

# **Scottish Law Commission**

**Discussion Paper No 106**

## **REAL BURDENS**

**October 1998**

**This Discussion Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission**

The Commission would be grateful if comments on this Discussion Paper were submitted by 31 January 1999. Comments may be made on all or any of the matters raised in the paper. All correspondence should be addressed to:

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## NOTES

1. In writing a later report on this subject, the Commission may find it useful to be able to refer to, and attribute, comments submitted in response to this paper. If no request for confidentiality is made, the Commission will assume that comments on the paper can be used in this way.
2. Those who wish copies, or further copies, of this Discussion Paper for the purpose of commenting on it should contact the Commission at the above address.

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## ABBREVIATIONS

American Law Institute, *Restatement (Servitudes)*

The American Law Institute, *Restatement of the Law Property (Servitudes) Tentative Drafts Nos 1 - 7 (1989-98)*

BGB

*Bürgerliches Gesetzbuch* (German Civil Code)

Cusine & Egan, *Feuing Conditions*

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

Gordon, *Scottish Land Law*

W M Gordon, *Scottish Land Law* (Edinburgh, 1989)

Gray, *Elements*

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

Halliday Committee

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

Halliday, *Conveyancing*

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

Halliday, *Opinions*

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

Law Com No 11

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

Law Com No 111

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

Law Com No 127

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

Law Com No 201

Law Commission, *Transfer of Land: Obsolete Restrictive Covenants* (Law Com No 201) (1991)

McDonald, *Conveyancing Manual*

A J McDonald, *Conveyancing Manual* (6th edn, by Stewart Brymer, Douglas J Cusine and Robert Rennie) (Edinburgh, 1997)

McDonald, *Enforcement*

A J McDonald, "The Enforcement of Title Conditions" (in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (Edinburgh, 1987) pp 9 - 32)

Ontario LRC, *Covenants*

Ontario Law Reform Commission, *Report on Covenants affecting Freehold Land* (1989)

Reid, *Property*

Kenneth G C Reid *et al*, *The Law of Property in Scotland* (Edinburgh, 1996)

Scot Law Com DP No 93

Scottish Law Commission, Discussion Paper No 93 on *Property Law: Abolition of the Feudal System* (1991)

Scot Law Com DP No 102

Scottish Law Commission, Discussion Paper No 102 on *Leasehold Casualties* (1997)

Scot Law Com DP No 103

Scottish Law Commission, Discussion Paper No 103 on *Penalty Clauses* (1997)

Scot Law Com No 160

Scottish Law Commission, *Report on Interpretation in Private Law* (Scot Law Com No 160) (1997)

Scot Law Com No 162

Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162) (1998)

Silberberg & Schoeman, *Property*

Silberberg & Schoeman's *The Law of Property* (3rd edn by D G Kleyn & A Boraine) (Durban, 1992)

Yiannopoulos, *Predial Servitudes*

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

# PART 1 INTRODUCTION

## Terminology

1.1 "Real burden" is used in this discussion paper to mean a condition imposed on one piece of land for the benefit of another piece of land,<sup>1</sup> and constituted in conformity with the rules set out in the leading case of *Tailors of Aberdeen v Coutts*.<sup>2</sup> However, the terminology is not entirely stable.<sup>3</sup> For on the one hand the obligation which we have called a real burden is sometimes referred to by alternative names, such as "real condition"<sup>4</sup> or "condition of the right";<sup>5</sup> and on the other hand "real burden" can also be used, in a quite different sense, to mean a real right in security, usually of payment of money, which is constituted by reservation in a conveyance of land.<sup>6</sup> Real burdens in this second (and much older) sense are also known as "pecuniary real burdens", and this usage is followed in the present paper. But in any case, pecuniary real burdens have long since been obsolete and, on one view of the law, have been abolished altogether.<sup>7</sup>

## What are real burdens?

1.2 At its simplest, a real burden involves two plots of neighbouring land. One plot, known as the "servient tenement", is subject to conditions conceived in favour of the other plot, known as the "dominant tenement". The conditions are known as "real burdens". By accession a plot of land includes any buildings erected on it, and in practice real burdens are often about buildings rather than about vacant ground. Sometimes there is no land at all. In a block of flats a flat on the top floor might be a servient tenement while a flat on a floor underneath might be a dominant tenement. In practice, real burdens are found in almost all blocks of flats (ie "tenements", in a different sense of the word), and are of the greatest importance in regulating use and in providing for common maintenance.<sup>8</sup>

1.3 Typically a real burden will place a restriction of some kind on the use which can be made of the servient tenement (for example, there may be a prohibition on building on part of the servient tenement, or on using it for business purposes) or it will impose an obligation on the owner of the servient tenement to maintain a part of that tenement (such as a wall or fence) or some other part which is common to both tenements.

1.4 There are a number of different ways in which real burdens might be brought to an end;<sup>9</sup> but insofar as this has not been done a real burden, like ownership itself, will last for ever. It runs with the land, and not with the persons who happened to own the two plots at the time when the burden was first created. Hence a real burden is enforceable by the owner for the time being of the dominant tenement against the owner for the time being of

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<sup>1</sup> Or, in the case of feudal burdens, for the benefit of the superiority of the same land.

<sup>2</sup> (1840) 1 Rob 296.

<sup>3</sup> Reid, *Property* para 375.

<sup>4</sup> Gordon, *Scottish Land Law* paras 22-29 ff; Halliday, *Conveyancing* vol II, para 34-17.

<sup>5</sup> This term is favoured by some nineteenth century case law (eg *McNeill v Mackenzie* (1870) 8 M 520, 525) but has now virtually dropped out of use.

<sup>6</sup> *Wells v New House Purchasers Ltd* 1964 SLT (Sh Ct) 2.

<sup>7</sup> This subject is explored further at paras 9.14-9.15.

<sup>8</sup> See Scot Law Com No 162, paras 2.3 and 2.23-2.24.

<sup>9</sup> See Part 5.

the servient tenement. Over time the identity of the creditor and debtor in the obligation will change, and a person becomes subject to a real burden simply by acquiring ownership of the servient tenement. But he buys with his eyes open. Real burdens are created either in a deed conveying the servient tenement, or in a deed of conditions affecting that tenement. In both cases the deed must be registered in the appropriate register (either the Register of Sasines or the Land Register<sup>10</sup>) and is readily discoverable by the purchaser. For titles registered in the Land Register, all burdens are conveniently collected together in a special part of the title sheet, known as the D. Section, and the purchaser has the statutory assurance that any real burdens not listed there will not affect him.<sup>11</sup>

### Three types of burden

1.5 **(1) Neighbour burdens.** Burdens imposed on one plot or plots for the benefit of a neighbouring plot or plots are referred to in this discussion paper as "neighbour burdens".<sup>12</sup> The essential feature of a neighbour burden is an absence of reciprocity. The obligations on the servient tenement are not matched by corresponding obligations on the dominant tenement. But while neighbour burdens are the simplest case, they are not the only case in which real burdens occur. Two other cases are also common.

1.6 **(2) Community burdens.** Real burdens are very often used as a means of self-regulation of discrete communities, such as housing estates, or blocks of flats, or sheltered housing developments. Here there is often a difference of scale, for instead of two plots or buildings there may be ten or fifty or one hundred. A more important point is that the burdens operate reciprocally. Each of the hundred houses in a housing estate is subject to identical burdens, and (at least in the usual case) the owner of each house has a right to enforce the burdens against the owner of each other house. Each house, in other words, is at the same time both a dominant and a servient tenement. The real burdens are the rules by which the owner of each house has agreed to live, in the interests of everyone in the estate, and the rules are mutually enforceable. A convenient term for such burdens is "community burdens".<sup>13</sup>

1.7 **(3) Feudal burdens.** Real burdens can also be created under the feudal system of land tenure. Today almost all land and buildings in Scotland are sold outright, by disposition, but in theory it still remains possible to sell by the process of subinfeudation, and in earlier times subinfeudation was common. In a grant by subinfeudation, the person making the grant retains a feudal estate in the land, known as *dominium directum* or superiority. This feudal estate is capable of acting as a dominant tenement in a real burden which the holder of that estate (the superior) can then enforce. Since the early nineteenth century it has been rare to subfeu without also imposing real burdens. This type of burden is quite unlike the other two identified above.<sup>14</sup> By contrast with community burdens there is no element of reciprocity. The burdens are one-way, and usually the superior need do nothing in return. More importantly, in a feudal burden the dominant tenement is

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<sup>10</sup> Strictly, with the Land Register what is registered is not the deed itself but the legal effect of the deed, but the former usage is convenient and will sometimes be used in this paper.

<sup>11</sup> Land Registration (Scotland) Act 1979 s 3(1)(a).

<sup>12</sup> The Law Commission in England and Wales used the similar term "neighbour obligations". See Law Com No 127, para 6.3.

<sup>13</sup> The Law Commission in England and Wales suggested "development obligations". See Law Com No 127, para 6.7.

<sup>14</sup> So much so that it is sometimes classified as an entirely separate type of obligation. See eg Gordon, *Scottish Land Law* chap 22.

metaphysical. The superior is not a neighbour - or at least if he happens to own<sup>15</sup> land nearby, such ownership is independent of his position as superior. The purpose of the real burden is not to regulate land or buildings for the benefit of neighbouring land or buildings, but rather to regulate land or buildings for the benefit of a superior. In practice, the same person is often superior over a wide area, so that a large number of properties may be subject to identical burdens conceived for the benefit of the superior.

1.8 We will shortly be publishing our final recommendations for the abolition of the feudal system.<sup>16</sup> Abolition of the feudal system implies the abolition of feudal superiors, and hence of feudal burdens.<sup>17</sup> In our view any legislation reforming the law on real burdens should be introduced at the same time as legislation abolishing the feudal system. Accordingly, the proposals contained in this discussion paper are based on the assumption that the feudal system has been abolished and that feudal real burdens have ceased to exist.

1.9 **Combined burdens.** Sometimes burdens of different types occur in combination.<sup>18</sup> By far the most common example is a combined feudal and community burden. Typically this arises in the following way. A builder builds a new housing estate. A deed of conditions is registered by the builder imposing uniform real burdens on each of the houses. The deed provides that the burdens are to be reciprocally enforceable by the future owners of each house. When the houses come to be sold they are transferred by subinfeudation, so that the builder becomes the superior of the owners of the houses. Real burdens created in this way are first and foremost feudal burdens. The builder has subfeued, imposing real burdens, and hence he is able to enforce the burdens against the purchasers of the houses, and against all successive owners. But since the burdens are mutually enforceable within the housing estate, they are also community burdens. In cases such as this the effect of feudal abolition will be to convert a combined burden into a single burden. The superior's rights will disappear, but the housing estate will continue to be regulated by community burdens.

1.10 Neighbour and community burdens may also occur in combination. For example an owner might divide his land into two plots, A and B, and sell plot B imposing real burdens for the benefit of plot A, which he retains. The purchaser of plot B might then build twenty houses and sell each house separately. In those circumstances the burdens are enforceable, both by the successive owners of plot A, and also, reciprocally among themselves, by the owners of the twenty houses.<sup>19</sup> In other words they are both neighbour and also community burdens.

1.11 In practice it is almost unknown for neighbour and feudal burdens to occur in combination. In creating a burden a superior is unlikely to confer enforcement rights on neighbours who are not themselves subject to the same burdens<sup>20</sup>; and even if the superior

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<sup>15</sup> By ownership here we mean *dominium utile*.

<sup>16</sup> For our earlier work on this subject, see Scot Law Com DP No 93.

<sup>17</sup> However, we are likely to recommend that, for a limited period, superiors who own suitable land in the neighbourhood of the servient tenement will be able to nominate that land as a dominant tenement in the real burden. In cases where that is done the feudal burden will have been converted into a neighbour burden.

<sup>18</sup> See further paras 3.11 - 3.16.

<sup>19</sup> The rights of the owners of the twenty houses arise as an automatic consequence of the subdivision. This is the second of the two situations for implied rights identified by Lord Watson in *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95, 103. See para 3.6.

<sup>20</sup> And no such enforcement rights would be implied.

happens also to be a neighbour, his right to enforce depends on his position as superior and not on his position as neighbour.<sup>21</sup>

### **What are real burdens for?**

1.12 The origins of real burdens lie in the rapid urbanisation which began at the end of the eighteenth century as an accompaniment to the industrial revolution.<sup>22</sup> Land sold for new housing was made subject to conditions which regulated the type of buildings which could be erected and the use to which these buildings could be put. These early real burdens played a crucial role in the orderly development of towns and cities in Scotland; and to some extent private law was being used to perform a role which, in a later age, would be performed by public law through legislation on planning, building, and the environment. Later, real burdens were also to be used in the sale of land in rural areas; but while burdens - and in particular feudal burdens - have become a commonplace in rural Scotland, real burdens taken as a whole are overwhelmingly an urban phenomenon.<sup>23</sup>

1.13 Different burdens have different purposes. Neighbour burdens allow the protection of one's own property by restricting in some manner the use made of property belonging to a neighbour. Feudal burdens may also have this function, if the superior lives locally, but feudal burdens are often imposed over a wide area and on a much larger scale and sometimes come close to planning control exercised by private hands. Community burdens are for the self-regulation of housing estates, tenements, and other communities where people live in close proximity to one another.

