scheme and any obligation owed by any person to the association; and the manager should be under a duty to carry out such enforcement on behalf of the association.

(f) The duties imposed on the manager by the scheme should be owed to the association and to its members.

(Development Management Scheme rules 3.3 and 3.4, 4.5 to 4.7 and 8(f))

General meetings

8.31 The general meeting is the legislature of the owners' association. It appoints the manager, who is the executive, and may give him instructions or impose restrictions. It may also dismiss him. Further, the general meeting has a residual right to exercise all of the powers of the association. Often only one general meeting will be held each year; and we suggest, following the rules for companies,⁴⁶ that a general meeting should require to be held annually, and that not more than 15 months should elapse between successive annual general meetings. The first annual general meeting should be held not later than 12 months after the establishment of the association.⁴⁷ The main business of the annual general meeting is likely to be the approval of a draft budget for the following year.⁴⁸

⁴⁵ See para 8.32 and r 9.3.

⁴⁶ Companies Act 1985 s 366. A similar rule operates for owners' associations in many other countries.

⁴⁷ The association is established on the day on which the scheme is brought into effect: see r 2.1.

⁴⁸ For the rules about budgets, see paras 8.46 and 8.47.

8.32 In addition to the annual general meeting it should be possible to hold other general meetings if and when the need arises. Earlier we recommended that a majority of members of the advisory committee should be able to requisition a meeting.⁴⁹ The manager should also be able to call a meeting whenever he wishes. Ordinary owners are in a different position. In order to avoid a proliferation of unnecessary meetings, a number of owners should require to be of like mind before a meeting can be arranged, and we suggest 25% of the total voting power as a suitable threshold.⁵⁰

8.33 The management scheme sets out certain procedural rules for the calling and the conduct of meetings. Since these are straightforward and, we imagine, uncontroversial, only a short summary is given here. A meeting is called by sending to each member a draft agenda and a notice of the date, time and place of the meeting. These must be sent 14 days in advance. A document may be sent by personal delivery to a member's unit, by post, or by electronic transmission such as fax or email. However, an inadvertent failure to send documentation to a member should not affect the validity of proceedings at the general meeting.⁵¹ By agreement at the meeting additional items can be added to the agenda. Thus an owner who wishes to protect his interests should take care to attend, or be represented at, all meetings.

8.34 Normally the manager will call the meeting. The scheme imposes a duty to call the annual general meeting, and also any other meeting which is requisitioned by members in accordance with the rules just described. If the manager fails to call a meeting, or if there is no manager, any member is entitled to step in and call the meeting himself.

8.35 Following the lead of many other countries⁵² we suggest that the quorum at a meeting should ordinarily be 50% of the total voting power of the association. Hence in cases where each unit has a single vote,⁵³ a quorum will be attained if the owners of half of the units are present or represented at the meeting. We are attracted by the system operated in South Africa whereby the quorum is reduced as the size of the development increases. This recognises the fact that in larger developments individual owners may feel that their vote counts for little and may feel inclined to stay away, with the result that a quorum is not easily attained. Under the South African legislation the quorum is 50% for developments with 10 or fewer units, 35% for developments with between 11 and 49 units, and 20% for still larger developments.⁵⁴ We suggest a slightly simpler formula: 50% for up to 30 units in the development, and 35% thereafter. A meeting which remains inquorate after 20 minutes should be postponed and rearranged for another day not less than 14 and not more than 28 days later. At the rearranged meeting business may be transacted even in the absence of a quorum. Under the scheme a quorum is necessary only for the start of the meeting. Hence if an initial quorum is present business can continue to be transacted even if the quorum subsequently falls away.

8.36 The meeting is presided over by a chairman elected by the members. A chairman may be elected for a particular meeting only or, if preferred, for a period of years. In its enacted form the scheme gives each unit the right to a single vote, but a developer may wish to provide weighted voting, at least in a case where units are of markedly different sizes. We imagine that voting rights will in most cases correspond with liability for scheme costs, so that a unit which has 12% liability for

⁴⁹ Para 8.22 and r 9.3(c).

⁵⁰ For the equivalent position for companies, see s 368 of the Companies Act 1985. South Africa also operates a 25% threshold: see Annexure 8 (made under s 35(2)(a) of the Sectional Titles Act 95 of 1986) r 53.

⁵¹ This adopts a rule of company law: see Table A (SI 1985/805) art 39.

⁵² C G van der Merwe, "Apartment Ownership" (being vol VI, chap 5 of the *International Encyclopaedia of Comparative Law*) (1994) paras 344 and 369.

⁵³ Which is the default provision: see r 11.1.

⁵⁴ Annexure 8 r 57.

costs will also command 12% of the votes.⁵⁵ An owner may vote in person or he may nominate another person (but not the manager) to attend the meeting and vote on his behalf. In order to avoid disputes, the nomination must be in writing. In a case of co-ownership, either (or any) *pro indiviso* owner may exercise the vote for the unit in question, but where there is disagreement among the owners the vote will not be counted.⁵⁶ A vote is normally taken by show of hands, although the chairman has a discretion to allow a ballot. In practice a ballot is likely to be important only where individual owners have significantly different voting rights.

8.37 Decisions are reached by a simple majority of votes cast. Hence if 50% of owners are present, a decision can be taken by 26% of the total voting power for the development.⁵⁷ However, there are three cases where the issues involved seem sufficiently important – and sufficiently removed from normal management – to require an absolute majority of votes. These are, first, a decision to vary or disapply the management scheme,⁵⁸ secondly, a decision to make a payment from the reserve fund,⁵⁹ and thirdly, a decision to carry out improvements or alterations to scheme property or to demolish the property.⁶⁰

8.38 The manager is placed under an obligation to attend the meeting, to take minutes, and to send a copy of the minutes to all members within 21 days. He is also bound to give effect to the decisions taken at the meeting.

8.39 We recommend that

58. (a) **An annual general meeting of the owners' association should be held every year, and not more than 15 months should elapse between the date of each successive meeting.**
- (b) **The first annual general meeting should take place not later than 12 months after the establishment of the association.**
- (c) **Members holding not less than 25% of the votes for the development should be entitled to requisition an additional general meeting at any time.**
- (d) **The manager should be under a duty to call the annual general meeting and any other meeting which is requisitioned by a member or members. In addition, he should be able to call a general meeting at any time.**
- (e) **Where the manager fails to call a general meeting, or where there is no manager, any member can call the meeting.**

⁵⁵ Under the scheme as set out in the draft bill each unit has both an equality of voting power (r 11.1) and an equality of liability (r 19.1).

⁵⁶ This is the rule already proposed in the default code for community burdens: see para 7.34.

⁵⁷ Or even less if there are abstentions.

⁵⁸ Other than variation in respect of individual units, for which see para 8.92.

⁵⁹ For the reserve fund, see further paras 8.49 and 8.50.

⁶⁰ See para 8.57.

(f) A meeting should be called by sending to each member, at least 14 days in advance, an agenda and a notice of the date, time and place of the meeting.

(g) However, any inadvertent failure to send the required documentation should not affect the validity of proceedings at the meeting.

(h) At the meeting a quorum should be the members holding not less than 50% of the votes for the development; but where the development has more than 30 units the figure should be reduced to 35%.

(i) A member should be able to be represented at the meeting by a person (other than the manager) duly nominated in writing.

(j) A quorum should be necessary for a meeting to begin, but the meeting should be able to continue thereafter even if a quorum has ceased to be present.

(k) If there is still no quorum 20 minutes after the time fixed for a general meeting, the meeting should be postponed until another day not less than 14 and not more than 28 days later. The postponed meeting should then be able to proceed even in the absence of a quorum.

(l) The meeting should be presided over by a chairman elected by the members.

(m) Decisions should be taken by a simple majority of the votes cast, one vote being allocated to each unit.

(n) However, an absolute majority of the votes for the development should be required -

(i) for any decision to vary or disapply the scheme (other than a variation under recommendation 70);

(ii) for any decision to make payments from a reserve fund; or

(iii) for any decision to carry out improvements or alterations to scheme property, or to demolish such property.

(o) Where two or more persons own a unit, any one owner should be able to vote, but if the owners disagree as to how the vote is to be cast the vote should not be counted.

(p) Voting should be taken by a show of hands unless the chairman decides it should be by ballot.

(q) The manager should be under a duty -

- (i) to attend all general meetings;**
 - (ii) to take minutes;**
 - (iii) to send a copy of the minutes to all members within 21 days; and**
 - (iv) to give effect to the decisions taken.**
- (Development Management Scheme rules 8(e), 9 to 12, and 13.1)

Annulling decisions

8.40 Majorities are not infallibly wise. Nor are they always fair to minority interests. In our view a decision taken at a general meeting should be challengeable, on the ground that it is not in the best interests of all the owners or on the alternative ground that it is unfairly prejudicial to one or more owner.⁶¹ We imagine that challenges would be uncommon. The review jurisdiction would be exercised by the sheriff, but with a right of appeal on a question of law to the Court of Session. In the interests of speed and simplicity, the procedure should be by summary application. Any owner would be able to apply, other than one who (or whose predecessor) had voted in favour of the decision. The proper defender would be the owners' association. In general summary applications must be lodged within 21 days of the decision complained against,⁶² but in view of the potential importance of some of the issues we think that this might reasonably be extended to 28 days. A longer period would impede the proper administration of the development. The 28-day period would start running from the date of the relevant meeting or, in a case where an owner was not present at the meeting, from the date on which notification of the decision was sent to him. Under the management scheme the manager must send each owner a copy of the minutes within 21 days of the meeting.⁶³

8.41 The effect of a successful application would be to annul the decision, and hence to restore the *status quo ante*. So the annulment of a decision to incur expenditure would mean that the expenditure would not go ahead. By contrast, the annulment of a decision *not* to incur expenditure would not have the effect of authorising the expenditure.⁶⁴ For if the original decision was one to preserve the *status quo*, its annulment can have no effect. The *status quo* remains as before. The desired expenditure continues to require majority approval, and the court cannot provide that which the owners are not willing to provide for themselves. The practical consequence is that applications are likely to be made only in respect of affirmative decisions.

8.42 In general the sheriff's discretion should be unfettered. However, if the application for review is in respect of a decision to carry out maintenance or improvements, there seems value in directing the sheriff to have particular regard to the age and condition of the property, to the probable cost of the work, and to whether that cost is reasonable. Thus if property has deteriorated to the point where it can no longer be economically repaired, the court may readily conclude that to carry out any maintenance at all is to throw good money after bad.

⁶¹ The procedure which follows is modelled on that developed for Management Scheme A: see Scot Law Com No 162 paras 5.19 to 5.25.

⁶² Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999 (SI 1999/929) r 2.6.

⁶³ Para 8.38; Development Management Scheme r 12.3(b).

⁶⁴ Unless the decision was seeking to reverse an earlier decision that the expenditure should be incurred. In that case expenditure is the *status quo ante*.

8.43 The sheriff should have power to make consequential orders. For example, if a decision is implemented, or partly implemented, before it can be challenged, the sheriff might wish to rearrange liability for the costs so incurred. The situation will rarely occur, however. Most decisions made at a general meeting will have no immediate financial, or other, consequences. Maintenance – the main type of day-to-day expenditure – is, under the scheme, usually carried out by the manager acting on his own authority and without recourse to a general meeting.⁶⁵ There is thus no decision to challenge. Later we propose a special procedure for where the implementation of a decision resulted in the preparation of a deed of variation or disapplication.⁶⁶

8.44 We recommend that

- 59. (a) The sheriff should have jurisdiction to annul a decision made by the owners' association at a general meeting on the ground that**
- (i) it is not in the best interests of all the owners, or**
 - (ii) it is unfairly prejudicial to one or more of the owners.**
- (b) The procedure should be by summary application brought by any owner (but excluding an owner who, or whose predecessor as owner, voted in favour of the decision).**
- (c) The application must be brought within 28 days of the meeting or, if the owner did not attend the meeting, within 28 days of notification of the decision.**
- (d) The sheriff should be able to make such consequential orders as he thinks fit, including an order regulating the liability of owners for any costs incurred in relation to implementation of the decision.**
- (e) In considering an application to annul a decision to carry out maintenance, improvements or alterations, the sheriff should have regard to**
- (i) the age of the property and its condition**
 - (ii) the likely cost of the work, and**
 - (iii) the reasonableness of that cost.**

(Draft Bill s 67)

Financial matters

8.45 In many tenements and other developments money is collected as and when the need for expenditure arises. There is no financial planning as such. Each item of expenditure is discussed in

⁶⁵ See paras 8.55 and 8.56.

⁶⁶ This involves reduction of the deed: see para 8.90. Except in a case where the deed has not already been granted, the objecting owner is likely to proceed directly to reduction without first seeking annulment of the initial decision that the deed be prepared. The grounds of challenge are the same in both cases.

isolation from all others and at the time when its need has become pressing. In a bad year owners may have to meet quite frequently to sanction individual repairs or other types of expenditure. This hand-to-mouth method of proceeding may work perfectly well in the case of small developments in a good state of repair. But it works less well in larger developments or in developments where there are likely to be regular calls for expenditure, and for such cases some form of annual budgeting is likely to be an attractive alternative.

8.46 In the model scheme we propose a system of annual budgeting. It works in quite a simple way. Each year the manager must produce a draft budget and present it to the annual general meeting for approval. The draft budget sets out the projected expenditure of the association for the coming 12 months on maintenance, insurance and other matters, and estimates the amount of service charge which will require to be levied on members in order to finance that expenditure. The draft budget must be circulated in advance. At the meeting the budget may either be accepted (whether in its original or in an amended form) or it may be rejected. If it is accepted the manager must then proceed to levy the service charge as agreed. If it is rejected the manager must prepare a revised draft budget for submission to a second meeting held within two months. In the meantime the service charge fixed under the previous budget will continue to be exigible.

8.47 Sometimes the estimates of income and expenditure will prove inaccurate. If more is collected from members than is needed then the surplus will be available for the following year.⁶⁷ But if there are items of expenditure which were not anticipated the manager can levy an additional amount of service charge without having to seek further authority. The power, however, should not be unlimited, for otherwise a manager, having won approval for a modest budget, could proceed to raise the bulk of the association's income by means of an additional service charge. A reasonable balance between financial flexibility and financial control would be achieved by allowing the manager to raise up to 25% of the annual budget as additional revenue. Thus in approving a total annual service charge of £10,000 members would be sanctioning the possibility that the amount actually levied might be as high as £12,500. A manager who wished to raise more than this would have to submit a full supplementary budget for approval by the members.

8.48 In a new development some expenditure may be incurred in the first months, before a general meeting can be held.⁶⁸ A standard example would be common insurance. It would be possible to make provision in the scheme for an initial float. We have not done so, however, on the basis that the issue seems best regulated in the missives of sale between the developer and the original purchasers.

8.49 One potential advantage of annual budgeting is the chance to make provision for longer term repairs. Under the existing law there is a natural tendency to avoid major repairs. Owners would rather patch and mend in the hope that, by the time that a major repair comes to be needed, they will have moved on and some successor will be left to foot the bill. In this way buildings and facilities come to deteriorate, and sometimes can be rescued only by the injection of public money. The position would be greatly improved if owners saved up as they went along so that, over a period of time, quite substantial sums became available for major repairs. The cost of such repairs would then no longer strike, randomly, at those who had the misfortune to be owners at the relevant time, but would be shared by all those who had ever owned a unit in the development. In the Development Management Scheme we make provision for a reserve (or sinking) fund to meet the cost of long-term repairs. The manager is empowered to include as part of his draft budget a contribution to a reserve

⁶⁷ We do not recommend that an owner who sells during that year should be able to take with him "his" share of the surplus, although the existence of a surplus may have some effect on the selling price.

⁶⁸ There will already be a manager: see para 8.17.

fund. Any reserve fund would require to be held and invested separately from the general funds of the association. Over time it will build up. An owner leaves the fund behind when he sells, for to allow him to withdraw from it would defeat the whole purpose of the exercise. This need not be specially provided for. The reserve fund is the property of the association and not of its members. It will be returned to members only in the event of the association being wound up.⁶⁹ We do not think that a reserve fund should be compulsory, at least in the scheme as enacted.⁷⁰ It is for owners to manage their own affairs. In deliberating on the draft budget, they should be free to accept or to reject the idea of a contribution for long-term repairs. But a unit in a development with a healthy reserve fund is likely to command a premium in the market place, and it is hoped that for this, as well as for other, reasons reserve funds will become a great deal more common than they are at present.

8.50 Contributions from members are levied by means of a service charge. The manager sends out a notice of payment. In the case of a unit owned in common a notice must be sent to each *pro indiviso* owner, and each is jointly and severally liable for the full amount attributable to that unit.⁷¹ The notice must set out the amount to be paid and the date or dates on which payment is due. These figures and dates will already have been approved at the annual general meeting, except where the amount claimed is an additional service charge. In practice payment will often be by instalments spread throughout the year. If an owner pays more than 28 days late we think that the manager should have a discretion to require interest. Occasionally recovery will prove impossible. The owner may be insolvent, for example, or have disappeared. In that case the unpaid contribution should be met by the other owners or, if the owners so decide by the requisite majority,⁷² out of the reserve fund. The underlying liability, however, would remain with the unit, and the amount due could be recovered from a subsequent owner on principles discussed below.

8.51 The scheme as enacted provides that each unit contributes to the service charge in equal shares, but we expect this provision to be varied in cases where the units are not of equal size. No differentiation is made between expenditure of different kinds. Similarly, nothing rests on ownership or on use, so that a facility on one part of the development, if it is scheme property,⁷³ falls to be maintained by all the owners and not merely by those whose units it happens to service.

8.52 In part 4 we recommended that a former owner should remain liable for any performance which was already due during his period of ownership. Liability would be shared, jointly and severally, with the incoming owner, while in a question between them the former owner would have full liability.⁷⁴ A service charge becomes due for payment on the date (or dates) stipulated in the notice.⁷⁵ This means that a person who sells at a time when an instalment of service charge is outstanding will share liability with the purchaser. So long as the purchaser can discover the position in advance, this seems fair to both parties, and matters can if necessary be regulated in the missives. Adopting a model found in a number of other countries,⁷⁶ we suggest that the manager should be

⁶⁹ For winding up, see paras 8.100 ff. It can also be used if an absolute majority so decide: see para 8.37.

⁷⁰ It might, of course, be made compulsory in the particular version of the scheme which applies to a particular development.

⁷¹ Joint and several liability is achieved by application to scheme conditions of s 10(4) of the draft bill. See para 8.81. Section 10(4) is discussed in para 4.37.

⁷² Para 8.37.

⁷³ It is for the developer to determine which parts of the development are scheme property. See para 8.3. The scheme as enacted does not offer a definition.

⁷⁴ See paras 4.39 to 4.47. The relevant provision of the draft bill (s 9) is applied to liability under the Development Management Scheme by s 61.

⁷⁵ Development Management Scheme r 19.3.

⁷⁶ C G van der Merwe, "Apartment Ownership" (being vol VI, chap 5 of the *International Encyclopaedia of Comparative Law*) (1994) paras 270 and 275.

bound, on request, to issue the purchaser with a certificate giving details of any service charge which is outstanding in relation to the unit in question. If there is nothing outstanding, the certificate should say so. Such a certificate should then be treated as conclusive. In other words, a purchaser could not be asked to pay more than the figure stated in the certificate in respect of liabilities accrued up to that date. If the manager were to make a mistake and under-estimate the amount outstanding, the additional amount would not be due by the purchaser and could be recovered only from the seller. No doubt in practice a purchaser would also wish to have other information, and documentation, from the manager. For example, he might want details of the current service charge, the current budget, any reserve fund, and plans for future expenditure. He might also wish to see the latest accounts, and minutes of the last annual general meeting. But only the certificate in relation to service charge would carry the special status of being treated as conclusively correct.

8.53 An annual general meeting should look backwards as well as forwards. In addition to introducing his plans for the year ahead, the manager should be bound to account for the expenditure of the association during the year just ended. A manager must keep proper financial records and use them to prepare accounts for each financial year. In view of the relatively small sums involved we hesitate to require that the accounts be audited, although it would be open to the members at a general meeting to require that an auditor be appointed. The accounts should be sent to members at the same time as the draft budget and at least 14 days before the annual general meeting. It is for the manager to fix the financial year of the association.⁷⁷ Since accounts cannot be produced until the financial year is finished, it will often be sensible to hold the annual general meeting in the opening months of the new financial year. A suitable date would be one which is neither too early for the production of accounts for the financial year just ended nor too late for the approval of a draft budget for the current year. Another possibility is to alter the scheme so as to provide for two annual meetings, one to approve the new budget and the other to approve the accounts for the previous year.

8.54 We recommend that

- 60. (a) The manager should fix the financial year of the association.**
- (b) The manager should keep proper financial records of the association and prepare accounts for each financial year.**
- (c) Not later than 14 days before an annual general meeting the manager should send to each member -**
 - (i) the accounts for the last financial year and**
 - (ii) a draft budget for the new financial year.**
- (d) The draft budget should set out an estimate of the income and expenditure of the association, the total service charge for the year, and the date or dates on which the service charge will be due for payment.**
- (e) The draft budget may also make provision for contributions to a reserve fund.**

⁷⁷ Development Management Scheme r 8(c).

(f) At the annual general meeting the association should be entitled either to approve the budget, whether in its original or in an amended form, or to reject it.

(g) If the budget is rejected, the manager should be bound to bring a revised draft budget to another general meeting within two months. In the meantime the service charge fixed under the previous budget should continue to be exigible.

(h) If the budget is approved, the manager should be bound to levy the service charge accordingly and to implement the budget.

(i) The manager should be empowered without further approval to levy an additional service charge up to an amount not exceeding 25% of the annual budget.

(j) The manager should not be empowered to levy further sums without first preparing a supplementary budget which is submitted to and approved by the association at a general meeting.

(k) A service charge should be levied by sending to each owner a notice setting out the amount due and the date or dates on which it is to be paid.

(l) If an owner is more than 28 days late in making payment of the service charge (or part of it) the manager should be able to charge interest on the amount outstanding at such rate (being a reasonable rate) and from such date as he may choose.

(m) The amount of service charge should be the same for each unit.

(n) An instalment of service charge which is irrecoverable should be paid for by the other owners or from the reserve fund.

(o) The manager should be bound, on request, to provide and sign a certificate setting out the amount of service charge (if any) outstanding for a particular unit; and where this is done the liability of an incoming owner for service charges outstanding at the date of the certificate should not exceed the figure stated in the certificate.

(p) A reserve fund should be adequately invested and should be kept separately from the general funds of the association.

(Draft Bill s 69; Development Management Scheme rules 4.8, 8(c)&(d), 9.4(b), and 18 to 21)

Maintenance and improvements

8.55 As part of his duties a manager must carry out inspections of the scheme property.⁷⁸ It may be prudent to regulate the frequency of such inspections in the manager's contract. Where maintenance is found to be required the manager can instruct it without the specific approval of the

⁷⁸ Development Management Scheme r 8(a).

owners; and, provided that he has done his budgeting properly, the association should already be in funds to pay for the cost. The manager should monitor the work and not release the money until he is satisfied that it has been properly carried out.

8.56 The extent to which the owners play a part in the maintenance process is largely a matter for them. Often – perhaps very often – they will be content to pay their service charges and to allow the manager to make the decisions, which can then be reported at the next annual general meeting. A more interventionist approach would be to require the manager to list in advance, as part of the annual budgeting process, the maintenance which is likely to be required over the next 12 months. The list could then be discussed and, if necessary, amended by the owners. Even if no detailed list is requested or produced, owners are always free at a general meeting to require of the manager that a particular repair be carried out or, as the case may be, not be carried out.⁷⁹ Owners may also have to make a decision as to whether payment should be made from the general funds of the association or from the reserve fund.⁸⁰

8.57 We do not think that the manager’s discretionary powers should extend beyond maintenance so as to include alterations and improvements, or demolition.⁸¹ By “maintenance” we mean to include repairs and replacement, cleaning and painting, gardening, and alterations, improvements and demolition which are incidental to maintenance.⁸² While the association has a general power to make other alterations and improvements to scheme property, or to demolish it,⁸³ such power should only be capable of being exercised by the owners at a general meeting. A similar restriction operates in a number of other countries.⁸⁴ We recommended earlier that alterations, improvements and demolition should require to be agreed by an absolute majority of owners and not merely by a majority of those who happen to be present at the meeting.⁸⁵ Even so, this remains a more lenient rule than at common law where improvements to common property require unanimity.

8.58 In some cases scheme property may be individually owned. That a sole owner should not have his property altered, improved or demolished against his will is a principle which hardly needs to be justified. Accordingly we suggest that, notwithstanding an appropriate vote at a general meeting, an act of alteration, improvement or demolition should not be allowed to go ahead unless the owner consents in writing at the time when the work is to be carried out.

8.59 We recommend that

61. (a) **The manager should be under a duty to carry out inspections of the scheme property from time to time and to arrange for and monitor maintenance.**
- (b) **Any alteration, improvement or demolition must be authorised in terms of recommendation 58(n)(iii), and should not be carried out to**

⁷⁹ This is because the general meeting is empowered to give the manager instructions or to impose restrictions on his authority: see r 4.7, discussed in para 8.25.

⁸⁰ A payment from the reserve fund requires to be authorised by an absolute majority of the total number of votes: see r 13.1(a) discussed in para 8.37.

⁸¹ “Alterations” and “improvements” are not synonyms. The replacement of a tennis court with a swimming pool is an alteration but not, or at least not necessarily, an improvement.

⁸² Development Management Scheme r 1. For a discussion of this definition in the context of tenements, see Scot Law Com No 162 paras 5.41 to 5.44.

⁸³ Development Management Scheme r 3.2(b).

⁸⁴ For a summary account, see C G van der Merwe, “Apartment Ownership” (being vol VI, chap 5 of the *International Encyclopaedia of Comparative Law*) (1994) paras 348 and 374.

⁸⁵ Para 8.37. See r 13.1(b).

property which is individually owned unless the owner has given his consent in writing.

(Development Management Scheme rules 8(a)&(b) and 13.2)

Emergency work

8.60 In an emergency there might be no time to contact the manager. In that case any owner should be able to carry out or instruct the work for himself and to recover the cost from the association. “Work” is deliberately wider than “repair”. If a shared roof is seriously damaged in a storm, the first thing – indeed probably the only thing – which needs to be done at once is to provide some kind of temporary covering. The repair proper can then be organised by the manager in the usual way. ‘Emergency’ includes not only the risk of immediate physical damage, whether to that or to other property, but also a risk to health or safety.⁸⁶ Our proposed rule is, of course, confined to scheme property. An owner is always free to carry out work to his own unit but, even in an emergency, could not expect to recover the cost from the association. We recommend that

62. (a) Any owner should be able to carry out emergency work in respect of scheme property.

(b) “Emergency work” is work which requires to be carried out

(i) to prevent damage to that or other property or

(ii) in the interests of health or safety

in circumstances where it is not practicable to consult the manager.

(c) An owner who carries out emergency work should be able to recover the cost from the owners’ association.

(Development Management Scheme rule 14)

Regulation of recreational facilities

8.61 If there are extensive common facilities, the association might wish to make regulations governing their use. Such regulations would bind the owners for as long as they were in force, and new owners (and non-owning occupiers) would also be bound.⁸⁷ In practice the regulations would be concerned with matters such as opening hours, type of use, use by guests and so forth. Nonetheless we have reservations. Although operating much like conditions in the scheme itself, such regulations would not be on the property register and would not be easily accessible to prospective purchasers. Yet they would be enforceable in much the same way. Further, the regulations might be unnecessarily intrusive. For example, an elderly majority in a block of flats might decide to deny access to the building between 11 pm and 7 am. While therefore we think that it should be possible

⁸⁶ This follows the definition used, following consultation, in our *Report on the Law of the Tenement*: see Scot Law Com No 162 para 5.54.

⁸⁷ Development Management Scheme r 3.3.

for the association to make regulations, we also think that the power should be subject to a number of restrictions. First, regulations could only be made (or altered) at a general meeting.⁸⁸ So the manager could not make regulations without consultation.⁸⁹ Secondly, once made the regulations could not take effect until a copy had been sent to all of the owners. This could conveniently be done at the same time as the minutes of the meeting were sent.⁹⁰ Thirdly, the manager must keep, and make available to the owners, a copy of the regulations.⁹¹ Fourthly, regulations could be made only in respect of recreational facilities and not facilities of other kinds. So swimming pools, or lawns, or television rooms could all be regulated. But facilities essential for normal living – entrance hallways, lifts, roads and paths, and the like – could not.⁹² It is hardly necessary to add that the property must be scheme property, and that regulations could not be made in respect of individual units. Finally, regulations would be confined to restrictions on use, for the benefit of the owners as a whole.⁹³ Affirmative obligations, such as obligations to pay for maintenance or use, could only be imposed as part of the scheme proper.⁹⁴

8.62 We recommend that

- 63. (a) The owners' association should be able to make regulations governing the use of any recreational facilities forming part of the scheme property. Otherwise regulations may not be made.**
- (b) The regulations must be made at a general meeting, and may not take effect until a copy has been sent to all of the owners.**
- (c) Regulations may be amended, or discharged, in the same manner as they were originally made.**
- (d) The manager should be under a duty to keep a copy of the regulations.**

(Development Management Scheme rules 3.5 and 8(g))

Payment of debts

8.63 In most cases the only assets of an owners' association will be the contributions received from its members by way of service charge. The amount held at any one time will vary depending on the incidence of particular items of expenditure but, unless a reserve fund is in place, the total assets of the association are always likely to be small. This may cause difficulties in practice. A contractor will be reluctant to undertake expensive work on a development unless he has clear assurance of payment. As a result, he may insist that he

⁸⁸ A special majority should not, however, be required. With such a majority it would be possible to add the regulations to the scheme itself: see r 16.2.

⁸⁹ Except where the scheme provides otherwise, the manager can exercise all the powers of the association: r 4.5. This would be a case where the scheme did indeed provide otherwise.

⁹⁰ By r 12.3(b) the minutes must be sent within 21 days of the meeting.

⁹¹ It is only necessary to impose an obligation to keep a copy. The manager is already under a general duty to make documents available: see r 17.1 discussed at para 8.78.

⁹² They could, of course, be regulated in the scheme itself, whether in the form originally applied to the development or by later amendment, under the procedure described at paras 8.89 to 8.91.

⁹³ All powers exercisable by the association are subject to the restriction that they must be exercised for the benefit of the owners. See r 3.1.

⁹⁴ For the distinction between restrictions and affirmative obligations, see para 2.1.

is put in funds first, or at least that earmarked funds are placed in trust for payment on completion of the contract. But arrangements of this kind may not always be possible or, even if possible, desirable. Further, any funds which are set aside might not in the end be sufficient to meet the full cost of the work. In those circumstances the contractor will not be content with a remedy against the association but will wish a right of direct recourse against the individual members.

8.64 A right of direct recourse against members is a standard feature of management schemes in other countries,⁹⁵ although precise techniques differ. We support its adoption in Scotland also. It is not, however, likely to be often used. Faced with an unpaid bill, the association will simply levy an additional service charge on its members,⁹⁶ so that there will be direct recourse by the manager rather than by the creditor. A creditor will need to act only where the internal organisation of an association is so moribund that service charges are no longer being raised.

8.65 An important initial question is whether members should be liable *in solidum* for the whole unpaid debts of the association, or whether each member should be liable only for his own individual share.⁹⁷ Here the underlying issue is whether inconvenience should lie with the creditor or with the members. If a member is liable only for his own share of the debt, the creditor has the inconvenience of having to recover individually from each. Conversely, if members are liable *in solidum* any one member can be made to pay the whole debt of the association and will be left with the labour of recovery *pro rata* from his fellow members. In most other countries the liability of individual members is restricted to their own share, and we are persuaded that this is the correct approach. Joint and several liability seems too great a burden for the owner of an individual unit. Unlike the creditor, he has no commercial involvement in the contract. He may have no liquid assets and might have to sell the unit to pay the bill. He might even become bankrupt. By contrast, the creditor is much better able to protect himself. The contract was freely entered into and the terms of payment were a matter of negotiation. It was for him to assess the commercial risks.

8.66 One possible method of providing for direct recourse would be to allow diligence against members on the basis of an initial decree against the association. This solution is used in partnership law, where each partner is liable *in solidum* for the debts of the firm.⁹⁸ It would work less well where, as here, individual liability is to be restricted, for the decree would show only the total sum due and not the amounts due from each individual member. A further problem is the potentially large number of members of an owners' association and the difficulty, in some cases at least,⁹⁹ of establishing their identity. Where there was a dispute, questions of identity would require to be resolved judicially. These considerations point to a requirement of separate decrees against individual members in respect of individual indebtedness. This would allow for the proper constitution of individual debts, and avoid the risk of the wrong debtor being pursued for the wrong amount. Of course in most cases the members will simply pay their share without the need for court process. There is no reason to suppose a greater reluctance to pay a share of a repair bill directly, to the creditor, than to pay the same share indirectly, to the manager.

⁹⁵ See for example Sectional Titles Act No 95 of 1986 s 47 (South Africa).

⁹⁶ Development Management Scheme r 20, discussed at para 8.47.

⁹⁷ The share would be calculated on the same basis as service charges. In the enacted version of the scheme the basis of liability is equality: see r 19.1.

⁹⁸ Partnership Act 1890 s 4(2).

⁹⁹ For example, where a unit has recently been sold.

8.67 We suggest that direct recourse is achieved most simply by allowing the creditor to levy a service charge as if he were the manager. This has the advantage of making the creditor subject to the ready-made procedural rules set out in the model scheme.¹⁰⁰ Thus no liability would arise until a written request for payment had been made. The proportion due from each unit would be determined by the appropriate rule. Where a unit had changed hands in the period between the work being carried out and payment being requested, liability would rest with the new owner and not with the old.¹⁰¹ Finally, the creditor would be protected against the insolvency of an owner, because any payment which proved irrecoverable could be recovered *pro rata* from the other owners;¹⁰² and so to this extent, at least, there is liability of the members *in solidum*.

8.68 Direct recourse should not be available unless the creditor has tried, and failed, to obtain payment from the association. In effect, the members are acting as cautioners for the debts of the association, but as cautioners they should not be denied the benefit of discussion. Hence as a condition of direct recourse, the creditor should be required to constitute the debt against the association, whether by decree or by registration for execution; and where the association appears to have assets he should first attempt to attach these assets by diligence. Only where he has sought recovery but failed should direct recourse be available.

8.69 A problem may arise if the association has been dissolved or is in the course of being wound up. There may then be no one for the creditor to sue. In that situation the creditor should be permitted to proceed directly against those who were owners of units as at the date of commencement of the winding up as if the scheme were, to that extent, still in force.

8.70 We recommend that

64. (a) Where a debt constituted against an owners' association is irrecoverable in whole or in part, the creditor should be entitled to recover the unpaid amount from the members as if he were the manager seeking recovery of a service charge.

(b) A creditor should also be able to proceed directly against the members if the owners' association is being, or has been, wound up.

(Draft Bill s 68)

Transactions with third parties

8.71 We next consider whether special protection is needed for third parties who transact with the owners' association. The potential risks are well-known. The legal capacity of a body corporate is limited by reference to the objects for which it was formed and any act which goes beyond those objects is, in principle, *ultra vires* and void. Furthermore, a body corporate cannot act directly for itself but depends on agents acting on its behalf. In the case of an owners' association, the normal agent will be the manager. But an agent's powers are not unlimited. How is a contractor to determine that the manager who offers an attractive

¹⁰⁰ See paras 8.51 and 8.52.

¹⁰¹ See para 8.52.

¹⁰² Development Management Scheme r 19.4.

contract for a major repair is acting within his powers? Thus third parties require a degree of protection. There are, however, competing interests. A provision which said that all contracts entered into by a manager bind the association regardless of *vires* or authority to act would be attractive to third parties but unfair to the owners of units in a development. It would mean that the association, and hence its members, would be bound by a contract entered into by the manager to buy an aeroplane or a shopping centre. The question to be decided is whether an appropriate balance is already struck by the general law, or whether there is a need for a special statutory rule.

8.72 Under the general law, a contract beyond the *vires* of a body corporate is void; and while in recent years this rule has been abolished in the case of most companies incorporated under the Companies Acts,¹⁰³ it remains in place for other bodies corporate. We are not persuaded that *ultra vires* should be abolished in the case of owners' associations. The objects and powers of such associations are narrowly defined. In essence an association has only such powers as are necessary for the management of the development. Furthermore, an association is not permitted to trade, or hold land outwith the development.¹⁰⁴ The narrowness of the powers is intended as a protection to the members. That protection would be wholly defeated if the *ultra vires* rule ceased to operate. We do not think that the *ultra vires* rule is unfair to third parties. Owners' associations are not like ordinary companies. There is no significant diversity in their objects and powers. A third party will know that he is dealing with an association because "owners' association" will appear as part of its name,¹⁰⁵ and he will know, or ought to know, that an owners' association has only limited powers.

8.73 Under the scheme a manager is an agent of the association and can exercise all of its powers.¹⁰⁶ Thus, provided that an act is *intra vires* of the association it can usually be performed by the manager. There is, in other words, an identity between the powers of the association and the powers of the manager; and this simple principle disposes of most of the difficulties which arise in other bodies corporate where an agent exceeds his powers. From the point of view of a third party, three possible difficulties remain. First, the third party will wish to be sure that the person conducting the negotiations is truly the manager of the association. Secondly, special procedural rules apply in the case of improvements to, or demolition of, scheme property (as opposed to ordinary acts of maintenance), which must be approved by the association by a special majority at a general meeting.¹⁰⁷ Finally, the members can vote at a general meeting for limits on the powers of the manager thus removing, in what is likely to be an unusual case, the identity between the powers of the association and the powers of the manager.¹⁰⁸

8.74 There is no perfect solution to the first difficulty, which is a general problem in the law of agency. The model scheme goes perhaps as far as is useful by making provision for a written certificate of appointment executed on behalf of the association.¹⁰⁹ In practice this will often be supplemented by a written contract. The possibility of procedural irregularity

¹⁰³ Companies Act 1985 s 35 (inserted by Companies Act 1989 s 108(1)).

¹⁰⁴ Para 8.14.

¹⁰⁵ Development Management Scheme r 2.2.

¹⁰⁶ *Ibid* r 4.4 and 4.5.

¹⁰⁷ *Ibid* r 13.1(b).

¹⁰⁸ *Ibid* r 4.7.

¹⁰⁹ *Ibid* r 7.2.

in relation to improvements seems covered by the rule in *Royal British Bank v Turquand*.¹¹⁰ A person entering into a contract with an association in good faith to carry out improvements to scheme property would not be affected by a prior failure to put the matter to a vote at a general meeting. The most difficult issue is the final one. It would be possible to make express statutory provision that, in a question with a third party, a manager is deemed to exercise all the powers of the association.¹¹¹ But this seems neither desirable nor necessary. It is not desirable because it leans too far in the direction of the third party and leaves association members too vulnerable to unauthorised liabilities undertaken by the manager. And it is not necessary because the common law of agency already provides a more balanced solution.¹¹² At common law an agent binds his principal if he acts within his apparent authority even where the act is beyond his actual authority. To benefit from this rule a third party dealing with the agent must be in good faith in the sense that he must not know, or reasonably suspect, the absence of actual authority. Since, in the normal case, a manager may exercise all the powers of the owners' association, it can hardly be doubted that such powers fall within his apparent authority. Hence a third party could rely on the manager's power to bind in all matters concerning the management of the development unless he knew of a restriction on the manager's power or unless the proposed contract was so extravagant or unusual that the possibility of a restriction might reasonably be expected.

Execution of deeds

8.75 From time to time the association may have to sign contracts or execute deeds. In the normal case the manager should sign on the association's behalf. But a transaction entered into beyond the manager's actual or apparent authority should not bind the association merely because it included a document signed by the manager.¹¹³ Subject to that limitation, the manager's power would be a general one; but a general meeting could extend authority in particular cases to someone else.¹¹⁴ Under the Requirements of Writing (Scotland) Act 1995 the addition of a witness's signature would make the document self-proving or "probative".¹¹⁵

8.76 We recommend that

65. A document should be treated as signed by an owners' association if it is signed on its behalf -

- (i) by the manager, or**
- (ii) by a person nominated for the purpose by the association at a general meeting**

¹¹⁰ (1855) 5 E & B 248.

¹¹¹ This is close to the effect achieved by s 35A of the Companies Act 1985 (inserted by s 108(1) of the Companies Act 1989). But there are special reasons for this provision, including the need to be consistent with the abolition of *ultra vires* effected by s 35.

¹¹² Of course it would be possible to re-state the common law, as has been done in the case of partnerships (by s 5 of the Partnership Act 1890), but perhaps not very useful.

¹¹³ See para 8.74.

¹¹⁴ Under the Requirements of Writing (Scotland) Act 1995 the execution of documents by bodies corporate other than a company or local authority is regulated by para 5 of sched 2. Our proposal will replace the default rule set out in para 5(2).

¹¹⁵ 1995 Act s 3(1) (as applied to bodies corporate by sched 2, para 5(5)).

except where this is beyond the actual or apparent authority of the signatory to bind the association.

(Development Management Scheme rule 5)

Names and addresses of members

8.77 Under our proposals an owners' association is largely unregulated. There is no register of owners' associations. There is no requirement to make public the name of the manager, or of the members.¹¹⁶ The association accounts need not be audited let alone be made available for public inspection. The only information that is publicly available, by means of the property register, is the fact that the development is governed by the scheme and hence that an owners' association is in existence. This lack of regulation is deliberate. The scheme would be unattractive if associations were regulated in the same manner as a company incorporated under the Companies Acts. No higher degree of formality should be required than is absolutely necessary for a body which has only modest administrative responsibilities coupled with a modest budget. One indispensable formality, however, is an accurate list of members. The manager must know who the members are and, if they are non-resident, where they live, for under the rules of the scheme he has to communicate with members quite frequently and to recover payment of service charges. The duty of maintaining an accurate list of names and addresses should fall on the manager, but to assist him an owner who is about to dispose of his unit should be obliged to provide a forwarding address as well as the name and address of the incoming owner and of his solicitor. The manager should also be told the date on which the new owner is to become entitled to take entry. In practice, the rules about transmission of liability¹¹⁷ are likely to encourage the purchaser's solicitor to make early contact with the manager to enquire about outstanding service charges, the state of any reserve fund, the projected budget for the year, and no doubt other matters also.

8.78 The register of names and addresses should be available for any member of the association to inspect, as should any other documentation held by the manager in relation to the development. However, in the interests of confidentiality there should be no obligation on the manager to disclose correspondence with individual members.

8.79 We recommend that

66. (a) **The manager should be under a duty to keep a record of the name and address of each member of the association.**
- (b) **On disposal of a unit an owner should be obliged to notify the manager of -**
 - (i) **his own forwarding address;**
 - (ii) **the name and address of the new owner;**
 - (iii) **the name and address of the solicitor or other agent acting for the new owner; and**

¹¹⁶ The names of the members (ie the owners) could, however, be discovered from the property register.

¹¹⁷ Para 8.52.

(iv) the date on which the new owner will be entitled to take entry.

(c) Any member should be entitled to inspect any document relating to the management of the development which is in the possession of the manager or which it is reasonably practicable for the manager to obtain; but this entitlement should not extend to correspondence passing between the manager and individual members.

(Development Management Scheme rules 8(h) and 17.1 and 17.2)

Juridical nature of scheme provisions

8.80 The provisions of the scheme as enacted are likely to be supplemented by amenity conditions of the kind traditionally constituted as real burdens in developments.¹¹⁸ But even as supplemented, scheme rules are not real burdens. There is no benefited property. The provisions are enforceable by the association, through its manager, and not by neighbours in their capacity as owners.¹¹⁹ Nor, strictly, is there a burdened property. The rights and obligations arising under the scheme stem, for the most part, from membership of the owners' association.¹²⁰ Thus, at a formal level at least, relationships are regulated by the law of (juristic) persons rather than by the law of property; and an owner is more like a member of a company than a member of a neighbourhood. But of course there is more to it than this. Membership of the association is itself dependent on ownership of a unit:¹²¹ a person who is not (or no longer) an owner has neither rights nor liabilities¹²² under the scheme. And while enforcement is by the association and not by individuals, the association is under the ultimate control of the owners.¹²³ At a purely functional level, therefore, there may be little difference between a development regulated by the model scheme and a development regulated by community burdens.¹²⁴ Community burdens frequently provide both for amenity conditions and for an owners' association, although the association is not a body corporate. If scheme provisions are not real burdens, they are at any rate part of the broader category of title conditions, and are so defined in the draft bill.¹²⁵

8.81 This functional resemblance has important consequences. Community burdens, like other real burdens, are subject to rules as to permissible content,¹²⁶ and may be extinguished by acquiescence,¹²⁷ negative prescription¹²⁸ and by application to the Lands Tribunal.¹²⁹ It should not be possible to avoid these rules by the simple expedient of constituting

¹¹⁸ Paras 8.3 and 8.84.

¹¹⁹ Development Management Scheme rules 3.4(a) and 8(f)(ii). It would, however, be possible for the scheme to be varied to give enforcement rights to neighbours, and it may be that this will sometimes be done in relation to amenity conditions.

¹²⁰ However, the obligation to pay service charge arises *qua* owner (r 19.3) – terminology which is designed to accommodate s 9 of the draft bill, and to draw on the definition of “owner” in s 114.

¹²¹ Development Management Scheme r 2.3.

¹²² Subject, however, to s 9 of the draft bill (as applied by s 61).

¹²³ Para 8.25.

¹²⁴ For community burdens generally, see part 7.

¹²⁵ Draft bill s 113(1). For title conditions, see paras 6.26 to 6.36.

¹²⁶ Paras 2.9 ff.

¹²⁷ Paras 5.60 to 5.66.

¹²⁸ Paras 5.67 to 5.72.

¹²⁹ Part 6.

conditions as provisions of a development management scheme rather than as community burdens. Conditions which are functionally similar should be accorded similar treatment. In the present case this is easily arranged. We recommend that

67. The sections of the draft bill relating to permissible content, acquiescence, negative prescription, and discharge by the Lands Tribunal should apply to the rules of the Development Management Scheme (including the rules as varied) as they apply to community burdens.

(Draft Bill s 61)

A complete list of the affected sections is given in the relevant provision in the draft bill.¹³⁰ Some adaptation is required of expressions such as “benefited property” and “burdened property”. The broad result is that scheme rules – and especially amenity conditions added to the statutory template – will be treated for many purposes as if they were real burdens.

Taxation

8.82 In taxation terms our proposals are thought to be neutral and do not give rise to liabilities which are not already encountered in the management of developments. Nonetheless it may be helpful to review briefly the taxation position of an owners’ association.¹³¹

8.83 An owners’ association is a body corporate and hence a separate legal person. For the purposes of income and corporation tax it is classified as a “company” - a classification which applies equally to unincorporated residents’ associations under present law and practice.¹³² The owners’ association will be liable to corporation tax on such income as it has – in practice, usually only interest and other income from funds which have been invested. Corporation tax is likely to be payable at the starting rate, currently 10%, although in the calculation of taxable income no account can be taken of management expenses.¹³³ An association with five members or fewer would probably be classified as a close company,¹³⁴ and also as a close investment holding company,¹³⁵ which would have the undesirable consequence of attracting the full rate of corporation tax, currently 30%. However, in practice we do not expect the model scheme to be used for small developments, and indeed the taxation position is a further reason for discouraging such use.

8.84 The payments of service charge will not normally be subject to tax. Certainly they are not subject to corporation tax: the identity between those who contribute to the management fund and those entitled to participate in any surplus brings into play the mutuality principle and prevents the payments from being treated as income of the association.¹³⁶ Nor will VAT be payable except in unusual cases. For if, as normally, the

¹³⁰ Draft bill s 61. In addition, the provisions on rights of pre-emption (ss 78 to 80) apply by virtue of the fact that scheme provisions are title conditions.

¹³¹ We are grateful to Mr Alan Barr of the University of Edinburgh for his assistance in the preparation of this section.

¹³² Income and Corporation Taxes Act 1988 s 832(1).

¹³³ See eg *Tintern Close Residents Society Ltd v Winter* [1995] STC 57.

¹³⁴ Income and Corporation Taxes Act 1988 s 414.

¹³⁵ Income and Corporation Taxes Act 1988 s 13A (inserted by Finance Act 1989 s 105).

¹³⁶ *English and Scottish Joint Co-operative Wholesale Society Ltd v Commissioner of Agricultural Income Tax, Assam* [1948] AC 405; *Municipal Mutual Insurance Ltd v Hills* (1932) 16 TC 430; *Fletcher v Income Tax Commissioner of Jamaica* [1972] AC 414.

association merely arranges for services to be carried out, the supply being made by the association is no more than the making of that arrangement – to which only a small part of the service charge could be attributed. The position would, however, be different if the association actually supplies the services, for example by itself employing tradesmen.¹³⁷ Since VAT is currently payable only where there is a taxable turnover of £51,000, it seems safe to assume that this figure will not usually be exceeded; but in any event service charges paid by the occupants of *residential* property are the subject of an extra-statutory concession by Customs and Excise.¹³⁸ However, while VAT will not usually be due on the service charge as such, it will generally need to be paid on specific services provided by third parties such as builders.

Variation

8.85 **Initial variation.** It will be unusual for the management scheme to be applied in the precise form in which it is enacted. Changes might be made in the distribution of powers and duties, in the rules for budgeting, in the calling and conduct of general meetings, and so on. Much more commonly there will be added a package of standard amenity burdens. Here a choice of technique is available. The scheme could be supplemented by a new part – part 5 – setting out the amenity conditions. In that case the conditions would have the same status as other provisions of the scheme, and would be enforceable by the manager on behalf of the owners' association. Alternatively, the scheme could be left much as it is, and the amenity conditions constituted as ordinary community burdens. In that case the conditions would be mutually enforceable by the owners, and there would be no role for the manager or the owners' association. The rules described in part 7 of this report would then apply. The deed itself would be a combined deed of application (in respect of the management scheme)¹³⁹ and constitutive deed (in respect of the community burdens).¹⁴⁰ A compromise between the two positions would be for the conditions to be constituted as scheme rules, but with a right of enforcement conferred on close neighbours (or on all neighbours).

8.86 Not all provisions of the scheme may be varied, and new provisions are subject to some control as respects content. The restrictions on variation are discussed at the end of this section.¹⁴¹

8.87 Initial variation is effected in the deed of application. This deed declares that the scheme shall apply, supplies any missing information requested by the scheme, and lists changes and additions. If the changes are significant, it would be greatly preferable to set out in full the scheme in its amended form. Otherwise it will be difficult for owners to piece together the rules which are supposed to apply. As under current practice, the deed could also contain a list of common parts; but this would not be part of the scheme as such, would not take effect until incorporated by reference in the dispositive clause of the individual break-off conveyances,¹⁴² and should by preference be isolated in a separate part of the deed.

¹³⁷ *Trustees of the Nell Gwyn House Maintenance Fund v Customs & Excise Commissioners* [1999] STC 79.

¹³⁸ Extra-statutory concession on for domestic service charges, effective from 1 April 1994: see *Value Added Tax: Land and Property* (H M Customs & Excise VAT Notice 742, 1995) para 5.10; *Extra-statutory concessions* (H M Customs & Excise Notice 48, 1999) para 3.18.

¹³⁹ For deeds of application see para 8.7.

¹⁴⁰ For constitutive deeds, see paras 3.11 ff.

¹⁴¹ Paras 8.94 to 8.96.

¹⁴² That is, equally, the current law: see G L Gretton & K G C Reid, *Conveyancing* (2nd edn, 1999) para 13.12.

8.88 We recommend that

68. Initial variation of the development management scheme should be effected in the deed of application.

(Draft Bill s 60(1))

8.89 **Subsequent variation.** At one level the rule here selects itself: the scheme as it applies to any development should be capable of being varied by a deed of variation granted by the owners' association and registered against the development. The deed would be executed by the manager on behalf of the association, under a provision already mentioned.¹⁴³ The more difficult question is, what should precede the granting of the deed. It does not seem acceptable that the manager should be able to act on his own. Routine management is not the same as constitutional change. So the members (owners) would need to be involved in some way. In view of the potential importance of the issues we suggest that a special majority should be required – that is, approval for the deed should be given at a general meeting by an absolute majority of the votes available to be cast.¹⁴⁴ This would mean that, if there were 100 units in the development each with one vote, the proposal could be successfully carried only if the owners of 51 units were willing to support it. A majority of those who happened to be present at the meeting would not be enough.

8.90 Occasionally variation will affect the essential interests of owners. Adapting proposals made earlier for community burdens,¹⁴⁵ we suggest two safeguards to protect the position of the defeated minority. First, it should not be possible to register the deed of variation until a copy has been sent to every owner. No one should be in ignorance as to the proposed new rules. And secondly, the deed should be capable of judicial challenge. Already, of course, an owner can seek judicial annulment of a decision at a general meeting by making a summary application to the sheriff within 28 days.¹⁴⁶ That will continue to be available for decisions to vary. But if a decision has been followed by the granting (and possibly registration) of a deed, we think that the deed itself should be capable of reduction. A sight of the actual deed may throw up issues which were not obvious from the in-principle discussion at the general meeting. The grounds would be the same as before, namely that the deed is not in the best interests of all the owners or is unfairly prejudicial to one or more of them. An application would require to be brought within eight weeks of being sent a copy of the deed. The deed would be accompanied by a note setting out the right to seek reduction and the time limit for applications. The sheriff court would have jurisdiction, contrary to the usual rule for reduction. If the application was successful, the extract decree would be capable of registration in the property register.

8.91 We recommend that

69. (a) Subsequent variation of the development management scheme should be effected by registration against the development of a deed of variation granted by the owners' association.

¹⁴³ Development Management Scheme r 5, discussed at para 8.75.

¹⁴⁴ For voting by special majority see para 8.37.

¹⁴⁵ Paras 7.73 to 7.76.

¹⁴⁶ Paras 8.40 to 8.44.

- (b) The granting of a deed of variation should require prior approval at a general meeting by an absolute majority of the votes for the development.
- (c) A deed should not be registrable unless every owner has been given or sent a copy of the deed and informed of his right to apply for reduction under (d).
- (d) If, in relation to such a deed, the court is satisfied that -
 - (i) the deed is not in the best interests of all the owners, or
 - (ii) the deed is unfairly prejudicial to one or more of the owners
 the court should be able to make an order reducing the deed in whole or in part.
- (e) An application must be brought not later than eight weeks after the owner received a copy of the deed under (c).
- (f) An extract decree of reduction should be registrable.
- (g) By “court” is meant the Court of Session or the Sheriff Court.
(Draft Bill ss 63 and 66; Development Management Scheme rule 16.2)

8.92 **Individual variation.** It should also be possible to vary the scheme in respect of individual units.¹⁴⁷ Indeed this may turn out to be common, at least in respect of amenity conditions. So if the scheme prohibits further building, as often it will, an owner seeking to add on a conservatory will require a variation of the scheme as it affects his own particular unit.¹⁴⁸ In a functional sense we are in the territory of community burdens and minutes of waiver, and the applicable rule should be on the lines already recommended in that context.¹⁴⁹ This means that individual variation would require the concurrence of at least one close neighbour – defined, as usual, as a neighbour within four metres (but discounting roads). If the deed imposed a fresh obligation it would also be signed by the owner of the affected unit. But in all cases the principal granter would be the owners’ association, acting through the manager. We do not think that the manager should require prior approval from a general meeting, at least in the case of routine waivers. An owner who wished to carry out some small building project could not be expected to wait eleven months for the next annual general meeting. But the manager should report all waivers to the next general meeting, and he should consult the advisory committee, if there is one. At the general meeting

¹⁴⁷ As with the variation of community burdens (ss 30 and 31), the draft bill (ss 62 and 63) distinguishes between (i) individual variation and (ii) universal variation, by counting the number of units affected. If the number is fewer than one half, the provision for individual variation applies. If the number is larger, this is treated as a universal variation. A variation which includes property other than the units is classified as a universal variation. In practice, variations are likely to be either for one unit or for the whole development.

¹⁴⁸ As this example shows, “variation” includes discharge. Variation of a “scheme” (as opposed, as more usually in the draft bill, to a single burden) includes the idea of the discharge of whole provisions of that scheme.

¹⁴⁹ Paras 7.51 to 7.67.

members will have the opportunity to consider the pattern of waivers and, if appropriate, to give directions to the manager in relation to future grants.¹⁵⁰

8.93 We recommend that

70. (a) Variation of the development management scheme in respect of an individual unit should be effected by registration against the unit of a deed of variation granted -

- (i) by the owners' association,**
- (ii) by the owner of a unit within four metres of the affected unit measuring along a horizontal plane (the width of any road being disregarded if of less than twenty metres), and**
- (iii) if the deed imposes a new obligation, by the owner of the affected unit.**

(b) Before granting a deed on behalf of the owners' association the manager should consult the advisory committee (if any); and he should report the granting of the deed to the next general meeting.

(Draft Bill s 62; Development Management Scheme rule 16.1)

8.94 **Limits on variation.** It is necessary to limit variation in two different ways. First, it should not usually be possible to vary part 2 of the scheme. This part, quasi-statutory in nature, sets out the indispensable features of the management scheme. Among the topics covered are the composition and powers of the managers' association, the method by which it is wound up, the role of the manager, and execution of deeds. However, there is no objection to adding to the association's powers provided, as already mentioned,¹⁵¹ the additions do not include a power to acquire land outwith the development or to carry on trade.

8.95 Secondly, any new provisions should be subject to the same restrictions on content as ordinary community burdens.¹⁵² Thus, positively, the provisions must relate in some way to the units and be for the benefit of other units or of the development as a whole; and, negatively, the provisions must not be contrary to public policy nor illegal.¹⁵³

8.96 We recommend that

71. In respect of variations carried out under recommendations 68 to 70 -

(a) it should not be possible to vary part 2 of the scheme other than to alter the powers of the owners' association; but no power may be conferred to acquire land outwith the development or to carry on a trade;

¹⁵⁰ For the power of a general meeting to give directions to the manager, see Development Management Scheme r 4.7.

¹⁵¹ Para 8.14.

¹⁵² Paras 2.9 ff.

¹⁵³ The technical way in which this is achieved is by applying s 3 of the draft bill to scheme provisions: see s 61, discussed in para 8.81.

- (b) any provision added to the scheme -
 - (i) must relate to a unit or units and be for the benefit of another unit or units or the development as a whole, and
 - (ii) must not be contrary to public policy nor illegal.
- (Draft Bill ss 3 (as applied by s 61) and 64)

Disapplication and winding up

8.97 **Disapplication.** Occasionally it may be decided to disapply the scheme altogether, either because the development is no longer to continue in its present form, or because some other method of management is thought more appropriate. Disapplication is merely a severe form of variation and should be subject to broadly similar rules.¹⁵⁴ This means that the scheme is disapplied by registration of a deed of disapplication granted by the owners' association, following approval by a special majority at a general meeting. No special words are required for the deed, and a statutory form is not provided. A copy of the deed must be given or sent to each owner before it can be registered.¹⁵⁵ Thereafter there is a period of eight weeks during which any owner can seek reduction. In general the disapplication of the scheme takes effect from the date of registration, but it is possible for the deed to nominate a later date and this would be prudent if the deed was likely to be challenged.

8.98 Disapplication might leave an administrative vacuum, at least in a case where the development (though not the scheme) is to continue. This would be avoided by allowing the deed to include provision, by real burden,¹⁵⁶ for the future management and regulation of the community. This is an exception to the rule that all affected owners should concur in the creation of real burdens;¹⁵⁷ but the proposed burdens would require to be approved, along with the rest of the deed, by a special majority at a general meeting. The remedy of reduction would also be available. In practice the new provisions might repeat many of the provisions of the scheme being disapplied, so that, in substance, the deed was merely a deed of variation.

8.99 We recommend that

- 72. (a) **The Development Management Scheme should cease to apply on the registration against the development of a deed of disapplication granted by the owners' association, or on some later date specified in the deed.**
- (b) **It should be possible for a deed of disapplication to provide, by real burden, for the future management and regulation of the development.**

¹⁵⁴ For variation see paras 8.89 to 8.91.

¹⁵⁵ One important reason for this is that the deed might contain replacement real burdens: see the next paragraph.

¹⁵⁶ In practice these would usually be community burdens.

¹⁵⁷ Para 3.15.

(c) The granting of a deed of disapplication should require prior approval at a general meeting by an absolute majority of the votes for the development.

(d) A deed should not be registrable unless every owner has been given or sent a copy of the deed and informed of his right to apply for reduction under (e).

(e) A deed of disapplication should be reducible on the terms provided in recommendation 69 for a deed of variation.

(Draft Bill s 65(1)&(2) and 66; Development Management Scheme rule 6.2)

8.100 **Winding up.** An owners' association is required only for as long as the management scheme is in operation. We recommended earlier¹⁵⁸ that the association should come into existence on the date on which the scheme first applies to a development. We now make the parallel recommendation that the winding up of the association should begin on the date on which the scheme ceases to apply – that is to say, on the date of registration of the deed of disapplication.¹⁵⁹ In the case of a members' voluntary winding up of a company, a liquidator is appointed by the company at a general meeting.¹⁶⁰ However, by comparison with most companies an owners' association is likely to have few assets and the conduct of the winding up will be a simple affair. We see no reason why the winding up should not be carried out by the manager, although, as always under the model scheme, the members could if they wished appoint a new manager specially for the winding up.¹⁶¹

8.101 The winding up will begin on the day when the scheme ceases to apply to the development. From that date the association will lose its power to manage the development, and the manager's role will be confined to paying the debts of the association and distributing any remaining assets to its members. However, if the disapplication is challenged in the courts,¹⁶² the winding up should be suspended until the matter has been judicially determined. Just as each owner of a unit has an equal liability for association costs,¹⁶³ so each owner should have an equal entitlement to association assets.¹⁶⁴ The manager must produce final accounts and send them to all members. In most cases winding up should take only a few weeks, but in any event the manager should be taken bound to complete the winding up, including the production of final accounts, within six months, except where the members decide otherwise. The association will dissolve automatically on completion of the time set for the winding up.

8.102 An association will not usually become insolvent. If it cannot meet its debts, the manager can raise money by means of an additional service charge¹⁶⁵ or, if he fails to do so, any creditor can act in his place.¹⁶⁶ Nonetheless, the theoretical possibility of insolvency

¹⁵⁸ Para 8.12.

¹⁵⁹ Or such later date as may be specified in the deed: see para 8.97.

¹⁶⁰ Insolvency Act 1986 s 91.

¹⁶¹ Members are always free to replace the manager at a general meeting: see Development Management Scheme rules 4.2 and 7.1.

¹⁶² See para 8.97.

¹⁶³ Development Management Scheme r 19.1.

¹⁶⁴ However this rule can be varied.

¹⁶⁵ Para 8.47.

¹⁶⁶ Paras 8.63 to 8.70.

remains. We do not think that insolvency should be a ground for the winding up of the association. The model scheme presupposes the continuing existence of the association, and the scheme could no longer operate if the association came to be dissolved. Under the present law, bodies corporate which are not companies are subject to sequestration under the Bankruptcy (Scotland) Act 1985,¹⁶⁷ and not to liquidation, and we propose that an owners' association should likewise be subject to sequestration.¹⁶⁸

8.103 We recommend that

73. (a) **If the Development Management Scheme ceases to apply to a development, the winding up of the owners' association should begin on the day of such cessation.**
- (b) **The winding up should end after a period of six months or on such other date as the members may decide, whereupon the association should be automatically dissolved.**
- (c) **If the disapplication of the scheme is challenged under recommendation 72(e), the winding up should be suspended until the challenge is finally determined.**
- (d) **The winding up should be conducted by the manager, who should**
- (i) **pay any debts of the association;**
 - (ii) **distribute any remaining funds of the association to those who owned units at the date of the commencement of the winding up, an equal share being apportioned to each unit; and**
 - (iii) **prepare and send to each member final accounts of the association showing how the winding up was conducted and the funds of the association disposed of.**
- (e) **Once the scheme has been disapplied, and the winding up commenced, the owners' association should cease to manage the development.**
- (f) **An insolvent association should be subject to sequestration proceedings under the Bankruptcy (Scotland) Act 1985.**
(Draft Bill s 65(3)&(4); Development Management Scheme rules 6 and 17.4)

¹⁶⁷ Bankruptcy (Scotland) Act 1985 s 6(1)(c), (2).

¹⁶⁸ No legislative provision is required. Unless the contrary is provided, sequestration is automatically deemed to apply.

Part 9 Real Burdens without a Benefited Property

Introduction

9.1 It is not possible to hold a real burden merely as an individual and without reference to land. In real burdens, as in servitudes, there must always be a benefited property as well as a burdened property. That, at any rate, is the current law.¹ The question is whether that law ought now to be changed. A *burdened* property is, of course, unavoidable. But, looked at afresh, the importance of a *benefited* property seems less clear. A number of factors argue for a reconsideration. These are (i) the experience of other countries (ii) existing functional equivalents, and (iii) the feudal system and its abolition. These are considered in turn.

Factors arguing for change

9.2 **(1) The experience of other countries.** German law recognises servitudes granted in favour of a person (*beschränkte persönliche Dienstbarkeit*).² Some other civilian or mixed systems, including the Netherlands,³ South Africa⁴ and Louisiana,⁵ do likewise. In the United States cautious acceptance has been given to easements “in gross” (ie in favour of a person, without reference to land), and the new Restatement on servitudes provides that

“The benefit of a servitude may be created to be held in gross, or as an appurtenance to another interest in property ...”⁶

In England and Wales profits à prendre⁷ can be in gross, but not easements or restrictive covenants.⁸ The Ontario Law Reform Commission has recommended that both easements and restrictive covenants should be in gross.⁹ Rules vary as to the duration and transmissibility of servitudes and covenants granted in favour of a person. In some systems they are restricted to the life of the original grantee,¹⁰ while in others they are perpetual,¹¹ although in a case where the grantee is a body corporate there may be little difference between these positions. Some systems allow free alienation of the right,¹² while others do not.¹³

9.3 At its lowest, this brief review suggests that there is no reason *in principle* why a burden in land should not exist without reference to a benefited property; and in some

¹ Paras 1.6 to 1.8.

² BGB arts 1090-93.

³ Dutch Civil Code art 6:252.

⁴ Silberberg & Schoeman, *Property* pp 386 ff, esp p 388.

⁵ Louisiana Civil Code, arts 639-45.

⁶ § 2.6(1). Not only may the benefit be in gross but also the burden (ie there need not be a burdened property). See generally American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 540-547. For a Scottish case in which there was a benefited property but no burdened property, see *Inverloch Castle Ltd v Lochaber Power Co* 1987 SLT 466.

⁷ Servitudes which involve the taking of something from the burdened property.

⁸ Gray, *Elements* pp 1045 and 1060.

⁹ Ontario LRC, *Covenants* pp 108 ff.

¹⁰ As in Germany: see BGB, arts 1061 and 1090.

¹¹ Louisiana Civil Code, art 644.

¹² American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 547 ff.

¹³ BGB, art 1092(1).

countries, at least, the idea is thought to be of value. On the other hand, it should not be supposed that Scotland is out of step with international trends, for there are many countries where the presence of a benefited property continues to be required.

9.4 **(2) Existing functional equivalents.** The law already recognises a number of functional equivalents to real burdens without a benefited property. A well-known example is section 75 of the Town and Country Planning (Scotland) Act 1997¹⁴ which empowers a planning authority to enter into a planning agreement with an owner of land, and interested parties, whereby the owner agrees to the land being affected by the restrictions contained in the agreement. On registration in the Sasine or Land Register the agreement runs with the land and is enforceable by the planning authority against successors.¹⁵ There is no benefited property: the agreement is enforceable by the planning authority. Other cases of this kind can be found on the statute book. For example, the National Trust for Scotland can enter into an agreement with an owner to restrict the development or use of his property. On registration, successors are bound. The conditions in the agreement must be in accordance with the purposes of the National Trust as provided in its constituent Acts.¹⁶ Equivalent powers are conferred on Scottish Enterprise and Highlands and Islands Enterprise.¹⁷ Scottish Natural Heritage or planning authorities can enter into an agreement with an owner to allow public access to land.¹⁸ Compulsory powers are held in reserve.¹⁹ Registration binds successors.²⁰ Again, where agricultural land is in an environmentally sensitive area, Scottish Ministers may reach an agreement with its owner as to how the land is to be managed. The agreement binds successors once it has been registered.²¹

9.5 No doubt each of these provisions has its own history and its own justification. Certainly it is hard to discern any general pattern beyond the fact that the holder of the right is always a public or a quasi-public body. The obligations imposed are not real burdens, and so are not, for example, subject to variation or discharge by the Lands Tribunal.²²

9.6 **(3) The feudal system and its abolition.** Real burdens created under the feudal system are enforceable by feudal superiors against their vassals. The right to enforce is attached to the reserved superiority (the *dominium directum*) and not – as with non-feudal burdens – to some neighbouring property.²³ An example explains the difference. If A sells land to B using a non-feudal means of transfer (a disposition), A can impose real burdens only if he owns other land in the neighbourhood. That other land then acts as the benefited property. But if A sells by feudal means (by feu disposition) he can impose burdens whether he owns other land or not. For in such a case the right to enforce attaches to the superiority alone. In a sense, therefore, there is no proper benefited property. A superiority has no physical existence, and in the feudalism of modern times is little more than a means

¹⁴ Formerly s 50 of the Town and Country (Planning) (Scotland) Act 1972. Agreements made under this Act are usually known as “section 50 agreements”.

¹⁵ Town and Country Planning (Scotland) Act 1997 s 75(3). On planning agreements generally, see Jeremy Rowan-Robinson & Eric Young, *Planning by Agreement in Scotland* (1989).

¹⁶ National Trust for Scotland Order Confirmation Act 1938 s 7.

¹⁷ Enterprise and New Towns (Scotland) Act 1990 s 32, discussed further at para 9.38.

¹⁸ Countryside (Scotland) Act 1967 s 13 (as amended by the Natural Heritage (Scotland) Act 1991 s 13 & sched 3).

¹⁹ *Ibid* s 14.

²⁰ *Ibid* s 16(5). And see also ss 30 and 31, which provide for public path creation agreements and public path creation orders.

²¹ Agriculture Act 1986 ss 18(3) and 19(1)&(2).

²² The question of whether they should be subject to such variation or discharge was discussed in para 6.34.

²³ Para 1.12.

of identifying the person who has the right to enforce a burden. Nonetheless it may remain important, even for a superior, to own other land in the neighbourhood. Like other people seeking to enforce real burdens, a superior must have interest as well as title, and, while interest is presumed, the presumption can be rebutted. On one view of the law, a superior does not have the requisite interest unless he owns property in the vicinity. Such property, while not strictly the benefited property in the burden, is, on that view, an indispensable condition of enforceability. Whether this is really the law, however, has never been properly determined.²⁴ If neighbouring land is not required, a feudal burden operates in practice as if there were no benefited property.

9.7 This is the background to the recommendations made in our *Report on Abolition of the Feudal System*²⁵ and carried forward into the Abolition of Feudal Tenure etc. (Scotland) Act 2000. In terms of the Act, a superior who is also a close neighbour can transfer the benefit of a real burden from the superiority to the neighbouring property.²⁶ By contrast, a superior without neighbouring land will, on feudal abolition, lose all right to enforce burdens.²⁷ But in two cases the right can be preserved even without neighbouring land. One is where the superior is a designated conservation body and the burdens in question qualify as conservation burdens.²⁸ The other is a special rule for the Crown in relation to burdens (“maritime burdens”) affecting the foreshore and sea bed.²⁹ Both conservation burdens and maritime burdens are real burdens without a benefited property, the one enforceable by a conservation body and the other by the Crown.

Evaluation

9.8 In our discussion paper we took the provisional view that, at least as a general rule, it should not be possible to create a real burden without a benefited property.³⁰ Nothing in the considerations presented above persuades us otherwise. Real burdens are intrusive. They restrict the use of land, or alternatively impose an affirmative obligation on the owner of that land. In principle, they last in perpetuity, so that a real burden imposed today will continue to affect the land a hundred years from now. All this argues for caution. While real burdens are of value, their use requires to be justified. The standard justification is the protection of a neighbouring property or – as in the case of housing estates or tenements – of a community of neighbouring properties. From the point of view of such property or properties, real burdens preserve amenity and allow for the maintenance of common facilities. These are important social goals.³¹ But if the requirement of a benefited property is removed, this justification disappears. It is difficult to see why a person who lives in Aberdeen, or Sydney, should be able to control the use of land in Edinburgh.³² He has no proper interest in such land. It is not his. He has no right of use over it.³³ It is not a security for money owed to

²⁴ Reid, *Property* paras 407 and 408; Scot Law Com No 168 para 5.22.

²⁵ Scot Law Com No 168 part 4.

²⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 18.

²⁷ *Ibid* s 17.

²⁸ *Ibid* ss 26 to 28.

²⁹ *Ibid* s 60.

³⁰ Scot Law Com DP No 106 paras 2.53 to 2.55.

³¹ Paras 1.14 to 1.21.

³² Susan F French, “Toward a modern law of servitudes: reweaving the ancient strands” (1982) 55 S California Law Rev 1260 at p 1287.

³³ Such as a lease. A lease restricts the use an owner can make of land, both by implication and often by express terms.

him.³⁴ The manner in which it is used cannot possibly affect any property right held by him.³⁵ In those circumstances, a real burden would often be little more than a sham. Its true purpose would be, not to control land use, but to extract money for minutes of waiver. The abuse of burdens in this way has been an unwelcome feature of the feudal system.³⁶ It should not be reproduced in post-feudal Scotland.

9.9 On consultation there was unanimous support for the view that real burdens should not be allowed without a benefited property.³⁷ We reaffirm that view here. But, as mentioned earlier, exceptions are already being put in place. The Feudal Act provides, as a transitional matter, for conservation burdens and maritime burdens. It is necessary to decide whether a transitional arrangement should now become a permanent one; and it is also necessary to decide whether there should be other exceptions to the rule which requires a benefited property.

Conservation burdens

9.10 **Background.** Mention was made earlier of the statutory facilities to burden land exercisable by certain public bodies, such as Scottish Natural Heritage or the National Trust for Scotland.³⁸ Once created the burdens are directly enforceable by the body in question; and since their purpose is to serve public rather than private interests, there is no need for a benefited property. From time to time real burdens, and in particular feudal burdens, have been used for much the same purpose. For example, if a preservation trust restores and sells an historic building, it will wish to ensure that future alterations are in keeping with the restoration work and the character of the building. There may also be financial reasons for this. A number of trusts receive funding from bodies such as Historic Scotland, and the grant-making bodies wish to ensure that the funding has not been squandered and that the benefits acquired are more than transient. As the law currently stands it is possible to regulate future alterations by feuing the building and imposing appropriate real burdens.³⁹ It would be unusual for the trust to own other property in the immediate vicinity which could act as a benefited property, and, even if it did, this would not disguise the fact that the main purpose of the burdens was to promote conservation, a public benefit, rather than to confer particular benefit on some other property which happened to belong to the trust. In other words, these are public burdens masquerading as private, even though the trust itself may often be a private body.

9.11 The usefulness of a real burden of this kind is unlikely to be confined to the built environment. As Scottish Natural Heritage pointed out to us

“It is important that whenever public funds are invested in any area of land with the aim of protecting or enhancing the natural heritage, that investment is not lost when

³⁴ If he held a standard security, it would be legitimate, and lawful, to impose conditions restricting the owner's use of the land. See Conveyancing and Feudal Reform (Scotland) Act 1970 s 11(2).

³⁵ Which was a justification – if latterly rather a notional one – for feudal burdens.

³⁶ Scot Law Com No 168 paras 4.16 to 4.18.

³⁷ The argument for allowing (positive) servitudes to be created without a benefited property is, however, much stronger. A servitude is simply a right of limited use, rather like a special form of lease. But this issue is beyond the scope of the current exercise.

³⁸ Para 9.4 above.

³⁹ Subject to what was said earlier about interest to enforce: see para 9.6

the land changes hands. Creating a burden on the land is an effective mechanism for safeguarding the investment of public funds ...”

9.12 Unless special provision is made it will not usually be possible, once the feudal system is abolished, to create real burdens of the kind just described. The question is whether some kind of special provision is justified.

9.13 **The Feudal Act.** In order to meet some of the points just mentioned, the Feudal Act provides that where (a) a feudal burden is in substance a conservation burden and (b) the superior holding enforcement rights is a designated conservation body, then (c) the burden can be preserved by registration of an appropriate notice in the property register prior to the appointed day.⁴⁰ The effect of registration is that the burden survives feudal abolition and is enforceable by the conservation body, and by its successors, provided that they too are conservation bodies. A conservation burden is defined⁴¹ as one which has

“the purpose of preserving, or protecting -

- (a) the architectural or historical characteristics of the land; or
- (b) any other special characteristics of the land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land).”

A conservation body is any body which appears on a list prescribed by Scottish Ministers. There is no requirement that it be a public body. In the case of a trust, the conservation body comprises the trustees of the trust. A body cannot appear on the list unless its object, or one of them, is conservation, exercised in the public interest. If a body is removed from the list, it ceases to be a conservation body. Scottish Ministers are given the same rights as conservation bodies, and so can also preserve the right to a conservation burden. The broad effect of these provisions is to create a new class of real burden, a conservation burden; but, as matters currently stand, all conservation burdens will previously have been feudal burdens,⁴² and there is no mechanism for creating conservation burdens of new.

9.14 **New conservation burdens?** In our discussion paper we reached the provisional view that it should be possible to create new conservation burdens;⁴³ and to the arguments on the merits there is now added the argument of consistency with the Feudal Act. If conservation burdens are thought of sufficient value to be saved from the feudal wreckage, they must also be of sufficient value to be created in the future. Old conservation is not better than new conservation. Our consultees favoured the introduction of conservation burdens. We recommend, therefore, that conservation burdens be introduced. It would be advantageous if they were immediately available, as soon as the proposed legislation is enacted, and without having to wait for the abolition of the feudal system. Otherwise such burdens could be created only indirectly, by subinfeudation followed by the registration of a notice under section 27 of the Feudal Act. Conservation burdens would be an additional

⁴⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 26 to 32.

⁴¹ Abolition of Feudal Tenure etc. (Scotland) Act s 27(2).

⁴² The moment of change from feudal burden to conservation burden is the appointed day. See Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 27(1). So no conservation burden can be created before that day.

⁴³ Scot Law Com DP No 106 paras 2.56 to 2.59.

facility and would not replace, for those bodies which have them, existing statutory powers directed at conservation.

9.15 For obvious reasons, the new burdens would follow closely the pattern set by the Feudal Act. Only recognised conservation bodies (or Scottish Ministers) would be able to create conservation burdens; and “conservation burdens” would be defined in the same way as in the Feudal Act. No benefited property would be needed. A conservation burden would be created in the same way as any other real burden, that is to say, by deed registered in the property register.⁴⁴ In practice, conservation burdens would most often be imposed on the disposal of land by the body in question, but there would be nothing to stop existing owners from agreeing to restrictions on their land in the interests of conservation.

9.16 We recommend that

- 74. (a) It should be possible for conservation burdens to be created in favour of conservation bodies.**
- (b) A “conservation burden” is one for the purpose of preserving, or protecting, for the benefit of the public –**
- (i) the architectural or historical characteristics of any land; or**
 - (ii) any other special characteristics of any land (including a special characteristic derived from the flora, fauna or general appearance of any land).**
- (c) The property affected by a conservation burden would be the burdened property; but the right to the burden would be held by the conservation body without reference to a benefited property.**
- (d) A body should be a conservation body only if it appears on a list prescribed, from time to time, by Scottish Ministers; and it should cease to be a conservation body if removed from that list. A body should only appear on the list if its object or function includes conservation.**
- (e) It should also be possible to create a conservation burden in favour of Scottish Ministers.**

(Draft Bill s 33)

9.17 **Creation, transmission, enforcement and extinction.** For the most part conservation burdens would be subject to the normal rules of real burdens, in respect of creation, extinction and other matters.⁴⁵ Nonetheless the absence of a benefited property leads to a number of specialities for which special provision seems required.⁴⁶

⁴⁴ See generally part 3 above. A conservation burden will be subject to the same rules as any other real burden, both for creation and in other respects, except where otherwise provided.

⁴⁵ The same is true of maritime burdens, discussed below.

⁴⁶ In some cases parallel provisions already appear in the Abolition of Feudal Tenure etc. (Scotland) Act 2000, but confined to conservation burdens and maritime burdens which have been converted from feudal burdens. The new provisions discussed below are to apply to all real burdens which do not have a benefited property. This makes it possible to repeal the earlier provisions in the Feudal Act: see sched 9 of the draft bill.

9.18 *Creation.* The normal rules of creation apply.⁴⁷ Conservation burdens must be created in writing and duly registered. But as there is no benefited property, registration can be against the burdened property only.

9.19 *Assignment.* As freestanding incorporeal property, the right to a conservation burden is transferred by assignment. That follows as a matter of general principles. It seems unnecessary, and probably unhelpful, to prescribe a statutory style of assignment. The assignment would be completed by registration, and intimation would not be required. In practice it would be difficult for the Keeper of the Land Register to determine whether intimation had taken place. A conservation burden could be assigned only to another conservation body or to Scottish Ministers.⁴⁸

9.20 *Rights in security.* Normally the right to a real burden is a pertinent of the benefited property and cannot be held separately. This means that a right in security over the benefited property would automatically include the real burden; but it also means that there could be no question of a security over the real burden alone. The position is different for conservation burdens. From the point of view of its holder, a conservation burden is an autonomous real right. In principle it could be the subject of a standard security.⁴⁹ Nonetheless we recommended, in our *Report on Abolition of the Feudal System*, that it should not be possible to create a standard security over a conservation burden.⁵⁰ Such a security, we pointed out, would be of little value. A conservation burden would not, or not usually, be income-producing; restrictions on assignment restrict the market for sale; and the heritable creditor would be unable to foreclose unless, improbably, it too was a conservation body. This recommendation is implemented by the Feudal Act, in respect of feudal burdens converted into conservation burdens.⁵¹ Plainly the same rule should apply to new conservation burdens as well.⁵² Conservation burdens are not intended as objects of commerce. And, at a practical level, it is not clear how a security could be entered on the Land Register in view of the fact that a real burden would not command its own title sheet.⁵³ Conservation burdens would, however, remain subject to any insolvency process, including receivership, which might affect their holder.

9.21 *Enforcement.* A real burden can be enforced only by a person who has title and interest to do so.⁵⁴ In a conservation burden title will lie with the conservation body. A body whose right is not completed by registration may be viewed as a holder for this,⁵⁵ and for other, purposes.⁵⁶ In the absence of a benefited property, praedial interest cannot be

⁴⁷ See generally part 3.

⁴⁸ Draft bill s 34. This repeats the terms of s 29 of the Feudal Act.

⁴⁹ Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2), (8)(b).

⁵⁰ Scot Law Com No 168 para 4.59. This could not be circumvented by creating an assignment in security: see Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(3).

⁵¹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 32.

⁵² This is achieved by means of the definition of "real right in land" in s 9(8)(b) of the Conveyancing and Feudal Reform (Scotland) Act 1970. See sched 8 para 3 of the draft bill. From the appointed day, a standard security can only be created over land or a real right in land: see Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2), as amended by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 sched 12 para 30(6)(a).

⁵³ By s 5(1)(a) of the Land Registration (Scotland) Act 1979 separate title sheets may be used only for ownership and long lease. It would not be appropriate to change this rule. Section 5(1)(b) requires that a heritable security be entered on the title sheet of the interest in land to which the security relates.

⁵⁴ Draft bill s 7(1). For title and interest in relation to standard real burdens, see paras 4.1 to 4.24.

⁵⁵ Draft bill s 35.

⁵⁶ This is the rule for ordinary real burdens: see para 4.6. For completion of title, see para 9.23.

required, and we suggest that interest be presumed⁵⁷ but be capable of rebuttal, for example on the ground that the restriction is trivial or inappropriate.

9.22 *Extinction.* The normal rules of extinction apply,⁵⁸ other than extinction by notice of termination (available for standard burdens which are more than 100 years old).⁵⁹ The case for conservation does not end after 100 years. However, a conservation burden should be extinguished if its holder (or if more than one, all of its holders) ceases to be a conservation body.⁶⁰ Normally this will occur only if the body is removed by Scottish Ministers from the approved list.⁶¹

9.23 *Deduction of title.* A body acquiring right to a conservation burden by a general conveyance (such as a deed of assumption and conveyance of trustees) is unable to complete title in the Register of Sasines by direct registration.⁶² The conveyancing solution, already available for other autonomous real rights such as standard securities and leases,⁶³ is to allow the holder to expedite a notice of title deducing title from the person with the last completed title. Direct registration is already permissible in cases where the Land Register is the appropriate register.⁶⁴

9.24 Sometimes the holder may not want to complete title, usually on grounds of expense. For example, if a conservation body comprises trustees, those trustees who are subsequently assumed will often not complete title. Over time the original trustees will be replaced by assumed trustees none of whom has a completed title. We do not think that the absence of a completed title should be a bar to enforcing the burden.⁶⁵ And there seems no reason why such a holder should not be able to grant assignations and discharges, subject to deduction of title. Deduction of title would not be required in cases where the burden was registered in the Land Register.⁶⁶

9.25 *Recommendation.* We now draw these various strands together by recommending that

- 75. (a) The right to a conservation burden should be capable of being assigned or otherwise transferred, but only to a conservation body or Scottish Ministers; and the assignation or transfer should take effect on registration, without the need for intimation.**

⁵⁷ This is the rule already adopted by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 28 (conservation burdens) and 60 (maritime burdens).

⁵⁸ See generally parts 5 and 6 above. The absence of a benefited property affects one of the factors to which the Lands Tribunal is to have regard in applications for discharge or renewal. See para 6.75. For technical reasons the rule for voluntary discharge is re-expressed in s 40 of the draft bill.

⁵⁹ For notices of termination, see paras 5.26 ff.

⁶⁰ See s 30 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, which is now to be replaced by the similar s 37 of the draft bill.

⁶¹ For the listing of conservation bodies, see para 9.13.

⁶² G L Gretton & K G C Reid, *Conveyancing* (2nd edn, 1999) para 24.02.

⁶³ Conveyancing (Scotland) Act 1924 ss 4 and 24.

⁶⁴ Land Registration (Scotland) Act 1979 s 3(6).

⁶⁵ Para 9.21.

⁶⁶ Land Registration (Scotland) Act 1979 s 15(3), as amended, with effect from royal assent, by sched 8 para 6(3) of the draft bill. This replaces an identical amendment contained in sched 12 para 39(6)(b) of the Feudal Act which had been due to take effect only on the appointed day. The earlier commencement is required because it will be possible to create conservation burdens immediately on royal assent.

(b) It should not be competent to create a standard security over a conservation burden.

(c) The title to enforce a conservation burden should lie with its holder, and interest to enforce should be presumed.

(d) A conservation burden should be extinguished if its holder (or, if there is more than one holder, all such holders) ceases to be a conservation body.

(e) The holder should be able to complete title to a conservation burden by registering a notice of title.

(f) In this recommendation the “holder” of a conservation burden includes a body which has right to the burden whether or not it has completed title by registration.

(Draft Bill, ss 34 to 37 and 39; sched 8 para 3)

Maritime burdens

9.26 The Feudal Act also provides for the preservation of maritime burdens, which are defined as burdens regulating the sea bed or foreshore and enforceable by the Crown.⁶⁷ In the past these have been constituted as feudal burdens, but, following feudal abolition, they will automatically be converted into real burdens held by the Crown. Maritime burdens may not be assigned⁶⁸ and, as with conservation burdens, there will be no benefited property. There seems no objection to allowing such burdens to be created in the future. Strictly, this may not be necessary for, since the Crown owns most of the sea bed as well as substantial tracts of the foreshore, there would be no difficulty in identifying a benefited property in the event that a part of the sea bed or foreshore was disposed of subject to real burdens. But in reality such burdens would usually be conceived for the public benefit, and it is both artificial, and potentially troublesome, to attach enforcement rights to a particular section of neighbouring sea bed or foreshore. We recommend therefore that

76. (a) It should be possible for maritime burdens (that is to say, burdens affecting the sea bed or foreshore) to be created in favour of the Crown.

(b) Maritime burdens should not be capable of being assigned.

(Draft Bill s 38)

⁶⁷ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 60(1). For the background to this provision, see Scot Law Com No 168 para 4.51.

⁶⁸ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 60(2). This provision is repealed and re-enacted by the draft bill: see s 38(2) and sched 9.

Development value burdens

9.27 In addition to conservation burdens and maritime burdens, a third type of burden is accorded special treatment by the Feudal Act. This is the development value burden.⁶⁹ In terms of the Act⁷⁰ a development value burden is a feudal burden which satisfies three criteria, namely

- (i) that the burden was imposed during the disposal of the (burdened) property;
- (ii) that the consideration for the disposal was significantly lower than if the property had not been subject to the burden; and
- (iii) that the burden reserved to the superior, whether wholly or in part, any development value of the property.

The essence of a development value burden, therefore, is that it is imposed in a disposal of land at a discount.

9.28 Development value burdens are not preserved as such by the Feudal Act. They are to be extinguished on the appointed day, in the same way as other feudal burdens. Nonetheless the land is not wholly free, for while the owner can disregard the burdens, he cannot do so without incurring liability to pay compensation to the former superior.⁷¹ It is as if the Lands Tribunal had discharged the burden but not yet determined the compensation. The compensation payable is the notional development value accruing to the owner, but restricted – as compensation which might be ordered by the Lands Tribunal would be restricted⁷² – to the reduction in consideration brought about by the burden.⁷³ There are two limiting factors. First, the superior must, before the appointed day, register a notice reserving the right to claim compensation; and secondly, even if he does so, the after-life of the burdens is restricted to a period of 20 years beginning with the appointed day. Once this period has expired, the burdens can be disregarded entirely.

9.29 An alternative approach would have been to preserve development value burdens for a period of 20 years. In recommending extinction (with compensation) rather than preservation we were influenced by the view that a mere personal interest, not connected with a benefited property, was not sufficient to sustain a real burden. The element of public interest, present in both conservation burdens and maritime burdens, was lacking. If the purpose of imposing the burdens was primarily financial, then it was sufficient to offer financial redress.⁷⁴ On these matters our view remains unchanged, and we do not think that it should be possible to create development value burdens in the future. In practice, the main use of such burdens has been in relation to clawback, to which subject we now turn. Before doing so we wish to record our thanks to those solicitors from private practice, local

⁶⁹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 33 to 39. For the background, see Scot Law Com No 168 paras 5.14 to 5.57.

⁷⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 33(1).

⁷¹ *Ibid* s 35.

⁷² Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(4)(ii).

⁷³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 37.

⁷⁴ Scot Law Com No 168 para 5.20.

authorities, Scottish Enterprise, and Highlands and Islands Enterprise whom we consulted specially on this and related topics, as well as to the members of our advisory group.⁷⁵

Clawback

9.30 **The nature of the problem.** Clawback is a device to reserve to the seller of land a share in such development gain as may accrue during a stipulated period of years after the sale. Typically development gain is brought about by a grant or variation of planning permission. Clawback is used in a number of different situations. Sometimes the circumstances are that permission for a particular use is likely to be granted but had not, at the time of sale, been obtained by the seller. On other occasions planning consent is unlikely in the short term, but there are prospects that the planning environment might change over time. It would of course be possible to build the chances of development gain into the price paid. In that case the purchaser pays a single sum, at the time of the sale, and has no further liability. But in practice it is often convenient to make payment for planning gain only if and when the gain accrues. This is partly for the financial convenience of the purchaser, but it also reflects the difficulty of placing a value on a contingency which may or may not occur. If the contingency occurs and payment is made, the payment is in effect a second instalment of the price. Clawback is widely used in sales of commercial property, both by public authorities and also in the private sector. Without it, “a distortion of the market would result and owners may be reluctant to sell for other than full development value”.⁷⁶

9.31 The documentation used for clawback varies but tends to include all or most of the following.⁷⁷ In the first place there is an agreement between the seller and purchaser. Often quite a lengthy document, this sets out, as a minimum (i) the trigger event or events for payment (ii) the amount to be paid and (iii) the duration of the agreement. The duration is commonly around 10 years but may be either shorter or longer. If the duration expires without the occurrence of one of the trigger events, there is no entitlement to payment. Secondly, the agreement is often secured by a standard security. Finally, a real burden is imposed in the conveyance which has the effect of restricting the property to its current use. Unless the seller is retaining land which can act as a benefited property, the conveyance is a feu disposition, and the burden a feudal burden.

