



Scottish Law Commission
promoting law reform

| (DISCUSSION PAPER No 130)

Discussion Paper on Land
Registration:
Miscellaneous Issues

discussion
paper



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December 2005

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EDINBURGH: The Stationery Office

£18.60

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Glossary

Actual inaccuracy. An entry in, or omission from, the Land Register which is inaccurate according to both the ordinary law of property and the rules of registration of title. Compare *bijural inaccuracy*.

Bijuralism. The simultaneous application of two different systems of law: in the case of Scottish land registration these are (i) the special rules of registration of title and (ii) the ordinary rules of the law of property.

Bijural inaccuracy. An entry in, or omission from, the Land Register which is inaccurate according to the ordinary law of property but not according to the rules of registration of title. Compare *actual inaccuracy*.

Encumbrance. A real right other than ownership. As used in this paper it is a synonym of *subordinate real right*.

Integrity principle. The principle that an acquirer in good faith can rely on the integrity of the Land Register. As a result, such an acquirer takes the property free of *Register error*.

Keeper's warranties. The proposed *warranty as to title* and *warranty as to encumbrances*.

Lease title sheet. The title sheet for the *primary right* of long lease.

Negative system. A system of land registration in which the validity of the title acquired depends on the validity of the acquirer's deed.

Off-register servitude. A servitude which was created other than by registration (for example, by positive prescription). Although so created, such a servitude might nonetheless appear on the Land Register, whether on the title sheet of the benefited property (as a pertinent of that property) or on the title sheet of the burdened (as an *overriding interest*).

Overriding interests. Real rights constituted other than by registration. In this paper overriding interests are also referred to as *unregistered real rights*.

Positive system. A system of land registration in which title flows from the register and is unaffected by the invalidity of the acquirer's deed.

Primary right. The real rights of ownership and long lease. Each primary right has its own title sheet.

Principal title sheet. The title sheet for the *primary right* of ownership.

Register error. An inaccuracy which already affected the Land Register at the time of an acquisition.

Secondary right. Real rights in land other than *primary rights*. The most important examples are standard securities, servitudes, and real burdens. A secondary right does not have its own title sheet but is entered on the title sheet of the primary right to which it most closely relates.

Subordinate real right. A real right other than ownership. It is a synonym of *encumbrance* (as used in this paper).

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

True owner. A person from whom ownership is taken away without his consent in order, in a system of registration of title, to confer ownership on the acquirer.

Unregistered real right. A real right created other than by registration. See also *overriding interests*.

Warranty as to encumbrances. The proposed warranty by the Keeper that, on registration, an acquirer takes free of any *encumbrance* affecting that right and omitted from the Register, other than *overriding interests*.

Warranty as to title. The proposed warranty by the Keeper that, on registration, the real right is duly acquired, varied or, as the case may be, discharged.

Abbreviations

1979 Act

Land Registration (Scotland) Act 1979

1980 Rules

Land Registration (Scotland) Rules 1980, SI 1980/1413

ARTL

Automated registration of title to land

BGB

Bürgerliches Gesetzbuch (German Civil Code)

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Scot Law Com No 183

Scottish Law Commission, Report on *Diligence* (Scot Law Com No 183, 2001)

Second Discussion Paper

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Part 1 Introduction

Background

1.1 The subject of land registration was included in our *Sixth Programme of Law Reform*¹ and has now been carried forward to our *Seventh Programme*² which commenced on 1 January 2005. We have already published two discussion papers on this topic. The first, *Land Registration: Void and Voidable Titles*,³ examined the principles which underlie the Land Registration (Scotland) Act 1979, suggested that they were unsatisfactory in a number of respects, and made some, quite general, proposals for reform. The implications of these proposals were worked out in detail in the second discussion paper, *Land Registration: Registration, Rectification and Indemnity*, which was published earlier this year.⁴ In this third and final paper we consider a number of further topics arising out of the 1979 Act and its proposed reform.

1.2 It may assist the reader if we begin with a general discussion of land registration and of our approach to its reform.⁵

Facility of transfer v security of title

1.3 Ideally, the conveyancing aspects of land acquisition should be as safe, simple and as cheap as possible, while at the same time a title, once acquired, should be secure against future challenge. Unfortunately these aspirations are irreconcilable. If transfer is to be simple and safe – if an acquirer is to receive a good title with little more than an inspection of the Land Register followed by an apparently valid deed of transfer – it follows that title will sometimes be acquired at the expense of a person who neither consented to the transfer nor, in all probability, was aware that it had taken place. Conversely, if a title is to be secure against future challenge, it must only be capable of being lost (in the ordinary case at least)⁶ by the consensual act of its holder. For acquirers that implies an exhaustive and time-consuming examination of title in order to ensure that the person purporting to transfer the land is also the person who owns it.

1.4 No absolute choice need be made between facility of transfer and security of title; but of course the more that one is pressed into service the more the other is discarded. The choice is often presented as being between the protection of the acquirer and the protection of the true owner – the person who, in some cases, must give up his title so that the acquirer's title can be good. But acquirers (if successful) become owners too, and something which was easily acquired may just as easily be lost to a future acquirer.

¹ *Sixth Programme of Law Reform* (Scot Law Com No 176, 2000) paras 2.13-2.17.

² *Seventh Programme of Law Reform* (Scot Law Com No 198, 2005) paras 2.7-2.11.

³ Scot Law Com DP No 125 (2004).

⁴ Scot Law Com DP No 128 (2005).

⁵ The text which follows is based on the summary given in paras 1.3-1.14 of the Second Discussion Paper.

⁶ Leaving aside compulsory purchase, diligence, bankruptcy, and other forms of involuntary transfer.

1.5 In Scotland the ordinary rules of property law uphold security of title. The 1979 Act, however, tends to uphold facility of transfer, for registration of title has as its fundamental objective that an acquirer should be able to rely on the Register without question or inquiry. To accept registration of title at all, therefore, it must also be accepted that facility of transfer will often prevail over security of title. The question is whether the 1979 Act achieves this end in a balanced way and by satisfactory means.

1.6 Under the 1979 Act the choice between acquirer and true owner – between transactional ease and security of title – is made on the basis of possession. An acquirer who is in possession at the time of a challenge is protected against any infirmity in the underlying title, and the true owner must make do with compensation (indemnity) from the Keeper.⁷ But an acquirer who is not in possession must yield title to the true owner, by the process of rectification of the Register, and is compensated in turn.⁸ In the first discussion paper we ventured two criticisms in particular of this solution.⁹ In the first place, momentary possession seemed too flimsy and uncertain a basis for so momentous a choice, and one too easily manipulated by individual acts of self-help. Secondly, the solution tilted the balance too far in favour of the acquirer, protecting him more even than was necessary for the purposes of registration of title. For since in practice the acquirer was almost always in possession, the effect of the 1979 Act was almost always to protect the acquirer and almost never to protect the true owner. In particular, this exposed those still holding on Sasine titles to an irrevocable loss in the event that part of their land was included by mistake in a neighbour's title at the time of first registration.

1.7 Our proposed solution was to make a distinction between "Register error" and "transactional error".¹⁰ The former is an inaccuracy which already affected the Register at the time of the acquirer's transaction. The latter is an inaccuracy which came to affect the Register only as a result of that transaction. So if, immediately before a transaction, the Register shows the owner as A whereas the owner should be B, the inaccuracy is a Register error. But if a person acquires land on the basis of a disposition which is forged or otherwise void, the entering of his name on the Register would be (so far as the acquirer is concerned) a transactional error. Registration of title requires that an acquirer be protected against Register error. What he sees on the Register must be what he gets. In the second discussion paper we called this the "integrity principle": the principle that, in a question with a *bona fide* acquirer, the integrity of the Register can be taken for granted. But there is no matching requirement of protection against transactional error. What goes on in a transaction is a matter for the acquirer and not for the Keeper. Strictly, it does not concern the Register at all. It is thus an open question whether, and if so in what way, the acquirer should be protected.

1.8 Our proposal was to give more protection to the true owner and less to the acquirer.¹¹ The true owner should keep the property¹² for as long as was consistent with the requirements of registration of title. In this way security of title would give way to transactional ease only at the point where the system left no alternative. Two conclusions followed. First, if the error affected the immediate transaction – if, in other words, it was a

⁷ 1979 Act ss 9(3), 12(1)(b).

⁸ 1979 Act ss 9(1), 12(1)(a).

⁹ First Discussion Paper paras 4.22 ff.

¹⁰ First Discussion Paper paras 3.15–3.18.

¹¹ First Discussion Papers paras 4.29 ff.

¹² Or, in a positive system, the right to the return of the property by rectification of the Register.

transactional error which did not involve the integrity of the Register – the property should be awarded to the true owner and not to the acquirer. Instead it was the acquirer who should receive indemnity. Secondly, if, before the true owner could assert his right, the acquirer transferred title to a second acquirer, the second acquirer should be awarded the property. This is because what was a transactional error in a question with the first acquirer would have become a Register error in a question with the second; for at the time of the second transaction the first acquirer would be named on the Register as owner. This idea of title defects being cured, not in the first transaction but in the second, is perfectly familiar in other systems of registration of title. In Torrens systems¹³ it is known as the principle of "deferred indefeasibility".¹⁴ To this principle we proposed one modification. The true owner should not lose title unless he had also lost possession for a significant period, such as a year. Loss of possession would thus be notice of a potential loss of title, giving the opportunity to investigate and, if necessary, to make a challenge. In the result, an acquirer could not rely on the Register alone but must also consider the state of possession.

"Positive" system v "negative" system

1.9 The 1979 Act operates what is sometimes referred to as a "positive" system of land registration.¹⁵ A "positive" system confers (or, as the case may be, varies or extinguishes) a right by the very act of registration and without regard to the validity of the underlying deed. A conventional or "negative" system, by contrast, operates within the normal rules of the law of property so that no right can be conferred by an invalid deed. Both types of system are fully compatible with the idea of registration of title, the integrity of the Register, and the protection of *bona fide* acquirers, and the choice between them is largely a matter of technique and of convenience. In the first discussion paper we argued that, in a Scottish context, the positive system of the 1979 Act brought mainly disadvantage.¹⁶ It was inflexible and irrational; often it left ownership in the wrong place; and above all it imported bijuralism, and with it unnecessary complexity and uncertainty. A system is "bijural" if it operates with two different sets of laws.¹⁷ By giving too much too soon, a positive system must sometimes take back, by rectification, that which was given by registration; and to know when and whether such a clawback should occur, the acquirer's position must be analysed both under the rules of land registration and under the ordinary rules of the law of property. If the results coincide, the acquirer's right is secure; but if they are different – if, in other words, the right would not have been conferred under the ordinary law – the Register is inaccurate and can, in principle, be rectified so as to deprive the acquirer of his right. In the second discussion paper such an inaccuracy was referred to as a "bijural inaccuracy": the acquirer is owner, for the moment, but ought not to be.¹⁸

1.10 Our proposal was that the positive system be replaced by a conventional, negative system. There would thus be one law of property and not two. But, as already mentioned,¹⁹ that law of property would be modified by the integrity principle so that a *bona fide* acquirer

¹³ The Torrens system originated in South Australia in 1858 and is widely used in Australia, New Zealand, Canada, and in some other Commonwealth countries. See First Discussion Paper paras 1.13-1.17.

¹⁴ As opposed to the "immediate indefeasibility" which is operated by the 1979 Act and by many Torrens systems.

¹⁵ For "positive" and "negative" systems, see First Discussion Paper para 1.9.

¹⁶ First Discussion Paper part 5.

¹⁷ First Discussion Paper para 1.11.

¹⁸ Second Discussion Paper paras 6.4 and 6.5.

¹⁹ Para 1.7.

would take free of Register error. In effect our proposal was that, rather than exist in a vacuum, the innovations of registration of title should be properly integrated with the law of property. The result would be clearer, simpler, more principled, and a great deal less prone to accident.

The integrity principle

1.11 Mention has already been made of the integrity principle.²⁰ As we explained in the second discussion paper, it comprises two distinct rules. First, a person shown on the Register as owner of land is taken, in a question with an acquirer, to have become owner of that land on the date stated on the Register, provided that the person was in possession for a year or other prescribed period.²¹ So an acquirer can take title from that person without further inquiry. Secondly, an acquirer takes the land free of all real rights other than (i) those which appeared on the title sheet immediately before registration and (ii) overriding interests.²² We return to the subject of overriding interests in the present paper.²³ An important result of the integrity principle is to reduce the incidence of inaccuracy on the Register; for even if the Register is inaccurate at the time of an acquisition (for example, by showing the wrong person as owner or by the omission of an encumbrance), it ceases to be inaccurate once the acquirer's title is registered. This is because the integrity principle is a rule of property law and not merely, like its equivalent under the 1979 Act,²⁴ a rule of land registration which is subject to correction by reference to the underlying law.

Rectification

1.12 The 1979 Act restricts rectification of the Register so as to safeguard the position of acquirers.²⁵ As elaborated in the second discussion paper, our scheme avoids the difficulty. Acquirers are protected by the integrity principle and not by the suppression of rectification. If the Register is inaccurate, rectification is available without restriction.²⁶

Indemnity

1.13 The second discussion paper considered the implications for the indemnity system of the introduction of the integrity principle and the shift from a positive to a negative system of registration. In respect of the acquisition, variation or extinction of real rights, we proposed that the Keeper should warrant that the rights were duly acquired, varied or discharged to the extent shown on the Register, and that in the case of acquisition he should further warrant that there were no subordinate real rights other than those which appear on the Register and overriding interests.²⁷ But no indemnity would be paid without "eviction", that is to say, without the inaccuracy being founded on by a third party.²⁸ We further proposed that, as under the present law, a true owner should be indemnified for rights lost as a result of the

²⁰ Para 1.7.

²¹ Second Discussion Paper paras 5.22-5.29.

²² Second Discussion Paper paras 5.33-5.44.

²³ See part 5.

²⁴ 1979 Act s 3(1).

²⁵ 1979 Act s 9(3).

²⁶ Second Discussion Paper para 6.21

²⁷ Second Discussion Paper paras 7.22-7.48. The warranties replace the payment of indemnity for rectification under 1979 Act s 12(1)(a).

²⁸ Second Discussion Paper paras 7.49-7.51.

legislation. In particular, indemnity should be paid to a person who loses rights as a result of the operation, in favour of another person, of the integrity principle.²⁹

The present paper

1.14 This, our third discussion paper, covers a range of miscellaneous topics. Parts 2 and 3 consider the related questions of how land is described on the Register, and problems which arise in the delineation of boundaries. Part 4 discusses one of the overriding interests, servitudes, and also real burdens, while part 5 reviews the position of overriding interests in general. Part 6 asks whether the mechanisms by which the Keeper makes decisions are compatible with the European Convention on Human Rights. The arguments for and against the introduction of a system of priority notices, akin to the caveats found in many other countries, are reviewed in part 7. Part 8 considers the relationship between the Land Register and certain personal registers (such as the Register of Inhibitions and Adjudications). Part 9 covers some transitional matters. A final part (part 10) gives a list of our proposals. The leading provisions of the 1979 Act are reproduced in an appendix.

Our proposals in summary

1.15 Our main proposals can be summarised as follows.

1.16 **Descriptions and boundaries.** In making up a new title sheet, the Keeper should make greater use of the prior deeds than at present. In particular, he should reproduce any deed plan which is of material assistance in the identification of the property (for example, because it is more up-to-date, or drawn to a larger scale, than the Ordnance Map).³⁰ Rules of preference are suggested for the unusual case where, in a title sheet, different elements in a description conflict.³¹ Although the Ordnance Map should continue for the present as the basis for descriptions, the Keeper should be free to substitute a different map provided that it meets prescribed standards.³² If, on the Ordnance Map (or any replacement) being updated, the line of a feature which marks the legal boundary of a property is altered, the Keeper should be able to rectify the legal boundary accordingly. The change would take effect for all purposes and would not attract payment of indemnity.³³ In the case of a boundary described or shown on the title plan as a natural water feature, the boundary should be taken to be that feature as altered from time to time by alluvion. This would mean that if the boundary moved, the movement would be treated as reflected on the Register even if the title plan had not been amended.³⁴

1.17 Where neighbours agree to clarify or adjust their boundaries, the agreement should be given effect by a special type of contract of excambion (replacing agreements under section 19 of the 1979 Act).³⁵ Subject to certain safeguards, the new boundaries would automatically bind those holding subordinate real rights over the respective properties.³⁶

²⁹ Second Discussion Paper paras 7.53-7.58.

³⁰ Paras 2.14-2.23.

³¹ Paras 2.11-2.13.

³² Paras 2.3-2.5.

³³ Paras 3.18-3.27.

³⁴ Paras 3.5-3.16.

³⁵ Assuming that a replacement is needed at all: see paras 3.39-3.42.

³⁶ Paras 3.28-3.49.

1.18 **Servitudes and real burdens.** The integrity principle³⁷ should apply to servitudes³⁸ but not to real burdens.³⁹ The first is, in effect, a change in the law. It would mean that an acquirer could take on trust any servitude which the Register showed as benefiting the property.

1.19 **Noting of overriding interests.** Overriding interests – provisionally re-named as "unregistered real rights" – should be defined as subordinate real rights which were created otherwise than by registration against the burdened property. The definition should no longer be supplemented by a list of examples.⁴⁰ Only a limited number of such rights should be capable of being noted on the Register, but they should include short leases (with some exceptions) and occupancy rights, neither of which can be noted under the present law.⁴¹ An application to note at the instance of the owner of the burdened property should be accepted without further inquiry, but an application at the instance of the holder of the alleged right (for example the benefited owner in a servitude said to have been created by prescription) should be intimated to the owner of the burdened property and rejected if the owner expresses reasoned opposition.⁴²

1.20 **Notification of applications.** Applications for rectification (but not for registration) should be notified to any person disclosed by the Register as being potentially affected, and such person should be entitled to make representations to the Keeper.⁴³

1.21 **Personal registers.** The Keeper should continue to transcribe inhibitions and other entries from the Register of Inhibitions and Adjudications to the Land Register, but only where the entry affects a deed which is being presented for registration in the Land Register.⁴⁴ No equivalent duty should be introduced in respect of the Companies Register, the Register of Insolvencies, or other personal registers.⁴⁵

New terminology

1.22 In developing our proposals for reform we have found it helpful to make use of a number of new terms as a shorthand for particular rules or concepts. These were previously encountered in the second discussion paper, and some have already been mentioned in this part. A complete list is given in a glossary at the beginning of the paper.

Which Parliament?

1.23 Legislation to give effect to our proposals would be within the legislative competence of the Scottish Parliament.⁴⁶ The law of land registration is not a reserved matter.⁴⁷ Nor are

³⁷ For which see para 1.11.

³⁸ Paras 4.7-4.26.

³⁹ Paras 4.37-4.45.

⁴⁰ Paras 5.8-5.24.

⁴¹ Paras 5.51-5.62.

⁴² Paras 5.30-5.47.

⁴³ Paras 6.22-6.27.

⁴⁴ Paras 8.11-8.20.

⁴⁵ Paras 8.23-8.28.

⁴⁶ For which see Scotland Act 1998 s 29.

⁴⁷ Reserved matters are listed in sch 5 of the 1998 Act.

our proposals in conflict with Community law or with any rights arising under the European Convention on Human Rights. Article 6 of the ECHR is discussed in part 6.⁴⁸

Acknowledgements

1.24 We are greatly indebted to Registers of Scotland for their continuing loan of a senior member of staff.⁴⁹ Valuable comments on an earlier version of this paper were received from Registers of Scotland and from Professor George Gretton, who has acted as a consultant on this project. We are grateful to them, and to others whose help is acknowledged elsewhere in this paper.

⁴⁸ Paras 6.8-6.21.

⁴⁹ Mr Martin Corbett.

Part 2 Plans and descriptions

ORDNANCE MAP

Introduction

2.1 Mapping services may be provided to registers in more than one way.¹ A standard model is for the land register to be tied to a cadastral information system which is maintained for other, mainly fiscal, reasons.² In Germany, for example, the entire country has been surveyed into cadastral units, each with a unique number, which form the basis of the land register.³ In the United Kingdom, however, there is no cadastre, but only the commercially available maps produced by Ordnance Survey. The Ordnance Map has been used by the Land Registry in England and Wales since 1889,⁴ and was the inevitable choice of the Henry Committee for the new Land Register in Scotland.⁵ In Scotland the Land Register is tied to the Ordnance Map by both primary and secondary legislation. Section 4(2)(a) of the 1979 Act provides that the Keeper shall not accept an application if the land to which it relates is not sufficiently described to enable him to identify it by reference to the Ordnance Map.⁶ Section 6(1)(a) requires the Keeper to enter in each title sheet "a description of the land which shall consist of or include a description of it based on the Ordnance Map".⁷ In terms of rule 23(a) of the Land Registration (Scotland) Rules 1980 the index map⁸ is to be "based on" the Ordnance Map. "Ordnance Map" is defined in the Interpretation Act 1978 as "a map made under powers conferred by the Ordnance Survey Act 1841 or the Boundary Survey (Ireland) Act 1854",⁹ and in practice the term may be taken as referring to the base survey from which Ordnance Survey products are extracted rather than to any particular digital or paper product created from that survey.¹⁰

2.2 Since the inception of the Land Register in 1981, the Keeper has included in every title sheet an extract from the Ordnance Map which shows, by lines or tints, both the extent of the property and also the land to which particular rights and burdens relate. Until 1993 the lines and tints were drawn by hand on Ordnance Survey prints, but title plans are now generated from a digital map base supplied by Ordnance Survey. Similarly, the index map was initially compiled by hand but is now stored as one of the layers on the same digital map base from which title plans are generated. The Keeper uses the Ordnance Survey Land-line

¹ For a comparative survey, see A M Garro, "Recordation of Interests in Land", *International Encyclopedia of Comparative Law* vol VI ch 8 (2004) paras 94 ff.

² Cadastres can be traced back at least to the reign of the Roman Emperor Diocletian (284-305 AD). Garro (above) para 98 writes that: "A modern cadastre consists of a series of largescale maps plotting to scale all parcels of land and building constructions, providing each plot with a parcel identifier number".

³ M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) pp 211-3.

⁴ Ruoff and Roper, *Registered Conveyancing* para 5.021.

⁵ Henry Report part I para 35.

⁶ See Second Discussion Paper para 4.26.

⁷ See also 1979 Act s 12(3)(d).

⁸ Ie the map showing all registered interests in land. See *Registration of Title Practice Book* para 4.3.

⁹ Interpretation Act 1978 s 5, sch 1.

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

product, at the best scale available for the area in question. This is supplied with a service contract for regular updating of individual map tiles within the database.¹¹ In the next year or two Land-line is to be replaced by a new digital map base known as MasterMap.

Severance of statutory link with Ordnance Map

2.3 The Land Register is likely to be based on the Ordnance Map for the foreseeable future. Whether this should continue to be mandatory is, however, a different matter. The possibility of competitor organisations cannot be ruled out. New technologies may result in a different approach to mapping: in this respect aerial photography and satellite imagery are already significant developments. Further, being produced for different types of user, the Ordnance Map does not, in all respects, meet the specialised needs of Registers of Scotland. In particular it may contain errors; it is rarely completely up-to-date;¹² the available scale is sometimes too small; and it does not cover much of the sea bed.¹³ This causes difficulties, not only for the Keeper, but also for applicants for first registration who may be faced with a discrepancy between an accurate deed plan and an inaccurate extract from the Ordnance Map. As one consultee expressed the position to us:¹⁴

"The main source of difficulty both for solicitors and for clients (in terms of delay and expense) is the procedure for comparing the legal boundaries with the occupational boundaries. Difficulties are particularly common in relation to rural properties as opposed to modern urban residential properties. In many cases we find that the Ordnance Map is either out of date or simply inaccurate. On some occasions even though it has been confirmed that the title plan matches the physical boundaries on the ground it still seems to be impossible to reconcile the title plan with the Ordnance Map. Where there is a discrepancy there is frequently a delay in progressing or concluding the transaction and on many occasions the sellers are involved in additional expense in relation to fees for architects' site visits and additional plans."

2.4 In suggesting that the Keeper should have the flexibility to change maps, we do not overlook the value of the present arrangements. In the typical case, the title plan in the Land Register is much more accurate and informative than the description, sometimes woefully inadequate, which is found in Sasine titles. Further, by linking the Land Register to the Ordnance Map, the legislation ensures that the maps employed by the Register are of a particular standard. In the event of that link being abandoned, a replacement standard would be needed.¹⁵ This is partly in deference to the public interest in an accurate and informative Register, but a prescribed standard would be needed for other reasons as well. It would set the threshold for applications – for, as at present, an application would fall to be rejected if the land could not be identified on the official map.¹⁶ More important still, it would set the level of the state guarantee in respect of boundaries: under the present law, no indemnity is

¹¹ See further paras 3.18-3.27.

¹² *Registration of Title Practice Book* para 4.14 warns that "even with continuous revision by the Ordnance Survey, the latest map information available may not necessarily reflect the situation on the ground".

¹³ On the sea bed, see further paras 2.28-2.31.

¹⁴ Ledingham Chalmers, writing in February 2002 in response to our preliminary consultation. A similar point was made by some other consultees.

¹⁵ As in the case of the Register of Community Interests in Land, which is directed to contain "a description of the land, including maps, plans or other drawings (prepared to such specifications as are prescribed). See Land Reform (Scotland) Act 2003 s 36(2)(f); Community Right to Buy (Specification of Plans) (Scotland) Regulations 2004 (SSI 2004/231).

¹⁶ 1979 Act s 4(2)(a). For an analysis of descriptions in the Land Register, see G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) paras 12-01ff.

paid for loss due to an inaccuracy which could not have been rectified by reference to the Ordnance Map.¹⁷

2.5 Our proposal is that:

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

If a new map were introduced, it would need to be introduced for all purposes, including all title plans and the index map. Whichever map is used, however, the Keeper will remain able to supplement the title plan with a further plan or plans which may or may not be based on the official map. Indeed we suggest later that the use of supplementary plans should sometimes be mandatory.¹⁸

DESCRIPTIONS

Four elements

2.6 Land is described in the property section (A section) of the title sheet.¹⁹ By section 6(1)(a) of the 1979 Act, that description must "consist of or include a description of it based on the Ordnance Map". But in practice it would be very unusual for a description to comprise only a reference to the title plan (and hence to the Ordnance Map). At the least the title plan is likely to be supplemented by a brief general description – typically a postal address²⁰ or a statement of location by reference to a public road.²¹ In the case of a tenement flat, the location within the building is given. Pertinents, where known, are also included (typically rights of common property, servitudes and real burdens). In the case of land of two hectares or more, the Act requires a statement as to area.²² Occasionally a lineal measurement is given. A verbal description may thus comprise a number of different elements.

2.7 The verbal description is distinct from the verbal explanation of the plan itself, stating which delineations or tints reflect the extent of the property, whether any areas have been removed from the title, and whether the title sheet includes an exclusive right to the whole area, or a *pro indiviso* share in that area, or a right to a part "within the land edged red on the title plan".

2.8 Individual boundaries may be further defined by reference to physical features – for example, the centre line of a wall – by means of a system of arrows on the title plan²³ or a

¹⁷ 1979 Act s 12(3)(d).

¹⁸ Paras 2.18 and 2.19.

¹⁹ 1980 Rules r 4(1)(a).

²⁰ As listed in the Address Point Gazetteer and so not necessarily the address given in the title deeds or application form.

²¹ There is something to be said for acknowledging this use of general descriptions by turning it into a duty. See C C Campbell, "The Land Register and the Keeper's Discretion" (1999) 4 SLPQ 277, 289. An exception would be necessary for a case where the property could not reasonably be given a verbal description.

²² 1979 Act s 6(1)(a). At para 8.17 of the Second Discussion Paper we suggest that this requirement might be dropped.

²³ *Registration of Title Practice Book* para 4.30.

written statement as to boundaries. The Keeper does not intend this to imply that adjoining titles agree as to the precise line of the boundary.²⁴

2.9 Finally, there may be one or more supplementary plans. These are used to illustrate information which cannot be depicted on the title plan – for example, for reasons of scaling, or because the plan is two-dimensional and so cannot show locations within buildings or strata of minerals. Often, supplementary plans are copies of the deed plan and are not based on the Ordnance Map. We understand that approximately 15% of title sheets contain one or more supplementary plans and of these almost 60% (ie nearly 10% of all registered titles) include at least one plan which is not based on the Ordnance Map.

2.10 Potentially, therefore, a description of land may comprise up to four different elements:

- (i) title plan (including verbal explanation);
- (ii) verbal description;
- (iii) statement as to boundaries;
- (iv) supplementary plan.

Descriptive elements in conflict

2.11 Usually, the different elements in a description complement one another, each contributing to build up an account of the boundaries of the property. But occasionally the elements are not in agreement. For example, the verbal description may refer to number 61 High Street and the plan to number 63; or a boundary may be given as the mid-point of a path whereas the plan shows the whole path as included within the property. For descriptions in Sasine writes a considerable body of case law has developed from which it may be possible to discern the general rule that a verbal description of boundaries is to be preferred to a plan.²⁵ For descriptions in the Land Register the rule is likely to be the other way around, on the basis that a plan-based system must give primacy to the plan in the title sheet; but it would be helpful to put the matter beyond doubt.²⁶ Of course, where descriptive elements conflict, this may indicate an inaccuracy, the rectification of which would bring the conflict to an end. But even where this is so, the description must be interpreted before it can be rectified, and for interpretation it is necessary to have rules of preference.

2.12 In formulating rules of preference for the Land Register, therefore, the starting point is that a plan is to be preferred to a verbal description (including a statement as to boundaries). Where there is more than one plan, and the plans are in conflict, the title plan should probably be preferred to any supplementary plan. This acknowledges the special status of the title plan, and the Ordnance Map (or any replacement), in the system of

²⁴ The Keeper offers a separate service providing confirmation as to whether there is agreement between adjoining titles. See *Registration of Title Practice Book* para 4.30. The fee is £20: see Fees in the Registers of Scotland Order 1995 (SI 1995/1945) sch part I para 3(f). In practice, however, the service is not used.

²⁵ Gordon, *Scottish Land Law* para 4-08; Halliday, *Conveyancing Law and Practice* vol 2 para 33-13. See eg *Rutco Incorporated v Jamieson* 2004 GWD 30-620.

²⁶ R Rennie, "Alluvio in the Land Register" 1996 SLT (News) 41, 41-2; "One of these presumptions [in Sasine descriptions] is that a plan will normally be presumed to be demonstrative only and not taxative. In many ways the opposite is true in the land registration system because it is map based."

registration of title. If, unusually, two supplementary plans exist, preference should be given to the plan with the larger scale. It does not seem necessary to say more. In particular, conflicts within a *verbal* description will hardly ever arise, if only because such a description tends to be brief; and in any event it is difficult to suggest a useful rule. Naturally, any rules of preference would come into play only if the different elements in the description were incapable of reconciliation. That would be unusual, for most apparent conflicts will yield to creative interpretation. Further, such rules should not be regarded as immutable. They would be guidelines or presumptions, capable on occasion of giving way to contrary evidence. In particular if the element which, under the relevant rule, is to be preferred is contradicted by all other elements in the description, the rule might sometimes be disregarded.

2.13 Our proposal is as follows:

2. (1) **In the interpretation of the description of land in a title sheet where –**
 - (a) **the description comprises two or more elements, and**
 - (b) **the elements are in conflict and cannot be reconciled,****regard should be had to the rules of preference stated below.**
- (2) **The first rule of preference is that a plan is preferred to a verbal description.**
- (3) **The second rule of preference is that the title plan is preferred to a supplementary plan.**
- (4) **The third rule of preference is that, except where the second rule applies, a larger scale plan is preferred to a smaller scale plan.**

TRANSMISSION OF INFORMATION FROM PRIOR DEEDS

The Keeper's discretion

2.14 A new title sheet is created on first registration and also when registered land is divided. The title sheet is based on the deed which is presented for registration, and in the case of first registrations on the deeds which comprise the prior Sasine title. If a deed describes the property in detail, a question arises as to whether the description should be reproduced in the title sheet. At present, and following a recommendation of the Henry Committee,²⁷ the inclusion of additional information is at the Keeper's discretion. For example, it is the Keeper's normal practice to carry forward information as to boundaries (for example that the boundary is the mid-point of a stone wall), but he will not usually include statements as to area or lengths of boundaries. Deed plans are not usually reproduced as supplementary plans unless there are compelling reasons to do so.

²⁷ Henry Report part I para 36: "It shall be in the discretion of the Keeper to add either to the written description or the plan any additional information from the title including information as to the area and holding".

Omission of information: for and against

2.15 From the Keeper's point of view, the omission of certain types of information meets a ready justification. Much of the information which is omitted is of a poor, or at least uncertain, quality. Most of the rest would simply duplicate information which is already given on the title, to no good purpose. To include all information from prior deeds would, in many cases, be to waste staff time and the time of future readers of the land certificate. It would also threaten the position of the title plan as the main descriptor of the property.

2.16 The perspective of users of the Register might in some respects be different. Our preliminary survey of the legal profession, conducted in 2002, indicated concern about some aspects of the Keeper's current practice. One consultee²⁸ put it in this way:

"In our view, the quality of Title Plans being issued with Land Certificates is vastly inferior (and show far less detail) than the majority of modern title plans actually attached to deeds being submitted for registration. While the Title Plans which are being issued may be sufficient in the case of detached, semi-detached or terraced properties in mature suburban areas, they are simply inadequate in many other cases particularly commercial properties in city centre locations. We consider the Keeper should be encouraged to make far greater use of supplemental plans to show much more detail than the limited information which can be reflected on the digital OS plan on which Title Plans are based.

In addition, Land Certificates/Title Plans invariably omit any mention of boundary or area measurements even when clearly shown on the relevant conveyance submitted for registration. This is far from helpful either to us or our clients."

2.17 Both plans and measurements merit further consideration. But first it is necessary to be clear as to the matter which is at issue. There is a difference between (i) the elements by which land is described on the Register and (ii) the extent to which the accuracy of individual elements is guaranteed by the Keeper. It is already the case that certain elements found in descriptions are outside the statutory indemnity scheme. That important question is considered later.²⁹ But for the present the concern is only with what should, and what should not, be included in a description of registered land.

Deed plans

2.18 As our consultee indicated, deed plans can show details which are absent from the Ordnance Map (and hence from the title plan). This may be because the deed plan is drawn to a larger scale, or because the Ordnance Map is incomplete or out of date. Sometimes, of course, the details in question will be insignificant and hardly worthy of inclusion. But where the information adds materially to what can be shown on the title plan, there is much to be said for reproducing a deed plan on the title sheet; for otherwise the description on the Land Register may turn out to be less informative and accurate than the previous description in the Register of Sasines. Admittedly, and unlike the title plan,³⁰ there is no mechanism for updating a supplementary plan which derives from a deed plan, and over time it may cease to be an accurate representation of the property on the ground. For that reason it would be important that the date of the plan be stated, as is sometimes done under current practice.

²⁸ Paull & Williamsons.

²⁹ Paras 2.24-2.27.

³⁰ For updating of the title plan, and the potential problems which it creates, see paras 3.18-3.27.

But the fact that something may eventually cease to be useful does not seem a sufficient reason for its exclusion from the title sheet at the outset. A further difficulty is that, while title plans are prepared on the electronic mapping system and can be transmitted electronically as geospatial data, deed plans are scanned and cannot be converted into this format. This presents problems of access through Registers Direct and, it may be, through future electronic services. Again, however, this does not seem an insuperable obstacle to the use of deed plans.

2.19 Of course, the Keeper should not be obliged to include a plan (or indeed other information) where he has reason to doubt its accuracy, although it is not envisaged that extensive inquiries should take place.³¹ And the additional information might fall outside the statutory indemnity scheme.³² Subject to these qualifications, however, we think that a deed plan which contains sufficient relevant detail should be carried forward to the title sheet. In many cases this is already the Keeper's practice.

Measurements

2.20 Under the present law the Keeper must calculate and note the area of any land which extends to two hectares or more,³³ but he is not obliged to carry forward a statement as to area contained in previous deeds and in practice rarely does so.³⁴ Arguably, this is the wrong way round. On the one hand, a previous statement as to area may provide useful additional information as to the extent of the property, particularly if the ground is undulating and the exact area could not be calculated merely from the length of the boundaries (which is the only method of calculation open to the Keeper); on the other hand, in the case of land of two hectares or more, there is little value in having the Keeper make a boundary-based calculation from the title plan which it would be open to anyone else to make. We suggest that previous statements as to area should be carried forward into the title sheet but that it should no longer be necessary to calculate and note the area of any land of two hectares or more. As in the case of plans, however, a statement as to area should not be carried forward if there is reason to doubt its accuracy. Where the area is given in imperial units, it should be converted into its metric equivalent.

2.21 The case for lineal measurements is less strong. To reproduce an account of the length and orientation of boundaries – an account which traditionally runs to many lines – would be wearisome without, in most cases, being especially useful. Readers would quickly tire of trying to follow the twists and turns of individual boundaries and move on with relief to the title plan. The argument that a written measurement is more accurate than one derived from measuring a boundary on the title plan of the land certificate is substantially negated by the words "or thereby" which, almost always, qualify statements in Sasine deeds as to length. Indeed it has been suggested that the limitations in scaling in the title plan are in rough correspondence with the "or thereby" principle.³⁵ It is possible to scale to 0.23m on a 1:1250 Ordnance Map, to 0.46m on a 1:2500 map and to 1.83m on a 1:10000 map;³⁶ by way

³¹ However, the Keeper should retain his *discretion* to include such plans if he considers it would be useful to do so.

³² Para 2.24-2.27.

³³ 1979 Act s 6(1)(a). And see also Second Discussion Paper para 8.17.

³⁴ *Registration of Title Practice Book* para 4.26.

³⁵ *Registration of Title Practice Book* para 4.26.

³⁶ *Registration of Title Practice Book* para 4.26.

of comparison a distance of 0.3m has been held to fall within the "or thereby" principle.³⁷ This is not to say that lineal measurements can never be of assistance in identifying the property. Where they are, they should be carried forward to the title sheet. But, relatively speaking, that will be unusual.

Boundary features

2.22 As already mentioned, the Keeper's usual practice is to carry forward any statements as to boundary features which are found in previous deeds. This is in line with the recommendation of the Henry Committee that where the prior title gives "an exact boundary line the Keeper shall state this information in the Title Sheet or relative plan".³⁸ There are, however, qualifications. It comes as no surprise that the Keeper omits the unhelpful statement, sometimes found in full bounding descriptions, that a boundary follows this or that imaginary line. Also omitted are references to boundary features which are not properly defined on the Ordnance Map. Kerb lines, for example, are shown on the Map only as pecked lines as they have not been accurately surveyed. In this second case (but not the first) it seems arguable that the information ought to be included, in the form of a written statement, unless it is plainly wrong or out of date.

2.23 The above discussion may be summarised in the form of a proposal:

3. **(1) In making up a title sheet, the Keeper should be bound to carry forward from the prior deeds such of the supplementary information mentioned at (2) as would be of material assistance in the identification of the property; but information should not be carried forward if the Keeper has reason to question its accuracy.**
 - (2) The information referred to is –**
 - (a) any deed plan; and**
 - (b) any statement as to –**
 - (i) area;**
 - (ii) lineal measurement; or**
 - (iii) the location of a boundary in relation to a boundary feature.**
 - (3) In this proposal, "prior deeds" means –**
 - (a) the deed inducing the making up of the title sheet; and**
 - (b) in the case of first registrations only, the deeds comprising the prior title.**

³⁷ In the context of an overall boundary of a little under 40m: see *Hetherington v Galt* (1905) 7 F 706. Professor Halliday has doubted whether the principle could accommodate 1m or more: see D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) p 205. See also *Young v McKellar Ltd* 1909 SC 1340, 1344 per Lord Low.

³⁸ Henry Report part I para 38(1).

EXCLUSION OF INDEMNITY

2.24 In the previous section we focused on four descriptors sometimes found in prior deeds – plans, boundary lines, area, and lineal measurements – and proposed that they should be carried forward into the title sheet more often than under present practice. As it happens, all four are subject to automatic exclusions of indemnity under the current law. In the case of boundary lines and lineal measurements this is achieved – arguably under the authority of section 12(2) of the 1979 Act³⁹ – by a statement which appears on the inside back cover of all land certificates.⁴⁰ For plans and statements as to area there are exclusions in section 12(3).⁴¹ The exclusion in respect of plans derives, rather obliquely, from paragraph (d) of section 12(3), which removes from the indemnity system a loss which:

"arises as a result of any inaccuracy in the delineation of any boundaries shown in a title sheet, being an inaccuracy which could not have been rectified by reference to the Ordnance Map, unless the Keeper has expressly assumed responsibility for the accuracy of that delineation".

This exclusion is concerned primarily with limitations of scaling. As applied to the title plan (which is based on the Ordnance Map), it is merely a statement of the obvious, because a plan cannot show a boundary detail for which its scale does not allow. But as applied to a supplementary plan drawn on a more generous scale, the exclusion has some substance. It means that if the plan contains a mistake on a matter too small to have shown up on the title plan, no indemnity is payable on its account. In effect, the Keeper is guaranteeing the accuracy of the title only to the scale of the Ordnance Map.

2.25 Assuming that, for the exclusions in relation to boundary lines and lineal measurements, the attribution to section 12(2) is correct, it is not clear why that provision – the source, normally, of discretionary exclusions – should be used for what amounts to exclusions which are automatic and universal. It might be expected that the exclusions would be contained in section 12(3). Further, the use of section 12(2) has unexpected consequences.⁴² It means that positive prescription can run in respect of the boundary feature in question.⁴³ More importantly, it allows rectification of the Register in respect of the inaccuracy.⁴⁴

2.26 Although under our proposals the use of the four descriptors would become more common, we do not suggest a change in the rules of indemnity.⁴⁵ In transcribing the descriptors from prior deeds, the Keeper is not usually in a position to be certain as to their

³⁹ Although the form of land certificate, incorporating the exclusions of indemnity, has an independent statutory basis: see 1980 Rules sch A form 6. A possible difficulty about relying on s 12(2) is that the exclusion appears only on the land certificate and not on the title sheet itself.

⁴⁰ The statement in relation to boundary lines appears under the general heading "The use of arrows on title plans" and so, on one view, would not apply where, as sometimes, the line is indicated in words and without arrows.

⁴¹ 1979 Act s 12(3)(d), (e). See Second Discussion Paper paras 8.15-8.17.

⁴² Under our proposed scheme, however, neither consequence would be of significance. This is because both positive prescription and rectification would be freely available and would not depend on exclusions of indemnity. See First Discussion Paper paras 3.4-3.11 (prescription), and Second Discussion Paper paras 6.17-6.32 (rectification).

⁴³ Prescription and Limitation (Scotland) Act 1973 s 1(1)(b).

⁴⁴ 1979 Act s 9(3)(a)(iv).

⁴⁵ The same view, in relation to s 12(3)(d) of the 1979 Act, was expressed in para 8.16 of the Second Discussion Paper.

accuracy.⁴⁶ He must take them to some extent on trust. In return he should not have to guarantee their accuracy.⁴⁷ In relation to section 12(3)(d) there is the further argument that all titles should be guaranteed to a uniform scale, or set of scales, and that it should not be possible to obtain a more generous guarantee by the use of more generous scaling in a deed plan. In fact, losses arising out of unindemnified descriptors are unlikely to be frequent or large. Under the rules of preference discussed above,⁴⁸ only limited significance attaches to statements of area or lineal measurements and they will not usually affect the overall interpretation of the description; errors in statements as to the boundary operate, by definition, mainly at the margins; and errors in supplementary plans are outside the indemnity system only if so small as not to show up on the Ordnance Map.

2.27 We propose that:

4. **There should continue to be blanket exclusions of indemnity in respect of errors in –**
 - (a) **delineations of boundaries where the error could not be rectified by reference to the Ordnance Map or its replacement;**
 - (b) **information as to the exact boundary line;**
 - (c) **statements as to area; and**
 - (d) **statements as to lineal measurements.**

We envisage that all four exclusions would appear in the legislation and not in – or only in – the cover of the land certificate. Indeed it is unlikely that land certificates will be issued in the future.⁴⁹

SEA BED

2.28 So far as Scots law is concerned, the sea bed is that area, normally covered by water, which lies between the foreshore and the limit of the territorial sea. The seaward limit of the foreshore is the mean low water mark of ordinary spring tides. The limit of the territorial sea is set by statute, generally at 12 nautical miles from the low water mark.⁵⁰ As well as the bed of the offshore sea, the sea bed is usually taken to extend to sea lochs, estuaries and other inshore tidal waters.⁵¹ The sea bed is presumed to belong to the Crown, but may have been acquired by others as a result of Crown grant, prescription, or udal

⁴⁶ If, however, he thinks they are inaccurate, he should not transcribe them in the first place: see para 2.19.