### **Conditions in leases**

1.14 Scotland has not followed the pattern in England where it is common for land or buildings to be held on leases of long duration, and where leasehold tenure forms an alternative to outright ownership (freehold tenure). Long leases are relatively rare in Scotland, and legislation passed in 1974 severely curtailed the creation of leases of more than twenty years where the use is to be residential.<sup>24</sup> If long leases can be treated as pseudo ownership, then conditions in such leases can be treated as pseudo real burdens, and indeed conditions in leases can be varied or discharged by the Lands Tribunal in the same way as real burdens.<sup>25</sup> Viewed in this way, a condition enforceable by the landlord is the equivalent of a feudal burden, while equivalents exist also of neighbour burdens<sup>26</sup> and of community burdens. A consideration of conditions in leases is beyond the scope of the present discussion paper, but we hope to return to the subject as part of a larger exercise on long leases.<sup>27</sup>

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<sup>21</sup> See however *Stevenson v Steel Co of Scotland Ltd* (1899) 1 F(HL) 91, discussed in para 3.16.

<sup>22</sup> Reid, *Property* paras 376-9.

<sup>23</sup> This is not always properly understood. The worst cases of abuse of (feudal) burdens tend to be in rural areas and the consequent publicity tends to produce a distorted picture of the incidence of real burdens. In fact real burdens in towns and cities have generally worked quite well.

<sup>24</sup> Land Tenure Reform (Scotland) Act 1974 s 8.

<sup>25</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1, especially s 1(2) which defines "land obligation".

<sup>26</sup> Registration of Leases (Scotland) Act 1857 s 3(2).

<sup>27</sup> The subject is included in our *Fifth Programme of Law Reform* (Scot Law Com No 159, 1997) paras 2.36 and 2.37.

## The role of feudalism

1.15 In what is a very complicated area of law the role of feudalism is easily misunderstood. A standard misperception is to characterise the whole system of private regulation of land in Scotland as "feudal". And as so often, language then comes to influence argument. "Feudal" nowadays suggests the ancient and the oppressive and the irrational; and the linkage implies that private regulation of land is inherently undesirable. We are shortly to publish our final recommendations for the abolition of the feudal system. If private controls over land were truly "feudal" in nature, then they would perish with the feudal system. But of course they are not and they will not.

1.16 In fact there is no close relationship between feudalism and the private regulation of land. As has been seen,<sup>28</sup> feudal burdens are only one type of real burden. There are others and, in the modern world, the others are of greater significance. Real burdens were caused, not by feudalism, but by urbanisation. By the time real burdens came to develop, in the late eighteenth century, feudalism was already 600 years old and in serious decline. Real burdens would have developed even without a feudal system, as indeed happened in England and, subsequently, elsewhere in the common law world.<sup>29</sup> Perhaps the most that can be said is that, since the system of land tenure in Scotland at the end of the eighteenth century was a feudal one, it was natural that, as a matter of conveyancing practice, real burdens should come to be embedded in that system.

## Servitudes

1.17 The same point is made in a different way by considering the law of praedial servitudes. Compared to servitudes, real burdens are relative newcomers. Long before land and buildings came to be regulated by real burdens they were being regulated by servitudes,<sup>30</sup> and servitudes remain of the first importance today. Servitudes come from Roman law, and are found, not only in the legal systems most directly influenced by that law (such as the systems of Continental Europe), but also in common law countries such as England, the United States, Canada, and Australia.<sup>31</sup> Servitudes have no connection of any kind with the feudal system, and will be completely unaffected by that system's abolition.

1.18 It is worth saying a little more about servitudes. Apart from real burdens, servitudes are the main method provided by private law for the regulation of land.<sup>32</sup> Servitudes correspond almost exactly to neighbour burdens. In a servitude, as in a neighbour burden, one plot of land (or building) is placed under restrictions for the benefit of another plot of land (or building). But there are two important differences. First, most servitudes (ie positive servitudes) can be created simply by being exercised by the dominant proprietor for the period set by positive prescription, currently twenty years. There is no need for registration or even writing. Secondly, and probably because of this, servitudes are in practice restricted to certain known types, based largely on the types which were recognised

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<sup>28</sup> Paras 1.5-1.8.

<sup>29</sup> The common law equivalent of the real burden is the restrictive covenant.

<sup>30</sup> The first case on servitudes in Morison's Dictionary is *Knockdolian v Tenants of Parthick* (1583) Mor 14540, but no doubt servitudes were in use before then.

<sup>31</sup> In common law countries servitudes tend to be known as "easements".

<sup>32</sup> The other principal mechanism is the law of nuisance, which is a general law and does not depend on the constitution of rights and obligations in particular cases. In general it can be said that nuisance reacts to events as they happen, whereas real burdens and servitudes attempt to regulate behaviour in advance.

under Roman law. In the definitive list assembled by Professor W M Gordon<sup>33</sup> the most important examples are rights of way, rights to lead water and other pipes, rights to draw water, rights to pasture cattle, and restrictions on building. The existence of this immutable list was one of the main reasons why the response to urbanisation was the invention of real burdens. Servitudes were felt inadequate for the task.<sup>34</sup> By contrast, in Continental Europe the response was generally to depart from the Roman list and to develop the law of servitudes instead.

### Three types of obligation

1.19 In practice there are three main types of obligation which, in principle at least, are capable of being constituted either as a real burden or as a servitude. These are:

- (i) an obligation on the servient proprietor to do something, such as build a wall, or maintain a building;
- (ii) an obligation on the servient proprietor not to do something, such as build on the land, or use a building as retail premises or for the sale of alcohol; and
- (iii) an obligation to allow the dominant proprietor to make some use of the servient tenement, such as walk or drive over part of it, or run a pipe through it.

Type (i) is a positive or affirmative obligation. Type (ii) is a restriction. Type (iii) is a passive obligation not to interfere while the dominant proprietor exercises some limited possessory right. Obligations of types (ii) and (iii) are capable of being constituted as servitudes. Where this is done a type (ii) obligation is called a "negative" servitude, and a type (iii) obligation a "positive" servitude. Obligations of types (i) and (ii) can be constituted as real burdens, and, arguably, type (iii) obligations also, although this is almost never done in practice.<sup>35</sup> The characteristic real burden is a type (ii) obligation, while the characteristic servitude is a type (iii) obligation. But there is a substantial, and obvious, overlap between type (ii) real burdens and negative servitudes, and later we make the preliminary proposal that negative servitudes should be replaced altogether by real burdens.<sup>36</sup>

### Should servitudes and real burdens be fused?

1.20 As we have seen, servitudes and real burdens are close, and sometimes overlapping, categories. A preliminary issue is whether they should continue to exist as separate categories. With the abolition of the feudal system there is removed the one type of real burden (the feudal burden) which is strongly inimical to servitudes. It would be an entirely feasible project to unite the remaining types of burden (neighbour and community burdens) with servitudes. In the United States the American Law Institute has been engaged for a number of years on the task of producing a restatement of the law of servitudes, which is intended to encompass (in Scottish parlance) both real burdens and servitudes.<sup>37</sup> However,

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<sup>33</sup> Gordon, *Scottish Land Law* paras 24-22 and 24-23.

<sup>34</sup> Reid, *Property* para 381.

<sup>35</sup> The position of type (iii) real burdens is discussed further at paras 7.66 and 7.67.

<sup>36</sup> Paras 2.42-2.50.

<sup>37</sup> American Law Institute, *Restatement (Servitudes)*. For the background to this enterprise, and for the arguments for and against fusion, see the symposium published at (1982) 55 Southern California Law Review 1177 ff. Of particular interest are the articles by Susan F French, Uriel Reichman, Curtis J Berger, Carol M Rose and Lawrence Berger. Professor French is the Reporter for the restatement, which is now almost completed.

we do not think that the balance of advantage, in Scotland at least, lies in favour of fusion. Partly, this is because fusion works well only for neighbour burdens, for, although there can sometimes be networks of reciprocal servitudes, there is little common ground between community burdens and servitudes. But more especially it is because of the distinctive rule that positive servitudes may be constituted by prescription, and without registration. Proper fusion would mean either the abandonment of a rule which works well in practice, or the extension of the rule to real burdens, which could hardly be justified. An approach which seems more promising than fusion would be to reduce the overlap between servitudes and real burdens by abolishing the category of negative servitudes. Type (iii) obligations would then require to be created under the rules of servitudes,<sup>38</sup> while obligations of types (i) and (ii) would be created under the more rigorous rules which apply to real burdens. We return to this subject in part 2.<sup>39</sup>

### The case for reform

1.21 The abolition of the feudal system will, at a stroke, extinguish one of the three types of real burden. At the very least, some consequential alterations in the law of real burdens will be required to accommodate this major change.<sup>40</sup> The question is whether further reform is also required. In our discussion paper on the abolition of the feudal system<sup>41</sup> we suggested a number of other possible reforms, often of a minor nature, but including a reform of the rules of title to enforce. Further work and reflection, coupled with the views of some of our consultees, have led us to the view both that fundamental reform of the law is required and also that such a fundamental reform cannot be carried out merely as an appendage to the abolition of the feudal system. A separate exercise is required, of which this discussion paper is the first stage.<sup>42</sup>

1.22 The abolition, with feudalism, of one type of burden raises the question of whether the other types of burden deserve to survive. Restrictions on ownership require to be justified. What are the justifications for community burdens and for neighbour burdens? This important issue is the subject of part 2 of this paper, where we reach the provisional conclusion that real burdens, and in particular community burdens, serve a number of important functions and could not easily be discarded.

1.23 If real burdens are to survive then, in our view, the law requires to be clarified and simplified. The existing law is based on the decision of the House of Lords in *Tailors of Aberdeen v Coutts* in 1840<sup>43</sup> and on subsequent case law. *Tailors of Aberdeen* was in many respects a confused and confusing case,<sup>44</sup> and the confusion left its mark on the later cases. The position was made worse by an absence of juristic writing and analysis. Today the law remains, in many respects, unclear or unwise, and hence subject to inefficiently high

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<sup>38</sup> Later we discuss whether type (iii) obligations should also be capable of being constituted as real burdens. See paras 7.66 and 7.67.

<sup>39</sup> Paras 2.42 ff.

<sup>40</sup> These consequential alterations are included in our forthcoming report on the abolition of the feudal system.

<sup>41</sup> Scot Law Com DP No 93.

<sup>42</sup> This work is being carried out under Item No 6 of our *Fifth Programme of Law Reform* (1997) Scot Law Com No 159.

<sup>43</sup> (1840) 1 Rob 296.

<sup>44</sup> Reid, *Property* paras 384-5.

administrative costs for those who have to use it.<sup>45</sup> Particular subjects of difficulty are explored later on in this paper, but three deserve mention even at this early stage.

1.24 **(1) Identification of the dominant tenement.** Real burdens are registered under the search or title sheet of the servient tenement. The identity of the servient tenement is therefore always clear from the registers, and a purchaser of property which is subject to real burdens has proper notice of their existence. This is satisfactory as far as it goes. However, since there is usually no equivalent registration under the search or title sheet of the dominant tenement, a person coming to acquire that property will often not know that he is the creditor in a real burden. On this matter the servient proprietor may be no better informed: rights to enforce real burdens can arise by implication and the deed creating the real burdens is often silent on the question of title to enforce. The end result is odd and unsatisfactory. Often the only person who knows of the existence of burdens is the person who is bound to comply with them. The person with enforcement rights may be wholly ignorant of those rights. This means that in practice real burdens are often unenforced, and that compliance becomes a matter for the conscience of the servient proprietor. The main incentive for complying may be no more than the prospect of awkward questions by potential purchasers when the property comes ultimately to be sold.

1.25 A related difficulty concerns minutes of waiver. A servient proprietor cannot obtain a waiver of a real burden unless he knows the identity of the dominant proprietor or proprietors. All too often he does not know their identity and either fails to obtain a waiver, or obtains a waiver from the wrong person.<sup>46</sup>

1.26 Ironically, the only type of burden which is exempt from these problems is the feudal burden. The dominant proprietor in a feudal burden is always the superior, and a superior always knows that he has rights to enforce burdens.<sup>47</sup> Hence the abolition of feudal burdens brings the existing problems into sharper focus. In our view an effective system of real burdens requires that there should be no doubt as to the identity of the dominant proprietor.<sup>48</sup>

1.27 **(2) Burdens for management and maintenance.** Real burdens (particularly community burdens) are often used as a mechanism for the management and maintenance of common facilities such as the common parts of a tenement building, or a shared water or drainage system, or recreational and leisure facilities. But there are doubts as to whether real burdens are up to the task. For example, there is case law to the effect that an obligation to contribute to the cost of maintenance cannot be constituted as a real burden.<sup>49</sup> Likewise there are serious doubts as to whether rules about management and decision-making are proper subjects for real burdens.<sup>50</sup> It seems self-evident that these doubts and difficulties need to be resolved.<sup>51</sup>

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<sup>45</sup> For the high administrative costs of restrictive covenants in the USA, see Robert C Ellickson, "Alternatives to zoning: covenants, nuisance rules, and fines as land use controls" (1973) 40 U of Chicago Law Rev 681 esp at pp 716-7.