9.32 The seller’s main protection is the standard security. If the trigger event occurs but the purchaser defaults, the security can be called up and the property sold. Often, of course, there is a prior security, but that is a known and will be part of the original agreement between seller and purchaser. More serious is the risk from later securities. Normally, securities rank by date of registration, but if a later creditor gives formal notice to the creditor under an earlier security, the effect, according to section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970, is that

⁷⁵ The members of the advisory group are listed in note 10 to part 1. In addition we met and consulted with: Mr John Crawford and Mr Cameron Gunn (Scottish Enterprise), Mr J S Hodge (Dundas & Wilson), Mr Allan MacLeod (Highlands and Islands Enterprise), Mr Ian Quigley (Maclay Murray & Spens), Ms Janet Simpson (Perth & Kinross Council), Mr Robert Swindell (Macdonalds), and Mr Terry Lynch (Renfrewshire Council). A variety of views was expressed, and we are solely responsible for our final recommendations.

⁷⁶ The words quoted were included in the response by The Royal Institution of Chartered Surveyors in Scotland.

⁷⁷ Model documentation was included in appendix III to our *Discussion Paper on Abolition of the Feudal System* (Scot Law Com DP No 93, 1991), but this is less ornate than the documentation now in use.

“the preference in ranking of the [earlier] security ... shall be restricted to security for his present advances and future advances which he may be required to make under the contract to which the security relates and interest present and future due thereon ...”

It is not easy to apply this provision where the earlier security is concerned with clawback. In clawback there is no loan and therefore, it may be argued, no “advances”, whether present or future. But if that view is correct, the effect of a section 13 notice sent before the trigger event would be to postpone the clawback security to the later security. In the result, a clawback security would always be vulnerable to the grant of further securities, and if those securities accounted for the full value of the property, the seller would be left unsecured. In theory the danger could be avoided by a clause in the clawback security prohibiting the grant of further securities,⁷⁸ but such a clause may be unduly restrictive of the purchaser’s rights and hence commercially unattractive. Section 13 also applies where the debtor sells on the property and the new owner gives notice, and this too can give rise to difficulties.

9.33 These difficulties with standard securities explain the use of real burdens. The real burden here performs a secondary role. If the money is paid the real burden is not needed. If the money is not paid but the standard security is still valid and effective, it is also not needed. A real burden is needed only if both the agreement and the standard security fail. In that case it has at least a nuisance value. Even after planning permission has been received, the development cannot go ahead unless the real burden is discharged; and since the burden runs with the land, it affects successors of the original purchaser. Naturally, the seller/superior will not discharge the burden without payment of the stipulated share of development gain.

9.34 Once the feudal system is abolished, it will not be possible to use real burdens as part of clawback arrangements unless the seller owns neighbouring land which could act as a benefited property. The difficulty would be avoided by allowing a further exception to the rule that real burdens require a benefited property. Thus the conservation burden and maritime burden could be joined by the “clawback burden”. In our view, however, this would be the wrong approach. In the context of clawback, real burdens are neither appropriate nor are they efficient. A real burden should not be used to secure the payment of money; and the “security”, such as it is, is in any event at the mercy of the variation and discharge jurisdiction of the Lands Tribunal. A recent example of the latter is provided by *Cumbernauld Development Corporation v County Properties and Developments Ltd.*⁷⁹ Land was sold by a development corporation in 1987 for the construction of an ice rink. The price was £100,000. In the feu disposition the purchasers were taken bound to erect and maintain an ice rink. In 1993 the ice rink was closed, and in the following year the site was sold for £2,250,000 for use as a bingo hall. There was a clawback agreement for £650,000, but it was not triggered by the development. The Lands Tribunal varied the use restriction, awarding the development corporation (only) £206,000 as compensation.

⁷⁸ Subsequent securities would then probably be voidable at the instance of the holder of the clawback security, although the issue is not completely straightforward. For the relevant authorities see Reid, *Property* para 697 n 21.

⁷⁹ 1996 SLT 1106.

9.35 Real burdens are used in clawback arrangements only because of the deficiencies of standard securities. A proper solution would be to make the necessary adjustments to the law of standard securities.

9.36 **Reform of standard securities.** As already mentioned, the main difficulty for discount securities is section 13 of the 1970 Act. The difficulty, however, is one of wording rather than of policy. The policy itself is unexceptionable. It is that the ranking of a second security, duly notified to the first creditor, should not be prejudiced by further advances by that creditor. Only new advances are struck at, that is to say, advances which the creditor was not already bound to make. In a clawback security, however, there are no new advances. The parties agree at the time of the disposal what sums are to be paid, and in what circumstances. If the clawback is triggered, payment must be made. In principle, therefore, a section 13 notice should not affect a clawback agreement. Nor should it matter that the trigger event occurred after the notice was sent, for the debtor was already bound to the creditor. The obligation to make the “advance” had already been undertaken. Whether this result is actually produced by a section 13 notice is, however, open to question. The difficulty in section 13 is the word “advance”. It may strain language to say that an obligation by the debtor to pay certain sums in certain contingencies is an “advance” by the creditor. More correctly, it is a “debt”, a general word also used in the Act,⁸⁰ rather than an “advance”. But the problem, if there is a problem, is easily solved.⁸¹ We recommend that

77. Section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 should be amended to substitute “debt” for “advances”.

(Draft Bill s 102)

9.37 The purpose of our recommendation is merely to clarify the effect of section 13. It remains for the parties to decide how clawback is best arranged. There may, for example, be a concern that clawback securities will discourage lending by a subsequent creditor. In that case the agreement can incorporate an appropriate provision about ranking.⁸² It should be borne in mind, however, that clawback is not usually triggered unless the value of the property increases, and that the sum due is unlikely to exceed that increase in value. In that case the later creditor is not prejudiced, for the equity available for his security has not diminished and may well have increased. Where, before the trigger event, the later creditor calls up the security and sells, he will normally have to sell subject to the clawback security.⁸³ For a forced sale does not disencumber the property of a prior-ranking security unless the security is redeemed; and a postponed creditor has a right to redeem only if the debtor had that right,⁸⁴ which will not usually be the case under a clawback agreement.⁸⁵

⁸⁰ Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(c) defines “debt” widely to mean “any obligation due, or which will or may become due, to repay or pay money, including any such obligation arising from a transaction or part of a transaction in the course of any trade, business or profession, and any obligation to pay an annuity or *ad factum praestandum* ...”

⁸¹ A precedent, in not entirely dissimilar circumstances, is s 72(5) of the Housing (Scotland) Act 1987, which adjusts s 13 in its application to discount standard securities.

⁸² This is expressly permitted by s 13(3)(b) of the Conveyancing and Feudal Reform (Scotland) Act 1970.

⁸³ Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(1)(b).

⁸⁴ Conveyancing and Feudal Reform (Scotland) Act 1970 s 26(2).

⁸⁵ A clawback agreement will usually exclude the right to redeem, on the basis of s 18(1A) of the Conveyancing and Feudal Reform (Scotland) Act 1970. Section 11 of the Land Tenure Reform (Scotland) Act 1974 limits such an exclusion to 20 years in certain cases, but few clawback agreements last as long as that. One practical reason for excluding the right to redeem is the difficulty of calculating, prior to the trigger event, the value of the debt which is being secured.

This will affect marketability to some degree, though perhaps not more so than under the current practice of using both a standard security and a real burden. The issue is likely to be one for negotiation between the two creditors.

Public bodies

9.38 **Scottish Enterprise and Highlands and Islands Enterprise.** Mention has already been made of the special legislation which exists for various public bodies.⁸⁶ One such body, Scottish Enterprise, drew our attention to a possible difficulty affecting section 32 of the Enterprise and New Towns (Scotland) Act 1990.⁸⁷ This provision allows Scottish Enterprise or Highlands and Islands Enterprise to enter into an agreement with “a person having such interest in land as enables him to bind the land”. On registration, the agreement runs with the land. To come within section 32, however, the agreement requires to be one “as is mentioned in section 8(6) of this Act”; and in terms of section 8(6) the agreement must be “with all persons having an interest in the land”. The reference back to section 8(6) creates a doubt as to whether it is sufficient to enter into a section 32 agreement with “a person having such interest as enables him to bind the land” (in practice, the owner), or whether “all persons having an interest in the land” (including, for example, heritable creditors) must also sign. The equivalent provision for local authorities – section 75 of the Town and Country Planning (Scotland) Act 1997 – requires only the former. We think that the doubt should be resolved by bringing section 32 of the 1990 Act into line with section 75 of the 1997 Act. Accordingly we recommend that

- 78. It should be made clear that an agreement made under section 32 of the Enterprise and New Towns (Scotland) Act 1990 need be entered into only with a person able to bind the land.**

(Draft Bill s 105)

9.39 **Local authorities.** The Society of Local Authority Lawyers & Administrators in Scotland, among others, pointed out that local authorities sometimes sell land at below market value

“on condition that the land is used for purposes considered to be in the interests of the community, e.g. the provision of sporting or cultural facilities, scout halls etc. These restrictions are often secured by feudal burdens, rights of pre-emption or rights of redemption.”

An ancillary purpose may be to secure clawback of development gain in the event that the land comes to be used for a different purpose. A sale subject to restrictions may also be a means of complying with section 74(2) of the Local Government (Scotland) Act 1973, which prevents disposals of land (other than with the consent of Scottish Ministers) “for a consideration less than the best that can reasonably be obtained”. If the effect of the restrictions is to reduce the value of the land to the level of the price actually paid, then it is arguable that section 74(2) has been complied with.⁸⁸

⁸⁶ Para 9.4.

⁸⁷ The provision derives from s 5(4) of the Highlands and Islands Development (Scotland) Act 1965.

⁸⁸ Some other public bodies are subject to a like restriction: see Enterprise and New Towns (Scotland) Act 1990 s 8(1)(g) (Scottish Enterprise and Highlands and Islands Enterprise); Local Government (Scotland) Act 1994 s 100(2) (water and sewerage authorities).

9.40 With feudal abolition, local authorities will no longer be able to use real burdens in this way unless they happen to own neighbouring property which, having regard to the nature of the restrictions, is capable of acting as a benefited property.⁸⁹ Planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1997 provide a possible alternative, although their use is restricted to planning purposes (itself a broad concept).⁹⁰ Whether further powers are now required is not for us to determine. The position in England and Wales is that, in addition to planning agreements, local authorities are able to impose covenants in certain circumstances.⁹¹

Other cases

9.41 The statutory burdens just discussed bear some resemblance to real burdens in favour of a person (ie, without reference to a benefited property). So, if more remotely, do clawback agreements secured by a standard security. Finally, then, we return to such burdens. Our overall approach has already been explained.⁹² As a general rule we do not think that it should be possible to create real burdens without a benefited property; but we are willing to admit two exceptions carried over from the Feudal Act, namely conservation burdens and maritime burdens. The question is whether there should be others.

9.42 This question has occupied a great deal of time and energy. Our initial thought⁹³ was to develop the idea of a real burden in favour of a person, but restricted by duration. Such a burden would have been generally available, so that anyone parting with land would have been able to impose real burdens on the acquirer – subject, of course, to the acquirer’s consent. There would be no requirement of public interest, such as exists in conservation and maritime burdens. But the duration would have been limited to a specified and short period, for example 20 years. In effect this would have been 20-year feudalism, with both the advantages and disadvantages which that description implies. The main advantage would be flexibility in the arrangements of the parties in question. A personal real burden would be an additional mechanism – or, following feudal abolition, a substitute mechanism – for giving effect to the parties’ intentions. The main disadvantage would be the risk of indiscriminate use. If the imposition of burdens were made too easy, it would be done routinely, and inappropriately. Often the real purpose would be financial gain from minutes of waiver; but even where this was not so, the practice might be difficult to defend. Certainly an acquirer would often resent the imposition of burdens for the benefit of someone who had no connection with the property or with neighbouring property. It is true that, in theory, he could reject the burdens, or some of them, but the practicalities are otherwise. Real burdens are rarely freely negotiated, and a person who is unwilling to accept the burdens is likely to find that he is denied the property. On this analysis it is misleading to talk of the intention of the parties. Usually the imposition of burdens would be the choice of the seller alone.

⁸⁹ A real burden must be for the benefit of the benefited property: see paras 2.13 to 2.18. This requirement may not always be met by a restriction which is imposed in the public interest.

⁹⁰ Jeremy Rowan-Robinson and Eric Young, *Planning by Agreement in Scotland* (1989) pp 33-4; Angus McAllister & Raymond McMaster, *Scottish Planning Law* (2nd edn, 1999) pp 232 ff.

⁹¹ Local Government (Miscellaneous Provisions) Act 1982 s 33; Housing Act 1985 s 609.

⁹² Paras 9.8 ff.

⁹³ This was before we decided that clawback was best dealt with by an amendment to the law relating to standard securities (for which see above).

9.43 One possible response would be to produce a more targeted real burden, available in cases where it was genuinely required but unavailable where it was likely to be abused. Here we considered various options. One was to have a commercial burden, from which residential property would be exempted. Another was to have a discount burden, which could be used only where land was given away or sold at a discount, and so unavailable in ordinary transactions. Neither seemed attractive. There were obvious definitional difficulties, which meant that the necessary provisions would be lengthy and complex. More importantly, both seemed at the same time too wide, including too many cases, but also too narrow. For example, a standard commercial transaction is the sale of land to a developer for residential use.

9.44 If personal burdens involve substantial disadvantages, they can be justified only by strong reasons. We are not persuaded that such reasons exist. Clawback, the use which featured most prominently in the responses to our discussion paper, has been dealt with by strengthening standard securities. But with clawback disposed of, the case for personal real burdens is much reduced. It is difficult to discover other cases where such burdens would be both useful and at the same time unobjectionable.

9.45 One possible example which has been brought to our attention concerns private (or mixed private and public) developments funded in part by public money. Grants from bodies such as the European Regional Development Fund may be conditional on the land being used in a particular way for a period of years. If this restriction cannot be imposed, directly or indirectly, on the end-purchasers of the development, and the use is then abandoned, the developer might have to repay the grant. There could be no objection in principle to personal real burdens in a case such as this; and it may be true that other mechanisms – such as standard securities, or leases (with or without an option to buy) – are less convenient. But at least other mechanisms do exist, and indeed are used in other European countries, including England, where an equivalent of personal real burdens is not available.

9.46 In the case of outright gifts, the obvious – and convenient – alternative mechanism is the trust. A person wishing to give land for some charitable or community purpose, such as a village hall, can convey to trustees who must then apply the property for the particular purposes specified by the donor. Indeed trusts are often used at present. From the donor's point of view they offer better protection than real burdens because judicial variation is difficult and unusual. The donor is also able to serve as one of the trustees.

9.47 Another example sometimes mentioned is the case of the High Street shop which wants to move premises without giving space to a competitor. At the moment the practice is sometimes to sell the premises by feu disposition subject to a use restriction which is designed to prevent competition. After feudal abolition the same effect could only be achieved by a personal real burden (if such were allowed). An obvious difficulty with this example is that real burdens are unlawful if in unreasonable restraint of trade. Depending on the circumstances, a burden such as the one described would fall on the wrong side of the law and be unenforceable, even under the present law.⁹⁴ There is a more general point here. The argument in favour of personal real burdens is often an argument to preserve the flexibility currently allowed by the feudal system. But the feudal system is less accommodating than is sometimes supposed. Many feudal burdens, solemnly entered on

⁹⁴ See paras 2.23 to 2.28.

the register, are in fact unenforceable, whether because of an absence of interest to enforce⁹⁵ or for some other reason.

9.48 Doubtless these examples do not exhaust the possibilities. But a few examples do not justify the introduction of a mechanism which, on other grounds, is intrinsically undesirable. In our view, the case for personal real burdens has not been made out.

⁹⁵ Reid, *Property* paras 407 and 408.

Part 10 Pre-emption, Redemption, Reversion and other Options to Acquire

Classification

10.1 Pre-emption, redemption and reversion are all examples of options to acquire property. There are other examples, although without a special name. Naturally options can arise in relation to property of all types, but in this report our interest is confined to land and buildings.

10.2 **Pre-emption.** A right of pre-emption is a right of first refusal in the event that the owner is willing to sell.¹ Its value to the holder (A) depends on the future conduct of the owner (B). The triggering event is B's decision to sell. If B chooses to sell, A can exercise his option to buy; but if B chooses not to sell, the option does not arise. In practice A was often the previous owner of the property, so that the right of pre-emption was a condition of the sale from A to B. Much more rarely, the sale was the other way around. For example, B might sell part of his property to A while conferring on A a right of first refusal in the event that he later came to sell the rest.² A right of pre-emption might also be granted to someone with no previous or current connection with the property, although this is uncommon in practice.

10.3 **Redemption.** A right of redemption is a right of repurchase, whether at the option of the holder, or at some fixed point in time, or on the occurrence of some future event such as the death of the owner or the granting of planning permission. Unlike a pre-emption, the option does not depend on a decision made by the owner of the property. Redemption is the buying back of that which one formerly had, and usually the redemption was inserted as a condition of a sale by the holder of the right.

10.4 **Reversion.** The relationship between reversion and redemption is one of genus and species.³ Reversion includes, but is wider than, redemption.⁴ A right of reversion is a right to reacquire property upon the fulfilment of a condition or conditions. Unlike redemption, the exercise of the right need not involve the payment of money or value. Bankton writes that:⁵

“A conventional reversion, is that whereby the granter of a disposition of lands has a right to redeem the same, upon payment of a certain sum, or performing other conditions agreed upon between him and the creditor.”

The reference to “creditor” rather than to “owner” is because the main use of reversions was in the grant of wadsets and of their later equivalent, securities constituted by *ex facie* absolute

¹ The definitions of the institutional writers are couched in feudal terms. For example, Bell, *Principles* s 864: “The Clause of Pre-emption is an obligation by the vassal to give the first offer to the superior if he means to sell his land.” See also Erskine II.5.28, and Bell, *Commentaries* I, 27.

² eg Halliday, *Opinions* pp 472-4.

³ The only modern legislative provision, s 12 of the Land Tenure Reform (Scotland) Act 1974, refers to “a right of redemption or reversion”.

⁴ Sometimes “reversion” is also used in the sense of disencumbering. See Scot Law Com No 106 para 8.5.

⁵ Bankton II.10.8. And see also Stair II.10.3; Erskine II.8.2; and Bell, *Principles* s 902.

disposition. A, having borrowed money from B, secured the loan by disposing to B heritable property. But the disposition was subject to a reversion on the repayment of the loan. Depending on the size of the loan, the amount payable for the reversion was often much smaller than the value of the property.

10.5 **Innominate options.** There are also options without names. The main example not already mentioned is where a third party has a right to acquire at a time of his choosing, or on the occurrence of some event.⁶ In the commercial world many options are like this.⁷ They are distinguished from rights of redemption and reversion by the fact that the person entitled to exercise the right is not a previous owner.

10.6 **Methods of classification.** Options to acquire can be classified in more than one way. A possible defining feature would be whether value has to be given in exchange for the option's exercise. Another would be whether the option is held by a previous owner or by a stranger to the property. For present purposes, however, it is more useful to classify by reference to the type of event which triggers the option. The trigger event might be wholly within the control of the holder of the right, so that the option can be exercised at will. Or the trigger event might be within the control of the owner. An intermediate possibility is that the option is triggered by an event outside the control of either party. In practice these three categories reduce readily to two. On the one hand there are those options which are triggered by the owner; and on the other hand there are those options which are triggered in some other way. Rights of pre-emption fall into the first category. A right of pre-emption is triggered by the owner's decision to sell. All other options to acquire, including rights of redemption and reversion, fall into the second. It seems hardly necessary to say that, from the point of view of an owner, the first is far less burdensome than the second.

Juridical nature

10.7 Options can be set up in a number of juridical guises. There are five main models.

10.8 **(1) Contract.** An option is often no more than an ordinary contract. As such it is perfectly effective for as long as the obligant continues to own the property, but if he sells to someone else the option is usually defeated. Sometimes a sale would be in breach of a term of the option agreement, whether express or implied, so that damages would be due. Further, if the purchaser knew of the option, and hence of the breach, his title would be reducible on the basis of the rule against "offside goals".⁸ In practice, purchasers do not usually know of the contractual obligations of their authors, although an option contained in a deed recorded in the Register of Sasines would be publicly available and hence within the constructive knowledge of a purchaser.⁹ By contrast, the Land Register would not normally extract from a deed an obligation which was merely contractual in effect.

10.9 **(2) Standard security.** A contractual option can be secured by a standard security granted over the property to which the option refers.¹⁰ This gives some additional protection to the holder of the option. It is true that the statutory remedies available on

⁶ Other than, of course, the owner's decision to sell. An option dependent on such a decision is a right of pre-emption.

⁷ eg *Stone v MacDonald* 1979 SC 363.

⁸ Reid, *Property* para 698(1).

⁹ *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74.

¹⁰ Or indeed over a different property. Standard securities can secure obligations of any kind, including obligations *ad factum praestandum*. See Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(c).

default seem scarcely appropriate for a non-pecuniary obligation. But a security will at least alert a purchaser to the existence of the option, and put him in bad faith for the purposes of the rule against offside goals. In practice the holder will be contacted and a discharge sought, and as part of the negotiations the option might come to be renewed.

10.10 **(3) Real burden.** An option can be constituted as a real burden, and rights of pre-emption in particular were commonly inserted in grants of feu made in rural areas. If constituted as a real burden, an option would in theory run with the land and bind successive owners of the affected property. But in practice a number of factors have reduced the effectiveness of options constituted in this way.

10.11 In the first place, by section 9 of the Conveyancing Amendment (Scotland) Act 1938 an option in the form of a right of pre-emption is limited to a single chance to buy. If the property is offered to the holder of the right, he must either accept the offer or lose the option. There is no second chance. Either way the real burden is extinguished. Thus a pre-emption constituted as a real burden is usually no more durable than a pre-emption constituted as an ordinary contract, although some differences remain.¹¹ Section 9 is retrospective, but only for pre-emptions in grants in feu.

10.12 Secondly, by section 12 of the Land Tenure Reform (Scotland) Act 1974 an option in the form of a right of redemption or reversion is restricted in duration to 20 years. It will still run with the land, but only for a short period. This provision is not retrospective and does not affect redemptions or reversions created prior to 1 September 1974.¹²

10.13 Thirdly, options not falling into either of the above categories, while not restricted by statute, are difficult to constitute as real burdens for other reasons. Most real burdens are created by or in association with a conveyance, and are for the benefit of the granter of that conveyance. This makes them suitable for redemptions and pre-emptions. The granter is given a right to reacquire his former property. They are less suitable for conferring options on third parties who have no previous connection with property. Technically such a real burden would be possible, for a real burden can be created in favour of a third party. But in practice options are rarely or never created in this way.

10.14 Fourthly, pre-emptions and redemptions are constituted either as feudal or as neighbour burdens,¹³ more usually the former. Prior to the abolition of the feudal system, feudal pre-emptions and redemptions can be converted into neighbour burdens if the former superior owns suitable property in the neighbourhood.¹⁴ Otherwise they are extinguished on the day of feudal abolition.¹⁵ After abolition only neighbour burdens will be available. That creates a number of difficulties. The granter (or other holder) will need to own neighbouring land which is capable of acting as a benefited property. It will need to be shown that the option is for the praedial benefit of that land and not merely for the personal benefit of its owner.¹⁶ And obvious but unchartered difficulties occur in the event that the benefited property is divided and its constituent parts come to be held by different people.¹⁷

¹¹ For the differences, see para 10.22.

¹² See further para 10.20.

¹³ For the distinction between feudal burdens and neighbour burdens, see paras 1.9 to 1.12.

¹⁴ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 18(1), (7)(b)(ii), discussed in Scot Law Com No 168 para 4.37.

¹⁵ *Ibid* s 17(1).

¹⁶ For the praedial rule, see paras 2.9 to 2.18.

¹⁷ For this problem, see further para 10.34. A superiority could not be divided.

10.15 Finally, the most effective remedy for checking breaches of pre-emptions and redemptions is irritancy. But irritancy in respect of feudal burdens was abolished on 9 June 2000,¹⁸ and the abolition of irritancy for non-feudal burdens was recommended earlier in this report.¹⁹ It will remain possible, however, to reduce dispositions granted in breach of pre-emptions and redemptions.²⁰

10.16 **(4) Lease.** Options to acquire are sometimes found in leases. While it has been held that an option in favour of the tenant does not run with the land,²¹ an option in favour of the landlord – to acquire the lease and hence bring it to an end²² – is probably enforceable in a question with successors. Where the option is a right of pre-emption it is subject to section 9 of the Conveyancing Amendment (Scotland) Act 1938.²³

10.17 **(5) Reversion Act 1469 (c 3).** The Reversion Act of 1469 is in the following terms:

“ITEM As tuiching the new Inuentionis of selling of landis be chartir and sesing and takin again of Reuersionis And It happin the byare to sell again the samyn land to ane vthir persone It is now sene expedient in this present parliament and according to law and conscience that the sellare sall haue Recourse to the samyn landis sauld be him vnder lettre of Reuersione to quhatsumeir handis the said lettre cummys payand the mone and schawand the Reuersione and haue sic priuelege and fredome aganis the personis that haldis the said landis as he suld haue again the principale first byare.”

The 1469 Act needs to be read together with the Registration Act 1617 (c 16), which provides for the recording of reversions in the Register of Sasines. In 1469 reversions were evidently “new Inuentionis”. The effect of the 1469 Act is that reversions run with the land provided they have been registered under the Act of 1617. The holder of the reversion is to have “sic priuelege and fredome” against a future owner (“the personis that haldis the said landis”) as he had against the original grantee (“the principale first byare”). In effect, the 1469 Act creates a real burden in favour of a person, for there is no requirement that the reversioner hold a benefited property.²⁴ This Act was designed for wadsets, and was later used to protect the reversionary interest of a creditor under a security constituted by an *ex facie* absolute disposition. But while the Act has tended to be discussed in the context of security rights,²⁵ there is nothing in its wording to prevent its use for a wider category of reversions arising on sale. The Act is now subject to section 12 of the Land Tenure Reform (Scotland) Act 1974, mentioned above, which limits new reversions to 20 years.

¹⁸ The date on which the Abolition of Feudal Tenure etc. (Scotland) Act 2000 received royal assent. Irritancy is abolished by s 53.

¹⁹ Paras 4.71 to 4.73.

²⁰ *Matheson v Tinney* 1989 SLT 535; *Roebuck v Edmunds* 1992 SLT 1055. This is an application of the rule against offside goals. Since the pre-emption or redemption appears on the register, an incoming purchaser is treated as being in bad faith.

²¹ *Bissett v Magistrates of Aberdeen* (1898) 1 F 87. However, if the new landlord knows of the option, he will be affected on the basis of the rule against offside goals: see *Davidson v Zani* 1992 SCLR 1001.

²² Functionally this is much the same as a superior re-acquiring the *dominium utile*.

²³ Discussed at para 10.11 above. This is because s 9 applies “in the case of any right of pre-emption ... of an interest in land” (s 9(3)). A lease is an interest in land.

²⁴ For real burdens without benefited properties, see generally part 9.

²⁵ Mackenzie, *Observations on the Acts of Parliament* (1686) p 67; Erskine II.8.9. But compare Craig *Jus Feudale* II.6.1 and Stair I.14.4.

10.18 Of the five methods of constituting options to acquire, methods (1) and (2) are unexceptionable and will not be discussed further here. Parties are generally free to contract as they wish, and there is no reason why the obligations arising under such a contract should not be secured by a standard security. The use of real burdens (method (3)) raises difficult issues which are discussed below. We also return, although much more briefly, to pre-emptions in leases.²⁶ Finally, the Reversion Act 1469 (method (5)) should presumably be repealed.²⁷ It has been unnecessary since 1970, when securities constituted by *ex facie* absolute dispositions ceased to be competent. Their replacement, the standard security, is a right in security in the strict sense, ownership remaining with the debtor. This means that there is no ownership in the creditor which could be the subject of a reversion. In practice the 1469 Act has been forgotten. We would not wish it to be revived. Outside the field of securities, reversions are potentially too oppressive to be elevated into real rights.²⁸ On consultation there was no opposition to this proposal. Accordingly we recommend that

79. (a) The Reversion Act 1469 (c 3) should be repealed.

(b) Repeal should not affect any right of reversion already constituted as a real right.

(Draft Bill s 84)

Redemptions, reversions and other options

10.19 In this and the following section we consider whether it should continue to be possible for options to acquire to be constituted as real burdens. The next section²⁹ considers rights of pre-emption. In this section we are concerned with other options, that is to say, with options which are triggered other than by the actions of the owner of the property.³⁰

10.20 Options falling into this category are potentially oppressive in that the owner has no control over when, or whether, the option is to be exercised. A person may lose property without his consent and, in some cases, without adequate compensation. This is private compulsory purchase. It is one thing for an owner to agree to redemption by contract. Then there is an initial act of consent and, sometimes, the payment of money. But it is another thing entirely for a successor of that owner to be bound. This does not seem an appropriate use of real burdens. It may even be challengeable as repugnant to ownership,³¹ although the real burden has been upheld in two reported cases, both in the context of a grant in feu.³² However, doubt was expressed as to whether successors would be bound if the repurchase price was merely “elusory”.³³ Since 1974 redemptions have been restricted to a duration of 20 years.³⁴ In the discussion paper we suggested that options to acquire (other than pre-emptions) should cease to be capable of being constituted as real burdens.³⁵ Options would thus remain in the realm of contract law, supported, if need be, by the grant of a standard

²⁶ Para 10.35.

²⁷ Consequential amendments will be necessary to the Registration Act 1617. A minor but related act which should also be repealed is the Redemptions Act 1661. See sched 9 of the draft bill.

²⁸ Para 10.20.

²⁹ Paras 10.21 ff.

³⁰ For this distinction, see para 10.6.

³¹ Para 2.22.

³² *Strathallan v Grantley* (1843) 5 D 1318; *McElroy v Duke of Argyll* (1902) 4 F 885.

³³ *McElroy v Duke of Argyll* (1902) 4 F 885 at p 889 per Lord Kyllachy.

³⁴ Land Tenure Reform (Scotland) Act 1974 s 12.

³⁵ Scot Law Com DP No 106 para 8.21.

security or, in appropriate cases, by a right of pre-emption. The original parties would remain bound, but successors would be unaffected. Consultees generally agreed. Our formal recommendation is that

- 80. It should no longer be possible for a right of redemption or reversion or other option to acquire (but not including a right of pre-emption) to be constituted as a real burden.**

(Draft Bill s 3(5))

Rights of pre-emption

10.21 **Contract or real burden?** After the abolition of the feudal system, the standard real burden available for rights of pre-emption will be the neighbour burden.³⁶ Further, as the law now stands the duration of such a burden would be subject to section 9 of the Conveyancing Amendment (Scotland) Act 1938, which limits its holder to a single opportunity to accept or refuse an offer to acquire. The question is whether more needs to be done. The choice lies between leaving the law as it is, or barring the use of real burdens altogether so that pre-emptions are in future confined to contracts. Both produce similar results. Issues with successors become important only when the affected property is transferred; but since transfer will usually induce an offer back to the holder of the right, a right of pre-emption will in most cases be extinguished by section 9 before the property reaches the hands of a successor. In other words, the effect of section 9 has been to reduce the real burden to little more than a contract.³⁷

10.22 Yet differences remain. There can sometimes be transfer without an offer back to the holder of the pre-emption; and while a contractual right of pre-emption would then be defeated,³⁸ a real burden would survive and be enforceable against the new owner. There are at least three cases in which this might occur:

- (i) *Sale without offering back.* The property might be sold without first offering it back to the holder of the right of pre-emption. The pre-emption, in other words, is not complied with. This is more common than might be supposed.³⁹ But even where the holder is approached, the approach may fall short of the formal offer required by section 9 as a condition of extinguishing the pre-emption.⁴⁰ Hence a pre-emption in the form of a real burden would survive and be enforceable against the new owner.
- (ii) *Gift.* Pre-emptions are triggered by sale but not, or at least not usually, by gift. Hence if property is given away, whether during the lifetime of the owner or as a result of his death, the pre-emption does not apply. The donee or legatee would take the property free of a pre-emption which was contractual in nature, although not of one which had been constituted as a real burden.

³⁶ In theory, however, there are other possibilities, most notably a community burden or conservation burden.

³⁷ Halliday, *Opinions* p 421.

³⁸ Although if (i) the transfer was in breach of the pre-emption and (ii) the transferee was gratuitous or in bad faith, the conveyance could be reduced on the principle of offside goals. See para 10.8.

³⁹ For two quite recent examples, see *Matheson v Tinney* 1989 SLT 535 and *Roebuck v Edmunds* 1992 SLT 1055.

⁴⁰ Para 10.36.

- (iii) *Sale under compulsion.* In *Ross & Cromarty District Council v Patience*⁴¹ it was held by the House of Lords that the exercise by a tenant of a statutory right to buy under the Housing (Scotland) Act 1987 was not a sale which triggered a right of pre-emption. In their Lordships' view, pre-emption was concerned only with voluntary sales. Here the sale was involuntary. Hence the council could sell to the tenant without having first to offer the property back to the holder of the pre-emption right. Although defeated on this occasion, the pre-emption would presumably survive for another day and would be triggered when the former tenant came to sell.⁴²

10.23 Arguments in favour of contract. We have already proposed that in future rights of redemption and other options to purchase should be created as contracts only and not as real burdens.⁴³ Two arguments in particular support the same conclusion for rights of pre-emption.

10.24 Simplicity. Pre-emptions are real burdens in name alone. By and large they operate only as contracts, whatever the outward form. It would simplify the law, without changing much in practice, if it ceased to be competent to create pre-emptions as real burdens. This would be the logical culmination of the reform process begun in 1938 and continued in 1970 and 1974.⁴⁴

10.25 Over-availability. For as long as pre-emptions can be constituted as real burdens, they are too easy to use. A pre-emption is created by a short clause in a deed which is already being drawn up for other reasons. The temptation to add a pre-emption can be hard to resist, and yet in practice pre-emptions are rarely exercised. In the result, titles are often burdened for no very good reason. In parts of rural Scotland rights of pre-emption are inserted into conveyances almost as a matter of style. The law ought to be more demanding. If a seller could be sure of bringing in successors only by securing his pre-emption with a standard security,⁴⁵ pre-emptions would be used more sparingly and with more regard to when they were needed.

10.26 Arguments in favour of real burden. But there are also counter-arguments which support the continuing value of using real burdens as a means of creating rights of pre-emption.

10.27 Acceptable on policy grounds. Over-use by superiors has given pre-emption a bad name. On the whole it is not deserved. Rights of pre-emption can be useful for a seller without being oppressive to a buyer. An estate owner may be more inclined to sell if there is an opportunity for reacquisition, and the abolition of pre-emption might have the effect of making less land available, particularly in rural Scotland. This potential benefit to the seller is achieved without much in the way of burden on the buyer. A right of pre-emption, the Lands Tribunal has observed, "is not so much burdensome as inconvenient".⁴⁶ The owner

⁴¹ 1997 SC(HL) 46.

⁴² McDonald, *Conveyancing Manual* para 33.13. By contrast, a sale by a heritable creditor in enforcement of a security may perhaps be classified as a voluntary sale: see Halliday, *Opinions* pp 477-9.

⁴³ Para 10.20.

⁴⁴ Important amendments were made to s 9 of the Conveyancing Amendment (Scotland) Act 1938 by s 46 of the Conveyancing and Feudal Reform (Scotland) Act 1970 and by s 13 of the Land Tenure Reform (Scotland) Act 1974.

⁴⁵ Para 10.9.

⁴⁶ *Banff and Buchan District Council v Earl of Seafield's Estate* 1988 SLT (Lands Tr) 21 at p 22K.

can still sell. He will still receive the market value. The only restriction is that he may not be able to choose the purchaser. Many obligations recognised as real burdens or servitudes are far more burdensome than this. Pre-emption might perhaps be oppressive if it was of perpetual duration, but that has not been the law since 1938.

10.28 Pre-emptions are well known in other countries, although they do not always run with the land.⁴⁷ In the United States, rights of first refusal are valid provided that they are reasonable, reasonableness being measured by reference to the following criteria:⁴⁸

“If the right to purchase is on the same terms and conditions as the owner may receive from a third party, if the procedures for exercising the right are clear, and if the period within which it must be exercised is relatively short, the right of first refusal is valid unless the purpose is not legitimate.”

A valid right of first refusal runs with the land without limit of time.

10.29 *Better than the alternative.* It is not certain that contractual rights of pre-emption would be an improvement on real burdens. A contractual right can be made to do much of the work of real burdens, but only if its terms are more severe. In the absence of real burdens, there would probably be a stiffening of the terms of contractual options. Redemptions might be preferred over pre-emptions; or, where pre-emptions were used, the option might be triggered by gift as well as by sale. This last point is important. A true pre-emption strikes only at sale, and donation is unaffected. The only restriction in a pre-emption is that, if an owner wishes to sell, he must give first refusal to the holder of the right. But if he wants to give the property away he is free to do so. In this way a person who wishes only to make a gift is not forced to make a sale; and pre-emption does not prevent property from being handed down a family. Here real burdens protect the interests of both parties. The owner can make the gift; and the holder of the pre-emption retains his right for use against the donee, should the donee wish to sell. By contrast, a contract could protect the holder only at the cost of extending the pre-emption to gift, for otherwise a gift would defeat the pre-emption.

10.30 **Evaluation.** In the discussion paper we suggested that there was merit in both sets of argument, and we invited the views of consultees. A clear majority of consultees was in favour of the retention of pre-emptions as real burdens, including the Law Society of Scotland, a working party of members of the Society of Writers to the Signet, the Society of Local Authority Lawyers and Administrators in Scotland, the Royal Institution of Chartered Surveyors in Scotland, and a number of local authorities. Among the reasons mentioned was the importance of pre-emption for large estates, and for local authorities in selling houses which have been specially adapted for the elderly or disabled.⁴⁹ We accept the views of the majority, and recommend that

81. It should continue to be possible for a right of pre-emption to be constituted as a real burden.

(Draft Bill s 3(5))

⁴⁷ See eg Gray, *Elements* p 146 (England and Wales); G W Hinde and D W McMorland, *Butterworths Land Law in New Zealand* (1997) paras 2.142 ff; Silberberg & Schoeman, *Property* pp 57 ff (South Africa); W L Hargrave (1987-8) 48 *Louisiana Law Rev* 456 at pp 472-4.

⁴⁸ American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, p 445.

⁴⁹ See Housing (Scotland) Act 1987 s 64(4).

Reform of pre-emptions

10.31 If pre-emption is to survive as a real burden, some reform is necessary of the manner in which it is exercised. In this section we consider two issues which affect all pre-emptions. In the sections that follow we then examine the position of (i) rights of pre-emption which are subject to section 9 of the Conveyancing Amendment (Scotland) Act 1938 and (ii) other rights of pre-emption.

10.32 **Identification of holder.** The holder of a real burden is the owner of the benefited property;⁵⁰ and with pre-emptions (unlike other real burdens)⁵¹ there can be no question of extending rights to non-owners. Only one person can buy the property, and so if disputes are to be avoided a right of pre-emption can only be held by one person. That person should be the owner of property and not his tenant. For much the same reason, if the benefited property is owned in common, the pre-emption should be regarded as held by all of the owners acting together, and no single owner should be able to exercise the right without the consent of the others.⁵² Where the benefited property is in the course of changing hands, the right, at any one time, should be held by the seller or by the purchaser but not by both. The shift from seller to purchaser would occur on acceptance of delivery of the disposition.⁵³

10.33 We recommend that

82. (a) **Notwithstanding recommendation 16, a right of pre-emption constituted as a real burden should be exercisable only by the owner of the benefited property.**
- (b) **If the benefited property is owned in common, each owner must concur in the exercise of the right.**
- (c) **“Owner” has the meaning given by recommendation 100.**
(Draft Bill s 7(4))

10.34 **Division of the benefited property.** Similar issues arise if the benefited property comes to be divided.⁵⁴ Our proposed solution, recommended earlier, is that the right of pre-emption should attach only to one part of the former whole.⁵⁵ If the break-off conveyance were silent, this would be the part retained by the granter; but the conveyance could elect for the part being transferred. What would not be possible would be for the right to attach both to the part being transferred and also to the part being retained.

Pre emptions subject to section 9 of the 1938 Act

⁵⁰ Para 4.4.

⁵¹ Paras 4.4 to 4.14.

⁵² In the draft bill this is achieved by the requirement, in s 7(4), that a right of pre-emption may be exercised only by “the” owner of the benefited property. For the significance of this wording, see para 13.6.

⁵³ Paras 13.3 to 13.5.

⁵⁴ Scot Law Com DP No 106 paras 8.42 to 8.47. The issue did not arise with feudal real burdens, because superiorities are indivisible.

⁵⁵ Paras 4.51 to 4.57.

10.35 Section 9 of the Conveyancing Amendment (Scotland) Act 1938 was mentioned earlier.⁵⁶ In cases where it applies it limits rights of pre-emption to a single opportunity. If the holder declines to buy, the right is immediately extinguished. There is no second chance. Originally section 9 applied only to pre-emptions created as feudal real burdens, but in 1974 it was extended to non-feudal burdens and to pre-emptions created in leases.⁵⁷ Since 1974, therefore, section 9 has in effect applied to all pre-emptions created as title conditions.⁵⁸ But the change in 1974 was not retrospective, so that today section 9 applies only to

- pre-emptions created as feudal burdens, regardless of date
- pre-emptions created as title conditions (other than feudal burdens) after 1 September 1974.

10.36 **Problems of timing.** In its current form, section 9 creates problems of timing for the person seeking to sell his property. A right of pre-emption is extinguished by section 9 if, and only if, “an offer has been made” to the holder of the right. Read together with a typical clause of pre-emption,⁵⁹ this means a written offer on the same terms and conditions as was offered by a third party. The holder then has 21 days to accept or refuse. This timescale is troublesome in practice. The pre-emption offer cannot be sent until the property has been marketed, a closing date set, and offers received. The seller must then wait 21 days. If, at the end of that period, the holder of the pre-emption decides not to buy, the owner may find that the other interested parties have lost patience and that the property requires to be re-marketed. It is hardly surprising that, in practice, the owner writes to the holder before the property is marketed in order to discover his intentions. If the holder indicates that he does not wish to buy, the property is marketed and sold in the normal way. Quite often no formal offer is ever made to the holder, with the result that section 9 is not satisfied and the pre-emption survives the sale.

10.37 Our discussion paper contained proposals to alleviate this problem.⁶⁰ The pre-sale approach was to be put on a statutory basis. If the pre-emption holder indicated that he did not wish to buy, the pre-emption was extinguished. If, on the other hand, he did wish to buy, the price and conditions would be fixed by agreement or, failing agreement, by an arbiter. An incidental advantage was to avoid the situation where third parties offer for property which is not genuinely available for sale.

10.38 While welcoming the idea of a pre-sale approach to the pre-emption holder, consultees expressed reservations about the price being fixed by an arbiter. The only true test of value, it was said, was the price which the market would pay. A price fixed by an arbiter might well be lower. Further, arbitration could be slow and expensive. Thus proposals which were designed to help the owner affected by a pre-emption would, in many cases, work to his disadvantage. We are persuaded by these criticisms. If the current practice of testing the market causes delay, it at least has the merit of producing an accurate price. The key reform needed is to eliminate that delay in cases where it is not necessary,

⁵⁶ Para 10.11.

⁵⁷ Conveyancing Amendment (Scotland) Act 1938 s 9(3) (inserted by the Land Tenure Reform (Scotland) Act 1974 s 13). This provision applies to any written pre-emption “in favour of any person” and so could in theory apply in cases where there was no benefited property or even to contractual rights. But the provision is of value only where the pre-emption is constituted as a real right.

⁵⁸ For the meaning of title conditions, see paras 6.28 to 6.36.

⁵⁹ For a typical clause, see Halliday, *Conveyancing* vol II, para 32-80.

⁶⁰ Scot Law Com DP No 106 paras 8.35 to 8.41.

that is to say in cases where the pre-emption holder is known not to wish to buy. That can be achieved by use of a pre-sale approach. It would work in this way. A person contemplating sale could approach the pre-emption holder to ascertain his intentions. If the holder did not wish to buy, he could sign an undertaking to that effect. A statutory form would be provided.⁶¹ The undertaking would be time-limited. If a sale took place within that time period, the right of pre-emption would be extinguished, on registration of the conveyance. But if no sale took place the undertaking would expire and the pre-emption remain in place as before. For the period of its duration the undertaking would bind successors in title of the holder. It could, but need not, be registered. In practice the holder might often wish to qualify the undertaking in some way, and this would be allowed. A typical qualification would be that the holder would not exercise the right if the property was sold for more than a stated figure.

10.39 Reform of section 9 procedure. Under our proposals the offer-back procedure currently in section 9 would be necessary only in cases where the holder declined to sign a pre-sale undertaking; and since pre-emptions are seldom exercised in practice, it is to be hoped that such cases would be relatively uncommon. There are some difficulties with the wording of section 9, and the section might usefully be repealed and re-enacted in simpler language. At the same time the opportunity could be taken to deal with what, in modern practice, has become a new difficulty. Rights of pre-emption typically provide that the offer-back to the holder is to be made at the same price and on the same conditions as the original offer which the seller wishes to accept.⁶² That traditional formula was acceptable in the days when offers were only a few lines long, and were accepted *de plano*. Today offers are made on the basis that they will not be accepted without qualification. Yet qualification is not provided for by section 9. So either the pre-emption holder must accept the offer, as it stands, or lose the option to purchase forever. The solution does not lie in allowing a pre-emption holder to qualify the offer which is made to him. That would cause further, and unacceptable, delay. But we think that something can be done to ensure that the offer which is made is one which could reasonably be accepted without qualification. In future the seller should not simply repeat in his offer-back all the terms contained in the offer made to him. Rather he must include only such terms as are reasonable in the circumstances, by which is meant terms which a reasonable purchaser, properly advised, would be inclined to accept. In appropriate cases he could add terms of his own. An offer which was found to be unreasonable would not extinguish the right of pre-emption. To avoid disputes long after the event, however, the terms of an offer would be deemed reasonable unless, during the time fixed for acceptance (usually 21 days), the pre-emption holder intimated to the seller that they were, in his view, unreasonable. In the absence of such intimation, the issue could not be re-opened; and, whether the offer was accepted or rejected, the pre-emption would be extinguished and could be deleted from the Land Register.

10.40 Recommendation. We recommend that

- 83. (a) The holder of a right of pre-emption should be able to give an undertaking, in a statutory form and with or without qualifications, that he will not exercise the right during a specified period; and if during that period a conveyance of the property in implement of a sale is registered, the pre-emption should be extinguished.**

⁶¹ It is set out in sched 5 of the draft bill.

⁶² For a case where a cap had been placed on the price, see *Grampian Joint Police Board v Pearson* 2000 GWD 15-610.

(b) An undertaking so given should be binding on any successor of the holder and should be capable of registration.

(c) Section 9 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed and re-enacted; and where an offer is made under that provision to the holder of a right of pre-emption, the offer must be in such terms as are reasonable in the circumstances.

(d) For the purposes of (c), the terms of an offer should be deemed to be reasonable unless, within the period set for acceptance, the holder of the right of pre-emption intimates to the person making the offer that he considers the terms unreasonable.

(e) This recommendation applies to any right of pre-emption constituted as a title condition and

(i) originally created in favour of a feudal superior, or

(ii) created in a deed executed after 1 September 1974.

(Draft Bill ss 78 to 80)

Other pre-emptions

10.41 Pre emptions not currently subject to section 9 of the 1938 Act will continue, in principle, to operate every time property is sold, but the position is improved by proposals made elsewhere in this report. Thus many such pre-emptions rest on implied enforcement rights and will be extinguished after ten years except where the holder registers a notice of preservation.⁶³ He is unlikely to do so unless the pre-emption is of special value. Those pre-emptions which survive the ten-year period can be extinguished by a notice of termination 100 years after first creation,⁶⁴ although with the possibility of renewal by application to the Lands Tribunal.⁶⁵ Finally, where a sale takes place without the property being offered back in the required manner, negative prescription will begin to run and the pre-emption will be extinguished after five years. Contrary to the usual rule⁶⁶ (but consistently with the approach taken by section 9) we recommend that

84. In the application of the five-year negative prescription to a right of pre-emption constituted as a real burden, a breach in respect of any one sale should, after the expiry of the prescriptive period, result in the complete extinction of the right.

(Draft Bill s 16(2))

This means that default in the case of one sale would lead to the extinction of the right in respect of all future sales. Time before the commencement of the proposed legislation

⁶³ Paras 11.72 to 11.79. These are neighbour burdens. In practice a right of pre-emption would not be imposed as a common scheme burden.

⁶⁴ Consultees were divided on the suggestion (Scot Law Com D P No 106 para 8.50) that a shorter period might apply for pre-emptions. We do not pursue it further here.

⁶⁵ Paras 5.26 ff.

⁶⁶ For which see paras 5.70 and 5.71.

would count towards the prescriptive period, in the usual way,⁶⁷ so that an unchallenged breach of a pre-emption occurring more than five years before the appointed day would result in the extinction of the pre-emption on that day.

Statutory pre-emptions and redemptions

10.42 **Churches.** In responding to our discussion paper on the abolition of the feudal system the Church of Scotland asked us to consider the repeal of two statutory pre-emptions affecting churches.⁶⁸ These were

- section 22(2)(h) of the Church of Scotland (Property and Endowments) Act 1925, which gives the relevant local authority a right of pre-emption in respect of burgh churches at a price restricted, in the usual case, to the amount spent by the General Trustees in the previous 40 years on the repair, enlargement or renewal of the church; and
- section 9(3) of the Church of Scotland (Property and Endowments) (Amendment) Act 1933, which gives a right of pre-emption in respect of Parliamentary churches and manse to the owner of adjoining land in a case where (i) his predecessor in title made the original grant for the church or manse and (ii) that grant was made without valuable consideration.

Both provisions are said to be difficult to operate in practice. In relation to the first, it is not suggested that there be repealed the standard right of pre-emption, at market value, which is given to local authorities by section 22(3) of the 1925 Act. The second provision applies only to a small number of churches and manses,⁶⁹ and does not confer a right to buy at undervalue. On consultation there was no opposition to the repeal of the first provision, and only two dissenting voices in relation to the repeal of the second.⁷⁰ In those circumstances we feel able to recommend that

85. There should be repealed -

(a) section 22(2)(h) of the Church of Scotland (Property and Endowments) Act 1925 (including any rights of pre-emption created under that provision), and

(b) section 9(3) of the Church of Scotland (Property and Endowments) (Amendment) Act 1933.

(Draft Bill s 81 and sched 9)

10.43 **Other examples.** The statute book contains other examples, both of pre-emptions and redemptions. Land acquired for compulsory purchase but which turns out to be

⁶⁷ Para 5.69.

⁶⁸ A third statutory pre-emption, contained in s 37 of the Church of Scotland (Property and Endowments) Act 1925, was repealed by s 49 and schedule 11, Part III of the Conveyancing and Feudal Reform (Scotland) Act 1970.

⁶⁹ Listed in sched 10 of the 1925 Act and s 15 of the 1933 Act.

⁷⁰ North Lanarkshire Council and the Scottish Landowners' Federation.

superfluous is subject to a right of pre-emption or, if the land is not sold within a certain period, to a right of redemption without payment.⁷¹ If land acquired under the Small Holdings Act 1892 ceases to be used for agricultural purposes, there is a right of pre-emption in favour of the local authority, or the owner of the estate from which the land was taken, or the owner of adjoining land.⁷² Surplus land acquired between 1919 and 1921 by the Board of Agriculture for Scotland under the Land Settlement (Scotland) Act 1919 must be offered back to the person from whom it was purchased or his successor before it can be sold to anyone else.⁷³ When a road is stopped up, the solum vests in the owner or owners of the land which adjoins the road.⁷⁴ There are reversions provided for in the Entail Sites Act 1840 and the School Sites Act 1841. With the exception of the last two statutes, which are considered separately below, we have no proposals for further repeal or amendment.

The School Sites Act 1841

10.44 The purpose of the School Sites Act 1841⁷⁵ was to facilitate the grant of land out of private estates for the building of schools and schoolhouses. Originally these were voluntary schools, privately funded, and the land was often given without payment. Legislation was necessary because sometimes the land was entailed, and the heir of entail in possession was not free to grant the necessary conveyance. The Act provided for a statutory form of conveyance.⁷⁶ The first grantees were private individuals who held as trustees, but in time their functions were taken over, first by education boards, under the Education (Scotland) Act 1872,⁷⁷ and later by education authorities. Today sites originally granted under the School Sites Act are held by local councils in their capacity as education authorities. Following school closures, some of the sites have been sold to private individuals.

10.45 The 1841 Act applied to England and Wales as well as to Scotland, but later the legislative history diverged. The Act was repealed, for Scotland only, by the Education (Scotland) Act 1945, with effect from 2 July 1945.⁷⁸ However, since the repeal was declared not to affect

“the title of an education authority to any property vested in or held in trust for them at the appointed day”⁷⁹

it has generally been assumed that the statutory reversion, discussed below, survived the repeal. Later legislation took this for granted.⁸⁰ The 1841 Act continues to apply in England and Wales, although its effect has been modified by the Reverter of Sites Act 1987.

⁷¹ Lands Clauses Consolidation (Scotland) Act 1845 ss 120 and 121.

⁷² s 11. This provision also applies in England and Wales.

⁷³ Land Settlement (Scotland) Act 1919 s 6(5).

⁷⁴ Roads (Scotland) Act 1984 s 115. This is subject to “any prior claim of any person by reason of title”.

⁷⁵ As modified and extended by the School Sites Acts of 1844, 1849 and 1852.

⁷⁶ School Sites Act 1841 s 10. Contrary to the view expressed to us by a working party of members of the Society of Writers to the Signet, the land was generally conveyed. If that had not been so, there would have no need of a statutory reversion. The decision relied on by the WS Society (*Angus Council and Strathmore Estates (Holdings) Ltd v Duncan* 25 November 1998, Forfar Sheriff Court, unreported) sheds no light on conveyancing practice under the Act. No doubt, of course, there were cases where, for one reason or another, no conveyancing ever took place, but such cases would then lie outside the ambit of the 1841 Act.

⁷⁷ Particularly ss 23, 24, 38 and 39.

⁷⁸ s 88 and sched 5. For commencement, see The Education (Scotland) Act 1945 (Appointed Days) (No 1) Order 1945 (SR&O 1945/787).

⁷⁹ Education (Scotland) Act 1945 s 88 (proviso (ii)).

10.46 **Statutory reversion.** In terms of the Act the site was to be held by the grantees and their successors only for as long as it was used for its original purpose. By a proviso to section 2

“upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate ... as fully to all intents and purposes as if this Act had not been passed, any thing herein contained to the contrary notwithstanding.”

One reading of this proviso is that, in the event of cessation of use, there is an automatic reversion of the land, without the need for any conveyancing. That would mean that, as soon as school doors are closed for the last time, ownership passes from the education authority to the person entitled to the reversion. In *Houldsworth v School Board of Cambusnethan*,⁸¹ one of only two Scottish cases on the Act, the pursuer successfully concluded for

“declarator that the whole right, title and interest in the said piece of land conveyed in 1858 had reverted to the first named pursuer and now belonged to him.”

However, much more recently, in *Hamilton v Grampian Regional Council*,⁸² the First Division took the view that the person in right of a reversion could not become owner without registration in the property register. In the absence of registration his right was merely personal. According to Lord President Hope:⁸³

“The operation of the reversion, by force of statute, is not enough to transfer the real right in the property to the grantor. Its effect is to enable the grantor, upon the basis of the personal right given to him by the reversion, to enforce that right against all parties acting in conflict with it, to challenge the deeds of others and to obtain a recorded title to the property by the registration of his interest as proprietor in the Register of Sasines.”

The precise nature of this personal right was not explored. In particular it is unclear whether the statutory reversion is itself a conveyance, which might then be used as the basis of a notice of title, or whether, like ordinary reversions,⁸⁴ it is no more than an entitlement to the grant of such a conveyance from the education authority.

10.47 Another interpretative difficulty concerns the identity of the person who is to receive the reversion.⁸⁵ The site is to go back to the granter, of course, but it is unclear whether this is in a personal capacity or in his capacity as owner of the larger subjects from which the site was originally taken. Since in practice the granter is always dead, the issue resolves into whether the reversion is in favour of his heirs or of his successors as owners of the larger subjects. In other words, the question is whether the reversion is personal or praedial. The

⁸⁰ Education (Scotland) Act 1980 ss 22(2), (3) and 106.

⁸¹ (1904) 7 F 291.

⁸² 1995 GWD 8-443 affd 1996 GWD 5-277.

⁸³ At p 17 of the transcript.

⁸⁴ For which see para 10.3.

⁸⁵ See Law Com No 111, paras 29 - 37.

position adopted in England and Wales is that the reversion is praedial.⁸⁶ However, if the site was free-standing and not part of other property belonging to the granter, the reversion is personal and runs in favour of heirs.⁸⁷ The rule in Scotland is probably the same. The issue did not arise for decision in the *Houldsworth* case because the claimant was both the heir and also the current owner of the larger subjects; and while the judgments in that case can be read as favouring a personal reversion, a majority⁸⁸ of the First Division in *Hamilton* concluded that the reversion arising under the 1841 Act is praedial in character, except where there is no *praedium* to which it can attach. An obvious difficulty with this approach is that the larger subjects may have become fragmented, so that it is unclear who is to benefit from the reversion. The answer may depend on the extent of the fragmentation. If the original estate has retained its identity, the site would presumably revert to the estate, notwithstanding that a great deal of other land had been sold. The deputy judge in *Marchant v Onslow* gave this example:⁸⁹

“If one acre of a 200-acre estate were the subject of a grant under section 2, and thereafter the estate owner conveyed, say, three 5-acre plots for the purpose of building and selling off a number of houses, it seems to me that, if the site were to revert, a practical application of section 2 would result in the site reverting in full to the owner of the balance of the 184 acres on the basis that these are in reality the lands the estate referred to in the proviso.”

The position would be different if the 184 acres had been sold for housing. Then there would be no surviving estate, and no obvious destination for the reversion. What would happen then is unclear. The owner of each house might receive a one six hundredth *pro indiviso* share in the site. Or perhaps the site would revert only to those whose property was contiguous. The point has never been decided. In Scotland the feudal system has probably served to preserve the identity of the original estate, for a person can feu most or all of his property while still remaining a titular proprietor. In many cases, ownership of the “lands of X” signifies a great deal more *dominium directum* than *dominium utile*.⁹⁰

10.48 Extinction of right of reversion. Reversions are often not claimed. Partly this is because there may be doubt as to where entitlement lies. Partly too it is because the creditor in a reversion may be unaware of his rights, for only the title to the *burdened* property is likely to refer to the 1841 Act. In practice a school is often closed and the site sold or used for another purpose without any claim being made. The fate of the reversion is then uncertain. In some circumstances it might be extinguished. But if it survives, its holder could make a claim many years after the original sale, and take the benefit of any improvements made on the site. There seem four possible ways in which a right of reversion might be extinguished.

10.49 (i) *Site held privately on 2 July 1945.* When the 1841 Act was repealed in 1945, the statutory reversion was saved only in respect of sites vested in or held in trust by an education authority as at that day. Consequently, any site previously sold by an education authority ceased to be subject to the reversion.

⁸⁶ *Marchant v Onslow* [1995] Ch 1.

⁸⁷ *Re Cawston's Conveyance* [1940] Ch 27.

⁸⁸ It was accepted on both sides that the reversion was praedial, but Lord President Hope expressed reservations about this approach (at p 21 of the transcript).

⁸⁹ [1995] Ch 1 at p 8 D-E.

⁹⁰ The pursuer in the *Hamilton* case was described as heritable proprietor of the lands and estates of the Marquisate, Earldom and Lordship of Huntly.

10.50 (ii) *Site sold prior to 2 July 1945 under section 14 of the 1841 Act.* Section 14 of the 1841 Act empowered trustees – and later education authorities – to sell or exchange the original site for another “more convenient and eligible site”. Where this was done, it seems that the reversion applied neither to the original site nor to its replacement.⁹¹ This gave education authorities an easy means of defeating the reversion. However, section 14 was repealed in 1945 along with the rest of the Act, and its extinctive effect for pre-1945 sales merely duplicates the extinction already described at (i).

10.51 (iii) *Site sold prior to 1 January 1947 under section 36 of the Education (Scotland) Act 1872.* Section 36 of the 1872 Act authorised school boards to sell the site of discontinued schools. Such a sale probably extinguished the reversion.⁹² Section 36 was not repealed until 1 January 1947, thus extending by 18 months the extinction described at (i). Successor legislation assimilated sites held under the 1841 Act to educational endowments, and removed any suggestion of automatic extinction by making express, if limited, provision for bringing the reversion to an end.⁹³

10.52 (iv) *Prescription.* A right of reversion is a personal right, but its juridical status is otherwise unclear.⁹⁴ There are two broad possibilities. Either a reversion is a right to receive a conveyance, or it has itself the status of a conveyance. The choice affects the operation of prescription.

- If a reversion is a conveyance, it can be extinguished by positive prescription but not by negative. The effect of positive prescription is to render a title “exempt from challenge”,⁹⁵ and a rival conveyance is a “challenge” to the title. Hence if a person has possessed for 10 years on the basis of a recorded title which is not *ex facie* invalid, the title is unchallengeable and the reversion is defeated. A possible difficulty is that a title which referred to the 1841 Act, whether directly or by incorporation of a prior deed which so referred, might be insufficient to override the reversion. To be sure of positive prescription it would be necessary for the disposition from the education authority to a third party purchaser to omit any mention of the Act. A second difficulty is that positive prescription does not operate in respect of Land Register titles unless indemnity is excluded.⁹⁶ A title which was registered with full indemnity would be vulnerable to rectification by the holder of the reversion if the proprietor in possession was in bad faith.⁹⁷ Negative prescription is excluded because a right “to take any steps necessary for making up or completing title to any interest in land” is imprescriptible.⁹⁸

⁹¹ Although not expressly decided, this point was taken for granted both in *Houldsworth* (per Lord Kyllachy at p 296) and in *Hamilton* (per Lord Johnston at p 23 of the transcript). In the case of England and Wales, provision is made by s 6(2) of the Reverter of Sites Act 1987.

⁹² That at least was the view expressed in *Hamilton* by the Lord President (at p 8 of the transcript) and by Lord Johnston (at p 26 of the transcript).

⁹³ The successor legislation was s 117 of the Education (Scotland) Act 1946, later replaced by s 119 of the Education (Scotland) Act 1962. The current provision, described in para 10.53, is s 106 of the Education (Scotland) Act 1980. This provision withdraws schools from the category of educational endowments, with the result that the standard sale provisions contained in s 22 apply.

⁹⁴ Para 10.46.

⁹⁵ Prescription and Limitation (Scotland) Act 1973 s 1(1).

⁹⁶ *Ibid* s 1(1)(b)(ii).

⁹⁷ Land Registration (Scotland) Act 1979 s 9(3)(a)(iii).

⁹⁸ Prescription and Limitation (Scotland) Act 1973 sched 3(h).

- If reversion is merely a right to receive a conveyance, it is subject to negative prescription, after 20 years,⁹⁹ but not to positive. Positive prescription is excluded because a right to receive a conveyance is less a “challenge” to the obligant’s title than an affirmation of its validity.

10.53 **The need for reform.** The continued existence of the reversion is troublesome. On the one hand it is rarely exercised. But on the other hand the risk that it might be exercised can have the effect of sterilising the land. Once a school is closed it is not clear what can be done with the site. Heightened awareness of the School Sites Act amongst conveyancers means that the school cannot easily be sold, for the possibility, however remote, that the reversion might be exercised prevents the title from being marketable. A purchaser is likely to reject the title or accept it only on the basis of title insurance. But if the site is not to be sold, there are difficulties about using it for a different purpose. In particular, an education authority will be reluctant to put up a new building if there is a risk that the whole site, including the building, might then revert under the 1841 Act. Admittedly, provisions in the Education (Scotland) Act 1980 allow for the overriding of the reversion, on application to the Secretary of State or Court of Session.¹⁰⁰ But they can be used only where the person entitled to the reversion cannot after due enquiry be found or where he has agreed to relinquish his rights. In most cases due enquiry would have the effect of yielding the name of the person entitled to the reversion, and he would presumably be unwilling to relinquish his rights without payment.

10.54 Two factors may make reform more urgent. First, there is evidence that the School Sites Act is attracting the attention of title raiders. Secondly, a substantial number of old schools and schoolhouses have previously passed into private ownership. In many cases they have been improved and refurbished. Usually they were bought in good faith. Their current owners may be vulnerable to the revival of a dormant reversion.

10.55 **Reform in England and Wales.** A working party set up by the Law Commission recommended that those holding reversions, including future reversions, should be required to register their interest within three years. Failure to do so would extinguish the reversion.¹⁰¹ However, these recommendations were not adopted. The Reverter of Sites Act 1987 shows greater consideration for the rights of reversion holders. Rights of reversion are converted into trust rights. Upon a site ceasing to be used for its original purpose, a trust of land arises. The trustees hold for the person who, but for the Act, would have been entitled to the reversion. But since the trustees are allowed to sell without the consent of the beneficiary, the beneficiary’s right resolves into a claim on the sale proceeds.¹⁰² An attempt must be made to find the beneficiary.¹⁰³ If the beneficiary fails to claim,¹⁰⁴ the trustees can then apply to the Charity Commissioners for a variation of the trust purposes.¹⁰⁵ Variation

⁹⁹ Ibid s 7. See *Macdonald v Scott’s Exrs* 1981 SC 75, and *Stewart’s Exrs v Stewart* 1993 SLT 440, 1994 SLT 466. Short negative prescription is excluded by para 2(e) of sched 1.

¹⁰⁰ Education (Scotland) Act 1980 ss 22 and 106. Section 22 applies to “educational establishments”, ie to schools (see the definition in s 135(1)). Section 106 applies to a site used for other purposes.

¹⁰¹ Law Com No 111, paras 84 ff.

¹⁰² Reverter of Sites Act 1987 s 1 (amended by the Trusts of Land and Appointment of Trustees Act 1996 sched 2 para 6).

¹⁰³ Ibid s 3.

¹⁰⁴ Ibid s 2(6).

¹⁰⁵ Ibid s 2(1)-(3).

extinguishes the right of the beneficiary, subject to a claim for compensation which remains open for five years.¹⁰⁶

10.56 **Proposed reform in Scotland.** Under the 1987 Act a reversion is transformed from a right to the property to a right to the proceeds of its sale. This allows the property to be sold while at the same time preserving the right of the reversion holder. After so long an interval the land has often no special value to the reversion holder; and especially in cases where the land is in private hands, there seems much to be said for preserving the existing state of possession and for awarding monetary compensation in its place. In the discussion paper we suggested that the 1987 Act solution could be adapted for use in Scotland.¹⁰⁷ It would be unnecessary to have recourse to a trust. Only education authorities would be affected, and they are already subject to sufficient statutory control. All rights of reversion could be converted into rights to claim compensation from the education authority. The property itself would be free of the reversion. The conversion would apply to such existing rights of reversion as had not either been extinguished or claimed as well as to new rights arising as and when sites ceased to be used for the purposes of the 1841 Act.

10.57 Our proposals were generally welcomed by consultees. Some, however, urged us to go further and to abolish the reversion without compensation. There were a number of arguments. First, the purpose of the 1841 Act was to allow conveyances rather than to facilitate reversions. The Act itself made provision for the reversion to be extinguished if a new site was substituted for the site originally conveyed.¹⁰⁸ Secondly, and following on from this, the reversion could readily be defeated by the education authority until the legislative changes which occurred in the 1940s.¹⁰⁹ These conferred a windfall benefit on the successors of those who, 100 years before, had conveyed their land for the provision of a school. It seems unlikely that this effect was intended. Thirdly, if a school site is sold today, the proceeds will be used for education. This is consonant with the policy of the 1841 Act, and of later legislation. Land should not be returned if its *surrogatum* is still being used for education purposes. Fourthly, not all conveyances under the 1841 Act were donations. If a price was paid no compensation should now be due. Finally, even if compensation should be payable, it should be confined to the value of the unimproved site. The windfall benefit conferred by the reversion should not extend to the large sums of public money spent on schools and other buildings.

10.58 We do not think that the right of reversion can be extinguished without the payment of compensation. Even if the changes effected in the 1940s were accidental, the fact remains that there is currently a contingent entitlement to a reversion which, if the contingency occurs, can no longer be defeated. That entitlement may of considerable value. It could not be extinguished without compensation.¹¹⁰ The question then becomes the level of compensation. We are attracted by the idea that compensation should not be given for the value of buildings erected since the land was conveyed under the Act. That view was supported, not only by the local authorities, but also by the Scottish Landowners' Federation.¹¹¹ It gains support from the Act itself.¹¹² Section 2 of the Act provided for the

¹⁰⁶ Ibid s 2(1)(a), (4).

¹⁰⁷ Scot Law Com DP No 106 paras 8.65 and 8.66.

¹⁰⁸ School Sites Act 1841 s 14, discussed in para 10.50.

¹⁰⁹ See, for these changes, paras 10.49 to 10.51.

¹¹⁰ See para 14.22 for a discussion of the European Convention of Human Rights in this context.

¹¹¹ Compensation, according to the Scottish Landowners' Federation, "should take into account the value of buildings, where provided by the landowners' predecessors in title". Section 82(6) of the draft bill so provides.

conveyance of “land as a site for a school”. The conveyance was thus of an unimproved site. Later, “upon the land so granted as aforesaid ... ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate”. The entitlement is to the land and not to the buildings. Naturally, if land is reconveyed,¹¹³ the buildings pass with it. The law admits of no other solution.¹¹⁴ But there is no entitlement to the buildings as such. If the education authority chose to set them on fire before reconveying, they would be free to do so. That fact should be reflected in the level of compensation awarded.

10.59 Our original proposal was that the right of reversion should be converted into a right to compensation in all cases. But this may go further than is necessary, and there is at least something to be said for the view, expressed by a working party of members of the Society of Writers to the Signet, that

“In many cases schools and schoolhouses are in the heart of traditional estates. The land is therefore highly likely to be of particular value to the landowner regardless of the time that has elapsed since the construction of the buildings.”

If the schoolhouse has been sold, without challenge, into private ownership, we remain of the view that the private owner should not be disturbed. The only claim of the holder of the reversion should be to compensation from the education authority. But if, at the time the claim is made, the site continues in the ownership of the education authority, we think that the claimant should have a choice. He can require a reconveyance of the land – on payment of compensation for buildings and other improvements. Or, if he does not want the land back, he can claim financial compensation, again under deduction of the value of the buildings. Disputes about valuation could be referred to the Lands Tribunal.¹¹⁵

10.60 The present law is unclear in relation to prescription.¹¹⁶ The doubt should be resolved by applying the five-year negative prescription.¹¹⁷ This would bring holders of reversions into line with other creditors, including creditors in real burdens. The right would prescribe five years after the contingency was purified and the reversion became due.¹¹⁸ An amendment will be required to the 1973 Prescription Act.¹¹⁹ As usual under that Act, time before the commencement of the provision will be reckonable for the purposes of prescription, so that a reversion which had not been claimed for more than five years prior to the appointed day will prescribe immediately after that day.¹²⁰

¹¹² And also, as one consultee pointed out, from ss 22(3) and 106(1)&(2) of the Education (Scotland) Act 1980 which provide, in certain circumstances involving the sale of land affected by the 1841 Act, for compensation to be paid “out of” the proceeds of sale. The wording presupposes that the whole proceeds are not to be paid.

¹¹³ Despite the reference in s 2 to the reversion occurring “immediately”, it seems clear that conveyancing of some kind is required: see para 10.46.

¹¹⁴ Buildings cannot usually be owned separately from the land: see Reid, *Property* para 212(2).

¹¹⁵ For completeness we should mention that we have no proposals to repeal ss 22 and 106 of the Education (Scotland) Act 1980, discussed in para 10.53 above. They have the merit of allowing the reversion to be extinguished in a case where the site is being redeveloped rather than sold, and the reversion holder cannot be traced.

¹¹⁶ It is not even clear whether the appropriate prescription is positive or negative. See para 10.52.

¹¹⁷ This was our proposal in Scot Law Com DP No 106 para 8.65.

¹¹⁸ For a recent case in England where a claim under the 1841 Act was found to be time-barred, see *Fraser v Canterbury Diocesan Board of Finance* The Times 22 February 2000.

¹¹⁹ Draft bill s 83.

¹²⁰ Prescription and Limitation (Scotland) Act 1973 s 14(1)(a) (as amended by s 103 of the draft bill). “Immediately after” because, under s 14(1)(a), some part at least of the prescriptive period must be after commencement.

10.61 In the discussion paper we raised the issue of whether the education authority should be under a positive duty to identify and notify the reversion holder. Section 3 of the 1987 Act makes provision, for England and Wales, for newspaper advertisements, for affixing a notice on the land, and for taking other steps to trace and identify the person in question. No doubt if sufficient effort is made, a claimant could be identified in many cases. However, a number of arguments can be made against the introduction of such a duty. First, it is not a usual task of a debtor to identify and alert his creditor. It is plainly against his interests to do so. There is no such duty on education authorities at the moment.¹²¹ Secondly, the duty might in practice be hard to discharge. Difficulties in identifying the person entitled to a reversion were mentioned earlier.¹²² These difficulties seem within tolerance if the number of claims is small, but if there is to be a potential claimant in every case, the situation might become unmanageable. While in theory it might be possible to include in any reform a clarification of the rules of entitlement, such a clarification would itself be complex, and would be challengeable on the ground that the interpretation adopted extinguished existing rights.¹²³ Thirdly, it is not clear that reversion holders are more worthy of protection than ordinary creditors. Some may feel that they are less worthy. The original grant is usually remote in time. Often the claimant has no family connection with the granter. He may be no more than a title raider. Finally, extinction without notification was a feature of the 1841 Act from the beginning. A sale under section 14 brought the reversion to an end.¹²⁴ Prescription has the same effect. A requirement of notification would in most cases prevent extinction. It seems doubtful that this is a move in the right direction. Consultees were unanimously of the view that notification should not be required.

10.62 We recommend that

86. (a) **Where, at the time when a reversion under section 2 of the School Sites Act 1841 is claimed, there has been a sale of the land (or a binding agreement to sell), the claimant's right should be a right to the net proceeds of sale, less that part of the proceeds attributable to any buildings or other structures on the land.**
- (b) **In any other case, a right of reversion should be a right, at the claimant's option, to –**
- (i) **a conveyance of the land, subject to payment of any increase in its value attributable to the buildings or other structures; or**
 - (ii) **payment of the open market value of the land, less that part of the value attributable to the buildings or other structures.**
- (c) **Disputes about valuation should be referred to the Lands Tribunal.**
- (d) **A right of reversion should prescribe after five years.**

¹²¹ Except where it is sought to extinguish a reversion under ss 22 and 106 of the Education (Scotland) Act 1980.

¹²² Para 10.47.

¹²³ In England and Wales a reform of the rules recommended by a working party set up by the Law Commission (Law Com No 111 para 103) was not included in the 1987 Act.

¹²⁴ Para 10.50.

(e) “Buildings or other structures” do not include buildings or structures provided, or paid for, by the person who made the original grant under the 1841 Act.

(Draft Bill ss 82 and 83)

Other statutory reversions

10.63 In our discussion paper we proposed the repeal of the Entail Sites Act 1840.¹²⁵ This Act, which applies only in Scotland, allows heirs of entail in possession to feu or lease small quantities of land as sites for churches and schools, and for houses for ministers and schoolmasters. On consultation there were no dissenting voices, and the Act was duly repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 as part of the abolition of all surviving entails.¹²⁶ The repeal takes effect on the appointed day. We are not aware of any other statutory reversions where repeal would be appropriate.

¹²⁵ Scot Law Com DP No 106 para 8.69, where the reasons are set out in full.

¹²⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 76(2) and sched 13. The abolition of entails is effected by part 5. See further Scot Law Com no 168 paras 9.8 to 9.17.

Part 11 Transitional: Identifying the Benefited Property

Introduction

11.1 There are strict rules as to disclosure and publicity.¹ As the law currently stands a real burden must be registered against the title of the burdened property; its terms must be given in full; and the burden must be expressed clearly and unambiguously. This means that an owner, or potential purchaser, of the burdened property need never be in doubt as to the restrictions which affect the property. But while admirable in many ways, this system has one startling defect. The requirement of disclosure does not extend to the identity of the benefited property or properties whose owner or owners have a right to enforce; and in practice the deed creating the burden - and hence the entry on the register - is often silent on this subject. The result is odd. On the one hand the burdened owner knows, in exhaustive detail, the nature of the burdens which affect him. But on the other hand he may have no idea who is entitled to enforce those burdens, or even how many enforcers there are likely to be. For all he is able to find out from the register, there may be no one with a title to enforce, or ten people, or a hundred. Of course information on this topic is, in the end, discoverable. Case law has created a series of rules importing a right to enforce. The appropriate rule can be identified and then applied. But the rules are by no means straightforward, and often can be applied only after time-consuming and expensive research.

11.2 Sometimes the position is made more clear. In modern deeds, in particular, it is common to stipulate for enforcement rights. But even here there is a potential trap. For the fact that burdens are expressly declared to be enforceable by the owner of plot A does not mean that they are not also enforceable by the owners of plots B and C. Implied rights to enforce can sit alongside express rights.² The only case in which an express right conclusively excludes the existence of implied rights is where the holder of the express right is stated to have a right of waiver, which is taken as indicative of an exclusive right to enforce.³ In all other cases the person affected by the burdens must consider the possibility that additional, and implied, rights exist. In this, and other, situations the possible existence of implied rights is often overlooked. A survey by Cusine and Egan found that in more than 80% of the cases sampled where burdens proved to be troublesome no account had been taken of implied rights and it was thought sufficient to obtain a minute of waiver from the superior alone.⁴ Of course, further investigation might have produced negative results, but by no means always. The rules of implied enforcement rights are more generous than is often supposed. In cases where implied rights exist a minute of waiver from the superior would have no effect on the rights of the other enforcers, and the real burden would continue to affect the land.⁵

¹ See part 3.

² The position is similar in the United States: see American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 188-90.

³ *Thomson v Alley and Maclellan* (1883) 10 R 433; *Walker and Dick v Park* (1888) 15 R 477; *Turner v Hamilton* (1890) 17 R 494.

⁴ Cusine & Egan, *Feuing Conditions* chapter 4, paras 15 to 17, and tables 4.12 and 4.13.

⁵ *Dalrymple v Herdman* (1878) 5 R 847.

11.3 Except in the one case mentioned above,⁶ a person whose property is subject to real burdens must bear in mind the possibility of implied enforcement rights. Indeed in a majority of all cases the register is silent on enforcement and the only rights arising are those which arise by implication. If the courts had not developed rules on implied rights, many burdens would have been stillborn.

11.4 The position will change as a result of our proposed reforms. Earlier we recommended that the deed creating real burdens should identify not only the burdened property, as at present, but the benefited property also; and that the deed should then be registered against both properties.⁷ We now make the further recommendation that

87. The existing rules whereby land may be the benefited property by implication should not apply to real burdens created on or after the appointed day.

(Draft Bill s 41(1))

For new real burdens, this achieves a proper degree of transparency. It means that the benefited property or properties will be immediately identifiable from the register, and that there can be no additional benefited properties which are not so identified. There remains, however, the problem of existing burdens, to which we now turn.

The present law

11.5 Under the present law a number of rules have been developed for identifying the benefited properties in real burdens. Typically, these rules apply where no benefited property is nominated in the deed, but they are also capable of applying to supplement such an express provision. The rules fall into three broad groups, classified by type of burden:

- community burdens: burdens imposed under a common scheme
- neighbour burdens: the rule in *Mactaggart*⁸
- feudal burdens.

Feudal burdens are shortly to be abolished and need not detain us further.⁹ But it is necessary to say a great deal more both about burdens imposed under a common scheme and about neighbour burdens.

Burdens imposed under a common scheme

11.6 **Common burdens.** Where two or more properties are subject to the same, or equivalent, burdens,¹⁰ imposed by the same grantor, the burdens are treated by the courts as forming a “common scheme” or “common plan” for the properties. The test is objective, so that the law is not concerned with the actual intention of the common grantor.¹¹ Nor is there

⁶ ie where there is an express right of waiver.

⁷ See paras 3.1 to 3.4, and 3.29 to 3.31.

⁸ ie *J A Mactaggart & Co v Harrower* (1906) 8 F 1101.

⁹ The rule is that, where burdens are imposed in a grant in feu, the benefited property is the reserved superiority of the grantor, whether this is expressed in the deed or not. See Reid, *Property* para 398.

¹⁰ For the meaning of equivalence in this context, see *Botanic Gardens Picture House Ltd v Adamson* 1924 SC 549 at 563 per Lord President Clyde, and *Lees v North East Fife District Council* 1987 SLT 769.

¹¹ For the possible different approaches to this issue, see Lawrence Berger, “A policy analysis of promises respecting the use of land” (1970) 55 *Minnesota Law Rev* 167 esp at pp 198-9. The new Restatement on

any need for an actual plan in the sense of a development plan for the estate on which individual plots are indicated.¹² Provided that the burdens are shared, the properties are considered to form a discrete community, regulated by common rules. In the leading case of *Hislop v MacRitchie's Trs*,¹³ Lord Watson identified two ways in which such a common scheme might come into existence. In the first place, the developer might convey each property separately but subject to the same burdens. Where this is done there is a series of individual conveyances each containing identical (or equivalent) burdens. Alternatively, the developer might convey the land in a single block to some second party who then subdivides and conveys away, usually after building houses on the individual plots. In this case the developer's burdens are contained in a single deed, the original conveyance, which, following on subdivision, becomes part of the title of each of the plots. In modern times, however, a third method has largely superseded the two identified by Lord Watson. Typically, the burdens are no longer put into a conveyance or conveyances,¹⁴ but instead are contained in a single deed of conditions which applies to the whole area. As the area comes to be sold off in plots, the deed of conditions is then part of the title of each individual plot.

11.7 Often a common scheme means reciprocal rights of enforcement. Thus if plot A and plot B are subject to the same burdens, imposed originally by the same grantor, the law may imply that the owner of each plot can enforce against the owner of the other.¹⁵ In the terminology used in this report, these are then community burdens.¹⁶ Each plot is both a benefited and a burdened property. Sometimes this rule of enforcement is attributed, perhaps not very accurately,¹⁷ to the doctrine of *jus quaesitum tertio*. A somewhat similar rule operates in England and Wales and in other common law jurisdictions.¹⁸

11.8 The courts, however, will not imply enforcement rights in every case. There are two further requirements, one positive and one negative. The positive requirement is of notice of the common scheme in the deed which creates the burdens. The negative requirement is that there is nothing in that deed which is inconsistent with the idea of enforcement by the owners of the other properties.

11.9 **Notice.** A burdened owner must be able to tell, merely from an inspection of his own title (that is to say, of the constitutive deed imposing burdens on his property), that the same burdens may affect the properties of his neighbours. The policy reason is obvious. If an owner is not to be told the precise identity of the benefited properties, he should at least be warned that such properties might exist. Notice of a common scheme is such a warning, and invites an investigation of the titles of neighbouring properties. Conversely, if there is

Servitudes pays some regard to intention: see American Law Institute, *Restatement Third, Property (Servitudes)* § 2.14 (vol 1, 179).

¹² At one time this was required in England and Wales, but no longer: see eg *In re Dolphin's Conveyance* [1970] Ch 654.

¹³ (1881) 8 R(HL) 95 at p 103. *Hislop* is also reported in Appeal Cases as *Hislop v Leckie* (1881) 6 App Cas 560. This report is of particular value in providing a full account of the arguments (see pp 566-70). For contemporary discussion of the decision, see articles published at (1880) 24 J Juris 561 & 565.

¹⁴ However, until the law was changed by s 17 of the Land Registration (Scotland) Act 1979, the deed of conditions required to be expressly incorporated by reference into each of the conveyances, and this remains standard practice.

¹⁵ For an exhaustive account of the case law, see McDonald, *Enforcement*.

¹⁶ See part 7.

¹⁷ Reid, *Property* para 402.

¹⁸ Gray, *Elements* pp 1159-64, and American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 179 ff. Mixed legal systems have also adopted this system: see Silberberg & Schoeman, *Property* pp 394 ff, and Yiannopoulos, *Predial Servitudes* pp 515 ff.

no mention of a common scheme, the burdened owner has the assurance that no enforcement rights can arise under this rule.

11.10 Usually there is no difficulty with notice. In the second of the cases identified by Lord Watson (single grant followed by subdivision), it will be obvious from even a cursory reading that the deed creating the burdens applies to a much wider area than the particular property owned by the individual proprietor.¹⁹ Hence the proprietor knows that others are subject to the same burdens. Similarly, a deed of conditions will always apply to a wider area; and in the Land Register that wider area is often shown on the individual title sheets by means of a supplementary plan, allowing owners to tell at a glance the full extent of the community which is being regulated. Occasionally deeds of conditions are stillborn. Up until 1979 a deed of conditions did not take effect on registration, but required the further step of incorporation into the individual conveyances of the individual plots.²⁰ If this was not done, the deed of conditions would never come into operation. Section 17 of the Land Registration (Scotland) Act 1979 dispenses with the requirement of incorporation but can be expressly excluded in the deed of conditions, and this is quite commonly done in practice if developers wish to retain the freedom to impose different conditions on different phases of a development. Our survey of deeds of conditions suggests that section 17 may be excluded in around 50% of all cases.²¹ It follows that, except where section 17 applies, the owner of a plot affected by a deed of conditions cannot take for granted that the whole area described in the deed is subject to those conditions. In some cases the developer may have chosen not to incorporate the conditions, or he may have registered and incorporated a different deed of conditions. In theory it is even possible that the affected plot is the only property made subject to the conditions, in which case there is no community at all. Thus in deeds of conditions not governed by section 17 it will be necessary to carry out some further research to establish the true position.

11.11 The one remaining case is the first of the two situations identified by Lord Watson (successive conveyances). Here the requirement of notice can cause difficulties. A typical example would be a small housing development from the interwar period. If a developer built 20 houses and granted a feu disposition of each, imposing identical burdens, it does not follow that the 20 owners will have mutual rights of enforcement. For that to happen each owner must be able to tell, merely from reading his own feu disposition, that the other houses in the estate are subject to the same burdens. Often he cannot tell.²² His deed may do nothing more than convey his own property under the burden of certain conditions. The courts in such cases have strained to be helpful.²³ The deed need not spell out the details of a common plan, nor make precise references to other properties. A broad hint will do. Thus there is said to be sufficient notice if the deed imposes on the granter an obligation to insert similar conditions in grants of other properties.²⁴ There is also sufficient notice if the deed refers, even in quite general terms,²⁵ to a common scheme. One difficulty with rules of this kind is that much comes to depend on the conveyancer's pen, and inevitably conveyancers are not always consistent, even within the same development. Particularly when an estate is

¹⁹ Reid, *Property* para 401; A J McDonald, "The Enforcement of Title Conditions" (in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987)) 9 at p 19.

²⁰ Conveyancing (Scotland) Act 1874 s 32.

²¹ Appendix D paras 17 and 18.

²² As in *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95.

²³ Gordon, *Scottish Land Law* paras 22-59 to 22-61; Reid, *Property* para 400; McDonald (n 19) pp 16 to 19.

²⁴ *McGibbon v Rankin* (1871) 9 M 423.

²⁵ *Johnston v The Walker Trs* (1897) 24 R 1061.

sold over a long period of time, the split-off deeds may not be worded in precisely the same way, and these differences may then turn out to affect enforceability. Take the case of 20 plots of ground being sold off subject to identical real burdens. If the dispositions of plots 1 - 15 contain an express obligation on the granter to impose identical conditions on the remaining plots, but the dispositions of plots 16 - 20 omit the obligation, the pattern of reciprocity is broken. The result is a lop-sided community. The titles of plots 1 - 15 contain notice of the common scheme. Hence the burdens on those plots can be enforced by all others who are subject to the same burdens, that is to say, by plots 1 - 20.²⁶ But since the titles of plots 16 - 20 contain no notice of the common scheme, the burdens on those plots cannot be enforced by the owner of any other plot.²⁷

11.12 Inconsistency with implied enforcement. The courts will not imply enforcement rights where this is inconsistent with the express terms of the deed. The cases suggest only two examples, although these may not be exhaustive of the possibilities.

11.13 Prohibition on subdivision. In the second of the cases identified by Lord Watson (single grant followed by subdivision), the burdens are imposed in the first instance on a single area of land and come to affect more than one property only because that land is later subdivided. If, therefore, subdivision was prohibited in the original constitutive deed, it is clear that the burdens were not intended to form a common scheme. Consequently, there are no mutual rights of enforcement.²⁸

11.14 Reserved power of waiver. In many cases involving common schemes the burdens are primarily enforceable by a superior or some other person extrinsic to the development. In that case such enforcement rights as may be held by neighbours are usually characterised as third party rights (the first two parties being the superior who holds the primary right to enforce and the vassal who is subject to the burdens). If, in the constitutive deed, the superior or other party with the primary right of enforcement reserves a power to waive or vary the burdens, or some of them, this is taken as excluding any implied²⁹ enforcement rights in neighbours. For by asserting the primacy of his own right, the superior is assumed to have excluded the possibility that other rights might arise. The rule is well-settled.³⁰

11.15 Reserved powers of waiver are relatively uncommon except in deeds of conditions. A standard example is the following. A volume builder builds an estate of 100 houses. He records a deed of conditions imposing uniform burdens on all the houses. He then disposes of the houses by feu disposition. The legal result is that the builder is the superior and the purchasers (and their successors) are his vassals. As superior, the builder has an automatic right to enforce the burdens. Whether the owners in the estate also have enforcement rights depends on the terms of the deed of conditions. Usually a deed of conditions satisfies the

²⁶ *Nicholson v Glasgow Asylum for the Blind* 1911 SC 391.

²⁷ *Bannerman's Trs v Howard and Wyndham* (1902) 10 SLT 2.

²⁸ *Girls School Co Ltd v Buchanan* 1958 SLT (Notes) 2.

²⁹ It would not exclude express enforcement rights: see *Lawrence v Scott* 1965 SC 403.

³⁰ *Thomson v Alley and Maclellan* (1883) 10 R 433; *Walker & Dick v Park* (1888) 15 R 477; *Turner v Hamilton* (1890) 17 R 494. Although there is no direct authority, it seems that a reserved power of waiver overrides contra-indicators such as provision for a residents' association. Section 44(2) of the draft bill makes the position clear. Since, however (i) the main (sometimes only) task of a residents' association is to attend to common repairs and (ii) we recommend later that burdens concerned with common repairs and other like matters ("facility burdens") should in the future be enforceable by the owners of the affected properties, and that ancillary management provisions should survive (paras 11.34 to 11.39), the overall effect of our proposals is that residents' associations will continue in existence in relation to common facilities.

basic criteria for implied enforcement rights. Thus the burdens (i) are imposed under a common scheme (ii) by a common author and (iii) there is sufficient notice that the scheme may exist. But there is often a clause reserving a power to vary. The following is typical:

“It is expressly provided and declared that there shall be reserved to the superiors full power to make or allow whatever alterations or deviations they may consider proper upon any feuing plans of the feuing area or any part thereof or to the layout thereof or of the roads, footpaths, sewers and other services within or outwith the same or even to depart entirely therefrom and the superiors expressly reserve to themselves the right and power to alter and modify in whole or in part the foregoing burdens, obligations, conditions and other clauses with respect to any particular feu or feus and in the event of their doing so the feuars shall have no right or title to object thereto and shall have no claim in respect thereof.”

