



Scottish Law Commission

DISCUSSION PAPER NO. 93

PROPERTY LAW ABOLITION OF THE FEUDAL SYSTEM

JULY 1991

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views of the Scottish Law Commission

The Commission would be grateful if comments on this Discussion Paper were submitted by 31 January 1992. All correspondence should be addressed to:-

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NOTES

1. In writing a later Report on this subject with recommendations for reform, the Commission may find it helpful to refer to and attribute comments submitted in response to this Discussion Paper. Any request from respondents to treat all, or part, of their replies in confidence will, of course, be respected, but if no request for confidentiality is made, the Commission will assume that comments on the Discussion paper can be used in this way.

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ABOLITION OF THE FEUDAL SYSTEM

PART I

INTRODUCTION

Purpose of Discussion Paper

1.1 The purpose of this Discussion Paper is to seek comments on the formulation of a new system of land tenure in Scotland to replace the existing feudal system and on ways of effecting a transition to the new system. We also make several proposals in relation to matters arising from our review of the feudal system.

1.2 This paper is the second in a series of papers to be issued by the Commission on the subject of property law. Our paper on the law of the tenement¹ was published recently and we are in the course of preparing a third paper covering the topic of long residential leases which we hope to publish shortly. The general topic of property law is included in our Fourth Programme of Law Reform².

1.3 Since the Halliday Committee reported in 1966, major legislation has effectively swept away many elements of the superior and vassal relationship which is the essential foundation of the feudal system. The introduction of legislation preventing the imposition of new feu duties and designed to phase out the majority of feu duties being paid has had far reaching effects. With the prohibition of the creation of new feu duties and the voluntary and compulsory redemption of existing allocated feu duties, the majority of feu duties have now been redeemed. The feu duties which remain are often too small to merit the expense of collection and in many cases the identities of current superiors

¹ Discussion Paper No 91.

² Scot Law Com No 126.

and vassals (otherwise known as "feuars") are unknown to each other. This causes significant practical difficulties for other consequences of the feudal relationship, since the relationship between vassal and superior is not extinguished merely by the redemption of feu duty. For example, the vassal may require to seek the superior's consent to vary a burden constituted in his title and this may be difficult if he cannot trace the superior. Both the White Paper of 1969¹ and the Green Paper of 1972² published by successive Governments, contained a commitment to abolish the feudal system in Scotland. This paper discusses how that abolition might best be achieved and the system which might be introduced in its place. As well as comments on the proposals and options outlined in this paper, we would welcome any suggestions from consultees as to other topics relating to property law which we should consider. We gratefully acknowledge the help we have received from the individuals, organisations and others listed in Appendix IV to this paper. The information and other assistance which they provided proved invaluable in the preparation of this Paper.

Outline of Commission's proposals

1.4 In this paper we provisionally propose that the existing feudal system of land tenure in Scotland be replaced by a system of absolute ownership. All feu duties will fall to be redeemed on a day to be appointed, subject to provision being made for payment by instalments over a maximum period of 5 years after the appointed day in the case of redemption monies due in respect of feu duties of over £20 per annum. Redemption sums will be

¹ Cmnd 4099 Land Tenure in Scotland - A Plan for Reform.

² Land Tenure Reform in Scotland.

calculated in accordance with the existing provisions.¹ We provisionally propose that all existing ground annuals and payments in respect of standard charge and stipend should also be compulsorily redeemed in the same way as feu duties. After the appointed day, in the case of feu duties which have not been redeemed, there will be only a personal obligation on the part of the former feuar to pay the redemption sum to the former superior. Similar obligations would arise in the case of other payments falling to be redeemed. We do not propose that there should be security over the land in respect of such payments.

1.5 From the appointed day, the feudal relationship between superior and vassal will cease to exist. We offer alternative approaches for a new system of land tenure for consideration by consultees. Our first option is derived from consideration of the previous approaches which might be adopted to a new system (these approaches are discussed in Part II of this Paper). Under this option ("option 1"),² former superiors, unless otherwise qualified under the new system, will lose their existing rights to enforce real burdens as will disponers who have created real burdens in dispositions and also co-feuars and co-disponees who may at present benefit from a ius quaesitum tertio³. It is not proposed that there be any compensation for the loss of such enforcement rights. Real burdens in existence at the appointed day will automatically be "converted" into a new category of burden or obligation to be called "land conditions" enforceable at the instance of a new category of qualified proprietors. In

¹ At the date of publication of this paper, the multiplier to be applied to feu duty for the purpose of calculating the redemption figure is approximately 10 times the annual feu duty.

² Proposition 6(i).

³ A ius quaesitum tertio is a right enjoyed by a third party to enforce burdens and restrictions created in a contract to which he is not a party. A superior or disponent may create such rights expressly or by implication when imposing identical burdens on several vassals or disponees - as in a modern housing development where parties are all bound by a deed of conditions.

addition, after the appointed day new land conditions may be created.

1.6 Under option 1, a land condition may be enforced by a qualified proprietor. "Qualification" will depend on the proximity of the enforcing proprietor's land to the burdened land and the enforcing proprietor's ability to demonstrate that failure to comply with a land condition is or would be detrimental to the enforcing proprietor's interest in his own land. A burdened proprietor will have to seek the consent of all neighbouring qualified proprietors to any proposed variation or discharge of a land condition or, alternatively, he may apply to the Lands Tribunal for an order to this effect.

1.7 Under the second, less radical alternative ("option 2")¹, which we prefer, while the rights of superiors would cease to exist at the appointed day, the person who was superior at that date would be deemed to have the enforcement rights of a disponent in relation to the enforcement of existing real burdens. For the future, real burdens could be created only by way of disposition. Existing rights of iura quaesita tertiis enjoyed by co-feuars and co-disponees would continue to be enforceable and existing disponents' rights would be unaffected. Under this option, rights to enforce would depend on the establishment of both title and interest on the part of the disponent and the tertii. Variation and discharge of real burdens would be effected according to existing practice.

1.8 It is envisaged that, in addition to making orders varying or discharging real burdens or land conditions, the Lands Tribunal would be given the power, where breaches have occurred, to make

¹ Proposition 6(ii).

enforcement orders and award compensation where appropriate. The Tribunal would also have authority to declare real burdens or land conditions to be obsolete on application by either a burdened proprietor or the Keeper of the Registers of Scotland (referred to in this paper as "the Keeper").

1.9 Where real burdens have been created prior to the appointed day by bodies set up for charitable, religious or other public purposes who would not otherwise be qualified proprietors for the purpose of enforcing land conditions, we have considered whether, in relation to option 1, such bodies should have limited preserved personal rights of enforcement. We have in mind, in this connection, such restrictions on the use of premises as, for example, where a religious body prohibits the sale of excisable liquor or where limitations are imposed on the use of a historic building. Such rights could be restricted to such conditions which were imposed prior to the appointed day as a consequence of the constitution, nature or statutory authority of such bodies and would not be exerciseable in the case of land conditions created after the appointed day. On balance, we do not favour the creation of a privileged class of persons with personal enforcement rights. Under option 2 we consider that no special provisions for such bodies are needed. The rules in relation to rights of pre-emption, reversion and redemption have recently been considered by Parliament.¹ We have not proposed any radical changes in the exercise of these rights but are willing to consider the topic further in light of problems encountered by consultees which are brought to our attention. We also seek comments on the exercise of these rights generally for further consideration, if appropriate.

¹ Land Tenure Reform (Scotland) Act 1974 s 12 and s 13.

1.10 In Appendix I to this paper, we list commonly occurring real burdens and reservations. Virtually all of these burdens and reservations are intended either to preserve amenity or to regulate liability for common parts and services. We have, accordingly, informally categorised the burdens and reservations listed as "amenity" or "service" burdens. In the case of amenity burdens, we take the view that under the feudal system, such burdens are only likely to be successfully enforced where the person taking the enforcement action has the necessary title and can establish his interest. Interest is generally held to exist only where there is an element of neighbourhood. We take the view that, in practice, neither of the two options we have outlined above would lead to proprietors, other than those in the immediate neighbourhood of the burdened subjects, being qualified to enforce amenity conditions.

1.11 The foregoing provisional proposals are discussed at length in Parts III and IV of this paper. Part V deals with various miscellaneous issues and Part VI contains a summary of our provisional proposals.

1.12 In Part II of this Paper we outline the history of the present proposals for reform since the Halliday Committee reported in 1966. In the following paragraphs we consider the background to the appointment of that Committee.

History of the feudal system

1.13 It has been suggested that feudalism as it is presently understood came to Scotland from the Continent via England following the Norman Conquest. European feudal systems of land tenure developed on the premise that the king owned all the land within his dominion and could grant the use of it to others in return for military or other services. Political and religious upheavals in Scotland during the 15th and 16th centuries led to the disposal of large tracts of land previously held by the Crown and the Church. At the same time there was a general lessening of traditional feudal loyalties, and the feudal system developed from one based entirely on obligations of service, in return for a grant of land, through a period when it was used primarily for the regulation of local government through the administration of baronies, to the system which was prevalent in Scotland by the end of the 18th century. At that time most land in Scotland was the subject of feudal tenure but that tenure was so modified and adapted that, unlike its European counterparts, it survived beyond the 19th century and formed the basis for the system as we know it today.

1.14 One reason which is put forward for the fact that the Scottish feudal system, unlike its European counterparts, survived, is that, by the end of the 19th century, when most European feudal systems had broken down and had been replaced by systems of absolute ownership, the Scottish feudal system had evolved to the extent that the normal feudal grant of land benefited the vassal, who obtained a secure tenure, as much as it benefited the superior who derived, in the short term at least, a higher income from land than he might have received by way of rent. The

Scottish system, purged of its most oppressive casualties¹ such as wardship and relief, operated principally as a source of revenue for superiors and in many cases as a method of effecting environmental improvement and control.

1.15 The Titles to Land Consolidation (Scotland) Act 1868, the Conveyancing (Scotland) Act 1874 and the Conveyancing (Scotland) Act 1924² represented a major modernisation of the conveyancing system in Scotland. These Acts consolidated existing practices and simplified procedures. Between 1924 and 1970 there were several small but important reforms but the most recent radical reform of conveyancing practice and the system within which it operates did not start until 1970 with the Conveyancing and Feudal Reform (Scotland) Act 1970.³

1.16 In 1963 the report of the Reid Committee on Registration of Title to Land in Scotland⁴ was published. The Committee, under the Chairmanship of Lord Reid, was set up by the Secretary of State for Scotland in 1959 to consider the desirability of

¹ "Casualties" were payments falling due to a superior on the happening of events of uncertain date or occurrence. The casualty of wardship was an entitlement to the income of lands during the minority of a deceased vassal's heir. Relief was a payment due to the superior by the vassal's heir on his entry to the deceased vassal's estate.

² 31 & 32 Vict c 101, 37 & 38 Vict c 94 and 14 & 15 Geo 5 c 27 all referred to in this paper as "the 1868 Act," "the 1874 Act" and "the 1924 Act" respectively.

³ 1970 c 35 referred to in this paper as "the 1970 Act".

⁴ Cmnd 2032, referred to in this paper as the "Reid Committee Report."

introducing a system of registration of title to land in Scotland. The Committee recommended, among other things, that two further expert committees should be set up to look at the amendment of conveyancing legislation and the details of land registration respectively. A committee under the Chairmanship of Professor John M. Halliday was appointed in June 1964 "to examine and report on existing conveyancing legislation and practice..." and in 1965 a committee under the Chairmanship of Professor George L. Henry was appointed to prepare a detailed scheme for the introduction and operation of a system of registration of title to land. Among other matters considered, the Reid Committee examined an argument that the introduction of a system of registration of title to land would not be practicable in the context of the feudal practices then existing. Views had been expressed that the additional intricacies and complexities of the feudal system, as against an allodial (non-feudal) system of tenure, with the concurrence of several interests in the same land, would make a system of registration of title difficult to operate properly. The Committee, however, recommended that a system of registration of title to land be introduced in Scotland and took the view that there was no fundamental incompatibility between the feudal system and a system of registration of title.

1.17 In accordance with their terms of reference, the Halliday Committee in their Report on Conveyancing Legislation and Practice published in December 1966,¹ concentrated on aspects of conveyancing practice. The Committee found, however, that a review of practices could not avoid consideration of the system within which such practices operated. While acknowledging that the question of land tenure was not strictly within their terms of reference the Committee felt that they should express views on

¹ Cmnd 3118 referred to in this paper as "the Halliday Report".

the matter insofar as their recommendations for reform of the conveyancing system required consideration of the wider issues. The Report of the Committee deals with land tenure at Chapters XII, XIII and XIV.

1.18 The review by the Halliday Committee of land tenure represents the most recent systematic review of the practice of conveyancing in the context of the feudal system, and for this reason we consider that it would be helpful for consultees to be reminded of the substance of the Committee's recommendations. We have also considered Government White and Green papers¹ on the topic of reform of the system of land tenure and the recommendations contained in these papers are considered along with the recommendations of the Halliday Committee in the following parts of this Paper. While, in the interests of economy of argument, we do not specifically cross-reference all of the options which we explore in this paper with the recommendations of the Halliday Committee and subsequent Government publications, consultees will recognise in our proposals aspects of the various views expressed in these publications.

¹ Cmnd 4099 "Land Tenure in Scotland a Plan for Reform" and "Land Tenure Reform in Scotland", respectively.

PART II

DEVELOPMENTS SINCE 1966

The Halliday Report

2.1 For the purpose of the following paragraphs, we confine our consideration to chapters XII to XV of the Halliday Committee's Report. We concentrate on those aspects of the Report which dealt with the feudal system, as it is proposed that other matters arising in the general field of land tenure, may be dealt with in subsequent discussion papers. At the time of the Report, the Committee estimated that more than 80% of properties in Scotland were held on feudal tenure. Feudal tenure is clearly still the most significant type of tenure in Scotland at the present day, and, with the substantial increase in the number of home owners, the need for reform is, if anything, more pressing than it was in 1966.

2.2 The Halliday Committee identified the following as the principal merits of the feudal system:-¹

- (1) The feudal system enables a permanent income to be created for the superior by way of feu duty.
- (2) Superiors have a method of retaining control over the amenity of properties they have disposed of, by way of detailed and precise restrictions on the structure and use of buildings and that control may be beneficial to both the amenity and the value of properties.

Against these benefits, the Committee recognised, in the first place, that the diminishing value of the income derived from feu duty, especially in a period of inflation, made it an increasingly

¹ Para 165.

unattractive income producing investment and, in the second place, the possibility of obsolete restrictions impeding desirable redevelopment of ground with the risk that a superior might demand a disproportionately high payment for granting a waiver of such restrictions. The Committee also recognised that practical difficulties arising from the continued existence of the feudal system of land tenure could cause problems for conveyancers and consequent expense for clients in a complex multi-tier structure of land ownership. The Report of the Committee states at paragraph 166

"We consider that the most important defects of the existing feudal system of tenure which require amendment in order to simplify transactions in land are the complicated structure of superiority and property interests and the restrictions imposed upon redevelopment by feuing conditions which often remain enforceable long after their original purpose has been served."

2.3 The Committee recommended that all feus should be converted by way of a long-term scheme to holdings direct from the Crown with all intermediate superiorities being extinguished. The redemption of feu duties payable to intermediate superiors was an essential part of the Committee's recommendations, as also was the proposal that all obsolete conditions affecting land should cease to be enforceable. Later in this paper we shall deal separately with proposals in relation to feu duties¹ and obsolete conditions.²

2.4 Feu duties. In paragraph 41 of their Report the Committee recommended that all feu duties amounting to less than 5 shillings (25p) gross per annum should cease to be payable on the

¹ See paras 4.2-4.22.

² See paras 4.35-36 and 4.56.

understanding that other "conditions of the contract" would subsist. The Committee concluded that so far as other feu duties were concerned there were "formidable difficulties" involved in any short term compulsory redemption scheme. These difficulties related primarily to financial hardship and practical matters. The Committee took the view that if a conversion period of 60 years was permitted the financial and practical difficulties which would exist in the case of a short term conversion would be substantially overcome. It was envisaged that after a period of 60 years from the effective date of legislation, payments of existing feu duties would cease. This would be achieved by converting existing feu duties over 5s (25p) per annum into annuities terminating at the end of the 60 year period, allowing an addition of around 5% of the annual feu duty to provide an income equivalent to the feu duty for the superior after the termination of the period. The Committee explored at some length the basis of their proposed annuity scheme at paragraphs 197 to 201 of their Report but did not rule out the possibility of an optional redemption before the end of the 60 year period at the request of the feuar (see paragraph 205).

2.5 Land conditions The Committee also considered the possibility of abolishing conditions and restrictions affecting land in the short term and in the long term. As with the proposed redemption of feu duties, the Committee concluded that the abolition of land conditions in the short term was not a practical option. The view was taken that it would be inequitable to alter a superior's right to enforce land conditions while leaving unaltered any conditions affecting land enforceable by virtue of a disposition, ius quaesitum tertio, deed of servitude and so on.

2.6 Three other possible approaches to land conditions were considered - annulling land conditions, transferring the right to enforce or vary them to planning authorities, or leaving the existing rights of parties to enforce land conditions unaltered - and were all discounted. General annulment which would involve interference with existing contractual rights and possible liability for compensation was considered to be neither desirable nor practicable. The option of reference to a local planning authority was not considered appropriate to what is effectively a private rather than public interest in development. The third option of maintaining the status quo so far as enforcement, at least, is concerned was also considered unacceptable as it would perpetuate one of the most undesirable features of the present system. In addition there would be problems in identifying superiors when feu duty liability had ceased. As we mentioned in paragraph 1.3, this has already happened. On the other hand, when considering the potential for a long term solution, the Committee considered that the 60 year period proposed for the conversion process would permit a gradual changeover to a refined version of feudal tenure whereby, after 60 years, only land conditions which could be proved to have a continuing usefulness would remain enforceable. The Committee took the view that as the only enforceable conditions at that time "would be those which were demonstrably of use to the owners of other properties in the vicinity, the identity of such owners should not be difficult of ascertainment." During the initial period of 60 years, existing conditions would be susceptible to variation and discharge. After the conversion date, any condition with a continuing usefulness could be enforced either by the person who previously had a right to enforce it, his successor or an affected proprietor who could "establish that the

condition had a continuing usefulness to him in respect of a substantial real interest in land".¹ It was suggested that such conditions should be referred to as "preserved conditions". The Committee proposed that the Land Court would be the ultimate arbiter in any dispute as to the enforcement of preserved conditions although any variation or discharge could be agreed with all parties, including any affected proprietors, who had a legal right and interest to enforce the preserved condition.

2.7 In conclusion, the Halliday Committee did not favour the abolition of feudal tenure but explored the possibility of introducing a system of limited feudal tenure lasting for succeeding periods of a maximum of 60 years each. The Committee did, however, recognise that this system might not be attractive in the light of the various reforms of conveyancing law and practice which they were recommending. The final statement of the Committee's Report was that "the adoption of any policy in relation to land tenure in the future would require to be preceded by a far-ranging and comprehensive inquiry..."

The Henry Report

2.8 The Committee appointed under the Chairmanship of Professor Henry to prepare a scheme for registration of title, reported in 1969². The recommendations of this Report were principally implemented in the Land Registration (Scotland) Act 1979³. While we are not generally concerned in this Discussion Paper with the introduction of the system of registration of title, we have taken into account the fact that the programme for

¹ Para 207 of the Committee's Report.

² Cmnd 4137.

³ 1979 c 38 referred to in this paper as "the 1979 Act".

introduction and completion of that system throughout Scotland is very much behind the original time-table. Accordingly the proposals which we discuss later on in this Discussion Paper are formulated with a view to their implementation against a background of a dual system of recording title deeds in the Register of Sasines and registering interests in land in the Land Register.

White Paper - Land Tenure in Scotland - A Plan for Reform¹

2.9 The White Paper, which was published in July 1969, contained proposals for basic reform of land tenure in Scotland both in the short term and in the long term. It was issued after consultation on a memorandum of proposals not only with this Commission but also with various professional bodies in Scotland. On the one hand, the White Paper recognised, as an advantage offered by the feudal system, the identifiable continuing relationship between successive superiors and vassals which makes for a ready understanding of the scope and enforceability of land conditions. On the other hand, and against this, has to be weighed the fact that the right to enforce those land conditions often "rests with one party alone to the exclusion of the interests of others who may be directly affected by a change in the use of the land".² The Government at that time took the view that the feudal system of land tenure should be replaced by a new system altogether. They were not attracted to the gradual conversion to a new or modified system proposed by the Halliday Committee and proposed, instead, that the new system should be introduced on the enactment of the necessary legislation. The Government's proposals in this respect are discussed in the following paragraphs.

¹ Cmnd 4099.

² Para 13.

2.10 Abolition of feudal tenure - After the appointed day, land would be held only by way of absolute ownership or lease. Feudal tenure would be abolished and every proprietor of a dominium utile (ie a feu) would become an absolute proprietor of the ground in question.

2.11 Abolition of Feu Duties - The Government proposed that feu duties should be redeemed compulsorily on the first sale of land occurring after the appointed day or by election. The feu duty itself would not be payable after the appointed day but the redemption sum would be a civil debt due to the former superior.

2.12 Abolition of land conditions - The Government recognised that there was a possible benefit to be derived from the operation of private land conditions. However, they took the view that their usefulness had to some extent been overtaken by planning and other legislation. On balance, the Government considered that the usefulness of land conditions "as a complement to statutory controls" justified their retention in the interests of ensuring an element of stability in the new system. They proposed a restricted category of land conditions to be attached to land in the future, along with a redefinition of how and by whom such conditions should be enforced. While not closing the door on a definition of land conditions based on the existing law, the Government took the view that there should be three necessary prerequisites to such conditions:-

- (1) they should relate solely to the land on which they are imposed and to its use;

- (2) they should be of such a kind as to benefit other land in that they serve to increase the value or amenity of that land or be conducive to the more convenient or beneficial use of it; and
- (3) they should be clearly defined, and the deed creating them should specifically provide that they are to run with the land.

Conditions which did not meet these prerequisites would not be precluded but such conditions would be personal to the original contracting parties. It was proposed that enforcement rights should be vested in owners of land benefiting from the conditions where that benefit is specifically attached by terms of the creating deed or subsequent variation. Parties without a title, but with an interest, might be authorised by the Lands Tribunal to enforce a land condition.

2.13 So far as existing feudal conditions were concerned, the Government proposed that, on conversion to the new system, those conditions which demonstrably have a continuing usefulness should remain enforceable not by the superior but by a category of affected proprietors to be defined by statute "perhaps by reference to geographical proximity of their land". The White Paper was silent on the question of compensation for superiors on the cancellation of their superiority interests.

Green Paper-Land Tenure Reform in Scotland

2.14 In 1972 a Green Paper was published reviewing, once more, the need for introduction of a new system of land tenure. The Green Paper was issued by the Government, which came into office in 1970, "as a basis for discussions and consultations". As with the previous Government's White Paper, the Green Paper recognised that there are some advantages in the working of the feudal system but on balance felt that the financial and practical disadvantages of the system were such that it should be abolished. Like their predecessors, the new Government took the view that any major reform of land tenure in Scotland should involve the abolition rather than the amendment of the existing feudal system. As with the foregoing paragraphs outlining the White Paper proposals, in the following paragraphs we shall deal with the proposals in the Green Paper as to the abolition of feudal tenure and the treatment of land conditions.

2.15 Abolition of feudal tenure - The Green Paper proposed that after the appointed day feudal tenure should cease to exist.

2.16 Abolition of feu duties - It was recommended that a machinery should be introduced to enable superiors to be compensated for the loss of income from feu duties on the understanding that, as from the appointed day, the superior's right to receive a redemption value would derive from a personal obligation on the part of the feuar. The Government proposed that the redemption arrangements should incorporate provision for payment by lump sum or instalments over a specified redemption period which should "not be too lengthy". A period of 20 years was considered to serve best the competing interests of superior

and feuar. In the case of payment by instalments, the Government took the view that the amount of instalments should be calculated as a fixed annuity. The Government envisaged a situation whereby the superior would have a statutory security over the land in respect of which the feu duty redemption was being effected. This security would last for a period of 20 years or such shorter period which would end on redemption of the feu duty.

2.17 Abolition of land conditions - The Government recognised the possibility that there might be some advantage in retaining existing land conditions which had not become obsolete by the development of statutory provisions but they did not consider it appropriate that a former superior should continue to have a title to enforce those land conditions. The Government took the view that the concept of "continuing usefulness" introduced in the preceding White Paper would be difficult to translate into a satisfactory statutory definition. It proposed that different arrangements for the identification of existing land conditions which were suitable for preservation and their enforcement should be introduced. The Green Paper canvassed the possibility of introducing three categories of land conditions. The first category could be continued by statute, the second by specific application to the Lands Tribunal and the third could be enforceable by suitably qualified proprietors.

2.18 Continuation by statute - The Government envisaged that certain types of existing conditions, particularly those relating to mutual repairs and apportionment of expenditure, could be specifically preserved by statute. In the event of this approach being adopted, the Government envisaged that all other types of land conditions would fall.

2.19 Application to the Lands Tribunal - If it was felt that there was justification for retaining land conditions other than those which would be specially saved by statute, provision could be made for application to the Lands Tribunal, before the appointed day, for such conditions to be preserved. In such a case, title to enforce would vest in the party making the application and pass to his successors. The Government itself recognised the drawbacks in this proposal.

2.20 Enforcement by qualified proprietors - This option would mean that existing land conditions would be retained but, instead of the superior having the title to enforce, that right would transfer to a category of qualified proprietors. The Government envisaged that this category would comprise only those persons satisfying the test of being formerly a superior or co-vassal of the owner of the burdened ground and also owning land sharing a common boundary. In addition, the Government felt that the retention of existing non-feudal methods of creating land conditions, for example by means of a disposition, would ensure a desirable degree of flexibility in land tenure.

2.21 In common with the preceding White Paper, the 1972 Green Paper made no proposals for compensating superiors for the loss of entitlement to enforce land conditions.

Legislation since 1970

2.22 In the 1969 White Paper, the Government committed itself to interim legislation to enact some of the more pressing proposals of the Halliday Committee. Judicial machinery for the

variation and discharge of land obligations was introduced by Part I of the 1970 Act which extended the jurisdiction of the Lands Tribunal to cover such matters. That Act also made provision for the allocation of feu duties as of right at the instance of the payer. Compulsory redemption of feu duties on sale was not introduced until 1974 with the Land Tenure Reform (Scotland) Act 1974¹ which prohibited the creation of new feu duties and ground annuals and required that allocated feu duties should be redeemed on the next sale occurring after 1 September 1974. These enactments also made several significant but less important changes to the system of feudal tenure in Scotland which it is not necessary to explore in detail in this paper. No new feu duties may now be created and, in the case of those which are still in existence, it is within the power of the vassal to effect redemption. The feudal system has ceased to be effective. As the Halliday Committee foresaw, the removal of the financial link between superior and vassal has led to an increasing difficulty in ascertaining the identity of persons entitled to enforce feudal burdens. This difficulty already existed in the case of burdens created by disposition where the financial nexus never existed.

2.23 There has been no further formal discussion of the possible abolition of the feudal system since the 1972 Green Paper. The 1974 Act went some way towards implementing the recommendations relating to conveyancing procedures contained in the Halliday Report but, while section 1 of that Act prohibited the imposition of new feu duties and sections 4 and 5 respectively introduced a right to redeem allocated feu duties voluntarily and an obligation to redeem allocated feu duties on sale, the Act did not effect any radical changes in the feudal system of land

¹ 1974 c 38 referred to in this paper as "the 1974 Act"

tenure. The 1979 Act introduced a new system of registration of interests in land. In the event, as envisaged by the Reid Committee, the existence of feudal tenure did not in any significant way complicate the introduction of legislation necessary to provide for registration of interests in land. The feudal system, therefore, remains more or less intact although its impact has been substantially reduced with the removal of the right to create new feu duties and the creation of the right or obligation in certain circumstances to redeem existing feu duties. We are left with a system which is becoming progressively more anachronistic. While the Halliday Committee favoured retention of a modified form of feudal tenure, successive Governments have undertaken to abolish the system of feudal tenure and substitute a new system based on absolute ownership. Our proposals are for the abolition of feudal tenure but we endeavour to ensure that the advantages of the present system are retained.

Conclusion

2.24 Preliminary enquiries have revealed that the number of feu duties still being collected on behalf of feudal superiors has diminished significantly. In many cases the amounts of feu duty are so small that it is not economically viable to collect them. One significant consequence of the fall in the number of feu duties currently being paid is that it is becoming increasingly difficult to identify superiors when waivers of feuing conditions are required. In some cases it is difficult to effect redemption because the superior is untraceable. While in the past it might be said that one of the principal objections to the feudal system was "the possession by a superior of autocratic powers which may or may not be used in the public interest and which are frequently

exercised for the purely negative purpose of frustrating proposals for land use and development"¹, the position now seems to be that the somewhat emasculated system left following recent legislation is leading to unacceptable complications in the practice of conveyancing with inevitable knock-on effects in terms of cost to buyers and sellers. The system no longer operates as a comprehensive method of regulating amenity by private contract and in general is seen by many people as beneficial only to superiors who are able to derive a certain amount of income from the practice of granting waivers.

2.25 We have considered other systems of land tenure² and in particular their method of constituting and enforcing conditions relating to land but we have not found our comparative study particularly helpful as most English-speaking non-European systems such as the American and Australian systems are based on the English system which we consider does not represent a good model.³ In the case of European systems which were originally based on the feudal system, these systems have developed in such a different way that they do not present attractive models for reform.