⁴⁷ Under our proposals the guarantee would normally be to the acquirer under the Keeper's warranty as to title. But if the integrity principle operated to cure the inaccuracy, ie to give title to what was erroneously described in the title sheet, indemnity would be due to the "true" owner for the loss of his property. See generally part 7 of the Second Discussion Paper.

⁴⁸ Para 2.11-2.13.

⁴⁹ Second Discussion Paper paras 4.59-4.66.

⁵⁰ Territorial Sea Act 1987 s 1(1). For a fuller account, see Scottish Law Commission, Report on *Law of the Foreshore and Sea Bed* (Scot Law Com No 190, 2003) para 2.3.

⁵¹ See eg the definitions in (i) Title Conditions (Scotland) Act 2003 s 44(3) and (ii) s 18(1) of the draft bill included in Scottish Law Commission, Report on *Law of the Foreshore and Sea Bed* (Scot Law Com No 190, 2003).

tenure. The modern view is that the Crown's entitlement is a full right of ownership, but subject to certain public rights, notably for navigation and white fishing.⁵²

2.29 Insofar as the issue arises at all, it tends to be taken for granted that the Land Register extends to the sea bed, and that rights in the sea bed are capable of registration. On the whole, this position is supported by the legislation.⁵³ The Register is defined in the 1979 Act as a "register of interests in land in Scotland",⁵⁴ and "land" is defined in turn as including "land covered with water".⁵⁵ The sea bed, therefore, is "land"; and although "Scotland" is not defined either in the 1979 Act or in the Interpretation Act 1978,⁵⁶ it is arguable that even the offshore sea bed is part of "Scotland". If there is doubt on this point, it should be removed in the replacement legislation.

2.30 In fact there is little demand for registration in respect of the sea bed. Almost always it is in the ownership of the Crown, and Crown grants are infrequent and tend to involve unregistrable (short) leases or licences.⁵⁷ But of course there are exceptions. Older Crown grants of harbour sometimes included a grant of the sea bed.⁵⁸ Registrable (long) leases are not unknown in respect both of the sea bed and of the minerals beneath. In theory the sea bed might be acquired by prescription, although there would be obvious difficulties in establishing possession.⁵⁹ Rights of coastal salmon fishing are perfectly common. Finally, the Title Conditions (Scotland) Act 2003⁶⁰ permits the creation of maritime burdens in respect of the sea bed, and such burdens must be constituted by registration.⁶¹ As this last example suggests, it is possible that the registration of rights in the sea bed will be more common in the future than they have been in the past; but it is still likely to be infrequent.

2.31 Registration encounters one practical difficulty.⁶² As already mentioned, the 1979 Act requires that a description of property in the title sheet must consist of or include a title plan based on the Ordnance Map.⁶³ Yet much of the sea bed is not included on any Ordnance Map,⁶⁴ and is unlikely to be included in any map which might replace the Ordnance Map in the future. The solution is obvious. We propose that:

⁵² See eg Reid, *Property* para 310; Gordon, *Scottish Land Law* paras 7-02 – 7-04.

⁵³ In England and Wales, the Land Registration Act 2002 s 130 provides that the Act applies to inland waters of the United Kingdom which are (a) within England or Wales or (b) adjacent to England or Wales and specified by order made by the Lord Chancellor.

⁵⁴ 1979 Act s 1(1).

⁵⁵ 1979 Act s 28(1).

⁵⁶ By contrast, the Interpretation Act 1978 contains a definition of "England".

⁵⁷ For an account, see Scottish Law Commission, Discussion Paper on *Law of the Foreshore and Sea Bed* (Scot Law Com DP No 113, 2001) paras 3.5-3.8.

⁵⁸ But this required to be a matter of express grant: see Scottish Law Commission, Discussion Paper on *Law of the Foreshore and Sea Bed* (Scot Law Com DP No 113, 2001) paras 7.2-7.7, and also s 1(2) of the draft bill included in Scottish Law Commission, Report on *Law of the Foreshore and Sea Bed* (Scot Law Com No 190, 2003).

⁵⁹ *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29.

⁶⁰ Title Conditions (Scotland) Act 2003 s 44.

⁶¹ Title Conditions (Scotland) Act 2003 s 4.

⁶² A second difficulty is whether the 33 registration counties which are now operational areas under the 1979 Act s 30(2) can be taken to extend to the offshore sea bed. But the difficulty, if there is one, is avoided by attributing individual acts of registration to the Keeper's power, under s 11(1) of the Act, to accept applications in respect of land not in an operational area.

⁶³ 1979 Act s 6(1)(a), discussed at para 2.6 above.

⁶⁴ The Ordnance Map extends seaward only to the mean low water mark. We are grateful to Hugh Buchanan and Grant Sinclair of Ordnance Survey for providing information on this point.

5. **The rule that a description of land on the Register must include a description based on the Ordnance Map (or any replacement for that Map) should not apply to a description of the sea bed.**

Instead some alternative means should be used to indicate location and extent.

Part 3 Boundaries

UNCERTAIN OR OVERLAPPING BOUNDARIES

Uncertain boundaries

3.1 Unless defined by reference to a boundary feature (for example, the mid-point of a wall), the *precise* location of a boundary will be uncertain due to the limitations of scaling in the Ordnance Map.¹ In some cases, possession makes clear what the plan does not; but, since positive prescription cannot usually apply to Land Register titles, the boundary will still not be fixed as a matter of law. Our proposals made elsewhere restore positive prescription, and so the possibility of certain boundaries.² Thus, assuming the possession to be consistent with the description in the title sheet, its effect, after 10 years, will be to settle the location of the boundary.³

Overlapping boundaries

3.2 Boundaries may be certain but overlap. Of course, in theory this should not be possible in a map-based system of registration of title,⁴ but experience shows that overlaps sometimes occur, whether by human error or by deliberate act. Suppose, for example, that on first registration of property A it becomes apparent that part of the property has already been registered in the title of an adjacent property (property B). If the owner of property B is not in possession, the offending part can be removed from that title by rectification. There is then no difficulty in completing the registration of property A. But if possession has been taken, or if the position as to possession is unclear, the part must be left in the title of property B. Nonetheless the practice is that it may also be included in the title of property A, under exclusion of indemnity.⁵ A different type of overlap arises if there is a discrepancy in the description of a shared boundary feature. The title sheet of property C might give a boundary as the outer face of a stone wall. The title sheet of the adjacent property D might give the shared boundary as the outer face of the same stone wall. Both descriptions will have been transcribed, at different times, from a prior Sasine title but both cannot be correct, for if the wall lies wholly within property C it cannot also lie wholly within property D.

¹ Para 2.21.

² First Discussion Paper paras 3.4-3.11.

³ For the purposes of prescription it is necessary only that the description be *capable* of being read as including the property possessed even if that is not the only or most natural interpretation. See eg *Auld v Hay* (1880) 7 R 663; *Suttie v Baird* 1992 SLT 133. This means that the rules of preference, set out in para 2.13, would not apply.

⁴ *Registration of Title Practice Book* para 4.25: "The mapping element of land registration is supported by a digital mapping system which allows the extent of each registered title to be fixed against the backdrop of the Ordnance map. To ensure no overlaps in titles are introduced, an index layer detailing each individual title is also maintained."

⁵ For a comparable example, see *Registration of Title Practice Book* para 4.32 example 2. If the practice seems a strange one, it can be traced back to para 104 of the Reid Report. Proposals already made in our Second Discussion Paper would result in a change. (i) If the disputed part actually belongs to property A, it would be included in that title sheet without exclusion of indemnity, and removed from the title sheet of property B. (ii) But if the part actually belongs to property B, it could not be included in the title sheet of property A – because it will no longer be possible to give effect to a *non domino* conveyance in the face of a rival title which is "live": see Second Discussion Paper para 4.57.

3.3 The present law is not well equipped to deal with overlapping boundaries, partly because of the automatic conferral of ownership arising out of the "positive" system of registration of title,⁶ and partly because of the weight given to temporary acts of possession.⁷ Thus in the first of the examples given above, each successive act of registration would confer ownership of the disputed part – and at the same time extinguish the title of the previous owner.⁸ So ownership would begin with the proprietor of property B and then pass to the proprietor of property A. If *either* property was then transferred, the transferee would, by registration, become owner in turn of the disputed part. Subsequent transfers, and registrations, would continue this curious oscillation of title until such time as the part was removed, by rectification, from the title sheet of one of the properties. But that could not be done in the face of possession by the proprietor, and the battle for title is thus in danger of degenerating into a battle for possession. *Safeway Stores plc v Tesco Stores Ltd*⁹ is an unhappy illustration of the difficulties.

3.4 The proposals set out in our first two discussion papers provide a simpler and principled solution. If both properties are still in the ownership of the grantee of the deed which induced first registration, the overlap can be brought to an end by awarding the disputed part to the "right" property¹⁰ and removing it from the title sheet of the "wrong" property.¹¹ But if the properties are transferred before this can be done, the position is regulated by the integrity principle under which ownership is given to the acquirer who, or whose author, was in possession for the statutory period (which is likely to be a period such as one year).¹² The part can then be removed from the rival title sheet.

SHIFTING BOUNDARIES: ALLUVION

Natural water boundaries

3.5 Natural water features, where they exist, often mark the boundaries of properties. Ownership of the bed (*alveus*) depends on whether the waters are tidal or non-tidal: the bed of non-tidal waters is in private ownership whereas, almost always,¹³ the bed of the sea and other tidal waters is the property of the Crown.¹⁴ Thus if a non-tidal river forms the boundary between two properties, the boundary may lie either (i) wholly on one side of the river or (ii) at some point on the river bed, typically the mid-point; the second is presumed in the absence of contrary provision.¹⁵ Equivalent rules apply to non-tidal lochs. With tidal waters, however, the bed is excluded as the Crown's, and the only question is likely to be whether the boundary between private property and Crown property is the low water mark (in which

⁶ For the "positive" system of registration of title, see First Discussion Paper paras 5.1 and 5.2.

⁷ For the difficulties caused by the temporary nature of the possession, see First Discussion Paper para 4.27.

⁸ First Discussion Paper paras 5.37 and 5.38.

⁹ 2004 SC 29. For a discussion, see K G C Reid and G L Gretton, *Conveyancing 2003* (2004) pp 91-6.

¹⁰ Assuming that the prior Sasine title gives a clear answer to this question – which it may not, particularly in relation to which point in a boundary feature (such as wall) marks the true boundary.

¹¹ Under our proposals, rectification is always possible where, as in this example, the Register is inaccurate: see Second Discussion Paper para 6.21.

¹² For the integrity principle, see Second Discussion Paper paras 5.21 ff. The fact that the part is shown on the title plan allows the operation of the integrity principle and therefore displaces any need for positive prescription. Compare the case of uncertain boundaries, discussed in the previous paragraph.

¹³ But see para 2.30.

¹⁴ See eg Reid, *Property* paras 275-6.

¹⁵ Reid, *Property* para 278; Gordon, *Scottish Land Law* para 4-34

case the foreshore is part of the private property) or the high water mark (in which case it is not).

3.6 Natural water features are liable to movement over time, so that where the feature forms the boundary of a property, the boundary is liable to movement as well. In common with other legal systems, a distinction is drawn in Scotland between movement which is gradual and imperceptible and movement which is sudden and violent.¹⁶ The first, alone, has proprietary consequences. Thus, where the dry land adjacent to water is slowly enlarged, whether by the imperceptible addition of soil washed towards it, or by the gradual retreat of the water, the additional dry land is treated as part of the existing dry land. Conversely, where the area of land under water increases, the new river bed or sea bed becomes part of the old. The process is known as alluvion and is classified as a form of accession. The effects of sudden movement are different. Sudden movement is classified as avulsion, not alluvion, and does not result in accession. If a boundary feature moves by alluvion, therefore, the legal boundary moves with it; but if it moves by avulsion, the legal boundary is unchanged. In this section we are concerned only with alluvion.

Alluvion and the Land Register

3.7 Alluvion is not displaced by registration of title.¹⁷ It is true, of course, that, the Land Register being map-based, the position of any natural water boundary will be shown as a fixed line on the title plan.¹⁸ But plans are often used in Sasine titles as well, and alluvion operates there even where a natural water boundary is indicated by plan.¹⁹ Furthermore, registration in the Land Register confers title only at the date of registration, and says nothing about whether the property might be enlarged, or diminished, in the future.²⁰ Accession is a fundamental doctrine of the law of property which is not to be stopped merely because it is inconsistent with a title plan or otherwise inconvenient; and in the same way as a new building will accede to land, so land freshly liberated from water will accede also. There are wider considerations as well. In most situations alluvion is a sensible and useful doctrine. For example, if the boundary between two properties is the mid-point of a river, it should remain the mid-point notwithstanding small changes in the river bed. Indeed, if alluvion were not to operate, the river – and its fishing rights – might eventually be lost altogether to one of the properties. That is not usually what the owners would expect or intend. Later, however, we consider whether it should be possible for owners to opt out of alluvion by registration of an agreement to that effect.²¹ Coastal erosion and rising water levels also point to the importance of alluvion. A practical point is that it would not be possible to operate a system in which alluvion applied to Sasine titles but not to titles on the Land Register, for a shared boundary feature could not alter in a question with the property

¹⁶ Reid, *Property* paras 592-4; Gordon, *Scottish Land Law* paras 4-17 – 4-23.

¹⁷ R Rennie, "Alluvion in the Land Register" 1996 SLT (News) 41, 42-3.

¹⁸ At one time, however, there was a practice of sometimes indicating the boundary in words without plotting it on the title plan.

¹⁹ *Secretary of State for Scotland v Coombs* 1991 GWD 39-2404. This presupposes (i) that the boundary line follows the water feature and (ii) that the plan is accurate. If, however, (as averred in *Coombs*) there was alluvion *before* the deed was granted, and the new position of the water feature is not given in the plan, the boundary line will not *in fact* follow the water feature, giving rise to the argument that the water feature is not after all the boundary.

²⁰ First Discussion Paper para 5.12.

²¹ Para 3.17.

on one side (being held on a Sasine title) but not with the property on the other. For England and Wales, the Land Registration Act 2002 provides that:²²

"The fact that a registered estate in land is shown on the register as having a particular boundary does not affect the operation of accretion or diluvion."

Although no matching provision is found in the Scottish legislation, it can hardly be doubted that the rule is the same.

3.8 That alluvion creates difficulties for the Land Register is, however, undeniable. Where alluvion occurs before first registration, the Ordnance Map may continue to show the water feature in its former place, with the result that the legal boundary may also be wrongly plotted by the Keeper. Where alluvion occurs after first registration, it is not clear how a system which is based on fixed and guaranteed boundaries can cope with a boundary which is prone to movement over time. A further issue is the difficulty of distinguishing between alluvion and avulsion, and the need for adequate and reliable information so as to allow an informed decision by the Keeper.

Three policy objectives

3.9 In responding to the challenge of alluvion, three policy objectives in particular must be met. First, where a natural water boundary changes, the Keeper should be able to make any necessary changes to the title plan. Secondly, no indemnity should be payable, for there is no special reason of registration of title which requires otherwise and, as in Sasine titles, the risk of a changing boundary is properly borne by the owner. Thirdly, the change in boundary should be reflected in any real rights held or granted over the property.

The current law

3.10 **Land gained.** These objectives are not sufficiently fulfilled by the current law. Admittedly, the position is reasonably satisfactory where land has been *gained* as a result of alluvion.²³ In such a case the Keeper can alter the title plan by rectification (on the basis that this will benefit rather than prejudice the proprietor in possession); no indemnity is payable, for there is no loss; and present and future rights held over the property will automatically reflect the increase in extent. Only the last point requires further discussion. Alluvion is a form of accession, in which the existing land is the principal and the land gained from the water the accessory. Two consequences follow. First, a right which was already held over the principal will, as soon as alluvion occurs, be held over the accessory as well. So for example the owner of the principal acquires ownership of the accessory, and a heritable creditor in respect of the principal acquires a security over the accessory. Secondly, even if the title plan has not been altered, any new right granted over the principal will extend to the accessory as well. So if the land as described in the title sheet is disposed, the disposition will also carry the land that has been gained but is not (yet) shown on the title plan.²⁴ That is just as well, for any other view would leave the disponent with a sliver of land interposed between the subjects disposed and the water feature. Here, for once, a general principle of

²² Land Registration Act 2002 s 61(1).

²³ For ease of exposition, it is assumed in paras 3.10 and 3.11 that only the title which has gained (or lost) land is registered in the Land Register. For a discussion of the position where both titles are on the Register, see para 3.12.

²⁴ Reid, *Property* para 574.

property law is reinforced by the 1979 Act which provides, in section 3(1)(a), that an acquirer receives, not only the interest in land in question, but also "any right, pertinent or servitude, express or implied, forming part of the interest". But the principle applies equally to land acquired before first registration. Thus suppose that the split-off writ of land bordering the sea is a disposition of 1950 and that the land is described only by plan. Suppose further that during the 1950s a significant amount of land is gained from the sea as a result of alluvion. When the land comes to be disposed in 1960, and again in 1967 and 1982, it will be described in each case by reference to the plan attached to the 1950 disposition (which showed only the original extent of the property); yet in each case the land gained from the sea will be regarded as included. When an application is eventually made for first registration, the title plan should show the new boundary and not the boundary dating from 1950; but if it does not, the additional land will be included anyway by virtue of the doctrine of accession.

3.11 **Land lost.** Where, however, land is *lost* rather than gained, the present law is less able to cope. There is no difficulty for as long as the person who owned the property at the time of alluvial change continues to be shown as owner on the title sheet. Due to the proprietary effects of alluvion, that person is no longer owner of the land which has been lost and hence is not a "proprietor" of it, still less a "proprietor in possession".²⁵ Thus the title plan can be rectified to show the reduced extent of the property; and, as the loss was caused by alluvion and not by the subsequent rectification, no indemnity is due.²⁶ But the position is different if the property is transferred before the Register can be rectified. By virtue of section 3(1)(a) of the 1979 Act the acquirer becomes owner of the *whole* property as shown on the title plan: in this way the "positive" effect of registration of title prevails over the common law doctrine of accession, and what has been lost by alluvion is retrieved by transfer. Of course, the Register is then (bijurally) inaccurate, for the disposition was *a non domino* in respect of the land which had previously been lost. The title plan can be rectified, assuming that the acquirer is not in possession, although, as a recent case shows,²⁷ it is difficult to take a firm view as to possession of the bed of a river or the sea. But in the event of rectification the Keeper must pay indemnity.

3.12 **Land both gained and lost.** Land gained by one property is matched by land lost by another. If the title to each is in the Land Register, then to the usual problems affecting land which has been lost must be added a new problem affecting the land which has been gained. The typical case is where there is movement in a non-tidal river, the mid-point of which marks the boundary between two registered properties. It was said earlier that, where land is gained, the Keeper is able to add the new land to the title plan by rectification. But that statement must be qualified if the land in question was in the title plan of the adjacent property. For although alluvion has removed the land from that property, it may not be

²⁵ R Rennie, "Alluvion in the Land Register" 1996 SLT (News) 41, 43. Cf *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29, para 70 *per* Lord Hamilton: "Where, in the register, a person is entered as the proprietor of a particular interest, that person is, in my view, for the purposes of sec 9(3) the proprietor of that interest – whether or not the relevant entry, as to the identification of the person or as to the extent of his interest or as to both, is accurate." But it is thought that this *dictum* refers to bijural inaccuracies (the wrong person being named as proprietor) rather than to actual inaccuracies (such as subsequent loss of title by alluvion). See Second Discussion Paper paras 6.2-6.5. With the former, the registered proprietor *is* the owner but should not be. With the latter the registered proprietor *is not* the owner.

²⁶ In other words, this is an actual and not a bijural inaccuracy: see Second Discussion Paper paras 6.2-6.9.

²⁷ *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29.

possible (due to possession) to rectify the title plan to show the loss;²⁸ and if the loss cannot be shown, the Keeper must either ignore the mirror gain, or allow the land in question to appear in *both* title sheets, thus inviting the no less intractable problems which arise with overlapping titles.²⁹

3.13 Routine exclusion of indemnity. Naturally, the Keeper is alive to the difficulties just described. Since 20 May 2002, and following consultation with the Joint Consultative Committee, his practice has been to exclude indemnity for all natural water boundaries in respect of any loss arising as a result of the boundary being declared or found to follow a different line from that shown on the title plan.³⁰ This relieves the Keeper of the need to pay indemnity while at the same time allowing rectification even to the prejudice of a proprietor in possession.³¹ But it does not solve the problem of an acquirer becoming the owner of land which is shown on the title plan but has been lost by alluvion; nor does it help in respect of titles registered before 20 May 2002. As the law currently stands, however, it is difficult to see how the Keeper could do more.

Proposal for reform

3.14 Our revised scheme of registration of title would reduce some of the problems described above but it would not eliminate them.³² What is required, therefore, is a special rule which applies only to natural water boundaries (including the boundaries of any fishing rights). Indeed in our discussion paper on *Law of the Foreshore and Seabed* we undertook to consider such a rule in the context of our work on land registration.³³

3.15 Any rule must acknowledge that, unlike boundaries of other types, a boundary formed by a natural water feature is capable of movement. In particular, it must provide that where, on a title sheet, a boundary is described or shown as a natural water feature, the boundary should be taken to be that feature as altered from time to time by alluvion. In other words, if the boundary has moved, the movement is to be treated as reflected on the title sheet even if the title plan has not actually been amended. A rule along these lines would satisfy all three policy objectives identified above.³⁴ It would allow the title plan to be altered in response to alluvion, because under our general scheme rectification is always available where the Register fails to state the actual legal position.³⁵ No indemnity would be payable for any loss because the Keeper's warranty as to title is confined to the time of registration,³⁶ and at that time any water boundary on the title plan would, under our rule, be taken to have

²⁸ Rectification is not usually possible to the prejudice of a proprietor in possession: see 1979 Act s 9(3)(a). Admittedly, a person who loses property by alluvion is no longer its "proprietor", but an acquirer from him would qualify as such: see para 3.11.

²⁹ For overlapping titles, see paras 3.2-3.4.

³⁰ (2002) 47 JLSS May/11. This replaces the practice set out at paras 6.99 ff of the *Registration of Title Practice Book*.

³¹ 1979 Act ss 9(3)(a)(iv), 12(2).

³² As under the current law, the main difficulty would concern the acquisition of property where the title plan continued to show land which had been lost by alluvion. Unless the integrity principle applied (which depends on possession), the grantee would not acquire the land in question. But the Keeper would be potentially liable for indemnity for breach of his warranty as to title – unless the acquirer is considered to have constructive notice as to the operation of alluvion. See Second Discussion Paper para 7.29.

³³ Scottish Law Commission, Discussion Paper on *Law of the Foreshore and Seabed* (Scot Law Com DP No 113, 2001) paras 8.12 and 8.13.

³⁴ Para 3.9. German law reaches a similar result by a slightly different route: see M Raff, *Private Property and Environmental Responsibility: a Comparative Study of German Real Property Law* (2003) p 213.

³⁵ Second Discussion Paper paras 6.17-6.23.

³⁶ Second Discussion Paper paras 7.29 and 7.38.

been adjusted to allow for such alluvion as had occurred. Finally, any boundary movement would be reflected in any real rights held or granted over the property. For such rights as already existed, our proposed rule would merely reinforce the familiar principle that alluvion has proprietary effect. For new rights, the grantee would be taken to acquire the property as shown on the title sheet but adjusted for the effects of alluvion. Thus there could be no question, as under the present law, of a grantee acquiring land which had previously been lost by alluvion.

3.16 Our proposal is that:

- 6. Where on a title sheet a boundary is described or shown as a natural water feature, the boundary should be taken to be that feature as altered from time to time by alluvion.**

Excluding alluvion by agreement

3.17 Occasionally, owners of properties separated by a river or loch might prefer to have a boundary which is fixed rather than one which is subject to the vagaries of alluvion. A fixed boundary might be attractive where, for example, a river was exceptionally prone to movement. As the law stands it is not possible to displace alluvion, and neighbours wishing to avoid its effects would have to engage in periodic acts of excambion. English law is different. Section 61(2) of the Land Registration Act 2002 allows neighbours to register an agreement fixing the boundary and excluding the operation of alluvion for all time thereafter.³⁷ We do not know whether there is demand for an equivalent provision in Scotland, and merely ask:

- 7. Where two properties are separated by a natural water feature, should it be possible for the owners, by registration of an agreement, to fix the boundary line and exclude alluvion for the future?**

UPDATING THE TITLE PLAN

Replacement map tiles

3.18 The Ordnance Map is supplied to Registers of Scotland in the form of digital map tiles which, depending on the scale, cover either 0.25 or 1 square kilometre. The Map itself is subject to a process of continuous updating, reflecting not only changes on the ground but also improvements in survey techniques. Ordnance Survey supplies a cyclical revision of all map tiles every five years, but in addition the Keeper receives an average of 400 updated tiles every month. The Positional Accuracy Improvement Programme, based on satellite technology, makes it possible to show physical features more accurately in relation to the curvature of the earth, resulting in a slight re-positioning of features on the Map; but this change is of cartographical representation and not of the extent of individual properties.

3.19 Normally, new map tiles are neutral as to property boundaries, and can be incorporated without difficulty into the index map and individual title plans. Typically the

³⁷ For a brief discussion, see C Harpum and J Bignell, *Registered Land* (2004) para 16.11.

changes which they show are new buildings or new boundary features such as hedges or fences. But while re-surveying is helpful in disclosing new boundary features, it can create awkwardness in relation to boundary features which previously existed but which are now shown to have been incorrectly depicted. At present there is a re-survey taking place of all areas mapped at 1:2500, which is the scale used in the Land Register for villages, small towns, and rural areas. As part of this process Ordnance Survey is surveying rural towns at the larger 1:1250 scale while continuing to issue maps at the 1:2500 scale. The greater detail revealed at the larger scale is then incorporated into the smaller-scale map. Unsurprisingly, this sometimes affects the representation of boundary features such as walls and hedges. We understand that on the 1:2500 scale any movement or jut of less than 0.6 metres in the line of a boundary feature would remain undisclosed, and the hedge or other feature would appear as a straight line; but following re-survey and re-scaling at 1:1250, the movements and juts will be shown on the updated map tile.

Three options

3.20 In practice a physical boundary feature is not always built precisely on the legal boundary; but where it is the red line on the title plan which denotes the legal boundary will coincide with the black line which denotes the boundary feature. In such cases a re-survey creates an obvious difficulty. Faced with a change in the depiction of a boundary feature, the Keeper has three main options. He could alter the title plan to show the revised line of the boundary feature, while at the same time altering the legal boundary to follow this line; or he could alter the line of the boundary feature but not that of the legal boundary; or he could do nothing. Doing nothing is not an option in practice, for it is plainly desirable that title plans should be accurate and up-to-date, and if they are not, there are serious difficulties of reconciliation with the title plans of neighbouring properties, made up on the basis of the updated map tile, and with the index map itself. Altering the line of the boundary feature but not that of the legal boundary has the merit of leaving property rights untouched but means that the red line which indicates the legal boundary will no longer coincide with the black line which indicates the boundary feature. The result is not only unattractive but also misleading. The proper response to an updated map tile, therefore, is to reflect the change both in the boundary feature *and* in the legal boundary, so that, after the change as before, the red line follows the black. Under the current law, however, there is reason to doubt the Keeper's power to make such a response.

Rectification: current law

3.21 An alteration of the legal boundary can only proceed by rectification. Admittedly, it is likely to be broadly neutral in effect, for while a small amount of land may be lost to the title, this will often be compensated for by land which is gained. Further, the change is rather theoretical in nature for, assuming the re-survey to be accurate, the revised boundary is the one which is in operation on the ground. Nonetheless the 1979 Act places obstacles in the way of making the change. Although the relevant provisions are difficult and open to interpretation, it appears that the Keeper's power to alter the legal boundary depends upon whether (i) the original applicant for first registration continues to own the property or (ii) the property has since been transferred to someone else. In the first case rectification is possible and in the second case it is subject to important limitations. Each possibility requires further discussion.

3.22 If the updated map tile had been available at the time of first registration, the title plan would have reflected the re-survey, and the legal boundary would have followed the revised line of the boundary feature. The fact that the legal boundary was made to follow a different line (being the inaccurately depicted line of the boundary feature) means that the Register is, in that respect, inaccurate and open to rectification. It is true that the Keeper cannot normally rectify to the prejudice of a proprietor in possession;³⁸ but, assuming the re-survey to have been accurate, the proprietor will possess the boundary as disclosed by the re-survey and not the boundary as disclosed by the title plan. In particular, he will not have possessed any land which will be lost as a result of the rectification.³⁹ Consequently rectification can take place. It is uncertain whether indemnity is then due. Often, of course, there will be no loss; but in the event of a loss occurring the Keeper may possibly be able to rely on the, obscurely-worded, section 12(3)(d), which prevents indemnity payments where the inaccuracy could not have been rectified by reference to the Ordnance Map.⁴⁰

3.23 The position is different once the property is transferred on. Typically, the inaccurate boundary line both gives too much land and also, at a different point in the boundary, too little. Insofar as the boundary line gives too much, the Register will continue to be (bijurally) inaccurate and can be rectified in the manner indicated above; for, according to the "normal" rules of property law, the transferor would have had no title to grant. But insofar as the line gives too little, the Register is perfectly accurate, for the acquirer took a conveyance, not of the Sasine title (in which the missing land was included), but of the property comprised in the Land Register title (in which it was not); and if the Register is not inaccurate in showing a "wrong" boundary, there can be no question of rectification.⁴¹

Rectification: proposals for reform

3.24 As matters stand, our proposed new system would give much the same result, although for different reasons.⁴² If, therefore, the Keeper is to have the power to rectify, it will need to be specially conferred. Such a power would be quite narrow. In particular, it would apply only where the legal boundary coincided with the boundary feature which is now shown to have been wrongly depicted. Obviously, the Keeper would have to be confident that the line on the updated map tile depicts the same boundary feature as on the previous version of the map (and not some replacement feature built in a different place), and that, even in its adjusted form, it correctly represents the legal boundary.

3.25 Normally under our scheme, rectification merely brings the Register into line with the true legal position and is without substantive effect.⁴³ But rectification in this case would need to have legal consequences.⁴⁴ To a small extent it would re-draw the legal boundary in

³⁸ 1979 Act s 9(3)(a).

³⁹ Such land will be on the "wrong" side of the boundary feature. And possession of part of the land in a title plan is not necessarily to be taken as possession of all: see *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29.

⁴⁰ Of course the inaccuracy can now be rectified by reference to the Ordnance Map. But the argument is that, for the purposes of s 12(3)(d), the relevant time is the time of first registration.

⁴¹ Compare the case where the land is augmented by alluvion, so that the disposition must be considered to carry the new land as an accessory to the old: see para 3.10.

⁴² It is unnecessary to go into details here, but once the property had been transferred on the proprietor would, under the integrity principle (and subject to possession), be owner up to the legal boundaries shown on the title plan but not beyond. See Second Discussion Paper paras 5.21 ff.

⁴³ Second Discussion Paper para 6.17.

⁴⁴ As under the current law. This could be avoided only by changing the substantive law itself, so that boundary features were treated as having already been accurately indicated even where this was not the case. Rectification would then merely bring the plan into line with the legal position. This is the approach which was

question and do so for all purposes. From the moment of rectification, therefore, the proprietor would own to the new boundary and not to the old. Subordinate real rights would be subject to an equivalent change. If a right was held over part only of the land in the title sheet, it would be affected only to the extent (if at all) that the part touched on the boundary which was being altered.⁴⁵ Naturally, the changes would not be retrospective.

3.26 Such rectification would not attract payment of indemnity under our scheme as it stands, for the guarantee in the Keeper's warranty as to title is restricted to the day of registration and does not cover later events (such as the special type of rectification here proposed).⁴⁶ Whether, nonetheless, indemnity ought to be paid seems doubtful. As already mentioned, any loss of land will typically be matched by a gain. Even where this is not so, the amount of land lost will be small (being, by definition, too small to be readily detectable on the scale used by the title plan). Other types of loss seem unlikely to occur. In particular, a proprietor who was building on or near his boundary would do so in reliance on the actual position of the boundary feature and not on its inaccurate representation on the title plan.

3.27 Our proposal is as follows:

8. (1) Where –

- (a) a legal boundary coincides with a boundary feature; and**
- (b) the depiction of the boundary feature is altered when the Ordnance Map (or its replacement) is updated;**

the Keeper should be empowered to rectify the Register by aligning the legal boundary with the new line of the boundary feature.

(2) Following rectification, the boundary of the property should be deemed to have changed for all purposes (including for the purposes of any subordinate real rights in the property).

(3) No indemnity should be payable as a result of the rectification.

SECTION 19 AGREEMENTS

Introduction

3.28 An anxiety at the time of introduction of registration of title was that boundary discrepancies which might remain latent under the Sasine system would be exposed, and require to be resolved, once an attempt was made to plot property boundaries on the Ordnance Map. First registration would thus expose what the previous system had conveniently concealed. The response to this anxiety was section 19 of the 1979 Act, which is in the following terms:

adopted in relation to alluvion: see paras 3.15 and 3.16. As applied to the present case, however, it would create uncertainty as to the reliability of *all* boundary features (and not just of those which turn out to have been incorrectly depicted).

⁴⁵ It may be that the proposed legislation should avoid the word "rectification" for this process.

⁴⁶ Second Discussion Paper paras 7.29 and 7.38.

"(1) This section shall apply where the titles to adjoining lands disclose a discrepancy as to the common boundary and the proprietors of those lands have agreed to, and have executed a plan of, that boundary.

(2) Where one or both of the proprietors holds his interest or their interest in the land or lands by virtue of a deed or, as the case may be, deeds recorded in the Register of Sasines, the agreement and plan may be recorded in the Register of Sasines and on being so recorded shall be binding on the singular successors of that proprietor or, as the case may be, those proprietors and on all other persons having an interest in the land or, as the case may be, the lands.

(3) Where one or both of the interests in the lands is or are registered interests, the plan with a docquet thereon executed by both proprietors referring to the agreement shall be registrable as affecting that interest or those interests, and on its being so registered its effect shall be binding on the singular successors of the proprietor of that interest or, as the case may be, the proprietors of those interests and on all other persons having an interest in the land or, as the case may be, the lands."

As subsection (2) makes clear, section 19 is not confined to the Land Register but can be used in respect of a boundary where one or even both areas of land are held on a Sasine title. Nonetheless, the provision is mainly a response to a problem identified with first registrations.

3.29 A number of difficulties affect section 19. "The aim of the section", it has been said, "is laudable, but its terms are unfortunately poorly drafted and obscure in a number of respects. This has led to the section being frequently considered but relatively rarely used as a solution to boundary problems."⁴⁷ In particular, there is uncertainty both as to the scope of the provision and as to its legal effect.

Scope

3.30 There are three cases, at least, in which neighbours might wish to reach agreement as to the line of a common boundary. One is where the respective titles, when read together, fail to produce a clear and consistent boundary. A second is where there is a discrepancy between occupation and title, so that a fence or other boundary feature fails to follow the boundary set out in the titles. Failures of this kind are typically exposed by the P16 report obtained at the time of first registration. A possible response is to seek to bring the legal boundary into line with the occupational boundary.⁴⁸ The third case is where the boundary, although clear, is unsatisfactory to one or both of the parties.

3.31 Section 19 does not cover the final case: where a boundary is unsatisfactory it is usually necessary to proceed by contract of excambion,⁴⁹ although in theory it might sometimes be possible to make use of the March Dykes Act 1669.⁵⁰ At first, however, it was taken for granted that section 19, like the recommendation of the Henry Committee which preceded it,⁵¹ would cover the other two cases.⁵² In particular, it was assumed that section 19

⁴⁷ R Rennie (ed), *Scottish Conveyancing Legislation* para C.063.1 (J M Halliday, R Rennie and R Paisley).

⁴⁸ Other possible responses are to do nothing, or to bring the occupational boundary into line with the legal boundary.

⁴⁹ A contract of excambion is a deed of exchange: A conveys certain property to B, and in return B conveys certain property to A. In effect it is a double disposition.

⁵⁰ For this Act see Reid, *Property* para 221.

⁵¹ Henry Report part I para 38(3) and note 7.

⁵² Eg Reid, *Property* para 220; J M Halliday, *Conveyancing Law and Practice* vol 2 para 33-79.

could be used for the case which most commonly occurs in practice, namely where occupational and legal boundaries are inconsistent, and more is occupied than is owned. The virtues of this approach were made clear in the first edition of the *Registration of Title Practice Book*:⁵³

"It is well known that fencing sub-contractors do not always erect fences conform to an estate lay-out plan (a boulder can be in the way!). Deed plan boundaries, which conform to the estate lay-out plan, do not necessarily indicate the position of the physical boundaries on the ground .. In many cases, discrepancies between physical and legal boundaries are too small to matter but there can be occasions where agreement can be reached speedily and cheaply under the procedure provided by section 19, to the mutual benefit of adjoining proprietors .."

3.32 Unfortunately, there is reason to doubt that section 19 can be used in this way. By subsection (1), the provision is to apply only to cases "where the titles to adjoining lands disclose a discrepancy as to the common boundary", which suggests a discrepancy between the title of one area of land and the title of another, and not a discrepancy between both titles on the one hand and the situation on the ground on the other. In other words, it suggests a discrepancy affecting the legal boundary rather than one which affects the occupational boundary. Closer analysis of section 19 has caused the Keeper to retreat from his earlier position. According to the current edition of the *Registration of Title Practice Book*:⁵⁴

"the section 19 procedure applies only when a comparison of the titles to adjoining lands discloses a discrepancy as to the common boundary. It does not apply when the title boundaries adjoin but there is a discrepancy between title and occupation. In that situation, remedial conveyancing (e.g. a contract of excambion) would be necessary."

If this view is correct, as it appears to be, it removes from the ambit of section 19 the very case in which it is likely to be most useful.

3.33 In fact, section 19 is narrower still, for it does not apply to all cases of discrepancy as to legal boundaries. Three such cases can be identified: where the boundaries in the respective titles overlap; where the boundaries fail to meet, so that there is a gap between them; and where the titles are unintelligible and the boundaries uncertain. Section 19 applies in the first case but not, presumably, in the third, for if boundaries are uncertain there cannot be said, or said for sure, to be a "discrepancy". Whether section 19 applies in the second case depends on the effect of a section 19 agreement – a subject to which we now turn.

Effect

3.34 Characteristically, the 1979 Act makes no attempt to locate section 19 agreements within an existing category of juridical act. Rather than being classified as a type of contract of excambion, which they closely resemble, they are presented as something new, with qualities and incidents of their own. Unfortunately, the statutory account of these qualities and incidents is unclear and incomplete. Four difficulties in particular may be mentioned.

3.35 First, it is not clear whether a section 19 agreement effects an actual transfer of the land. All that the provision discloses is that there is an "agreement" which is binding on

⁵³ Para C.102.

⁵⁴ *Registration of Title Practice Book* para 6.64.

singular successors. The difficulty is that, as a matter of ordinary property law, no agreement, however much it binds others, is sufficient to transfer ownership: *traditionibus non nudis pactis dominia rerum transferuntur*.⁵⁵ Whether section 19 innovates on this principle is unclear.

3.36 Secondly, and following on from the first point, if it is not clear whether a section 19 agreement is a conveyance, it is not clear whether it is subject to the normal rules which apply to conveyances. For example, there is no guidance as to whether the parties to an agreement need a completed title or whether, as in a conveyance, it is sufficient to hold the property on an unregistered midcouple.⁵⁶ Section 19(1) talks only of "proprietors", a word with no fixed meaning, and one which is not used in the Act with any consistency.⁵⁷

3.37 Thirdly, the interaction with section 3(1)(a) is uncertain. This becomes important if boundaries fail to meet and there is a gap between them which is (presumably) the property of someone else. Section 19(1) refers to an agreement between the "proprietors" of "adjoining lands". But if the lands do not in fact adjoin at a particular point, the question arises as to whether the absence of title is cured by the "positive" effect of section 3(1)(a). If a section 19 agreement is properly characterised as a conveyance, creating real rights, the answer would seem to be yes – although the Register, in redrawing the boundary at that point, would be *bijurally* inaccurate.⁵⁸ But otherwise the answer may be no, in which case ownership of the strip would be unchanged and the Register would be actually inaccurate. The difficulty falls away if, as we propose, the change is made from a positive to a negative system of registration of title.⁵⁹

3.38 Finally, there is uncertainty as to the effect on existing rights. One or both of the areas of land might be subject to subordinate real rights such as standard securities or leases. What is the effect on them of a section 19 agreement? Does the boundary change extend to subordinate rights, so that they come to be held over a slightly different area than before? Or does the fact that they are real rights mean that they are unaffected, and so spill over the new boundary into land which is now part of a different property? The second would be the result of the general law (and hence of a contract of *excambion*), but section 19 may be taken to have achieved the first by providing that the agreement is to bind "all other persons having an interest in the land". There is, however, a difficulty. "Interest in land" is defined in section 28(1) as excluding short leases (ie leases of 20 years or less). Unless, therefore, "interest in land" is somehow different from "an interest in the land", it seems that short leases are unaffected by an agreement under section 19 – a surprising result which is almost certainly an accident of drafting.

Retention or abolition?

3.39 As well as being inadequate, section 19 agreements may also be unnecessary. Contracts of *excambion* are already available for those who wish to regulate their boundaries, and it is not clear that anything more is needed. A section 19 agreement, it is true, will often be shorter and simpler than a contract of *excambion*; but even a section 19

⁵⁵ Reid, *Property* para 606. Despite its name, a contract of *excambion* is not a contract but a conveyance.

⁵⁶ Conveyancing (Scotland) Act 1924 s 3; 1979 Act s 15(3).

⁵⁷ *Kaur v Singh* 1999 SC 180, 186 *per* Lord President Rodger.

⁵⁸ For the difference between actual and *bijural* inaccuracy, see Second Discussion Paper paras 6.2-6.5.

⁵⁹ See in particular First Discussion Paper part 5.

agreement must be in formal writing,⁶⁰ and the agreement must be supplemented by an executed plan and (for Land Register titles) by an executed docquet.⁶¹ Any gain in simplicity is likely to be marginal and could hardly justify retention of a separate device. The current experience is that section 19 agreements are little used, although this is partly because of the difficulties as to scope described earlier.⁶²

3.40 In the particular context of boundaries, however, there are two respects in which a section 19 agreement might be thought more useful than a contract of excambion. One concerns ease of description. A section 19 agreement need define only the end which the parties seek to achieve whereas a contract of excambion must set out the means: in other words, while the former need show only a line on a plan, the latter must spell out which areas of land each party is to convey to the other in order to create the desired boundary. The difference should not, however, be exaggerated. Indeed it can be eliminated by deft drafting of the excambion: for example A and B could jointly convey all the land on one side of a line on a plan to A and all the land on the other side to B. There is no strong argument here for retention of section 19 agreements.

3.41 The second concerns the effect on subordinate real rights. A section 19 agreement realigns existing real rights with the new boundary,⁶³ an excambion leaves them undisturbed. So if an excambion is used, the new boundary applies for some purposes but not for others. For example, rights such as securities and leases will continue to affect areas of land which have moved to another title; and since the areas in question will generally be small and sometimes uncertain, they may be difficult to identify on the title plan. If the security is called up and the security subjects are sold, the purchaser acquires to the old boundary and not to the new – thus undoing the effect of the original excambion. A section 19 agreement avoids these difficulties; but it creates difficulties of its own by risking prejudice to the holders of existing rights. Whether that prejudice is material is likely to depend on the extent of the change effected by the section 19 agreement.