<sup>46</sup> Para 3.2.

<sup>47</sup> Traditionally superiors kept chartularies containing copies of all the feudal grants made out of the estate. Hence the superior is often not dependent on the registers for his information.

<sup>48</sup> We return to this issue at paras 3.2, 3.36 ff, and 7.4.

<sup>49</sup> Reid, *Property* para 418(4).

<sup>50</sup> Reid, *Property* para 391.

<sup>51</sup> See further paras 7.20-7.24, and 7.49-7.54.

1.28 **(3) Obsolete burdens.** Real burdens can date quickly. Scotland has allowed the use of real burdens for 200 years. Unsurprisingly, many of the older burdens are now badly out of date, so that property is being restricted for no useful purpose. The scale of the problem is substantial, because there are relatively few properties which are completely free of burdens.<sup>52</sup> Under the current law there is no easy way of removing obsolete burdens. Burdens require to be dealt with on an individual basis, and cannot normally be discharged without initiative and expense on the part of the servient proprietor. Stronger measures seem required. One possibility would be to abolish all burdens which depend on implied enforcement rights.<sup>53</sup> Another would be to introduce a "sunset rule", by which a burden would cease to bind after a certain number of years (such as 100).<sup>54</sup> In both cases exceptions would doubtless be necessary.

1.29 A related issue is ease of extinction. Even where a burden is not spent, there may be good reasons for allowing the person affected by it to obtain its discharge. The position here was much improved by the introduction, in 1970, of a right to apply to the Lands Tribunal for the variation or discharge of burdens.<sup>55</sup> But more can and should be done. If real burdens are to be allowed to continue into the next century it should be on the basis that they can be readily, and cheaply, discharged.<sup>56</sup>

### **Restricting the length of leases**

1.30 The abolition of the feudal system and the reform of real burdens may be met by attempts to create feudal burdens by other means. An obvious device for this purpose is the ultra-long lease. Later in this paper we conclude that a cap should be imposed on the length of leases, and invite views as to what the appropriate period should be.<sup>57</sup>

### **Pre-consultation seminar**

1.31 On 24 June 1998 we held a pre-consultation seminar, in association with the University of Edinburgh, which considered some of the main issues raised by this paper. The seminar was attended by members of the legal profession and by a number of other

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<sup>52</sup> For this reason there developed the rule that a purchaser has no remedy against the seller merely because the house or land is subject to real burdens (and servitudes). The seller is in breach of his contract only where the burdens are "unusual" ones. See *Whyte v Lee* (1879) 6 R 699, and *Smith v Soeder* (1895) 23 R 60.

<sup>53</sup> See paras 3.31-3.55.

<sup>54</sup> See paras 5.63 ff.

<sup>55</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 Part I.

<sup>56</sup> See Parts 5 and 6.

<sup>57</sup> Paras 9.1 - 9.5.

interested persons. We learnt much, both from the papers which were presented<sup>58</sup> and from the discussion which followed, and we are grateful to all those who took part.

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<sup>58</sup> The following papers were presented: Professor Robert Rennie (University of Glasgow), "A reaction to the Scottish Law Commission's proposals"; Professor Kevin Gray (University of Cambridge), "What should be done with existing real burdens?"; and Professor Gregory Alexander (Universities of Cornell and Harvard), "The publicness of private land use controls". The Commission's proposals were introduced by Professor Kenneth Reid (University of Edinburgh and Scottish Law Commission).

## PART 2 ABOLITION OR RESTRICTION?

### Background

2.1 Under the present law there may be said to be three types of real burden which, in Part 1 of this paper, we characterised as neighbour burdens, community burdens and feudal burdens.<sup>1</sup> If our forthcoming recommendations on the abolition of the feudal system are accepted, the last of these will disappear, and it seems appropriate that we should now go on to review the role of real burdens as a whole. Restrictions on ownership require to be justified;<sup>2</sup> and it may be that restrictions conceived in the private interest require to be justified more carefully than restrictions in the public interest. In this part of the discussion paper we consider the fundamental question of whether community burdens and neighbour burdens can be justified.

### Community burdens

2.2 In towns and cities people often live or do business in premises which form part of some larger community. Examples of such communities are blocks of flats (whether in residential or in business use), sheltered housing complexes, and housing estates. Usually a community involves the pooling of facilities. In a block of flats or tenement the individual flat owners all share the benefit of the roof, the external walls, the rhones and down pipes, and so on. In housing estates there may be shared roads, gardens, parking areas and recreational facilities. In sheltered housing there is a pooling, not only of facilities but also of services, in particular the services of a warden.

2.3 Common facilities require common regulation. Some provision must be made for maintenance. Rules may also be required about use. As one commentator has observed:<sup>3</sup>

"The nature of modern housing developments has virtually dictated the establishment of residential private governments. Commonly-owned facilities need management, ongoing financing and permanent regulation. Without them, such projects could easily fall into decay. Furthermore, the character of the new developments required the provision of certain services (such as complex indoor services in a multi-unit apartment house) that local governments furnish inadequately, if at all."

The puzzle is how all of this is to be achieved. Regulation by ordinary contract will not do, because a contract binds only the parties to it, and over time, with changes in ownership, the membership of the community will change. A new owner is not bound by a contract entered into by his predecessor. What is needed is some mechanism by which the regulation can be made to affect successors. A person must be bound, not as an individual,

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<sup>1</sup> Paras 1.5-1.7.

<sup>2</sup> See eg Uriel Reichman, "Towards a Unified Concept of Servitudes" (1982) 55 S Californian Law Rev 1177 esp at p 1233, Richard A Epstein, "Notice and Freedom of Contract in the Law of Servitudes" (1982) 55 S Californian Law Rev 1353 esp at p 1359, and Carol M Rose, "Servitudes, security and assent: some comments on Professors French and Reichman" (1982) 55 S Californian Law Rev 1403 at p 1403.

<sup>3</sup> Uriel Reichman, "Residential Private Governments: An Introductory Survey" (1976) 43 Univ of Chicago Law Rev 253 at p 260.

but in his capacity as a member of the community, so that those entering the community are bound in place of those who have left it.

2.4 The solution to this difficulty need not of course lie in the law of real burdens. Many legal systems provide a special statutory regime for blocks of flats, and quite often this regime, or a variant of it, is available for housing estates also.<sup>4</sup> Another approach is to provide a set of model management rules as part of the law of common property.<sup>5</sup> Or again long leases can be used to achieve much the same result<sup>6</sup> although, in Scotland at least, it would seem a retrograde step to move from owner occupation to renting. Recently we recommended the introduction of a special statutory regime for tenements.<sup>7</sup> This seemed necessary because tenements as a building form pre-date real burdens and there are many tenements where the title fails to make adequate provision for management and maintenance. The problem, in other words, was not of too many real burdens but of too few. The same problem does not, on the whole, affect other examples of community living, most of which are developments of the modern period.

2.5 In Scotland the solution adopted for the regulation of communities has been the community real burden. Much the same approach is found throughout the common law world, including England and Wales,<sup>8</sup> the United States, Canada, Australia and New Zealand.<sup>9</sup> Through community burdens it is possible to provide a set of rules for the management and maintenance of shared facilities; and despite some technical, although not insoluble, difficulties,<sup>10</sup> such burdens seem to work well in practice. For this reason our recent proposals for the law of the tenement would preserve all existing community burdens and apply the new statutory regime only to the extent that management and maintenance is not otherwise provided for.<sup>11</sup> In the present discussion paper it would of course be possible to propose the abolition of all community burdens and their replacement by a series of special statutory regimes for particular types of community. Such regimes would work perfectly well in practice, as they have in some other countries. But it is difficult to see what would be gained. As our experience with the law of the tenement shows, the development of special statutory schemes is a troublesome and time-consuming business. It should be a last resort and not a first, to be used only where the existing law has failed. In Scotland the existing law has not failed.

2.6 Thus far we have concentrated on the use of burdens to regulate shared facilities. But burdens may also be used to regulate the individual units themselves. A striking example comes from sheltered housing where, standardly, a real burden prohibits the occupation of any unit by a person who is under a certain age (such as 65). The idea is to prevent the use of sheltered units by young people who would not wish to pay for the level

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<sup>4</sup> See generally C G van der Merwe, *Apartment Ownership* (1994) (being vol VI, chapter 5 of the *International Encyclopedia of Comparative Law*). We consider at paras 7.85 ff whether this idea could be used in Scotland.

<sup>5</sup> As is done for example in Germany. See BGB arts 744-6 and 1010.

<sup>6</sup> As, often, in England and Wales.

<sup>7</sup> Scot Law Com No 162.

<sup>8</sup> Gray, *Elements* pp 1159 ff.

<sup>9</sup> The decision in *Elliston v Reacher* [1908] 2 Ch 374 has been influential in a number of these jurisdictions. The United States goes further still by, in certain cases, *implying* covenants for communities where none have been provided in the titles. See Lawrence Berger, "A Policy Analysis of Promises Respecting the Use of Land" (1970) 55 *Minnesota Law Rev* 167 at pp 197 ff, and American Law Institute, *Restatement (Servitudes)* TD No 1, s 2.14. The equivalent of real burdens is also used in some of the mixed legal systems, such as Louisiana (see *Louisiana Civil Code* arts 775-83) and South Africa (see Silberberg & Schoeman, *Property*, chap 18).

<sup>10</sup> See further paras 7.20-7.24 and 7.49-7.54. For consideration of a model management scheme, see paras 7.85 ff.

<sup>11</sup> Scot Law Com No 162, para 3.8.

of service (and in particular for the provision of a warden) found in sheltered housing. If even a small number of units were to be occupied by young people, the entire development would be de-stabilised and at risk. Tenements and housing estates exhibit more prosaic examples of regulation of the individual units, such as a prohibition on use for commercial purposes, or a prohibition on building in the front garden. Restrictions of this kind seem unexceptionable.<sup>12</sup> By contrast with neighbour and with feudal burdens, community burdens are both universal and reciprocal. All units are subject to them, and the owners of all units have a right of enforcement. The restrictions are conceived for the benefit of the community as a whole, in acknowledgement of the fact that when people live closely together the conduct of one can have a serious effect on the amenity of the others. Admittedly the degree of regulation can sometimes seem overdone. For example, it is not clear what is to be gained by restricting the number of pets which can be kept, or by prohibiting the parking of certain kinds of vehicles. But such matters seem best left to market forces. It can be assumed that volume builders have no personal views about the lifestyle of the purchasers of their houses.<sup>13</sup> Once a housing estate is sold off their interest is at an end.<sup>14</sup> Community burdens are used because they sell houses,<sup>15</sup> and if they acted as a barrier to sale they would not be used.<sup>16</sup> Later we consider methods of discharging burdens which turn out to be inappropriate.<sup>17</sup>

2.7 In summary we conclude that community burdens have, and will continue to have, a vital role to play in the regulation of tenements, housing estates, and other communities. Accordingly we propose that:

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

### **Definition of "community burden"**

2.8 Not all "communities" are in towns and cities. Nor need a community be large. The essence of a community burden is uniformity and reciprocity. All units must be subject to

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<sup>12</sup> But a restriction which is contrary to public policy will not be enforced: see paras 7.55 ff.

<sup>13</sup> It was not always so. The prohibition on the sale of alcohol litigated in *Earl of Zetland v Hislop* (1882) 9 R(HL) 40 was imposed because of the superior's views on temperance and social reform.

<sup>14</sup> Except that some builders might regard the state of one of "their" estates as reflecting on their commercial reputation.

<sup>15</sup> See *Lothian Regional Council v George Wimpey & Co Ltd* 1985 SLT (Lands Tr) 2 at p 3: "It was .. on the faith of this and other conditions contained in the deed of conditions that local house owners within the estate have bought their houses. The deed of conditions thus constitutes a contractual law of the local neighbourhood preventing certain changes of use which, as here, do not even require planning permission."

<sup>16</sup> See Robert C Ellickson, "Alternatives to Zoning: Covenants, Nuisance rules, and Fines as Land Use Controls" (1973) 40 Univ of Chicago Law Rev 681 at pp 713f: "[W]hen a developer drafts covenants that will bind people who move into his subdivision, market forces prompt him to draft efficient ones. Covenants will enhance the developer's profit only if they increase his land values by more than the cost of imposing them ... . The developer will suggest ... only those covenants that provide each purchaser with a reduction of nuisance costs greater than the purchaser's loss in flexibility plus his enforcement cost plus a pro rata share of the developer's administrative costs. Not all conflicts between neighbors can be solved by covenants, but covenants generated by market forces will tend to promote efficiency." And see also Allison Dunham, "Promises respecting the use of land" (1965) 8 J of Law and Economics 133 at pp 138-9, and Gray, *Elements* p 1124.