¹ Government White Paper Land Tenure in Scotland a Plan for Reform Cmnd 4099 para 12.

² See paras 3.10-3.17.

³ See para 3.15.

PART III.
A NEW SYSTEM OF LAND TENURE

Introduction

3.1 The concept of the real burden is an essential feature of our present system of land tenure. If it is "real", the burden attaches to land and may be enforceable against singular successors¹ of the original burdened proprietor. We perceive the real burden to be one of the greatest strengths of the Scottish system and see no benefit in moving away from a system of enforcement based on the existence of real burdens. Accordingly, the notion of the continuing ability to create a burden which attaches to land and is enforceable against successive proprietors of that land is central to the options which we offer to consultees for consideration in this part of our paper. We recognise the risk, inherent in any system which enables the imposition of perpetual burdens, that obsolete or potentially unenforceable burdens may adversely affect the efficient use of land in the future. We consider that if the existing provisions for the variation and discharge of land obligations are extended, they will remove such a risk.

3.2 In the next section of this Part we discuss some relatively minor matters in connection with our proposals for a new system:-

- (i) how burdens created under the new system should be designated;
- (ii) the constitution of burdens;
- (iii) whether compulsory scheduling of real burdens or land conditions created after the appointed day would be appropriate;

¹ "Singular successors" are proprietors who have acquired land by gift, purchase or other singular title.

- (iv) whether certain land conditions should be imposed by statute;
- (v) whether real burdens or land conditions should be categorised;
- (vi) whether special enforcement rights should be recognised;
- (vii) whether overlap with statutory provisions should be avoided.

Notwithstanding the fact that we have made provisional proposals in respect of only some of these matters, we would welcome consultees' views on any of them.

(i) Designation of obligations and restrictions

3.3 If a new scheme of enforcement of restrictions and obligations is introduced, it would be useful to differentiate them from burdens created under the feudal system by giving them a new name. We have considered the following designations -

- (a) burden
- (b) land obligation
- (c) land condition

We take the view that it is desirable that the chosen designation should avoid confusion as to the context in which the obligations

or restrictions are created. For this reason for the purpose of Option 1, we tend not to favour the retention of the word "burden" notwithstanding its aptness in implying the existence of an obligation of an onerous nature.

3.4 The 1970 Act defines a "land obligation" at s.1(2) as "... an obligation relating to land which is enforceable by a proprietor of an interest in land, by virtue of his being such proprietor, and which is binding upon a proprietor of another interest in that land, or of an interest in other land, by virtue of his being such proprietor ..." and "... includes a future or contingent obligation, an obligation to defray or contribute towards some cost, an obligation to refrain from doing something and an obligation to permit or suffer something to be done or maintained." This definition covers the relationship between a superior and vassal, between a disponer and disponee, and between co-vassals or other proprietors where a ius quaesitum tertio exists. The definition also covers the relationship between the proprietors of the dominant and servient tenements in a servitude.¹

3.5 The above definition has been imported into section 7(3) of the 1974 Act and section 17(2) of the 1979 Act. "Land obligation" is the appropriate term for a burden noted in the burdens section of a land certificate.²

3.6 With abolition of the feudal system, the separate interests of superior and vassal in the same piece of land will cease to exist.

¹ See Part IV of this paper for a short discussion on servitudes.

² A "land certificate" is a certificate issued under s.5 of the Land Registration (Scotland) Act 1979 comprising a copy of the title sheet for a particular unit of land authenticated by the Keeper.

Accordingly, part at least of the existing statutory definition of land obligation will no longer be appropriate. That part of the definition which refers to rights enforceable by proprietors of interests in "other land" may, depending on consultees' response to this paper, be retained. We consider that in view of the fact that a statutory definition exists, it may not be appropriate to retain the use of the term "land obligation" as it may give rise to uncertainties as to the context in which it is used in the future.

3.7 While reference is generally made in feudal titles to "burdens, conditions, obligations and others" there has been no statutory definition of "condition". The Halliday Committee in their 1966 Report used the term "land condition" as meaning "such conditions, restrictions, provisions, limitations, obligations, stipulations, servitudes and real burdens of a continuing nature affecting land as are created by any deed recorded in the Register of Sasines ...". The ensuing White and Green Papers took up the reference to land "conditions" for their proposals on land tenure reform.

3.8 In relation to our first option (Option 1)¹ for the new system, we propose that in order to distinguish rights, duties and restrictions created under that system from those created under the feudal system the former should be described as "land conditions" subject to a satisfactory statutory definition being provided for the term. For the purpose of our discussion of proposals in the context of Option 1, we have referred to real burdens and obligations created after the appointed day² as "land conditions" throughout this paper in order to distinguish the enforcement of burdens under the new system from enforcement under the existing regime. In relation to our second option for

¹ See Proposition 6.

² The day on which the legislation abolishing the feudal system comes into effect. See paras 3.111-3.115.

reform (Option 2),¹ we take the view that no change in designation will be necessary.

We provisionally propose that

1. In relation to our Option 1, conditions attaching to land under the new system created after the appointed day should be designated "land conditions".

(Consultees' views are sought as to whether this designation would be appropriate whether or not an entirely new system of enforcement is introduced.)

(ii) Constitution of real burdens or land conditions

3.9 Introduction In the following paragraphs we discuss how land conditions may be constituted under the proposed new system of absolute ownership. We consider initially how private regulation of land use is effected under other systems.

3.10 Approaches adopted by other systems - England - In theory, the English system should be, of all the systems of land tenure, closest to our own. Historically many elements of our own feudal system were imported from England. The English system, however, developed in a radically different way from our own and, apart from the fact that it is still notionally subject to vestiges of feudal tenure in relation to the role of the monarch, land is not now held on feudal tenure in England.

¹ See Proposition 6.

3.11 Oliver Cromwell is quoted by Megarry¹ as describing the English law of real property as "an ungodly jumble". It has been much simplified since Cromwell's time but still presents some difficulties to an observer both in terms of content and practice. England, like Scotland, has a system of registration of interests in land and not all land is subject to that system although, in England, compulsory registration will shortly be universal. It will, however, be some time before all land becomes registered. Apart from the fact that in the case of registered land, specific formalities require to be observed, registration does not affect the constitution of restrictions and limitations on the proprietor's freedom to use the land although it may be significant where it is sought to identify those restrictions and limitations. For the purpose of this paper it would not be appropriate to attempt to give anything other than an outline of the English system of creating such restrictions and our discussion, which concentrates on freehold land, is perforce perfunctory.

3.12 Land in England may be subject to restrictions in the shape of charges or servitudes. Charges may be local land charges which are detailed in the local land charges register kept by a local authority. Such charges may consist of charges required by local authorities such as those under the Public Health and Highways Acts, prohibitions or restrictions on the use of land imposed by the local authority or the Crown and other local or statutory matters. In the case of registered land such charges are overriding interests. There are also a number of registers kept at the Land Charges Department. These include the Register of Land Charges where charges over unregistered land are registered.

¹ Megarry's Manual of the Law of Real Property 6th ed p 1.

Section 2 of the Land Charges Act 1972 details the charges which may be registered. Charges which may be registered in the Register of Land Charges include puisne mortgages, equitable charges, estate contracts and restrictive covenants. Apart from servitudes, which are discussed later, restrictive covenants (covenants which can be complied with by refraining from action) form the most important means of private regulation of the use of freehold land in England. To be enforceable, these covenants must be negative in nature (ie not involve expenditure of money), they must benefit the land in question and must have been expressly assigned to the person seeking to enforce the covenant if not originally annexed to the land or related to land subject to a building scheme or a scheme of development of land¹. Positive covenants on the other hand, being obligations to do something which may entail expenditure of money (eg erect a wall or fence), generally only transmit if supported by a chain of personal indemnities whereby each successive owner enters a personal obligation to take over the previous owner's personal obligation. If one owner in the chain dies, the link is broken.

3.13 Land in England may also be subject to servitudes categorised as easements (the right to use or restrict the use of the land of another person) or profits à prendre (the right to take something from another's land). As in Scotland, these may be implied or acquired by prescription and may not be formally recorded.

¹ For an extensive review of the English law of restrictive covenants reference may be made to Megarry's Manual of the Law of Real Property 6th edition Chapter 12. Reference may also be made to the important case of Tulk v Moxhay (1848) 2 Ph 774 which is the first of a series of cases giving rise to the present equitable rules governing restrictive covenants.

3.14 The difficulties encountered in enforcing restrictions on the use of land have led to the growth in the practice in England of granting interests in land in leasehold thereby ensuring a continuing obligation on the part of the original tenant's successors to comply with restrictions. The problems encountered in England in securing that restrictions are enforceable against successors are highlighted in the difficulties which exist in relation to flatted property or property where there are mutual parts. In 1987 the English Law Commission published a report of a working group set up to propose a scheme for the common ownership of land.¹

3.15 The present English system is highly complex and disparate. It is difficult for individual proprietors in many cases to ascertain restrictions on the use of their own land and the system offers no satisfactory provisions for the regulation of land which, in Scotland, could be held in common ownership. For this reason, we consider that the English system and most of the land tenure systems in the English speaking world which have developed from the English root do not offer suitable models for a new system for Scotland.

3.16 France. The French system of land tenure is representative of many European systems in that it was originally based on feudal tenure rather like our own. European systems were, as we have indicated in Part I, subject to political upheavals which

¹ "Commonhold Freehold Flats and Freehold Ownership of Other Interdependent Buildings" published by Her Majesty's Stationery Office. CM 179. Reference may also be made to "Commonhold A Consultation Paper" issued by the Lord Chancellor's Department in November 1990. CM 1345.

radically altered their approach to land ownership. In the case of France, the Revolution swept away feudalism at a single stroke and introduced the notion of an individual's right to the free unfettered ownership of his own land. Inevitably, this freedom has over the years come to be restricted to some extent both by public laws and regulation through a system of servitudes similar to easement and profits a prendre in England. Such servitudes may be classified as positive or negative according to the civil code. Some servitudes are implied by law, others may be created by use or by deed such as a contract or legacy. In the case of flatted or other mutual properties, a system of co-ownership has evolved which provides a structure for ensuring the management of common parts.

3.17 In addition to the systems of land tenure in England and France, we have looked at the approaches adopted in the United States and also in Australia, where, in common with many other Commonwealth countries, a Torrens system of land registration operates and the English law on easements and covenants has been imported.¹ We have not found any elements in the English, French or other systems which we have considered which could usefully or easily be utilised in converting our own system of land tenure from a feudal to a non-feudal basis. Accordingly in the following paragraphs we concentrate on our existing law and practice in formulating our proposals for reform without further reference to other systems.

¹ See, for example Discussion Paper No 15. "Easements and covenants" published by the Law Reform Commission of Victoria in February 1989.

3.18. Scotland. The principal method of imposing obligations or restrictions on the use of land and of preserving rights in respect of land in Scotland is by way of the real burden. That is a burden which attaches to land and is usually enforceable against the proprietors of that land from time to time by the proprietors of other land or an interest in the burdened land, from time to time, without the need which exists in some cases in England for a chain of personal indemnities "transferring" rights and obligations in respect of burdens to successive proprietors. For the purposes of this paper we have chosen to use the term "real burdens" as defined by Professor Halliday¹ to cover both "real burdens" and "real conditions". In our view, none of the major systems of land tenure which we considered offers such a satisfactory method of constituting such burdens as our own. The principal difficulty which we perceive with the operation of the present system in Scotland lies, not with the nature of the real burden but with problems arising from enforcement. We take the view that no changes are needed to the current rules for the constitution of real burdens and, if appropriate, they should continue to apply to land conditions under the new system of land tenure.

3.19 Real burdens at present may be ascertained by reference to the deed creating them. In each successive transfer of ownership the burdens may be repeated at length or, more usually, be incorporated by reference to the earlier deed creating them. Over the years rules have developed governing the enforceability of burdens. To be enforceable, they must, broadly speaking, be precise and expressed in clear unequivocal language, consistent with the nature of the affected property and enter the Register of Sasines or the Land Register. Burdens, or a reference to deeds creating burdens, are generally contained in the dispositive clause

¹ Conveyancing Law and Practice II p 252-284.

of the disposition conveying the burdened estate. Alternatively the burdens may be contained in a deed of conditions in accordance with section 32 of the 1874 Act. As indicated in the preceding paragraph, we do not envisage that under the new system any changes will be required to the existing rules for the constitution of burdens and those rules should apply to the constitution of land conditions.

3.20 Titles to land recorded in the General Register of Sasines will disclose all the burdens imposed by deed on the land. In addition, the land may be subject to statutory restrictions, servitude rights and others which are not recorded as affecting the land but nevertheless restrict to a significant extent the land owner's freedom to use his land. In the case of a title registered in the Land Register, burdens are disclosed on the title sheet and the land certificate, as also are extant charges. Overriding interests are noted either following special application to the Keeper or, if they are disclosed in documents accompanying an application for registration, they will be automatically noted. The Keeper also has a discretion to note such overriding interests as come to light during the registration process. Otherwise, they do not appear on the title sheet. Overriding interests are defined by section 28 of the 1979 Act and include such matters as the interest of a lessee under a lease not being a long lease, the interest of a proprietor of the dominant tenement in a servitude and the interest of a member of the public in respect of any public right of way etc. It is interesting to note in this connection that section 6(1)(e) of the 1979 Act requires the Keeper to note any "enforceable real right pertaining to the interest or subsisting real burden or condition affecting the interest". This provision does not appear to authorise the Keeper

to omit references to burdens which have become obsolete.¹ We consider the position in relation to obsolete burdens or land conditions where appropriate throughout this paper.

(iii) Scheduling of real burdens or land conditions

3.21 It is the practice in some areas of the country to detail burdens affecting subjects in a schedule annexed to the disposition of those subjects. The practice is, however, by no means universal and we have considered whether a statutory requirement that real burdens or land conditions should be taken out of the

¹ See Professor Halliday's view as stated in the footnote to page 37 in his commentary on the Land Registration (Scotland) Act 1979. "In Brookfield Developments Ltd v Keeper of the Registers of Scotland 1989 SLT (Lands Tr) 105, 1989 SCLR 435, the Lands Tribunal for Scotland observed that the Keeper was not obliged to ascertain whether a subsisting burden was enforceable or not, and that his duty was to enter such burdens as appeared to him to be still possibly enforceable and to delete those which were no longer subsisting, ie which no longer appeared on the face of the titles relating to the interest in question as still remaining in being. For comment on this decision see C Brownlie, "Registration of Title, Burdens and the Keeper's Role" (1990) 35 JLS 200."

dispositive clause of the disposition and inserted in a schedule to the disposition in a prescribed form would be desirable. This approach was recommended by the Halliday Committee who considered that the practice of scheduling of both ancillary rights and land conditions would greatly assist in the identification of such rights and conditions for all purposes. The Government in their 1972 Green Paper agreed that scheduling would facilitate examination of sasine titles.¹ In the case of interests in land which are subject to registration of title, a schedule of real burdens or land conditions could be incorporated in the title sheet of the affected subjects more readily and be more easily amended to take account of subsequent variations or discharges than the existing approach which entails extracting the burdens provisions from the relevant titles.

3.22 We recognise that the facility to narrate real burdens or land conditions in a schedule rather than in the body of the deed exists, and there is, accordingly, an argument that no legislative provision is necessary. We have however, concluded that a statutory requirement that real burdens or land conditions be detailed in a prescribed form in a schedule to a conveyance would make it easier for unqualified persons to identify real burdens or land conditions and, perhaps, even more importantly, greatly assist the Keeper's staff and help speed up the registration process. For this reason, despite the fact that the format of deeds is not strictly a matter which should concern us in our review of land tenure, we have concluded that we should make a provisional proposal to the effect that, in deeds executed after the appointed day, real burdens or land conditions should be detailed in a schedule to be annexed to and referred to in the deed.

¹ Para 87.

We provisionally propose:

2. **Real burdens or land conditions which are created after the appointed day should be narrated in a prescribed form in a schedule to the deed imposing them.**

(iv) Imposition of Real Burdens or Land Conditions by Statute

3.23 Section 95 of the Civic Government (Scotland) Act 1982¹ provides, in relation to private open spaces in populous places, that the liability for maintaining such spaces and their boundaries should be shared equally among those entitled to use them. The provision is silent as to how it is to be interpreted where there are inconsistent title provisions regulating the open space. We have considered in our Discussion Paper No 91² whether a statutory code based on this kind of approach might be adopted on a wider basis in respect of obligations relating to liability for payments in respect of common parts such as mutual walls, gables or roofs which are presently governed by the common law rules for the law of the tenement where there has been no express provision to the contrary. Such a code, which would also apply in the absence of specific provision to the contrary would, we hope, lead to a reduced need to impose in individual conveyances land conditions or real burdens dealing with matters covered by the code.

¹ 1982 c.45.

² The Law of the Tenement (Dec 1990).

3.24 We also consider, in relation to Option 1, whether this approach might be extended to the regulation of shared liabilities and rights¹, outwith the relatively narrow field of the law of the tenement, where titles are silent. We have concluded that while it may be possible to formulate general rules, the difficulties in establishing a suitable statutory formula for sharing such liabilities and rights in individual cases, which would accommodate the varying shares which may be appropriate to different parts of the whole affected subjects, would make the formulation of such legislation impracticable.²

3.25 We take the view that, within the context of the reformed structure of land tenure, it would be inappropriate to make any general provision for the imposition of specific real burdens or land conditions by statute. Accordingly we propose that, except for the proposals made by us elsewhere in respect of the law of the tenement, real burdens or land conditions should not be imposed by way of statutory provision.

We provisionally propose that

3. Notwithstanding any recommendation which may be made in respect of the introduction of a statutory code in defined circumstances, such as the law of the tenement, no general provision should be made for imposition of real burdens or land conditions by statute.

¹ Such liabilities would fall within our definition of "service" conditions- see para

² We propose, however, to issue a short discussion paper on the narrow issue of rights to and obligations in respect of mutual boundary walls.

(v) Should Real Burdens or Land Conditions be categorised?

3.26 Real burdens do not at present fall to be formally divided into different categories according to their nature. We considered whether, under the new system, there would be any benefit in categorising real burdens or land conditions, to enable, if appropriate, each category to have different rules for constitution and enforcement. We identified three potential categories - amenity conditions, service conditions and special conditions. We have concluded that enforcement varying according to the category of real burdens or land conditions involved would be unduly complex and do not, accordingly, suggest the introduction of such a regime. We found it convenient, however, for the purpose of this paper, to refer to real burdens or land conditions broadly categorised in these terms. In the following paragraphs we indicate the type of conditions which we intend should be included in each category for the purposes of discussion.

3.27 Amenity conditions. The majority of real burdens which are of most relevance to land ownership today fall into the general category of amenity conditions. We regard this category as including conditions relating to:-

- (a) The external appearance, use and care of the land (including buildings).
- (b) External additions, alterations, destruction etc.

- (c) Provision and maintenance of private roads and paths serving only the burdened subjects.
- (d) Location and use of moveable or heritable objects brought on to the land.
- (e) Parking of vehicles.
- (f) Keeping of animals etc.

3.28 Service conditions. We would define service conditions, broadly, as being conditions relating to the provision, maintenance and renewal of common parts and services where "parts" would include walls, fences, roofs, chimney stacks, gutters, down pipes, rhones, gates etc., with all necessary rights of access, and "services" would include pipes, vents, ducts, cables and tanks, with all necessary rights of access.

3.29 Special conditions. In this and the following Part of the paper reference is made to a type of condition described as a "special" condition. The meaning of this is explained in paragraphs 3.30-3.32 below. It is intended to take account of the special requirements of bodies such as churches, charities and public authorities.

(vi) Should special enforcement rights be recognised

3.30 We recognise that certain bodies, such as churches, charities or public authorities might be constituted by statute, trust deed or by some other method which circumscribes their

ability to deal freely with land and, in particular, to dispose of land without imposing restrictions on its future use which might not be properly categorised as being of an amenity or service nature. In recognition that such circumstances can exist, we considered it appropriate to explore the possibility of introducing special rules for enforcement of a category of "special conditions" to meet the requirements of those bodies which might not be qualified to enforce real burdens or land conditions under either of our options for the new system of land tenure. In designating this category as "special conditions" we would, strictly speaking, be attributing the speciality more to the nature of the person or body imposing the condition than to the condition itself. The difference between special and other conditions would be the creation of a personal entitlement to enforce the conditions. A body imposing special conditions would be entitled to enforce those conditions notwithstanding the fact that the body would not otherwise meet the normal criteria to be established under any new requirements for entitlement to enforce. We do not consider that all conditions should be capable of being special conditions. Only those which would be appropriate in the light of the status of the body imposing them should qualify, as for example, when a church imposes a condition that the use of former church buildings should not be inconsistent with the dignity of the subjects as former ecclesiastical buildings.

3.31 If a category of special conditions was to be introduced, consideration would have to be given as to how bodies entitled to impose and enforce special conditions should be identified. One option would be to provide a general statutory definition of qualifying bodies or authorities, or, alternatively, provision could

be made for subordinate legislation which could specify those bodies and authorities. A general statutory definition would have to be so widely worded that it would almost certainly give rise to abuse. We preferred the second option whereby bodies entitled to impose special conditions could be prescribed by regulations. Such regulations might also indicate, in general terms, the type of condition which could be imposed by each body.

3.32 We have had regard to the particular difficulties facing those bodies to which power might be given to impose special conditions but have concluded that the creation of such a privileged category would be inconsistent with the general approach favoured by us in the proposed new system of land tenure. We accordingly propose that no special rights should be conferred on such bodies in relation to alienations of land taking place after the appointed day. We consider later in this paper (at paragraph 4.34) whether there should be some saving provision introduced in respect of the entitlement of such bodies to enforce a restricted category of obligations or restrictions which were imposed as real burdens before the appointed day.

We provisionally propose that

4. **No special enforcement provisions should be introduced for charitable, religious or public bodies in respect of real burdens or land conditions created after the appointed day.**

(vii) Should an overlap with statutory provisions be avoided?

3.33 We have considered whether it would be appropriate, for the future, to restrict the scope of real burdens or land conditions to avoid duplication between public and private (ie created by statute and deed respectively) regulation and we have considered whether real burdens or land conditions in the private category should be enforceable only insofar as they relate to matters not already regulated by statute. We have concluded that, as it is not possible to predict the future extent and nature of statutory regulation of amenity matters with certainty, such an approach would not be consistent with the retention of a system of private regulation of land use. In addition, in relation to matters affecting amenity, we take the view that the need to take account of local variations, such as requirements in respect of the external appearance of buildings which may differ from locality to locality, is particularly important. The flexibility needed for such local variations could not be easily accommodated within a statutory provision. We have concluded that any restriction on the scope of amenity conditions to matters not otherwise regulated by statute would be inappropriate.

We provisionally propose that

5. **There should be no restriction on the scope of real burdens or land conditions to be created after the appointed day by reference to parallel statutory provisions.**

Enforcement of real burdens or land conditions

3.34 Introduction. We are satisfied that the real burden remains the most effective method of constituting obligations or restrictions in respect of land. Under the new system of land tenure, land will continue to be subject to existing and new real burdens or land conditions imposed and constituted according to the rules and practices which have developed for real burdens under the present system. The principal difference will be in the entitlement to enforce those real burdens or land conditions. This is one of the most difficult aspects of any system of land tenure which permits any degree of private regulation of land use. Who should be qualified to enforce real burdens or land conditions and grant waivers or discharges? Should qualified proprietors derive their right to enforce from

- (i) proximity only,
- (ii) a combination of proximity and contractual title¹,
- (iii) contractual title only, or
- (iv) other factors?

¹ By "contractual title" we have in mind the present system where title to enforce on the part of a superior exists where, for example, a real burden has been created by a feu deed and he is presumed to have an interest to enforce that real burden. A disponent and his successors, in the case of a real burden created by disposition, also have a right to enforce when title and interest exist. A ius quaesitum tertio would also come into this category (see paras 3.66-3.68).

3.35 The Halliday Committee favoured retention of a modified type of feudal tenure and did not, accordingly, consider to any significant extent the question of entitlement to enforce. Their consideration of the matter (paras 178-182) was restricted to the possibility of transferring enforcement rights to local planning authorities or leaving enforcement rights as they were. Neither option was considered to be wholly satisfactory. The Government in the White Paper of 1969 made it clear that they were not attracted to the retention of the feudal system in any form. They proposed at para 34 that enforcement rights should be given "... to owners of land to which the benefit created by the conditions is specifically attached by the terms of the creating deed or any subsequent variation of it..." ie the White Paper proposed that the right to enforce should depend only on contract. While the White Paper did not address the question of whether contractual rights would or should pass to successors, it was implied that they would so pass. The succeeding Government in the Green Paper of 1972 proposed that the existing non-feu deed methods of creating real burdens (ie burdens created by disposition) should be retained. Although the Green Paper did not explore entitlement to enforce, it is reasonable to presume that no change from the existing rules on entitlement to enforce non-feudal real burdens created by disposition was envisaged.

3.36 Against this background, we do not think that it is worth considering the option of retaining the feudal system as it stands. It is clear that, in view of the commitment to reform by successive governments and the diminishing effectiveness of the feudal system as a fair and universal method of regulating land use, reform is needed. In this section of the paper we consider two options for the enforcement of real burdens or land

conditions. We then go on to discuss, in relation to those options, by whom enforcement action might be taken and what procedures should be followed. In the following paragraphs we consider, briefly, the existing law on enforcement of real burdens.

3.37 The present system. Under the present system, land may be subject to real burdens created by feu deed, disposition or Deed of Conditions.¹ In some cases, a superior may have created a ius quaesitum tertio in favour of co-feuars which would enable a feuar who could demonstrate a mutuality between an obligation created in his own title and an obligation created in similar terms in the titles of his co-feuars to take appropriate enforcement action against his co-feuars. In the case of burdens created by way of disposition, the deed may provide that ownership of the benefited land will give rise to an entitlement to enforce real burdens. In such a case, unless the original disponent identifies the lands benefited by the burdens and expressly provides that the burdens will be enforceable by his successors in title to those lands,² it is likely that the right to enforce burdens created by a disposition will end when the original disponent's ownership comes to an end. A ius quaesitum tertio can be created by a disposition and in that case, if the necessary mutuality can be proved and interest demonstrated, the tertius will be able to enforce the real burdens.

3.38 The present law depends on the person seeking to enforce a real burden having both title and interest to enforce. In the case of a superior, his title to enforce exists by virtue of the feudal grant itself and his interest is presumed to exist as a consequence

¹ 1874 Act s.32.

² Braid Hills Hotel Co Ltd v Manuels 1909 SC 120.

of the continuing relationship between successive superiors and vassals. In the case of a disponer and disponee, the disponer's title derives from the conveyance imposing the real burdens, while his interest to enforce may be implied but is open to challenge by the disponee. In the case of co-feuars and co-disponees, a title to enforce may be created expressly or, implied, by establishing the necessary mutuality of burdens. Interest in such cases must be proved and must be demonstrated to be real and substantial.

3.39 The proposed new system. We put forward two options for comment. Option 1, which is discussed in paragraphs 3.40-3.60, is the more radical but is based on the preferred approach of successive Governments as expressed in the White and Green Papers discussed in Part II of this paper. In the case of land conditions imposed after the appointed day, this option would give enforcement rights to neighbouring proprietors who would be qualified by virtue of their proximity to the burdened subjects and their ability to demonstrate that failure to comply with the land condition in question would be detrimental to them. The person imposing the land condition would have a personal contractual right to enforce that condition against the original burdened proprietor. While the land condition would attach to the land in the same way as a real burden, the right to enforce the condition would not automatically be transmissible by the creator of the condition, nor would he automatically be able to enforce it against singular successors of the original burdened proprietor. Proximity and detriment would be the qualifying tests to be met to found enforcement rights. In effect, neighbouring proprietors would be given an automatic ius quaesitum tertio which would not be dependent, as at present, on their deriving title from a common author. Our preferred option, option 2, discussed in paragraphs

3.61-3.71, builds on the existing rights of disponers in relation to the creation and enforcement of real burdens, and involves the conversion of existing superiors' rights into disponers' rights. The existing rights of disponers and tertii would remain undisturbed and could continue to be constituted in the future in the same way as at present. In discussing each option we consider -

- (i) the criteria for qualification to enforce; and
- (ii) the nature of the real burden or land condition to be enforced.

Consultees' views on the following alternative propositions are sought

- 6. (i) Should land conditions be enforceable only by proprietors who qualify by virtue of owning land near to the burdened land and can demonstrate that failure to comply with the land conditions would be detrimental to them (Option 1)¹, or
- (ii) Should real burdens be enforceable only by disponers and their successors who can establish the necessary title and interest, and likewise, by co-disponees and their successors who benefit from a properly constituted ius quaesitum tertio (Option 2).²

Note: We would welcome any suggestions consultees may have as to alternative approaches to a new system of land

¹ See paras 3.40-3.60.

² See paras 3.61-3.71.

tenure or any changes that consultees would like to be made to either of the options we canvass.

OPTION 1

(i) Qualification to enforce

3.40 Under the present system it is essential that a person wishing to enforce a real burden should be able to demonstrate a title and interest so to do. Under Option 1, following the abolition of feudal tenure with its notion of a perpetual contract by tenure, the ability to demonstrate title will become so subordinate to the interest of neighbouring proprietors that title should cease to be of any significance in the enforcement process.