This clause reserves a power to alter, both the physical layout of the development and also the real burdens. Our concern is only with the second of those. The purpose of the reservation is usually to retain flexibility in respect of those units which are not yet sold (or in some cases not yet built). Market conditions, for example, might cause a developer to alter his plans.³¹ But the clause operates indiscriminately on units sold as well as unsold,³² and in relation to the former³³ its legal effect is to exclude implied enforcement rights.³⁴ The results are striking. In our survey of 252 deeds of conditions, only 16 (6.84%) were found to create implied enforcement rights in favour of neighbours.³⁵ This is partly explained by the fact that 96 deeds (41.03%) conferred express rights; and in one deed implied rights were expressly excluded. But otherwise the absence of implied rights was due to a reserved power of waiver.

The rule in *Mactaggart*

11.16 *J A Mactaggart & Co v Harrower*³⁶ appears to be authority for the following rule. If an owner divides his land and transfers one plot (plot B) by disposition while retaining another plot (plot A), it is implied that any real burdens imposed on plot B in the disposition are for the benefit of the retained plot A. Hence plot A is the benefited property and plot B the burdened property, and the burdens may be enforced by successive owners of plot A against successive owners of plot B. The burdens must be imposed in a disposition³⁷ and not in a feu disposition.³⁸ The owners thus stand in the relationship of neighbours and not of superior and vassal; and since plot B alone is subject to the obligations, the burdens fall to be

³¹ Halliday, *Conveyancing* para 34-37.

³² A clause which reserved a power to vary only in respect of unsold units would be almost indistinguishable in effect from a clause which disapplied s 17 of the Land Registration (Scotland) Act (for which see para 11.10). Neither appears to exclude implied enforcement rights.

³³ Meaning such units as are sold. Eventually, of course, all units will be sold.

³⁴ It can only apply to sold units to the limited extent of allowing the builder/superior to grant a waiver. A builder/superior cannot reserve the right to vary a burden to the effect of introducing new obligations, since this would break the rule that the full terms of a burden are to be set out in the property register.

³⁵ Appendix D para 12, table 4.

³⁶ (1906) 8 F 1101.

³⁷ In theory the same result might be obtained by a deed of conditions granted in association with a disposition; but in practice a deed of conditions is only used where there is a common scheme, in which the governing rules will be those described at paras 11.6 to 11.15, and the rule in *Mactaggart* will not apply.

³⁸ Where burdens are imposed in a feu disposition, the corresponding rule is that the granter's reserved superiority is the benefited property. The forthcoming abolition of the feudal system makes it unnecessary to consider that rule further here.

classified as neighbour burdens.³⁹ In *Mactaggart* the Dean of Guild explained the rule in this way:⁴⁰

“A real burden ... is praedial in its character; it is for the benefit of some lands or the owners thereof, as owners, and not as individuals; and, considering the nature of the grant under which the burden in question was imposed, it must be taken to have been imposed for the benefit of the lands remaining in the person of those who imposed it, or at all events, of so much of these remaining lands as might be injuriously affected by operations or buildings on the ground restricted.”

There is no need for the disposition of plot B to mention the retained land.⁴¹ A similar, if less mechanical, rule has been adopted in the United States in the new Restatement on Servitudes.⁴²

11.17 A recent case questions the scope of the rule laid down in *Mactaggart*. In *Marden v Craighelen Lawn Tennis and Squash Club*⁴³ property had been disposed in 1927. Real burdens were imposed in the disposition. The property was broken off from a larger area which was retained by the granter. Later the granter sold the larger area in separate plots. In the current litigation owners of some of these plots were seeking to enforce one of the burdens against the property originally disposed in 1927. The action failed for a number of reasons which are not relevant here. However, the sheriff expressed the view that, in any event, the owners of the plots had no title to sue. *Mactaggart* was distinguished. In that case the original disponent had, when eventually disposing of the retained land, granted an express assignation of the right to enforce the burdens. In the present case there had been no such assignation.⁴⁴

11.18 Strictly, the sheriff's views on this point were *obiter*; but if correct they have far-reaching consequences. Most real burdens in dispositions depend on the rule in *Mactaggart*, for it has always been relatively uncommon to nominate a benefited property. Further, it would be highly unusual for a later disposition to contain an express assignation of the right to enforce real burdens. Against this background it would follow that the burdens contained in most dispositions are, and always have been, unenforceable. At a rough guess this would extinguish around one third of all burdens now registered in the property registers.

11.19 In our view, however, the sheriff's analysis is not correct. It fails to distinguish real burdens from contractual rights. The benefit of a contractual right passes only if it is assigned. By contrast, it is of the essence of a real burden – as of a servitude – that the right

³⁹ See para 1.9.

⁴⁰ At p 1104.

⁴¹ There was none in *Mactaggart*.

⁴² Less mechanical because it pays some attention to the parties' intentions. See American Law Institute, *Restatement Third, Property (Servitudes)* § 2.11(b), vol 1 153 and 156. Intention is also important in England and Wales: see Gray, *Elements* pp 1153-4, and H W R Wade “Covenants: ‘a broad and reasonable view’” (1972B) 31 CLJ 157.

⁴³ 1999 GWD 37-1820.

⁴⁴ In *Mactaggart* Lord Kyllachy reserved his opinion as to whether the assignation was in fact necessary. Commenting on that reservation in *Braid Hills Hotel Co Ltd v Manuels* 1909 SC 120 at 125, Lord President Dunedin said that: “The question was mentioned, but not decided, in the case of *Mactaggat & Co v Harrower*. It is mentioned by Lord Kyllachy in such terms as, I think, indicate not obscurely his view was that no special assignation in such a case was necessary ...”.

runs with the benefited property, and indeed could not be separated from that property.⁴⁵ If the point was ever in doubt it was settled by the decision of the First Division in *Braid Hills Hotel Co Ltd. v Manuels*.⁴⁶

Criticisms of the existing law

11.20 We now move from exposition to critique. As pointed out in our discussion paper,⁴⁷ a number of criticisms may be made of the existing law of implied enforcement rights. Three may be mentioned in particular.

11.21 **(1) Difficult to operate.** No regime which relies on implied enforcement rights is likely to operate satisfactorily in practice.⁴⁸ But in Scotland the position is made worse by the difficulty of applying certain of the rules described above.

11.22 The rule in *Mactaggart* requires an exhaustive investigation into the position, at the time of the original disposition, of the person making the grant. Enquiries must be made as to whether he owned other property in the neighbourhood, and, if so, the details must be retrieved. Often the information is difficult to come by. If the granter owned a substantial estate, it will be necessary to trace other grants made out of the same estate in order to determine how much of the estate was left at the material time. The subsequent history of this residual benefited property must then be investigated. Often the property will have come to be divided up, perhaps into many different parts,⁴⁹ and if so each constituent part continues to form a benefited property in the burden, and the consent of its current owner must be obtained for any waiver. The problem is at its worst with old burdens. Where a real burden was created by disposition in 1850, it may require a great deal of detective work in order to identify the current benefited properties and their owners. But while this will be time consuming and expensive, it will at any rate be possible. With very modern burdens it may turn out not to be possible. The new Land Register is ahistorical. It discloses who owns land today, but not who owned the same land yesterday. Hence if real burdens are created in a disposition which was registered in the Land Register in 1984 or 1995, it is impossible to discover from the Register what other land the granter may have owned at the time of the grant. All that can be discovered is what land he owns today. It is true that the historical information is not entirely lost, for copies of the deeds which led to entries on the Register are kept. However, there is no obligation to make these copies available to the public and the current practice is not to do so.⁵⁰ In any event it is not clear whether these could be searched in a manner which would yield the information which is required.

⁴⁵ There are other difficulties with the sheriff's view. (1) The validity of the burden cannot be determined unless or until the original disponer transfers the property to someone else. There may be a long period of doubt. Must the Keeper wait before he enters the burdens on the Land Register? (2) What happens, during this initial period, if the (potentially) burdened property changes hands? Is the new owner bound? (3) If the original disponer fails to assign the right to enforce, does this mean that the right remains with him, detached from the benefited property? (4) The first transmission of the (potentially) benefited property might be involuntary, eg on death. Would that constitute a sufficient assignation? (5) Is assignation required only for the first transmission or for future transmissions also?

⁴⁶ 1909 SC 120. This was a case where enforcement rights were expressly reserved. But the Lord President discusses *Mactaggart* and the clear implication is that the same rule should apply in relation to implied enforcement rights.

⁴⁷ Scot Law Com DP No 106 paras 3.17 to 3.27.

⁴⁸ Paras 11.1 to 11.4.

⁴⁹ As occurred in *Marsden v Craighelen Lawn Tennis and Squash Club* 1999 GWD 37-1820.

⁵⁰ Section 6(5) of the Land Registration (Scotland) Act 1979 only requires that the Keeper make available copies of those deeds which are referred to in a title sheet.

11.23 The position is often easier in respect of burdens imposed under a common scheme.⁵¹ If there is a deed of conditions, it is possible to tell at a glance both that there is a common scheme and also which other properties it potentially affects. The same is true in cases affected by the second of the two rules identified by Lord Watson in *Hislop v MacRitchie's Trs*⁵² (single grant followed by subdivision). This is because the original grant forms part of the title of each of the subdivided parts. Matters are, however, much more difficult in respect of Lord Watson's other rule (series of separate grants imposing uniform burdens). While an owner of property affected by such burdens has notice that other properties are also so affected – for without such notice there could be no question of enforcement rights being implied – he has no ready means of identifying those properties. His own title is silent on the subject. The first step is to investigate what other grants were made by the same granter in respect of the same estate. These may be numerous and, if the granter is a trust or a juristic person, spread over a long period of time. Next, each individual grant must be inspected to determine whether there are burdens imposed and, if so, whether they are the same as, or equivalent to, the burdens in the owner's grant. Finally, the current owners of these properties must be ascertained, and subdivisions taken into account. The problem with the Land Register mentioned above applies here also.

11.24 It is true that, with the possible exception of cases involving the Land Register, the investigations just described will in the end yield the information needed. All that is required is patience, time and money. But in practice the rules of implied enforcement rights are so convoluted and cumbersome that they are widely ignored.⁵³ The result is that a burdened owner may often have little idea of who has the right to enforce the burdens in his title. For all practical purposes the present law is unworkable. The consequences are unwelcome. An owner who does not know who can enforce the burdens does not know whom to approach for a minute of waiver. He may be driven to making an application to the Lands Tribunal, on the basis that a discharge under the 1970 legislation will at least bind all parties.⁵⁴ Or he may obtain a waiver from some only of the benefited owners – for example, from the superior – in which case he will have wasted his money because the burdens continue to be enforceable by others.⁵⁵ Of course, further investigation might have produced negative results, but by no means always.

11.25 Another consequence is that burdens which are not, or are no longer, enforceable continue to clutter up the property register, and in practice continue to be observed. Significant numbers of the burdens which currently appear on the D Section of title sheets on the Land Register are enforceable by no one and should not be there at all. This problem is about to become very much worse. With the abolition of the feudal system, all burdens currently enforceable by a superior alone will cease to be enforceable and fall to be deleted from the Register.⁵⁶ But in order to identify such burdens it will be necessary to consider, on a case by case basis, the possible application of the rules for implied enforcement. Deletion is appropriate only where they do not apply. As the law currently stands, this is a task far beyond the resources of the Keeper. An idea of the difficulties which lie ahead is given by

⁵¹ For which see paras 11.6 to 11.15.

⁵² 1881 8 R(HL) 95 at p 103. See para 11.6.

⁵³ See para 11.2.

⁵⁴ Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(4).

⁵⁵ *Dalrymple v Herdman* (1878) 5 R 847.

⁵⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 17(1).

the litigation in *Brookfield Developments Ltd v Keeper of the Registers of Scotland*.⁵⁷ Here the owners of a *dominium utile* acquired the superiority and consolidated. As usual in such cases, the idea was to extinguish the real burdens contained in the feudal link in question. But when the land certificate was issued some of the burdens continued to appear. The Keeper's argument was that, notwithstanding the consolidation of the feu, there might possibly be third party rights on the basis of the first rule in *Hislop*. Since he was not in a position to say whether that rule applied or not, he was not prepared to delete the burdens. In the event, the owners were able to establish to the satisfaction of the Lands Tribunal that the rule did not apply, and the Register was rectified to the effect of deleting the burdens. But the Tribunal supported the general approach taken by the Keeper. According to the Tribunal, the legislation makes a distinction between "subsisting" burdens and "enforceable" burdens. The statutory duty on the Keeper⁵⁸ is to retain on the Register all burdens which are "subsisting", and

"'subsisting' in the context can only mean appearing on the face of the titles relating to the interest in question as still remaining in being".⁵⁹

A burden which is "subsisting" in this sense might turn out not to be "enforceable". In that case the Register is inaccurate and falls to be rectified. But the task of investigating the titles of neighbouring properties for possible enforcement rights is not one for the Keeper:

"The parties have not said that before the Keeper entered these burdens as being still subsisting, he should have attempted to identify the other feuars who might be concerned and then by an examination of their titles satisfy himself as to whether some or all of them were given a right of enforcement and we would agree that this is not the case. We cannot think that Parliament ever intended the Keeper to be involved in investigations like this and in our opinion the use of the word 'subsisting' was deliberate, to make it clear that the Keeper's duties were simply to enter such burdens as appeared to him from his title examination to be still possibly enforceable."⁶⁰

In view of the complexity of the rules of implied rights, the duty on the Keeper could not, realistically, be put any higher. And if these rules remain unchanged, the Keeper's response to feudal abolition, quite properly, will be to retain on the Register all or almost all feudal burdens on the basis that they might be "still possibly enforceable". That result does not seem acceptable. It would mean that the Register was inaccurate on a massive scale, and that, on the ground at least, feudal abolition would seem to have achieved remarkably little.

11.26 **(2) Arbitrary.** If sometimes the rules seem arbitrary in their attribution of rights, it should be borne in mind that broadly similar rules have developed, apparently independently, in a number of other legal systems.⁶¹ The rule most open to challenge on the ground of being arbitrary is the first rule in *Hislop*.⁶² Here much depends on the conveyancer's pen. The use of one form of words will give rise to enforcement rights. The use of another form of words will ensure that no such rights exist. Often these are no more

⁵⁷ 1989 SLT (Lands Tr) 105.

⁵⁸ Under s 6(1)(e) of the Land Registration (Scotland) Act 1979.

⁵⁹ 1989 SLT (Lands Tr) 105 at p 110 F.

⁶⁰ 1989 SLT (Lands Tr) 105 at p 110 H-I.

⁶¹ See para 11.7.

⁶² Para 11.6.

than words of style, used randomly and without any intention either to create rights or to take them away.⁶³ Indeed it could hardly be otherwise. A conveyancer who wished to create or deny enforcement rights would make express provision to that effect and would not peril the position on language which was open to interpretation either way. Hence in applying this rule the courts are giving words a meaning which was not usually intended by their author.

11.27 **(3) Over-generous.** The rules can sometimes result in enforcement rights being held by a large number of people. It is not clear that this was always intended by the original parties to the deed, or that it is in all cases desirable. Compared to some other countries, the rules in Scotland work mechanically, without any reference to intention or to factors extrinsic to the deeds themselves; and while this promotes certainty (a welcome result) it is sometimes at the expense of over-generosity. This is seen most clearly with the second rule in *Hislop*.⁶⁴ Suppose that in 1890 an owner divides his land and sells one part, plot B, by disposition. The burdens in the disposition are, by the rule in *Mactaggart*,⁶⁵ neighbour burdens enforceable by the owner of the retained plot, plot A, against the owner of plot B. Suppose now that in 1990 plot B is in turn divided up and sold off as four separate plots. By an application of the second rule in *Hislop* the burdens in the original 1890 disposition become mutually enforceable by the owners of the four constituent parts of plot B. Burdens which were conceived originally for the benefit of neighbouring land have come to regulate relations amongst the owners of the burdened land. Neighbour burdens have grown into community burdens. It is unlikely that this was within the contemplation of the original parties, and in some cases the result may be inappropriate or regrettable. But, while the example given is not directly covered by authority, it seems that this is the probable effect of the rule.

Abolition with savings

11.28 **Abolition.** In the discussion paper we suggested that the difficulties with the present law were so acute, and the law was so frequently ignored in practice, that existing rights to enforce which had arisen by implication should be swept away. Some savings would be allowed, but the general rule would be abolition.⁶⁶ On consultation this broad conclusion was generally approved. We recommend therefore that

88. (a) **The existing rules whereby land may be benefited property by implication should cease to apply on the appointed day, and no burden should be enforceable on the basis of those rules on or after that day.**

(b) **This recommendation is qualified by recommendation 93.**

(Draft Bill s 41(1))

Only implied enforcement rights are affected by this recommendation. If a benefited property is sufficiently identified in the constitutive deed, its status is undisturbed.⁶⁷

⁶³ For example, in *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95 at p 103 Lord Watson treated the standard clause by which the donee is bound to repeat or refer to the burdens in future transmissions as being indicative of implied rights. And on the same clause see also *Lees v North East Fife District Council* 1987 SLT 769.

⁶⁴ Para 11.6.

⁶⁵ Para 11.16.

⁶⁶ Scot Law Com DP No 106 paras 3.28 to 3.32.

⁶⁷ Para 11.80 (condition (i)).

11.29 **Savings.** This leaves the task of identifying the savings. Not all burdens are equally useful. At the outset it will be useful to distinguish (i) facility burdens and service burdens from (ii) amenity burdens.

11.30 *Facility/service burdens and amenity burdens.* Facility burdens and service burdens are already familiar (although not by name) from the Abolition of Feudal Tenure etc. (Scotland) Act 2000. A facility burden regulates the maintenance, management,⁶⁸ reinstatement or use of common facilities such as the roof or common stair in a block of flats, or a fence between two gardens, or a private road serving more than one house.⁶⁹ This is one of the most frequent, and most useful, applications of real burdens. Facility burdens are found in the titles of tenements and other developments with shared facilities. Typically they apportion liability for maintenance, set out rules for when maintenance is to take place, and, in appropriate cases, provide rules on how the facility is to be used. By contrast, service burdens are comparatively rare. A service burden binds the owner of one piece of land to provide services, from that land, to some other land.⁷⁰ An example would be an obligation to supply water or electricity.⁷¹

11.31 The term “amenity burdens” is used in this report (though not in the draft bill) as a convenient shorthand for all other real burdens,⁷² ie burdens other than facility burdens and service burdens.⁷³ The term is only slightly misleading, for most burdens falling into this category are indeed intended to preserve the amenity, in a broad sense, of some neighbouring property or properties.⁷⁴ If that were not so, they would usually fail to satisfy the praedial rule.⁷⁵ Most amenity burdens take the form of use restrictions – no further building, use only as a private dwellinghouse, no parking of caravans and commercial vehicles, and so on; but there may sometimes be affirmative burdens as well, such as an obligation to maintain property, or to keep the garden tidy.

11.32 *Two variables.* In formulating proposals on savings, it is necessary to take two variables into account. The first is the different kinds of real burden just mentioned (facility/service burdens or amenity burdens). The second is the two types of case in which implied enforcement rights can arise (common scheme cases or cases affected by the rule in *Mactaggart*). Each may require a different solution. We set out below the details of our recommendations, and the reasons for them, but it may be helpful to begin with a summary. We recommend that all facility burdens and service burdens should be saved. In the future they will be enforceable by the owners of those properties which take benefit from the facility or, as the case may be, from the service. With amenity burdens, our recommendation varies with the method by which the enforcement right arose. Amenity burdens which form part of a common scheme should continue to be enforceable, but only by immediate

⁶⁸ It should be noted, however, that monopoly management powers reserved by a developer or local authority are unenforceable (s 3(7) of the draft bill), except insofar as they are manager burdens within s 53 of the draft bill.

⁶⁹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(1).

⁷⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(2).

⁷¹ This is different from a servitude to take water – the servitude of *aquaehaustus*. The servitude imposes no affirmative obligation on the burdened owner. The benefited owner can take, but only if water happens to be there. The real burden imposes an affirmative obligation to supply the water.

⁷² Other than those without a benefited property at all, ie conservation burdens, maritime burdens, and manager burdens.

⁷³ This is a classification by function. The report also classifies burdens by reference to enforceability, and by reference to type of obligation. See para 1.9, n 23.

⁷⁴ This is not absolutely true in all cases. A right of pre-emption, for example, is not concerned with amenity.

⁷⁵ ie the rule that a burden must confer benefit on another property. See paras 2.9 to 2.18.

neighbours. Amenity burdens which fall under the rule in *Mactaggart* should cease to be enforceable ten years after the appointed day unless, within that period, the benefited owner registers a notice of preservation. These recommendations may be set out in tabular form as follows:

	Enforceable under a common scheme	Enforceable under the rule in <i>Mactaggart</i>
Facility and service burdens	Preserved: enforceable by owners of properties which take benefit.	Preserved: enforceable by owners of properties which take benefit.
Amenity burdens	Preserved in part: enforceable by close neighbours.	Preserved in part: enforceable by person who registers a notice of preservation.

Table showing recommendations as to the future of implied enforcement rights

11.33 The technical means of achieving these savings is not the same in all cases. Registration of a notice of preservation is the only true exception to the principle of abolition of implied enforcement rights. A person who registers such a notice preserves that which he already has. Registration gives him neither less nor more. In all other cases the rights conferred are new, statutory rights. Their measure is the terms of the legislation and not the extent of the rights previously held. In a small number of cases, rights will be conferred which do not currently exist.

Facility burdens and service burdens

11.34 **Facility burdens.** It is important to be clear about what is meant by a “facility”. Following the definition in the Feudal Act,⁷⁶ a “facility” is heritable property which constitutes, and is intended to constitute, a facility of benefit to other land. The words “intended to constitute” are important. The benefit must be intentional and not merely adventitious. A garage erected in a garden may protect a neighbour from the prevailing wind, and from a view of the municipal waste ground, but that was not the purpose in erecting it. The garage is for the owner’s benefit and not for his neighbour’s. It is not, therefore, a facility in the sense meant here. In most cases, of course, the nature of the thing will leave no room for doubt one way or the other. The Feudal Act gives the following as examples of facilities: a common part of a tenement building; a common area for recreation; a private road; private sewerage; and a boundary wall.⁷⁷

11.35 Consultees were of the view that facility burdens should continue to be enforceable notwithstanding the general abolition of implied rights.⁷⁸ The case indeed hardly requires to be made.⁷⁹ Without such burdens there would often be disputes about liability for maintenance and the facility might be allowed to deteriorate, with damaging consequences

⁷⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(1).

⁷⁷ This list is reproduced in the draft bill: see s 113(3).

⁷⁸ That had been our provisional proposal in the discussion paper: see Scot Law Com DP No 106 para 3.35.

⁷⁹ See further Scot Law Com No 168 paras 4.78 to 4.84.

in the long-term. Facilities in housing estates and tenements would be particularly at risk. Difficulties would also be caused by the removal of such rules as regulated use. The value of facility burdens has already been recognised in this paper by special rules in relation to extinction.⁸⁰

11.36 The saving should not take the form of preserving existing enforcement rights, which are often obscure and productive of random enforcement patterns. Instead the opportunity should be taken to provide a new statutory rule which would be both clear and principled. The principle is not hard to identify. In our view, a facility burden should be enforceable by the owners of those properties that benefit from the facility; or, to state the proposal more accurately,⁸¹ the benefited properties in a facility burden should be those properties which take actual benefit. Title, in other words, should follow interest. This idea can already be found in the Feudal Act in the context of feudal burdens. Our current proposal would extend the rule to all real burdens.⁸² No rights would be lost, because a person cannot enforce a burden without interest, but some new rights would be created.

11.37 Usually the owner of the facility will be among those taking benefit and so will fall within the rule just described. Occasionally this will not be the case. For example a developer might sell all the houses in a housing estate but retain ownership of a common recreational area. In the deed of conditions the owners would be taken bound to pay for maintenance. The recreational area is for the benefit of the owners not the developer. Yet clearly the developer requires to be able to enforce the maintenance obligations. The difficulty is solved, as in the Feudal Act, by including among the benefited properties the actual facility itself.

11.38 There is one exception. Maintenance obligations which have since been assumed by a local authority or some successor body should not be included. Many obligations of this kind can be found on the register. In the titles of Victorian properties the owners are often taken bound to build and maintain public facilities such as sewers and roads. Usually the local authority has long since taken over liability for maintenance, and the burden has become a dead letter. It should not be revived under our proposals. A similar exception is included in the Feudal Act.⁸³

11.39 To the extent that liabilities and enforcement rights coincide, facility burdens will be community burdens.⁸⁴ Quite often the coincidence will be complete. A typical case is where a maintenance obligation is imposed on all the owners in a tenement or other development. In cases where the coincidence is not complete, this will usually be because some of those who have rights do not have corresponding liabilities. For those within a “community” of mutual rights and obligations, decisions as to maintenance may be taken by a majority, in

⁸⁰ Thus both facility and service burdens are exempted from the notice of termination procedure (para 5.28 and 5.29). Similarly, the rule that the Lands Tribunal can grant an unopposed application for discharge without a consideration of its merits does not apply to facility and service burdens (para 6.15).

⁸¹ Although linguistically clumsy, it is more accurate to speak of benefited properties than enforcement by owners. This is because enforcement rights depend on an association with the benefited property, and (paras 4.3 to 4.15) that association need not be ownership.

⁸² From which it follows that the (narrower) provision in the Feudal Act can be repealed, and replaced by the new provision. See draft bill s 47 and sched 9.

⁸³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(3).

⁸⁴ Para 7.17.

accordance with the recommendations made earlier;⁸⁵ but a person outside that community may enforce the burden according to its terms.

11.40 Service burdens. Service burdens should be treated in the same way as facility burdens. Thus the rule should be that a service burden is enforceable by the owner of the property or properties to which the service is provided. A provision to this effect is contained in the Feudal Act in the context of feudal burdens.⁸⁶ Service burdens are uncommon in practice.

11.41 Existing burdens only. Our proposals, both here and later, are confined to existing burdens, by which is meant burdens in respect of which the constitutive deed is registered before the appointed day. The appointed day is both the day on which most of the proposed legislation will come into force and also the day on which the feudal system is to be abolished.⁸⁷ A deed registered on or after the appointed day will require to nominate the benefited property,⁸⁸ and there can be no question of implied rights arising.⁸⁹

11.42 Recommendation. We recommend that

89. (a) In a facility burden created before the appointed day any land benefited by the facility should be a benefited property. The facility itself should also be a benefited property.

(b) In a service burden created before the appointed day, any land to which the services are provided should be a benefited property.

(c) By “facility burden” is meant a real burden which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land; but does not include an obligation to maintain or reinstate which has been assumed by a local or other public authority or by a successor body to such an authority.

(d) By “service burden” is meant a real burden which relates to the provision of services to land other than the burdened property.

(Draft Bill ss 47 and 113)

Amenity burdens: general

11.43 The case for saving amenity burdens is not so compelling. As compared to facility and service burdens, they are both less important and potentially more vexatious.

11.44 Amenity burdens are less important because they often replicate the general law. Even without such burdens, an owner would not be free to use his land as he pleased. The erection of a new building requires planning permission. So, usually, does a change of use.

⁸⁵ Paras 7.33 to 7.41.

⁸⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23(2).

⁸⁷ Para 1.39.

⁸⁸ Paras 3.30 and 3.31.

⁸⁹ Para 11.4.

Any building which is constructed must comply with the building regulations. A building warrant and completion certificate are needed. Use harmful to the environment is prohibited by legislation. Use harmful to neighbours is controlled by the common law of delict and of nuisance. It would be easy to add to this list.⁹⁰ The argument should not, however, be pushed too hard. The level of protection provided by amenity burdens is often higher – and sometimes much higher – than under the general law.⁹¹ Plainly there remains an important role for amenity burdens.⁹² But that role is related to physical proximity. Work or a change of use which impacts severely on a close neighbour might have no effect on those owning property further away. One of the difficulties with the current law, particularly in relation to common scheme burdens, is that enforcement rights are often conferred indiscriminately on everyone in a housing estate or other development.

11.45 Amenity burdens are also, from the point of view of the burdened owner, more vexatious. In the case of facility and service burdens, waivers are rarely sought. An owner may grumble about the cost of a repair, but he will not dispute the principle of liability. With amenity burdens the position is different. Such burdens are frequently breached. This is partly because of the very nature of the burdens, and partly because they tend to be couched in wide terms. If, as commonly in practice, a burden prohibits all building, it is breached as much by a garden shed as by a nuclear power station. The shift from facility burdens to amenity burdens is thus a shift from compliance to non-compliance. Of course few owners want to break the law. Before building a garden shed they would like to obtain the necessary permissions. But often it is hardly practicable to do so. If a burden is enforceable by 50 other owners in a housing estate – or by 100 or 500 – it is unrealistic to look for a minute of waiver. In the houses covered by our Title Conditions Survey, external alterations had been carried out by the current owner in around one fifth of all cases.⁹³ Of that one fifth, 40% of the owners had carried out the work without seeking permission of any kind, while most of the others had consulted close neighbours only. All therefore had breached the prohibition on building, to some degree. Only 1% claimed to have consulted all the owners in the estate but, so far as could be determined, no one had actually obtained a formal minute of waiver.⁹⁴ In the end, the value of amenity burdens is tied in with the number of potential enforcers. If that number is too high, amenity burdens are likely to do more harm than good. In devising a replacement scheme for enforcement rights it is necessary to keep this point constantly in mind.

11.46 A different point is that, for amenity burdens at least, implied rights are frequently accidental. A conveyancer who had intended to confer enforcement rights would, or should, have done so expressly.⁹⁵ Typically, implied rights are windfall rights, with the main right to enforce lying elsewhere. The beneficiary of an implied right has often no idea of its existence, has never been approached for a waiver, and would not in practice take steps for its enforcement. Even if he sought to enforce, he might well fail for lack of interest. Often too the burdens concerned are obsolete, and at any rate they are quite likely to be old. For modern deeds tend to be clear about enforcement rights, and it is mainly in older deeds that the possibility of implied rights occurs. Legislation should be wary of reviving rights which may, for all practical purposes, be extinct.

⁹⁰ Gordon, *Scottish Land Law* pp 801-938.

⁹¹ K Gray & S F Gray, "The Future of Real Burdens in Scots Law" (1999) 3 ELR 229.

⁹² Paras 1.15 to 1.21.

⁹³ Appendix C para 2.6.

⁹⁴ Appendix C para 2.7.

⁹⁵ Para 11.26.

11.47 Finally, it should be mentioned that the problem under discussion is, in some respects, a transitional one. If the solutions offered are imperfect, they are at any rate not intended to be permanent. For, unlike facility and service burdens, amenity burdens are to be subject to the notice of termination procedure. This means that any burden which is more than 100 years old can be extinguished by service and registration of a notice of termination (subject to possible challenge before the Lands Tribunal); and the rules of service take account of the possible difficulty of identifying the benefited properties.⁹⁶ As the years pass, therefore, fewer and fewer amenity burdens which are subject to the rules proposed below will not also be capable of extinction by notice of termination. After 100 years there will be none.

Amenity burdens: common schemes

11.48 **Properties with implied enforcement rights.** Burdens imposed under a common scheme are mutually enforceable by the affected owners if certain conditions are satisfied. The conditions are (i) that the burdens were imposed by a common author (ii) that the constitutive deed gave notice of the existence of the common scheme and (iii) that there was nothing in the constitutive deed inconsistent with the idea of mutual enforcement.⁹⁷ Earlier we recommended that implied enforcement rights be abolished, subject to savings. The question now to be determined is whether, and if so to what extent, the rights just described ought to be saved. In the present section we are concerned with the ordinary case of burdens imposed under a common scheme. Later we give special consideration to tenements and to sheltered housing.⁹⁸

11.49 Our Title Conditions Survey demonstrated support for common scheme amenity burdens, 70% of owners in the sample considering them of value.⁹⁹ We do not think that amenity burdens should be abolished, but rather that the class of enforcers should be clarified, and reduced in size. In our discussion paper we suggested that this might be achieved by a system of voluntary registration.¹⁰⁰ Those holding implied enforcement rights could preserve the burdens by registering a notice of preservation in the property register. This would be done within a limited period of time, such as five years. A minimum of three owners would have to join together so that a viable community would be preserved. Majority rule would operate, so that 7 owners could bring in 12 properties, and 21 could bring in 40. The result, where demand was present, would be to create concentrated mini-communities in place of the often much larger communities presently governed by common schemes. While this rather elaborate proposal was generally supported on consultation, it also attracted some opposition. On reconsideration the disadvantages loom large. As applied to common scheme burdens, a registration requirement would affect a large number of people, involve considerable trouble and expense, lead to disputes about which properties were and were not to be included in the community, and result in a patchwork quilt of rights preserved and rights extinguished. While, therefore, we think that a registration scheme could be made to work, we are disinclined to recommend it if there is a reasonable alternative.

⁹⁶ Para 5.34. A burden is not terminated to the extent that a benefited owner successfully challenges the notice before the Lands Tribunal.

⁹⁷ A detailed analysis of the law is given in paras 11.6 to 11.15.

⁹⁸ Paras 11.62 to 11.67.

⁹⁹ Appendix C chapter 3.

¹⁰⁰ Scot Law Com DP No 106 paras 3.44 to 3.49.

11.50 The only viable alternative seems one based on distance. When the owners in our Title Conditions Survey were asked about consent for building work prevented by a real burden, the overwhelming response was that consent should be given by close neighbours only.¹⁰¹ 92% of those questioned took the view that next-door neighbours should have to give consent, and 56% were willing to extend this to all immediate close neighbours. By contrast, only 2% favoured the current law, which is that consent must be given by everyone in the housing estate. Even those holding enforcement rights took substantially the same view.¹⁰² There is, of course, a well-known precedent. A person applying for planning permission must notify those with rights in “neighbouring land”, on the basis that they are the most likely to be affected by the development being proposed. For this purpose “neighbouring land” means land within four metres, subject to some qualifications.¹⁰³ If enforcement rights in real burdens are to be tied to distance, there are obvious advantages in using the same basic definition. A person who proposes to build should not have to wrestle with two different definitions of “neighbour”; and using the same definition would allow planning notification to be combined with a request for consent under the real burden.¹⁰⁴ A four-metre rule would also accord with the views expressed in the Title Conditions Survey. If roads are disregarded, as in the planning notification procedure,¹⁰⁵ the effect in an ordinary housing estate would be to include immediate neighbours on all sides including the closest neighbours on the other side of the street. In a ribbon development in a rural area the number of neighbours would usually be smaller. The four-metre rule would be measured on a horizontal plane, on the hypothesis that both properties were on the same level.¹⁰⁶ So in a mixed estate comprising villas and blocks of flats, the distance between a flat and a villa would be measured without regard to the difference in levels.¹⁰⁷ The same rule operates in planning law.¹⁰⁸ A mere pertinent should not qualify,¹⁰⁹ so that if a house carries with it, as a pertinent, a right in common to recreational ground or a road – often, in practice, some distance away – the four-metre rule should be measured from the house and not from the pertinent. Otherwise the owner of a house next to the recreational ground would need the consent of all the owners in the estate.¹¹⁰

11.51 In planning law *all* neighbours within four -metres must be notified. Our proposal does not go so far. In relation to any one burdened property there may at present be a large, and ill-defined, number of benefited properties. The idea is to reduce the class of benefited properties to those which lie within four metres of the burdened property. This resembles a statutory rule on interest to enforce. But the properties must be benefited properties under the current law – or in other words, they too must be subject to the common scheme

¹⁰¹ Appendix C table 4.3i.

¹⁰² Appendix C table 4.3ii.

¹⁰³ Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224 art 2(1).

¹⁰⁴ A formal minute of waiver need not always be used. Under a recommendation made earlier, informal consent will often suffice: see para 5.64.

¹⁰⁵ Roads are not, however, disregarded if they exceed 20 metres in width. For the sake of uniformity this rule should also be adopted, although, in housing estates at least, a road would only rarely be so wide.

¹⁰⁶ The same principle operates in the 100-metres rule which we recommended for feudal burdens. See Scot Law Com No 168 para 4.35.

¹⁰⁷ For special rules *within* blocks of flats, see paras 11.62 to 11.64.

¹⁰⁸ The provision itself, however, is rather cumbersome and is not adopted in our bill.

¹⁰⁹ For pertinents, see Reid, *Property* paras 199-206.

¹¹⁰ The problem arises equally the other way, ie the potential benefited property might be within four metres, not of the burdened property, but of a pertinent of that property. In practice both properties are likely to share the same pertinents.

burdens, and the constitutive deed which forms the title of the particular burdened property must make reference to the common scheme.¹¹¹ If these conditions are not met, a property will not qualify, despite the fact that it lies within four metres.¹¹² This means, for example, that a property on the edge of a housing estate will not face enforcement from properties within four metres but which are not part of the same estate. In rural areas the properties within a four-metre radius may quite often not be subject to the same burdens.¹¹³ One consequence of this approach is that enforcement is almost always a two-way business. If property A can enforce against property B (being a property lying within four metres), then property B can also enforce against property A.

11.52 The overall effect of our proposals is to blend the old law with the new. The old law determines the principle of enforceability, and, crucially, the existence of enforcement rights can be ascertained from the title of the burdened property alone.¹¹⁴ We suggest that, for convenience, the relevant rules be re-stated in statutory form. We further suggest that the requirement of a common author be dropped, on the basis that in modern practice part of an estate may come to be developed by a different company. Naturally the requirement of a common plan remains. If enforcement rights are found to exist, the new law then limits the benefited properties to those which lie within a four-metre radius and are subject to the same burdens. As well as leading to manageable numbers, this solves the difficulty of identifying the enforcers, which, under the present law, is sometimes insurmountable.

11.53 If enforcers are to be measured by reference to a four-metre radius, it follows that the class of enforcers will not be the same for any two properties. Instead there will be a series of, partially overlapping, circles of enforcement. The treatment of amenity burdens is thus quite different from the treatment of facility and service burdens. The latter will often be community burdens, reciprocally enforceable throughout the community, and hence subject to majority decision-making. The former, by contrast, will be a matter for close neighbours alone and will not be subject to rule by the majority. The difference is deliberate. Majority rule has little or no role to play for amenity burdens except in relation to variation and discharge¹¹⁵ – and not even there if the class of enforcers is as small as is currently proposed. To prevent amenity burdens from qualifying as community burdens in respect of the small group of properties formed by the four-metre radius, we have already recommended an appropriate adjustment to the definition of “community burden”.¹¹⁶

11.54 The rule proposed is not perfect. Any solution which relies on a fixed distance suffers from obvious difficulties and is probably acceptable only on a transitional basis.¹¹⁷ A fixed distance cannot take into account differences in topography and population density.

¹¹¹ Para 11.48.

¹¹² This is one of the points of distinction between the present proposal and the proposal made in Scot Law Com DP No 93 paras 3.40 to 3.49, that burdens be enforceable by properties within a 20-metre radius. In other respects too the present proposal is of much narrower scope, applying only to amenity burdens, and only where they are created as part of a common scheme.

¹¹³ For example, it might be bounded on all sides by fields belonging to the estate from which it was sold. The residual estate is unlikely to be subject to the same burdens, although its owner may have enforcement rights as feudal superior, or under the rule in *Mactaggart*.

¹¹⁴ Paras 11.9 to 11.11.

¹¹⁵ The other two instances of majority rule contained in the default code for community burdens (decision-making as to the repairs, and the appointment of a manager) are designed for facility burdens only. See paras 7.31 to 7.46.

¹¹⁶ Para 7.20.

¹¹⁷ Scot Law Com DP No 106 para 3.29.

Nor, outside the broad distinction between amenity burdens and others, can it take into account differences in burden type. Large properties are likely to have more enforcers than small. In some cases a property which is within four metres of a burdened property might still be a substantial distance from the location of a proposed breach. Furthermore, a large property may come to be divided, which might change the class of enforcers.¹¹⁸ To some extent these difficulties can be answered. Differences in location and burden type are relatively unimportant if the fixed distance is as small as four metres. No doubt that is why the limit is thought acceptable in planning law. In practice the properties subject to a common scheme are usually of modest size. The typical cases are houses in housing developments, or individual plots sold over a period of years from a landed estate. The residual landed estate will not itself be part of the common scheme. Distance from the location of the proposed breach – solved in neighbour notification by a 90-metre rule¹¹⁹ – will be regulated by interest to enforce.

11.55 The case for the rule can also be expressed more positively. It coheres with planning law, and with the rule for intimation recommended earlier in the context of notices of termination.¹²⁰ It fulfils the expectations expressed in the Title Conditions Survey. No amenity burdens are lost, but at the same time enforcement rights are kept within manageable limits. A person outside the four-metre rule loses rights, admittedly, but also corresponding obligations: if he can no longer enforce against his neighbour, his neighbour can no longer enforce against him. Rights and obligations thus remain in balance.¹²¹ Moreover, a person whose own property is too distant can seek to persuade a closer neighbour to enforce. If he fails it is probably because the breach is unobjectionable. Finally, the rule proposed is at any rate better than the alternatives. As compared to a registration scheme, it has the great advantage that no one is required to do anything. Enforcement rights are realigned by force of statute.

11.56 We recommend that

90. (a) **Where -**
- (i) **real burdens are imposed under a common scheme, and**
 - (ii) **in relation to any property so burdened, the constitutive deed discloses or refers to the common scheme**

¹¹⁸ The four metres are measured, not once and for all on the appointed day, but from time to time, as enforcement issues arise. (Hence the words “for the time being” in s 44(1) of the draft bill.) This allows later subdivisions to be taken into account and prevents enforcement by remote properties which, at the appointed day, happened to be part of a much larger property within four metres of the burdened property. Any other rule would require historical knowledge of the state of the boundaries on the appointed day. Note however that if subdivision of the burdened property were done artificially, as a means of removing or restricting the class of enforcers, it would be strongly arguable that a mere division of ownership did not achieve a division of the original unit. This is because the definition of “unit” in s 113(1) of the draft bill is functional and does not depend on separation of ownership.

¹¹⁹ Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224 art 2(1). The 90-metre rule cannot be used here directly, because it is impossible to tell in advance where in the property projected breaches are likely to occur. The point could be met, at the expense of some complexity, by restricting enforcement rights to that part of the burdened property which lies within, say, 100 metres of the benefited property. But, given the small scale of the problem, interest to enforce seems a more satisfactory resolution.

¹²⁰ Para 5.34.

¹²¹ This is important from the point of view of the European Convention of Human Rights. See para 14.20.

any other property subject to the same common scheme and within four metres of the burdened property should be a benefited property.

(b) In measuring the distance of four metres there should be disregarded -

- (i) roads, if of less than 20 metres in width;
- (ii) pertinents of either property.

(c) This recommendation does not apply where -

- (i) inconsistent with the constitutive deed
- (ii) the constitutive deed is registered on or after the appointed day.

(Draft Bill s 44)

11.57 **Properties without enforcement rights.** Common schemes are often set up so that the affected properties are without enforcement rights. No enforcement rights are conferred; and implied rights are avoided either because there are individual constitutive deeds which make no reference to the common plan,¹²² or because the granter reserves a power of waiver. As was seen earlier, reserved powers of waiver are almost standard in modern deeds of conditions.¹²³ Whether the denial of implied rights is deliberate or accidental is hard to say, and will no doubt vary from development to development; but in any event it is common. Our survey of deeds of conditions showed that neighbours were without enforcement rights in around one half of all cases.¹²⁴ The consequence, sometimes, is that the burdens are enforceable by no one. In that case they need not be complied with.¹²⁵ More usually, however, the burdens were created in association with a grant in feu, so that the burdens are enforceable by the feudal superior. With the abolition of the feudal system the burdens will be extinguished.¹²⁶

11.58 It is possible to argue that the enforcement rights now held by superiors should be transferred to neighbours – or in other words, that the four-metre rule should apply to common scheme burdens with superiors as well as to common scheme burdens with implied enforcement rights. The burdens in question are currently enforceable, and complied with. To extinguish them would be to leave the land unregulated, with possibly undesirable results. There is some evidence from our survey of deeds of conditions that express enforcement rights are more common in non-feudal burdens, suggesting that neighbours are denied enforcement rights in cases where burdens are to be enforceable by

¹²² This is the first of the two situations identified in *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95 at p 103. See paras 11.6 and 11.11.

¹²³ Para 11.15.

¹²⁴ Appendix D para 12.

¹²⁵ And may in practice not have been complied with. Owners will sometimes have bought, or otherwise acted, on the basis of advice as to the burdens' enforceability. It is no part of our proposals to undermine that advice. If a burden is not currently enforceable it should not, as a general rule, be rescued by the legislation here proposed.

¹²⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 17. We are dealing here only with amenity burdens. Facility and service burdens will survive, both under s 23 of the Act and under the recommendation made at para 11.41 above.

superiors.¹²⁷ While no provision is made in the Feudal Act to save burdens in the situation just described,¹²⁸ it is not too late for the point to be reconsidered. In evaluating the arguments, much depends on the standpoint from which the issue is approached. If amenity burdens look attractive to the potential enforcer, they look less attractive to the potential defaulter; and in the case of burdens imposed under a common scheme burdens, many owners will eventually fall into both categories. A person who wishes to depart from a burden must obtain the consent of those entitled to enforce. If a burden is enforceable only by the superior, only one consent is needed. The superior's practice is usually to require a fee, but the process is generally quick, and consent is generally granted. If in place of the superior there is substituted a group of neighbours, the outlook is less favourable. A number of consents are required. A formal minute of waiver would be slow and expensive, even if no fee were requested. And since the neighbours are directly affected by the proposed breach, there is a much greater chance that the request would be refused. For the owner seeking to make use of his property this would be a change for the worse. The effect of feudal abolition would be to increase the regulation of land rather than to reduce it. For this reason we do not support a general transfer of superiors' rights to neighbours. Our advisory group were of the same view.

11.59 There might, however, be special cases. In our discussion paper we suggested that amenity burdens should be saved if created in a deed of conditions, on the basis that such a deed was evidence of a proper self-regulating community.¹²⁹ But while this was generally supported on consultation, there were also reservations. One experienced solicitor¹³⁰ warned against

“the assumption that all houses grouped together are a ‘community’ just because the conditions in their title are identical. This is not the normal perception. One should distinguish flats in a tenement (where property is owned in common, or at least there is common interest) from houses in a development where there may be no property in which there is common ownership or common interest.”

Others wondered why there should be special treatment for deeds of conditions but not for functionally identical cases involving a different kind of constitutive deed.

11.60 On reflection, we think that to single out deeds of conditions is to use the wrong criterion of selection. The underlying policy, however, seems sound. In proper communities, amenity burdens serve an important and distinctive role. Their extinction would harm the community as a whole. The difficulty lies in identifying cases of proper communities. We suggest that two are worthy of special consideration:

- tenements (including modern blocks of flats)
- sheltered housing developments.

Both are discussed below.

¹²⁷ Appendix D para 13. On this point, however, the sample is too small to be reliable.

¹²⁸ Scot Law Com No 168 paras 4.16 to 4.20.

¹²⁹ Scot Law Com DP No 106 paras 3.33 and 3.34. Since a four-metre rule was not then in contemplation, the proposal was that the burdens should be enforceable by all the properties which were subject to the burdens.

¹³⁰ Mr Bruce Merchant.

11.61 **Properties with express enforcement rights.** Some common schemes give express rights to neighbours. In our survey of deeds of conditions this had been done in around 40% of all cases. Some of the arguments mentioned above apply equally to express enforcement rights. In particular the task of obtaining a minute of waiver from 100 people is not made easier because the enforcement rights were expressly conferred. There would be something to be said for extending the four-metre rule to all cases where neighbours have rights to enforce, even where the rights are expressly conferred. Often this would be a considerable improvement on the present position. Many of the owners who took part in our Title Conditions Survey, and who expressed enthusiasm for enforcement by close neighbours (alone), were in housing estates where enforcement rights had been expressly conferred. Nonetheless we have concluded that it would be wrong to override the express terms of the titles. In some cases the enforcement rights will have been specially tailored to the particular development. Certain burdens may deliberately have been made enforceable by certain properties, and other burdens by other properties. In small developments too, an express provision that everyone can enforce may make much better sense than a four-metre limit which would include some properties but not others. Where the titles provide, we think that the titles should rule. Recommendations made earlier will ease the business of obtaining discharges.¹³¹

Tenements

11.62 A tenement is the paradigm community. There is a high level of mutual proximity and dependency, such that the use of one flat affects the amenity of all. In a tenement all owners are neighbours and not merely those whose flats lie within four metres.¹³² We recommend therefore that

91. (a) **Where real burdens are imposed under a common scheme on all the flats in a tenement, each flat should be a benefited property.**

(b) **This recommendation does not apply where the constitutive deed is registered on or after the appointed day.**

(Draft Bill s 45)

We do not require actual notice of the scheme in the constitutive deed: the fact that burdens are imposed in a tenement seems sufficient notice that such a scheme may exist. Indeed that may already be the law, although the issue has not been tested by litigation. To the extent that it is not the law, our proposal will confer new enforcement rights. The proposal fits well with our *Report on the Law of the Tenement* which envisages a network of mutually enforceable rights and obligations within a tenement.¹³³

11.63 Common scheme and tenement must coincide. If burdens are imposed on some flats but not on others, the tenement is not being treated as a discrete community and there is no reason to apply a special rule. The position will then be regulated by the four-metre rule discussed earlier. Assuming that scheme and tenement do coincide, the burdens will satisfy

¹³¹ Strictly s 44 of the draft bill is capable of applying to common scheme cases where there are express rights of enforcement - in the same way as the presence of express rights does not, under the current law, exclude the possibility of implied rights. The point is rather theoretical, however, because the class of express enforcers will invariably include the small class who are given rights to enforce under s 44.

¹³² In a traditional tenement, however, a four-metre rule would be sufficient to bring in all the flats.

¹³³ Scot Law Com No 162.

the criteria for community burdens and will be subject to majority rule in respect of management and discharge.¹³⁴

11.64 Finally, we should make clear that “tenement” is being used in its technical sense to include any building in which ownership is divided horizontally, including modern blocks of flats and villa conversions. Since division of ownership is not required for real burdens,¹³⁵ we would also include a building which is flatted but in which the flats have not yet been disposed of.¹³⁶

Sheltered housing

11.65 Owner occupied sheltered housing dates only from the early 1980s but in recent years has become popular. In a typical development, the individual houses have been sold by grant in feu and the developer remains as feudal superior. Burdens are imposed on a common scheme by deed of conditions, and sole management rights are reserved to the superior or to a manager selected by the superior. The burdens are usually mutually enforceable within the development. In the twelve deeds of conditions relating to sheltered housing which were examined as part of our survey, express enforcement rights had been conferred in eight cases and implied enforcement rights in one. This may be contrasted with the more general picture for deeds of conditions where neighbours have enforcement rights in only 48% of cases.¹³⁷ Against this background it seems clear that enforcement rights should be given to all the houses in the development. For the most part this does no more than affirm the *status quo*. In practice, one house is often held back by the developer for use as a warden’s flat (or for some other special purpose) and is not subject to the real burdens, and this needs to be taken into account in formulating a recommendation. We recommend therefore that

92. (a) Where real burdens are imposed under a common scheme on all the units in a sheltered housing development (or on all units other than one which is used in some special way), each unit should be a benefited property.

(b) This recommendation does not apply where the constitutive deed is registered on or after the appointed day.

(Draft Bill s 46)

On general principles the unburdened unit would be excluded from the “community” established by these community burdens, but this result is avoided by an adjustment to the definition of “community burden” which was recommended earlier.¹³⁸

11.66 Some controversy surrounds the management of sheltered housing developments. It is typically provided in the deed of conditions that the manager is to be appointed by the superior/developer with power to carry out maintenance, provide services, and levy a service charge. Although the manager must consult, he is not always bound by the results

¹³⁴ See generally part 7.

¹³⁵ Para 3.1.

¹³⁶ See the definition of “tenement” in s 113(1) of the draft bill.

¹³⁷ Appendix D paras 12 and 16.

¹³⁸ Para 7.19.

of the consultation. Nor usually can he be dismissed by the owners whose interests he represents. This system of strong management has been attacked as a potential abuse of power,¹³⁹ but also defended on the basis that those who live in such developments do not wish to be troubled by matters of management.¹⁴⁰ Both arguments have merit. The day-to-day management of sheltered housing should not, probably, lie with its owners; but the owners should nevertheless retain ultimate control, even if this is expressed only as a power to dismiss a manager whose performance is unsatisfactory. This compromise may already be enshrined in the law. A real burden which deprives owners of all powers of management is probably unenforceable, on the ground of repugnancy with ownership.¹⁴¹ If that is correct, the legal foundations of the current management regime are dubious. With the abolition of the feudal system they will be removed altogether. Following feudal abolition, the developer will cease to be a superior. His unique management rights, such as they were, will disappear.¹⁴² He will still be able to enforce the standard burdens in the title, but only as owner of the warden's flat or other reserved unit; and in that context he will simply be one voice in the overall community and subject to being outvoted by the other owners. It is true that, as the Feudal Act currently stands, a superior/developer might attempt to preserve his management rights by registering a notice under section 18 in respect of the relevant burden. If all other units were positioned within 100 metres of the reserved unit, this could be done for the whole development. The attempt, however, would fail, for not only is the burden, probably, invalid but ownership of a single unit does not confer interest to enforce a right of management over all other units.¹⁴³ We think, however, that there would be an advantage in forestalling any such attempt by making an appropriate amendment to section 18 (which is not yet in force).¹⁴⁴

11.67 It is important that management should not be interrupted during the transition from one system to another. For that reason we have already recommended that any existing manager should be able to continue to act unless or until steps are taken to replace him.¹⁴⁵ The rules for community burdens would apply, so that a manager could be replaced by the vote of a majority.¹⁴⁶ If the existing manager provides a good service at a reasonable cost there is no reason to suppose that he would be replaced. A working group led by the Scottish Executive has recently produced a framework code of good management practice for owner occupied sheltered housing.¹⁴⁷

¹³⁹ Anne Stern, "Private Sheltered Housing - the need for regulation" 1991 SCOLAG 182.

¹⁴⁰ Representations to that effect have been made to us by some of the providers of sheltered housing.

¹⁴¹ Para 2.22. And see also Scot Law Com No 168 para 4.98.

¹⁴² Unless, temporarily, they qualify as a management burden. See draft bill s 53(9). In order to do so (i) the constitutive deed must be less than 10 years old and (ii) the developer must continue to own a unit in the development, other than the warden's flat or other unit used in some special way. See paras 2.29 to 2.39.

¹⁴³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 18(1) (burden must be "enforceable by a superior of the feu") and 24.

¹⁴⁴ Draft bill sched 7 para 3.

¹⁴⁵ Para 2.40. Even where the titles provide for a higher figure, we recommend (paras 2.41 to 2.44) that a two thirds majority should always be able to dismiss a manager.

¹⁴⁶ Para 7.44.

¹⁴⁷ This was published in March 2000 and is available at <http://www.scotland.gov.uk>.

Some clarifications

11.68 It may be helpful to make some general comments about the rules proposed above for facility and service burdens and for amenity burdens.¹⁴⁸

11.69 **Burdens with implied enforcement rights.** For burdens with implied enforcement rights, our proposals are designed to provide a new set of statutory rules. With the exception mentioned below,¹⁴⁹ all existing implied rights are abolished. In their place come the rules set out above.¹⁵⁰ A person who qualified under the old rules but not under the new will no longer be able to enforce real burdens.¹⁵¹

11.70 **Burdens with express enforcement rights.** The rules apply to all burdens created before the appointed day, and not merely to those which depend on implied enforcement rights.¹⁵² Like burdens should, we think, be treated alike. In practice, however, the impact of the rules will be limited. Often the existing enforcement rights will coincide with the new statutory rights. To the extent that they do not, the express rights are likely to be wider. For example, in an estate of 100 houses any express rights would probably extend to all the houses and not merely to those within four metres. No existing right which was expressly conferred will be extinguished.¹⁵³

11.71 **Rules cumulative not alternative.** The same set of burdens may be affected by more than one rule. That is deliberate: the relevant sections in the draft bill¹⁵⁴ talk of becoming “a” (and not “the”) benefited property. This allows for the possibility of other benefited properties, whether under different rules, or by virtue of express nomination. Thus, as well as falling under its own particular rule (ie the rule which gives enforcement rights to all properties taking benefit from the facility),¹⁵⁵ a facility burden may also be subject to the four-metre rule¹⁵⁶ and so enforceable by all those with corresponding burdens within a four-metre radius. In practice this is unlikely to add to the list of enforcers. Perhaps the only important case of the application of two rules is a block of flats forming part of a larger development (whether of other blocks of flats, or of a mixture of flats and villas). In relation to any one flat the common scheme burdens will be enforceable, not only by the other owners in the block of flats,¹⁵⁷ but by any other owner in the development whose property is within four metres. Quite often in such a case the burdens which are common to the flats will be different from those which are common to the rest of the development.

¹⁴⁸ Paras 11.34 to 11.67. They are not intended to apply to the proposal described later (paras 11.72 to 11.79) by which the right of enforce certain categories of amenity burdens can be preserved by registration of a notice of preservation.

¹⁴⁹ Paras 11.72 to 11.79.

¹⁵⁰ Thus (para 11.33) they are not *exceptions* to the abolition of implied enforcement rights. They are new statutory rules.

¹⁵¹ This mainly affects someone outwith the four-metre radius in burdens imposed under a common scheme. See paras 11.48 to 11.56.

¹⁵² It is, of course, possible for burdens to be subject to *both* express and implied enforcement rights. See para 11.2.

¹⁵³ Para 11.61.

¹⁵⁴ Draft bill ss 44 to 47.

¹⁵⁵ Paras 11.34 to 11.41.

¹⁵⁶ ie the rule set out in paras 11.50 to 11.55.

¹⁵⁷ Under the rules set out in paras 11.62 and 11.63.

Amenity burdens: the rule in *Mactaggart*

11.72 Thus far we have been considering amenity burdens imposed as part of a common scheme. The other case of implied enforcement rights is the rule in *Mactaggart*, ie the rule that, if A imposes real burdens in a disposition of land to B, such neighbouring land as is retained by A is, by implication, the benefited property in those burdens.¹⁵⁸ The solution proposed for common scheme burdens (enforcement within a radius of four metres) cannot be used here. Partly this is because A's retained land may not lie within four metres. But the real difficulty is more fundamental. The four-metre rule works only if the burdened owner knows whether implied rights exist. In common scheme cases that can be ascertained merely by reading the constitutive deed.¹⁵⁹ In the case of the rule in *Mactaggart*, however, this is rarely possible. When burdens are imposed in, or in association with,¹⁶⁰ a disposition, and the deed is silent as to enforcement rights, there are three possibilities. Either (i) the burdens are imposed under a common scheme or (ii) the rule in *Mactaggart* applies or (iii) there are no enforcement rights. Which applies is often impossible to determine without painstaking research.¹⁶¹ In the case of (i), the common scheme may be referred to in the deed. If so, the burdens are enforceable as common scheme burdens under principles already mentioned. But if a common scheme exists and is not referred to, the result is probably that the burdens are not enforceable by anyone. In other words (although the matter is not free from doubt) the mere existence of a common scheme, disclosed or undisclosed, appears to have the effect of excluding the rule in *Mactaggart*.¹⁶² On that basis the application of (ii) then depends on both a negative and a positive proposition. The negative proposition is that the burdens were not imposed under a common scheme. The positive proposition is that the granter of the disposition retained land in the neighbourhood which could act as a benefited property. Neither is readily verifiable.

11.73 Earlier we rejected a registration solution for common scheme burdens. In the case of the rule in *Mactaggart* such a solution seems unavoidable. For unless enforcement rights are registered, the status of many burdens will remain uncertain. An owner ought to be able to tell whether the burdens in his title are alive or dead, and if alive, where the enforcement rights lie. Under the present law that is barely possible.

11.74 An outline registration scheme was set out in the discussion paper.¹⁶³ The registration schemes in the Feudal Act provide an obvious model.¹⁶⁴ The scheme would

¹⁵⁸ The rule is discussed in detail in paras 11.16 to 11.19.

¹⁵⁹ The existence, but not the details: see paras 11.9 to 11.11.

¹⁶⁰ ie in a deed of conditions.

¹⁶¹ Para 11.22.

¹⁶² Scot Law Com DP No 106 paras 3.14 and 3.15. Our proposal (para 3.50 and proposal 9) that the doubt be resolved on the lines expressed in the text was overwhelmingly supported on consultation. It is given effect by s 42(6) of the draft bill.

¹⁶³ Scot Law Com DP No 106 para 3.43.

¹⁶⁴ There is, however, no equivalent to the 100 metres requirement set out in s 18(7) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The situations are different. See Scot Law Com No 168 para 4.36. In the present case the neighbouring land is already a benefited property. The purpose of the notice is merely affirmative of that right. There is no reason to cut down an existing right by imposing a distance limit. In the situation covered by s 18 of the Feudal Act the neighbouring land was not a benefited property. There the granter of the original constitutive deed elected to have the burden enforceable by a superior and not by the owner of neighbouring land. With the abolition of the feudal system such burdens might have been lost altogether. But the policy of the Feudal Act is to save essential burdens. The 100 metres rule is one of a number of attempts in the Act to measure what is essential.

work like this. A person holding enforcement rights¹⁶⁵ under the rule in *Mactaggart* could preserve those rights by registering a notice of preservation in the Land Register or Register of Sasines, as appropriate. The notice would:

- (i) identify and describe the burdened property;
- (ii) identify and describe the benefited property and, if the title is not completed by registration, set out the links in title;
- (iii) narrate the burdens; and
- (iv) explain the basis on which an implied right of enforcement attaches to the benefited property.

A proper conveyancing description would be required, or, in Land Register cases, details of the title number. If he wished, the applicant could be selective about the burdens which were included. For example he would probably wish to omit burdens which were clearly obsolete. In some cases this might be a matter for negotiation with the burdened owner. As with the creation of new burdens, the notice would require to be registered against the title of both the benefited and the burdened properties. If the original benefited property had come to be divided, it would be open to the owner of each constituent part to register a separate notice in respect of his own part. Alternatively two or more of the owners could prepare a combined notice.¹⁶⁶ As well as multiple benefited properties there might also be multiple burdened properties, as where the original burdened property had been divided. Once again a combined notice would be allowed, but registration would be required under each of the burdened properties.

11.75 In other matters too the procedure would follow that established by the Feudal Act.¹⁶⁷ The notice would be sworn or affirmed before a notary public. The oath or affirmation would be that the statements in the notice were true to the best of the owner's knowledge and belief. This would include the statement, which will not be checked by the Keeper,¹⁶⁸ that the notice has been properly served. The oath or affirmation would require to be given by the owner personally, and not through a solicitor or other agent.¹⁶⁹ The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. Prior to registration the notice would require to be sent¹⁷⁰ to the burdened owner along with an explanatory note in statutory form. If the name is not known, it would be sufficient to address the envelope to "The Owner" (or equivalent). The requirement would be waived in cases where it was not reasonably practicable, for example because the owner had disappeared. Although the burdened owner

¹⁶⁵ Such a person would be owner of the benefited property although, as elsewhere in this report, there would be no requirement that his title be completed by registration. If necessary the midcouples could be listed in the notice.

¹⁶⁶ For combined notices, see s 107(4) of the draft bill.

¹⁶⁷ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 18(4), (5), 41 and 43. See Scot Law Com No 168 paras 4.65 and 4.66.

¹⁶⁸ Draft bill s 107(5).

¹⁶⁹ However, where an individual is unable to swear or affirm by reason of a legal disability (such as nonage) or incapacity (caused, for example, by mental disorder), this could be done by a guardian, a curator bonis, a person acting under a continuing power of attorney or other similar legal representative. See draft bill s 42(5).

¹⁷⁰ For the meaning of sending in this, and other, contexts, see s 115 of the draft bill.

could not challenge the notice as such, he could seek a ruling on the validity of the burden, or the alleged enforcement right, either from the Lands Tribunal¹⁷¹ or the ordinary court.

11.76 In part 12 we suggest that, on the appointed day, negative servitudes should cease to exist as such but should be converted into real burdens.¹⁷² Normally no further action would be required; but where a servitude was not already registered against the burdened property it would be necessary to register a notice of converted servitude. If the constitutive deed for the converted servitude – now a real burden – does not nominate the benefited property, it would also be necessary to register a notice of preservation. In order to save the labour of two notices, we think that it should be possible for a notice of converted servitude to include the information contained in a notice of preservation. The single notice could then do the work of a notice of preservation as well.

11.77 A cut-off point is required after which registration of the notice would no longer be possible. Any rights not then registered would fall. In our discussion paper we suggested for consideration a period of five years beginning on the appointed day.¹⁷³ A number of consultees thought that a longer period was needed and suggested that ten years would be fairer on those who require to register, without being so long as to create uncertainty. We are inclined to agree. A ten year period is sufficiently long for many properties to change hands, and a change of ownership would be an appropriate occasion on which to review the issue of enforcement rights. If current use is any guide, however, we imagine that enforcement rights will often be judged not worth the trouble of investigation.

11.78 A notice which is incomplete or inaccurate will be rejected by the Keeper.¹⁷⁴ Occasionally, such a rejection might be challenged, either in the Lands Tribunal¹⁷⁵ or the ordinary courts.¹⁷⁶ If the challenge is successful, an owner should be able to register the notice even if the ten-year period has expired, provided he does so within a reasonable period. Two months would seem sufficient. In the interests of certainty, Scottish Ministers should be able to prescribe a final date after which registration would cease to be possible.¹⁷⁷

11.79 Drawing these various points together, we recommend that

93. (a) **An owner of property which carries enforcement rights by virtue of the rule in *Mactaggart* should be able to preserve such rights by registration of a notice of preservation not later than ten years after the appointed day; and during that period he may continue to enforce the real burden.**
- (b) **The notice would have to -**
- (i) **identify the benefited and burdened properties;**
 - (ii) **set out the terms of the real burden;**

¹⁷¹ Under the new jurisdiction which is to be conferred. See paras 6.19 to 6.23.

¹⁷² Paras 12.6 to 12.14.

¹⁷³ Scot Law Com DP No 106 para 3.54.

¹⁷⁴ Land Registration (Scotland) Act s 4(1).

¹⁷⁵ Land Registration (Scotland) Act s 25.

¹⁷⁶ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

¹⁷⁷ These proposals are modelled on s 45 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

- (iii) set out the grounds on which enforcement rights currently exist; and
 - (iv) narrate that a copy of the notice has been sent to the burdened owner or that it was not reasonably practicable to do so.
- (c) The owner should swear or affirm before a notary public that all the information contained in the notice is true to the best of his knowledge and belief.
- (d) A copy of the notice should be sent to the owner of the burdened property, together with an explanatory note, except where it is not reasonably practicable to do so.
- (e) The notice should be registered against both properties.
- (f) In appropriate cases a notice of converted servitude could be used instead of a notice of preservation.
- (g) Where a notice submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal to be registrable, it should be possible to register the notice late, but not later than
- (i) two months after the determination, or
 - (ii) such date as Scottish Ministers may prescribe

whichever occurs first.

(Draft Bill ss 42 and 107)

Registration issues

11.80 **Removal of extinguished burdens.** On the appointed day, two general extinctive provisions will come into force. Superiors' enforcement rights will be extinguished by section 17 of the Feudal Act; and implied enforcement rights will be extinguished by section 41 of the Title Conditions Bill. If the rights extinguished, or either of them, were the only enforcement rights in relation to a particular burden, the effect will be to extinguish the burden itself. Both provisions, however, are subject to complicated, and overlapping, savings. The combined effect of these various provisions may be summarised in this way. A real burden will not be extinguished on the appointed day if, and only if, one of the following conditions is satisfied:¹⁷⁸

- (i) enforcement rights are expressly conferred in the constitutive deed (other than in favour of a superior);

¹⁷⁸ Condition (i) is the single case where neither extinctive rules applies. The remaining conditions are derogations from one or other (or sometimes both) of the extinctive rules.

- (ii) a notice has been registered under section 18 of the Feudal Act (neighbour burdens);
- (iii) an agreement has been registered under section 19 of the Feudal Act (neighbour burdens);
- (iv) a notice or order of the Lands Tribunal has been registered under section 20 of the Feudal Act (neighbour burdens);
- (v) a notice has been registered under section 27 of the Feudal Act (conservation burdens);
- (vi) the burden is one in respect of which a notice could be registered under 42 of the Title Conditions Bill¹⁷⁹ (neighbour burdens: rule in *Mactaggart*); such a notice may be registered only for the first ten years after the appointed day;
- (vii) the burden is a facility burden;¹⁸⁰
- (viii) the burden is a service burden;¹⁸¹
- (ix) the burden is a maritime burden;¹⁸²
- (x) the burden is (a) imposed under a common scheme (b) notice of which appears in the constitutive deed (c) there is another property within four metres which is subject to a like burden under the same common scheme and (d) there is nothing in the constitutive deed to exclude implied enforcement rights;¹⁸³
- (xi) the burden is imposed under a common scheme on all the flats in a tenement;¹⁸⁴
- (xii) the burden is imposed under a common scheme on the units in a sheltered housing development.¹⁸⁵

Although the proposition is expressed negatively, the likelihood is that a majority of burdens will satisfy one or more conditions. Those which do not, however, will require to be removed from the Land Register. The questions are then how, and when.

11.81 *How?* The conditions set out above are less daunting than first appears. Whether condition (i) is satisfied will be obvious from the most cursory glance at the deed of conditions or other constitutive deed. Conditions (ii) to (vi) depend on the registration of a notice. More difficult are conditions (vii) to (ix) which require that individual burdens be

¹⁷⁹ Strictly this is extended to a notice of converted servitude under s 76. See para 11.76.

¹⁸⁰ Draft bill s 47(a), replacing s 23(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

¹⁸¹ Draft bill s 47(b), replacing s 23(2) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

¹⁸² Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 60.

¹⁸³ Draft bill s 44.

¹⁸⁴ Draft bill s 45.

¹⁸⁵ Draft bill s 46.

read and characterised; but only condition (vii) (facility burdens) will be at all common and should usually be straightforward to apply. The existence of a common plan (condition (x)) will often be obvious, but will require research if the burdens are imposed in a series of deeds¹⁸⁶ as opposed to a single conveyance or deed of conditions. The final two conditions require identification of the type of property. A feature common to all twelve conditions is that all can be determined from the register and, with the partial exception of condition (x), all from the title sheet of the particular burdened property. Even allowing for the transitional difficulties, that is an important advance on the current position.

11.82 With training, and experience, the staff at the Land Register will no doubt become adept at determining which burdens survive and which do not. But it will take time for the Register to catch up. There are currently over 500,000 title sheets, and the numbers are rising steadily. The Keeper could not be expected to go through each title sheet weeding out burdens, and a more gradualist approach seems unavoidable. While the Keeper should have a discretionary power to delete burdens,¹⁸⁷ he should be bound to do so only on request. Under the Land Registration (Scotland) Act 1979 a request is likely to come about in one of two ways. First, an owner can ask the Keeper to rectify the Register or rectification can be ordered by a court. This arises because the continuing presence on the Register of an extinguished real burden is an “inaccuracy” within section 9(1) of the 1979 Act.¹⁸⁸ Secondly, if more speculatively,¹⁸⁹ an owner can seek to extinguish the burden by registration on the basis that feudal abolition constitutes an “event” within section 2(4)(c) of the Act. In practice free-standing requests are likely to be rare. The natural time to request deletions will be when property changes hands, and a fresh application for registration is being made. Consideration should be given to altering the application forms to make space for such a request.¹⁹⁰ It will be for the applicant to demonstrate why a particular burden or set of burdens should be deleted. In the case of burdens extinguished by feudal abolition, this gradualist approach is already enshrined in statute,¹⁹¹ and a matching provision is required for burdens extinguished by the abolition of implied enforcement rights.

11.83 *When?* The Feudal Act imposes an initial freeze on the removal of burdens. No application or order for removal may be made for such period after the appointed day as Scottish Ministers may prescribe; and during this period the burdens are to be treated as subsisting for the purposes of making up title sheets on first registration.¹⁹² In theory the Keeper could still remove burdens on his own initiative but in practice is unlikely to do so. The original purpose of the freeze was to allow for the registration of notices of preservation under the Title Conditions Bill. Feudal burdens could not safely be deleted until the position about implied enforcement rights had been clarified. Thus deletion must wait until the final date for registration of notices had passed.¹⁹³ This justification has now disappeared. Under our revised proposals for implied rights, a notice can only be registered

¹⁸⁶ ie the first situation identified in *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95, 103. See para 11.6.

¹⁸⁷ Section 9(1) of the Land Registration (Scotland) Act 1979 empowers the Keeper to rectify any inaccuracy in the Register “whether on being so requested or not”.

¹⁸⁸ *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105.

¹⁸⁹ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

¹⁹⁰ The application forms are forms 1-3 of sched 1 to the Land Registration (Scotland) Rules 1980 (SI 1980/1413). The Rules may be altered under powers contained in s 27 of the Land Registration (Scotland) Act 1979.

¹⁹¹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 46(1).

¹⁹² Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 46(1), (2). Our original recommendation was for a five-year freeze.

¹⁹³ Scot Law Com No 168 para 4.24.

where a person holds under the rule in *Mactaggart*;¹⁹⁴ and a person cannot so hold in the case of feudal burdens.¹⁹⁵ So far as the Title Conditions Bill is concerned, therefore, there is no reason why the process of removing *feudal* burdens should not begin on the appointed day.¹⁹⁶ The position is different for *non-feudal* burdens, ie burdens created in, or in association with, dispositions. Here the rule in *Mactaggart* has the potential to apply, and the process of removal must wait until the period for registration of notices of preservation has expired, ten years after the appointed day. An express provision is needed.¹⁹⁷ Further, even after the expiry of the ten-year period the Keeper should not be able to delete a burden in respect of which a notice was presented for registration, rejected by the Keeper, and the rejection judicially challenged.¹⁹⁸ There are likely to be very few such cases.

11.84 *Deleted burdens not to be reinstated.* In a sense deletion is no more than a tidying up exercise. For even although they appear on the Register the burdens are already extinct. If that were not so, the Register would be accurate and there could be no question of rectification. No doubt the opportunity will be taken to delete burdens which are extinct on other grounds: indeed some burdens presently on the Register have never been valid.¹⁹⁹ Having regard to the scale of the task, it is unrealistic to suppose that mistakes will not be made. The Keeper will be properly cautious, no doubt; but from time to time burdens will be removed from the Register which were valid and in respect of which enforcement rights continued to exist. The effect of the removal will be for the burdens to be extinguished, for presence on the Register is a necessary (though not a sufficient) condition of validity.²⁰⁰ In theory the mistake might be undone by rectification, for the Register would be inaccurate;²⁰¹ but in practice rectification would be prevented as being prejudicial to a proprietor in possession.²⁰² A future purchaser therefore need not fear the reinstatement of burdens deleted in error: what he sees on the Register is what he will get. A person who has lost enforcement rights has a claim against the Keeper for indemnity.²⁰³

11.85 **Statement concerning enforcement rights.** The decision to remove or not to remove will involve an evaluation of the burdens. There should be no difficulty in respect of conditions (i) to (vi) mentioned above,²⁰⁴ for it will be immediately obvious from the Register if these apply. Conditions (vii) to (xii), however, may sometimes be more challenging and involve further inquiry. Where inquiry takes place its benefits should not be lost for the future. If the Keeper is satisfied that any of conditions (vii) to (xii) apply he should have a duty to make a statement to that effect on the title sheet;²⁰⁵ and where he has sufficient

¹⁹⁴ Paras 11.48 and 11.72 to 11.78.

¹⁹⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 48. For an explanation of this provision, see Scot Law Com No 162 para 4.87.

¹⁹⁶ There may of course be other considerations, such as resource implications at the registers at a time when the final Sasine counties are becoming operational for registration of title.

¹⁹⁷ Draft bill s 43.

¹⁹⁸ Para 11.77.

¹⁹⁹ Scot Law Com DP No 106 para 3.53.

²⁰⁰ Land Registration (Scotland) Act 1979 s 3(1).

²⁰¹ The Register is inaccurate both if spent burdens appear and also if unspent burdens are omitted.

²⁰² Land Registration (Scotland) Act 1979 s 9(3). In our *Report on Abolition of the Feudal System* (Scot Law Com No 168, para 4.23) we recommended that reinstatement should be possible, even in a question with a proprietor in possession, but this recommendation was not accepted: see Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 3(b)(ii) (inserting a new s 9(3C) into the 1979 Act). On this point the Title Conditions Bill follows the Feudal Act.

²⁰³ Land Registration (Scotland) Act 1979 s 12(1)(b).

²⁰⁴ In para 11.80.

²⁰⁵ For reasons of resources, s 48(a) of the draft bill reduces the duty to a power for the first ten years after the appointed day.

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 of the benefited property. For the first time the Land Register will give an accurate picture in relation to real burdens.

11.86 Rectification and indemnity. Usually rectification cannot take place if it would prejudice a proprietor in possession.²⁰⁶ Strictly, rectification in order to remove burdens extinguished by the abolition of implied enforcement rights would not cause such prejudice on the basis that the burdens were already spent and could not have been enforced. But an express provision would remove any possible doubt.²⁰⁷

11.87 The transitional provisions of the Title Conditions Bill impose various duties on the Keeper. He must adjudicate on notices of preservation²⁰⁸ and notices of converted servitude;²⁰⁹ and he must make statements as to the enforceability of burdens.²¹⁰ Sometimes mistakes may occur, if only because of the obscurity and difficulty of the law surrounding the rule in *Mactaggart*. Following the approach adopted in the Feudal Act,²¹¹ we think that mistakes in transitional matters should be open to correction by rectification of the Register even against a proprietor in possession; and we think that indemnity should not be payable. As mentioned earlier,²¹² however, it would not be possible to use rectification to reinstate burdens which had previously been removed.

11.88 Recommendation. We recommend that

- 94. (a) The Keeper should not be required to remove from the Land Register a real burden extinguished by virtue of recommendation 88 unless requested to do so in an application for registration or rectification or ordered to do so by the court.**
- (b) For a period of 10 years after the appointed day –**
- (i) it should not be possible for an application or order to be made under paragraph (a);**
 - (ii) for the purposes of section 6(1)(e) of the Land Registration (Scotland) Act 1979 a real burden extinguished by recommendation 88 should, at the Keeper’s discretion, continue to be treated as “subsisting”.**

²⁰⁶ Land Registration (Scotland) Act 1979 s 9(3).

²⁰⁷ The same approach is adopted in the Feudal Act: see Scot Law Com No 168 para 2.47.

²⁰⁸ Draft bill s 47; and see paras 11.72 to 11.78.

²⁰⁹ Draft bill s 76; and see paras 12.8 to 12.14.

²¹⁰ Draft bill s 48; and see para 11.84.

²¹¹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 3. And see Scot Law Com No 168 paras 2.48 and 2.49.

²¹² Para 11.83.

(c) The Keeper should not remove from the Land Register a real burden in respect of which a notice of preservation or notice of converted servitude has been rejected if the rejection is being challenged before the court or Lands Tribunal.

(d) If the Keeper is satisfied that a real burden is enforceable by virtue of any of conditions (vii) to (xii) set out in paragraph 11.80, he should enter on the title sheet of the burdened property

(i) a statement that the real burden is enforceable by virtue of the condition in question; and

(ii) where he has sufficient information to describe the benefited property, a description of that property.

(e) It should be made clear -

(i) that any rectification of the Land Register which is required to take into account recommendation 91, or of anything done under recommendations 88, 93 and 96 and paragraph (d) of this recommendation, is not to be regarded as prejudicing any proprietor in possession, and

(ii) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification.

(Draft Bill ss 43, 48 and 104)

Part 12 Servitudes

Introduction

12.1 A review of the law of servitudes is beyond the scope of the present exercise. But a number of changes are required to accommodate recommendations made earlier in respect of real burdens, and we also suggest one or two further changes of a minor nature.

Realignment of boundary between servitudes and real burdens

12.2 We suggested in the discussion paper that the boundary between servitudes and real burdens might usefully be realigned.¹ At present the two types of right overlap in a manner which can be explained historically but which today seems unsatisfactory. It would be a simple matter to draw a clear line between them. For the purposes of analysis there may be said to be three types of obligation which run with the land:

- (i) an obligation on the burdened owner to do something, such as to use the property for a particular purpose, or to maintain a building;
- (ii) an obligation not to do something, such as to build on the property, or to use it for commercial purposes; and
- (iii) an obligation to allow the benefited owner some limited use of the property, such as to walk or drive over part of it, or to run a pipe through it.

Type (i) is a positive or affirmative obligation. Type (ii) is a restriction. Type (iii) is a passive obligation not to interfere while the benefited owner exercises some limited possessory right. Type (i) obligations are exclusively real burdens: a servitude cannot impose an affirmative obligation, other than incidentally.² Type (ii) obligations are always real burdens, except that restrictions on building can be created both as a real burden and as a (negative) servitude. Type (iii) obligations are in practice almost exclusively (positive) servitudes, although in theory it may be possible to constitute such an obligation as a real burden.³

12.3 We have already recommended, earlier in the report, that real burdens should in future be confined to obligations of the first two types.⁴ In the discussion paper we further proposed that servitudes should be confined to obligations of the third type, or in other words that it should cease to be possible to create negative servitudes.⁵ The few negative servitudes recognised by our law⁶ could, we thought, just as readily be constituted in the form of real burdens, and there seemed no reason for maintaining the separate category. Indeed there was disadvantage in doing so, for negative servitudes can in theory be

¹ Scot Law Com DP No 106 paras 2.42 to 2.49.

² *Cusine & Paisley, Servitudes* para 1.06(1).

³ *B & C Group Management v Haren* Outer House, 4 December 1992, unreported.

⁴ Paras 2.1 to 2.3.

⁵ Scot Law Com DP No 106 para 2.49.

⁶ Almost all servitudes are positive. Such negative servitudes as are recognised restrict building for the protection of light or prospect. See *Cusine & Paisley, Servitudes* paras 3.07, 3.34, and 3.40.

constituted without registration, an unsatisfactory rule which has frequently been criticised.⁷ Most consultees agreed, favouring the abolition of negative servitudes. Law reform bodies in other jurisdictions have come to the same conclusion.⁸ We recommend therefore that

95. It should no longer be possible to create negative servitudes.

(Draft Bill s 75)

12.4 The combined effect of our proposals is to redraw the boundary between servitudes and real burdens. In future all affirmative obligations and all restrictions will be constituted as real burdens (to be known, respectively, as “affirmative burdens” and “negative burdens”);⁹ and all obligations allowing limited use of the burdened property will be positive servitudes. Negative servitudes will cease to exist. This is a simpler and more logical structure.

12.5 Below we consider some consequential changes made necessary by this realignment.

Existing negative servitudes

12.6 If negative servitudes are to be disallowed in the future, it becomes necessary to consider the position of such negative servitudes as already exist. Two options were set out in the discussion paper.¹⁰ One was the complete assimilation of negative servitudes to real burdens. On the appointed day¹¹ all existing servitudes would be converted automatically to real burdens. Thereafter the usual rules of real burdens would apply, including the new rules recommended in this report. Some provision would be made for the registration of those negative servitudes which were not already on the property register. The other option was to leave existing servitudes alone, subject perhaps to introducing the notice of termination procedure which is to apply to real burdens more than 100 years old. Most consultees favoured the first option, and we are content that it should be adopted.

12.7 Automatic conversion is a straightforward idea. On the appointed day, all negative servitudes would become (negative) real burdens, by force of statute. No conveyancing process would be necessary.¹² The conversion is not intended to apply to servitudes of support which, on a proper analysis, are positive and not negative servitudes.¹³

12.8 More difficult is arranging for converted servitudes to appear on the register. It would be rare for a negative servitude not to appear on the register somewhere. But it would not be sufficient for our purposes if it was registered against the benefited property only (ie, in the traditional language of servitudes, against the dominant tenement). Real burdens must be registered against the burdened property, so that those dealing with that

⁷ eg, *Sivwright v Wilson* (1828) 7 S 210 *per* Lord Gillies at p 213; Halliday Report para 82.

⁸ Law Commission of England and Wales, *Transfer of Land: Appurtenant Rights* (Working Paper No 36) (1971) paras 17, 32 and 44; American Law Institute, *Restatement Third, Property (Servitudes)* vol 1, 16 and 17.

⁹ For the terminology, see paras 2.1 to 2.4.

¹⁰ Scot Law Com DP No 106 para 2.50.

¹¹ The appointed day is the day on which most of the Title Conditions Bill will come into force. It is also the day on which the feudal system will be abolished. See draft bill s 113(1).

¹² The conversion would be effective even for those servitudes for which (see below) a notice of converted servitude is needed. Such servitudes would be real burdens for the first ten years after the appointed day, and would then be extinguished unless a notice had been registered.

¹³ The issue is discussed in Scot Law Com DP No 106 para 2.51.

property have notice of the encumbrances,¹⁴ and converted servitudes should not be in a different position. Often it is a matter of chance whether registration is against the benefited or the burdened property. If A divides his land and disposes half to B, imposing a servitude *non aedificandi*,¹⁵ the servitude will be registered against B's property (ie the burdened property). But if the servitude is to affect A's property and not B's, it will still appear in B's disposition and hence be registered under B's property – which in this example is the benefited property.

12.9 We propose a simple registration scheme, based on the notice of preservation procedure described earlier, in part 11.¹⁶ It would work in this way. A period of ten years would be allowed after the appointed day for registration of a notice, to be known as a notice of converted servitude. This is the same as the period allowed for notices of preservation, and for the same reason: in the course of ten years (benefited) properties will often change hands, and a change of ownership would be an appropriate occasion on which to review the existence of converted servitudes. At the end of ten years all converted servitudes not yet registered against the burdened property would be extinguished. From that time on purchasers would have the reassurance of knowing that they could not be affected by former servitudes which were not disclosed on the register. A notice would not be needed if the former servitude was already, on the appointed day, registered against the burdened property.

12.10 A statutory form of notice would be provided.¹⁷ This would identify and describe the benefited and burdened properties and set out the terms of the converted servitude. A proper conveyancing description would be required, or, in Land Register cases, details of the title number. The notice would be accompanied by the constitutive deed, or a copy of that deed.¹⁸ The deed should be formally annexed to the notice in the sense of section 8 of the Requirements of Writing (Scotland) Act 1995, meaning that it must contain an appropriate docket linking it to the notice.¹⁹ If the benefited property was not nominated in the deed it would be necessary to explain in the notice the basis on which an implied right of enforcement attached.²⁰

12.11 A notice could be executed only by an owner of the benefited property, although a single *pro indiviso* owner would be sufficient. The owner's title need not be completed by registration, but in that case the notice should list the midcouples linking up to the last holder of a completed title. If the original benefited property had come to be divided, it would be open to the owner of each constituent part to register a separate notice in respect of his own part. Alternatively two or more of the owners could prepare a combined notice. Similarly, a single notice could be used in respect of all separate burdened properties.

¹⁴ That of course is the existing law. One of the recommendations in this report is that in future real burdens should be registered against *both* properties. See paras 3.3 to 3.7.

¹⁵ Ie a (negative) servitude prohibiting building.

¹⁶ Paras 11.74 to 11.79. That scheme is in turn based on the various registration schemes provided in the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

¹⁷ It is set out in sched 4 of the draft bill.

¹⁸ The requirement is waived if, as may occasionally happen, there is no constitutive deed. There would be no deed if the servitude was created by implication: see Cusine & Paisley, *Servitudes* chap 9.

¹⁹ For a form of words, see draft bill sched 4 note 6.

²⁰ It is thought that such cases will be uncommon. Registering a notice of converted servitude containing the required information is in substitution for registering a separate notice of preservation: see para 11.76.

12.12 The notice would be sworn or affirmed before a notary public. The oath or affirmation would be that the statements in the notice were true to the best of the owner's knowledge and belief. This would include the statement, which will not be checked by the Keeper,²¹ that the notice had been properly served. The oath or affirmation would require to be given by the owner personally, and not through a solicitor or other agent.²² The sanctions of the False Oaths (Scotland) Act 1933 would apply in the event that the oath or affirmation was known to be false or not believed to be true. Prior to registration the notice would require to be sent to the burdened owner, along with an explanatory note in statutory form. If the name is not known, it would be sufficient to address the envelope to "The Owner" (or equivalent). The requirement would be waived in cases where it was not reasonably practicable, for example because the owner had disappeared. Although the burdened owner could not challenge the notice as such, he could seek a ruling on the validity of the converted servitude (now a real burden) either from the Lands Tribunal²³ or the ordinary court. The final step would be registration, against both the benefited and the burdened properties.

12.13 A notice which is incomplete or inaccurate will be rejected by the Keeper.²⁴ Occasionally, such a rejection might be challenged, either in the Lands Tribunal²⁵ or the ordinary courts.²⁶ If the challenge is successful, an owner should be able to register the notice even if the ten-year period has expired, provided he does so within a reasonable period. Two months seems sufficient for this purpose. In the interests of certainty, Scottish Ministers should be able to prescribe a final date after which registration would cease to be possible.²⁷

12.14 Drawing these various points together, we recommend that

96. (a) **On the appointed day all negative servitudes should be converted into real burdens by force of statute.**
- (b) **Any converted servitude which was not, at the appointed day, registered against the burdened property should be extinguished ten years after that day unless, during that period, a notice of converted servitude, in statutory form, is executed and registered by an owner of the benefited property.**
- (c) **The notice would have to -**
 - (i) **identify the benefited property and, if that property was not nominated in the constitutive deed, set out the reasons why it is the benefited property;**
 - (ii) **identify the burdened property;**
 - (iii) **set out the terms of the converted servitude;**

²¹ Draft bill s 107(5).

²² However, where an individual is unable to swear or affirm by reason of a legal disability (such as nonage) or incapacity (caused, for example, by mental disorder), this could be done by a guardian, a curator bonis, a person acting under a continuing power of attorney or other similar legal representative. See draft bill s 42(5) as applied by s 76(7).

²³ Under the new jurisdiction which is to be conferred. See paras 6.19 and 6.20.

²⁴ Land Registration (Scotland) Act 1979 s 4(1).

²⁵ Land Registration (Scotland) Act 1979 s 25.

²⁶ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

²⁷ These proposals are modelled on s 45 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

- (iv) include as an annexation the constitutive deed (or copy); and
- (v) narrate that a copy of the notice has been sent to the burdened owner or that it was not reasonably practicable to do so.

(d) The owner should swear or affirm before a notary public that all the information contained in the notice is true to the best of his knowledge and belief.

(e) A copy of the notice should be sent to the owner of the burdened property, together with an explanatory note, except where it is not reasonably practicable to do so.

(f) The notice should be registered against both properties.

(g) Where a notice submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal to be registrable, it should be possible to register the notice late, but not later than

- (i) two months after the determination, or
- (ii) such date as Scottish Ministers may prescribe

whichever occurs first.

(Draft Bill ss 76 and 107)

Existing real burdens allowing use

12.15 From the appointed day, obligations which allow some use of the burdened property (such as access across it) can be constituted only as positive servitudes, and real burdens will cease to be available for this purpose.²⁸ And in the same way that existing negative servitudes are to be converted into (negative) real burdens, so it seems that existing real burdens allowing use should be converted into (positive) servitudes.²⁹ Thereafter they will be governed by the law of servitudes in all respects. For example the prescriptive period for extinction will be twenty years³⁰ and not five.³¹ We recommend that

97. On the appointed day all real burdens comprising a right to enter, or otherwise make use of, property should be converted into positive servitudes by force of statute.

(Draft Bill s 77)

²⁸ Except in a case where the use is ancillary to an affirmative or negative burden. See paras 2.5 to 2.8.

²⁹ This would not, of course, apply to a feudal real burden which was extinguished on the appointed day by s 17(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The position is put beyond doubt by s 77(2)(a) of the draft bill.

³⁰ The existing period for servitudes: see Prescription and Limitation (Scotland) Act 1973 s 8.

³¹ The proposed period for real burdens: see paras 5.68 and 5.69.

Other than fishing and game rights,³² it is thought that there are very few such burdens.

New positive servitudes created expressly by deed

12.16 The intention is that only positive servitudes can be created after the appointed day. Under the present law, such servitudes are created (i) expressly, in writing (ii) by implication or (iii) by positive prescription. In this section we are concerned only with the first of these.³³ A number of changes to the existing law seem desirable.