<sup>17</sup> See generally part 5.

the same (or equivalent)<sup>18</sup> burdens, and all must carry enforcement rights. Hence in theory a "community" might consist of no more than two units.<sup>19</sup>

## Neighbour burdens

2.9 For much of the rest of this part we are concerned only with neighbour burdens, that is to say, with burdens where the obligations imposed on the servient tenement are not matched by equivalent burdens imposed on the (neighbouring) dominant tenement. The essential characteristic of a neighbour burden is that it is non-reciprocal, or "one-way". Earlier we concluded that community burdens were necessary and should continue to form part of our legal system. The case for neighbour burdens seems less self-evidently strong, and there are arguments to be made on both sides.

### Some arguments against neighbour burdens

2.10 **(1) Too long-lasting.** In principle real burdens last for ever, so that the future is controlled by the past.<sup>20</sup> Naturally, burdens can date quite rapidly, and land which is subject to obsolete burdens may cease to be capable of proper use. Economic efficiency requires that a scarce resource should not be sterilised in this way.

2.11 **(2) Too autocratic.** To allow neighbour burdens is to continue the feudal system by other means. The dominant proprietor has rights without corresponding obligations. The very language of the law ("dominant" and "servient" tenements) exposes the true nature of the relationship. The interests of one piece of property ought not to be subordinated in perpetuity to the interests of another.

2.12 **(3) Too open to abuse.** The dominant proprietor may abuse his position by refusing to waive a burden that serves no useful purpose, or by agreeing to waive it only against payment of a substantial sum of money. In practice even quite innocuous activities can be prohibited by burdens and may only be able to proceed if payment is made. Minor alterations to a building are a standard example. A subsequent alteration might then require a further payment. The likelihood of abuse increases as conditions become progressively out of date so that, for the dominant proprietor, burdens may evolve from being a source of protection for his property to being a source of profit for his pocket.

2.13 **(4) Unnecessary.** At the time when real burdens first came to be used, the regulation of land by public law was in its infancy. Today the position is transformed. Against a background of developed laws on planning, building and the environment, there may no longer be a proper role for the private regulation of land through real burdens. We return to this important subject later.<sup>21</sup>

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<sup>18</sup> Some idea of the possible range of equivalence will be found in *Lees v North East Fife District Council* 1987 SLT 769.

<sup>19</sup> A more refined definition will be necessary at the next stage of the reform process. One obvious danger is of attempts to circumvent restrictions on neighbour burdens by the creation of community burdens in which the restrictions on one property are spurious and notional and hence not properly equivalent to the restrictions on the other property. Alternatively, the restrictions may affect only a very small part of the dominant tenement.

<sup>20</sup> Stewart Sterk, "Freedom from freedom of contract: the enduring value of servitude restrictions" (1985) 70 Iowa Law Rev 615 at pp 634 ff.

<sup>21</sup> Paras 2.21 ff..

## Some arguments in favour of neighbour burdens

2.14 **(1) Distinctiveness of private interests.** The extent to which public law can take over from private law has tended to be exaggerated.<sup>22</sup> But even where the same activity is restrained both by planning law and also by a real burden, it seems plain that the private interest is distinct from the public.<sup>23</sup> The public interest in having multi-storey office accommodation in a particular locality may be opposed by a private interest in not having it as the building next door. As a member of the public I may approve of multi-storey offices in general, but as the owner of a house I may not want such an office to dwarf my garden and block out my sunlight.<sup>24</sup> The distinction between private and public interest has been recognised by the Lands Tribunal, which for the most part listens to arguments founded on private interest.<sup>25</sup>

2.15 This is part of a wider point. In order to qualify as a real burden, a condition must enure for the benefit of the dominant tenement. The law requires that a condition be "praedial" in character.<sup>26</sup> But in this rule of praedial benefit there is a formal acknowledgement of the distinctiveness of private interest. Other legal systems have similar rules. In Anglo-American systems a restrictive covenant must "touch and concern" the dominant tenement. In French law a servitude must be "pour l'usage et l'utilité d'un héritage".<sup>27</sup> And the German Civil Code provides that "eine Grunddienstbarkeit kann nur in einer Belastung bestehen, die für die Benutzung des Grundstücks des Berechtigten Vorteil bietet".<sup>28</sup> In practice praedial benefit tends to mean protection of amenity, and hence of value. For a restriction on plot A will benefit its neighbour, plot B. If, for example, nothing can be built on a part of plot A, this will protect the light and the outlook for plot B; or if commercial use is excluded in a residential area, there will be a benefit to overall amenity.

2.16 **(2) Certainty.** The first argument takes matters only so far. Even if private interest has a distinctive existence it does not follow that it merits special protection. Other arguments must also be found. Probably the most important defence of real burdens is that they promote certainty, and hence the efficient utilisation of property.<sup>29</sup> By comparison with public law controls, which may alter over time, and which in practice may not be enforced, real burdens offer a set of clear rules which can be privately enforced. As a result the owners of both tenements know where they are. The owner of the servient tenement knows - and knew in advance of finalising the purchase - that various restrictions affect his property. And the owner of the dominant tenement can rely on these restrictions and invest in his own property accordingly. On this view, real burdens are justified

"because they provide a long lasting security for land development and encourage property owners to invest in the long term improvements that are essential to the productive use of real estate .. [I]f the community wants to encourage my neighbor to

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<sup>22</sup> Paras 2.22 ff.

<sup>23</sup> This point was commented on by the Halliday Committee at para 180.

<sup>24</sup> The private interest would be given effect to here by the servitude *non aedificandi*. Our researches have not disclosed any country in which this servitude is not recognised.

<sup>25</sup> *T & I Consultants v Cullion* 1998 Hous L R 9.

<sup>26</sup> Reid, *Property* para 391. See further paras 7.42 ff.

<sup>27</sup> Code Civil, art 637.

<sup>28</sup> BGB, art 1019.

<sup>29</sup> Allison Dunham. "Property, city planning, and liberty" (in Charles M Haar (ed) *Law and Land: Anglo-American Planning Practice* (1964) p 28 esp at pp 38 ff).

invest time and effort in a solar heating panel, it had better let him agree with me that I *and my successors* will keep my trees from overshadowing his roof."<sup>30</sup>

The issue of "successors" is of course a crucial one. Making a contract with my neighbour is not enough. He may sell his property tomorrow, and the new owner would then be free of the restriction. In neighbourhood law, certainty requires that restrictions be capable of running with the land.<sup>31</sup>

2.17 In practice, neighbour burdens are created mainly on sale or on gift.<sup>32</sup> Typically what happens is that A sells or gives part of his property to B, imposing burdens on the part acquired by B for the benefit of the part retained by A. Without the possibility of burdens the sale or gift might not take place at all. A philanthropist giving land for the building of a hospital, or selling it at a discount, may be unwilling to part with the land if he does not have assurances as to its future use. Similarly, an owner is less likely to make part of his garden available as a building plot unless he can have some control over the type and density of development; and his view of what is suitable development may not coincide with the views of the planning authority.<sup>33</sup> Of course, even without burdens, a person might still be willing to sell, but he might only do so at a higher price.

2.18 **(3) Proximity and vulnerability.** Proximity leads to vulnerability. The conduct of a thoughtless or unreasonable neighbour can affect the enjoyment - and the value - of one's own property. The protection of property, and of property values, are legitimate social goals both of which are promoted by real burdens.

2.19 **(4) Cost.** Private law regulation is unobjectionable in principle and cheap in practice. A great deal of private law is about regulation in one form or another; and real burdens are not intrinsically more objectionable than, say, contracts or real rights. Further, compared with public law regulation, real burdens have the inestimable advantage of being cheap. Real burdens are easily created, and are enforced privately, by those with the most interest to do so and without cost to the public purse.

2.20 **(5) Better than the alternative.** If real burdens did not exist, they would require to be invented; and if they are abolished, some other legal device would be adapted to serve the same ends. But any alternative is likely to be worse. It will be less transparent. It will be less obvious to a purchaser. And it will be speculative and controversial, and promote uncertainty and litigation. Possibilities spring readily to mind. Land might be given in long lease instead of being sold outright, as often happens in England in the case of flats.<sup>34</sup> Or contractual conditions may be made to run with the land by being coupled with a (contractual) right of pre-emption, or with an obligation on the purchaser to impose

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<sup>30</sup> Carol M Rose, "Servitudes, Security, and Assent: Some Comments on Professors French and Reichman" (1982) 55 S California Law Rev 1403 at p 1403. And see also Uriel Reichman, "Toward a Unified Concept of Servitudes" (1982) 55 S California Law Rev 1177 at p 1232.

<sup>31</sup> See further on this topic, Richard A Posner, *Economic Analysis of Law* (5th edn, 1998) pp 73-4.

<sup>32</sup> However, they may arise by agreement between two neighbours, given effect to by a deed of conditions.

<sup>33</sup> *Smith v Strathkelvin District Council* 1997 SC 98.

<sup>34</sup> This could not be done for leases of residential property: see Land Tenure Reform (Scotland) Act 1974 s 8.

identical conditions on the next owner, perhaps secured by a standard security.<sup>35</sup> A move towards alternative devices can also be attacked on economic grounds:

"[T]hese alternative devices impose restrictions that are far more intrusive than simple servitudes,<sup>36</sup> which essentially make clear the permitted uses of the land. The scope of the alternative restrictions renders them less desirable from an economic point of view than the more tailored restrictions that a robust law of servitudes can foster. Who will develop land if he knows that he is in peril of losing his gain? How does one value an option to repurchase or determine the time period for rights of first refusal?"<sup>37</sup>

## The impact of planning law

2.21 In Scotland, as elsewhere, planning law has come to provide an alternative, and often highly effective, means of regulating land and buildings. And as a creature of statute, exercised in the public interest through the democratic process, planning law has a degree of legitimacy which, in the view of some, may elude real burdens. Broadly speaking, planning law regulates building operations and other kinds of work, and also major changes of use.<sup>38</sup> A person who wants to build a new house, or a factory, cannot proceed without first obtaining planning permission; and the same is true if he wants to convert an existing house into a cafeteria or restaurant.<sup>39</sup> These important, and far-reaching, restrictions prompt the argument that if land is already regulated once, by planning law, there is no need for it to be regulated a second time, by real burdens. On this view, double regulation is over-regulation, and regulation in the private interest should now give way to regulation in the public interest. In short, it can be argued that planning law has made real burdens unnecessary. However, there are a number of grounds for supposing that this may not be the case.<sup>40</sup>

2.22 First, unlike planning law, the role of real burdens is not limited to restrictions on use. For real burdens may also impose positive obligations (including maintenance obligations) or allow the exercise of limited possessory rights.<sup>41</sup> Those aspects of real burdens are not replicated by planning law, although positive obligations can be imposed as planning conditions and in s 75 agreements.<sup>42</sup>

2.23 Secondly, even in the area of restrictions, planning law falls far short of the degree of regulation which might be provided by real burdens.<sup>43</sup> Rules of universal application are

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<sup>35</sup> Although it cannot be used directly to secure restrictions, a standard security can be used to secure obligations *ad factum praestandum* such as an obligation to impose identical conditions on a future owner. See Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(c).

<sup>36</sup> By "servitudes" is meant, in Scottish terms, real burdens.

<sup>37</sup> Richard A Epstein, "Notice and Freedom of Contract in the Law of Servitudes" (1982) 55 S California Law Rev 1353 at pp 1363-4.

<sup>38</sup> Town and Country Planning (Scotland) Act 1997 s 28(1) requires planning permission for cases of "development" (which is defined in s 26).

<sup>39</sup> That would be a change of use classes (from class 9 to class 3). See Town and Country Planning (Use Classes) (Scotland) Order 1997 (SI 1997/3061).

<sup>40</sup> A further ground was mentioned in para 2.14.

<sup>41</sup> Para 1.19.

<sup>42</sup> ie agreements made with the planning authority under s 75 of the Town and Country Planning (Scotland) Act 1997.

<sup>43</sup> *Bachoo v George Wimpey & Co Ltd* 1977 SLT (Lands Tr) 2 at p 3: "It will be seen that many of these detailed controls regulating local amenity fall outwith the ambit of public planning control which is, in any event, sometimes difficult for a local planning authority to enforce or police. For this reason similar conditions are often imposed by land obligation or leasehold condition in new town schemes or council estates."

bound to be general in nature.<sup>44</sup> By contrast, real burdens can be specially written for each separate property and be used to achieve precise and appropriate regulation.