3.41 Subject to our proposals in respect of service conditions,¹ for the purposes of Option 1 we propose that under the new system qualification to enforce should depend on proximity and the ability to demonstrate actual or potential detriment. Such an approach would ensure that only those with the greatest interest in enforcing burdens, ie proprietors in the vicinity, would be qualified to take enforcement action. Our proposals are without prejudice to any contractual provisions agreed between the grantor of a conveyance and the grantee regulating the use of the subjects disposed. The contractual rights and obligations, however, would not be transmissible to singular successors of either party.

¹ In paras 3.51-3.60 below we consider whether special provisions should be made for the enforcement of service conditions.

3.42 A real burden has to be created in accordance with the existing clearly defined rules and its enforceability depends on compliance with those rules. Under Option 1, land conditions would still be constituted by deed, usually on the transmission of land, but entitlement to enforce would rest with the grantor in respect of the original grantee and also with qualified neighbouring proprietors. We discuss the tests which could be imposed to establish proximity at paragraphs 3.43-3.47. In the case of proximity, we consider whether an appropriate test for the proximity of the enforcer's land to the enforcee's should require land - (a) to be coterminous, (b) to be within a specified distance, or (c) to meet other criteria. So far as detriment is concerned, we consider that it should be actual or potential in the sense that it is a likely consequence of failure to observe a land condition.

3.43 Tests for proximity. We have considered whether proximity should be assessed by reference to coterminosity only or by reference to the relative distance between the burdened and benefited land. Coterminous land may be defined as land having a common boundary line with burdened land. Article 7 of the Town and Country Planning (General Development) (Scotland) Order 1981¹ provides a proximity test based on either coterminosity or location within a specified distance. The Order provides that persons with a notifiable interest (ie that of owner, occupier or lessee) in "neighbouring" land should be notified of any proposed development on the land which it "neighbours". "Neighbouring" land is defined in Article 2 of the 1984 Order as land which is coterminous or within 4 metres of the boundary of the land for which the development is proposed. If the development itself is

¹ SI 1981/830 as amended by the Town and Country Planning (General Development)(Scotland) Amendment Order 1984 ("the 1984 Order") SI 1984/237 both made under the Town and Country Planning (Scotland) Act 1972 c 52.

more than 90 metres from any part of the "neighbouring land", the notification requirements do not apply. The terms of Article 2 are reproduced at Appendix II to this paper for the benefit of consultees who will be interested to note the special provisions made in respect of flatted property and the situation where the "neighbouring land" is a road.

3.44 While not necessarily taking the view that the planning legislation referred to in the foregoing paragraph represents the ideal test of proximity for the purposes of enforcement of land conditions, we consider that, for the purposes of this Option 1, qualification to enforce should depend on the benefited and burdened land being close to each other. We do not believe that it should always be necessary for the properties to be coterminous as in the case of flatted property or properties separated by a road. Accordingly, we have concluded that the proximity test should be met by proprietors whose properties lie within a prescribed distance of the burdened property.

3.45 In considering what test for proximity would be most equitable in all circumstances, we have had regard not only to the identification of proprietors who should appropriately be invested with the right to take enforcement action but also to the need to ensure that when a burdened proprietor seeks to vary or discharge a land condition by agreement, he is not faced with the necessity of seeking consent from an unreasonably large number of qualified proprietors. The question of discharge and variation of land conditions is dealt with later in this paper¹. In this part we are principally concerned with rights to enforce.

¹ Paras 3.95-3.105.

3.46 We have considered different tests for the measurement of the prescribed distance and our provisional proposal reflects our conclusion on the optimum distance, taking into account the need to avoid the creation of an excessive number of qualified proprietors. We have given special consideration to the position of co-owners. If, say, a private road or path which is in common ownership falls within the prescribed distance, it could be argued that it is inequitable that a distant proprietor should, by virtue only of owning, say a 1/100th part of a road, be given a right to enforce land conditions affecting land near to the road but distant from the main part of his property. We take the view that, in such a case, the burdened proprietor would be protected by the fact that the benefiting proprietor would probably have difficulty in establishing the necessary potential detriment to take enforcement action. The situation where a burdened proprietor is seeking a variation or discharge of a land condition is dealt with later in this paper.¹ In many cases co-owners of land falling within the prescribed distance, including land forming a road or path may have a legitimate interest in the enforcement of land conditions. We can see no justification for treating owners in common of roads differently from any other owner in common or sole proprietor. Accordingly, we have concluded that the proximity test should be met by any proprietor with an interest as an owner of any ground situated within the prescribed distance.

3.47 A typical urban road, including footpaths, would be approximately 10 metres wide. Our preference would be for a prescribed distance of 20 metres, as we consider that this would ensure that all proprietors whose amenity might be adversely affected by any failure to observe a land condition would have the necessary enforcement rights.

¹ Paras 3.102-3.105.

3.48 Detriment. Enforcing proprietors would be qualified to enforce under Option 1 by virtue of their ownership of land within a defined distance from the burdened area of ground. In many cases this would greatly increase the number of proprietors who would be entitled to enforce land conditions and whose consent would require to be sought for a variation or discharge of such conditions. We propose that an additional test, requiring proprietors qualified by virtue of proximity to demonstrate that they would suffer actual or potential detriment by virtue of failure to observe land conditions, should also be imposed. Such a test should ensure that only those proprietors in the vicinity of burdened land who are likely to be adversely affected by a failure to comply with land conditions will be qualified to take enforcement action.

3.49 Under the present system, the enforcing proprietor does not generally require to show that he will suffer detriment if the burden in question is not complied with, although it is possible that the deed imposing the burden might make some provision to this effect. On the other hand, the Lands Tribunal has not been prepared to make awards of compensation under section 1 of the 1970 Act unless some detriment to neighbouring proprietors seeking compensation on the discharge or variation of a land obligation can be shown. The word "detriment" is not in fact used in the 1970 Act which refers instead to "substantial loss or disadvantage ...". We envisage that the concept of detriment might be interpreted widely to include aesthetic considerations, nuisance and other factors which might lead to a loss of amenity for qualified proprietors. While a loss of amenity could, of course, lead to a quantifiable reduction in the value of the qualified

proprietor's property, we do not consider that such a loss of value should be an essential prerequisite for successful enforcement proceedings based on detriment.

We provisionally propose:

7. (i) The proximity test should be met if the burdened land is coterminous with or within a prescribed distance of the benefited land.

(ii) The prescribed distance should be 20 metres.

Note: We would welcome consultees' views on our proposed prescribed distance.

(iii) In addition to proximity, enforcing proprietors should be required to demonstrate that failure to comply with a land condition will result in actual or potential detriment to the proprietor's interest in the benefited land.

(ii) The nature of land conditions

3.50 Amenity conditions: The emphasis in all the recent reviews of land tenure referred to in this Paper has been on enforcement of real burdens or land conditions of an amenity nature. We consider that, for the majority of proprietors, one of the principal justifications for a system of private regulation of land use is the preservation of the amenity of their neighbourhood. This brings benefits both in general environmental terms and in terms of property values. Our proposals for this option are directed to ensuring that those with the greatest interest in preserving the amenity of their neighbourhood may take steps to ensure that land conditions imposed for this purpose are observed.

3.51 Service conditions: While the majority of conditions regulating the maintenance and use of common parts and services can be treated in the same way as "amenity" conditions, with the same test applied to ascertain qualification to enforce, there are cases where a proprietor with a very real interest in the maintenance of a common part, eg a drainage system, might not qualify under the rules based on a test of proximity as set out in the previous paragraphs. While such problems are not confined to our proposals for Option 1, we recognise that an enforcement regime which depends on proximity might lead to particular problems for proprietors benefiting from such common parts. In the following paragraphs we discuss methods of overcoming such problems.

3.52 Conditions regulating liability for and rights to common parts and services may be imposed in several different ways. An example of a statutory provision which we have already referred to¹ is section 95 of the Civic Government (Scotland) Act 1982 which makes provision for the maintenance of common areas. This is a good example of how rights and obligations may be regulated by statute.

3.53 The common law, in the case of tenement property, regulates maintenance and repair of common parts and services. In our Discussion Paper on the law of the tenement² we have discussed a possible statutory code to replace the common law

¹ Para 3.23 supra.

² DP No 91. We also propose to publish a discussion paper on Mutual Boundary Walls.

rules. While it would not, in our view, be practicable to extend this specific code to shared parts and services other than those in tenement property, there is, of course, no reason why the code or any part of it should not be applied as a matter of agreement between various burdened and benefited proprietors. We consider, however, that there are aspects of our proposals in relation to the law of the tenement which might be helpful in relation to common ownership in general and common maintenance obligations.

3.54 One category of obligation which we have not as yet touched upon in any detail in this paper is the servitude. For a servitude to exist there must be a dominant tenement (land benefiting from the obligation) and a servient tenement (land burdened by the obligation). A good example is the servitude right to lead a pipe through a neighbouring proprietor's land. The neighbour grants a servitude for the pipeline. His land is the servient tenement while the land of the pipe owner is the dominant tenement. Servitudes may be constituted in several ways. They may be the subject of specific written agreements which may be recorded in the Register of Sasines or registered in the Land Register. They may be incorporated in a conveyance of land or, alternatively, they may not be constituted by writing at all. It is possible for servitudes to exist as a matter of law, as in the case of natural servitudes such as the obligation of lower ground to receive water draining naturally from higher ground. A servitude may be constituted by prescription or may be the subject of an implied grant. Servitudes may be real burdens.

3.55 It is not necessary for the purposes of this paper to consider the law of servitudes at any length. It is sufficient to note that although servitudes may be real burdens, they will not

be affected by our proposals for the abolition of feudal land tenure. Servitudes, however, are relevant to our consideration of service conditions, as servitude rights may be created in relation to obligations which are also created real burdens by feudal grant or disposition. This could happen where, for example, there is a servitude right in relation to a shared drainage system or water supply pipe and the title of the property benefiting from the service also imposes real burdens on the servient tenement in relation to repair, maintenance and renewal. Maintenance obligations are not part of the servitude and must be separately constituted real burdens. Accordingly, while servitude rights may exist, any maintenance obligations imposed in relation to those rights may be unenforceable for a variety of reasons but principally, in the case of option 1, through lack of qualification to enforce by virtue of proximity.

3.56 Under the present system there are often significant practical difficulties in enforcing maintenance obligations in respect of common parts. For example, in the case of a mutual access roadway where, either ownership is retained by the disponent with rights of access only granted to the disponent, or portions of the roadway ex adverso the subjects served by it are sold off to the individual proprietors, it can be very difficult for one proprietor to enforce maintenance obligations against the others. If the disponent has no continuing interest in ensuring that the roadway is adequately maintained, it is not easy to persuade him to take any action which may be available to him in terms of the individual conveyances to secure maintenance work. In the absence of specific provision in the individual titles, and if no ius quaestium tertio has been created, there will be no reciprocal rights of enforcement among the benefiting proprietors. In either

of these cases, under Option 1 it is likely that neighbouring proprietors would be able to take enforcement action but neighbours who are too distant to meet the proximity test (and who might have had rights as tertii under the present system) would have no rights.

3.57 As the rights of enforcement inter se in such cases are totally dependent on the wording of the individual conveyances and the relationship which may have been created by those conveyances between the proprietors involved, it is not practicable to consider in detail all the different situations which may arise under the present system. We have considered whether there would be any advantage in a reform which would enable maintenance obligations to be enforced by all proprietors benefiting from the common part or service. We have it in mind that such entitlement might subsist regardless of any element of common ownership in the part or service in question where the titles are silent on such matters. Where the common part or service is in common ownership there may be remedies available at common law¹ to the proprietor who wishes to recover the costs of remedial work required to meet maintenance obligations. Such remedies are, however, at best, uncertain and for this reason we are attracted by the possibility of improving the position of such common owners, along with others who benefit from a common part or service, by giving them a statutory right to enforce land conditions in relation to such common parts against any other co-owner or benefiting proprietor regardless of whether the proximity test has been met. We would also propose that where the titles are silent as to the precise apportionment of liability, in any case where the part or service is in common ownership, liability should be allocated according to the ownership of the part or service.

¹ We have in mind such remedies as the right of the owner in common to effect necessary repairs (see Deans v Woolfson 1922 SC 221), although it is not certain how the cost of effecting such repairs may be recovered.

3.58 Where a contractual provision exists burdening the property benefited by the right of use with liability for the cost of maintenance, we take the view that it should be open to proprietors of any other benefited property to enforce such contractual obligations. Such an approach would be consistent with our proposals where there is common ownership. Where there is no common ownership and the titles are silent, liability should, in our view, be shared equally among those benefiting in the absence of the parties not reaching some alternative agreement. We consider that an apportionment of liability based on use, while being apparently fairer, would give rise to too many problems of proof of usage.

3.59 While the acceptance of a maintenance liability is a contractual matter for individual proprietors which should not be interfered with, if any of the parties wish to effect a re-allocation of liability, it should be open to them, as at present, to reach an agreement to this effect. Such an agreement should be binding on their successors. We also suggest that it should be open to a majority of the burdened parties to seek a formal re-allocation by the Lands Tribunal and, in making an order in respect of the re-allocation, the Tribunal should be authorised to award compensation, to be payable, as directed, to any proprietor or proprietors adversely affected by any such re-allocation, by the other proprietors. The Lands Tribunal order in such cases would be given effect to in the Land Register or recorded in the General Register of Sasines but should not be capable of registration or recording until the Tribunal is satisfied that any compensation payments have been made.

3.60 Special conditions: The imposition of a test of proximity for qualification to enforce land conditions would mean that many organisations which, at present, appear to be qualified to enforce real burdens would not be able to enforce similar land conditions imposed under the new system. We have already suggested that no special provisions should be made for enforcement of land conditions by organisations such as charities, religious bodies or public authorities disposing of land after the appointed day. Transitional arrangements for such bodies are discussed in Part IV of this paper. When disposing of land in the future, such organisations would have to use techniques other than land conditions, such as contractual obligations in conjunction with rights of pre-emption or reversion.¹

Where consultees prefer Option 1, we provisionally propose:

8. (i) Where proprietors benefit from a common part or service they should be entitled to enforce any maintenance obligation in respect of that part or service imposed on any other benefiting proprietor.
- (ii) Where a part is in common ownership and the titles do not apportion liability for maintenance that liability should be shared in the same proportion as ownership.
- (iii) Where there is no apportionment of liability among benefiting proprietors who have no interest in the part or service as owners in common, liability should be shared equally.

¹ See paras 5.26-5.31 of this paper.

- (iv) Proprietors benefiting from a common part or service should be able to bind themselves and their successors, by agreement to a re-allocation of maintenance liability.
- (v) It should be open to a majority of burdened proprietors to make application to the Lands Tribunal for an order re-allocating maintenance liability for a common part or service and awarding compensation, as appropriate.

OPTION 2

(i) Qualification to enforce

3.61 Option 2 leaves unaffected any enforcement rights in respect of real burdens enjoyed by disponers or co-disponees (with rights as tertii) and their successors. However, the person in right of the former superior's interest would be deemed by statute to have the same enforcement rights as if he were a disponent who had created real burdens in a disposition. Co-feuars with rights of tertii and their successors would have the same rights of enforcement as co-disponees who are tertii. In the case of co-disponees and co-feuars, Option 2 would not materially affect their ability to take enforcement action. The interests of former superiors would, however, be affected to some extent and these difficulties are discussed in Part IV - (Transitional Arrangements) at paragraphs 4.51-4.53.

3.62 After the appointed day, as before, the ability of a disponent to enforce real burdens will depend on his being able to establish that he has the necessary title and interest to do so. In the following paragraphs we discuss both title and interest.

3.63 Disponent's title to enforce. Professor Halliday states that the title of a disponent to enforce real burdens rests on the contract embodied in the disposition¹. Whether the original disponent or his successors may enforce against the original disponent's successors depends on the proper constitution of the original burden as a real burden, and the transfer of title to enforce to the proprietor seeking to enforce.

3.64 A disponent creating real burdens in a disposition may reserve to himself the right to enforce, or he may reserve such right to himself and his successors. Such successors may be specifically identified as successors in title to a specified area of ground or the reference may be to "successors" without any further identifying features. Title to enforce a properly constituted real burden can be transmitted to successors in title either by specific assignation² or by implication.³ Where there is no specification beyond "successors", the law is not clear as to whether the reference to successors includes only successors who are heirs or personal representatives.

¹ Conveyancing Law and Practice 11 para 19.48.

² J.A. McTaggart & Co v Harrower (1906) 8F 1101; Aberdeen Varieties Limited v James F Donald (Aberdeen Cinemas) Limited 1939 SC 788 1940 SC (HL) 52 referred to in this paper as "Aberdeen Varieties".

³ Braid Hills Hotel Co Ltd v Manuels 1909 SC 120 referred to in this paper as "Braid Hills".

3.65 Disponer's interest to enforce - As well as requiring title to enforce a real burden, the disponer or his successors, if appropriate, must have and are required to demonstrate an interest to enforce. In Scottish Co-operative Wholesale Society v Finnie¹ Lord Justice-Clerk Aitchison said -

"Prima facie a disponee who enters into a solemn contract to do or refrain from doing certain things concedes the interest of the disponer to enforce the condition, unless it can be affirmed upon the terms of the disposition that the condition was conceived in the interest not of the disponer but of someone else. If it cannot be so affirmed then it lies upon the disponee seeking a release from the restriction to aver and prove that the disponer has no interest recognised by law to enforce the restriction".

A disponee may, accordingly, challenge the presumed interest of the disponer to enforce a condition. If the disponer has reserved the right to enforce to his own successors in title to land near the burdened land, the interest of those successors may be sufficient to found an enforcement action against the original disponee and his successors but each case depends on its own circumstances. In Aberdeen Varieties, while the court found that the burden in question was not, in that particular case, enforceable as it was not a restriction for the protection of a patrimonial interest in property, Lord Wark (at p 796), expressed the view that 'the essential condition' of the validity of a real burden was that it was imposed for the protection of the amenity or comfortable enjoyment of other lands. In Scottish Co-operative Wholesale Society v Finnie some doubt was expressed as to whether "interest" other than a patrimonial or property interest would qualify a proprietor to take enforcement proceedings. This question was to some extent addressed in Aberdeen Varieties but has not as yet been fully resolved.

¹ 1937 SC 835 at p 840.

3.66 Enforcement by a co-disponee (tertius): A co-disponee who has a properly constituted right as a tertius may be able to take enforcement action against a fellow tertius. Where a properly constituted ius quaesitum tertio exists, the co-disponee's rights of enforcement are identical to the rights of a co-feuar tertius. In order to create the title of the tertius, it is essential that the co-disponee has expressly or by implication consented to the introduction of the tertius.¹ The most common method of achieving this is by express provision in the disposition in favour of the individual disponees. Another common method of creating a ius quaesitum tertio is through the medium of a Deed of Conditions² imposing identical conditions on all disponees and implying the existence of or expressly granting a ius quaesitum. In all cases the conditions in respect of which the ius quaesitum is created require to be in identical or at least very similar terms. The conditions also require to be of such a character that each disponee will have an interest in their enforcement. The rights of enforcement of a co-disponee tertius are fully explored by the court in the cases of Hislop, Botanic Gardens Picture House³ and Braid Hills.

3.67 If a co-disponee's right to enforce a real burden is to be dependent on a properly constituted ius quaesitum tertio, we envisage that greater care will be taken after the appointed day in ensuring that such rights are effectively created where this is intended. The right of the tertius is usually entirely dependent on

¹ Hislop v MacRitchie's Trustees (1881) 8 R (HL) 95 (referred to in this paper as "Hislop").

² 1874 Act s.32.

³ Botanic Gardens Picture House v Adamson 1924 SC 549.

the will of the disponent. If a disponent who proposes to sell off several pieces of ground is not minded to create a ius quaesitum in favour of his disponees, the individual disponee cannot force the creation of such rights. The nature of a ius quaesitum tertio is such that it must be constituted at the time of initial disposal by the common author. While one purchaser may not be able to bring pressure to bear on a seller to create a ius quaesitum tertio, it is possible that if potential purchasers were able to co-ordinate their requirements collective pressure might be more effective. We would be interested to consider views as to whether there is any other way of requiring disponents to create such rights.

3.68 There is further discussion about the consequences of Options 1 and 2 in Part IV of this paper where we discuss approaches to the transition from the feudal system to a new system of land tenure.

9. Views are invited on whether there is any way of requiring a disponent to create a ius quaesitum tertio other than by the collective pressure of potential purchasers referred to in paragraph 3.67 above.

(ii) The nature of real burdens

3.69 Amenity conditions: Under the present system, not all neighbouring proprietors with an interest in preserving the amenity of their neighbourhood have any entitlement to enforce real burdens against their neighbours. Such rights normally depend on

their benefiting from a ius quaesitum tertio. So far as we are aware, such rights of an enforceable nature are not widespread and accordingly it is fair to say that the average proprietor of land is unlikely to be able to take action against his neighbours to enforce real burdens. The best he can generally hope for in the case of a building estate is that he will be able to persuade the superior to take appropriate action competent to him. Our proposals for Option 2 would not lead to any changes in the present rules for enforcement of such real burdens by neighbouring proprietors.

3.70 Service conditions. Under Option 2, enforcement rights in respect of service conditions would be unaffected. Entitlement would depend, as at present, on the terms of the relevant conveyances. There would be cases, however, in which the continuing title and interest of the superior would have been relied upon for enforcement and will no longer exist. For example, a co-feuar who has no rights as a tertius may at present look to the superior to enforce real burdens. While this situation subsists in relation to amenity conditions also, the inability to enforce real burdens relating to the maintenance of common parts and services may cause greater difficulties. We have made proposals to meet difficulties which would arise if Option 1 was to be preferred at paragraphs 3.51-3.59 above. As Option 2 would not involve any significant changes in the present position, it may be unnecessary to explore, in relation to this option, whether a special regime for enforcement of service conditions should be introduced. Consultees' views, however, on this matter would be welcome.

3.71 Special conditions - The ability of disponers like charities, religious bodies or public authorities to enforce special types of

real burden created after the appointed day will, under Option 2, be unaffected by the abolition of the feudal system, as under Option 2 disponers who can establish the necessary title and interest will be able to enforce real burdens as before.

10. Views are invited on whether there is any need for the introduction of special rules for the enforcement of service conditions similar to those proposed in relation to option 1 for option 2.

How should land conditions or real burdens be enforced after the appointed day?

3.72 In the following paragraphs we discuss in relation to each option, aspects of enforcement action, such as methods of identifying qualified proprietors, what procedures would be appropriate, and the forum for hearing and resolving any disputes.

3.73 Identification of qualified proprietors (i) Option 1 Under Option 1 there will, in virtually every case, be more than one person who could be qualified to enforce a particular land condition ("qualified proprietors"). Identification of qualified proprietors should be relatively straightforward on the application of a simple test of proximity. Once all interests in land have been registered in the Land Register (which is map-based) identification of benefited property should be easily made by reference to the relevant ordnance survey map.

3.74 (ii) Option 2 - Under Option 2, the existing rules as to enforcement by disponers who can establish the necessary title and interest to enforce will apply. We are not aware of there being any difficulty at present in identifying disponers who may have

enforcement rights. The same cannot, however, be said in the case of tertii. At present where a ius quaestium tertio exists, unless the deeds make specific provision to the contrary, any benefited proprietor may take enforcement action, and this is discussed in the following paragraphs. In the case of a disponent and his successors, their right to enforce depends on their ability to establish title and interest.

3.75 Under Option 2, the rights of tertii in enforcing real burdens will have increasing significance. It is, accordingly, important that some method of ensuring that those with rights as tertii in relation to the enforcement of any real burden can be readily identified. At present an individual proprietor whose title is recorded in the General Register of Sasines would find it extremely difficult to identify all individuals who might have rights as tertii. We understand that in the case of titles registered in the Land Register, the Keeper cannot excise a burden from the title sheet even where there has been a consolidation of the right of superiority (dominium directum) and the right of property (dominium utile) unless he is satisfied that there are no extant rights of tertii. Given the way in which such rights are created, investigations in such cases, even for the specialist staff at Meadowbank House, can be extremely time-consuming.

3.76 We have considered whether, in future, tertii should have to be identified by reference to plans annexed to the disposition of the burdened land which show the extent of the land benefiting from the rights conferred on third parties. We have concluded that this might encourage perpetuation of the practice of giving all the proprietors in a large development the rights of tertii

regardless of their proximity to the burdened land. While such an approach has the attraction of simplicity in the context of a map-based system of registration of title, we think that it would be better to require rights in favour of third parties to be created expressly in the disposition of the burdened property by reference to individual plots identified by a sufficient conveyancing description and, if appropriate, by reference to a plan.

3.77 Our reservations in relation to identification of tertia by reference only to a plan are based on the potential proliferation of rights which may be created in this respect. This is still a slight risk with our preferred approach but we are not attracted to the possibility of imposing a limitation by reference to distance from the burdened subjects on the extent to which such rights may be created. Those responsible for constituting enforcement rights will not normally wish to make them unduly onerous for the burdened proprietor.

3.78 Consideration has been given in past reviews to the possibility of a local planning officer taking on responsibility for enforcing real burdens. We consider that this would not be a desirable solution and would be inconsistent with the present trend towards deregulation of planning controls.

We provisionally propose:

11. Under Option 1

- (i) any qualified proprietor should be entitled to take enforcement action.**

Under Option 2

- (ii) the existing rules as to enforcement by a disponent, successor of a disponent or a tertius should continue to apply.
- (iii) Consultees are invited to indicate whether after the appointed day, rights in favour of a tertius should only be capable of being created in respect of areas of land which have been specifically identified in the disposition of the burdened land.

Remedies available for enforcement of land conditions or real burdens

3.79 (i) Option 1 The feudal relationship is essentially one of a perpetual contract by tenure between the superior for the time being and the vassal for the time being. If a vassal fails in his obligation to pay feu duty or to comply with other burdens, the superior will have, in addition to the various rights of enforcement which may be available to him by contract, other remedies such as the superior's right of hypothec, poinding of the ground and the right of irritancy.¹ If a feu is to be irritated for non-payment of feu duty, the irritancy may be purged probably at any time before an extract decree is recorded in the Register of Sasines. Other irritancies, following on a breach of an obligation ad factum praestandum, are not automatically purgeable, but only at the discretion of the court.²

¹ "Irritancy" is a term used for the process whereby the court cancels the vassal's feu right and it reverts to the superior unencumbered.

² Precision Relays Ltd v Beaton 1980 SC 220.

3.80 Under a system of absolute ownership, the continuing relationship between superior and vassal and their concurrent interests in the same area of ground will disappear, and special remedies available to a superior deriving from that relationship will no longer be appropriate. In the future, under Option 1, an entirely new class of benefited proprietors would be entitled to enforce land conditions. We see no reason why the enforcement remedies available to qualified proprietors under the new system should differ materially from those available to individuals, other than superiors, with enforcement rights under the present system.

3.81 These remedies between disponent and disponent have been conveniently classed according to their nature by Professor Halliday as remedies available in respect of "real burdens for money" and "real conditions". Real burdens for money which are not constituted within a superior and vassal relationship do not, in the absence of a specific personal power of enforcement, found a right to raise a personal action for payment.¹ It is therefore unlikely that the creation of land conditions imposing any obligations equivalent to this type of real burden will be attractive under the new system. We suggest later some transitional arrangements in respect of existing "commercial burdens" which may fall into the category of real burdens for money.²

3.82 The other category, real conditions, offers a better enforcement model for the new system. Real conditions may impose an obligation to do or not to do something. Enforcement

¹ Conveyancing Law and Practice II para 19.62.

² See paragraphs 4.28-4.33.

in the latter case would normally be by way of action of interdict. Where an obligation to do something has not been met, that obligation may be enforced by way of an action ad factum praestandum against the disponent. At present the existence of a right of enforcement by successors of the original disponent against successors of the original disponent very much depends on the wording of the original disposition and the nature of the obligation.

3.83 Our provisional proposals for Option 1 are based on the fact that there are remedies available to persons, other than superiors, who can establish title and interest under the present system such as an action of interdict, an action ad factum praestandum or an action for damages. We consider that these remedies are sufficient for the purposes of the new system.

3.84 (ii) Option 2. Existing remedies would be available if Option 2 was preferred. These remedies exist at present and we do not consider that any significant changes would be required.

We provisionally propose:

12. Under Option 1

- (i) the remedies currently available to a disponent or co-disponent for enforcing real burdens should be available for the enforcement of land conditions.

Under Option 2

- (ii) the remedies currently available to a disponent or co-disponent for enforcing real burdens should continue to be available.

3.85 Forum for disputes. In considering whether any change is desirable in the forum where enforcement actions are heard, we have reviewed the desirability of (i) enforcement by means of actions brought before the ordinary civil courts as at present and (ii) extension of the jurisdiction of the Lands Tribunal for Scotland to enable it to hear such cases. We have also considered whether any additional remedies should be introduced.

3.86 (i) Enforcement through the courts - A civil action in the court is the only remedy available at present for failure to comply with real burdens. There is no evidence that court enforcement has proved unsatisfactory in the past. In an action for specific implement of a contract the court, by virtue of its equitable jurisdiction, may exercise its discretion to refuse to grant decree of specific implement and award damages instead.¹ We recognise that there are great pressures on court timetables which can result in substantial delays, and due regard must also be had to the potential expense for the parties which attends all formal court proceedings. We question, in the circumstances, whether the ordinary civil courts are the most appropriate fora for considering matters relating to such a specialised area as land tenure.