3.42 In the end the question as to whether section 19 agreements should be retained or abolished turns on an assessment of the value of realignment of real rights. If realignment is seen, on balance, as a useful device, then a version of section 19 should be persevered with. Conversely, if the effect of realignment on third parties is judged unacceptable, then section 19 should be repealed without replacement. At this stage we do not advance any view but simply ask consultees:

9. Should section 19 of the Land Registration (Scotland) Act 1979 (agreement as to common boundary) be repealed without replacement?

Section 19 agreements: a possible replacement

3.43 In this final section we consider a possible replacement for section 19. In doing so, however, we should not be taken as having decided that a replacement is either necessary or desirable.

⁶⁰ Assuming, at any rate, that it concerns the creation of real rights (as to which see para 3.35): Requirements of Writing (Scotland) Act 1995 s 1(2).

⁶¹ 1979 Act s 19(2), (3). It is unclear why, for Land Register titles, the agreement itself is not to be presented for registration.

⁶² Paras 3.30-3.33.

⁶³ Para 3.38.

3.44 If realignment of real rights is to be available, it seems better to link it to contracts of excambion than to continue with an *ad hoc* device of uncertain scope and effect.⁶⁴ In other words, we think that section 19 agreements should be replaced by a special type of contract of excambion which would be available for the fixing of boundaries but not for other purposes. The problem is then how to effect realignment while at the same time protecting the holders of real rights from a boundary change which is to their prejudice. Two broad options seem available. One is to restrict the use of boundary excambions to trivial changes which would be unlikely to cause prejudice. The other is to give certain entitlements to the rightholders.

3.45 The present provisions show the difficulty of the first option. They limit the *type* of case for which a section 19 agreement can be used, but they do nothing to limit the *extent* of the resulting change. It appears that, so long as the agreement follows on from a discrepancy in title, the parties can draw the new boundary wherever they please. If one party chooses to give up three quarters of his land to the other, that would be a valid use of section 19. This should not surprise us. Limitations as to extent seem hardly manageable in practice. Unless parties are to be unacceptably constrained – for example, by a rule that the new boundary must lie within an area of overlap which the titles disclose – it is difficult to see any principled basis on which a limitation could be imposed.

3.46 The second option is slightly more promising. There could be a requirement that the rightholder must consent to the boundary, so that the deed would not be valid, or at least affect him, without his signature.⁶⁵ Alternatively, there could be a right of challenge if the deed caused material prejudice. The challenge need not be by way of reduction, for the rightholder has no interest beyond his own right.⁶⁶ Instead the court could order the restoration of the right to its original extent. Which alternative is to be preferred? The first favours the rightholder by extending a right of veto; the second favours the parties to the deed by allowing them to go ahead unhindered, although the rightholder might then be faced with the trouble and expense of a court application. In deciding between these alternatives, the most important factor is probably the likely incidence of prejudice. If prejudice were to be common – if, in other words, the change in boundary was typically extensive – then the case for maximum protection would be strong. If, however, prejudice would be unusual, it would be sufficient to allow the rightholder the opportunity of challenge after the event (although in practice he might have given his consent in advance). Subject to the views of consultees, we imagine that boundary changes would usually be trivial in nature and would not cause difficulty for heritable creditors or the holders of other subordinate real rights. If that is correct, we would favour a right of subsequent challenge over a requirement to consent to the original deed.

3.47 There is one real right which should not be realigned, or at least not without the consent of its holder. Today all servitudes are positive servitudes,⁶⁷ and in the case of many such servitudes the identity and extent of the burdened property may be of great importance.

⁶⁴ Paras 3.34-3.38.

⁶⁵ Even without a special provision, a rightholder who consented to an (ordinary) excambion would be bound by its terms to the extent that the area affected by his right was diminished; but he would not take the benefit of any increase in that area brought about by the excambion.

⁶⁶ At common law, however, a heritable creditor may be able to reduce a deed which is prejudicial to the security: see eg *Reid v McGill* 1912 2 SLT 246.

⁶⁷ Negative servitudes were abolished by the Title Conditions (Scotland) Act 2003 ss 79, 80. Real burdens are unlikely to be adversely affected by realignment.

A right of way, for example, might become fractured and useless if it ceased to be exercisable over an area of land which had been transferred to another title. It is a defect of section 19 that it takes no account of the special position of servitudes. A replacement provision should be more circumspect.

3.48 Finally, there is the question of scope. Under the present law, section 19 agreements are conceived too narrowly. They apply to discrepancies affecting legal boundaries but not to discrepancies affecting occupational boundaries or to cases where the boundary is simply unclear.⁶⁸ If a new boundary excambion is to be introduced, it should apply in all three cases. An excambion should be available to clarify boundaries which are disputed or unclear, and to adjust boundaries which are unsatisfactory. But there should also be limits, for a boundary excambion will affect third parties holding subordinate real rights. The purpose of a boundary excambion is to fix the boundary between two properties. It should not be available for substantial exchanges of land where the fixing of a new boundary is merely incidental, and for such cases an ordinary excambion should continue to be used.

3.49 We propose, therefore, that:

10. (1) **In the event that the answer to the question in proposal 9 is no, it should be possible to enter into a special type of contract of excambion (a "boundary excambion") for the purpose of clarifying or adjusting the boundary between two properties.**
- (2) **In a boundary excambion it should be sufficient words of conveyance of the land if –**
 - (a) **the parties express agreement as to the line of the boundary; and**
 - (b) **the boundary is shown on a plan annexed to the excambion.**
- (3) **Any new boundary which, following registration, is set by the excambion should be deemed to be the boundary for all purposes (including for the purposes of any subordinate real rights in the properties); but it should not affect any servitude.**
- (4) **Where, as a result of the new boundary, the value of a subordinate real right is materially reduced, the court, on application of the holder of the right, should be able to order that the right be restored to the previous boundary. The order should take effect on registration.**
- (5) **Section 19 of the Land Registration (Scotland) Act 1979 should be repealed.**

⁶⁸ Paras 3.30-3.33.

Part 4 Servitudes and real burdens

INTRODUCTION

Two properties

4.1 Until recently, servitudes and real burdens overlapped in scope. Anything which could be constituted as a servitude could also be constituted as a real burden; in the case of restrictions on building, in particular, it was usually a matter of chance whether a real burden was used or a (negative) servitude.¹ The position was changed by the Title Conditions (Scotland) Act 2003, with effect from 28 November 2004.² Servitudes are now restricted to positive servitudes – that is, to rights of limited use over land belonging to someone else (for example, for access or for service media). Real burdens can be used either for use restrictions or for affirmative obligations such as an obligation to maintain a shared facility.

4.2 Despite these changes, however, servitudes and real burdens remain closely connected. Both are types of title condition. Where one is found – typically in deeds effecting development or subdivision – the other is often found too. And, except in the case of personal real burdens such as conservation burdens,³ each involves two separate properties: as with all real rights, there is the property affected by the right (the "burdened property"), but, unlike other real rights, title to the right is not freestanding but is attached to a different property (the "benefited property").⁴ A servitude or real burden is thus "an encumbrance on land constituted in favour of the owner of other land in that person's capacity as owner of that other land".⁵ Indeed there can be more than one benefited property: in housing estates, for example, it is common for the burdens and servitudes on any one property to be enforceable by the owners of every other property.

4.3 The need for a benefited as well as a burdened property has important implications for land registration. It means that a servitude or real burden may appear in the Register in more than one place and, since the role of the properties is different, that it is both an encumbrance on property and also a benefit to, and pertinent of, another property.

Creation by registration

4.4 Both servitudes and real burdens may be created by registration. The rules, however, have been changed by the Title Conditions (Scotland) Act 2003. Previously, real burdens required to be registered against the burdened property alone, while servitudes could be registered against either property.⁶ In either case, registration against both properties was

¹ Scottish Law Commission, Report on *Real Burdens* (Scot Law Com No 181, 2000) paras 2.1-2.4

² Title Conditions (Scotland) Act 2003 ss 2, 79-81.

³ Title Conditions (Scotland) Act 2003 s 1(3), part 3.

⁴ For servitudes the traditional terminology was "servient tenement" and "dominant tenement".

⁵ The definition of real burdens in s 1(1) of the Title Conditions (Scotland) Act 2003.

⁶ Reid, *Property* para 451 (A G M Duncan); Cusine and Paisley, *Servitudes and Rights of Way* para 6.31; Gordon, *Scottish Land Law* para 24-29.

possible but, relatively speaking, unusual.⁷ In the case of servitudes, the choice of property was usually a matter of chance. As most servitudes were created in a split-off conveyance (implementing a subdivision), the deed was, naturally, registered against the land which was being conveyed. This meant that for any servitudes which were *reserved* in that deed, registration was against the burdened property (ie the land conveyed); but for servitudes which were *granted* in the deed, registration was against the benefited property. A servitude which was registered only against the benefited property was invisible to a person acquiring the burdened property.⁸ The Title Conditions Act has no effect on existing rights,⁹ but provides that, in future, servitudes and burdens must be registered against both properties.¹⁰ The result is not invariably two entries in the Land Register, for title to one property (or even both) may still be held on the Register of Sasines; but, as increasing numbers of properties move to the Land Register, two entries will become the norm.

Creation by other means

4.5 While most real rights in land are created by registration, some, notably short leases and floating charges, are created by other means. Uniquely, servitudes can be created both by registration and also by methods which do not involve registration. This has caused difficulties under the 1979 Act. As a real right which can be created off the register, servitudes are classified as overriding interests;¹¹ but they are not overriding interests where created by registration.¹² So servitudes are sometimes overriding interests and sometimes not. The subject of overriding interests is considered further in part 5.

4.6 Where a servitude is created off the register, the usual method of creation is positive prescription, which requires possession for 20 years.¹³ Prescriptive servitudes are common in practice. Other possible methods of creation include implied grant or reservation, and Act of Parliament.¹⁴

⁷ In practice this tended to occur only when the burdens or servitudes were created in a deed of conditions. The expression "registered against" a particular property is convenient, and is used both in the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the Title Conditions (Scotland) Act 2003. But it must be remembered that the Register of Sasines is a register of deeds only (and not of properties), and that to say that a burden is registered "against" a particular property means no more than that the deed is listed in the (unofficial) search sheet for the property in question.

⁸ But was nonetheless perfectly valid: see *Balfour v Kinsey* 1987 SLT 144.

⁹ But see Title Conditions (Scotland) Act 2003 s 58 (imposing a duty on the Keeper to enter a statement as to enforcement rights in respect of real burdens).

¹⁰ Title Conditions (Scotland) Act 2003 ss 4(5), 75(1).

¹¹ 1979 Act s 28(1).

¹² The *Registration of Title Practice Book* para 6.51 is incorrect to state that a servitude can only be noted (as an overriding interest), and not registered, against the burdened property. In fact registration is perfectly common (as where eg a split-off disposition reserves a servitude to the grantor). See, for example, *Cusine and Paisley, Servitudes and Rights of Way* para 6.31: "A servitude will be regarded as 'recorded' or 'registered' for the purpose of being constituted a real right if it is entered by the Keeper in either or both search sheets or title sheets".

¹³ Prescription and Limitation (Scotland) Act 1973 s 3.

¹⁴ For a full discussion, see *Cusine and Paisley, Servitudes and Rights of Way* chap 11. Under the law prior to the Title Conditions (Scotland) Act 2003 s 75(1), even a servitude created by registered deed might have come into existence off the Register, if possession preceded registration.

SERVITUDES: THE CURRENT LAW

Three types of servitude

4.7 Under the current law, servitudes can reach the Land Register in three different ways:

- (i) *By registration* (section 2). Where a servitude is created by registration, it must be registered against both the benefited and the burdened properties.¹⁵ This means that where one or both properties are on the Land Register, the servitude will appear in that Register under that property or properties.¹⁶
- (ii) *By entering* (section 6(1)). In relation to the *benefited* property a servitude is a pertinent. In making up a new title sheet (typically on first registration), or maintaining an existing one, the Keeper is directed by section 6(1) to enter "any subsisting real right pertaining to the interest". A servitude pertains to the benefited property, and must be entered under section 6(1). It will appear in the property section (A section) of the title sheet. In practice this procedure applies mainly to servitudes which were already in existence at the time of first registration, having been created either by registration in the Register of Sasines or by some off-register means such as prescription.
- (iii) *By noting* (section 6(4)). While it is a pertinent in relation to the *benefited* property, a servitude is an overriding interest in relation to the *burdened* property (except where created by registration, ie under (i) above). Overriding interests are noted by the Keeper under section 6(4),¹⁷ and appear in the burdens section (D section) of the title sheet. Again in practice this occurs mainly at the time of first registration.

4.8 The inflexibilities of this system should be observed. While a servitude can be *registered* against both the benefited and burdened properties, it can be *entered* only against the benefited property and *noted* only against the burdened.¹⁸ Further, the three methods of adding to the Register have different legal effects. Registration attracts the statutory guarantee as to title which, as discussed below, involves the "positive" effect by which a bad servitude is made good.¹⁹ The guarantee is also engaged by entering under section 6(1) to the extent that it accompanies, or is followed by, registration.

Example 1. On first registration the prior titles disclose that the land is a benefited property in respect of a servitude which was created by registration in the Register of Sasines. Accordingly, the servitude is entered in the A section. The making of the entry coincides with registration of the transfer which induced first registration, with the result that the statutory guarantee as to title applies.

¹⁵ Title Conditions (Scotland) Act 2003 s 75(1). As already mentioned, the previous law required registration against one of these properties but not both.

¹⁶ Otherwise it will be registered in the Register of Sasines.

¹⁷ For noting, see paras 5.30 ff.

¹⁸ It is, however, possible to argue that a servitude can also be "entered" against the burdened property as a "real burden or condition" within s 6(1)(e). But that is virtually a matter of terminology, because entering against the burdened property would have as little legal effect as noting. The important omission of the current legislation is that there can be no noting against the benefited property.

¹⁹ Paras 4.10-4.15.

Example 2. The owner of land already on the Land Register draws the Keeper's attention to the existence of a servitude, previously created by prescription, in respect of which the land is the benefited property. The Keeper enters the servitude in the A section.²⁰ As there is no registration, the statutory guarantee as to title does not apply; but it will apply in favour of the transferee on the registration of a subsequent transfer.

No guarantee, however, applies in respect of noting. It follows that if the Keeper wishes to add a servitude, but not guarantee its validity, he must either note it against the burdened property, or enter it against the benefited property with an express exclusion of indemnity. One of our proposals for reform is that it should be possible in future to note the servitude against the benefited property, thus allowing it to appear as a pertinent in an unindemnified form.²¹

4.9 In this section we consider only servitudes which appear on the Land Register as a result of registration (type (i) above) or entering (type (ii)). We leave until later servitudes which are noted as overriding interests (type (iii)) or which are not included in the Land Register at all.²²

Incidence of guarantee

4.10 Although shown on the Land Register, a servitude might be defective as to constitution. It might, for example, have been granted by a non-owner, or there may be a defect of drafting or of execution, or again it may purport to create a right which the law does not recognise as a servitude. In principle, real rights which reach the Register by (or in association with) registration are covered by a guarantee as to title. The threshold provision is section 3(1)(a) of the 1979 Act, which provides that:²³

"Registration shall have the effect of vesting in the person registered as entitled to the registered interest in land a real right [A] in and to the interest and [B] in and to any right, pertinent or servitude, express or implied, forming part of the interest ..."

Although it may not seem so at first, "servitude" occurs twice in this provision, because "interest in land" is itself defined as including a servitude.²⁴ On the assumption that the occurrences are intended as alternative rather than cumulative, part A of section 3(1)(a) must apply in some cases and part B in others.²⁵ If that is correct, the choice would appear to turn on the type of interest in land which is being presented for registration. If registration is sought in respect of a servitude,²⁶ it is arguable that part A applies – as it would apply to the registration of any other interest in land. But if registration is sought in respect of ownership, part A applies to the right of ownership and part B to any *pre-existing* servitude in respect of which the land in question is a benefited property. In other words, on this view part A applies

²⁰ In practice he is rarely now willing to do so: see paras 4.32 and 4.33.

²¹ Paras 4.36 and 5.37-5.41.

²² Paras 4.32-4.46.

²³ Our lettering.

²⁴ 1979 Act s 28(1).

²⁵ A further complication is that s 3(1)(b) may also apply to servitudes. See Second Discussion Paper paras 5.1-5.6.

²⁶ Whether by itself or, more usually, in association with registration of the ownership of the benefited or burdened property.

to the creation of new servitudes and part B to the transmission of servitudes which were previously created.²⁷

4.11 The effect of part A is not – or not now – in doubt.²⁸ By registration any infirmities in the grant are cured, the "positive" effect of registration ensuring that even a bad deed results in a good servitude. Whether part B has the same effect – whether transmission is in the same position as creation – is perhaps less clear. Often, of course, this hardly matters, for a servitude which was created by registration is already valid by virtue of part A and needs no help from part B when it comes to be transferred (as a pertinent of the benefited property). But not all servitudes on the title sheet of the benefited property were created by registration in the Land Register: some derived from Sasine deeds, while others were originally created by positive prescription. For servitudes of this kind – the class of servitudes described earlier as type (ii)²⁹ – the curative properties of section 3(1)(a) (if such they are) are of potential benefit.

4.12 Part B of section 3(1)(a) provides that there is vested in the applicant for registration, not only ownership of the (benefited) property, but also a real right in and to "any right, pertinent or servitude, express or implied, forming part of the interest". A servitude which was already entered in the property section of the title sheet is an "express" servitude. Interpretation of part B is not straightforward. It can be read merely as a statement of the common law rule that a conveyance of property is also a conveyance of any pertinents associated with that property. On that view, a right would be carried only if it had already been properly constituted as a servitude. Indeed, so far as concerns servitudes not on the title sheet, no other reading is possible. But in *Griffiths v Keeper of the Registers of Scotland*³⁰ it was held that, as applied to servitudes which are expressed on the title sheet, section 3(1)(a) operates in a "positive" way and cures any defect of constitution. If that is correct,³¹ a defective "servitude" (for example, a prescriptive "servitude" for which the necessary possession is lacking) will nonetheless be created as a real right if it was previously included on the Register.

Type of guarantee

4.13 Of course that is not the end of the matter. If the servitude was bad, the Register is (bijurally) inaccurate, notwithstanding the curative effect of section 3(1)(a). In principle it can be rectified so as to remove the servitude. But, by section 9(3) of the Act, rectification is not usually possible to the prejudice of a proprietor in possession.³² This raises the question of whether the holder of a servitude can be said to be a "proprietor" in the required sense. If the answer is yes, the holder is protected and can retain the servitude; but if the answer is no, the Register can be rectified and the (former) holder must make do with indemnity.³³ In the first case the guarantee takes the form of retention of the right; in the second it takes the form of compensation for its loss.³⁴

²⁷ This tentative analysis draws some support from the commentary in para C.19 of the first edition of the *Registration of Title Practice Book*.

²⁸ First Discussion Paper paras 5.1-5.6; Second Discussion Paper paras 5.9-5.11.

²⁹ Para 4.7.

³⁰ 20 December 2002, unreported but available on www.lands-tribunal-scotland.org.uk/.

³¹ As is assumed to be the case in para 5.28 of our Second Discussion Paper.

³² 1979 Act s 9(3).

³³ For a possible difficulty with indemnity as applied to servitudes, see para 5.10.

³⁴ For the two types of guarantee, see First Discussion Paper paras 3.13 and 4.2.

4.14 The meaning of "proprietor" in section 9(3) was considered by the First Division in *Kaur v Singh*:³⁵

"There is, however, a clear distinction between sec 9(3) and the other provisions where the term 'proprietor' is used ... [I]n these other provisions the term 'proprietor' is modified by an objective genitive which defines its range: proprietor of 'an interest in land', of 'the *dominium utile*', of 'the dominant tenement', of 'those lands', of 'that interest', of 'those interests'. In sec 9(3), by contrast, the draftsman refers to 'a proprietor' *tout court* ... In our view, when, in the context of a discussion of land, one refers to 'a proprietor' without any qualification, then in ordinary usage the reference is to 'an owner' of the land. On that basis alone we would tend to the view that, when the draftsman refers to 'a proprietor in possession' in sec 9(3), he intends to refer to 'an owner of land who is in possession'. Had he wished to encompass proprietors of other interests, he could have written 'a proprietor of an interest in land', following the usage he adopted in sec 3(6) ... It seems to us that, as sec 6(1)(a) would suggest, lessees under a long lease should be viewed as being in substance similar to proprietors of the *dominium utile*. All these, if in possession, would therefore be entitled to the special protection afforded by sec 9(3)."

In other words, the distinction is between primary rights and secondary rights. A person holding a primary right (ownership or long lease) is a "proprietor" within section 9(3) and is protected against rectification. A person holding a secondary right is not. Accordingly, in *Kaur v Singh* it was held that a heritable creditor is not a "proprietor" and has no protection.

4.15 A servitude is a secondary right, but, unlike most such rights, it must be held by a person who also holds a primary right (ie ownership of the benefited property). On the authority of *Kaur v Singh*, such a person is not "proprietor" of the servitude, but he is undoubtedly "proprietor" of the benefited property. This leaves open the possibility that he is a proprietor in possession within section 9(3). That indeed was the *obiter* view of the sheriff principal in *Mutch v Mavisbank Properties Ltd*.³⁶ But in *Griffiths v The Keeper of the Registers of Scotland*³⁷ the Lands Tribunal decided that a person holding a servitude was not a "proprietor" and was not protected against rectification. It is possible that a higher court might yet reach a different conclusion.

SERVITUDES: PROPOSALS FOR REFORM

Type of guarantee

4.16 Thus far our account has concentrated on the position of the person seeking to acquire the servitude. But it must be remembered that in every case involving section 9(3) there is a competition of title, so that if the acquirer is to be preferred, it can only be at the expense of someone else, who must then make do with payment of indemnity. The task of the law is thus to choose between competitors.³⁸ The present law can be said to be based on two, largely unarticulated, principles. First, in a competition as to primary rights (usually ownership), an acquirer is preferred to the previous holder. Secondly, and following the

³⁵ 1999 SC 180, 186-7 *per* Lord President Rodger.

³⁶ 2002 SLT (Sh Ct) 91, 94 *per* Sheriff Principal E F Bowen QC.

³⁷ 20 December 2002, unreported but available on www.lands-tribunal-scotland.org.uk/.

³⁸ First Discussion Paper paras 4.6 and 4.7.

decision in *Kaur v Singh*,³⁹ in a competition between a primary right and a secondary right, the former is preferred to the latter. In other words, ownership⁴⁰ is favoured over lesser rights, and a later acquirer of ownership is favoured over one who acquired earlier.⁴¹

4.17 In previous discussion papers we proposed an important alteration to the first principle, which would restrict the preference of the acquirer to cases of Register error;⁴² but in other respects we left the principles untouched. In relation to the second principle, however, we explained that it would be necessary to reconsider the position of servitudes (and real burdens).⁴³ In other words, we contemplated the possibility that, contrary to the usual rule, it might be better to favour a servitude over ownership itself. If so, a *bona fide* holder would be able to keep the servitude, and indemnity would be paid to the owner of the property which it burdened. As has been seen, the rule under the present law is the other way around.

4.18 A strong case can be made for allowing the holder to retain the servitude. Admittedly it is a sound principle that the most important real right, ownership, should in general be preferred to rights which are merely secondary in character. But servitudes are different from other secondary rights (such as standard securities) in two important respects. First, a servitude can only be held by the owner of the property which the servitude benefits. That person is thus an owner as well as a servitude holder, so that the competition is, in a sense, between two rights of ownership – between ownership of the benefited property and ownership of the burdened. Secondly, and following on from the first point, servitudes are not only ancillary to ownership of the benefited property but are often important or even essential for its proper enjoyment. That is why the law is tolerant in the creation of servitudes off the Register. In justifying the second principle (ie that primary rights are preferred to secondary) we have previously argued that money is sufficient compensation for loss of a secondary right.⁴⁴ In the case of many servitudes, however – most notably rights of way and servitudes for pipelines and other service media – that would not be true.⁴⁵ On the contrary, it will usually be more important that the owner of the benefited property has the servitude than that the owner of the burdened property is free of the encumbrance. Money compensates for the encumbrance better than it compensates for the loss of the right. There is also a practical point. A person buying the benefited property does so in reliance on the servitudes set out in the title sheet. If the law allows them to be set aside, the buyer, in a case where a servitude was of importance, might feel obliged to go behind the Register to determine whether there was a possible ground of challenge. In that case the curtain principle would no longer be properly observed.⁴⁶

4.19 For these reasons, we favour retention of servitudes by *bona fide* acquirers. Certainly that should be the rule for servitudes which are wholly within the system of registration of title

³⁹ 1999 SC 180, discussed above.

⁴⁰ And long lease.

⁴¹ This is because only "proprietors" (ie owners and lessees under a long lease) are protected by s 9(3) of the 1979 Act.

⁴² First Discussion Paper paras 4.44 ff; Second Discussion Paper paras 5.17 ff.

⁴³ Second Discussion Paper paras 5.28 and 5.31. For a discussion of the same issue in relation to real burdens, see para 4.39 below.

⁴⁴ First Discussion Paper para 4.53.

⁴⁵ A possible refinement of our proposal is to say that where it is true, as for example with servitudes of grazing, the right should be lost and its holder compensated by indemnity.

⁴⁶ The "curtain principle" is the principle that the Register can be taken at face value, and that there is no need to look at the deeds which lie behind it. See First Discussion Paper para 1.14.

– that is to say, for servitudes created by registration in the Land Register. Earlier we referred to this class of servitudes as type (i).⁴⁷ It should also, probably, be the rule for one category of type (ii) servitude, namely those servitudes created by registration in the Register of Sasines but entered in the title sheet of the benefited property on first registration under section 6(1). Neither the 1979 Act nor our proposed replacement for it places a secondary right at a disadvantage merely on the ground that it originated in the Register of Sasines.⁴⁸ The case is far less strong for the other category of type (ii) servitude, namely those servitudes created off the register but now also entered on the title sheet of the benefited property, and later we suggest that an acquirer of off-register servitudes should not be entitled to a guarantee in either of its forms (ie retention of the servitude or payment of indemnity).⁴⁹ But that is for the future. Under current practice the provenance of a servitude cannot usually be determined from the entry made on the Register, and it would scarcely be workable for different servitudes to be subject to different rules.

Extension of integrity principle

4.20 If servitudes are to be protected, this would be achieved, under our scheme, by an extension of the integrity principle. Only the first part of that principle is of relevance. This provides that a person shown on the Register as owner of land and who has possessed for the relevant period is taken, in a question with a *bona fide* acquirer, to have become owner of that land on the date stated on the Register.⁵⁰ The acquirer is thus protected against Register error but not transactional error: he can take the Register to be correct but must ensure that his own deed is beyond reproach.

4.21 So far as servitudes are concerned, a distinction can be made between creation and transmission. In the case of creation, the relevant property for the purposes of the integrity principle would be that over which the servitude is being created (ie the burdened property). So if the conditions of the principle were satisfied, the person seeking to acquire the servitude could assume that the person named on the Register as owner was indeed owner and so in a position to make the grant. With transmissions, however, the focus would shift from the burdened property to the benefited. Transmission of a servitude requires transmission of the benefited property to which the servitude attaches as a pertinent; and if the property is successfully conveyed,⁵¹ the integrity principle could be extended to carry the servitude as well.⁵² There would be no requirement that the servitude (as opposed to the property) had been possessed.

Two qualifications

4.22 A servitude confers a right to make limited use of the property of another; but not every such right is capable of being elevated into a servitude. Before the Title Conditions

⁴⁷ Para 4.7.

⁴⁸ The rule in both is to give indemnity to acquirers of a secondary right: see First Discussion Paper paras 4.53-4.55.

⁴⁹ Para 4.36.

⁵⁰ Second Discussion Paper paras 5.22-5.31.

⁵¹ Whether or not by operation of the integrity principle.

⁵² Servitudes would thus be treated in the same way as pertinents of any other kind, for which see Second Discussion Paper para 5.28. It should be emphasised that the concern here is with servitudes which were originally created by registration. The position for servitudes created in other ways is discussed in paras 4.32-4.36.

(Scotland) Act 2003, servitudes were limited to a virtual fixed list of a dozen or so rights;⁵³ and although the fixed list is abandoned by the Act, at least for servitudes created by registration,⁵⁴ certain restrictions remain, both at common law⁵⁵ and by statute.⁵⁶ Any rule designed to protect acquirers must accept the possibility that the right in question is incapable of being a servitude.

4.23 A second qualification is also needed. A servitude can be extinguished by events off the Register – in particular by negative prescription, or by confusion when benefited and burdened properties come into the same ownership.⁵⁷ Yet the servitude will remain on the Register. No protection should be given to acquirers in a case like this. On the contrary, an acquirer should be mindful of the possibility of off-Register extinction. To provide otherwise would be to undo the work of negative prescription and other methods of extinction, as well as to expose the Keeper to a claim for indemnity from the burdened owner.⁵⁸

4.24 The present law pays full regard to the first qualification, for the "positive" effect of section 3(1)(a) is subject to the proviso that the right in question "is capable, under any enactment or rule of law, of being vested as a real right". A servitude which was defective as to content would not fulfil that proviso.⁵⁹ The second qualification, however, is imperfectly realised. It is true that indemnity is restricted to matters affecting the constitution of servitudes, so that nothing would be payable where a servitude, properly constituted, was later extinguished by prescription.⁶⁰ But there is no equivalent restriction in section 3(1) itself. The result is hardly satisfactory. Take the case where a servitude appearing on the title sheet of the benefited property is already extinguished by prescription. Two years later the property is transferred. By section 3(1)(a) the acquirer receives, not only the property, but also any servitude expressed as forming part of it. A servitude which was extinguished by prescription would thus be revived by transfer.

4.25 Our replacement for section 3(1)(a) is the integrity principle. In formulating that principle in respect of servitudes it will be important to ensure that both of the above qualifications are in place. The qualifications are also needed for the indemnity which, under our scheme, would be payable if the conditions for the integrity principle were not met and the servitude was not acquired. Indemnity would be due because, under our scheme, the Keeper gives a warranty as to title.⁶¹ As already mentioned, the exceptions are already present in the current provisions as to indemnity.⁶²

⁵³ Cusine and Paisley, *Servitudes and Right of Way* chap 3.

⁵⁴ Title Conditions (Scotland) Act 2003 s 76(1).

⁵⁵ Cusine and Paisley, *Servitudes and Rights of Way* para 2.01.

⁵⁶ Title Conditions (Scotland) Act 2003 s 76(2).

⁵⁷ For a full account, see Cusine and Paisley, *Servitudes and Rights of Way* chap 17.

⁵⁸ Indemnity is due for loss incurred as a result of the operation of the integrity principle in favour of someone else: see Second Discussion Paper paras 7.53-7.58.

⁵⁹ *Registration of Title Practice Book* (1st edn, 1981) para C.21.

⁶⁰ 1979 Act s 12(3)(l).

⁶¹ Second Discussion Paper paras 7.29-7.46.

⁶² 1979 Act s 12(3)(l) provides that there is no entitlement to indemnity in respect of loss "where the claimant is the proprietor of the dominant tenement in a servitude, except insofar as the claim may relate to the validity of the constitution of the servitude". That plainly covers the second exception (servitude properly created but now extinguished). But it also covers the first exception (right not capable of being a servitude) because, due to its proviso, not even s 3(1)(a) could elevate a non-qualifying right into a "servitude".

4.26 We propose that:

- 11. (1) The integrity principle should apply in relation to –**
 - (a) the creation of servitudes by registration, and**
 - (b) the transmission, as pertinents, of servitudes entered in the title sheet of a benefited property (other than servitudes noted as unregistered real rights).**
- (2) But neither the integrity principle nor the Keeper's warranty as to title should apply where –**
 - (a) the right is not capable of being a servitude; or**
 - (b) the servitude has been extinguished.**

Dual entry

4.27 Since 28 November 2004 all servitudes created by registration must be registered against both the benefited and the burdened properties.⁶³ Naturally, the rule is not retrospective, so that in the case of servitudes which were already on the Land Register on that date there is typically an entry against the benefited property or the burdened property but not both. The same may be true of servitudes which come to be added as part of the process of first registration, although in entering a servitude in the title sheet of a benefited property⁶⁴ the Keeper will endeavour to make a corresponding entry in the title sheet of the burdened.⁶⁵

4.28 Plainly it is desirable that a servitude which appears in the title sheet of one of the properties should appear also in the title sheet of the other. This is partly a matter of transparency and public notice, for an owner is unlikely to know of servitudes in respect of which his title sheet is silent. But it is also because only a servitude which is entered in the title sheet of the benefited property is subject to the integrity principle discussed in the previous section.

4.29 We do not underestimate the difficulties of procuring matching entries for such servitudes. The identity of the other property might be unclear. It might still be on the Sasine Register with the result that there is no title sheet. A servitude might appear in the titles of both properties but in different terms, which must either be reconciled or treated as two different servitudes. Above all, there is the difficulty of how the Keeper is to be alerted to the existence of single entries. In a normal dealing, for example, he could not be expected to check the listed servitudes for matching entries and to make good those which were missing. That would be time-consuming and, often, fruitless; under ARTL it would be impossible. Probably there are only three types of occasion on which it would be reasonable to expect that a matching entry be made. One is on first registration of a benefited or burdened property. To assist the Keeper a new question could be added to form 1 directed to the

⁶³ Title Conditions (Scotland) Act 2003 s 75(1).

⁶⁴ Under 1979 Act s 6(1)(e).

⁶⁵ *Land Register Legal Manual* (available at www.ros.gov.uk/foi/legal) para 21.9; *Registration of Title Practice Book* para 5.69. But not, it seems, the other way around.

identity of the other property. If that property was still on the Sasine Register, it might be possible to make an annotation on the index map, thus allowing the servitude to be added when eventually the property shifted registers. A second occasion is where a request is made to the Keeper to make the matching entry. An appropriate form could be provided. The third is where the existence of a single entry otherwise comes to the Keeper's attention. The last two are adapted from the existing rules as to the noting of overriding interests.⁶⁶

4.30 Some exceptions would be needed. Thus no entry could be made without a title sheet or where the other property could not safely be identified or where it was outside Scotland. The last of these can also be found in the Title Conditions Act in respect of dual registration.⁶⁷ A further exception in the Title Conditions Act is for pipeline servitudes which, typically, affect large numbers of properties.⁶⁸

4.31 Our proposal is that:

- 12. (1) Where the Keeper enters a servitude in the title sheet of one affected property, he should make a corresponding entry in the title sheet of the other affected property.**
- (2) Where a servitude is already entered in the title sheet of one affected property but is not entered on the title sheet of the other, the Keeper should make a corresponding entry in the title sheet of the other affected property if –**
 - (a) he is requested to do so; or**
 - (b) the existing entry otherwise comes to his attention.**
- (3) This proposal should not apply where –**
 - (a) the servitude comprises a right to lead a pipe, cable, wire or other such enclosed unit over or under land; or**
 - (b) the other affected property –**
 - (i) cannot be identified**
 - (ii) does not have a title sheet, or**
 - (iii) is not in Scotland.**
- (4) In this proposal, the "affected properties" in relation to a servitude are the benefited property and the burdened property.**

⁶⁶ Contained in 1979 Act s 6(4).

⁶⁷ Title Conditions (Scotland) Act 2003 s 116.

⁶⁸ Title Conditions (Scotland) Act 2003 s 75(3)(b).

Off-register servitudes

4.32 Servitudes are frequently created by positive prescription or by other means which do not involve registration.⁶⁹ Fortunately, even servitudes of this kind may find their way on to the Land Register, whether on the title sheet of the benefited property or the title sheet of the burdened. It is important to be clear as to the difference. In relation to the benefited property an off-register servitude is a pertinent; in relation to the burdened property it is an overriding interest. Earlier we described these, respectively, as type (ii) and type (iii) servitudes.⁷⁰ In the first case the servitude is "entered" under section 6(1); in the second it is "noted" under section 6(4). The legal effect is not the same. Noting against the burdened property is for information only and has no bearing on the validity of the right,⁷¹ but where a servitude is entered against the benefited property it potentially engages the "positive" effect of section 3(1)(a).⁷² Noting is considered further in part 5, and our concern here is only with entering.

4.33 In the early days of registration of title, the Keeper was often willing to enter against the benefited property servitudes which, it was alleged, had been created by prescription or otherwise off the register. As the *Registration of Title Practice Book* explains, however, the result was not always satisfactory:⁷³

"Affidavit evidence submitted to the Keeper with respect to a dominant tenement represents a one sided version of events. There is little or no risk for deponents by either being selective or exaggerating the position. There is also scope for more innocent misrepresentation by the deponent of the position on the ground. On numerous occasions the Keeper has been the recipient of subsequent contrary evidence from proprietors of putative servient tenements to the effect that no servitude had ever been constituted. The Keeper would then find himself in the middle of a dispute that he had no power to resolve."⁷⁴

At best the Keeper was then liable for indemnity. At worst the mistake could not be undone by rectification, so that the owner of the burdened property was encumbered by a servitude for which there was no legal basis.⁷⁵ This second difficulty, however, is now removed by the decision in *Griffiths v Keeper of the Registers of Scotland*⁷⁶ that a servitude holder is not a proprietor in possession and so not able to rely on the protection against rectification given by section 9(3).

4.34 Practice has changed in response to these concerns. Since the end of 1997 the Keeper has asked for a court declarator as to the existence of off-register servitudes, and will no longer accept affidavit evidence.⁷⁷ Since declarators are virtually unknown, the practical result is that off-register servitudes are no longer entered on the title sheet of the benefited property. The new policy has proved controversial. A working party of the Law Society's Conveyancing Committee expressed disquiet at an approach which, it said, "gives

⁶⁹ Paras 4.5 and 4.6.

⁷⁰ Para 4.7.

⁷¹ Para 5.31.

⁷² This was previously discussed: see paras 4.7-4.15.

⁷³ *Registration of Title Practice Book* para 6.55.

⁷⁴ See also the case studies given in I A Davis, "Positive Servitudes and the Land Register" (1999) 4 SLPQ 64, 68-9.

⁷⁵ *Registration of Title Practice Book* para 6.56.

⁷⁶ 20 December 2002, unreported but available on www.lands-tribunal-scotland.org.uk/. On this aspect of the decision, see para 4.15.

⁷⁷ *Registration of Title Practice Book* para 6.58.

rise to serious difficulties for practitioners and their clients".⁷⁸ The particular difficulties affecting rural areas were highlighted by one of our consultees.⁷⁹

"[I]t is frequently the case that rights of access have not been properly documented in the titles and have not been the subject of specific grants. In most cases there is ample evidence that the route in question has been used for well in excess of the prescriptive period and we do not consider it satisfactory that where there appears to be very strong evidence of the valid constitution of a servitude right by use rather than by express grant that the Keeper refuses to include such rights in the Land Certificate."

4.35 Both points of view have merit. That so many servitudes are absent from the Register is a blemish on registration of title.⁸⁰ If it were possible to do so, some scheme should be devised which would allow more to appear. But, as the law currently stands, the Keeper's stance seems entirely justified. As already mentioned, entry in the title sheet of a *benefited property* is not a neutral act. The servitude is not there merely for information. On the contrary, entry in the benefited property's title sheet engages the "positive" effect of section 3(1)(a),⁸¹ so that a bad servitude is transformed into a good servitude which is unequivocally binding on a person – the owner of the burdened property – who had no say in or notice of the decision to make the entry.⁸² Yet the Keeper is not in a position to tell whether an off-register servitude is good or bad, for the evidence presented to him is, by its nature, one-sided and incomplete. Wrong decisions thus seem unavoidable, and are unfair both to the owner of the putative burdened property (who must put up with the servitude unless or until he is able to have it removed by rectification) and to the Keeper himself (who must pay indemnity).

4.36 In part the unease in the legal profession is due to a departure from a previous, and too indulgent, policy. No servitude created off the register is disclosed in the Register of Sasines. If none had been disclosed on the Land Register from the outset, there would perhaps have been no complaint. Nonetheless we favour a scheme, if one can be found, which would allow at least some off-register servitudes to appear on the Register. A possible starting point is with the idea of overriding interests. As already mentioned, off-register servitudes can be noted in the title sheet of the *burdened* property as overriding interests, ie simply for the purposes of information.⁸³ That, perhaps, is as it should be. Such servitudes exist outside the system of land registration and cannot easily be brought inside. But information as to their existence (or possible existence) is valuable, and should be captured as and when it becomes available. In our view, the system already in place for burdened properties could, with advantage, be extended to benefited properties, so that a servitude could be noted for information on the benefited property as well. Unlike other servitudes on the title sheet of the benefited property (ie type (i) or (ii) servitudes),⁸⁴ it would be excluded both from the integrity principle and from the Keeper's warranty as to title.⁸⁵ Yet its presence would be of practical use. Inevitably, this proposal would require an extension of the idea of

⁷⁸ The working party was responding to the detailed submission made to us in 2002 by Registers of Scotland.

⁷⁹ Mr D W Thomson WS, J & H Mitchell WS.

⁸⁰ Albeit one which has its origins in the underlying law which, for good reasons, allows servitudes to be created by positive prescription.

⁸¹ Provided that the entry accompanies, or is followed by, registration: see para 4.8.

⁸² Under the current law, however, this is subject to the possible rectification of what is a *bijural* inaccuracy. For *bijural* inaccuracies, see Second Discussion Paper paras 6.4 and 6.5.

⁸³ Para 4.8.

⁸⁴ Para 4.7.

⁸⁵ For the position of other servitudes in this regard, see paras 4.16-4.26.

overriding interests – or more usefully, their transformation into unregistered real rights. That transformation, and the proposal itself, are explored further in part 5.⁸⁶

REAL BURDENS

Introduction

4.37 Unlike servitudes, real burdens can only be created by registration. Until recently, the requirement was registration against the burdened property, with the result that real burdens were rarely mentioned in the title sheet of the benefited property. That is now changing. For real burdens created on or after 28 November 2004, the Title Conditions (Scotland) Act 2003 requires registration against both properties;⁸⁷ and for many older burdens section 58 of the 2003 Act enables, and will eventually require, the Keeper to enter a statement in the title sheet of the benefited property.

4.38 The 1979 Act treats real burdens in much the same way as servitudes.⁸⁸ Thus the "positive" effect of section 3(1) applies both to the creation of real burdens⁸⁹ and also, to the extent that they are mentioned in the title sheet of the *benefited* property, to their transmission. But it does not apply to burdens which, originally created by registration in the Register of Sasines, were entered in the title sheet of the *burdened* property at first registration⁹⁰ and which are not mentioned in the title sheet of the benefited property. The holder of a real burden (like the holder of a servitude) is not a proprietor in possession within section 9(3), with the result that defective burdens can be removed from the Register by rectification.⁹¹ The holder's claim is then for indemnity although, as will be seen, indemnity may not be payable in practice.⁹²

Type of guarantee

4.39 As already mentioned, the state guarantee of title can take the form either of retention of the right which is under challenge or of payment of indemnity for its loss.⁹³ With real burdens, as with other secondary rights, the guarantee is always in the form of indemnity. In other words, if a burden on the Register is successfully challenged, it will be removed and so lost to its holder;⁹⁴ but indemnity may then be payable. In the case of servitudes we argued that this result was unsatisfactory, and that it was more important to protect a servitude than to leave unencumbered the ownership of the putative burdened property.⁹⁵ The position of real burdens is different. From the point of view of its holder, a real

⁸⁶ Respectively paras 5.26-5.28 and 5.37-5.41.

⁸⁷ Title Conditions (Scotland) Act 2003 s 4(5).

⁸⁸ For servitudes, see paras 4.8-4.13.

⁸⁹ Including creation prior to 28 November 2004 when real burdens were registered in the Land Register only against the burdened property.

⁹⁰ I.e. as a "subsisting real burden or condition affecting the interest" under 1979 Act s 6(1)(e).

⁹¹ This would appear to follow from the decisions in *Kaur v Singh* 1999 SC 180, and *Griffiths v The Keeper of the Registers of Scotland*, Lands Tribunal, 20 December 2002, unreported but available on www.lands-tribunal-scotland.org.uk/.

⁹² Para 4.40.

⁹³ Para 4.13.

⁹⁴ This is because, as just mentioned, the holder of a servitude is not a proprietor in possession within s 9(3) of the 1979 Act.