12.17 **Dual registration.** Most servitudes created by deed find their way to the register. Registration is then against either the benefited³⁴ or the burdened property but not usually against both. Further, registration is not mandatory and a servitude can be made real merely by taking possession. In the discussion paper we suggested that registration should become mandatory.³⁵ Registration, we argued, achieved transparency in relation to rights over land and was in the public interest. And from the point of view of the benefited owner, registration did not seem too high a price to pay for an immediate grant of servitude. A person who did not choose to register would have to wait 20 years, for the running of prescription, or rely on the rules of implied servitudes. But if a requirement of registration was to be introduced, the requirement should extend to dual registration, that is to say, to registration against both the benefited and the burdened properties.³⁶ This would bring the rule for servitudes into line with the rule being proposed for real burdens.

12.18 All consultees who responded on this point were in favour of mandatory dual registration. The change is not intended to alter current law and practice in other respects. The provision in our draft bill does not attempt to set out the rules for constitution of servitudes by deed. It says nothing about who is to grant the deed, how it is to be executed, what words it must contain, or (except negatively) when it is to take effect. Rather it merely provides that a servitude is not created by deed unless the deed is registered. At a practical level, however, it will now be necessary for the deed to describe both properties in a manner which allows registration to take place.³⁷ In the case of the Land Register this means that the title numbers must be given.³⁸ Unless the deed is registered there can be no real right of servitude, although the deed will be enforceable between the parties to it as a matter of contract.

12.19 One exception seems desirable. A servitude for a pipeline or cable can sometimes run for long distances and affect large numbers of properties.³⁹ Here the time, trouble and

³² Discussed in Scot Law Com No 168 paras 6.22 to 6.35. Where such rights were constituted as feudal burdens, they may be converted into neighbour burdens by registration of a notice under s 18(1), (7)(b)(ii) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. The conversion takes effect on the appointed day. The result of our proposal would be to bring about a second, and simultaneous, conversion into positive servitudes.

³³ For proposals which apply to all positive servitudes, however created, see para 12.26.

³⁴ *Balfour v Kinsey* 1987 SLT 144.

³⁵ Scot Law Com DP No 106 paras 7.3 to 7.5.

³⁶ In the case of the Land Register, we mean registration in its proper sense (ie under s 2(3)(iii) of the Land Registration (Scotland) Act 1979) and not merely noting (under s 6(4)). The difference between registration and noting is problematic, but it may be that (i) registration is a method of constitution of servitudes, so that, until registration takes place, there is no servitude, whereas (ii) noting is, as its name suggests, merely a note of a servitude which has already been constituted by some other means, for example by prescription or possession. The statement, in para 6.51 of the *Registration of Title Practice Book*, that in relation to the servient tenement a servitude can only be noted but not registered, seems incorrect, even under the present law. See also Cusine & Paisley, *Servitudes* para 11.07.

³⁷ *Macdonald v Keeper of the Registers* 1914 SC 854.

³⁸ Land Registration (Scotland) Act 1979 s 4(2)(d).

³⁹ For a further proposal in relation to pipeline servitudes, see para 12.26.

expense involved in registration may be disproportionate to the benefit, particularly if the rights are acquired piecemeal over a long period of time, with the result that hundreds of separate deeds would require to be registered against the same benefited property. At present such deeds are usually registered against the *burdened* property and it may be assumed that this practice will continue.

12.20 A matching rule is required in respect of discharge. A registered servitude should only be discharged by registered deed. Otherwise the register would become inaccurate. By a “registered” servitude we mean one which is registered at least against the burdened property, but including cases where the servitude is “noted” under section 6(4) of the Land Registration (Scotland) Act 1979.⁴⁰ The test is thus a practical one. The rule applies in respect of any servitude which in fact appears on the title sheet of the burdened property, regardless of the method by which it was entered. Conversely, a servitude which did not so appear could continue to be discharged by an unregistered deed, although in some cases registration would be both appropriate and desirable. In both cases this would be without prejudice to other ways in which a servitude might come to be extinguished, for example by negative prescription. Registration of the discharge would be against the burdened property, but the Keeper could make consequential amendments to the title sheet of the benefited property.⁴¹ This rule replaces section 18 of the 1979 Act, which, while not apparently making registration compulsory, provides that a registered discharge binds successors.⁴²

12.21 **Both properties owned by grantor.** In *Hamilton v Elder*⁴³ it was held that a servitude could not be created if, at the time of registration, both the benefited and the burdened properties were owned by the grantor. This was an application of the rule that no one can hold a servitude over his own property.⁴⁴ But while sound in theory, this result is sometimes awkward in practice, and in recent times developers have sought to avoid it by use of deeds of conditions.⁴⁵ By section 17 of the Land Registration (Scotland) Act 1979 a “land obligation” (including a servitude) contained in a deed of conditions becomes “a real obligation” immediately on registration. This suggests that it is, or at least may be, possible for a deed of conditions, registered before any part of a development has been sold, to create servitudes over and in favour of the units comprising the development. The servitudes will then become live as and when the units are sold, and the benefited and burdened properties come to be separately owned. Section 17, which is used mainly for real burdens, is repealed as part of the current reform. But for servitudes something is needed in its place. The solution seems self-evident. We suggest the introduction of a rule that a servitude should not be invalid only on the ground that, at the time of registration of the constitutive deed, both properties were owned by the same person. This would apply to any constitutive deed and not merely to a deed of conditions. The servitude, although appearing on the register, would remain latent until the properties came into separate ownership, and in this respect servitudes would resemble real burdens.⁴⁶

⁴⁰ For the meaning of noting, see note 36 above. The usual reason for “entering” a servitude under s 6(1)(e) is that a new title sheet is being made on first registration. The servitude is already in existence, typically because the constitutive deed was previously registered in the Register of Sasines.

⁴¹ Para 13.32.

⁴² For a discussion, see Scot Law Com DP No 106 para 5.31. Section 18 is repealed by sched 9 of the draft bill.

⁴³ 1968 SLT (Sh Ct) 53.

⁴⁴ *Res sua nemini servit.*

⁴⁵ Cusine & Paisley, *Servitudes* para 2.07.

⁴⁶ For the position in respect of real burdens, see Reid, *Property* para 388.

12.22 **Abandoning the fixed list.** There is, in effect, a fixed list of servitudes in Scotland, derived mainly from Roman law, and despite *obiter dicta* to the contrary the courts have not generally been willing to add to the list.⁴⁷ No new servitude has been recognised for 200 years,⁴⁸ and the law of servitudes seems to have stopped when the law of real burdens began, in the closing years of the eighteenth century. Recent case law is scarcely encouraging. In *Mendelssohn v The Wee Pub Co Ltd*⁴⁹ the court declined to recognise as a servitude the right to place a shop sign on another's wall, partly on the basis that shop signs were known to the Romans but no servitude right had existed in Roman law. In *Neill v Scobbie*⁵⁰ the court refused recognition of a right to lead a private electricity line. It may be doubted whether there is a servitude right to park a car or to place an advertising hoarding on the burdened property.⁵¹ The position is different in other countries, where new servitudes are usually allowed provided they conform to the essential features of the right. In Scotland an important reason for the fixed list is that servitudes can be created without registration. This means that a purchaser is vulnerable to the existence of servitudes which cannot be discovered from the register. The fixed list acts as a reassurance that, whatever servitudes might turn out to exist, they are at least confined to certain well-recognised types.

12.23 The current rule in Scotland seems unduly restrictive. No policy purpose is served by disallowing the hanging of signs, or the cabling of electricity, or the parking of cars. In the discussion paper our suggested solution was to make use of real burdens.⁵² It appears already to be the law that real burdens can replicate positive servitudes by conferring a right to make use of the burdened property. All that seemed required was to put the position beyond doubt. Servitudes could continue to be used in respect of the fixed list, but other rights could be created as real burdens. The difficulty facing purchasers would be solved by the fact that real burdens are always registered. Most consultees agreed with this solution, but some pointed out that it would be neater, and simpler, to break the fixed list for servitudes than to encourage an artificial development in the law of real burdens. We accept this suggestion. It requires two changes in the law. First, it must be provided that real burdens can no longer confer a right of use of the burdened property. The necessary recommendation is contained in part 2 of this report.⁵³ And secondly, the fixed list must be broken, although only in respect of servitudes constituted by registration. For implied servitudes, or for servitudes constituted by prescription, the present law would remain unchanged.

12.24 The proposed change is less far-reaching than might at first sight appear. It does not open the way to *any* right of use being created as a servitude. The existing limitations on servitudes will continue to apply. Sheriff Cusine and Professor Paisley list these as being that

- “(1) the right must be enforceable and controllable in law;
- (2) there must be two tenements in separate ownership, one comprising the ‘dominant’ tenement and the other the ‘servient’;

⁴⁷ Cusine & Paisley, *Servitudes* paras 1.30 & 1.31; Gordon, *Scottish Land Law* para 24-24.

⁴⁸ The last was the servitude of bleaching, in *Sinclair v Magistrates of Dysart* (1779) Mor 14519, (1780) 2 Pat 554.

⁴⁹ 1991 GWD 26-1518.

⁵⁰ 1993 GWD 13-887.

⁵¹ Cusine & Paisley, *Servitudes* paras 3.45 to 3.52.

⁵² Scot Law Com DP No 106 para 7.67.

⁵³ See paras 2.1 to 2.4.

- (3) a servitude is a praedial right benefiting the dominant tenement and burdening the servient tenement;
- (4) the obligation imposed on the servient proprietor by a servitude is *in patiendo* only.⁵⁴

Of those, the key limitation is the praedial rule, which is comparable in scope and effect to the equivalent rule for real burdens.⁵⁵ Unless an obligation burdens one property for the benefit of another it cannot be created as a servitude. And to this we would add a second limitation, which is also found in the law of real burdens. An obligation is not recognised as a real burden if it is repugnant with ownership, that is to say, if it is so extensive as to encroach on ownership to an unacceptable extent.⁵⁶ The point at which the line might be crossed, in relation to servitudes, would be a matter for judicial discretion. A right of transitory use, such as a right of way, is clearly acceptable. So is a right to place an object, such as a pipe, on the property. But a right of permanent and exclusive use would create a repugnancy and would not be permitted. The overall effect of our proposal will thus be relatively modest. It will no longer be necessary to play the tiresome game of determining whether a particular right is an acceptable adaptation of an existing servitude, and hence permitted, or whether it is different in kind from such a servitude, and hence excluded.⁵⁷ A number of rights currently regarded as marginal candidates for servitudes – parking for example or the right to place a ladder or scaffolding for repairs – will now clearly be allowed. But the praedial rule will prevent a rush of new and undesirable rights.

12.25 **Recommendation.** We recommend that

- 98. (a) **A deed should not be effective to create a servitude by express words unless the deed is registered against the benefited and the burdened properties.**
- (b) **It should be no objection to the validity of a servitude created under (a) that, at the time of registration, both properties were owned by the same person.**
- (c) **The rule that servitudes must be of a known type should cease to apply in respect of servitudes created under (a); but no obligation which is repugnant to ownership should be recognised as a servitude.**
- (d) **A deed should not be effective to discharge a servitude which is registered against (or noted on the title sheet of) the burdened property unless the deed is itself registered against the burdened property.**

(Draft Bill ss 71, 72 and 74)

Pipeline servitudes

⁵⁴ Cusine & Paisley, *Servitudes* para 2.01. The final limitation under the current law is of course the fixed list. See also M J de Waal, 'Servitudes' in Kenneth Reid and Reinhard Zimmermann (eds) *A History of Private Law in Scotland* (2000) vol 1, 305 at 317-29.

⁵⁵ For servitudes, see Cusine & Paisley, *Servitudes* paras 2.49 to 2.52. For real burdens, see paras 2.9 to 2.18 above.

⁵⁶ Para 2.22.

⁵⁷ See generally Cusine & Paisley, *Servitudes* chap 3.

12.26 The servitude of aqueduct was recognised in Roman law, and has been received into the law of Scotland.⁵⁸ Further, it seems that pipeline servitudes are not confined to water but apply to other liquids also.⁵⁹ If pipes are permitted there would seem no reason for excluding cables, but some uncertainty has been created by a decision, in the sheriff court, which refused to give effect to a servitude for the transmission of electricity by overhead cable.⁶⁰ The case has been doubted and may not represent the law.⁶¹ But in view of the commercial importance of cables, and more generally of pipes, the opportunity should be taken to make the position clear. We recommend therefore that

- 99. For the avoidance of doubt, it should be provided that it is competent (and is deemed always to have been competent) for a right to lead a pipe, cable, wire or other enclosed unit over, through or under land to be constituted as a positive servitude.**

(Draft Bill s 73)

This reassurance is to apply in respect of all servitudes, whenever or however created.⁶² It may be added that wayleaves for gas, electricity and other services held by public utilities are often created under special statutory powers rather than under the common law of servitudes.⁶³

⁵⁸ Cusine & Paisley, *Servitudes* paras 3.80 and 3.81.

⁵⁹ Ibid para 3.44; *Ferguson v Tennant* 1978 SC(HL) 19 at p 65 *per* Lord Fraser of Tullybelton. We are grateful to Mr I N D Walker for drawing this *dictum* to our attention.

⁶⁰ *Neill v Scobbie* 1993 GWD 13-887.

⁶¹ Cusine & Paisley, *Servitudes* para 3.44.

⁶² *Neill v Scobbie* was a case involving creation by implied grant.

⁶³ For which see Cusine & Paisley, *Servitudes* paras 26.03 to 26.05.

Part 13 Miscellaneous Topics

Meaning of “owner”

13.1 The word “owner” appears frequently in this report and in the draft bill. A real burden is created by the “owner” of the burdened property. It is constituted in favour of the “owner” of the benefited property. The right to enforce is held by, among others, such “owner”. Liability for affirmative burdens attaches to the “owner” of the burdened property. Only an objection by an “owner” of the benefited property is sufficient to prevent a Lands Tribunal application from being treated as unopposed. There are other examples. Clearly “owner” is a term requiring precise definition.

13.2 **Registered owners.** Almost always, “owner”, as used in the bill and report, is to carry its normal, and technically correct, meaning. An owner of land is a person who has completed title to it by registration in the Land Register or Register of Sasines.¹ The deed inducing registration is usually a disposition, although there are other possibilities.

13.3 **Unregistered “owners”.** Our definition, however, goes further. The consistent policy throughout the report is that a person qualifies as “owner” even though he has not completed title by registration.² This is the “unfeft proprietor”, in the language of feudalism, or the person who “has right” to the property in the uninformative but established terminology of the Conveyancing (Scotland) Act 1924.³ The idea is perfectly familiar to conveyancers.⁴ A person “has right” to property if he holds under a delivered conveyance. Such a person would be an “owner” under our definition. But a purchaser under missives or a beneficiary under a trust or executry is not an “owner”, for in such a case there is no delivered conveyance. Of course, as a matter of strict law a person who, having right, has not completed title by registration is not owner at all. But he often resembles an owner in the practical sense of having paid for the property and taken entry to it. Usually his status as unregistered “owner” is shortlived. Within a few days the disposition will be registered and proper ownership will have been acquired. Sometimes, however, registration never takes place, for good (or at least for practical) reasons. In continuing trusts, trustees newly assumed seldom complete title, and in time there will be no registered trustees left. Similarly the grantees of judicial conveyances – trustees in sequestration, executors and the like – do not usually complete title by registration.

13.4 A difficulty of extending the meaning of “owner” in the manner suggested is that it may bring in too many people. A standard example shows the problem. Suppose that A disposes land to B, that B dies without registering the disposition, that C is confirmed as B’s executor, and that C endorses on the confirmation a docket transfer⁵ in favour of D. Who is “owner”? On the definition just given, A, C and D are all owners. Admittedly A, the last person with a registered title, is the only true owner. But both C and D are “owners” in the extended sense meant here because both hold under delivered but unregistered conveyances

¹ This rule is restated by s 4 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

² See eg paras 3.17 and 5.12.

³ Conveyancing (Scotland) Act 1924 ss 3 and 4.

⁴ G L Gretton & K G C Reid, *Conveyancing* (2nd edn, 1999) chap 24.

⁵ Under s 15(2) of the Succession (Scotland) Act 1964.

(respectively the confirmation and the docket transfer). C does not lose his status as “owner” merely because he has conveyed to D. Only registration by D could achieve that result. In some cases this multiplication of “owners” does not matter very much. It occurs already in the general law relating to the granting of deeds. In the example given, it is already the law that a disposition could be granted by any of A, C or D, and on registration this would confer ownership on the grantee. It would be contrary to principle, as well as awkward in practice, if the result were not the same in relation to the deeds provided for in our draft bill – the constitutive deed, and deeds of variation and discharge. Accordingly, we suggest that for the purposes of provisions concerned with these deeds, “owner” should mean *anyowner*.⁶ Except where the land is already on the Land Register, it will be necessary for an unregistered grantor to deduce title in the deed.⁷

13.5 In all other cases, however, there should only be one owner – disregarding for the moment the situation where the (single) right of ownership is itself held by more than one person *pro indiviso*.⁸ That would be the result if “owner” were defined more correctly as meaning the registered owner.⁹ It should also be the result on the looser definition proposed here. This is particularly important in questions of transfer of liability. A person ceases to be liable for affirmative burdens on ceasing to be owner.¹⁰ But if loss of “ownership” depended on the registration of a conveyance by the acquirer, an outgoing owner would have no control over loss of liability. If the acquirer declined to register, the outgoing owner would remain liable for obligations incurred by his successor. The difficulty is easily solved. Apart from the cases mentioned in the previous paragraph, the “owner” of property, if more than one person qualifies, should be the person who has most recently acquired the right.¹¹ Thus in the example given earlier, the owner would be D, and not either A or C. One consequence is that the register may occasionally mislead. In the example given the person on the register would be A and not D. Except in issues of liability, however, third parties are not often concerned with the identity of the owner; and for cases where they are, we recommended earlier that any person who was at one time owner should be under a duty to disclose the name and address of the current owner, if known.¹²

13.6 **Owners in common.** A person holding a *pro indiviso* share is also an owner. If his title is registered, he is an owner in the strict sense. If it is unregistered but he “has right”, he is an owner in the extended sense described above. Sometimes under our proposals *pro indiviso* owners are allowed to act on their own, without the participation of their fellow owners. On other occasions they have no independent power but must act together. The latter is the position in relation to the grant of deeds. On general principles a deed affecting land can be granted only by the owner or, if more than one, by all the owners. But where our proposals have the effect of conferring powers – for example, in relation to enforcement

⁶ That is to say, any person (or persons) holding the full right of “ownership” as so defined. It would not include a mere *pro indiviso* owner. The position of *pro indiviso* owners is considered further at para 13.6.

⁷ Draft bill s 50. In Land Register cases the midcouples require to be produced to the Keeper under s 15(3) of the Land Registration (Scotland) Act 1979 (as amended by sched 8 of the draft bill). In some of the proposed forms, provision is also made, in effect, for deduction of title: see scheds 2 and 4 of the draft bill.

⁸ For which see para 13.6.

⁹ If owner A conveys to B, and B registers, the result is that B becomes owner and A ceases to be owner. If A is owner, B is not; and if B is owner, A is not.

¹⁰ Paras 4.41 to 4.47.

¹¹ This is the technique used in the Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 16(1) and 49. Much the same result is achieved, but in a different way, by s 29(3) of the Tenements (Scotland) Bill appended to Scot Law Com No 162.

¹² Para 4.35.

or termination – these powers can be exercised by any one co-owner. In the draft bill the difference is indicated by the use of the definite or indefinite article. “The” owner means all the owners acting together; “an” owner means any one owner *pro indiviso*. In the Development Management Scheme “member” means any one *pro indiviso* owner.¹³ Finally, it may be mentioned that any liability affecting *pro indiviso* owners is joint and several, but subject to a right of relief in proportion to the size of the shares.¹⁴

13.7 Heritable creditors in possession. If a debtor is in default, the creditor is entitled to enter into possession,¹⁵ following, usually, a warrant from the court.¹⁶ But a mere entitlement does not of itself constitute “possession”. Nor is it “possession” to call up the loan and market the property.¹⁷ In practice possession, when it occurs, is often civil possession, through a tenant. Thus creditors are in possession if they give notice to an existing tenant of their right to claim the rents.¹⁸ They are also in possession if, the debtor having vacated the property, they grant a lease to someone else.¹⁹

13.8 A heritable creditor in possession is usually regarded as standing in the place of the owner.²⁰ In particular, by section 20(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970 there is assigned to such a creditor “all rights and obligations of the proprietor relating to ... the management and maintenance of the subjects”.²¹ This statutory assignation would not cover all rights and obligations which attach to an “owner” under our draft bill; but it would be consistent with the policy of the 1970 Act (and of the pre-Act common law) if a heritable creditor in possession were to be treated as an “owner”. More precisely, our proposal is that, on taking possession, a heritable creditor should be regarded as sole “owner”, in substitution for the debtor, except in respect of the granting of deeds where the heritable creditor should be treated as one of the “owners”.²² A heritable creditor in possession would thus have all the rights of an owner in relation to real burdens, including a right of enforcement²³ and discharge, and a right, in the case of community burdens or the Development Management Scheme, to participate in the management of the development. But the creditor would also have liability, both for obligations already due under the burdens at the time of taking possession,²⁴ and also for any new obligations during the period of possession.

¹³ Development Management Scheme r 2.3.

¹⁴ See para 4.37.

¹⁵ Conveyancing and Feudal Reform (Scotland) Act 1970 sched 3, standard condition 10(3).

¹⁶ Under s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970: see *Bank of Scotland v Fernand* 1997 SLT (Sh Ct) 78.

¹⁷ *Northern Rock Building Society v Wood* 1990 SLT (Sh Ct) 109; *Ascot Inns Ltd v Braidwood Estates Ltd* 1995 SCLR 390; D J Cusine, *Standard Securities* (1990) para 8.40.

¹⁸ *Ascot Inns Ltd v Braidwood Estates Ltd* 1995 SCLR 390.

¹⁹ A creditor can grant a lease for up to seven years: see Conveyancing and Feudal Reform (Scotland) Act 1970 s 20(3) and sched 3, standard condition 10(4).

²⁰ Gloag & Irvine, *Law of Rights in Security* (1897) pp 100-01.

²¹ See also Conveyancing and Feudal Reform (Scotland) Act 1970 sched 3, standard condition 10(5).

²² The reason for this exception is explained in para 13.4. It would allow the debtor (who is almost always the registered owner) to continue to grant constitutive deeds and deeds of variation or discharge, but subject always to the possibility of reduction by the creditor in a case where they were prejudicial to the security. See para 5.11.

²³ Not, it seems, available under the present law: see *Heron v Martin* (1893) 20 R 1001.

²⁴ Subject to a right of relief against the debtor or other predecessor. See para 4.45.

13.9 **Recommendation.** We recommend that

100. (a) **“Owner” should be defined to mean a person who has right to property whether or not he has completed title; except that where a heritable creditor is in possession, “owner” means the heritable creditor.**

(b) **Where more than one person comes within the description of owner, the owner should be –**

(i) **in relation to any provision concerned with the granting of deeds, any person having such right; and**

(ii) **in any other case, the person who has most recently acquired such right.**

(Draft Bill s 114)

Compulsory purchase

13.10 **Process.** Powers of compulsory purchase are held by government departments, most government agencies (for example, Scottish Enterprise), local authorities, certain bodies with statutory obligations (for example, Scottish Power), and bodies subject to a Regulator (for example, British Airports Authority). The process of compulsory purchase falls into two distinct phases.²⁵

13.11 First, the acquiring authority must make a compulsory purchase order.²⁶ Written notice is given to any owner, lessee or occupier of the land being acquired, although not to the holder of a real burden or servitude. There are also newspaper advertisements. The compulsory purchase order does not take effect unless or until it is confirmed by the appropriate confirming authority. Before confirming the order, the authority takes account of any objections and, if necessary, holds a public local inquiry. Notice of the confirmation is then given, in the same way as before.²⁷

13.12 The second phase is the transfer of ownership. Normally this is done either by a statutory conveyance, following the style in schedule A to the Lands Clauses Consolidation (Scotland) Act 1845, or by a general vesting declaration.²⁸

13.13 In practice, acquisitions frequently proceed by agreement made in the shadow of the statutory powers. In that case there is no compulsory purchase order but the transfer is usually effected by a statutory conveyance.

²⁵ The law is currently being reviewed by the Scottish Executive. This parallels a review of the, broadly similar, legislation in England and Wales recently completed by the Department of the Environment, Transport and the Regions: see *Fundamental review of the laws and procedures relating to compulsory purchase and compensation: final report* (July 2000).

²⁶ See generally, Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 s 1 and sched 1, and the Compulsory Purchase of Land (Scotland) Regulations 1976 SI 1976/820. There is a valuable account of the law in the *Stair Memorial Encyclopaedia* vol 5 paras 1 - 104 (G F G Welsh).

²⁷ The procedure is different where the land is being acquired by Scottish Ministers or a Minister of the UK Government. An order is first prepared in draft and is then “made”. There is no confirming authority as such. See Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 sched 1 para 7(4).

²⁸ For general vesting declarations, see Town and Country Planning (Scotland) Act 1997 s 195 and sched 15.

13.14 **Effect.** Compulsory purchase is thought to extinguish mid-superiorities, although the point is not established beyond doubt.²⁹ However, with the abolition of the feudal system, the more important question is the effect of compulsory purchase on servitudes and non-feudal real burdens (including third party rights in respect of burdens created in a grant in feu). Here opinion is divided.³⁰ On one view compulsory purchase extinguishes all real burdens and servitudes. On another there is temporary extinction only and the servitudes and burdens revive once the land is sold on. A third view is that, while servitudes and burdens cannot be enforced so as to frustrate the purpose for which the land was acquired, they are not extinguished and continue to affect the land. A further source of disagreement is whether the extinctive effect, such as it is, is confined to cases where there has been a confirmed compulsory purchase order or whether it applies also to cases of acquisition by agreement, at least where the transfer was carried out by a statutory conveyance. Although these issues have arisen in case law from time to time,³¹ they have not been in full focus and the law remains in doubt and in dispute.

13.15 **Proposals for reform.** The position is in need of clarification. In the discussion paper³² we suggested that compulsory purchase should extinguish all real burdens on the affected land. Almost all consultees agreed. We now think that the rule might usefully be extended to servitudes, thus affirming by statute what may possibly be the common law.³³ Later we consider whether any exceptions are necessary.³⁴

13.16 Our original proposal was confined to compulsory acquisition, that is to say, to acquisition following on from a confirmed compulsory purchase order. If an acquisition proceeded simply by agreement, there was to be no extinction of real burdens. There is much to be said for this approach. An acquisition by agreement takes place without publicity. There are no advertisements. There is no public local inquiry. As a result, the holder of a real burden, although often a close neighbour, may know nothing of the acquisition until after it has been completed; and even if he does know, there is no forum in which it can be opposed. If acquisition by agreement were to result in the extinction of burdens, the neighbour would lose rights without notice and without the opportunity to resist. And it is uncertain whether compensation would be due. A different way of expressing this view is to say that acquisition by agreement should properly include the agreement of those who hold real burdens.³⁵ The agreement of the owner should not be regarded as carrying with it the agreement of neighbours. In the absence of such agreement, the acquiring authority is not left without a remedy. It can either proceed to compulsory purchase, or can choose one of the courses of action open to private developers, such as an application to the Lands Tribunal or (if the burdens are more than 100 years old) service of a notice of termination.³⁶

²⁹ The debate is reviewed in Gordon, *Scottish Land Law* pp 45-47.

³⁰ For a range of views, see eg *Stair Memorial Encyclopaedia* vol 5 paras 86 & 87; I J Ghosh, "Statutory Conveyances – Examination of Title" (1990) 35 JLSS 236 at 238-9; A J McDonald, "Schedule Conveyances under the Lands Clauses Consolidation (Scotland) Act 1845" (1992) 37 JLSS 68 at 71-2; Cusine & Paisley, *Servitudes* para 17.42.

³¹ *Oban Town Council v Callander & Oban Rly* (1892) 19 R 912; *MacGregor v North British Rly* (1893) 20 R 300; *Wilson v Keeper of the Registers of Scotland* 2000 SLT 267.

³² Scot Law Com DP No 106 paras 5.61 and 5.62, and proposal 22.

³³ For a discussion, see Cusine & Paisley, *Servitudes* para 17.42.

³⁴ Paras 13.21 to 13.26.

³⁵ Section 6 of the Lands Clauses Consolidation (Scotland) Act 1845 envisages agreement, not merely with the owners of lands, but "with all parties having any right or interest in such lands".

³⁶ For notices of termination, see paras 5.26 ff.

13.17 These are arguments of principle. But there are counter-arguments based on convenience. On consultation, a number of bodies with powers of compulsory purchase pointed out that, in practice, acquisitions tend to proceed by agreement. This saves time and public money, and ought to be encouraged. The extinctive effect of the current law was believed, rightly or wrongly, to apply to all cases where a statutory conveyance was used, even where there had been no compulsory purchase order. It would cause considerable difficulties if this rule (if it is a rule) were to be changed. In particular, it would mean that in every case where the proposed development was affected by real burdens, it would be necessary to use the full apparatus of compulsory purchase. It would make no difference that the owner agreed to both the sale and the price.

13.18 While the arguments here are finely balanced, three factors have persuaded us that the proposed statutory extinction should extend to acquisitions by agreement. First, we acknowledge that in practice there may be difficulties in identifying those who hold enforcement rights. Those difficulties are of course also encountered by private developers, but acquiring authorities act in the public interest and merit special treatment. We accept that an acquiring authority would quite often be forced into compulsory purchase solely in order to deal with the real burdens. That seems undesirable. Secondly, the only purpose of excluding acquisitions by agreement would be to give to holders of real burdens and servitudes an opportunity to object to the proposed compulsory purchase.³⁷ But in practice objections from this source are likely to be rare. The fact that an objection might be made in a small number of cases must be set against the substantial inconvenience and expense of requiring compulsory purchase in all cases. Thirdly, there is a significant precedent. By section 196 of the Town and Country Planning (Scotland) Act 1997 real burdens and servitudes³⁸ are waived where land is acquired by a local authority for development and other planning purposes. The waiver applies to acquisitions by agreement as well as to compulsory acquisitions.³⁹

13.19 But if statutory extinction is to extend to acquisitions by agreement, provision must be made for some form of notice; for while the holders of burdens would not be able to prevent the acquisition, they should at least be alerted to the possibility of compensation. Our initial preference was for individual notification, at least for immediate neighbours.⁴⁰ But individual notification is not required even in cases of compulsory acquisition, and it would be unsatisfactory to set a higher standard for acquisitions which proceed by agreement.⁴¹ In a compulsory acquisition, notice is given by advertisement on two successive weeks in one or more local newspapers circulating in the locality.⁴² We suggest that for voluntary acquisitions the matter be left to the discretion of the authority. The rule would simply be that notice must be given, in some form, to the owner of any benefited

³⁷ Under any system they would be able to claim compensation: see below.

³⁸ By s 196(1) the provision affects "any servitude, liberty, privilege, right or advantage annexed to land and adversely affecting other land, including any natural right of support".

³⁹ By s 196(2) this provision applies to land acquired for planning purposes; and such acquisition is defined (s 201(1)(a)) as acquisition under ss 188 or 189 of the Act. Section 188 authorises acquisition by agreement, and s 189 acquisition by compulsion. Our recommendations, if implemented, will render this provision substantially unnecessary in the case of real burdens and servitudes, which will usually be extinguished on registration of the conveyance. But the provision applies to other restrictions also.

⁴⁰ It would be possible to use substantially the same scheme as developed for notices of termination. See paras 5.33 to 5.37.

⁴¹ The alternative, of course, would be to increase the notice requirements for cases of compulsory purchase. There is something to be said for this, but it is beyond the scope of the present exercise.

⁴² Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 sched 1 para 3(a).

property.⁴³ A (single) newspaper advertisement might often be the simplest way to proceed. Another option would be to display a notice in a prominent place on the land itself. In a case where the benefited owners were identifiable and small in number, it might be simpler, and cheaper, for individual notices to be sent. The notice would include a statement that compensation may be due. Notice would have to be given before registration of the acquiring authority's title, and the Keeper would presumably refuse to delete the burdens from the Land Register in the absence of appropriate assurances that notice had been duly given.⁴⁴

13.20 There seems no reason for requiring the use of a statutory conveyance,⁴⁵ and the acquiring authority would be free to use an ordinary disposition if it so wished. However, in order that the Keeper, and others, are alerted to the extinctive effect of the deed, it would be necessary for some reference to be made to the relevant statutory provision. For example, it might be declared that the disposition is granted under section 98 or 99 of the Title Conditions (Scotland) Act.

13.21 **Exceptions.** As some consultees pointed out, a rule which, indiscriminately, extinguished all real burdens and servitudes would be capable of operating unfairly and unreasonably. Some burdens and servitudes are, by their nature, unlikely to affect the purpose for which the land was acquired. They could be left in place without harming the position of the acquiring authority. And in the case of conservation burdens there is a potential conflict of public interest. The issue is not straightforward, however. From a practical point of view, a rule that all burdens and servitudes are extinguished has obvious attractions. It leaves no room for doubt as to the burdens affecting land. And the acquiring authority is liberated from having to make a detailed examination of title in order to identify burdens which might possibly have survived – a considerable saving of time and effort, particularly in cases (such as purchases for road construction) where a large number of properties are involved. The latter point should not, however, be exaggerated. Many titles are already on the Land Register, and the position is improving daily. For such properties, burdens can be identified at a glance. Further, authorities already have to examine title for other purposes, such as the existence of heritable securities. Finally, it should be possible to tailor the excepted burdens so that either their existence is easy to predict, or so that, even if undetected, they are unlikely to have any effect on the use proposed by the authority.

13.22 *Both types of acquisition.* We propose two different types of exception. The first, with which we begin, comprises burdens which would survive both compulsory acquisition and also acquisition by agreement. One possible candidate was mentioned by the Royal Institution of Chartered Surveyors in Scotland:

“If the subjects were being compulsorily purchased for a specific purpose which conflicts with any existing real burdens then those burdens should be automatically extinguished. However, there are cases where in order to permit repairs to proceed,

⁴³ There will always be a benefited property. Conservation burdens and maritime burdens are unaffected by voluntary acquisition: see paras 13.24 to 13.26.

⁴⁴ Even if the land is still on the Sasine Register, the acquisition by the authority will induce (first) registration in the Land Register. See Land Registration (Scotland) Act 1979 s 2(1)(a)(ii). The deletion of the burdens would be legally effective even if the notice was inadequate, but the Register would then be inaccurate and could in certain circumstances be rectified.

⁴⁵ In a conveyance in the form of sched A to the Lands Clauses Consolidation (Scotland) Act 1845. Statutory conveyances have frequently been criticised as ill-adapted to Scottish practice.

local authorities exercise powers of compulsory purchase over properties whose owners are untraceable. The local authority also has powers to compulsorily purchase property in order to permit development to take place. In these circumstances, the local authority can remain part of the 'community' and therefore the burdens must remain in place. We would therefore stress that a blanket approach cannot be taken to this issue."

Maintenance burdens are an obvious example of the problem. If 20 properties are subject to an obligation to contribute to the maintenance of some common facility, a property should not be freed of its obligation merely on the ground that it has been subject to compulsory purchase. We suggest, therefore, that facility burdens be excepted from the general extinction.⁴⁶

13.23 As other consultees pointed out, a second exception seems necessary for servitudes for pipes and service media. The extinction of such servitudes would present serious problems for neighbouring properties, while their continued existence would only rarely affect the use for which the land was acquired.⁴⁷ In cases where use was affected, we think that the authority should be entitled to disregard the servitude (or facility burden), subject to the payment of compensation.⁴⁸ Otherwise the servitude (or burden) would remain.

13.24 *Acquisition by agreement.* Special considerations apply to conservation burdens.⁴⁹ Like compulsory purchase itself, conservation burdens exist to serve the public interest, and it cannot be assumed without inquiry that the public interest in the former is, in any particular case, greater than the public interest in the latter. So conservation burdens should not be subject to automatic extinction in cases of voluntary acquisition. Instead it will be for the acquiring authority to seek agreement with the conservation body or, failing agreement, to proceed to compulsory purchase. This proposal should not create undue difficulties for the authority. Often the nature of the property will exclude the possibility of conservation burdens, while in other cases the existence of a conservation burden will be readily detectable from the register.⁵⁰

13.25 Different considerations apply where the acquisition is by compulsory purchase. A compulsory purchase order takes effect only when it is approved by the confirming authority, and before approval is given there is an opportunity for objections to be made. A conservation body which has notice of the order is in a position to make objections. If it declines to do so, or if its objections are unsuccessful, it is reasonable that the conservation burden should be extinguished. The difficulty is how the order is to be brought to the conservation body's attention. As the law currently stands, the acquiring authority need give personal notice only to owners, lessees and occupiers. Others must rely on the

⁴⁶ For the meaning of facility burdens, see para 11.30.

⁴⁷ A compulsory purchase order must indicate the purpose for which the land is being acquired: see Compulsory Purchase of Land (Scotland) Regulations 1976, SI 1976/820, sched 1, form 1, para 2.

⁴⁸ A precedent for this approach is s 196 of the Town and Country Planning (Scotland) Act 1997.

⁴⁹ For conservation burdens, see paras 9.10 ff.

⁵⁰ A new conservation burden will appear either in a disposition or in a separate deed. The former will induce first registration in the Land Register (if the land is not already registered there), with the result that the burden will be immediately obvious from the D. Section of the title sheet. The latter will be readily detectable, even in Sasine titles. There are no conservation burdens currently in existence, although certain classes of feudal burden can be converted into conservation burdens by registration of an appropriate notice under s 27 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Again such a notice will be readily detectable from either property register.

newspaper advertisements. It is possible to argue that a newspaper advertisement is sufficient notice to a conservation body, as it is to other holders of real burdens and servitudes. But on balance we think that the special nature of conservation burdens justifies personal notice.

13.26 Similar issues arise in relation to maritime burdens, and the rules should be the same.⁵¹ No doubt instances will be extremely rare.⁵²

13.27 **Compensation.** If a real burden or servitude is extinguished by compulsory purchase, compensation is due by the acquiring authority to the owner of the benefited property.⁵³ The position is less certain where the acquisition proceeds by agreement. It seems clear that compensation should be due in both cases. Compensation should also be due where an acquiring authority disregards a facility burden or a pipeline servitude in the manner indicated above.⁵⁴ In all cases the basis of compensation would be the same as under the existing law of compulsory purchase.⁵⁵ In practice there will often be no loss for which compensation could be paid. Sometimes the authority might prefer to restore a burden than to pay compensation. It should be given the opportunity to do so.⁵⁶ Thus in assessing the amount of compensation due account should be taken of any replacement burden or servitude created in favour of the claimant (or offered to be so created) by the acquiring authority. The replacement burden or servitude need not be in the same terms as the one which is extinguished. For example, in the case of a servitude right of way, the authority may offer access over a different part of the land. The replacement would be created in accordance with the normal rules for creating real burdens or, as the case may be, servitudes.

13.28 **Recommendation.** Our recommendation is that

101. (a) **Where land is acquired compulsorily, or is acquired by agreement but in circumstances where compulsory powers could have been used, any real burdens or servitudes affecting the land should be extinguished on registration of the conveyance.**
- (b) **There should not, however, be extinguished -**
- (i) **facility burdens and pipeline servitudes**
 - (ii) **in the case of an acquisition by agreement, conservation burdens and maritime burdens.**
- (c) **An ordinary disposition may be used, but if so it should make reference to the relevant statutory provision.**

⁵¹ For maritime burdens, see para 9.26.

⁵² If a case does arise, it will be acquisition from a private owner and not from the Crown. Maritime burdens are used only where the foreshore or sea bed is in private ownership.

⁵³ Railways Clauses Consolidation (Scotland) Act 1845 s 6 as applied by the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 s 1(3) and sched 2 para 1.

⁵⁴ Para 13.23.

⁵⁵ For a summary account, see *Stair Memorial Encyclopaedia* vol 5 paras 105 ff.

⁵⁶ This was suggested to us by Scottish Enterprise.

(d) An acquiring authority (or successor in title) may disregard a facility burden or pipeline servitude where this is necessary to carry out a purpose for which the land was acquired.

(e) Compensation should be payable by the acquiring authority in respect of

(i) the extinction of real burdens and servitudes

(ii) the disregarding of a facility burden or pipeline servitude

but in assessing the amount due account should be taken of any replacement burden or servitude which the acquiring authority has granted or offered to grant.

(f) In the case of compulsory purchase the acquiring authority should give written notice of the compulsory purchase order to the holder of any conservation burden.

(g) In the case of acquisition by agreement the acquiring authority should, prior to registration of the conveyance, give notice to the holders of any real burdens or servitudes by such method as it thinks fit.

(Draft Bill ss 98 to 100)

Pecuniary real burdens

13.29 A pecuniary real burden⁵⁷ is a heritable security constituted by reservation in a conveyance.⁵⁸ A conveys to B but reserving in his own favour, or in favour of a third party, a right in security in respect of some existing obligation. At one time popular for securing family loans, pecuniary real burdens passed out of regular use in the course of the nineteenth century, although various provisions remain on the statute book.⁵⁹ Today pecuniary real burdens are obsolete and are never used.⁶⁰ Indeed on one view they ceased to be competent in 1970, when the standard security was introduced.⁶¹ This is because, by section 9(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970

“A grant of any right over an interest in land for the purpose of securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security.”

⁵⁷ For nomenclature, see Scot Law Com DP No 106 para 1.1.

⁵⁸ See generally: Gordon, *Scottish Land Law* paras 20-103; Reid, *Property* para 383; and Halliday, *Conveyancing* vol II paras 50.02 - 50.08.

⁵⁹ Conveyancing (Scotland) Act 1874 s 30; Conveyancing (Scotland) Act 1924 sched A form 1, note; sched B note 4; sched K note 4. Section 30 of the 1874 Act is repealed by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 sched 12 para 9(7).

⁶⁰ Their abolition was proposed in our Discussion Paper No 78 on *Adjudications for Debt and Related Matters* (vol 2, paras 8.7 to 8.9).

⁶¹ Halliday, *Conveyancing* vol II para 50.01.

Doubts remain, however.⁶² A pecuniary real burden is not the “grant” of a right in security, but a reservation. Nor is it clear that a pecuniary real burden falls within the definition of “heritable security” in section 9(8)(a), which is

“any security capable of being constituted over any interest in land by disposition ... of that interest in security of any debt ...”.

An outright disposition on sale, reserving a pecuniary real burden, cannot easily be characterised as a disposition in security of a debt. At any rate, subsequent legislation took the pecuniary real burden for granted. Section 5(5) of the Land Tenure Reform (Scotland) Act 1974⁶³ provides in the context of the redemption of feuduty that unpaid redemption money is secured as a real burden on the feu; and section 72(7) of the Housing (Scotland) Act 1987 provides that the liability to repay the discount given for sales of council houses under the right-to-buy legislation

“shall not be imposed as a real burden in a disposition of any interest in the house.”⁶⁴

13.30 In the discussion paper we suggested that these doubts should be removed, and pecuniary real burdens formally abolished.⁶⁵ Almost all consultees agreed. We recommend therefore that

102. For the avoidance of doubt, it should be provided that it is no longer competent to create pecuniary real burdens.

(Draft Bill s 109)

New feuduties and ground annuals, both of which were secured by a type of real burden, have not been competent since 1974.⁶⁶ Existing pecuniary real burdens, such as they are, will survive until extinguished either by payment or by prescription.

Common interest

13.31 Common interest comprises a network of reciprocal rights and obligations that govern certain types of property – most typically tenements⁶⁷ or rivers – in which, characteristically, there is a division of ownership, section by section, among a number of different people.⁶⁸ Such rights and obligations run with the land so that common interest bears a resemblance to real burdens, and particularly to community burdens. A key difference is that, in the normal case at least, common interest is implied by law. It is a set of default rules developed by the common law to regulate property of the type in question. It is sometimes suggested, however, that common interest rights might also be created expressly, by agreement between the parties, although no rules of constitution have ever

⁶² Gordon, *Scottish Land Law* para 20-103; K G C Reid, “What is a real burden?” (1984) 29 JLSS 9 at pp 12-13.

⁶³ Which is repealed, with effect from the appointed day, by sched 13 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

⁶⁴ This provision is repealed by sched 9 of the draft bill.

⁶⁵ Scot Law Com DP No 106 paras 9.14 and 9.15.

⁶⁶ Land Tenure Reform (Scotland) Act 1974 ss 1 and 2.

⁶⁷ In relation to tenements we have recommended that the common law regime provided by common interest be replaced by a new regime based on statute: see Scot Law Com No 162 part 7.

⁶⁸ Reid, *Property* paras 354 to 374; Gordon, *Scottish Land Law* paras 15-31 to 15-49.

been settled.⁶⁹ Whether this is really the law seems open to doubt.⁷⁰ But if express creation were to be recognised, it would provide a ready means of avoiding the restrictions imposed by our proposals, and by the general law, on real burdens and servitudes. An obligation which could not conveniently be created as a real burden or servitude could then be created as an obligation founded on common interest. The temptation should be removed. We recommend therefore that

- 103. For the avoidance of doubt, it should be provided that rights of common interest may not be expressly created.**

(Draft Bill s 110)

Consequential amendments to the Land Register

13.32 In the proposed new law, as in the old, deeds or decrees which extinguish real burdens need be registered only against the burdened property.⁷¹ But if the burden or servitude is also entered on the title sheet of the benefited property – as will come to be normal⁷² – it will usually be desirable for a matching amendment to be made there. Section 5(1) of the Land Registration (Scotland) Act 1979 empowers the Keeper to make such an amendment provided that the discharge was itself registered in the Land Register. There is no such power if the discharge was registered in the Register of Sasines, which would occur in a case where the burdened property was still held on a Sasine title. We recommend therefore that

- 104. In registering a discharge in the Register of Sasines the Keeper should have power to make such consequential amendments to the Land Register as may be necessary.**

(Draft Bill s 97)

The recommendation can only apply where the burdened property is a Sasine title and the benefited property a Land Register title. If the benefited property is also on the Register of Sasines there is no title sheet to amend.

Length of leases

13.33 The discussion paper canvassed views on possible limitations on the duration of long leases, following the abolition of the feudal system.⁷³ In the absence of such a limitation there was an obvious danger that the feudal system would be re-created by means of long leases. On the basis of responses received we recommended to Scottish Ministers that new leases should be limited to 125 years. This was duly incorporated into the Abolition of Feudal Tenure Bill as introduced to the Scottish Parliament, but was later amended. The provision as enacted, and now in force, allows leases for a maximum period of 175 years.⁷⁴

⁶⁹ See eg *Fearnan Partnership v Grindlay* 1992 SC(HL) 38 per Lord Jauncey at pp 62-3.

⁷⁰ Compare Reid, *Property* para 358 with Gordon, *Scottish Land Law* para 15-32.

⁷¹ Draft bill ss 14(1), 22(1), 74 and 96(2).

⁷² Paras 3.3 to 3.10 and 12.17 to 12.20.

⁷³ Scot Law Com DP No 106 paras 9.1 to 9.5. And see also Scot Law Com No 168 paras 9.40 to 9.42.

⁷⁴ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67.

Contractual chains

13.34 In a contractual chain, conditions are imposed, not as real burdens, but as contractual terms; but the purchaser is placed under an obligation to impose like terms – including a further obligation to impose like terms – on the next purchaser. If the device works properly, successive owners are subject to contractual conditions conceived in favour of the original seller, who could then enforce on the principle of *jus quaesitum tertio*. Contractual chains are little used in Scotland, although they are familiar south of the border. In the discussion paper we expressed concern that contractual chains might be used to avoid the restrictions that were to be placed on real burdens, and asked whether they should be declared unenforceable.⁷⁵ Opinion was divided, some consultees urging the importance of freedom of contract, while others favoured the removal of an obvious avoidance device. We have decided not to take the matter further. Our final recommendations for real burdens are less restrictive than those originally put forward. In particular, we no longer support the idea that burdens should be automatically extinguished at the end of a fixed period such as 100 years. We do not expect a significant growth in avoidance devices as a result of these recommendations.

Amendments and repeals

13.35 A number of provisions currently in the Abolition of Feudal Tenure etc. (Scotland) Act are repealed and re-enacted in our draft bill. The statement of the law of real burdens in the new bill is intended to be comprehensive, and without those provisions there would be unexplained and unsatisfactory gaps which would make the bill difficult to use.⁷⁶ There are also some further amendments of a minor nature,⁷⁷ but there is no substantial change to the disposal of feudal burdens effected by part 4 of the Feudal Act.⁷⁸ A number of provisions in other Acts have also been repealed or amended to take account of the new rules for real burdens. Some of these are mentioned elsewhere in the report. Among the well-known provisions repealed are those dealing with deeds of conditions,⁷⁹ and with applications to the Lands Tribunal for the variation and discharge of land obligations.⁸⁰

⁷⁵ Scot Law Com DP No 106 para 9.6.

⁷⁶ Most of the provisions in question deal with conservation burdens. Thus ss 29 to 32 of the Abolition of Feudal Tenure etc. (Scotland) Bill 2000 are replaced by ss 34, 36 and 37 of the Title Conditions Bill.

⁷⁷ The main changes are (i) that feudal burdens reserving a power of appointment in relation to a manager (“manager burdens”) survive feudal abolition in some circumstances and for a limited period (para 2.36), and (ii) that a notice converting feudal burdens into neighbour burdens cannot be served in respect of burdens in sheltered housing developments (para 11.66). The relevant provisions are s 53(9) and sched 7 para 3 of the draft bill.

⁷⁸ See in particular para 11.58.

⁷⁹ Conveyancing (Scotland) Act 1874 s 32; Land Registration (Scotland) Act s 17.

⁸⁰ Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 & 2.

Part 14 Legislative Competence

Introduction

14.1 With the establishment of the Scottish Parliament we require to consider whether our recommendations for reform fall within the legislative competence of that body. In some respects this raises new issues. In others it raises old issues but in a new context.

14.2 The legislative competence of the Scottish Parliament is defined and delimited in the Scotland Act 1998. An Act of the Scottish Parliament is not law so far as any provision is outside the legislative competence of the Parliament.⁸¹ In terms of section 29(2) a provision is outside that competence where –

- (a) it would form part of the law of a country or territory other than Scotland, or confer or remove functions exercisable otherwise than in or as regards Scotland;
- (b) it relates to reserved matters (which are set out in schedule 5 of the Act);
- (c) it is in breach of the restrictions in schedule 4 of the Act;
- (d) it is incompatible with any of the Convention rights⁸² or with Community law; or
- (e) it would remove the Lord Advocate from his position as head of the systems of criminal prosecution and investigation of deaths in Scotland.⁸³

14.3 The Scotland Act introduces scrutiny procedures which are designed to ensure that Acts of the Scottish Parliament are within its legislative competence. A member of the Scottish Executive is required to state, on or before the introduction of a bill, that its provisions are within the legislative competence of the Parliament.⁸⁴ The Presiding Officer is required to make a similar judgment.⁸⁵ The Advocate General, the Lord Advocate or the Attorney General may refer the question of whether any bill, or provision in a bill, is within the Parliament's competence to the Judicial Committee of the Privy Council for a period of up to four weeks after the bill is passed.⁸⁶ The Secretary of State may on certain grounds prevent the bill being submitted for royal assent.⁸⁷ Questions about legislative competence are devolution issues under the Act and may be raised in any civil or criminal proceedings.⁸⁸ A court can decide that a provision is outside legislative competence. In that event the provision is not law.⁸⁹

14.4 Legislative competence is an important issue with important consequences. For present purposes there are two main matters to consider: (1) do our recommendations relate

⁸¹ Scotland Act 1998, s 29(1).

⁸² "Convention rights" has the same meaning as in the Human Rights Act 1998, namely the rights and fundamental freedoms set out in various articles of the Convention for the Protection of Human Rights and Fundamental Freedoms as agreed by the Council of Europe, that is to say, (a) articles 2 to 12 and 14 of the Convention, (b) articles 1 to 3 of the First Protocol, and (c) articles 1 and 2 of the Sixth Protocol, as read with articles 16 to 18 of the Convention. (Scotland Act 1998 s 126(1) and Human Rights Act 1998 ss 1 and 21(1)).

⁸³ Scotland Act 1998, s 29(2).

⁸⁴ *Ibid*, s 31(1).

⁸⁵ *Ibid*, s 31(2).

⁸⁶ *Ibid*, s 33.

⁸⁷ *Ibid*, s 35.

⁸⁸ *Ibid*, s 98, sched 6, part I, para 1(a), and part II.

⁸⁹ *Ibid*, s 29(1). See *Whaley v Lord Watson of Invergowrie* 2000 SLT 475.

to devolved or to reserved matters;⁹⁰ and (2) are they compatible with the European Convention on Human Rights?⁹¹

Devolved or reserved?

14.5 It seems clear that the reform of the law of real burdens, and any matters incidental thereto, relate to devolved matters and are therefore within the legislative competence of the Scottish Parliament. Indeed, as real burdens are the principal means of private regulation of land use, it would be surprising if they were not within the competence of the Parliament.

14.6 **The main reform.** As was seen earlier, a provision is outside the legislative competence of the Parliament if it relates to reserved matters⁹² or is in breach of the restrictions in schedule 4 of the Act.⁹³ “Reserved matters” are listed in schedule 5⁹⁴ and do not include real burdens.

14.7 **Incidental reforms.** Reform of the law of real burdens may touch on reserved matters in incidental ways. That does not take the reform outwith the legislative competence of the Parliament. A number of interpretative guides and savings are provided, including the following.⁹⁵ First, the question of whether a provision relates to a reserved matter must be decided by reference to its purpose having regard to its effect in all the circumstances.⁹⁶ Secondly, a provision which would not otherwise relate to a reserved matter but which makes modifications to private law as it applies to reserved matters will fall outwith competence unless the purpose of the provision is to make the law apply consistently to reserved matters and otherwise.⁹⁷ Thirdly, a provision relating to reserved matters will be competent if it is incidental to, or consequential on, provision made which does not relate to reserved matters, and does not have a greater effect on reserved matters than is necessary to give effect to the purpose of the provision.⁹⁸ Finally, any provision which might be read as outside competence is “to be read as narrowly as is required for it to be within competence, if such a reading is possible, and is to have effect accordingly.”⁹⁹ Some specific topics are considered below.

14.8 *Crown property.* Our recommendations for reform will apply to property held by the Crown in a private capacity or otherwise. The Crown is a reserved matter¹⁰⁰ but the reservation does not extend to “property belonging to Her Majesty in right of the Crown or belonging to any person acting on behalf of the Crown or held in trust for Her Majesty for

⁹⁰ This covers s 29(2)(b) and (c) of the Scotland Act 1998. s 29(2)(a) is also considered under this heading.

⁹¹ This covers s 29(2)(d) of the Scotland Act 1998. s 29(2)(e) is not relevant.

⁹² Scotland Act 1998, s 29(2)(b).

⁹³ *Ibid*, s 29(2)(c). To the extent that para 2 of part I of sched 4 provides that an Act of the Scottish Parliament cannot modify or confer power by subordinate legislation to modify the law on reserved matters, s 29(2)(b) and (2)(c) overlap.

⁹⁴ *Ibid*, s 30(1), sched 5.

⁹⁵ Reference might also be made to s 29, sched 4, part I, para 2 (prohibiting the modification of rules of Scots private law which are special to reserved matters) and part II, para 7 (permitting restatement of the law on reserved matters in certain circumstances) of the Scotland Act 1998.

⁹⁶ Scotland Act 1998, s 29(3).

⁹⁷ *Ibid*, s 29(4).

⁹⁸ *Ibid*, s 29, sched 4, part I, para 3.

⁹⁹ *Ibid*, s 101(1) and (2).

¹⁰⁰ *Ibid*, sched 5, part I, para 1.

the purposes of any person acting on behalf of the Crown”¹⁰¹ or “property held by Her Majesty in Her private capacity”.¹⁰²

14.9 *Burdens imposed for a reserved purpose.* It seems within the competence of the Scottish Parliament to legislate in respect of real burdens which may have been imposed for purposes to do with reserved matters. A real burden which was imposed for purposes connected with the defence of the realm or for naval, military or air force purposes is an example.¹⁰³ This would seem clearly to fall within the scope of the saving for incidental or consequential matters.¹⁰⁴

14.10 *Ranking of standard securities.* The proposed reform of s13 of the Conveyancing and Feudal Reform (Scotland) Act 1970, to clarify the effect on a clawback standard security of a subsequent security, is within legislative competence.¹⁰⁵ This affects the ranking of securities *inter se* and as such concerns the law of securities, which is not a reserved matter. It does not alter the law on insolvency of business associations, which is a reserved matter.¹⁰⁶

14.11 *Benefited property outwith Scotland.* Our recommendation that a benefited property need not be in Scotland¹⁰⁷ is not an example of extraterritorial legislation.¹⁰⁸ Only the burdened property is affected by real burdens, and such property must of course be in Scotland. The function of the benefited property is to justify the real burden and to identify its holder. There is no reason why a person holding a right recognised under Scots law should live in Scotland.

European Convention on Human Rights

14.12 This is not a new issue. An individual in the United Kingdom has had recourse to the European Convention on Human Rights for many years. The Convention was drawn up in 1950 and ratified by the United Kingdom in 1951. In 1966 individuals became able to apply to the European Commission of Human Rights if they considered that their Convention rights were being infringed by the State.¹⁰⁹ One of the most important cases on Article 1 of the First Protocol involved the United Kingdom.¹¹⁰ For some time therefore we have had to consider the impact of the European Convention when framing recommendations for reform.¹¹¹ Nonetheless recent legislation has changed the position in a fundamental way. The effect of the Human Rights Act 1998 and the Scotland Act 1998 is to incorporate the Convention fully into Scots law.¹¹² If an Act of the Scottish Parliament is

¹⁰¹ Ibid, sched 5, part I, para 3(1).

¹⁰² Ibid, sched 5, part I, para 4(1).

¹⁰³ The defence of the realm, the naval, military and air forces of the Crown are reserved matters: sched 5, part I, paras 9(a) and (b) of the Scotland Act 1998.

¹⁰⁴ Ibid, sched 4, part I, para 3.

¹⁰⁵ Paras 9.30 ff.

¹⁰⁶ Scotland Act 1998, sched 5, part II, head C, section C2.

¹⁰⁷ Para 3.7 and draft bill s 108.

¹⁰⁸ Which, naturally, is beyond the competence of the Parliament: see Scotland Act 1998 s 29(2)(a).

¹⁰⁹ Following the Eleventh Protocol to the Convention, which came into force on 1 November 1998, complaints now go directly to the European Court of Human Rights.

¹¹⁰ *James and Others v UK* A.98 (1986) (“*James*”).

¹¹¹ See eg our *Report on Leasehold Casualties* (Scot Law Com No 165) paras 4.2 to 4.10, 6.2 to 6.6 and 7.3 to 7.7 and our *Report on Abolition of the Feudal System* (Scot Law Com No 168) paras 5.65 to 5.68.

¹¹² Under the Scotland Act the Scottish Executive and the Scottish Parliament are required to comply with the Convention in exercising their powers. The Human Rights Act makes it unlawful for a public authority to act incompatibly with the Convention rights.

incompatible with the Convention, this can be pled directly in the domestic courts.¹¹³ In determining a question about a Convention right, the courts are bound to take into account the jurisprudence of the European Court of Human Rights, as well as any opinion or decision of the Commission.¹¹⁴

14.13 In assessing the compatibility of our recommendations with the Convention two preliminary points may be made. First, the purpose of the recommendations is to reform and to modernise an area of law which is already familiar and well developed. Our draft bill provides a code for the future, but one which is based on existing common and statute law. The effect on rights currently held will be slight. Secondly, it is clear from the case law of the European Court that each Contracting State enjoys a large measure of discretion – a margin of appreciation – in assessing what is in the public or general interest, and also in assessing whether a fair balance has been struck between the public and private interests involved – the proportionality test.¹¹⁵ The Convention does not prevent modernisation of a country’s private law. Nor does it require the payment of full compensation for every right which is restricted or removed in the course of that modernisation.¹¹⁶

14.14 Article 1 of the First Protocol to the Convention (the right to peaceful enjoyment of property) and article 14 of the Convention (discrimination) are of most relevance to our recommendations. We also briefly consider article 6 (right to a fair trial).

Article 1 of the First Protocol

14.15 Article 1 provides that:

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

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

14.16 Probably only the first paragraph of article 1 is of potential relevance.¹¹⁷ A small number of our proposals have the effect, in certain circumstances, of depriving a person of

¹¹³ Scotland Act 1998, s 98, sched 6, and s 100. See *Anderson Doherty and Reid v The Scottish Ministers and the Advocate General for Scotland*, 16 June 2000, First Division (unreported) concerning the compatibility with the Convention of section 1 of the Mental Health (Public Safety and Appeals) (Scotland) Act 1999.

¹¹⁴ Human Rights Act 1998, ss 1 and 2.

¹¹⁵ See D J Harris, M O’Boyle & C Warbrick, *Law of the European Convention on Human Rights* (1995) pp 521-527 and 532, and P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* 3rd ed. (1998) pp 631-635. On the approach of the Scottish Courts to these matters see *Her Majesty’s Advocate v McSalley* 2000 GWD 16-653 (concerning article 1 of the First Protocol to the Convention and the principle of proportionality) and *Anderson Doherty and Reid v The Scottish Ministers and the Advocate General for Scotland*.

¹¹⁶ See note 50 below and generally the case of *Mellacher v Austria* A.169 (1989).

¹¹⁷ Since our draft bill does not impose (new) restrictions on the use of property, its provisions do not appear to fall within the second paragraph of article 1. But even if they did, it is clear that the second paragraph would not be breached. See generally van Dijk & van Hoof, *Theory and Practice* pp 638 ff and Harris, O’Boyle & Warbrick, pp 534-538.

the right to a real burden, and hence to a “possession”.¹¹⁸ Three may be said to fall into this category. (1) An enforcement right which arises by implication with reference to real burdens imposed under a common scheme is extinguished if the benefited property is further than four metres from the burdened property.¹¹⁹ (2) Various proposals make it easier for real burdens to be extinguished. In particular (a) the period of negative prescription is reduced from twenty years to five years;¹²⁰ (b) a burden which is more than 100 years old can be extinguished by service of a notice of termination;¹²¹ and (c) a community burden can be varied or discharged by a majority of owners where previously this would have required unanimity.¹²² (3) A right of reversion under the School Sites Act 1841 is, in certain circumstances, converted into a right to receive the value of the property; and in exercising the right the holder is not to receive the value of any buildings.¹²³

14.17 The fact that a person is deprived of a “possession” does not, of itself, mean that there is a breach of article 1, for the article is not breached if the deprivation is “in the public interest and subject to the provisions provided for by law and by the general principles of international law”.¹²⁴ The public interest saving may be analysed as having three main elements. In order to come within the saving (i) the measure must be in the public interest; (ii) there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised; and (iii) the measure must be lawful. We consider these in turn.

14.18 (i) *Public interest.* States enjoy a wide margin of appreciation as to whether a particular expropriation has been performed in the public interest and this matter will only be subjected to a very limited review by the courts.¹²⁵ There is no case in which the European Court has ruled that a deprivation of possessions was not in the public interest.¹²⁶ The public interest in the proposals currently under scrutiny is fully set out in the relevant parts of the report and need not be repeated here.

14.19 (ii) *Proportionality.* There must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.¹²⁷ The Court again allows a

¹¹⁸ The term “possessions” has been widely interpreted to include rights other than possession or ownership of physical goods. For example it has been said to include: real rights in security (*Gasus Dosier- und Fördertechnik GmbH v Netherlands*, A. 306-B (1995) at para 53), delictual claims for compensation (*Pressos Compania Naviera SA v Belgium*, A. 332 (1995) at paras 29-32), and a right to goodwill (*Van Marle and Others v Netherlands* A.101 (1986) at paras 39-44).

¹¹⁹ Paras 11.48 ff; draft bill ss 41 and 44.

¹²⁰ Paras 5.67 to 5.72; draft bill s 16.

¹²¹ Paras 5.22 ff; draft bill ss 18 to 22.

¹²² Paras 7.48 ff; draft bill ss 30 to 32.

¹²³ Paras 10.44 ff; draft bill s 82.

¹²⁴ We are concerned here with the second sentence of the first paragraph of article 1. In *James* (at para 71) the Court concluded that if the requirements of this sentence were met, it was inconceivable that the application of the first sentence should lead to a different conclusion.

¹²⁵ “Furthermore the notion of ‘public interest’ is necessarily extensive. In particular, ...the decision to enact laws expropriating property will commonly involve considerations of political, economic and social issues on which opinion within a democratic society may differ widely. The Court, finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature’s judgement as to what is ‘in the public interest’ unless that judgement be manifestly without reasonable foundation” (*James* at para 46). See also *Lithgow and Others v UK* A.102 (1986) at paras 108-109 and *Holy Monasteries v Greece* A.301-A (1994) at paras 67-69. The *Lithgow* case was reviewed in *Booker Aquaculture Ltd v Secretary of State for Scotland* 1999 GWD 30-1435.

¹²⁶ Van Dijk and van Hoof, *Theory and Practice* p 632.

¹²⁷ See *James* at para 50, *Lithgow* at para 120, and *Holy Monasteries* at para 70.

wide margin of appreciation. The question is whether a fair balance has been struck between the interest of the community and the protection of the individual's rights. The requisite balance will not be found where a person is asked to bear an individual and excessive burden.¹²⁸ In general, appropriation must be matched by compensation: in *Holy Monasteries* the Court confirmed a principle developed in *James and Lithgow* that "a total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances".¹²⁹ Full compensation, however, may not be required.¹³⁰

14.20 We are satisfied that the requirement of proportionality has been met in relation to all three proposals mentioned above. The abolition of implied enforcement rights (proposal (1)) is carefully targeted. Many such rights are preserved or re-created. Abolition is confined to certain types of common scheme burdens. But even here a person will always be able to enforce the burdens against properties within four metres of his own; and in respect of properties lying outside that area, the burdens will continue to be enforceable by closer neighbours. Real burdens so rarely have independent economic value that it is not clear that compensation is required for their loss. But be that as it may, our proposals allow for non-pecuniary compensation, for the loss of rights is accompanied by a corresponding loss of obligations. Four metres marks the limit of obligation as well as of right. Neighbours further apart have no rights against, nor obligations towards, one another.

14.21 Proportionality is also observed in the case of the revised rules of extinction (proposal (2)). There is no novelty in the idea of extinctive prescription, either in Scotland or in other countries. A person who neglects his rights will, in the end, lose them. The notice of termination procedure, while new, is closely related to an existing method of extinction, by application to the Lands Tribunal. A notice of termination can be challenged before the Tribunal. If the challenge is successful, the burden survives. If it is unsuccessful, compensation may be payable, under headings familiar from the existing law. The right of the majority to vary or discharge a community burden is also new, but accompanied by safeguards designed to prevent oppression of the minority.¹³¹

14.22 Rights of reversion under the School Sites Act (proposal (3)) are, in most cases, left untouched. But where a former school site has been sold on by the education authority, we have preferred the claims of the purchaser to the claims of a person whose predecessor gave the land away at some remote time in the past. But compensation is payable. The value of buildings, however, is excluded, on the basis that the entitlement conferred by the 1841 Act is to the site alone.¹³²

14.23 (iii) *Lawfulness*. The proposed measures must also be lawful. A deprivation must be carried out in accordance with the conditions provided for by law and by the general principles of international law. These conditions are readily met, as indeed they usually

¹²⁸ See *Sporrong and Lönnroth v Sweden* A.52 (1982) at para 73 and *James* at para 50.

¹²⁹ At para 71.

¹³⁰ In *James* at para 54 the Court made it clear that, "Article 1 does not...guarantee a right to full compensation in all circumstances. Legitimate objectives of "public interest", such as pursued in measures of economic reform or measures designed to achieve social justice, may call for less than reimbursement of the full market value". See also *Lithgow* at para 121.

¹³¹ These are (a) in the case of individual variation and discharge, the requirement that at least one close neighbour must sign; and (b) in the case of universal variation and discharge, the right to seek reduction of the deed on grounds of unfair prejudice. See paras 7.60 and 7.74 and 7.75.

¹³² Hence, in cases where the land itself was being returned, the education authority would be entitled to demolish the buildings first.

are.¹³³ Our proposals will be implemented by an Act of the Scottish Parliament, thus satisfying the first requirement. And there is no breach of the principles of international law.

Article 14

14.24 Article 14 provides that:

“The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status ...”

Article 14 amounts to an autonomous, though complementary, guarantee in relation to the rights and freedoms protected in Section I of the Convention: even if the main provision has not been violated by itself, the facts may show a violation of that provision in conjunction with article 14.¹³⁴ The list of prohibited grounds of discrimination set out in article 14 is not exhaustive.¹³⁵

14.25 The principle of equality and non-discrimination contained within article 14 is violated where there is (i) differential treatment of equal cases (the comparability test) without (ii) an “objective and reasonable justification” or if “there is no reasonable relationship of proportionality between the means employed and the aim to be realised”¹³⁶ (the justification test). In practice it is difficult to establish discrimination unless the case falls within the more obvious categories, such as differential treatment as between legitimate and illegitimate children,¹³⁷ or on the basis of gender,¹³⁸ religion¹³⁹ or nationality.¹⁴⁰

14.26 Our recommendations for the reform of real burdens apply to all real burdens. But they do not in every respect treat all burdens in the same way. Existing implied rights to enforce are treated differently from existing express rights to enforce, for while the latter are preserved, the former, as already mentioned, are abolished in some cases.¹⁴¹ Further, not all implied rights are treated in the same way. Some are abolished and cannot be saved.¹⁴² Others are abolished but can be saved by registering a notice of preservation.¹⁴³ Yet others are saved automatically.¹⁴⁴

¹³³ Van Dijk and van Hoof, *Theory and Practice* p 631, n 1825.

¹³⁴ *Abdulaziz, Cabales and Balkandali v UK* A. 92 (1985) at para 71. See also *Inze v Austria* A.126 (1987) at para 36.

¹³⁵ *Rasmussen v. Denmark* A87 (1984) at para 34.

¹³⁶ *Belgium Linguistic* A.6 (1968) at para 10, *Abdulaziz, Cabales and Balkandali* at para 72, *James* at para 75, *Lithgow* at para 177, *Inze* at para 41, *Darby v Sweden*, A.187 (1990) at para 31.

¹³⁷ *Marckxx v Belgium* A.31 (1979).

¹³⁸ *Abdulaziz, Cabales and Balkandali and Schuler -Zraggen v Switzerland* A.263 (1993).

¹³⁹ *Hoffman v Austria* A.255-C (1993) and *Canea Catholic Church v Greece*, Reports 1997-VIII.

¹⁴⁰ *Gaysusuz* Reports 1996-IV, Vol. 14, para 42. See further van Dijk and van Hoof, pp 727-729 and Harris, O’Boyle & Warbrick, p 481: “suspect categories”.

¹⁴¹ See part 11; draft bill part 4.

¹⁴² Common scheme burdens enforceable by proprietors of benefited properties more than 4 metres from the burdened property.

¹⁴³ Neighbour burdens.

¹⁴⁴ Facility burdens, service burdens, and common scheme burdens in tenements and sheltered housing developments.

14.27 These recommendations are remote from the normal ambit of article 14 and we have no doubt that article 14 does not apply. We will therefore be brief. There are two tests under article 14. The comparability test involves differential treatment of analogous or relevantly similar situations linked to the purpose of the article.¹⁴⁵ It can be difficult to satisfy. Where, for example, legislation retrospectively validated regulations changing the basis on which composite rate tax was collected, but exempted the Woolwich Building Society, it was held that other building societies were not in a relevantly similar position to the Woolwich as the latter alone had challenged the original regulations and borne the costs and risks of expensive litigation.¹⁴⁶ We doubt whether the comparability test is satisfied in respect of our proposals. Rights expressly conferred are different from rights arising by implication. That is why they are treated differently in our proposed legislation. The same can be said about the different categories of implied right.

14.28 If, however, the differences are not enough to escape the charge of comparability, they are at any rate easily sufficient to justify the differences in treatment. The “justification test” attracts a wide margin of appreciation. If the aim being pursued is legitimate it is difficult to say that the means adopted are not proportionate; and in practice the Court is quick to accept that national authorities have a justified aim (as opposed to “other and ill-intentioned designs”).¹⁴⁷ While the judgment of the national authorities must not be without reasonable foundation, evident arbitrariness may require to be shown before a finding of discrimination would be made.¹⁴⁸ We are satisfied that such differential treatment as may be thought to affect our proposals has a legitimate aim, and that there is proportionality between the aim sought and the means used. The policy behind our proposals is explored elsewhere. Our recommendations for implied rights are necessary precisely because the rights are nowhere expressed. They are designed to solve the problem of identification. And within the class of implied rights, different solutions are required by the different nature of the property affected by the burdens. For example, community burdens regulating maintenance and amenity within a block of flats raise different issues, and require different treatment, from a neighbour burden which restricts the use of one property for the benefit of another. Practical considerations are also relevant here. A block of flats is a discrete community and can be readily identified. A neighbour must identify himself by registering a notice.

¹⁴⁵ See *Sunday Times v UK* A. 217 (1991), and *National and Provincial Building Society, Leeds Permanent Building Society, and the Yorkshire Building Society v the United Kingdom*, Reports 1997-VII, at para 88 (“*Building Societies*”).

¹⁴⁶ *Building Societies* at paras 88-92. Naturally there are cases where the comparability test is met. In *Darby* at paras 32-34 exemption from church tax was only available to non-members of the church who were formally registered as resident in Sweden. It was held that both residents and non-residents were in a similar situation as regards the right to an exemption and that no legitimate aim had been identified for the difference in treatment. In *Chassagnou and Others v France* Judgement of 29 April 1999 at paras 90-95 it was held that in connection with the transfer of hunting rights the owners of small and large landholdings were in a similar situation and that the difference in treatment between the two was not justified.

¹⁴⁷ *National Union of Belgian Police, A.19* (1975) at para 48 and see, generally, Harris, O’Boyle & Warbrick, at pp 479-483.

¹⁴⁸ In *James* at paras 76-78 differential treatment of landlords was reasonably and objectively justified given the aim of the legislation (to remedy social injustice by enfranchising tenants) and the margin of appreciation. In *Holy Monasteries* at paras 92-94, where only monasteries and properties belonging to the Greek Church were expropriated, it was held that since the legal status of other monasteries was different the law treating them differently was justified.

Article 6

14.29 Article 6 begins with the declaration that

“In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

The subject matter of this article is touched on by our proposal that, once a right has been extinguished under the legislation, existing court actions fall, together with any prior decrees (other than pecuniary decrees).¹⁴⁹ But there is plainly no breach. A right which has been extinguished can no longer be enforced, and the main purpose of the proposal is to clarify the status of prior decrees of interdict or implement. The proposal is based on a provision in the Abolition of Feudal Tenure etc. (Scotland) Act 2000.¹⁵⁰ The same policy underlies the further proposal that, following the abolition of the remedy of irritancy, existing proceedings should be deemed abandoned.¹⁵¹

Part 15 List of Recommendations

Part 1 – Introduction

1. It should continue to be competent to create real burdens, and existing non-feudal burdens should remain enforceable.

(Para 1.21)

Part 2 – Content

2. Subject to recommendation 3, a real burden should be either -
 - (a) an affirmative burden (that is to say, an obligation to do something) or
 - (b) a negative burden (that is to say, an obligation to refrain from doing something).

(Para 2.3; Draft Bill s 2(1), (2))

¹⁴⁹ Para 5.81; draft bill s 49.

¹⁵⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 16(2), (3).

¹⁵¹ Draft bill s 56. Once again this is based on a provision (s 51) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

3. It should be possible for an affirmative burden or a negative burden to include an ancillary obligation -
 - (a) to allow access to or use of the burdened property
 - (b) to promote management or administration.
(Para 2.8; Draft Bill s 2(3), (4))

4.
 - (a) A real burden should relate to the burdened property, whether directly or indirectly; but the relationship should not merely be that the obligated person is the owner of the burdened property.
 - (b) Unless it is a community burden, a real burden should be for the benefit of the benefited property.
 - (c) It should be sufficient if a community burden is for the benefit of the community or a part of the community.
(Para 2.18; Draft Bill s 3(1)-(4))

5. A real burden should not be -
 - (a) illegal, or
 - (b) contrary to public policy, as for example in unreasonable restraint of trade, repugnant with ownership, or (subject to our other recommendations) requiring the employment of a particular person as manager or as the provider of other services.
(Para 2.28; Draft Bill s 3(6))

6.
 - (a) It should be possible (and deemed always to have been possible) for a real burden to reserve or confer on a third party the right to nominate, and dismiss, the manager of a group of properties.
 - (b) Such a burden may be referred to as a “manager burden”.
 - (c) It should be possible for a manager burden to be held by a person without reference to a benefited property.
 - (d) A manager burden should be exercisable only if its holder owns one of the properties in question.
 - (e) A manager burden should be extinguished on the expiry of -
 - (i) the period (if any) specified in the constitutive deed; or

- (ii) the period of ten years beginning with the date of registration of the constitutive deed

whichever is the shorter.

(f) In the case of houses sold under part III of the Housing (Scotland) Act 1987 (or its predecessor legislation), the period mentioned in (e)(ii) above should be thirty years.

(g) It should not be possible for the owners of the properties to dismiss a manager nominated under a manager burden during any period when the burden is exercisable.

(h) The right to a manager burden should be capable of being assigned or otherwise transferred; the assignation or transfer should take effect on intimation without registration.

(Para 2.39; Draft Bill s 53)

- 7. Any person who, immediately before the appointed day, acts as manager of a group of properties by virtue of a provision contained in the title (whether or not that provision was valid) should be deemed to have been validly appointed.

(Para 2.40; Draft Bill s 55)

- 8. (a) Notwithstanding any title provision to the contrary, a person appointed to manage a group of properties should be capable of dismissal by the owners of two thirds of those properties.

(b) In the application of this recommendation to a manager appointed under a manager burden, there should be disregarded any property owned by the (former) holder of the burden.

(c) This recommendation is subject to recommendation 6(g).

(Para 2.44; Draft Bill s 54)

Part 3 – Creation

- 9. It should not be possible for a *pro indiviso* share to serve as either a benefited property or a burdened property.

(Para 3.2; Draft Bill s 4(6))

- 10. (a) A real burden should be created by registration of a constitutive deed in the Land Register or Register of Sasines against both the burdened property and the benefited property.

- (b) There should be no requirement of registration against the benefited property
 - (i) in the case of a conservation burden or maritime burden or
 - (ii) if the benefited property is outside Scotland.
 - (c) If a deed requires to be registered against both properties, it should not be competent for it to be registered against one property only.
 - (d) A real burden should take effect -
 - (i) on the date of registration, or
 - (ii) on such later date as may be specified in the constitutive deed (including the date of registration of some other deed).
(Para 3.10; Draft Bill, ss 4(1), (5) and 112)
11. There should be no requirement that the constitutive deed take any particular form.
(Para 3.14; Draft Bill s 4(2))
12. (a) The constitutive deed should be granted by or on behalf of the person who, at the time of its registration, is owner of the burdened property.
- (b) For this purpose “owner” includes a person who has right to the property but has not completed title; but, except in a case where section 15(3) of the Land Registration (Scotland) Act 1979 applies, such a person must deduce title in the constitutive deed.
(Para 3.18; Draft Bill, ss 4(2)(b), 50(1) and 114)
13. (a) The constitutive deed should be required to -
 - (i) set out the terms of the real burden;
 - (ii) use the term “real burden” or equivalent; and
 - (iii) nominate and identify the burdened property and either the benefited property or, if there is none, the person in whose favour the burden is created.
- (b) The constitutive deed may also stipulate for a fixed duration.
- (c) In setting out the terms of a burden -

- (i) it should be (and deemed always to have been) permissible to incorporate by reference any enactment, public register or public records which are readily available to the general public; and
- (ii) it should not be (and should be deemed always not to have been) necessary to specify the amount payable in respect of an obligation to defray or contribute towards some cost provided that the way in which the amount can be arrived at is sufficiently specified.

(Para 3.33; Draft Bill ss 4(2)&(3), 5 and 6)

14. Where an obligation in a disposition or other constitutive deed has become enforceable as a real burden, it should cease to have incidental validity as a contractual term.

(Para 3.45; Draft Bill s 51)

15. (a) Any requirement in any deed that real burdens be repeated or referred to in future deeds should cease to have effect.

(b) Sections 9(3) and 9(4) of the Conveyancing (Scotland) Act 1924 should be repealed.

(Para 3.46; Draft Bill s 57 and sched 9)

Part 4 - Enforcement and Transmission

16. (a) A person should have title to enforce a real burden if, in relation to the benefited property, he is -

- (i) its owner;
- (ii) a tenant;
- (iii) a proper liferenter; or
- (iv) the non-entitled spouse of a person mentioned above, being a person holding occupancy rights.

(b) If a right mentioned at (a) is held as common property, each *pro indiviso* owner should have a separate title to enforce.

(Para 4.14; Draft Bill s 7(2))

17. A person should have interest to enforce a real burden if -

- (i) failure to comply with the burden would cause material detriment to the value or enjoyment of the enforcer's right in the benefited property, or
- (ii) the enforcer has incurred or will incur maintenance or other costs which, in terms of the burden, fall to be reimbursed.

(Para 4.23; Draft Bill s 7(3))

18. A negative burden should be enforceable against an owner, tenant or anyone else who intromits with the burdened property.

(Para 4.30; Draft Bill s 8(2))

19. (a) Subject to recommendation 21, an affirmative burden should be enforceable only against the owner of the burdened property.

(b) By "owner" is meant the person who has right to the property whether or not title has been completed (and where there is more than one such person, the person who has most recently acquired such right).

(c) If the property is owned in common, each owner should be liable jointly and severally, but subject to a right of relief proportionate to the size of the shares.

(d) Any person who formerly owned the burdened property should be under an obligation to disclose to a person with title to enforce such information as he may have, directly or indirectly, as to the name and address of the current owner.

(Para 4.38; Draft Bill, ss 5, 10 and 114)

20. A person who, at the time when a cost was incurred, had title to seek its reimbursement under a real burden, should not lose that title merely on the ground that he has ceased to hold the right in the benefited property on which the title was founded.

(Para 4.40; Draft Bill s 7(2)(c))

21. (a) Notwithstanding recommendation 19(a), a person who was owner of the burdened property at the time when an obligation under an affirmative burden became due (or was already due) should not cease to be liable for the obligation by virtue only of ceasing to be owner; but such liability should be held jointly and severally with any successor or successors as owner.

(b) An obligation should be regarded as having become due on any date or on the occurrence of any event which was stipulated for its performance.

(c) Where an owner performs an obligation for which a former owner remained liable under (a), he should have a full right of relief against that owner.

(Para 4.47; Draft Bill, s 9)

22. (a) Where part of a benefited property is conveyed, that part should, on registration, cease to be a benefited property unless different provision is made in the conveyance.

(b) Where different provision is made in the case of a right of pre-emption, redemption or reversion, the part retained should cease to be a benefited property.

(c) This recommendation does not apply to community burdens, or to a property which is a benefited property only by virtue of recommendations 89 to 92.

(Para 4.56; Draft Bill s 11)

23. (a) Where a burdened property is divided, the owner of each constituent part should be jointly and severally liable for the performance of any affirmative burden.

(b) There should be a right of relief among the owners -

(i) on the basis specified in the constitutive deed or deed effecting the division, or

(ii) if no such basis is specified, proportionate to the respective areas of the constituent parts.

(c) (a) should not apply to a constituent part on which the burden in question could not be performed.

(Para 4.59; Draft Bill s 12)

24. Provisions imposing real burdens should be interpreted in the same manner as other provisions in deeds relating to land and intended for registration.

(Para 4.67; Draft Bill s 13)

25. Any irritancy clause which relates to real burdens should cease to have effect.

(Para 4.73; Draft Bill s 56)

Part 5 - Extinction

26. (a) A real burden should be discharged, as respects any benefited property, by registration of a deed granted and subscribed by or on behalf of the owner of that property.

- (b) A real burden may be discharged wholly or in part.
- (c) A deed of discharge should not require a grantee; but it could be presented for registration by or on behalf of an owner of the burdened property or any other person against whom the burden was enforceable.
- (d) For the purpose of this recommendation “owner” includes a person who has right to the property but has not completed title; but, except in a case where section 15(3) of the Land Registration (Scotland) Act 1979 applies, such a person must deduce title in the constitutive deed.

(Para 5.16; Draft Bill ss 14, 58(1)&(2), and 114)

27. (a) A real burden should be extinguished by the execution and registration of a notice of termination by an owner of the burdened property or by any other person against whom the burden is enforceable (“the terminator”).
- (b) This recommendation applies only to real burdens which are at least 100 years old and are not
- (i) conservation burdens
 - (ii) maritime burdens
 - (iii) facility burdens
 - (iv) service burdens
 - (v) burdens of the kind listed in recommendation 37.
- (c) A notice of termination would have to
- (i) identify the burdened property;
 - (ii) set out the real burden or burdens and, if appropriate, the extent of the termination;
 - (iii) specify the renewal date (ie the date by which applications for renewal must normally be brought), being a date not less than eight weeks after intimation of the proposed termination;
 - (iv) specify the date and means of intimation; and
 - (v) set out the name and address of each person to whom, in the course of intimation, the proposed notice is sent.

(d) A proposal to execute and register a notice of termination should be intimated to the owner of each benefited property and to any other owner of the burdened property.

(e) The proposal should be intimated to

(i) the owner of any benefited property within four metres of the burdened property (but disregarding pertinents, and roads if of less than 20 metres in width);

(ii) any other owner of the burdened property

by sending a copy of the proposed notice, together with an explanatory note in statutory form.

(f) The notice should be intimated to the owner of any other benefited property

(i) by sending a copy of the proposed notice, together with an explanatory note in statutory form, or

(ii) by advertisement in a newspaper circulating in the area.

(g) Any owner of a benefited property should be able to challenge the proposed termination as it affects that property by applying to the Lands Tribunal for renewal of the burden or burdens.

(h) Unless the terminator agrees otherwise, an application to the Lands Tribunal must be made by not later than the renewal date.

(i) A notice of termination should be of no effect to the extent that it is subject to an application to the Lands Tribunal (unless the application is withdrawn). This rule should apply regardless of the outcome of the application.

(j) In executing the notice the terminator should swear or affirm before a notary public that all the information contained there is true to the best of his knowledge and belief.

(k) It should not be possible to register a notice of termination unless

(i) there has been due intimation; and

(ii) the notice is endorsed with a certificate executed by a member of the Lands Tribunal, or its clerk, to the effect that no application for renewal has been received, or that any application received does not relate to all of the burdens (or, as the case may be, to all of the benefited properties).

(l) It should be possible to withdraw a notice of termination by written intimation to the Lands Tribunal given at any time before the notice has been endorsed with a certificate; and where a notice has been withdrawn, it should cease to be competent to endorse a certificate.

(Para 5.56; Draft Bill ss 18 to 22)

28. (a) Where -
- (i) a real burden is breached by an activity involving material expenditure;
 - (ii) the benefit of the expenditure would be substantially lost if the burden were to be enforced; and
 - (iii) the person (or persons) by whom the burden is enforceable either consented to the activity or, being aware of it (whether actually or constructively), had failed to object by the time that the activity was substantially complete;

the burden should be extinguished to the extent of the breach.

- (b) In a case where the activity is substantially complete it should be presumed, unless the contrary is shown, that the person (or persons) by whom the burden is enforceable knew of the breach but failed to object.

(Para 5.66; Draft Bill s 15)

29. (a) The period for negative prescription of real burdens should be reduced from twenty years to five years.

- (b) A burden should be extinguished only to the extent of the breach which induced the prescription.

(Para 5.72; Draft Bill s 16)

30. A real burden should not be extinguished only because the same person is owner of the benefited and the burdened property.

(Para 5.80; Draft Bill s 17)

31. If a real burden is extinguished -

- (i) no proceedings for enforcement should be competent;
- (ii) all existing proceedings (other than for payment of money) should be deemed abandoned; and

- (iii) any decree or interlocutor already pronounced (other than for payment of money) should fall.

(Para 5.81; Draft Bill s 49)

Part 6 - The Lands Tribunal for Scotland

32. A fee should be payable by a person who wishes to object to an application. (Para 6.11)

33. In determining any question of expenses the Lands Tribunal should have regard to the extent to which the application, or any opposition to the application, is successful.

(Para 6.12; Draft Bill s 96)

34. (a) An application for discharge of a real burden which is not opposed should be granted as of right.

(b) In such a case it should not be competent for the Lands Tribunal to award compensation nor to impose a substitute real burden.

(c) For the purposes of (a) an application is unopposed in a case where no representations were made by an owner of a benefited property, or any representations so made were later withdrawn.

(d) This recommendation does not extend to facility burdens or service burdens.

(Para 6.17; Draft Bill s 92)

35. (a) The Lands Tribunal should be empowered –

(i) subject to recommendation 37, to discharge any title condition or purported title condition;

(ii) to determine any question as to the validity, applicability or enforceability of a real burden or as to how it is to be construed.

(b) An application made under both (i) and (ii) above may be combined; and the Tribunal should have a discretion to decline jurisdiction in the case of an application made under (ii) alone.

(Para 6.23; Draft Bill s 85(1)(a)&(9))

36. “Title condition” should be defined to mean –

(a) a real burden;

- (b) a servitude;
- (c) a servitude condition constituted as an affirmative obligation;
- (d) a condition relating to land in a registrable lease, whether the condition is binding on the landlord or on the tenant, but excluding an obligation to pay rent or any obligation of relief relating to any such payment;
- (e) a condition imposed under section 3(2) or section 3(2A) of the Registration of Leases (Scotland) Act 1857;
- (f) a rule of the Development Management Scheme (other than part 2);
- (g) a condition in an agreement entered into under section 7 of the National Trust for Scotland Order Confirmation Act 1938; and
- (h) such other condition relating to land as Scottish Ministers may prescribe by statutory instrument.

(Para 6.36; Draft Bill s 113(1))

37. The power conferred on the Lands Tribunal in terms of recommendation 35(a)(i) should not include a power to discharge –
- (a) an obligation relating to the right to work minerals or to any ancillary right in relation to minerals;
 - (b) an obligation enforceable by the Crown or a public or international authority and created for military or civil aviation purposes; and
 - (c) an obligation created in a lease of an agricultural holding, small landholding or croft.

(Para 6.43; Draft Bill s 85(2) and sched 6)

38. (a) An application for discharge, or for a ruling on validity or scope, should be available to any owner of the burdened property and to any one else against whom the title condition is enforceable.
- (b) An application for renewal should be available to any owner of a benefited property.

(Para 6.51; Draft Bill s 85(1))

39. (a) The persons entitled to make representations in relation to an application should be –

- (i) any person who has title to enforce the title condition; and
- (ii) any person against whom the title condition is enforceable.

(b) Representations should be in writing and accompanied by payment of the appropriate fee.

(c) Representations should be made within 21 days of notification (or such later date as may be specified), but the Lands Tribunal should be able, at its discretion, to accept representations made after this date.

(Para 6.55; Draft Bill ss 90 and 91)

40. (a) On receipt of an application for discharge, or for a ruling on validity or scope, the Lands Tribunal should give notice of the application to any person (not being the applicant) who appears to be -

- (i) an owner of the burdened property;
- (ii) an owner of any benefited property; and
- (iii) in a case where there is no benefited property, a person in right of the title condition.

(b) On receipt of an application for renewal, the Lands Tribunal should give notice of the application to the terminator and to any (other) person who appears to be an owner of the burdened property.

(c) The Lands Tribunal may also give notice of the application to any other person.

(d) Normally the notice should be sent, but it may be given by advertisement or other means if -

- (i) given to a person who cannot, by reasonable inquiry, be identified or found;
- (ii) the person to whom it is given does not appear to have any interest to enforce; or
- (iii) so many people require to be given notice that individual notification is not reasonably practicable.