¹ W.M. Gloag, Contract (2nd ed), pp 657-661; D.M. Walker, Civil Remedies, pp 276-282; W. McBryde, Contract, pp 510-513.

3.87 (ii) Enforcement through the Lands Tribunal for Scotland (referred to in this paper as the "Lands Tribunal" or "Tribunal") - This Tribunal was set up under the Lands Tribunal Act 1949¹ to determine questions relating to compensation and other matters brought within its jurisdiction. At present, following the enactment of the 1970 Act, the Lands Tribunal has jurisdiction to deal with inter alia matters arising from the assessment of compensation, variations or discharges of land obligations and, relatively rarely, applications in respect of allocation of feu duties. Over the years since its establishment, the Lands Tribunal has developed an expertise in the assessment of compensation as well as in the variation and discharge of land obligations. For this reason we consider it would be an appropriate forum for enforcement actions under the new system of land tenure in questions arising under either Option 1 or 2. We think that the Tribunal should be given the power to award compensation in appropriate cases where an enforcement order has been sought.

3.88 We propose that the jurisdiction of the Lands Tribunal should be extended to include power to consider applications for orders requiring compliance with land conditions or real burdens ("enforcement orders"), and that the provisions of the 1949 Act which empower the Lands Tribunal to award expenses and compensation to parties to a hearing should be extended accordingly. The Lands Tribunal for Scotland Rules 1971² make provision in respect of inter alia applications under section 1 of the 1970 Act for variations and discharges of land obligations and also for determinations of questions of disputed compensation. We suggest that these rules should apply to applications for variations and discharges of land conditions (if Option 1 is adopted) and we

¹ C.42 referred to in this paper as the "1949 Act".

² SI 1971/218 referred to in this paper as "the 1971 Rules".

propose, in addition, that they should apply to awards of compensation made by the Tribunal in respect of breaches of, or non-compliance with, land conditions. We also propose that the provisions of section 3 of the 1949 Act which allows appeals by way of stated case to the Court of Session on points of law should apply.

We provisionally propose:

- 13.(i) The jurisdiction of the Lands Tribunal should be extended to enable the Tribunal to make enforcement orders.
- (ii) The Lands Tribunal should be empowered to award compensation as an alternative to an enforcement order.
- (iii) The Lands Tribunal should be the only competent forum for hearing applications in respect of enforcement of real burdens or land conditions.
- (iv) The existing provisions for appeal to the Court of Session by way of stated case on points of law should be available in respect of enforcement orders.

Enforcement of Lands Tribunal Orders

3.89 Under the 1949 Act, an extract of an order of the Tribunal may be recorded for execution in the Books of Council and

Session and is enforceable accordingly.¹ This provision would seem to apply principally to awards of expenses² as orders varying or discharging land obligations would not generally require to be "executed" in that way. Where a land obligation is varied or discharged subject to the payment of compensation, the order cannot take effect until the Tribunal has endorsed the order to the effect either that the compensation has been paid or that all persons to whom any compensation has been awarded, but who have not received payment of it, have agreed to the order taking effect.³ The Tribunal may direct that the compensation shall be paid or satisfied within a specified time and that, unless it is so paid or satisfied, the order shall be void on the expiration of the time so specified.⁴

3.90 We envisage that the Tribunal would be empowered to direct that an enforcement order must be obtempered within a specified period. It is therefore necessary to make provision for further procedure in the event of refusal or failure to obtemper the order within that period. We propose that in that event the enforcing proprietor should be entitled to return to the Tribunal and apply for an award of compensation. An extract of the order making the award could be recorded for execution and enforced in the same way as other orders of the Tribunal.⁵

¹ 1949 Act, s 3(12)(d), substituted by the Conveyancing and Feudal Reform (Scotland) Act 1970 (c 35), s 50(2).

² 1949 Act, s 3(5); 1971 Rules, r 33 (amended by SI 1985/581).

³ 1971 Rules, r 5(2), substituted by SI 1977/432, r 3.

⁴ Ibid, r 5(3).

⁵ 1949 Act, s 3(12)(d)- see para 3.90 above.

3.91 There may be cases, however, where an order has not been timeously obtempered and either the enforcing proprietor or the Tribunal considers that compensation would not be an appropriate remedy. We have considered whether in such cases the enforcing proprietor should be entitled to invoke the procedure for the enforcement of a decree ad factum praestandum which is provided by section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. Under this procedure the person in right of a decree ad factum praestandum may apply to the court by which the decree was granted. The court, if satisfied that the person against whom the decree was granted is wilfully refusing to comply with it, may either grant warrant for his imprisonment or recall the decree and make an order for payment by him to the applicant of a specified sum "or make such other order as appears to the court to be just and equitable in the circumstances".¹ We are aware that there are difficulties with regard to the enforcement of decrees ad factum praestandum against corporate bodies and unincorporated associations, and that there is doubt about the nature of the alternative orders which may be obtained without resorting to the nobile officium of the Court of Session. We consider, however, that it would be inappropriate in this Paper either to propose new general rules as to the enforcement of decrees ad factum praestandum or to devise special rules as to enforcement orders which would not apply to decrees ad factum praestandum. We propose only that an enforcement order should be deemed to be a decree ad factum praestandum for the purposes of section 1 of the 1940 Act.

¹ Law Reform (Miscellaneous Provisions)(Scotland) Act 1940, (3 & 4 Geo VI, c 42), s 1(1), (2).

greatest of care and the widest discretion,¹ it is unnecessary to impose further statutory constraints on the Tribunal.

We provisionally propose:

- 14.(i) In any case where a person has failed to obtemper an enforcement order, it should be competent for the person who obtained the order to apply to the Lands Tribunal for an award of compensation.
- (ii) An enforcement order should be deemed to be a decree ad factum praestandum for the purposes of section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.
- (iii) The Lands Tribunal should have the same power as a Lord Ordinary to punish contempt of court.

3.94 Possible alternative treatment of compensation payable following a breach. We have also considered whether sums of money payable as compensation should be capable of being secured on the heritage involved or become an automatic charge on that heritage. Since the enactment of the 1970 Act, a security over heritage must be created by standard security. There are at present no provisions which would enable deemed standard securities to exist although it is still possible to create statutory charges. To be effective a standard security has to be

¹ Milburn 1946 SC 301 per L P Normand at p 315; Royle v Gray 1973 SLT 31.

constituted in the prescribed form and recorded. There is nothing to prevent a debtor voluntarily granting a standard security over his property but, if he does not contract to do so, he cannot be compelled. It might be possible to give the courts or Lands Tribunal power to order that sums due following breach of a real burden or land condition be secured by standard security. This approach would in our view lead to so many practical difficulties in, for example, the ranking of securities that the difficulties far outweigh any benefit which might accrue. Accordingly we do not propose to pursue this option further.

We provisionally propose:

15. **Provisions to secure payment of compensation due by a burdened proprietor to a benefited proprietor by means of a standard security or statutory charge should not be introduced.**

Discharge or variation of real burdens or land conditions

3.95 In considering the variation and discharge of real burdens or land conditions under the new system, we have discounted the possibility of adopting a more radical approach to the continuation of real burdens or land conditions by making them matters of personal contract which would lapse if not specifically renewed on each change of ownership. For the reasons given below, we discarded this approach as being less beneficial than the real burden to the maintenance of amenity in the longer term. We are concerned that real burdens or land conditions which are purely personal in nature would very quickly become unenforceable

no matter which enforcement regime was adopted. In England an attempt has been made to overcome this deficiency through the use of complex systems of covenants and indemnities which do not, in our view, achieve the desired result of enforceability by successors as effectively as the real burden. We have been unable to identify any way in which land conditions which are a matter of personal contract could be enforced against successors without the complex arrangements which operate in England.

3.96 A properly constituted real burden at present runs with the land and can be enforceable in perpetuity. This is at the same time one of the strengths and one of the weaknesses of the feudal system. There are circumstances where it is desirable that restrictions on the use of land and other obligations related to the ownership of the land should be enforceable against successors in title of the original grantee but there are circumstances where the original reason for creating a burden has been overtaken by the passage of time and it is entirely unreasonable that successors of the original disponee should continue to be bound by that burden.

3.97 A superior and vassal have always been able to vary the terms of a feu grant by agreement as have the grantor of a disposition and the disponee. It has only been since the enactment of the Conveyancing and Feudal Reform (Scotland) Act 1970 which provided for the variation and discharge of land obligations¹ in section 1, that variation of land obligations against the wishes of the benefited proprietor was possible. The Lands Tribunal is, however, able to vary or discharge a land obligation only in the

¹ "Land obligation" is so defined in section 1 of the 1970 Act as to exclude real burdens constituted by disposition where the disponent does not specifically reserve enforcement rights to the proprietor of "an interest in land" (see section 2(6)). Such burdens, consequently, are not capable of variation or discharge under the Act.

circumstances prescribed by section 1(3) of the Act.¹

3.98 By virtue of section 18 of the 1979 Act, for the avoidance of doubt, variations and discharges of land obligations are binding on singular successors when registered or recorded. The statutory provisions in respect of the variation and discharge of land obligations could be extended to apply to all real burdens and, subject to such extension, could be applied without further amendment to land conditions in the event of Option 1 being preferred.

3.99 We have explored the possibility that the jurisdiction of the Lands Tribunal should be extended to enable it to consider any grounds for variation or discharge beyond the limitations imposed by section 1(3) of the 1970 Act. The limitations seem to us to be reasonable and afford sufficient flexibility to burdened proprietors, while adequately protecting the position of benefited proprietors. We do, however, propose that the Lands Tribunal should be given declaratory powers in relation to real burdens created before or after the appointed day and land conditions created after the appointed day which appear to be obsolete or incapable of enforcement, for example, where specified building materials are no longer available. We propose that this new power should be exercisable at the instance of a burdened proprietor or the Keeper, who would give effect to the order of the Lands

¹ The Lands Tribunal requires to be satisfied that the obligation has become unreasonable or inappropriate in the particular circumstances, prevents a reasonable use of the burdened land, or is unduly burdensome compared with any benefit resulting.

Tribunal in the Land Register. We consider that, in such cases, the decision of the Lands Tribunal should be subject to a right of appeal to the Court of Session by way of stated case on points of law.

3.100 Any order made by the Lands Tribunal would bind all affected proprietors. The Tribunal would require to be satisfied that all qualified proprietors had been identified, notified and given an opportunity to make representations. The existing provisions in relation to notification of an application are contained in section 2(1) of the 1970 Act and provide for notification by the Tribunal to benefited or burdened proprietors. We understand that the Tribunal exercises its discretion to limit notification to benefited proprietors who, in its opinion, are in the neighbourhood. We propose in relation to the options discussed in the following section of this paper that these procedures should, if Option 1 is preferred, also be applied to real burdens and land conditions and be given statutory authority, if necessary. An order of the Tribunal, like an agreed variation or discharge of a real burden or a land condition, would be recorded in the Register of Sasines or registered in the Land Register.

We provisionally propose that:

- 16.(i) Subject to our earlier proposals, the existing powers of the Lands Tribunal should be extended to enable consideration to be given to the variation or discharge of all real burdens and land conditions.**

(ii) Any order for the variation or discharge of real burdens or land conditions granted by the Lands Tribunal should be formally recorded in the General Register of Sasines or given effect to in the Land Register.

(iii) The Lands Tribunal should be authorised, on application by the Keeper or by a burdened proprietor, to declare that land conditions or real burdens are obsolete or unenforceable and such declaration should be final, subject to the right of an aggrieved person to appeal to the Court of Session on a point of law by way of stated case.

Effecting a discharge or variation

3.101 In paragraphs 3.95-100 above we considered in general terms the desirability of providing for the variation and discharge of real burdens and land conditions. In this and the following paragraphs we consider the "mechanics" of the process. A vassal and superior or burdened and benefited proprietor may at present vary or discharge real burdens by agreement. If there is no consensus it is open to the burdened proprietor to apply to the Lands Tribunal under section 1 of the 1970 Act. The variation sought must fall within the scope of section 1 and refer to burdens which, broadly speaking, could be considered to be unreasonable, inappropriate, disproportionately onerous or preventing a reasonable use of land. We have proposed at Proposition 16 that the existing system of variation and discharge of land obligations should be applied to real burdens and land

conditions. In the following paragraphs we consider how this might be achieved for our alternative options for the new system.

3.102 OPTION 1 Under Option 1 (where enforcement depends on proximity and detriment), it would be possible for all proprietors who are entitled to enforce the burden in question to reach agreement that it be varied or discharged. While in the majority of cases the number of such proprietors will be relatively small and easily identifiable, a drawback of this option is the possibility of a proliferation of qualified proprietors in any case where land in common ownership or tenement properties fall within the qualifying distance. However the fact that it will be open to a burdened proprietor to apply to the Lands Tribunal for an order effecting a variation or discharge in accordance with the provisions of the 1970 Act should minimise the difficulties which the applicant might face if he was required to obtain the agreement of a large number of proprietors qualified by virtue of proximity when seeking a variation. Notwithstanding our recommendation, for the purposes of establishing rights of enforcement of a land condition, that qualification should depend not only on proximity but also on the ability of the enforcing proprietor to establish actual or potential detriment, we have concluded that, for the purpose of variations and discharges, detriment should not be a relevant factor and all proprietors qualified by virtue of proximity should be eligible to object to and consequently be entitled to notification of a proposed variation or discharge of a land condition.

3.103 OPTION 2 - Under Option 2 (where enforcement depends upon disponers and co-disponees possessing the necessary title and interest), the position would be much the same as it is at present.

We are not aware of any widespread practice at present whereby the consents of proprietors with third party rights are sought to a discharge or variation of a real burden. If a discharge or variation is required, the burdened proprietor generally looks no further than the superior or disponer who has enforcement rights in respect of the real burden. If that individual grants the necessary waiver, the validity of the waiver is not usually questioned, nor is there generally any need to demonstrate that tertii have also consented. This may be a major deficiency in present practice. We have noted that where application is made to the Lands Tribunal for a discharge or waiver, the Tribunal in accordance with section 2 of the 1970 Act, notify benefited and burdened proprietors of the proposed variation or discharge (tertii generally come within the category of benefited proprietors). We can see no justification for applying a different approach to the rights of tertii in cases where the discharge or variation is by agreement.

3.104 We have discussed enforcement by tertii at paragraphs 3.75-3.77 and suggested that, after the appointed day, when real burdens are created, those areas of ground whose proprietors are to have rights as tertii should be specifically identified in the disposition. We recognise that, as with option 1, it might be argued that this approach may well give rise to a proliferation of qualified proprietors. The numbers of tertii are unlikely, however, to be any greater than at present and may, in fact, be less if it is required that they be clearly identified in the title imposing the real burden. Under the present system tertii may own property a considerable distance from the burdened area. Although we have rejected the possibility of imposing a limitation by reference to distance on the creation of rights of tertii, for enforcement

purposes, we have considered whether, for the purposes of agreed variations and discharges only, some such restriction should be placed on the requirement to obtain consent in order to limit the number of proprietors whose consent would have to be obtained. We have concluded that such a restriction would be unwarranted, as it would be wrong in principle on the one hand to recognise the rights of tertii, in respect of the enforcement of real burdens and, on the other hand, to limit the exercise of that right in relation to agreed variations and discharges.

3.105 Disponers may have an interest to enforce real burdens. Whether they are qualified to do so will depend on the circumstances of each case. While we recognise that it will not always be easy for a burdened proprietor to ascertain what enforcement rights a disponer or his successors may have, we can see no simple alternative to leaving each case to depend upon its particular circumstances. The prudent burdened proprietor would always seek the consent of the disponer or his successor to any variation or discharge as appropriate, if only to avoid difficulties on a subsequent sale of the property. In line with current practice it could be argued that any application by a burdened proprietor to the Lands Tribunal for a variation or discharge amounts to a concession by the burdened proprietor that the disponer or his successor has the necessary title and interest to enforce.

We provisionally propose:

17. Under Option 1 -

- (i) the existing rules in relation to variation and discharge of land obligations should apply to land conditions and
- (ii) consultees are invited to indicate whether, for the purposes of consideration by the Lands Tribunal of an application for a variation or discharge of a land condition, qualification by virtue of proximity should be the only test required for identification of benefited proprietors.

18. Under Option 2 -

in the case of a variation or discharge of a real burden by agreement, the consent of all tertii as well as the consent of a disponent or his successors (where appropriate) should continue to be required.

Identification of burdened party

3.106 Under the feudal system it is the proprietor rather than the occupier of the subjects who is bound to comply with real burdens. It is always open to the burdened proprietor to seek, by contract, to require the occupier of premises to comply with the title provisions but this personal arrangement between owner and occupier does not affect the owner's obligation to comply with the real burdens. In the event of Option 1 being preferred, we have considered the possibility of introducing a statutory provision deeming the occupier of premises, from time to time, to be the

person responsible for observing land conditions but have concluded that such a provision would cause extensive practical problems in the case of short term occupiers. If a proprietor wishes to impose a condition in a contract to the effect that the occupier would be liable for the observance of land conditions, that would, of course, be a matter between the proprietor and occupier and would not detract from any rights of enforcement against the proprietor.

We provisionally propose that:

19. **The proprietor and not the occupier should be bound to observe real burdens and land conditions in questions with qualified proprietors.**

Implementation

3.107 Introduction. In this section of the paper we consider the impact of the introduction of the system of registration of title on our proposals for the introduction of a new system of land tenure.

3.108 The Registers. The 1979 Act introduced a new system of land registration to Scotland. When the Act came into force it was envisaged that the whole of Scotland would be subject to land registration within about 10 years of the first registration area (Renfrew) becoming operational. Administrative and other difficulties have prevented this timetable being met and, at present, it is not possible to state with any certainty when all the areas presently served by the Register of Sasines will be subject to land registration.

3.109 We recognise that there are arguments for deferring consideration and implementation of any review of the feudal system of land tenure until the system of registration of title to land regulates the transfer of land throughout the whole country. However, we consider that in view of the uncertainty as to when the full implementation of the 1979 Act provisions in relation to registration of title can be expected and the desirability on grounds of public interest of introducing a simple and modern system of land tenure as soon as possible, consideration of potential reforms and the implementation of those reforms should not be delayed.

3.110 As, in the long term, all land in Scotland will be subject to registration of title, the proposals for reform contained in this paper are for a system of land tenure which will operate within the context of a universally applicable regime of land registration. In view of the fact that this is some time away, wherever appropriate, we have put forward options for reform in both the Sasine and Land Registers and have taken into account the continuing existence of the Register of Sasines in our proposals for transitional arrangements in Part IV.

We provisionally propose that:

- 20. The new system of land tenure should not be delayed until after all areas covered by the Land Register of Scotland have become operational.**

The appointed day

3.111 The new system should come into operation from a date to be appointed by statute known as "the appointed day". From that day, it is envisaged that all transfers of interests in land will require to be consistent with the new system. Subject to consultees' views on our proposals in this respect, it is probable that by the appointed day all existing pecuniary burdens such as feu duty will have been redeemed or be in the process of redemption¹.

3.112 When assessing what would be an appropriate period between enactment of the statute and the appointed day we have had regard to the competing requirements of public interest in introducing the new system as soon as possible and the necessity of ensuring on a practical level that the period of time chosen is sufficiently long to ensure public and professional awareness of the requirements of the new system so that the necessary legal and administrative arrangements can be completed.

3.114 A period of two years, for example, might not be sufficient to enable all the practical matters, for example, final redemption of all feu duties, to be completed prior to introduction of the new system. The range of matters which require to be dealt with prior to the introduction of the new system will very much depend on consultees' views on our various proposals in relation to the redemption of feu duties and the transitional provisions contained in Part IV of this paper but a period of five or even ten years might be considered appropriate given the far reaching nature of the proposed reforms. The

¹ See paras 4.2-4.22.

Halliday Committee in their 1966 Report proposed a period of 60 years between enactment of legislation and partial abolition of the feudal system. The main argument in favour of such a long period was that it would negate any financial hardship which might arise on the compulsory redemption of all feu duties and ground annuals and after such a period the number of land conditions which could be demonstrated to have a continuing usefulness (a concept favoured in the 1972 Green Paper see para 2.17) would be few. The Government made it clear in the Green Paper that they were not attracted to such a long period although they did canvass the possibility of redemption of feu duty by instalments over a period of 20 years after the appointed day. The previous administration in their 1969 White Paper felt "that the disadvantages of the feudal system could be avoided and provision made for all the needs of desirable land use and development under a system of land tenure capable of being established as soon as the necessary legislation has been passed."¹

3.115 We have concluded that the appointed day should be five years after the enactment of legislation as this period appears to achieve the best balance between the public interest in introducing the new system as soon as possible and providing sufficient time to complete the consequent practical and administrative requirements.

We provisionally propose that:

21. There should be a period of 5 years from enactment of the legislation to the introduction of the new system of land tenure.

¹ See paras 2.9-2.13.

PART IV
OPTIONS FOR TRANSITIONAL ARRANGEMENTS

Introduction

4.1 In recent years there has been an increase in home ownership in Scotland, attributable in some measure to the introduction of a statutory entitlement in the case of some tenants to purchase their homes. The growing number of properties passing into private ownership each year is leading to greater fragmentation of estates as they are developed and disposed of as new residential units. Ground in individual or corporate ownership now is almost always subject to real burdens restricting the owner's freedom to use his land and imposing obligations in relation to maintenance of common parts and services. With the introduction of the new system of land tenure, it will be necessary to provide for the final phasing out of feu duties and similar pecuniary real burdens which remain exigible on the appointed day. Provision will also require to be made for the treatment of non-pecuniary real burdens created prior to the appointed day. In the following paragraphs we look at the available options for effecting the transition in relation to each of our alternatives, Option 1 and Option 2, for the new system of land tenure. We deal separately with feu duty and non-pecuniary real burdens and we also consider whether different considerations should apply to a category of real burdens which we describe as "commercial burdens". Pecuniary burdens other than feu duties, such as ground annuals and standard charges are dealt with in Part V of this Paper.

Allocated feu duties

4.2 Since 1 September 1974 when the 1974 Act came into operation providing a mechanism for the voluntary and compulsory redemption of allocated feu duties and the consequent phasing out of feu duties themselves, the number of extant allocated feu duties has declined substantially. There will still, however, be a significant number of unredeemed unallocated, as well as some allocated, feu duties in existence at the date of enactment of the new legislation.

4.3 The continued burdening of land with a liability to pay feu duty would be inconsistent with a system of absolute ownership. With a view to the final abolition of such liability through compulsory redemption, we consider in the following paragraphs whether allocated feu duties should be compulsorily redeemed prior to the appointed day or alternatively within a specified period after the appointed day. So far as we are aware, the financial provisions for calculating the sums due on redemption which were laid down by the 1974 Act have operated satisfactorily and we provisionally propose that they should continue to apply to the compulsory redemptions which we propose in this part of the paper.

4.4 (i) Redemption prior to the appointed day. If all allocated feu duties were required to be redeemed prior to the appointed day, the practicability of such a requirement would depend on the length of period between the enactment of legislation and the appointed day. We consider that the period of 5 years which we proposed above¹ would be sufficiently long to enable all allocated feu duties to be voluntarily redeemed and any outstanding

¹ Paras 3.111-3.115.

difficulties in relation to individual redemptions to be resolved prior to the appointed day. We do, however, recognise that inevitably there will be cases where voluntary redemptions will not have been effected by the appointed day. To cater for such cases, we propose that on the appointed day, the redemption sum due in respect of any unredeemed feu duty, calculated as at that date in accordance with the provisions of the 1974 Act, should become a personal debt due by the former feuar to the former superior. This proposal is in line with the approach suggested in the 1969 White Paper (paragraph 37) and in certain cases should be subject to provision for payment by instalments,¹ as recommended in the 1972 Green Paper (paragraphs 22-27). We do not find the annuity-linked approach to redemption over a period of 60 years, which the Halliday Committee favoured, attractive, and experience to date with the existing statutory redemption scheme has shown that, with inflation, a lengthy period such as 60 years would be totally inappropriate in view of the real value of the feu duties involved. The principal consequence of our preferred approach that the former superior's entitlement to the redemption sum would become a debt due by the former feuar is that liability to pay would prescribe after 5 years in accordance with the laws of prescription in relation to debts. We are anxious to ensure that there should be no unsatisfactory overlap between the systems and we consider that the foregoing approach would help achieve the desired "clean break".

4.5 (ii) Redemption after the appointed day. We have considered the possibility of providing machinery enabling redemption of feu duties to continue to be effected after the appointed day subject to an overall time limit for redemption of 5 years from that date. It has to be said at the outset that we are not attracted by this

¹ For discussion of payment by instalments on compulsory redemption see paragraphs 4.17-4.19.

possible solution as we consider that it would lead to an unsatisfactory situation where elements of the old system of land tenure would operate in parallel with the new system. We envisage that if such an approach were to be adopted, the redemption sum would still be fixed at the rate applying on the appointed day but, by way of a penalty for non-payment of the redemption sum, an amount equivalent to the feu duty previously payable would continue to be payable to the former superior by the former vassal until final redemption was effected.

We provisionally propose:

- 22. Any allocated feu duty which has not been redeemed prior to the appointed day by payment of an amount calculated in accordance with the existing statutory provisions should, on the appointed day, become a personal debt due by the former feuar to the former superior. The amount of that debt should be calculated, as aforesaid, as at the appointed day.**

Unallocated feu duties

4.6 The majority of feu duties still in payment are believed to be unallocated feu duties which are not the subject of existing compulsory redemption legislation except under section 6 of the 1974 Act. These feu duties will usually have been apportioned informally and while payments made by individual proprietors may be small, the cumulo amounts exigible may be substantial. We are aware that in some cases the amounts involved are so low that it is uneconomic to collect the feu duties and payments in such cases have been allowed to fall into arrears.

4.7 We see no justification in principle for treating unallocated feu duties differently from allocated ones. Accordingly, we propose that they too should require to be redeemed prior to the appointed day. We do, however, recognise that there are more practical difficulties to be resolved in the case of unallocated feu duties and these difficulties, with possible solutions are discussed in the following paragraphs. Our discussions are based on our commitment to the principle that entitlement to receive and liability to pay feu duty will cease at a specified date. As with allocated feu duties, the amount which is due to a superior to effect redemption will be calculated by reference to the existing statutory machinery.

4.8 (i) Present position. An unallocated feu duty may be described as a feu duty created in respect of an area of ground which has subsequently been divided into a number of units without individual portions of the cumulo feu duty for the whole area being formally allocated on those units. The cumulo feu duty remains a burden on the whole land and may be claimed by the superior from the proprietor of any part of that land notwithstanding any informal apportionment of liability among the burdened proprietors. The party paying the cumulo feu duty has a right of recovery against other proprietors of parts of the area of ground which has been subdivided based on an implied assignation of the superior's own right to recover.¹ While the foregoing is the most common situation, there are other less common situations where payment of unallocated feu duty is made to a superior. Firstly, there are cases where the superior collects the apportioned feu duty direct and treats it in every respect as if it were an allocated feu duty, down to accepting redemption and

¹ Fotheringham v Anderson 1950 SLT (Sh Ct) 25.

issuing the appropriate receipts. Secondly, there are cases where a proprietor of one unit is liable for the payment of the cumulo feu duty but where it is impossible for him to identify the proprietors of other units for the purposes of recovering the amount due from them. This can happen where several tenement blocks have been built on the original feu but the majority of the buildings have now been demolished. Thirdly there are situations where the cumulo feu duty is paid by an individual ("the collector"¹) who may have apportioned a larger amount on individual units to cover the cost of collection and possibly to provide a profit element.

4.9 (ii) Abolition of unallocated feu duties. So far as superiors are concerned, the cumulo feu duty which is paid to them by the collector is an allocated feu duty. One solution would be simply to abolish the rights of collectors to recover payments due in respect of unallocated feu duties from the appointed day. Individual owners would no longer be liable to pay unallocated feu duties to the collector. The collector would, however, lose any income he derived from any surplus payments collected in excess of the cumulo feu duty. In order to avoid involving collectors in significant financial detriment, we would envisage the introduction of the necessary machinery to enable the collector to recover a pro rata share of any redemption sum due by him, from the payers of the unallocated feu duties.

¹ From the point of view of the superior, the collector is his feuar. Notices are sent to him and the superior would look to the collector to meet any liability to effect redemption. The collector's relationship with individual owners is not one of superior and vassal and so compulsory redemption could leave the collector without any right to recover shares of the redemption sum from the payers of the unallocated feu duties.

4.10 A second option would be to introduce a multi-tier approach to cater for each of the three categories of proprietors outlined at paragraph 4.8. In the case of the first category of proprietors, who are paying an apportioned feu duty (ie one which has not been formally allocated) direct to the superior, those feu duties could be deemed to have been allocated as at the date of enactment of legislation and thereafter they could be subject to the same rules as to redemption as formally allocated feu duties. Such an approach would require individuals to ascertain the basis on which their feu duty is paid and might involve superiors in some research as to the basis on which their entitlement to receive payments from the individuals concerned rests.