⁹⁵ Para 4.16-4.19.

burden is a right either to prevent some activity on the burdened property or to insist on performance of an affirmative obligation (typically payment of the cost of maintenance).⁹⁶ Neither is likely to be of critical importance to the benefited property, and both can be adequately compensated by money; but for the burdened property, the burden might sterilise its very use. In our view, the 1979 Act strikes the correct balance by extinguishing the burden and offering compensation to its holder. Previously we have reached the same conclusion in respect of other secondary rights such as standard securities.⁹⁷

Indemnity: the current law

4.40 If a real burden is successfully challenged, and removed from the Register by rectification, the holder is, in principle, entitled to indemnity.⁹⁸ Indemnity is also due if, on first registration of the burdened property, the Keeper omits a real burden, with the result that it is extinguished.⁹⁹ Payment of indemnity in the first case, however, is obstructed, or even prevented, by section 12(3)(g), which excludes indemnity in respect of a loss which

"arises from inability to enforce a real burden or condition¹⁰⁰ entered in the register, unless the Keeper expressly assumes responsibility for the enforceability of that burden or condition".

Since it is not the Keeper's practice to assume responsibility for enforceability, it follows that the exclusion stands without qualification.

4.41 What does it mean? Its origins can be traced to a passage in the report of the Reid Committee:¹⁰¹

"We think it important to emphasise that in our view no guarantee should be given by the Keeper as to the validity or enforceability of any particular burden affecting a property. All that the Keeper should do is to guarantee that the list of burdens contained in the Certificate of Title [ie title sheet] is an exhaustive list and that if any burden is omitted from that list compensation will be payable to the aggrieved party on proof of loss."

As is clear from the context, these remarks are directed at burdens which are carried forward from a Sasine title and not at burdens created of new by registration in the Land Register. A passage in similar terms can be found in the report of the Henry Committee.¹⁰² The link to burdens carried forward from a Sasine title is also made in the discussion of section 12(3)(g) in the *Registration of Title Practice Book*.¹⁰³

⁹⁶ Title Conditions (Scotland) Act 2003 s 2.

⁹⁷ Other, of course, than servitudes. See First Discussion Paper paras 4.53-4.55.

⁹⁸ 1979 Act s 12(1)(a).

⁹⁹ 1979 Act s 12(1)(b). For extinction by omission, see Reid, *Property* para 437.

¹⁰⁰ We pass over here the complexities arising out of the argument that "real condition" is different from, and wider than, "real burden" and is capable of including servitudes: see K G C Reid and G L Gretton, *Conveyancing 2003* (2004) pp 90-01.

¹⁰¹ Reid Report para 107.

¹⁰² Henry Report part 1 para 41(3): "It shall be competent for any person to claim indemnity in respect of loss suffered by reason of the omission or misstatement of any subsisting real burden from the Burdens Section but subject thereto neither the disclosure of burdens in the Burdens Section nor any entry by the Keeper in the Burdens Section of any variation or discharge of any such burdens shall raise any presumption or implication of their validity or enforceability *quoad* the creditor in right thereof: Provided nevertheless that the Keeper may guarantee the validity or enforceability of any burden if he shall think fit."

¹⁰³ *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. So, while the Keeper will guarantee that there are no burdens affecting the subjects other than overriding interests and those burdens contained in the title sheet, he is relieved of liability in respect of the continued subsistence of burdens or conditions entered in the title sheet except on the rare occasion when he expressly assumes responsibility for their enforceability."

4.42 If that was the policy behind section 12(3)(g), the provision was unnecessary. No indemnity is payable under the Act merely because a burden on the Register happens to be unenforceable. Rather indemnity is payable only in the four circumstances set out in section 12(1). Of these only section 12(1)(a) is of even potential relevance: indemnity is payable to a person who suffers loss as a result of rectification of the Register. It follows that unless there is rectification – unless, in other words, the unenforceable burden is actually removed from the Register – section 12(1)(a) is not engaged. Rectification is not, however, enough in itself, for section 12(1)(a) applies only where the rectification caused the loss. But, in the case imagined, it was not rectification which rendered unenforceable the burden carried forward from the Register of Sasines. On the contrary, the burden was unenforceable all along. In short, the inaccuracy which has led to the rectification was an *actual* inaccuracy (ie the real burden really was invalid) and not a *bijural* inaccuracy; and, as we explained in our second discussion paper, no loss can result from the rectification of an actual inaccuracy.¹⁰⁴ Even without section 12(3)(g), therefore, there could be no basis for the payment of indemnity.

4.43 But if section 12(3)(g) is unnecessary it is also harmful. The main reason for inability to enforce a real burden is that the burden is, or has become, invalid.¹⁰⁵ But if no claim for indemnity can be made in respect of the invalidity of a burden, then, for all practical purposes, no claim can be made for indemnity at all. In effect, real burdens are removed from the indemnity system.¹⁰⁶ It is assumed that this consequence is an accident of drafting. Certainly it is difficult to find any policy justification for such a rule. A person who registers a right to a real burden is no less worthy of protection than a person who registers a right to a standard security or any other secondary right.

Indemnity: proposals for reform

4.44 It seems clear that indemnity should be available for real burdens as for other secondary rights. Under our scheme that means that the Keeper's warranty as to title would apply. Where a person registered the creation or transmission of a real burden, the Keeper would warrant that the right had been duly created or transmitted.¹⁰⁷ But the same qualifications are needed as previously mentioned in the case of servitudes, and for the same reasons.¹⁰⁸ The Keeper cannot be expected to guarantee that the right complies with

¹⁰⁴ Second Discussion Paper paras 6.6-6.10.

¹⁰⁵ It is noteworthy that, in the context of the provision which became s 12(3)(g), both the Reid Report (para 107) and the Henry Report (part I para 41(3)) couple "enforceability" with "validity".

¹⁰⁶ Scottish Law Commission, Report on *Real Burdens* (Scot Law Com No 181, 2000) para 3.39. Perhaps the only way of avoiding this reading is to emphasise the words "entered in the register" and to argue that s 12(3)(g) does not apply once a burden has been removed from the Register by rectification. But this reading would deprive the provision of all content because, as previously mentioned, no indemnity is due under s 12(1) merely because a burden on the Register is unenforceable.

¹⁰⁷ Second Discussion Paper paras 7.29-7.46.

¹⁰⁸ Paras 4.22-4.25.

sections 2 and 3 of the Title Conditions Act and so is, by content and nature, capable of being a real burden. Nor can he be expected to guarantee that the right has not been extinguished off the register – for example, by negative prescription,¹⁰⁹ or acquiescence,¹¹⁰ or by the abolition of the feudal system.¹¹¹

4.45 We propose that:

- 13. (1) The Keeper's warranty as to title (but not the integrity principle) should apply in relation to –**
 - (a) the creation of real burdens by registration, and**
 - (b) the transmission, as pertinents, of the real burdens entered in the title sheet of a benefited property.**
- (2) But the Keeper's warranty should not apply where –**
 - (a) the right is not capable of being a real burden; or**
 - (b) the real burden has been extinguished.**

¹⁰⁹ Title Conditions (Scotland) Act 2003 s 18.

¹¹⁰ Title Conditions (Scotland) Act 2003 s 16.

¹¹¹ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 17(1)(a).

Part 5 Overriding interests

INTRODUCTION

Off-register real rights

5.1 The idea of overriding interests is encapsulated in paragraph (h) of the voluminous definition given in section 28(1) of the 1979 Act (and discussed below).¹ According to paragraph (h) an overriding interest is, or includes, a right in land "which has been made real, otherwise than by the recording of a deed in the Register of Sasines or by registration [in the Land Register]." An overriding interest, in other words, is an off-register real right. Only the term is new;² for while Scots law, like other systems based on civil law, requires publicity for the creation of real rights, this "publicity principle" may be satisfied in more than one way. In particular, publicity is sometimes achieved by possession rather than by registration. The position for the main real rights in land is summarised in the following table:

Creation of real rights in land

Type of real right	Method of creation
Ownership	Registration in property register ³
Proper liferent	Registration in property register
Standard security	Registration in property register
Floating charge	Registration in companies register
Servitude	Registration in property register or possession for 20 years
Real burden	Registration in property register
Long lease	Registration in property register
Short lease	Possession

¹ Paras 5.8-5.12.

² *Registration of Title Practice Book* para 5.67: "Although 'overriding interest' is not a term of art familiar to the Scottish conveyancer, the use of the term in the context of registration of title is not introducing any new concept into Scottish conveyancing; the expression is merely a convenient label for those 'real' rights or restrictions which may affect a given property but which, under present procedures, a search in the Sasine Register may not disclose."

³ I.e. the Land Register or Register of Sasines.

5.2 To these private law rights must be added rights which are held by the public at large. As well as public rights of way (established by prescriptive possession for 20 years),⁴ they include rights which always affect property of a particular type. At common law, for example, the public has a right of navigation and fishing⁵ in tidal waters and on the foreshore. Under part 1 of the Land Reform (Scotland) Act 2003 the public has certain access rights in respect of open land. In such cases the fact that the property is of the relevant type is treated as giving notice as to the existence of the right.

Overriding interests and the 1979 Act

5.3 Overriding interests occur in two different sets of provisions in the 1979 Act. Only one is of importance.

5.4 The unimportant occurrence may be quickly disposed of. Section 3(1)(a) provides that registration has the effect of vesting a real right in an interest in land

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

Despite appearances, this provision is mainly about *registered* real rights and hardly at all about overriding interests. Its purpose is to cover the possibility that, in making up and maintaining a title sheet, the Keeper has omitted a registered real right – typically one which dates back to the Register of Sasines. The effect of section 3(1)(a) is to allow the acquirer to rely on the Register, so that if a right previously registered has come to be omitted, the acquirer is unaffected by it.⁶ An equivalent rule can be found in the integrity principle which, under our scheme, will replace section 3(1)(a).⁷ The reference in section 3(1)(a) to overriding interests is simply a convenience of drafting and adds nothing to the provision's substantive effect. It could easily have been avoided.⁸ As it is, it merely re-states an elementary rule of property law, namely that acquirers take property subject to real rights, including real rights constituted without registration.

5.5 The other occurrence is of much greater significance. Although off-register rights are often publicised, as we have seen, the form of publicity falls far short of what can be achieved by registration. Under the Sasine system it was not normally possible for off-register rights to enter the Register. This is repaired by section 6(4) of the 1979 Act which allows for the "noting" of overriding interests on the Register.⁹ More is said about this important provision later on in this part.¹⁰

⁴ Prescription and Limitation (Scotland) Act 1973 s 3(3).

⁵ Other than for salmon.

⁶ Second Discussion Paper paras 5.13-5.15.

⁷ Second Discussion Paper paras 5.33-5.44. And see also para 5.24 below.

⁸ For example, the rule could have been expressed as being that an acquirer is free of real rights which were created by registration but are not, or not now, entered on the title sheet. No doubt one reason for the form the provision takes is a desire to express the mirror principle (discussed at para 5.6 below).

⁹ Related provisions are ss 9(3)(a)(i), 12(3)(h).

¹⁰ Paras 5.30 ff.

Public law rights

5.6 It is often said that a land register should give a complete and accurate account of the state of the title and of the burdens to which it is subject. Ruoff called this¹¹

"the *mirror* principle under which the register book reflects all facts material to an owner's title to land."¹²

This, of course, is an impossible ambition. No land register is likely to show every standard real right. Still less will it disclose the innumerable use restrictions imposed by statute in the interests, among others, of rational planning, safety of construction, and environmental protection. In some jurisdictions this mismatch between ambition and achievement has been the subject of expressions of dissatisfaction which may exaggerate the appropriateness and value of publicity by registration.¹³ More importantly, the fact that land registers omit public law controls as well as certain others which derive from private law has led to some confusion as to the proper scope of overriding interests. The Reid Committee thought that overriding interests should be defined to include, not only unregistered real rights such as servitudes and short leases, but also¹⁴

"improvement and other grants and statutory orders, road widening schemes, clearance orders, compulsory acquisition orders and notices, claims by local authorities for making up roads, pavements, etc., demolition or closing orders, grants or refusals of planning permission and enforcement orders under the Town and Country Planning Acts, burgh engineer's notices, development plans"

and, as if that were not enough,

"all statutory provisions and restrictions affecting heritable property."

A similar, if shorter, list can be found in the Henry Report.¹⁵ In the definition of overriding interest in the 1979 Act this tendency is represented by the, deliberately general, paragraph (e),¹⁶ which refers to the right or interest of

"the Crown or any Government or other public department, or any public or local authority, under any enactment or rule of law, other than an enactment or rule of law authorising or requiring the recording of a deed in the Register of Sasines or registration [ie in the Land Register] in order to complete the right or interest."

5.7 What is overlooked by definitions of this kind – indeed by the mirror principle itself – is that land registers are registers of real rights, of "interests in land" as the 1979 Act puts it;¹⁷ and accordingly the things which might be expected to be on the register but sometimes are

¹¹ T Ruoff, "An Englishman Looks at the Torrens System" (1952) 26 ALJ 118. The other two principles identified by Ruoff are the curtain principle and the insurance principle: see First Discussion Paper para 1.14.

¹² Interestingly, the metaphor of a mirror appears to suggest a negative rather than a positive system of registration of title, ie a system in which the source of rights is, not the register itself (for that is a mere mirror), but the ordinary law of property.

¹³ For registration has costs as well as benefits. See eg T W Mapp, *Torrens' Elusive Title* (1978) ch 9. This tendency may be confined to common law jurisdictions, where the discovery of the publicity principle and the benefits of registration is often a relatively recent occurrence.

¹⁴ Reid Report para 109.

¹⁵ Henry Report part I para 45(1).

¹⁶ 1979 Act s 28(1).

¹⁷ 1979 Act s 1(1).

not – the overriding interests, in other words – are also real rights. On the whole, land registration is not concerned with rights and obligations which derive from public law.¹⁸

FROM OVERRIDING INTERESTS TO UNREGISTERED REAL RIGHTS

Definition: the 1979 Act

5.8 Something has already been said about the definition of overriding interests in the 1979 Act. In its full form the definition in section 28(1) reads:

"'overriding interest' means, subject to sections 6(4) and 9(4) of this Act, in relation to any interest in land, the right or interest over it of—

- (a) the lessee under a lease which is not a long lease;
- (b) the lessee under a long lease who, prior to the commencement of this Act, has acquired a real right to the subjects of the lease by virtue of possession of them;
- (c) a crofter or cottar within the meaning of section 3 or 28(4) respectively of the Crofters (Scotland) Act 1955, or a landholder or statutory small tenant within the meaning of section 2(2) or 32(1) respectively of the Small Landholders (Scotland) Act 1911;
- (d) the proprietor of the dominant tenement in any servitude which was not created by registration in accordance with section 75(1) of the Title Conditions (Scotland) Act 2003 (asp 9);
- (e) the Crown or any Government or other public department, or any public or local authority, under any enactment or rule of law, other than an enactment or rule of law authorising or requiring the recording of a deed in the Register of Sasines or registration in order to complete the right or interest;
- (ee) the operator having a right conferred in accordance with paragraph 2, 3 or 5 of Schedule 2 to the Telecommunications Act 1984 (agreements for execution of works, obstruction of access, etc);
- (ef) a licence holder within the meaning of Part I of the Electricity Act 1989 having such a wayleave as is mentioned in paragraph 6 of Schedule 4 to that Act (wayleaves for electric lines), whether granted under that paragraph or by agreement between the parties;
- (eg) a licence holder within the meaning of Part I of the Electricity Act 1989 who is authorised by virtue of paragraph 1 of Schedule 5 to that Act to abstract, divert and use water for a generating station wholly or mainly driven by water;
- (eh) insofar as it is an interest vesting by virtue of section 7(3) of the Coal Industry Act 1994, the Coal Authority;

¹⁸ Thus in Germany it has been decided that the principle of good faith acquisition, embodied in § 892 BGB, does not extend to public burdens and limitations (which, naturally, do not appear on the register): see M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) p 225.

(f) the holder of a floating charge whether or not the charge has attached to the interest;

(g) a member of the public in respect of any public right of way or in respect of any right held inalienably by the Crown in trust for the public or in respect of the exercise of access rights within the meaning of the Land Reform (Scotland) Act 2003 (asp 2) by way of a path delineated in a path order made under section 22 of that Act;

(gg) the non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;

(gh) the non-entitled civil partner within the meaning of section 106 of the Civil Partnership Act 2004;

(h) any person, being a right which has been made real, otherwise than by the recording of a deed in the Register of Sasines or by registration; or

(i) any other person under any rule of law relating to common interest or joint or common property, not being a right or interest constituting a real right, burden or condition entered in the title sheet of the interest in land under section 6(1)(e) of this Act or having effect by virtue of a deed recorded in the Register of Sasines,

but does not include any subsisting burden or condition enforceable against the interest in land and entered in its title sheet under section 6(1) of this Act;"

5.9 As in many other jurisdictions,¹⁹ the most important overriding interests are short leases (paragraph (a)) and servitudes (paragraph (d)). Paragraph (b) is transitional in character and refers to the former rule, removed by section 3(3) of the 1979 Act, by which a long lease could be constituted by possession as an alternative to registration. Paragraph (c) also refers to unregistered leases, albeit of a specialised kind. Paragraph (d) (servitudes) is supplemented by the servitude-like rights mentioned in paragraphs (ee), (ef) and (eg). A floating charge (paragraph (f)) becomes a real right only if and when it crystallises; in any event it is registered in the Companies Register.²⁰ Paragraph (g) deals with public rights over land,²¹ while paragraph (gg) refers to the occupancy rights of the non-entitled spouse which, though not real rights in the strict sense,²² are sometimes capable of binding an incoming owner. Paragraph (h) (unregistered real rights) was discussed earlier.²³ For the most part, these provisions are self-explanatory and unremarkable, but one or two merit further discussion.

5.10 **Servitudes.** As originally enacted, paragraph (d) listed as an overriding interest the right of "the proprietor of the dominant tenement in a servitude". Plainly, however, this was too wide, for it included, not only servitudes created by prescription or otherwise off the register, but also servitudes created by registration in the Register of Sasines or Land

¹⁹ See eg Real Property Act 1900 s 42(1) (a1), (d) (New South Wales); Land Transfer Act 1952 s 62(b) (New Zealand); Land Titles Act, RSA 1970 s 64(1)(d), (f) (Alberta); Land Title Act 1994 s 185(1)(b), (c) (Queensland); Land Registration Act 2002 sch 1 paras 1, 3, sch 3 paras 1, 3 (England and Wales).

²⁰ Companies Act 1985 s 410. Under s 32(3) of the Bankruptcy and Diligence etc (Scotland) Bill, currently before the Scottish Parliament, a floating charge will in future be registered in the new Register of Floating Charges.

²¹ Albeit incompletely: see para 5.20.

²² Reid, *Property* para 10(2).

²³ Para 5.1.

Register. Since no indemnity is payable in respect of the noting of overriding interests,²⁴ the effect was potentially to leave all, or many, servitudes unindemnified.²⁵ A recent amendment has limited the scope of paragraph (d), which now applies to the right of "the proprietor of the dominant tenement in any servitude which was not created by registration in accordance with section 75(1) of the Title Conditions (Scotland) Act 2003".²⁶ The exclusion, however, is confined to servitudes which were created by registration on or after 28 November 2004 and does nothing to remove prior servitudes from the category of overriding interest.

5.11 Pro indiviso ownership. It is to be expected that overriding interests are confined to subordinate real rights and do not extend to ownership itself; for otherwise there could be no assurance that land shown on the Register as belonging to A did not in fact belong to B. Yet paragraph (i) refers to rights of joint or common property. The meaning of this paragraph is obscure.²⁷ It is possible that the qualifying words "under any rule of law" confine its scope to *pro indiviso* rights which arise by implication of common law – as for example rights of common property in the passage and stair of tenements under the common law of the tenement (now replaced by the Tenements (Scotland) Act 2004).²⁸ Certainly if the provision is wider it has implications both for the existence of a rival title to registered land and, as with servitudes, for the availability of indemnity.

5.12 Coal. Perhaps the one case in which ownership might justifiably be made an overriding interest is the ownership of coal, now vested in the Coal Authority, for no acquirer receives (or expects to receive) any rights in coal and it is necessary to qualify section 3(1)(a) accordingly. Paragraph (eh) does what is needed here by referring to the rights of the Coal Authority under section 7(3) of the Coal Industry Act 1994. The qualification will be unnecessary under our scheme because minerals are excluded from the integrity principle.²⁹ It is instructive to compare paragraph (eh) with the corresponding provision in the legislation for England and Wales. Although the list of overriding interests in the Land Registration Act 2002 is much shorter than in the 1979 Act, it includes, in relation to coal, both the right to withdraw support conferred by section 38 of the 1994 Act and also the right to enter upon underground land conferred by section 51.³⁰ In one sense, of course, their omission from the 1979 Act does not matter in view of the very general nature of paragraphs (e) and (h). But that argument applies with equal force to the provision of the 1994 Act which was included³¹ – and indeed to the other paragraphs in the definition of overriding interest.

Definition: proposals for reform

5.13 Although it is not set out in that way, the current definition of overriding interest comprises, in effect

²⁴ 1979 Act s 12(3)(h).

²⁵ But since overriding interests are defined in relation to the burdened property (see para 5.40), it is possible to argue that indemnity was payable insofar as the servitude appeared on the title sheet of the benefited property. Alternatively, it can be argued that, even if all servitudes are overriding interests, the registration of such an interest is not the same as its "noting", which is the focus of s 12(3)(h).

²⁶ Title Conditions (Scotland) Act 2003 sch 14 para 7.

²⁷ For different views see (1984) 29 JLSS 215 and 216-7.

²⁸ *Registration of Title Practice Book* p 180. But if this is correct, it is difficult to see why it was necessary to make the right an overriding interest.

²⁹ The integrity principle is intended as a replacement for s 3(1)(a): see Second Discussion Paper paras 5.25-5.27.

³⁰ Land Registration Act 2002 sch 1 para 7, sch 3 para 7.

³¹ Ie s 7(3), included in para (eh).

- (i) a general definition of overriding interests, set out in paragraph (h), as rights made real other than by registration;
- (ii) a series of non-exhaustive examples of (i), and
- (iii) a small number of further rights which, not being real rights, would not fall within (i).

Of these three parts, part (i) (general definition) is plainly necessary while part (iii) (rights which are not real) is unnecessary.³² The question to be determined is whether there is any value in part (ii) (examples).

5.14 The argument in favour of a list of examples is that it is helpful, both to legal practitioners and also to others who may consult the Register. It is for this reason that the list is included on the cover of all land certificates.³³ But there are formidable arguments against the inclusion of a list.

5.15 One is the difficulty of knowing which rights to include. The potential confusion between public law and private law rights has already been mentioned;³⁴ but even within the heartland of private law it is not always certain which rights are truly real.³⁵ The trouble with a list of examples is that some of the examples may turn out to be false.

5.16 A second difficulty is that any list, however long, is bound to be incomplete. For example, missing from the careful enumeration of leasehold rights in paragraphs (a)-(c) is any mention of tenants-at-will – despite the fact that such tenants have an entire provision of the 1979 Act (section 20) devoted to them. In similar vein, paragraph (ee) names one statutory right of access to land³⁶ but omits numerous others, including rights arising under the following statutory provisions:³⁷

- Health Services and Public Health Act 1968 s 73
- Health and Safety at Work Act 1974 s 20
- Control of Pollution Act 1974 s 91
- Water (Scotland) Act 1980 s 38
- Civic Government (Scotland) Act 1982 ss 5, 6, 60, 99
- Environment Act 1995 s 108
- Deer (Scotland) Act 1996 s 15
- Town and Country Planning (Scotland) Act 1997 s 269
- Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 s 76
- Planning (Hazardous Substances) (Scotland) Act 1997 s 33
- Tenements (Scotland) Act 2004 s 17.

³² The integrity principle, unlike s 3(1)(a) which it replaces, is formulated in terms only of real rights: see para 5.24.

³³ 1980 Rules sch A form 6.

³⁴ Para 5.6 and 5.7.

³⁵ Reid, *Property* paras 5 and 10. See most recently R R M Paisley, "Real Rights: Practical Problems and Dogmatic Rigidity" (2005) 9 EdinLR 267.

³⁶ To inspect apparatus: see Telecommunications Act 1984 sch 2 para 2(1)(c).

³⁷ This list is drawn from note 43 of R R M Paisley, "Real Rights: Practical Problems and Dogmatic Rigidity" (2005) 9 EdinLR 267. It is of course true that such rights are included within one or both of the general provisions set out in paragraphs (e) or (h). But the same is true of *any* of the examples.

There is nothing surprising in this. In practice a complete list of rights could hardly be assembled, and, even if that were not so, would run to so many pages as to be unintelligible.

5.17 Thirdly, an incomplete list is misleading, not only because of the items which are missed out, but also because of the false prominence given to those which happen to be included. The only overriding interests of much practical importance are short leases and servitudes; but that is hardly the impression given by the numerous items listed in section 28(1).

5.18 Fourthly, any list will quickly become out of date and require amendment. Partly this is because any statutes listed are vulnerable to repeal, with or without replacement. Paragraph (c) is an example. The Crofters (Scotland) Act 1955, which is referred to in that paragraph, was repealed and replaced by the Crofters (Scotland) Act 1993. It is provided in the 1993 Act that³⁸

"any reference in an enactment or document, whether express or implied, to an enactment repealed by this Act shall, unless the context otherwise requires, be construed as a reference to the corresponding enactment in this Act."

So the references in paragraph (c) to section 3 and section 28(4) of the Crofters (Scotland) Act 1955 are now to be read as references, respectively, to section 3 and section 12(5) of the Crofters (Scotland) Act 1993. No amendment to paragraph (c) being needed, none was made. But the end result is the opposite of informative to the user of the Register.

5.19 A greater danger than repeal is the creation of new real rights. The 9 examples of overriding interest originally given in the 1979 Act have now, by amendment, increased to 14. Even so, the list has failed to keep up with changes in the law. In *Bowers v Kennedy*,³⁹ for example, the First Division decided that there is a general right of access to landlocked property. Or, and much more narrowly, the Stirling-Alloa-Kincardine Railway and Linked Improvements Act 2004 section 16(1) authorises Clackmannanshire Council to "enter upon and appropriate so much of the subsoil of, or air-space over" certain land for certain purposes. It is added in subsection (3) that:

"For the purposes of section 28 of the Land Registration (Scotland) Act 1979, subsection (1) above shall be taken to create a real right over the land referred to in that section without any necessity to record a deed in the Register of Sasines or to register the right."

This amounts to a declaration that the right in question is an overriding interest.⁴⁰ Nonetheless, neither this right nor the one created by the decision in *Bowers v Kennedy* appears in the list of overriding interests in section 28(1).

5.20 Even when a new statute finds its way on to the list in section 28(1), it can be a matter of difficulty to know which of its provisions should be included. The different approaches taken by the Scottish and English legislation to the Coal Industry Act 1994 have already been mentioned.⁴¹ In respect of the Land Reform (Scotland) Act 2003, paragraph (g) of section 28(1) was amended to include access rights by way of a path delineated in a path

³⁸ Crofters (Scotland) Act 1993 sch 6 para 3.

³⁹ 2000 SC 555.

⁴⁰ It is obviously designed to engage paragraph (h) of s 28(1) of the 1979 Act.

⁴¹ Para 5.12.

order made under section 22, but not the general access rights conferred by section 1 of that Act.

5.21 For all of these reasons, we are doubtful as to whether a list of examples serves any useful purpose. Indeed whatever, slight, publicity value might arise from its appearance on the land certificate will disappear if, as proposed in our second discussion paper, the use of land certificates is discontinued.⁴²

5.22 If the list of examples is dropped, only a general definition of overriding interest is needed. For this purpose, paragraph (h) of section 28(1) is a helpful model. This specifies "a right which has been made real, otherwise than by the recording of a deed in the Register of Sasines⁴³ or by registration [in the Land Register]". It seems only necessary to add that the right is subordinate in nature (ie does not include ownership), and that the recording or registration is against the burdened property. The latter is for the accommodation of servitudes which (unlike most real rights) involve two properties and not one, and acknowledges that, prior to the Title Conditions (Scotland) Act 2003, a servitude could be created by registration against the benefited property only. Such a servitude, being invisible to an acquirer of the burdened property, must remain an overriding interest.⁴⁴

5.23 We propose that:

14. (1) An overriding interest should be defined as a subordinate real right which was created otherwise than by registration against the burdened property in the Land Register or Register of Sasines.

(2) The definition should no longer be supplemented by a list of examples.

5.24 This proposed definition is intended to tie in with the integrity principle⁴⁵ set out in our second discussion paper.⁴⁶ Its second rule begins:⁴⁷

"On becoming owner on registration an acquirer should take the land free of all subordinate real rights other than –

- (a) such rights as appeared on the title sheet on the day of registration (or, having the same or a prior date of registration to that of the acquirer, were omitted from the title sheet only because the registration process was incomplete);
- (b) any rights which, although omitted from the title sheet, were known to the acquirer; and
- (c) overriding interests."

⁴² Second Discussion Paper paras 4.59-4.66.

⁴³ It is necessary to include rights originally created in a deed registered in the Register of Sasines. So, for example, if a standard security, or servitude, was created in that way but is then omitted from the Land Register on first registration, the right (not being an overriding interest) is extinguished by the integrity principle when the land is next transferred. But if a servitude created by prescription is not included on the Land Register on first registration, it is an overriding interest and so continues to burden the land.

⁴⁴ Para 4.4.

⁴⁵ This is the intended replacement for s 3(1)(a) of the 1979 Act, discussed in para 5.4.

⁴⁶ Equally it ties in with the Keeper's warranty as to encumbrances: see Second Discussion Paper para 7.47.

⁴⁷ Second Discussion Paper para 5.37.

Taken in conjunction with this rule, the proposed definition of overriding interests deals satisfactorily with all rights which are created off the register. Thus insofar as off-register rights are real, they are overriding interests and the rule is disapplied. But insofar as such rights are not real, the rule is also disapplied because it protects only against undisclosed *real* rights. Either way the effect is, as it should be, that off-register rights bind, or may bind, acquirers, and there is no need to determine which rights are properly real and which merely have the capability in some circumstances of binding successors.⁴⁸

Reducing off-register rights?

5.25 Scotland recognises a number of off-register real rights, including servitudes constituted by implication or prescription and leases for 20 years or less. By comparison, other countries are often less tolerant of off-register servitudes,⁴⁹ while in many Torrens jurisdictions a lease must be registered if it is for more than 3 years.⁵⁰ In England and Wales the duration at which a lease requires registration has recently been reduced from 21 years to 7.⁵¹ No doubt it would be possible to make a case in Scotland for, say, the abolition of servitudes by prescription, or for reducing the length of long (ie registrable) leases from the current 20 years to 15 years or even 10. But the issues are not straightforward. It is true, of course, that a reduction in off-register rights would benefit the acquirer of land. But, as we noted in the first discussion paper, the interests of acquirers must be balanced against those of the holders of rights which pre-date the acquisition.⁵² In fact there are usually good reasons for allowing real rights to be constituted without registration: for example, the short duration of the right in question, the need to allow informal acquisition of rights which in practice are unlikely to be the subject of express grant, the fact that the right is sufficiently publicised in some other way (typically by possession), and so on. If, for example, the length of long leases were to be reduced to 10 years, the result would be to bring residential leases within the ambit of the registration statute, risking the loss of such leases if the tenant neglected to register.⁵³ Issues of this kind are, of course, worth discussing, but they are primarily issues in the law of leases or, as the case may be, the law of servitudes, and lie beyond the scope of the current project.

A change of name?

5.26 The term "overriding interest" originated with the (English) Land Registration Act 1925.⁵⁴ The Reid Committee was unenthusiastic as to the term, explaining that:⁵⁵

⁴⁸ For the potential difficulties of such a determination, see paras 5.6 and 5.7.

⁴⁹ See eg P Butt, *Land Law* (4th edn, 2001) paras 2070-1.

⁵⁰ See eg Real Property Act 1900 s 42(1)(d) (New South Wales); Land Titles Act 1970 s 64(1)(d) (Alberta); Land Title Act 1994 s 185(1)(b), sch 2 (Queensland). In New Zealand, a lease must always be on the register, whether by registration or by caveat, if it is to affect acquirers. The length is irrelevant. See Hinde McMorland & Sim, *Land Law in New Zealand* (1997) p 454. By contrast, in Germany (as in many other civil law countries) an ordinary lease is not classified as a real right and cannot be registered. Nonetheless acquirers are affected by it. See M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) pp 214, 267.

⁵¹ Land Registration Act 2002 sch 1 para 1, sch 3 para 1. See Law Com No 271 paras 8.9, 8.50.

⁵² First Discussion Paper paras 4.9, 4.10.

⁵³ Joint Land Titles Committee, *Renovating the Foundation* p 27: the recognition of a three-year lease as an overriding interest "runs counter to the policy of facilitating transfer, as the existence of a three-year lease may significantly derogate from rights of ownership, and the possibility of the existence of such a lease may require an investigation on the site. However, requiring short term leases to be recorded or registered would be an unconscionable burden on tenants and upon land registration offices."

⁵⁴ Land Registration Act 1925 s 3(xvi). See Law Com No 271 para 8.1.

"We do not like the term 'over-riding interests' and suggest that in Scotland the name should be 'unrecorded interests'."

The 1979 Act, however, followed the lead of the Henry Committee in reverting to "overriding interest". The reasoning of the Henry Committee was as follows:⁵⁶

"The English term 'Overriding Interests' is rejected by the Reid Committee Report, paragraph 109, in favour of the term 'Unrecorded Interests', but it appears to us that the word 'Unrecorded' is not satisfactory because some of those interests may in fact be recorded in the Register of Sasines or may be noted in the Land Register. Our preference is to adopt the term 'Overriding Interests' to avoid any confusion."

5.27 This reasoning does not convince. An interest which is recorded in the Register of Sasines is not an overriding interest,⁵⁷ even if it is omitted from the Land Register,⁵⁸ while an interest which is "noted" on the Land Register cannot be said to have been "recorded". But in any event, neither part of the term "overriding interest" seems satisfactory. In this context "interest" is an imprecise version of "right". For that reason the Abolition of Feudal Tenure etc (Scotland) Act 2000 replaced many occurrences of "interest in land" in the statute book with "real right in land".⁵⁹ "Overriding" is also unsatisfactory. It is true that, from the point of view of the property which is burdened, a right of the kind in question does, in a sense, "override" the registered title (from which it is absent). But where there is also a benefited property, as in the case of servitudes, it is inappropriate to use the language of overriding, for the right in question supplements the registered title rather than overriding it.⁶⁰

5.28 If "overriding interest" is inadequate, the question arises as to what term should replace it. In England and Wales the Land Registration Act 2002 uses "unregistered interests".⁶¹ Our provisional suggestion is "unregistered real right". "Unregistered" is equivalent to the "unrecorded" suggested by the Reid Committee; and, as already mentioned, "interest" is better rendered as "right". Taken as a whole, the phrase properly captures the idea of off-register rights. We would be grateful for the views of consultees on this or any other term.

5.29 It is perhaps worth adding that a name, and definition, may turn out to be unnecessary. As previously mentioned, the concept is potentially needed only twice in legislation on land registration: once in the articulation of the integrity principle (the replacement for section 3(1)(a)), and again in the provisions for noting off-register rights on the Register.⁶² In both the term itself could easily be avoided. Thus it would be a simple matter to formulate the integrity principle without making any reference to unregistered real rights;⁶³ and, as will be seen, there is much to be said for noting to be available only for named off-register rights and not for the class as a whole.⁶⁴

⁵⁵ Reid Report para 109.

⁵⁶ Henry Report part I para 45 n 1.

⁵⁷ Unless it is a servitude recorded only against the benefited property.

⁵⁸ See note 43.

⁵⁹ For a discussion, see Scottish Law Commission, Report on *Abolition of the Feudal System* (Scot Law Com No 168, 1999) para 9.5.

⁶⁰ The abandonment of 'overriding' makes it easier to understand the idea of noting a servitude for information in the title sheet of the benefited property: see paras 4.36, 5.40 and 5.41.

⁶¹ Land Registration Act 2002 schs 1, 3.

⁶² Paras 5.3-5.5.

⁶³ Para 5.4.

⁶⁴ Para 5.52.

NOTING ON THE REGISTER

Introduction

5.30 Overriding interests do not appear in the Register of Sasines. For the Land Register, however, the 1979 Act makes special provision. The procedure, which is known as "noting", is set out in section 6(4):

"Any overriding interest which appears to the Keeper to affect an interest in land—

(a) shall be noted by him in the title sheet of that interest if it has been disclosed in any document accompanying an application for registration in respect of that interest;

(b) may be so noted if—

- (i) application is made to him to do so;
- (ii) the overriding interest is disclosed in any application for registration; or
- (iii) the overriding interest otherwise comes to his notice.

In this subsection 'overriding interest' does not include the interest of—

- (i) a lessee under a lease which is not a long lease;
- (ii) a non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981; and
- (iii) a non-entitled civil partner within the meaning of section 106 of the Civil Partnership Act 2004."

Noting under section 6(4) thus supplements the other ways in which entries can be made in the Register: registration (section 3), rectification (section 9), and the making up and maintenance of a title sheet, generally on first registration (section 6(1)).⁶⁵ But noting is unique in being confined to rights of a particular type.

5.31 Noting has no legal effect. Already a real right before it enters the Register, an overriding interest is not improved by being noted there. In this respect, noting under section 6(4) resembles the entering under section 6(1), as part of making up a title sheet on first registration, of, say, a standard security previously constituted by recording in the Register of Sasines. Equally, noting is quite unlike registration or rectification, both of which have substantive effect.⁶⁶ The parallel between section 6(4) and section 6(1) is, however, inexact. The purpose of noting is to give information, and overriding interests stand largely outside the scheme of registration of title. In particular, overriding interests noted on the Register can

⁶⁵ First Discussion Paper para 2.21; Second Discussion Paper paras 6.33-6.41.

⁶⁶ Second Discussion Paper para 6.36.

be corrected or removed without restriction.⁶⁷ Unlike other real rights, they are also unindemnified.⁶⁸ On these matters we have no proposals for change.

5.32 Two main topics are covered by section 6(4): the circumstances under which noting may take place, and the type of overriding interest for which noting is available. Each requires further consideration.

Circumstances under which noting may take place

5.33 In terms of section 6(4) the Keeper is bound to note an overriding interest if it is disclosed in a document accompanying an application for registration (as opposed to being disclosed in the application itself). Otherwise the Keeper has a discretion as to noting. In practice, overriding interests are rarely disclosed in documents, or at least in documents of a kind which are likely to accompany applications for registration,⁶⁹ with the result that noting is largely a matter for the Keeper's discretion.

5.34 Section 6(4) seems capable of improvement. In relation to applications for noting, it takes no account of whether the application is made by the holder of the right or by the person subject to it. Nothing is said as to intimation. The provision is passive in character and does little to encourage the identification of overriding interests. As so often in the Act, it leaves much to the Keeper's discretion. Finally, it does not work well in respect of an important overriding interest, servitude. These issues are explored below.

Applications for noting

5.35 Applications for the noting of an overriding interest are made on form 5.⁷⁰ Although the legislation is not prescriptive, applications are in practice likely to be brought either by the owner of the land which is subject to the unregistered real right (as we may now call it)⁷¹ or by the person who is the rightholder. The two situations are quite different.

5.36 An application by the owner of the burdened property can be accepted by the Keeper with little or no inquiry, for if a person says that his land is affected by an encumbrance, there is no reason to disbelieve him.

5.37 The position is otherwise where the application is by the person holding (or claiming to hold) the right. The evidential basis for an off-register right is often unsatisfactory.⁷² The applicant may be able to produce something on paper, which may, however, fall short of a formal grant. Otherwise he must rely on oral communings or on some principle of the general law such as prescription. This puts the Keeper in a difficult position. Of course, if the evidence is obviously unconvincing he may be able to reject the application without much in the way of deliberation. But even if the evidence is more substantial, he cannot overlook the possibility that there is other, contrary, evidence which remains unknown or undisclosed. In

⁶⁷ Generally by rectification, as to which see 1979 Act s 9(3)(a)(i) (a provision which is actually unnecessary: see Second Discussion Paper paras 6.12 and 6.13). For the removal of overriding interests, see paras 5.48-5.50.

⁶⁸ At least in most cases: see 1979 Act s 12(3)(h).

⁶⁹ A possible (but rare) example is a floating charge which happens to be contained in the same document as a standard security: *Registration of Title Practice Book* para 5.69. If a servitude is disclosed in a document, it has usually been registered and so is not properly regarded as an overriding interest (but see para 5.10).

⁷⁰ 1980 Rules r 13.

⁷¹ Para 5.28.

⁷² Para 4.32.

one sense, of course, no risk attaches to agreeing to make the entry on the Register for, as already mentioned, noting has no legal effect and does not prejudice the owner of the land in question.⁷³ The right is either good or it is bad. If good, it is not made more burdensome by being noted on the Register; if bad, it is not thereby infused with life. But the practical perspective is different. The affected owner might be unaware of the off-register right. In the absence of intimation of the original application, he will not know that it has now been put on the Register. The time when he is most likely to find out – on obtaining a form 12 report when the land is being sold – is also the time which is likely to be most inopportune. For the discovery of an unexpected right might imperil the sale or reduce the price which the buyer is willing to pay; yet to challenge the right and have it removed from the Register would take time and cost money.

5.38 A new procedure seems necessary for applications at the instance of the holder of the right. We suggest the following as the basis for comment. On receipt of an application, the Keeper would notify the person who appears to be the owner of the burdened property.⁷⁴ That person would be allowed 8 weeks in which to communicate his views.⁷⁵ If the owner supported the application, or failed to respond, the application would be accepted and the right duly noted on the Register. If the owner expressed opposition, the application would normally be rejected, because it is not for the Keeper to adjudicate contested claims, especially in relation to rights which fall outside the framework of registration of title.⁷⁶ The applicant could then appeal against the rejection or seek a declarator as to the existence of the right;⁷⁷ or, much more likely in practice, he could abandon the idea of having the right noted on the Register. It is important, however, that the owner of the burdened property does not have an absolute veto, for opposition to an application for noting may be opportunistic and without foundation. Thus if, despite expressions of opposition, the Keeper is satisfied that the right truly exists, he should note it nevertheless. If the owner's opposition is maintained, he could apply to have the entry removed by rectification.

5.39 Instead of being satisfied that a right exists (the situation just mentioned), the Keeper might sometimes be satisfied that a right does *not* exist. That will be rare indeed. Much more commonly, the Keeper will have no concluded view one way or the other. But if it is clear that there is no right, any application for noting should, of course, be rejected – even if it is made by the owner of the burdened property.

Servitudes

5.40 The position of servitudes requires special attention. In a servitude, the holder derives his title from the ownership of land,⁷⁸ with the result that a servitude involves two properties (a benefited property and a burdened property) and not merely one (a burdened property). This difference is insufficiently acknowledged by the 1979 Act, which defines overriding interests only in relation to the property which is burdened.⁷⁹ This means that an off-register servitude is an overriding interest only in respect of the burdened property and so

⁷³ Para 5.31.

⁷⁴ As to the method of notification, see paras 6.35 and 6.36.

⁷⁵ 8 weeks is the period allowed for objections to the variation or extinction of certain real burdens: see Title Conditions (Scotland) Act 2003 ss 20(5), 34(3), 37(1).

⁷⁶ Our proposals in respect of applications for rectification are broadly similar: see paras 6.22-6.27.

⁷⁷ If the declarator were granted, the court could also order that the right be noted: see para 5.46.

⁷⁸ Paras 4.2 and 4.3.

⁷⁹ Thus overriding interests are defined in s 28(1) to mean "in relation to any interest in land, the right or interest *over it of ..*"

cannot be noted under section 6(4) in the title sheet of the benefited property.⁸⁰ If it is to enter that title sheet at all, therefore, the entry must be made under section 6(1). The result, as was explained earlier, is unsatisfactory.⁸¹ An entry made under section 6(1) is protected by indemnity, and (in association with registration) will validate the servitude (if invalid). Consequently, the Keeper is now unwilling to make the necessary entry unless the existence of the servitude has been established by declarator.