(e) The notice should -

- (i) summarise the application;

- (ii) specify the date (being not less than 21 days after notification) by which representations must be made;
- (iii) specify the fee; and
- (iv) contain a warning that an unopposed application may be granted without further inquiry.

(Para 6.60; Draft Bill ss 88 and 89)

41. In considering the merits of an application for discharge, or renewal, of a title condition, the Lands Tribunal should grant the application if it is reasonable to do so having regard to -

- (a) any change in circumstances since the condition was first created, including changes in the character of the benefited and burdened properties and of the neighbourhood thereof;
- (b) the extent to which the condition confers benefit on the benefited property;
- (c) in a case where there is no benefited property, the extent to which the condition confers benefit on the public;
- (d) the extent to which the condition impedes enjoyment of the burdened property;
- (e) the cost and practicability of compliance;
- (f) the age of the condition;
- (g) whether appropriate consents (including deemed consents) from planning or other regulatory authorities have been given; and
- (h) any other material circumstances.

(Para 6.84; Draft Bill ss 93 and 94)

42. Where an application for discharge or renewal is considered on its merits, the Lands Tribunal should continue to have power to award compensation or to impose a substitute condition; but -

- (a) the power should not be exercised without the consent of the person against whom compensation is awarded or, as the case may be, the owner of the burdened property;
- (b) any substitute condition should be classified as a title condition.

(Para 6.91; Draft Bill s 85(4)-(8))

43. On registration of an order of the Lands Tribunal discharging a title condition, the title condition should be extinguished in whole or in part, in accordance with the terms of the order.

(Para 6.93; Draft Bill s 97(2))

44. The rule that no application for discharge can be made to the Lands Tribunal for an initial period of two years should cease to have effect; but it should be possible to provide in the constitutive deed for an initial period, not exceeding five years, during which no application could be made.

(Para 6.94; Draft Bill s 87)

45. The Lands Tribunal should be empowered to vary or discharge a community burden for all or any part of the community on the application of the owners of 25% of the units.

(Para 6.96; Draft Bill s 86)

Part 7 – Community Burdens

46. “Community burden” should be defined to mean –

- (i) burdens imposed under a common scheme on four or more units in circumstances where each unit is both a benefited and a burdened property, and
- (ii) burdens affected by recommendation 92;

but under exclusion of –

- (iii) burdens affected by recommendation 90.

(Para 7.21; Draft Bill s 23)

47. (a) It should be sufficient compliance with recommendation 13(a)(iii) in the case of community burdens if the community is nominated and identified in the constitutive deed.

(b) Where burdens affecting units of property are declared to be community burdens, each unit should have the dual status of benefited and burdened property.

(c) A community burden should be able to make provision for any of the following

- (i) the appointment and dismissal of a manager;

- (ii) the nomination of a person to act as the first manager;
 - (iii) a statement of the powers and duties of the manager;
 - (iv) the procedures for making decisions;
 - (v) the subject matter on which decisions may be made; and
 - (vi) the resolution of disputes concerning community burdens.
- (Para 7.28; Draft Bill ss 24 and 25)

48. (a) Where a community burden imposes a shared obligation to maintain some part of the community or to contribute towards its maintenance, the owners of a majority of units affected by the obligation should be able to -

- (i) decide when maintenance is to be carried out, and instruct or carry out that maintenance;
- (ii) require each owner to deposit in advance a sum of money not exceeding a reasonable estimate of that person's share of the cost; and
- (iii) modify or revoke any decision made under (i) or (ii).

(b) If a unit is owned by two or more persons, either person should be able to exercise the vote for that unit, but if they disagree the vote should not be counted.

(c) The rule in (a) should not apply if -

- (i) the burdens affecting the community make alternative provision for decision-making; or
 - (ii) the obligation does not account for the entire liability for maintenance.
- (Para 7.41; Draft Bill s 27)

49. (a) The owners of a majority of units in a community should be able to -

- (i) appoint a manager;
- (ii) delegate to the manager any of their powers; and
- (iii) dismiss a manager.

(b) Liability for the manager's remuneration should be shared equally among the owners on the basis of one share per unit.

(c) If a unit is owned by two or more persons, either person should be able to exercise the vote for that unit, but if they disagree the vote should not be counted.

(d) The rules in (a) and (b) should not apply if the burdens affecting the community make alternative provision.

(Para 7.46; Draft Bill ss 26 and 29)

50. Anything done (including any decision made) by the owners of a community in accordance with the community burdens or with recommendations 48 and 49 should be binding on all the owners and on their successors as owners.

(Para 7.47; Draft Bill s 28)

51. (a) A community burden should be varied or discharged in relation to a single unit (or a number of units, not exceeding one half of the community) by registration against the affected unit (or units) of a deed granted and subscribed -

- (i) by the owners of a majority of units;
- (ii) by the owners of such units as is provided for in the constitutive deed;
or
- (iii) where he is empowered to do so, by the manager.

(b) The persons subscribing under (a) should include -

- (i) except where (ii) applies, the owner of a unit within four metres of the affected property measuring along a horizontal plane (the width of any road being disregarded if of less than twenty metres);
- (ii) if the deed has the effect of imposing a new burden, the owner of the affected unit (or units).

(Para 7.67; Draft Bill s 30)

52. (a) A community burden should be varied or discharged in relation to all units (or a lesser number, but not less than one half of the community) by registration against the affected units of a deed granted and subscribed -

- (i) by the owners of a majority of units;
- (ii) by the owners of such units as is provided for in the constitutive deed;
or
- (iii) where he is empowered to do so, by the manager.

(b) A deed should not be registrable unless the owner of every affected unit (other than an owner who granted the deed) has been given or sent a copy of the deed and informed of his right to apply for reduction under (c).

(c) If, in relation to such a deed, the court is satisfied that -

- (i) the deed is not in the best interests of the community, or
- (ii) the deed is unfairly prejudicial to one or more of the owners

the court should be able to make an order reducing the deed in whole or in part.

(d) An application under (c) should be available to any person who -

- (i) owns an affected unit, and
- (ii) did not grant, or agree to grant, the deed.

(e) An application must be brought not later than eight weeks after the owner received a copy of the deed under (b).

(f) An extract decree of reduction should be registrable.

(g) By "court" is meant the Court of Session or the Sheriff Court.

(Para 7.75; Draft Bill ss 31 and 32)

Part 8 - Development Management Scheme

53. (a) There should be an optional scheme for the management of properties ("units"), to be known as the "Development Management Scheme".

(b) The scheme should apply to land if a deed of application is granted and registered by its owner.

(c) The deed of application should contain the information required in order to complete the scheme.

(d) The scheme should take effect

- (i) on the date of registration, or
- (ii) on such later date as may be specified in the deed (including the date of registration of some other deed).

(e) It should be possible for the scheme to take effect at different times for different units.

(f) Scottish Ministers should have the power to alter the scheme, as enacted, by statutory instrument, but such alterations should not apply to any application of the scheme by virtue of a deed executed before the coming into force of the instrument.

(Para 8.11; Draft Bill ss 60 and 70)

54. (a) An owners' association should come into existence on the day on which the Development Management Scheme takes effect.

(b) The association should be a body corporate but not a company.

(c) The members of the association should be the owners for the time being of the units in the development.

(d) Where two or more persons own a unit both (or all) of them should be members.

(e) The function of the association should be to manage the development for the benefit of the owners.

(f) The association should have power to do anything necessary for the carrying out of its function and in particular should be able to -

(i) carry out maintenance, improvements or alterations to, or demolition of, scheme property;

(ii) enter into a contract of insurance in respect of the development (and for that purpose the association should have an insurable interest);

(iii) purchase or otherwise acquire moveable property;

(iv) require owners to contribute by way of a service charge to association funds;

(v) open and maintain an account with any bank or building society;

(vi) invest any money held on its behalf;

(vii) borrow money;

(viii) engage employees or appoint agents; and

(ix) own, or acquire ownership of, any part of the development.

(Para 8.15; Development Management Scheme rules 2.1, 2.3, 3.1, and 3.2)

55. (a) In an owners' association executive responsibility should be vested in a manager, who may but need not be a member of the association.

- (b) The manager should be appointed by the association at a general meeting, and on such terms and conditions as the association may decide.
 - (c) However, the first manager should be nominated in the deed of application, and should serve until the first annual general meeting, be entitled to reasonable remuneration, and be eligible for reappointment.
 - (d) The actings of a manager should be valid even if there is an irregularity in the way he was appointed.
 - (e) Within a month of a manager's appointment a certificate should be prepared recording the making of the appointment and its duration, and the certificate should be signed by the manager and, on behalf of the association, by a member.
 - (f) The manager should have the duty to manage the development for the benefit of the members.
 - (g) The manager should be an agent of the association.
 - (h) The association should be empowered to dismiss the manager at a general meeting before his term of office has expired.
(Para 8.21; Development Management Scheme rules 4.1 to 4.4, 7 and 8)
56. (a) At a general meeting the association should be entitled to elect an advisory committee of members to provide advice to the manager.
- (b) If an advisory committee is appointed, the manager should be bound to consult it from time to time, but should not be bound to follow its advice.
 - (c) A majority of members of the advisory committee should be entitled to requisition a general meeting.
(Para 8.24; Development Management Scheme rules 9.3(c) and 15)
57. (a) The powers of the association should be exercisable by the association in general meeting and by the manager, but subject in both cases to the other rules of the scheme.
- (b) In the exercise of these powers the manager should be subject to any directions given by the association at a general meeting.
 - (c) The rules of the Development Management Scheme should be binding on the association, its members and on the manager.
 - (d) Rules in the form of restrictions should also be binding on tenants and other persons having use of a unit.

(e) The association should be entitled to enforce any rule of the scheme and any obligation owed by any person to the association; and the manager should be under a duty to carry out such enforcement on behalf of the association.

(f) The duties imposed on the manager by the scheme should be owed to the association and to its members.

(Para 8.30; Development Management Scheme rules 3.3 and 3.4, 4.5 to 4.7 and 8(f))

58. (a) An annual general meeting of the owners' association should be held every year, and not more than 15 months should elapse between the date of each successive meeting.

(b) The first annual general meeting should take place not later than 12 months after the establishment of the association.

(c) Members holding not less than 25% of the votes for the development should be entitled to requisition an additional general meeting at any time.

(d) The manager should be under a duty to call the annual general meeting and any other meeting which is requisitioned by a member or members. In addition, he should be able to call a general meeting at any time.

(e) Where the manager fails to call a general meeting, or where there is no manager, any member can call the meeting.

(f) A meeting should be called by sending to each member, at least 14 days in advance, an agenda and a notice of the date, time and place of the meeting.

(g) However, any inadvertent failure to send the required documentation should not affect the validity of proceedings at the meeting.

(h) At the meeting a quorum should be the members holding not less than 50% of the votes for the development; but where the development has more than 30 units the figure should be reduced to 35%.

(i) A member should be able to be represented at the meeting by a person (other than the manager) duly nominated in writing.

(j) A quorum should be necessary for a meeting to begin, but the meeting should be able to continue thereafter even if a quorum has ceased to be present.

(k) If there is still no quorum 20 minutes after the time fixed for a general meeting, the meeting should be postponed until another day not less than 14 and not more than 28 days later. The postponed meeting should then be able to proceed even in the absence of a quorum.

- (l) The meeting should be presided over by a chairman elected by the members.
 - (m) Decisions should be taken by a simple majority of the votes cast, one vote being allocated to each unit.
 - (n) However, an absolute majority of the votes for the development should be required -
 - (i) for any decision to vary or disapply the scheme (other than a variation under recommendation 70);
 - (ii) for any decision to make payments from a reserve fund; or
 - (iii) for any decision to carry out improvements or alterations to scheme property, or to demolish such property.
 - (o) Where two or more persons own a unit, any one owner should be able to vote, but if the owners disagree as to how the vote is to be cast the vote should not be counted.
 - (p) Voting should be taken by a show of hands unless the chairman decides it should be by ballot.
 - (q) The manager should be under a duty -
 - (i) to attend all general meetings;
 - (ii) to take minutes;
 - (iii) to send a copy of the minutes to all members within 21 days; and
 - (iv) to give effect to the decisions taken.
 (Para 8.39; Development Management Scheme rules 8(e), 9 to 12, and 13.1)
59. (a) The sheriff should have jurisdiction to annul a decision made by the owners' association at a general meeting on the ground that
- (i) it is not in the best interests of all the owners, or
 - (ii) it is unfairly prejudicial to one or more of the owners.
- (b) The procedure should be by summary application brought by any owner (but excluding an owner who, or whose predecessor as owner, voted in favour of the decision).
- (c) The application must be brought within 28 days of the meeting or, if the owner did not attend the meeting, within 28 days of notification of the decision.

(d) The sheriff should be able to make such consequential orders as he thinks fit, including an order regulating the liability of owners for any costs incurred in relation to implementation of the decision.

(e) In considering an application to annul a decision to carry out maintenance, improvements or alterations, the sheriff should have regard to

(ii) the age of the property and its condition

(ii) the likely cost of the work, and

(iii) the reasonableness of that cost.

(Para 8.44; Draft Bill s 67)

60. (a) The manager should fix the financial year of the association.

(b) The manager should keep proper financial records of the association and prepare accounts for each financial year.

(c) Not later than 14 days before an annual general meeting the manager should send to each member -

(ii) the accounts for the last financial year and

(ii) a draft budget for the new financial year.

(d) The draft budget should set out an estimate of the income and expenditure of the association, the total service charge for the year, and the date or dates on which the service charge will be due for payment.

(e) The draft budget may also make provision for contributions to a reserve fund.

(f) At the annual general meeting the association should be entitled either to approve the budget, whether in its original or in an amended form, or to reject it.

(g) If the budget is rejected, the manager should be bound to bring a revised draft budget to another general meeting within two months. In the meantime the service charge fixed under the previous budget should continue to be exigible.

(h) If the budget is approved, the manager should be bound to levy the service charge accordingly and to implement the budget.

(i) The manager should be empowered without further approval to levy an additional service charge up to an amount not exceeding 25% of the annual budget.

(j) The manager should not be empowered to levy further sums without first preparing a supplementary budget which is submitted to and approved by the association at a general meeting.

(k) A service charge should be levied by sending to each owner a notice setting out the amount due and the date or dates on which it is to be paid.

(l) If an owner is more than 28 days late in making payment of the service charge (or part of it) the manager should be able to charge interest on the amount outstanding at such rate (being a reasonable rate) and from such date as he may choose.

(m) The amount of service charge should be the same for each unit.

(n) An instalment of service charge which is irrecoverable should be paid for by the other owners or from the reserve fund.

(o) The manager should be bound, on request, to provide and sign a certificate setting out the amount of service charge (if any) outstanding for a particular unit; and where this is done the liability of an incoming owner for service charges outstanding at the date of the certificate should not exceed the figure stated in the certificate.

(p) A reserve fund should be adequately invested and should be kept separately from the general funds of the association.

(Para 8.54; Draft Bill s 69; Development Management Scheme rules 4.8, 8(c)&(d), 9.4(b), and 18 to 21)

61. (a) The manager should be under a duty to carry out inspections of the scheme property from time to time and to arrange for and monitor maintenance.

(b) Any alteration, improvement or demolition must be authorised in terms of recommendation 58(n)(iii), and should not be carried out to property which is individually owned unless the owner has given his consent in writing.

(Para 8.59; Development Management Scheme rules 8(a)&(b) and 13.2)

62. (a) Any owner should be able to carry out emergency work in respect of scheme property.

(b) "Emergency work" is work which requires to be carried out

(ii) to prevent damage to that or other property or

(ii) in the interests of health or safety

in circumstances where it is not practicable to consult the manager.

(c) An owner who carries out emergency work should be able to recover the cost from the owners' association.

(Para 8.60; Development Management Scheme rule 14)

63. (a) The owners' association should be able to make regulations governing the use of any recreational facilities forming part of the scheme property. Otherwise regulations may not be made.

(b) The regulations must be made at a general meeting, and may not take effect until a copy has been sent to all of the owners.

(c) Regulations may be amended, or discharged, in the same manner as they were originally made.

(d) The manager should be under a duty to keep a copy of the regulations.

(Para 8.62; Development Management Scheme rules 3.5 and 8(g))

64. (a) Where a debt constituted against an owners' association is irrecoverable in whole or in part, the creditor should be entitled to recover the unpaid amount from the members as if he were the manager seeking recovery of a service charge.

(b) A creditor should also be able to proceed directly against the members if the owners' association is being, or has been, wound up.

(Para 8.70; Draft Bill s 68)

65. A document should be treated as signed by an owners' association if it is signed on its behalf -

(i) by the manager, or

(ii) by a person nominated for the purpose by the association at a general meeting

except where this is beyond the actual or apparent authority of the signatory to bind the association.

(Para 8.76; Development Management Scheme rule 5)

66. (a) The manager should be under a duty to keep a record of the name and address of each member of the association.

(b) On disposal of a unit an owner should be obliged to notify the manager of -

(i) his own forwarding address;

- (ii) the name and address of the new owner;
- (iii) the name and address of the solicitor or other agent acting for the new owner; and
- (iv) the date on which the new owner will be entitled to take entry.

(c) Any member should be entitled to inspect any document relating to the management of the development which is in the possession of the manager or which it is reasonably practicable for the manager to obtain; but this entitlement should not extend to correspondence passing between the manager and individual members.

(Para 8.79: Development Management Scheme rules 8(h) and 17.1 and 17.2)

67. The sections of the draft bill relating to permissible content, acquiescence, negative prescription, and discharge by the Lands Tribunal should apply to the rules of the Development Management Scheme (including the rules as varied) as they apply to community burdens.

(Para 8.81; Draft Bill s 61)

68. Initial variation of the development management scheme should be effected in the deed of application.

(Para 8.88; Draft Bill s 60(1))

69. (a) Subsequent variation of the development management scheme should be effected by registration against the development of a deed of variation granted by the owners' association.

(b) The granting of a deed of variation should require prior approval at a general meeting by an absolute majority of the votes for the development.

(c) A deed should not be registrable unless every owner has been given or sent a copy of the deed and informed of his right to apply for reduction under (d).

(d) If, in relation to such a deed, the court is satisfied that -

- (i) the deed is not in the best interests of all the owners, or
- (ii) the deed is unfairly prejudicial to one or more of the owners

the court should be able to make an order reducing the deed in whole or in part.

(e) An application must be brought not later than eight weeks after the owner received a copy of the deed under (c).

- (f) An extract decree of reduction should be registrable.
 - (g) By “court” is meant the Court of Session or the Sheriff Court.
(Para 8.91; Draft Bill ss 63 and 66; Development Management Scheme rule 16.2)
70. (a) Variation of the development management scheme in respect of an individual unit should be effected by registration against the unit of a deed of variation granted -
- (i) by the owners’ association,
 - (ii) by the owner of a unit within four metres of the affected unit measuring along a horizontal plane (the width of any road being disregarded if of less than twenty metres), and
 - (iii) if the deed imposes a new obligation, by the owner of the affected unit.
- (b) Before granting a deed on behalf of the owners’ association the manager should consult the advisory committee (if any); and he should report the granting of the deed to the next general meeting.
(Para 8.93; Draft Bill s 62; Development Management Scheme rule 16.1)
71. In respect of variations carried out under recommendations 68 to 70 -
- (a) it should not be possible to vary part 2 of the scheme other than to alter the powers of the owners’ association; but no power may be conferred to acquire land outwith the development or to carry on a trade;
 - (b) any provision added to the scheme -
 - (j) must relate to a unit or units and be for the benefit of another unit or units or the development as a whole, and
 - (ii) must not be contrary to public policy nor illegal.
(Para 8.96; Draft Bill ss 3 (as applied by s 61) and 64)
72. (a) The Development Management Scheme should cease to apply on the registration against the development of a deed of disapplication granted by the owners’ association, or on some later date specified in the deed.
- (b) It should be possible for a deed of disapplication to provide, by real burden, for the future management and regulation of the development.

(c) The granting of a deed of disapplication should require prior approval at a general meeting by an absolute majority of the votes for the development.

(d) A deed should not be registrable unless every owner has been given or sent a copy of the deed and informed of his right to apply for reduction under (e).

(e) A deed of disapplication should be reducible on the terms provided in recommendation 69 for a deed of variation.

(Para 8.99; Draft Bill s 65(1)&(2) and 66; Development Management Scheme rule 6.2)

73. (a) If the Development Management Scheme ceases to apply to a development, the winding up of the owners' association should begin on the day of such cessation.

(b) The winding up should end after a period of six months or on such other date as the members may decide, whereupon the association should be automatically dissolved.

(c) If the disapplication of the scheme is challenged under recommendation 72(e), the winding up should be suspended until the challenge is finally determined.

(d) The winding up should be conducted by the manager, who should

(i) pay any debts of the association;

(ii) distribute any remaining funds of the association to those who owned units at the date of the commencement of the winding up, an equal share being apportioned to each unit; and

(iii) prepare and send to each member final accounts of the association showing how the winding up was conducted and the funds of the association disposed of.

(e) Once the scheme has been disapplied, and the winding up commenced, the owners' association should cease to manage the development.

(f) An insolvent association should be subject to sequestration proceedings under the Bankruptcy (Scotland) Act 1985.

(Para 8.103; Draft Bill s 65(3)&(4); Development Management Scheme rules 6 and 17.4)

Part 9 – Real burdens without a benefited property

74. (a) It should be possible for conservation burdens to be created in favour of conservation bodies.

(b) A “conservation burden” is one for the purpose of preserving, or protecting, for the benefit of the public –

- (i) the architectural or historical characteristics of any land; or
- (ii) any other special characteristics of any land (including a special characteristic derived from the flora, fauna or general appearance of any land).

(c) The property affected by a conservation burden would be the burdened property; but the right to the burden would be held by the conservation body without reference to a benefited property.

(d) A body should be a conservation body only if it appears on a list prescribed, from time to time, by Scottish Ministers; and it should cease to be a conservation body if removed from that list. A body should only appear on the list if its object or function includes conservation.

(e) It should also be possible to create a conservation burden in favour of Scottish Ministers.

(Para 9.16; Draft Bill s 33)

75. (a) The right to a conservation burden should be capable of being assigned or otherwise transferred, but only to a conservation body or Scottish Ministers; and the assignation or transfer should take effect on registration, without the need for intimation.

(b) It should not be competent to create a standard security over a conservation burden.

(c) The title to enforce a conservation burden should lie with its holder, and interest to enforce should be presumed.

(d) A conservation burden should be extinguished if its holder (or, if there is more than one holder, all such holders) ceases to be a conservation body.

(e) The holder should be able to complete title to a conservation burden by registering a notice of title.

(f) In this recommendation the "holder" of a conservation burden includes a body which has right to the burden whether or not it has completed title by registration.

(Para 9.25; Draft Bill, ss 34 to 37 and 39; sched 8 para 3)

76. (a) It should be possible for maritime burdens (that is to say, burdens affecting the sea bed or foreshore) to be created in favour of the Crown.

(b) Maritime burdens should not be capable of being assigned.

(Para 9.26; Draft Bill s 38)

77. Section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 should be amended to substitute “debt” for “advances”.

Para 9.36; (Draft Bill s 102)

78. It should be made clear that an agreement made under section 32 of the Enterprise and New Towns (Scotland) Act 1990 need be entered into only with a person able to bind the land.

(Para 9.38; Draft Bill s 105)

Part 10 – Pre-emption, redemption, reversion and other options to acquire

79. (a) The Reversion Act 1469 (c 3) should be repealed.

- (b) Repeal should not affect any right of reversion already constituted as a real right.

(Para 10.18; Draft Bill s 84)

80. It should no longer be possible for a right of redemption or reversion or other option to acquire (but not including a right of pre-emption) to be constituted as a real burden.

(Para 10.20; Draft Bill s 3(5))

81. It should continue to be possible for a right of pre-emption to be constituted as a real burden.

(Para 10.30; Draft Bill s 3(5))

82. (a) Notwithstanding recommendation 16, a right of pre-emption constituted as a real burden should be exercisable only by the owner of the benefited property.

- (b) If the benefited property is owned in common, each owner must concur in the exercise of the right.

- (c) “Owner” has the meaning given by recommendation 100.

(Para 10.33; Draft Bill s 7(4))

83. (a) The holder of a right of pre-emption should be able to give an undertaking, in a statutory form and with or without qualifications, that he will not exercise the right during a specified period; and if during that period a conveyance of the property in implement of a sale is registered, the pre-emption should be extinguished.

(b) An undertaking so given should be binding on any successor of the holder and should be capable of registration.

(c) Section 9 of the Conveyancing Amendment (Scotland) Act 1938 should be repealed and re-enacted; and where an offer is made under that provision to the holder of a right of pre-emption, the offer must be in such terms as are reasonable in the circumstances.

(d) For the purposes of (c), the terms of an offer should be deemed to be reasonable unless, within the period set for acceptance, the holder of the right of pre-emption intimates to the person making the offer that he considers the terms unreasonable.

(e) This recommendation applies to any right of pre-emption constituted as a title condition and

(ii) originally created in favour of a feudal superior, or

(ii) created in a deed executed after 1 September 1974.

(Para 10.40; Draft Bill ss 78 to 80)

84. In the application of the five-year negative prescription to a right of pre-emption constituted as a real burden, a breach in respect of any one sale should, after the expiry of the prescriptive period, result in the complete extinction of the right.

(Para 10.41; Draft Bill s 16(2))

85. There should be repealed -

(a) section 22(2)(h) of the Church of Scotland (Property and Endowments) Act 1925 (including any rights of pre-emption created under that provision), and

(b) section 9(3) of the Church of Scotland (Property and Endowments) (Amendment) Act 1933.

(Para 10.42; Draft Bill s 81 and sched 9)

86. (a) Where, at the time when a reversion under section 2 of the School Sites Act 1841 is claimed, there has been a sale of the land (or a binding agreement to sell), the claimant's right should be a right to the net proceeds of sale, less that part of the proceeds attributable to any buildings or other structures on the land.

(b) In any other case, a right of reversion should be a right, at the claimant's option, to -

- (i) a conveyance of the land, subject to payment of any increase in its value attributable to the buildings or other structures; or
 - (ii) payment of the open market value of the land, less that part of the value attributable to the buildings or other structures.
- (c) Disputes about valuation should be referred to the Lands Tribunal.
- (d) A right of reversion should prescribe after five years.
- (e) “Buildings or other structures” do not include buildings or structures provided, or paid for, by the person who made the original grant under the 1841 Act.
(Para 10.62; Draft Bill ss 82 and 83)

Part 11 – Transitional: Identifying the Benefited Property

87. The existing rules whereby land may be the benefited property by implication should not apply to real burdens created on or after the appointed day.
(Para 11.4; Draft Bill s 41(1))
88. (a) The existing rules whereby land may be the benefited property by implication should cease to apply on the appointed day, and no burden should be enforceable on the basis of those rules on or after that day.
- (b) This recommendation is qualified by recommendation 93.
(Para 11.28; Draft Bill s 41(1))
89. (a) In a facility burden created before the appointed day any land benefited by the facility should be a benefited property. The facility itself should also be a benefited property.
- (b) In a service burden created before the appointed day, any land to which the services are provided should be a benefited property.
- (c) By “facility burden” is meant a real burden which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land; but does not include an obligation to maintain or reinstate which has been assumed by a local or other public authority or by a successor body to such an authority.
- (d) By “service burden” is meant a real burden which relates to the provision of services to land other than the burdened property.
(Para 11.42; Draft Bill ss 47 and 113)

90. (a) Where -
- (i) real burdens are imposed under a common scheme, and
 - (ii) in relation to any property so burdened, the constitutive deed discloses or refers to the common scheme
- any other property subject to the same common scheme and within four metres of the burdened property should be a benefited property.
- (b) In measuring the distance of four metres there should be disregarded -
- (i) roads, if of less than 20 metres in width;
 - (ii) pertinents of either property.
- (c) This recommendation does not apply where -
- (j) inconsistent with the constitutive deed
 - (ii) the constitutive deed is registered on or after the appointed day.
(Para 11.56; Draft Bill s 44)
91. (a) Where real burdens are imposed under a common scheme on all the flats in a tenement, each flat should be a benefited property.
- (b) This recommendation does not apply where the constitutive deed is registered on or after the appointed day.
(Para 11.62; Draft Bill s 45)
92. (a) Where real burdens are imposed under a common scheme on all the units in a sheltered housing development (or on all units other than one which is used in some special way), each unit should be a benefited property.
- (b) This recommendation does not apply where the constitutive deed is registered on or after the appointed day.
(Para 11.65; Draft Bill s 46)
93. (a) An owner of property which carries enforcement rights by virtue of the rule in *Mactaggart* should be able to preserve such rights by registration of a notice of preservation not later than ten years after the appointed day; and during that period he may continue to enforce the real burden.
- (b) The notice would have to -

- (i) identify the benefited and burdened properties;
 - (ii) set out the terms of the real burden;
 - (iii) set out the grounds on which enforcement rights currently exist; and
 - (iv) narrate that a copy of the notice has been sent to the burdened owner or that it was not reasonably practicable to do so.
- (c) The owner should swear or affirm before a notary public that all the information contained in the notice is true to the best of his knowledge and belief.
- (d) A copy of the notice should be sent to the owner of the burdened property, together with an explanatory note, except where it is not reasonably practicable to do so.
- (e) The notice should be registered against both properties.
- (f) In appropriate cases a notice of converted servitude could be used instead of a notice of preservation.
- (g) Where a notice submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal to be registrable, it should be possible to register the notice late, but not later than
- (i) two months after the determination, or
 - (ii) such date as Scottish Ministers may prescribe

whichever occurs first.

(Para 11.79; Draft Bill ss 42 and 107)

94. (a) The Keeper should not be required to remove from the Land Register a real burden extinguished by virtue of recommendation 88 unless requested to do so in an application for registration or rectification or ordered to do so by the court.
- (b) For a period of 10 years after the appointed day –
- (i) it should not be possible for an application or order to be made under paragraph (a);
 - (ii) for the purposes of section 6(1)(e) of the Land Registration (Scotland) Act 1979 a real burden extinguished by recommendation 88 should, at the Keeper’s discretion, continue to be treated as “subsisting”.

(c) The Keeper should not remove from the Land Register a real burden in respect of which a notice of preservation or notice of converted servitude has been rejected if the rejection is being challenged before the court or Lands Tribunal.

(d) If the Keeper is satisfied that a real burden is enforceable by virtue of any of conditions (vii) to (xii) set out in paragraph 11.80, he should enter on the title sheet of the burdened property

(i) a statement that the real burden is enforceable by virtue of the condition in question; and

(ii) where he has sufficient information to describe the benefited property, a description of that property.

(e) It should be made clear -

(i) that any rectification of the Land Register which is required to take into account recommendation 91, or of anything done under recommendations 88, 93 and 96 and paragraph (d) of this recommendation, is not to be regarded as prejudicing any proprietor in possession, and

(ii) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification.

(Para 11.88; Draft Bill ss 43, 48 and 104)

Part 12 - Servitudes

95. It should no longer be possible to create negative servitudes.

(Para 12.3; Draft Bill s 75)

96. (a) On the appointed day all negative servitudes should be converted into real burdens by force of statute.

(b) Any converted servitude which was not, at the appointed day, registered against the burdened property should be extinguished ten years after that day unless, during that period, a notice of converted servitude, in statutory form, is executed and registered by an owner of the benefited property.

(c) The notice would have to -

(i) identify the benefited property and, if that property was not nominated in the constitutive deed, set out the reasons why it is the benefited property;

(ii) identify the burdened property;

- (iii) set out the terms of the converted servitude;
 - (iv) include as an annexation the constitutive deed (or copy); and
 - (v) narrate that a copy of the notice has been sent to the burdened owner or that it was not reasonably practicable to do so.
- (d) The owner should swear or affirm before a notary public that all the information contained in the notice is true to the best of his knowledge and belief.
- (e) A copy of the notice should be sent to the owner of the burdened property, together with an explanatory note, except where it is not reasonably practicable to do so.
- (f) The notice should be registered against both properties.
- (g) Where a notice submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal to be registrable, it should be possible to register the notice late, but not later than
- (i) two months after the determination, or
 - (ii) such date as Scottish Ministers may prescribe

whichever occurs first.

(Para 12.14; Draft Bill ss 76 and 107)

97. On the appointed day all real burdens comprising a right to enter, or otherwise make use of, property should be converted into positive servitudes by force of statute.
(Para 12.15; Draft Bill s 77)

98. (a) A deed should not be effective to create a servitude by express words unless the deed is registered against the benefited and the burdened properties.
- (b) It should be no objection to the validity of a servitude created under (a) that, at the time of registration, both properties were owned by the same person.
- (c) The rule that servitudes must be of a known type should cease to apply in respect of servitudes created under (a); but no obligation which is repugnant to ownership should be recognised as a servitude.
- (d) A deed should not be effective to discharge a servitude which is registered against (or noted on the title sheet of) the burdened property unless the deed is itself registered against the burdened property.

(Para 12.25; Draft Bill ss 71, 72 and 74)

99. For the avoidance of doubt, it should be provided that it is competent (and is deemed always to have been competent) for a right to lead a pipe, cable, wire or other enclosed unit over, through or under land to be constituted as a positive servitude.
(Para 12.26; Draft Bill s 73)

Part 13 - Miscellaneous Topics

100. (a) "Owner" should be defined to mean a person who has right to property whether or not he has completed title; except that where a heritable creditor is in possession, "owner" means the heritable creditor.
- (b) Where more than one person comes within the description of owner, the owner should be -
- (j) in relation to any provision concerned with the granting of deeds, any person having such right; and
 - (ii) in any other case, the person who has most recently acquired such right.
- (Para 13.9; Draft Bill s 114)
101. (a) Where land is acquired compulsorily, or is acquired by agreement but in circumstances where compulsory powers could have been used, any real burdens or servitudes affecting the land should be extinguished on registration of the conveyance.
- (b) There should not, however, be extinguished -
- (i) facility burdens and pipeline servitudes
 - (ii) in the case of an acquisition by agreement, conservation burdens and maritime burdens.
- (c) An ordinary disposition may be used, but if so it should make reference to the relevant statutory provision.
- (d) An acquiring authority (or successor in title) may disregard a facility burden or pipeline servitude where this is necessary to carry out a purpose for which the land was acquired.
- (e) Compensation should be payable by the acquiring authority in respect of
- (i) the extinction of real burdens and servitudes

(ii) the disregarding of a facility burden or pipeline servitude

but in assessing the amount due account should be taken of any replacement burden or servitude which the acquiring authority has granted or offered to grant.

(f) In the case of compulsory purchase the acquiring authority should give written notice of the compulsory purchase order to the holder of any conservation burden.

(g) In the case of acquisition by agreement the acquiring authority should, prior to registration of the conveyance, give notice to the holders of any real burdens or servitudes by such method as it thinks fit.

(Para 13.28; Draft Bill ss 98 to 100)

102. For the avoidance of doubt, it should be provided that it is no longer competent to create pecuniary real burdens.

(Para 13.30; Draft Bill s 109)

103. For the avoidance of doubt, it should be provided that rights of common interest may not be expressly created.

(Para 13.31; Draft Bill s 110)

104. In registering a discharge in the Register of Sasines the Keeper should have power to make such consequential amendments to the Land Register as may be necessary.

(Para 13.32; Draft Bill s 97)

Appendix A

Title Conditions (Scotland) Bill [DRAFT]

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Title Conditions (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to make further provision as respects real burdens, servitudes and certain other obligations affecting land; to amend the law relating to the ranking of standard securities; to amend the law relating to the computation of prescriptive periods; and for connected purposes.

PART 1

REAL BURDENS: GENERAL

Meaning and creation

1 The expression “real burden”

- (1) A real burden is an encumbrance on land constituted in favour of the owner of other land in his capacity as owner of that other land.
- (2) In relation to a real burden—
 - (a) the encumbered land is known as the “burdened property”; and
 - (b) the other land is known as the “benefited property”.
- (3) Notwithstanding subsections (1) and (2) above, the expression “real burden” includes a conservation burden, a maritime burden and a manager burden (being burdens created in favour of a person other than by reference to his capacity as owner of any land).

NOTE

Sections 1 to 17 of the Bill re-state, with modifications, the current law of real burdens. The remaining sections of part 1 (ss 18 to 22) introduce a new procedure for the extinction of burdens which are more than 100 years old. Part 1 applies to all real burdens, including those created before the Bill is enacted (s 111(9)), but a burden which was already valid under the existing law is not invalidated by any provision of the Bill (s 111(1)).

Section 1 defines “real burden”, and introduces the terms “benefited property” and “burdened property”.

The definition in subsection (1) re-states, but does not change, the current law (for which see paragraphs 1.9 to 1.12 of the report). Except in the cases mentioned in subsection (3), there must always be a benefited property; and the holder of a burden is the person who for the time being is the owner of that property. Viewed from the position of the holder, a real burden is a real right. The benefited property must be “land”, which is defined in s 113(1) as including incorporeal heritable property (most notably the right of salmon fishings) held as a separate tenement. Almost always, however, the benefited property will simply be neighbouring land. Following the abolition of the feudal system it will no longer be possible for real burdens to be created for the benefit of feudal superiorities.

Subsection (2) gives names to the properties affected, or benefited, by real burdens. No stable terminology exists under the current law. In the Abolition of Feudal Tenure etc. (Scotland) Act 2000 the terms used are “dominant

tenement” and “servient tenement”. The current Bill adopts more modern terminology. See paragraph 1.7 of the report.

Notwithstanding the rule expressed in subsection (1), the Bill allows three types of burden to be created directly in favour of a person and without reference to a benefited property. These are conservation burdens, maritime burdens and manager burdens, listed in subsection (3). Conservation and maritime burdens are the subject of part 3 of the Bill, while manager burdens are regulated by s 53. These are new burden types, although with feudal antecedents: see paragraph 1.8 of the report.

2 Affirmative, negative and ancillary burdens

- (1) Subject to subsection (3) below, a real burden may be created only as—
 - (a) an obligation to do something (including an obligation to defray, or contribute towards, some cost); or
 - (b) an obligation to refrain from doing something.
- (2) An obligation created as is described in—
 - (a) paragraph (a) of subsection (1) above is known as an “affirmative burden”; and
 - (b) paragraph (b) of that subsection is known as a “negative burden”.
- (3) A real burden may be created which—
 - (a) consists of a right to enter, or otherwise make use of, property; or
 - (b) makes provision for management or administration,but only for a purpose ancillary to those of an affirmative burden or a negative burden.
- (4) A real burden created as is described in subsection (3) above is known as an “ancillary burden”.
- (5) In determining whether a real burden is created as is described in subsection (1) or (3) above, regard shall be had to the effect of a provision rather than to the way in which the provision is expressed.

NOTE

This section implements recommendations 2 and 3. See paragraphs 2.1 to 2.8 of the report.

Section 2 is concerned with the *type* of obligation which can be created as a real burden. The basic rule is set out in subsection (1). In future a real burden must be either an obligation to do something, or an obligation to refrain from doing something; but certain ancillary obligations are allowed by subsection (3). In one respect this is more restrictive than the current law. Under the current law it is possible, if rare, to create as a real burden a *self-standing* right to enter or make use of property. More usually such rights are constituted as positive servitudes. In future only positive servitudes will be available, and any existing real burdens in this form are converted into positive servitudes by s 77.

Subsections (2) and (4) give names to the permitted burden types. Thus in future all real burdens are either affirmative burdens, negative burdens or ancillary burdens.

Subsection (5) prevents the rules set out in s 2 being avoided by adroit draftsmanship. Whether an obligation falls within the permitted categories will be judged by the effect of the words and not merely by their form.

3 Other characteristics

- (1) A real burden must relate in some way to the burdened property.
- (2) The relationship may be direct or indirect but shall not merely be that the obligated person is the owner of the burdened property.
- (3) In a case in which there is a benefited property, a real burden must, unless it is a community burden, be for the benefit of that property.
- (4) A community burden may be for the benefit of the community to which it relates or of some part of that community.
- (5) A real burden may consist of a right of pre-emption; but in the case of a real burden created on or after the appointed day must not consist of—
 - (a) a right of redemption or reversion; or
 - (b) any other type of option to acquire the burdened property.
- (6) A real burden must not be contrary to public policy as for example an unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).
- (7) Except in so far as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint—
 - (a) the manager of property; or
 - (b) the supplier of any services in relation to property).

NOTE

In addition to complying with s 2 in relation to *type* of obligation, a real burden must also comply with certain rules as to *content* of obligation. The rules are set out in s 3.

Subsections (1) to (4) re-state the praedial rule, ie the rule that a real burden must (i) affect the burdened property (ii) for the benefit of the benefited property. They implement recommendation 4. See paragraphs 2.9 to 2.18 of the report.

Subsections (1) and (2) re-state the rule that a real burden must affect the burdened property. However, as subsection (2) makes clear, if the *only* link between the burden and the property is that the burden is imposed on the person who owns that property, the praedial rule is not complied with.

Subsections (3) and (4) focus on the benefited property. The special position of community burdens (for which see part 2 of the Bill) is acknowledged in subsection (4).

Subsection (5) is concerned with options to acquire. The present law allows any option to be constituted as a real burden. Subsection (5), which implements recommendations 80 and 81, limits real burdens in future to rights of pre-emption. See paragraphs 10.19 to 10.30 of the report. Further provision for rights of pre-emption is made by ss 78 to 80.

Subsection (6) re-states the rule of the common law that a real burden must not be contrary to public policy nor illegal. Subsection (7) makes clear that a real burden cannot create a monopoly, except where the contrary is expressly permitted by the Bill. The Bill allows temporary monopolies in relation to the appointment of managers: see ss 24(1)(d), 53 and schedule 3 r 7.3. Subsections (6) and (7) implement recommendation 5. See paragraphs 2.19 to 2.28 of the report.

4 Creation

- (1) A real burden is created by duly registering the constitutive deed except that, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), the constitutive deed may provide for the postponement of the effectiveness of the real burden to—
 - (a) a date specified in that deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or
 - (b) the date of registration of some other deed so specified.
- (2) The reference in subsection (1) above to the constitutive deed is to a deed which—
 - (a) sets out (employing, unless subsection (3) below is invoked, the expression “real burden”) the terms of the prospective real burden;
 - (b) is granted by or on behalf of the owner of the land which is to be the burdened property; and
 - (c) except in the case mentioned in subsection (4) below, nominates and identifies that land and either—
 - (i) the land which is to be the benefited property; or
 - (ii) in a case in which there will not be a benefited property, the person in whose favour the real burden is to be constituted.
- (3) Where the constitutive deed relates to the creation of a nameable type of real burden (such as, for example, a community burden), that deed may, instead of employing the expression “real burden”, employ the expression appropriate to that type.
- (4) Where the constitutive deed relates to the creation of a community burden, that deed shall nominate and identify the community.
- (5) For the purposes of this section, a constitutive deed is duly registered in relation to a real burden only when registered against the burdened property and (except where there is no benefited property or the benefited property is outwith Scotland) the benefited property; and any reference in this Act to the date of registration of the constitutive deed shall be construed accordingly.
- (6) A right of ownership held *pro indiviso* shall not in itself constitute a property against which a real burden can be duly registered.
- (7) This section is subject to sections 65(3) and 85(6) of this Act.

NOTE

This section explains how a real burden is created. The rule, in summary, is that a burden is created by deed (known as a ‘constitutive deed’) granted by the owner of the burdened property and registered in the Land Register or Register of Sasines against both the benefited and the burdened properties.

Under the current law, a real burden is created by registration of a constitutive deed, and that rule is repeated by subsection (1). By s 113(1) “registration” means registration of the real burden in the Land Register or recording of the constitutive deed in the Register of Sasines. The time of creation is usually the time of registration: see s 3(4) of the Land Registration (Scotland) Act 1979 (in relation to registrations in the Land Register). But where the constitutive deed is a deed of conditions, it is permissible, under the present law, to postpone the date of creation to the date of registration of a subsequent conveyance into which the deed of conditions is incorporated. See Conveyancing (Scotland) Act 1874 s 32 and Land Registration (Scotland) Act 1979 s 17 (both repealed by schedule 9 of the Bill). Subsection (1) allows the continuation of this practice (by paragraph (b)), as well as

allowing (by paragraph (a)) a more straightforward postponement to a stipulated date. This implements recommendation 10(d). See paragraph 3.9 of the report.

Under the current law the terms of a real burden must be set out either in a conveyance or a deed of conditions. Subsection (2) abandons this limitation. In future it will be possible to create a real burden using any deed, provided that the deed complies with the three conditions set out in subsection (2). This implements recommendations 11, 12 and 13(a). See paragraphs 3.11 to 3.21 and 3.28 to 3.32 of the report.

Paragraph (a) of subsection (2) should be read together with s 5 (which qualifies the rule that the terms of the burden must be set out in full). The requirement that the term “real burden” (or “community burden” etc) be used is new.

Only an owner can burden his land. That rule is re-stated by paragraph (b) of subsection (2). “Owner” includes a person who has right to the property but has not completed title by registration (s 114(1)(a)), but there must then be deduction of title (other than for land already on the Land Register) (s 50(1)). Where property is owned in common, both (or all) *pro indiviso* owners must grant. This is indicated by the use of the definite article (“the” owner). If the constitutive deed is a conveyance of the burdened property, the granter satisfies paragraph (b) on the basis that he continues to own until the time of registration, and in such a case transfer of ownership and creation of the real burden occur simultaneously. An owner “grants” a deed by subscribing it in accordance with s 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under s 3 of that Act.

Paragraph (c) of subsection (2) requires nomination and identification of both the benefited and the burdened property. The former requirement is new. With conservation burdens, maritime burdens and (usually) manager burdens, there is no benefited property, and the requirement is merely to identify the person in whose favour the burden is created.

Many burdens are given special names by the Bill. Subsection (3) makes clear that such special names can be used in the constitutive deed instead of “real burden”.

In community burdens, the same land is both the benefited and the burdened property. Such land is the “community” which is being regulated by the burdens: see s 24(2). Since it would be pointless to describe the same land twice, subsection (4) modifies subsection (2)(c) by requiring merely that there is nomination and identification of the community. This implements recommendation 47(a). See paragraph 7.24 of the report.

Subsection (5), which implements recommendation 10(a) & (b), provides for dual registration of the constitutive deed. See paras 3.3 to 3.8 of the report. This changes the law. At present registration is required against the burdened property only. Section 112 prevents a deed which requires dual registration from being registered against one property only. Registration against the benefited property is excused where there is no such property (as with conservation, maritime and manager burdens) or where the property is not in Scotland (for which see s 108).

It is unclear at present whether a real burden can be created over, or in favour of, a mere *pro indiviso* right to land. Subsection (6) puts the position beyond doubt by disallowing such burdens. This implements recommendation 9. See paragraphs 3.1 and 3.2 of the report.

In certain circumstances real burdens can be created by the Lands Tribunal (s 85(6)) or by an owners’ association following the disapplication of the Development Management Scheme (s 65(3)). Section 4 does not then apply, or (in the second case) applies subject to modification. These exceptions are acknowledged by subsection (7).

5 Further provision as respects constitutive deed

It shall not be an objection to the validity of a real burden (whenever created) that—

- (a) the constitutive deed sets out the terms of the real burden by reference to a public document the terms of which are not reproduced in the deed (that is to say, by reference to an enactment or to a public register or to some record or roll to which the public readily has access); or
- (b) an amount payable in respect of an obligation to defray, or contribute towards, some cost is not specified in the constitutive deed, if the way in which that amount can be arrived at is so specified.

NOTE

Usually (s 4(2)(a)) the terms of a real burden must be set out in full in the constitutive deed. Section 5 introduces two exceptions to that rule, and the first, at least, alters the current law. The change is retrospective. Section 5 implements recommendation 13(c). See paragraphs 3.22 to 3.26 of the report.

Duration, enforceability and liability

6 Duration

Subject to any enactment (including this Act) or to any rule of law, the duration of a real burden is perpetual unless the constitutive deed provides for a duration of a specific period.

NOTE

This section re-states the existing rule that real burdens are perpetual, unless they have been extinguished by one of the methods recognised by law. Extinction of burdens is provided for by ss 14 to 22. The section also makes clear that the constitutive deed can provide for a shorter duration. Section 6 implements recommendation 13(b). See paragraph 3.27 of the report.

7 Right to enforce

- (1) A real burden is enforceable by any person who has both title and interest to enforce it.
- (2) A person has such title if he is an owner of the benefited property; but the following persons also have such title—
 - (a) a person who has a real right of lease or proper liferent in the benefited property (or has a *pro indiviso* share in such right);
 - (b) a person who—
 - (i) is the non-entitled spouse of an owner of the benefited property or of a person mentioned in paragraph (a) above; and
 - (ii) has occupancy rights in that property; and
 - (c) if the real burden was created as mentioned in subsection (3)(b) below, a person who was, at the time the cost in question was incurred—
 - (i) an owner of the benefited property; or
 - (ii) a person having such title by virtue of paragraph (a) or (b) above.
- (3) A person has such interest if—
 - (a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person's ownership of, or right in, the benefited property; or

- (b) the real burden being an affirmative burden created as an obligation to defray, or contribute towards, some cost, he seeks (and has grounds to seek) payment of, or as respects, that cost.
- (4) A person has title to enforce a real burden consisting of—
 - (a) a right of pre-emption, redemption or reversion; or
 - (b) any other type of option to acquire the burdened property,
 only if he is the owner of the benefited property.
- (5) In subsection (2)(b) above, “non-entitled spouse” and “occupancy rights” shall be construed in accordance with section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c.59) (right of spouse without title to occupy matrimonial home).
- (6) Subsections (2) to (5) above do not apply in relation to conservation burdens, maritime burdens and manager burdens.

NOTE

This section identifies the person who has right to enforce a real burden.

Subsection (1) sets out the rule, familiar from the common law, that to enforce a real burden a person must have both title and interest. Subsection (2) is concerned with title, and subsection (3) with interest.

Subsection (2) implements recommendations 16 and 20. See paragraphs 4.1 to 4.15 and 4.40 of the report. The main person with title to enforce is the owner of the benefited property, for it is the owner who is holder of the real burden (see s 1(1)). The meaning of “owner” is given in s 114. In a departure from the common law, subsection (2) extends enforcement rights to the three additional categories set out in paragraphs (a) to (c). Those listed in paragraphs (a) and (b) comprise the holders of such real (or quasi-real) rights as give a right to possession of the benefited property. The idea is that a possessor should be able to protect his interest by founding on the real burden. Paragraph (c) allows former owners (or right-holders) to recover certain costs.

If a right is held by two or more people *pro indiviso*, each has an independent entitlement to enforce the real burden. In subsection (2) this is indicated by the use of the indefinite article (“an owner”, “a person”, and so on). So if the benefited property is owned in common by a husband and wife, each could enforce without reference to the other.

Subsection (3) implements recommendation 17. See paragraphs 4.16 to 4.24 of the report. Paragraph (a) clarifies the meaning of interest to enforce. The opening words (“in the circumstances of any case”) emphasise that whether interest arises depends on the nature of the particular breach. The interest of an owner is likely to be stronger than that of a person holding a lesser right, such as a lease. For example, if a breach affects the value of the benefited property but not its enjoyment, a tenant might not have interest to enforce. For in such a case the value of the *lease* might be unaffected.

Paragraph (b) sets out a special rule for payment of maintenance and other costs. Here a person has interest only if he has some ground for seeking payment – for example, that he has paid the cost and is seeking reimbursement, or that he is charged by the other owners with the task of managing the repair and of assembling the necessary funds.

Subsection (4), which implements recommendation 82, restricts title to enforce in respect of pre-emptions, and other options, to the owner of the benefited property. See paragraphs 10.32 and 10.33 of the report. The use of the definite article (“the” owner) indicates that, contrary to the rule set out in subsection (2), *pro indiviso* owners do not have independent rights. Once the Bill is in force it will not be possible to create as real burdens options other than pre-emptions: see s 3(5).

As subsection (6) indicates, special rules are necessary for those real burdens which do not have benefited properties. The rules can be found in ss 35, 39 and 53(7).

8 Persons against whom burdens are enforceable

- (1) An affirmative burden is enforceable against the owner of the burdened property.
- (2) A negative burden or an ancillary burden is enforceable against—
 - (a) the owner, or tenant, of the burdened property; or
 - (b) any other person having the use of that property.

NOTE

This section identifies the person who has liability in respect of a real burden. It implements recommendations 18 and 19(a)&(b). See paragraphs 4.25 to 4.38 of the report. The terminology (“affirmative”, “negative” and “ancillary” burdens) is explained in s 2.

Resolving a doubt in the existing law, subsection (2) makes clear that real burdens are enforceable against anyone having use of the burdened property. Universal enforceability follows from the status of a real burden as a real right. Subsection (1) repeats an exception which exists in the current law. The meaning of “owner” is given in s 114.

9 Affirmative burdens: continuing liability of former owner

- (1) An owner of burdened property shall not, by virtue only of ceasing to be such an owner, cease to be liable for the performance of any relevant obligation.
- (2) Subject to section 69 of this Act, where a person becomes an owner of burdened property (any such person being referred to in this section as a “new owner”) he shall be severally liable with any former owner of the property for any relevant obligation for which the former owner is liable.
- (3) Where a new owner incurs expenditure in the performance of any relevant obligation for which a former owner of the property is liable he may recover an amount equal to such expenditure from that former owner.
- (4) For the purposes of subsections (1) to (3) above, “relevant obligation” means any obligation under an affirmative burden which is due for performance; and such an obligation becomes due—
 - (a) in a case where—
 - (i) the burden is a community burden; and
 - (ii) a binding decision to incur expenditure is made, on the date on which that decision is made; or
 - (b) in any other case, on—
 - (i) such date; or
 - (ii) the occurrence of such event,as may be stipulated for its performance (whether in the constitutive deed or otherwise).

NOTE

Usually only an owner can be liable in respect of an affirmative burden (s 8(1)), so that liability is lost with ownership. In the circumstances set out in s 9, however, a former owner retains liability. Section 9 clarifies and develops a rule of the existing law. It implements recommendation 21. See paragraphs 4.41 to 4.47 of the report. Read together with subsection (4), the effect of subsection (1) is for liability to be retained in respect of any obligation which was already due for performance at the time of ceasing to be owner. This includes, not only obligations becoming due during the period of ownership, but also obligations attributable to an earlier period (for which see subsection (2)). By s 114(1) a person ceases to be “owner” (in the sense meant here) on delivery of a conveyance.

The new owner is also liable: see s 8(1). Subsections (2) and (3) make clear that, while the liability of old and new owners is joint and several, the underlying liability rests with the old owner. Section 69 introduces a special rule in respect of service charges due under the Development Management Scheme.

Subsection (4) explains when an obligation becomes due for performance. Paragraph (a) deals with expenditure (typically for maintenance) incurred by virtue of a community burden. Usually such expenditure will be sanctioned by some collective decision-making process, whether under the titles or in terms of s 27. If so, the obligation to contribute to the expenditure is treated as becoming due when the decision is made and not when the expenditure occurs. Paragraph (b) sets out a (necessarily) general rule for other cases.

10 Affirmative burdens: shared liability

- (1) If a burdened property as respects which an affirmative burden is created is divided (whether before or after the appointed day) into two or more parts then, subject to subsections (2) and (4) below, the owners of the parts—
 - (a) are severally liable in respect of the burden; and
 - (b) as between (or among) themselves, are liable in the proportions which the areas of their respective parts bear to the area of the burdened property.
- (2) “Part” in subsection (1) above does not include a part to which the affirmative burden cannot relate.
- (3) In the application of subsection (1) above to parts which are flats in a tenement, the reference in paragraph (b) of that subsection to the areas of the respective parts shall be construed as a reference to the floor areas of the respective flats.
- (4) Paragraph (a) of subsection (1) above shall not apply if, in the constitutive deed, it is provided that liability as between (or among) the owners of the parts shall be otherwise than is provided for in that paragraph; and paragraph (b) of that subsection shall not apply if, in the constitutive deed or in the conveyance effecting the division, it is provided that liability as between (or among) them shall be otherwise than is provided for in that paragraph.
- (5) If two or more persons own in common a burdened property as respects which an affirmative burden is created then, unless the constitutive deed otherwise provides—
 - (a) they are severally liable in respect of the burden; and
 - (b) as between (or among) themselves, they are liable in the proportions in which they own the property.

NOTE

The first four subsections deal with the effect of division of the burdened property on liability for an affirmative burden. Subsection (5) apportions liability where the burdened property is owned in common. The meaning of “affirmative burden” is given in s 2(2)(a). Section 10 implements recommendations 19(c) and 23. See paragraphs 4.37, 4.58 and 4.59 of the report.

Subsection (1) clarifies and develops the existing law. If a burdened property is divided, the owner of each part is jointly and severally liable for any affirmative burdens. Internal liability is determined by the respective sizes of the parts. Since the effect of division is to create two separate burdened properties (see s 12), s 10(1) operates of new if either burdened property is further divided. Subsection (1) applies even where the division took place before the appointed day (ie the day on which most of the Bill comes into force: see ss 113(1) and 119(2)).

Subsection (2) introduces a necessary exception. Some affirmative burdens are, by their nature, restricted to a particular part of the burdened property.

Subsection (3) introduces a special rule for tenement flats in relation to calculation of internal liability.

Subsection (4) allows contracting out of the rules set out in subsection (1). The rules of external liability can be varied only in the constitutive deed.

Subsection (5) does not deal with division. Rather it regulates both external and internal liability in a case where the burdened property is owned in common.

Division of benefited or burdened property

11 Division of a benefited property

- (1) Where part of a benefited property is conveyed, then on registration of the conveyance the part conveyed shall cease to be a benefited property unless in the conveyance some other provision is made, as for example—
 - (a) that the part retained and the part conveyed are separately to constitute benefited properties; or
 - (b) that it is the part retained which is to cease to be a benefited property.
- (2) Different provision may, under subsection (1) above, be made in respect of different real burdens.
- (3) For the purposes of subsection (1) above, any such provision as is referred to in that subsection shall—
 - (a) identify the constitutive deed, say where it is registered and give the date of registration;
 - (b) identify the real burdens; and
 - (c) be of no effect in so far as it relates to—
 - (i) a right of pre-emption, redemption or reversion; or
 - (ii) any other type of option to acquire the burdened property,if it is other than such provision as is mentioned in paragraph (b) of that subsection.
- (4) Subsection (1) above does not apply where—
 - (a) the property, part of which is conveyed, is a benefited property only by virtue of any of sections 44 to 47 of this Act; or
 - (b) the real burden is a community burden.

NOTE

This and the following section are concerned with division of the properties. Section 11 implements recommendation 22. See paragraphs 4.50 to 4.56 of the report.

If a benefited property is divided, the current law confers on each part the status of an independent benefited property. The result is an, often unwelcome, multiplication of benefited properties. Subsection (1) changes the rule in respect of divisions effected by deed registered on or after the appointed day. If A divides his land and conveys part to B, then only the part retained by A is the benefited property – unless contrary provision is made in the conveyance. Subsection (1) will apply again if the new, reduced, benefited property comes to be divided.

Sometimes it may be desirable to provide that certain burdens are enforceable by the owner of the retained land and certain others by the owner of the conveyed land. Subsection (2) makes clear that this is permissible.

Paragraphs (a) and (b) of subsection (3) explain the method by which contrary provision is made. Paragraph (c) restricts choice in the case of pre-emptions and other options. In such a case there is only to be one benefited property. Hence, if the default rule (retained property) is disapplied, the only contrary provision which may be made is that the conveyed property is to be the benefited property.

In certain cases the rules just described would be inappropriate. They are excepted by subsection (4). Sections 44 to 47 provide special rules for the identification of benefited properties in relation to common scheme burdens created before the appointed day. Paragraph (a) ensures that the rules operate regardless of division. In the case of community burdens (paragraph (b)), it is undesirable that any unit in the community should be deprived of enforcement rights.

12 Division of a burdened property

Where part of a burdened property is conveyed (whether before or after the appointed day), then on registration of the conveyance the part retained and the part conveyed shall separately constitute burdened properties unless the real burden cannot relate to one of the parts, in which case that part shall, on that registration, cease to be a burdened property.

NOTE

This section makes clear that, on division of a burdened property, each part is treated as a separate burdened property. This means, for example, that the owner of any part may make an application to the Lands Tribunal under s 85(1)(a) in respect of that part only. Liability for affirmative burdens, following division, is regulated by s 10.

Construction

13 Construction

Real burdens shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration.

NOTE

This section, which implements recommendation 24, overturns the rule that real burdens are to be interpreted more strictly than other comparable obligations, such as servitudes. See paragraphs 4.61 to 4.67 of the report.

Extinction

14 Discharge

- (1) A real burden is discharged as respects a benefited property by registering against the burdened property a deed of discharge granted by or on behalf of the owner of the benefited property.
- (2) In subsection (1) above, “discharged” means discharged—
 - (a) wholly; or
 - (b) to such extent as may be specified in the deed of discharge.

NOTE

The remaining provisions of part 1 are concerned with the manner in which real burdens are extinguished.

Section 14, which implements recommendation 26(a), (b)&(d), re-states the current rules in respect of voluntary discharge. See paragraphs 5.9 to 5.16 of the report.

In terms of s 14 a real burden is discharged by registration of an appropriate deed granted by or on behalf of the owner of the benefited property. Unlike under the present law, “owner” includes a person who has right to the property but has not completed title by registration (s 114(1)(a)); but (s 50(1)) there must then be deduction of title (other than for benefited properties on the Land Register). Where property is owned in common, both (or all) *pro indiviso* owners must grant. (Section 14(1) refers to “the” owner.) The owner “grants” a deed by subscribing it in accordance with s 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under s 3 of that Act. A grantee is not required (s 58(1)) but would be normal in practice. By s 113(1) “registration” means registration of the discharge in the Land Register or recording of the deed of discharge in the Register of Sasines; and while registration is required only against the burdened property, the Keeper has power to make a corresponding entry against the title sheet of the benefited property (s 97). No particular deed or form of deed is specified, and the familiar minute of waiver will doubtless continue in use.

As subsection (1) makes clear, the discharge is effective only in respect of the benefited property in question. Thus, on the one hand, *other* benefited properties (if any) are unaffected. But on the other hand the burden is wholly extinguished in respect of *that* benefited property. This means that subsidiary enforcement rights derived, under s 7(2)(a)&(b), from a connection with the benefited property are defeated by the unilateral act of its owner. The Bill makes separate provision, in s 40, for burdens which do not have a benefited property.

Subsection (2) makes clear that partial discharge is included.

15 Acquiescence

- (1) Where—
 - (a) a real burden is breached in such a way that material expenditure is incurred;
 - (b) any benefit arising from such expenditure would be substantially lost were the burden to be enforced; and
 - (c) the person by whom the real burden is enforceable (or, where a burden is enforceable by more than one person, each of those persons)—
 - (i) gives his consent to the carrying on of the activity that results in the breach; or
 - (ii) being aware of the carrying on of that activity (or, because of its nature, being in a position where he ought to be aware of it), has not, by the time that that activity has been substantially completed, objected to its being carried on,

the burden shall to the extent of the breach, be extinguished.

- (2) In any case where the carrying on of an activity has been substantially completed as mentioned in sub-paragraph (ii) of subsection (1)(c) above, it shall be presumed, unless the contrary is shown, that the person by whom the real burden was, at the time in question, enforceable (or where a burden is enforceable by more than one person, each of those persons) was, or ought to have been, aware of the carrying on of the activity and did not object as mentioned in that sub- paragraph.

NOTE

This section and the section immediately following are concerned with extinction by breach. In both cases, the burden is extinguished only to the extent of the breach. So if a prohibition on building work is breached by the construction of a particular building, and the conditions in the section are otherwise satisfied, the burden is extinguished to the extent of permitting that building (or any replacement building) but not otherwise.

Section 15, which implements recommendation 28, clarifies and develops the common law of extinction by acquiescence. See paragraphs 5.60 to 5.66 of the report.

The three paragraphs of subsection (1) set out the pre-conditions for acquiescence. Paragraph (c) places active and passive consent on the same footing. But, by contrast with the rules for voluntary discharge (set out in s 14), consent is required from all enforcers (including tenants and others with subsidiary rights under s 7(2)(a)&(b)), and in respect of all benefited properties. This means that a burden cannot be extinguished in respect of some enforcers, or benefited properties, but not in respect of others. The two types of consent may be mixed, so that some enforcers give active and others merely passive consent. No formality is prescribed for active consent (subparagraph (i)), and a casual word exchanged over the garden fence would be sufficient, if awkward to prove. Passive consent (subparagraph (ii)) requires knowledge (actual or constructive) of the activity coupled with an absence of opposition. In both cases (and by contrast with s 14) the consent is to the activity itself rather than to the breach of the burden. Neither party need know that the burden is being breached.

Subsection (2) introduces a presumption that, once the activity is substantially completed, paragraph (c)(ii) of subsection (1) has been satisfied. The presumption can be rebutted. It will remain necessary to show, as a positive fact, that paragraphs (a) and (b) have been satisfied.

16 Negative prescription

- (1) If—
 - (a) a real burden is breached to any extent; and
 - (b) during the period of five years beginning with the breach neither—
 - (i) a relevant claim; nor
 - (ii) a relevant acknowledgement,is made,

then, subject to subsection (2) below, the burden shall, to the extent of the breach, be extinguished on the expiry of that period.

- (2) Where, in relation to a real burden which consists of—
 - (a) a right of pre-emption, redemption or reversion; or
 - (b) any other type of option to acquire the burdened property,

the owner of the burdened property fails to comply with an obligation to convey (or, as the case may be, to offer to convey) the property (or part of the property) and paragraph (b) of subsection (1) above is satisfied, the burden shall be extinguished in relation to the property (or part) on the expiry of the period mentioned in the said paragraph (b).

- (3) Sections 9 and 10 of the Prescription and Limitation (Scotland) Act 1973 (c.52) (which define the expressions “relevant claim” and “relevant acknowledgement” for the purposes of sections 6, 7 and 8A of that Act) shall apply for the purposes of subsections (1) and (2) above as those sections apply for the purposes of sections 6, 7 and 8A of that Act but subject to the following modifications—
- (a) in each of sections 9 and 10 of that Act—
 - (i) subsection (2) shall not apply;
 - (ii) for any reference to an obligation there shall be substituted a reference to a real burden; and
 - (iii) for any reference to a creditor there shall be substituted a reference to any person by whom a real burden is enforceable;
 - (b) in section 9 of that Act, for the reference to a creditor in an obligation there shall be substituted a reference to any person by whom a real burden is enforceable; and
 - (c) in section 10 of that Act, for any reference to a debtor there shall be substituted a reference to any person against whom the real burden is enforceable.
- (4) Section 14 of the said Act of 1973 (which makes provision as respects the computation of prescriptive periods) shall apply for the purposes of subsections (1) and (2) above as that section applies for the purposes of Part I of that Act but subject to the modification that in subsection (1)(a) of that section the words “, but subject to the restriction that any time reckoned under this paragraph shall be less than the prescriptive period” shall be disregarded.

NOTE

This section reduces the period of negative prescription from twenty years to five years. It does so by a self-standing provision rather than (as in s 83) by amendment to the Prescription and Limitation (Scotland) Act 1973. But prescription is to operate in substantially the same way as under that Act, and subsections (3) and (4) apply some of the 1973 Act provisions. Section 16 implements recommendations 29 and 84. See paragraphs 5.67 to 5.72 and 10.41 of the report.

Subsection (1) provides for extinction if a breach is unchallenged for a period of five years. As with acquiescence (s 15), the extinction is only to the extent of the breach, and the burden remains enforceable in other respects.

Subsection (2) is by way of exception to subsection (1). In the case of pre-emptions and other options to acquire, a single failure to convey (or, with pre-emptions, to offer to convey) results in the complete extinction of the burden.

Subsection (3) defines “relevant claim” and “relevant acknowledgement”, used in subsection (1), by reference to the definitions in the 1973 Act.

Subsection (4) is a transitional provision. By applying s 14 of the 1973 Act, it makes clear that time before the commencement of s 16 can be counted for the purposes of calculating the five-year period.

17 ***Confusio* not to extinguish real burden**

A real burden is not extinguished by reason only that—

- (a) the same person is the owner of the benefited property and the burdened property;
or
- (b) in a case in which there is no benefited property, the person in whose favour the real burden is constituted is the owner of the burdened property.

NOTE

While a real burden (usually) requires two properties (s 1(1)), there is no requirement that the properties be in separate ownership. Section 17(a) resolves a doubt in the existing law by making clear that the burden is not then extinguished by confusion. Paragraph (b) gives an equivalent rule for conservation burdens, maritime burdens, and manager burdens. Section 17 implements recommendation 30. See paragraphs 5.73 to 5.80 of the report.

Termination

18 Notice of termination

- (1) Subject to section 21 of this Act, if at least one hundred years have elapsed since the creation of a real burden (whether or not the real burden has been varied or renewed since its creation), an owner of the burdened property, or any other person against whom the burden is enforceable, may, after intimation under section 19(1) of this Act, execute and register, in (or as nearly as may be in) the form contained in schedule 1 to this Act, a notice of termination as respects the real burden.
- (2) It shall be no objection to the validity of a notice of termination that it is executed or registered by a successor in title of the person who has given such intimation; and any reference in this Act to the “terminator” shall be construed as a reference to—
 - (a) except where paragraph (b) below applies, the person who has given such intimation; or
 - (b) where that person no longer has the right or obligation by virtue of which intimation was given, the person who has most recently acquired that right or obligation.
- (3) Subsections (1) and (2) above do not apply in relation to—
 - (a) a conservation burden;
 - (b) a maritime burden;
 - (c) a facility burden;
 - (d) a service burden; or
 - (e) a real burden which is a title condition of a kind specified in schedule 6 to this Act.
- (4) The notice of termination shall—
 - (a) identify the land which is the burdened property;
 - (b) describe the terminator’s connection with the property (as for example by identifying him as an owner or as a tenant);
 - (c) set out the terms of the real burden and if it is not wholly to be terminated, specify the extent of the termination;
 - (d) specify a date on or before which any application under paragraph (b) of section 85(1) of this Act will require to be made if the real burden is to be renewed under that paragraph (that date being referred to in this Act as the “renewal date”);

- (e) specify the date on which, and the means by which, intimation was given under subsection (1) of section 19 of this Act; and
 - (f) set out the name (in so far as known) and the address of each person to whom intimation is sent under subsection (2)(a) of that section.
- (5) Any date may be specified under paragraph (d) of subsection (4) above provided that it is a date not less than eight weeks after intimation is last given under subsection (1) of the said section 19.
- (6) Where a property is subject to two or more real burdens the terms of which are set out in the same constitutive deed, it shall be competent to execute and register a single notice of termination in respect of both (or all) the real burdens.

NOTE

Sections 18 to 22 introduce a new termination procedure for real burdens which are at least 100 years old. In brief, the burdened owner (or other person subject to the burdens) executes and registers a notice in statutory form, known as a notice of termination. If the notice is unopposed the burdens are extinguished on registration.

Section 18, which implements recommendation 27(a), (b), (c) & (k)(i), makes provision for the notice of termination. See paragraphs 5.26 to 5.32, 5.38 and 5.39 of the report.

Subsection (1) sets out the essential criteria. The burden must be at least 100 years old. For this purpose variations or renewals (whether by charter of novodamus or judicially, under s 85(1)(b)) are disregarded. The procedure may be used by any owner of the burdened property (including a *pro indiviso* owner) or any other person (such as a tenant) against whom the burden is enforceable. It comprises two stages: intimation is given under s 19 of an intention to register a notice of termination, and the notice is then executed and registered under s 22.

Subsection (2) makes clear that an owner (or other person) can continue with a termination process initiated by a predecessor in title. “Terminator” is used throughout this group of sections to refer to the person who is currently using the procedure.

The termination procedure is not available for all burdens. Subsection (3) sets out the exclusions. The most important is facility burdens (defined in s 113(1)). The title conditions specified in schedule 6 (paragraph (e)) are those excluded from the jurisdiction of the Lands Tribunal under s 85(2).

Subsection (4) specifies the content of a notice of termination. A statutory form is given in schedule 1. Paragraph (c) makes clear that partial termination is permitted (and see also s 22(1)). Paragraphs (e) and (f) require information about intimation, both in general terms and also in the form of a list of those to whom intimation was sent. There is no requirement to identify the benefited property or properties, and in practice these may often be unknown to the terminator.

Subsection (5) provides that the renewal date stipulated in the notice must be not less than eight weeks after the date of last intimation. The renewal date is, ordinarily, the last day on which the notice may be opposed, by application to the Lands Tribunal for renewal of the burden.

Subsection (6) makes clear that a single notice can be used in respect of more than one burden, provided that all are contained in the same deed.

19 Intimation

- (1) A proposal to execute and register a notice of termination shall be intimated—
- (a) to the owner of each benefited property; and

- (b) to the owner (or, if the terminator is himself an owner, to any other owner) of the burdened property.
- (2) Subject to subsection (3) below, such intimation—
- (a) may be given by sending a copy of the proposed notice of termination, completed as respects all the matters which must, in pursuance of paragraphs (a) to (d) and (f) of section 18(4) of this Act, be identified, described, set out or specified in the notice and with the explanatory note which immediately follows the form of notice of termination in schedule 1 to this Act; or
 - (b) may be given by advertisement in a newspaper circulating in the area of the burdened property.
- (3) Such intimation shall, except where it is impossible to do so, be given by a means described in subsection (2)(a) above if it is given—
- (a) under subsection (1)(b) above; or
 - (b) under subsection (1)(a) above in relation to a benefited property which is at some point within four metres of the burdened property.
- (4) An advertisement giving intimation under subsection (2)(b) above shall—
- (a) identify the land which is the burdened property;
 - (b) set out the terms of the real burden either in full or by reference to the constitutive deed;
 - (c) specify the name and address of a person from whom a copy of the proposed notice of termination may be obtained; and
 - (d) state that any owner of a benefited property may apply to the Lands Tribunal for Scotland for the real burden to be renewed but that if no such application is received by a specified date (being the renewal date) the consequence may be that the real burden is extinguished.
- (5) The terminator shall provide an owner with a copy of the proposed notice of termination (completed as is mentioned in subsection (2)(a) above and with the explanatory note referred to in that subsection) if so requested.

NOTE

This section provides for intimation, which is the first stage of the termination procedure. It implements recommendation 27(d) to (f). See paragraphs 5.33 to 5.37 of the report.

Subsection (1) imposes a requirement to intimate.

Subsection (2) explains the two permissible methods of intimation. Method (a) involves sending a copy of the proposed notice (with explanatory note). The meaning of “sending” is given in s 115. The notice must be substantially complete, but should not, of course, be signed. Method (b) involves a newspaper advertisement.

Subsection (3) regulates the use of the two methods of intimation. Method (a) must be used in respect of any owner of the burdened property. It must also be used in respect of the owner of any benefited property which is within four metres of the burdened property. Otherwise either method may be used. In the measurement of the four metres there is to be disregarded (i) pertinents and (ii) any road if of less than twenty metres (s 116).

Subsection (4) sets out the content of the advertisement used in method (b).

Subsection (5) obliges the terminator to provide a copy of the notice to any owner of the benefited or burdened properties. This will mainly be necessary where intimation has been by advertisement (see subsection (4)(c)).

20 Oath or affirmation before notary public

- (1) Before submitting a notice of termination for registration, the terminator shall swear or affirm before a notary public that, to the best of the terminator's knowledge and belief, all the information contained in the notice is true and that section 19 of this Act has been complied with.
- (2) For the purposes of subsection (1) above, if the terminator is—
 - (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of his may swear or affirm;
 - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;

and any reference in that subsection to a terminator shall be construed accordingly.

NOTE

This and the following two sections are concerned with the second (and final) stage of the termination procedure, namely execution and registration.

Section 20, which implements recommendation 27(j), deals with execution. See paragraph 5.42 of the report. Before signing, the terminator must swear or affirm before a notary public that the information in the notice is true, and that the notice has been duly intimated. In the normal case this must be done by the terminator personally, but subsection (2) sets out some exceptions. Subsection (2)(b) should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. "Notary public" is given an extended meaning, in relation to overseas execution, by s 113(1).

21 Prerequisite certificate for registration of notice of termination

- (1) A notice of termination shall not be registrable unless, after the renewal date, there is endorsed on the notice (or on an annexation to it referred to in the notice and identified, on the face of the annexation, as being the annexation so referred to) a certificate executed by a member of the Lands Tribunal, or by their clerk, to the effect that no application in relation to the proposal to execute and register the notice has been received under section 85(1)(b) (and (3)) of this Act or that any such application which has been received—
 - (a) has been withdrawn; or
 - (b) relates (either or both)—
 - (i) to one or more but not to all of the real burdens the terms of which are set out in the notice (any real burden to which it relates being described in the certificate);
 - (ii) to one or more but not to all (or probably or possibly not to all) of the benefited properties (any benefited property to which it relates being described in the certificate),

and where more than one such application has been received the certificate shall relate to both (or as the case may be all) applications.

- (2) At any time before endorsement under subsection (1) above, a notice of termination, whether or not it has been submitted for such endorsement, may be withdrawn, by intimation in writing to the Lands Tribunal, by the terminator; and it shall not be competent to endorse under that subsection a notice in respect of which such intimation is given.
- (3) The Scottish Ministers may, after consultation with the Scottish Committee of the Council on Tribunals, make rules as to the fees chargeable by the Lands Tribunal in respect of that tribunal's functions under subsections (1) and (2) above.

NOTE

A notice of termination cannot be registered if it is opposed (other than opposed in part). A notice is opposed by making an application to the Lands Tribunal under s 85(1)(b) for renewal of the real burden (or burdens). Section 21, which implements recommendation 27(i),(k)(ii)&(l), provides for evidence of the absence of opposition, in the form of a certificate from the Lands Tribunal. See paragraphs 5.43, 5.52 and 5.55 of the report.

Subsection (1) makes provision for the Lands Tribunal certificate. A certificate may be given if (i) by the renewal date there has been no application for renewal (ii) any application so made has been withdrawn or (iii) the application relates only to some of the burdens or is in respect only of some of the benefited properties. Otherwise a certificate may not be given, and the notice may not be registered. The meaning of "renewal date" is given in s 18(4)(d)&(5). The reference, in paragraph (b)(ii) of subsection (1), to "probably or possibly" reflects the difficulty, under the current law, of making an accurate identification of the benefited properties.

Subsection (2) allows a notice of termination to be withdrawn at any time before the certificate is endorsed.

A fee will be charged for the Lands Tribunal certificate. Subsection (3) authorises the necessary rules.

22 Effect of registration of notice of termination

- (1) Subject to subsection (2) below, a notice of termination, when registered against the burdened property, extinguishes the real burden in question wholly or as the case may be to such extent as may be described in that notice.
- (2) A notice of termination registrable by virtue of a certificate under paragraph (b) of section 21(1) of this Act shall not, on being registered, extinguish a real burden described in the certificate nor extinguish a real burden as respects a benefited property so described; but if under that section a further certificate is endorsed on the notice (or on an annexation to the notice) the notice may be registered again, the effect of the later registration being determined by reference to the further certificate rather than to the certificate by virtue of which the notice was previously registered.

NOTE

This section, which implements recommendation 27(a), explains the effect of registration. See paragraphs 5.43 and 5.52 of the report. Registration extinguishes the burdens, subject to any qualifications (i) in the notice itself or (ii) in the Lands Tribunal certificate endorsed on the notice. If there was originally partial opposition to the notice (leading to a certificate under s 21(1)(b)) but the partial opposition was later withdrawn, subsection (2) allows a further certificate (under s 21(1)(a)) and a second registration. If, however, the opposition (partial or full) was not withdrawn and the application was then refused by the Lands Tribunal and the burden discharged, the proper procedure is to register the Tribunal's order in terms of s 96(2). The notice itself cannot be registered because no certificate can be given under s 21(1).

PART 2

COMMUNITY BURDENS

Meaning, creation etc.

23 The expression “community burdens”

- (1) Subject to subsections (2) and (3) below, where—
 - (a) real burdens are imposed under a common scheme on four or more units; and
 - (b) each of those units is, in relation to those burdens, both a benefited property and a burdened property,the burdens shall, in relation to any such units, be known as “community burdens”.
- (2) Community burdens are not created by virtue of section 44(1) of this Act.
- (3) Any real burdens such as are mentioned in section 46(1) of this Act are community burdens.

NOTE

This section introduces part 2 of the Bill, which is concerned with community burdens. Community burdens are the subject of part 7 of the report. Community burdens are perfectly familiar under existing law and practice, and only the name is new. Part 2 applies to all community burdens, whether created before or after the Bill comes into force (s 111(9)).

Section 23 defines “community burdens”. It implements recommendation 46. See paragraphs 7.11 to 7.21 of the report. The basic definition is set out in subsection (1). Its essence is mutual enforceability of common burdens. The meaning of “unit” is given in s 113(1).

Section 44(1) is a provision conferring enforcement rights in respect of common scheme burdens created before the appointed day. Subsection (2) makes clear that s 44(1) does not, of itself, create community burdens. However, burdens which come within s 44(1) but are reciprocally enforceable for other reasons (such as that enforcement is expressly provided for in the constitutive deed) would qualify as community burdens.

Subsection (3) extends community burdens to common scheme burdens in sheltered housing developments. The provision is necessary in order to bring in units (such as a warden’s flat) which may not be subject to the burdens. See also s 24(2)(b).

24 Creation of community burdens: supplementary provision

- (1) Without prejudice to section 2 of this Act, community burdens may make provision as respects any of the following—
 - (a) the appointment by the owners of a manager;
 - (b) the dismissal by the owners of a manager;
 - (c) the powers and duties of a manager;
 - (d) the nomination of a person to be the first manager;
 - (e) the procedures to be followed by the owners in making decisions about matters affecting the community;
 - (f) the matters on which such decisions may be made; and
 - (g) the resolution of disputes relating to community burdens.

- (2) In this Act “community” means—
- (a) the units subject to community burdens; and
 - (b) any unit in a sheltered housing development which is used in some special way as mentioned in section 46(1) of this Act.

NOTE

The content of community burdens, as of other real burdens, is regulated by ss 2 and 3. Subsection (1) amplifies these provisions by giving a non-exhaustive list of possible content. This implements recommendation 47(c). See paragraph 7.27 of the report. It will be noted that paragraphs (a), (b) and (e) refer to the appointment of a manager, and the exercise of other powers, *by the owners*. As a general rule it is not possible for a developer to reserve such powers to himself (s 3(7)), although s 53 introduces a limited exception. The meaning of “manager” is given in s 113(1).

Subsection (2) defines “community”. Paragraph (b) takes account of the fact that a unit in sheltered housing which is used in a special way (for example as a warden’s flat) might not itself be subject to the burdens. Nonetheless it is part of the community, and is for example counted for the purposes of majority decision-making (for which see ss 26 to 28).

25 Effect on units of statement that burdens are community burdens

Where, in relation to any real burdens, the constitutive deed states that the burdens are to be community burdens, each unit shall, in relation to those burdens, be both a benefited property and a burdened property.

NOTE

This section, which implements recommendation 47(b), introduces a conveyancing shortcut. See paragraphs 7.25 and 7.26 of the report. The effect of using the term “community burdens” is to create reciprocal enforceability. That is one of the two criteria for community burdens set out in s 23(1). Notwithstanding the use of the term, however, the burdens will not qualify as community burdens unless the other criterion (common scheme burdens imposed on four or more units) is also met.

Management of community

26 Power of majority to appoint manager etc.

- (1) Subject to any provision made by community burdens, the owners of a majority of the units in a community may—
- (a) appoint a person to be the manager of the community on such terms as they may specify;
 - (b) confer on any such manager the right to exercise such of their powers as they may specify;
 - (c) revoke, or vary, the right to exercise such of the powers conferred under paragraph (b) above as they may specify; and
 - (d) dismiss any such manager.
- (2) Without prejudice to the generality of subsection (1)(b) above, the powers mentioned there include—
- (a) power to carry out maintenance;

- (b) power to enforce community burdens; and
 - (c) power to vary or discharge such burdens.
- (3) If a unit is owned by two or more persons in common, then, for the purposes of voting on any proposal to exercise a power conferred by subsection (1) above—
- (a) either (or any) of them may exercise the vote allocated as respects that unit; but
 - (b) if they disagree as to how the vote should be cast then no vote shall be counted as respects that unit.
- (4) The powers conferred by paragraphs (b) to (d) of subsection (1) above may be exercised whether or not the manager was appointed by virtue of paragraph (a) of that subsection.

NOTE

This is the first of a group of sections (ss 26 to 29) which set out some basic rules for the management of a community. The rules are default rules – or in other words, they apply only to the extent that alternative (or contrary) provision is not made in the titles. Alternative provision on one or all of the topics in question is common in modern deeds of conditions.

Section 26 itself confers on the owners of a majority of units various powers in relation to managers. This implements recommendation 49. See paragraphs 7.43 to 7.46 of the report. The meaning of “manager” is given in s 113(1).

Subsection (1) sets out the powers in question. Since acts carried out under paragraphs (a) and (b) bind both the dissenting minority and also successors (s 28), it is necessary – through paragraphs (c) and (d) – to allow the acts to be undone if a different majority can be assembled.

Subsection (2) gives a non-exhaustive list of the powers that might be conferred on a manager. By para (b) of subsection (1), only “their” powers (ie the powers of a majority, whether collectively or individually) may be conferred. The powers mentioned in paragraphs (a) and (c) in subsection (2) are collective powers of a majority, by virtue of ss 27, 30 and 31. The power mentioned in paragraph (b) is an individual power: it is of the very essence of a community burden (s 23(1)(b)) that the owner of each unit has a right to enforce. The conferral of powers may be subject to qualification. For example, the manager might be allowed to carry out repairs only if the cost is below a stipulated figure. Or he may be allowed to vary or discharge only certain burdens, or only to a certain effect.

Subsection (3) makes provision for voting in a case where a unit is owned in common (for example by husband and wife).

Subsection (4) allows the powers in subsection (1) to be used for managers appointed in some other way (ie other than by a majority of owners). Thus a manager might have been nominated in the constitutive deed either as a first manager (under s 24(1)(d)) or by virtue of a manager burden (under s 53). Or there may have been an informal appointment which is formalised by s 55. A manager appointed under a manager burden cannot be dismissed under subsection (1)(d): see s 53(3).

27 Power of majority to instruct common maintenance

- (1) This section applies where—
- (a) community burdens impose an obligation on the owners of all or some of the units to maintain, or contribute towards the cost of maintaining, particular property; and
 - (b) the obligation so imposed accounts for the entire liability for the maintenance of such property.

- (2) Subject to any provision made by community burdens, the owners of a majority of the units subject to the obligation may—
 - (a) decide that maintenance should be carried out;
 - (b) require each owner to deposit by such time as they may specify and with such person as they may nominate for the purpose a sum of money (being a sum not exceeding a reasonable estimate of each owner’s share of the cost of maintenance) to be used by such person as payment for the maintenance;
 - (c) instruct or carry out such maintenance; and
 - (d) modify or revoke anything done by them by virtue of paragraphs (a) to (c) above.
- (3) If a unit is owned by two or more persons in common, then, for the purposes of voting on any proposal to exercise a power conferred by subsection (2) above—
 - (a) either (or any) of them may exercise the vote allocated as respects that unit; but
 - (b) if they disagree as to how the vote should be cast then no vote shall be counted as respects that unit.

NOTE

As subsection (1)(a) makes clear, this section is concerned with common maintenance, that is to say, with maintenance obligations imposed on the owners of more than one unit. Typically all units will be affected, but in large developments maintenance obligations may be localised, with the owners of particular units being responsible for facilities which serve their (but not other) units. Section 27 implements recommendation 48. See paragraphs 7.33 to 7.41 of the report. It will be unusual for paragraph (b) of subsection (1) not to be satisfied. But it would not be satisfied where, for example, a boundary wall is to be maintained jointly by the owners in the community and the owner of neighbouring property.

Subsection (2) sets out a list of powers. These are exercisable, not by a majority of units in the community, but (which may not be the same thing) by a majority of the units subject to the particular maintenance obligation. Paragraph (b) allows the money to be collected in advance of the repair. Paragraph (d) allows owners to change their minds – typically as a result of units coming under new ownership.

Subsection (3) makes provision for voting in a case where a unit is owned in common (for example by husband and wife).

28 Owners’ decision binding

Anything done (including any decision made) by—

- (a) the owners in accordance with such provision as is made in community burdens;
or
 - (b) a majority of them, in accordance with section 26 or 27 of this Act,
- is binding on all the owners and their successors as owners.

NOTE

This section, which implements recommendation 50, confirms the principle of majority rule. See paragraph 7.47 of the report. Decisions, and acts (such as the appointment of a manager), bind both the dissenting minority and also incoming owners. An incoming owner would, for example, be liable for maintenance costs which had already

been agreed to (and see ss 8(1) and 9). The section is not confined to the default code but applies also to decisions and acts carried out in terms of the titles.

29 Remuneration of manager

Subject to any provision made by community burdens, liability for any remuneration due to a manager of the community (however appointed) shall be shared equally among the units in a community and each owner shall be liable accordingly; but if two or more persons have common ownership of a unit then—

- (a) they are severally liable for any share payable in respect of that unit; and
- (b) as between (or among) themselves, they are liable in the proportions in which they own the unit.

NOTE

If a professional manager is used, a fee will be due, probably at regular intervals. The amount is a matter for negotiation with the manager. Section 29 apportions that amount equally among owners in the community (subject to different provision in the titles). The second half of s 29 introduces a rule already familiar from s 10(5). Section 29 implements recommendation 49(b). See paragraph 7.43 of the report.

Variation, discharge etc.

30 Variation and discharge of community burdens affecting certain units

- (1) This section applies where a community burden is to be varied, or discharged, in relation to—
 - (a) a single unit; or
 - (b) units fewer than one-half of those in a community,
(a unit in respect of which the burden is to be so varied, or discharged, being, in subsections (2) to (6) below, referred to as an “affected unit”).
- (2) Subject to subsection (5) below, a community burden may be so varied, or discharged, by registering against each affected unit a deed of variation, or discharge, granted—
 - (a) where provision is made in the constitutive deed for it to be granted by the owners of such units as may be specified, by the owners of those units; or
 - (b) where no such provision is made, in accordance with subsection (3) below.
- (3) A deed is granted in accordance with this subsection if granted by the owner of at least one adjacent unit of each affected unit which has an adjacent unit and—
 - (a) by the owners of such number of units (including any other adjacent units) as, taken with the adjacent unit (or units) whose owner has (or owners have) granted the deed, amount to a majority of the units; or
 - (b) where he is authorised to do so (whether in the constitutive deed or otherwise), by the manager of the community.
- (4) An affected unit may, for the purposes of subsection (2)(a) or (3)(a) above, be included in any calculation of the number of units.
- (5) A deed purporting to impose a new obligation shall, to the extent that it purports to do so, be invalid unless it is granted by the owner of each affected unit.

- (6) For the purposes of this section, “adjacent unit” means any unit which is at some point within four metres of the affected unit.

NOTE

Sections 30 and 31 provide for the variation and discharge of community burdens. Section 30 is concerned mainly with individual minutes of waiver while s 31 applies where the burdens are to be varied or discharged for all (or most of) the community.

Section 30 implements recommendation 51. See paragraphs 7.50 to 7.67 of the report. Subsection (1) sets out the scope of the provision. “Discharge” is the extinction of a burden, while “variation” (s 113(1)) includes the imposition of a new burden. Under the present law, variation and discharge, even for a single unit, must be granted by the owners of all the units in the community. Section 30 allows variation and discharge by the owners of a majority of units, or by the manager.

Subsection (2) sets out two possible situations. Either the titles make provision or they do not. Provision in the titles might be for variation and discharge (i) by the owners of certain units (for example a majority of units, or all contiguous units) (ii) by the manager or (iii) by someone else, such as the developer. (iii) is not recognised by s 30 as a valid method of variation or discharge. (ii) is given effect, subject to the requirement that the owner of an adjacent unit also grants (see subs (3)). (i) is given effect according to its terms (see subs (2)(a)).