4.11 In the case of the second category of proprietor, ie the individual who has been left responsible for payment of cumulo feu duty where other proprietors are no longer identifiable, the position is less straightforward. It would clearly be inequitable to require such a person to effect redemption without provision for recovery from other proprietors since the sums involved could be significant. In the case of Ian Stoddart Barr v Bass Ltd¹ where the proprietors of one unit in a tenement had been required to pay the whole cumulo feu duty, the Lands Tribunal, on application by the superior, allocated proportions of the cumulo feu duty on all the units forming part of the tenement notwithstanding the fact that it was impossible to identify the proprietors of a number of the units which had been demolished over the years. The Tribunal recognised that this approach could result in a loss to the superior but took the view that it would not be appropriate to impose a disproportionate continuing obligation on the proprietor of one or more units purely because they were identifiable. The Tribunal rationalised the potentially detrimental effect of their

¹ 1972 SLT (Lands Tr) 5.

decision on the superior on the basis that he could exercise his right of irritancy for non-payment of the newly allocated feu duties. Clearly such an approach would not be available in the context of the present exercise after the appointed day. There is, however, no reason why the payer of the cumulo feu duty should not seek a formal allocation prior to the appointed day, leaving the superior free to exercise his remedies for non-payment in respect of the rest of the land prior to introduction of the new system. We think it is unavoidable that the loss arising in such circumstances has to fall somewhere. If the proprietor paying the cumulo feu duty has had a proportion of the feu duty allocated on the unit within his ownership and if the superior has not taken steps to secure his position prior to the appointed day by exercising remedies available to him for non-payment, he should bear such loss in the shape of forgone redemption money. If the paying feuar has not sought allocation timeously, we consider that he should be liable to effect redemption in respect of the whole cumulo feu duty. Proprietors who are responsible for the payment of a cumulo feu duty in such circumstances could apply before the appointed day for a formal allocation of part of the cumulo feu duty on their own property under sections 3 to 5 of the 1970 Act. No change in the existing law would be needed for this category.

4.12 The third category of proprietor affected by apportioned feu duty, already referred to at paragraph 4.9, is the individual paying a cumulo feu duty but recovering contributions by way of informal apportionments which may result in collection of a total sum greater than the cumulo feu duty. We have suggested above that in such cases the simplest approach would be to require the payer of the cumulo feu duty to effect redemption but to give him the right to recover redemption contributions from those currently

contributing to the cumulo feu duty in the proportion which their individual unallocated feu duties bears to the total sum of unallocated feu duties being collected. We do not consider that, in cases of this type, the collector should be entitled to a premium on pro rata recovery of the redemption sum by requiring the redemption of the unallocated feu duties to be calculated on the basis of the amount paid to the collector, including his profit element.

4.13 One of the principal drawbacks of the multi-tier system outlined in the preceding paragraphs is that it would be fairly specific and would not necessarily deal with every possible variation of informal apportionment practice. A single approach on the other hand may prove inequitable in a significant number of cases. We prefer a solution which will be as straightforward as possible and will ensure that superiors who have benefited from the receipt of feu duties will receive a proper payment on redemption of those feu duties. We consider that provisional Proposal 23 below achieves this.

4.14 The Halliday Committee in their Report recommended the abolition without compensation of all feu duties below 5s (25p) gross per annum. We have reservations as to whether such an approach would be appropriate in the circumstances which prevail now but we recognise that it might have its attractions, and would be interested in consultees' views.

We provisionally propose:

- 23.(i) All unallocated feu duties should be redeemed by the appointed day in accordance with our provisional proposal for allocated feu duties (Proposition 22). After the appointed day, any unallocated feu duties which have not been redeemed will become a personal debt due by the former feuar to the former superior.
- (ii) The person responsible for collecting unallocated feu duties and paying the cumulo feu duty to the superior should be liable to pay the redemption sum and should be entitled to recover shares of such sum from the payers of the unallocated feu duties in the proportions which the individual unallocated feu duties bear to the total sum of the unallocated feu duties being collected.
- (iii) Where a superior has sent out a notice requiring payment of an informally apportioned feu duty, that apportionment should be deemed to be an allocation from and after the enactment of legislation.

(Note: consultees are invited to indicate whether small feu duties under 25 pence per annum should be subject to the foregoing redemption requirements or abolished without compensation).

Arrangements for Redemption

4.15 (i) Who should initiate redemption? Once the feu duty is capable of being redeemed, and the amount required to effect redemption ascertained by reference to existing statutory provisions, the question arises as to who should be able to initiate the redemption process and at what stage. At present an allocated feu duty may be redeemed voluntarily by the feuar at any term of Whitsunday or Martinmas. In such cases the redemption figure may not be assessed in accordance with the relevant statutory provisions as some superiors have been known to offer discounts as an incentive to feuars to effect voluntary redemptions. On a sale of the property in respect of which an allocated feu duty is exigible, the feu duty must be redeemed in accordance with the statutory provisions. In addition an unallocated feu duty may be allocated at any time at the instance of a payer subject to a right of appeal to the Lands Tribunal¹ by the superior in relation to the amount sought to be allocated by the payer.

4.16 While it might be argued that the existing provisions for voluntary and compulsory redemption and voluntary allocation at the behest of a payer will be sufficient to enable allocation and payment to take place before the appointed day, we have considered whether there may be some merit in investing the superior with a right to require allocation and redemption in the period between enactment and the appointed day. Such a right on the part of the superior might be particularly relevant in the second category of case mentioned at paragraph 4.11 where the right to irritate for non-payment in respect of part only of a feu

¹ Sections 3, 4 and 5 of the 1970 Act.

could only be exercised after the necessary allocation on that part of the feu had been effected. Otherwise, in the event of the cumulo feu duty being unpaid, the superior could exercise his rights in respect of the whole feu. On balance, we consider that in such cases, as it will be in the interests of the payer to have a formal allocation of feu duty made, in order to minimise his potential liability, no steps need to be taken to safeguard the superior's interests. We recognise that the continued payment of a cumulo feu duty by the proprietor of part only of a feu will, effectively, prevent a superior from exercising any rights he may otherwise have had to irritate the feu for non-payment of feu duty. Such cases will, however, be rare. We take the view that redemption of feu duties during the period from enactment to whatever date is specified for final redemption should be at the instance of the vassal, as at present, and make no formal proposal in this respect.

4.17 (ii) Payment by instalments. At present the amount required to redeem a feu duty on voluntary redemption is normally paid by way of a lump sum but there is nothing to stop a superior accepting payment by instalments. In the case of a sale, the redemption figure calculated in accordance with the 1974 Act requires to be paid by way of a lump sum. Section 5 of the 1974 Act provides that where a feu duty falls to be redeemed on sale it may, in certain circumstances, be secured as a real burden over the subjects of sale. It is not necessary to consider the terms of the section at length for present purposes. Suffice it to say that the procedure is complex and in practice rarely, if ever, used. When a redemption receipt is not available for delivery to a purchaser at settlement, the seller's solicitors usually give their personal obligation to effect redemption and to deliver a receipt

within a specified time or, in the event of the superior being untraceable, the redemption money may be lodged on deposit receipt in joint names of the seller and the purchaser or their solicitors.

4.18 As we have already observed, we believe that the majority of feu duties remaining unredeemed are for relatively small amounts. We have considered whether compulsory redemption should be by way of a single payment only or whether there is any need to introduce provision for payment by instalments. While it is not thought likely that compulsory redemption by way of a single payment on sale of property would cause hardship, this argument does not have the same strength in a case where redemption is to be effected outwith the context of a sale. We recognise that while the majority of feu duties may be for small amounts, it is possible that there are still unredeemed duties in excess of (say) £20 per annum and the sum required to redeem such duties could be regarded as substantial by many people.

4.19 We do not favour introducing a system whereby small redemption sums (where the feu duty is £20 per annum or less) could be paid off by instalments in view of the potentially disproportionate administrative and other costs involved. In the case of feu duties of over £20 per annum, we provisionally propose that redemption should be effected either by a single payment calculated in accordance with the provisions of the 1974 Act or by instalments which would include an additional sum in respect of interest to compensate the superior. Such interest could be at a specified rate of, say, 10% or be linked to bank base rate. The number of instalments could be a matter of negotiation between the superior and vassal or the period over

which the instalments should be paid could be prescribed by statute as envisaged in the 1972 Green Paper (paragraphs 22-27) where the Government proposed a redemption period of 20 years. We consider that this period is too long and provisionally propose that the maximum period for redemption by instalments, if it is to be prescribed, should be 5 years. This would ensure that all payments in respect of feu duty would cease not later than 5 years after the appointed day, even if the number of instalments in each case was left to negotiation between the parties. In view of the relatively short periods of time involved, we do not consider that it is necessary to introduce a judicial remedy to resolve disputes in cases where the parties are unable to agree a timetable.

We provisionally propose:

- 24. Feu duties of over £20 per annum should be capable of redemption in instalments, with interest, over a maximum period of 5 years from the appointed day.**

Note: consultees' views are sought on whether the figure of £20 per annum and interest at the rate of 10% are appropriate. Suggestions for alternative amounts and rates, with reasons, would be welcome.

(iii) Statutory Compensation on Redemption of Feu duties

4.20 It has, in the past, been suggested that in the event of the introduction of compulsory redemption of feu duty which is not

linked to the sale of burdened property, the Government should assist feuars by way of a statutory compensation scheme. We consider that there is a very strong argument for the view that no feuar ultimately suffers any loss through redeeming a feu duty exigible in respect of burdened property. There is no evidence from experience to date with voluntary and compulsory redemptions that the public is dissatisfied with the method of assessing redemption figures and with the procedures involved. In view of this, we do not consider that a compensation scheme would be appropriate. In addition, we take the view that the cost to the tax payer of setting up and administering such a scheme would be disproportionate to the benefit to be derived by individual feuars. We do not, therefore, suggest the introduction of such a compensation scheme as an option.

(iv) Payments where superior's identity unknown

4.21 One of the principal obstacles to redeeming remaining feu duties is the growing problem of untraceable superiors. At present the only satisfactory evidence of redemption is a receipt issued by or on behalf of a superior. The abolition of the feudal system of land tenure and the removal of the superior's right to receive payment of feu duty at the appointed day would mean that on the sale of land after the appointed day the existence of the evidence of redemption will be irrelevant. It might be argued, however, that it is necessary to take reasonable steps to protect the interests of the superior who, as a consequence of his failure to seek payment of feu duty, might not be identifiable and, accordingly, not be in receipt of redemption monies which he is due. We do not consider that the remedy provided by section 5

of the 1974 Act¹ for the superior in the case of compulsory redemption forms a suitable precedent. The procedures are complicated and, as we have already indicated, we know they are rarely, if ever, used. The obligation to effect redemption will rest with the feuar and the liability to effect redemption should not cease merely because the feuar has failed to locate the superior. Redemption monies could be lodged on deposit receipt as is sometimes done at present.

4.22 After the day prescribed for the final redemption of all feu duties, those acquiring an interest in land previously burdened by a feu duty will have no liability in respect of that feu duty and will not require evidence of the fact that the necessary redemption has been effected. Accordingly, in the case of redemptions which cannot be completed because the superior cannot be identified, the present "commercial" pressure for ensuring that the appropriate procedures have been followed will be absent. In view of this, we have concluded that no special statutory procedures should be introduced to cover the situation where the superior cannot be identified.

We provisionally propose that:

25. **No special redemption provisions should be made for situations where the superior is untraceable.**

¹ Section 5 provides for unpaid redemption money to be secured as a real burden on the feued land.

Non-pecuniary burdens

Introduction

4.23 Most heritable property in Scotland is subject to existing real burdens, a significant number of which have been imposed by way of a feu deed. While many early feudal burdens and obligations are obsolete, or not enforced, some still serve a useful purpose in the preservation of amenity and allocation of responsibility and liability for shared duties and obligations. A principal aim of the present review of the system of land tenure must be to ensure that those aspects of the system of feudal tenure which are worth retaining and which have been demonstrated to work through the test of time are incorporated as far as possible into the new system. The desirability of retaining some, at least, of the existing rules in relation to burdens was recognised by the Halliday Committee in its Report, in the 1969 White Paper, and in the 1972 Green Paper. We do not consider that the radical approach of sweeping existing burdens away as at the appointed day is desirable or, indeed, practicable as, given our view that land should continue to be burdened by real conditions, such an approach would potentially put proprietors of subjects affected by real burdens at the appointed day in a better position than proprietors affected by land conditions imposed after the appointed day. In Part III of this Paper we have explored methods for enforcing land conditions under the new system if Option 1 was to be preferred and in this Part we look at how rights of enforcement in respect of existing real burdens may be dealt with under the new system.

We provisionally propose:

26. Land should continue to be burdened by real burdens imposed before the appointed day but such burdens should be enforceable in accordance with the requirements of the new system of land tenure.

4.24 We have envisaged that for the new system of land tenure land conditions will fall into the broad categories of "amenity" or "service" conditions although no formal categorisation is proposed. We have also discussed the possibility of introducing a category of "special" conditions, but were not attracted by the consequences of recognising special rights of enforcement in the case of defined classes of enforcers. We expect that the nature of land conditions imposed under the new system will, to a significant extent, be dictated by the ease with which they can be enforced. Accordingly some real burdens which may be imposed today will not be so attractive to disponers under the new system. In particular we take the view that burdens of a commercial¹ nature are less likely to occur in the future. By "commercial" burdens we mean the type of burden sometimes referred to as a "clawback" provision, usually imposed in a feudal grant, whereby the grantor reserves to himself the right to share in any financial gain which might accrue to the proprietor of the ground either on the happening of a specified event or on disposal of the ground within a specified period. Such arrangements should, in our view, be a matter of personal contract between the parties in the future and should not be enforceable as land conditions under Option 1 or real burdens under Option 2 unless the enforcing proprietor is qualified to enforce in accordance with the requirements for the relevant Option.

¹ For a fuller discussion of "commercial" burdens see paras 4.28-4.35. An example of a provision in a public authority missive in respect of a "commercial" burden and an extract from the SDA conditions of tender are given at Appendix III.

4.25 In Part III of this Paper we have put forward for consideration by consultees two options for a new system of land tenure and in the following paragraphs we discuss, in relation to each option -

- (i) Enforcement - At present real burdens may be enforced by the superior or disponer and, in some cases, co-feuars or co-disponees who are tertii. In the following paragraphs the enforcement of each of the categories of burden referred to in paragraph 4.24 above is discussed.
- (ii) Obsolete conditions - do we need to make any special provisions?
- (iii) Compensation - We have considered in relation to each option, if an existing enforcement right is to be superseded, whether compensation should be payable and, if so, by whom. We discuss the matter of compensation in general terms at paragraphs 4.66-4.69.

OPTION 1

Enforcement of real burdens by qualified proprietors where qualification depends on proximity and detriment only.

(i) Enforcement

4.26 Amenity and service real burdens. We have listed in Appendix I Part I typical real burdens which might be imposed in

respect of a modern dwellinghouse under the present system. Those which might be identified as relating to the amenity of the neighbourhood are listed separately from those relating to maintenance of common parts or services. We have also indicated where there are existing statutory provisions which would potentially have the same effect as the privately imposed real burdens. In Part II of the Appendix typical reservations which might also affect an owner's rights in respect of his property are listed. Subject to our comments in the following paragraphs on the position of commercial burdens, we take the view that the typical real burden created today is intended to benefit neighbouring proprietors rather than superiors.

4.27 Our proposals in relation to Option 1 would mean that for the future, apart from a limited category of disponer or superior who would have created personal contractual rights to enforce real burdens in the conveyance in favour of the current proprietor, only neighbours could enforce land conditions. In order to avoid a dual system of enforcement, the implication of Option 1 for existing real burdens would be that all existing enforcement rights would cease as at the appointed day and persons entitled to exercise those rights, apart from those qualified under the new system, would no longer have any right or title to take enforcement action.

4.28 Commercial burdens. In paragraph 4.24 above we mention a category of real burdens which we called "commercial burdens". These are real burdens for money¹ which may require special transitional provisions. Under Option 1, we have suggested that rights to enforce land conditions should rest with neighbouring proprietors qualified by virtue of their proximity to the burdened

¹ Halliday Conveyancing Law and Practice II paras 19.15, 19.62 and 19.28.

land and their ability to show that failure to comply with a land condition will be detrimental to them. We have proposed that after the appointed day real burdens created under the feudal system should continue to attach to land but should be enforceable only by qualified proprietors and those with a contractual right. While it seems to us to be appropriate that burdens which regulate the amenity of a neighbourhood and maintenance of and liability for common parts and services should be enforced by neighbouring proprietors, the same arguments cannot be applied to burdens which are intended to produce a specified financial return to an identified individual.

4.29 If no special provision is made for commercial burdens imposed prior to the appointed day, it is possible that such burdens, which would have been enforceable at the instance of the benefited party not only against the original burdened proprietor but against that proprietor's successors in title, would only be enforceable against the proprietor as at the appointed day on the basis of personal contract if he was the original burdened proprietor. On a change of ownership after the appointed day the contractual rights of enforcement would fall and neighbouring proprietors qualified by virtue of proximity would be unable to demonstrate that failure to comply with the burden would be detrimental. The burdens would then become unenforceable and could attract application of the provisions which we have suggested at paragraphs 4.35-4.36 below for such burdens and be liable to deletion from the land register.

4.30 As we have observed above, under Option 1 for the new system of land tenure, conditions of this nature will not be readily enforced and in the future disponents will no doubt find an

alternative means of gaining the required financial return.¹ We are concerned that our proposals for Option 1 will have a potentially adverse effect on the legitimate expectations of parties standing to gain from the enforcement of such burdens imposed prior to the appointed day. The proprietors of ground subject to such burdens will have been aware of their existence when they acquired the ground and this would have been reflected in the price paid. No additional loss, therefore, should accrue to such proprietors if special provisions enabling continued enforcement are introduced in respect of commercial burdens.

4.31 We take the view that the only practicable approach to the problem would be to preserve the benefits which the original parties to the contract intended to constitute, by making special provision enabling such burdens to be enforced, after the appointed day, against successors of the original burdened proprietor by successors of the original benefited party if such rights existed immediately prior to the appointed day. We do not offer comments on the current enforceability or methods of constitution of burdens of this type, but seek to ensure that the position of the burdened and benefited parties is neither adversely affected nor improved by our proposals. Where there is any dispute as to whether a real burden should be classified as a "commercial" burden, we consider that the Lands Tribunal should be given the necessary authority to resolve such disputes.

¹ Reference may be made to Agreements under s 50 of the Town and Country Planning (Scotland) Act 1972 and, more recently, the provisions of s 32 of the Enterprise and New Towns (Scotland) Act 1990.

4.32 We have considered whether there should be any limitation on the duration of such preserved rights. Should they exist in perpetuity or should they be exercisable only within a specified period? We are aware that in most cases where such real burdens have been imposed, time limits for the exercise of the rights conferred by the burdens are specified in conveyances. In such cases, any statutory cut-off should not be taken as extending any period stated in a conveyance. There will, however, be cases where there is no provision in the conveyance and, in such cases, we have considered whether, in order to maintain consistency with our proposals in relation to feu duties and other similar monetary burdens, provision should be made ensuring that the right to enforce such burdens comes to an end on the expiry of a defined period commencing with the appointed day.

4.33 Our own preference in the matter of imposed time limits is that such commercial burdens should continue to be enforceable in accordance with the terms of the contract embodied in the conveyance in which they were imposed. Continued enforceability would be achieved by a statutory extension of enforcement rights by and against successors to the original contracting parties where necessary to ensure that the intentions of the original contracting parties are complied with. No time limit would, accordingly, be appropriate.

4.34 Special Conditions: We discussed at paragraphs 3.26-3.29 the possible categorisation of land conditions under the new system as "special conditions" ie those imposed by a defined class of organisations such as public authorities, religious bodies, charities etc which would not be enforceable because such bodies would generally fail to meet the test for qualified proprietors. We took

the view that for the new system such a privileged class should not be introduced but consultees who are attracted by our proposals in relation to commercial burdens may feel that it would be appropriate also to preserve some rights in relation to real burdens which could not be defined as commercial but have been imposed by specified public, religious, charitable or other bodies. We do not favour this approach as we consider that it is possible to distinguish between commercial matters and the situation in which public authorities and others might be given special enforcement powers in relation to matters affecting amenity. We take the view that the retention of privileged enforcement rights in relation to land conditions (formerly real burdens) which relate to the amenity of an area in which the enforcing body has no neighbourhood interest would be contrary to the fundamental principles on which our first option is based.

We provisionally propose

- 27.(i) Existing enforcement rights of superiors, disponers, co-feuars and co-disponees should cease on the appointed day, unless they are otherwise qualified by virtue of proximity and detriment.
- (ii)a Existing real burdens of a commercial nature should be classified as such, subject to resolution by order of the Lands Tribunal of any disputes as to classification.
- (ii)b Such burdens should continue to be enforceable by the original benefited party proprietor and his successors against the original burdened proprietor and his successors.

(iii) Public, religious, charitable and similar organisations should not be given special enforcement rights in respect of real burdens created prior to the appointed day.

(ii) Obsolete or unenforceable real burdens

4.35 The Register of Sasines is a register of deeds and not a register of interests in land. The Keeper accordingly has no discretion in relation to the content of deeds which are otherwise acceptable for recording in the Register of Sasines. In the case of the Land Register, section 5 of the 1979 Act requires the Keeper to complete registration by making up or amending a title sheet. Section 6(1)(e) provides that the title sheet should have entered in it, inter alia "any enforceable real right pertaining to the interest or subsisting real burden or condition affecting the interest". Professor Halliday took the view that this provision does not authorise the Keeper to excise obsolete real burdens¹ although there is an argument that a burden which was shown to be unenforceable could be deleted. In practice, unless the Keeper assumes express responsibility for their enforceability, real burdens and conditions are not subject to indemnity under section 12(3)(g) of the 1979 Act. Consequently, they tend to be incorporated in the title sheet if no evidence is presented to the Keeper that they have been discharged or no longer subsist for any other reason.

4.36 We have provisionally proposed earlier in this paper (paragraphs 3.99-3.100, Proposition 16(iii)) that the Lands Tribunal should be authorised to declare, at the request of the burdened

¹ Halliday, The Land Registration (Scotland) Act 1979 p 6.

proprietor or the Keeper, that a real burden or land condition is obsolete and unenforceable. Such a process would ensure that obsolete real burdens under the present system and land conditions under the new system could be deleted from the title sheet in the case of registered land. We have also considered whether the Keeper either at his sole discretion or on application by a burdened proprietor should be given the power to delete obsolete burdens or conditions himself without the need for reference to the Lands Tribunal. We concluded that the difficulties for the Keeper in satisfying himself as to the propriety of making such a deletion were such as to render this possible course impracticable.

(iii) Compensation for loss of entitlement to enforce non-pecuniary real burdens

4.37 If Option 1 is preferred, one consequence will be the loss of entitlement to enforce existing real burdens by the majority of former superiors, disponers, co-feuars and co-disponees. We have considered whether such rights to enforce give rise to a benefit, quantifiable in financial terms, which would justify cash compensation on its removal. Rights arising from matters of personal contract will, of course, remain unaffected. We consider each category of enforcement interest in turn, first in relation to ordinary real burdens and then in relation to "commercial" burdens.

4.38 A. Compensation for former superior. Erskine,¹ following Craig² has classified the character of feudal rights as (a) essential, (b) natural and (c) accidental.

¹ Institute II.iii.11.

² Craig, Jus Feudale I,ix, 20-28.

(a) Essential rights are the superior's radical rights to property in the land and his right to service or payment from the vassal. The superior's radical right to property which at one time amounted to virtually co-ownership has now effectively been reduced to a conceptual interest which is of practical relevance in the majority of cases only for purposes of recovering feu duty or enforcing burdens. The superior is no longer able to exercise any rights in respect of service from a vassal.

(b) Natural rights are those which arise from the nature of the feudal contract, the most important of which is the right to irritate. The superior's right to irritate or tinsel the feu and recover possession of the vassal's estate merely because the vassal has not paid his feu duty may now only be exercised on the vassal's failure to purge the irritancy. The right to purge subsists up to the very last moment of the irritancy proceedings. This remedy is now rarely used.

(c) Accidental rights include reservations, real burdens, conditions and renunciations which depend on the terms of the actual contract between the superior and vassal. It is this category of superior's right which has most significance to the majority of vassals today. Most reservations, real burdens and conditions are concerned with preserving amenity and allocating responsibility not for the immediate benefit of the superior but for the benefit of neighbouring proprietors. For example, a requirement imposed on a house in a modern estate that a certain type of uniform fencing be used cannot be of any conceivable direct benefit to a feudal superior which is a limited liability company with a registered

office in Manchester. The benefit to the superior in such circumstances would be financial, either in terms of the "income" he could derive from charging for granting waivers or, from the fact that the enhanced amenity resulting from the observance of the burden will make other properties in the estate retained by the superior more saleable. Once all the properties on an estate are sold, it seems that there can be no remaining benefit to the superior on the latter count and it is doubtful whether in such cases the superior could successfully establish the necessary interest to enforce the real burdens.

4.39 At the end of the 19th century, it was common to find provisions in feudal grants which were designed to protect the amenity of the subjects sold and its neighbours by preventing development or anti-social uses. It was also common to find provisions allocating responsibility for installation of drains and making up roads and footpaths. Such matters are now also dealt with by public regulation through such legislation as the Town and Country Planning, Local Government and Public Health Acts. These Acts and others which, like them, regulate land use, have effectively overtaken the role of the real burden in preserving amenity. We have shown in Appendix I how many common real burdens constituted in relation to various properties today might perhaps be redundant in view of existing legislation.

4.40 Superiority interests in land in Scotland can be divided into interests held by private persons (including companies and trustees), those held by public authorities and those held by bodies such as churches, the National Trust, the Crown etc. Earlier in this Paper we considered the position of the last category in relation to special conditions which they might impose. We also

explored the possibility of distinguishing between real burdens of a strictly commercial nature and others, with the possibility of preserving special enforcement rights in respect of "commercial" real burdens. Our proposals under option 1, therefore, for land conditions in general could result in parties who have imposed commercial real burdens retaining the ability to enforce such real burdens despite not being otherwise qualified by reason of proximity and potential detriment. We recognise that, in light of this, consultees may take the view that some or all of the bodies mentioned at the beginning of this paragraph should also be entitled to preserved enforcement rights in relation to existing real burdens regulating matters which could be defined as relating to amenity. As we have already indicated, we consider that any extension of the category of proprietors who would have enforcement rights beyond those with a commercial interest would be inconsistent with the policy objective of Option 1.

4.41 We have reviewed real burdens by reference to Erskine's classification of the rights of superiority into essential rights, natural rights and accidental rights. Essential rights have effectively become translated into the right to recover feu duty and this has already been dealt with. We do not consider that this should give rise to any entitlement to compensation beyond the amount of the redemption figure calculated in accordance with existing statutory provisions. The superior's natural right of a statutory irritancy on non-payment of feu duty will also cease to be relevant once feu duty has been finally abolished. We take the view that, given the existing right to purge a conventional irritancy in the case of non-performance of obligations ad factum praestandum at the discretion of the court, irritancy, as a remedy, is of very limited effect. Accordingly, we do not consider that the

loss of superiors' rights in this respect should give rise to any entitlement to payment of compensation.

4.42 The superior's rights, classified by Erskine as accidental rights, have always been subject to voluntary variation and discharge. Since 1970, in the absence of agreement, the Lands Tribunal has had the power to vary and discharge land obligations on application. Section 1 of the 1970 Act gives the Tribunal authority to award compensation for "any substantial loss or disadvantage suffered by the proprietor as such benefited proprietor in consequence of the variation or discharge". It is understood that the Tribunal has very rarely, if ever, used its powers to compensate superiors who would come within the definition of benefited proprietors. It seems that the Tribunal has taken the view that it was not the intention of Parliament that it should grant compensation where the only loss to the superior was the removal of an interest "in obtaining money in return for selling the superiority or granting a minute of waiver".¹ In practice the Tribunal has rarely made an award of compensation (around 12 awards over a period of 15 years) and such awards have invariably been made to benefited proprietors who have been neighbours entitled to enforce a land obligation by virtue of a ius quaesitum tertio. It is understood that the Tribunal has never been invited to determine a claim in respect of a real burden which would, according to our proposed classification, be purely "commercial". In all decided cases where compensation has been awarded it has been possible to identify potential harm to the benefited proprietor's interests in the dominant lands and to quantify any loss which he may suffer as a result of a variation or discharge of a land obligation.²

¹ Robertson v Church of Scotland General Trustees 1976 SLT (Lands Tr) 11, at p 13. See also McVey and Another v Glasgow Corporation 1973 SLT (Lands Tr) 15.

² Leney v Craig and Others 1982 SLT (Lands Tr) 9.

4.43 We take the view that, where there are no enforceable contractual rights, the loss by a superior of his right to enforce a real burden relating purely to the amenity of an area of ground or to the regulation of common services and parts should not give rise to an entitlement to compensation. We are fortified in this view by the approach adopted by the Lands Tribunal. In addition, while the interest of a superior to enforce a land obligation is presumed to exist by virtue of the continuing feudal relationship between a superior and his vassal, it is always open to a vassal to demonstrate that such an interest no longer exists. It is, perhaps, surprising that the continuing interest of a superior to enforce burdens is not tested more frequently. In very many cases superiors have no continuing interests in the neighbourhood of feued land. In the absence of such local interest, it is extremely unlikely that a superior would be able to resist a claim by a feuar seeking to prove absence of interest.¹

4.44 If consultees accept our provisional proposal in respect of commercial real burdens, the right to enforce this category of burden would be preserved and the former superior would not suffer any loss. Accordingly, compensation would not be appropriate.

¹ See Howard de Walden Estates Ltd v Bowmaker Ltd 1965 SC 163. The court accepted that a superior's interest to enforce could be proved by the vassal not to exist.