2.24 Thirdly, the standards imposed by planning law are likely to be different<sup>45</sup> from, and probably lower than, those imposed by real burdens.<sup>46</sup> An Australian commentator puts it this way:<sup>47</sup>

"The landowner is concerned not merely to limit the use of the neighbouring property to compatible uses but has an interest in ensuring that the type of use is of a standard that will not reflect unfavourably upon the value of the land. For example, the erection of sub-standard housing on neighbouring properties can impact upon the value of any housing estate neighbouring that development. This detail is not well dealt with in the generalised concepts inherent in town plans ... Although policies, bylaws and legislation relevant to building, roads and services will impact upon development techniques, construction standards, the size of allotments, and the level of services such as sewerage, roads and drainage, for example, this will not provide sufficient control of the standard of housing including aesthetic appeal, the quality of finish and size."

At our seminar the same point was made forcefully by Professor Kevin Gray.

2.25 Fourthly, as the Law Commission has noted in relation to England and Wales, "certain changes of use and building operations to which an adjoining resident might reasonably and justifiably object do not require planning permission at all".<sup>48</sup> For example, and depending on size, individual planning permission may not be required for extensions to dwellinghouses or for garages and other outbuildings.<sup>49</sup> Individual planning permission is not required for the planting of trees<sup>50</sup> or for replacing a garden with a concrete surface.<sup>51</sup> The same is true for a change of use from an insurance brokers to a launderette,<sup>52</sup> or from a family dwellinghouse to a small nursing home.<sup>53</sup> These gaps in the law could not be closed without major resource implications for the planning authorities, and some of the matters with which they are concerned are not in any case suitable for public regulation.

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<sup>44</sup> M J Weir, "Private and Public Planning - Implications for Legal Processes" (1994) 11 Environmental and Planning Law Journal 137 at 141.

<sup>45</sup> One important reason for this is the difference between public and private interest: see para 2.14.

<sup>46</sup> This point is emphasised by the Law Commission in relation to England and Wales: see Law Com No 127, para 2.5. The same point was made in the parliamentary debates on the Conveyancing and Feudal Reform (Scotland) Act 1970. For example: "Then there is the fallacy, and fallacy it is ... that we can abolish the feudal system and do without what has been described in the debate as an element of private planning control. It is tempting to say that we now live in an era of sophisticated planning procedures and we can leave it to the local planning authority to look after amenity. It seems to me, however, that there is a basic and important difference between the private contract, the private agreement between people living in an area when they buy their houses and the houses are erected, and the criteria and standards which are right for a public authority to enforce." (Hansard, Standing Committees 1969-70, vol VI cols 47-8.)

<sup>47</sup> M J Weir, "Private and Public Planning - Implications for Legal Processes" (1994) 11 Environmental and Planning Law Journal 137 at 141.

<sup>48</sup> Law Com No 127, para 2.5.

<sup>49</sup> Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223) Art 3, Sched 1, part 1, classes 1 and 3. (Art 3 is amended by SI 1992/2084, 1993/1036, 1994/3294 and 1997/1871, and classes 1 and 3 are amended by SI 1994/3294.)

<sup>50</sup> Town and Country Planning (Scotland) Act 1997 s 26(2)(e).

<sup>51</sup> Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223) Art 3, Sched 1, part 1, class 4. (Art 3 is amended by SI 1992/2084, 1993/1036, 1994/3294 and 1997/1871.)

<sup>52</sup> Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223) Art 3, Sched 1, part 3, class 10. (Art 3 is amended by SI 1992/2084, 1993/1036, 1994/3294 and 1997/1871.)

<sup>53</sup> Both uses fall within use class 9: see Town and Country Planning (Use Classes) (Scotland) Order 1997 (SI 1997/3061).

2.26 Fifthly, the enforcement of planning law depends on the resources available to the planning authorities. If resources are limited, enforcement is likely to be patchy. By contrast, with real burdens enforcement is in the hands of those who are most likely to know of, and be affected by, the breach.

2.27 If planning law were really a full and adequate replacement for real burdens, then it might be expected that the use of such burdens would have died out after 1 July 1948, when the modern planning regime was introduced. In fact almost the reverse seems to have occurred. Today it would be very unusual for a subdivision of land not to be accompanied by the imposition of real burdens. Of course this is not to deny the impact, and the importance, of planning law. In the United States it has been noted that the modern tendency is for *both* public and private regulation to become more important:<sup>54</sup>

"The 20th century has seen dramatic increases in the use of servitudes<sup>55</sup> as the amount of land devoted to urban and suburban uses has increased. Demands for amenities and control of the environment drove the adoption and widespread acceptance of both public and private land use devices unthinkable in the 19th century. Zoning, subdivision controls, and environmental legislation became commonplace in the public sector; mandatory property owner associations, privately financed utilities, security, maintenance, and amenities, use controls, design controls, and conservation servitudes became commonplace in the private sector."

Planning law has made real burdens of a certain type less necessary, or perhaps even unnecessary. But it is not a replacement for the system of neighbour burdens and does not, by itself, make the case for their abolition.<sup>56</sup>

### The experience of other countries

2.28 In England and Wales there is a close equivalent to the real burden, known as the restrictive covenant.<sup>57</sup> Restrictive covenants developed at much the same time as real burdens, and for much the same reasons.<sup>58</sup> Subsequently they were exported throughout the common law world, and today, restrictive covenants are to be found in countries such as Australia, New Zealand, Canada, the United States, and Ireland. Mixed legal systems such as South Africa and Louisiana also have restrictive covenants or their equivalent. Like Scotland, all these systems also have servitudes (easements). On continental Europe, neighbour burdens were achieved by the development of an existing device, the servitude, rather than by the invention of a new one. But the results have been much the same. Under German law, servitudes can be used to prohibit the erection of any building or of any building of a particular type, such as a factory.<sup>59</sup> They can also be used to control use, for

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<sup>54</sup> American Law Institute, *Restatement (Servitudes)* TD No 7, s 3.1, p 43.

<sup>55</sup> ie, real burdens.

<sup>56</sup> The conclusion of the Law Commission was the same (see Law Com No 127, paras 2.5 - 2.7), and was subsequently adopted by the Ontario Law Reform Commission (see Ontario LRC, *Convenants* pp 99-100). And see also Law Reform Commission of Western Australia, *Report on Restrictive Covenants* (1997) Project No 91, paras 5.1 - 5.6.

<sup>57</sup> The most important difference is that restrictive covenants cannot be used to impose positive obligations, although the Law Commission has recommended that this be allowed. See Law Com No 127, part IV.

<sup>58</sup> A W B Simpson, *A History of the Land Law* (2nd edn, 1986) pp 256 ff. For the position in Scotland, see para 1.12 above.

<sup>59</sup> *Oberlandesgericht Celle*, 1958 *Neue Juristische Wochenschrift* 1096; *Bayerisches Oberstes Landesgericht* 1965 *Juristen-Zeitung* 645.

example by prohibiting use for business or commerce.<sup>60</sup> Similarly, under French law there can be a prohibition on building,<sup>61</sup> or on use for a commercial purpose (the so-called *clause d'habitation bourgeoise*),<sup>62</sup> or even on running a competing business.<sup>63</sup>

2.29 In recent years law reform bodies in the following common law jurisdictions have reviewed the law of restrictive covenants: England and Wales,<sup>64</sup> Manitoba,<sup>65</sup> New Zealand,<sup>66</sup> Victoria,<sup>67</sup> Ontario,<sup>68</sup> Northern Ireland,<sup>69</sup> New South Wales,<sup>70</sup> California,<sup>71</sup> and Western Australia.<sup>72</sup> None has recommended abolition. Indeed the issue of abolition was fully canvassed only in Western Australia, and on consultation received no support.<sup>73</sup> In England and Wales the Law Commission strongly supported the retention of restrictive covenants.<sup>74</sup> The value of restrictive covenants has been much discussed in the law journals of the United States, and almost always approvingly.<sup>75</sup> Currently the American Law Institute is engaged in the major project of producing a restatement of the law of "servitudes", by which is meant easements and restrictive covenants.<sup>76</sup>

2.30 To say that everyone else has restrictive conditions, and wants to keep them, is not, precisely, an argument in favour of real burdens. Everyone else might be wrong. But the experience of other countries should give pause for reflection.

### Neighbour burdens in long leases

2.31 In Scotland it has always been possible to have the equivalents of real burdens in long leases,<sup>77</sup> but for a long time there was doubt as to whether these could take the form of neighbour burdens. The position was clarified by legislation in 1985,<sup>78</sup> with bipartisan support,<sup>79</sup> and neighbour burdens are permitted. It is not clear that neighbour burdens are less attractive now than they were in 1985.

### Evaluation: neighbour burdens or not?

2.32 We would welcome the views of consultees on the arguments presented in this part of the paper. On the one side, some criticisms made of real burdens (such as potential for

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<sup>60</sup> *Münchener Kommentar zum Bürgerlichen Gesetzbuch* art 1019. In Scotland such controls could only be imposed by means of a real burden.

<sup>61</sup> *Bruxelles*, 5e ch 29 May 1964, 1965 *Journal des tribunaux* 87.

<sup>62</sup> CA Aix, 16 March 1965, 1966 *Juris-classeur périodique* II, 14570.

<sup>63</sup> Cass Com 15 July 1987, 1988 *Recueil Dalloz-Sirey* J 360; Cass Civ 3e 24 March 1993, 1993 *Recueil Dalloz-Sirey* SC 306.

<sup>64</sup> Law Com Nos 11, 127 and 201.

<sup>65</sup> Manitoba Law Reform Commission, *Report on Prescriptive Easements and Profits-à-Prendre* (1982).

<sup>66</sup> Property Law and Equity Reform Committee, *Positive Covenants affecting Land* (1985).

<sup>67</sup> Law Reform Commission of Victoria, *Easements and Covenants* (Discussion Paper No 15) (1989).

<sup>68</sup> Ontario Law Reform Commission, *Report on Covenants affecting Freehold Land* (1989) and *Report on Basic Principles of Land Law* (1996).

<sup>69</sup> Office of Law Reform, *The Final Report of the Land Law Working Group* (1990).

<sup>70</sup> New South Wales Land Titles Office, *Review of the Law of Positive Covenants affecting Freehold Land* (1994).

<sup>71</sup> California Law Revision Commission, *Marketable Title: Enforcement of Land Use Restrictions* (Vol 26, 1996).

<sup>72</sup> Law Reform Commission of Western Australia, *Report on Restrictive Covenants* (Project No 91) (1997).

<sup>73</sup> *Ibid*, para 5.1.

<sup>74</sup> Law Com No 127, paras 2.1 - 2.13.

<sup>75</sup> Some of the leading contributions are quoted from, or cited, in this part of the discussion paper.

<sup>76</sup> American Law Institute, *Restatement (Servitudes)*.

<sup>77</sup> Para 1.14.

<sup>78</sup> Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 3 (inserting new subsections into s 3 of the Registration of Leases (Scotland) Act 1857).

<sup>79</sup> Hansard HC Standing Committees 1984-85, Vol VII, col 92.

abuse)<sup>80</sup> are really criticisms of feudal burdens, and will cease to be valid with the abolition of the feudal system. Other criticisms (such as excessive longevity)<sup>81</sup> could be met by appropriate reform, a subject which is explored further in Part 5. The validity of the criticism of autocracy<sup>82</sup> depends on from the standpoint where the issue is judged. A burden which, viewed from the dominant tenement, seems an essential safeguard of amenity may, when viewed from the servient tenement, seem an intolerable interference with property rights. The truth is that neighbour burdens are at the same time both good and also bad. This is not necessarily an argument against burdens as such, but an argument that the law must strive to ensure a reasonable balance between the interests of the dominant tenement and the interests of the servient.

2.33 Even if abolition were desirable in principle, it would meet with practical objections. A compensation scheme would be needed for loss of rights.<sup>83</sup> Consideration would have to be given to the abolition of negative servitudes, which, although from a different branch of the law, are functionally identical to neighbour burdens.<sup>84</sup> And further resources might have to be made available to planning authorities to ensure a more stringent enforcement of planning law.

2.34 These are negative factors. On the other side, some may feel that the arguments outlined earlier<sup>85</sup> amount to a strong and positive case for the retention of neighbour burdens. That would be our preliminary view. The results of the recent public consultation carried out by the Land Reform Policy Group were broadly supportive of real burdens,<sup>86</sup> and at our seminar the principle of neighbour burdens was strongly supported. Accordingly we suggest that:

**2. It should continue to be competent to create neighbour burdens, and existing neighbour burdens should remain enforceable.**

### **Future restrictions**

2.35 While we conclude that real burdens ought to continue, we do not think that they should continue on their present terms. Both neighbour and community burdens should be subject to durational limits, so that it is no longer possible to burden land in perpetuity.<sup>87</sup> Discharge should be made easier and cheaper.<sup>88</sup> The problem of obsolete burdens should be met by providing for automatic lapse after a period of time.<sup>89</sup> In short, real burdens should be preserved, but also reformed.