The other possibility is that the titles do not make provision (or do not make provision which falls into category (i) mentioned above). In that case subsection (3) provides that variation and discharge is granted either by the owners of a majority of units or, where authorised to do so, by the manager. Authorisation to the manager might be contained in the constitutive deed (s 24(1)(c)), or might be given following a decision by a majority of owners (s 26(1)(b) and (2)(c)). If there is an adjacent unit (defined in subs (6)), the owner of that unit must also be among the granters; and this requirement applies, separately, in respect of every unit for which the deed is being granted.

Unlike under the present law, “owner” includes a person who has right to the property but has not completed title by registration (s 114(1)(a)); but (s 50(1)) there must then be deduction of title (other than for units on the Land Register). A manager, however, need not deduce title (s 50(2)). Where a unit is owned in common, both (or all) *pro indiviso* owners must grant. (Section 30 refers to “the” owner.) The owner “grants” a deed by subscribing it in accordance with s 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under s 3 of that Act. A grantee is not required (s 58(1)) but would be normal in practice. No particular deed or form of deed is specified, and the familiar minute of waiver will doubtless continue in use. Registration can be by a granter as well as by a grantee (s 58(2)&(3)); and while the deed need only be registered against the affected unit, the Keeper has power to make a corresponding entry against the title sheets of the other units in the community (s 97).

If the owner of the affected unit (ie the grantee) signs, his unit counts for the purposes of assembling a majority (subs (4)). The adjacent units also count (subs (3)(a)). If it otherwise qualifies (for which see subs (6)) the same property may be used as the adjacent unit for more than one affected unit; and an affected unit could itself be an adjacent unit in respect of another affected unit.

Unlike s 14, s 30 allows variation as well as discharge – or in other words, it allows the imposition of new obligations. But in such a case (and consistently with s 4(2)(b)) the owner of the affected unit must also sign the deed (subs (5)).

Subsection (6) gives the meaning of “adjacent unit”. In the measurement of the four metres there is to be disregarded (i) pertinents and (ii) any road if of less than twenty metres (s 116).

31 Variation and discharge where section 30 not applicable

- (1) This section applies where a community burden is to be varied, or discharged, in relation to at least one-half of the units in a community (a unit in respect of which the burden is to be so varied, or discharged, being, in subsections (2) and (5) below and in section 32(1) of this Act, referred to as an “affected unit”).

- (2) A community burden may be so varied, or discharged, by registering against each affected unit a deed of variation, or discharge, granted—
 - (a) where provision is made in the constitutive deed for it to be granted by the owners of such units as may be specified, by the owners of those units; or
 - (b) where no such provision is made, in accordance with subsection (3) below.
- (3) A deed is granted in accordance with this subsection if granted—
 - (a) by the owners of a majority of the units; or
 - (b) where he is authorised to do so (whether in the constitutive deed or otherwise), by the manager of the community.
- (4) An affected unit may, for the purposes of subsection (2)(a) or (3)(a) above, be included in any calculation of the number of units.
- (5) A deed of discharge or, as the case may be, variation shall not be registrable under subsection (2) above unless the owner of each affected unit (other than any such owner who granted the deed) has been—
 - (a) given sufficient notice; and
 - (b) informed that, if neither he nor any predecessor of his as owner agreed to the granting of the deed, he may, within eight weeks after being given that notice, apply to the court under section 32(1) of this Act for reduction of the deed;

and for the purposes of paragraph (a) above sufficient notice is given by sending a copy of the deed together with a note containing the information required by paragraph (b) above.

NOTE

Subsection (1) sets out the scope of the provision. Section 31, which implements recommendation 52(a)&(b), provides for variation or discharge in respect of all or most of the units in a community. See paragraphs 7.68 to 7.72 of the report. “Communities” consist exclusively of “units” (s 24(2)). “Discharge” is the extinction of a burden, while “variation” (s 113(1)) includes the imposition of a new burden. Under the present law, variation and discharge require to be granted by the owners of all the units in the community. Section 31 allows variation and discharge by the owners of a majority of units, or by the manager.

Subsection (2) sets out two possible situations. Either the titles make provision or they do not. Provision in the titles might be for variation and discharge (i) by the owners of certain units (ii) by the manager or (iii) by someone else, such as the developer. (iii) is not recognised by s 31 as a valid method of variation or discharge. (i) and (ii) are given effect according to their terms (see subs (2)(a) and 3(b)).

The other possibility is that the titles do not make provision (or do not make provision which falls into categories (i) and (ii) mentioned above). In that case variation and discharge is granted either by the owners of a majority of units (see subs (3)(a)) or, where authorised to do so, by the manager (see subs 3(b)).

Unlike under the present law, “owner” includes a person who has right to the property but has not completed title by registration (s 114(1)(a)); but (s 50(1)) there must then be deduction of title (other than for units on the Land Register). A manager, however, need not deduce title (s 50(2)). Where a unit is owned in common, both (or all) *pro indiviso* owners must grant. (Section 31 refers to “the” owner.) The owner “grants” a deed by subscribing it in accordance with s 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under s 3 of that Act. A grantee is not required (s 58(1)). No particular deed or form of deed is specified. Registration can be by a granter as well as by a grantee (s 58(2)&(3)).

Subsection (4) makes clear that if the owner of an affected unit (ie a grantee) signs, his unit counts for the purposes of assembling a majority.

Subsection (5) requires that a copy of the executed deed be sent to the owner of each affected unit (other than those who granted the deed). Rules for sending are given in s 115. The deed must be accompanied by a notice advising of the right to make an application under s 32.

32 Reduction of deed granted by virtue of section 31

- (1) Where a deed of variation or, as the case may be, a deed of discharge has been granted by virtue of section 31 of this Act, any owner of an affected unit, if neither he nor any predecessor of his as owner agreed to the granting of the deed, may, during the period mentioned in subsection (3) below, apply to the court for reduction of—
 - (a) the deed; or
 - (b) such part of it as may be specified in the application.
- (2) A person making application under subsection (1) above shall forthwith give written intimation in that regard to the Keeper of the Registers of Scotland; and such intimation shall include information sufficient to enable the Keeper to identify the deed.
- (3) The period is the period of eight weeks beginning with the date on which notice is given under section 31(5)(a) of this Act to the owner of the affected unit.
- (4) The court may, if satisfied that the deed in question—
 - (a) is not in the best interests of the owners of all the units in the community; or
 - (b) is unfairly prejudicial to one or more of those owners,grant decree of reduction (either in whole or to such extent, or subject to such modifications, as may be specified in the decree).
- (5) An extract of any decree granted under subsection (4) above may be registered.
- (6) Notwithstanding section 5(4) of the Sheriff Courts (Scotland) Act 1907 (c.51) (exclusion of actions of reduction from jurisdiction of sheriff court), it shall be competent to bring an action under this section in the sheriff court; and accordingly in subsections (1) and (4) above “court” means Court of Session or sheriff.

NOTE

This section, which implements recommendation 52(c) to (g), allows a dissenting owner to apply for reduction of a deed of variation or discharge granted under s 31 (but not s 30). See paragraphs 7.73 and 7.74 of the report. Any owner can apply, including a *pro indiviso* owner.

Subsection (2) requires notice to the Keeper. This is because the deed may already have been presented for registration.

Subsection (3) sets out the time within which an application must be made. Notice is “given” under s 31(5)(a) by being sent; and a document, if sent by post or electronic means, is treated as sent on the day of posting or transmission (s 115(3)). The relevant period is the eight weeks beginning on the day on which notice was given to the particular applicant (or a predecessor as owner) – even if later notice was given to other owners.

Subsection (4) sets out the grounds on which reduction may be granted.

Subsection (5) allows registration of any extract decree. In the case of the Land Register this means that a reduction can enter the Register by registration rather than (as usually) by rectification.

Subsection (6) confers jurisdiction on the sheriff, contrary to the usual rule for reductions.

PART 3

CONSERVATION AND MARITIME BURDENS

Conservation burdens

33 Conservation burdens

- (1) On and after the day on which this section comes into force, it shall be competent to create a real burden in favour of a conservation body, or of the Scottish Ministers, for the purpose of preserving, or protecting, for the benefit of the public—
 - (a) the architectural or historical characteristics of any land; or
 - (b) any other special characteristics of any land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of any land);and any such burden shall be known as a “conservation burden”.
- (2) The Scottish Ministers may, subject to subsection (3) below, by regulations, prescribe such body as they think fit to be a conservation body.
- (3) The power conferred by subsection (2) above may be exercised in relation to a body only if the object, or function, of the body (or, as the case may be, one of its objects or functions) is to preserve, or protect, for the benefit of the public—
 - (a) the architectural or historical characteristics of any land; or
 - (b) any other special characteristics of any land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of any land).
- (4) Where the power conferred by subsection (2) above is exercised in relation to a trust, the conservation body shall be the trustees of the trust.
- (5) The Scottish Ministers may, by regulations, determine that such conservation body as may be specified in the regulations shall cease to be a conservation body.

NOTE

Part 3 of the Bill is concerned with conservation burdens and maritime burdens (for which see part 9 of the report). These have in common the fact that they are created directly in favour of a person (respectively a conservation body/Scottish Ministers or the Crown) and without reference to a benefited property. Part 3 comes into force immediately on royal assent (s 119(3)).

Section 33 is the first of a group of sections on the subject of conservation burdens. Conservation burdens were identified as a special class by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Under that Act (ss 26 to 28) feudal burdens can be preserved if they qualify as conservation burdens and if the superior is either a conservation body or Scottish Ministers. Preservation requires the registration of a notice before the appointed day. Feudal burdens preserved in this way are known, from the appointed day onwards, as conservation burdens. The provisions in the present Bill are based on, and to some extent supersede, those in the Feudal Act. They apply both to new conservation burdens created under s 33, and also to former feudal burdens converted in the manner just described (see the definition of “conservation burden” in s 113(1)).

Section 33, which implements recommendation 74, allows the creation of new conservation burdens. See paragraphs 9.10 to 9.16 of the report. The criteria are the same as under the Feudal Act. Thus the definition in subsection (1) substantially repeats s 27(2) of the Feudal Act. A conservation burden is one which protects, for the benefit of the public, either the built or the natural environment. Subsections (2) to (5) repeat, and replace, s 26 of the Feudal Act (which is repealed by schedule 9 without having ever come into force). They provide for the

establishment by Scottish Ministers of a list of conservation bodies. Names may be added to or removed from the list. Subsection (4) is made necessary by the fact that trusts do not have legal personality. In relation to a trust, therefore, the conservation body is to be the trustees.

34 Assignment

The right to a conservation burden may be assigned or otherwise transferred to any conservation body or to the Scottish Ministers; and any such assignment or transfer takes effect on registration.

NOTE

This section repeats, and replaces, s 29 of the Feudal Act (which is repealed by schedule 9). It implements recommendation 75(a). See paragraph 9.19 of the report. The registration must be in the Land Register or Register of Sasines (s 113(1): definition of “registering”). There is no requirement of intimation. The holder of a conservation burden may assign even where he has not completed title (s 36(b)).

35 Enforcement where no completed title

A conservation burden is enforceable by the holder of the burden irrespective of whether the holder has completed title to the burden.

NOTE

A real burden may be enforced only by a person who has both title and interest to do so (s 7(1)). Section 35, which implements recommendation 75(c) in part, is concerned with title. See paragraphs 9.21 and 9.24 of the report. Interest is governed by s 39. The meaning of “holder” is given in s 113(1). The holder of a conservation burden is the conservation body or, as the case may be, Scottish Ministers. A title completed by registration is not required, so that a burden could be enforced by the grantee of a delivered assignment made under s 34.

36 Completion of title

Where the holder of a conservation burden does not have a completed title—

- (a) title may be completed by his registering a notice of title; or
- (b) without completing title, he may grant—
 - (i) under section 34 of this Act, a deed assigning the right to the burden; or
 - (ii) under section 40 of this Act, a deed discharging, in whole or in part, the burden,

but unless the deed is one to which section 15(3) of the 1979 Act (circumstances where unnecessary to deduce title) applies, it shall be necessary, in the deed, to deduce title to the burden through the midcouples linking him to the person who had the last completed title.

NOTE

This section is based on, and replaces, s 30 of the Feudal Act (which is repealed by schedule 9). It implements recommendation 75(e)&(f). See paragraphs 9.23 and 9.24 of the report. Usually a successor of the original holder would complete title by registering an assignment. Occasionally there will be no assignment, or direct registration will for some reason not be possible. The standard case is likely to be the assumption of new trustees. The appropriate conveyancing procedure is then to use a notice of title, and paragraph (a) so allows. A notice of title is unnecessary in the case of conservation burdens registered in the Land Register (see s 3(6) of the Land Registration

(Scotland) Act 1979 (as amended by schedule 8, para 6(3) of this Bill)). Paragraph (b) (which is the equivalent, for conservation burdens, of s 50(1)) allows an unregistered holder to grant assignments and discharges. Section 15(3) of the 1979 Act (as amended by schedule 8, para 6(4) of this Bill) dispenses with deduction of title in cases where the conservation burden is registered in the Land Register, but otherwise deduction of title is necessary.

37 Extinction of burden on body ceasing to be conservation body

Where—

- (a) the holder of a conservation burden is a conservation body or, as the case may be, two or more such bodies; and
- (b) that body ceases to be such a body, or those bodies cease to be such bodies (whether because regulations under section 33(5) of this Act so provide or because the body in question has ceased to exist),

the conservation burden shall, on the body, or bodies, so ceasing forthwith be extinguished.

NOTE

This section is based on, and replaces, s 31 of the Feudal Act (which is repealed by schedule 9). It implements recommendation 75(d). See paragraph 9.22 of the report. It makes clear that a conservation burden is extinguished if the sole holder ceases to be a conservation body.

Maritime burdens

38 Maritime burdens

- (1) On and after the day on which this section comes into force, it shall be competent to create a real burden over the sea bed or foreshore in favour of the Crown for the benefit of the public; and any such burden shall be known as a “maritime burden”.
- (2) The right of the Crown to a maritime burden may not be assigned or otherwise transferred.
- (3) For the purposes of this section—
 - (a) “sea bed” means the bed of the territorial sea adjacent to Scotland; and
 - (b) “territorial sea” includes any tidal waters.

NOTE

Maritime burdens were identified as a special class by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 60 and allowed to survive feudal abolition. Section 38, which implements recommendation 76, allows the creation of new maritime burdens. The definition in subsection (1) substantially repeats s 60(1) of the Feudal Act.

Subsection (2) is based on, and replaces, s 60(2) of the Feudal Act (which is repealed by schedule 9). It applies both to new maritime burdens created under subsection (1), and also to former feudal burdens which survive under s 60(1) of the Feudal Act (see the definition of “maritime burden” in s 113(1)). Its effect is to prevent alienation by the Crown.

General

39 Interest to enforce

The holder of a conservation burden or a maritime burden is presumed to have an interest to enforce the burden.

NOTE

A real burden may be enforced only by a person who has both title and interest to do so (s 7(1)). Section 39, which implements recommendation 75(c) in part, provides that such interest is presumed in the case of conservation and maritime burdens. See paragraph 9.21 of the report. This repeats a rule which already applies, under the Feudal Act (ss 28(1)(b) and 60(1)(b)), to conservation and maritime burdens which were formerly feudal burdens.

40 Discharge

- (1) A conservation burden or maritime burden is discharged by registering against the burdened property a deed of discharge granted by or on behalf of the holder of the burden.
- (2) In subsection (1) above, “discharged” means discharged—
 - (a) wholly; or
 - (b) to such extent as may be specified in the deed of discharge.

NOTE

This section is based on s 14 (which provides for discharge in the case of standard real burdens). “Holder” includes a person who has right to the burden but has not completed title by registration (s 113(1)), but deduction of title may then be necessary (s 36(b)). Where a burden is held by two (or more) people, both (or all) must grant the deed of discharge. (Subsection (1) refers to “the” holder.) The holder “grants” a deed by subscribing it in accordance with s 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under s 3 of that Act. A grantee is not required (s 58(1)) but would be normal in practice. No particular deed or form of deed is specified.

Subsection (2) makes clear that partial discharge is included.

PART 4

TRANSITIONAL: IMPLIED RIGHTS OF ENFORCEMENT

Extinction of implied rights of enforcement

41 Extinction

- (1) Any rule of law whereby land may be the benefited property, in relation to a real burden, by implication (that is to say, without being nominated in the constitutive deed as the benefited property) shall cease to have effect on the appointed day and a real burden shall not, on and after that day, be enforceable by virtue of such rule; but this subsection is subject to subsection (2) below.
- (2) In relation to a benefited property as respects which, on the appointed day, it is competent (taking such rule of law as is mentioned in subsection (1) above still to be in effect) to register a notice of preservation or of converted servitude, subsection (1) above shall apply with the substitution, for the reference to the appointed day, of a reference to the day immediately following the expiry of the period of ten years beginning with the appointed day.

NOTE

Part 4 of the Bill contains a number of transitional provisions on the subject of implied enforcement rights. See part 11 of the report. With only one exception (s 41(1)), the provisions are confined to real burdens created by deed registered before the appointed day. Currently, real burdens are quite often enforceable by virtue of implied rights. Section 41 extinguishes implied rights, other than those which may be preserved under ss 42 (or 76). In their place ss 44 to 47 create a new body of statutory implied rights.

Subsection (1) of s 41 abolishes, with effect from the appointed day, the common law rules by which the right to enforce real burdens may arise by implication. This implements recommendation 88. See paragraphs 11.1 to 11.28 of the report. Other provisions of the Bill deal with the consequences. Thus for new burdens (ie those created by deed registered on or after the appointed day) the benefited property must be nominated and identified in the constitutive deed (s 4(2)(c)), while for existing burdens (ie those created by deed registered before the appointed day) ss 44 to 47 provide replacement rules for identifying the benefited property. The meaning of “appointed day” is given in s 113(1).

Subsection (2), which implements recommendation 93(a) in part, postpones by ten years the abolition of implied rights in cases where the enforcement rights can be preserved under s 42 (or s 76). Ten years is the period allowed under s 42(1) (or s 76(4)) for registration of the appropriate notice.

42 Preservation

- (1) Subject to subsection (6) below, an owner of land which is a benefited property by virtue of such rule of law as is mentioned in section 41(1) of this Act may, during the period of ten years beginning with the appointed day, execute and duly register, in (or as nearly as may be in) the form contained in schedule 2 to this Act, a notice of preservation as respects the land; and if the owner does so then the land shall continue to be a benefited property after the expiry of that period (in so far as the burdened property, the benefited property and the real burden are the burdened property, the benefited property, and the real burden identified in the notice of preservation).
- (2) The notice of preservation shall—
 - (a) identify the land which is the burdened property (or any part of that land);
 - (b) identify the land which is the benefited property (or any part of that land);
 - (c) where the person registering the notice does not have a completed title to the benefited property, set out the midcouplets linking him to the person who last had such completed title;
 - (d) set out the terms of the real burden; and
 - (e) set out the grounds, both factual and legal, for describing as a benefited property the land identified in pursuance of paragraph (b) above.
- (3) For the purposes of subsection (1) above, a notice is, subject to section 108 of this Act, duly registered only when registered against both properties identified in pursuance of subsection (2)(a) and (b) above.
- (4) A person submitting any notice for registration under this section shall, before he does so, swear or affirm before a notary public that to the best of the knowledge and belief of the person all the information contained in the notice is true.
- (5) For the purposes of subsection (4) above, if the person is—

- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the person may swear or affirm;
 - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;
- and any reference in that subsection to a person shall be construed accordingly.
- (6) Subsection (1) above does not apply as respects a real burden which has been imposed under a common scheme affecting both the burdened and the benefited property.
 - (7) This section is subject to section 107 of this Act.

NOTE

This section allows any owner (including a *pro indiviso* owner) of property, to which enforcements rights attach by virtue of the rule in *J A Mactaggart & Co v Harrower* (1906) 8 F 1101, to preserve those rights by registration of a notice of preservation during the ten years immediately following the appointed day. Any rights not so preserved are extinguished by s 41 at the end of the ten-year period. The rule in *Mactaggart* is the rule that, if A imposes real burdens in a disposition of land to B, such neighbouring land as is retained by A may, by implication, be the benefited property in those burdens. Section 42 implements recommendation 93(a) to (c) and (e). See paragraphs 11.72 to 11.79 of the report.

Subsection (1) provides that, where a notice is duly registered, the enforcement rights are preserved, and the property retains its status as a benefited property at the end of the ten-year period.

Subsection (2) specifies the content of a notice of preservation. A statutory form is given in schedule 2. As paragraphs (a), (b) and (d) make clear, a notice may be restricted to certain burdens only, or to a certain part of the benefited or burdened properties. A title completed by registration is not required (see the definition of “owner” in s 114(1)), but in that case paragraph (c) requires that the midcouples be listed. In Land Register cases the Keeper will no doubt wish to inspect the midcouples. The meaning of “midcouples” is given in s 113(1). Paragraph (e) requires, in effect, an explanation of why the rule in *Mactaggart* applies on the particular facts.

Consistently with s 4(5) (for new burdens), subsection (3) requires dual registration.

Subsections (4) and (5) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done by the owner personally, but subsection (5) sets out some exceptions. Subsection (5)(b) should be read with schedule 2 to the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons. “Notary public” is given an extended meaning, in relation to overseas execution, by s 113(1).

Subsection (6) excludes common scheme burdens, for which separate provision is made by ss 44 to 47. In effect, this restricts notices of preservation to enforcement rights arising under the rule in *Mactaggart*.

Section 107, referred to in subsection (7), makes further provision as to notices of preservation (and of converted servitude).

43 Duties of Keeper: amendments relating to unenforceable real burdens

- (1) Unless one of the circumstances mentioned in subsection (2) below arises, the Keeper of the Registers of Scotland shall not be required to remove from the Land Register of Scotland a real burden which section 41 of this Act makes unenforceable.
- (2) The circumstances are that the Keeper—
 - (a) is requested, in an application for registration or rectification, to remove the real burden; or

- (b) is, under section 9(1) of the 1979 Act (rectification of the register), ordered to do so by the court or the Lands Tribunal,
- and no such request or order shall be competent during that period of ten years which commences with the appointed day.
- (3) During the period mentioned in subsection (2) above a real burden, notwithstanding that it has been so made unenforceable, may at the discretion of the Keeper, for the purposes of section 6(1)(e) of the 1979 Act (entering enforceable real right in title sheet), be taken to subsist; but this subsection is without prejudice to subsection (4) below.
- (4) The Keeper shall not, before the date mentioned in subsection (5) below, remove from the Land Register of Scotland a real burden which is the subject of a notice in respect of which application has been made for a determination by—
- (a) a court; or
 - (b) the Lands Tribunal,
- under section 107(6)(b) of this Act.
- (5) The date is whichever is the earlier of—
- (a) that two months after the final decision on the application; and
 - (b) that prescribed under section 107(6)(ii) of this Act.

NOTE

Part 4 of the Bill extinguishes some enforcement rights while preserving or creating certain others. The overall effect, however, is extinctive. This means that a number of burdens which are currently enforceable by virtue of an implied right (almost always under the rule in *Mactaggart*) will cease to be enforceable by anyone. In that case the burdens fail, through want of a benefited property (see s 1(1)), and should be deleted from the Land Register. Section 43, which is modelled on s 46 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, makes clear that this will not happen at once. Section 43 implements recommendation 94(a) to (c). See paragraph 11.83 of the report.

The section has two main purposes. First, it makes clear (in subsections (1) and (2)) that the Keeper has no immediate duty to delete failed burdens from the Land Register but can wait until deletion is requested by the owners of the affected properties. Since there are more than 500,000 title sheets it is inevitable that this should be a gradual process.

Secondly, subsection (2) gives the Keeper temporary relief for a period of ten years after the appointed day. There is no obligation to delete burdens during this period, even on request; and subsection (3) means that in relation to first registrations the Keeper can disregard the fact that the burdens have failed. The ten-year period ties in with the period allowed for registration of notices of preservation (s 42) and converted servitude (s 76). If a notice is duly registered, the burden does not fail.

Subsections (4) and (5) prevent the deletion of burdens which were the subject of a notice of preservation or converted servitude in circumstances where the notice was rejected by the Keeper and the rejection is under challenge (see s 107(6)-(8)).

New implied rights of enforcement

44 Common schemes: general

- (1) Where real burdens are imposed under a common scheme and the constitutive deed by which they are imposed on any unit, being a deed registered before the appointed day, expressly refers to the common scheme or is so worded that the existence of the common scheme is to be implied then, subject to subsection (2) below, any unit subject to the common scheme by virtue of—
 - (a) that deed; or
 - (b) any other constitutive deed so registered,shall be a benefited property in relation to the real burdens provided that it is, for the time being, an adjacent unit.
- (2) Subsection (1) above applies only in so far as no provision to the contrary is impliedly (as for example by reservation of a right to vary or waive the real burdens) or expressly made in the constitutive deed mentioned in paragraph (a) of that subsection.
- (3) For the purposes of subsection (1) above, “adjacent unit” means a unit which is at some point within four metres of the unit on which the real burdens are imposed.

NOTE

Rights to enforce implied by common law are abolished by s 41. Sections 44 to 47 introduce a number of replacement rights in respect of existing burdens (ie burdens created by deed registered before the appointed day). The first three sections (ss 44 to 46) apply only to common scheme burdens, and so are a direct replacement for the common law rules developed in cases such as *Hislop v MacRitchie’s Trs* (1881) 8 R(HL) 95. The new rules are based on, but simplify, the old, as well as reducing the number of benefited properties. Section 48 is concerned with burdens which provide for the maintenance and regulation of facilities. The new provisions are not mutually exclusive, and some real burdens will be subject to more than one provision. Further, they are additional to, and not in substitution for, enforcement rights expressly created (which are untouched by the Bill).

Section 44, which implements recommendation 90, sets out a general rule which applies to all cases where burdens are imposed under a common scheme. See paragraphs 11.48 to 11.56 of the report. Sections 45 and 46 introduce special rules for tenements and for sheltered housing.

Subsection (1) of s 44 focuses, not on the whole area affected by common scheme burdens, but on particular units of property within that area. In relation to any particular unit, the burdens can be enforced by the owners (or tenants etc) of any other units in the affected area which lie within a four-metre radius and so qualify as adjacent units (for which see subs (3)). The meaning of “unit” is given in s 113(1). There are some qualifications. As well as imposing the burdens on the particular unit, the constitutive deed must also give notice, directly or indirectly, that the burdens are part of a common scheme applying to other units. And the other units must either be burdened by the same deed (in practice either a deed of conditions or a conveyance of all the units), or by another deed which was registered before the appointed day.

As indicated by the words “for the time being”, the identity of the benefited units may alter over time. Thus suppose that, at the appointed day, units A and B are within four metres of one another. Assuming the other requirements of s 44 to have been met, unit A would be a benefited property in respect of unit B, and unit B in respect of unit A. Suppose further that unit A came later to be divided into two (units A(1) and A(2)), each separately owned, and that only unit A(1) lay within four metres of unit B. In that case unit A(2) would not be a benefited property in respect of unit B, nor unit B a benefited property in respect of unit A(2). (Section 11 does not apply in this case: see s 11(4)(a).)

Subsection (1) does not have the effect of creating community burdens (s 23(2)).

Subsection (2) re-states the common law. Sometimes the wording of a constitutive deed excludes the existence of implied enforcement rights. The case mentioned in brackets is the main, but not the only, example.

Subsection (3) defines “adjacent unit”. In the measurement of the four metres there is to be disregarded (i) pertinents and (ii) any road if of less than twenty metres (s 116).

45 Tenements

Where by a constitutive deed registered before the appointed day real burdens are imposed under a common scheme on all the flats in a tenement, each flat shall be a benefited property in relation to the real burdens.

NOTE

This section, which implements recommendation 91, introduces a special rule for tenements (as defined by s 113(1)). See paragraphs 11.62 to 11.64 of the report. If common scheme burdens have been imposed in the manner indicated, the effect is to allow mutual enforceability within the tenement. Such burdens are then community burdens, unless the tenement has only three flats or fewer (s 23(1)). There is no requirement that the burdens are contained in a single deed, such as a deed of conditions, applying to the whole tenement. (Although “constitutive deed” is in the singular, the singular is deemed to include the plural: see the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 schedule 1 para 3(c).) In practice the burdens will often be contained in the split-off conveyances of individual flats.

46 Sheltered housing

- (1) Where by a constitutive deed registered before the appointed day real burdens are imposed under a common scheme on all the units in a sheltered housing development or on all such units except a unit which is used in some special way, each unit shall be a benefited property in relation to the real burdens.
- (2) In subsection (1) above, “sheltered housing development” means a group of dwelling-houses which, having regard to their design, size and other features, are particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) and which, for the purposes of such occupation, are provided with facilities substantially different from those of ordinary dwelling-houses.

NOTE

This section applies to sheltered housing the rule applied by s 45 to tenements. It implements recommendation 92. See paragraphs 11.65 to 11.67 of the report. The only point of distinction is the allowance made for units used in some special way (typically as a warden’s flat). Although not subject to the burdens, such units are given the status of benefited properties and, by s 24(2)(b), are part of the “community”. Burdens falling under s 46 are community burdens (s 23(3)).

47 Facility burdens and service burdens

Where by a constitutive deed registered before the appointed day—

- (a) a facility burden is imposed on land, then—
 - (i) any land to which the facility is (and is intended to be) of benefit; and
 - (ii) the heritable property which constitutes the facility,

shall be benefited properties in relation to the facility burden;

- (b) a service burden is imposed on land, then any land to which the services are provided shall be a benefited property in relation to the service burden.

NOTE

This section is based on, and replaces, s 23 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which is repealed by schedule 9). It extends the rule introduced by s 23 from feudal to non-feudal burdens. Section 47 implements recommendation 89. See paragraphs 11.34 to 11.42 of the report. The meaning of “facility burden” and “service burden” is given in s 113. The broad effect of s 47 is that facility and service burdens are enforceable by the owners (and tenants etc) of those properties for whose benefit they were conceived. By contrast to ss 44 to 46, there is no requirement that the benefited properties be subject to like burdens (although often they will).

48 Duty of Keeper to enter on title sheet statement concerning enforcement rights

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 he is satisfied that a real burden is enforceable by virtue of any of sections 44 to 47 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 is enforceable by virtue of the section in question;
and
- (ii) where he has sufficient information to enable him to describe the benefited property, a description of that property.

NOTE

This section is designed, so far as possible, to make the new implied enforcement rights apparent from the Land Register. It implements recommendation 94(d). See paragraph 11.85 of the report. 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 at all is imposed for the first ten years after the appointed day.

PART 5

REAL BURDENS: MISCELLANEOUS

49 Effect of extinction etc. on court proceedings

Where by virtue of this Act, a real burden is to any extent discharged, extinguished or made unenforceable, then on and after the day on which that happens (but only to the extent in question)—

- (a) no proceedings for enforcement shall be commenced;
- (b) any such proceedings already commenced shall, in so far as they do not relate to the payment of money, be deemed to have been abandoned on that day and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly; and

- (c) any decree or interlocutor already pronounced in proceedings for such enforcement shall, in so far as it does not relate to the payment of money, be deemed to have been reduced, or as the case may be recalled, on that day.

NOTE

Part 5 contains provisions on a number of miscellaneous matters affecting real burdens. The first of those, section 49, provides that real burdens cannot be enforced after (or to the extent that) they have been extinguished even although – by definition – the breach in question occurred prior to extinction. Paragraph (c) makes clear that an interdict, or order for specific implement, will not survive extinction of the burden itself. There is a partial exception for proceedings concluding for the payment of money, whether in relation to a debt or by way of damages. Section 49 is based on s 17(2) and (3) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, and implements recommendation 31. See paragraph 5.81 of the report.

50 Grant of deed where title not completed: requirements

- (1) Subject to subsection (2) below, where an owner who does not have a completed title to land is to grant, as respects a real burden—
 - (a) a constitutive deed;
 - (b) a deed of discharge; or
 - (c) a deed of variation,

then unless the deed is one to which section 15(3) of the 1979 Act (circumstances where unnecessary to deduce title) applies, it shall be necessary in the deed to deduce title to the land through the midcouples linking the owner to the person who had the last completed title to the land.

- (2) Where, under section 30 or 31 of this Act, a manager is to grant a deed of variation or discharge, it shall not be necessary to comply with subsection (1) above or with section 15(3) of the 1979 Act.

NOTE

This section, which implements recommendations 12(b) and 26(d) in part, introduces a requirement of deduction of title in cases where the owner granting the deed does not have a completed title. See paragraph 3.17 of the report. “Owner” in this section does not include a heritable creditor in possession (s 114(3)(a)). A constitutive deed is granted under s 4, and deeds of variation or discharge under ss 14, 30 and 31. (A deed of discharge under s 40 is not granted by an “owner” and so does not come within s 50.) The relevant land is the burdened property in the case of constitutive deeds, and the benefited property in the case of deeds of variation and discharge. The meaning of “midcouple” is given in s 113(1), and deduction of title should in practice follow the style set out in schedule A form 1 to the Conveyancing (Scotland) Act 1924. Deduction is excused in cases where the property is already on the Land Register (Land Registration (Scotland) Act 1979 s 15(3), as amended by schedule 8 para 6(4) of this Bill).

Subsection (2) makes clear that, if a deed of variation or discharge is granted by a manager, it does not matter if the owners (or some of them) do not have a completed title. No deduction of title is needed, nor, in Land Register cases, need midcouples be produced to the Keeper under s 15(3) of the 1979 Act.

51 Contractual liability incidental to creation of real burden

Incidental contractual liability which a constitutive deed (or a deed into which a constitutive deed is incorporated) gives rise to as respects a prospective real burden, ends when the deed has been duly registered and the real burden has become effective.

NOTE

This section, which implements recommendation 14, prevents dual validity as both a contract and a real burden. If an obligation is a real burden it is not to have contractual effect merely because it is contained in a delivered deed. See paragraphs 3.40 to 3.45 of the report. A disposition imposing burdens by reference to a deed of conditions is the leading example of a deed into which a constitutive deed is incorporated. The section does not apply in cases where, notwithstanding registration, no real burden is created (eg because the obligation does not comply with s 3). Nor (s 111(6)) does the section apply to constitutive deeds registered before the appointed day.

52 Real burdens of combined type

Where an obligation is constituted both as a nameable type of real burden (such as, for example, a community burden) and as a real burden which is not of that nameable type, then in so far as a provision of this Act relates specifically to real burdens of the nameable type the obligation shall be taken, for the purpose of determining the effect of that provision, to be constituted as two distinct real burdens.

NOTE

This section acknowledges the fact that the same obligation may be constituted as, for example, both a community burden and as a neighbour burden (ie a burden enforceable by someone outside the community). Other combinations are possible. Where it is necessary to do so, a combined burden is to be treated as two separate burdens.

53 Manager burdens

- (1) A real burden (whenever created) may make provision conferring on such person as may be specified in the burden power to—
 - (a) act as the manager of related properties;
 - (b) appoint some other person to be the manager of related properties; and
 - (c) dismiss any person appointed by virtue of paragraph (b) above,(a real burden making any such provision being referred to in this Act as a “manager burden”).
- (2) A power conferred by a manager burden is exercisable only if the person on whom the power is conferred is the owner of one of the related properties.
- (3) Where a power conferred by a manager burden is exercisable, any person who is, by virtue of that burden, a manager may not be dismissed under section 26(1)(d) or 54(1) of this Act.
- (4) The right to a manager burden may be assigned or otherwise transferred; and any such assignation or transfer shall take effect on the giving of written intimation to the owners of the related properties.
- (5) A manager burden shall be extinguished on the expiry of the shorter of the following periods—
 - (a) such period as may be specified in the burden; and
 - (b) in—
 - (i) the case mentioned in subsection (6) below, the period of thirty years; or

- (ii) any other case, the period of ten years, beginning with the day on which the constitutive deed creating the burden is registered.
- (6) The case is where the manager burden is a burden imposed on the sale of a property by—
 - (a) a person such as is mentioned in any of the sub-paragraphs of section 61(2)(a) of the Housing (Scotland) Act 1987 (c.26) (which sets out a list of landlords for the purposes of determining when a tenant has a right to buy his house); or
 - (b) a predecessor of any such person, to a tenant of such a person.
- (7) Sections 39 and 40 of this Act shall apply as respects manager burdens as those sections apply as respects conservation burdens and maritime burdens.
- (8) The reference, in subsection (2) above, to property does not include a reference to—
 - (a) any property which is used in some special way as mentioned in section 46(1) of this Act; or
 - (b) any facility which benefits two or more properties (examples of such a facility being, without prejudice to the generality of this paragraph, a private road and a common area for recreation).
- (9) Section 17(1) of the 2000 Act (extinction on appointed day of certain rights of superior) shall not apply to manager burdens.

NOTE

This section, which implements recommendation 6, identifies a new category of real burden, known as a manager burden. See paragraphs 2.29 to 2.39 of the report. But while the category is new, the burden itself is already familiar from current practice, and the section applies to existing real burdens as well as to those created after the section comes into force, on royal assent (s 119(3)).

By subsection (1) a “manager burden” is one which confers the power to act as, or to appoint, a manager. Typically such power would be conferred on a developer during the initial years of a housing or other development. By “related properties” is meant a group of properties which can sensibly be managed together, such as a tenement or housing estate. Subsection (1) is a qualification of the rule, stated in s 3(7), that a real burden must not have the effect of creating a monopoly. The meaning of “manager” is given in s 113(1).

The duration of a manager burden is as specified in subsection (5). But even during the permitted duration, the power cannot be exercised unless its holder owns one at least of the properties being managed. That is provided by subsection (2) (which should be read together with subsection (8)). In some manager burdens the power to appoint may be tied to one of the properties in particular. In that case it is a standard real burden, with a benefited property. Much more usually, however, the power will be conferred on a person without any reference to a benefited property. Such manager burdens then resemble conservation burdens and maritime burdens. But the effect of subsection (2) is to provide what is virtually a floating benefited property.

Subsection (3) prevents dismissal of the manager under the two dismissal provisions set out in the Bill. In theory the titles might confer an independent power of dismissal on the owners of the managed properties.

Subsection (4) makes clear that the holder of a manager burden may assign his right. Registration is not required, but there must be intimation.

The normal rule under subsection (5) is that a manager burden comes to an end after ten years.

Subsection (6) allows a duration of thirty years where the burden was imposed in a sale under the right-to-buy legislation for council houses, or otherwise in a sale by a local authority (or similar) to its tenant.

Subsection (7) imports the provisions on interest to enforce and discharge which apply to conservation and maritime burdens.

The effect of subsection (8) is to prevent the requirement of ownership of a managed property (imposed by subsection (2)) from being satisfied merely by ownership of a common facility or, in the case of a sheltered housing development, of a unit used in some special way (for example, the warden's flat).

Subsection (9) makes clear that a manager burden imposed in a grant in feu is not extinguished with the abolition of the feudal system. Instead it will be extinguished in accordance with subsection (5); and until that occurs the former superior will be able to exercise the power under the burden.

54 Overriding power to dismiss manager

- (1) Where a person is the manager of related properties, the owners of two-thirds of those properties may dismiss him; and such dismissal shall be effective notwithstanding the terms of any real burden affecting those properties.
- (2) Where a person was appointed as manager by virtue of a manager burden, any properties owned by a person who, at any time, was a holder of such burden shall be left out of account in calculating numbers of properties for the purposes of subsection (1) above.

NOTE

The general rule, for properties governed by community burdens, is that the manager may be dismissed by the owners of a majority of the units (s 26(1)(d)). But this rule can be altered in the titles, and a higher threshold imposed. Section 54 restricts that threshold. Whatever the titles may say, the owners of two thirds of units can always dismiss the manager. The meaning of "owner" is given in s 114. Section 54 implements recommendation 8. See paragraphs 2.41 to 2.44 of the report. The section is not confined to communities and community burdens, and applies to any group of related properties.

Subsection (2) introduces a special rule for managers appointed under a manager burden. For the duration of the burden, the manager cannot be dismissed under s 54 (see s 53(3)). But once the burden has expired, any properties owned by its (former) holder are discounted, and subsection (1) is applied on the basis of the remaining properties.

55 Manager: transitory provisions

Where, immediately before the appointed day, any person is, by virtue of any real burden or purported real burden, ostensibly the manager of related properties that person shall be deemed to have been validly appointed as such.

NOTE

Not all management provisions in title deeds are valid; and quite a number of burdens containing management provisions will in any case be extinguished on the appointed day under s 17(1)(a) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Section 55, as a transitional measure, ratifies any appointment made under such provisions. The manager will then be able to continue to act after the appointed day unless or until dismissed under ss 26(1)(d) or 54. Section 55 implements recommendation 7. See paragraph 2.40 of the report.

56 Discharge of rights of irritancy

- (1) All rights of irritancy in respect of a breach of a real burden are, on the day on which this section comes into force, discharged; and on and after that day—
 - (a) it shall not be competent to create any such right; and
 - (b) any proceedings already commenced to enforce any such right shall be deemed abandoned and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly.
- (2) Subsection (1)(b) above shall not affect any cause in which final decree (that is to say, any decree or interlocutor which disposes of the cause and is not subject to appeal or review) is granted before the coming into force of this section.

NOTE

Irritancy in this context means confiscation of the (burdened) property as a penalty for non-compliance with a real burden. This section implements recommendation 25 by abolishing the remedy, with effect from royal assent (s 119(3)). See paragraphs 4.71 to 4.73 of the report. Section 56 is based on s 53 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which abolishes feudal irritancies).

57 Requirement for repetition etc. of terms of real burden in future deed

In any deed (whenever executed) a requirement to the effect that the terms of a real burden shall be repeated or referred to in any subsequent deed shall be of no effect.

NOTE

In imposing real burdens there is sometimes added a requirement that the burdens be repeated in all future transmissions of the land on pain of nullity. The enforceability of this requirement is open to question; but special statutory provision (s 9(3)&(4) of the Conveyancing (Scotland) Act 1924) has been made for curing a failure to comply. Section 57 implements recommendation 15 by dispensing with any requirement to repeat burdens. See paragraph 3.46 of the report. The opportunity is also taken, in schedule 9, to repeal s 9(3)&(4) of the 1924 Act. This is a technical change only, and no change in practice is envisaged. In Sasine transactions and first registrations, dispositions should continue to list the burdens writs in order to avoid a claim in warrandice in respect of latent burdens.

58 Further provision as respects deeds of variation and of discharge

- (1) Where a deed of variation, deed of discharge or deed of disapplication is granted under this Act, it is not requisite that there be a grantee.
- (2) Any such deed so granted may be registered by an owner of the burdened property or by any other person against whom the real burden is enforceable.
- (3) Without prejudice to subsection (2) above—
 - (a) a deed of variation or deed of discharge granted under section 30 or 31;
 - (b) a deed of variation granted under section 62 or 63; or
 - (c) a deed of disapplication granted under section 65,of this Act may be registered by a granter.

NOTE

This section, which implements recommendation 26(c), makes additional provision in respect of extinctive deeds. See paragraph 5.13 of the report.

Subsection (1) makes clear that such a deed need not be granted in favour of any particular person.

Subsection (2), in effect, allows anyone who is subject to a real burden – including a tenant or other temporary possessor (see s 8(2)) – to procure a discharge or other extinctive deed and to register it in the property register.

The normal rule is that only a grantee can register: see the Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 5(1) (Register of Sasines), and the Land Registration (Scotland) Rules 1980 r 9(1) (Land Register). Subsection (3) allows registration by a granter in cases where the deed is granted by a majority of owners, by a manager, or by an owners' association. In at least some of these cases the grantee might oppose the deed and would not therefore be willing to register. In other cases allowing a manager (including a manager acting on behalf of an owners' association) to register is administratively convenient.

59 Duty to disclose identity of owner

A person who has title to enforce a real burden may require any person who, at any time, was an owner of the burdened property to disclose to him—

- (a) the name and address of the owner, for the time being, of such property; or
- (b) (if he cannot do that) such other information as he has which might enable the person entitled to enforce the burden to discover that name and address.

NOTE

Usually, affirmative burdens are enforceable only against the owner of the burdened property (s 8(1)); but since an “owner” includes a person whose title has not been completed by registration (s 114(1)), the identification of the current owner may not always be easy. Section 59, which implements recommendation 19(d), assists the enforcer by requiring any previous owner to pass on such information as he may have. See paragraph 4.35 of the report. (See s 7(2)&(4) for a list of those who have title to enforce a real burden.)

PART 6

DEVELOPMENT MANAGEMENT SCHEME

60 Development Management Scheme

- (1) The Development Management Scheme (that is to say, the scheme set out in schedule 3 to this Act) may be applied to any land by registering against the land (in this Part of this Act referred to as “the development”) a deed of application granted by, or on behalf of, the owner of the land or may be thus applied with such variations as may be specified in the deed; and the scheme shall take effect in relation to that land on the date of registration or, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.)—
 - (a) on such later date as may be so specified (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or
 - (b) on the date of registration of such other deed as may be so specified,and different provision for the taking effect of the scheme may be made for different parts of the development.

- (2) The deed of application shall include specification or description of the matters which the scheme as so set out requires shall be specified or described, that is to say—
- (a) the meaning, in the scheme, of the expressions “the development”, “scheme property” and “unit”;
 - (b) the name by which the owners’ association is to be known; and
 - (c) (subject to any variation of rule 7.3 of the scheme by virtue of subsection (1) above) the name and address of the first manager.

NOTE

This section introduces part 6, which is concerned with the Development Management Scheme. See generally part 8 of the report. The Scheme itself is set out in schedule 3 to the Bill, and the provisions in part 6 are largely of an ancillary nature.

The Development Management Scheme applies if, and only if, the owner of the property in question so decides. Section 60, which implements recommendation 53(a) to (f), sets out the method by which the Scheme may be applied. See paragraphs 8.7 to 8.11 of the report.

Subsection (1) provides that the Scheme should apply on registration of a deed to that effect. No special form of deed is required. It must be granted by the owner of the property in question. “Owner” includes a person who has right to the property but has not completed title by registration (s 114(1)(a)), but (s 50(1), applied by s 61) there must then be deduction of title (other than for land already on the Land Register). An owner “grants” a deed by subscribing it in accordance with s 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under s 3 of that Act. The Scheme takes effect, either immediately on registration, or on a date identified in terms of paragraphs (a) or (b) (which are based on s 4(1)). The Scheme may be applied either in the form enacted, or with variations (other than, generally, of part 2: see s 64).

The Scheme as set out in schedule 3 contains a number of blanks where information is required which is particular to the development in question. Subsection (2) requires that the information be given in the deed of application.

61 Application of other provisions of this Act to rules of Scheme

Sections 2, 3, 5, 9 (except subsection (4)(a)), 10, 12, 13, 15, 16, 49, 50, 51, 54, 56 to 59 and 85 to 100 of this Act apply in relation to the rules of the Development Management Scheme (but not the rules of Part 2 of that scheme) as those sections apply in relation to community burdens; except that, for the purposes of that application, in those sections any reference—

- (a) to an owner of a benefited property shall be construed as to the manager of the owners’ association;
- (b) to a benefited property shall be construed as to a unit of the development in so far as advantaged by those rules;
- (c) to a burdened property shall be construed as to a unit of the development in so far as constrained by those rules;
- (d) to a community shall be construed as to the development; and
- (e) to a constitutive deed shall be construed as to the deed of application.

NOTE

Although the rules of the Scheme are not real burdens, they have a close functional resemblance, particularly to community burdens. This is acknowledged in s 61, which applies a number of provisions from parts of the Bill

concerned with real burdens. In addition to the provisions listed, ss 78 to 80 (pre-emptions) will also apply, on the basis that Scheme rules (other than those in part 2) are “title conditions” (s 113(1)). Section 61 implements recommendation 67. See paragraphs 8.80 and 8.81 of the report.

62 Variation of Scheme as it affects certain units

- (1) This section applies where the Development Management Scheme is to be varied in relation to—
 - (a) a single unit; or
 - (b) units fewer than one-half of those in the development,(a unit in respect of which the scheme is to be so varied being, in subsections (2) to (4) below, referred to as an “affected unit”).
- (2) Subject to subsection (3) below, the scheme may be so varied by registering against each affected unit a deed of variation granted—
 - (a) in accordance with the scheme, by the owners’ association; and
 - (b) by the owner of at least one adjacent unit of each affected unit which has an adjacent unit.
- (3) A deed purporting to impose a new obligation shall, to the extent that it purports to do so, be invalid unless it is granted by the owner of each affected unit.
- (4) For the purposes of subsection (2) above, “adjacent unit” means any unit which is at some point within four metres of the affected unit.

NOTE

The Scheme can be varied after it has been applied to a particular development. Variation of “the Scheme” (as opposed to individual rules) includes the idea of discharge. It also includes the imposition of new obligations (s 113(1)). Part 2 of the Scheme is not generally variable (s 64). The relevant provisions are ss 62 and 63. Section 62 is concerned mainly with variation in respect of individual units while s 63 applies where the Scheme is to be varied for all (or most of) the development. The meaning of “unit” is given in s 113(1) and in r 1 of the Scheme.

Section 62 implements recommendation 70. See paragraphs 8.92 and 8.93 of the report. The scope of the provision is set out in subsection (1).

Subsections (2) and (3) set out the basic rule. In general a deed of variation must be granted by the owners’ association and by the owner of an adjacent unit (defined in subsection (4)). If the deed imposes a new obligation it must also be granted by the owner of the affected unit. “Owner” includes a person who has right to the unit but has not completed title by registration (s 114(1)(a)); but (s 50(1) applied by s 61) there must then be deduction of title (other than for units on the Land Register). Where a unit is owned in common, both (or all) *pro indiviso* owners must grant. (Section 62 refers to “the” owner.) Paragraph (a) of subsection (2) requires that the owners’ association grant “in accordance with the scheme”; and the Scheme as set out in schedule 3 (rules 5 and 16.1) empowers the manager to make the grant on behalf of the association, subject to consultation with the advisory committee (if any) and a report to the next general meeting.

The manager or owner “grants” the deed by subscribing in accordance with s 2 of the Requirements of Writing (Scotland) Act 1995, and in practice the deed will also be witnessed under s 3 of that Act. A grantee is not required (s 58(1) applied by s 61). No particular deed or form of deed is specified. Registration can be by a grantor as well as by a grantee (s 58(2)&(3)); and while the deed need only be registered against the affected unit, the Keeper has power to make a corresponding entry against the title sheets of the other units in the community (s 97 applied by s 61).

Subsection (4) gives the meaning of “adjacent unit”. In the measurement of the four metres there is to be disregarded (i) pertinents and (ii) any road if of less than twenty metres (s 116).

63 Variation of Scheme where section 62 not applicable

- (1) The section applies where the Development Management Scheme is to be varied otherwise than as is mentioned in section 62(1) of this Act (property in respect of which the scheme is, under this section, to be varied being, in subsection (2) below, referred to as affected property and a unit in respect of which the scheme is so to be varied being, in subsection (3) below and in section 66(1)(a) of this Act, referred to as an affected unit).
- (2) The scheme may be so varied by registering against the affected property a deed of variation granted, in accordance with the scheme, by the owners’ association.
- (3) A deed of variation shall not be registrable under subsection (2) above unless the owner of each affected unit has been—
 - (a) given sufficient notice; and
 - (b) informed that, if neither he nor any predecessor of his as owner agreed to the granting of the deed, he may, within eight weeks after being given that notice, apply to the court under section 66(1) of this Act for reduction of the deed,and for the purposes of paragraph (a) above, sufficient notice is given by sending a copy of the deed together with a note containing the information required by paragraph (b) above.

NOTE

This section implements recommendation 69(a) to (c). See paragraphs 8.89 to 8.91 of the report. Subsection (1) sets out the scope. “Property” is distinguished from “unit” because a development will usually contain more than just units. Section 63 is likely to be used mainly for variation affecting the whole development.

Subsection (2) sets out the method of variation. An owners’ association grants “in accordance with the scheme” if it approves the variation by a special majority of owners at a general meeting (r 16.2). The deed itself is executed by the manager (r 5) in accordance with the Requirements of Writing (Scotland) Act 1995. A grantee is not required (s 58(1) applied by s 61), and the manager can register (s 58(3)). No particular deed or form of deed is specified.

Subsection (3) requires that a copy of the executed deed be sent to the owner of each affected unit. Rules for sending are given in s 115. The deed must be accompanied by a notice advising of the right to make an application under s 66.

64 Restrictions on variation of Part 2 of Scheme

Part 2 of the Development Management Scheme may be varied by virtue of section 60, 62 or 63 of this Act so as to alter the powers of the owners’ association but not so as to grant that association power to acquire land outwith the development or to carry on any trade the object of which is to make a profit; and otherwise that part shall not be varied under any of those sections.

NOTE

Part 2 of the Scheme is generally non-variable. This is because it sets out the legal framework of the Scheme, and in particular of the owners' association. But s 64 permits (with qualifications) alterations of the powers of the owners' association, as set out in r 3.2. This implements recommendation 71(a). See paragraph 8.94 of the report.

65 Disapplication

- (1) The Development Management Scheme may be disapplied to the development, or to any part of the development, by registering against the development or as the case may be the part, a deed of disapplication granted in accordance with the scheme by the owners' association; and the disapplication shall take effect—
 - (a) on the date of registration; or
 - (b) notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), on such later date as may be specified in the deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event).
- (2) A deed of disapplication shall not be registrable under subsection (1) above unless the owner of each unit in the development has been—
 - (a) given sufficient notice; and
 - (b) informed that, if neither he nor any predecessor of his as owner agreed to the granting of the deed, he may, within eight weeks after being given that notice, apply to the court under section 66(1) of this Act for reduction of the deed,and for the purposes of paragraph (a) above, sufficient notice is given by sending a copy of the deed together with a note containing the information required by paragraph (b) above.
- (3) The deed of disapplication may by means of real burdens provide for the future management and regulation—
 - (a) in the case of disapplication to the development, of the development or of any part of the development; or
 - (b) in the case of disapplication to a part of the development, of that part or of any part of that part,and section 4 of this Act shall apply accordingly except that paragraph (b) of subsection (2) of that section shall, for the purposes of this subsection, apply with the substitution, for the reference to the owner of the land which is to be burdened property, of a reference to the owners' association.
- (4) Rule 6 of the scheme, and any other rule of the scheme in so far as applicable as respects the winding up of the owners' association, shall continue to have effect notwithstanding the disapplication of the scheme to the development.

NOTE

Once applied to a development by a deed of application under s 60, the Scheme continues to apply unless or until it is formally disapplied. Section 65, which implements recommendation 72, gives the rules for disapplication. See paragraphs 8.97 to 8.99 of the report.

Subsection (1) provides that the Scheme should cease to apply on registration of a deed to that effect (or on a later date specified in the deed). No special form of deed is required. An owners' association grants "in accordance with the scheme" if it approves the disapplication by a special majority of owners at a general meeting (r 16.2). The deed itself is executed by the manager (r 5) in accordance with the Requirements of Writing (Scotland) Act

1995. A grantee is not required (s 58(1) applied by s 61), and the manager can register (s 58(3)). Partial disapplication is allowed, and in practice would probably be accompanied by a variation of the Scheme under s 63.

Subsection (2) requires that a copy of the executed deed be sent to the owner of each unit in the development. Rules for sending are given in s 115. The deed must be accompanied by a notice advising of the right to make an application under s 66.

The disapplication of the Scheme may leave an administrative vacuum. Accordingly subsection (3) allows the deed to include real burdens for the future management and regulation of the land. This is an exception to the rule (s 4(2)(b)) that real burdens may only be imposed by the owner of the burdened property.

Even after disapplication, some of the rules of the Scheme (most notably r 6) will be needed in order to allow the winding up of the owners' association. Subsection (4) makes the necessary provision.

66 Reduction of deed of variation or of disapplication

(1) Where—

- (a) a deed of variation has been granted by virtue of section 63 of this Act, any owner of an affected unit; or
- (b) a deed of disapplication has been granted by virtue of section 65 of this Act, any owner,

if neither he nor any predecessor of his as owner agreed to the granting of the deed, may, during the period mentioned in subsection (3) below, apply to the court for reduction of—

- (i) the deed; or
- (ii) such part of it as may be specified in the application.

(2) A person making application under subsection (1) above shall forthwith give written intimation in that regard to the Keeper of the Registers of Scotland; and such intimation shall include information sufficient to enable the Keeper to identify the deed.

(3) The period is the period of eight weeks beginning with the date on which, in the case of—

- (a) variation under section 63, notice is given under subsection (3)(a) of that section to the owner of the affected unit;
- (b) disapplication under section 65, notice is given under subsection (2)(a) of that section to the owner of the unit in question.

(4) The court may, if satisfied that the deed in question—

- (a) is not in the best interests of all the owners; or
- (b) is unfairly prejudicial to one or more of the owners,

grant decree of reduction (either in whole or to such extent, or subject to such modifications, as may be specified in the decree).

(5) An extract of any decree granted under subsection (4) above may be registered.

(6) Notwithstanding section 5(4) of the Sheriff Courts (Scotland) Act 1907 (c.51) (exclusion of actions of reduction from jurisdiction of sheriff court), it shall be competent to bring an action under this section in the sheriff court; and accordingly in subsections (1) and (4) above “court” means Court of Session or sheriff.

(7) In any such application as is mentioned in subsection (1) above, the defender shall be the owners' association.

NOTE

This section, which implements recommendations 69(d) to (g) and 72(e), allows a dissenting owner to apply for reduction of a deed of variation or disapplication granted under ss 63 and 65 (but not s 62). See paragraphs 8.90 and 8.97 of the report. Any owner can apply, including a *pro indiviso* owner. The provision is based on s 32.

Subsection (2) requires notice to the Keeper. This is because the deed may already have been presented for registration.

Subsection (3) sets out the time within which an application must be made. Notice is “given” under ss 63(3)(a) and 65(2)(a) by being sent; and a document, if sent by post or electronic means, is treated as sent on the day of posting or transmission (s 115(3)). The relevant period is the eight weeks beginning on the day on which notice was given to the particular applicant (or a predecessor as owner) – even if later notice was given to other owners.

Subsection (4) sets out the grounds on which reduction may be granted.

Subsection (5) allows registration of any extract decree. In the case of the Land Register this means that a reduction can enter the Register by registration rather than (as usually) by rectification.

Subsection (6) confers jurisdiction on the sheriff, contrary to the usual rule for reductions.

67 Application to sheriff for annulment of certain decisions made under Scheme

- (1) Any owner of a unit in the development may, by summary application to the sheriff, seek an order annulling a decision made by the owners’ association at a general meeting provided that no vote allocated to that unit was cast in favour of the decision.
- (2) An application by an owner under subsection (1) above shall be made—
 - (a) in a case where the decision was made at a meeting attended by the owner, not later than twenty-eight days after the date of that meeting; or
 - (b) in any other case, not later than twenty-eight days after the date on which notice of the making of the decision was sent to the owner for the time being of the unit in question.
- (3) The sheriff may, if satisfied that the decision—
 - (a) is not in the best interests of all the owners; or
 - (b) is unfairly prejudicial to one or more of the owners,make an order annulling the decision (in whole or in part).
- (4) Where such an application is made as respects a decision to carry out maintenance, improvements or alterations, the sheriff shall, in determining whether he is satisfied as to the matters mentioned in subsection (3) above, have regard to—
 - (a) the age of the property which is to be maintained, improved or, as the case may be, altered;
 - (b) its condition;
 - (c) the likely cost of any such maintenance, improvements or alterations; and
 - (d) the reasonableness of that cost.
- (5) Where the sheriff makes an order under subsection (3) above annulling a decision (in whole or in part), he may make such other, consequential, order as he thinks fit (as, for example, an order as respects the liability of owners for any costs already incurred).

- (6) A party may not later than fourteen days after the date of—
 - (a) an order under subsection (3) above; or
 - (b) an interlocutor dismissing such an application, appeal to the Court of Session on a point of law.
- (7) A decision of the Court of Session on an appeal under subsection (6) above shall be final.
- (8) For the purposes of any such application the defender shall be the owners' association.

NOTE

Section 66 is concerned with the reduction of certain deeds. Section 67, which implements recommendation 59, confers on the sheriff a general jurisdiction to annul decisions made at general meetings. See paragraphs 8.40 to 8.44 of the report.

Subsection (1) sets out the entitlement and the basic procedure. Any owner can apply, including a *pro indiviso* owner.

Subsection (2) sets out the time within which an application must be made. In relation to paragraph (b), notice will usually be sent by the manager under r 12.3 of the Scheme. If sent by post or electronic means, notice is treated as sent on the day of posting or transmission (s 115(3)). The relevant period is then the four weeks beginning on the day on which notice was sent to the particular applicant (or a predecessor as owner) – even if later notice was sent to other owners.

Subsection (3) sets out the grounds on which a decision may be annulled.

Subsection (4) only applies in cases where the decision under challenge relates to maintenance, improvements or alterations. It sets out the circumstances which the sheriff must take into account in deciding whether he is satisfied on the matters mentioned in subsection (3). Not all the circumstances will be relevant in every case. Circumstances (a) to (c) will be important when it is argued that a building has deteriorated too far to make repair worthwhile. Circumstance (d) will be important when it is argued that the repair, while justifiable, could be carried out more cheaply.

In some cases costs might have been incurred before the application was disposed of by the sheriff. Subsection (5) allows the sheriff to make consequential orders on this, and other, matters.

Subsection (6) is based on s 106(5) of the Civic Government (Scotland) Act 1982.

Subsection (7) is based on s 106(6) of the Civic Government (Scotland) Act 1982.

68 Rights of creditors

- (1) Where—
 - (a) a debt due by the association satisfies the conditions mentioned in subsection (2) below; or
 - (b) the owners' association of the development is being, or has been, wound up,
 any creditor of the association shall be entitled to recover the debt from the members of the association (or, as the case may be, from those who were at the commencement of the winding up such members) as if he were the manager of the association recovering, in accordance with the provisions of the Development Management Scheme, a service charge from the members (or from those who were members).

- (2) The conditions are that—
- (a) the debt is constituted by—
 - (i) decree; or
 - (ii) a document which has been registered for execution in the Books of Council and Session or, as the case may be, in the appropriate sheriff court books kept for any sheriffdom; and
 - (b) either—
 - (i) the creditor has executed diligence but has not recovered the debt in full; or
 - (ii) it does not appear that the association has any assets which reasonably could be recovered by diligence.

NOTE

This section, which implements recommendation 64, allows a creditor to go behind the owners' association and make direct recovery from individual owners. See paragraphs 8.63 to 8.70 of the report.

Subsection (1) allows direct recovery only where the debt cannot be recovered from the association or where the association is being (or has been) wound up. The creditor is put in the same position as the manager and can recover from the members by means of a service charge under r 19 of the Scheme. The liability of individual owners is regulated by r 19.1.

Subsection (2) sets out the conditions referred to in subsection (1)(a).

69 Liability of successor for service charge

Where a person who becomes, or is to become, an owner of a unit in the development obtains a certificate signed by the manager of the owners' association stating that as at the date on which it is signed no service charge is outstanding as respects such unit or, as the case may be, that any service charge due does not exceed an amount specified in the certificate, then, apart from a service charge no greater than the amount so specified, that person shall not be liable for any service charge which was outstanding on that date.

NOTE

Usually an incoming owner is liable for any unpaid service charge, subject to a right of relief against the seller (s 9, applied by s 61). Section 69, which implements recommendation 60(o), limits that liability in a case where a certificate has been obtained from the manager. See paragraph 8.52 of the report. By r 4.8 of the Scheme the manager is placed under a duty to supply such a certificate on request.

70 Power of Scottish Ministers to vary schedule 3

- (1) The Scottish Ministers may by regulations vary schedule 3 to this Act.
- (2) Any variations of that schedule contained in regulations made under subsection (1) above shall not apply as respects that schedule as applied (or applied with variations) under section 60 of this Act by virtue of a deed executed before the coming into force of the regulations.

NOTE

This section empowers Scottish Ministers to vary the Scheme, as set out in schedule 3; but, as subsection (2) makes clear, this has no effect on the Scheme as already applied to a development. The relevant date is the date of execution of the deed of application. Section 70 implements recommendation 53(f). See paragraph 8.6 of the report.

PART 7

SERVITUDES

Positive servitudes

71 Creation of positive servitude by writing: deed to be registered

- (1) A deed is not effective to create a positive servitude by express provision unless it is registered against both the benefited property and the burdened property.
- (2) It shall be no objection to the validity of a positive servitude that, at the time when the deed was registered as mentioned in subsection (1) above, the same person owned the benefited property and the burdened property; but, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), the servitude shall not be created while that person remains owner of both those properties.
- (3) Subsection (1) above—
 - (a) is subject to section 3(1) of the Prescription and Limitation (Scotland) Act 1973 (c.52) (creation of positive servitude by 20 years' possession following execution of deed);
 - (b) does not apply to servitudes such as are mentioned in section 73(1) of this Act.

NOTE

Part 7 of the Bill is not a re-statement of the law of servitudes. Instead the provisions of the part are narrow and focused, and pre-suppose the underlying common law. The first, s 71, introduces a requirement of dual registration in the creation of servitudes by deed. Under the present law, the right to such a servitude can be completed by possession or alternatively by registration against either property. Subsection (1) requires registration against both properties, as with real burdens (for which see s 4(5)). Possession is no longer sufficient. By s 113(1) “registration” means registration of the servitude in the Land Register or recording of the deed in the Register of Sasines. This provision implements recommendation 98(a). See paragraphs 12.17 to 12.19 of the report. The requirement is expressed negatively, and no rule is given as to the time of creation. The terminology will be noted: “benefited property” and “burdened property”, as in the rest of the Bill, rather than the traditional “dominant tenement” and “servient tenement”. Subsection (1) has no effect on servitudes created by other means, such as by positive prescription (for which see subsection (3)), or by implication in a deed. Nor (s 111(7)) does it apply to deeds executed before the appointed day.

Subsection (2) removes the common law rule that benefited and burdened properties must be in separate ownership at the time of registration. But registration would not then mark the time at which the servitude is created (contrary, in Land Register cases, to s 3(4) of the Land Registration (Scotland) Act 1979). Subsection (2) implements recommendation 98(b). See paragraph 12.21 of the report.

Subsection (3) makes two qualifications to the requirement of dual registration set out in subsection (1). Section (3)(1) of the Prescription Act, referred to in paragraph (a), allows a servitude to be created by unregistered deed followed by twenty years possession. Paragraph (b), for practical reasons, exempts pipeline servitudes. See paragraph 12.19 of the report.

72 Disapplication of requirement that positive servitude created in writing be of a known type

- (1) Any rule of law that requires that a positive servitude be of a type known to the law shall not apply in relation to any servitude created in accordance with section 71(1) of this Act.
- (2) Nothing in subsection (1) above permits the creation of a servitude that is repugnant with ownership.

NOTE

This section, which implements recommendation 98(c), breaks the *numerus clausus* (fixed list) of positive servitudes. See paragraphs 12.22 to 12.24 of the report. A servitude created expressly by deed, under s 71(1), need no longer fall within a type already known to the law. But the fixed list remains in place for servitudes created in any other way.

Even without the fixed list, the question of what may constitute a valid servitude is subject to a number of limitations. Subsection (2) adds a further limitation, in imitation of s 3(6).

73 Positive servitude of leading pipes etc. over or under land

- (1) A right to lead a pipe, cable, wire or other such enclosed unit over or under land for any purpose may be constituted as a positive servitude.
- (2) It shall be deemed always to have been competent to constitute a right such as is mentioned in subsection (1) above as a servitude.

NOTE

This provision removes, retrospectively, a doubt which has sometimes been expressed as to the current law by making clear that all pipeline servitudes are included in the fixed list of servitudes. It implements recommendation 99. See paragraph 12.26 of the report.

74 Discharge of positive servitude

A positive servitude which has been—

- (a) registered against the burdened property; or
- (b) noted in the title sheet of the burdened property in pursuance of section 6(4) of the 1979 Act (duty of Keeper to note in title sheet overriding interest affecting interest in land),

is discharged by deed only on registration of the deed against the burdened property.

NOTE

Under the present law a servitude can be discharged by an unregistered deed. Section 74, which implements recommendation 98(d), introduces a requirement of registration in cases where the servitude appears on the register against the *burdened* property. See paragraph 12.20 of the report. Registration must then be against the burdened property also, although the Keeper has discretion to make a consequential amendment to the title sheet of the benefited property (s 97). In other cases, registration is not required (though may be desirable). Section 74 does not apply to discharges executed before the appointed day (s 111(7)). Further, it does not affect other methods of extinguishing a servitude, such as negative prescription or confusion.

Negative servitudes

75 Prohibition on creation of negative servitude

On the appointed day it shall cease to be competent to create a negative servitude.

NOTE

This section prevents the creation of negative servitudes on or after the appointed day. Instead it will be necessary to use (negative) real burdens: see s 2(1)(b). All servitudes in the future will therefore be positive in nature. This implements recommendation 95. See paragraphs 12.2 and 12.3 of the report.

Transitional

76 Negative servitudes to become real burdens

- (1) A negative servitude shall, on the appointed day, cease to exist as such but shall forthwith become a real burden (such a real burden being, for the purposes of this section, referred to as a “converted servitude”).
- (2) Subject to subsections (3) and (4) below, a converted servitude shall be extinguished on the expiry of the period of ten years beginning with the appointed day.
- (3) If, before the appointed day, a negative servitude was registered against the burdened property the converted servitude shall not be extinguished as mentioned in subsection (2) above.
- (4) If, during the period mentioned in subsection (2) above, an owner of the benefited property executes and duly registers, in (or as nearly as may be in) the form contained in schedule 4 to this Act, a notice of converted servitude, the converted servitude shall not be extinguished as mentioned in subsection (2) above (in so far as the burdened property, the benefited property and the converted servitude are the burdened property, the benefited property, and the converted servitude identified in the notice of converted servitude).
- (5) The notice of converted servitude shall—
 - (a) identify the land which is the burdened property (or any part of that land);
 - (b) identify the land which is the benefited property (or any part of that land);
 - (c) where the person registering the notice does not have a completed title to the benefited property, set out the midcouples linking him to the person who last had such completed title;
 - (d) set out the terms of the converted servitude;
 - (e) include as an annexation the constitutive deed, if any (or a copy of such deed); and
 - (f) if the land identified for the purposes of paragraph (b) above is not nominated in the constitutive deed, set out the grounds, both factual and legal, for describing that land as a benefited property.
- (6) For the purposes of subsection (4) above, a notice is, subject to section 108 of this Act, duly registered only when registered against both properties identified in pursuance of subsection (5)(a) and (b) above.
- (7) Subsections (4) and (5) of section 42 of this Act shall apply in respect of a notice of converted servitude as they apply in respect of a notice of preservation.

(8) This section is subject to section 107 of this Act.

NOTE

This is the first of two transitional provisions consequential on the realignment of the boundary between real burdens and servitudes. New negative servitudes having been prevented by s 75, s 76 provides for the conversion of all existing negative servitudes into real burdens. The section implements recommendation 96. See paragraphs 12.6 to 12.14 of the report.

Subsection (1) provides for the automatic conversion of negative servitudes into negative burdens. (See s 2(2)(b) for the meaning of “negative burdens”.)

Subsections (2) and (3) provide for the extinction after ten years of all negative servitudes (now negative burdens) which were not, before the appointed day, registered against the burdened property. The delayed extinction is to give the opportunity to register a notice under subsection (4).

Subsection (4) provides that a converted servitude is not extinguished under subsection (2) if a notice is registered during the ten years beginning with the appointed day. Any owner, including a *pro indiviso* owner, may register.

Subsection (5) specifies the content of a notice of converted servitude. A statutory form is given in schedule 4. The notice may be restricted to a part only of the benefited or burdened properties (see paragraphs (a) and (b)). A title completed by registration is not required (see the definition of “owner” in s 114(1)), but in that case paragraph (c) requires that the midcouples be listed. In Land Register cases the Keeper will no doubt wish to inspect the midcouples. The meaning of “midcouples” is given in s 113(1). Paragraph (f) is the equivalent of s 42(2)(e) and avoids the need for a separate notice of preservation under that provision.

Consistently with s 4(5) (for new real burdens), subsection (6) requires dual registration.

Subsection (7) imports the requirement of s 42 that the notice be sworn or affirmed before a notary public.

Section 107, referred to in subsection (8), makes further provision as to notices of converted servitude (and of preservation).

77 Certain real burdens to become positive servitudes

- (1) A real burden consisting of a right to enter, or otherwise make use of, the burdened property shall, on the appointed day, cease to exist as such but shall forthwith become a positive servitude.
- (2) Subsection (1) above—
 - (a) is subject to section 17(1) of the 2000 Act (extinction on appointed day of certain rights of superior);
 - (b) does not apply to real burdens such as are mentioned in section 2(3)(a) of this Act.

NOTE

This section implements recommendation 97. See paragraph 12.15 of the report. Where a real burden imitates a positive servitude, it is converted into such a servitude on the appointed day. Future imitation is prevented by s 2(1).

Paragraph (a) of subsection (2) makes clear that s 77 does not apply to feudal burdens which are extinguished, on the appointed day, by s 17(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Paragraph (b) excludes by far the most common case of real burdens of entry and use, namely those burdens (“ancillary burdens”: see s 2(4)) whose purpose is ancillary to some other type of real burden. The exclusion is made necessary by the fact that ancillary burdens are permitted in the future, by s 2(3).

PART 8

PRE-EMPTION AND REVERSION

Pre-emption

78 Application of sections 79 and 80

Sections 79 and 80 of this Act apply to any subsisting right of pre-emption constituted as a title condition which—

- (a) was originally created in favour of a feudal superior; or
- (b) was created in a deed executed after 1st September 1974.

NOTE

This provision introduces a group of sections (ss 78 to 80) concerned with rights of pre-emption. Together they implement recommendation 83. See paragraphs 10.35 to 10.40 of the report.

The effect of s 78 is to give the provisions the same scope as s 9 of the Conveyancing Amendment (Scotland) Act 1938 (as amended). “Title condition” is defined in s 113(1). It is wider than real burden and includes, for example, pre-emptions created in long leases.

The scope of paragraph (a) is likely to be limited. Many feudal pre-emptions have already been extinguished under s 9 of the 1938 Act. Those which remain will be extinguished on the appointed day by s 17(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 unless reallotted under ss 18, 19 or 20 of that Act.

79 Extinction following pre-sale undertaking

- (1) Where, in relation to any burdened property (or, as the case may be, part of such property)—
 - (a) the holder of a right of pre-emption to which this section applies gives an undertaking (in the form, or as nearly as may be in the form, contained in schedule 5 to this Act) that, subject to such conditions (if any) as he may specify in the undertaking, he will not exercise that right during such period as may be so specified;
 - (b) a conveyance in implement of the sale of the burdened property (or part) is registered before the end of that period; and
 - (c) any conditions specified under paragraph (a) above have been satisfied,such right shall, on registration of such a conveyance, be extinguished.
- (2) Any undertaking given under subsection (1) above—
 - (a) is binding on the holder of the right of pre-emption and any successor as holder; and
 - (b) may be registered.

NOTE

Subsection (1) allows the owner of the burdened property to obtain, in advance of a sale, an undertaking that a right of pre-emption will not be exercised for a specified period and subject (if desired) to specified conditions. The “holder” of a right of pre-emption is the owner of the benefited property (s 7(4)) or, in the case of a pre-

emption in a lease, the landlord. A statutory form of undertaking is set out in schedule 5. If the property is then sold within the specified period, and if the other conditions are met, the pre-emption is extinguished on registration of the conveyance.

Subsection (2) makes clear that successors of the holder are bound by the undertaking.

80 Extinction following offer to sell

- (1) If in relation to a right of pre-emption to which this section applies—
 - (a) an event specified in the constitutive deed as an event on the occurrence of which such right may be exercised occurs; and
 - (b) the owner of the burdened property makes, in accordance with subsections (2) to (6) below, an offer to sell that property (or, as the case may be, part of that property) to the holder of such right,then such right shall, in relation to that property (or part), be extinguished.
- (2) An offer shall be in writing and shall comply with section 2 of the Requirements of Writing (Scotland) Act 1995 (c.7) (requirements for formal validity of certain documents).
- (3) An offer shall be open for acceptance during whichever is the shorter of—
 - (a) the period of 21 days beginning with the day on which the offer is sent;
 - (b) such number of days beginning with that day as may be specified in the constitutive deed.
- (4) An offer shall be made on such terms as may be set out, or provided for, in the constitutive deed; but in so far as no such terms are set out, an offer shall be made on such terms (including any terms so provided for) as are reasonable in the circumstances.
- (5) Where—
 - (a) an offer is sent in accordance with this section; and
 - (b) the holder of the right does not, within the time allowed by virtue of subsection (3) above for acceptance of the offer, inform (in writing) the owner of the burdened property that he considers that the terms on which the offer is made are unreasonable,the terms of the offer shall, for the purposes of subsection (4) above, be deemed to be reasonable.
- (6) If the holder of a right cannot by reasonable inquiry be identified or found, an offer may be sent to the Extractor of the Court of Session; and for the purposes of this section an offer so sent shall be deemed to have been sent to the holder.

NOTE

This provision is based on, and replaces, s 9 of the Conveyancing Amendment (Scotland) Act 1938 (which is repealed by schedule 9). It applies to the pre-emptions mentioned in s 78.

Subsection (1) provides that a pre-emption is extinguished if, on sale or other trigger event, the property is offered back to the pre-emption holder. It makes no difference whether the offer is accepted or rejected. As with s 9 of the 1938 Act, the extinction is for all time.

Subsection (2) specifies the form of the offer. This does no more than give effect to s 1(2)(a)(i) of the 1995 Act.

Subsection (3) provides that the offer lapses after a maximum period of 21 days from the date on which it is sent. An offer which is posted or transmitted by electronic means is taken to be sent on the day of posting or transmission (s 115(3)).

Usually the constitutive deed provides that the offer back is to be made on the same terms as any offer received and which it is proposed to accept. These are terms “provided for” in the sense of subsection (4). The effect of that subsection is that the terms must themselves be reasonable, and that unreasonable terms should not be included in the offer back. Subsection (4) also allows additional terms.

Subsection (5) provides that the terms of the offer back are deemed reasonable, within subsection (4), unless their reasonableness is challenged in writing within the 21-day period.

Subsection (6) makes provision for the case where the pre-emption holder cannot be identified.

81 Ending of council’s right of pre-emption as respects certain churches

In a scheme framed under subsection (1) of section 22 of the Church of Scotland (Property and Endowments) Act 1925 (c.33) (schemes for the ownership, maintenance and administration of churches etc.), any provision made in accordance with subsection (2)(h) of that section (council’s right of pre-emption) shall cease to have effect.

NOTE

Schemes for burgh churches made under s 22(1) of the 1925 Act may, by s 22(2)(h) of that Act, include a right of pre-emption in favour of local authorities in the event that the church is to be sold. The effect of s 81 is to extinguish any such pre-emptions. Section 22(2)(h) of the 1925 Act is repealed by schedule 9 of the Bill. This implements recommendation 85(a). See paragraph 10.42 of the report.

Reversion

82 Reversions under School Sites Act 1841

- (1) In a case where, in relation to land—
 - (a) any person to whom the ownership of the land would, under the third proviso to section 2 of the School Sites Act 1841 (4 & 5 Vict. c.38), revert (any such person and that Act being referred to in this section, respectively, as the “claimant” and “the 1841 Act”) claims, on or after the day on which this section comes into force, a right of reversion under that proviso; and
 - (b) the claimant has not, before that day, claimed that right in relation to such land,subsections (2) to (6) below (and not that proviso) shall apply.
- (2) Where—
 - (a) on the making of a claim, a contract of sale of the land has been concluded by, or on behalf of, the education authority; and
 - (b) the sale takes, or has taken, place,the authority shall pay to the claimant the net proceeds of the sale.
- (3) Where no sale takes, or has taken, place in pursuance of a contract such as is mentioned in paragraph (a) of subsection (2) above, the claimant may require the authority to perform whichever of the obligations mentioned in subsection (4) below he may specify; and the authority shall comply with any such requirement.

- (4) The obligations are—
- (a) on payment by the claimant of any improvement value as at the date when the requirement is made in pursuance of subsection (3) above, to convey the land to the claimant; and
 - (b) to make a payment to the claimant of an amount equal to the open market value of the land less any improvement value as at the date mentioned in paragraph (a) above.
- (5) Any dispute arising in relation to the assessment of the value for the purposes of this section of any land, buildings or structures may be referred to, and determined by, the Lands Tribunal.
- (6) For the purposes of this section—
- “education authority” has the meaning given by section 135(1) of the Education (Scotland) Act 1980 (c.44);
- “improvement value”, in relation to land in respect of which a claim is made, means such part of the value of the land as is attributable to any building (or other structure) on the land other than any such building (or other structure) erected by or at the expense of—
- (a) the person who made the gift, sale or exchange of the land under section 2 of the 1841 Act; or
 - (b) any predecessor, as owner of such land, of that person; and
- “net proceeds” means the price paid under the contract of sale less an amount equal to—
- (a) any improvement value as at the date on which the contract of sale is concluded; and
 - (b) any expenses attributable to the sale.
- (7) References in subsection (1) above to the third proviso to section 2 of the 1841 Act shall be construed as including references to that proviso as applied by virtue of any other enactment; and for the purposes of that construction, the reference in the definition of “improvement value” in subsection (6) above to the gift, sale or exchange of land under section 2 of the 1841 Act shall be construed as a reference to the gift, sale or exchange of land mentioned in such other enactment.

NOTE

This section alters the content of rights of reversion claimed under the third proviso to s 2 of the School Sites Act 1841. It implements recommendation 86(a) to (c) and (e). See paragraphs 10.44 to 10.62 of the report.

As subsection (1) makes clear, the new rules are to apply only to reversions claimed on or after the day of royal assent (being the day on which s 82 comes into force: see s 119(3)). The relevant date is the date of first claim and not the date on which the trigger event for the reversion occurred.

Subsections (2) to (4) set out the revised content of the reversion. If, by the time of the claim, the land is already sold, the entitlement of the reversion holder is to the net proceeds of sale (as defined in subsection (6)). Otherwise the reversion holder has the choice set out in subsection (4). Either he can ask for the land to be conveyed (as would be his entitlement under the original reversion) or he can ask for payment of the open market value of the land. In all cases there is withheld the benefit of any improvement value (defined in subsection (6)).

Subsection (5) confers jurisdiction on the Lands Tribunal in relation to the valuation of lands and buildings.

Subsection (7) brings in the School Sites Act 1852 (c 49).

83 Prescriptive period for claims under 1841 Act

In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (obligations affected by prescriptive periods of five years to which section 6 of that Act applies)—

(a) after paragraph 1(aa) there shall be inserted—

“(ab) to any obligation arising by virtue of a right of reversion under the third proviso to section 2 of the School Sites Act 1841 (4 & 5 Vict. c.38) (or a right of reversion under that proviso as applied by virtue of any other enactment);”;
and

(b) in paragraph 2(e), for the words “or (aa)” there shall be substituted “, (aa) or (ab)”.

NOTE

This section applies the five-year negative prescription to rights of reversion. Its effect is that, if a reversion lies unclaimed for five years after the event which led to its becoming due, the reversion is extinguished and no claim can be made under s 82(1). This implements recommendation 86(d). See paragraph 10.60 of the report.

84 Repeal of Reversion Act 1469

- (1) The Reversion Act 1469 (c.3) shall cease to have effect.
- (2) Subsection (1) above shall not affect any right of reversion constituted, before the appointed day, as a real right.

NOTE

This section implements recommendation 79 by repealing the Reversion Act 1469. See paragraphs 10.17 and 10.18 of the report. Any rights of reversion which still survive are preserved by subsection (2).

PART 9

TITLE CONDITIONS: POWERS OF LANDS TRIBUNAL

85 Powers of Lands Tribunal as respects title conditions

- (1) Subject to sections 92, 93 and 96 of this Act and to subsections (2) and (3) below, the Lands Tribunal may by order, on the application of—
 - (a) an owner of a burdened property or any other person against whom a title condition (or purported title condition) is enforceable (or bears to be enforceable)—
 - (i) discharge it, wholly or partly, in relation to that property; or
 - (ii) if the title condition is a real burden, determine any question as to its validity, applicability or enforceability or as to how it is to be construed; or

(b) an owner of a benefited property, renew wholly or partly, in relation to that property, a title condition which is a real burden in respect of which intimation of a proposal to execute and register a notice of termination has been given under section 19 of this Act;

but where the Lands Tribunal refuse an application under paragraph (b) above, wholly or in part, they shall in relation to the benefited property discharge the title condition, wholly or partly, accordingly.

- (2) It shall not be competent to make an application under subsection (1) above in relation to a title condition of a kind specified in schedule 6 to this Act.
- (3) It shall not be competent to make an application under subsection (1)(b) above—
- (a) after the renewal date except with the consent of the terminator; or
 - (b) after there has been, in relation to the proposal, endorsement under section 21(1) of this Act.
- (4) Subject to section 92(1) of this Act and to subsection (7) below, an order discharging, whether wholly or partly, a title condition may—
- (a) where made under paragraph (a)(i) of subsection (1) above, direct the applicant; or
 - (b) where made by virtue of the refusal of an application under paragraph (b) of that subsection, direct the terminator,

to pay to any person who in relation to the title condition was an owner of the benefited property or, where there is no benefited property, to any holder of the title condition, such sum as the Lands Tribunal may think it just to award under one, but not both, of the heads mentioned in subsection (5) below.

- (5) The heads are—
- (a) a sum to compensate for any substantial loss or disadvantage suffered by, as the case may be—
 - (i) the owner, as owner of the benefited property; or
 - (ii) the holder of the title condition,in consequence of the discharge;
 - (b) a sum to make up for any effect which the title condition produced, at the time when it was created, in reducing the consideration then paid or made payable for the burdened property.
- (6) Subject to section 92(1) of this Act and to subsection (8) below, an order discharging, whether wholly or partly, a title condition may impose on the burdened property a new title condition or vary a title condition extant at the time the order is made.
- (7) A direction under subsection (4) above shall be made only if the person directed consents.
- (8) An imposition under subsection (6) above shall be made only if the owner of the burdened property consents.
- (9) The jurisdiction conferred by subsection (1) above includes power, in relation to an application under paragraph (a)(ii) only of that subsection, to decline (with reason stated) to proceed to determine the question.

NOTE

Part 6 introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes, and other title conditions. It replaces ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which are repealed by schedule 9 of the Bill).

Subsections (1) to (3) of s 85 set out the revised jurisdiction of the Lands Tribunal. They implement recommendations 27(g)&(h), 35 and 37. See paragraphs 5.45 to 5.50, 5.55, 6.19 to 6.23, and 6.37 to 6.43 of the report.

Subsection (1) confers three separate jurisdictions. The Lands Tribunal can discharge a real burden, servitude, or other title condition. It can pronounce on the validity and enforceability of a real burden (only). And it can renew or discharge a real burden (only), following intimation of a proposal under s 18 to execute and register a notice of termination. Only the first exists under the current law. “Discharge” includes partial discharge and so carries the same sense as “vary or discharge” under the present legislation (1970 Act s 1(3)). The meanings of “benefited property”, “burdened property”, and “title condition” are given in s 113(1). Paragraph (a) of subsection (1) extends the jurisdiction to “purported” title conditions, ie to obligations which bear to be (but may in fact not be) valid title conditions. This means that the Tribunal can grant a discharge without having first to determine the validity of the condition. Paragraph (a)(ii) is qualified by subsection (9).

An application under paragraph (a) may be brought by anyone against whom a title condition is enforceable (for which see s 8). By contrast, an application under paragraph (b) may be brought only by an owner of the benefited property (and so not by those holding subsidiary enforcement rights under s 7(2)(a)&(b)). “An” owner includes individual *pro indiviso* owners. The effect of a discharge or renewal is confined to the particular property in respect of which the application was brought.

Subsection (2), which is modelled on the proviso to s 1(1) of the 1970 Act, excludes certain title conditions of a minor nature.

Subsection (3) imposes time limits in respect of applications for renewal (only). The “renewal date” is the date given on the original notice of termination, and must be at least eight weeks after intimation (s 18(4)(d), (5)). The “terminator” is the owner of the burdened property or other person seeking the termination of the burden (s 18(2)). The endorsement referred to in paragraph (b) is a statement by the Lands Tribunal as to whether an application for renewal has been made. The endorsement is made on the notice of termination.

Subsections (4) to (8), which implement recommendation 42, allow the Tribunal to pronounce certain ancillary orders. See paragraphs 6.85 to 6.91 of the report. The provisions are based on s 1(4)&(5) of the 1970 Act.

Subsections (4) and (5) concern compensation for discharge. Only the owner of the benefited property is eligible for compensation, and not those holding subsidiary enforcement rights. The title conditions in which there is no benefited property are (or may be) conservation burdens, maritime burdens, manager burdens, and conditions in agreements under s 7 of the National Trust for Scotland Order Confirmation Act 1938. The grounds on which compensation may be awarded are set out in subsection (5) and are familiar from the current legislation. Subsection (7) ensures that compensation can be awarded only if the person who is to pay agrees; but if he does not agree the Tribunal may decide not to grant the discharge. Compensation cannot usually be awarded if the application for discharge is unopposed (s 92(1)).

Subsection (6) concerns the imposition of replacement title conditions. There is no requirement that the replacement condition be of the same type as the condition which is being discharged. Subsection (8) requires the consent of the owner of the burdened property (who may be a different person from the applicant/terminator). This is consistent with the principle that only the owner can burden his land: see s 4(2)(b). If consent is not given, the Tribunal may decide not to grant the discharge. Replacement conditions cannot usually be imposed if the application for discharge is unopposed (s 92(1)).

Applications under paragraph (a)(ii) of subsection (1) (for a ruling on validity etc) will often be accompanied by applications under paragraph (a)(i) (for discharge). Where they do not, the matter could as well be disposed of by the ordinary courts, and the Tribunal is given a discretion, by subsection (9), to decline jurisdiction.

86 Special provision as to variation or discharge of community burdens

- (1) Without prejudice to section 85(1)(a)(i) of this Act, an application may be made to the Lands Tribunal under this section by the owners of at least one quarter of the units in a community for the variation or discharge of a community burden as it affects all or some of the units in the community.
- (2) In the case of an application made by the owners of some only of the units in the community, the units affected need not be the units which they own.
- (3) Subsections (4), (5) and (7) of section 85 of this Act shall apply in relation to an order under subsection (1) above varying or discharging a community burden as they apply to an order under subsection (1)(a)(i) of that section discharging a title condition.

NOTE

This section confers a special jurisdiction for the variation or discharge of community burdens as they affect all or part of a community. It implements recommendation 45. See paragraphs 6.95 and 6.96 of the report. The meaning of “community burdens” is given in s 23, and of “unit” in s 113(1). By contrast with the jurisdiction under s 85(1)(a)(i), the Tribunal is empowered to “vary” burdens, thus allowing the imposition of new obligations (s 113(1)). (New obligations can be imposed under s 85 only with the consent of the owner of the burdened property: see s 85(6), (8)).

Subsection (3) enables the Tribunal to award compensation, on the same basis as under s 85.

87 Early application for discharge: restrictive provisions

In the constitutive deed, provision may be made to the effect that there shall be no application under section 85(1)(a)(i) or 86(1) of this Act in respect of a title condition before such date as may be specified in the deed (being a date not more than five years after the creation of the title condition); and if such provision is so made it shall not be competent to make an application under the section in question before that date.

NOTE

This section, which implements recommendation 44, allows parties to agree to a moratorium of up to five years on Lands Tribunal applications. It replaces the fixed two-year period contained in the current legislation (Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(5)). See paragraph 6.94 of the report.

88 Notification of application

- (1) The Lands Tribunal shall, on receipt of an application under—
 - (a) section 85(1)(a) or 86(1) of this Act, give notice of that application to any person who, not being the applicant, appears to them to fall within any of the following descriptions—
 - (i) an owner of the burdened property;
 - (ii) in a case where there is a benefited property, an owner of a benefited property;
 - (iii) in a case other than is mentioned in sub-paragraph (ii) above, a holder of the title condition; or

- (b) section 85(1)(b) of this Act, give such notice to any person who appears to them to fall within either of the following descriptions—
 - (i) the terminator;
 - (ii) an owner of the burdened property,
 and subject to subsection (2) below shall do so by sending the notice.
- (2) Notice under subsection (1) above may be given by advertisement, or by such other method as the Lands Tribunal think fit, if—
 - (a) given to a person who cannot, by reasonable inquiry, be identified or found;
 - (b) the person to whom it is given, being a person given notice by virtue of paragraph (a)(ii) of that subsection, does not appear to them to have any interest to enforce the title condition; or
 - (c) so many people require to be given notice that, in the opinion of the Lands Tribunal, it is not reasonably practicable to send it.
- (3) The Lands Tribunal may also give notice of the application, by such means as they think fit, to any other person.