B. Compensation for disponent

4.45 In many respects the enforcement rights of a disponent are similar to the rights enjoyed by a superior. A disponent does not, however, enjoy the continuing interest in the land itself which is fundamental to the superior's status in relation to the feuar. We have discussed the nature of a disponent's enforcement rights at paragraphs 3.61-3.65. As in the case of a superior, a disponent has to have a title and interest to enforce a burden. The disponent's title to enforce a burden depends on the terms of the disposition. His rights and his disponent's obligations may be transferred to their respective successors by subsequent dispositions. It is for a disponent or his successors to establish not only a title to enforce a real burden but also an interest. It has been held that such an interest can only properly exist in a case where the enforcing party has retained some property in the vicinity of the burdened ground. In Aberdeen Varieties Lord Wark observed¹ -

"Where, therefore, there is no contiguity, it will not do to put forward, as an interest to enforce the restriction, the protection of a commercial enterprise carried on in another part of the city Having regard to the relative situation of the properties belonging to the parties in this case, I am of opinion that the observance or non-observance of the condition as to the use of the first party's property can have no appreciable effect upon the amenity or enjoyment of the property of the second parties. I therefore think the second parties have no interest to enforce the condition which the law will recognise."

4.46 We take the view that a disponent should not have any greater entitlement to compensation than a superior. Those disponents who by virtue of their ability to demonstrate the necessary title and interest might have been qualified to enforce

¹ Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd 1939 SC 788 per Lord Wark at p 797.

real burdens will, under Option 1, generally be qualified to enforce land conditions as neighbouring proprietors. Other disponers and, in particular those who are not able to demonstrate the necessary interest, will not, as a consequence of our proposals, have suffered loss which should attract compensation. In the case of "commercial" real burdens imposed by disponers, we consider that entitlement to compensation should be the same as for superiors.

C. Compensation for tertii

4.47 It is well established that the rights of co-feuars who are properly constituted tertii are indistinguishable from the rights of co-disponees who are so constituted. Accordingly in this section we refer to them collectively as "tertii".

4.48 As a matter of practice the position of tertii in relation to the enforcement of real burdens has become somewhat inconsistent. On the one hand there is no doubt that a proprietor who is a properly constituted tertius may take action against another burdened proprietor. On the other hand if the burdened proprietor wishes to obtain a discharge or variation of a burden the usual practice is to approach the superior or disponer for the necessary waiver and no further consents are generally sought from tertii. The Lands Tribunal recognise that neighbouring tertii do at present have a right to compensation on the variation or discharge of a land obligation by the Tribunal and will award compensation in appropriate cases based on any diminution in the value of the tertius' interest in his property. Under Option 1 any tertius who would have qualified for compensation according to criteria applied by the Lands Tribunal will probably be qualified by

virtue of proximity to enforce land conditions under the new system. Accordingly a tertius falling into this category will not suffer any quantifiable loss and no compensation should be payable. We take the view that no value can be attributed to the rights of a tertius who is not the owner of property in the vicinity of the burdened land.

4.49 It is remotely possible that tertii might have rights in relation to "commercial" burdens. In cases of this kind only rights of the tertii which depend on contractual provisions should be recognised and those rights should fall to be determined according to the contract itself. If there is no contract, we take the view that the tertii should not be entitled to claim compensation.

We provisionally propose

28. Compensation for loss of enforcement rights should not be available to superiors, disponers, co-feuars or co-disponees.

OPTION 2

Enforcement of real burdens by disponers (including former superiors) and tertii.

(i) Enforcement:

4.50 In our consideration of transitional arrangements for Option 1, we considered enforceability of amenity and service real

burdens, commercial burdens and special burdens in turn. In the following paragraphs we discuss the effect of Option 2 on the enforcement rights of former superiors and tertii. Our second option would preserve the existing rights of disponers and co-disponee tertii to enforce existing real burdens, from the appointed day. As there will be no change in their position there is no need to consider their interests further.

Enforcement by Former Superiors

4.51 Disponers' and Superiors' title and interest to enforce. Under the present system, a disponer and a superior seeking to enforce a properly constituted real burden must have both title and interest to do so. There is no appreciable difference between them in this respect. Where the rights of the respective enforcing parties diverge is on the question of proof of interest to enforce and the need for a disponer to establish a title where he is not in a direct contractual relationship with the owner of the burdened property. Under Option 2, the former superior would be in the position of a disponer and subject to the requirements of a disponer in establishing title and interest to enforce real burdens. We consider title and interest separately.

4.52 Title: The former superior's title to enforce would cease to follow automatically from the feudal relationship with the vassal. We propose that any person owning the superiority of an area of ground at the appointed day should be deemed to have the same enforcement rights in relation to real burdens affecting the land as a disponer who had created the real burdens in the last conveyance of the land occurring prior to the appointed day.

Such a disponent would be deemed to have retained personal enforcement rights against the donee and his successors. As a consequence, the real burdens would continue to be enforceable against successors of the proprietor as at the appointed day but only by the former superior and not by his successors. This, in many cases, will place a former superior in a less advantageous position than many disponents. We have considered whether it would be practicable to imply rights in favour of successors or to enable such rights to be created but have concluded that little would be achieved by such an approach given the difficulty, in the case of any deemed successor to the former superior, in establishing the necessary interest to enforce.

4.53 Interest: A disponent seeking to enforce a real burden requires to establish, in addition to title, that he has an interest to do so. Such an interest may be readily established between the original parties to the disposition but the donee can challenge the disponent on the continued subsistence of that interest or on the grounds that he has no interest recognised by law to enforce the restriction.¹ In questions between successors to the original contracting parties, it is for the disponent's successor to establish his interest.² This is where the principal difference lies between establishment of interest by disponents and by superiors. In the case of a superior, interest is presumed to exist and it is for the burdened proprietor to prove that it does not. There appears to be no difference in the quality of interest required in the case of a disponent as opposed to a superior. The burden of proof seems to be the only distinction which can be drawn. In this respect Option 2 should have little significant effect on a former superior's ability to enforce real burdens as if he were a disponent. It will be for him as a deemed disponent to

¹ Scottish Co-operative Wholesale Society v Finnie 1937 SC 835.

² Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd 1939 SC 788 per Lord Wark at p 797. 1940 SC (HL) 52.

establish, if he can, that interest exists. Apart from the shifting of the burden of proof, the former superior will be at no greater disadvantage in this respect than if he was still a superior seeking to enforce.

Enforcement by tertii

4.54 As indicated at paragraph 4.52 above, the right and title of a tertius to enforce would not be affected by option 2. Current practices in relation to the constitution of real burdens often expressly or impliedly exclude the creation of rights in favour of tertii. Accordingly, in many modern building developments if the superior or disponer is unable or unwilling to take steps to enforce a real burden, no other proprietor may be in a position to take any enforcement action against a neighbour in breach of a real burden. This might have a serious effect on the general amenity of residential areas and force demands to be made on public authorities for application of statutory powers at a time when such authorities may not have the necessary resources or expertise to meet those demands. Heavy reliance must, therefore, be placed on the role of superiors and disponers in the enforcement of real burdens but while it is generally accepted that superiors/disponers enforce real burdens, it is possible that in many cases, if put to the test, the necessary interest may be shown not to exist and enforcement action would fail.

4.55 Commercial burdens. We have suggested in respect of Option 1¹ that commercial burdens should continue to be enforceable. Under Option 2, we consider that, where a commercial burden has been imposed as part of a feudal grant, similar considerations apply as to our proposals in relation to Option 1. Where the burden was created in a feudal conveyance,

¹ Paras 4.28-4.33.

successors of the benefited party at the appointed day should be entitled to enforcement rights in respect of that real burden against the original burdened proprietor and his successors in accordance with the terms of the deed creating the real burden.

We provisionally propose -

- 29.(i) Existing real burdens should continue to be enforceable from the appointed day by disponers and co-disponee tertii who are able to establish the necessary title and interest.
- (ii) Existing real burdens created by superiors should continue to be enforceable by the former superior as at the appointed day. The former superior should be deemed to have the same enforcement rights as if he were a disponent who had created the real burdens by disposition immediately prior to the appointed day. Co-feuar tertii should have the same enforcement rights as co-disponee tertii, and
- (iii) Commercial burdens should continue to be enforceable by the original benefited party and his successors against the original burdened proprietor and his successors.

(ii) Obsolete or unenforceable real burdens

4.56 The requirement that an individual seeking to enforce a real burden must be able to demonstrate title and interest to do so means that if Option 2 were to be accepted, the practical effect would ultimately be to render unenforceable many of the real burdens affecting land at present as interest would be absent. Where no rights in favour of tertii have been created, the only potential for enforcement action, at present, would lie with the disponer or superior who, in the future under Option 2, as actual or deemed disponer would, in many cases, be unable to prove both title and interest to enforce. It is clearly inappropriate that land should continue to bear to be burdened by obligations which cannot be enforced. We have discussed at paragraph 4.36 how obsolete real burdens might be dealt with under Option 1. We consider that the facility of applying to the Lands Tribunal to have conditions declared obsolete or unenforceable should apply equally for the purposes of Option 2. (See Proposition 16(iii).

(iii) Compensation for loss of entitlement to enforce non-pecuniary real burdens. (Option 2)

4.57 Under Option 2, there would be no alteration in the rights of disponers and co-disponee tertii. Effectively co-feuar tertii would also be unaffected. The most significant consequence of Option 2 will be the conversion of the existing superior's rights at the appointed day into rights of a disponer. As an individual, he would still be able to enforce real burdens, the only material differences being (firstly) that instead of his interest being

presumed, he would have to establish that he has an interest to enforce and (secondly) that there may be problems in transmitting his right to enforce to successors.

4.58 So far as the first point is concerned, we do not consider that a shift of the onus of proof is sufficient to justify payment of compensation as it will not in our view give rise to any quantifiable loss. We have discussed the difficulty in securing for a former superior fully comparable rights to a disponent in relation to the succession to a former superior's right to enforce real burdens. We take the view that, as the loss of such a facility will not cause any loss to the superior himself as at the appointed day, no compensation should be payable in this respect either.

We provisionally propose:

30. No compensation should be payable to superiors for the change in their enforcement rights.

Compensation - General

4.59 In the foregoing paragraphs we have discussed compensation in relation to each of the options offered to consultees for consideration. We have not proposed that compensation should be payable to former superiors. The general principle that individuals should not be deprived of property rights without being properly compensated is accepted.¹ We have, however, had regard to the overall public interest in formulating our proposals for the abolition of the feudal system. We think that the abolition of that system is, as a matter of sound legal policy, long overdue

¹ See James v United Kingdom 1986 8 EHRR 123 a case concerning rights protected by Article 1 of Protocol No 1 of the European Convention of Human Rights.

and that, in that context compensation should be payable only where there is a quantifiable loss or potential loss. We do not consider that the abolition of the superiority interest in itself should give rise to entitlement to compensation. Our reasons are given below.

4.60 We have discussed in some detail the historical background to superiority interests in lands. We have demonstrated that the principal function of the superiority interest was to secure a financial or other return from land subject to feudal tenure. With the passage of time, feudal tenure increasingly regulated the use of land not for the benefit of the superior in the majority of cases, but for the public good at a time when public controls were less well developed than they are today. With recent legislation, the incidence of feu duty is declining, and we have proposed in this paper that all remaining feu duties should be redeemed by a specified date. Superiors will be compensated for the loss of income which they will suffer, by way of a redemption figure calculated in accordance with existing statutory provisions. We are not aware that existing redemption calculations have given rise to difficulties or are considered to result in inappropriate payments.

4.61 Once the remaining feu duties have been redeemed, what value can be put on the remaining interest of the superior? The Lands Tribunal has taken the view that a superior must show more than a potential loss of income from granting waivers to be awarded compensation in respect of an order discharging a land obligation.¹ While we recognise that superiors still make a practice of charging a grassum for granting waivers of real burdens, we believe that if such superiors were put to the test,

¹See para 4.42.

they would very often be unable to resist a claim that they did not have the necessary interest to enforce the real burdens. In many cases superiors are asked to give waivers (a) in order to satisfy subsequent purchasers of the burdened subjects that there will be no enforcement steps taken by the superior or his successors and (b) because it is cheaper and quicker to pay the grassum than to employ professionals to apply to the Lands Tribunal for a discharge. We cannot, of course, discount the possibly large number of cases where the feu duty having been redeemed, the feuar has either lost touch with the current superior or, under the erroneous impression that he has bought the superiority of his feu by redeeming the feu duty, is unaware that a waiver is required. In such cases the necessary waiver is not obtained and the breach of the real burden might quite simply go unnoticed even in subsequent transmissions of ownership of the burdened property. We do not consider that current practices support the view that, in the case of the real burden designed to protect amenity, the superior has any quantifiable interest which would justify entitlement to compensation for loss of enforcement rights.

4.62 The decision of the European Court of Human Rights in what is generally known as the "Westminster" case is relevant to our conclusions on the matter of compensation.¹ In this case, the Trustees of the Second Duke of Westminster argued that legislation² enabling certain tenants under long leases to purchase the freehold interests at what was argued were favourable prices

¹ James v United Kingdom (1986) 8 EHRR 123.

² Leasehold Reform Act 1967.

breached Article 1 of Protocol No 1 of the Convention.¹ The Court found that the Leasehold Reform Act 1967 had the effect of depriving the applicants of their "possessions" in terms of Article 1. In addition, the court recognised that "the compulsory transfer of property from one individual to another may, in principle, be considered to be "in the public interest", if the taking is effected in pursuance of legitimate social policies".² We do not consider that our recommendations as to the circumstances under which compensation should be payable are inconsistent with the views expressed by the Court. The abolition of the feudal system of land tenure in Scotland, long after it has been abolished in other European countries is, in our view, a legitimate social policy.

¹ European Convention on Human Rights. Art 1 states: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

² p. 140.

PART V
MISCELLANEOUS ISSUES

Introduction

5.1 In this part of the Paper we discuss the following miscellaneous issues arising from and relating to the abolition of the feudal system.

1. The role of the Crown as paramount superior.
2. Superiors' rights to minerals.
3. Rights to salmon fishings.
4. Ground annuals.
5. Standard charges, stipends and teinds.
6. Superiors' rights of pre-emption.
7. Superiors' rights of redemption and reversion.
8. Treatment of increasing feu duties on redemption.
9. Securities over superiority interests.
10. Compulsory purchase

The Crown as paramount superior

5.2 The whole feudal hierarchy descends from the Crown as paramount feudal superior. We have proposed that the feudal hierarchy be dismantled insofar as it relates to land tenure and it is, accordingly, necessary to consider whether there can be any justification for abolishing only those tenures (mid-superiorities) which are intermediate between the Crown and the current owner of the right of property leaving the ultimate feudal relationship between the Crown and current owner intact. The retention of the Crown's interest in land as ultimate feudal superior would be inconsistent with our proposed system of absolute ownership. The Crown's constitutional position and jurisdictional rights will not be affected by our proposals.

5.3 History of Crown's interest. The development of the Crown's role as paramount superior is not well documented. Erskine states:-

"as the sovereign is, by the feudal system, the highest superior of his whole territories, and the common fountain from which every feudal grant flows, the right in the Crown over all the lands within the kingdom is constituted jure coronae without seisin. His being king completes his right as fully as a seisin does the rights of subjects"¹

It seems clear that with the feudalisation of Scotland under David I and his successors there emerged the concept that the king was lord of all the land and the fountain of all justice. He could make grants of land or fiefs, to supporters and others in return for vassalage, the performance by them of certain services. Such grants, made by charter, formed the first link in the feudal chain.

¹ Erskine, Institute II, iii, 44.

5.4 A vassal holding from the king might, himself "subinfeudate" or grant part or the whole of his holding to another, the vassal now being in the position of the superior quoad the person to whom he made the subordinate grant. Again, the latter in turn might subinfeudate part or the whole of his holding, and so on, making a chain of sub-feus downwards from the Crown. On each successive grant the superior or mid-superior retained an interest in the land. Historians have taken the view that the practice of giving a written grant of land probably subsisted for some time prior to the earliest recorded example. It is impossible to point with any certainty to the historical development of the feudal system as we know it today and the Crown's role in relation to that system. In the course of time, virtually all the land on mainland Scotland became subject to feudal tenure through Crown Charters with the exception of areas such as those occupied by Edinburgh and Stirling Castles. While some of that land may still be occupied by proprietors holding direct from the Crown through barony titles, most of mainland Scotland is owned by proprietors whose tenure is so remote from the original Crown grant that its very existence and terms are neither disclosed in the progress of title deeds to the areas of ground nor ascertainable by other means.

5.5 The position of the Crown today. The Crown has an interest in all land in Scotland held feudally by virtue of its role as paramount superior. In addition, the Crown holds various mid-superiorities. In the case of such mid-superiorities, we do not propose that the Crown should be treated differently from any other superior. The paramount superiority of the Crown does, however, give rise to different considerations.

5.6 The role of the Crown as ultimate feudal superior is of limited continuing practical significance to the feudal system of land tenure. We recognise that the Crown's role as highest superior may, however, have continuing importance in jurisdictional, ceremonial and other constitutional matters. Our proposals will not interfere with the Crown's position in these respects: they are confined solely to the role of the Crown as paramount superior in the feudal system of land holding.

5.7 While the major part of land subject to feudal tenure is not held direct from the Crown, we recognise that there are still estates held on Crown grants where payments may be made to the Crown and burdens enforced by the Crown in its capacity as paramount superior. Insofar as such payments and burdens are covered by our proposals for abolition of the feudal system, we consider that those proposals should apply to the Crown in the same way as they would apply to any other superior. We are aware, however, that holding land direct from the Crown may give rise to other benefits or obligations which would not be covered by our general proposals for the abolition of superiority interests. In the following paragraphs we consider in greater detail the consequences for such benefits and obligations of our proposals for the abolition of the feudal system

Possible consequences for the paramount superiority of the abolition of the feudal system

5.8 We do not consider that the Crown should be exempted from our proposals for the abolition of the feudal system of land

tenure. Accordingly, we propose that the Crown should be bound by the terms of any legislation effecting abolition in the same way as any subject superior. However, the Crown has certain other rights which stem from its position as paramount superior. Some subjects owe certain obligations and duties and have certain rights which likewise are derived from the paramount superiority. In the following paragraphs we discuss these rights, obligations and duties, some of which will be affected by our proposals for the feudal system as a whole.

5.9 (i) Barony titles. As we have indicated in the previous paragraphs it would seem that the existence of the paramount superiority has little, if any, practical effect on the great majority of feuars and accordingly most feuars would not be adversely affected by the abolition of the Crown's interest. It does, however, have more real consequences for a limited category of land owners who hold direct from the Crown. The barony title is the highest feudal tenure within the feudal system. Erskine writes -

"No other feudal privileges higher than those of barony are included in the erection of lands into an earldom, or a lordship, etc; for these last are only titles of greater dignity conferred upon a barony but all have precisely the same feudal effects."¹

An individual who holds on a barony title may in a few cases still have some sort of financial obligation to the Crown as superior but in the majority of cases a barony title confers significant benefits on the holder. Ownership of land under a barony title may give rise to a right to the title "Baron". In addition, the barony title may contain a specific grant of elements of the regalia minora, for example a grant cum piscationibus (ie, with

¹ Institute II, iii, 46.

salmon fishings). A barony title is habile also to found a prescriptive title to regalia minora such as salmon fishings¹ where there is no express reference to fishings.

5.10 While we do not envisage that there would be any difficulty in preserving individuals' rights to salmon fishings in such a way that they would be transmissible in the future notwithstanding the abolition of feudal tenure, the same approach may not be appropriate to the noble title of "Baron". The right to the title "Baron" is inseparable from the tenure of land held on a barony title direct from the Crown. It is, therefore, dependent on the subsistence of the feudal relationship between the Sovereign and the baron. We do not intend, by removing elements of the Sovereign's role in the feudal hierarchy, to destroy the relationship of tenure between Sovereign and baron.

5.11 One approach to the particular problem of the noble title would be to preserve the right of an individual to call himself "Baron" as at the appointed day as a personal privilege heritable in nature and, accordingly, transmissible after the abolition of the feudal system. This could be achieved by separating the right to the noble title from ownership of the whole or part of the barony lands which presently gives rise to the right to use the title, in much the same way as peerages which once were territorial in character have now been severed from the land to which they were linked and now may be inherited but not sold. Heritable offices, on the other hand may be alienated² and an alternative approach would be to treat barony titles in the same way as heritable offices. We consider, however, that the nature of the barony title is distinguishable from the nature of a heritable office and should be treated accordingly.

¹ For our proposals in relation to salmon fishings see para 5.22.

² Cockburn v Cockburn, (1755) 1 Paton 603.

5.12 We have considered the possibility of allowing the noble aspects of the barony title to lapse along with the abolition of the feudal relationship on which the ennoblement of the baron is based. The abolition of noble titles, however, is not an intended consequence of our proposed reforms of land tenure and, in any event, we have concluded that, unlike the abolition of superiority interests, the abolition of entitlement to the noble title "baron" might well give rise to justifiable claims for compensation. It is clear that a significant commercial value is placed on the right to the title "Baron" which cannot be attributed to the value of the land held on the barony title. On a conservative estimate there may be as many as 2,000 extant barony titles. Even if the amount of compensation due in each case was as little as £10,000, the cost to the Exchequer would be substantial.

5.13 On balance, we have concluded that a more conservative approach to the problem of baronies would be justified. We take the view that the benefits and obligations of a barony title, apart from those which will be affected by our general proposals for abolition of superiority interests, should be permitted to remain intact and, except in so far as provision is made for transmission of separate tenements (such as salmon fishings) which might be included in a barony title, such benefits should subsist as pertinents of the whole or part of the land comprised in the barony title. Such an approach would, we consider, meet our prime objective of removing the incidents of feudal land tenure from the holding of a baron while leaving other aspects of the tenure unaffected.

5.14 (ii) The regalia. Another aspect of sovereignty which will not be affected by our proposals is the Crown's rights in the regalia. According to Erskine -

"No right in lands which is by our feudal customs appropriated to the sovereign, and therefore goes by the name of regale is presumed to be conveyed by the charter unless it be expressed."

The origins of the Crown's right to the regalia both minora and maiora are uncertain and the extent of these rights has never been clearly defined. Accordingly, we cannot be sure that an unqualified abolition of the paramount superiority would not affect the Crown's right in the regalia. Erskine, at least, appears to consider that the Crown's right to regalia is bound up in the feudal system. This is a view which appears to be borne out by the cases concerning udal tenure in the early part of this century.²

5.15 In the Lerwick Harbour case, the Inner House of the Court of Session found that the Crown had no radical right of property to the foreshore of the Shetland Islands where the udal form of tenure was allodial ie non-feudal. It was recognised that, in the case of land subject to feudal tenure, the sovereign's radical right to the foreshore is generally held to be part of the regalia minora. It could, accordingly, be argued that the court were stating that, where land is not held under the feudal system, the rights of regalia could not exist. In the later case of Balfour

¹ Erskine Institutes II,vi,13.

² Smith v The Trustees of the Port and Harbour of Lerwick 1903 5 F 680 ("the Lerwick Harbour case") and Lord Advocate v Balfour 1907 SC 1360. ("Balfour"). But see Shetland Salmon Farmers Association v Crown Estate Commissioners 1991 SLT 166, 1990 SCLR 484 ("Shetland Salmon Farmers").

which concerned a right to salmon fishings (again, regalia minora) in Orkney, the Lord Ordinary held that the right of fishing for salmon in Orkney was not inter regalia and that the feudal law as to salmon fishing rights did not apply in Orkney. Lord Johnston stated in his opinion.

"I think that the examination shews that the Crown derived its rights in Orkney in a definite and historic manner which precludes the idea or fiction that the Crown is the fountain of all land rights and the paramount superior ..." (page 1368)

5.16 In these two cases the courts appeared to take the view that the udal system of land tenure in Orkney and Shetland precluded the existence of rights deriving from the Crown's rights of regalia which were themselves dependent on the existence of a feudal system such as obtained on mainland Scotland. In the later St Ninian's Isle treasure case¹ it was argued for the University of Aberdeen that the Crown's rights to treasure (regalia minora) were ascribable to the Sovereign's status as supreme overlord under the feudal system. Where land was not subject to feudal tenure the Crown would, accordingly, have no rights. This view did not find favour with the court. Lord Patrick (at page 554) stated that:

"The Crown's rights to the regalia minora are ascribed to the prerogative, not to any estate in land"

Lord Mackintosh (at page 560) acknowledged that the Crown's right to the foreshore or to salmon fishings might arguably stem from the Crown's "original and supreme overlordship of the land under the feudal system" but he distinguished the right to treasure as being a non-heritable right which had never been regarded as an incident of land tenure. The court in the St Ninian's treasure

¹ Lord Advocate v University of Aberdeen and Budge 1963 SC 533.

case appeared to be divided as to the feudal or non-feudal nature of the regalia. On the one hand Lord Patrick stated that the rights to the regalia minora are unrelated to an estate in land while on the other hand Lord Mackintosh appeared to acknowledge that there might be some justification for treating certain of the rights in regalia minora as incidental to land tenure. The best that can be said is that the position is unclear.¹

5.17 (iii) Crown property to which there is no recorded title. There are examples of land on the mainland of Scotland owned by the Crown as Sovereign, since time immemorial, where there is no recorded title. At present, so long as the Crown's role as "universal landlord"² is recognised then there is no need for the Crown to be able to establish title to ground, such as that on which Stirling Castle stands, which the Crown occupies and where there is no competing claim to ownership. This situation might, however, alter if the Crown ceased to be recognised as ultimate feudal superior. It is necessary to ensure that the Crown's right in such land is not adversely affected by the abolition of the feudal system.

5.18 (iv) Crown's rights in respect of titles and dignities. We have discussed the special case of barony titles at paragraphs 5.9-

¹ In the Shetland Salmon Fisheries case, which we understand may be the subject of an appeal to the House of Lords, the court found that the Crown had a right of property, derived from the ius coronae, in the bed of the sea round the Shetland Islands. This right is based on the Crown's prerogative rights in respect of any territory within the State not appropriated to private use. The right was found not to derive from the position of the Crown as feudal owner.

² Lord Mackintosh in Lord Advocate v University of Aberdeen and Budge 1963 SC 533 at 561.

5.13 above. The Crown's rights in respect of peerages, heritable offices and other dignities and the corresponding benefits deriving from such dignities, also fall to be considered as they too may stem from the paramount superiority. We would not wish the abolition of the feudal system to affect, for example, the ability of the Crown to regrant, with a new or varied destination, such titles, offices and dignities as have been resigned to the Crown. Accordingly, we propose that the rights of the Crown in this respect should remain unaffected by our proposals in relation to land tenure.

5.19 We take the view that the abolition of the Crown's feudal interest in land is entirely consistent with our proposals for a system of absolute land ownership. We are, however, conscious of the need to ensure that the position of the Crown as paramount superior other than in relation to land tenure is not adversely affected by our proposed reforms.

We provisionally propose

- 31.(i) As from the appointed day, the Crown as paramount superior, in common with all subject superiors, should cease to be entitled to create new feus, exact payment of feuduty or enforce as superior land conditions or real burdens as the case may be.
- (ii) The abolition of the feudal system of land tenure should be without prejudice to any other rights, privileges or benefits of or derived from the Crown by virtue of the paramount superiority.

- (iii) All pertinents of land held on Barony titles, including any rights to salmon fishings and rights in respect of the noble title of Baron, should continue to be transmissible with the title to the land.

Superior's rights to minerals

5.20 As a matter of general principle, the owner of land owns all that lies beneath the surface. This proposition, however, may be restricted in its application either by statute or by contract. British Coal, for example, has certain rights in relation to coal. Mineral rights may be separated from the right of property to the surface of an area of ground by, for example, a reservation to the superior when he makes a feudal grant of the right of property (the dominium utile) to a feuar. The right to minerals, apart from precious metals which belong to the Crown as part of the regalia, forms a separate tenement under Scots law and may be conveyed separately from the surface of the ground. When the rights are reserved as part of a superiority title, a conveyance of the superiority without restriction will transfer ownership of the minerals, or the mineral rights may be conveyed separately by disposition or be leased. When minerals have been reserved by superiors and neither sold on nor worked, it is often difficult to identify the current owner of the mineral rights.

5.21 Difficulties can arise when there have been successive reservations of minerals in conveyances "so far as the granter has right thereto". Since the case of Caledonian Railway Co v Glenboig Union Fireclay Co Ltd¹ the question whether a particular substance is a reserved mineral or not is considered by reference

¹ 1911 SC (HL) 72.

to the state of knowledge and usage prevailing at the time the reservation was effected. It follows from this that substances now regarded as important minerals may not have been reserved in earlier conveyances of mineral rights. Accordingly, there may be several separate interests in different minerals under a single piece of ground. Likewise, a situation may easily arise where by historical accident several previous owners of a plot of ground may have inadvertently retained rights to certain minerals. These problems, however, do not arise from the nature of the feudal system but exist as a consequence of mineral rights forming a separate tenement. For this reason, for the purposes of our review of land tenure in the context of abolition of the feudal system, we do not consider that a wide-ranging consideration of the law insofar as it affects the operation of mineral rights is necessary or appropriate. We propose that any rights in minerals held by individuals as feudal superiors should as from the appointed day be deemed to be rights similar to those which would have been held by a disponent in a conveyance of the surface rights under reservation of the mineral rights. After the appointed day title to the minerals may be transferred by disposition as at present.