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<sup>80</sup> Para 2.12. By contrast to a neighbour, the interest of a superior to enforce real burdens may often be no more than financial. And a neighbour may hesitate to enforce a real burden which depresses the value of the property next door, and hence carries the risk that it may depress the value of his own property also. See Susan F French, "Toward a modern law of servitudes: reweaving the ancient strands" (1982) 55 *S California Law Rev* 1261 at p 1287.

<sup>81</sup> Para 2.10.

<sup>82</sup> Para 2.11.

<sup>83</sup> Law Com No 127, para 2.12.

<sup>84</sup> Later, however, we suggest that *new* negative servitudes should be assimilated to neighbour burdens. See paras 2.42 ff.

<sup>85</sup> ie at paras 2.14 - 2.20.

<sup>86</sup> Land Reform Policy Group, *Identifying the Solutions* (1998) para 5.1.

<sup>87</sup> Paras 5.69 ff (for existing burdens) and paras 7.6 ff (for future burdens).

<sup>88</sup> See generally parts 5 and 6.

<sup>89</sup> Paras 5.63 ff.

## Real burdens and planning permission

2.36 Sometimes planning permission is granted for a development which is prohibited, or some aspect of which is prohibited, by real burdens. What then? Three approaches seem possible. One is to say that if real burdens prohibit the development, then the development cannot proceed. A radically different approach would be for the planning permission to override the real burdens. This would mean that a development which had received planning permission could not then be prevented by the real burdens. Private rights would give way to public law. The only jurisdiction to favour this approach, and then only in a qualified form, is New South Wales. Section 28 of the (NWS) Environmental Planning and Assessment Act 1979 regulates local plans, known as environmental planning instruments. By s 28(2)

"... an environmental planning instrument may provide that, to the extent necessary to serve that purpose, a regulatory instrument [including restrictive covenants] specified in that environmental planning instrument shall not apply to any such development or shall apply subject to the modifications specified in that environmental planning instrument."

Restrictive covenants are not automatically displaced. Instead express provision must be made in the environmental planning instrument, and, by s 28(3), the provision must then be approved by the Governor. The current practice in New South Wales is in favour of such express provision.<sup>90</sup>

2.37 Most jurisdictions adopt an approach which is intermediate between the two so far described. This takes the initial position that the real burdens (restrictive covenants) are to be observed, but then provides that the granting of planning permission is a persuasive factor in any application for judicial discharge. For example, the legislation in Northern Ireland<sup>91</sup> provides that the Lands Tribunal should take into account -

(c) any public interest in the land, particularly as exemplified by any development plan adopted under Part III of the Planning (Northern Ireland) Order 1972 for the area in which the land is situated, as that plan is for the time being in force;

(d) any trend shown by planning permissions (within the meaning of that Planning Order) granted for land in the vicinity of the land, or by refusals of applications for such planning permissions, which are brought to the notice of the Tribunal ...".

These provisions are modelled on English provisions of 1969.<sup>92</sup> Similar provisions are found in other jurisdictions, including Alberta,<sup>93</sup> New Brunswick<sup>94</sup>, Queensland,<sup>95</sup> Victoria,<sup>96</sup> and Tasmania.<sup>97</sup>

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<sup>90</sup> See a series of articles by Peter Butt published at (1995) 69 ALJ 482, (1997) 71 ALJ 910, (1998) 72 ALJ 181, and (1998) 72 ALJ 584.

<sup>91</sup> The Property (Northern Ireland) Order 1978 art 5(5).

<sup>92</sup> Law of Property Act 1925 s 84(1A), (1B) (as inserted by the Law of Property Act 1969 s 28(2)).

<sup>93</sup> Land Titles Act RSA 1980 s 52(3).

<sup>94</sup> Land Titles Act 1981 s 48(2)(b).

<sup>95</sup> Property Law Act 1974 s 181(2).

<sup>96</sup> Planning and Environment Act 1987 s 60(b)(ii). And see also Law Reform Commission of Victoria, *Easements and Covenants* (DP No 15) (1989) para 49.

2.38 Scotland also adopts the intermediate approach. Although no mention is made of planning permission in s 1(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970 (which sets out the grounds for variation and discharge), the Lands Tribunal in practice treats the granting of planning permission as evidence that the existence of the obligation impedes a reasonable use of the land within ground (c). In *Cameron v Stirling*<sup>98</sup> the position was put like this:

"With regard to the case under s 1(3)(c) the tribunal ... are prepared to regard a grant of planning permission as evidence that a proposed development is reasonable; but not as conclusive. A refusal of planning permission however is probably conclusive evidence that the relevant land obligation does not of itself impede the proposed new use of the land."

In practice, an application which is supported by a grant of planning permission will usually succeed.<sup>99</sup> In a recent case, *T & I Consultants Ltd v Cullion*,<sup>100</sup> the Tribunal expressed unwillingness to reopen issues which had already been dealt with by the planning authority. An application supported by planning permission is likely to be refused only where there would be substantial prejudice to the dominant proprietor or where planning policy can be shown to have changed.<sup>101</sup> An example of the former is *Bachoo v George Wimpey & Co*<sup>102</sup> where the applicant had received planning permission for a two-storey extension which would completely obstruct a neighbour's view. The application was refused.<sup>103</sup>

2.39 Our provisional view is that the solution adopted in Scotland and other jurisdictions achieves a reasonable balance between public and private interest. Certainly we would not support a move to a position where private land regulation could operate unchecked by the planning process. But nor are we at present attracted by a model in which real burdens would give way automatically and in every case to decisions by the planning authorities.<sup>104</sup> The distinctive roles of private and public controls were discussed earlier.<sup>105</sup> If the case for private control is accepted, then it almost necessarily follows that real burdens should not fall automatically with the grant of planning permission. For that would be to confine real burdens to the relatively minor cases where planning permission is not required; and in all significant development, private interest would be overridden. In a paper given at our seminar, Professor Kevin Gray had this to say of the role of the Lands Tribunal in the variation and discharge of covenants:

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<sup>97</sup> Conveyancing and Law of Property Act 1884 s 84C(1).

<sup>98</sup> 1988 SLT (Lands Tr) 18 at p 20f.

<sup>99</sup> See generally, E Young, "Land Obligations, Planning Permission and the Lands Tribunal for Scotland" (1988) 33 JLSS 434. The principal reported decisions are: *Main v Lord Doune* 1972 SLT (Lands Tr) 14; *Gorrie & Banks Ltd v Musselburgh Town Council* 1974 SLT (Lands Tr) 5; *Robinson v Hamilton and Others* 1974 SLT (Lands Tr) 2; *Ness v Shannon and Others* 1978 SLT (Lands Tr) 13; *Ross and Cromarty District Council v Ullapool Property Co Ltd* 1983 SLT (Lands Tr) 9; *British Bakeries (Scotland) Ltd v City of Edinburgh District Council* 1990 SLT (Lands Tr) 33; and *Ramsay v Holmes* 1992 SLT (Lands Tr) 53.

<sup>100</sup> 1998 Hous L R 9.

<sup>101</sup> *Mercer v Macleod and Others* 1977 SLT (Lands Tr) 14 is an example of the latter.

<sup>102</sup> 1977 SLT (Lands Tr) 2.

<sup>103</sup> See also: *Solway Cedar Ltd v Hendry* 1972 SLT (Lands Tr) 42; *Sinclair v Gillon* 1974 SLT (Lands Tr) 18; and *McArthur v Mahoney* 1975 SLT (Lands Tr) 2.

<sup>104</sup> The only other law reform body to review this issue came to the same conclusion. See the Law Reform Commission of Western Australia, *Report on Restrictive Covenants* (Project No 91) (1997) paras 5.15 - 5.17. The Commission's main reason was that "Town planning schemes and local laws generally impose minimum standards on the use and development of land. It is not unreasonable to impose more stringent standards by restrictive covenants to improve the amenity of an area or to protect the economic interests of landowners." (ibid at para 5.17).

<sup>105</sup> Paras 2.21-2.27.

"[I]t is now quite obvious that the Lands Tribunal in England has begun to function as the residual guarantor of a degree of environmental quality which the individual citizen can no longer count on receiving at the hands of his local planning authority. And the protection is, in the case of the individual objector to a section 84 application,<sup>106</sup> rarely self-directed or entirely self-interested. Instead applications are community-oriented, with groups of objectors gathering together to oppose threatened developments which will degrade their neighbourhood, usually by devastating quiet residential enclaves. So often the relevant planning department has sanctioned proposed developments within a locality, arbitrarily cutting through conservation areas, or areas of green belt or special character,<sup>107</sup> only to have the Lands Tribunal come ultimately to the rescue by refusing to relax private covenants originally created for the precise purpose of securing the threatened amenity."

We would greatly welcome the views of others with experience in this area.

2.40 Two practical issues may be mentioned briefly. First, at present, notification of an application for planning permission requires to be served only on a limited category of close neighbours.<sup>108</sup> If planning permission were to have the effect of overriding real burdens, it would be necessary to notify all those with a right to enforce. Secondly, once planning permission was granted, and the burdens duly overridden, those whose rights had been extinguished would need to be given the opportunity, as at present,<sup>109</sup> to apply for compensation.

2.41 Our preliminary view is against fundamental change. But we think that there would be value in giving legislative recognition to the role of planning permission in the variation and discharge of burdens, as has been done in a number of other jurisdictions. More precisely, in considering the reasonableness of an application for variation and discharge, the Lands Tribunal should take account of any grant of planning permission which has been made. This whole subject is taken up again in part 6.<sup>110</sup>

### **Assimilation of negative servitudes to real burdens**

2.42 **Types of negative servitude.** Almost all servitudes are positive servitudes.<sup>111</sup> The only negative servitude for which clear authority exists is a servitude preventing or restricting building on the servient tenement, usually to preserve the light or prospect of the dominant tenement. By convention, this servitude exists in three different forms, each with a Latin name. The servitude *non aedificandi* prohibits all building on the servient tenement (or part of the servient tenement); the servitude *altius non tollendi* prohibits building above a stipulated height; and the servitude *luminibus non officiendi* prohibits building which interferes with light (or, in some versions, with prospect). A second negative servitude mentioned in the institutional writers<sup>112</sup> would prevent windows on the servient tenement

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<sup>106</sup> ie, an application for variation or discharge of a restrictive covenant under s 84 of the Law of Property Act 1925. The equivalent provision in Scotland is s 1(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970.

<sup>107</sup> Professor Gray's footnotes refer to *Re Manson & Gill Construction Ltd*, Lands Tr, 9 April 1991, and *Re Page's Application* (1996) 71 P & CR 440.

<sup>108</sup> Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224, arts 2(1) (definition of "neighbouring land") and 9.

<sup>109</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(4).

<sup>110</sup> See in particular para 6.38.

<sup>111</sup> For the difference between positive and negative servitudes, see para 1.19.

<sup>112</sup> Stair II.7.9; Erskine II.9.10; Bell, *Principles* ss 1005-07.

from overlooking the dominant tenement, but this servitude - if indeed it is a servitude - has not been the subject of a reported decision and seems to be unknown in practice.<sup>113</sup>

2.43 One reason for this meagre total is that, from the end of the eighteenth century onwards, negative servitudes languished in the shadow of real burdens. A real burden restricting building could be as easily imposed as a servitude. But whereas servitudes were limited to restrictions on building, real burdens could also be used for restrictions of many other kinds. Sometimes it was impossible to tell whether a real burden or a servitude was intended,<sup>114</sup> nor did it matter much in practice, since the effect was substantially the same in both cases.

2.44 **Functional identity.** If the only restriction which can be constituted as a negative servitude is a restriction on building, and if that restriction can also be constituted as a real burden, there does not seem a strong argument for retaining negative servitudes as a separate category. This is not a novel insight. The draft Restatement on Servitudes prepared by the American Law Institute abandons negative servitudes (easements) "because no salient differences remain between negative easements and restrictive covenants".<sup>115</sup> Similarly, almost 30 years ago the Law Commission of England and Wales suggested that negative easements might be assimilated to restrictive covenants,<sup>116</sup> although this suggestion was not persevered with.

2.45 Once created, negative servitudes work in the same way as real burdens. The rules for variation and extinction are identical, and both are capable of lasting in perpetuity. In most cases servitudes are the equivalent of neighbour burdens, although sometimes they are used to regulate communities.<sup>117</sup> The only difference of substance concerns juridical nature. While a servitude is a real right, a real burden is, in the strictest sense, only a personal right, albeit one which runs with the dominant and servient tenements. In practical terms this means that while a real burden can, probably, be enforced against only the owner of the servient tenement,<sup>118</sup> a negative servitude can be enforced against anyone who makes use of the property, whether the owner or not. Later we suggest that this difference be removed by allowing real burdens to be universally enforced.<sup>119</sup>

2.46 **Differences in constitution.** But while substantially the same in legal effect, servitudes and real burdens are markedly different in their rules of constitution. In the first place, negative servitudes can be constituted merely by writing and without registration,<sup>120</sup> although this would be very unusual in practice. For the purposes of registration of title, a negative servitude is classified as an overriding interest.<sup>121</sup> It has sometimes been suggested that even writing may not be required and that a negative servitude can be created by implication,<sup>122</sup> although this is not the generally accepted view.<sup>123</sup> Secondly, the strict rules

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<sup>113</sup> Sometimes support is also classified as a negative servitude - see para 2.51.