5.41 There is no reason for persevering with the limitation in the current definition of overriding interest and good reason for abandoning it. It is abandoned under the proposed definition given earlier,⁸² in which a servitude is an "unregistered real right" in relation to the benefited property as much as in relation to the burdened. The change should make it easier to have servitudes entered in the title sheet of the benefited property. Since any application will in practice be by the servitude holder, the procedure described above will apply.⁸³ Thus the Keeper will intimate the application to note the servitude to the owner of the burdened property. If he objects, on reasonable grounds, the application will be rejected. If he supports the application or fails to respond,⁸⁴ the servitude will be duly noted. In order to distinguish it from servitudes which have entered the Register in some other way (and so are indemnified), the entry should make clear that the servitude is merely being noted.⁸⁵ Our proposals attempt to balance the interests of different parties. For the servitude holder, they make it more likely that an entry on the Register will be made; for the owner of the burdened property, they offer notice and the chance to object; and for the Keeper, they provide a system which is virtually mechanical and which does not put his indemnity at risk.

5.42 We proposed earlier that, where the Keeper enters a servitude in the title sheet of one of the affected properties (ie the benefited or the burdened property), he should, wherever possible, make a corresponding entry in the title sheet of the other affected property.⁸⁶ This proposal would apply to an entry made by noting as much as to an entry made in any other way. Thus if the Keeper noted a servitude on the title sheet of the benefited property, he would note it also on the title sheet of the burdened property.

Applications for registration

5.43 In practice, such overriding interests as appear on the Register are often picked up as part of the examination of title on first registration. But no special effort is made to uncover overriding interests. In England and Wales a more inquiring spirit prevails, applicants for first registration being required to disclose all overriding interests which are within their actual knowledge.⁸⁷ We think that this requirement could with advantage be adopted in Scotland. An appropriate question could be added to form 1.⁸⁸ Since this would in

⁸⁰ Paras 4.7 and 4.8.

⁸¹ Paras 4.32-4.36.

⁸² Para 5.23.

⁸³ Para 5.38.

⁸⁴ Such failure would not prevent a later challenge to the servitude by means of an application for rectification of the entry. But it should preclude a claim in indemnity which, under our scheme, would otherwise be available in respect of costs if the application was successful: see Second Discussion Paper para 7.59.

⁸⁵ Under present practice it is not usually possible to distinguish servitudes which have been noted from servitudes which have been registered, or entered under s 6(1): see para 4.19.

⁸⁶ Paras 4.27-4.31.

⁸⁷ Land Registration Act 2002 s 71; Land Registration Rules 2003 r 28.

⁸⁸ The current question (5(c)) asks merely: "Are there any overriding interests affecting the subjects or any part of them which you wish noted on the Title Sheet?"

effect be an application for noting by the owner of the burdened property,⁸⁹ noting should then take place as a matter of course and without the need for further inquiry on the part of the Keeper.⁹⁰

5.44 The same rule could apply for applications in respect of dealings,⁹¹ although it would be unusual for an overriding interest to emerge at that stage.

A residual Keeper's discretion

5.45 Thus far we have considered direct applications for the noting of overriding interests, and also overriding interests which are disclosed in the course of an application for first registration. Occasionally, an overriding interest might come to the Keeper's attention in some other way.⁹² If so, he should have a discretion to note it, as under the current law.⁹³

Noting by court order

5.46 As the law currently stands, the court can order rectification of the Register⁹⁴ but not the noting of an overriding interest. We think that the court's power should extend to noting as well. That would allow a person seeking declarator as to the existence of an unregistered real right to obtain an ancillary order that the right be noted.

5.47 The discussion on noting can be drawn together in the form of a proposal:

15. (1) This proposal applies to the unregistered rights mentioned in proposal 16.

(2) The noting of unregistered rights on the Register should take place in accordance with the following rules; except that no noting should take place in respect of a "right" which the Keeper is satisfied does not exist.

(3) An applicant for registration should be under a duty to disclose any unregistered right which burdens the property and of which he has knowledge.

(4) In addition, an application for the noting of an unregistered right should be possible at any time at the instance of –

(a) an owner of the property burdened by the right; or

(b) a holder of the right.

⁸⁹ As to which see para 5.36.

⁹⁰ Probably, however, the Keeper should retain a discretion not to note on cause shown – for example, if the overriding interest was shortly to expire.

⁹¹ As in England and Wales: see Land Registration Rules 2003 r 57.

⁹² The example given in the *Registration of Title Practice Book* para 5.69 (servitude granted by two adjoining owners followed by an application to note the interest on behalf of one) could not now occur, as a grant of a servitude must be followed by (dual) registration: see Title Conditions (Scotland) Act 2003 s 75(1).

⁹³ 1979 Act s 6(4)(b)(iii).

⁹⁴ 1979 Act s 9(1).

- (5) On receipt of an application under (4)(b), the Keeper should notify the owner of the burdened property and invite his views by a stipulated date (not being less than 8 weeks after the date of notification).**
- (6) The Keeper should be bound to note an unregistered right which is –**
- (a) disclosed in an application for registration; or**
 - (b) the subject of an application made under (4)(a).**
- (7) The Keeper should also be bound to note an unregistered right which is the subject of an application made under (4)(b), provided that –**
- (a) it is not opposed by the owner of the burdened property; or**
 - (b) although so opposed, the Keeper is satisfied that the right exists.**
- (8) The Keeper should be at liberty to note any other unregistered right which comes to his attention.**
- (9) Where it is satisfied as to the existence of an unregistered right, a court should be able to order that the right be noted on the Register.**
- (10) It should be possible to note a servitude against the benefited property as well as (as at present) against the burdened property.**

Variation or extinction

5.48 Provision is made in the Land Registration Rules both for (i) the deletion of an overriding interest and for (ii) the entering of a "probative discharge" of such an interest.⁹⁵ It is hard to see why. If provision is made in respect of (i), there seems little value in making provision in respect of (ii), for the best way of acknowledging the effect of a discharge is by deleting any reference to the right.⁹⁶ But even provision in respect of (i) is unnecessary, for if the entry in respect of an overriding interest is wrong – whether because it was always wrong or because it has become wrong due to some supervening event such as variation, discharge or the running of negative prescription – the Register is inaccurate and can be corrected by rectification. Indeed the 1979 Act takes some trouble to ensure that rectification would be possible for overriding interests even to the prejudice of a proprietor in possession, and that no indemnity would be due.⁹⁷ Our proposed scheme is equally accommodating of rectification.⁹⁸ It is possible that a facility to delete or enter was seen as an equivalent, for

⁹⁵ 1980 Rules rr 7(3), 13(b), (c). There is nothing in the 1979 Act itself. Presumably an entry made under (ii) is an entry within the 1979 Act s 6(1)(g).

⁹⁶ As is done under current practice in relation to standard securities, for example.

⁹⁷ 1979 Act ss 9(3)(a)(i), 12(3)(h).

⁹⁸ Thus rectification is always possible where the Register is inaccurate; and an error in an entry in respect of an overriding interest is not covered by any of the proposed heads of indemnity. See Second Discussion Paper paras 6.21 and 7.34. Proposal 30 of that Paper (para 7.59) is, however, stated too broadly. Where, as here, the

overriding interests, of the registration of a discharge for real rights which are constituted by registration. If so, the parallel is not especially close. As a right constituted without registration, an overriding interest is also discharged without registration. The discharge takes effect immediately on delivery, and its entry on the Register would merely speak to an event which had already taken place. By contrast, the discharge of a registered real right must itself be registered if it is to take effect.⁹⁹

5.49 One curiosity may be mentioned. As we have seen, only a small proportion of off-register servitudes come to be noted on the Register.¹⁰⁰ But even where a servitude is not noted, the Land Registration Rules allow its discharge to be entered. The Register thus records the death of a servitude without ever having recorded its life. Again it is hard to see why. The list of servitudes which do *not* affect a given property is infinite. Why one should be singled out for mention is unclear. If the idea is to provide a way of preserving the discharge, this can be done more directly by registration in the Books of Council and Session or the sheriff court books.

5.50 In view of the ready availability of rectification, we do not envisage carrying forward into the new legislation the current provisions concerned with the deletion or discharge of unregistered real rights. No formal proposal seems necessary but we would welcome the views of consultees, and especially of those who consider that there is merit in the current arrangements.

What rights can be noted?

5.51 We accept that, as under the current law, not all off-register rights should be capable of being noted. In deciding which rights to exclude from the Register, two factors seem especially relevant. One is duration. A right which is shortlived has little need of noting, and, if it were to be noted, is likely to clutter the Register for many years after it has come to an end. The other is method of creation. Unregistered real rights can be classified according to whether they are created by writing or by some other method, such as positive prescription, by implication, or by operation of law. Where the law insists on writing without also insisting on registration, this can usually be taken as a deliberate decision that the right should be kept off the Register, and the case for noting is correspondingly small. But where a right is created in some other way, it would not be capable of registration (which requires a deed or other document),¹⁰¹ and the case for noting is correspondingly stronger.

5.52 The approach of the current law is to allow the noting of all overriding interests other than short leases and the occupancy rights of a non-entitled spouse (under the Matrimonial Homes (Family Protection) (Scotland) Act 1981) and of a non-entitled civil partner (under the Civil Partnership Act 2004).¹⁰² But this seems over-inclusive as well as rather uncertain (due to uncertainty as to the meaning of overriding interests). It seems preferable to begin at the

entry on the Register was accurate when made and has become inaccurate only as a result of a supervening event, there is no reason why the Keeper should bear the costs of rectification.

⁹⁹ See eg Conveyancing and Feudal Reform (Scotland) Act 1970 s 17 (standard securities); Title Conditions (Scotland) Act 2003 ss 15 (real burdens), 78 (servitudes; para (b), which refers to "noting", should probably be repealed). Of course, registered real rights can also be extinguished by off-register means, eg negative prescription or, in the case of standard securities, repayment of the loan.

¹⁰⁰ Paras 4.32-4.34.

¹⁰¹ Second Discussion Paper paras 3.6-3.9.

¹⁰² 1979 Act s 6(4).

other end by compiling a list of rights which are to be capable of noting. In assembling such a list, it will be necessary to reconsider the two exceptions provided for in the current law.

5.53 The following off-register rights appear to be the main candidates for inclusion in any list:

5.54 **Servitudes.** It is uncontroversial that off-register servitudes should remain capable of noting. In practice they are likely to be the right for which noting is most commonly used.

5.55 **Public rights of way.** As with servitudes, it seems clear that public rights of way should continue to be capable of being noted.¹⁰³

5.56 **Floating charges.** Currently a floating charge can be noted although this is uncommon in practice. The case for noting is weak. Floating charges are created in writing. They already require to be registered elsewhere (in the Companies Register).¹⁰⁴ They are not real rights unless they crystallise. In relation to any particular property they are likely to be shortlived because, unless the charge has crystallised, the property is put beyond their ambit as soon as it is transferred. We do not think that floating charges should continue to be noted.¹⁰⁵

5.57 **Leases.** Unregistered leases comprise (i) short leases (ie leases for 20 years or less) and (ii) long leases which, under the law formerly in force, were made real by possession. Unregistered long leases can be noted under the current law, but must in any case be registered on the first occasion on which they are transferred.¹⁰⁶ Short leases cannot be noted unless they are (a) crofting leases (b) cottar's leases (c) statutory small tenancies and (d) small landholdings.¹⁰⁷ There would be merit in extending noting to short leases in general.¹⁰⁸ This would mainly benefit an acquirer of the land, who would have better notice than at present as to the existence of the lease; but it is also helpful to the tenant that an acquirer should buy with proper notice. If noting were to be allowed, there would probably have to be exceptions – for example for leases of less than a certain duration (such as three years),¹⁰⁹ or for short assured tenancies, or for leases held from social landlords (ie Scottish secure tenancies). It should, however, be borne in mind that in England and Wales registration is allowed for leases of seven years while in some other countries the period is as short as three years.¹¹⁰

¹⁰³ It can be argued that, being a right in favour of the public (para 5.2), a public right of way is not a real right in the strict sense. But any rate it affects successive owners of the burdened property in just the same way as a servitude of way.

¹⁰⁴ To be replaced by a new Register of Floating Charges in terms of ss 31 and 32 of the Bankruptcy and Diligence etc (Scotland) Bill.

¹⁰⁵ This is so even although, very occasionally, noting would be of assistance to a third party acquirer: see para 8.29.

¹⁰⁶ 1979 Act s 3(3).

¹⁰⁷ Para (c) of the definition of overriding interest in 1979 Act s 28(1). Although by s 6(4) noting is not permitted in respect of "the interest of a lessee under a lease which is not a long lease", it seems clear that this refers only to the rights mentioned in para (a) of the definition in s 28(1).

¹⁰⁸ Despite the fact that a lease must usually be constituted in writing, thus engaging the second of the factors set out in para 5.51.

¹⁰⁹ But this exception would then itself require an exception for crofting and other similar leases.

¹¹⁰ Para 5.25.

5.58 **Occupancy rights.** Where one spouse owns the matrimonial home and the other spouse does not, the non-owning spouse – known as the "non-entitled spouse" – has certain rights as to occupation.¹¹¹ A comparable regime operates in respect of civil partners.¹¹² In principle, occupancy rights (if not renounced) bind acquirers from the entitled spouse or civil partner,¹¹³ but this is subject to exceptions. In particular a purchaser is not subject to the occupancy rights if he acts in good faith and there is produced to him either:¹¹⁴

"(i) an affidavit sworn or affirmed by the seller declaring that the subjects of sale are not or were not at the time of the dealing a matrimonial home [family home]¹¹⁵ in relation to which a spouse [civil partner] of the seller has or had occupancy rights; or

(ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled spouse [partner]."

For the purposes of this provision, it does not matter that the affidavit, renunciation or consent was improperly given. Even if the affidavit were false or the signature on the consent to dealing forged, the occupancy rights would still be lost provided the acquirer was in good faith. An easy way of avoiding deception by spouses or civil partners would be to note occupancy rights on the Register, for in the face of a noted right an acquirer could not be said to be in good faith. Under the current law, however, the noting of occupancy rights is not permitted.¹¹⁶ We think that the position ought to be reconsidered.¹¹⁷ No doubt it would be unusual for a non-entitled spouse or partner to seek to have occupancy rights noted on the Register. But for a person who had reason to suspect a secret sale, noting would be an effective defence.

5.59 In suggesting that noting might be allowed, we do not propose any alteration in the existing practice by which the Keeper enters a statement on the Register (if he can) that there are no subsisting occupancy rights of spouses of persons who were formerly entitled to the house.¹¹⁸ Such a statement relates to the occupancy rights of previous owners whereas the noting procedure would, in most cases, relate to the spouse of the current owner.

5.60 **Other rights added by order.** If a limited list is to be drawn up, it seems sensible that Scottish Ministers should have power to add to it by delegated legislation.

5.61 The previous discussion can be summarised in the form of a proposal and two questions:

¹¹¹ Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 1.

¹¹² Civil Partnership Act 2004 s 101.

¹¹³ Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 6(1).

¹¹⁴ Matrimonial Homes (Family Protection) (Scotland) Act 1981 s 6(3)(e); Civil Partnership Act 2004 s 106(3)(e). The Family Law (Scotland) Bill 2005 s 5(3), if enacted, will replace an affidavit with a written declaration in respect of sales by an entitled spouse; but the principle remains the same.

¹¹⁵ In this quotation the words in square brackets indicate the terminology which applies in respect of civil partners.

¹¹⁶ 1979 Act s 6(4).

¹¹⁷ Despite the fact that an occupancy right is not a real right in the strict sense: see Reid, *Property* para 10(2). In this instance the class of unregistered real right is extended to include a right which is not real.

¹¹⁸ 1980 Rules r 5(j). See further *Registration of Title Practice Book* paras 6.28 ff. So far at least there is no equivalent provision in respect of civil partners.

- 16. (1) The following unregistered rights should be capable of being noted on the Register:**
- (a) servitudes;**
 - (b) public rights of way;**
 - (c) certain leases;**
 - (d) the occupancy rights of non-entitled spouses and civil partners.**
- (2) What leases (if any) should be excluded from noting?**
- (3) Should any other rights be capable of being noted?**

Part 6 Decision-making

CURRENT LAW

Duties and discretions

6.1 Various statutory duties are laid on the Keeper: for example, to enter on the title sheet a subsisting entry in the Register of Inhibitions and Adjudications,¹ to note an overriding interest which is disclosed in a document accompanying an application,² or to pay indemnity in respect of rectification of the Register.³ Much more rarely, the Keeper is under a duty *not* to do something: for example, to accept an application for registration of a souvenir plot,⁴ or to notify the owner as to registration of an *a non domino* disposition.⁵ But discretions play as important a role under the 1979 Act as duties: thus the Keeper "may" exclude indemnity⁶ or rectify an inaccuracy on the Register,⁷ and even in respect of registration itself the Keeper is invested with a broad discretion.⁸

6.2 The prominent role given to discretion should not surprise, for a new system of land registration needed flexibility of response. Of course, as experience has evolved into practice, the Keeper has tended to exercise his discretion in a consistent and predictable manner which is a matter of public record. Thus the *Registration of Title Practice Book* gives clear guidance in relation to matters such as registration and exclusion of indemnity,⁹ and this is supplemented by the much more detailed material contained in the internal *Legal Manual* which, since 2004, has been available for public consultation on the Registers of Scotland website.¹⁰ In our second discussion paper we suggested that, wherever possible, settled practice should be expressed in the legislation as formal rules. In particular we proposed that the Keeper should in future be under a statutory duty:

- to accept an application for registration where both deed and application are in order;¹¹
- to indemnify the title which is being registered, except where it is bad;¹² and
- to accept an application for rectification if the Register is inaccurate.¹³

¹ 1979 Act s 6(1)(c).

² 1979 Act s 6(4)(a).

³ 1979 Act s 12(1)(a).

⁴ 1979 Act s 4(2)(b).

⁵ 1980 Rules r 21(2).

⁶ 1979 Act s 12(2).

⁷ 1979 Act s 9(1).

⁸ 1979 Act s 4(1), discussed at paras 4.11 ff of the Second Discussion Paper.

⁹ *Registration of Title Practice Book*, paras 5.10 ff and 7.17.

¹⁰ www.ros.gov.uk/foi/legal.

¹¹ Second Discussion Paper paras 4.20-4.24.

¹² Second Discussion Paper para 4.43.

¹³ Second Discussion Paper paras 6.27 and 6.32.

6.3 Even with changes such as these, however, a degree of discretion will, quite properly, remain with the Keeper. And even where there is a duty rather than a discretion, it will sometimes be a matter of fine judgment as to whether the conditions which give rise to the duty have been satisfied. In short, under the new law, as under the old, the Keeper will require to make decisions on matters which are difficult or contentious. The way in which such decisions are made is the subject matter of this part.

Making decisions

6.4 Most decisions of significance arise in response to an application to the Keeper, and most commonly this is an application for registration. In considering an application the Keeper acts in an administrative capacity and not, as in some registration systems, as a judge.¹⁴

6.5 Aspects of the procedure are laid down either in the 1979 Act or in the Land Registration (Scotland) Rules 1980. Thus it is provided that the application must be made on a prescribed form;¹⁵ that, in relation to applications for registration (only), the Keeper is entitled to call for further evidence¹⁶ and to return a document for amendment;¹⁷ and that the decision, when made, must be notified to the applicant and other interested parties.¹⁸ But there are omissions. There is no provision for representations by the applicant, or for oral hearings; there is no time limit within which decisions must be made; and in the relatively small number of cases where the interests of a person other than the applicant may also be involved – typically in applications for rectification¹⁹ – there is no provision for that person to be heard. Indeed even the decision itself is not notified to such a person where it concerns an application for registration in respect of an *a non domino* disposition.²⁰

6.6 Actual practice is more accommodating. At least in a difficult case there is likely to be communication, and even negotiation, between the Keeper and the applicant; and, if the Keeper is minded to refuse an application – or, in the case of an application for registration, accept it only on the basis that indemnity is excluded – he will usually give advance notice of his intentions and hence an opportunity for further representations.²¹ For example, the Keeper's practice in relation to exclusion of indemnity is set out in the *Registration of Title Practice Book* in this way:²²

"Where the Keeper intends to exclude indemnity in whole or in part from a registered title, the applicant will be advised of this before the registration process is completed.

¹⁴ In systems of Continental Europe the registrar is often a judge. For a review, see eg A Hurndall (ed), *Property in Europe: Law and Practice* (1998); A M Garro, 'Recordation of Interests in Land', *International Encyclopedia of Comparative Law* vol VI ch 8 (2004) paras 134-6. In Scotland, the decision to use an administrative procedure was deliberate: see Reid Report para 117.

¹⁵ 1980 Rules rr 9, 13, 16, 20.

¹⁶ 1979 Act s 4(1). This can be made subject to a time limit after which the application is rejected, or accepted only subject to exclusion of indemnity: see 1980 Rules r 12.

¹⁷ Within limits: see 1980 Rules r 11.

¹⁸ 1980 Rules r 21(1).

¹⁹ Paras 6.20 and 6.21.

²⁰ 1980 Rules r 21(2).

²¹ There may be no prior notification, however, if the title is to be subject to an encumbrance not disclosed in the application eg a set of real burdens. And there is not normally notification of a qualification to the statement under r 5(j) of the 1980 Rules as to occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

²² *Registration of Title Practice Book* para 7.17.

The applicant will therefore have an opportunity to remedy the defect occasioning the exclusion of indemnity or to make the case that indemnity should not be excluded."

Naturally, cases of this kind are unusual. Most applications are untroubled, and the decision-making mechanical. Under ARTL it will indeed be mechanised. Nonetheless, in a difficult case the Keeper remains powerful and is relatively free of legislative guidance or restraint.

Appeals

6.7 The Keeper's decision can, however, be appealed, with the result that an administrative process gives way to a judicial process. The 1979 Act provides for an appeal to the Lands Tribunal on any question of fact or law,²³ and from the Lands Tribunal there can be a further appeal, on a question of law, to the Court of Session and House of Lords.²⁴ No appeal is allowed, however, in respect of the refusal of an application for voluntary first registration.²⁵ As well as a Tribunal appeal, a decision of the Keeper can be made subject to judicial review in the ordinary courts.²⁶

EUROPEAN CONVENTION ON HUMAN RIGHTS

Compliance as to substance

6.8 At least as respects substantive content, there seem no grounds for doubting that the 1979 Act is in full compliance with the European Convention on Human Rights. It is true that the Act will generally prefer an acquirer over a true owner, allowing for the possibility of non-consensual loss of property.²⁷ But the small number of cases in which this happens is sufficiently justified as a matter of public policy, and the person so deprived of property is entitled to full compensation, through the Keeper, from the State. There is nothing in such a principle which breaches the property clause (article 1 of the First Protocol) of the ECHR; and indeed the tendency of our proposals for reform is to reduce the incidence of deprivations.²⁸

Compliance as to procedure

6.9 Procedural fairness is governed by article 6 of the ECHR. Article 6(1) provides that:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be

²³ 1979 Act s 25(1).

²⁴ Tribunals and Inquiries Act 1992 s 11(1), (7).

²⁵ The registration in the absence of a transaction (such as sale) which would trigger first registration: 1979 Act s 25(4). See Second Discussion Paper paras 3.35-3.38. A second exception, which related to registration of land not in an operational area, is now defunct.

²⁶ 1979 Act s 25(2). An example is *Short's Tr v Keeper of the Registers of Scotland* 1994 SC 122, 1996 SC (HL) 14.

²⁷ This is because (i) registration confers immediate ownership on the acquirer and (ii) even if wrongly conferred, such conferral cannot be undone, by rectification, for as long as the acquirer is in possession. See 1979 Act ss 3(1)(a) and 9(3).

²⁸ This is because registration will not of itself confer ownership on an acquirer if there is a defect in the current transaction (such as acquiring from the wrong person). For a summary of our proposals on this point, see paras 1.3-1.13.

pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in the special circumstances where publicity would prejudice the interests of justice."

6.10 Although article 6 might seem directed only at judicial processes, it is well-settled that it is capable of applying even to decision-making of an administrative nature.²⁹ Thus, insofar as he considers applications in respect of registration or other matters, it appears that the Keeper is subject to article 6. One limitation, however, should be noticed at the outset. Article 6 is concerned with adjective and not with substantive rights. Unlike other parts of the ECHR, it does not guarantee the *content* of national law: it guarantees only that disputes within the confines of that law are heard by an independent and impartial tribunal. As was said in *James v United Kingdom*:³⁰

"Article 6(1) extends only to 'contestations' (disputes) over (civil) 'rights and obligations' which can be said, at least on arguable grounds, to be recognised under domestic law: it does not in itself guarantee any particular content for (civil) 'rights and obligations' in the substantive law of the Contracting States."

6.11 In considering article 6 in the context of applications to the Keeper, it will be convenient to treat separately (i) applications for registration and (ii) applications for rectification. Only incidental mention need be made of applications of other kinds (of which the most important are applications for payment of indemnity).

Registration: ordinary applications

6.12 Applications for registration involve only one party (the applicant). Nonetheless registration is, in some sense, a "determination" of the applicant's "civil rights", and it seems likely that article 6 applies.³¹ If so, compliance can take one of two forms: either the decision-making process must itself meet the requirements of article 6, or alternatively it must be subject to the control of a judicial body which meets those requirements. There must, in other words, be either "internal" or "external" compliance.³²

6.13 It seems plain that internal compliance with article 6 is not achieved. As the Register's chief executive, the Keeper cannot easily be characterised as an "independent and impartial tribunal" for matters affecting registration.³³ Nor, as also required by article 6(1), does he conduct hearings in public or pronounce public judgments. External compliance is,

²⁹ See eg *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295; *County Properties Ltd v Scottish Ministers* 2002 SC 79.

³⁰ (1986) 8 EHRR 123, para 81. See also R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland* (2001) para 5.30.

³¹ *Ringeisen v Austria No 1* (1979-80) 1 EHRR 455, para 94. See also *H v Belgium* (1988) 10 EHRR 339; *De Moor v Belgium* (1994) 18 EHRR 372.

³² R Clayton and H Tomlinson, *The Law of Human Rights* (2000) para 11.197.

³³ *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 (Secretary of State in relation to a planning application); *County Properties Ltd v Scottish Ministers* 2002 SC 79 (Scottish Ministers and a reporter appointed by them in relation to an application for listed building consent). See also *Runa Begum v Tower Hamlets LBC* [2003] 1 All ER 731, para 27 *per* Lord Hoffmann: "It is no disrespect to Mrs Hayes [a rehousing manager] to say that she is not an independent tribunal simply because she is an administrator and cannot be described as part of the judicial branch of government". In the case of the Keeper, the lack of independence is particularly apparent in relation to applications that he should pay indemnity.

however, a different matter. As a general rule,³⁴ internal deficiencies can be made good by a judicial body which has "full jurisdiction" over the initial decision. Although less will sometimes do,³⁵ "full jurisdiction" usually means a power of review both as to law and as to fact. As already mentioned,³⁶ the Lands Tribunal can review a decision of the Keeper on both fact and law; and, as there can be no doubt that the procedure of the Tribunal is itself compliant with article 6, it follows that article 6 is satisfied in respect of decision-making as to registration, taken as a whole. The small difficulty that appeals to the Tribunal are not allowed against a refusal of voluntary registration³⁷ would be removed if, as proposed in our second discussion paper, the Keeper should in future be bound to accept such registrations.³⁸

Registration: applications leading to deprivation of property

6.14 The position is much the same even where, as occasionally, a successful application for registration has the incidental effect of an involuntary deprivation of property. For example: A grants a disposition to B of land part of which, it later turns out, belongs to Z; the Keeper accepts the application and enters B on the Register as owner; as a result, Z is deprived of ownership. Article 6 is not usually engaged by examples like this,³⁹ for Z's loss is due to a substantive, and not a procedural, rule, and the substantive rule is not a matter for the Keeper (or article 6). Thus, in processing B's application, the Keeper does not seek to adjudicate between the rights of B and those of Z (of whom usually he will know nothing). Instead the Keeper considers only the position of B, the applicant for registration. If the application is accepted, the substantive rule does the rest; and that rule, as already noted, is itself in compliance with the ECHR.⁴⁰ In practice, registration is typically a straightforward administrative act and one which, under ARTL, will come to be performed largely by machine.⁴¹

6.15 In theory it would be possible to halt all applications for registration in order to allow an anxious search for competing titles. But no register could be run on such a basis. In the interests of speed and efficiency, the strategy of the law is not to halt registrations but to deal with any unexpected consequences which registration might bring about. Thus once B's registration is completed, Z can, in principle, have the Register rectified and his name restored as owner.⁴² Under our proposals for reform, indeed, ownership would never have

³⁴ But there are exceptions which do not affect the present case. For these see: *De Cubber v Belgium* (1985) 7 EHRR 236; *Runa Begum v Tower Hamlets LBC* [2003] 1 All ER 731, paras 42 and 57 *per* Lord Hoffmann; *S A Marie Brizzard et Roger International v Grant & Sons (No 2)* 2002 SLT 1365, para 61 *per* Lord Mackay of Drumadoon.

³⁵ *Bryan v United Kingdom* (1996) 21 EHRR 342. In *R (Alconbury Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, for example, a more limited review was held to be sufficient in relation to a decision of administrative policy.

³⁶ Para 6.7.

³⁷ 1979 Act s 25(4).

³⁸ Second Discussion Paper paras 3.35-3.38.

³⁹ The position may be different if the Keeper knows of Z's rights, as to which see para 6.16.

⁴⁰ Para 6.8.

⁴¹ This statement does not, however, apply to first registrations and to transfers of part.

⁴² 1979 Act s 9(1).

been lost.⁴³ Sometimes, of course, rectification is denied and Z must make do with indemnity from the Keeper;⁴⁴ but that, again, is a substantive rule and not one concerning procedure.⁴⁵

6.16 Of course, if Z became aware of B's application he could make (unofficial) representations to the Keeper.⁴⁶ And if, for that reason or some other, the Keeper had notice of Z's title, he would be bound, under proposals made in our second discussion paper, to reject B's application.⁴⁷ Thus the Keeper will not knowingly deprive Z of his rights. Current practice (although not law) is much the same.⁴⁸

Registration: delays

6.17 Article 6(1) requires that the determination of civil rights should take place "within a reasonable time". As is well-known, delay has been a persistent problem with registration of title and in particular with first registrations. To a considerable extent this is due to matters beyond the Keeper's control, such as the number of writs presented for registration in any given year, the difficulty of individual cases (greatly underestimated at the time the new system was introduced),⁴⁹ and finite staff resources. Equally, the issue of delay is beyond the reach of legislation, for there seems little value in a statutory exhortation, such as exists for the Register of Sasines, that registration should take place "with all due despatch".⁵⁰

6.18 Turnaround times for registration are now the subject of ministerial targets, and considerable improvements have been achieved. For instance, during the year 1999-2000, only 40.5% of domestic first registrations⁵¹ were processed within 200 working days, whereas in the following year the figure had almost doubled, to 75.5%. In the year 2003-04, 74.5% of domestic first registrations were processed within the much shorter target time of 125 working days, with the overall average turnaround time being 103.5 days. Similarly, the average turnaround time for a dealing with a registered interest has fallen from 46.1 days in the year 1999-2000 to 17.6 days in the year 2003-04. Under ARTL registration of dealings will take place almost instantaneously. The Keeper's annual customer surveys include questions as to the speed of service in relation to first registrations, dealings, and transfers of part. On a scale of 1 to 5 (where 5 is excellent), the percentage rating the Keeper's speed of service at a level of 3 or above was as follows:⁵²

⁴³ Where the defect in B's title is transactional, ownership remains with Z. Compare examples 1 and 2 in paras 7.65 and 7.66 of the Second Discussion Paper. The fact that ownership is not lost is helpful in relation to any questions arising under the ECHR: see First Discussion Paper para 5.33.

⁴⁴ Under the current law, that would occur where B was in possession; under our proposals, where B had possessed for a significant period *and* purported to transfer ownership to a successor.

⁴⁵ By contrast, if Z had a substantive right of challenge to B's title which was prevented only by procedural bar, there would be a potential breach of article 6. See eg *De Geouffre de la Pradelle v France* (1992) A253-B; *Tsironis v Greece* (2003) 37 EHRR 7; *Serghides and Christoforou v Cyprus* (2003) 37 EHRR 44.

⁴⁶ No provision is made in the legislation for official representations and we have no proposal that such a provision be introduced. In the interests of speed and simplicity it seems better that registration should remain an administrative process involving the applicant alone.

⁴⁷ Second Discussion Paper paras 4.47-4.57. Current practice is more or less the same.

⁴⁸ It may thus be questioned whether the current law is ECHR-compliant in this respect. If the Keeper knows of Z's rights, he is in a position where he must adjudicate between Z and B (ie determine the civil rights of both, in the sense of article 6). The legislation does not generally allow intimation to Z (see para 6.30). Nor is the Keeper bound to reject B's application (though he usually does so in practice).

⁴⁹ First Discussion Paper para 2.26.

⁵⁰ Titles to Land Consolidation (Scotland) Act 1868 s 142.

⁵¹ ie first registrations in respect of residential property.

⁵² These figures are taken from successive annual reports of the Registers of Scotland Executive Agency.

	First registrations	Dealings	Transfers of part
2000-2001	49%	88%	[no stats]
2001-2002	63%	92%	70%
2002-2003	72%	95%	83%
2003-2004	72%	95%	78%
2004-2005	63%	92%	70%

Inevitably, some disquiet remains. A number of those responding to our preliminary consultation – which, admittedly, was as long ago as 2001 – complained that, while registration was often quick, it could be extremely slow in commercial cases or in cases involving non-standard facts. Partly in order to address this difficulty, a new ministerial target, set in 2004, requires the elimination within three years of all stocks of domestic first registrations which are more than one year old.⁵³ No doubt other targets will follow.

6.19 Although irksome for those affected, it seems unlikely that, at least in the normal case, delay will amount to a breach of article 6. The "reasonable time" requirement of article 6(1) is assessed by considering all the facts and circumstances of a case including in particular its complexity, the conduct of the applicant, and the conduct of the decision-making authority.⁵⁴ If article 6(1) were found to have been breached, one possible outcome is an award of damages.⁵⁵

Rectification

6.20 In registration there is no adjudication of rights between parties.⁵⁶ In rectification, however, such adjudication is both normal and unavoidable.⁵⁷ So if – to use the example in the previous section⁵⁸ – Z applies to have the Register rectified, to the effect of substituting his name as owner for that of B, the Keeper must consider not only the position of the applicant (Z), but also that of the person (B) who will be displaced in the event that rectification is allowed. Under the legislation, rectification is only possible in respect of an 'inaccuracy' on the Register, and the task of the Keeper is thus to determine whether the better right lies in Z or in B.

6.21 This difference in role is not sufficiently noticed by the legislation. Like an application for registration, an application for rectification is treated as if it concerned the applicant alone. No provision is made for the application to be notified to the person who stands to

⁵³ Registers of Scotland, *Annual Report and Accounts 2003-2004* (SE/2004/213) p 13.

⁵⁴ P van Dijk and G J H van Hoof, *Theory and Practice of the European Convention on Human Rights* (3rd edn, 1998) para 6.63; R Clayton and H Tomlinson, *The Law of Human Rights* (2000) para 11.220; R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland* (2001) para 5.97.

⁵⁵ Human Rights Act 1998 s 8. By s 8(3) damages are awarded only where necessary "to afford just satisfaction". On quantum, see Law Commission and Scottish Law Commission, *Report on Damages under the Human Rights Act 1998* (Law Com No 266; Scot Law Com No 180; 2000) paras 6.113-6.124.

⁵⁶ Paras 6.12 and 6.14.

⁵⁷ Except in trivial cases, eg the correction of a clerical error.

⁵⁸ Para 6.14.

lose if rectification is granted, and none allowing that person to be heard. Further, such provisions as do exist fail to make clear whether a decision as to rectification, once made, must be notified to the affected person,⁵⁹ or whether that person (not being a party to the application) has a right of appeal to the Lands Tribunal.⁶⁰ So far as the legislation is concerned, therefore, rectification would appear to comprise an adjudication between two parties which takes account of the views of only one. A number of factors, however, mitigate what would otherwise be an unfair procedure. Although not bound to do so, the Keeper's practice is to intimate an application for rectification to the person whose right is at risk, and to invite representations. Where, as a result, the outcome is disputed, and involves difficult questions of fact or law,⁶¹ the Keeper is likely to refuse the application⁶² and invite the applicant to establish his claim in court. Any decree pronounced in his favour will then contain an order for rectification, thus passing the decision from the Keeper to the court.⁶³ Finally, a decision to rectify can be challenged, if not by an appeal (as to which the position is uncertain), then by a fresh application for rectification by the person against whom the Register was previously rectified⁶⁴ – although rectification could not be granted if the original, and successful, applicant was in possession.⁶⁵ It has not been suggested to us that the rectification procedure works other than reasonably well. Nonetheless there is some reason to doubt whether the legislative provisions comply with article 6.

PROPOSALS FOR REFORM

Rectification

6.22 So far as compliance with the ECHR is concerned, only the procedure for rectification stands in need of alteration; and such changes as are needed can readily be justified on their merits. Two changes in particular seem necessary.

6.23 First, an application for rectification should be notified by the Keeper to any person disclosed by the Register as potentially affected. A rectification which the Keeper proposes to make on his own initiative should similarly be notified.⁶⁶ Normally there would only be one person to be notified. In the example given above,⁶⁷ an application by Z would trigger notification to B. The eventual decision of the Keeper should likewise be notified.

6.24 Secondly, both the applicant and any person to whom notification has been made should be entitled to make representations in respect of the application. Normally

⁵⁹ 1980 Rules r 21(1), discussed in paras 6.28 and 6.29.

⁶⁰ 1979 Act s 25(1) provides for an appeal without indicating by whom the right can be exercised. The *Stair Memorial Encyclopaedia* vol 6 para 786 takes the view that s 25 extends to the applicant "or any other person aggrieved by a decision of the Keeper". The Reid Report para 117 refers to the Tribunal as hearing disputes 'between parties'. But s 25(1) of the 1979 Act is unclear on the point. The position as to judicial review is equally unclear.

⁶¹ These might include, not only whether the Register is inaccurate, but also, if it is, whether the person vulnerable to rectification is a proprietor in possession, or has caused the inaccuracy by his fraud or carelessness. See First Discussion Paper paras 2.11-2.16.

⁶² Or at least not accept it pending the outcome of any litigation.

⁶³ 1979 Act s 9(1).

⁶⁴ In theory, applications and counter-applications could continue without limit.

⁶⁵ 1979 Act s 9(3). In that case – assuming there to be an inaccuracy which could not be rectified – the Keeper would be liable for indemnity: see s 12(1)(b).

⁶⁶ 1979 Act s 9(1) allows the Keeper to rectify "whether on being so requested or not".

⁶⁷ Para 6.14.

representations would be in writing but there seems no reason for excluding the possibility of an oral procedure. In England and Wales there is a formal right to object to any application made to the Registrar.⁶⁸

6.25 In England and Wales a contested application must be referred to an independent Adjudicator.⁶⁹ This replaces a procedure by which disputes were resolved by the Registrar, acting through the Solicitor to H M Land Registry. In Scotland, as already mentioned, the Keeper has not sought to resolve disputes of this kind. Unless an inaccuracy is plainly established, an application for rectification will be refused and it is then for the parties to reach agreement, to litigate, or to leave matters as they are. Subject to the views of consultees, we would not propose to disturb this practice. A decision as to whether to take a dispute further seems best left to the parties themselves, and the role of the Keeper should be confined to accepting an application for rectification (if it is obviously meritorious) or rejecting it (if it is not).

6.26 If an unsuccessful applicant chooses to pursue a remedy in the ordinary courts – in practice, a declarator of his rights – the party who would be affected by the rectification is the defender and the Keeper is not further involved.⁷⁰ If, however, the applicant chooses to challenge the Keeper's refusal to rectify by an appeal to the Lands Tribunal,⁷¹ the Keeper is unavoidably drawn into the litigation as well as, or even instead of, the affected party.⁷² It is important to be clear as to his role. He will wish to defend his decision, of course; but to do so is not necessarily to argue the merits of the case – to argue, positively, that the Register was accurate and not in need of rectification. The proper contradictor in this respect is the affected party and not the Keeper. Rather the Keeper need show no more than that, on the evidence produced to him, the alleged inaccuracy was not properly established. With the benefit of fuller information, and argument, the Lands Tribunal might come to a different conclusion on the merits.

6.27 We propose that:

- 17. (1) Applications for rectification should be notified by the Keeper to any person disclosed by the Register as being potentially affected.**
- (2) Notification should also take place where the Keeper intends to rectify the Register other than in response to an application.**
- (3) Both the applicant and any person to whom notification is made should be entitled to make representations to the Keeper in respect of the application, and both should be notified as to the Keeper's decision.**

⁶⁸ Land Registration Act 2002 s 73(1).

⁶⁹ Land Registration Act 2002 s 73(6), (7). No referral is necessary where the Registrar is satisfied that the objection to the application is groundless. For the office of Adjudicator, see 2002 Act part 11, sch 9 and the Adjudicator to Her Majesty's Land Registry (Practice and Procedure) Rules 2003, SI 2003/2171.

⁷⁰ Except to rectify the Register if so ordered by the court.

⁷¹ 1979 Act s 25(1).

⁷² Although the appeal is against the decision of the Keeper, the affected party will receive a copy of the application and have the opportunity to become a party to the proceedings. See Lands Tribunal for Scotland Rules 2003, SSI 2003/452, rr 13, 21.

Notification

6.28 Rule 21 of the Land Registration (Scotland) Rules 1980 is in the following terms:

"(1) The Keeper shall notify his decision on any matter affecting registration to any person whose interest appears from the register to be affected by that decision.

(2) Notification shall not be made under the foregoing paragraph where notification would have the effect of informing the person entitled to the interest in land of the existence of a recorded deed or a registration upon which possession adverse to his interest may be founded in terms of section 1 of the Prescription and Limitation (Scotland) Act 1973.

(3) A notification under paragraph (1) shall be made in such form as the Keeper shall think fit and shall be sufficiently made if sent by post to the person's last address shown on the register."

6.29 Each part of this rule causes difficulty. Paragraph (1) is unsatisfactory for a number of reasons. The meaning of "any matter affecting registration" is unclear. Is *every* decision, great or small, which is made as part of the registration process to be the subject of notification as and when the decision is made? Is the notification requirement triggered only by decisions made in response to an application for registration or does it apply to other decisions which affect the state of the Register? Does it, for example, apply to a decision to rectify the Register, or to enter or amend an overriding interest? Again there is uncertainty as to the persons to whom notification is to be made. The person most affected by a decision to register is the grantor of the deed on which the application is based; but such a person already knows about, and has consented to, the change in the Register. Notification would be pointless and is not done in practice. Finally, it is not clear why notification should be made to a person whose interest appears from the Land Register but not one whose interest appears from the Register of Sasines.

6.30 The person most in need of notification is the potential victim of an *a non domino* conveyance, but that person is expressly excluded by paragraph (2) in order to facilitate the running of positive prescription.⁷³ The point is perhaps a theoretical one because in practice the Keeper usually refuses to register an *a non domino* deed in the face of a competing title, and in the second discussion paper we proposed that this practice should be elevated into a formal rule.⁷⁴ In that case paragraph (2) would become unnecessary.

6.31 Even paragraph (3) is not free from difficulty. The reference to sending by post ignores both private delivery services and also electronic communication. Nor is it helpful, at least for residential properties, to propose notification to "the person's last address shown on the register" since that address, taken invariably from the narrative clause of the disposition, is likely to be the previous address of the proprietor.

6.32 Above all, however, it is the policy of rule 21 which requires review. When the Register comes to be altered, it may be accepted that notification is sometimes necessary. But the need for notification will depend on which method of alteration – registration, rectification, noting, or making up and maintaining a title sheet – is used.

⁷³ But there is an exception for the foreshore where notification to the Crown Estate Commissioners is required. See 1979 Act s 14.

⁷⁴ Second Discussion Paper paras 4.47-4.57.

6.33 Where the alteration simply gives effect to an application for registration – the standard case and the only one indisputably covered by rule 21 – it is difficult to see why notification is needed at all. The granter of the deed has already consented to the grant. The grantee has made the application for registration and will be informed of its outcome as a matter of course. Other parties with real rights in the same land are either unaffected (as, for example, a servitude holder in relation to a disposition) or must be taken to know that, under the ordinary law of property, their right is vulnerable to later rights granted by the owner (as, for example, a heritable creditor in relation to a lease or servitude), and that these later rights are visible from a search of the Register. Their remedy, if there is one, lies under the ordinary law: a heritable creditor, for example, can obtain reduction of a lease.⁷⁵ Nothing in this regard was altered by the introduction of registration of title.