We provisionally propose:

32. **As from the appointed day, minerals which have been reserved to a superior and form part of a superiority title should continue to be transferable as a separate tenement notwithstanding the abolition of the superiority interest.**

Superior's rights to salmon fishings

5.22 Salmon fishings form part of the regalia minora and as such may be acquired only by the actual or implied authority of the Crown. Professor Halliday in his book on Conveyancing Law and Practice¹ identifies methods by which a right to salmon fishings may be acquired:

"A right to salmon fishings may be acquired by (i) an express grant from the Crown of lands with salmon fishings, (ii) a Crown grant of lands with fishings followed by prescriptive possession of the salmon fishings, (iii) a barony title, with or without a general clause of fishings, followed by prescriptive possession of salmon fishings (iv) a separate grant, from the Crown of salmon fishings alone, (v) a feu grant with pertinents and mention of fishings in the tenendas clause, of land which had formed part of a barony title which included fishings where salmon fishings, had been enjoyed by the grantee for more than the period of positive prescription, or even (vi) a disposition from a subject with fishings followed by prescriptive possession of salmon fishings."

The ownership of salmon fishings is dependent on a Crown grant be it express or implied. In the words of Lord Cairns LC in McDouall v Lord Advocate:²

"it is now clearly established ... that the right of salmon fishing in the sea round the coast of Scotland belongs to the Crown and is inter regalia of the Crown, except insofar as it has been parted with by grant. Nor is there any doubt of this further proposition, that the onus lies upon those who maintain the right as against the Crown of shewing that they derive that right either by express grant or by a grant sufficiently large to carry salmon fishing if connected with user and enjoyment for the requisite period."

¹ II para 18-28.

² 1875 2 R HL 49.

We have discussed the Crown's prerogative rights as paramount superior in the opening paragraphs of this Part of the Paper. We have proposed that the abolition of the feudal system should affect barony titles only insofar as our proposals for the redemption of feuduty and enforcement of land conditions will affect all land held on feudal tenure. It is not our intention that any rights in salmon fishings existing as at the appointed day should be adversely affected by the introduction of absolute ownership. Accordingly we consider that any statutory provision abolishing the feudal system should ensure that all existing rights in salmon fishings at the appointed day will be preserved and will continue to be capable of transmission as a separate tenement thereafter in the normal way. We have also discussed in general terms whether the Crown's rights to the regalia, which include rights in respect of salmon, are separate from its rights as ultimate superior and concluded that the law is unclear. We have proposed that the paramount superiority should be abolished only insofar as it affects the feudal tenure of land and the Crown's rights to the regalia minora should be unaffected. In effect, except for the need to ensure the preservation of a title to salmon fishings forming part of a Barony, no alteration in present law and practice should be required.

We provisionally propose

33. Apart from preserving the rights of owners of salmon fishings derived from barony titles as at the appointed day, no changes in the present system of ownership and transmission of salmon fishings are required.

Ground annuals

5.23 Ground annuals are not strictly speaking a product of the feudal system but contracts of ground annual were frequently used as a method of creating real burdens and deriving an income from property, particularly before 1874, when there was a valid prohibition against subinfeudation or where land was held on burgage tenure. Ground annuals were originally constituted on the sale of property against an annual payment in perpetuity as opposed to the capital sum in respect of the purchase price. The effect of the ground annual is to make the seller a secured creditor for annual payments.

5.24 Professor Walker describes the contract of ground annual thus:

"A contract of ground annual does not create a feudal relation between the granter and the disponee of the lands but merely an obligation to pay or act. The personal obligation of the disponee binds him and his successors in perpetuity, despite transfer of the lands, and does not transmit to a singular successor in the lands. The real burden does, however, transmit to singular successors and ceases to bind the disponee on his parting with the lands."¹

Under the 1974² Act, the creation of new ground annuals was prohibited and provision was made, in similar terms to the provision made for feu duties, for voluntary or compulsory redemption of ground annuals. As a consequence of this, the number of ground annuals still in payment is dwindling annually

¹ Walker, Principles of Scottish Private Law, 4th edn vol III p 155.

² Land Tenure Reform (Scotland) Act 1974 c 38 s.2.

and, like feu duties, the real value of amounts payable tend to be greatly diminished as a consequence of inflation. We are not aware of any significant practical difficulties which have arisen as a consequence of the redemption provisions of the 1974 Act and, accordingly, can see no reason why our proposals in relation to the final abolition of feu duties¹ should not be extended to include the abolition of ground annuals also.

We provisionally propose:

- 34. Ground annuals should be subject to the same provisions as to compulsory redemption as feu duties.**

Standard charges, stipends and teinds

5.25 Stipends formerly burdens on the teinds² were converted to standard charges by virtue of the Church of Scotland (Property and Endowments) Act 1925. The existence of standard charge or stipend, although a real burden on the land, may not be disclosed in the title deeds except where it has been apportioned on the division of an estate. In practice it is understood that standard charges are of significance only in relation to rural land where the amount due may be substantial. Provision is made in the 1974 Act for compulsory redemption of standard charges on the sale of a property although no provision is made for voluntary redemption. In considering whether our proposals for compulsory redemption of feu duty should also apply to stipend and standard charge, we were conscious that in some cases the liability for stipend or

¹ See paras 4.2-4.22.

² "Teinds" were originally the one-tenth share of the produce and income of a parish payable to the church. The stipend paid to the parish minister came from the teinds until the standard stipend was introduced in 1925. After that date stipend became a real burden on the lands affected and was known as "standard charge" but it could be allocated and, under the 1925 Act, voluntarily redeemed.

standard charge may be substantial although the potentially heavy burden this would impose would be ameliorated by application of the provisions we have proposed for compulsory redemption to be effected by instalments. This paper is principally concerned with feudal tenure and its incidents and it could be argued that redemption of stipend and standard charge should not be considered as part of this exercise. We are not attracted by such arguments and in making proposals in this respect we have had regard to the fact that feu duty, ground annuals and standard charges were all dealt with in the 1974 Act, and that a failure to deal with all such payments in the present exercise could, in certain areas, lead to an unsatisfactory situation where several small payments continued to be exigible while the majority of other payments had been abolished.

We provisionally propose:

35. All existing standard charges and stipends should be subject to the same provisions as to compulsory redemption as feu duties

Consultees' views are sought as to whether teinds should be dealt with in a similar way.

Superior's Rights of pre-emption

5.26 A right of pre-emption is essentially a contractual one which may exist on a personal basis between disponer and disponee and is not, accordingly, special to a feudal relationship. A right of pre-emption may, however, be constituted a real burden on

the land which it affects. In the 1972 Green Paper the Government favoured the abolition of the right of pre-emption, with payment of compensation in appropriate cases to the former superior, on abolition of the feudal system. The Government did, however, recognise that there might be arguments for retaining a right of pre-emption in certain cases. In the event, subsequent legislation did not abolish the right.

5.27 Section 9 of the Conveyancing Amendment (Scotland) Act 1938¹ as amended represents the present law on the subject. Our initial view was that further consideration of the law at this stage would be inappropriate. However, the introduction of legislation giving sitting tenants the right to buy their houses at discounted prices in certain circumstances² has given rise to some specific problems in relation to pre-emption rights. While it appears to be accepted practice that the statutory right to buy overrides any right of pre-emption which may burden the landlord's title, there is concern that pre-emption rights are still exercisable where public authorities who are not statutorily bound to sell houses at a discounted price to sitting tenants nevertheless operate schemes analogous to the statutory scheme.

5.28 Under the present pre-emption rules the status of the person benefiting from the right as superior or disponent is irrelevant. Because of this we considered that it would be inappropriate to

¹ S 9 amended by the 1970 Act, which makes it clear that a right of pre-emption is exercisable only once and then only within a limited period not exceeding 21 days. The 1974 Act, extended the statutory restrictions in relation to rights of pre-emption to rights created outwith the feudal relationship ie by disposition after 1974.

² The Housing (Scotland) Act 1987 ss 61 and 62 - the right was originally introduced by the Tenants' Rights etc (Scotland) Act 1980.

include a general discussion on rights of pre-emption in a paper dealing with abolition of the feudal system. We have, however, concluded that this opportunity should be taken to canvass the need for clarifying the effect of the right to buy legislation on rights of pre-emption both in relation to statutory schemes and also in relation to analogous non-statutory schemes.

Consultees' views are sought on whether:

- 36.(i) there are any problems arising in relation to the enforcement or discharge of rights of pre-emption which we should consider in a subsequent paper; and**
- (ii) there is any need for clarification of the law insofar as it relates to the exercise of rights of pre-emption in respect of property which is the subject of a statutory right to buy scheme.**

Superior's rights of redemption and reversion

5.29 The Government in their 1972 Green Paper also favoured the abolition of rights of redemption or reversion on the introduction of a new system of land tenure. However, subsequent legislation has only modified the rules in respect of these rights. In the case of a deed executed after the commencement of the 1974 Act (1 September 1974) such a right "which purports to be exercisable on the happening of an event, which is bound to occur, or the occurrence of which is within the control of the person for the time being entitled to exercise the right or of a third party,

shall be exercisable only within 20 years of the date of its creation."¹ This provision left unaffected rights of reversion or redemption created in deeds executed prior to 1 September 1974.

5.30 We are conscious of the fact that Parliament has considered the law in relation to rights of redemption and reversion relatively recently. In the light of this and the fact that rights of this type display characteristics of personal contracts rather than being of an essentially feudal nature we do not consider that it would be appropriate to propose any change in the present law in this respect.

5.31 In many cases the irritancy clause in a feu deed provides for reversion to the superior in the event of failure to comply with feuing conditions. Except as undernoted, we do not consider that special provision needs to be made for the preservation of such reversion rights reserved to the former superior as at the appointed day for the purpose of Option 1 as the creation of such personal rights would be inconsistent with the approach adopted. If, however, the former superior was qualified by virtue of proximity and detriment to enforce any burden, we can see no reason why he should not also be entitled to exercise his rights of irritancy. Such rights would, of course, be personal to the former superior and would not be exercisable by other neighbouring proprietors. In the case of Option 2, the former superior will be deemed to be a disponer for the purposes of enforcing real burdens and obligations in respect of the burdened land and as such will be able to enforce the irritancy clause if he can establish interest.

We provisionally propose:

¹ Land Tenure Reform (Scotland) Act 1974 c 38 s 12.

37. No change should be made in the law relating to rights of redemption and reversion except in relation to irritancy clauses created by feu deed which should continue to be enforceable by a former superior provided he is otherwise qualified.

Treatment of increasing feu duties

5.32 We have dealt earlier in this paper with the subject of redemption of feu duties on abolition of the feudal system. In some cases, feu duties have been created in such a way that there is an automatic increase in the level of feu duty payable after the passage of a fixed amount of time, for example, in year 1 the feu duty may be fixed at £5, from year 10, £10, from year 20, £20 and so on. We have considered whether the redemption process should be based on the maximum amount of feu duty payable within a specified time after the appointed day or on the actual amount payable at the appointed day.

5.33 In view of the fact that the most compelling justification for the creation of increasing feu duties is the diminution of the value of money as a result of inflation, we consider that it would be inequitable to base any redemption figure on a sum payable at any time other than the date of redemption. We have considered whether there may be some argument for taking a mean figure calculated by reference to the period of time which has elapsed between the last upgrading and the next upgrading ie if the date of redemption falls half way through a period of 10 years then the feu duty to which the redemption calculation should be applied

would be the amount in payment plus half the difference. On balance we have come to the view that such an approach is unnecessarily complex.

We provisionally propose:

- 38. In the case of increasing feu duties, the amount required to redeem them should be calculated by reference to the amount being paid at the appointed day.**

Securities over superiority interests

5.34 We are aware that there may be some instances where, probably more through historical accident than design, creditors may hold security over superiority estates. Such a situation could arise where, for example, the owner of a dominium utile over which a security had been granted subsequently acquired the superiority interest and granted a security over that interest separately to his creditor. Under either Option 1 or Option 2, the superiority interest in land would, effectively, cease to exist and would be valueless for security purposes. We have been unable to trace any cases where any significance is attached to the value of the superiority interest, the security being taken more as a "tidying-up" exercise than with a view to providing any realistic security for sums due. We would, however, be interested to hear from consultees who may have information which would enable us to assess the scale and significance of the problem. We make the following provisional proposal subject to the identification of a real problem which requires a legislative remedy.

5.35 We consider that since the 1974 Act the capital value for the purposes of security of any bare superiority estate is likely to have dwindled substantially where the feu duties have been redeemed. It is principally for this reason that we are doubtful whether, in practice, there is a problem which will require a legislative solution. One option might be to give any such heritable creditor a statutory right of repayment, prior to or as at the appointed day, of the sums secured over the superiority interest up to the value of that interest or the debt, whichever is less. We would envisage introducing a statutory right of repayment of the secured sum, exerciseable during the 2 years prior to the appointed day, on the basis of the value of the interest as at the date of repayment. Such a right would not affect the creditors' other rights in respect of such sums such as the recovery of any outstanding balance still due after the repayment mentioned above had been effected. On balance, we favour this approach. Another approach might be to give to the heritable creditor the right to require the debtor to provide alternative security up to the value of the superiority interest. In such a case, the valuation would have to be agreed or fixed by the Lands Tribunal. This approach has obvious practical difficulties. For example, the debtor may not be in a position to offer alternative security. In either case, we would envisage that the heritable creditor's rights would cease to exist along with the superiority interest on the appointed day.

We provisionally propose:

39. **If a problem is seen to exist in this area, a secured creditor holding a security over a superiority should be entitled to insist on repayment of the amounts secured up**

to the value of the superiority interest within the two years prior to the appointed day. Thereafter his security should cease to exist.

Consultees are invited to indicate whether they consider that there is a real problem requiring legislative provision. Suggestions as to alternative approaches would be welcome.

Effect of compulsory purchase on land conditions or real burdens

5.36 Since the passage of the Lands Clauses Consolidation (Scotland) Act 1845 there has been some debate as to the effect of a schedule conveyance under section 80 of that Act on the superior/vassal relationship. We do not consider that a discussion of the existing position is necessary in this paper. For the future, however, we would hope to secure a clear statement of the effect of compulsory acquisition on existing and new land conditions (under Option 1) or real burdens (under Option 2).

5.37 We believe that acquiring authorities should acquire title to the property which they are purchasing compulsorily free of all land conditions or real burdens affecting that property. Compulsory acquisition should have the effect of extinguishing all land conditions or real burdens in all time coming. They should not revive on any subsequent disposal of the compulsorily acquired land by the acquiring authority.

We provisionally propose:

40. Land conditions or real burdens, as the case may be, should be extinguished for all time coming on compulsory acquisition of the burdened land under section 80 of the Lands Clauses Consolidation (Scotland) Act 1845.

PART VI

SUMMARY OF PROVISIONAL PROPOSALS AND QUESTIONS

To assist consultees, our usual summary of all the provisional proposals and questions is followed by summaries of the proposals and questions relating to Option 1 and Option 2 respectively.

Nomenclature, form, constitution and categorisation of obligations under the new system

Option 1

1. Conditions attaching to land under the new system created after the appointed day should be designated "land conditions".

(Paras 3.3-3.8)

Options 1 and 2

2. Real burdens or land conditions which are created after the appointed day should be narrated in a prescribed form in a schedule to the deed imposing them.

(Paras 3.21-3.22)

3. Notwithstanding any recommendation which may be made in respect of the introduction of a statutory code in defined circumstances, such as the law of the tenement, no general provision should be made for imposition of real burdens or land conditions by statute.

(Paras 3.23-3.25)

4. No special enforcement provisions should be introduced for charitable religious or public bodies in respect of real burdens or land conditions created after the appointed day.

(Paras 3.29-3.32)

5. There should be no restriction on the scope of real burdens or land conditions to be created after the appointed day by reference to parallel statutory provisions.

(Para 3.33)

Options 1 and 2

6. (i) Should land conditions be enforceable only by proprietors who qualify by virtue of owning land near to the burdened land and can demonstrate that failure to comply with the land conditions would be detrimental to them? or
- (ii) Should real burdens be enforceable only by disponers and their successors who can establish the necessary title and interest, and likewise by co-disponees and their successors, who benefit from a properly constituted ius quaesitum tertio?

(Paras 3.34-3.39)

Note: We would welcome any suggestions consultees may have as to alternative approaches to a new system of land tenure or any changes that consultees would like to be made to either of the options we canvass.

Option 1

Proximity Test

7. (i) The proximity test should be met if the burdened land is coterminous with or within a prescribed distance of the benefited land.
- (ii) The prescribed distance should be 20 metres.

(Note: we would welcome consultees' views on our proposed prescribed distance)
- (iii) In addition to proximity, the enforcing proprietor should be required to demonstrate that failure to comply with a land condition will result in actual or potential detriment to the proprietor's interest in the benefited land..

(Para 3.40-3.49)

Enforcement of service conditions

8. (i) Where proprietors benefit from a common part or service they should be entitled to enforce any maintenance obligation in respect of that part or service imposed on any other benefiting proprietor.

- (ii) Where a part is in common ownership and the titles do not apportion liability for maintenance that liability should be shared in the same proportion as ownership.
- (iii) Where there is no apportionment of liability among benefiting proprietors who have no interest in the part or service as owners in common, liability should be shared equally.
- (iv) Proprietors benefiting from a common part or service should be able to bind themselves and their successors, by agreement to a re-allocation of maintenance liability.
- (v) It should be open to a majority of burdened proprietors to make application to the Lands Tribunal for an order re-allocating maintenance liability for a common part or service and awarding compensation, as appropriate.

(Paras 3.51-3.60)

Option 2

- 9. Views are invited on whether there is any way of requiring a disponent to create a ius quaesitum tertio other than by the collective pressure of potential purchasers referred to in paragraph 3.67.
- 10. Views are invited on whether there is any need for the introduction of special rules for the enforcement of service conditions similar to those proposed in relation to Option 1 for Option 2.

(Paras 3.61-3.68)

(Paras 3.69-3.71)

Who should be entitled to enforce?

Option 1

- 11 (i) Any qualified proprietor should be entitled to take enforcement action.

Option 2

- (ii) The existing rules as to enforcement by a disponent, successor of a disponent or a tertius should continue to apply.

Options 1 and 2

- (iii) After the appointed day, rights in favour of a tertius should only be capable of being created, in respect of areas of land which have been specifically identified in the disposition of the burdened land.

(Paras 3.72-3.78)

Remedies

Option 1

- 12. (i) The remedies currently available to a disponent or co-disponee for enforcing real burdens should be available for the enforcement of land conditions.

Option 2

- (ii) The remedies currently available to a disponent or co-disponee for enforcing real burdens should continue to be available.

(Paras 3.79-3.84)

Options 1 and 2

Enforcement role of Lands Tribunal

- 13. (i) The jurisdiction of the Lands Tribunal should be extended to enable the Tribunal to make enforcement orders.
- (ii) The Lands Tribunal should be empowered to award compensation as an alternative to an enforcement order.
- (iii) The Lands Tribunal should be the only competent forum for hearing applications in respect of enforcement of real burdens or land conditions.
- (iv) The existing provisions for appeal to the Court of Session by way of stated case on points of law should be available in respect of enforcement orders.

(Paras 3.85-3.88)

Consequences of failure to obtemper an enforcement order

14. (i) In any case where a person has failed to obtemper an enforcement order, it should be competent for the person who obtained the order to apply to the Lands Tribunal for an award of compensation.
- (ii) An enforcement order should be deemed to be a decree ad factum praestandum for the purposes of section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.
- (iii) The Lands Tribunal should have the same power as a Lord Ordinary to punish contempt of court.

(Paras 3.89-3.93)

15. Provisions to secure payment of compensation due by a burdened proprietor to a benefited proprietor by means of a standard security or statutory charge should not be introduced.

(Para 3.94)

Discharge and variation of real burdens and land conditions

16. (i) Subject to our earlier proposals, the existing powers of the Lands Tribunal should be extended to enable consideration to be given to the variation or discharge of all real burdens and land conditions.
- (ii) Any order for the variation or discharge of real burdens or land conditions granted by the Lands Tribunal should be formally recorded in the General Register of Sasines or given effect to in the Land Register.
- (iii) The Lands Tribunal should be authorised, on application by the Keeper or by a burdened proprietor, to declare that land conditions or real burdens are obsolete or unenforceable

and such declaration should be final, subject to the right of an aggrieved person to appeal to the Court of Session on a point of law by way of stated case.

(Paras 3.95-3.100)

Option 1

17. (i) The existing rules in relation to variation and discharge of land obligations should apply to land conditions; and
- (ii) For the purposes of consideration by the Lands Tribunal of an application for a variation or discharge of a land condition, qualification by virtue of proximity should be the only test required for identification of benefited proprietors.

(Paras 3.101-3.102)

Option 2

18. In the case of a variation or discharge of a real burden by agreement, the consent of all tertia as well as the consent of a disponent or his successors (where appropriate) should continue to be required.

(Paras 3.103-3.105)

Options 1 and 2

Identification of burdened party

19. The proprietor and not the occupier should be bound to observe land conditions in questions with qualified proprietors.

(Para 3.106)

Implementation

20. The new system of land tenure should not be delayed until after all areas covered by the Land Register of Scotland have become operational.

(Paras 3.107-3.110)

21. There should be a period of 5 years from enactment of the legislation to the introduction of the new system of land tenure.

(Paras 3.111-3.115)

Compulsory redemption of feu duty

Allocated

22. Any allocated feu duty which has not been redeemed prior to the appointed day by payment of an amount calculated in accordance with the existing statutory provisions should, on the appointed day, become a personal debt due by the former feuar to the former superior. The amount of that debt should be calculated, as aforesaid, as at the appointed day.

(Paras 4.2-4.5)

Unallocated

23. (i) All unallocated feu duties should be redeemed in accordance with our provisional proposal for allocated feu duties by the appointed day (Proposition 22). After the appointed day, any unallocated feu duties which have not been redeemed will become a personal debt due by the former feuar to the former superior.
- (ii) The person responsible for collecting unallocated feu duties and paying the cumulo feu duty to the superior should be liable to pay the redemption sum and should be entitled to recover shares of such sum from the payers of the unallocated feu duties in the proportions which the individual unallocated feu duties bear to the total sum of the unallocated feu duties being collected.
- (iii) Where a superior has sent out a notice requiring payment of an informally apportioned feu duty, that apportionment should be deemed to be an allocation from and after the enactment of legislation.

(Paras 4.6-4.14)

(Note: Consultees are invited to indicate whether small feu duties under 25 pence per annum should be subject to the foregoing redemption requirements or abolished without compensation).

Payment by instalments, and untraceable superiors

24. Feu duties of over £20 per annum should be capable of redemption in instalments, with interest, over a maximum period of 5 years from the appointed day.

(Paras 4.17-4.19)

(Note: consultees' views are sought on whether the figure of £20 per annum and interest at the rate of 10% are appropriate. Suggestions for alternative amounts and rates, with reasons, would be welcome.)

25. No special redemption provisions should be made for situations where the superior is untraceable.

(Paras 4.21-4.22)

Existing non-pecuniary burdens

26. Land should continue to be burdened by real burdens imposed before the appointed day but such burdens should be enforceable in accordance with the requirements of the new system of land tenure.

(Para 4.23)

Option 1

27. (i) Existing enforcement rights of superiors, disponers, co-feuars and co-disponees should cease on the appointed day, unless they are otherwise qualified by virtue of proximity.
- (ii) (a) Existing real burdens of a commercial nature should be classified as such, subject to resolution by order of the Lands Tribunal of any disputes as to classification.
- (b) Such burdens should continue to be enforceable by the original benefited party and his successors against the original burdened proprietors and his successors.

- (iii) Public, religious, charitable and similar organisations should not be given special enforcement rights in respect of real burdens created prior to the appointed day.

(Paras 4.28-4.34)

Compensation

- 28. Compensation for loss of enforcement rights should not be available to superiors, disponers, co-feuars or co-disponees.

(Paras 4.37-4.49)

Option 2

- 29. (i) Existing real burdens should continue to be enforceable from the appointed day by disponers and co-disponee tertii who are able to establish the necessary title and interest.
- (ii) Existing real burdens created by superiors should continue to be enforceable by the former superior as at the appointed day. The former superior should be deemed to have the same enforcement rights as if he were a disponer who had created the real burdens by disposition immediately prior to the appointed day. Co-feuar tertii should have the same enforcement rights as co-disponee tertii.
- (iii) Commercial burdens should continue to be enforceable by the original benefited party and his successors against the original burdened proprietor and his successors.

(Paras 4.51-4.55)

Compensation

- 30. No compensation should be payable to superiors for the change in their enforcement rights.

(Paras 4.57-4.58)

**The effect of abolition of the feudal system
on the paramount superiority**

31. (i) As from the appointed day, the Crown as paramount superior, in common with all subject superiors, should cease to be entitled to create new feus, exact payment of feu duty or enforce as superior land conditions or real burdens as the case may be.
- (ii) The abolition of the feudal system of land tenure should be without prejudice to any other rights, privileges or benefits of or derived from the Crown by virtue of the paramount superiority.
- (iii) All pertinents of land held on Barony titles, including any rights to salmon fishings and rights in respect of the noble title of Baron should continue to be transmissible with the title to the land.

(Paras 5.2-5.19)

Superior's rights to minerals and salmon fishings

32. As from the appointed day, minerals which have been reserved to a superior and form part of a superiority title should continue to be transferable as a separate tenement notwithstanding the abolition of the superiority interest.

(Paras 5.20-5.21)

33. Apart from preserving the rights of owners of salmon fishings derived from Barony titles as at the appointed day, no changes in the present system of ownership and transmission of salmon fishings are required.

(Para 5.22)

Annual charges other than feu duty

34. Ground annuals should be subject to the same provisions as to compulsory redemption as feu duties.

(Paras 5.23-5.24)

35. All existing standard charges and stipends should be subject to the same provisions as to compulsory redemption as feu duties

Consultees' views are sought as to whether teinds should be dealt with in a similar way.

(Para 5.25)

Rights of Pre-emption, redemption and reversion

36. (i) Are there any problems arising in relation to the enforcement or discharge of rights of pre-emption which we should consider in a subsequent paper; and
- (ii) Is there any need for clarification of the law insofar as it relates to the exercise of rights of pre-emption in respect of property which is the subject of a statutory right to buy scheme.

(Paras 5.26-5.28)

37. No change should be made in the law relating to rights of redemption and reversion except in relation to irritancy clauses created by feu deed which should continue to be enforceable by a former superior provided he is otherwise qualified.

(Paras 5.29-5.31)

Increasing feu duties

38. In the case of increasing feu duties, the amount required to redeem them should be calculated by reference to the amount being paid at the appointed day.

(Paras 5.32-33)

Security over superiority interests

39. If a problem is seen to exist in this area, a secured creditor holding a security over a superiority should be entitled to insist on repayment of the amounts secured up to the value of the superiority interest within the two years prior to the appointed day. Thereafter his security should cease to exist.

(Paras 5.34-5.35)

Consultees are invited to indicate whether they consider that there is a real problem requiring legislative provision. Suggestions as to alternative approaches would be welcome.

Effect of compulsory purchase

40. Land conditions or real burdens, as the case may be, should be extinguished for all time coming on compulsory acquisition of the burdened land under section 80 of the Lands Clauses Consolidation (Scotland) Act 1845.

(Paras 5.36-5.37)

Option 1

Nomenclature, form, constitution and categorisation of obligations under the new system

1. Conditions attaching to land under the new system created after the appointed day should be designated "land conditions".

(Paras 3.3-3.8)
2. Real burdens or land conditions which are created after the appointed day should be narrated in a prescribed form in a schedule to the deed imposing them.

(Paras 3.21-3.22)
3. Notwithstanding any recommendation which may be made in respect of the introduction of a statutory code in defined circumstances, such as the law of the tenement, no general provision should be made for imposition of real burdens or land conditions by statute.

(Paras 3.23-3.25)
4. No special enforcement provisions should be introduced for charitable religious or public bodies in respect of real burdens or land conditions created after the appointed day.

(Paras 3.29-3.32)
5. There should be no restriction on the scope of real burdens or land conditions to be created after the appointed day by reference to parallel statutory provisions.

(Para 3.33)
- 6.(i) Should land conditions be enforceable only by proprietors who qualify by virtue of owning land near to the burdened land and can demonstrate that failure to comply with the land conditions would be detrimental to them?

Note: we would welcome any suggestions consultees may have as to alternative approaches to a new system of land tenure or any changes that consultees would like to be made to either of the options we canvass.

Proximity Test

7. (i) The proximity test should be met if the burdened land is coterminous with or within a prescribed distance of the benefited land.
- (ii) The prescribed distance should be 20 metres.

(Note: we would welcome consultees' views on our proposed prescribed distance)
- (iii) In addition to proximity, the enforcing proprietor should be required to demonstrate that failure to comply with a land condition will result in actual or potential detriment to the proprietor's interest in the benefited land.

(Para 3.40-3.49)

Enforcement of service conditions

8. (i) Where proprietors benefit from a common part or service they should be entitled to enforce any maintenance obligation in respect of that part or service imposed on any other benefiting proprietor.
- (ii) Where a part is in common ownership and the titles do not apportion liability for maintenance that liability should be shared in the same proportion as ownership.
- (iii) Where there is no apportionment of liability among benefiting proprietors who have no interest in the part or service as owners in common, liability should be shared equally.
- (iv) Proprietors benefiting from a common part or service should be able to bind themselves and their successors, by agreement to a re-allocation of maintenance liability.
- (v) It should be open to a majority of burdened proprietors to make application to the Lands Tribunal for an order re-allocating maintenance liability for a common part or service and awarding compensation, as appropriate.