<sup>114</sup> *Braid Hills Hotel Co Ltd v Manuels* 1909 SC 120.

<sup>115</sup> Susan F French, "Tradition and innovation in the new Restatement of Servitudes: a report from the midpoint" (1994) 27 Connecticut Law Rev 119 at p 126.

<sup>116</sup> Law Commission, *Transfer of Land: Appurtenant Rights* (Working Paper No 36) (1971) paras 17, 32 and 44.

<sup>117</sup> However, probably there cannot be feudal servitudes.

<sup>118</sup> Reid, *Property* para 413.

<sup>119</sup> Paras 4.12 ff.

<sup>120</sup> Reid, *Property* para 451 (A G M Duncan).

<sup>121</sup> Land Registration (Scotland) Act 1979 s 28(1).

<sup>122</sup> Reid, *Property* para 456 (A G M Duncan).

<sup>123</sup> McDonald, *Conveyancing Manual* para 11.11; Halliday, *Conveyancing* vol II, para 35-15.

about clarity of expression in the constitution of real burdens do not apply, or at least do not apply to the same extent, to servitudes.<sup>124</sup> Thirdly, the rules as to implied rights to enforce developed in cases such as *Hislop v MacRitchie's Trs*<sup>125</sup> are confined to real burdens and have no counterpart in the law of servitudes.

2.47 Of these differences, the second and third will disappear if proposals made elsewhere in this paper are adopted. The first difference (no registration) remains and is of itself a subsidiary ground for the abolition of negative servitudes. As long ago as 1828 the rule that a negative servitude could be constituted without registration was described by the court as "an anomaly in our law".<sup>126</sup> This criticism was taken up by the Halliday Committee, which recommended compulsory registration.<sup>127</sup> Today, with the introduction of registration of title, the rule seems barely defensible. It means that a person might buy a plot of land in complete ignorance of the fact that the land cannot be built on. Unlike a positive servitude (where registration is also not required) there will be no indication on the ground that a servitude exists, for a restriction has no physical manifestations other than the, entirely neutral, manifestation of an absence of buildings. Even where registration has in fact occurred, the servitude may be registered under the dominant tenement only,<sup>128</sup> in which case it will not be discovered by a purchaser of the servient.

2.48 **Limitation on duration.** Later we suggest that real burdens should be subject to durational limits.<sup>129</sup> It would be unfortunate if a restriction on building, uniquely, could be imposed in perpetuity merely because it was capable of being constituted as a negative servitude. Once again this argues for the abolition of negative servitudes.

2.49 For all these reasons we propose that:

**3. It should no longer be possible to create negative servitudes.**

2.50 **Existing negative servitudes.** What should be done with existing negative servitudes? Three approaches seem available. One is to do nothing. Another is to apply to negative servitudes the rule proposed later for real burdens by which the right would suffer automatic extinction after a period of time such as 100 years. A third is to attempt a complete assimilation of negative servitudes with real burdens. This would mean that all servitudes not currently on the register would, within a limited period of time, require to be registered; and that, where necessary, existing registrations would require to be upgraded to give details of the dominant tenement, and to ensure that the servitude is registered against the title of the servient tenement. Durational limits would then automatically apply. Our preference would be for either the second or the third of these approaches. Of these the third is the more principled, but the second the more convenient.

**4. We would welcome views on whether -**

- (a) existing negative servitudes should be registered and otherwise fully assimilated with real burdens, or**

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<sup>124</sup> *Hunter v Fox* 1964 SC(HL) 95.

<sup>125</sup> (1881) 8 R(HL) 95.

<sup>126</sup> *Sivwright v Wilson* (1828) 7 S 210 *per* Lord Gillies at p 213.

<sup>127</sup> Halliday Committee, para 82.

<sup>128</sup> *Balfour v Kinsey* 1987 SLT 144.

<sup>129</sup> Paras 7.6 ff.

**(b) existing negative servitudes should be retained as a separate juristic category but made subject to extinction on the expiry of a fixed period in accordance with proposal 24.**

2.51 **Servitude of support.** Our proposals on negative servitudes are not intended to affect the servitude of support. The modern consensus is, with Rankine,<sup>130</sup> that support is

"a positive servitude, since it enables the dominant owner to do something with or on the servient tenement - that is, to exert physical pressure on it which it would not otherwise have had to bear, therein differing from the negative servitudes, of light and prospect, though the distinction is thin enough."

Previously doubts had arisen because the servitude of support imposes a restriction on the servient proprietor, *viz* that he must not withdraw support. But this was to approach the issue from the wrong end. All servitudes, whether positive or negative, involve restrictions on the servient proprietor. The distinctive feature of a positive servitude is that it also allows the dominant proprietor to make use of the servient tenement.

2.52 **Positive servitudes.** Our proposals are confined to negative servitudes. While it is arguable that the effect of a positive servitude could also be replicated by a real burden,<sup>131</sup> in current practice this is never attempted, so that for all practical purposes there is no overlap between positive servitudes and real burdens. A more important point is the differences in the rules of constitution. Positive servitudes can be, and in practice often are, created by positive prescription.<sup>132</sup> This is a useful rule, frequently relied upon, but which could hardly be retained if positive servitudes were to be assimilated to real burdens. Thus we envisage that, while negative servitudes will disappear, positive servitudes will remain as a separate juridical category.

### **Real burdens in favour of a person**

2.53 A person cannot hold a real burden or servitude as an individual.<sup>133</sup> Instead the right is tied to a piece of land (the dominant tenement) and passes, not with the person, but with that land. Not all countries have this limitation. German law recognises servitudes granted in favour of a person (*beschränkte persönliche Dienstbarkeit*).<sup>134</sup> Some other civilian or mixed systems, including the Netherlands,<sup>135</sup> South Africa<sup>136</sup> and Louisiana,<sup>137</sup> do likewise. In the United States cautious acceptance has been given to easements "in gross" (ie in favour of a person), and the draft Restatement on servitudes provides that

"The benefit of servitude may be held personally, in gross, or as an appurtenance to an estate or other interest in land."<sup>138</sup>

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<sup>130</sup> Rankine, *Landownership* (4th edn, 1909) p 496. This view is followed by modern writers: see Gordon, *Scottish Land Law* para 6-103, and Reid, *Property* para 484 (A G M Duncan).

<sup>131</sup> Paras 1.19, 7.66 and 7.67.

<sup>132</sup> Prescription and Limitation (Scotland) Act 1973 s 3.

<sup>133</sup> *Patrick v Napier* (1867) 5 M 683 at p 690 per Lord President Inglis.

<sup>134</sup> BGB arts 1090-93.

<sup>135</sup> Dutch Civil Code art 6:252.

<sup>136</sup> Silberberg & Schoeman, *Property* pp 386 ff, esp p 388.

<sup>137</sup> Louisiana Civil Code, arts 639-45.

<sup>138</sup> Section 2.6.(b). Not only may the benefit be in gross but also the burden (ie there need not be a servient tenement). See generally American Law Institute, *Restatement (Servitudes)* TD No 1 s 2.6, pp 59, 61-5 and 68-71.

In England and Wales profits à prendre<sup>139</sup> can be in gross, but not easements or restrictive covenants.<sup>140</sup> The Ontario Law Reform Commission has recommended that both easements and restrictive covenants should be in gross.<sup>141</sup> Rules vary as to the duration and transmissibility of servitudes and covenants granted in favour of a person. In some systems they are restricted to the life of the original grantee,<sup>142</sup> while in others they are perpetual,<sup>143</sup> although in a case where the grantee is a body corporate there may be little difference between these positions. Some systems allow free alienation of the right,<sup>144</sup> while others do not.<sup>145</sup>

2.54 In Scotland there are some functional equivalents to burdens in favour of a person. A liferent is a right held by a person to make use of a thing for the duration of his life, and was in fact classified by the institutional writers as a "personal servitude" (that is, a servitude conceived in favour of a person rather than a piece of land).<sup>146</sup> A lease is also, in this broad sense, a personal servitude. A right to fish for salmon is a perpetual right to use the property of another, although, for historical reasons, this is classified as being itself land rather than as a burden on land.<sup>147</sup> If attention is paid to function and not to form, feudal real burdens are also an example of burdens in favour of a person. In theory, of course, the person in right of such burdens (the superior) is the proprietor of a feudal estate in land (the superiority), and the right attaches to the superiority and not to the superior personally. But in the atrophied feudalism of the late twentieth century the only value of a superiority is likely to lie in the right to enforce real burdens, and the only purpose of selling the superiority is to sell the right to enforce. Hence feudal estate begins to merge into right to enforce.

2.55 The abolition of the feudal system will bring an end to feudal real burdens. Should feudal real burdens be replaced by real burdens conceived in favour of a person? The form of the question suggests the answer. There would be little point in abolishing the feudal system if it were to be replaced by a system of personal burdens. There seems little justification for allowing perpetual restrictions to be placed on land by a person who has no further connection with that land and who owns no land nearby;<sup>148</sup> and experience with feudal burdens shows how readily rights of this kind can be abused. If there is a case for "personal" conditions at all it would be for conditions which confer rights of limited use of the servient tenement, such as car parking or the placing of billboards or fishing.<sup>149</sup> But since these would be personal (positive) servitudes and not personal real burdens, they lie beyond the scope of the present exercise. It seems sufficient to note here that a lease can sometimes

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For a Scottish case in which there was a dominant tenement but no servient tenement, see *Inverloch Castle Ltd v Lochaber Power Co* 1987 SLT 466.

<sup>139</sup> Servitudes which involve the taking of something from the servient tenement.

<sup>140</sup> Gray, *Elements* pp 1045 and 1060.

<sup>141</sup> Ontario LRC, *Covenants* pp 108 ff.

<sup>142</sup> As in Germany: see BGB, art 1090.

<sup>143</sup> Louisiana Civil Code, art 644.

<sup>144</sup> American Law Institute, *Restatement (Servitudes)* TD No 4 s 4.6, pp 64 ff

<sup>145</sup> BGB, art 1092(1).

<sup>146</sup> Stair II.6.pr: "Personal servitudes are these, whereby the property of one is subservient to the person of another than the fiar: Real servitude is, whereby a tenement is subservient to another tenement, and to persons, but as, and while, they have right to the tenement dominant". See also Stair II.7.pr; Bankton II.6.2; and Erskine II.9.5.

<sup>147</sup> Reid, *Property* para 207. The same is also true of rights to gather mussels and oysters.

<sup>148</sup> Susan F French, "Toward a modern law of servitudes: reweaving the ancient strands" (1982) 55 S California Law Rev 1260 at p 1287.

<sup>149</sup> Michael F Sturley, "Easements in gross" (1980) 96 LQR 557.

be used to replicate the right which, in some other jurisdictions, would be effected by a personal servitude.<sup>150</sup> We propose therefore that:

**5. The existing rule that real burdens are conceived in favour of a property and not a person should not be disturbed.**

**Planning and conservation burdens**

2.56 By s 75 of the Town and Country Planning (Scotland) Act 1997<sup>151</sup> a planning authority can enter into a planning agreement with an owner of land, and interested parties, whereby the owner agrees to the land being bound by the restrictions contained in the agreement. On registration in the Sasine or Land Register the agreement runs with the land and is enforceable by the planning authority against successors.<sup>152</sup> In effect the registered agreement creates burdens on the land conceived in favour of a person (the planning authority). Other cases of this kind can be found on the statute book. For example, the National Trust for Scotland can enter into an agreement with an owner to restrict the development or use of his property. On registration, successors are bound. The conditions in the agreement must be in accordance with the purposes of the National Trust as provided in its constituent Acts.<sup>153</sup> Scottish Natural Heritage or planning authorities can enter into an agreement with an owner to allow public access to land.<sup>154</sup> Compulsory powers are held in reserve.<sup>155</sup> Registration binds successors.<sup>156</sup> Again, where agricultural land is in an environmentally sensitive area, the Secretary of State may reach an agreement with its owner as to how the land is to be managed. The agreement binds successors once it has been registered.<sup>157</sup>

2.57 These provisions have in common that they are conceived in favour of a governmental or other public body. But their apparent randomness prompts the question of whether they should be replaced, or at least supplemented, by a general provision allowing categories of public bodies to enter into conservation agreements. This point was raised in responses to our discussion paper on the abolition of the feudal system. A number of preservation trusts informed us of their work in restoring historic buildings. Under the current law the restored buildings are feued, allowing the trust to maintain some control and to ensure that any developments or alterations are in keeping with the character of the buildings. There are practical reasons for this. A number of trusts receive funding from bodies such as Historic Scotland. The grant-making bodies wish to ensure that the funding has not been squandered, and that the benefits acquired are more than transient. Support for conservation burdens was expressed at our seminar.