6.34 Other cases are, or may be, different. We proposed earlier that a potential rectification should always be notified to the affected parties,⁷⁶ and that an application for noting should be notified if made by the holder of the overriding interest.⁷⁷ Conversely, it seems both unnecessary and impractical to impose an obligation to notify in respect of the routine minor alterations which the Keeper may make as part of his duty to make up and maintain title sheets – for example, alterations resulting from the reconfiguration of the map base.

6.35 In our view, therefore, notification is needed only in respect of rectification and the noting of overriding interests. In line with recent legislation on conveyancing,⁷⁸ it should be possible to notify by post, by delivery (including by private delivery services) or by electronic means. There seems no reason to lay down rules as to the best address and the Keeper will no doubt wish to use his discretion. Obviously, the duty to notify falls away if no address can be found.⁷⁹ That, however, would be unusual. By definition, the persons who are to be notified will themselves be the holders of a right which is registered in the Land Register. Typically that right will be ownership itself, with the result that notification can take place at the address of the property (if it has one). In other cases, the deed which induced registration will contain an address which often remain current.

6.36 Our proposal is that:

- 18. (1) Except in the cases mentioned in proposals 15(5) (noting of overriding interests) and 17 (rectification), the Keeper should not be required to give notice of alterations made to the Register.**
- (2) Where notice is to be given it should –**
 - (a) be sent by post;**
 - (b) delivered; or**

⁷⁵ For such a lease breaches standard condition 6 of the standard conditions set out in the Conveyancing and Feudal Reform (Scotland) Act 1970 sch 3. See *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74. The result may possibly be the same at common law.

⁷⁶ Para 6.23.

⁷⁷ Para 5.38.

⁷⁸ Title Conditions (Scotland) Act 2003 s 124(2); Tenements (Scotland) Act 2004 s 30(2).

⁷⁹ In England and Wales the Land Registration Rules 2003 r 198 imposes an obligation on the registered proprietor to give the registrar an address for service. A difficulty is that the address may become out of date.

(c) transmitted by electronic means.

(3) If no address can be found, the duty to notify should lapse.

6.37 For completeness it should be added that notification is required by the 1979 Act in two other cases. Section 14(1) requires the Keeper to notify the Crown Estate Commissioners of certain applications for registration in respect of the foreshore. And by an amendment made to the 1979 Act by the Land Reform (Scotland) Act 2003,⁸⁰ the Keeper must notify Scottish Ministers if he rejects an application on the ground that it is subject, or potentially subject, to a registered community interest in land.

Other matters

6.38 No further changes seem necessary to accommodate the ECHR. Nor, so far as we are aware, are there other aspects of the decision-making process which are in need of legislative reform. We would, however, welcome the views of consultees.

⁸⁰ 1979 Act s 4(4), inserted by the Land Reform (Scotland) Act 2003 s 66.

Part 7 Caveats and priority notices

INTRODUCTION

7.1 The 1979 Act has at least one prominent omission. In all other systems of registration of title which we have examined provision is made for a device which is often described as a "caveat" (or a "caution" or "restriction"). A caveat is a notice which can be put on the Register by the registrar, or by the owner, or by certain categories of third party. Its potential uses are multifarious and vary from country to country. Among other things it can confer priority, prevent rights from being extinguished, give information, provide a means of obtaining information, and prevent someone from dealing with the land. As the Henry Report makes clear, however, the omission of caveats from the Scottish scheme was deliberate:¹

"We considered that part of the English system of registration of title which provides for the entry on the Register of notices, cautions, restrictions and inhibitions² which are used to protect a variety of interests of persons other than the registered proprietor. These interests include the rights of creditors, beneficiaries, purchasers under a contract of sale and generally persons claiming the right to restrict or prohibit the registered proprietor from dealing with the property. Although there may be advantages in having notices of this kind entered on the Register as, for example, where a purchaser paying the price by instalments wishes to protect his interest until he is given a title, the complications of introducing such a system into the land law of Scotland are such, in our view, as to outweigh any advantage."³

Earlier, the Reid Committee had reached a similar view.⁴ In both cases the working assumption seems to have been that caveats were based on peculiarities of English law which have no counterpart in the law of Scotland.⁵ Yet, as mentioned earlier, caveats are a standard feature of systems of registration of title worldwide, including systems where, like Scotland, the underlying property law is based on civil law and not on common law. In this part of the discussion paper we consider the question of whether caveats might yet have a useful role to play under the Scottish system of registration of title.⁶

¹ Henry Report part I para 46 note 1.

² Now, under the Land Registration Act 2002, reformulated as cautions, notices and restrictions.

³ Four reasons are then given for this conclusion. In summary these are (i) inhibitions already cover some of the ground (ii) absence of demand or justification (iii) personal rights should not be protected in a Register which deals with real rights (iv) fear of abuse.

⁴ Reid Report para 120.

⁵ Little comparative research was carried on in the preparation of the two Reports, and the principal model relied on was the (English) Land Registration Act 1925. See First Discussion Paper para 1.22 note 54.

⁶ In fact one, rather minor, instance of a caveat may shortly be on the statute book. Section 80 of the Bankruptcy and Diligence etc (Scotland) Bill allows a purchaser under missives to register a caveat in the Land Register (or Register of Sasines). This entitles him to be informed if a creditor under a land attachment applies to the sheriff for a warrant of sale.

CAVEATS IN COMMON LAW COUNTRIES

Introduction

7.2 In considering the experience of other countries, it is convenient to make a distinction between those countries with a system of property law based on common law and those with a system based on civil law. To the former category belong, not only England and Wales, but also the numerous jurisdictions which use a version of the Torrens system.

7.3 It is not necessary to give a detailed account of the different uses of caveats in the common law world,⁷ but the most important, at least, must be mentioned. Caveats are used as a means of preserving rights which would otherwise be destroyed by a later registered disposition of an interest in land. More particularly, they can be used to preserve the priority of rights which, in a civil law system, would be categorised as (personal) contractual rights for the acquisition of real rights. For present purposes, therefore, it is convenient to say that caveats can be used both for preservation and also for priority, although the second is more properly regarded as a subcategory of the first. Each usage may now be considered in turn.

Preservation

7.4 Caveats for preservation are used for certain proprietary rights which fall short of ownership – for subordinate real rights, in Scottish parlance. At the risk of over-simplification, it can be said that rights of this kind in common law systems fall into three broad categories. First there are rights which must be constituted (or evidenced) by registration. Next there are rights which can be constituted (and evidenced) without registration but which are destroyed by a registered disposition of the land.⁸ Finally there are other rights, sometimes known as overriding interests, which can be constituted (and evidenced) without registration and which are *not* lost by transfer of the land.⁹ For present purposes no difficulty is presented by rights falling into the first and the last categories, for both survive transfer of the property. Rights of the second category, however, are problematic. The principles of registration of title require that an acquirer should take free of rights not included on the Register (other than overriding interests). Normally, therefore, a right falling within the second category would be lost following a registered transfer. Caveats provide a means of having the right acknowledged on the Register, and hence of preventing its loss.¹⁰

7.5 Naturally, the use of a caveat presupposes that the land itself is on the Register. Where it is not, it is possible, in England and Wales, to lodge a caution against first

⁷ For an historical account of caveats in Torrens systems, see D J Thom, "The Caveat in the Torrens Systems" (1924) 2 Can Bar Rev 327. We are grateful to Professor Peter Butt of the University of Sydney for advice and information on Torrens systems.

⁸ For England and Wales, see Land Registration Act 2002 s 29(1). In some jurisdictions the disposition must be for valuable consideration; in others (such as New South Wales) even a gratuitous disposition is sufficient once registered.

⁹ For England and Wales, see Land Registration Act 2002 s 28(1). Overriding interests – described as "unregistered interests which override registered dispositions" – are listed in sch 3. They include leases of 7 years or less, and certain categories of legal easements. For overriding interests in Scotland see part 5.

¹⁰ For Canada, for example, the position has been expressed as follows: "'Registration' giving rise to the issuance of a Torrens-guaranteed title is available only for a defined (albeit large) set of interests .. The primary means of providing protection for rights that are not amenable to registration in the strict sense is through the filing (or 'recording') of a caveat." See B Ziff, *Principles of Property Law* (3rd edn, 2000) p 433. In Canada this usage is carried forward to the proposed new law although the term "caveat" is not used: see part 4 of the Model Land Recording and Registration Act contained in Joint Land Titles Committee, *Renovating the Foundation*.

registration which ensures that the right-holder is notified when an application for first registration eventually comes to be made.¹¹

7.6 Even from this brief account it will be obvious that there is no place for preservation caveats in Scotland. In common law systems, the rights for which caveats may be used are both numerous and important. They may include, for example, equitable easements, freehold restrictive covenants, equitable mortgages and equitable charges.¹² In Scotland, as in other civil law systems, the structure of the law is different. By and large, rights are either real or they are personal. Personal rights do not affect the land at all; real rights affect the land whether registered or not. There is no intermediate category of real (or proprietary) rights which affect the current owner but do not survive transfer for consideration. In common law countries such intermediate rights are often the product of equity. Their equivalents in Scotland would be classified either as full real rights (as with servitudes (easements) and real burdens (restrictive covenants)) or as personal rights (as with the right of a purchaser under a contract of sale). A caveat would be unnecessary in the first case and out of place in the second.¹³

Priority

7.7 A second use of caveats is to preserve priority in respect of contractual rights to real rights (although no common lawyer would describe it in that way). In common law systems the usage turns on the difference between legal rights and equitable rights. A contract of sale (to take the most important example) confers on the buyer a right of equitable ownership, but legal ownership must await the registration of the seller's conveyance. As soon as equitable ownership is acquired – as soon, in other words, as the contract is concluded – the buyer is safe from the supervening insolvency of the seller; but he is not safe from a rival title granted by the seller, who remains the legal owner. Once a caveat is entered on the Register the buyer ceases to be at risk from subsequent grants by the seller.¹⁴ Unlike caveats for preservation, it is not difficult to see how caveats for priority might be of use in Scotland, and we return to that subject below.¹⁵

CAVEATS IN CIVIL LAW COUNTRIES

Introduction

7.8 In civil law countries caveats are used, not to protect existing real rights (which have no need of protection), but in anticipation of the acquisition of new rights. German law may

¹¹ Land Registration Act 2002 ss 15, 16. In addition to the normal caveat for preservation (known as a "notice": see 2002 Act ss 32-39), the 2002 Act ss 40-47 also makes provision for a "restriction" which, in certain circumstances, can prevent the registration of a disposition of a registered estate or charge.

¹² P Butt, *Land Law* (4th edn, 2001) para 2025 (Australia); K Gray and S Gray, *Elements of Land Law* (4th edn, 2005) para 12.89 (England and Wales).

¹³ One of the reasons given for rejecting caveats in the Henry Report was that the Land Register "is a Register of heritable rights, whereas the interests protected by these notices are in the nature of personal rights". See Henry Report part I para 46 note 1.

¹⁴ See eg Real Property Act 1900 s 74F(1) (New South Wales); Land Registration Act 2002 ss 29(1),(2)(a)(i) and 32(1) (England and Wales). In England and Wales, however, protection is achieved more easily by the 30-day priority period which is conferred by obtaining an official search. See Land Registration Act 2002 s 72 and Land Registration Rules 2003, SI 2003/1417, rr 147-154.

¹⁵ Paras 7.12 ff.

be taken as a typical example, both as a leading system in its own right and also because our proposed new scheme is, in some important respects, modelled on the German system.¹⁶ In Germany, caveats are used in respect of both rectification and registration.

Rectification

7.9 In German law – as under our proposals for Scotland¹⁷ – there is an unrestricted right to rectify the Register in the event that it does not reflect the true legal position.¹⁸ So if the Register names A as owner when the owner is really B, B can procure the substitution of his name for that of A. In practice, however, rectification cannot usually be granted without inquiry or even litigation; if in the meantime the land is transferred to a *bona fide* acquirer, the acquirer receives a good title with the result that the Register is no longer inaccurate and the chance to rectify is lost.¹⁹ The result in Scotland would be the same under our proposals (and perhaps even under the present law), for the effect of the integrity principle is to confer a good title on a *bona fide* acquirer.²⁰ Two devices are available under German law to protect the position of the person seeking rectification (B in the example). A type of caveat, known as a *Widerspruch*, can be put on the Register,²¹ and if the dispute matures into litigation it is possible to register a *Rechtshängigkeitsvermerk* which gives notice of the fact of litigation.²² Either prevents the acquirer from being in good faith and hence from receiving a good title.²³

7.10 As it happens, both devices have close equivalents in Scottish law and practice. Where an application is made for rectification, it is noted by the Keeper on the application record and so will (or ought to) be discovered by a potential acquirer.²⁴ The integrity principle would not then operate in the acquirer's favour.²⁵ Usually, publicity will be achieved earlier than under a *Widerspruch*: a *Widerspruch* requires either the consent of the registered owner or the authority of the court before it can be registered²⁶ whereas an application for rectification is made merely by completion of a short form.²⁷ The equivalent of the *Rechtshängigkeitsvermerk* is the notice of litigiousity, available in respect of actions of reduction of deeds affecting land and in certain other cases.²⁸ Registration is in the Personal Register and not in the Land Register,²⁹ and the effect is that the deed is potentially voidable.³⁰

¹⁶ Eg First Discussion Paper paras 4.44-4.45 and 5.3.

¹⁷ Second Discussion Paper paras 6.17-6.23.

¹⁸ § 894 BGB. Rectification of the Land Register is *Berichtigung des Grundbuchs*.

¹⁹ § 892 BGB.

²⁰ Second Discussion Paper paras 5.21-5.31.

²¹ § 899 BGB. For brief discussion see E J Cohn, *Manual of German Law* (2nd edn, 1968) vol 1 paras 409-10; M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) pp 252-4.

²² M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) pp 256-7.

²³ For the *Widerspruch* this is made explicit by § 892 BGB.

²⁴ For the application record, see Second Discussion Paper paras 4.7 and 4.8.

²⁵ For the meaning of good faith under our proposals, see First Discussion Paper paras 7.11 and 7.12. It would avoid possible argument on this point if the noting of an application for rectification was stated in the legislation as excluding the integrity principle. As already mentioned, that is the method adopted by § 892 BGB.

²⁶ § 885(1) BGB.

²⁷ 1980 Rules sch A form 9.

²⁸ Titles to Land Consolidation (Scotland) Act 1868 s 159; Conveyancing (Scotland) Act 1924 s 44.

²⁹ But it is proposed that in future notices of litigiousity in respect of reductions of deeds granted in breach of an inhibition should also be registered in the Land Register (or Register of Sasines): see Bankruptcy and Diligence etc (Scotland) Bill s 149 (inserting a new s 159A into the Title to Lands Consolidation (Scotland) Act 1868).

³⁰ D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004) para 32.22.

Registration

7.11 A caveat, known as a *Vormerkung*, is also available in respect of registration.³¹ This is a priority caveat, broadly analogous to the priority caveat in use in common law systems and discussed above.³² The basis of the *Vormerkung* is a contract, or other entitlement, to acquire a real right,³³ and its registration (which normally requires the consent of the future grantor of the deed³⁴) determines the priority of the real right which is to follow.³⁵ Even without the real right, therefore, the acquirer is protected against the grantor's insolvency or a rival grant. The *Vormerkung* is used standardly in the transfer of land in Germany. There is no Scottish equivalent. Whether there ought to be is the subject of the next section.

PRIORITY NOTICES IN SCOTLAND: FOR AND AGAINST

Introduction

7.12 As has been seen, priority notices (or caveats) are a standard feature of systems of registration of title, both in the common law and in the civil law worlds.³⁶ They are found even in systems of registration of deeds.³⁷ Their virtual absence in Scotland cannot be explained by an absence of the dangers against which they are designed to protect. On the contrary, a long series of cases, of which *Rodger (Builders) Ltd v Fawdry*³⁸ is merely the best-known, bears witness to the danger of double grants, while the high-profile decisions in *Sharp v Thomson*³⁹ and *Burnett's Tr v Grainger*⁴⁰ suggest that an acquirer of land in Scotland is more, and not less, vulnerable to the insolvency of the grantor than in most other countries. In this section we put forward a possible scheme for the introduction of priority notices to Scotland, and attempt to evaluate its merits.

Four simplifications

7.13 Schemes for priority notices are often complex. In addition to basic rules as to form, eligibility, and registration they may also make provision on matters such as qualifying entitlements to the real right, the effect of the invalidity of that entitlement or of the real right itself, the method by which a notice can be challenged or removed, remedies for abuse of notices, and so on. We make here four proposals which would simplify a scheme for priority notices without impairing its overall effectiveness.

³¹ F Baur, J F Baur & R Stürner, *Sachenrecht* (17th edn, 1999) pp 217-35. For brief accounts in English, see E J Cohn, *Manual of German Law* (2nd edn, 1968) vol 1 paras 411-13; M Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (2003) pp 254-6.

³² Para 7.7.

³³ § 883(1) BGB.

³⁴ § 885 BGB.

³⁵ §§ 883(2), 888 BGB.

³⁶ Paras 7.7 and 7.11.

³⁷ See eg A M Garro, 'Recordation of Interests in Land' in *International Encyclopedia of Comparative Law* vol 6 ch 8 (2004) para 73.

³⁸ 1950 SC 483. See further Reid, *Property* paras 695 ff.

³⁹ 1997 SC (HL) 66.

⁴⁰ 2004 SC (HL) 19.

7.14 First, the notice would require to be signed by the prospective grantor of the (future) real right as well as by the grantee. Only consensual notices would thus be possible. In a sale the notice would be signed by the seller as well as by the buyer.

7.15 Secondly, the notice would be time-limited.⁴¹ If the deed creating the real right, and to which the notice refers, were not registered within a prescribed period – such as 4 weeks – the notice would automatically expire. A notice which deals with transitional matters need not be long-lived. Taken together, the first two proposals remove the need for provisions as to challenge and removal of notices.

7.16 Thirdly, although a prospective grantor is unlikely to sign a notice unless a contract has been concluded or is close to conclusion, a prior entitlement to the real right would not be a formal requirement. That means that where missives were slow, it would be possible to secure the acquirer's priority even before the contract was concluded. Assuming the transaction then went ahead, and the disposition or other deed was registered, the notice would regulate priority; but if, unusually, the transaction fell through, the notice would fall at the end of the prescribed period. In other countries priority notices tend to be conceptualised as securing an existing contractual right.⁴² Under the scheme suggested for Scotland they would give priority to a future real right.

7.17 Finally, a notice would not prevent the registration of rival deeds, as in some other countries⁴³ (though that might sometimes be the result in practice).⁴⁴ Instead its effect would be to ascribe to the acquirer's deed the date of registration achieved earlier by the preliminary notice.⁴⁵ So if a notice in respect of a disposition were registered on 1 June and the disposition itself on 23 June, the disposition would be deemed to have been registered on 1 June. Not only does this avoid the conflicts which might arise if other registrations were to be blocked, but it makes use of an idea which is already part of the system. For even as matters stand, the registration of a deed is backdated to the date on which it was presented for registration⁴⁶ – a rule whose theoretical basis was explored, and approved, in our second discussion paper.⁴⁷ A priority notice would merely push the date further back.

Priority notices and floating charges

7.18 Priority notices are not unknown to Scots law. It has long been the case that an inhibition is backdated to the date of registration of a preliminary notice provided that the inhibition is registered within 21 days of the notice.⁴⁸ More significantly, in the Bankruptcy and Diligence etc (Scotland) Bill, currently before the Scottish Parliament, provision is made for a priority notice for floating charges.⁴⁹ This implements a recommendation made in our report on *Registration of Rights in Security by Companies*.⁵⁰ The idea is straightforward.

⁴¹ As was once the case with caveats in Torrens systems: see I L Head, "The Torrens System in Alberta: a Dream in Operation" (1957) 35 Can Bar Rev 1, 28-9.

⁴² For example § 883 BGB begins: "Zur Sicherung des Anspruchs auf Einräumung oder Aufhebung eines Rechtes an einem Grundstück .."

⁴³ See eg Real Property Act 1900 s 74F(1) (New South Wales).

⁴⁴ Para 7.24.

⁴⁵ German law also employs a form of backdating: see § 883(3) BGB.

⁴⁶ 1979 Act s 4(3).

⁴⁷ Second Discussion Paper paras 4.1-4.5.

⁴⁸ Titles to Land Consolidation (Scotland) Act 1868 s 155.

⁴⁹ Bankruptcy and Diligence etc (Scotland) Bill s 33.

⁵⁰ Scottish Law Commission, Report on *Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004) paras 2.12-2.15.

Where a floating charge is to be granted, the debtor and creditor can register a joint notice, known as an "advance notice".⁵¹ Assuming the floating charge is then registered within 21 days, its registration (and creation) is backdated to the date on which the notice was registered. Conversely, if the floating charge is not registered within 21 days, or indeed not registered at all, the notice falls.

Priority notices: a possible scheme

7.19 The provisions for floating charges provide an apt model for priority notices in relation to deeds in the Land Register. A possible scheme would be the following. Priority notices would be available in respect of any deed for the creation, transfer, variation or extinction of a real right in land, including dispositions, standard securities and their variation or discharge, and long leases. A concluded contract to grant such a deed would not be a requirement. The notice would contain brief details of (i) the proposed deed (ii) the parties to it and (iii) the land⁵² affected. It would be signed by or on behalf of both parties and registered by either. In practice it might be expected that solicitors would sign on behalf of their clients (with or without written instructions), and that the notice – like the deed to follow – would be presented for registration by the grantee. A future version of ARTL might be able to accommodate a notice in electronic form.⁵³ Normally, of course, registration would be in the Land Register; but if notices are to be available for deeds inducing first registration (which seems desirable), it would be necessary in such cases to allow registration elsewhere, for example in the Register of Sasines, on the index map maintained for the Land Register, or in a special register of priority notices. By way of example, cautions against first registration in England and Wales are registered both in the index map and in a special cautions register.⁵⁴

7.20 Following registration, a priority notice would have a limited duration fixed by statute (such as 4 weeks).⁵⁵ Registration of the deed within this period would attract the earlier registration date obtained by the priority notice, and, as with the existing system of backdating,⁵⁶ the deed would carry the earlier date for all purposes. So if a disposition from A to B was presented for registration on 1 April but followed a priority notice which was registered on 10 March, ownership would pass from A to B on 10 March. Typically this would be before settlement and payment of the price; but if B failed to pay, A would no doubt withhold delivery of the disposition and so prevent the utilisation of the notice.

Some arguments in favour

7.21 **Victory in a competition of title.** A number of advantages might flow from a system of priority notices. One is the opportunity for victory in the race to the Register which arises when parties are in competition for rights which derive from the same source; for if one party

⁵¹ Registration is in a new register, known as the Register of Floating Charges: see Bankruptcy and Diligence etc (Scotland) Bill s 31.

⁵² Or, in the case of a deed affecting a real right in land (as opposed to the land itself) details of the real right in land.

⁵³ Alternatively, ARTL transactions might be excluded from the system of priority notices on the basis that the risk from competition of title is acceptably small: see paras 7.26 and 7.27.

⁵⁴ Land Registration Act 2002 ss 19(1), 68(1)(c); Land Registration Rules 2003, SI 2003/1417, rr 40, 41. And see also C Harpum and J Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002* (2004) paras 5.2 and 5.3.

⁵⁵ For a discussion of the appropriate period, see para 7.35.

⁵⁶ 1979 Act s 4(3). See Second Discussion Paper paras 4.4 and 4.5.

registers a priority notice and the other does not, a later deed in favour of the first party may defeat a deed in favour of the second which was registered first but which did not benefit from the backdating afforded by a priority notice. Importantly, this would favour voluntary acquirers over creditors, including trustees in sequestration and liquidators acting on behalf of all the creditors, because priority notices would not be available to creditors. But it would make less difference in competitions among voluntary acquirers, where each has the opportunity to register a notice. Indeed if notices became standard practice, the only result would be to replace a race to register deeds with a race to register notices.⁵⁷

7.22 Certainty as to the absence of competition. More important than victory is certainty. The current law can give no assurance as to competition. It is true that, before paying the price, an acquirer will obtain a search of the registers (including the application record)⁵⁸ so as to uncover any insolvency process or competing grant. But information as to insolvency can be slow to reach the register, and searches are, by their nature, out of date.⁵⁹ Even if this were not so there would be the risk of *future* competition. There is in practice a time gap, of two or three weeks, between payment of the price and registration of the disposition or other deed. One reason is the delays attendant in paying stamp duty land tax. Until such time as the acquirer can register, he is vulnerable to the insolvency of the granter, to diligence by the granter's creditors, and to new deeds by the granter himself.

7.23 These difficulties are removed by a system of priority notices. An acquirer who registered a notice in advance could tell, from the search obtained before payment, whether there was a risk of competition. The search would show the priority notice. If no rival deeds or diligences were disclosed, none which emerged later could harm the acquirer's position. Nor would the acquirer be affected by a deed or diligence disclosed by the search as having been registered *after* the priority notice (unless itself supported by an earlier priority notice). In either case he could make payment secure in the knowledge that his right could not be defeated. Only if the deed, diligence or priority notice preceded the acquirer's own notice would there be cause for concern, and in that case the acquirer would be able to refuse payment of the price.

7.24 It is worth pausing to consider the effect of a priority notice on a rival, but later, deed. The result would depend on whether the later deed was compatible with the deed to which the notice related. Some examples illustrate the range of possibilities.⁶⁰

Example 1. A is to sell land to B. B registers a priority notice on 1 April. A, fraudulently, disposes the same land to C. C presents his disposition for registration on 20 April (without a prior notice). B presents his disposition for registration on 23 April.

When B's disposition comes to be registered, the registration is backdated to 1 April. As ownership thus passed from A to B on 1 April, the disposition in favour of C is now shown to have been a *non domino* on the day it was presented for registration (20 April). Hence it is incompatible with B's disposition and, in accordance with the proposals on a

⁵⁷ In a competition between voluntary acquirers (only), the ultimate result can be affected by the rule against offside goals, in terms of which a successful acquirer can lose a right which was acquired in the knowledge that the granter was already committed to another party. See further Reid, *Property* paras 695 ff.

⁵⁸ By "search" we mean to include form 10, 11, 12 and 13 reports obtained for the Land Register.

⁵⁹ Scottish Law Commission, Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001) part 3.

⁶⁰ In these examples we assume that the offside goal rule does not apply.

non domino deeds made in our second discussion paper,⁶¹ would fall to be rejected by the Keeper.

Example 2. The same except that the deed in favour of C is a standard security. As before, C's deed is ineffective as a *non domino*.

Example 3. A is to grant a standard security to B Bank. B Bank registers a priority notice on 1 April. A grants a second standard security to C Bank which is presented for registration on 20 April (without a priority notice). B Bank presents its standard security for registration on 23 April.

The fact that a security is granted to B Bank does not prevent the granting of a security to C Bank. Both securities are valid and both will be accepted for registration; but, by virtue of the priority notice, the security in favour of B Bank will rank before the security in favour of C Bank.

7.25 Reduced exposure on letters of obligation. A system of priority notices would reduce the exposure of solicitors in respect of letters of obligation without, however, removing the need for such letters entirely. That would be useful in itself and is likely to be welcome to the legal profession. Indeed, if certain other events came to pass – most notably the implementation of the proposals of this Commission in respect of the decision in *Sharp v Thomson*⁶² – it would be possible to reconsider the role of letters of obligation and perhaps even to propose their elimination, at least from certain types of transaction.

7.26 A letter of obligation is a personal undertaking by the granter's solicitor, underwritten by professional indemnity insurance, which is given at the time of settlement of the transaction. It undertakes to clear the records of any deed, decree or diligence which is registered in the Land Register or Register of Inhibitions and Adjudications during a period beginning with the date of the most recent search⁶³ (in practice, shortly before settlement) and ending 21 days after settlement.⁶⁴ During this period the grantee is vulnerable both to other deeds by the granter which are registered in the Land Register (such as dispositions and standard securities) and also to decrees and diligences which are entered in the Register of Inhibitions and Adjudications (such as sequestrations and inhibitions). A priority notice would eliminate the risk from the former, as already seen,⁶⁵ but the risk from the latter would remain. So for example an inhibition against the granter before settlement might or might not affect the deed; but whether it did would depend, not on whether a priority notice had been registered, but on whether missives (or some other contract) had been concluded before the inhibition or after. Only if missives were concluded first would the deed be free of the inhibition.⁶⁶ Or again sequestration removes the capacity of the debtor to grant deeds, so

⁶¹ Second Discussion Paper paras 4.47-4.57.

⁶² 1997 SC (HL) 66. See Scottish Law Commission, Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001).

⁶³ By "search" we mean form 10, 11, 12 or 13 reports.

⁶⁴ For standard styles, see *Registration of Title Practice Book* paras 8.14 and 8.43.

⁶⁵ Paras 7.21 and 7.24.

⁶⁶ Gretton, *Inhibition and Adjudication* p 98. It follows that an acquirer who concludes missives a week or more before settlement (overwhelmingly the normal case) has nothing to fear from an inhibition which was not disclosed in the search obtained at settlement; for such an inhibition would, inevitably, post-date the missives. In other words, letters of obligation are unnecessary in respect of inhibitions provided that missives have been concluded in good time.

that a disposition would be void if the granter was sequestrated before it was executed and delivered.⁶⁷ In the face of a void disposition a priority notice would be of no avail.

7.27 Usually, letters of obligation cover certain other matters, such as delivery of the discharge of a standard security, or the continued correctness of the answers to the questions in the application form for registration. Naturally these would be unaffected by the introduction of priority notices.

7.28 **Consistency.** Assuming that the provisions in the Bankruptcy and Diligence etc (Scotland) Bill command the support of the Scottish Parliament, a system of priority notices will soon exist for floating charges. In that case consistency suggests that a priority available to a creditor taking a floating charge should likewise be available to a creditor taking a standard security, for otherwise the latter will be disadvantaged in a competition with the former.⁶⁸ And if priority notices were to be available for standard securities, it would be difficult to deny their use for other deeds which are registered in the Land Register.

Some arguments against

7.29 **Unnecessary.** But there are counter-arguments. One is that priority notices are made unnecessary by the system of automated registration of title to land (ARTL) which is shortly to be available. When carried out under ARTL, a transaction will be virtually instantaneous, with the acquirer receiving his real right at almost the same time as payment. As a result, the risk from competition of title will all but disappear. If a person craves safety, therefore, he can, and perhaps should, use ARTL. On this view priority notices are an idea from a pre-electronic age.

7.30 This argument should not, however, be pressed too hard. For the foreseeable future ARTL will be available only for the most straightforward transactions involving dealings with the whole of the land in a particular title sheet. It will not be available for first registrations, or for dealings affecting part only of the land, or for dealings affecting the whole which are of a more complex nature (for example, involving the creation of real burdens). Further, even under ARTL there are gaps of execution and information which, however small, cannot exclude the possibility of a competing title.

7.31 **Disproportionate.** A stronger argument is to say that priority notices are a disproportionate response to a low level of risk. For, on the one hand, a system of notices will complicate conveyancing, add to costs, and (if widely used) greatly increase the workload of the Keeper while, on the other hand, the dangers from competition of title are perhaps not very great. Such dangers have two possible sources – insolvency (including heritable diligence) and double grants – each of which merits closer examination here.

7.32 Insolvency processes can take a number of forms. Any risk to an acquirer from the granter's sequestration would be removed by the implementation of proposals made in our

⁶⁷ Bankruptcy (Scotland) Act 1985 s 32(8). For a proposal to eliminate this difficulty, see Scottish Law Commission, Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001) paras 4.5-4.7 and 4.10.

⁶⁸ Under the Bankruptcy and Diligence etc (Scotland) Bill, competitions between floating charges and standard securities are resolved according to the date of registration – including, in the case of a floating charge (only), the date of registration of the priority notice. See ss 32, 33, and 34(1)-(3).

discussion paper on *Sharp v Thomson*.⁶⁹ The danger of post-delivery receivership was eliminated by the decision in *Sharp v Thomson*⁷⁰ itself. Neither liquidation nor administration poses much of a risk to an acquirer.⁷¹ And, finally, and following the recommendations of this Commission,⁷² the diligence of adjudication – which in theory might catch an acquirer unaware – is replaced in the Bankruptcy and Diligence etc (Scotland) Bill by the new diligence of land attachment, which protects acquirers who register with reasonable dispatch.⁷³ Even without other legislative action, however, we were not inclined, in our discussion paper on *Sharp v Thomson*, to support the introduction of priority notices.⁷⁴

7.33 Double grants are a different matter. Until such time as his title is on the Register an acquirer remains at risk from a rival deed from the same granter. From time to time purchasers discover, too late, that the land is burdened by an unexpected and unannounced security, or even that it has been sold to someone else altogether. Yet, while statute is inactive on this topic, a degree of protection is provided by the common law. For if the rival acquirer took in the knowledge of the first grant, his title can be set aside by reduction.⁷⁵ Alternatively, there is a remedy in damages against the granter for breach of warrandice.⁷⁶ Of course these remedies are imperfect in the same way that all remedies are imperfect. They may involve the worry, expense and delay of litigation. They may be unsuccessful. The granter may have disappeared or be insolvent. Above all, they offer, at best, cure where a system of priority notices offers prevention. Priority notices are plainly better. But the question is whether the relatively low incidence of risk justifies the complexities of a system of notices, or whether the few acquirers who turn out to be unlucky should be left to try their fortunes in the courts.

7.34 **Premature real right.** The attribution to the deed of the date of registration achieved by the notice is not without its difficulties. Under the present law, registration is backdated to the date on which the application for registration is received by the Keeper.⁷⁷ To push it back still further is to provide for the passing of ownership⁷⁸ before settlement of the transaction, before the date of entry, and even, in some cases, before conclusion of missives. A secure right is achieved only at the cost of its premature acquisition. As owner before settlement,⁷⁹ the grantee would be immediately entitled to the fruits of ownership (eg rent) but immediately subject to its liabilities (eg maintenance costs). His right could be attached by heritable

⁶⁹ Scottish Law Commission, Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001) paras 4.4-4.10.

⁷⁰ 1997 SC (HL) 66. This aspect of *Sharp* is unaffected by the later decision in *Burnett's Tr v Grainger* 2004 SC (HL) 19, which was concerned with sequestration.

⁷¹ Discussion Paper on *Sharp v Thomson* paras 4.12-4.28.

⁷² Scottish Law Commission, Report on *Diligence* (Scot Law Com No 183, 2001) parts 2 and 3.

⁷³ For a detailed explanation, see Discussion Paper on *Sharp v Thomson* paras 4.46 and 4.47.

⁷⁴ Discussion Paper on *Sharp v Thomson* para 3.18: the introduction of priority notices "would involve more trouble and expense than would seem justified by the risk sought to be guarded against".

⁷⁵ This is the so-called rule against offside goals, as to which see Reid, *Property* paras 695 ff.

⁷⁶ Contrary to the usual rule for warrandice, eviction of the acquirer is not a pre-requisite of a claim. On the contrary, a claim arises from the mere fact of the double grant: see *Burnet v Johnston* (1666) Mor 16586; *Smith v Ross* (1672) Mor 16596; Bankton II.3.124; Erskine II.3.30; Bell, *Principles* s 895.

⁷⁷ 1979 Act s 4(3).

⁷⁸ Or the creation of another real right.

⁷⁹ Although only shown to be such by the later (and now backdated) registration of the disposition.

diligence. It is unlikely that these are the only unwanted consequences of what is an *ad hoc* and improvised arrangement.⁸⁰

Duration

7.35 How long should priority notices last? The longer the period the longer rights will be held prematurely,⁸¹ the more property will be sterilised in respect of future grants, and the greater the danger of speculative notices being put on the Register when parties are still in early and inconclusive negotiation. But the duration could not be shorter than the three weeks standardly allowed by letters of obligation for deeds to be registered;⁸² and since the main value of notices lies in having them registered sufficiently long before settlement as to show up on the last-minute search,⁸³ to this period of three weeks must be added at least another week. A further week, though not essential, would build in some flexibility so that, for example, a notice would not be rendered useless by a small and unexpected delay in settlement. In short, we think that four weeks would probably be a sufficient duration for priority notices, and in any event doubt whether the period should be longer than five weeks or six.

Evaluation

7.36 A system of priority notices would largely remove the risk to acquirers from competitions of title, including competitions arising out of the granter's insolvency. But the risk is itself relatively slight and is likely to trouble only a small number of acquirers. If notices came to be used as a matter of standard practice, almost all would turn out to have been unnecessary.

7.37 At this stage we have not reached even a provisional view as to the desirability of the introduction of priority notices and simply ask consultees:

19. (1) **Should a system of priority notices be introduced?**
- (2) **If so, do you agree that the system should contain the following elements –**
 - (a) **A priority notice could be used whenever there is to be granted a deed which creates, transfers, varies or discharges a real right in land.**
 - (b) **A prior contract to grant such a deed would not be necessary.**
 - (c) **A notice would be signed by or on behalf of both parties to the proposed deed and be registered in the Land Register by either.**

⁸⁰ No doubt priority could be achieved in other ways, eg by providing that no rival deed registered during the period between the notice and the disposition could be opposed to the disposition. Non-opposability would thus replace backdating. But any priority arrangement is likely to involve difficulties.

⁸¹ Para 7.34.

⁸² The period was increased from 14 days to 21 days on 1 November 2002: see (2002) 47 JLSS October/12.

⁸³ Para 7.23.

- (d) Following registration a notice would endure for a prescribed period.
 - (e) If the deed referred to in the notice was presented for registration within the prescribed period, its date of registration would be the date on which the notice was registered.
- (3) Should the prescribed period be –
- (a) 4 weeks;
 - (b) 5 weeks; or
 - (c) some other period?

Part 8 Personal registers

THE CURRENT LAW

Property registers and personal registers

8.1 The Land Register is a register of land and of the rights which affect land.¹ So too, in a weaker sense, is the Register of Sasines. These "property registers" – as they are often called – can be contrasted with another group of public registers where registration is by person and not by property. When conveyancers use the term "personal register" they mean the Register of Inhibitions and Adjudications, but other personal registers are also of significance in the transfer of land, most notably the Companies Register and the Register of Insolvencies. The Bankruptcy and Diligence etc (Scotland) Bill, currently before the Scottish Parliament, will, if enacted, create a new personal register, the Register of Floating Charges,² as well as re-naming the "Register of Inhibitions and Adjudications" the "Register of Inhibitions".³

8.2 Traditionally there was little in the way of overlap between the property and the personal registers. Each register had its own function, and each required to be consulted, as appropriate, in order to discover the information which it was its sole responsibility to record. In particular there was absent from the property register – the Register of Sasines – any information as to inhibitions, insolvency, liquidation, floating charges or other matters to which publicity was given in the personal registers. To a limited extent the position has now changed. Like the Register of Sasines, the Land Register says nothing of matters which can be found in the Companies Register⁴ or the Register of Insolvencies; but by section 6(1)(c) of the 1979 Act, the Keeper is bound to

"... make up and maintain a title sheet of an interest in land in the register by entering therein ... any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest".

Typically, an entry in the Register of Inhibitions and Adjudications records either an inhibition or a sequestration.⁵

Scope of section 6(1)(c)

8.3 The scope of section 6(1)(c) is uncertain. The Keeper is directed to enter on the Land Register only those entries in the Register of Inhibitions and Adjudications which are adverse to "the interest", and the words "the interest" seem to refer back to the expression "title sheet of an interest in land" which occurs at the beginning of the paragraph. If that is correct,

¹ 1979 Act s 1(1).

² Bankruptcy and Diligence etc (Scotland) Bill s 31. All references to this Bill are to the Bill as first introduced to Parliament on 21 November 2005.

³ Bankruptcy and Diligence etc (Scotland) Bill s 69.

⁴ With the limited exception of the small number of floating charges which have been noted as overriding interests.

⁵ Gretton, *Inhibition and Adjudication* pp 20-2. For other possibilities, see para 8.18.

section 6(1)(c) is restricted to entries affecting primary rights (ie ownership and long lease), because only primary rights have a title sheet of their own. That does not mean that the Keeper must ignore entries affecting secondary rights (such as a standard security), for section 6(1)(g) allows him to enter such other information on the Register as he thinks fit. But it would then be a matter of discretion and not of duty.

8.4 A much more important issue turns on the word "adverse". An entry is to be carried forward into the Land Register under section 6(1)(c) only where it is "adverse" to the interest in land. The meaning is unclear. Professor Gretton⁶ has complained of wording

"which is so loose, and so unconnected with the traditional language of Scots property law and conveyancing, that it is anyone's guess as to what it means. What looks like linguistic technicality ('adverse', 'interest') might suggest that the draftsman is appealing to age-old certainties. The contrary is the case: not age-old certainties but brand-new vaguenesses."⁷

8.5 Two main readings of section 6(1)(c) seem possible, one narrow and one wide. The narrow reading is that an entry is "adverse" to an interest in land only if it undermines the title of the person who is currently registered as its owner.⁸ The other, wider, reading is that an entry is "adverse" if it affects *any* owner, present or future, even if the title itself is not at present subject to challenge. The difference is best illustrated by examples.

Example 1. A owns land. A is inhibited. A disposes the land to B. B applies for registration and is duly registered as owner.

Example 2. A owns land. A disposes the land to B. B applies for registration and is duly registered as owner. Three years later B is inhibited.

In example 1, B's title can be reduced on account of the inhibition; in example 2, B's title is unassailable, although any voluntary deed granted by him could be reduced. On a narrow interpretation of section 6(1)(c), the inhibition is "adverse" in example 1 but (B's title being unassailable) not in example 2; but on a wide interpretation, the inhibition is "adverse" even in example 2 (because future owners are affected). The implications for registration practice are readily apparent. On the second view the Keeper must enter inhibitions and sequestrations as and when they arise, so that the Land Register is subject to continuous revision by reference to the Register of Inhibitions and Adjudications. On the first view, the Keeper's duty is much more modest. When an application is made for registration, he must enter any inhibition or sequestration which affects the ability of the *granter* (A in the examples) to make the grant. He is not concerned with inhibitions and sequestrations which affect only the *grantee* (B in the examples); and, most importantly, his role is confined to applications for registration, there being no requirement to make an entry under section 6(1)(c) on any other occasion.

⁶ Gretton, *Inhibition and Adjudication* p 40.

⁷ "Adverse to the interest" also appears in s 3(1)(a).

⁸ Or, in the case of a subordinate real right, the person currently registered as the holder of that right.

8.6 It is uncertain which view is correct. Professor Gretton argues cogently in favour of the first,⁹ but the second derives support from the only other provision in the Act to touch on the issue. By section 12(3)(k) there is no entitlement to indemnity in respect of a loss where

"the loss arises as a result of an error or omission in an office copy as to the effect of any subsisting adverse entry in the Register of Inhibitions and Adjudications affecting any person in respect of any registered interest in land, and that person's entitlement to that interest is neither disclosed in the register nor otherwise known to the Keeper".

The working assumption must be that, but for this provision, there *would* be liability for indemnity; and if indemnity would have been due,¹⁰ it can only be because an office copy (and hence the title sheet of which it is a copy) must contain any inhibitions or other entries which affect, not only the registered owner, but a person with an unregistered right (for example, a right as grantee of an unregistered disposition). Furthermore, the reference to an office copy (as opposed to a land certificate) implies that the unregistered right in question is one created *after* the registration of the current owner (for if it was created *before* registration, the omission would affect the land certificate itself). Indeed, commentaries suggest that the mischief at which the provision is directed is the requisition of an office copy by a stranger to the title who would not know of, and therefore disclose to the Keeper, the existence of unregistered rights.¹¹ On the narrow view of section 6(1)(c), an inhibition which affected such a future right would not require to be entered on the Land Register. Accordingly, section 12(3)(k) seems to presuppose the wide view. But while this line of argument has persuasive force, it is not conclusive, because an unregistered right can also pre-date the registration of the current owner and so require to be entered even on the narrow view of section 6(1)(c).¹²

8.7 The Keeper's actual practice goes beyond what would be required by the first view of section 6(1)(c) but falls well short of what would be required by the second. He enters inhibitions (and other matters) taken out against the registered owner and not merely (as the first view would suggest) those taken out against those from whom the owner derived title;¹³ but the entries are made intermittently and not continuously – in practice, only when the title sheet is being updated for some other reason, notably on registration, rectification, noting of an overriding interest, on being requested to supply an office copy, and when a land certificate is submitted for updating to correspond with the title sheet.¹⁴

Effect of making, or omitting to make, an entry

8.8 No legal effect attaches to an entry made under section 6(1)(c). Inhibitions and sequestrations are "entered" in the Land Register and not "registered". They exist already.