(Paras 3.51-3.60)

Who should be entitled to enforce?

11. (i) Any qualified proprietor should be entitled to take enforcement action.
- (iii) After the appointed day, rights in favour of a tertius should only be capable of being created, in respect of areas of land which have been specifically identified in the disposition of the burdened land.

(Paras 3.72-3.78)

Remedies

12. (i) The remedies currently available to a disponent or co-disponee for enforcing real burdens should be available for the enforcement of land conditions.

(Paras 3.79-3.84)

Enforcement role of Lands Tribunal

13. (i) The jurisdiction of the Lands Tribunal should be extended to enable the Tribunal to make enforcement orders.
- (ii) The Lands Tribunal should be empowered to award compensation as an alternative to an enforcement order.
- (iii) The Lands Tribunal should be the only competent forum for hearing applications in respect of enforcement of real burdens or land conditions.
- (iv) The existing provisions for appeal to the Court of Session by way of stated case on points of law should be available in respect of enforcement orders.

(Paras 3.85-3.88)

Consequences of failure to obtemper an enforcement order

14. (i) In any case where a person has failed to obtemper an enforcement order, it should be competent for the person who obtained the order to apply to the Tribunal for an award of compensation.
- (ii) An enforcement order should be deemed to nbe a decree ad factum praestandum for the purposes of section 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.
- (iii) The Lands Tribunal should have the same power as a Lord Ordinary to punish contempt of court.

(Paras 3.89-3.93)

15. Provisions to secure payment of compensation due by a burdened proprietor to a benefited proprietor by means of a standard security or statutory charge should not be introduced.

(Para 3.94)

Discharge and variation of real burdens and land conditions

16. (i) Subject to our earlier proposals, the existing powers of the Lands Tribunal should be extended to enable consideration to be given to the variation or discharge of all real burdens and land conditions.
- (ii) Any order for the variation or discharge of real burdens or land conditions granted by the Lands Tribunal should be formally recorded in the General Register of Sasines or given effect to in the Land Register.
- (iii) The Lands Tribunal should be authorised, on application by the Keeper or by a burdened proprietor, to declare that land conditions or burdens are obsolete or unenforceable and such declaration should be final, subject to the right of an aggrieved person to appeal to the Court of Session on a point of law by way of stated case.

(Paras 3.95-3.100)

17. (i) The existing rules in relation to variation and discharge of land obligations should apply to land conditions; and
- (ii) for the purposes of consideration by the Lands Tribunal of an application for a variation or discharge of a land condition, qualification by virtue of proximity should be the only test required for identification of benefited proprietors.

(Paras 3.101-3.102)

Identification of burdened party

19. The proprietor and not the occupier should be bound to observe real burden or land conditions in questions with qualified proprietors.

(Para 3.106)

Implementation

20. The new system of land tenure should not be delayed until after all areas covered by the Land Register of Scotland have become operational.

(Paras 3.107-3.110)

21. There should be a period of 5 years from enactment of the legislation to the introduction of the new system of land tenure.

(Paras 3.111-3.115)

Compulsory redemption of feu duty

Allocated

22. Any allocated feu duty which has not been redeemed prior to the appointed day by payment of an amount calculated in accordance with the existing statutory provisions should, on the appointed day, become a personal debt due by the former feuar to the former superior. The amount of that debt should be calculated, as aforesaid, as at the appointed day.

(Paras 4.2-4.5)

Unallocated

23. (i) All unallocated feu duties should be redeemed in accordance with our provisional proposal for allocated feu duties by the appointed day (Proposition 22). After the appointed day, any unallocated feu duties which have not been redeemed will become a personal debt due by the former feuar to the former superior.
- (ii) The person responsible for collecting unallocated feu duties and paying the cumulo feu duty to the superior should be liable to effect redemption and should be entitled to recover shares of the redemption payable from the payers of the unallocated feu duties in the proportions which the individual unallocated feu duties bear to the total sum of the unallocated feu duties being collected.
- (iii) Where a superior has sent out a notice requiring payment of an informally apportioned feu duty, that apportionment should be deemed to be an allocation from and after the enactment of legislation.

(Paras 4.6-4.14)

(Note: consultees are invited to indicate whether small feu duties under 25 pence per annum should be subject to the foregoing redemption requirements or abolished without compensation).

Payment by Instalments and untraceable superiors

24. Feu duties of over £20 per annum should be capable of redemption in instalments, with interest, over a maximum period of 5 years from the appointed day.

(Paras 4.17-4.19)

(Note: consultees' views are sought on whether the figure of £20 per annum and interest at the rate of 10% are appropriate. Suggestions for alternative amounts and rates, with reasons, would be welcome.)

25. No special redemption provisions should be made for situations where the superior is untraceable.

(Paras 4.21-4.22)

Existing non-pecuniary burdens

26. Land should continue to be burdened by real burdens imposed before the appointed day but such burdens should be enforceable in accordance with the requirements of the new system of land tenure.

(Para 4.23)

27. (i) Existing enforcement rights of superiors, disponers, co-feuars and co-disponees should cease on the appointed day, unless they are otherwise qualified by virtue of proximity

(ii) (a) Existing real burdens of a commercial nature should be classified as such, subject to resolution by order of the Lands Tribunal of any disputes as to classification.

(ii) (b) Such burdens should continue to be enforceable by the original benefited party and his successors against the original burdened proprietor and his successors

(iii) Public, religious, charitable and similar organisations should not be given special enforcement rights in respect of real burdens created prior to the appointed day.

(Paras 4.28-4.34)

Compensation

28. Compensation for loss of enforcement rights should not be available to superiors, disponers, co-feuars or co-disponees.

(Paras 4.37-4.49)

The effect of abolition of the feudal system on the paramount superiority

31 (i) As from the appointed day, the Crown as paramount superior, in common with all subject superiors, shall cease to be entitled to create new feus, exact payment of feu duty or enforce as superior land conditions or real burdens as the case may be.

- (ii) The abolition of the feudal system of land tenure shall be without prejudice to any other rights, privileges, benefits of or derived from the Crown by virtue of the paramount superiority.
- (iii) All pertinents of land held on Barony titles, including any rights to salmon fishings and rights in respect of the noble title of Baron should continue to be transmissible with the title to the land.

(Paras 5.2-5.19)

Superior's rights to minerals and salmon fishings

- 32. As from the appointed day, minerals which have been reserved to a superior and form part of a superiority title should continue to be transferable as a separate tenement notwithstanding the abolition of the superiority interest.

(Paras 5.20-5.21)

- 33. Apart from preserving the rights of owners of salmon fishings derived from Barony titles as at the appointed day, no changes in the present system of ownership and transmission of salmon fishings are required.

(Para 5.22)

Annual charges other than feu duty

- 34. Ground annuals should be subject to the same provisions as to compulsory redemption as feu duties.

(Paras 5.24-5.25)

- 35. All existing standard charges and stipends should be subject to the same provisions as to compulsory redemption as feu duties.

(Para 5.26)

Consultees' views are sought as to whether Teinds should be dealt with in a similar way.

Rights of Pre-emption, redemption and reversion

36. (i) Are there any problems arising in relation to the enforcement or discharge of rights of pre-emption which we should consider in a subsequent paper; and
- (ii) Is there any need for clarification of the law insofar as it relates to the exercise of rights of pre-emption in respect of property which is the subject of a statutory right to buy scheme.

(Paras 5.27-5.31)

37. No change should be made in the law relating to rights of redemption and reversion except in relation to irritancy clauses created by feu deed which should continue to be enforceable by a former superior provided he is otherwise qualified.

(Paras 5.29-5.31)

Increasing feu duties

38. In the case of increasing feu duties, the amount required to redeem them should be calculated by reference to the amount being paid at the appointed day.

(Paras 5.32-5.34)

Security over superiority interests

39. If a problem is seen to exist in this area, a secured creditor should be entitled to insist on repayment of the amounts secured up to the value of the superiority interest within the two years prior to the appointed day. Thereafter his security should cease to exist.

(Paras 5.34-5.35)

Consultees are invited to indicate whether they consider that there is a real problem requiring legislative provision. Suggestions as to alternative approaches would be welcome.

Effect of compulsory purchase

40. Land conditions or real burdens, as the case may be, should be extinguished for all time coming on compulsory acquisition of the burdened land under section 80 of the Lands Clauses Consolidation (Scotland) Act 1845.

(Paras 5.36-5.37)

Option 2

Nomenclature, form, constitution and categorisation of obligations under the new system

2. Real burdens or land conditions should be narrated in a prescribed form in a schedule to the deed imposing them.

(Paras 3.21-3.22)

3. Notwithstanding any recommendation which may be made in respect of the introduction of a statutory code in defined circumstances, such as the law of the tenement, no general provision should be made for imposition of real burdens or land conditions by statute.

(Paras 3.23-3.25)

4. No special enforcement provisions should be introduced for charitable religious or public bodies in respect of real burdens or land conditions created after the appointed day.

(Paras 3.29-3.32)

5. There should be no restriction on the scope of real burdens or land conditions to be created after the appointed day by reference to parallel statutory provisions.

(Para 3.33)

6. (ii) Should real burdens be enforceable only by disponers and their successors who can establish the necessary title and interest, and likewise by co-disponees and their successors, who benefit from a properly constituted ius quaesitum tertio.

Note: we would welcome any suggestions consultees may have as to alternative approaches to a new system of land tenure or any changes that consultees would like to be made to either of the options we canvass.

(Paras 3.34-3.39)

Enforcement of Real Burdens

9. Views are invited on whether there is any way of requiring a disponent to create a ius quaestium tertio other than by the collective pressure of potential purchasers referred to in paragraph 3.67.

(Paras 3.61-3.68)

10. Views are invited on whether there is any need for the introduction of special rules for the enforcement of service conditions similar to those proposed in relation to Option 1 for Option 2.

(Paras 3.69-3.71)

Who should be entitled to enforce?

11. (ii) The existing rules as to enforcement by a disponent, successor of a disponent or a tertius should continue to apply.

- (iii) After the appointed day, rights in favour of a tertius should only be created, in respect of areas of land which have been specifically identified in the disposition of the burdened land.

(Paras 3.72-3.78)

Remedies

12. (ii) The remedies currently available to a disponent or co-dispensee for enforcing real burdens should continue to be available.

(Paras 3.79-3.84)

Enforcement role of the Lands Tribunal

13. (i) The jurisdiction of the Lands Tribunal should be extended to enable the Tribunal to make enforcement orders.

- (ii) The Lands Tribunal should be empowered to award compensation as an alternative to an enforcement order

- (iii) The Lands Tribunal should be the only competent forum for hearing applications in respect of enforcement of real burdens or land conditions.

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Consequences of failure to obtemper an enforcement order

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16. (i) Subject to our earlier proposals, the existing powers of the Lands Tribunal should be extended to enable consideration to be given to the variation or discharge of all real burdens and land conditions.
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(Paras 3.95-3.100)

18. In the case of a variation or discharge of a real burden by agreement, the consent of all tertii as well as the consent of a disponent or his successors (where appropriate) should continue to be required.

(Paras 3.103-3.105)

Identification of burdened party

19. The proprietor and not the occupier should be bound to observe real burdens or land conditions in questions with qualified proprietors.

(Para 3.106)

Implementation

20. The new system of land tenure should not be delayed until after all areas covered by the Land Register of Scotland have become operational.

(Paras 3.107-3.110)

21. There should be a period of 5 years from enactment of the legislation to the introduction of the new system of land tenure.

(Paras 3.111-3.115)

Compulsory redemption of feu duty

Allocated

22. Any allocated feu duty which has not been redeemed prior to the appointed day by payment of an amount calculated in accordance with the existing statutory provisions should, on the appointed day, become a personal debt due by the former feuar to the former superior. The amount of that debt should be calculated, as aforesaid, as at the appointed day.

(Paras 4.2-4.5)

Unallocated

23. (i) All unallocated feu duties should be redeemed in accordance with our provisional proposal for allocated feu duties by the appointed day (Proposition 22). After the appointed day, any unallocated feu duties which have not been redeemed will become a personal debt due by the former feuar to the former superior.
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- (iii) Where a superior has sent out a notice requiring payment of an informally apportioned feu duty, that apportionment should be deemed to be an allocation from and after the enactment of legislation.

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(Note: Consultees are invited to indicate whether small feu duties under 25 pence per annum should be subject to the foregoing redemption requirements or abolished without compensation).

Payment by instalments and untraceable superiors

24. Feu duties of over £20 per annum should be capable of redemption in instalments, with interest, over a maximum period of 5 years from the appointed day.

(Paras 4.17-4.19)

(Note: consultees' views are sought on whether the figure of £20 per annum and interest at the rate of 10% are appropriate. Suggestions for alternative amounts and rates, with reasons, would be welcome.)

25. No special redemption provisions should be made for situations where the superior is untraceable.

(Paras 4.21-4.22)

Existing non-pecuniary burdens

26. Land should continue to be burdened by real burdens imposed before the appointed day but such burdens should be enforceable in accordance with the requirements of the new system of land tenure.

(Para 4.23)

29. (i) Existing real burdens should continue to be enforceable from the appointed day by disponers and co-disponee tertii who are able to establish the necessary title and interest.

- (ii) Existing real burdens created by superiors should continue to be enforceable by the former superior as at the appointed day. The former superior should be deemed to have the same enforcement rights as if he were a disponent who had created the real burdens by disposition immediately prior to the appointed day. co-feuar tertii should have the same enforcement rights as co-disponee tertii.

- (iii) Commercial burdens should continue to be enforceable by the original benefited party and his successors against the original burdened proprietor and his successors.

(Paras 4.51-4.55)

Compensation

30. No compensation should be payable to superiors for the change in their enforcement rights.

(Paras 4.57-58)

**The effect of abolition of the feudal system
on the paramount superiority**

31. (i) As from the appointed day, the Crown as paramount superior, in common with all subject superiors, shall cease to be entitled to create new feus, exact payment of feu duty or enforce qua superior land conditions or real burdens as the case may be.
- (ii) The abolition of the feudal system of land tenure shall be without prejudice to any other rights, privileges, benefits of or derived from the Crown by virtue of the paramount superiority.
- (iii) All pertinents of land held on Barony titles, including any rights to salmon fishings and rights in respect of the noble title of Baron should continue to be transmissible with the title to the land.

(Paras 5.2-5.19)

Superior's rights to minerals and salmon fishings

- 32 As from the appointed day, minerals which have been reserved to a superior and form part of a superiority title should continue to be transferable as a separate tenement notwithstanding the abolition of the superiority interest.

(Paras 5.20-5.21)

33. Apart from preserving the rights of owners of salmon fishings derived from Barony titles as at the appointed day, no changes in the present system of ownership and transmission of salmon fishings are required.

(Paras 5.22)

Annual charges other than feu duty

34. Ground annuals should be subject to the same provisions as to compulsory redemption as feu duties.

(Paras 5.23-5.24)

35. All existing standard charges and stipends should be subject to the same provisions as to compulsory redemption as feu duties.

(Para 5.25)

Consultees' views are sought as to whether Teinds should be dealt with in a similar way.

Rights of Pre-emption, redemption and reversion

Consultees views are sought on whether

- 36 (i) Are there any problems arising in relation to the enforcement or discharge of rights of pre-emption which we should consider in a subsequent paper; and
- (ii) Is there any need for clarification of the law insofar as it relates to the exercise of rights of pre-emption in respect of property which is the subject of a statutory right to buy scheme.

(Paras 5.26-5.28)

37. No change should be made in the law relating to rights of redemption and reversion except in relation to irritancy clauses created by feu deed which should continue to be enforceable by a former superior provided he is otherwise qualified.

(Paras 5.29-5.31)

Increasing feu duties

38. In the case of increasing feu duties, the amount required to redeem them should be calculated by reference to the amount being paid at the appointed day.

(Paras 5.32-33)

Security over superiority interests

39. If a problem is seen to exist in this area, a secured creditor should be entitled to insist on repayment of the amounts secured up to the value of the superiority interest within the two years prior to the appointed day. Thereafter his security should cease to exist.

(Paras 5.34-5.35)

Consultees are invited to indicate whether they consider that there is a real problem requiring legislative provision. Suggestions as to alternative approaches would be welcome.

Effect of compulsory purchase

40. Land conditions or real burdens, as the case may be, should be extinguished for all time coming on compulsory acquisition of the burdened land under section 80 of the Lands Clauses Consolidation (Scotland) Act 1845.

(Paras 5.36-5.37)

APPENDIX I

PART I

Examples of burdens presently found in modern feu dispositions or deeds of conditions with possible categorisation and references to relevant statutory provisions

| 1. Amenity conditions | (Statute) |
|---|--|
| (a) Buildings to be erected in accordance with approved plans. | Town & Country Planning (Scotland) Act 1972 |
| (b) Any change to external appearance of buildings to be approved. | " s 20 |
| (c) House to be used as a private dwellinghouse only and not subdivided. | " s 19 |
| (d) House not to be used for sale of wine, spirits or exciseable liquor. | " s 20 |
| (e) Trees not to be felled or lopped without consent. | " s 58 |
| (f) Maintenance of buildings in good order. | Public Health (Scotland) Act 1897 (Nuisance provisions s 16) |
| (g) Maintenance of drains, pipes, roadways etc. | " |
| (h) Prohibition of offensive trades and activities constituting a nuisance. | |
| (i) Maintenance of ornamental garden ground. | Town & Country Planning (Scotland) Act 1972 s 63 |
| (j) External paintwork to be kept in good repair. | |
| (k) Prohibition of parking cars, caravans, trailers etc on or about the feu. | - |
| (l) Prohibition of keeping poultry, livestock etc and restriction on number of domestic pets. | - |

(Statute)

- (m) Prohibition of separate sale of eg garages. -
 - (n) Provisions regarding constitution and regulation of body to administer open spaces/amenity ground. -
 - (o) Prohibition against internal or external alterations in case of historic buildings. Town & Country Planning (Scotland) Act 1972 Part IV
 - (p) Requirement not to put buildings to a use inconsistent with their previous use as ecclesiastical buildings in case of former church buildings.
 - (q) The requirement to hand over archaeological artifacts found in ground to superior.
2. Service conditions
- (a) Back greens and retaining walls or fences to be maintained at expense of those using them. Civic Government (Scotland) Act 1982
 - (b) Cost of maintaining mutual roofs, gables, walls, hedges, drains, pipes etc to be shared among parties using them.
 - (c) Mutual gables and walls etc to be erected one half on each side of mutual boundary.

PART II

Servitudes and wayleaves

- (a) Reserved to superior/grantor and his successors in title to other parts of the feu.
 - (i) Access over the feu for pedestrian and vehicular traffic for specified purposes.

- (b) Reserved to co-feuars/disponees and statutory undertakers or public authorities.
 - (i) The right to lay pipes, cables etc through neighbouring land with access thereto for repair and renewal.
 - (ii) The right in favour of public authorities and statutory undertakers to lay, maintain and renew pipes, cables and others through the feu.
 - (iii) The right of access over neighbouring ground to repair or renew walls, fences, hedges etc.
 - (iv) Access over all roads, pathways and parking areas on the larger area of which the feu forms part.
 - (v) Access to mutual clothes poles.

Reservations

- (a) Mines metals, minerals and other substances under the feu with the right to work.
- (b) Coins or other articles of value found beneath the surface.
- (c) Right to irritate on non-performance of conditions.
- (d) Right of pre-emption.
- (e) Right of redemption.
- (f) Right of reversion.

APPENDIX II

Extract from

**THE TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT)
(SCOTLAND) ORDER 1981 (SI 1981/830) - as amended
by SI 1984/237**

"7.-(1) Subject to paragraph (4) of this Article an applicant for planning permission or for approval of reserved matters under Articles 8 and 9 shall serve on any party who holds a notifiable interest in neighbouring land and who has not been served in terms of section 24 of the Act with notice of the application a copy of the application with a noticestating:-

- (a) that the plans or drawings relating to the application may be inspected in the register kept by the planning authority in terms of Article 17(1); and
 - (b) the address at which the plans may be so inspected if different from the address of the planning authority shown on the application; and
 - (c) the period within which the plans may be inspected
- (2) The parties holding a notifiable interest in neighbouring land are:-
- (a) in the case of lands and heritages entered in the valuation roll, the persons appearing therefrom to be the owners, lessees and occupiers of these lands and heritages- and
 - (b) in any other case, the owners, lessees and occupiers of the land.

....."

Extract from

**THE TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT)
(SCOTLAND) AMENDMENT ORDER 1984 (SI 1984/237)**

2. The Town and Country Planning (General Development)(Scotland) Order 1981 is hereby amended as follows:-

- (a) in article 2(1) for the definition of "neighbouring land" there shall be substituted -

"neighbouring land' means land which is conterminous with or within 4 metres of the boundary of land for which the development is proposed but only if any part of such land is within 90 metres of any part of the development in question:

Provided that -

- (a) where the proposed development is taking place within a building divided into separate units "neighbouring land" shall include -
 - (i) those parts of the building conterminous with or within 4 metres of the unit for which the development is proposed, and
 - (ii) all units directly above and below the unit for which the development is proposed and all units directly above and below those parts of the building conterminous with or within 4 metres of the boundary of that unit, and
 - (iii) land outwith the building which is conterminous with or within 4 metres of the boundary of the unit for which the development is proposed.
- (b) where the "neighbouring land" consists of or includes a building divided into separate units, and the proposed development is taking place within a building which is not divided into separate units, only those units of that building which are conterminous with or are within 4 metres of the boundary of the land for which the development is proposed and all parts of the building directly above and below those units shall constitute neighbouring land-
- (c) where the "neighbouring land" consists of or includes a building divided into separate units, and the proposed development is taking place within a building which is also divided into separate units, only those units of the former building which are conterminous with or are within 4 metres of the boundary of the unit for which the development is proposed and all parts of the building directly above and below those units shall constitute neighbouring land;
- (d) where a road falls within the distance of 4 metres measured from the boundary of the land or the boundary of the unit (as the case may be) for which the development is proposed, the width of such road shall be disregarded in calculating the specified distance unless the road is more than 20 metres in width.";

APPENDIX III

1. EXAMPLE OF CONDITION IN MISSIVES IMPOSING A COMMERCIAL BURDEN¹

It is agreed that the Feu Disposition to be granted in favour of the Purchaser will contain a clause providing that the Purchaser and his successors as proprietors of the subjects of sale shall not be permitted to use any part of the subjects of sale for office purposes for a period of 10 years after the date of entry. In the event of planning permission being obtained for change of use of all or any part of the subjects of sale to offices, other than offices ancillary to the use of the subjects as an Hotel, then the whole subjects will be re-valued by an independent arbiter to be appointed by the Chairman for the time being of the Royal Institution of Chartered Surveyors in Scotland, said arbiter to agree the amount of uplift in the value attaching to the subjects of sale as a result of the planning permission for office use. Once said uplift in value is established, the Purchaser or his successors as proprietors of the subjects of sale will be obliged to make payment to the Seller of a sum representing a percentage of the said uplift in value, the said sum to be calculated as follows:-

- (a) In the event of the date of the planning permission for change of use being within one year of the said date of entry, 95% of the said uplift in value shall be payable by the Purchaser to the Seller-
- (b) In the event of the date of the said planning permission being more than one year but less than 2 years from the said date of entry, 85% of the said uplift in value shall be payable by the Purchaser to the Seller-
- (c) In the event of the date of the said planning permission being more than 2 years but less than 3 years from the said date of entry, 75% of the said uplift in value shall be payable by the Purchaser to the Seller-
- (d) In the event of the date of the said planning permission being more than 3 years but less than 4 years from the said date of entry, 65% of the said uplift in value shall be payable by the Purchaser to the Seller-

¹This style was kindly made available to us by the Legal Adviser, Central Legal Office, Scottish Health Service. The conditions are examples only and are not in any way warranted or guaranteed.

- (e) In the event of the date of the said planning permission being more than 4 years but less than 5 years from the said date of entry, 55% of the said uplift in value shall be payable by the Purchaser to the Seller-
- (f) In the event of the date of the said planning permission being more than 5 years but less than 6 years from the said date of entry, 45% of the said uplift in value shall be payable by the Purchaser to the Seller-
- (g) In the event of the date of the said planning permission being more than 6 years but less than 7 years from the said date of entry, 35% of the said uplift in value shall be payable by the Purchaser to the Seller-
- (h) In the event of the date of the said planning permission being more than 7 years but less than 8 years from the said date of entry, 25% of the said uplift in value shall be payable by the Purchaser to the Seller;
- (i) In the event of the date of the said planning permission being more than 8 years but less than 9 years from the said date of entry, 15% of the said uplift in value shall be payable by the Purchaser to the Seller;
- (j) In the event of the date of the said planning permission being more than 9 years but less than 10 years from the said date of entry, 5% of the said uplift in value shall be payable by the Purchaser to the Seller-

The Purchaser will be obliged to make payment to the Seller in terms of this clause within one month of the date of the Certificate of Value by the said arbiter. It is agreed that the said arbiter's decision will be final and binding and he will have the power in assessing said uplift in value to take into account any factors or costs which he considers to be relevant at the time in arriving at a fair assessment of said uplift in value.

2. EXTRACT FROM THE SDA CONDITIONS OF TENDER DEALING WITH "PLANNING GAIN".¹

13. SHARING OF PLANNING GAIN

13.1 In the event that, during the 5 years following the Completion Date, planning permission or a series of planning permissions for change of use to, or authorising any development involving, any use or uses not included within Classes 4, 5 or 11 in the Schedule to the Town & Country Planning (Use Classes)(Scotland) Order 1989 is granted in respect of any part or parts of the Properties having either a building or buildings with a total net lettable area in excess of 1,000 square metres or an area or areas of land having in aggregate an area in excess of 1 acre, the Company shall notify the Agency in writing of this fact within 14 days of the grant of such planning permission or permissions. For the avoidance of doubt, "planning permission" in this Clause shall include outline planning permission.

13.2 The Company shall be obliged to notify the Agency of all applications for such planning permission(s) made within the said 5 years period, such notification to be accompanied by a copy of the relevant applications, plans and specifications to be given not less than 14 days after submission of each application.

13.3

13.4

13.5 The Company will pay by way of additional consideration for the Properties to the Agency within 14 days of the said valuations being agreed or determined as aforesaid 50% of the excess (if any) of Valuation A over Valuation B together with Interest on such sum from the date 14 days after the Relevant Date until payment in full by the Company.

13.6

13.7

¹The Scottish Development Agency (now "Scottish Enterprise") kindly permitted us to reproduce parts of their conditions of Tender Document. The conditions are examples only and are not in any way warranted or guaranteed.

14. SHARING OF GAINS ON RESALE

14.1 In this Clause the following meanings shall apply:-

"Contract for Sale" means a bargain for sale of an Interest In Land, including lease or agreement for lease granted for a premium and/or at less than rack rental value, but excluding:-

(a) any sale to the Agency of any of the Option Properties; and

(b) any sale under compulsory purchase powers;

and "Sale" shall be construed accordingly;

"Resale Property" means in relation to any Contract for Sale the Interest in Land which is the subject of that Contract for Sale;

"Interest in Land" means an interest in land within the meaning attributed thereto in paragraph 1 of Schedule 17 to the Finance Act 1985 in any of the Properties;

"Resale Gains" shall be calculated in accordance with formula $X - Y$ (X minus Y), where:-

14.2.1

14.2.2

14.3 In the event that, during the period ("the Resale Period") prior to the third anniversary of the Completion Date, the Company or its successors in title shall conclude a Contract or Contracts for Sale where:-

- (a) the aggregate of the gross proceeds of Sale (inclusive of the value of any deferred payments, options or other benefits) of the Resale Properties referable to a Contract or Contracts for Sale in any period or periods of twelve consecutive months within the Resale Period amounts to not less than ten per centum of the Purchase Price ("Basis 10"); and/or
- (b) the aggregate of the gross proceeds of Sale (inclusive of the value of any deferred payments, options or other benefits) of the Resale Properties referable to a Contract or Contracts for Sale concluded in the whole of the Resale Period amounts to not less than twenty five per centum of the Purchase Price ("Basis 25"),

then the Company shall pay to the Agency one-half of all Resale Gains referable to such Sales by way of additional consideration for the Properties.

14.4

14.5 The Company shall be obliged to notify the Agency of the conclusion of all Contracts for Sale not less than fourteen days after the occurrence of the same and each such notification will be accompanied by a copy of the document or documents constituting the relevant Contract for Sale.

14.6 Basis 10 and/or Basis 25 will be applied in the following manner:-

- (a) at any time after any period of twelve months (but not later than two years after the expiry of the Resale Period, and not after the Agency shall have notified the Company that Basis 25 is to be applied), the Agency shall, where the provisions of Clause 14.3(a) hereof shall apply, be entitled to notify the Company and/or its foresaids that Basis 10 is to be applied, it being declared, for the avoidance of doubt, that the Agency shall be entitled to apply Basis 10 to any one or more such twelve months period; and/or
- (b) at, or within two years after, the expiry of the Resale Period, the Agency shall, where the provisions of Clause 14.3(b) hereof shall apply, be entitled to notify the Company that Basis 25 is to be applied, in which event the amount of any Resale Gains to which the Agency may be entitled under Basis 25 shall be reduced by the amount of any Resale Gains under Basis 10 which the Agency shall have already received.

14.7

Resale Gains shall be paid by the Company to the Agency within fourteen days of the relevant intimation by the Agency in terms of paragraph 6 of this Clause and, failing payment within such period, Interest shall be payable from the due date until the Resale Gains with Interest thereon have been paid.

APPENDIX IV

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