NOTE

Once an application has been received, the Lands Tribunal must notify interested parties. Section 88 sets out the list of those who are to be notified (subsection (1)) and the means by which notification should be given (subsection (2)). Subsection (3) adds a discretion to notify others. Section 88 implements recommendation 40(a) to (d). See paragraphs 6.56 to 6.58 of the report.

As a general rule, notification is restricted to owners and does not extend to those holding subsidiary enforcement rights (for which see s 7(2)(a)&(b)). Usually notice must be sent individually, but this requirement is waived in the cases mentioned in subsection (2). The meaning of “send” is given in s 115. Section 89 prescribes the content of the notice.

89 Content of notice

In any notice given by them under section 88 of this Act the Lands Tribunal shall—

- (a) summarise or reproduce the application;
- (b) set a date (being a date no earlier than twenty-one days after the notice is given) by which representations to them as respects the application may be made;
- (c) state the fee which must accompany any such representations; and
- (d) in the case of an application for the discharge or renewal, wholly or partly, of a real burden, state that if the application is not opposed it may be granted without further inquiry.

NOTE

Whether notice under s 88 is given individually or in some other way, it requires to contain the information set out in s 89. This implements recommendation 40(e). See paragraph 6.59 of the report. The requirement of a fee (paragraph (c)) is new. Paragraph (d) refers forward to s 92.

90 Persons entitled to make representations

The persons entitled to make representations as respects an application under section 85(1) or 86(1) of this Act are—

- (a) any person who has title to enforce the title condition; and
- (b) any person against whom the title condition is enforceable.

NOTE

The class of those entitled to make representations, set out in s 90, is wider than the class of those to whom notice must be given under s 88. So far as real burdens are concerned, s 90 should be read together with ss 7(2) and (4), 8, 9 and 35 (which describe those with rights and liabilities). Section 90 implements recommendation 39(a). See paragraphs 6.52 and 6.53 of the report.

91 Representations

- (1) Representations made by any person to the Lands Tribunal as respects an application under section 85(1) or 86(1) of this Act shall be in writing and shall comprise a statement of the facts and contentions upon which the person proposes to rely.
- (2) For the purposes of section 89(b) of this Act, representations are made when they are sent to the Lands Tribunal with the requisite fee; and a person doing so shall forthwith send a copy of the representations to the applicant.
- (3) Notwithstanding section 89(b) of this Act, the Lands Tribunal may if they think fit accept representations after the date set under that section.

NOTE

This section, which implements recommendation 39(b)&(c), explains how representations are to be made. See paragraph 6.54 of the report.

In general, representations must be made within the 21-day (or other) period specified in the Tribunal's notice (s 89(b)). Representations are "made" by being sent with the requisite fee (subsection (2)); and a document, if sent by post or electronic means, is treated as sent on the day of posting or transmission (s 115(3)). Nonetheless the Tribunal has a discretion – as it has at present – to accept late representations (subsection (3)).

92 Granting unopposed application for discharge or renewal of real burden

- (1) Subject to subsection (2) below, an unopposed application duly made for—
 - (a) the discharge of a real burden; or
 - (b) the renewal of a real burden,shall be granted as of right; and as respects an application under paragraph (a) above neither subsection (4)(a) nor subsection (6) of section 85 of this Act shall apply in relation to the order discharging the real burden.
- (2) Subsection (1) above does not apply as respects—
 - (a) a facility burden; or
 - (b) a service burden.
- (3) An application is unopposed for the purposes of—

- (a) subsection (1)(a) above if, as at the date on which the application falls to be determined—
 - (i) no representations opposing it have been made under section 91 of this Act either by an owner of a benefited property or, where there is no benefited property, by a holder of the real burden; or
 - (ii) all such representations which have been so made have been withdrawn; or
 - (b) subsection (1)(b) above if, as at the date on which the application falls to be determined—
 - (i) no representations opposing it have been made under that section by the terminator; or
 - (ii) all such representations which have been so made have been withdrawn.
- (4) In granting an application under subsection (1)(b) above, the Lands Tribunal may, as they think fit, order either—
- (a) the person who intimated the proposal to execute and register the notice of termination; or
 - (b) any person who succeeded him as terminator,
- to pay to the applicant a specific sum in respect of the expenses incurred by the applicant or such proportion of those expenses as the Tribunal think fit.

NOTE

Under the existing law, all applications must be considered on their merits, whether opposed or not. Section 92 introduces the principle that unopposed applications in respect of real burdens (only) are to be granted without further inquiry. It implements recommendation 34. See paragraphs 5.45 and 6.13 to 6.17 of the report.

Subsection (1) sets out the general principle, and makes clear that no ancillary orders (for compensation or a replacement title condition) may be made where an application for discharge is unopposed. An application is “duly made” if it complies with s 85 (or s 86).

Subsection (2) excepts facility and service burdens (defined in s 113). They are already excepted from the notice of termination procedure, and hence from applications for renewal, by s 18(3).

Subsection (3) explains what is meant by “unopposed”. Representations by non-owners do not generally count; and representations must comply with s 91. An application accepted late under s 91(3) qualifies.

Expenses, for the most part, are dealt with in s 95. The purpose of subsection (4) is to allow the Tribunal to award expenses against the terminator despite the fact that – the application for renewal being unopposed – he is not a party to the application. See paragraph 5.48 of the report.

93 Granting any other application for variation, discharge or renewal of title condition

An application for the variation, discharge or renewal of a title condition shall, unless it falls to be granted as of right under section 92(1) of this Act, be granted by the Lands Tribunal only if they are satisfied that, having regard to the factors set out in section 94 of this Act, it is reasonable to grant that application.

NOTE

Apart from certain categories of unopposed application (s 92), the Tribunal must consider applications for variation, discharge or renewal on their merits. Section 93, which implements recommendation 41 in part, imposes a general standard of reasonableness.

94 Factors to which the Lands Tribunal are to have regard in determining applications etc.

The factors mentioned in section 93 of this Act are—

- (a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefited property, of the burdened property or of the neighbourhood of the properties);
- (b) the extent to which the condition—
 - (i) confers benefit on the benefited property; or
 - (ii) where there is no benefited property, confers benefit on the public;
- (c) the extent to which the condition impedes enjoyment of the burdened property;
- (d) if the condition is an affirmative obligation, how—
 - (i) practicable; or
 - (ii) costly,it is to comply with the condition;
- (e) the length of time which has elapsed since the condition was created;
- (f) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents; and
- (g) any other factor which the Lands Tribunal consider to be material.

NOTE

In considering the reasonableness of an application in terms of s 93, the Tribunal must have regard to the factors set out in s 94. This implements recommendation 41. See paragraphs 6.61 to 6.84 of the report. Not all factors will be relevant to every application. Nor – see factor (g) – are they intended to be exhaustive.

Factor (a) focuses on change in circumstances. The next three factors compare the benefit conferred (factor (b)) with the burden imposed (factors (c) and (d)). Factor (e) considers age, and factor (g) planning permission and other regulatory consent.

95 Expenses

- (1) The Lands Tribunal may, in determining an application made under this Part of this Act, make such order as to expenses as they think fit but shall have regard, in particular, to the extent to which the application, or any opposition to the application, is successful.
- (2) Subsection (1) above is without prejudice to section 92(4) of this Act.

NOTE

This section reaffirms the rule that the Lands Tribunal has a discretion as to expenses, but directs the Tribunal to have some regard to the principle that expenses follow success (ie that the successful party should not bear the expenses). This implements recommendation 33. See paragraph 6.12 of the report.

96 Taking effect of orders of Lands Tribunal etc.

- (1) The Scottish Ministers may, after consultation with the Scottish Committee of the Council on Tribunals, make rules as to when an order of the Lands Tribunal on an application under section 85(1) or 86(1) of this Act shall take effect.
- (2) An order under section 85(1)(a)(i) or (b) or 86(1) of this Act which has taken effect in accordance with rules made under subsection (1) above may be registered against the burdened property by any person who was a party to the application; and on the order being so registered the title condition to which it relates is extinguished (wholly or partly), renewed (wholly or partly), imposed or varied according to the terms of the order.

NOTE

Once a Tribunal order has taken effect (other than an order under s 85(1)(a)(ii) in relation to validity etc), the order may be registered. It is only on registration that the title condition is affected in the manner provided for in the order. Section 96 implements recommendation 43. See paragraph 6.93 of the report. While registration is against the burdened property only, the Keeper has power (s 97) to make a consequential alteration to the title sheet of the benefited property.

PART 10

MISCELLANEOUS

Consequential alterations to Land Register

97 Alterations to Land Register consequential upon registering certain deeds

- (1) In registering in the Register of Sasines a document mentioned in subsection (2) below the Keeper of the Registers of Scotland may make such consequential alterations to the Land Register of Scotland as he considers requisite.
- (2) The documents are—
 - (a) any decree, deed or other document which varies, discharges, renews or imposes a real burden or servitude; and
 - (b) any deed which comprises a conveyance of part of—
 - (i) the benefited property; or
 - (ii) the burdened property.

NOTE

This section introduces part 10, which is concerned with a number of miscellaneous topics. Section 97 extends a power which is already conferred by s 5(1) of the Land Registration (Scotland) Act 1979. The section implements recommendation 104. See paragraph 13.32 of the report.

In carrying out a registration process in the Land Register, the Keeper is empowered by s 5(1) of the 1979 Act to make such consequential amendments in the Register as are necessary. The effect of s 97 is to apply the same rule to the case where the initial registration process is in the Register of Sasines.

For the purposes of the present Bill, such power is required only in the two circumstances set out in subsection (2). The first concerns, mainly, deeds and other documents which vary or extinguish burdens. (The reference in paragraph (a) to “renews or imposes” refers back to s 96(2).) Under the Bill such deeds require to be registered against the burdened property alone. But if the burden also appears on the title sheet of the benefited property, the Keeper might wish to make a corresponding amendment there. Section 97 allows him to do so. The second situation concerns division of the benefited or burdened property. If, as sometimes, division affects the distribution of rights or, as the case be, liabilities in relation to real burdens (for which see ss 11 and 12), the Keeper might wish to note the change on the title sheet of property other than the one which is being conveyed.

Compulsory acquisition of land

98 Extinction of real burdens and servitudes on compulsory acquisition of land

- (1) If land is acquired compulsorily by virtue of any enactment then, subject to subsection (2) below, on registration of a conveyance in implement of such acquisition, any real burden, or servitude, over the land shall be extinguished.
- (2) There shall not be extinguished by virtue of subsection (1) above any—
 - (a) facility burden; or
 - (b) servitude such as is mentioned in section 73 of this Act.
- (3) Notwithstanding subsection (2) above—
 - (a) a person registering a conveyance in implement of an acquisition of land as mentioned in subsection (1) above; and
 - (b) any successor of such a person,may use the land for the purpose for which it was so acquired as if it were not subject to the burden or, as the case may be, servitude in question.
- (4) In subsection (1) above, “conveyance” means—
 - (a) a—
 - (i) disposition;
 - (ii) notice of title; or
 - (iii) notarial instrument,which includes a reference to the application of subsection (1) above;
 - (b) a conveyance in the form set out in Schedule A to the Lands Clauses Consolidation (Scotland) Act 1845 (c.19); or
 - (c) a general vesting declaration (as defined in paragraph 1(1) of Schedule 15 to the Town and Country Planning (Scotland) Act 1997 (c.8)).

NOTE

This is the first of a group of provisions (ss 98 to 101) which are concerned with the effect of compulsory purchase on real burdens and servitudes. Together they implement recommendation 101. See paragraphs 13.10 to 13.28 of the report.

The effect of compulsory purchase on real burdens and servitudes is uncertain and disputed under the current law. Section 98 provides a clear rule. In general (subsection (1)), all real burdens and servitudes are extinguished on registration of the conveyance (defined in subsection (4)). This applies to any conveyance which is registered on or after the appointed day, regardless of the date of the compulsory purchase order (s 111(8)). Subsection (2)

introduces a provisional exception for facility burdens (defined in s 113) and pipeline servitudes; but, by subsection (3), the acquiring authority or successor can disregard such burdens and servitudes in the course of using the land for the purpose for which it was acquired.

Subsection (4) gives a wide definition of “conveyance”. The effect of paragraph (a)(i) is that it will cease to be necessary to use a statutory conveyance (ie a conveyance referred to in paragraph (b)), though such use will remain competent.

99 Extinction of real burdens and servitudes where land acquired by agreement

- (1) If—
 - (a) land acquired by a person by agreement could have been so acquired by that person compulsorily by virtue of any enactment; and
 - (b) the person, having complied with subsection (4) below, registers a conveyance in implement of such acquisition,then, subject to subsection (2) below, on registration of such a conveyance any real burden, or servitude, over the land shall be extinguished.
- (2) There shall not be extinguished by virtue of subsection (1) above any—
 - (a) facility burden;
 - (b) servitude such as is mentioned in section 73 of this Act;
 - (c) conservation burden; or
 - (d) maritime burden.
- (3) Notwithstanding subsection (2)(a) and (b) above—
 - (a) a person registering a conveyance in implement of an acquisition of land as mentioned in subsection (1)(b) above; and
 - (b) any successor of such a person,may use the land for the purpose for which it was so acquired as if it were not subject to the facility burden or servitude in question.
- (4) Before registering a conveyance such as is mentioned in subsection (1)(b) above, the person acquiring the land shall give notice to the owner of the benefited property of the matters mentioned in subsection (5) below.
- (5) The matters are—
 - (a) a description of the land;
 - (b) the name and address of the person acquiring the land;
 - (c) that, by virtue of this section, real burdens and servitudes over the land shall be extinguished; and
 - (d) that any person having a real burden, or servitude, over the land may obtain information from the person acquiring the land about any entitlement to compensation.
- (6) Notice under subsection (4) above may be given—
 - (a) by sending;
 - (b) by advertisement; or
 - (c) by such other method as the person acquiring the land thinks fit.

- (7) In this section, “conveyance” has the same meaning as in section 98(4) of this Act except that the reference, in paragraph (a) of the definition of that expression in that section, to subsection (1) of that section shall be read as a reference to that subsection of this section.

NOTE

The rules set out in s 98 for compulsory purchase are applied by s 99 to cases of acquisition by agreement in circumstances where compulsory powers could have been used. There are two differences. One is that the list of exceptions, in subsection (2), is longer, and the additions cannot be disregarded under subsection (3). The other is the requirement, in subsections (4) and (5), of notification to the owner of any benefited property in the real burdens or servitudes. Subsection (6) gives a wide discretion as to how notice is to be given, and individual notice is not required.

100 Extinction under sections 98 and 99: compensation

- (1) Where—
- (a) a real burden, or servitude, is extinguished under section 98(1) or 99(1) of this Act; or
 - (b) any land is used as mentioned in section 98(3) or 99(3) of this Act,
- any compensation due shall be payable by the person acquiring the land in question (or, as the case may be, his successor) under section 61 of the Lands Clauses Consolidation (Scotland) Act 1845 (c.19) or section 6 of the Railway Clauses Consolidation (Scotland) Act 1845 (c.33), to the owner of the benefited property or, if there is no such property, to the holder of the burden.
- (2) In determining, for the purposes of subsection (1) above, the amount of any compensation, account shall be taken of any real burden or, as the case may be, servitude which the person acquiring the land (or, as the case may be, his successor) has granted, or offered to grant, in place of the burden or servitude extinguished as mentioned in that subsection.

NOTE

Where the extinction, or disregarding, of a real burden or servitude results in loss, compensation is due. Section 100 re-states the principle. In practice there will often be no loss and hence no compensation. Compensation is normally payable by the acquiring authority, but would be payable by a successor in circumstances where the successor had acted in disregard of a facility burden or pipeline servitude.

Sometimes the acquiring authority would prefer to reinstate servitudes and burdens (or grant new servitudes and burdens) than to pay compensation. Subsection (2) allows this possibility to be taken into account in the assessment of compensation.

Amendments

101 Amendment of Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947

In paragraph 3(b) of Schedule 1 to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c.42) (which requires a local authority to notify certain persons that a compulsory purchase order is about to be submitted by the authority for confirmation etc.)—

- (a) after the word “on” there shall be inserted “—

- (i)”; and
- (b) after the word “order”, where it first occurs, there shall be inserted “; and
- (ii) the holder of any conservation burden affecting that land.”.

NOTE

The effect of the amendment is to impose a duty on an acquiring authority, in the case of compulsory purchase, to notify the holder of any conservation burden that a compulsory purchase order has been made and is about to be submitted for confirmation.

102 Amendment of Conveyancing and Feudal Reform (Scotland) Act 1970

- (1) In section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35) (ranking of standard securities), in subsection (1), for the words from “his present advances” to “to which the security relates” there shall be substituted the following paragraphs—
 - “(a) the present debt incurred (whenever payable); and
 - (b) any future debt which, under the contract to which the security relates, he is required to allow the debtor in the security to incur.”.
- (2) Subsection (1) above does not affect the preference in ranking of the standard security of a creditor if the notice mentioned in the said section 13 was received by him before the day on which this section comes into force.

NOTE

Section 13 of the 1970 Act regulates the ranking of standard securities following service of a notice by a subsequent security holder. By replacing “advances” with a wider term, “debt”, the amendment makes clear that s 13 applies to debts of all kinds (including, for example, clawback). The amendment implements recommendation 77 and takes effect on royal assent (s 119(3)). See paragraphs 9.30 to 9.37 of the report.

103 Amendment of Prescription and Limitation (Scotland) Act 1973

In section 14(1)(a) of the Prescription and Limitation (Scotland) Act 1973 (c.52) (computation of prescriptive periods), the existing words “the commencement of this Part of this Act” shall be sub-paragraph (i); and after that sub-paragraph there shall be inserted the word “; or” and the following sub-paragraph—

- “(ii) an amendment to a Schedule introduced by a section of the Part is made.”.

NOTE

Section 14(1)(a) of the 1973 Act provides that, for the purposes of calculating the prescriptive period, time occurring before the commencement of part 1 of the Act (25 July 1976) is to count in the same way as time occurring thereafter. The effect of s 103 is that, where a schedule introduced by part 1 is amended, the same rule should apply in respect of time occurring before the amendment. In practice this is likely to affect only schedule 1 of the 1973 Act, which lists the obligations which are subject to the five-year negative prescription. It means that if a new obligation is added to the list of those which prescribe, time occurring before the amendment is available for the purposes of calculating the prescriptive period. Typical amendments to schedule 1 are those effected by s 12 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and by s 83 of this Bill.

104 Amendment of Land Registration (Scotland) Act 1979

In section 9 of the 1979 Act (rectification of Land Register of Scotland), in subsection (3B)—

- (a) the words “any provision of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) other than section 4 or 65” shall be paragraph (a); and
- (b) after that paragraph there shall be inserted the word “; or” and the following paragraph—
 - “(b) section 41, 42, 48 or 76 of the Title Conditions (Scotland) Act 2000 (asp 00),”.

NOTE

This amendment presupposes the amendment which is made to s 9 of the 1979 Act by s 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Both amendments come into force on the appointed day. The effect of s 104 is substantially the same as that of s 3 of the Feudal Act, but in a different context. It allows the Keeper to rectify the Land Register to take account of the listed provisions, and also in respect of things done (such as the registration of notices) in response to those provisions. No indemnity is then payable. The listed provisions are concerned only with transitional matters. Section 104 implements recommendation 94(e). See paragraphs 11.86 and 11.87 of the report.

105 Amendment of Enterprise and New Towns (Scotland) Act 1990

- (1) The Enterprise and New Towns (Scotland) Act 1990 (c.35) shall be amended in accordance with the following subsections.
- (2) In section 8(6) (powers and duties of Scottish Enterprise or Highlands and Islands Enterprise exercisable on terms and conditions arranged by agreement with person having an interest in land), for the words “section 32(3)” there shall be substituted “section 32”.
- (3) In section 32 (registration of agreements), for subsection (1) there shall be substituted—
 - “(1) Scottish Enterprise or Highlands and Islands Enterprise, in exercising the powers and duties conferred on it by this Act, may as respects land which does not belong to it enter into an agreement with any person who has an interest in the land (provided that it is an interest which enables the person to bind the land) for the purpose of restricting or regulating, either permanently or during such period as may be prescribed by the agreement, the development or use of the land; and the agreement may be registered either—
 - (a) in a case where the land affected by the agreement is registered in the Land Register of Scotland, in that register; or
 - (b) in any other case, in the appropriate Division of the General Register of Sasines.
 - (1A) An agreement under subsection (1) above may contain such incidental and consequential provisions (including financial ones) as appear to the body in question to be necessary or expedient for the purposes of the agreement.”.

NOTE

The effect of this amendment is to remove a possible repugnancy between ss 8(6) and 32 of the 1990 Act. The amendment implements recommendation 78 and takes effect on royal assent (s 119(3)). See paragraph 9.38 of the report. The new version of s 32(1) is based on s 75 of the Town and Country Planning (Scotland) Act 1997.

106 Amendment of Abolition of Feudal Tenure etc. (Scotland) Act 2000

Schedule 7 to this Act, which contains amendments of the 2000 Act consequential upon the provisions of this Act, shall have effect.

NOTE

This section introduces some minor amendments to the Abolition of Feudal Tenure etc. (Scotland) Act 2000, detailed in schedule 7. The amendments take effect on royal assent (s 119(3)), and hence before the relevant provisions of the Feudal Act come into force.

Miscellaneous

107 Further provision as respects notices of preservation or of converted servitude

- (1) This section applies in relation to a notice of preservation or of converted servitude.
- (2) Except where it is not reasonably practicable to do so, the owner of the benefited property shall, before he executes the notice, send to the owner of the burdened property a copy of—
 - (a) the notice;
 - (b) the explanatory note set out in whichever schedule to this Act relates to the notice; and
 - (c) in the case of a notice of converted servitude, the constitutive deed (if any).
- (3) The owner of the benefited property shall, in the notice, state either—
 - (a) that a copy of the notice has been sent in accordance with subsection (2) above; or
 - (b) that it was not reasonably practicable for such a notice to be so sent.
- (4) However many the benefited or burdened properties may be, if the terms of the real burdens or converted servitudes are set out in a single constitutive deed, execution and registration may be accomplished in a single notice.
- (5) The Keeper of the Registers of Scotland shall not be required to determine whether a person submitting a notice for registration has complied with subsection (2) above.
- (6) Where—
 - (a) a notice submitted before the expiry of the period of ten years which commences immediately after the appointed day is rejected by the Keeper; but
 - (b) a court or the Lands Tribunal then determines that the notice is registrable,the notice may, if not registered before that expiry, be registered—
 - (i) within two months after the determination is made; but
 - (ii) before such date after that expiry as the Scottish Ministers may by order prescribe;

and any notice registered under this subsection shall be treated as if it had been registered before that expiry.

- (7) For the purposes of subsection (6) above, the application to the court, or to the Lands Tribunal, which has resulted in the determination shall require to have been made within such period as the Scottish Ministers may by order prescribe.
- (8) In subsection (6)(b) above, “court” means Court of Session or sheriff.

NOTE

This section contains some supplementary rules in relation to notices of preservation (s 42) and of converted servitude (s 76).

Subsections (2) and (3) are based on s 41(3) and (4) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and implement recommendations 93(b)(iv)&(d) and 96(c)(v)&(e). See paragraphs 11.75 and 12.12 of the report. They impose a duty, in the normal case, to send a copy of the notice (and explanatory note) to the owner of the burdened property. Further provisions about sending are contained in s 115.

Subsection (4) allows all real burdens or servitudes contained in any particular constitutive deed to be included in a single notice.

Subsection (5) is based on s 43(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and relieves the Keeper from having to verify that the notice was duly sent to the owner of the burdened property. See paragraph 11.75 of the report.

Subsections (6) to (8) are based on s 45 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and implement recommendations 93(g) and 96(g). See paragraphs 11.78 and 12.13 of the report. They allow (with qualifications) registration outwith the ten-year period in circumstances where a notice has been wrongly rejected by the Keeper.

108 Benefited property outwith Scotland

As respects a real burden or servitude, the benefited property need not be in Scotland; but where it is not then nothing in this Act requires registration against that property.

NOTE

This section reaffirms the common law rule that a benefited property (but not a burdened property) can be outside Scotland (subject, of course, to the usual rules of praedial interest and interest to enforce). It also makes clear that, in such a case, there is to be no requirement of registration against the benefited property (for example, under ss 4(5) and 71(1)). See paragraph 3.7 of the report.

109 Pecuniary real burdens

On and after the day on which this section comes into force, it shall not be competent to create a pecuniary real burden (that is to say, to constitute a heritable security by reservation in a conveyance).

NOTE

It is unclear whether it is still competent to create pecuniary real burdens. See paragraphs 13.29 and 13.30 of the report. Section 109, which implements recommendation 102, removes the doubt by disallowing new pecuniary burdens. The provision comes into force on royal assent (s 119(3)).

110 Common interest

On and after the day on which this section comes into force—

- (a) it shall not be competent to create a right of common interest; and
- (b) no such right shall arise otherwise than by implication of law.

NOTE

Normally common interest arises simply by force of law (for example in tenements or rivers), and it is disputed whether such a right can be created by express agreement. See paragraph 13.31 of the report. If express creation were possible, common interest could be used as a substitute for real burdens and hence as a means of avoiding the provisions of this Bill. Accordingly, s 109 makes clear that common interest cannot be expressly created. This implements recommendation 103. Section 109 comes into force on royal assent (s 119(3)).

PART 11

SAVINGS, TRANSITIONAL AND GENERAL

Savings and transitional provisions etc.

111 Savings and transitional provisions etc.

- (1) Nothing in this Act shall be taken to impair the validity of creating, varying or discharging a real burden by the registering of a deed before the appointed day.
- (2) This Act is without prejudice to section 3(1) of the 1979 Act (effect of registration).
- (3) Sections 7 and 13 of this Act do not affect proceedings commenced before the appointed day.
- (4) Section 9 of this Act does not apply where a person ceases to be, or becomes, an owner before the appointed day.
- (5) Section 15 of this Act does not apply as respects a breach of a real burden which occurs before the appointed day.
- (6) Section 51 of this Act does not apply as respects a constitutive deed registered before the appointed day.
- (7) Sections 71 and 74 of this Act do not apply as respects a deed executed before the appointed day.
- (8) Sections 98 and 99 of this Act do not apply as respects a conveyance registered before the appointed day.
- (9) Except where the contrary intention appears, this Act applies to all real burdens, whenever created.

NOTE

The savings and transitional provisions contained in this section have, for the most part, already been discussed in the appropriate context. Only a few need be mentioned here.

As subsection (1) acknowledges, the division between the old law and the new is, usually, the time of registration of the deed in question. Pre-appointed day deeds are governed by the old law. Deeds registered on or after the appointed day are governed by the provisions of the Bill. Section 4(1), for example, provides that a real burden is

created “by duly registering” the constitutive deed. Similarly, s 14(1) provides that a burden is discharged “by registering” a deed of discharge. Sometimes, as with the creation of real burdens, the new law imposes more exacting standards than the old; but, as subsection (1) makes clear, the new standards are to apply only prospectively.

The Bill, following the common law, requires the use of a deed for a number of juridical acts in relation to real burdens – most notably creation, variation and discharge. Strictly, s 3(1) of the 1979 Act does not: in other words, if a real burden is entered on (or deleted from) the Land Register, the entry or deletion is legally effective under that provision notwithstanding the absence of a valid underlying deed. The Register would then be inaccurate, however, and vulnerable to rectification under s 9 of the Act. The purpose of subsection (2) is to preserve this rule of land registration.

Subsection (9) makes clear that the Bill is to apply to all real burdens, including those created before the appointed day, except where the contrary is clearly intended. Section 4 (creation) is an example of a provision intended to apply only to new real burdens.

General

112 Requirement for dual registration

A deed which, to be duly registered for the purposes of any provision of this Act, requires to be registered against both a benefited property and a burdened property, shall not be registrable against one only of the properties; nor shall a document which includes but does not wholly consist of such a deed.

NOTE

This section, which implements recommendation 10(c), prevents a deed which requires, under the Bill, to be registered against both properties, from being registered against one property only. See paragraph 3.6 of the report. The provision is aimed particularly at dispositions containing new real burdens. If the disponee were able to register against the property being conveyed only (as under current practice), the effect would be to transfer the property free of the burdens.

113 Interpretation

(1) In this Act, unless the context otherwise requires—

“the 1979 Act” means the Land Registration (Scotland) Act 1979 (c.33);

“the 2000 Act” means the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5);

“affirmative burden” shall be construed in accordance with section 2(2)(a) of this Act;

“ancillary burden” shall be construed in accordance with section 2(4) of this Act;

“appointed day” means the day appointed under section 71 of the 2000 Act;

“benefited property”—

(a) in relation to a real burden, shall be construed in accordance with section 1(2)(b) of this Act; and

(b) in relation to a title condition other than a real burden, means the land, or real right in land, to which the right to enforce the title condition is attached;

“burdened property”—

(a) in relation to a real burden, shall be construed in accordance with section 1(2)(a) of this Act; and

(b) in relation to a title condition other than a real burden, means the land, or real right in land, which is subject to the title condition;

“community” has the meaning given by section 24(2) of this Act;

“community burdens” shall be construed in accordance with section 23 of this Act;

“conservation body” means any body prescribed by regulations under section 33(2) of this Act;

“conservation burden” shall be construed in accordance with section 33(1) of this Act; and includes (other than in section 33 of this Act) a reference to a real burden the right to which was preserved by virtue of section 27(1) of the 2000 Act (preservation of right to enforce conservation burden);

“constitutive deed” is the deed which sets out the terms of a title condition (or of a prospective title condition) but the expression includes any document in which the terms of the title condition in question are varied;

“the Development Management Scheme” means the scheme set out in schedule 3 to this Act or, in relation to a particular development, that scheme as applied to the development;

“enactment” includes a local and personal or private Act;

“facility burden” means, subject to subsection (2) below, a real burden which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land (examples of property which might constitute such a facility being without prejudice to the generality of this definition, set out in subsection (3) below);

“flat” means a dwelling-house, or any business or other premises, in a tenement;

“holder”, in relation to a title condition, means the person who has right to the title condition;

“land” includes—

(a) heritable property, whether corporeal or incorporeal, held as a separate tenement; and

(b) land covered with water,

but does not include any estate of *dominium directum*;

“Lands Tribunal” means Lands Tribunal for Scotland;

“manager”, in relation to related properties, means any person (including an owner of one of those properties or a firm) who is authorised (whether by virtue of this Act or otherwise) to act generally, or for such purposes as may be applicable in relation to a particular authorisation, in respect of those properties;

“manager burden” shall be construed in accordance with section 53(1) of this Act;

“maritime burden” shall be construed in accordance with section 38(1) of this Act; and includes (other than in section 38(1) of this Act) a reference to any real burden in relation to which the Crown has title and interest under section 60(1) of the 2000 Act (preserved right of Crown to maritime burdens);

“midcouple” means such midcouple or link in title as it is competent to specify, under section 5(1) of the Conveyancing (Scotland) Act 1924 (14 & 15 Geo. 5, c.27), in a deduction of title in terms of that Act;

“negative burden” shall be construed in accordance with section 2(2)(b) of this Act;

“notary public” includes, in a case where swearing or affirmation is to take place outwith Scotland, any person duly authorised by the law of the country or territory in question to administer oaths or receive affirmations in that country or territory;

“notice of converted servitude” shall be construed in accordance with section 76(4) and (5) of this Act;

“notice of preservation” shall be construed in accordance with section 42 of this Act;

“notice of termination” shall be construed in accordance with section 18 of this Act;

“owner” shall be construed in accordance with section 114 of this Act;

“property” includes unit;

“real burden” has the meaning given by section 1 of this Act;

“registering”, in relation to any document, means registering an interest in land or information relating to an interest in land (being an interest or information for which that document provides) in the Land Register of Scotland or, as the case may be, recording the document in the Register of Sasines (cognate expressions being construed accordingly);

“renewal date” has the meaning given by section 18(4)(d) of this Act;

“road” does not include any verge;

“send” shall be construed in accordance with section 115 of this Act (cognate expressions being construed accordingly);

“service burden” means a real burden which relates to the provision of services to land other than the burdened property;

“tenement” means a building which comprises two or more flats which are, or are designed to be, in separate ownership and are divided from each other horizontally;

“terminator” shall be construed in accordance with section 18(2) of this Act;

“title condition” means—

- (a) a real burden;
- (b) a servitude;
- (c) an affirmative obligation imposed, in a servitude, on the person who is in right of the servitude;
- (d) a condition in a registrable lease if it is a condition which relates to the land (but not a condition which imposes either an obligation to pay rent or an obligation of relief relating to the payment of rent);
- (e) a condition or stipulation—

(i) imposed under subsection (2) of section 3 of the Registration of Leases (Scotland) Act 1857 (c.26) (assignment of recorded leases) in an assignment which has been duly registered; or

(ii) contained in a deed registered under subsection (2A) of that section;

(f) a condition in an agreement entered into under section 7 of the National Trust for Scotland Order Confirmation Act 1938 (c.iv);

(g) a rule of the Development Management Scheme but not a rule of part 2 of that scheme; or

(h) such other condition relating to land as the Scottish Ministers may, for the purposes of this paragraph, prescribe by order;

“unit” means any land which is designed to be held in separate ownership (whether it is so held or not); and

“variation”, in relation to a title condition, includes imposition of a new obligation (cognate expressions being construed accordingly).

(2) In so far as it constitutes an obligation to maintain or reinstate which has been assumed—

(a) by a local or other public authority; or

(b) by virtue of any enactment, by a successor body to any such authority,

a real burden is not a facility burden.

(3) The examples referred to in the definition of “facility burden” in subsection (1) above are—

(a) a common part of a tenement;

(b) a common area for recreation;

(c) a private road;

(d) private sewerage; and

(e) a boundary wall.

NOTE

Only a small number of the definitions require explanation here.

appointed day. This is the date on which most of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 comes into force, and on which the feudal system is abolished.

facility burden. This definition substantially replicates the (unnamed) definition in s 23(1), (3) and (4) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which is repealed by schedule 9 of this Bill). The purpose of subsection (2) is to exclude obligations, typically in relation to roads and sewers, which have been assumed by a local authority or other public body. The list of facilities in subsection (3) is intended to be illustrative and not exhaustive.

holder. The words “has right” import the idea that the title might not have been completed by registration. See for example s 35.

land. Paragraph (a) brings in separate tenements such as minerals and salmon fishings. The exclusion of *dominium directum* (feudal superiority) is to prevent any argument that, for example, a superiority could be the

subject of a notice of preservation under s 42. (All superiorities will be extinguished on the appointed day under s 2(2) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.)

manager. The reference to a firm is made necessary by the fact that the definition of “person” in schedule 2 to the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999, SI 1999/1379 states merely that “‘person’ includes a body of persons corporate or unincorporate”.

service burden. This definition substantially replicates the (unnamed) definition in s 23(2) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which is repealed by schedule 9 of this Bill).

title condition. This definition follows the substance, though not the form, of the definition of “land obligation” given in s 1(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which is repealed by schedule 9 of this Bill). “Title condition” is the replacement term for “land obligation”. The definition implements recommendation 36. See paragraphs 6.26 to 6.36 of the report. Paragraphs (c), (f) and (g) are not currently covered by the term “land obligation”. Paragraph (h) allows Scottish Ministers to add to the list.

unit. An explanation of this definition is given in paragraph 7.34 of the report.

114 The expression “owner”

- (1) Subject to subsections (2) and (3) below, in this Act “owner”, in relation to any property, means a person who has right to the property whether or not he has completed title; but if, in relation to the property (or, if the property is held *pro indiviso*, any *pro indiviso* share in the property) more than one person comes within that description of owner, then “owner”—
 - (a) for the purposes of sections 4(2)(b), 14, 17, 30(2), (3) and (5), 31(2) and (3), 60(1) and 62(2) and (3) of this Act, means any person having such right; and
 - (b) for any other purposes means such person as has most recently acquired such right.
- (2) Where a heritable creditor is in lawful possession of security subjects which comprise the property, then “owner”—
 - (a) for the purposes of the sections mentioned in paragraph (a) of subsection (1) above includes, in addition to any such person as is there mentioned, that heritable creditor; and
 - (b) for any other purposes means the heritable creditor.
- (3) In section 50(1) of this Act, “owner” in relation to any property has the meaning given by subsection (1) above except that, for the purposes of this subsection, in that subsection—
 - (a) the words “Subject to subsections (2) and (3) below, in this Act” shall be disregarded; and
 - (b) paragraph (a) shall be construed as if section 50(1) were one of the sections mentioned.

NOTE

In defining “owner” this section implements recommendation 100. See paragraphs 13.1 to 13.9 of the report.

The first half of subsection (1) sets out the general rule. An owner is a person who “has right” to property (a term familiar from ss 3 and 4 of the Conveyancing (Scotland) Act 1924). A person “has right” if he is grantee of a delivered conveyance (or equivalent). Registration is not required.

More than one person might be owner within this definition. If ownership is held concurrently, as with *pro indiviso* owners, this presents no particular difficulty. But the position is, or may be, different, with consecutive owners. The second half of subsection (1) deals with this problem. If two or more people acquiring rights consecutively are capable of falling within the definition, the “owner” is to be the last of them (paragraph (b)) – except for the purposes of the provisions listed in paragraph (a).

Subsection (2) introduces a special rule where a heritable creditor is in possession of the property.

The effect of paragraph (a) of subsection (3) is to exclude heritable creditors in possession from s 50(1) (which is concerned with deduction of title).

115 Sending

- (1) Where a provision of this Act requires that a thing be sent—
 - (a) to a person it shall suffice, for the purposes of that provision, that the thing be sent to an agent of the person;
 - (b) to an owner of property but only the property is known and not the name of the owner, it shall suffice, for the purposes of that provision, that the thing be sent there addressed to “The Owner” (or using some other such expression, as for example “The Proprietor”).
- (2) Except in subsection (3) below, in this Act any reference to a thing being sent shall be construed as a reference to its being—
 - (a) posted;
 - (b) delivered; or
 - (c) transmitted by electronic means.
- (3) For the purposes of any provision of this Act, a thing posted shall be taken to be sent on the day of posting; and a thing transmitted by electronic means, to be sent on the day of transmission.

NOTE

Paragraph (a) of subsection (1) makes clear that it is sufficient if the thing to be sent is sent to the person’s solicitor or other agent. Paragraph (b) provides a solution where the person’s name is unknown, and excuses the sender from attempts to discover it.

Subsection (2) explains how a thing may be sent.

Subsection (3) gives the rule as to when a thing is considered to have been sent.

116 References to distance

Where a provision of this Act refers to a property being within a certain distance of another property, the reference is to distance along a horizontal plane, there being disregarded—

- (a) the width of any intervening road if of less than twenty metres; and

- (b) any pertinent of either property.

NOTE

This section explains how the four-metre distance (see eg ss 19(3) and 44(3)) is to be calculated. See paragraph 11.50 of the report.

Paragraph (a) follows the rule for neighbour notification set out in art 2(1) of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224 (para (d) of definition of “neighbouring land”). A “road” does not include the verge (s 113(1)).

Paragraph (b) ensures that measurements are taken from the property itself and not from, for example, an access roadway in respect of which the property has, as a pertinent, a *pro indiviso* share.

117 Orders, regulations and rules

Any power of the Scottish Ministers under this Act to make orders, regulations or rules shall be exercisable by statutory instrument; and a statutory instrument containing any such orders, regulations or rules shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

NOTE

At various points the Bill empowers Scottish Ministers to make orders, regulations or rules. Section 117 explains how this is to be done.

118 Minor and consequential amendments and repeals

- (1) Schedule 8 to this Act, which contains minor amendments and amendments consequential upon the provisions of this Act, shall have effect.
- (2) The enactments mentioned in schedule 9 to this Act are hereby repealed to the extent mentioned in the second column of that schedule.

NOTE

This section deals with minor amendments and repeals. The details are set out in schedules 8 and 9.

119 Short title and commencement

- (1) This Act may be cited as the Title Conditions (Scotland) Act 2000.
- (2) Subject to subsections (3) and (4) below, this Act shall come into force on the appointed day.
- (3) Part 3, sections 53, 56, 82, 102, 105, 106, 109, 110, 113, 114, 117, this section, schedule 7 and, in schedule 8, paragraph 6(1), (3) and (4) come into force on Royal Assent.
- (4) In so far as—
 - (a) it relates to paragraph 6(1), (3) and (4) of schedule 8, section 118(1);
 - (b) it relates to the 2000 Act, section 118(2);
 - (c) it relates to the 2000 Act, schedule 9;

(d) is necessary for the purposes of Part 3 and section 53, Part 1,
shall come into force on Royal Assent.

NOTE

Subsection (1) gives the short title.

Subsection (2) provides that most of the Bill is not to come into force until the appointed day, ie the day on which the feudal system is abolished (s 113(1)).

The provisions set out in subsections (3) and (4) come into force on royal assent.

SCHEDULE 1
(introduced by section 18(1))
FORM OF NOTICE OF TERMINATION

“NOTICE OF TERMINATION

Name and address of terminator:

(see note for completion 1)

Description of burdened property:

(see note for completion 2)

Terminator’s connection with burdened property:

(see note for completion 3)

Terms of real burden(s):

(see note for completion 4)

Extent of termination:

(see note for completion 5)

Renewal date:

(see note for completion 6)

An application to the Lands Tribunal for Scotland for renewal of the real burden(s) must be made by not later than the renewal date.

Persons to whom a copy of the notice sent:

(see note for completion 7)

Date and method of intimation:

(see note for completion 8)

I swear [or affirm] that the information contained in this notice is, to the best of my knowledge and belief, true, and that this notice has been duly intimated.

Signature of person so swearing [or affirming]:

(see note for completion 9)

Signature of notary public:

Date:

Certificate by Lands Tribunal for Scotland

(see note for completion 10). ”.

Explanatory note for owner of benefited property

(This explanation has no legal effect)

This notice concerns real burdens which affect a neighbouring property (referred to in the notice as the “burdened property”), and is sent to you by the owner of that property or by some other person affected by the burdens. The sender (who is referred to in the notice and in these notes as the “terminator”) wishes to free the property of the real burdens listed in the notice.

The burdens are more than 100 years old.

If you are opposed to the freeing, you can apply to the Lands Tribunal for Scotland for the burdens to be renewed. The address of the Lands Tribunal is *[insert address]* and their telephone number is *[insert telephone number]*. However, you can only apply if you are an owner of a property which, in a legal sense, takes benefit from the burden and which carries enforcement rights. For further guidance you may wish to consult a solicitor or other adviser.

[A list of other people who have been sent this notice is given in the notice itself. It is possible to make an application to the Lands Tribunal jointly with other people.]

An application to the Lands Tribunal must be made by the renewal date stated in the notice. If no application is made by then, you may lose any right which you may currently hold to enforce the burdens.

Notes for completion of the notice

(These notes have no legal effect)

- 1 The “terminator” is the person who, at any time, is seeking to terminate the real burden. Where the person who intimates the proposal to execute and register the notice of termination is not the terminator when the notice comes to be executed, the name and address of the person executing should be appended after the name and address of the person who so intimated.
- 2 Describe the property in a way that is sufficient to identify it. Where the title has been registered in the Land Register the description should refer to the title number of the property or of the larger subjects of which the property forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
- 3 Describe the terminator’s connection with the burdened property, as for example by identifying him as owner or tenant or by setting out the midcouple(s) linking him to the person who last had a completed title as owner. Where the circumstances mentioned in note for completion 1 arise, the description should be extended accordingly.
- 4 A single notice may be used for any real burdens created in the same constitutive deed. Identify the constitutive deed by reference to the appropriate Register, and set out the real burden in full or refer to the deed in such a way as to identify the real burden.
- 5 If the real burden is wholly to be terminated say so; otherwise describe the extent of termination.
- 6 Insert the date by which applications for renewal must be made. This can be any date, provided that it is not less than 8 weeks after the last date on which this notice is intimated.
- 7 This notice (and the explanatory note) must be intimated to (a) the owner of any benefited property and (b) the owner of the burdened property (or, if the terminator is such an owner, any other owner of that property). Intimation can be by sending (or delivering) the notice, or by newspaper advertisement. However, advertisement cannot be used for the owners of benefited property which lies within 4 metres of the burdened property (disregarding roads of less than 20 metres) or for the owner of the burdened property. Where sending or delivery is used, state (i) the name of the person concerned (if known) (ii) the address to which the notice is sent or delivered, and (iii) the address of the benefited (or burdened) property owned by that person, if different from (ii). Since evidence of sending may be required at the time of registration in the Land Register, it is recommended that the notice be sent by recorded delivery or registered post.
- 8 State the date and method of intimation. By way of example, if notices were posted to the persons listed in the previous box on 25th. March 2000 and advertised in the *Inverness Courier* on 4th. April 2000, insert: “(a) Intimation by post on 25th. March 2000; (b) Advertisement in the *Inverness Courier* on 4th. April 2000.”

- 9 The terminator should not swear or affirm, or sign, until the notice has been completed (except for the certificate by the Lands Tribunal for Scotland) and duly intimated. Before signing, he should swear or affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive affirmations) that, to the best of his knowledge and belief, all the information contained in the notice is true and that the notice has been duly intimated. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under the False Oaths (Scotland) Act 1933 (c.20). Normally the terminator should swear or affirm, and sign, personally. If, however, he is legally disabled or incapable (for example because of mental disorder) a legal representative should swear or affirm and sign. If the terminator is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign.
- 10 There is to be endorsed before registration the certificate required by section 21(1) of the Title Conditions (Scotland) Act 2000 (asp 00).

NOTE

This is the statutory form of notice prescribed by s 18(1) for the termination of real burdens which are at least 100 years old. The schedule includes an explanatory note and notes for completion of the notice. See further ss 18 to 22 of the Bill and paragraphs 5.33 to 5.55 of the report.

SCHEDULE 2
(introduced by section 42(1))

FORM OF NOTICE OF PRESERVATION

“NOTICE OF PRESERVATION

Name and address of person sending notice:

Description of burdened property:
(see note for completion 1)

Description of benefited property:
(see note for completion 1)

Links in title:
(see note for completion 2)

Terms of real burden(s):
(see note for completion 3)

Explanation of why the property described as a benefited property is such a property:
(see note for completion 4)

Service:
(see note for completion 5)

I swear [or affirm] that the information contained in this notice is, to the best of my knowledge and belief, true.

Signature of person sending notice:
(see note for completion 6)

Signature of notary public:

Date: .?.

Explanatory note for owner of burdened property

(This explanation has no legal effect)

This notice is sent by a person who asserts that the use of your property is affected by the real burden [*or* real burdens] whose terms are described in the notice and that he is one of the people entitled to the benefit of the real burden [*or* real burdens] and can, if necessary, enforce it [*or* them] against you. In this notice your property (or some part of it) is referred to as the “burdened property” and the property belonging to that person is referred to as the “benefited property”.

The grounds for his assertion are given in the notice. By section 42 of the Title Conditions (Scotland) Act 2000 (asp 00) his rights will be lost unless this notice is registered in the Land Register or Register of Sasines by not later than [*insert date ten years after the appointed day*]. Registration preserves the rights and means that the burden [*or* burdens] can continue to be enforced by him and by anyone succeeding him as owner of his property.

This notice does not require you to take any action; but if you think there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser. A notice can be challenged even after it has been registered.

Notes for completion of the notice

(These notes have no legal effect)

- 1 A single notice may be used for any properties covered by the same constitutive deed. Describe the property in a way that is sufficient to identify it. Where the title has been registered in the Land Register the description should refer to the title number of the property or of the larger subjects of which the property forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
- 2 Complete the section “Links in Title” only if the person sending the notice does not have a completed title to the benefited property. Set out the midcouple(s) linking that person with the person who had the last completed title.
- 3 A single notice may be used for any real burdens created in the same constitutive deed. Identify the constitutive deed by reference to the appropriate Register, and set out the real burden in full or refer to the deed in such a way as to identify the real burden.
- 4 Explain the legal and factual grounds on which the land described as a benefited property is a benefited property in relation to the burdened property and the burden described in the notice.
- 5 Do not complete until a copy of the notice, together with the explanatory note, has been sent (or delivered) to the owner of the burdened property (except in a case where that is not reasonably practicable). Then insert whichever is applicable of the following:

“A copy of this notice has been sent by [*state method and if by post specify whether by recorded delivery, by registered post or by ordinary post*] on [*date*] to the owner of the burdened property at [*address*].”; or

“It has not been reasonably practicable to send a copy of this notice to the owner of the burdened property for the following reason: [*specify the reason*].”

- 6 The person sending the notice should not swear or affirm, or sign, until a copy of the notice has been sent (or otherwise) as mentioned in note 5. Before signing, the sender should swear or affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive affirmations) that, to the best of the sender’s knowledge and belief, all the information contained in the notice is true. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under the False Oaths (Scotland) Act 1933 (c.20). Normally the sender should swear or affirm, and sign, personally. If, however, the sender is legally disabled or incapable (for example because of mental disorder) a legal representative should swear or affirm and sign. If the sender is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign.

NOTE

This is the statutory form of notice prescribed by s 42(1) for the preservation of the status of benefited property in circumstances where that status is currently implied by common law. The schedule includes an explanatory note and notes for completion of the notice. See further ss 42 and 107 of the Bill and paragraphs 11.72 to 11.78 of the report.

SCHEDULE 3
(introduced by section 60(1))

DEVELOPMENT MANAGEMENT SCHEME

DEVELOPMENT MANAGEMENT SCHEME

PART 1

INTERPRETATION

RULE 1 – INTERPRETATION

1 Definitions

In this scheme, unless the context otherwise requires—

“the Act” means the Title Conditions (Scotland) Act 2000 (asp 00),

“advisory committee” means any such committee formed in pursuance of rule 15.1,

“association” means the owners’ association of the development established under rule 2.1,

“the development” is [*specify the extent of the development*],

“general meeting” means an annual or other general meeting of the association,

“maintenance” includes repairs or replacement, cleaning, painting and other routine works, gardening and the day-to-day running of property; but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance,

“manager” means the person appointed to be manager of the association,

“member” means a member of the association,

“regulations” means regulations made under rule 3.5,

“reserve fund” means money held on behalf of the association to meet the cost of long-term maintenance, improvement or alteration of scheme property or to meet such other expenses of the association as the association may determine,

“service charge” includes additional service charge,

“scheme property” means [*describe the property which is subject to maintenance under the scheme*], and

“unit” means [*specify the individual properties forming the development*].

PART 2

THE OWNERS’ ASSOCIATION

RULE 2 - ESTABLISHMENT, STATUS ETC.

2.1 Establishment

The association is established on the day on which this scheme takes effect.

2.2 Status

The association is a body corporate to be known as “The Owners’ Association of [*add the address of the development or some other means of identifying the association*]” .

2.3 Members of the association

The members are the persons who, for the time being, are the owners of the units; and where two or more persons own a unit both (or all) of them are members.

2.4 Address of association

The address of the association is that of—

- (a) the development, and
- (b) the manager,

or either of them.

RULE 3 - FUNCTION, POWERS AND ENFORCEMENT

3.1 Function of association

The function of the association is to manage the development for the benefit of the members.

3.2 Specific powers

The association has power to do anything necessary for or in connection with the carrying out of the function mentioned in rule 3.1 and in particular may—

- (a) own, or acquire ownership of, any part of the development,
- (b) carry out maintenance, improvements or alterations to, or demolition of, the scheme property,
- (c) enter into a contract of insurance in respect of the development or any part of it (and for that purpose the association is deemed to have an insurable interest),
- (d) purchase, or otherwise acquire or obtain the use of, moveable property,
- (e) require owners to contribute by way of service charge to association funds,
- (f) open and maintain an account with any bank or building society,
- (g) invest any money held by the association,
- (h) borrow money,
- (i) engage employees or appoint agents, or
- (j) act in accordance with any other powers conferred under or by virtue of this part of this scheme or by the Act,

but subject to rule 3.5 the association does not have power to make regulations.

3.3 Scheme to be binding

This scheme is binding on the association, the manager and the members as are any regulations which have taken effect; and a rule, or any such regulation, in the form of an obligation to refrain from doing something is binding on—

- (a) a tenant of property affected by the rule or regulation; or
- (b) any other person having the use of such property.

3.4 Enforcement of scheme

The association may enforce—

- (a) the provisions of this scheme and any regulations which have taken effect, and
- (b) any obligation owed by any person to the association.

3.5 Regulations

The association may, at a general meeting

- (a) make regulations as to the use of recreational facilities which are part of the scheme property; and
- (b) revoke or amend regulations made under paragraph (a);

but any such regulation, revocation or amendment is to take effect only after a copy of it has been delivered or sent to each member.

RULE 4 - THE MANAGER

4.1 Association to have manager

The association is to have a manager who, subject to any other provision of this scheme, is a person (whether or not a member) appointed by the association at a general meeting.

4.2 Power to remove manager

The association may at a general meeting remove the manager from office before the expiry of his term of office.

4.3 Validity of actings of manager

Any actings of the manager are valid notwithstanding any defect in his appointment.

4.4 Manager to be agent

The manager is an agent of the association.

4.5 Exercise of powers

Subject to this scheme, any power conferred on the association under or by virtue of this scheme is exercisable by—

- (a) the manager, or
- (b) the association at a general meeting.

4.6 Duties owed to association and members

Any duty imposed on the manager under or by virtue of this scheme is owed to the association and to the members.

4.7 Manager to comply with directions

The manager is to comply with any direction given by the association at a general meeting as respects the exercise by him of—

- (a) powers conferred; or
- (b) duties imposed,

on the association or on him.

4.8 Certificates under section 69

The manager is to provide and sign any certificate required for the purposes of section 69 of the Act.

RULE 5 – EXECUTION OF DOCUMENTS

5 Execution of documents by association

A document is signed by the association if signed on behalf of the association by—

- (a) the manager, or
- (b) a person nominated for the purpose by the association at a general meeting,

provided that the manager or person acts within his actual or ostensible authority to bind the association.

RULE 6 – WINDING UP

6.1 Commencement of winding up

The manager is to commence the winding up of the association on the day on which this scheme ceases to apply as respects the development.

6.2 Distribution of funds

The manager is, as soon as practicable after the commencement of the winding up, to use any association funds to pay any debts of the association; and thereafter is to distribute in accordance with this scheme any remaining funds among those who were, on the date when the winding up commenced, owners of units.

6.3 Final accounts

The manager is—

- (a) to prepare the final accounts of the association showing how the winding up was conducted and the funds were disposed of, and
- (b) not later than six months after the commencement of the winding up, to send a copy of those accounts to each owner.

6.4 Automatic dissolution of association

Subject to rule 6.5, the association is dissolved at the end of the period of six months beginning with the commencement of the winding up.

6.5 Delayed dissolution

At any time before the end of the period of six months mentioned in rule 6.4, the members may determine that the association is to continue for such period as they may specify; and if they so determine it is dissolved at the end of the period so specified.

6.6 Effect of application for reduction of deed of disapplication

If application is made under section 66(1)(b) of the Act for reduction of so much of a deed of disapplication as disapplies the scheme, then—

- (a) until that application is finally determined, the winding up is to be suspended;
- (b) if the application is granted the winding up is to cease; and
- (c) if the application is refused the winding up is to proceed but rules 6.3(b), 6.4 and 6.5 are in that case to be construed as if the reference in each of rules 6.3(b) and 6.4 to the commencement of the winding up were a reference to the final determination of the application.

PART 3

MANAGEMENT

RULE 7 - APPOINTMENT OF MANAGER

7.1 Appointment of manager

The association—

- (a) at the first annual general meeting, and
- (b) where the manager's period of office expires or a vacancy occurs, at any subsequent general meeting,

is to appoint on such terms and conditions as the association may decide the person who is to be the manager.

7.2 Certificate of appointment

Not later than one month after the date of a general meeting at which a person is appointed to be manager—

- (a) that person, and
- (b) on behalf of the association, a member,

is to sign a certificate recording the making, and the period, of the appointment.

7.3 First manager

The first manager is [*specify the name and address of the first manager*] and he—

- (a) acts as such until the first annual general meeting is held,
- (b) is entitled to reasonable remuneration, and
- (c) is eligible for reappointment.

RULE 8 - DUTIES OF MANAGER

8 Duties of manager

The manager is to manage the development for the benefit of the members and in particular is—

- (a) from time to time to carry out inspections of the scheme property,
- (b) to arrange for the carrying out of maintenance to scheme property,
- (c) to fix the financial year of the association,
- (d) to keep, as respects the association, proper financial records and prepare the accounts of the association for each financial year,
- (e) to implement any decision made by the association at a general meeting,
- (f) in so far as it is reasonable to do so, to enforce—
 - (i) any obligation owed by any person to the association, and
 - (ii) the provisions of the scheme and of any regulations which have taken effect,
- (g) if there are regulations, to keep a copy of them (taking account of revocations and amendments), and
- (h) to keep a record of the name and address of each member.

RULE 9 – CALLING OF GENERAL MEETINGS

9.1 First annual general meeting

The first annual general meeting is to be called by the manager and to be held not later than twelve months after the day on which, in accordance with rule 2.1, the association is established.

9.2 Annual general meetings

The manager is to call an annual general meeting each year; and a meeting so called is to be held no more than fifteen months after the date on which the previous annual general meeting was held.

9.3 Other general meetings

The manager may call a general meeting at any time and is to call a general meeting if—

- (a) a revised draft budget requires to be considered,
- (b) he is required to do so by members holding not less than twenty-five per cent. of the total number of votes allocated, or
- (c) he is required to do so by a majority of the members of the advisory committee.

9.4 Calling of meeting

Not later than fourteen days before the date fixed for a general meeting the manager is to call the meeting by sending to each member—

- (a) a notice stating—
 - (i) the date and time fixed for the meeting and the place where it is to be held, and
 - (ii) the business to be transacted at the meeting, and
- (b) if the meeting is an annual general meeting, copies of the draft budget and (except in the case of the first annual general meeting) the accounts of the association for the last financial year.

9.5 Validity of proceedings

Any inadvertent failure to comply with rule 9.4 as respects any member does not affect the validity of proceedings at a general meeting.

9.6 Member's right to call meeting in certain circumstances

Any member may call a general meeting if—

- (a) the manager fails to call a general meeting—
 - (i) in a case where paragraph (b) or (c) of rule 9.3 applies, not later than fourteen days after being required to do so as mentioned in those paragraphs, or
 - (ii) in any other case, in accordance with this scheme, or
- (b) the association does not have a manager.

9.7 Procedure where member calls meeting

Where under rule 9.6 a general meeting is called by a member—

- (a) any rule imposing a procedural or other duty on the manager in relation to general meetings (other than the duty imposed by rule 9.4(b)) applies as if it imposed the duty on the member, and
- (b) if there is a manager, the member is to send him a notice stating the date and time fixed for the meeting, the business to be transacted at it and the place where it is to be held.

RULE 10 – GENERAL MEETINGS: QUORUM

10.1 Quorum necessary for meeting to begin

A general meeting is not to begin unless there is a quorum; and if there is still no quorum twenty minutes after the time fixed for a general meeting then—

- (a) the meeting is to be postponed until such date, being not less than fourteen nor more than twenty-eight days later, as may be specified by the manager (or, if the manager is not present, by a majority of the members present or represented), and
- (b) the manager (or any member) is to send to each member a notice stating the date and time fixed for the postponed meeting and the place where it is to be held.

10.2 No quorum at postponed meeting

A meeting may be postponed only once; and if at a postponed meeting the provisions in rule 10.1. as respects a quorum are not satisfied, then the members who are present or represented are to be deemed a quorum.

10.3 Quorum need not be maintained

If a general meeting has begun, it may continue even if the number of members present or represented ceases to be a quorum.

10.4 Number required for quorum

For the purposes of rule 10 a quorum is—

- (a) where there are no more than thirty units in the development, members present or represented holding fifty per cent. of the total number of votes allocated,
- (b) where there are more than thirty such units, members present or represented holding thirty-five per cent. of the total number of votes allocated.

RULE 11 – GENERAL MEETINGS: VOTING

11.1 Allocation and exercise of votes

For the purpose of voting on any proposal at a general meeting one vote is allocated to each unit; and any right to vote is exercisable by the owner of that unit or by someone (not being the manager) nominated in writing by the owner to vote.

11.2 Exercise of vote where two or more persons own unit

If a unit is owned by two or more persons the vote allocated to that unit may be exercised by either (or any) of them; but if those persons disagree as to how the vote should be cast then no vote is to be counted for that unit.

11.3 Decision by majority

Except where the scheme otherwise provides, a decision is made by the association at a general meeting by majority vote of all the votes cast.

11.4 Method of voting

Voting on any proposal is by show of hands; but the chairman may determine that voting on a particular proposal is to be by ballot.

RULE 12 – GENERAL MEETINGS: FURTHER PROVISIONS

12.1 Election of chairman

The members present or represented at a general meeting are to elect one of their number or the manager to be chairman of the meeting; and on being so elected the chairman is to take charge of the organisation of the business of the meeting.

12.2 Additional business

Any member present or represented at a general meeting may nominate additional business to be transacted at that meeting.

12.3 Manager to attend and keep record of business transacted

Except where he is unable to do so because of illness or for some other good reason, the manager is to attend each general meeting and to—

- (a) keep a record of the business transacted, and
- (b) not later than twenty-one days after the date of the meeting, send a copy of the record of business to each member,

and where the manager does not attend the chairman is to nominate a person present to carry out the manager's duties under paragraphs (a) and (b) of this rule in respect of the meeting.

RULE 13 - SPECIAL MAJORITY DECISIONS

13.1 Special majority required

The association may —

- (a) make a payment out of any reserve fund which it has formed, or
- (b) use any money held on behalf of the association to carry out improvements or alterations to, or demolition of, scheme property (not being improvements, alterations or demolition reasonably incidental to maintenance);

but only after the association have, at a general meeting, by majority vote of all the votes allocated, determined to do so.

13.2 Consent of owner to be given where not common property

Where scheme property is not the common property of the members (or not the common property of members who between them own two or more units) a determination under rule 13.1 for the purposes of paragraph (b) of that rule may be implemented only if the owner of the property consents in writing to the improvements, alterations or demolition in question.

RULE 14 - EMERGENCY WORK

14.1 Power to instruct etc.

Any member may instruct or carry out emergency work.

14.2 Reimbursement of member

The association is to reimburse any member who pays for emergency work.

14.3 Meaning of “emergency work”

“Emergency work” means work which requires to be carried out to scheme property—

- (a) to prevent damage to any part of that or any other property, or
- (b) in the interests of health or safety,

in circumstances in which it is not practicable to consult the manager before carrying out the work.

RULE 15 - ADVISORY COMMITTEE

15.1 Power to elect advisory committee

The association may at a general meeting elect such number of the members as it may specify to form an advisory committee whose function is to provide the manager with advice relating to—

- (a) the exercise of his powers; and
- (b) the fulfilment of his duties,

under or by virtue of this scheme.

15.2 Manager to consult advisory committee

Where an advisory committee is formed, the manager is from time to time to seek advice from the committee.

RULE 16 – VARIATION

16.1 Deeds of variation for a single unit or for units fewer than half of those in the development

The manager may, on behalf of the association and after consulting the advisory committee (if any), grant a deed of variation under section 62 of the Act (that is to say, in relation to a single unit or to units fewer than one half of those in the development); but the manager is, at the first general meeting after the granting of the deed, to report that it has been so granted.

16.2 Deeds of variation for half or more of the units and deeds of disapplication

The manager may, on behalf of the association, grant a deed of variation under section 63 (that is to say, in relation to half or more of the units) or a deed of disapplication under section 65 of the Act but only after the association has, at a general meeting, by majority of all the votes allocated, determined to do so.

RULE 17 – MISCELLANEOUS

17.1 Information about management

Any member may require the manager to allow him to inspect a copy of any document, other than any correspondence with another member, which relates to the management of the development; and the manager is, if the document is in his possession or it is reasonably practicable for him to obtain a copy of it, to comply with the requirement.

17.2 Notice to manager on sale etc. of unit

Any member who sells or otherwise disposes of his unit is, before the date on which the person to whom the unit is to be sold (or otherwise transferred) will be entitled to take entry, to send a notice to the manager stating—

- (a) the entry date and the name and address of that person,
- (b) the name and address of the solicitor or other agent acting for that person in the acquisition of the unit, and
- (c) an address at which the member may be contacted after that date.

17.3 Service of documents

Any document which requires to be sent to a member under or in connection with this scheme may be—

- (a) sent to his unit,
- (b) sent to such other address as he is known to have, or
- (c) transmitted to him by electronic means.

17.4 Distribution of funds on winding up

Where funds are distributed under rule 6.2 the basis of distribution is that each unit receives one share.

PART 4

FINANCIAL MATTERS

RULE 18 – ANNUAL BUDGET

18.1 Duty of manager to prepare annual budget

Before each annual general meeting the manager is to prepare, and submit for consideration at that meeting, a draft budget for the new financial year.

18.2 Content of draft budget

A draft budget is to set out—

- (a) the total service charge and the date (or dates) on which the service charge will be due for payment,
- (b) an estimate of any other funds which the association is likely to receive and the source of those funds,
- (c) an estimate of the expenditure of the association, and
- (d) the amount (if any) to be deposited in a reserve fund.

18.3 Consideration of draft budget by association

The association may at a general meeting—

- (a) approve the draft budget subject to such variations as it may specify, or
- (b) reject the budget and direct the manager to prepare a revised draft budget for consideration by the association at a general meeting to be called by the manager and to take place not later than two months after the date of the meeting at which the budget is rejected,

and where the budget is rejected the service charge exigible under the budget last approved is, until a new budget is approved, to continue to be exigible and is to be due for payment on the anniversary (or anniversaries) of the date (or dates) on which it was originally due for payment.

18.4 Revised draft budget

At a general meeting at which a revised draft budget is to be considered, the association may approve or reject the budget as mentioned in rule 18.3(a) and (b).

RULE 19 - SERVICE CHARGE

19.1 Amount of service charge

Except where rule 19.2 applies, the amount of any service charge imposed under this scheme is the same as respects each unit.

19.2 Service charge exemption

The association may at a general meeting decide as respects a particular owner and in relation to a particular payment that no service charge (or a service charge of a reduced amount) is payable.

19.3 Manager to collect service charge

When the draft budget has been approved in accordance with this scheme, the manager—

- (a) is to send to each owner a notice requiring payment, on the date (or dates) specified in the budget, of the amount of the service charge so specified, and
- (b) may send to each owner at any time a notice—
 - (i) requiring payment, on the date (or dates) stated in the notice, of an additional amount of service charge determined under rule 20.1, and
 - (ii) explaining why the additional amount is payable;

and each owner is liable for that amount accordingly.

19.4 Redistribution of share of costs

Where an owner is liable for a service charge but the service charge cannot be recovered for some reason such as that—

- (a) the estate of that owner has been sequestrated, or
- (b) he cannot be contacted,

then that service charge is to be shared equally among the other owners or, if they so decide, is to be met out of any reserve fund; but that owner remains liable for the service charge.

19.5 Interest payable on overdue service charge

Where any service charge (or part of it) remains outstanding not less than twenty-eight days after it became due for payment, the manager may send a notice to the owner concerned requiring him to pay interest on the sum outstanding at such rate (being a reasonable rate) and from such date as the manager may specify in the notice.

19.6 Interpretation of rule 19

In rule 19, “owner” means the owner of a unit.

RULE 20 – ADDITIONAL SERVICE CHARGE

20.1 Additional service charge

The manager may from time to time determine that an additional service charge, limited as is mentioned in rule 20.2, is payable by the members to enable the association to meet any expenses that are due (or soon to become due) and which could not be met otherwise than out of the reserve fund.

20.2 Limit on amount of additional service charge

In any financial year the total amount of any additional service charge determined under rule 20.1 is not to exceed twenty-five per cent. of the total service charge for that year as set out in the budget approved by the association; but in calculating that percentage no account is to be taken of any additional service charge payable in respect of the cost of emergency work (as defined in rule 14.3).

20.3 Supplementary budget

If in any financial year the manager considers that any additional service charge exceeding the percentage mentioned in rule 20.2 should be payable, he is to prepare and submit to the association at a general meeting a draft supplementary budget setting out the amount of the additional service charge and the date (or dates) on which the charge will be due for payment; and rules 18.3, 18.4 and 19.3(a) apply as respects that draft supplementary budget as they apply as respects a draft budget and revised draft budget.

RULE 21 – FUNDS

21.1 Association funds

Any association funds are to be—

- (a) held in the name of the association, and
- (b) subject to rule 21.2, deposited by the manager in a bank or building society account.

21.2 Special treatment of certain funds

The manager is to ensure that any association funds which are likely to be held for some time are—

- (a) deposited in an account which is interest-bearing, or
- (b) invested in such other way as the association may at a general meeting decide.

21.3 Reserve fund

The manager is to ensure that any association funds forming a reserve fund are kept separately from other association funds.”.

NOTE

Printed below is a guide to the Development Management Scheme. This is written in non-technical language so as to be more easily understood by the owners who will have to operate the Scheme. It is suggested that owners be given a copy of this guide. In cases where the Scheme is amended, under ss 60(1) or 63, the guide will need to be amended accordingly. The guide concentrates on those issues which are of practical importance to owners and so is not comprehensive. However, it is followed by a table which links up the rules of the Scheme to the relevant parts of the report. The table need not be reproduced for owners.

The guide is written as if the Scheme had been brought into effect for the development.

GUIDE TO THE DEVELOPMENT MANAGEMENT SCHEME

This Scheme comprises a set of rules for running the development. It is divided into four parts and consists of 21 rules which are explained more fully below.

PART 1

Part 1 consists of a single rule (rule 1) which explains the meaning of some of the words used in the Scheme.

Rule 1

“The development” is the total area covered by the Scheme. A “unit” is an individual property belonging to one of the owners. “Scheme property” is that part of the development which is managed and maintained in common.

PART 2

Under the Scheme the development is managed by an association of all the owners. Part 2 describes how the owners’ association works. Part 2 is not very important for the day-to-day running of the development, and some of the rules are technical in nature.

Rule 2

The owners’ association comes into being at the same time as the Scheme itself (rule 2.1). All owners of units (ie of individual properties) are members, for as long as they remain owners. If a unit belongs to two people (such as a husband and wife) both are members (rule 2.3).

Rule 3

Rule 3 sets out the functions and powers of the association. The association’s main function is to manage the development for the benefit of the members (rule 3.1). A general meeting of the association can make regulations for the use of any recreational facilities (rule 3.5). The association is restricted to the functions and powers listed in rule 3, and any other activities would be invalid.

Rule 4

The members can meet together in a general meeting. A general meeting of members is the governing body of the association and can make decisions on any matter on which the association has power to act (rule 4.5(b)). (Those matters are listed in rule 3.) Rules 9 to 12 give further information about general meetings.

The day-to-day running of the association, and of the development, is in the hands of a manager. The manager can be an ordinary person or a firm or company. A member can be the manager (rule 4.1). Usually the manager is

appointed by the members at a general meeting (rule 4.1). Rule 7 gives further details. The first manager of the development, however, is the person named in rule 7.3. The duties of a manager are set out in rule 8.

The general meeting of members has ultimate authority over the manager. The manager must do what he is told by the general meeting (rule 4.7). The general meeting can also dismiss the manager (rule 4.2). However, in some cases dismissal may be a breach of the contract made with the manager and may lead to a claim for damages against the association.

Rule 5

This rule explains how the association signs documents (such as contracts).

Rule 6

A general meeting of members can decide that the Scheme should no longer apply (rule 16.2). In that case the association needs to be wound up. This involves a number of technical steps which are set out in rule 6 and in rule 17.4.

PART 3

Part 3 of the Scheme describes the day-to-day running of the development.

Rule 7

The person named in rule 7.3 as the first manager holds office only until the first annual general meeting. From that point on it is up to the members to appoint their own manager, at a general meeting (rule 7.1). All owners are members (rule 2.3). The first manager can be re-appointed, if the members so wish (rule 7.3(c)). It is up to the members to decide how long a manager should be appointed for and how much he should be paid. It is unwise to appoint someone as manager unless he has already indicated willingness to act. Rule 4 has some further provisions about appointments.

Rule 8

This rule sets out the main duties of the manager. Some other duties can be found in other parts of the Scheme. In practice the manager's most important task is usually to arrange a proper programme of maintenance. The manager can be told what to do by a general meeting of members (rules 4.7 and 8(e)), but otherwise he is free to decide himself what maintenance needs to be done. However, he is restricted in what he can spend by the budgeting arrangements described in part 4 of the Scheme.

Rule 9

Members must meet once a year for an annual general meeting (rule 9.2). Normally they will not meet more often than this. But if the need arises an extra meeting can be arranged at the instance of the manager or of a number of members (rule 9.3). It is up to the manager to organise the meeting although, if he fails to do so, any member can step in and call the meeting instead (rules 9.6 and 9.7).

Rule 9.4 lists certain documents that the manager must send to all members at least 14 days before the general meeting. These include a draft agenda, although members may add further items to the agenda at the meeting itself (rule 12.2).

Rule 10

A meeting cannot begin unless a certain number of the members, or their representatives (see rule 11.1), are present. This is known as a quorum. The quorum is based on the number of votes held by the members present (or represented). There is one vote per unit (rule 11.1), and normally a quorum is 50% of the votes (rule 10.4(a)). (The meaning of “unit” is given in rule 1.) So if there are 20 units in a development, a quorum is reached when members for 10 of the units are either present at the meeting or are represented there by someone else. However, if the development has more than 30 units, a quorum is only 35% of the votes (rule 10.4(b)). A quorum is required only for the start of the meeting, and the meeting can continue even if some members leave before the end (rule 10.3).

Rules 10.1 and 10.2 make special provision for where there is no quorum at the start of a meeting.

Rule 11

The main business at an annual general meeting will often be approval of the draft budget for the following year (see rule 18). Other decisions may also need to be made. Even after a decision has been made, it can be challenged by any member who did not support it. This is done by making an application to the sheriff court within 28 days of the meeting (or of notification of the decision if the member was not at the meeting). Further details are given in section 67 of the Title Conditions (Scotland) Act 2000.

Except in the special cases mentioned in rules 13.1 and 16.2, decisions are reached by a simple majority of the votes actually cast at the meeting (rule 11.3). There is one vote per unit (rule 11.1), and the vote is exercised by the owner of the unit or (if a unit is owned by more than one person) by any of the owners (rule 11.2). (The meaning of “unit” is given in rule 1.) An owner can give written authority to someone else (but not the manager) to vote for him (rule 11.1).

Rule 12

Rule 12.1 explains who is to be chairman at a general meeting. The meeting must be attended by the manager, and it is up to him to keep a record of all decisions reached and other business transacted. A copy must then be sent to all members within 21 days (rule 12.3).

Rule 13

Usually decisions at general meetings are taken by a majority of the votes *cast* (rule 11.3). But in the two cases listed in rule 13.1 (and in a third mentioned in rule 16.2), a decision requires a majority of the votes *allocated*. Each unit is allocated one vote (rule 11.1). So in a development of 20 units, a majority of the votes allocated would be 11 votes.

The two cases are:

- *A decision to use money from any reserve fund.* A reserve (or “sinking”) fund is money put away for long-term expenditure of various kinds (rule 1). Sometimes a part of the service charge is ear-marked as a contribution to the reserve fund (rule 18.2(d)). Not all developments have reserve funds, but members can decide at a general meeting to set one up.
- *A decision to carry out improvements, alterations, or demolition.* These are relatively unusual activities. Ordinary maintenance can be carried out by the manager without the need for a decision by members (rule 8(b)). (The meaning of “maintenance” is given in rule 1.)

Rule 14

This rule allows a member to carry out work to scheme property in an emergency, where there is no time to consult the manager. (The meaning of “scheme property” is given in rule 1.) The association reimburses the cost of the work.

Rule 15

This rule allows a general meeting of members to set up a committee to give advice to the manager. Such a committee is consultative only. The manager must listen but he need not take the advice. Only a general meeting of members can tell the manager what to do (rule 4.7). However, a majority of members of the advisory committee can insist on calling a general meeting (rule 9.3(c)).

Rule 16

Sometimes it may be necessary to alter the Scheme. If the alteration is to affect one unit only (or a number of units but fewer than half), the manager can sign the appropriate legal deed without special permission (rule 16.1). But he must consult the advisory committee (if there is one) and report the alteration to the next general meeting.

Alterations affecting the whole development (or half or more units in the development) require the approval of a general meeting, by a majority of all the votes allocated (rule 16.2). The necessary legal deed is then signed by the manager. The same procedure applies for a decision to bring the Scheme to an end. A member who is unhappy about either decision can apply to the court to have the legal deed set aside. The application must be made within eight weeks of the member being sent a copy of the deed. Further details are given in section 66 of the Title Conditions (Scotland) Act 2000.

Rule 17

Rule 17.1 gives members access to documents concerning the management of the development.

Rule 17.2 requires a person who is selling or disposing of his unit to give certain information to the manager.

Rule 17.3 sets out ways in which documents can be sent to members. Other methods can also be used.

Rule 17.4 explains how surplus assets are to be distributed in the event of the association being wound up under rule 6.

PART 4

Part 4 describes the process of annual budgets, and the collection of service charge.

Rule 18

The association has a financial year, which is fixed by the manager (rule 8(c)). Each financial year the manager must prepare a draft budget which is then sent to members not later than 14 days before the annual general meeting (rules 9.4(b) and 18.1). The budget sets out the projected expenditure of the association for the year, and explains how that expenditure is to be met (rule 18.2). Usually expenditure is met by levying a service charge on the members. The draft budget must state the amount of service charge and when it is to be collected. At the annual general meeting members vote on the draft budget. If they are not willing to approve it they can either amend it, or reject it altogether and require the manager to produce a new budget (rule 18.3).

Rule 19

Once a draft budget is approved, the manager will ask the members to pay the agreed service charge on the agreed dates. Each unit pays the same amount of service charge (rule 19.1). (The meaning of “unit” is given in rule 1.) However, a general meeting of members has discretion to alter this rule in particular cases (rule 19.2).

Where two or more people own a unit (such as a husband and wife), both are members of the association (rule 2.3) and either can be made to pay the full amount due for that unit. (The details are given in section 10(5) (as applied by section 61) of the Title Conditions (Scotland) Act 2000.)

No one need pay anything until a notice is received from the manager. The notice sets out the amount due and the date (or dates) on which it is to be paid (rule 19.3). If a member pays late the manager has a discretion to charge interest (rule 19.5).

Rule 19.4 deals with the situation where a member is unable to pay.

Rule 20

Normally the manager will levy the exact amount of service charge agreed in the annual budget. But he has a discretion to ask for up to 25% more (rules 20.1 and 20.2). This gives a certain amount of flexibility and recognises the fact that it is difficult to predict future expenditure. However, the manager cannot go beyond the 25% figure without preparing a supplementary budget and submitting that budget for approval at a new general meeting (rule 20.3).

Rule 21

Rule 21 controls the way in which the manager is to invest association funds.

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SCHEDULE 4
(introduced by section 76(4))

FORM OF NOTICE OF CONVERTED SERVITUDE

“NOTICE OF CONVERTED SERVITUDE

Name and address of person sending notice:

Description of burdened property:

(see note for completion 1)

Description of benefited property:

(see note for completion 1)

Links in title:

(see note for completion 2)

Terms of converted servitude:

(see note for completion 3)

Explanation of why the property described as a benefited property is such a property:

(see note for completion 4)

Service:

(see note for completion 5)

I swear [or affirm] that the information contained in this notice is, to the best of my knowledge and belief, true. The constitutive deed [or A copy of the constitutive deed] is annexed to the notice.

(see note for completion 6)

Signature of person sending notice:

(see note for completion 7)

Signature of notary public:

Date: .”.

Explanatory note for owner of burdened property

(This explanation has no legal effect)

This notice is sent by a person who asserts that the use of your property is affected by a converted servitude which he is entitled to enforce. In this notice your property (or some part of it) is referred to as the “burdened property” and the property belonging to that person is referred to as the “benefited property”. The “converted servitude” is a condition which may affect the use of your property. Formerly a servitude, the condition was converted into a real burden by subsection (1) of section 76 of the Title Conditions (Scotland) Act 2000 (asp 00).

At the moment the converted servitude is not disclosed against your title on the property registers. By subsection (2) of that section the sender’s right will be lost unless this notice is registered in the Land Register of Scotland or the Register of Sasines by not later than [*insert date ten years after the appointed day*]. Registration preserves the right and means that the converted servitude can continue to be enforced by him, and by anyone succeeding him as owner of that property.

This notice does not require you to take any action; but if you think there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser. A notice can be challenged even after it has been registered.

Notes for completion of the notice

(These notes have no legal effect)

- 1 A single notice may be used for any properties covered by the same constitutive deed. Describe the property in a way that is sufficient to identify it. Where the title has been registered in the Land Register the description should refer to the title number of the property or of the larger subjects of which the property forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
- 2 Complete the section “Links in Title” only if the person sending the notice does not have a completed title to the benefited property. List the midcouple(s) linking that person with the person who had the last completed title.
- 3 A single notice may be used for any converted servitudes created in the same constitutive deed. Set out the converted servitude in full or refer to the constitutive deed in such a way as to identify the servitude. If there is no such deed, explain the factual and legal circumstances in which the servitude was created.
- 4 Complete this part only if the land described as the benefited property is not nominated as such by the constitutive deed. Explain the legal and factual grounds on which that land is a benefited property in relation to the burdened property and the converted servitude described in the notice.
- 5 Do not complete until a copy of the notice, together with the constitutive deed and the explanatory note, has been sent (or delivered) to the owner of the burdened property (except in a case where that is not reasonably practicable). Then insert whichever is applicable of the following:

“A copy of this notice has been sent by [*state method and if by post specify whether by recorded delivery, by registered post or by ordinary post*] on [*date*] to the owner of the burdened property at [*address*].”; or

“It has not been reasonably practicable to send a copy of this notice to the owner of the burdened property for the following reason: [*specify the reason*].”

- 6 Endorse on the constitutive deed (or copy) words to the effect of: “This is the constitutive deed referred to in the notice of converted servitude by [*give name of person sending the notice*] dated [*give date*].” The endorsement need not be signed.
- 7 The person sending the notice should not swear or affirm, or sign, until a copy of the notice has been sent (or otherwise) as mentioned in note 5. Before signing, the sender should swear or affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive affirmations) that, to the best of the sender’s knowledge and belief, all the information contained in the notice is true. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under the False Oaths (Scotland) Act 1933 (c.20). Normally the sender should swear or affirm, and sign, personally. If, however, the sender is legally disabled or incapable (for example because of mental disorder) a legal representative should swear or affirm and sign. If the sender is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign.

NOTE

This is the statutory form of notice prescribed by s 76(4) for the preservation of certain of the negative servitudes which were converted, on the appointed day, into real burdens. The schedule includes an explanatory note and notes for completion of the notice. See further ss 76(4) to (8) and 107 of the Bill and paragraphs 12.6 to 12.12 of the report.

SCHEDULE 5
(introduced by section 79(1)(a))

FORM OF UNDERTAKING

“UNDERTAKING NOT TO EXERCISE RIGHT OF PRE-EMPTION

Property benefited by right of pre-emption:
(see note for completion 1)

Holder of right of pre-emption:
(see note for completion 2)

Property subject to right of pre-emption:
(see note for completion 3)

Deed in which right of pre-emption imposed:
(see note for completion 4)

I hereby undertake that I will not exercise my right of pre-emption in respect of a sale occurring before *(insert date)* **[if** *(insert any conditions to be satisfied)* **– see note for completion 5]**

Signature by or on behalf of the holder of right of pre-emption:

Signature of witness:

Date: .”.

Notes for completion of the undertaking

(These notes have no legal effect)

- 1 Describe the property in a way that is sufficient to enable it to be identified. Where the title has been registered in the Land Register the description should refer to the title number. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
- 2 Insert the holder’s name and address. The holder is the owner of the benefited property.

- 3 Describe the property in a way that is sufficient to enable it to be identified. Where the title has been registered in the Land Register the description should refer to the title number. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines. If part only of the burdened property is to be sold, describe that part only.
- 4 Give the name of the deed and the particulars of its registration or recording.
- 5 Insert any conditions concerning the type of sale in respect of which the right of pre-emption will not be exercised (for example, “if the consideration for the sale is £100,000 or more”).

NOTE

This is the statutory form of undertaking not to exercise a right of pre-emption, prescribed by s 79(1)(a). The schedule includes notes for completion of the undertaking. See further ss 78 and 79 of the Bill and paragraphs 10.35 to 10.38 of the report.

SCHEDULE 6
(introduced by section 85(2))

TITLE CONDITIONS NOT SUBJECT TO DISCHARGE BY LANDS TRIBUNAL

- 1 An obligation, however constituted, relating to the right to work minerals or to any ancillary rights in relation to minerals (“minerals” and “ancillary rights” having the same meanings as in the Mines (Working Facilities and Support) Act 1966 (c.4)).
- 2 In so far as enforceable by or on behalf of—
 - (a) the Crown, an obligation created or imposed for naval, military or air force purposes; or
 - (b) the Crown or any public or international authority, an obligation created or imposed—
 - (i) for civil aviation purposes; or
 - (ii) in connection with the use of land as an aerodrome.
- 3 An obligation created or imposed in or in relation to a lease of—
 - (a) an agricultural holding (as defined in section 1(1) of the Agricultural Holdings (Scotland) Act 1991 (c.55));
 - (b) a holding (within the meaning of the Small Landholders (Scotland) Acts 1886 to 1931); or
 - (c) a croft (within the meaning of the Crofters (Scotland) Act 1993 (c.44)).

NOTE

This schedule lists those title conditions which are not subject to discharge by the Lands Tribunal under part 9 of the Bill. The list is based on the equivalent list in schedule 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which is repealed by schedule 9 of this Bill). Paragraph 1 of that list (obligation to pay rent) has been incorporated directly into the definition of “title condition” (for which see s 113(1)). Schedule 6 implements recommendation 37. See paragraphs 6.37 to 6.43 of the report.

SCHEDULE 7
(introduced by section 106)

AMENDMENT OF ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000

1 The 2000 Act shall be amended in accordance with the following paragraphs.

NOTE

This schedule contains amendments to the Abolition of Feudal Tenure etc. (Scotland) Act 2000. See paragraph 13.35 of the report. The amendments come into force on royal assent (s 119(3)).

2 In section 17(1) (extinction of superior's rights), after the word "Act" there shall be inserted "and to sections 44 to 47 (which make provision as to common schemes, facility burdens and service burdens) and 53 (which makes provision as to manager burdens) of the Title Conditions (Scotland) Act 2000 (asp 00)".

NOTE

Section 17(1) extinguishes superiors' rights to enforce real burdens, subject to some savings. The amendments add further savings. Sections 44 to 47 of the Bill create new enforcement rights for existing burdens in place of the implied enforcement rights which are extinguished by s 41 of the Bill. Section 47 replaces s 23 of the Feudal Act (which is repealed by schedule 9). The saving for manager burdens is the counterpart of s 53(9) of the Bill.

3 In section 18 (reallotment of real burden by nomination of new dominant tenement)—

- (a) in subsection (1), at the end there shall be added " ; but this subsection is subject to subsection (7A) below"; and
- (b) after subsection (7) there shall be inserted—

“(7A) “Real burden” in paragraph (a) of subsection (1) above does not include a real burden imposed as is mentioned in section 46(1) of the Title Conditions (Scotland) Act 2000 (asp 00) (which makes provision as respects the imposition of real burdens, under a common scheme, on all the units of a sheltered housing development).”.

NOTE

This amendment prevents a superior in a sheltered housing development from attempting to preserve his management rights by registering a notice under s 18. See paragraph 11.66 of the report.

4 In section 25 (counter-obligations on reallotment)—

- (a) for the words “, 20 or 23” there shall be substituted “or 20”;
- (b) after the word “Act” there shall be inserted the words “or under section 47 or 53 of the Title Conditions (Scotland) Act 2000 (asp 00) (which make provision, respectively, as to facility burdens and service burdens and as to manager burdens)”; and
- (c) for the words from “(as the case may be)” to the end there shall be substituted “reallotment is effected”.

NOTE

Section 25 provides that on reallocation of a real burden the right to enforce is subject to any counter-obligation. The reference to reallocation under s 23 of the Act (now repealed) is replaced by a reference to reallocation under s 47 of the Bill. A reference to reallocation of manager burdens is added and the opportunity is taken to simplify the wording.

- 5 In section 27(3) (content of notice preserving right to enforce conservation burden), in paragraph (a), for the words “26 of this Act” there shall be substituted “33 of the Title Conditions (Scotland) Act 2000 (asp 00) (which makes provision generally as respects conservation burdens)”.

NOTE

The amendment to s 27(3)(a) is consequential on the repeal (by schedule 9 of the Bill) of s 26 of the Feudal Act (which provides for the establishment of a list of conservation bodies) and its replacement by s 33 of the Bill.

- 6 In section 49 (interpretation of Part 4), in the definition of “conservation body”, for the words “under section 26(1) of this Act” there shall be substituted “in regulations under section 33(2) of the Title Conditions (Scotland) Act 2000 (asp 00)”.

NOTE

This alters the definition of conservation body in consequence of the repeal (by schedule 9 of the Bill) of s 26 of the Feudal Act and its replacement by s 33 of the Bill.

- 7 In section 56 (extinction etc. of certain payments analogous to feuduty)—
- (a) in subsection (1), for the words “land obligation” there shall be substituted “title condition”; and
 - (b) for subsection (3) there shall be substituted—

“(3) The definition of “title condition” in section 113(1) of the Title Conditions (Scotland) Act 2000 (asp 00) shall apply for the purposes of this section as that definition applies for the purposes of that Act.”.

NOTE

This amendment replaces the reference to “land obligation” with a reference to “title condition”. The term “land obligation” is used in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 9 of the Bill. The replacement term in the Bill is “title condition” (defined in s 113(1)) the change being one of name rather than of substance. See paragraphs 6.28 to 6.36 of the report.

SCHEDULE 8
(introduced by section 118(1))

MINOR AND CONSEQUENTIAL AMENDMENTS

Registration of Leases (Scotland) Act 1857 (c.26)

- 1 (1) Section 3 of the Registration of Leases (Scotland) Act 1857 (assignment of recorded, or registered, leases etc.) shall be amended in accordance with this paragraph.
- (2) After subsection (2) there shall be inserted—
- “(2A) Any person entitled to grant an assignment under this section may—
- (a) execute a deed containing such conditions, or stipulations, as may be specified in an assignment under subsection (2) above; and
- (b) register such conditions and stipulations in the Land Register of Scotland or, as the case may be, record the deed in the Register of Sasines,
- and, subject to subsection (2B) below, on such registration or, as the case may be, recording such conditions and stipulations shall be effectual.
- (2B) Where, notwithstanding section 3(4) of the Land Registration (Scotland) Act 1979 (c.33) (creation of real right or obligation on date of registration etc.), a deed provides for the postponement of effectiveness of any conditions or, as the case may be, stipulations to—
- (a) a date specified in that deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or
- (b) the date of—
- (i) registration of an interest in land under; or
- (ii) recording of,
- some other deed so specified,
- the conditions, or stipulations, shall take effect in accordance with such provision.”.
- (3) In subsection (3), after the word “(2)” there shall be inserted “or (2A)”.
- (4) In subsection (4), after the word “assignment”—
- (a) where it first occurs, there shall be inserted “, or as the case may be in a deed such as is mentioned in subsection (2A) above,”; and
- (b) where it secondly occurs, there shall be inserted “, or as the case may be the deed,”.

NOTE

Following the repeal of s 32 of the Conveyancing (Scotland) Act 1874 and s 17 of the Land Registration (Scotland) Act 1979 by schedule 9 of the Bill, this amendment provides an alternative mechanism for creating conditions or stipulations which may be specified in an assignment under s 3(2) of the 1857 Act and for postponing the date of effectiveness of such conditions etc.