⁹ Gretton, *Inhibition and Adjudication* pp 39-43.

¹⁰ Under 1979 Act s 12(1)(d).

¹¹ *Registration of Title Practice Book* para 7.27; *Stair Memorial Encyclopaedia* vol 6 para 766. If that is correct, the protection is nowadays insufficient because it does not extend to a copy of the title sheet consulted online on Registers Direct.

¹² Take this example. A is the registered owner of land. A dies. B confirms as A's executor. B is inhibited *qua* executor. Without completing title B disposes the land to C, who is registered as owner. Even on the narrow view the inhibition against B (the holder of an unregistered right) would fall to be entered on the Land Register, as rendering the title of C voidable.

¹³ Respectively B and A in the examples given in para 8.5.

¹⁴ *Registration of Title Practice Book* para 6.18.

An inhibition is created by registration in the Register of Inhibitions and Adjudications.¹⁵ Entry of an inhibition under section 6(1)(c) is similar to the entry of a standard security, previously constituted by recording in the Register of Sasines, under section 6(1)(d).¹⁶ Its purpose is to give further publicity to a right which already exists and is publicised elsewhere. Why such further publicity might be needed is a matter to which we will return.¹⁷

8.9 An omission to make an entry is a different matter. By section 3(1)(a) registration vests a real right "subject only to the effect of any matter entered in the title sheet of that interest under section 6 of this Act so far as adverse to the interest or that person's entitlement to it and to any overriding interest whether noted under that section or not". Inhibition and sequestration require to be entered under section 6. They are not overriding interests. Accordingly, if they are omitted from the title sheet, they do not affect the acquirer¹⁸ – despite the fact that they continue to appear on, and are discoverable from, the Register of Inhibitions and Adjudications. Of course the Register is then (bijurally) inaccurate. The inhibiting creditor or trustee in sequestration can request rectification. But, assuming the acquirer to be in possession, the Register can be rectified to his prejudice only if the inaccuracy was caused by his fraud or carelessness.¹⁹ If he had failed to disclose relevant information to the Keeper, such failure might amount to carelessness or even to fraud. But where he properly disclosed the names of those against whom a search in the Register of Inhibitions and Adjudications should be made, he is not at fault if the Keeper fails to find an inhibition or, having found it, fails to make the necessary entry on the Land Register. There is no requirement of good faith, so that even if the acquirer knows of an inhibition from a form 12 report, he is unaffected by it if it is omitted from his title sheet.²⁰ If rectification is not possible, indemnity is paid to the inhibiting creditor or other right holder.²¹

8.10 Naturally, the scope of section 3(1)(a) in this context depends on the scope of section 6(1)(c) itself.²² Where a right is lost, this occurs, not on the failure to make an entry, but on the registration of the title of a new owner who acquired on the faith of the Register. Even on an expansive view of section 6(1)(c), therefore, an inhibition newly taken out against the current owner would not be lost merely because the Keeper did not immediately make a matching entry in the Land Register.

REFORM: REGISTER OF INHIBITIONS AND ADJUDICATIONS

Four options

8.11 The uncertainties affecting section 6(1)(c) have already been described. In considering a replacement provision, four main options seem available:

¹⁵ Titles to Land Consolidation (Scotland) Act 1868 s 155.

¹⁶ As to which see *Registration of Title Practice Book* para 5.29.

¹⁷ Para 8.14.

¹⁸ But it seems they would continue to affect any heritable creditor or holder of any other secondary right. This is because the part of s 3(1)(a) relied upon is confined to primary rights, ie rights with their own title sheet. See also Second Discussion Paper para 5.6.

¹⁹ 1979 Act s 9(3)(a)(iii).

²⁰ First Discussion Paper paras 7.4 and 7.5.

²¹ 1979 Act s 12(1)(b).

²² As to which see paras 8.3-8.7.

- (i) There should be entered on the Land Register all subsisting inhibitions, sequestrations, and other matters which bear, directly or indirectly, on a person with a right in respect of the land. This should be done immediately following the making of the entry in the Register of Inhibitions and Adjudications.
- (ii) The same as (i) except that the entry on the Land Register should be made only when the Keeper happens, for other reasons, to update the title sheet.
- (iii) On registering a deed the Keeper should enter any inhibition, sequestration or other matter which affects the validity of that deed, but he should not otherwise make an entry on the Land Register.
- (iv) Inhibitions, sequestrations and other related matters should cease to be entered on the Land Register.

(i) represents what we described earlier as the wide interpretation of section 6(1)(c), while (iii) represents the narrow interpretation.²³ (ii) describes current practice in relation to the Land Register, and (iv) current practice (and law) in relation to the Register of Sasines.

Evaluation

8.12 Option (i) has obvious attractions, at least for the users of public registers. At present an acquirer of land must search both the Land Register and the Register of Inhibitions and Adjudications; and in searching the latter he risks missing an entry due to small differences in names and designations as between the two registers.²⁴ Under option (i) the hard work would already have been done by the Keeper, so that by consulting the Land Register an acquirer would know of any potentially hostile entries in the Register of Inhibitions and Adjudications. At one time option (i) seems to have been regarded as the proper interpretation of section 6(1)(c). Thus in a passage which appears in the first edition of the *Registration of Title Practice Book*,²⁵ but not in the second, it is said that:

"As a Land Certificate will obviate the necessity for a Search for Incumbrances, in Registration of Title it is essential that any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest in land should appear in the Title Sheet and so in the Land Certificate. This is provided for in section 6(1)(c)."

In fact, option (i) is wasteful of resources which could be better used in some other way. It would require the Keeper to monitor the Register of Inhibitions and Adjudications on a day-to-day basis and to make substantial numbers of entries in the Land Register. In many cases these entries would be pointless, because before the title sheet in question was next consulted (typically on transfer) the inhibition or other entry would have been extinguished, whether by discharge, lapse of time, or for some other reason. Further work would then be involved in deleting the entry. But even if the resources could be mustered for this task, the end result would be imperfect, because the Keeper could not know of the existence of unregistered rights which could nonetheless be the subject of inhibition or sequestration. So,

²³ Para 8.5.

²⁴ *Atlas Appointments v Tinsley* 1997 SC 200. For a discussion, see G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) para 9-20.

²⁵ Para C.41.

for example, if the person registered as owner died and title came to be held by his widow under an unregistered docket transfer,²⁶ an inhibition against the widow would not be entered by the Keeper.

8.13 Option (ii) is an uneasy compromise. It means that at any given time the Land Register will disclose some, but not necessarily all, of the relevant entries from the Register of Inhibitions and Adjudications; and as the Land Register is, or may be, incomplete, an acquirer will continue to need a separate search in the Register of Inhibitions and Adjudications. Indeed the statutory forms for Land Register searches (forms 12 and 13) make provision for such a search. The result is unsatisfactory. Without avoiding the need for a separate search, option (ii) involves the Keeper in a significant amount of work which duplicates the information which such a search will in any case provide.

8.14 The reason for rejecting option (ii) might also appear to be a reason for favouring option (iv); for if a separate search in the Register of Inhibitions and Adjudications is necessary in any event, there may seem little point in transposing *any* entries from that Register to the Land Register. But there is a practical difficulty. In order to instruct a proper search in the Register of Inhibitions and Adjudications, an acquirer must know the names of those previous owners against whom the search should be made. For titles still in the Register of Sasines, these names are readily available. But a Land Register title does not disclose even the name of the person from whom the land was most recently acquired; yet if that person was inhibited, the title is at risk. The curtain principle thus frustrates the personal search. If an acquirer cannot go behind the Register, he cannot adequately protect himself against the possibility that inhibitions and sequestrations exist. Instead this must be done for him. Naturally, there is more than one way in which the law might protect an acquirer. The acquirer could, for example, be paid indemnity on the emergence of an undiscoverable inhibition or sequestration; or he could be given a statutory clean title, with indemnity paid instead to the holder of the inhibition or other right which is now to be extinguished.²⁷ Both have the disadvantage of cost to the Keeper. As will be seen later in the context of other personal registers, such an outcome is sometimes unavoidable;²⁸ but it can largely be avoided in the case of the Register of Inhibitions and Adjudications by the utilisation of option (iii). If the Keeper must enter inhibitions and sequestrations which affect *previous* owners, all that the acquirer need do is to search against the person shown on the Land Register as the current owner. In this way the labour is shared between Keeper and acquirer.

8.15 The Reid Committee seems to have favoured option (iii).²⁹

"We envisage that this Register [ie the Register of Inhibitions and Adjudications] would continue to function as a separate Register as at present, and that notices which are normally entered on this Register would not appear in the Register of Title: we do not think that the English system of notices on the Register should be adopted. It should, however, be the duty of the Keeper to check the Register of Inhibitions and Adjudications before issuing a Certificate of Title [ie land certificate] and any adverse

²⁶ ie a docket under Succession (Scotland) Act 1964 s 15(2).

²⁷ Assuming possession, the latter would seem to be the result under the present law: see 1979 Act ss 9(3)(a), 12(1)(b).

²⁸ Paras 8.25-8.28.

²⁹ Reid Report para 120. We say "seems to have" because it is possible to read the words "adverse entry affecting the proprietor of the property" as requiring the entering of an inhibition taken out against the proprietor (as opposed to one against his author and which therefore imperils his title).

entry affecting the proprietor of the property would be noted on the Certificate of Title. Of course, a Search in this Register will still be necessary."

The Henry Report expressed a similar view.³⁰ In our report on *Diligence* we too made a recommendation along the lines of option (iii),³¹ and this is now in the course of being implemented, for inhibitions only, by the Bankruptcy and Diligence etc (Scotland) Bill.³² It is important to understand the purpose of option (iii). It protects, not the owner just registered (who already knows the position), but a future acquirer from him, by disclosing information which the acquirer could not otherwise discover. It does just as much as is necessary and no more. In particular, it does not duplicate the search which the acquirer will in any event have to obtain. In the examples given earlier,³³ it discloses the inhibition against A but not the inhibition against B.

Inhibitions

8.16 As already mentioned, a version of option (iii) is introduced for inhibitions by the Bankruptcy and Diligence etc (Scotland) Bill. Section 154 of the Bill inserts into the 1979 Act a new section 6(1A) which qualifies section 6(1)(c). It reads:

"The Keeper shall enter an inhibition registered in the Register of Inhibitions in the title sheet only when completing registration of an interest in land where the interest has been transferred in breach of the inhibition."

Since such an entry is, by definition, a response to the inhibition having been breached, there is an obvious risk that the offending deed will come to be reduced. At present, the Keeper anticipates this eventuality by adding an exclusion of indemnity in respect of any loss arising from a future reduction.³⁴ This avoids any argument as to indemnity while at the same time allowing the reduction to be given effect on the Register by rectification.³⁵ No exclusion of indemnity will be needed under the scheme which we propose, because no indemnity is given in respect of supervening events (such as reduction),³⁶ and rectification is available without restriction.³⁷

8.17 Occasionally an inhibition may be missed by the Keeper at the time of registration, so that the new section 6(1A) is not complied with. The result then depends on whether the acquirer knew of the inhibition at the time when the disposition was delivered. If the acquirer did not know – if, in other words, the search in the Register of Inhibitions yielded nothing – he is protected by section 146 of the new Bill, which extinguishes the inhibition in relation to that property. Even if accidental, therefore, the Keeper's subsequent omission of the inhibition will have been fully justified. If, however, the acquirer knew of the inhibition, it continues to subsist, and its omission from the Register is an inaccuracy which can be rectified.³⁸ But unless rectification takes place before the property is sold on, a subsequent

³⁰ Henry Report part I para 10(c).

³¹ Scot Law Com No 183 paras 6.133 and 6.134.

³² Bankruptcy and Diligence etc (Scotland) Bill s 154, discussed in para 8.16.

³³ Para 8.5.

³⁴ *Registration of Title Practice Book* para 6.18.

³⁵ 1979 Act s 9(3)(a)(iv). Reductions can only enter the Register by rectification: see *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14.

³⁶ Second Discussion Paper para 7.38.

³⁷ Second Discussion Paper para 6.21.

³⁸ Under our scheme rectification is available without restriction; but even under the current law rectification may be available by virtue of s 9(3)(a)(iii): see para 8.9.

acquirer (who will search only against the seller and so will not find the inhibition) is protected by section 146 and the inhibition is extinguished on delivery of the disposition. As section 146 is a rule of the general law and not a special rule of registration of title,³⁹ no indemnity is payable to the inhibitor, although a claim might arise under ordinary principles of contract or delict.⁴⁰ We have no proposal to change the position.

Sequestration and other entries

8.18 The Register of Inhibitions and Adjudications is not, of course, confined to inhibitions.⁴¹ Also registered there are notices and other documents which relate to:

- sequestrations⁴²
- trust deeds for creditors⁴³
- adjudications⁴⁴
- land attachments⁴⁵
- company administrations⁴⁶
- reduction or rectification of deeds relating to land.⁴⁷

All are currently subject to section 6(1)(c) of the 1979 Act and fall to be entered in the Land Register in accordance with that, rather uncertain, provision. It seems necessary to clarify the provision and to restrict its scope. Earlier we expressed the view that the only purpose in transferring information from the personal register to the property register was because of the invisibility, on the latter, of previous owners against whom a search in the former might be necessary. It followed that information should be transferred to the Land Register only at the time of registration, only in respect of *previous* owners, and only where it affected the title of the current owner.⁴⁸ For inhibitions, as has been seen,⁴⁹ the necessary change will be made by the enactment of a new section 6(1A) of the 1979 Act. In our report on *Diligence* we suggested that the same change should be made in respect of other entries in the Register of Inhibitions and Adjudications,⁵⁰ and we adhere to that suggestion here.

8.19 A qualification is necessary. In two cases the Bankruptcy and Diligence etc (Scotland) Bill provides that notices which are registered in the Register of Inhibitions must also be registered in the Land Register. Plainly, if a notice has already been registered in the Land Register it should not be entered there for a second time under a different provision.

³⁹ It applies for example to Sasine transactions.

⁴⁰ Scot Law Com No 183 paras 6.120-6.122.

⁴¹ Gretton, *Inhibition and Adjudication* pp 20-2.

⁴² Bankruptcy (Scotland) Act 1985 s 14(1): the clerk of court must send for registration a certified copy of the first court order (either the warrant to cite the debtor or, if the petition is presented by the debtor, the award of sequestration).

⁴³ Bankruptcy (Scotland) Act 1985 sch 5 para 2(1).

⁴⁴ Titles to Land (Consolidation) (Scotland) Act 1868 s 159. Adjudication for debt is abolished by s 68 of the Bankruptcy and Diligence etc (Scotland) Bill.

⁴⁵ Bankruptcy and Diligence etc (Scotland) Bill ss 72(1)(c)(ii), 77(3)(b)(ii)

⁴⁶ Insolvency (Scotland) Rules 1986, SI 1986/1915, rr 2.2, 2.3(3).

⁴⁷ Titles to Land Consolidation (Scotland) Act 1868 s 159; Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8(7), (8).

⁴⁸ Paras 8.14 and 8.15.

⁴⁹ Para 8.16.

⁵⁰ Scot Law Com No 183 para 6.133 n 202.

The notices in question are notices of land attachment⁵¹ and notices of a signeted summons in an action of reduction of a deed relating to land granted in breach of an inhibition.⁵²

8.20 We propose that:

20. (1) The intended new section 6(1A) of the Land Registration (Scotland) Act 1979 (which requires the Keeper to enter on the Land Register an inhibition only where it impairs the validity of a deed which is being registered) should be extended to other entries in the Register of Inhibitions.

(2) But the Keeper should not enter on the Land Register under this provision any notice of –

(a) land attachment; or

(b) signeted summons in an action of reduction of a deed relating to land granted in breach of an inhibition.

8.21 Of the entries in the Register of Inhibitions just mentioned, many have the effect of inhibitions⁵³ while some go further still and signify the loss of power of disposal.⁵⁴ In the first case, a deed granted by the affected person is voidable; in the second case it is void. Registration law and practice in relation to grants which are voidable by reason of an inhibition have already been discussed,⁵⁵ but something should be said about grants which are void. The standard case, in the present context, is sequestration. If a deed being presented for registration in the Land Register was granted by a person who was already sequestrated at the time of the grant, the deed is void and can confer no rights.⁵⁶ It will either be rejected by the Keeper or, if accepted, will be registered only on the basis that the fact of sequestration is noted and indemnity is excluded. Under both the current law and our proposed replacement for it, rectification would then be possible at any time.⁵⁷ If, however, the fact of sequestration was unknown to the Keeper, registration would proceed, and without exclusion of indemnity. The end result, under our scheme, would depend on the state of knowledge of the grantee. A grantee in good faith would be eligible for indemnity although his title would be bad;⁵⁸ an acquirer from him would receive a good title, by virtue of the integrity principle,⁵⁹ indemnity being paid to the trustee in sequestration.⁶⁰ But bad faith would exclude both indemnity and the acquisition of a title. The role given to good and bad faith has obvious parallels with section 146 of the Bankruptcy and Diligence etc (Scotland)

⁵¹ And also notices of acquisition of a right to execute a land attachment. See Bankruptcy and Diligence etc (Scotland) Bill ss 72(1)(c)(i), 77(3)(b)(i).

⁵² Bankruptcy and Diligence etc (Scotland) Bill s 149, inserting a new s 159A into the Titles to Land Consolidation (Scotland) Act 1868.

⁵³ For example Titles to Land Consolidation (Scotland) Act 1868 s 159 (reduction); Bankruptcy (Scotland) Act 1985 s 14(2) (sequestration); Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8(7) (rectification); Bankruptcy and Diligence etc (Scotland) Bill s 70(4) (land attachment).

⁵⁴ Bankruptcy (Scotland) Act 1985 s 32(8) (sequestration); Insolvency Act 1986 sch B1 para 64 (administration).

⁵⁵ Paras 8.16 and 8.17.

⁵⁶ At least in a question with the trustee in sequestration: see Bankruptcy (Scotland) Act 1985 s 32(8).

⁵⁷ Under our scheme, the exclusion of indemnity would prevent the operation of the integrity principle: see Second Discussion Paper para 5.29. Thus no title could be acquired, even by an acquirer from the grantee, and the Register would remain inaccurate and open to rectification.

⁵⁸ This is the Keeper's warranty as to title: see Second Discussion Paper paras 7.29-7.46.

⁵⁹ Second Discussion Paper paras 5.22-5.30.

⁶⁰ Second Discussion Paper paras 7.53-7.58.

Bill (discussed above).⁶¹ By contrast, the current law turns, not on good faith, but on fraud and carelessness (or its absence), with results which are less satisfactory.⁶² In particular, an acquirer from the original grantee will receive a good title even if he knows of the sequestration.⁶³

Restriction or extinction

8.22 By their nature, entries made under section 6(1)(c) concern rights of limited duration; and even before the date of expiry set by law, such rights may in any case be subject to voluntary discharge or restriction. An entry which is affected by restriction or extinction can be rectified, either on the Keeper's initiative or in response to an application (typically by the owner of the property in question).⁶⁴ It is unlikely that rectification would prejudice a proprietor in possession (the subject of protection under the present law),⁶⁵ but in any case our scheme allows rectification wherever the Register is inaccurate.⁶⁶ The availability of rectification makes further provision on the removal of entries unnecessary and none is to be found in the current legislation.⁶⁷ However, the Bankruptcy and Diligence etc (Scotland) Bill amends the 1979 Act so as to add a power to enter discharges and restrictions of inhibitions (only).⁶⁸

REFORM: OTHER PERSONAL REGISTERS

Acquirer's duty to search

8.23 The Register of Inhibitions and Adjudications is not the only personal register of interest to conveyancers.⁶⁹ If land is being acquired from a company it is necessary to consult the Companies Register and, perhaps, the Register of Insolvencies as well;⁷⁰ and to these will shortly be added the Register of Floating Charges, which is being introduced by the Bankruptcy and Diligence etc (Scotland) Bill.⁷¹ If the company is registered in England and Wales, the search must be conducted in Cardiff and not in Edinburgh, while for overseas bodies corporate a search will be needed in a register in the jurisdiction in question. What might such searches disclose? The Companies Register gives details of liquidation,⁷² striking off,⁷³ receivership,⁷⁴ administration,⁷⁵ and company voluntary

⁶¹ Para 8.17.

⁶² 1979 Act ss 9(3)(a)(iii), 12(3)(n).

⁶³ This is because the inaccuracy on the Register was not caused by his fraud or carelessness. See *Douglas Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513. And see also First Discussion Paper paras 7.4 and 7.5.

⁶⁴ 1979 Act s 9(1).

⁶⁵ 1979 Act s 9(3).

⁶⁶ Second Discussion Paper para 6.21.

⁶⁷ Compare the position for overriding interests, discussed in paras 5.48-5.50. Of course where a right is *constituted* by *registration* in the Land Register (as in the case of a land attachment), it is appropriate that a discharge should be registered also: see Bankruptcy and Diligence etc (Scotland) Bill ss 111(3), 112(6).

⁶⁸ Bankruptcy and Diligence etc (Scotland) Bill s 154, inserting a new s 6(1B) in the 1979 Act. The power is to enter a discharge and not simply to delete the original entry. Where an inhibition has been breached, it should be left on the Register even if its 5-year duration has expired, because the right of reduction has a potential duration of 20 years: see Bankruptcy and Diligence etc (Scotland) Bill s 148. For a discussion, see Gretton, *Inhibition and Adjudication* pp 66-9; Scot Law Com No 183 paras 6.72-6.81.

⁶⁹ Para 8.1.

⁷⁰ G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) para 25-06.

⁷¹ Bankruptcy and Diligence etc (Scotland) Bill s 31.

⁷² Insolvency Act 1986 ss 84(3), 130(1); Insolvency (Scotland) Rules 1986, SI 1986/1915, r 4.2(1)

arrangement.⁷⁶ Information as to liquidation is also available from the Register of Insolvencies. An overseas register might be expected to give information about liquidation and other insolvency regimes.

8.24 At present, conducting searches is a matter for the acquirer alone. There is no equivalent of section 6(1)(c), and the Keeper does not search the registers in question, far less transcribe their contents on to the Land Register. Rather he relies on the information provided by the acquirer in his application for registration. In particular, the application form asks of the applicant:⁷⁷

"Where any party to the dealing is a company registered under the Companies Acts

Has a receiver or liquidator been appointed?

If YES, please give details.

If NO, has any resolution been passed or court order made for the winding up of the company or petition presented for its liquidation?

If YES, please give details."

An affirmative answer is likely to produce an exclusion of indemnity. A negative answer, if false, amounts to carelessness or even fraud, so that the Register can be rectified against the applicant without restriction and without payment of indemnity.⁷⁸ Under our scheme, too, a false answer would put the acquirer in bad faith, with similar consequences.⁷⁹ The result is perfectly satisfactory. In this as in many other aspects of the conveyancing process, it is for the acquirer to make the necessary inquiries. If he fails to do so, or is dishonest as to what he has found, there is no reason why he should be protected.

Third parties: the standard case

8.25 The position is less satisfactory, at least from the Keeper's point of view, where the property is transferred before rectification can occur. The new acquirer is unlikely to be in bad faith, or fraudulent or careless, for he has no means of knowing about an insolvency process which affected, not his author, but the body corporate from whom his author previously acquired (and the name of which is not given on the Register).⁸⁰ Quite properly the acquirer will be given an unassailable title. But the Keeper must then indemnify the liquidator.

⁷³ ie under the Companies Act 1985 s 652.

⁷⁴ Insolvency Act 1986 ss 53(1), 54(3).

⁷⁵ Insolvency (Scotland) Rules 1986 r 2.2. Administration is also registered in the Register of Inhibitions and Adjudications.

⁷⁶ Insolvency (Scotland) Rules 1986 r 1.17(5).

⁷⁷ Form 2 Q 2. Similar questions can be found in forms 1 and 3.

⁷⁸ 1979 Act ss 9(3)(a)(iii), 12(3)(n).

⁷⁹ As this would be a case of transactional error, the integrity principle would not operate, but the Keeper's warranty as to title would apply. But no indemnity is payable under the warranty if the applicant is in bad faith, and "bad faith" includes constructive knowledge (ie things which the applicant ought to have known). See Second Discussion Paper paras 7.41-7.44.

⁸⁰ This is the invisibility problem mentioned earlier: see para 8.14.

8.26 No doubt it is unsatisfactory that the Keeper should have to pay indemnity in respect of an insolvency process which it was not his business to uncover.⁸¹ Yet it is hard to see how this result can be avoided. A possible approach would be to make it the Keeper's business – or in other words to impose on the Keeper a duty similar to that imposed by section 6(1)(c) in respect of the Register of Inhibitions and Adjudications. This would require the Keeper to search the Companies Register and other relevant registers (including foreign registers) and to make appropriate entries in the Land Register. We are doubtful as to the practicality of this suggestion, especially in respect of foreign registers. Apart from anything else, the cost in staff time is likely to exceed, perhaps by a large amount, any saving which would be made to the indemnity fund.

8.27 A different approach would be to facilitate a search by the acquirer by supplying him with information as to previous owners. Indeed in the second discussion paper we proposed that such information should be made available on request.⁸² Yet this solution too seems unsatisfactory. Faced with a list of previous corporate owners, the acquirer would be uncertain as to which should be searched against and for what periods. Frequently, the search would duplicate one which had been carried out earlier but was no longer with the titles. The information supplied by the Keeper would not extend to companies which did not complete a title by registration. Finally, a search against prior owners would be contrary to the very ethos of registration of title: it should be possible to rely on the Register without inquiry as to what may lie behind it.

8.28 In the absence of a more attractive alternative, and subject to the views of consultees, we conclude that the law should be left as it is, and that the Keeper should continue to bear the risk of undisclosed insolvency affecting a previous corporate owner.

Third parties: crystallised floating charges

8.29 In one case a third party acquirer is not protected. Suppose that A Ltd, having granted a floating charge over its whole property and undertaking to X Bank, disposes certain land to B Ltd, and further suppose that, before the disposition is delivered, the floating charge crystallises and becomes a fixed security.⁸³ B Ltd is registered as owner. Shortly afterwards B Ltd sells the land to C who is registered as owner in turn. As an overriding interest, the floating charge will affect C. Yet, unless he was fortunate, C will not have known of its existence at the time of acquiring the land. Certainly there will be nothing on the Land Register to alert him to the former interest in the land of A Ltd or, in all probability, to the existence of the floating charge;⁸⁴ and although C will have carried out a search in the Companies Register against B Ltd, of the existence of A Ltd he is likely to be entirely ignorant. The same difficulty would not arise with a Sasine title, where previous owners are fully disclosed. In our view, a problem which is caused by registration of title should also be solved by registration of title. A third party acquirer should not be affected by a floating charge which is, to all intents and purposes, undetectable. Contrary to the normal

⁸¹ In some cases, however, he may be able to recover from the previous acquirer who failed to disclose the insolvency of his author: see Second Discussion Paper para 8.29.

⁸² Second Discussion Paper paras 2.45-2.49.

⁸³ If the floating charge crystallises *after* delivery it does not attach the land: see *Sharp v Thomson* 1997 SC (HL) 66. In fact, in the example given the disposition would be void because, following receivership or liquidation, the directors of B Ltd would be unable to grant a disposition. But that would not affect C's title: see para 8.21.

⁸⁴ Para 5.56.

rule for overriding interests, he should take the property unencumbered. Indemnity would then be paid to the chargeholder.⁸⁵

8.30 We propose that:

- 21. (1) On becoming owner on registration an acquirer should take the land free of any crystallised floating charge which was –**
 - (a) granted by a predecessor of the acquirer's author; and**
 - (b) unknown to the acquirer.**
- (2) Where a floating charge is extinguished (or extinguished in part) by the operation of (1), the chargeholder should be indemnified by the Keeper for his loss.**

Under our scheme this proposal would be implemented by a simple extension of the integrity principle.⁸⁶

⁸⁵ An different solution would be to provide that a floating charge is not constituted (or alternatively does not crystallise) with respect to land until it is registered in the property register. But this is too far-reaching in effect to be put forward merely as a solution to the minor problem identified in the text.

⁸⁶ This would be achieved by a qualification of proposal 20(1)(c) in para 5.37 of the Second Discussion Paper. Indemnity would then automatically be due under proposal 28 in para 7.53. A similar qualification would be needed to the Keeper's warranty as to encumbrances (proposal 26(c) in para 7.47) in order to cover cases where the integrity principle did not apply (eg where the right being acquired was a secondary right such as a standard security).

Part 9 Transitional issues

Introduction

9.1 In this paper, and in the two discussion papers which preceded it, we make a large number of proposals for reform. If implemented they would not, on the whole, give rise to transitional difficulties. Our proposals would affect new transactions, and in particular new applications for registration, but they would have little or no effect on rights acquired before the day on which the new legislation came into force. That day is referred to in this part as the "appointed day".

9.2 In one respect, however, some transitional arrangements cannot be avoided. The current system of land registration is positive and bijural. We propose that in future it should be negative and monojural.¹ This change cannot be managed without special provision. In devising such a provision we have had two principles in mind above all others.

9.3 First, matters must be so arranged that it should be of no concern to future acquirers whether property was first registered under the 1979 Act or, later, under the legislation which it is intended will replace it. Regardless of provenance, all titles must be treated in the same way and be subject to the same rules. In particular, there should be no question of perpetuating the 1979 Act in respect of those titles which were already on the Land Register at the appointed day. The 1979 Act is too defective to be spared, and, even if that were not so, it would be no improvement to replace one system of land registration with two.

9.4 Secondly, the transitional arrangements should not prejudice existing rights. A title acquired under the old law should not become less secure following the introduction of the new law. Indeed, since an important aim of the reform is that titles should become *more* secure,² any change should, if possible, tend towards increased security.

Bijural inaccuracy

9.5 Most titles are good, and for such titles no transitional arrangements are needed. But the position is different for the small proportion of cases where the title sheet is inaccurate. In the second discussion paper we distinguished two types of inaccuracy.³ "Actual" inaccuracy arises where the Register really is wrong – that is to say, where the right mentioned is misstated or has been extinguished. "Bijural" inaccuracy arises where an entry on the Register is correct as a matter of registration law but incorrect by reference to the ordinary rules of property law: in other words, it is correct only because of the positive effect of registration under the 1979 Act. An example explains the difference. Suppose that A Ltd is named in the title sheet as the owner of land. If A Ltd has since been dissolved, it is no longer owner and the Register is "actually" inaccurate. But if A Ltd, though still active, acquired title through a forged disposition, the Register is "bijurally" (but not "actually") inaccurate. For although A

¹ Paras 1.9 and 1.10.

² Paras 1.3-1.8; First Discussion Paper para 4.8.

³ Second Discussion Paper paras 6.1-6.5.

Ltd is owner, it ought not to be. It is owner only by virtue of the positive effect of land registration. By the ordinary rules of property law no title could pass under a forged disposition.

9.6 Either type of inaccuracy can lead to rectification. But whereas actual inaccuracies can be rectified without restriction,⁴ the 1979 Act places a number of obstacles in the way of the rectification of bijural inaccuracies. In particular, rectification is not usually possible to the prejudice of a proprietor in possession.⁵

From bijuralism to monojuralism

9.7 The proposed new legislation will abandon the idea of bijuralism, and with it a great deal of law which is unattractive, unprincipled, and uncertain. But in abandoning bijuralism the legislation must also abandon the concept of bijural inaccuracy; and where such an inaccuracy is to be found in existing titles, it must either be disregarded or re-conceptualised as an actual inaccuracy.⁶ We suggest that both solutions are likely to be needed, and that the proper way of choosing between them is to ask whether, immediately before the appointed day, a particular inaccuracy could in fact have been rectified. If the answer is yes, the bijural inaccuracy should be re-conceptualised as an actual inaccuracy, thus ensuring that rectification can take place after the appointed day as before.⁷ If the answer is no, the bijural inaccuracy should be disregarded and the Register should be treated as accurate. In both cases, the result is continuity in substance if not in legal attribution. A title which was vulnerable to rectification will remain vulnerable; one which was invulnerable (usually because rectification would have prejudiced a proprietor in possession) will be free from the possibility of rectification in the future. At the end of this part we give eight examples of how such a transitional provision might work. In view of the crucial role of possession under the current law and in order to minimise problems of evidence, especially after the passage of time, the provision should include a presumption that the proprietor of the land was in possession immediately before the appointed day; but the presumption would be weak and could readily be rebutted by evidence of contrary possession.

9.8 Something more should be said about the re-conceptualisation of bijural inaccuracy as actual inaccuracy. As a matter of legal technique, this is most easily achieved by the idea of a deemed rectification. On the appointed day the parties would be given (or deprived of) those rights which would have been created (or extinguished) by a bijural rectification, had such a rectification been possible;⁸ but, of course, nothing will change on the face of the Register. So for example if A is shown on the Register as owner of land which, under the ordinary law of property, ought to belong to B – and if A is not in possession, thus making rectification possible – then on the appointed day there is a deemed rectification as a result of which the land now belongs to B. A, however, remains on the Register.⁹ He is presumed to be owner.¹⁰ He is no more vulnerable to rectification than under the former law. He can

⁴ Second Discussion Paper paras 6.9 and 6.13.

⁵ 1979 Act s 9(3).

⁶ Under our proposals, only actual inaccuracy is possible: Second Discussion Paper para 6.18.

⁷ Under our proposals, as under the present law, an actual inaccuracy can always be rectified: Second Discussion Paper para 6.21.

⁸ Second Discussion Paper para 6.8.

⁹ His removal would require the *actual* rectification which will now be available.

¹⁰ Under our proposals the person named on the Register as owner is presumed to be owner: see Second Discussion Paper para 5.32.

encumber or dispose of the property as readily (or with as much difficulty) as before.¹¹ But his title, formerly voidable, is now void. In showing A as owner the Register is actually, and not merely bijurally, inaccurate.

9.9 Whether a bijural inaccuracy is disregarded or reconceptualised as an actual inaccuracy, the result in practice¹² is a modest improvement in the position of the affected person. Where an inaccuracy is disregarded, the threat of rectification is removed for all time. Where an inaccuracy is reconceptualised, the continuing vulnerability to rectification can be removed, given possession, by positive prescription which is reintroduced as part of our proposals.¹³

9.10 Indemnity would be due as under the current law. So if an inaccuracy is disregarded, the person who is now, definitively, denied rectification is entitled to indemnity for his loss.¹⁴ If an inaccuracy is re-conceptualised, indemnity is due to the person who has lost rights thereby (A in the example given earlier);¹⁵ but, as under the current law, no indemnity would be due without "eviction" (in effect an application for rectification by the true owner).¹⁶

9.11 Our proposal is as follows:

- 22. (1) This proposal applies to title sheets which, immediately before the appointed day, contain an inaccuracy in respect of a real right.**
- (2) An inaccuracy which could have been rectified immediately before the appointed day should, so far as concerns the rights of any person, be deemed to have been rectified on that day.**
- (3) An inaccuracy which could not have been rectified immediately before the appointed day should, on the appointed day, cease to be an inaccuracy.**
- (4) A person who loses a right as a result of (2) or (3) should be indemnified by the Keeper for his loss; but no indemnity should be due in respect of (2) unless the claimant is first evicted by a person founding on the deemed rectification.**
- (5) For the purposes of determining whether an inaccuracy could have been rectified, it should be presumed (unless the contrary is shown) that the proprietor of the land was in possession.**

¹¹ Whether a grantee then receives a good title depended under the 1979 Act on s 3(1)(a), and will depend under our proposals on the integrity principle, its replacement.

¹² If not in law. A void title is plainly not an improvement on a title which is voidable.

¹³ First Discussion Paper paras 3.4-3.11.

¹⁴ This is the equivalent of the 1979 Act s 12(1)(b). A close parallel under our proposals is indemnity for loss due to the integrity principle: see Second Discussion Paper paras 7.53-7.57.

¹⁵ Para 9.8. This is the equivalent of the 1979 Act s 12(1)(a).

¹⁶ The idea of eviction is also used in the comparable case of the Keeper's warranty as to title: see Second Discussion Paper paras 7.49-7.51.

Some examples

9.12 Proposal 22 is best understood by reference to examples which illustrate the range of situations in which it might apply. Except where otherwise stated, the examples assume that all parties are in good faith, and are not fraudulent or careless.

9.13 **Example 1.** A is registered as owner of land and takes possession. The disposition in his favour purports to be granted by Z, the last registered owner but, unbeknownst to A, Z's signature has been forged.

Immediately before the appointed day. A is owner and the Register is inaccurate,¹⁷ but rectification is prevented by the fact of A's possession.¹⁸ An application for rectification by Z would be met by a refusal and by payment of indemnity.¹⁹

On and after the appointed day. A remains owner and the Register ceases to be inaccurate. Z is entitled to indemnity.

Comment. A's voidable title has been converted into one which is absolutely good, but in substance the parties' positions remain the same.

9.14 **Example 2.** A is registered as owner of 8 hectares, a first registration. In fact the disposition conveyed only 7 hectares, the missing hectare being the property of Z. Immediately before the appointed day Z continues in possession of "his" hectare.

Immediately before the appointed day. A is owner of all 8 hectares but the Register is inaccurate in respect of the additional hectare.²⁰ As A is not in possession, Z could rectify the Register and reclaim his hectare.²¹ Indemnity would be paid to A.²²

On and after the appointed day. Z becomes owner of the additional hectare by virtue of the deemed rectification. As the Register is thus inaccurate, it can be rectified. Indemnity would be paid to A.²³

If rectification is not sought, no indemnity is due to A (as there is no eviction). If A disposes all 8 hectares to B, B becomes owner of only 7, because the integrity principle (which would normally protect B) requires a period of possession.²⁴ The same would be true for any subsequent acquisition, provided possession is retained by Z.

Comment. A's voidable title to the additional hectare has been converted into one which is void, but in substance the parties' positions remain the same. The bijural inaccuracy before the appointed day has become an actual inaccuracy after that day.

¹⁷ 1979 Act s 3(1)(a).

¹⁸ 1979 Act s 9(3).

¹⁹ 1979 Act s 12(1)(b).

²⁰ 1979 Act s 3(1)(a).

²¹ 1979 Act s 9(1).

²² 1979 Act s 12(1)(a).

²³ This is because payment of indemnity would have been due under the 1979 Act. The new law, however, is different: see Second Discussion Paper para 7.40.

²⁴ Second Discussion Paper para 5.29.

9.15 **Example 3.** In a form B²⁵ standard security granted to Bank A, the granter's signature is forged, unbeknownst to the Bank. The security is duly registered.

Immediately before the appointed day. Bank A holds a standard security but the Register is inaccurate.²⁶ As the heritable creditor cannot be a proprietor in possession,²⁷ Z, the owner of the security subjects, could rectify the Register and have the standard security removed.²⁸ Indemnity would be paid to Bank A (assuming loss).²⁹

On and after the appointed day. The standard security is extinguished, and the Register remains inaccurate. Z could rectify and indemnity would be paid to Bank A (assuming loss).

Comment. Bank A's voidable title to the standard security has been converted into one which is void, but in substance the parties' positions remain the same. The bijural inaccuracy before the appointed day has become an actual inaccuracy after that day.

9.16 **Example 4.** A is registered as owner of Blackmains, a first registration. The title sheet includes the benefit of a servitude of way over Whitemains. The servitude had no previous legal basis.

Immediately before the appointed day. A holds a servitude but the Register is inaccurate.³⁰ As a servitude holder cannot, in that capacity, be a proprietor in possession,³¹ Z, the owner of Whitemains, could rectify the Register and have the servitude removed from A's title.³² Indemnity would be paid to A.³³

On and after the appointed day. A ceases to hold the servitude, and the Register remains inaccurate. Z could rectify and indemnity would be paid to A.

If rectification is not sought, no indemnity is due to A (as there is no eviction). If A then disposes to B, B obtains a good title to the servitude by virtue of the integrity principle.³⁴ The Register then ceases to be inaccurate, and indemnity is due to Z.³⁵

Comment. A's voidable title to the servitude has been converted into one which is void, but in substance the parties' positions remain the same. The bijural inaccuracy before the appointed day has become an actual inaccuracy after that day. The subsequent transfer to B shows that, following the transition, titles which were on the Register before the appointed day can take full advantage of the rules of the new

²⁵ A form B standard security secures a personal bond contained in a separate deed. A form A security (where the bond itself is part of the security) would complicate the example because the underlying obligation to pay would itself be invalid.

²⁶ 1979 Act s 3(1)(a).

²⁷ *Kaur v Singh* 1999 SC 180.

²⁸ 1979 Act s 9(1).

²⁹ 1979 Act s 12(1)(a).

³⁰ 1979 Act s 3(1)(a).

³¹ Paras 4.10-4.12.

³² 1979 Act s 9(1).

³³ 1979 Act s 12(1)(a).

³⁴ Paras 4.20-4.26.

³⁵ Second Discussion Paper paras 7.53-7.58.

legislation – in this case the rule that (contrary to the current law) a servitude cannot usually be lost by rectification.

9.17 **Example 5.** A disposes to B, and B is registered as owner of the land and takes possession. Later the disposition is reduced by Z.

Immediately before the appointed day. B is owner and, following the reduction, the Register is inaccurate.³⁶ But rectification is prevented by the fact of B's possession.³⁷ Z is entitled to indemnity.³⁸

On and after the appointed day. B remains owner and the Register ceases to be inaccurate. An application for rectification by Z would be met by a refusal and by payment of indemnity.

Comment. B's voidable title has been converted into one which is absolutely good, but in substance the parties' positions remain the same.³⁹

9.18 **Example 6.** Z disposes to A, and A is registered as owner of the land and takes possession. Z was induced to disposes by A's fraud. Later the disposition is reduced by Z.

Immediately before the appointed day. A is owner and, following the reduction, the Register is inaccurate. Although A is in possession, the effect of his fraud is that the Register can be rectified against him.⁴⁰ No indemnity is payable to A.⁴¹

On and after the appointed day. A ceases to be owner and the Register remains inaccurate. Z could rectify. No indemnity is payable to A.

Comment. A's voidable title has been converted into one which is void, but in substance the parties' positions remain the same. The bijural inaccuracy before the appointed day has become an actual inaccuracy after that day.

9.19 **Example 7.** A is the owner of land burdened by a standard security in favour of Bank Z. A disposes the land to B, and forges a discharge of the security. When B is registered as owner (and takes possession) the security is removed from the charges section of the title sheet.

Immediately before the appointed day. The standard security is extinguished. The Register is inaccurate,⁴² but rectification is prevented by the fact of B's possession.⁴³

³⁶ This is a bijural inaccuracy: see Second Discussion Paper para 6.24.

³⁷ 1979 Act s 9(3).

³⁸ 1979 Act s 12(1)(b).

³⁹ It is for further consideration whether, if Z had reduced *after* the appointed day, effect should be given to the reduction (as would be normal under our scheme). For a discussion of voidable titles, see part 6 of the First Discussion Paper.

⁴⁰ Or at least that appears to be the position: see First Discussion Paper para 6.10.

⁴¹ 1979 Act s 12(3)(n). This example also throws light on the position where there has been judicial rectification under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. There too the inaccuracy is the result of a supervening event, and there too the Register can be rectified even against a proprietor in possession: see 1979 Act s 9(3)(b).

⁴² 1979 Act s 3(1)(a).

⁴³ 1979 Act s 9(3).

An application for rectification by Bank Z would be met by a refusal and payment of indemnity.⁴⁴

On and after the appointed day. The standard security remains extinguished and the Register ceases to be inaccurate. Bank Z is entitled to indemnity.

Comment. The standard security is now irrevocably extinguished, but in substance the parties' positions remain the same.

9.20 **Example 8.** A is the owner of Whitemains. Whitemains is burdened by a servitude of way in favour of Blackmains. The servitude is shown on the title sheets of both properties. Subsequently it is extinguished by negative prescription.

Immediately before the appointed day. The servitude having been extinguished, the Register is inaccurate. As this is an actual inaccuracy (ie the servitude was extinguished by ordinary property law), A could rectify the Register and have the servitude removed from both titles. No indemnity would be paid to Z, the owner of Blackmains (and former holder of the servitude).⁴⁵

On and after the appointed day. The position is unchanged.

Comment. Although not expressly so limited,⁴⁶ proposal 22 does not apply in respect of actual inaccuracy. This is because the rectification of an actual inaccuracy – including the rectification deemed by proposal 22(2) – does not change the legal position of parties.⁴⁷

⁴⁴ 1979 Act s 12(1)(b).

⁴⁵ Second Discussion Paper para 6.9.

⁴⁶ Any definition of "bijural inaccuracy" and "actual inaccuracy" would inevitably be complex and is best avoided.

⁴⁷ Second Discussion Paper para 6.7.

Part 10 Summary of provisional proposals

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

(Para 2.5)

2. (1) In the interpretation of the description of land in a title sheet where –
 - (a) the description comprises two or more elements, and
 - (b) the elements are in conflict and cannot be reconciled,

regard should be had to the rules of preference stated below.

(2) The first rule of preference is that a plan is preferred to a verbal description.

(3) The second rule of preference is that the title plan is preferred to a supplementary plan.

(4) The third rule of preference is that, except where the second rule applies, a larger scale plan is preferred to a smaller scale plan.

(Para 2.13)

3. (1) In making up a title sheet, the Keeper should be bound to carry forward from the prior deeds such of the supplementary information mentioned at (2) as would be of material assistance in the identification of the property; but information should not be carried forward if the Keeper has reason to question its accuracy.

(2) The information referred to is –

(a) any deed plan; and

(b) any statement as to –

(i) area;

(ii) lineal measurement; or

(iii) the location of a boundary in relation to a boundary feature.

(3) In this proposal, "prior deeds" means –

(a) the deed inducing the making up of the title sheet; and

- (b) in the case of first registrations only, the deeds comprising the prior title.

(Para 2.23)

- 4. There should continue to be blanket exclusions of indemnity in respect of errors in –
 - (a) delineations of boundaries where the error could not be rectified by reference to the Ordnance Map or its replacement;
 - (b) information as to the exact boundary line;
 - (c) statements as to area; and
 - (d) statements as to lineal measurements.

(Para 2.27)

- 5. The rule that a description of land on the Register must include a description based on the Ordnance Map (or any replacement for that Map) should not apply to a description of the sea bed.

(Para 2.31)

- 6. Where on a title sheet a boundary is described or shown as a natural water feature, the boundary should be taken to be that feature as altered from time to time by alluvion.

(Para 3.16)

- 7. Where two properties are separated by a natural water feature, should it be possible for the owners, by registration of an agreement, to fix the boundary line and exclude alluvion for the future?

(Para 3.17)

- 8. (1) Where –
 - (a) a legal boundary coincides with a boundary feature; and
 - (b) the depiction of the boundary feature is altered when the Ordnance Map (or its replacement) is updated;

the Keeper should be empowered to rectify the Register by aligning the legal boundary with the new line of the boundary feature.

- (2) Following rectification, the boundary of the property should be deemed to have changed for all purposes (including for the purposes of any subordinate real rights in the property).

(3) No indemnity should be payable as a result of the rectification.

(Para 3.27)

9. Should section 19 of the Land Registration (Scotland) Act 1979 (agreement as to common boundary) be repealed without replacement?

(Para 3.42)

10. (1) In the event that the answer to the question in proposal 9 is no, it should be possible to enter into a special type of contract of excambion (a "boundary excambion") for the purpose of clarifying or adjusting the boundary between two properties.

(2) In a boundary excambion it should be sufficient words of conveyance of the land if –

(a) the parties express agreement as to the line of the boundary; and

(b) the boundary is shown on a plan annexed to the excambion.

(3) Any new boundary which, following registration, is set by the excambion should be deemed to be the boundary for all purposes (including for the purposes of any subordinate real rights in the properties); but it should not affect any servitude.

(4) Where, as a result of the new boundary, the value of a subordinate real right is materially reduced, the court, on application of the holder of the right, should be able to order that the right be restored to the previous boundary. The order should take effect on registration.

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

(Para 3.49)

11. (1) The integrity principle should apply in relation to –

(a) the creation of servitudes by registration, and

(b) the transmission, as pertinents, of servitudes entered in the title sheet of a benefited property (other than servitudes noted as unregistered real rights).

(2) But neither the integrity principle nor the Keeper's warranty as to title should apply where –

(a) the right is not capable of being a servitude; or

(b) the servitude has been extinguished.

(Para 4.26)

12. (1) Where the Keeper enters a servitude in the title sheet of one affected property, he should make a corresponding entry in the title sheet of the other affected property.
- (2) Where a servitude is already entered in the title sheet of one affected property but is not entered on the title sheet of the other, the Keeper should make a corresponding entry in the title sheet of the other affected property if –
- (a) he is requested to do so; or
 - (b) the existing entry otherwise comes to his attention.
- (3) This proposal should not apply where –
- (a) the servitude comprises a right to lead a pipe, cable, wire or other such enclosed unit over or under land; or
 - (b) the other affected property –
 - (i) cannot be identified
 - (ii) does not have a title sheet, or
 - (iii) is not in Scotland.
- (4) In this proposal, the "affected properties" in relation to a servitude are the benefited property and the burdened property.

(Para 4.31)

13. (1) The Keeper's warranty as to title (but not the integrity principle) should apply in relation to –
- (a) the creation of real burdens by registration, and
 - (b) the transmission, as pertinents, of the real burdens entered in the title sheet of a benefited property.
- (2) But the Keeper's warranty should not apply where –
- (a) the right is not capable of being a real burden; or
 - (b) the real burden has been extinguished.

(Para 4.45)

14. (1) An overriding interest should be defined as a subordinate real right which was created otherwise than by registration against the burdened property in the Land Register or Register of Sasines.

(2) The definition should no longer be supplemented by a list of examples.

(Para 5.23)

15. (1) This proposal applies to the unregistered rights mentioned in proposal 16.

(2) The noting of unregistered rights on the Register should take place in accordance with the following rules; except that no noting should take place in respect of a "right" which the Keeper is satisfied does not exist.

(3) An applicant for registration should be under a duty to disclose any unregistered right which burdens the property and of which he has knowledge.

(4) In addition, an application for the noting of an unregistered right should be possible at any time at the instance of –

(a) an owner of the property burdened by the right; or

(b) a holder of the right.

(5) On receipt of an application under (4)(b), the Keeper should notify the owner of the burdened property and invite his views by a stipulated date (not being less than 8 weeks after the date of notification).

(6) The Keeper should be bound to note an unregistered right which is –

(a) disclosed in an application for registration; or

(b) the subject of an application made under (4)(a).

(7) The Keeper should also be bound to note an unregistered right which is the subject of an application made under (4)(b), provided that –

(a) it is not opposed by the owner of the burdened property; or

(b) although so opposed, the Keeper is satisfied that the right exists.

(8) The Keeper should be at liberty to note any other unregistered right which comes to his attention.

(9) Where it is satisfied as to the existence of an unregistered right, a court should be able to order that the right be noted on the Register.

(10) It should be possible to note a servitude against the benefited property as well as (as at present) against the burdened property.

(Para 5.47)

16. (1) The following unregistered rights should be capable of being noted on the Register:

(a) servitudes;

- (b) public rights of way;
 - (c) certain leases;
 - (d) the occupancy rights of non-entitled spouses and civil partners.
- (2) What leases (if any) should be excluded from noting?
- (3) Should any other rights be capable of being noted?
- (Para 5.61)
17. (1) Applications for rectification should be notified by the Keeper to any person disclosed by the Register as being potentially affected.
- (2) Notification should also take place where the Keeper intends to rectify the Register other than in response to an application.
- (3) Both the applicant and any person to whom notification is made should be entitled to make representations to the Keeper in respect of the application, and both should be notified as to the Keeper's decision.
- (Para 6.27)
18. (1) Except in the cases mentioned in proposals 15(5) (noting of overriding interests) and 17 (rectification), the Keeper should not be required to give notice of alterations made to the Register.
- (2) Where notice is to be given it should –
- (a) be sent by post;
 - (b) delivered; or
 - (c) transmitted by electronic means.
- (3) If no address can be found, the duty to notify should lapse.
- (Para 6.36)
19. (1) Should a system of priority notices be introduced?
- (2) If so, do you agree that the system should contain the following elements –
- (a) A priority notice could be used whenever there is to be granted a deed which creates, transfers, varies or discharges a real right in land.
 - (b) A prior contract to grant such a deed would not be necessary.
 - (c) A notice would be signed by or on behalf of both parties to the proposed deed and be registered in the Land Register by either.

- (d) Following registration a notice would endure for a prescribed period.
- (e) If the deed referred to in the notice was presented for registration within the prescribed period, its date of registration would be the date on which the notice was registered.

(3) Should the prescribed period be –

- (a) 4 weeks;
- (b) 5 weeks; or
- (c) some other period?

(Para 7.37)

20. (1) The intended new section 6(1A) of the Land Registration (Scotland) Act 1979 (which requires the Keeper to enter on the Land Register an inhibition only where it impairs the validity of a deed which is being registered) should be extended to other entries in the Register of Inhibitions.

(2) But the Keeper should not enter on the Land Register under this provision any notice of –

- (a) land attachment; or
- (b) signeted summons in an action of reduction of a deed relating to land granted in breach of an inhibition.

(Para 8.20)

21. (1) On becoming owner on registration an acquirer should take the land free of any crystallised floating charge which was –

- (a) granted by a predecessor of the acquirer's author; and
- (b) unknown to the acquirer.

(2) Where a floating charge is extinguished (or extinguished in part) by the operation of (1), the chargeholder should be indemnified by the Keeper for his loss.

(Para 8.30)

22. (1) This proposal applies to title sheets which, immediately before the appointed day, contain an inaccuracy in respect of a real right.

(2) An inaccuracy which could have been rectified immediately before the appointed day should, so far as concerns the rights of any person, be deemed to have been rectified on that day.

(3) An inaccuracy which could not have been rectified immediately before the appointed day should, on the appointed day, cease to be an inaccuracy.

(4) A person who loses a right as a result of (2) or (3) should be indemnified by the Keeper for his loss; but no indemnity should be due in respect of (2) unless the claimant is first evicted by a person founding on the deemed rectification.

(5) For the purposes of determining whether an inaccuracy could have been rectified, it should be presumed (unless the contrary is shown) that the proprietor of the land was in possession.

(Para 9.11)

Appendix

Extracts from the Land Registration (Scotland) Act 1979

PART I

REGISTRATION OF INTERESTS IN LAND

1. The Land Register of Scotland

(1) There shall be a public register of interests in land in Scotland to be known as the 'Land Register of Scotland' (in this Act referred to as 'the register').

(2) The register shall be under the management and control of the Keeper of the Registers of Scotland (in this Act referred to as 'the Keeper') and shall have a seal.

(3) In this Act 'registered' means registered in the register in accordance with this Act and 'registrable', 'registration' and other cognate expressions shall be construed accordingly.

2. Registration

(1) Subject to subsection (2) below, an unregistered interest in land other than an overriding interest shall be registrable—

(a) in any of the following circumstances occurring after the commencement of this Act—

(i) on a grant of the interest in land in long lease but only to the extent that the interest has become that of the lessee;

(ii) on a transfer of the interest for valuable consideration;

(iii) on a transfer of the interest in consideration of marriage;

(iv) on a transfer of the interest whereby it is absorbed into a registered interest in land;

(v) on any transfer of the interest where it is held under a long lease or udal tenure;

(b) in any other circumstances in which an application is made for registration of the interest by the person or persons having that interest and the Keeper considers it expedient that the interest should be registered.

(2) Subsection (1) above does not apply to an unregistered interest which is a heritable security, liferent or incorporeal heritable right; and subsection (1)(a)(ii)

above does not apply where the interest on transference is absorbed into another unregistered interest.

(3) The creation over a registered interest in land of any of the following interests in land—

- (i) a heritable security;
- (ii) a liferent;
- (iii) an incorporeal heritable right,

shall be registrable; and on registration of its creation such an interest shall become a registered interest in land.

(4) There shall also be registrable—

- (a) any transfer of a registered interest in land including any transfer whereby it is absorbed into another registered interest in land;
- (b) any absorption by a registered interest in land of another registered interest in land;
- (c) any other transaction or event which (whether by itself or in conjunction with registration) is capable under any enactment or rule of law of affecting the title to a registered interest in land but which is not a transaction or event creating or affecting an overriding interest.

(5) The Secretary of State may, by order made by statutory instrument, provide that interests in land of a kind or kinds specified in the order, being interests in land which are unregistered at the date of the making of the order other than overriding interests, shall be registered; and the provisions of this Act shall apply for the purposes of such registration with such modifications, which may include provision as to the expenses of such registration, as may be specified in the order.

(6) In this section, 'enactment' includes section 19 of this Act.

3. Effect of registration

(1) Registration shall have the effect of—

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

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

In this subsection, 'enactment' includes section 19 of this Act.

(2) Registration shall supersede the recording of a deed in the Register of Sasines but, subject to subsection (3) below, shall be without prejudice to any other means of creating or affecting real rights or obligations under any enactment or rule of law.

(3) A—

- (a) lessee under a long lease;
- (b) proprietor under udal tenure;

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

(4) The date at which a real right or obligation is created or as from which it is affected under this section shall be the date of registration.

(5) Where an interest in land has been registered, any obligation to assign title deeds and searches relating to that interest in land or to deliver them or make them forthcoming or any related obligation shall be of no effect in relation to that interest or to any other registered interest in land.

This subsection does not apply—

- (a) to a land or charge certificate issued under section 5 of this Act;
- (b) where the Keeper has, under section 12(2) of this Act, excluded indemnity under Part II of this Act.

(6) It shall not be necessary for an unregistered holder of an interest in land which has been registered to expedite a notice of title in order to complete his title to that interest if evidence of sufficient midcouples or links between him and the person last registered as entitled to the interest are produced to the Keeper on any registration in respect of that interest and accordingly—

- (a) section 4 of the Conveyancing (Scotland) Act 1924 (c 27);
- (b) section 18A(8)(a) of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5); and
- (c) section 41(a) of the Title Conditions (Scotland) Act 2003 (asp 9),

(each of which relates to completion of title) shall be of no effect in relation to such an interest in land.

This subsection does not apply to the completion of title under section 74 or 76 of the Lands Clauses Consolidation (Scotland) Act 1845 (procedure on compulsory purchase of lands).

(7) Nothing in this section affects any question as to the validity or effect of an overriding interest.

4. Applications for registration

(1) Subject to subsection (2) below, an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require.

(2) An application for registration shall not be accepted by the Keeper if—

(a) it relates to land which is not sufficiently described to enable him to identify it by reference to the Ordnance Map;

(aa) it relates in whole or in part to an interest in land which by, under or by virtue of any provision of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5) is an interest which has ceased to exist;

(b) it relates to land which is a souvenir plot, that is a piece of land which, being of inconsiderable size or no practical utility, is unlikely to be wanted in isolation except for the sake of mere ownership or for sentimental reasons or commemorative purposes; or

(c) it is frivolous or vexatious;

(d) a deed which—

(i) accompanies the application;

(ii) relates to a registered interest in land; and

(iii) is executed after that interest has been registered,

does not bear a reference to the number of the title sheet of that interest;

(e) payment of the fee payable in respect of such registration under section 25 of the Land Registers (Scotland) Act 1868 has not been tendered.

(3) On receipt of an application for registration, the Keeper shall forthwith note the date of such receipt, and that date shall be deemed for the purposes of this Act to be the date of registration either—

(a) where the application, after examination by the Keeper, is accepted by him, or

(b) where the application is not accepted by him on the grounds that it does not comply with subsection (1) or (2)(a) or (d) above but, without being rejected by the Keeper or withdrawn by the applicant, is subsequently accepted by the Keeper on his being satisfied that it does so comply, or has been made so to comply.

(4) Where an application is not accepted by the Keeper on the ground that he has not been provided with sufficient evidence to confirm that it does not relate to a transfer which is prohibited by section 40(1) of the Land Reform (Scotland) Act 2003 (asp 2), or by virtue of section 37(5)(e) of that Act, the Keeper shall, subject to

subsection (5) below, provide the Scottish Ministers with a copy of the application and notify them of the reason for which the application has been rejected.

(5) Subsection (4) above does not apply where the application has been rejected by reason only of the application not being accompanied by a declaration required under section 43(2) of that Act of 2003.

5. Completion of registration

(1) The Keeper shall complete registration—

(a) in respect of an interest in land which is not a heritable security, liferent or incorporeal heritable right—

(i) if the interest has not previously been registered, by making up a title sheet for it in the register in accordance with section 6 of this Act, or

(ii) if the interest has previously been registered, by making such amendment as is necessary to the title sheet of the interest;

(b) in respect of an interest in land which is a heritable security, liferent or incorporeal heritable right or in respect of the matters registrable under section 2(4) of this Act by making such amendment as is necessary to the title sheet of the interest in land to which the heritable security, liferent, incorporeal heritable right or matter, as the case may be, relates,

and in each case by making such consequential amendments in the register as are necessary.

(2) Where the Keeper has completed registration under subsection (1)(a) above, he shall issue to the applicant a copy of the title sheet, authenticated by the seal of the register; and such copy shall be known as a land certificate.

(3) Where the Keeper has completed registration in respect of a heritable security, he shall issue to the applicant a certificate authenticated by the seal of the register; and such certificate shall be known as a charge certificate.

(4) A land certificate shall be accepted for all purposes as sufficient evidence of the contents of the title sheet of which the land certificate is a copy; and a charge certificate shall be accepted for all purposes as sufficient evidence of the facts stated in it.

(5) Every land certificate and charge certificate shall contain a statement as to indemnity by the Keeper under Part II of this Act.

6. The title sheet

(1) Subject to subsection (3) below, the Keeper shall make up and maintain a title sheet of an interest in land in the register by entering therein—

(a) a description of the land which shall consist of or include a description of it based on the Ordnance Map, and, where the interest is that of the proprietor of the land or the lessee under a long lease and the land appears

to the Keeper to extend to 2 hectares or more, its area as calculated by the Keeper;

(b) the name and designation of the person entitled to the interest in the land and the nature of that interest;

(c) any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest;

(d) any heritable security over the interest;

(e) any subsisting real right pertaining to the interest or subsisting real burden or condition affecting the interest and, where the interest is so affected by virtue of section 18, 18A, 18B, 18C, 19, 20, 27 or 27A of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5) or section 4(5), 50, 75 or 80 of the Title Conditions (Scotland) Act 2003 (asp 9), the Keeper shall in the entry identify the benefited property, or as the case may be the dominant tenement, (if any) and any person in whose favour the real burden is constituted;

(ee) any subsisting right to a title condition pertaining to the interest by virtue of section 18, 19 or 20 of that Act of 2000 or 4(5), 50, 75 or 80 of that Act of 2003, the Keeper identifying in the entry the burdened property;

(f) any exclusion of indemnity under section 12(2) of this Act in respect of the interest;

(g) such other information as the Keeper thinks fit to enter in the register.

(2) The Keeper shall enter a real right or real burden or condition in the title sheet by entering its terms or a summary of its terms therein; and such a summary shall, unless it contains a reference to a further entry in the title sheet wherein the terms of the real right, burden or condition are set out in full be presumed to be a correct statement of the terms of the right, burden or condition.

(3) The Keeper's duty under subsection (1) above shall not extend to entering in the title sheet any over-rent exigible in respect of the interest in land, but he may so enter any such over-rent.

(4) Any overriding interest which appears to the Keeper to affect an interest in land—

(a) shall be noted by him in the title sheet of that interest if it has been disclosed in any document accompanying an application for registration in respect of that interest;

(b) may be so noted if—

(i) application is made to him to do so;

(ii) the overriding interest is disclosed in any application for registration; or

(iii) the overriding interest otherwise comes to his notice.

In this subsection 'overriding interest' does not include the interest of—

- (i) a lessee under a lease which is not a long lease;
- (ii) a non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981; and
- (iii) a non-entitled civil partner within the meaning of section 106 of the Civil Partnership Act 2004.

(5) The Keeper shall issue, to any person applying, a copy, authenticated as the Keeper thinks fit, of any title sheet, part thereof, or of any document referred to in a title sheet; and such copy, which shall be known as an office copy, shall be accepted for all purposes as sufficient evidence of the contents of the original.

(6) In subsections (1)(e) and (2) above, 'condition' includes a servitude created by a deed registered in accordance with section 75(1) of the Title Conditions (Scotland) Act 2003 (asp 9) and a rule of a development management scheme ('development management scheme' being construed in accordance with section 71 of that Act).

7. Ranking

(1) Without prejudice to any express provision as to ranking in any deed or any other provision as to ranking in, or having effect by virtue of, any enactment or rule of law, the following provisions of this section shall have effect to determine the ranking of titles to interests in land.

(2) Titles to registered interests in land shall rank according to the date of registration of those interests.

(3) A title to a registered interest and a title governed by a deed recorded in the Register of Sasines shall rank according to the respective dates of registration and recording.

(4) Where the date of registration or recording of the titles to two or more interests in land is the same, the titles to those interests shall rank equally.

8. Continuing effectiveness of recording in Register of Sasines

(1) Subject to subsection (3) below, the only means of creating or affecting a real right or a real obligation relating to anything to which subsection (2) below applies shall be by recording a deed in the Register of Sasines.

(2) This subsection applies to—

- (a) an interest in land which is to be transferred or otherwise affected by—
 - (i) an instrument which, having been recorded before the commencement of this Act in the Register of Sasines with an error or defect; or
 - (ii) a deed which, having been recorded before the commencement of this Act in the Register of Sasines with an error or defect in the recording,

has not, before such commencement, been re-presented, corrected as necessary, for the purposes of recording of new under section 143 of the Titles to Land Consolidation (Scotland) Act 1868;

In this paragraph, 'instrument' has the same meaning as in section 3 of the said Act of 1868.

(b) a registered interest in land which has been absorbed, otherwise than by operation of prescription, into another interest in land the title to which is governed by a deed recorded in the Register of Sasines;

(c) anything which is not registrable under subsections (1) to (4) of section 2 of this Act and in respect of which, immediately before the commencement of this Act, a real right or obligation could be created or affected by recording a deed in the Register of Sasines.

(3) Nothing in subsection (1) above shall prejudice any other means, other than by registration, of creating or affecting real rights or obligations under any enactment or rule of law.

(4) Except as provided in this section, the Keeper shall reject any deed submitted for recording in the Register of Sasines.

9. Rectification of the Register

(1) Subject to subsection (3) below, the Keeper may, whether on being so requested or not, and shall, on being so ordered by the court or the Lands Tribunal for Scotland, rectify any inaccuracy in the register by inserting, amending or cancelling anything therein.

(2) Subject to subsection (3)(b) below, the powers of the court and of the Lands Tribunal for Scotland to deal with questions of heritable right or title shall include power to make orders for the purposes of subsection (1) above.

(3) Subject to subsection (3B) below, if rectification under subsection (1) above would prejudice a proprietor in possession—

(a) the Keeper may exercise his power to rectify only where—

(i) the purpose of the rectification is to note an overriding interest or to correct any information in the register relating to an overriding interest;

(ii) all persons whose interests in land are likely to be affected by the rectification have been informed by the Keeper of his intention to rectify and have consented in writing;

(iii) the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession; or

(iv) the rectification relates to a matter in respect of which indemnity has been excluded under section 12(2) of this Act;

(b) the court or the Lands Tribunal for Scotland may order the Keeper to rectify only where sub-paragraph (i), (iii) or (iv) of paragraph (a) above applies

or the rectification is consequential on the making of an order under section 8 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985.

(3A) Where a rectification of an entry in the register is consequential on the making of an order under section 8 of the said Act of 1985, the entry shall have effect as rectified as from the date when the entry was made:

Provided that the court, for the purpose of protecting the interests of a person to whom section 9 of that Act applies, may order that the rectification shall have effect as from such later date as it may specify.

(3B) Subject to subsection (3C) below, rectification (whether requisite or in exercise of the Keeper's discretion) to take account of, or of anything done (or purportedly done) under or by virtue of—

(a) any provision of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5), other than section 4 or 65; or

(b) section 49, 50, 58 or 80 of the Title Conditions (Scotland) Act 2003 (asp 9),

shall, for the purposes of subsection (3) above (and of section 12(3)(cc) of this Act), be deemed not to prejudice a proprietor in possession.

(3C) For the purposes of subsection (3B) above, rectification does not include entering or reinstating in a title sheet a real burden or a condition affecting an interest in land.

(4) In this section—

(a) 'the court' means any court having jurisdiction in questions of heritable right or title;

(b) 'overriding interest' does not include the interest of—

(i) a lessee under a lease which is not a long lease;

(ii) a non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981; and

(iii) a non-entitled civil partner within the meaning of section 106 of the Civil Partnership Act 2004.

11. Transitional provisions for Part I

(1) If an application for registration relates to land no part of which is in an operational area, the Keeper may nevertheless accept that application as if it related to land wholly within an operational area, and if the Keeper has so accepted such an application, the provisions of this Act relating to registration then in force shall apply in relation to that application.

(2) An application for registration which relates to land which is partly in an operational area shall be treated as if it related to land wholly in that area, and the provisions of this Act relating to registration in force shall apply in relation to that application.

(3) In this section an 'operational area' means an area in respect of which the provisions of this Act relating to registration have come into operation.

PART II

INDEMNITY IN RESPECT OF REGISTERED INTERESTS IN LAND

12. Indemnity in respect of loss

(1) Subject to the provisions of this section, a person who suffers loss as a result of—

- (a) a rectification of the register made under section 9 of this Act;
- (b) the refusal or omission of the Keeper to make such a rectification;
- (c) the loss or destruction of any document, while lodged with the Keeper;
- (d) an error or omission in any land or charge certificate or in any information given by the Keeper in writing or in such other manner as may be prescribed by rules made under section 27 of this Act,

shall be entitled to be indemnified by the Keeper in respect of that loss.

(2) Subject to section 14 of this Act, the Keeper may on registration in respect of an interest in land exclude, in whole or in part, any right to indemnity under this section in respect of anything appearing in, or omitted from, the title sheet of that interest.

(3) There shall be no entitlement to indemnity under this section in respect of loss where—

- (a) the loss arises as a result of a title prevailing over that of the claimant in a case where—
 - (i) the prevailing title is one in respect of which the right to indemnity has been partially excluded under subsection (2) above, and
 - (ii) such exclusion has been cancelled but only on the prevailing title having been fortified by prescription;
- (b) the loss arises in respect of a title which has been reduced, whether or not under subsection (4) of section 34, or subsection (5) of section 36, of the Bankruptcy (Scotland) Act 1985 (or either of those subsections as applied by sections 615A(4) and 615B of the Companies Act 1985, respectively), as a gratuitous alienation or fraudulent preference, or has been reduced or varied by an order under section 6(2) of the Divorce (Scotland) Act 1976 or by an order made by virtue of section 29 of the Matrimonial and Family Proceedings Act 1984 (orders relating to settlements and other dealings) or has been set aside or varied by an order under section 18(2) (orders relating to avoidance transactions) of the Family Law (Scotland) Act 1985;

(c) the loss arises in consequence of the making of a further order under section 5(2) of the Presumption of Death (Scotland) Act 1977 (effect on property rights of recall or variation of decree of declarator of presumed death);

(cc) the loss arises in consequence of—

(i) a rectification which; or

(ii) there being, in the register, an inaccuracy the rectification of which,

were there a proprietor in possession, would be deemed, by subsection (3B) of section 9 of this Act, not to prejudice that proprietor;

(d) the loss arises as a result of any inaccuracy in the delineation of any boundaries shown in a title sheet, being an inaccuracy which could not have been rectified by reference to the Ordnance Map, unless the Keeper has expressly assumed responsibility for the accuracy of that delineation;

(e) the loss arises, in the case of land extending to 2 hectares or more the area of which falls to be entered in the title sheet of an interest in that land under section 6(1)(a) of this Act, as a result of the Keeper's failure to enter such area in the title sheet or, where he has so entered such area, as a result of any inaccuracy in the specification of that area in the title sheet;

(f) the loss arises in respect of an interest in mines and minerals and the title sheet of any interest in land which is or includes the surface land does not expressly disclose that the interest in mines and minerals is included in that interest in land;

(g) 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;

(gg) the loss arises from inability to enforce sporting rights converted into a tenement in land by virtue of section 65A of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5), unless the Keeper expressly assumes responsibility for the enforceability of those rights;

(h) the loss arises in respect of an error or omission in the noting of an overriding interest;

(j) the loss is suffered by—

(i) a beneficiary under a trust in respect of any transaction entered into by its trustees or in respect of any title granted by them the validity of which is unchallengeable by virtue of section 2 of the Trusts (Scotland) Act 1961 (validity of certain transactions by trustees), or as the case may be, section 17 of the Succession (Scotland) Act 1964 (protection of persons acquiring title), or

(ii) a person in respect of any interest transferred to him by trustees in purported implement of trust purposes;

(k) the loss arises as a result of an error or omission in an office copy as to the effect of any subsisting adverse entry in the Register of Inhibitions and Adjudications affecting any person in respect of any registered interest in land, and that person's entitlement to that interest is neither disclosed in the register nor otherwise known to the Keeper;

(kk) the loss is suffered by an adult within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4) because of the operation of sections 24, 53, 67, 77 or 79 of that Act, or by any person who acquires any right, title or interest from that adult;

(l) the claimant is the proprietor of the dominant tenement in a servitude, except insofar as the claim may relate to the validity of the constitution of that servitude;

(m) the claimant is a landlord under a long lease and the claim relates to any information—

(i) contained in the lease and

(ii) omitted from the title sheet of the interest of the landlord,

(except insofar as the claim may relate to the constitution or amount of the rent and adequate information has been made available to the Keeper to enable him to make an entry in the register in respect of such constitution or amount or to the description of the land in respect of which the rent is payable);

(n) the claimant has by his fraudulent or careless act or omission caused the loss;

(o) the claim relates to the amount due under a heritable security;

(p) the loss arises from a rectification of the register consequential on the making of an order under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

(q) the loss arises in consequence of an inaccuracy in any information contained in a notice of potential liability for costs registered in pursuance of—

(i) section 10(2A)(a) or 10A(3) of the Title Conditions (Scotland) Act 2003 (asp 9); or

(ii) section 12(3)(a) or 13(3) of the Tenements (Scotland) Act 2004 (asp 11).

(4) A refusal or omission by the Keeper to enter in a title sheet—

(a) any over-rent exigible in respect of a registrable interest;

(b) any right alleged to be a real right on the ground that by virtue of section 6 of this Act he has no duty to do so since it is unenforceable,

shall not by itself prevent a claim to indemnity under this section.

(5) In subsection (3)(g) above, 'condition' includes a rule of a development management scheme ('development management scheme' being construed in accordance with section 71 of the Title Conditions (Scotland) Act 2003 (asp 9)).

13. Provisions supplementary to section 12

(1) Subject to any order by the Lands Tribunal for Scotland or the court for the payment of expenses in connection with any claim disposed of by the Lands Tribunal under section 25 of this Act or the court, the Keeper shall reimburse any expenditure reasonably and properly incurred by a person in pursuing a *prima facie* well-founded claim under section 12 of this Act, whether successful or not.

(2) On settlement of any claim to indemnity under the said section 12, the Keeper shall be subrogated to all rights which would have been available to the claimant to recover the loss indemnified.

(3) The Keeper may require a claimant, as a condition of payment of his claim, to grant, at the Keeper's expense, a formal assignation to the Keeper of the rights mentioned in subsection (2) above.

(4) If a claimant to indemnity has by his fraudulent or careless act or omission contributed to the loss in respect of which he claims indemnity, the amount of the indemnity to which he would have been entitled had he not so contributed to his loss shall be reduced proportionately to the extent to which he has so contributed.

14. The foreshore

(1) If—

(a) it appears to the Keeper that—

(i) an interest in land which is registered or in respect of which an application for registration has been made consists, in whole or in part, of foreshore or a right in foreshore, or might so consist, and

(ii) discounting any other deficiencies in his title in respect of that foreshore or right in foreshore, the person registered or, as the case may be, applying to be registered as entitled to the interest will not have an unchallengeable title in respect of the foreshore or the right in foreshore until prescription against the Crown has fortified his title in that respect, and

(b) the Keeper wholly excludes or proposes wholly to exclude rights to indemnity in respect of that person's entitlement to that foreshore or that right in foreshore, and is requested by that person not to do so,

the Keeper shall notify the Crown Estate Commissioners that he has been so requested.

(2) If the Crown Estate Commissioners have—

(a) within one month of receipt of the notification referred to in subsection (1) above, given to the Keeper written notice of their interest, and

(b) within three months of that receipt informed the Keeper in writing that they are taking steps to challenge that title,

the Keeper shall

(i) during the prescriptive period, or

(ii) until such time as it appears to the Keeper that the Commissioners are no longer taking steps to challenge that title or that their challenge has been unsuccessful,

whichever is the shorter, continue wholly to exclude or, as the case may be, wholly exclude right to indemnity in respect of that person's entitlement to that foreshore or that right in foreshore.

(3) This section, or anything done under it, shall be without prejudice to any other right or remedy available to any person in respect of foreshore or any right in foreshore.

PART III

SIMPLIFICATION AND EFFECT OF DEEDS

19. Agreement as to common boundary

(1) This section shall apply where the titles to adjoining lands disclose a discrepancy as to the common boundary and the proprietors of those lands have agreed to, and have executed a plan of, that boundary.

(2) Where one or both of the proprietors holds his interest or their interest in the land or lands by virtue of a deed or, as the case may be, deeds recorded in the Register of Sasines, the agreement and plan may be recorded in the Register of Sasines and on being so recorded shall be binding on the singular successors of that proprietor or, as the case may be, those proprietors and on all other persons having an interest in the land or, as the case may be, the lands.

(3) Where one or both of the interests in the lands is or are registered interests, the plan with a docquet thereon executed by both proprietors referring to the agreement shall be registrable as affecting that interest or those interests, and on its being so registered its effect shall be binding on the singular successors of the proprietor of that interest or, as the case may be, the proprietors of those interests and on all other persons having an interest in the land or, as the case may be, the lands.

PART IV

MISCELLANEOUS AND GENERAL

24. Financial Provisions

There shall be defrayed out of money provided by Parliament all expenses incurred by the Keeper in consequence of the provisions of this Act.

25. Appeals

(1) Subject to subsections (3) and (4) below, an appeal shall lie, on any question of fact or law arising from anything done or omitted to be done by the Keeper under this Act, to the Lands Tribunal for Scotland.

(2) Subject to subsections (3) and (4) below, subsection (1) above is without prejudice to any right of recourse under any enactment other than this Act or under any rule of law.

(3) Nothing in subsection (1) above shall enable the taking of an appeal if it is, under the law relating to *res judicata*, excluded as a result of the exercise of any right of recourse by virtue of subsection (2) above; and nothing in subsection (2) above shall enable the exercise of any right of recourse if it is so excluded as a result of the taking of an appeal under subsection (1) above.

(4) No appeal shall lie under this section, nor shall there be any right of recourse by virtue of this section in respect of a decision of the Keeper under section 2(1)(b) or 11(1) of this Act.

26. Application to Crown

This Act shall apply to land owned by the Crown or by the Prince and Steward of Scotland, and to land in which there is any other interest belonging to Her Majesty in right of the Crown or to a Government department, or held on behalf of Her Majesty for the purposes of a Government department, in like manner as it applies to other land.

27. Rules

(1) The Secretary of State may, after consultation with the Lord President of the Court of Session, make rules—

- (a) regulating the making up and keeping of the register;
- (b) prescribing the form of any search, report or other document to be issued or used under or in connection with this Act and regulating the issue of any such document;
- (c) regulating the procedure on application for any registration;
- (d) prescribing the form of deeds relating to registered interests in land;
- (e) concerning such other matters as seem to the Secretary of State to be necessary or proper in order to give full effect to the purposes of this Act.

(2) The power to make rules under this section shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

28. Interpretation, etc

(1) In this Act, except where the context otherwise requires—

'deed' has the meaning assigned to it by section 3 of the Titles to Land Consolidation (Scotland) Act 1868, section 3 of the Conveyancing (Scotland) Act 1874 and section 2 of the Conveyancing (Scotland) Act 1924;

'heritable security' has the same meaning as in section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970;

'incorporeal heritable right' does not include a right of ownership of land, the right of a lessee under a long lease of land, a right to mines or minerals or

- (a) a right to salmon fishings; or
- (b) sporting rights (as defined by section 65A(9) of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5));

'interest in land'—

- (a) means any right in or over land, including any heritable security or servitude but excluding any lease which is not a long lease; and
- (b) where the context admits, includes the land;

'the Keeper' has the meaning assigned by section 1(2) of this Act;

'land' includes buildings and other structures and land covered with water;

'long lease' means a probative lease—

- (a) exceeding 20 years; or
- (b) which is subject to any provision whereby any person holding the interest of the grantor is under a future obligation, if so requested by the grantee, to renew the lease so that the total duration could (in terms of the lease, as renewed, and without any subsequent agreement, express or implied, between the persons holding the interests of the grantor and the grantee) extend for more than 20 years;

'overriding interest' means, subject to sections 6(4) and 9(4) of this Act, in relation to any interest in land, the right or interest over it of—

- (a) the lessee under a lease which is not a long lease;
- (b) the lessee under a long lease who, prior to the commencement of this Act, has acquired a real right to the subjects of the lease by virtue of possession of them;

- (c) a crofter or cottar within the meaning of section 3 or 28(4) respectively of the Crofters (Scotland) Act 1955, or a landholder or statutory small tenant within the meaning of section 2(2) or 32(1) respectively of the Small Landholders (Scotland) Act 1911;
- (d) the proprietor of the dominant tenement in any servitude which was not created by registration in accordance with section 75(1) of the Title Conditions (Scotland) Act 2003 (asp 9);
- (e) the Crown or any Government or other public department, or any public or local authority, under any enactment or rule of law, other than an enactment or rule of law authorising or requiring the recording of a deed in the Register of Sasines or registration in order to complete the right or interest;
- (ee) the operator having a right conferred in accordance with paragraph 2, 3 or 5 of Schedule 2 to the Telecommunications Act 1984 (agreements for execution of works, obstruction of access, etc);
- (ef) a licence holder within the meaning of Part I of the Electricity Act 1989 having such a wayleave as is mentioned in paragraph 6 of Schedule 4 to that Act (wayleaves for electric lines), whether granted under that paragraph or by agreement between the parties;
- (eg) a licence holder within the meaning of Part I of the Electricity Act 1989 who is authorised by virtue of paragraph 1 of Schedule 5 to that Act to abstract, divert and use water for a generating station wholly or mainly driven by water;
- (eh) insofar as it is an interest vesting by virtue of section 7(3) of the Coal Industry Act 1994, the Coal Authority;
- (f) the holder of a floating charge whether or not the charge has attached to the interest;
- (g) a member of the public in respect of any public right of way or in respect of any right held inalienably by the Crown in trust for the public or in respect of the exercise of access rights within the meaning of the Land Reform (Scotland) Act 2003 (asp 2) by way of a path delineated in a path order made under section 22 of that Act;
- (gg) the non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981;
- (gh) the non-entitled civil partner within the meaning of section 106 of the Civil Partnership Act 2004;
- (h) any person, being a right which has been made real, otherwise than by the recording of a deed in the Register of Sasines or by registration; or
- (i) any other person under any rule of law relating to common interest or joint or common property, not being a right or interest constituting a real right, burden or condition entered in the title sheet

of the interest in land under section 6(1)(e) of this Act or having effect by virtue of a deed recorded in the Register of Sasines,

but does not include any subsisting burden or condition enforceable against the interest in land and entered in its title sheet under section 6(1) of this Act;

'the register' and 'registered' have the meanings assigned to them respectively by subsections (1) and (3) of section 1 of this Act;

'Register of Sasines' has the same meaning as in section 2 of the Conveyancing (Scotland) Act 1924;

'transfer' includes transfer by operation of law.

29. Amendment and repeal of enactments

(1) ...

(2) Subject to subsection (3) below, any reference, however expressed, in any enactment passed before, or during the same Session as, this Act or in any instrument made before the passing of this Act under any enactment to the Register of Sasines or to the recording of a deed therein shall be construed as a reference to the register or, as the case may be, to registration.

(3) Subsection (2) above does not apply—

(a) to the enactments specified in Schedule 3 to this Act;

(b) for the purposes of the recording of a deed in the Register of Sasines under section 8 of this Act.

(4) ...

SCHEDULE 3

ENACTMENTS REFERRING TO THE REGISTER OF SASINES OR TO THE RECORDING OF A DEED IN THE REGISTER OF SASINES NOT AFFECTED BY SECTION 29(2)

1. *The Real Rights Act 1693*

The whole Act.

2. *The Register of Sasines Act 1693*

The whole Act.

3. *The Register of Sasines Act 1829*

Section 1.

4. *The Infertment Act 1845*

Sections 1 to 4 and Schedule B insofar as relating to section 1.

5. *The Registration of Leases (Scotland) Act 1857*
 - (a) In section 6, from the beginning of the section to "to the extent assigned" and Schedule D.
 - (b) Section 12.
 - (c) Section 15.
 - (d) Section 16.
6. *The Land Registers (Scotland) Act 1868*
 - (a) Sections 2 and 3.
 - (b) Sections 5 to 7.
 - (c) Section 9.
 - (d) Sections 12 to 14.
 - (e) In section 19, the proviso.
 - (f) Section 23.
7. *The Titles to Land Consolidation (Scotland) Act 1868*
 - (a) Sections 9 and 10 and Schedules C and D.
 - (b) Sections 12 and 13 and Schedules F and G insofar as relating to sections 12 and 13 respectively.
 - (c) Section 17.
 - (d) Section 19 and Schedule L.
 - (e) Section 120.
 - (f) Section 141.
 - (g) Section 142.
 - (h) Section 143.
 - (i) Section 146.
 - (j) Schedule D.
 - (k) Schedule G.
8. *The Conveyancing (Scotland) Act 1874*
 - (a) Section 8.
 - (b) In section 32, from the beginning to "shall be sufficient" and Schedule H.

- (c) Section 61.
 - (d) Schedule M.
9. *The Writs Execution (Scotland) Act 1877*
Sections 5 and 6.
10. *The Registration of Certain Writs (Scotland) Act 1891*
Section 1(2).
11. *The Conveyancing (Scotland) Act 1924*
- (a) Section 3, form 1 of Schedule A and Note 2 to Schedule K.
 - (b) Section 4 and, in Schedule B, forms 1 to 6 and Note 7, but not insofar as relating to the completion of title under section 74 or 76 of the Lands Clauses Consolidation (Scotland) Act 1845.
 - (c) Section 8 and Schedule D.
 - (d) Section 9(3) and (4).
 - (e) Section 10(1) to (5) and Schedule F.
 - (f) In section 24(3) from "and such lease, before" to "Schedule B to this Act".
 - (g) Section 24(2) and (5) and Schedule J.
 - (h) Section 47.
 - (i) Sections 48 and 49(2).
12. *The Burgh Registers (Scotland) Act 1926*
- (a) Section 1(1) (except the words from "and any writ" to "appropriate burgh register of sasines") and Schedule 1 insofar as relating to section 1(1) with that exception.
 - (b) Section 1(2).
 - (c) Section 2 and Schedule 1 insofar as relating to section 2.
 - (d) Section 5 and Schedule 1 insofar as relating to section 5.
13. *The Conveyancing Amendment (Scotland) Act 1938*
Section 6(1) and (2).
14. *The Public Registers and Records (Scotland) Act 1948*
- (a) Section 2.
 - (b) Section 4.

15. *The Public Registers and Records (Scotland) Act 1950*
Section 1(1).
16. *The Conveyancing and Feudal Reform (Scotland) Act 1970*
 - (a) Section 12(1) and (2) and Notes 1, 2 and 3 to Schedule 2 insofar as relating to section 12(2).
 - (b) Section 28(3).
17. *The Prescription and Limitation (Scotland) Act 1973*
Section 1.



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