Conveyancing (Scotland) Act 1924 (c.27)

- 2 In section 40(2) of the Conveyancing (Scotland) Act 1924 (powers of creditor), after the word “conditions” there shall be inserted “(whether or not by creating a real burden)”.

NOTE

Following the repeal of s 40(3) of this Act by schedule 9, this amendment to s 40(2) makes it clear that a heritable creditor can create real burdens after the appointed day by whatever methods may be competent.

Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

- 3 In section 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which introduces the standard security), in subsection (8)(b), for the definition of “interest in land” there shall be substituted—

““real right in land” means any such right, other than ownership or a real burden, which is capable of being held separately and to which a title may be recorded in the Register of Sasines;”.

NOTE

This amendment is made necessary by (i) the repeal by schedule 9 of the Bill of ss 1 and 2 of the 1970 Act, and (ii) the consequential repeal, also by schedule 9, of schedule 12 para 30(6)(d)(ii) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which replaced the definition of “interest in land” in s 9 with a definition of “real right in land” as defined in ss 1 and 2 of the 1970 Act). The new definition is in substance the same as that introduced by the Feudal Act.

Prescription and Limitation (Scotland) Act 1973 (c.52)

- 4 (1) The Prescription and Limitation (Scotland) Act 1973 shall be amended in accordance with this paragraph.
- (2) In section 1 (prescriptive period in relation to real rights in land), in subsection (3), after the word “to”, where it fourthly occurs, there shall be inserted “real burdens,”.
- (3) In Schedule 1 (obligations affect by prescriptive periods of five years under section 6 of the Act)—
- (a) in paragraph 1(a)(vii), for the words “land obligation” there shall be substituted “title condition”; and
- (b) for paragraph 4 there shall be substituted—
- “4. In this Schedule, “title condition” shall be construed in accordance with section 113(1) of the Title Conditions (Scotland) Act 2000 (c.00).”.
- (4) In Schedule 3 (rights and obligations which are imprescriptible for certain purposes of the Act), in sub-paragraph (h), for the word “interest” there shall be substituted “real right”.

NOTE

Subparagraphs (1) and (2) amend s 1 of the 1973 Act in the version which is substituted, from the appointed day, by schedule 12 para 33(2) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Their purpose is to make clear that the right to a real burden cannot be acquired by positive prescription.

Subparagraph (3) replaces the reference to “land obligation” with a reference to “title condition”. The term “land obligation” is used in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 9 of the Bill. The replacement term in the Bill is “title condition” (defined in s 113(1)) the change being one of name rather than of substance. See paragraphs 6.28 to 6.36 of the report.

Subparagraph (4) makes an amendment of terminology which was overlooked by para 33 of schedule 12 to the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Land Tenure Reform (Scotland) Act 1974 (c.38)

- 5 In section 2 of the Land Tenure Reform (Scotland) Act 1974 (prohibition of new ground annuals and other periodical payments from land)—
- (a) in subsection (1), for the words “land obligation” there shall be substituted “title condition”; and
 - (b) after subsection (2) there shall be added—
 - “(3) In subsection (1) above, “title condition” has the meaning given by section 113(1) of the Title Conditions (Scotland) Act 2000 (asp00).”.

NOTE

This amendment replaces the reference to “land obligation” with a reference to “title condition”. The term “land obligation” is used in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 9 of the Bill. The replacement term in the Bill is “title condition” (defined in s 113(1)) the change being one of name rather than of substance. See paragraphs 6.28 to 6.36 of the report.

Land Registration (Scotland) Act 1979 (c.33)

- 6 (1) The 1979 Act shall be amended in accordance with this paragraph.
- (2) In each of sections 2(6) (interpretation) and 3(1) (effect of registration), for the words “sections 17, 18 and” there shall be substituted “section”.
- (3) In section 3(6) (special provision as respects completion of title)—
- (a) for the words “an uninfert proprietor” there shall be substituted “an unregistered holder”;
 - (b) for the words “the uninfert proprietor” there shall be substituted “him”;
 - (c) for the word “infert” there shall be substituted “registered as entitled to the interest”; and
 - (d) for the words from “section 4” to “land”, where it secondly occurs, there shall be substituted “—
 - (a) section 4 of the Conveyancing (Scotland) Act 1924 (c.27); and
 - (b) section 36(a) of the Title Conditions (Scotland) Act 2000 (asp 00),(both of which relate to completion of title) shall be of no effect in relation to such an interest in land.”.

- (4) In section 15 (simplification of deeds relating to registered interests), for subsection (3) there shall be substituted—

“(3) It shall not be necessary, in any deed relating to a registered interest in land, to deduce title if evidence of sufficient midcouples or links between the unregistered holder and the person last registered as entitled to the interest are produced to the Keeper on registration in respect of that interest in land.”

NOTE

The amendments in subparagraph (2) are consequential on the repeal, in schedule 9, of ss 17 and 18 of the 1979 Act.

For the most part subparagraph (3) repeats an amendment made prospectively by schedule 12 para 39(3)(c) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which is repealed by schedule 9 of the Bill). This is necessary because the amendment is capable of relating to part 3 of the Bill, which comes into force on royal assent. Subparagraph (3) likewise comes into force on royal assent (s 119(3)) – and not on the appointed day, as was the position under the Feudal Act. The only addition to the earlier version of the amendment is a reference to s 36(a) of the Bill. This makes clear that it is not necessary to expedite a notice of title in the case of a conservation burden which is already on the Land Register.

Subparagraph (4) repeats an amendment made prospectively by schedule 12 para 39(6)(b) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (which is repealed by schedule 9 of the Bill). This is necessary because the amendment is capable of relating to part 3 of the Bill, which comes into force on royal assent. Subparagraph (4) likewise comes into force on royal assent (s 119(3)) – and not on the appointed day, as was the position under the Feudal Act.

Ancient Monuments and Archaeological Areas Act 1979 (c.46)

- 7 In section 17 of the Ancient Monuments and Archaeological Areas Act 1979 (agreements concerning ancient monuments and land in their vicinity), for subsection (7) there shall be substituted—

“(7) Section 84 of the Law of Property Act 1925 (c.25) (power of Lands Tribunal to discharge or modify restrictive covenant) shall not apply to an agreement under this section.”

NOTE

Section 17(7)(b), which provides that ss 1 & 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 are not to apply to agreements made under s 17, is repealed as (i) ss 1 & 2 of the 1970 Act are repealed by schedule 9 of the Bill, and (ii) a s 17 agreement would not fall within the successor provisions (ie part 9 of the Bill) because they are not “title conditions” as defined in s 113(1).

Health and Social Services and Social Security Adjudications Act 1983 (c.41)

- 8 In section 23 of the Health and Social Services and Social Security Adjudications Act 1983 (arrears of contributions secured over interest in land in Scotland)—

(a) in subsection (1)(b)—

(i) after the word “Scotland” (and within the parentheses) there shall be inserted ““an interest in land” meaning land or,”; and

(ii) after the words “1970” (and within the parentheses) there shall be inserted “, a real right in land”; and

(b) for subsection (4) there shall be substituted—

“(4) Where an interest in land (as defined in subsection (1)(b) above) over which a charging order is made is an interest to which the debtor does not have a completed title, the order shall be as valid as if the debtor had such title.”.

NOTE

Section 23(1)(b) refers to an “interest in land” as defined in s 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970. That definition has now been replaced by a definition of “real right in land” (see schedule 8 para 3 of this Bill). This amendment makes the necessary adjustment to s 23.

Feudal terminology is also replaced, following the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Further and Higher Education (Scotland) Act 1992 (c.37)

9 In Schedule 3 to the Further and Higher Education (Scotland) Act 1992 (transfer and apportionment of property)—

(a) in paragraph 1—

(i) in each of sub-paragraphs (2) and (3), for the words “land obligations” there shall be substituted “title conditions”; and

(ii) for sub-paragraph (5) there shall be substituted—

“(5) In this Schedule, “title conditions” has the meaning given by section 113(1) of the Title Conditions (Scotland) Act 2000 (asp 00).”; and

(b) in paragraph 4(6), for the words “land obligations” there shall be substituted “title conditions”.

NOTE

This amendment replaces the reference to “land obligations” with a reference to “title conditions”. The term “land obligation” is used in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 9 of the Bill. The replacement term in the Bill is “title condition” (defined in s 113(1)), the change being one of name rather than of substance. See paragraphs 6.28 to 6.36 of the report.

Crofters (Scotland) Act 1993 (c.44)

10 In section 16(6) of the Crofters (Scotland) Act 1993 (provisions relating to conveyance), for the words “land obligations as defined in section 1(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970” there shall be substituted “title conditions, within the meaning given by section 113(1) of the Title Conditions (Scotland) Act 2000 (asp 00).”.

NOTE

This amendment to s 16(6) replaces the reference to “land obligations” with a reference to “title conditions”. The term “land obligation” is used in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are

repealed by schedule 9 of the Bill. The replacement term in the Bill is “title condition” (defined in s 113(1)), the change being one of name rather than of substance. See paragraphs 6.28 to 6.36 of the report.

Standards in Scotland’s Schools etc. Act 2000 (asp 6)

- 11 In section 58(1) of the Standards in Scotland’s Schools etc. Act 2000 (interpretation), in the definition of “land”, for the words “land obligations (as defined in section 2(6) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c. 35)” there shall be substituted “title conditions, within the meaning given by section 113(1) of the Title Conditions (Scotland) Act 2000 (asp 00)”.

NOTE

This amendment to s 58(1) replaces the reference to “land obligations” with a reference to “title conditions”. The term “land obligation” is used in ss 1 and 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970 to identify the rights which are capable of discharge by the Lands Tribunal. Sections 1 and 2 of the 1970 Act are repealed by schedule 9 of the Bill. The replacement term in the Bill is “title condition” (defined in s 113(1)), the change being one of name rather than of substance. See paragraphs 6.28 to 6.36 of the report.

SCHEDULE 9
(introduced by section 118)

REPEALS

<i>Enactment</i>	<i>Extent of repeal</i>
Registration Act 1617 (c.16) (Act of the Parliaments of Scotland)	The words from “It is”, where they first occur, to “improvin”; and the words from “It is”, where they thirdly occur, to “sufficient”.
Redemptions Act 1661 (c.247) (Act of the Parliaments of Scotland)	The whole Act.
Registration of Leases (Scotland) Act 1857 (c.26)	Section 3(5).
Conveyancing (Scotland) Act 1874 (c.94)	Section 32. Schedule H.
Conveyancing (Scotland) Act 1924 (c.27)	In section 8(5), the words “and to the form of such reference given in Schedule H of the Conveyancing (Scotland) Act, 1874”. Section 9. Section 40(3).

<i>Enactment</i>	<i>Extent of repeal</i>
	In Schedule B, in Form No 1, the words “there are”; and the words from “and have entered” to “and others which affect the land or any part thereof”.
	Schedule E.
Church of Scotland (Property and Endowments) Act 1925 (c.33)	Section 22(2)(h).
Church of Scotland (Property and Endowments) (Amendment) Act 1933 (c.44)	Section 9(3).
Conveyancing Amendment (Scotland) Act 1938 (c.24)	Section 9.
Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)	Sections 1, 2 and 7. In section 53(4), the definition of “prescribed”.
	Schedule 1.
Land Tenure Reform (Scotland) Act 1974 (c.38)	In section 19, the words “and section 2(4) of the said Act of 1970” and “in both of those provisions,”.
Land Registration (Scotland) Act 1979 (c.33)	In section 15(2), paragraph (a); and the words “; and (b)” immediately following that paragraph.
	Sections 17 and 18.
Aviation Security Act 1982 (c.36)	In schedule 1, in paragraph 5(b), the words “to a feuduty or ground annual or”.
Housing (Scotland) Act 1987 (c.26)	Section 72(7).
Aviation and Maritime Security Act 1990 (c.31)	In schedule 2, in paragraph 5(b), the words “to a feuduty or ground annual or”.
Enterprise and New Towns (Scotland) Act 1990 (c.35)	In section 32(3), the words “as is mentioned in section 8(6) of this Act”.

<i>Enactment</i>	<i>Extent of repeal</i>
Further and Higher Education (Scotland) Act 1992 (c.37)	In Schedule 3, in paragraph 2(3), the words “, feuduties, stipend”.
Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)	<p>In section 17(1), the word “23,”.</p> <p>Section 23.</p> <p>In section 24, the words “and 23”.</p> <p>Section 26.</p> <p>In section 28, the words “Subject to section 31 of this Act,”.</p> <p>Sections 29 to 32.</p> <p>Section 60(2).</p> <p>In section 73(2), the word “23,”.</p> <p>In section 77, in subsection (2), the words “Subject to subsection (4)(c) and (d) below,”; and in subsection (4), paragraphs (c) and (d).</p> <p>In schedule 12, paragraphs 2, 9(8) and (21), 15(8), 16(2)(a), 17(4)(b), 18(3) and 30(2), (3), (5), (6)(d)(ii) and (22); and, in paragraph 39, head (c) of sub-paragraph (3) (and the word “and” immediately preceding that head) and sub-paragraph (6).</p> <p>Schedule 13 in so far as it relates to section 32 of and Schedule H to the Conveyancing (Scotland) Act 1874; to section 9 of the Conveyancing (Scotland) Act 1924; to section 22(2)(h) of the Church of Scotland (Property and Endowments) Act 1925; to section 9(3) of the Church of Scotland (Property and Endowments) Amendment Act 1933; to section 2 of and Schedule 1 to the Conveyancing and Feudal Reform (Scotland) Act 1970; and to sections 3(6) and 15(2)(a) of the Land Registration (Scotland) Act 1979.</p>

NOTE

This schedule deals with the repeals that are made necessary or possible as a result of the reform of the law of real burdens and the related reforms recommended in the report.

Registration Act 1617

References to reversions and regresses are removed in consequence of the repeal of the Reversion Act 1469 by s 84 of the Bill.

Redemptions Act 1661

The Act is wholly obsolete and can be repealed with the repeal of the Reversion Act 1469 by s 84 of the Bill.

Registration of Leases (Scotland) Act 1857

16. Section 3. *Section 3(5) falls in consequence of the repeal of s 32 of the Conveyancing (Scotland) Act 1874 and s 17 of the Land Registration (Scotland) Act 1979 by this schedule.*

Conveyancing (Scotland) Act 1874

Section 32 and Schedule H. The first half of s 32 repeats a power that is already available at common law.

The second half of s 32 (which permits the creation of a real burden in a deed of conditions) is repealed in consequence of s 4(2) of the Bill. In future it will be possible to create a real burden using any deed which satisfies the conditions set out in s 4 (2).

Conveyancing (Scotland) Act 1924

Section 8. The reference in s 8(5) falls in consequence of the repeal by this schedule of s 32 and schedule H of the Conveyancing (Scotland) Act 1874.

Section 9, Schedule E. This section, which exempts heritable securities from having to contain burdens and provides a mechanism for other cases where burdens have been omitted, is repealed following s 57 of the Bill.

Section 40. Section 40(3), which enables a heritable creditor to create real burdens by using a deed of conditions under s 32 of the Conveyancing (Scotland) Act 1874, is repealed following the repeal of s 32 itself. See also the note to paragraph 2 of schedule 8.

Schedule B. This repeal is consequential on the repeal by this schedule of s 32 and schedule H of the Conveyancing (Scotland) Act 1874.

Church of Scotland (Property and Endowments) Act 1925

Section 22. This repeal, which should be read with s 81 of the Bill, implements recommendation 85(a). See paragraph 10.42 of the report.

Church of Scotland (Property and Endowments) (Amendment) Act 1933

Section 9. This repeal implements recommendation 85(b). See paragraph 10.42 of the report.

Conveyancing Amendment (Scotland) Act 1938

Section 9. This section, which limits the effect of certain rights of pre-emption, is replaced by s 80 of the Bill.

Conveyancing and Feudal Reform (Scotland) Act 1970

Sections 1 and 2 and 7, Schedule 1. Part 6 of the Bill introduces a revised jurisdiction for the Lands Tribunal in relation to the discharge of real burdens, servitudes and other title conditions in place of the jurisdiction conferred by the provisions here repealed.

Section 53. The definition in s 53(4) is repealed in consequence of the repeal of those sections of the 1970 Act where the term “prescribed” is found, namely s 2 (by this schedule) and s 4 (by schedule 13 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000).

Land Tenure Reform (Scotland) Act 1974

Section 19. This repeal is in consequence of the repeal, by this schedule, of s 2 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

Land Registration (Scotland) Act 1979

Section 15. Paragraph (a) of s 15(2) lists a number of provisions. Its repeal is consequential on the repeal, by this Bill, of those provisions. (Paragraph (a) is amended, prospectively, by schedule 12 para 39(6)(a) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, but that amendment now falls.)

Section 17. This section provides that, except where the deed says otherwise, a deed of conditions under s 32 of the Conveyancing (Scotland) Act 1874 takes effect immediately on registration. It falls in consequence of the repeal of s 32 by this schedule.

Section 18. This section, concerning the effect of registration of a discharge etc, is replaced by ss 14 and 40 of the Bill.

Aviation Security Act 1982

Schedule 1. This repeal is consequential on the abolition of feuduties and ground annuals by part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Housing (Scotland) Act 1987

Section 72. This repeal is consequential on the abolition of pecuniary real burdens by s 109 of the Bill.

Aviation and Maritime Security Act 1990

Section 2. This repeal is consequential on the abolition of feuduties and ground annuals by part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Enterprise and New Towns (Scotland) Act 1990

Section 32. This repeal is consequential on the amendments made to the Act by s 105 of the Bill.

Further and Higher Education (Scotland) Act 1992

Schedule 3. This repeal is consequential on the abolition of feuduties and stipends by part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Abolition of Feudal Tenure etc. (Scotland) Act 2000

The repeal of provisions in this Act comes into force on royal assent (s 119(3)).

Section 17. The reference in s 17(1) falls with the repeal of section 23 of the Act.

Section 23. This section is replaced by s 47 of the Bill.

Section 24. The reference falls with the repeal of section 23 of the Act.

Section 26. This section is replaced by s 33 of the Bill.

Section 28. The reference falls in consequence of the repeal of s 31 of the Act.

Section 29. This section is replaced by s 34 of the Bill.

Section 30. This section is replaced by s 36 of the Bill.

Section 31. This section is replaced by s 37 of the Bill.

Section 32. This section is replaced by the exclusion of “real burden” from the definition of “real right in land” substituted into s 9(8)(b) of the Conveyancing and Feudal Reform (Scotland) Act 1970 by schedule 8 para 3 of the Bill.

Section 60. Section 60(2) is replaced by s 38(2) of the Bill.

Section 73. In s 73(2) the reference falls with the repeal of section 23 of the Act.

Section 77. This is consequential on the repeal, by this schedule, of s 15(2)(a) of the Land Registration (Scotland) Act 1979 and schedule 12 para 39(6) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Schedule 12. This schedule of the Feudal Act contains minor and consequential amendments resulting from feudal abolition and the other reforms dealt with in the Act. As the Bill now replaces and (in this schedule) repeals some of the provisions referred to in schedule 12, the relevant paragraphs of schedule 12 fall to be repealed in turn. Of the repeals listed, only the following do not come into the category just described:

Paragraph 30(6)(d)(ii). The words repealed are replaced by schedule 8 para 3 of the Bill.

Paragraph 39(3)(c). The words repealed are replaced by schedule 8 para 6(3) of the Bill.

Paragraph 39(6)(b). The words repealed are replaced by schedule 8 para 6(4) of the Bill.

Schedule 13. This schedule of the Feudal Act contains repeals resulting from feudal abolition and the other reforms dealt with in the Act. As the Bill now replaces and (in this schedule) repeals some of the provisions referred to in schedule 13, the relevant parts of schedule 13 fall to be repealed in turn. The only repeal not falling into this category is of words in s 3(6) of the Land Registration (Scotland) Act 1979. Section 3(6) is not repealed by the Bill but it is re-cast by schedule 8 para 6(3) in a way which supersedes the original repeal.

Appendix B

List of those who submitted written comments on Discussion Paper No 106

Aberdeen City Council
D R Adie, Solicitor
H J Beach, Solicitor
Bield Housing Association Limited
A Brown, Solicitor
S Brymer, Solicitor
R F Callander
Campbeltown Faculty of Solicitors
Church of Scotland General Trustees
S G Clarke
Committee of Scottish Clearing Bankers
R C Connal, Solicitor
Convention of Scottish Local Authorities
J W Craig, Solicitor
Messrs Craxton & Grant, SSC
East Ayrshire Council
Faculty of Advocates
C J G Fforde
Professor W M Gordon, University of Glasgow
Messrs Friels, Solicitors
Professor G L Gretton, University of Edinburgh
T Guthrie, University of Glasgow
B G Hamilton
Hanover (Scotland) Housing Association Limited
Highland Council
M McIlroy Hipwell, Solicitor
Historic Scotland
J S Hodge, Solicitor
J R Hudson
R T B Jack, Solicitor
G Jamieson, Solicitor
D A Johnstone, Solicitor
R Johnstone, Solicitor
Keeper of the Registers of Scotland
Lands Tribunal for Scotland
The Law Society of Scotland
The Lord President
D Lorimer
A I Macdonald, Solicitor
L J Macgregor, University of Glasgow
McCarthy and Stone plc and Peverel Management Services Ltd (per Messrs Biggart Baillie, Solicitors)
Professor A J McDonald, Messrs Thorntons WS
Messrs McJarrow and Stevenson, Solicitors
Messrs J M & J Mailer, Solicitors
Messrs Morton Fraser Commercial, Solicitors
I W Moffett, Solicitor
L D Most, Solicitor

Ministry of Defence in Scotland (per Messrs Robson McLean, WS)
A D Murray, University of Stirling
The National Trust for Scotland
North Ayrshire Council
North Lanarkshire Council
B A Merchant, Solicitor
R Oliphant
Professor R Paisley
J P A Parrott
D Patterson
Messrs Pomphreys, Solicitors
Property Law Honours Class, University of Glasgow
Property Managers Association Scotland Limited
I S Quigley, Solicitor
Professor C T Reid, University of Dundee
Renfrewshire Council
P F A Roper, Solicitor
Royal Institution of Chartered Surveyors in Scotland
S E Scammell
Scottish Enterprise
Scottish Homes
Scottish Landowners' Federation
Scottish Law Agents Society
Scottish Natural Heritage
Sheriffs Association
Sheriffs Principal
J Smythe
Society of Local Authority Lawyers and Administrators in Scotland
Society of Writers to HM Signet¹
South Ayrshire Council
The St Andrews Preservation Trust Ltd
Dr A J M Steven
Taylor Woodrow Property Co Ltd
Messrs Thorntons, WS
I N D Walker, Solicitor
M S Watton
West Lothian Council

¹ The response was prepared by a working party comprising G L Davidson, J M Robertson, A S M Thornton, and A J McAndrew, and while it was discussed and noted by the Council of the Society, according to their normal practice, it has not been formally adopted by them.

Appendix C

SURVEY OF OWNER OCCUPIERS' UNDERSTANDING OF TITLE CONDITIONS

Andra Laird and Emma Peden
George Street Research

The Scottish Executive Central Research Unit
2000

Note

Annex 2, which contains a copy of the questionnaire used in the survey, has been omitted. A full copy of the survey including the questionnaire was published under the title of *Real Burdens* on 23 June 2000.

SUMMARY

OWNER OCCUPIERS' OPINIONS OF REAL BURDENS

1. Background (1.1-1.2)

Real burdens are the conditions imposed in title deeds to regulate the maintenance and use of land and buildings for the benefit of those that might be affected. Real burdens fall into three main categories: neighbour burdens, community burdens and feudal burdens. Community burdens are those which are used as a means of regulation in a discrete community, such as a housing estate, a block of flats or in sheltered housing accommodation. As such, community burdens operate on a reciprocal basis, in that each house situated within a discrete community is subject to identical burdens, with the owner of each residence maintaining the right to enforce burdens against other house owners within the estate.

In anticipation of the advent of feudal abolition leading to a legislative re-definition of title conditions, the Scottish Law Commission outlined its position in a Discussion Paper on Real Burdens (No. 106), published in October 1998. Whilst favouring the retention of real burdens, the Commission recognises a need for further clarification in this area and proposes a simplification of the law to adapt to a new post-feudal environment.

2. The research objectives and approach (1.3 – 1.4)

The key objectives of this research study were:

- To assess current levels of awareness and understanding of title conditions attached to the property
- To gauge views on the advantages and disadvantages of title conditions in principle
- To identify the perceived strengths and weaknesses of specific types of conditions (both as enforcer and enforced against)

A quantitative approach to the research was adopted and a random route methodology was used to obtain the views of owner occupiers in selected housing developments Scotland-wide. The survey was conducted in housing developments in seven key locations throughout Scotland, namely Edinburgh, Glasgow, Inverness, West Lothian, Dumfries, Perth and Fife. A pilot survey (using a draft questionnaire) was conducted before the start of the main fieldwork period.

3. Awareness of title conditions (2.1 - 2.7)

Overall, awareness of title conditions was relatively high, with 62% of those interviewed claiming that they had heard of the conditions governing their property. Factors such as the year in which owner occupiers had moved into their property, whether any building work had been done and the location of the housing development influenced responses.

Questioning revealed that knowledge of the content of the conditions was limited; only 31% said that they knew either a lot or a little about the conditions attached to their house. After showing the title conditions to owner occupiers who claimed no knowledge of them, some recognition was recorded.

On this basis, the total calculated as knowing some of the content of their title conditions was 62%. Further probing revealed that some rather than all conditions could be identified accurately.

Despite the claimed overall levels of familiarity with the fact that title conditions applied to their property, there appeared to be a general lack of awareness among respondents of what the title conditions actually mean in real terms. For example, there was little evidence that, when building work had been carried out, owner occupiers had sought consent from those with rights of enforcement in the development. So, owner occupiers appeared to know that title conditions applied to their property, but had not acknowledged that this obliged them to check with others if they intended to undertake any building work on their property.

Only 29% had learned of them when considering the purchase of their home before the buying process began and thus for a majority the title conditions were not an influence on the decision to purchase. For 45% of those with previous knowledge of the conditions attached to their house, the conditions were brought to their attention during the process of buying the property.

Lawyers and solicitors are commonly cited as the source through which information on title conditions was brought to light.

4. Opinions towards title conditions (3.1-3.5)

Attitudes towards title conditions were largely positive, with 81% of home owners in agreement that they help to maintain the residential character of the development. Title conditions were considered by 64% of respondents to be beneficial in relation to selling houses. Just one quarter agreed that there was no point in having title conditions as no-one tends to bother with them in reality. However, there was some indication that title conditions might cause problems: 65% agreed they could cause neighbourly disputes. Nevertheless they are widely regarded as useful (by 70%).

Based on a number of fictional scenarios which were presented to owner occupiers concerning the practical use of title conditions, significant numbers were of the opinion that it is reasonable to have to seek the permission of one's neighbours before starting external building work. Moreover, high numbers said that they were in favour of title conditions relating to major building work such as an extension, although relatively few supported title conditions when used for small-scale works, such as the building of a garden shed at some distance from houses within a development.

5. The future of title conditions (4.1 – 4.4)

More than half (61%) of those interviewed said that they did want title conditions to remain in principle as a means of restricting the ways in which their property could be used, though their support was conditional on the appropriate use of these. Overall a small majority (53%) were of the opinion that title conditions should not be abolished. Only 16% felt that all conditions should be abolished, although one in five held mixed views, stating that some conditions should be retained and others abolished.

Summary

To sum up, whilst there is no strong evidence that all title conditions are known or that the spirit of them is followed, they are still valued and accepted as a form of safety net by the majority of those

residing in the developments surveyed. Thus any review of them might best concentrate on ensuring that those employed are appropriate and applicable rather than removing them wholesale.

CHAPTER ONE INTRODUCTION

This chapter begins by detailing the background behind the survey, and outlines the legislative context against which this programme of research was commissioned. It then goes on to discuss the specific objectives of the study and also explains the survey approach employed.

1.1 BACKGROUND

Real burdens are the conditions imposed in title deeds to regulate the maintenance and use of land and buildings for the benefit of those that might be affected. They were introduced in the late eighteenth century in response to the rapid urbanisation which accompanied the Industrial Revolution. Today real burdens are still considered to provide an efficient means of private regulation throughout Scotland. Real burdens fall into three main categories: neighbour burdens, community burdens and feudal burdens. Community burdens are those which are used as a means of regulation in a discrete community, such as a housing development, a block of flats or sheltered housing accommodation. As such, community burdens operate on a reciprocal basis, in that each house situated within a discrete community is subject to identical burdens, with the owner of each residence maintaining the right to enforce burdens against other house owners within the estate. Such rules are mutually enforceable, so that each resident is at the same time both a dominant and a servient property dweller.

1.2 THE LEGISLATIVE BACKGROUND

Real burdens arose as a direct consequence of urbanisation and are not feudal in origin or in nature. However, as a matter of conveyancing practice, a vast number of real burdens are embedded in the feudal system, and, as such, are enforceable by feudal superiors. In October 1999 a bill to abolish the feudal system was introduced to the Scottish Parliament. In effect, because feudal abolition will ensure the abolition of superiors, real burdens will also be abolished insofar as they are enforceable by superiors.

In anticipation of the advent of feudal abolition leading to a legislative re-definition of title conditions, the Scottish Law Commission outlined its position in a Discussion Paper on Real Burdens (No. 106), published in October 1998. Whilst favouring the retention of real burdens, the Commission recognises a need for further clarification in this area and proposes a simplification of the law to adapt to a new post-feudal environment¹. In particular, the Commission proposes to make it easier to identify the person with the right to enforce a real burden; to resolve doubts as to the validity of real burdens which regulate the management and maintenance of common facilities; to deal with the problem of obsolete burdens, for instance, by introducing a 'sunset' rule (ie, a rule that burdens are extinguished at the end of a fixed period); and to make it easier, quicker and cheaper to discharge real burdens. The Discussion Paper also considers rights of pre-emption, redemption and reversion and proposes the introduction of a cap on the length of long leases.

¹ For a fuller discussion of this, please see the Scottish Law Commission's Discussion Paper.

1.3 THE RESEARCH OBJECTIVES

To inform future legislative recommendations, the Scottish Law Commission was keen to undertake a programme of research which would evaluate title conditions as used within developments such as housing estates (community burdens) which currently serve to restrict the ways in which a property might be used. The key objectives of this research study were defined as follows:

- To assess current levels of awareness and understanding of title conditions attached to the property
- To gauge views on the advantages and disadvantages of title conditions in principle
- To identify the perceived strengths and weaknesses of specific types of conditions (both as enforcer and enforced against)

1.4 SURVEY METHOD

Full details of the survey approach are appended. The views of 402 owner occupiers were obtained by means of personal interviews spread over seven locations in Scotland. Locations were selected to cover a mix of urban and rural situations which reflected the range of different types of title condition applying in developments throughout Scotland. The choice of respondent within each interview locale was guided by the adoption of a random method of selection.

The survey explored the views of owner occupiers in houses only: those residing in rented and other sectors and tenement properties (flats) were excluded. All interviewing was conducted in June 1999. A pilot survey was conducted before the start of the main fieldwork period and the feedback from this exploratory stage informed development of the final questionnaire.

A reasonable spread of property ages was attained in the sample; 31% of properties were less than 5 years old, 4% were between 5 and 10 years old, 22% were between 11 and 20 years old, 35% were between 21 and 30 years old and 9% were more than 30 years old. More than half (52%) of the properties were new when bought by the respondent, with a further 44% of owner occupiers confirmed as a second or subsequent owner of the house. The status of the remaining 4% was not known.

A copy of the questionnaire used in the survey is appended in Annex 2. This should be referred to for the precise wording and sequence of the questions asked.

This chapter has defined the context of the research and the approach used. The following chapters present the findings of the research conducted by George Street Research.

CHAPTER TWO

AWARENESS AND UNDERSTANDING OF TITLE CONDITIONS

This chapter provides an assessment of current levels of awareness and understanding of title conditions attached to property. The most common sources through which owner occupiers are made aware of title conditions are discussed as is the extent to which undertaking external building work on a property acts as an influence in increasing awareness and understanding of the title conditions attached to it.

2.1 AWARENESS OF TITLE CONDITIONS

In general terms, awareness of the existence of title conditions was relatively high overall with significantly more than half (62%) of those interviewed saying that they knew of their existence. Slight variation was evident with regard to the year in which owner occupiers had moved into their property. Claimed awareness of title conditions was greatest amongst those who had moved into their house before 1985; 66% of those moving in before this date maintained that they had heard of the conditions, compared to 60% of homeowners who had moved within the last year. Awareness amongst those moving in between 1994 and 1997, and those moving in between 1985 and 1993, was the same at 61%. This pattern probably reflects the extent to which those in older properties were more likely to have done some building work on the property in the past, as awareness of title conditions was higher amongst those who had previously done building work (70%). The detailed analysis reveals that those in older properties were more likely to have undertaken building work and to have consulted someone for permission.

There is evidence also that awareness of the title conditions applying to the property was not universal and that some title conditions were more widely known than others. A fuller analysis of this is provided at 2.3.

Considerable differentiation was also evident with regard to the location of the housing development in question. As shown in the table overleaf, awareness of title conditions was generally lowest amongst those living in housing developments in Glasgow, Dumfries and Inverness.

Table 2.1
Awareness of title conditions according to individual development

Base: 402 (All respondents)	Yes		No
	Number of Respondents Aware	%	%
Edinburgh: Location 3	8	100	-
Edinburgh: Location 5	11	92	8
West Lothian: Location 1	9	90	10
Edinburgh: Location 1	18	90	10
Fife: Location 1	13	87	13
Inverness: Location 1	13	87	13
Edinburgh: Location 4	23	85	15
West Lothian: Location 2	8	80	20
Glasgow: Location 5	7	70	30
Edinburgh: Location 6	7	70	30
Perth: Location 1	10	67	33
Edinburgh: Location 2	10	67	33
Inverness: Location 2	29	64	36
West Lothian: Location 3	18	60	40
Dumfries: Location 1	6	55	45
Glasgow: Location 1	7	54	46
Glasgow: Location 3	8	53	47
Glasgow: Location 4	7	47	53
Glasgow: Location 6	3	43	57
Dumfries: Location 3	4	40	60
Dumfries: Location 2	14	36	64
Glasgow: Location 2	14	34	66
Inverness: Location 3	2	22	78

(1) As noted in the sample profile, the number of interviews achieved in each estate varied significantly and a number of the sample sizes are small. As such, figures should be treated with some caution. For instance, although Edinburgh residents (Location 3) appear to have significantly higher levels of awareness, these figures are based on a sample size of 8 owner occupiers.

At an overall level it was clear that awareness of title conditions was relatively high amongst the sample of owner occupiers.

2.2 LEVELS OF KNOWLEDGE OF TITLE CONDITIONS

Further information was sought regarding the extent of home owners' knowledge of the particular title conditions attached to their property.

Actual knowledge of the content and substance of title conditions was largely limited:

- Only a minority (31%) of home owners said that they had some knowledge of the conditions attached to their house, in that they knew either a lot or a little about them.
- Around two fifths (38%) said that they knew very little, or were aware of their existence, but remained unsure about the meaning of title conditions in practical terms.
- A further 29% admitted that they had no knowledge whatsoever and had not heard of the title conditions governing their property prior to the date of interview.

As shown below, the final spread of response confirmed that general knowledge of the contents of title conditions was fairly restricted:

Table 2.2
Levels of knowledge of title conditions

Base: 402 (All respondents)	Number stating	%
I know a lot about the title conditions attached to my house	34	8
I know a little about the title conditions on my house	94	23
I know very little about the title conditions on my house	80	20
I am aware that they exist but not what they are	74	18
Before today, I had never heard of the title conditions on my house	115	29
Don't know	5	1

It is interesting to note that even amongst those owner occupiers living in developments cited previously as having higher levels of awareness of title conditions, claimed knowledge of the content of title conditions remained limited. Whilst all eight of those living in Edinburgh (Location 3) had said that they were aware of the conditions, three said that they remained unsure about what the conditions actually were.

Home owners who admitted they had very limited awareness (ie, those who had not previously heard of title conditions and those who knew only of their existence but nothing of their content) were then shown the relevant conditions for their particular development. They were then asked if, after seeing them, the conditions were recognisable. More than six in ten (62%) said that they still did not recognise the relevant title conditions after viewing, although 22% did consider them to be familiar. A further 16% responded that they were unsure as to whether they recognised the conditions or not.

Overall, levels of knowledge of the conditions attached to properties was fairly limited. From the total sample, 52% of home owners had some knowledge (either a lot, a little or very little) of the relevant title conditions pertaining to their home. Of those who had not previously heard of them, or knew only of the existence of title conditions, just 22% recognised the conditions attached to their home when prompted visually with the title conditions governing their property. Combining these figures, it would appear that 62% of owner occupiers claimed to know something of the content of the title conditions in their deeds.

Comparing these results, which aimed to establish the extent of detailed knowledge of the title conditions, with the earlier question about general awareness shows little difference in the proportions who claimed any such knowledge. Thus people who had heard of their title conditions prior to the interview also recognised or considered themselves knowledgeable about specific elements within the title conditions.

2.3 PERCEPTIONS OF TITLE CONDITIONS APPLYING TO INDIVIDUAL DEVELOPMENTS

As seen in Table 2.2, more than one in two owner occupiers (52%) said that they knew either a lot, a little, or very little about the title conditions attached to their property. In order to assess the extent of knowledge amongst this group of owner occupiers, examples of nine title conditions, which apply to housing developments in general, were read aloud. Owner occupiers were then asked to identify the conditions they thought applied to their development in particular. Examples of the conditions included: adherence to the original colour scheme of exterior parts, prohibition on the parking of private vehicles and a prohibition on using the property for business use.

Although a prohibition on using a property for business use was applicable to all the estates included in the survey, only around half (55%) believed that this condition was relevant to their development. Moreover, whilst a prohibition on parking commercial vehicles was in existence for all but three of the estates, just 41% made reference to this condition. The next most common response related to a prohibition on major external buildings (such as an extension, conservatory, garage, etc) which was mentioned by two fifths of owner occupiers.

Table 2.3i provides a summary of the correctness of owner occupiers in identifying the conditions pertaining to their development. The first column shows the total number of owner occupiers who could have been correct in each instance; the second shows the actual numbers of owner occupiers who identified each condition correctly; the third shows the actual percentage of correct responses in relation to each development.

Table 2.3I
Perceptions of title conditions applying to particular housing developments

Base: 208 (All respondents who knew either a lot, a little or very little about the conditions on their house)	Number of people who could have known (ie possible total)	Actual number who knew it	%
Adherence to the original colour scheme of exterior parts	23	16	70
Prohibition on using property for business use	208	114	55
Prohibition on parking commercial vehicles	191	75	40
Prohibition on parking caravans	191	71	37
Prohibition on keeping animals	188	68	36
Prohibition on all external buildings	185	63	34
Prohibition on only major external buildings	23	7	30
Prohibition on the growing of certain varieties of plants/trees	35	5	14
Prohibition on the parking of private vehicles	-	33	-

It is, perhaps, not surprising that the condition most likely to be correctly identified relates to the painting of houses, as this condition is likely to be encountered with some frequency and to apply to all home owners in the relevant developments.

Table 2.3ii provides a further summary of the correctness of responses by individual housing developments in the survey.

Table 2.3ii
Summary of correctness of title conditions applying to specific developments

Base: 208 (All respondents who knew either a lot, a little or very little about the conditions on their house)	All conditions exactly	Some conditions correct	No conditions correct
	%	%	%
TOTAL	-	79	21
West Lothian: Location 2	-	100	-
Glasgow: Location 1	-	100	-
Glasgow: Location 3	-	100	-
Glasgow: Location 6	-	100	-
Inverness: Location 3	-	100	-
Glasgow: Location 2	-	89	11
West Lothian: Location 1	-	88	13
Edinburgh: Location 6	-	86	14
West Lothian: Location 3	-	86	14
Fife: Location 1	-	82	18
Edinburgh: Location 3	-	80	20
Edinburgh: Location 2	-	80	20
Glasgow: Location 4	-	80	20
Edinburgh: Location 5	-	78	22
Inverness: Location 1	-	78	22
Perth: Location 1	-	75	25
Edinburgh: Location 1	-	73	27
Dumfries: Location 2	-	73	27
Edinburgh: Location 4	-	71	29
Inverness: Location 2	-	70	30
Glasgow: Location 5	-	67	33
Dumfries: Location 3	-	67	33
Dumfries: Location 1	-	33	67

Whilst none of the home owners participating in the study correctly identified all the pertinent conditions attached to their particular development, overall, more than three quarters of those answering these questions recognised at least some of the appropriate conditions.

Additional analysis revealed that the number of conditions recognised by owner occupiers fell within the range of 1.4 and 7, when the actual number of conditions ranged from 3 to 7. Generally owner occupiers specified fewer conditions as applying to their development than actually appeared in the deeds.

As such, there were very low levels of comprehensive and specific knowledge of title conditions and their applicability to each of the developments in question.

2.4 TIME OF FIRST AWARENESS OF TITLE CONDITIONS ON HOUSE

Less than one third (29%) of owner occupiers knew of the title conditions prior to buying their house and so title conditions could only have influenced a small proportion of the decisions about property purchase. Awareness was most likely to occur during the purchasing process. One in five had only become aware of the conditions after they had completed their move, as shown in Table 2.4 below.

Table 2.4
Time of first awareness of title conditions on house

Base: 251 (All respondents who knew a lot, a little or very little about the conditions on their house, or who recognised them after viewing)	%
At the time when considering buying the house	29
During the purchasing process	45
After moving into the house	20
Don't know	5

Slight variation was seen in relation to the year in which the owner had moved into the property. Whilst 43% of those who had moved before 1985 became aware of title conditions at the time of considering buying their house, those moving within the last ten years or so were more likely to have become aware of the title conditions during the actual purchasing process.

2.5 SOURCE FROM WHICH HEARD OF TITLE CONDITIONS

Owner occupiers with some claimed previous knowledge of their title conditions were asked to confirm the source from which they had first heard of them. As Table 2.5 highlights, the most common information source was lawyers or solicitors. Less than one in ten (8%) had found out by themselves, either by deciding to read the deeds, or by other means.

Table 2.5
Source from which heard of title conditions

Base: 251 (All respondents who knew a lot, a little or very little about the conditions on their house, or who recognised them after viewing)	%*
Lawyer/solicitor	63
Myself/read the title deeds	8
The builder/housebuilder	5
When building extension/work applied for	3
From previous house/similar situation	2
Site agent/sales office	2
Heard from neighbours/through neighbours	2
Previous owner	1
The Council	1
Other	4
Don't know	11

* Note respondents could identify more than one source

Despite being mentioned as a prominent source of information by more than six in ten owner occupiers, the role of lawyers/solicitors appears to have decreased slightly over the years. To this effect, homeowners moving into their property before 1993 were more likely to cite lawyers/solicitors than those moving within the last ten years or so. A variety of other sources were identified by those who had been in their properties prior to 1993, including previous owners and neighbours as well as knowledge arising when building work was being done.

Finally, all those who had claimed some previous knowledge of the conditions attached to their property were asked whether they were aware of anyone in the household holding a copy of the title conditions for the house. A majority of those answering this question (60%) confirmed they thought a copy could be found in their house; less than one in three (28%) said they did not think that a copy could be found in the property; and a further 12% were unsure in this regard.

2.6 EXTERNAL WORK AS INFLUENCE IN KNOWLEDGE

At the outset of the research study, it was assumed that those who had undertaken some form of external building work in the past would be more aware of the title conditions attached to their property.

From the total sample, only around one in four (27%) of those questioned had in fact had some work carried out on their home. 18% had carried out external alterations, whilst 13% had undertaken some other form of building work. As might be expected, those who had occupied their house for a number of years (typically more than ten years) were more likely to have had some external work done on their home than those who had moved into their property more recently.

Of the 109 owner occupiers who had had some kind of work done to their home, around two-thirds (67%) had undertaken external work to their property on a solitary occasion, whilst one-quarter had carried out work twice in the past. A further 6% had done so three times and the final 3% had had work done on four previous occasions. Table 2.6i provides an indication of the nature of work performed.

Table 2.6i

Nature of work performed

Base: 109 (All those who had carried out external alterations or building work on their property)	%
Extension to existing property (eg, larger kitchen)	29
Conservatory	20
Wall / fence	19
Garden shed	18
Garage	17
Porch	8
Doors/windows/double glazing	7
Greenhouse	6
Patio	6
Outhouse/outside building	1
Don't know/can't remember	1
Other	5

Returning to the assumption referred to above, the results confirmed that awareness of title conditions was marginally higher amongst those carrying out some form of external or building work on their property in the past, as shown in Table 2.6ii below.

Table 2.6ii

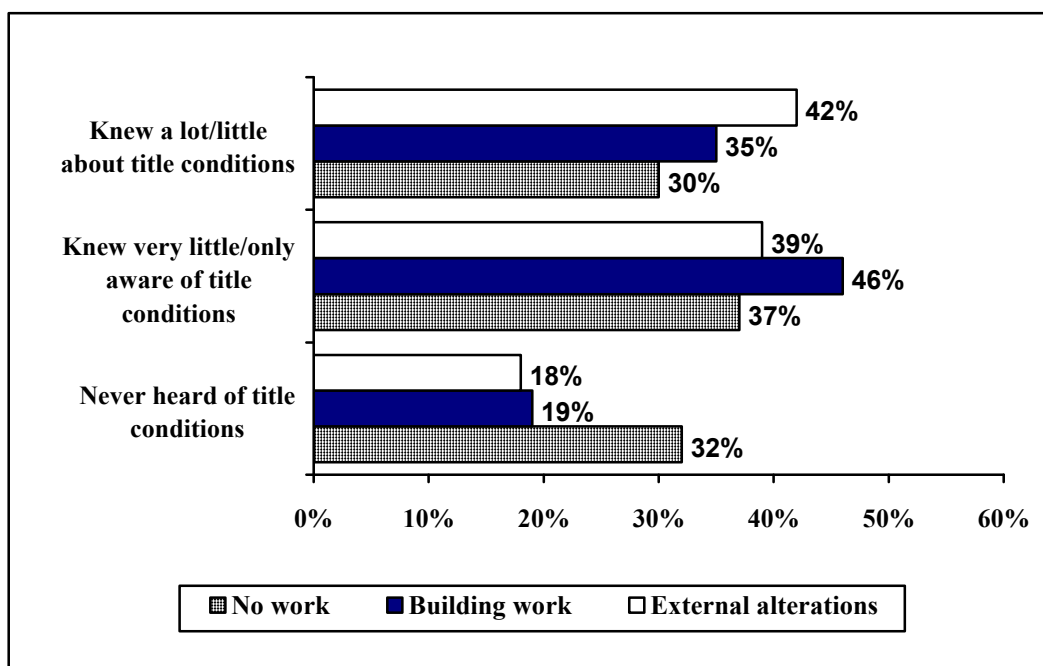
Awareness of title conditions amongst total sample (according to whether work carried out in past)

Base: 402 (All respondents)	External alterations %	Building work %	None %
Aware that conditions affect use	71	70	60
Unaware that conditions affect use	29	30	40

As the results suggest, those carrying out work were more likely to be aware of the existence of title conditions. Moreover, as shown in Figure 2.1, claimed levels of knowledge about the specific contents of title conditions also varied according to whether work had been conducted in the past. More than two-fifths (42%) of those carrying out external alterations claimed to know either a lot or a little about the conditions relevant to their property, and 46% of those who had carried out some form of building work were likely to say that they knew either a little about title conditions, or, at the very least, that they were aware of their existence.

Figure 2.1

Knowledge of title conditions according to whether work carried out



2.7 SEEKING PERMISSION TO BUILD

In order to gather some background information regarding the enforcement of title conditions, all those who had actually carried out some work in the past were asked to identify the parties they had approached for permission to build/alter their property, as part of their obligations under their title conditions. In answering this question, owner occupiers were specifically instructed to exclude contact with neighbours that arose as part of their application for Planning Permission. Some 44% had consulted with any of their neighbours although a very small proportion (1%) claimed to have consulted all those within the development. Generally this consultation with neighbours was confined to next door neighbours; only one quarter (27%) of those who had done any building work had spoken more widely to immediate or close neighbours. Other individuals approached as a result of this process are shown in the table below:

Table 2.7
People approached for permission to build in the past

Base: 109 (All those who had carried out external alterations or building work on their property)	%*
Next door neighbours (on either side or immediately opposite)	44
Did not seek permission from anyone	40
All immediate close neighbours	27
The housebuilder	15
The factor or property manager	3
Other	2
Everyone in the housing development	1
Don't know / can't remember	8

* Note respondents could identify more than one response

As the table confirms, the group most likely to be consulted by those who had carried out building/external work were next door neighbours.

Over half (53%) of those who had contacted any neighbours were aware of title conditions attached to their property, but 32% of this group (aware of title conditions) did not consult anyone at the time they were doing this work – most of the remainder consulted the housebuilder, factor or property manager. A proportion (39%) of those unaware at the time of interview of the existence of their title conditions had consulted someone, usually neighbours. This would suggest that a proportion of the contact arose for social reasons rather than out of a recognised need to meet the title conditions.

Of the 48 owner occupiers who had approached any of those in their housing development for permission to build on the last occasion any work was carried out, 30 (63%) sought written permission and 27% had received oral permission.

All those carrying out more than one piece of external work on their home (36 owner occupiers) were asked also which people they had ever approached for permission to build in the past. A majority (64%) had not sought permission from anyone, although more than one in five (22%) had spoken to any neighbours. Of all those approaching their neighbours in the past (eight owner occupiers), half had gained written permission, three had received oral permission and the final respondent could not recall how permission had been granted.

Whilst it should be borne in mind that the number carrying out more than one piece of work on their home was relatively small (36 owner occupiers), the overall pattern would suggest that home owners were less likely to approach any of their neighbours on the first occasion when doing any building or external work to their property. However, with subsequent pieces of building work, the propensity to approach individuals under the title conditions appears to increase.

Summary

Overall awareness of the applicability of title conditions in the housing developments surveyed was quite high at 62%, although more detailed knowledge of the content was lower. Overall 52% believed they knew something about the content of their title conditions albeit that just 8% claimed to know a lot. With prompting, around 62% of the owner occupiers interviewed claimed to know some of the content of their title conditions. When asked to identify specific title conditions applying to their development, the general situation was that some rather than all were identified. Thus, owner occupiers were familiar with fewer of the conditions that apply to their scheme than actually appear in the deeds.

Those carrying out any form of building work/external alterations to their property appear to be more familiar with their title conditions. Despite this, there was little evidence that consent had been obtained widely from all proprietors in the developments or from the development superior or manager when building work had been undertaken. The main group consulted were next door neighbours, but on less than half of the recent occasions. Where permission had been sought, in the majority of instances this was claimed to have been obtained in writing.

As we shall see in the following chapters, there is further evidence of a distinction in the practice and theory of title conditions.

CHAPTER THREE

OPINIONS TOWARDS TITLE CONDITIONS

This chapter provides an insight into the opinions of homeowners towards the effectiveness and usefulness of title conditions as a means of regulating properties. It begins by exploring in detail the attitudes of homeowners towards title conditions and goes on to examine reactions to a series of made-up scenarios designed to gather views towards conditions in a number of potential real-life situations. Finally, we present the perceived advantages and disadvantages of title conditions as they currently stand.

3.1 ATTITUDES TOWARDS TITLE CONDITIONS

A key objective of the research study was to gauge views on the advantages and disadvantages of title conditions in general. In order to gather opinions relating to attitudes towards title conditions, both in principle and in reality, owner occupiers were asked to indicate the extent to which they either agreed or disagreed with statements about title conditions. These questions were asked towards the end of the interview, and form a summary of views after the pros and cons of title conditions had been discussed. The results are detailed in Table 3.1.

Table 3.1
Attitudes towards title conditions

Base: 402 (All respondents)	Agree strongly (4) %	Agree slightly (3) %	Disagree slightly (2) %	Disagree strongly (1) %	DK %
Title conditions on the use of properties help ensure areas maintain their residential character	47	34	8	5	6
Title conditions on the use of properties are helpful when it comes to selling houses	35	29	10	11	15
Title conditions restricting the use of properties cause neighbourly disputes	30	35	15	11	9
People should be free to do what they want with their property subject to planning/building control	28	30	22	15	5
You should only have to comply with planning/building control and not private title conditions	25	23	23	19	11
There is no point in having title conditions on the use of properties as no-one bothers with them	13	12	29	31	15

The results gathered from this element of the survey revealed that opinions towards the principle of title conditions were largely positive. Of those interviewed, 81% were in agreement that title conditions help to maintain the residential character of the development, and as we shall see later, this was perceived as an advantage valued by significant numbers of those taking part in the survey. The

use of title conditions as a means of selling houses was considered to be largely relevant; again, a majority (64%) agreed that title conditions were helpful in this context. As the pattern of responses suggests, a minority (25%) were in agreement that title conditions were principally redundant as no-one actually bothers with them in reality. Based on these responses, it was clear that most of the home owners in our survey had largely positive attitudes towards title conditions.

For some, however, planning and/or building control were thought to be sufficient, although opinion was rather more evenly split on this issue; 48% agreed that the current local authority provisions were sufficient, with 42% in disagreement. More than half of those interviewed (58%) believed that people should be free to do what they wished with their own property, as long as this remained subject to planning or building control. Finally, a belief that title conditions restricting the use of properties can cause neighbourly disputes was expressed by 65% of home owners. This suggests that whilst most are willing to subscribe to the benefits of title conditions in principle, there was an appreciation that their use in practical terms might be more questionable.

3.2 PERCEIVED USEFULNESS OF TITLE CONDITIONS

In order to elicit further information on opinions towards title conditions, owner occupiers were asked to rate their usefulness on a scale from very useful to not at all useful. Table 3.2 overleaf displays the results, and gives a composite breakdown by each housing development.

Table 3.2
Perceived usefulness of title conditions

Base: 402 (All respondents)	Very Useful (4) %	Quite useful (3) %	Not very useful (2) %	Not at all useful (1) %	DK %	Mean score
TOTAL	32	38	18	7	5	3.00
Edinburgh: Location 6	60	40	-	-	-	3.60
Edinburgh: Location 1	45	45	10	-	-	3.35
Inverness: Location 2	42	31	4	4	18	3.35
Inverness: Location 1	27	60	-	-	13	3.31
Dumfries: Location 2	54	13	18	5	10	3.29
West Lothian: Location 3	33	60	3	3	-	3.23
Glasgow: Location 3	40	33	27	-	-	3.13
West Lothian: Location 2	20	70	10	-	-	3.10
Dumfries: Location 1	45	27	-	18	9	3.10
Fife: Location 1	27	53	20	-	-	3.07
Glasgow: Location 6	43	14	43	-	-	3.00
Inverness: Location 3	22	22	-	11	45	3.00
Edinburgh: Location 2	27	47	13	7	7	3.00
Edinburgh: Location 4	37	33	19	11	-	2.96
West Lothian: Location 1	30	40	20	10	-	2.90
Glasgow: Location 5	20	50	30	-	-	2.90
Edinburgh: Location 5	25	42	25	8	-	2.83
Glasgow: Location 2	17	37	29	12	5	2.62
Perth: Location 1	-	67	27	7	-	2.60
Glasgow: Location 4	20	27	40	13	-	2.53
Edinburgh: Location 3	25	25	25	25	-	2.50
Dumfries: Location 3	-	50	40	10	-	2.40
Glasgow: Location 1	15	23	46	15	-	2.38

(1) As mentioned previously, it is worth bearing in mind the small sample sizes for a number of the developments.

As the table illustrates, the overall mean score for this question was 3.00, which suggests that, in general terms, title conditions were considered to be quite useful by most of those participating in the survey. In only five of the 24 developments where interviewing was conducted did less than half of those interviewed state that they believed title conditions were not useful.

Later analysis at 4.4 identifies the title conditions that were most valued by owner occupiers.

3.3 SCENARIOS

The results shown in the tables above reflect owner occupiers' opinions towards title conditions in theory, and on a more general level. To gauge reactions to conditions in a practical sense, a number of scenarios were devised whereby owner occupiers were asked to consider potential situations and say whether a) they thought that it was appropriate to have to seek the consent of one's neighbours and b) whether they were subsequently in favour or opposed to the use of title conditions.

As an introduction to this section, owner occupiers were informed that the Government was seeking to review the law relating to those title conditions which restrict the use of property. However, it was

explained that the way in which property can be used will continue to be regulated by the planning permission and building control system. Owner occupiers were told that the questions were designed to determine whether they were in favour of the title conditions that restrict the use that individuals can make of their property, or whether they would prefer the conditions to be removed.

To ensure that responses were not biased by the sequence in which the scenarios were read, the order of the questions was changed for each respondent. To this effect, two questionnaires were used, with roughly equal numbers of respondents answering each one. The following scenarios, set in the context of plans to undertake some major building works, were put to one half of home owners in the study:

- Imagine that one of the title conditions affecting your house prohibits any building work or external alterations to your building, and you want to build an extension to your home. You apply for and obtain planning permission from the local council, but because of the title condition mentioned above, you cannot go ahead with the extension unless you have your neighbours' consent under the title conditions. Do you think that it is reasonable to have to ask your neighbour for permission under the title conditions?
- Suppose that your immediate neighbour refuses to consent to your building the extension and you have to abandon your plans. Thinking about this example, would you say that you are in favour of title conditions or opposed to title conditions?
- Now suppose that it is your neighbour who wants to build an extension. Having looked at the neighbour's plans, you refuse permission and stop the extension being built. In the light of this example, would you say that you are in favour of title conditions or opposed to title conditions?

As noted above, when asked whether it was reasonable to have to ask for their neighbour's consent under the title conditions when wanting to undertake some major building works such as building an extension to their property, almost three quarters (71%) said that they thought it was reasonable to ask their neighbour for permission. Some 24% disagreed. The remaining 5% did not offer an opinion.

When presented with the scenario that the neighbour in question actually refused permission, around one in two (51%) said that they still favoured the existence of title conditions despite permission being refused. However 34% went on to say that they were opposed to title conditions in the light of this example. Whilst 15% said that they were not sure, 1% commented that they would want title conditions to exist provided an arbitration system was in place.

Finally, owner occupiers were presented with the scenario whereby they had the right to refuse permission for their neighbours' extension under the title conditions. Again, a majority (58%) remained in favour of title conditions under this scenario, although 26% said that they disagreed. Just under one in five were unsure (16%).

Hence, it was clear that there was some shift in opinion depending on which party was being prevented from carrying out their plans. As shown above, although 58% were in favour of title conditions if the plans of their neighbour were thwarted, 51% still said that they were in favour even when their own plans had to be abandoned.

As outlined previously, the order in which the scenarios were presented to owner occupiers were alternated in order to prevent possible bias. Those answering the second questionnaire were presented with the following sequence:

- Imagine that one of the title conditions affecting your development prohibits any building work or external alterations to the houses and that your next door neighbours wanted to build an extension to his home. They apply for and obtain planning permission from the local council, but because of the title condition mentioned above, they cannot go ahead with the extension unless you have given your consent under the title conditions. Do you think that it is reasonable for them to have to ask you for permission under the title conditions?
- You refuse to consent to your neighbours' extension and they have to abandon their plans. Thinking about this example, would you say that you are in favour of title conditions or opposed to title conditions?
- Now suppose that it is you who wants to build an extension. Having looked at your plans, your neighbour refuses permission and stops the extension being built. In the light of this example, would you say that you are in favour of title conditions or opposed to title conditions?

With regard to the opening scenario which quizzed homeowners on whether they thought it was reasonable for their neighbour to ask for their permission to build an extension under the title conditions, three quarters answered that they felt it was indeed reasonable to do so. However, just under one in five (16%) did not think that this was reasonable.

Concerning the second scenario, whereby the respondent effectively refused to give consent for the next door neighbour to go ahead with this major building work, 63% said that they were in favour of title conditions, 23% were opposed and 14% were unsure.

However, when the situation was reversed, and home owners were asked to imagine that their neighbour refused them consent under the same scenario, numbers favouring title conditions dropped slightly to 59%.

Comparing these results with those detailed under the first set of scenarios, owner occupiers do place a slightly higher emphasis on their own rights under the title conditions than those of their neighbours. Some, however, did seem to adopt an even-handed approach.

Thus we can see that opinions vary depending on the status of the respondent as enforcer or as enforced against. Nevertheless, there was widespread agreement with the principle of securing permission and, in each instance, more than half agreed with the use of title conditions for major building work, regardless of the effect on them personally. A different view was evident in connection with more minor building work.

Next, all owner occupiers were asked to imagine a plan that would involve some minor work such as building a garden shed well away from any houses, instead of the extension example discussed above. The building of a garden shed would also require consent, and participants were asked whether they were in favour or opposed to title conditions based on this example. At this point, the numbers in

favour of title conditions dropped quite dramatically to 39%, with almost half (49%) becoming opposed to the conditions as a result of this example; a further 13% were undecided.

Thus the figures did show that views differed with regard to more minor work; the numbers in favour of title conditions concerning this particular type of work reduced considerably. To sum up then, it would seem that significant numbers of home owners perceive the value of title conditions, both in practice and in principle, with regard to substantial alterations. They were less willing to consider them useful regarding small-scale changes, such as building a garden shed.

3.4 ADVANTAGES OF TITLE CONDITIONS

As we have seen in Chapter 2, more than half the total sample (62%) were aware of the existence of title conditions restricting the use of their property. With a view to determining opinions towards these conditions, all 251 respondents who were aware of their existence were asked whether they had thought title conditions to be a good idea *when they were first made aware of them*.

In response to this question, almost three quarters (72%) said that they had thought title conditions to be a good idea. Table 3.4 below details the most commonly cited reasons given for this opinion.

Table 3.4

Reasons for thinking title conditions were a good idea

Base: 251 (All those who considered title conditions to be a good idea when they first became aware of them)	%*
Stops unrestricted building	22
Keeps up the standards of the area/keeps the area in good condition	16
It's good to have guidelines	13
Maintains the character/the look of the neighbourhood	8
Keeps the area neat and tidy	8
The same rules should be adhered to by everyone	8
Conditions offer control/stops abuses	8
Maintains uniformity	6
Stops noise and other inconveniences for neighbours	6
Safety reasons	4

* Note respondents could identify more than one response

Other reasons given by 3% or less included the effect on property value, and protection from potential problems (such as parking and commercial traffic).

As previously stated, one of the most frequently mentioned advantages associated with title conditions is their perceived usefulness in maintaining the original/residential character of a housing development. For this reason alone, many of the home owners in the survey appeared to value the existence of title conditions and their perceived usefulness in this particular regard.

Despite thinking that title conditions were a good idea, there were also some negative comments about the perceived hassle that they might cause, both in terms of restrictiveness and a lack of applicability for some.

3.5 DISADVANTAGES OF TITLE CONDITIONS

Whilst a majority of owner occupiers that were aware of title conditions had thought that title conditions were a good idea when they first became aware of them, one in ten (24 respondents in total) disagreed. The main reasons given for this point of view are detailed in Table 3.5 below and relate to some of the caveats mentioned by those who generally thought that title conditions were a good idea.

Table 3.5
Reasons for thinking title conditions were not a good idea

Base: 24 (All those who did not consider title conditions to be a good idea when they first became aware of them)	%
Some conditions are silly/only some are a good idea	21
They are inconvenient/restrictive	21
Don't like being told what to do/want freedom	21
Planning permission should be sufficient	13
Out of date/don't apply now	8

As above, please note the small sample size answering this particular question.

As the table suggests, one of the more commonly cited reasons behind the view of title conditions as a bad idea is that they are considered to be restrictive. A similar number do not criticise the conditions outright, but say that some are silly, although some are in fact a good idea and do serve a purpose. A small number of other comments were made by one respondent only in each instance.

Summary

Most were willing to subscribe to the benefits of title conditions in principle, although there was an appreciation that in practical terms their use might be more questionable. Nevertheless title conditions were generally regarded as useful by owner occupiers in the housing developments surveyed – 70% rated them as such.

This support towards title conditions wavered slightly when tested according to the respondent's status as enforcer or enforced against. Whilst support varied slightly, it is also true that half or more accepted the principle of neighbours or themselves being able to give consent or block major building work. More believed it acceptable that such consent should be sought in principle. Support for title conditions did, however, lessen in the context of less significant building projects.

Despite personal consequences, a substantial degree of support was evident for many of the title conditions put to owner occupiers. However, there was an acknowledgement also that title conditions do have the potential to be disruptive or cause neighbour problems.

CHAPTER FOUR THE FUTURE OF TITLE CONDITIONS

This final chapter seeks to offer an evaluation of the future of title conditions. We first examine whether owner occupiers want title conditions to restrict the use of their property, then go on to explore whether conditions should be kept or abolished, and if kept, which individuals should be consulted. Finally, we explore the reasons behind the favoured retention of specific title conditions.

4.1 WHETHER TITLE CONDITIONS ARE WANTED

Towards the end of the interview, home owners were asked whether they wanted title conditions to restrict the ways in which their property could be used. This question was asked after the fictional scenarios relating to building work, and was asked of all owner occupiers. More than half (61%) said that they did want conditions to remain in force to restrict use. Agreement varied according to the level of knowledge of title conditions claimed by owner occupiers; of those who claimed to know either a little or a lot, 70% said that they did want title conditions to restrict the use of their property. However, 69% of those knowing very little, and 43% of those who had never heard of title conditions before the interview were of the same opinion. There was equal support for the retention of title conditions amongst those who had previously carried out some form of building work and those without such experience. In only two of the 24 developments where interviewing took place did a majority of those expressing an opinion reject the use of title conditions on their property.

Reasons behind favouring title conditions to restrict the use of properties are outlined in Table 4.1i below.

Table 4.1i

Reasons for wanting title conditions to restrict the use of property

Base: 247 (All those who wanted title conditions to restrict the use of their property)	%
People could otherwise abuse the area	21
Rules should apply to everyone/keeps law and order	19
Keep estate/house standards in order	17
Everyone should be able to have a say	9
Protects the character of the area	9
Gives protection/acts as a safeguard	6
It is important for people to be considerate towards each other	5

Other reasons were mentioned by less than 3% of owner occupiers.

The threat of other residents being able to carry out uncontrolled work, or spoil the area, was the most frequently cited reason behind home owners wanting title conditions to restrict the use of property. Moreover, the need to have some form of commonality, whereby rules apply to every house in the development, was also mentioned often. As such, title conditions can be seen to be a form of safety net for a number of owner occupiers, allowing local control and ensuring that everyone in the development will be treated the same way.

However, one quarter of owner occupiers said that they did not want title conditions to restrict the use of property. As shown in Table 4.1ii below, the most common response was that owner occupiers

should be free to do what they want with their own property, and that they should not be limited or restricted by their title conditions. For others, planning permission was perceived to be sufficient. Whilst some regarded title conditions as a means of ensuring fair treatment for everyone, the opposite reason (the potential to cause trouble) was cited by some owner occupiers as a reason for not favouring their retention in a post-feudal environment.

Table 4.1ii

Reasons for not wanting title conditions to restrict the use of property

Base: 99 (All those who did not want title conditions to restrict the use of their property)	%
Want freedom to do what I want/no-one else should influence	40
Council planning permission is sufficient	19
Depends on what sort of neighbours you have	9
Keep certain conditions/only some should apply	4
Can cause arguments and disputes	4
They are too restrictive	4
Conditions are meaningless/outdated	4
Can cause hassle/problems	4

4.2 WHETHER TITLE CONDITIONS SHOULD BE KEPT OR ABOLISHED

Towards the end of the interview, all home owners were asked whether, in their opinion, all title conditions on the use of their property should be kept, all abolished, or whether some should be kept and others abolished.

The results confirmed that a majority (53%) were of the opinion that title conditions should be kept; only 16% thought that they should be completely abolished. One in five held mixed views, believing that some should be kept and others removed, and a further 11% answered that they were unsure. Section 4.4 provides further information on owner occupiers' views of which title conditions should be kept and which abolished.

Tables 4.2i and 4.2ii summarise the main reasons mentioned by home owners as justification for, respectively, the retention and the abolition of title conditions.

Table 4.2i
Reasons for keeping title conditions

Base: 214 (All respondents who wanted title conditions to be kept)	%
Maintains standards/keeps in good order	23
It is a means of control/ensures regulation of building work	19
Stops people abusing the area	14
They are fair and give everyone a say	12
Maintains character of the area	7
Keeps things looking as they are	7
They are useful/they work well	5
Provides a basis for resolving disputes	5

Other reasons were mentioned by a very small number of respondents.

Table 4.2ii
Reasons for abolishing title conditions

Base: 63 (All respondents who favoured the abolition of title conditions)	%*
Want to be able to do what I want with my own property	40
Only need planning permission/some of the rules are petty	22
They are not needed/are a waste of time and money	14
They can cause trouble/friction	8
People don't obey them and do what they want anyway	6
They are outdated/irrelevant	5
Don't know enough about them	49

* Note respondents could identify more than one response

It is important to note that almost half of those owner occupiers who said that they favoured the abolition of title conditions also said that they did not know enough about them.

4.3 INDIVIDUALS WHO SHOULD BE CONSULTED IF TITLE CONDITIONS ARE KEPT

All owner occupiers participating in the survey (regardless of whether they favoured the retention or abolition of title conditions) were asked whose consent should be obtained when planning to carry out building work. Table 4.3i confirms that an overwhelming majority make reference to next door neighbours, although more than half would extend this to all immediate and close neighbours.

Table 4.3i
Whose consent should be obtained to carry out building work?

Base: 402 (All respondents)	%
Next door neighbours (on either side or immediately opposite)	92
All immediate close neighbours	56
The housebuilder	4
The factor or property manager	3
Everyone in the housing development	2
Other	1
No-one	4

* Note respondents could identify more than one response

Only 2% believe that all proprietors in the development should have to provide consent, and a few also mentioned obtaining the superior's consent as desirable.

Moreover, further analysis was undertaken which revealed that, in relation to the individuals who should be approached for consent under the title conditions, most proprietors who currently had rights of enforcement are of the opinion that only those most closely affected by potential building work should be consulted:

Table 4.3ii
Whose consent should be obtained to carry out building work according to enforcement rights?

Base: 220 (All properties where proprietors have rights of enforcement)	%*
Next door neighbours	90
All immediate/close neighbours	56
Everyone in the housing development	3
Housebuilder	5
Factor or property manager	3
Other	2
No-one	6
Don't know	-

* Note respondents could identify more than one response

For most properties, including those where each proprietor in the development has the right to enforce title conditions, owner occupiers were of the view that only those who would be directly affected by building work (next door and/or other immediate neighbours) should be approached for permission under the title conditions.

4.4 SPECIFIC TITLE CONDITIONS WHICH SHOULD BE KEPT

All home owners were asked which of a given list of title conditions they felt should be retained. Table 4.4 reveals the results gathered in response.

Table 4.4
Specific title conditions which should be kept

Base: 402 (All respondents)	%*
Prohibition on parking commercial vehicles	40
Prohibition on using property for business use	38
Adherence to the original colour scheme of exterior parts	37
Prohibition on only major external buildings	32
Prohibition on parking caravans	30
Prohibition on all external buildings	27
Prohibition on keeping animals	22
Prohibition on growing certain varieties of plants or trees	21
Prohibition on the parking of private vehicles	17
Amenity/environmental conditions	2
Other	1
None of these	7

* Note respondents could identify more than one response

As the table demonstrates, the most frequently cited condition to be kept relates to the parking of commercial vehicles within housing developments. In terms of individual estates, this condition was mentioned most commonly by those living in developments which have this condition in place at the present time. Just under two in five refer to a prohibition on using the property for business use and adherence to the original colour scheme of exterior parts.

Clearly, some title conditions were less popular than others, with less than one in five in favour of the retention of restrictions on parking private vehicles, for example. This condition did not actually apply in any of the developments surveyed, hence it is interesting to note that some owner occupiers would perhaps favour its introduction. On average, owner occupiers were in favour of 3.7 conditions being retained, compared with the average of five title conditions that are currently imposed across the developments surveyed. Thus, the analysis suggests that the number of conditions imposed might be reduced.

Finally, owner occupiers were asked to relate the reasons behind their favouring the retention of particular conditions. The most frequently mentioned justifications for keeping title conditions prohibiting parking commercial vehicles were that they can make the area look untidy (14%), that restrictions are needed in this regard (14%), the need to preserve the area (12%) and to keep up standards (11%). With regard to a prohibition on using their property for business use, 17% of owner occupiers said that although they favoured retention of this condition, their decision would have to be largely dependant on the type of business in question.

Many of the reasons mentioned were common to a number of the conditions, such as maintaining the residential character of a particular area, and the need to ensure that some restrictions are in place to stop people being able to do what they want. However, there was some equivocation; for example, some types of pets or animals would be tolerated, and caravans parked discretely would be acceptable to a few.

Summary

There was widespread support for the retention of title conditions, with 61% stating they wanted them to remain in force.

Analysis of the reasons underlying this suggests that title conditions are seen as a safety net, ensuring the status quo, albeit that in terms of enforcement there is little evidence that the conditions are adhered to. Specifically, there was an acceptance of the principle of obtaining consent, if carrying out building work in the future, but from immediate/close neighbours rather than all proprietors in the housing development or the developer as superior, even where such parties had rights of enforcement at present.

The results also suggest that proprietors favour lower numbers of title conditions being retained than are in place at present.

ANNEX ONE : SURVEY METHOD

A random route method was used to obtain the views of owner occupiers in selected housing developments Scotland-wide. The survey explored the views of owner occupiers in houses only: those residing in rented and other sectors and tenement properties (flats) were excluded from participation. Interviewers were instructed to begin at a pre-determined, but randomly selected, starting point and, having obtained an interview at that particular property, continue to follow a designated random walk pattern to complete the number of interviews required. All interviewers were equipped with a copy of the title conditions pertaining to each individual estate for cross-reference purposes.

A pilot survey was conducted before the start of the main fieldwork period and this informed the design of the final questionnaire. All interviewing was conducted in June 1999, with the pilot survey undertaken in May 1999. A total of 402 interviews took place.

The final sample structure is shown in Table 1.1.

Annex Table 1.1

Sample Profile

Scheme Name	Quota set	Interviews achieved
<u>Dumfries</u>		
Location 1	10	11
Location 2	40	39
Location 3	10	10
<u>Fife</u>		
Location 1	15	15
<u>Perth</u>		
Location 1	15	15
<u>Edinburgh</u>		
Location 1	20	20
Location 2	15	15
Location 3	10	8
Location 4	25	27
Location 5	10	12
Location 6	10	10
<u>West Lothian</u>		
Location 1	10	10
Location 2	10	10
Location 3	30	30
<u>Inverness</u>		
Location 1	15	15
Location 2	45	45
Location 3	10	9
<u>Glasgow</u>		
Location 1	10	13
Location 2	40	41
Location 3	15	15
Location 4	15	15
Location 5	10	10
Location 6	10	7
Total	400	402

Appendix D

Survey of Deeds of Conditions

Introduction

1. This survey was carried out to ascertain the extent of implied and express third party rights of enforcement and to answer a number of other questions. As there would be difficulties in selecting single conveyances (such as ordinary dispositions or feu dispositions) for examination,² it was decided that a survey of deeds of conditions should be made.

2. A deed of conditions³ is a deed in which, by statutory authority,⁴ real burdens and other title conditions affecting land can be set out prior to land being sold. Deeds of conditions have been permitted since 1874. Until April 4 1979 a deed of conditions required to be incorporated into a later conveyance of the land before it became effective. However, since the passing of section 17 of the Land Registration (Scotland) Act 1979 burdens created by deed of conditions are effective from the date of registration unless section 17 is expressly disapplied.

Objectives of research

3. The survey considered the following questions:

- (1) What is the incidence of third party rights of enforcement in deeds of conditions? How many of these rights are created expressly? How many of these rights are created by implication? Are there instances where no third party rights of enforcement are granted?
- (2) What techniques are used to exclude the possibility of third party rights of enforcement?
- (3) What is the nature of the transaction (grant in feu or disposition) which is to follow the deed of conditions?
- (4) Do the answers to the above depend to any degree on (a) the age of the deed of conditions (b) the location of the property (c) the nature of the property?

By third party rights of enforcement we mean rights held other than by the granter of the deed of conditions (who typically is the feudal superior). In practice, the third parties in question are the owners of the other properties affected by the deed of conditions. Thus the issue is whether the burdens in a deed of conditions are enforceable (i) by the superior or other granter alone or (ii) by the granter and also, against each other, by the owners affected by the burdens.

Methodology

² It would not be possible to guarantee that any deed (be it a feu disposition or ordinary disposition) contained any real burdens. Further the resource implications (in terms of time and money) in trawling the search sheets at the Registers of Scotland to check for break-off writs meant that this option was not practicable.

³ For a brief discussion, see Scot Law Com DP No 106 paras 7.29ff.

⁴ See Conveyancing (Scotland) Act 1874 s 32 and Land Registration (Scotland) Act 1979 s 17.

4. We asked the Registers of Scotland for deeds of conditions from the following periods:
 - (a) late Victorian times (1885 to 1900), following the introduction of deeds of conditions in 1874 and the landmark decision of the House of Lords in *Hislop v MacRitchie's Trs*;⁵
 - (b) the inter-war years (1920 to 1939) to take account of early developments of "modern" housing estates;
 - (c) the immediate postwar years (1948 to 1965) to take account of postwar building programmes and the enactment of the Town and Country Planning (Scotland) Act 1947;⁶
 - (d) the years following the enactment of section 17 of the Land Registration (Scotland) Act 1979 (1980 to 1990); and
 - (e) recent years (1995 to 1999) when discussion of the current law and its difficulties has become more common.

5. We also asked for deeds from a number of different registration counties, namely:
 - (a) Midlothian;⁷
 - (b) Glasgow;
 - (c) Inverness;
 - (d) Dumfries;
 - (e) Fife.

This was to ensure coverage of different types of area.

6. The Registers of Scotland made around 100 deeds available to us for the requested counties and time spans.⁸ We also contacted a number of volume builders, including local authorities, and also academic and practising lawyers, to obtain further deeds. We are grateful to the undernoted builders, solicitors and others who replied forwarding copy deeds of conditions.⁹ In all 252 deeds were obtained and examined, covering 17 registration counties and a time span from 1876 (only two years after the introduction of deeds of conditions) to 1999.

7. The breakdown by county was:

⁵ (1881) 8 R (HL) 95.

⁶ The rationale for examining this period and taking account of planning control is that an important early role for real burdens - the planning function - was from the passing of the 1947 Act supplanted, or at least supplemented, by public law control.

⁷ Which includes Edinburgh.

⁸ We wish to thank, particularly, Ian Davis, John Marshall, Ian Stevenson, and Ruth Jamie for their assistance in obtaining copies, allowing use of the Registers of Scotland automated search sheet facilities, and for giving freely of their time.

⁹ Aberdeen City Council; Messrs Anderson Fyfe, Solicitors (on behalf of Redrow Homes (Scotland) Ltd); Messrs Bird Semple, Solicitors, (Tulloch Homes Ltd); Messrs Brechin Tindall Oatts, Solicitors; Bryant Homes Scotland Ltd; Cala Homes (Scotland) Ltd; The City of Edinburgh Council; Mr Gerald Cooper, Messrs Macleod & MacCallum, Solicitors; Mr Les Dalgarno and Ms Lynne Stewart, Messrs Paul and Williamsons, Solicitors; Mr Hugh Devine; Dundee City Council; Fife Council; Glasgow City Council; East Ayrshire Council; Mr Murdo Fraser, Messrs Ketchen & Stevens WS; Mr J P Gribbon, Regional Solicitor, Wimpey Homes Holdings Ltd; Highland Council; Messrs Ledingham Chalmers, Solicitors; Mr Bruce Merchant, Messrs South Forrest, Solicitors; Moray Council; Mr Malcolm Niven, Miller Homes; North Ayrshire Council; Perth & Kinross Council; Messrs Primrose and Gordon, Solicitors, (Robison & Davidson Ltd); Messrs Raeburn Christie and Company, Solicitors (Barratt Homes); Renfrewshire Council; Scottish Homes; Sheltered Retirement Housing Owners' Confederation; Mr Philip Simpson, Regional Solicitor, Wimpey Homes Holdings Ltd; Messrs Smith & Valentine, Solicitors (Robison & Davidson Ltd); Society of Local Authority Lawyers and Administrators in Scotland; Mr Dermot Stewart, Messrs Drummond Cook & Mackintosh, Solicitors; Mr Campbell White, Messrs Wright Johnston and Mackenzie, Solicitors. We particularly thank Professor (now Sheriff) Douglas Cusine and Professor Roderick Paisley who provided over 50 deeds of conditions from Aberdeen, including a deed from 1876, the oldest in our sample.

COUNTY	NUMBER	PERCENTAGE
Aberdeen	48	19.05
Angus	1	0.40
Ayr	12	4.76
Dumbarton	12	4.76
Dumfries	18	7.14
E Lothian	5	1.98
Fife	18	7.14
Glasgow	35	13.89
Inverness	23	9.13
Kincardine	8	3.17
Lanark	15	5.95
Midlothian	28	11.11
Moray	2	0.79
Perth	10	3.97
Renfrew	7	2.78
Stirling	3	1.19
W Lothian	5	1.98
Pro forma	2	0.79
TOTAL	252	

Table 1: Breakdown of deeds of conditions by registration county

It is unlikely that the sample is representative of all deeds registered. As can be seen, almost one-fifth of the deeds examined came from Aberdeen; just over one eighth from Glasgow; and one ninth from Edinburgh. The figure for *pro forma* documents covers deeds sent to us in the format used by some volume builders and where no registration county was given.

8. The breakdown by date was:

DATES	Numbers	Percentage
1876-85	1	0.40
1886-95	1	0.40
1896-1905	1	0.40
1906-15	0	0.00
1916-25	4	1.59
1926-35	2	0.79
1936-45	3	1.19
1946-50	1	0.40
1951-55	4	1.59
1956-60	6	2.38
1961-65	7	2.78
1966-70	6	2.38
1971-75	14	5.56
1976-80	26	10.32
1981-85	41	16.27
1986-90	23	9.13
1991-95	36	14.29
1996-99	72	28.57
pro forma	4	1.59
TOTAL	252	100

Table 2: Breakdown of deeds of conditions by date

Again some shortcomings are brought into focus. A substantial number (28.57%) of the deeds examined are from the period 1996 to 1999. Over one half are from 1986 or later. We cannot be sure how far this reflects changes in practice. Deeds of conditions may be much more common now than in the immediate postwar years.

9. A deed of conditions is, almost always, a prelude to a future transaction, usually the sale of the individual units which are to be subject to the burdens. As the law currently stands, such a sale may be carried out either by disposition or by a grant in feu. In examining the deeds of conditions a note was taken of the future transaction envisaged by the granter. In a surprisingly large number of cases, however – over one fifth of the total sample – it was not possible to ascertain this information. Where the information was available, it usually pointed to a grant in feu, as table 3 shows. The effect of a grant in feu is for the granter to become the superior of the units which are sold, with the result that the burdens can be enforced as feudal burdens.¹⁰ A small number of deeds did not relate to sales at all, our sample also including: supplementary deeds of conditions amending previous deeds; neighbour agreements; deeds creating servitudes and servitude conditions; a deed imposing burdens on land prior to the grant of a standard security; and a deed regulating *pro indiviso* ownership of property. The following table shows the type of transaction envisaged by the deeds of conditions in the sample:

¹⁰ Para 1.12 of the report.

Type of transaction	Number	Percentage
Feu	157	62.30
Dispone	25	9.92
Unknown	52	20.63
Servitude	3	1.19
Neighbour agreement	9	3.57
Supplementary deed	4	1.59
Shared ownership	1	0.40
Security	1	0.40
TOTAL	252	100

Table 3: Breakdown of deeds of conditions by nature of future transaction

10. The deeds of conditions were examined for the following information: the granter; the registration county; the date; the nature of the proposed future transaction; whether there were express third party rights of enforcement; whether there were implied third party rights of enforcement; and whether section 17 of the Land Registration (Scotland) Act 1979 had been distilled. Notes were taken as to the incidence of owners' associations, proprietors' councils, or proprietors' meetings. The results of the survey were collated in a database.

Extent of third party rights of enforcement

The main purpose of the survey was to discover the incidence of third party rights of enforcement (ie enforcement by parties other than the granter of the deed). Such rights may either be expressly granted in the deed of conditions, or their existence may be implied. The former is straightforward, but the rules concerning the latter were developed by case law and are complex.¹¹ So far as deeds of conditions are concerned, it is implied that the owner of each affected property has a right of enforcement against the other affected properties except where there is something in the deed to indicate the contrary – as usually there is. In most cases the indication to the contrary takes the form of a reservation to the granter of a right to vary or depart from the scheme of burdens. Such a reservation is said to exclude enforcement rights other than in the person of the granter.¹²

¹¹ They are summarised in paras 11.5 to 11.19 of this report.

¹² Para 11.15 of the report. It is thought that provision for a residents' association does not displace the effect of a right to vary. In any event, residents' associations are concerned almost entirely with facility burdens, which will survive, and be mutually enforceable, under s 47 of the draft bill.

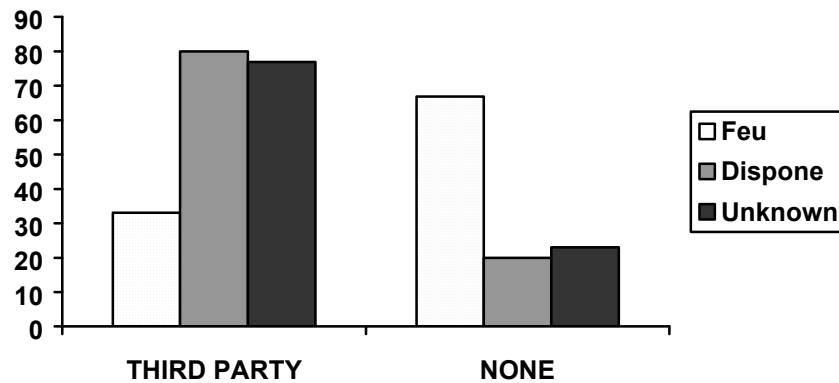
12. Our examination of deeds of conditions produced the following figures:

	EXP	EXP %age	IMP	IMP %age	NONE	NONE %age
1876-85	0	0	1	100	0	0
1886-95	0	0	1	100	0	0
1896-1905	0	0	1	100	0	0
1906-15	0	0	0	0	0	0
1916-25	4	100	0	0	0	0
1926-35	2	100	0	0	0	0
1936-45	1	33.33	0	0	2	66.67
1946-50	1	100	0	0	0	0
1951-55	4	100	0	0	0	0
1956-60	4	66.67	0	0	2	33.33
1961-65	6	85.71	0	0	1	14.29
1966-70	0	0	0	0	6	100
1971-75	0	0	0	0	14	100
1976-80	7	25.93	1	3.70	19	70.37
1981-85	15	38.46	4	10.26	20	51.28
1986-90	8	40.00	1	5.00	11	55.00
1991-95	10	31.25	3	9.38	19	59.38
1996-99	33	53.23	4	6.45	25	40.32
pro forma	1	25	0	0	3	75
TOTAL	96	41.03	16	6.84	122	52.14

Table 4: Extent of third party enforcement rights (express, implied, or none)

As table 4 shows, there was a more or less even divide between cases where third party rights were conferred, and cases where they were denied. Third parties held enforcement rights in just under half (47.86%) of all cases. Overwhelmingly (41.03%) such rights were expressly conferred, implied rights usually being excluded by a reservation of a power to vary. The fact that implied rights are uncommon in deeds of conditions should not, however, be taken to mean that they are uncommon in all constitutive deeds. Reservations of a power to vary are a particular feature of deeds of conditions.

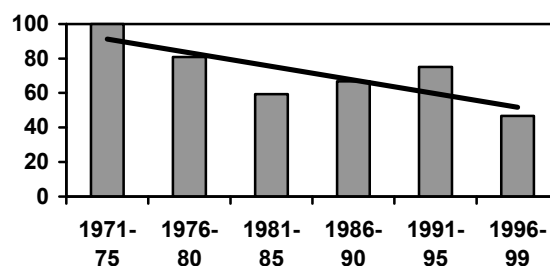
13. The figures can be broken down by reference to type of transaction:



Graph 1: Bar chart showing the extent of enforcement rights based on the nature of the transaction

Graph 1 suggests some quite dramatic differences. Third party rights were conferred in only 33% of cases in which the deed of conditions was followed by grants in feu. The corresponding figure for deeds of conditions followed by dispositions is 80%. This suggests that third party rights were much more likely to be conferred where the grantor was not to have a continuing link, through the feudal system, with the properties being sold. And indeed in the absence of such third party rights the burdens would not usually have been enforceable by anyone.¹³ Further, the figures may also suggest that the reason why third party rights were generally denied in grants of feu was that they were unnecessary, since the burdens could be enforced by the grantor as superior. The figures must, however, be approached with considerable caution. The sample of deeds where land was to be disposed is very small – a mere 25 deeds. This contrasts with the 157 deeds where land was to be feued. Further, there were a large number of deeds of conditions – some 52 in all – in which it was not possible to discover the nature of the subsequent transaction.

14. While, on average, third party rights were excluded in around two thirds of all cases where the deed of conditions was followed by grants in feus, the trend over time was for this figure to become smaller, falling in recent years to around one half. Graph 2 shows the trend:



Graph 2: Graph tracing the percentage of deeds of conditions to be followed by a feu granted with no third party enforcement rights

¹³ Unless the grantor had reserved neighbouring land which was capable of acting as the benefited property.

15. The results were also tabulated by registration county. This showed some regional variation, although the number of deeds in each county was too small for the findings to be more than impressionistic.¹⁴ In Glasgow, for example, enforcement rights were conferred in almost 90% of cases (compared to a national average of just under 50%). In Dumfries the figure was over 70%. Other counties showed much lower figures, for example Aberdeen (33%), Midlothian (30%) and Inverness (27%).

16. A special study was made of deeds of conditions which related to sheltered housing. Our results are collated in the following table:

SHELTERED HOUSING	EXP	EXP %age	IMP	IMP %age	NONE	NONE %age
pro forma	1	100	0	0	0	0
1981-1985	2	50.00	0	0	2	50.00
1986-1990	4	80.00	0	0	1	20.00
1991-1995	1	100	0	0	0	0
1996-1999	0	0	1	100	0	0
TOTAL	8	66.67	1	8.33	3	25.00

Table 5: Extent of third party enforcement rights (express, implied, or none) in owner-occupied retirement housing developments

The sample (12 deeds) is of a reasonable size having regard to the small number of sheltered housing developments in Scotland.¹⁵ It will be seen that the developments were feued in 11 of the 12 cases. Third party rights were conferred in three quarters of all cases, a much higher figure than is generally found in feus.

The application of section 17

17. As mentioned earlier,¹⁶ section 17 of the Land Registration (Scotland) Act 1979 provides that burdens created in a deed of conditions are effective from the date of registration. But section 17 can be disapplied, in which case the deed will be subject to the previous law by which burdens were not effective unless or until imported into a subsequence conveyance. In practice, section 17 is likely to be disapplied if the site governed by the deed is substantial and the development plan may be subject to change.

18. Our survey shows that section 17 is excluded in around one half of all cases:

¹⁴ The tables are not reproduced here.

¹⁵ The response from McCarthy and Stone plc and Peverel Management Services Ltd to our discussion paper indicate that in their estimate there are approximately 52 such developments in Scotland. If that is correct, the number surveyed here would comprise almost one quarter of the total of such deeds of conditions across Scotland.

¹⁶ Para 2 above.

Section 17	Applies	%age	Disapplied	%age
1976-80	7	46.67	8	53.33
1981-85	23	63.89	13	36.11
1986-90	12	54.55	10	45.45
1991-95	17	50.00	17	50.00
1996-99	32	46.38	37	53.62
pro forma	1	33.33	2	66.67
TOTAL	92	51.40	87	48.60

Table 6: Deeds where section 17 applies or is disapplied

As a general rule section 17 was not disapplied in relation to buildings already constructed, or small tenements.