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<sup>150</sup> Of course unless the thing leased is land (as opposed to some limited use of land which is also being used by others), then it cannot be created a real right. However, special rules exist for trout fishings (Freshwater and Salmon Fisheries (Scotland) Act 1976 s 4) and for shooting rights (*Palmer v Brown* 1989 SLT 128).

<sup>151</sup> Formerly s 50 of the Town and Country (Planning) (Scotland) Act 1972. Agreements made under this Act are usually known as "s 50 agreements".

<sup>152</sup> Town and Country Planning (Scotland) Act 1997 s 75(3). On planning agreements generally see further, Jeremy Rowan-Robinson & Eric Young, *Planning by Agreement in Scotland* (1989).

<sup>153</sup> National Trust for Scotland Order Confirmation Act 1938 s 7.

<sup>154</sup> Countryside (Scotland) Act 1967 s 13 (as amended by the Natural Heritage (Scotland) Act 1991 s 13 & sched 3).

<sup>155</sup> *Ibid* s 14.

<sup>156</sup> *Ibid* s 16(5). And see also ss 30 and 31, which provide for public path creation agreements and public path creation orders.

<sup>157</sup> Agriculture Act 1986 ss 18(3) and 19(1)&(2).

2.58 An example of what can be done in this field is provided by the Uniform Conservation Easement Act of 1981, which has been adopted by a number of jurisdictions in the United States.<sup>158</sup> This allows conservation easements to be entered into by governmental bodies and by certain kinds of charities.<sup>159</sup> A "conservation easement" is defined as<sup>160</sup>

"a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property."

Conservation easements are perpetual,<sup>161</sup> and are capable of being transferred to any other qualifying body.<sup>162</sup>

2.59 While we think that there is a case for introducing conservation burdens in Scotland,<sup>163</sup> a number of practical difficulties arise. It would necessary to be clear about what kind of bodies could hold the benefit of conservation burdens, what the permitted content of such burdens should be, whether the burdens should be subject to a time limit (such as 100 years)<sup>164</sup>, and whether the burdens should be transferable. Careful consideration would also be required of the interaction with the complex edifice of existing regulatory law. Nonetheless our provisional view is that:

#### **6. Conservation burdens should be introduced.**

In our forthcoming report on feudal abolition we recommend a mechanism by which conservation obligations which currently operate within the feudal system can be converted into the proposed new conservation burdens.

2.60 We consider later whether s 75 agreements and other planning and conservation burdens should be capable of being varied or discharged by the Lands Tribunal.<sup>165</sup>

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<sup>158</sup> For a discussion of this Act, see Jeffrey A Blackie, "Conservation Easements and the Doctrine of Changed Conditions" (1989) 40 Hastings Law Jo 1187. Similar legislation has been enacted as arts 815-16 of the California Civil Code.

<sup>159</sup> Uniform Conservation Easement Act 1981 s 1(2).

<sup>160</sup> Ibid, s 1(1).

<sup>161</sup> Ibid, s 2(c).

<sup>162</sup> Ibid, s 4(2).

<sup>163</sup> Departing here from the view expressed in Scot Law Com DP No 93, paras 3.30 - 3.32.

<sup>164</sup> See paras 5.63 ff (esp at 5.77) and 7.6 ff.

<sup>165</sup> Paras 6.70-6.71.

## PART 3 TITLE TO ENFORCE

### Finding the enforcers

3.1 There are strict rules as to disclosure and publicity. A real burden must be registered against the title of the servient tenement. Its terms must be given in full. And the burden must be expressed clearly and unambiguously. As a result, an owner, or potential purchaser, of the servient tenement need never be in doubt as to the restrictions which affect the property. But while admirable in many ways, this system has one startling defect. The requirement of disclosure does not extend to the identity of the dominant tenement or tenements whose owner or owners have a right to enforce; and in practice the deed creating the burden - and hence the entry on the register - is often silent on this subject. The result is odd. On the one hand the servient owner knows, in exhaustive detail, the nature of the burdens which affect his property. But on the other hand he may have no idea who is entitled to enforce those burdens, or even how many enforcers there are likely to be. For all he is able to find out from the register, there may be no one with a title to enforce, or ten people, or a hundred. Of course information on this topic is, in the end, discoverable. Case law has created a series of rules importing a right to enforce. The appropriate rule can be identified and then applied. But the rules are by no means straightforward, and often can be applied only after time-consuming and expensive research.

3.2 Sometimes the position is made more clear. In modern deeds, in particular, it is common to stipulate for enforcement rights. But even here there is a potential trap. For the fact that burdens are expressly declared to be enforceable by the owner of plot A does not mean that they are not also enforceable by the owners of plots B and C. Implied rights to enforce can sit alongside express rights.<sup>1</sup> The only case in which an express right conclusively excludes the existence of implied rights is where the holder of the express right is stated to have a right of waiver. Here the court take the view that a reference to waiver is indicative of an exclusive right to enforce.<sup>2</sup> In all other cases the person affected by the burdens must consider the possibility that additional, and implied, rights exist. This point is often missed in practice. A survey by Cusine and Egan found that in more than 80% of the cases sampled where burdens proved to be troublesome no account had been taken of implied rights and it was thought sufficient to obtain a minute of waiver from the superior alone.<sup>3</sup> Of course, further investigation might have produced negative results, but by no means always. The rules of implied enforcement rights are more generous than is commonly supposed. In cases where implied rights exist a minute of waiver from the superior would have no effect on the rights of the other enforcers, and the real burden would continue to affect the land.<sup>4</sup>

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<sup>1</sup> The position is similar in the United States: see American Law Institute, *Restatement (Servitudes)*, TD No 1, pp 65 and 166-9, ss 2.6 & 2.14.

<sup>2</sup> *Thomson v Alley and Maclellan* (1883) 10 R 433; *Walker and Dick v Park* (1888) 15 R 477; *Turner v Hamilton* (1890) 17 R 494.

<sup>3</sup> Cusine & Egan, *Feuing Conditions* chapter 4, paras 15 - 17, and tables 4.12 and 4.13.

<sup>4</sup> *Dalrymple v Herdman* (1878) 5 R 847.

3.3 Except in the one case mentioned above,<sup>5</sup> a person whose property is subject to real burdens must bear in mind the possibility of implied enforcement rights. Indeed in a majority of all cases the register is silent on enforcement and the only rights arising are those which arise by implication. If the courts had not developed rules on implied rights, many burdens would have been stillborn. In the application of those rules, four outcomes are possible. The burdens in question may be found to be either (i) feudal burdens or (ii) neighbour burdens or (iii) community burdens or (iv) combined burdens. The problem facing the servient proprietor is to know which.

### **Feudal burdens**

3.4 Real burdens which are created as part of a subinfeudation are enforceable by the superior/granter and by his successors as superior. The superiority, in other words, is the dominant tenement in the burdens. This right of the superior arises by implication, although sometimes it is expressed in the deed.<sup>6</sup> It follows therefore that all burdens created in a grant in feu are, necessarily, feudal burdens<sup>7</sup> and are enforceable by the superior. The same rule applies where the burdens are contained in a separate deed of conditions executed in association with a grant in feu. We need not linger over the details. With the abolition of the feudal system, all feudal burdens will disappear. In this paper we are concerned almost exclusively with a post-feudal world.<sup>8</sup>

### **Neighbour burdens: the rule in *Mactaggart***

3.5 *J A Mactaggart & Co v Harrower*<sup>9</sup> is authority for the following rule. If an owner subdivides his land and transfers one plot (plot B) by disposition while retaining another plot (plot A), it is implied that any real burdens in the disposition are for the benefit of the retained plot A. Hence plot A is the dominant tenement and plot B the servient tenement, and the burdens may be enforced by successive owners of plot A against successive owners of plot B. Those owners stand in the relationship of neighbours and not of superior and vassal; and since plot B alone is subject to the obligations, the burdens fall to be classified as neighbour burdens.<sup>10</sup> In *Mactaggart* the Dean of Guild explained the rule in this way:<sup>11</sup>

"A real burden ... is praedial in its character; it is for the benefit of some lands or the owners thereof, as owners, and not as individuals; and, considering the nature of the grant under which the burden in question was imposed, it must be taken to have been imposed for the benefit of the lands remaining in the person of those who imposed it, or at all events, of so much of these remaining lands as might be injuriously affected by operations or buildings on the ground restricted."

There is no need for the disposition of plot B to mention the retained land.<sup>12</sup> Nor is it necessary for later dispositions of plot A to assign the right to enforce.<sup>13</sup> Perhaps

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<sup>5</sup> ie where there is an express right of waiver.

<sup>6</sup> Gordon, *Scottish Land Law* para 22-56; Reid, *Property* para 398.

<sup>7</sup> For the meaning of "feudal burdens" as used in this paper, see para 1.7.

<sup>8</sup> See para 1.8.

<sup>9</sup> (1906) 8 F 1101

<sup>10</sup> See para 1.5.

<sup>11</sup> At p 1104.

<sup>12</sup> There was none in *Mactaggart*.

<sup>13</sup> Gordon, *Scottish Land Law* para 23-13. In fact there was an express assignation in *Mactaggart*, and Lord Kyllachy reserved his opinion as to whether such an assignation was required. But in *Braid Hills Hotel Co Ltd v*

surprisingly, *Mactaggart* stands alone, so that a key rule rests on a single decision.<sup>14</sup> But the fact situation covered by *Mactaggart* is very common in practice, and the rule seems well established.<sup>15</sup> It is the equivalent, for ordinary dispositions, of the rule described earlier<sup>16</sup> for grants in feu. In both cases the granter of the conveyance has reserved some property (neighbouring land in the one case and the superiority in the other), and in both cases the law implies that the reserved property is the dominant tenement. A similar, if less mechanical rule, has been adopted in the United States in the draft Restatement on Servitudes.<sup>17</sup>

### Community burdens: *Hislop* and beyond

3.6 Where two or more properties are subject to the same, or equivalent, burdens,<sup>18</sup> imposed by the same granter, the burdens are treated by the courts as forming a "common plan" for the properties. The test is objective, so that the law is not concerned with the actual intention of the common granter.<sup>19</sup> Nor is there any need for an actual plan in the sense of a development plan for the estate on which individual plots are indicated.<sup>20</sup> Provided that the burdens are shared, the properties are considered to form a discrete community, regulated by common rules. In the leading case of *Hislop v MacRitchie's Trs*<sup>21</sup>, Lord Watson identified two ways in which such a common plan might come into existence. In the first place, the developer might convey each property separately but subject to the same burdens. Where this is done there is a series of individual conveyances each containing identical burdens. Alternatively, the developer might convey the land in a single block to some second party who then subdivides and conveys away, usually after building houses on the individual plots. In this case the developer's burdens are contained in a single deed, the original conveyance, which, following on subdivision, becomes part of the title of each of the plots. In modern times, however, a third method has largely superseded the two identified by Lord Watson. Typically, the burdens are no longer put into a conveyance or conveyances,<sup>22</sup> but instead are contained in a single deed of conditions which applies to the whole area. As

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*Manuels* 1909 SC 120 Lord President Dunedin stated (at p 125) that an express assignation was unnecessary. See also McDonald, *Enforcement* p 13. The rule is the same in England and Wales (see *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594), although it has been criticised, eg by D J Hayton, "Revolution in Restrictive Covenants" (1980) 43 MLR 445.

<sup>14</sup> It is possible to read *Botanic Gardens Picture House Ltd v Adamson* 1924 SC 549 as an authority to the contrary, but the facts of the case are somewhat special, and there is no evidence that *Mactaggart* was brought to the attention of the court. On the *Botanic Gardens* case see further para 3.15.

<sup>15</sup> See eg Halliday, *Conveyancing* vol II, para 34-49.

<sup>16</sup> In para 3.4.

<sup>17</sup> Less mechanical because it pays some attention to the parties' intentions. See American Law Institute, *Restatement (Servitudes)* TD No 1 pp 123 & 127 and s 2.11(b). Intention is also important in England and Wales: see Gray, *Elements* pp 1153-4, and H W R Wade "Covenants: 'a broad and reasonable view'" (1972B) 31 CLJ 156.

<sup>18</sup> For the meaning of equivalence in this context, see *Botanic Gardens Picture House Ltd v Adamson* 1924 SC 549 at 563 per Lord President Clyde, and *Lees v North East Fife District Council* 1987 SLT 769.

<sup>19</sup> For the possible different approaches to this issue, see Lawrence Berger, "A policy analysis of promises respecting the use of land" (1970) 55 Minnesota Law Rev 167 esp at pp 198-9. The draft Restatement on Servitudes pays regard to intention: see American Law Institute, *Restatement (Servitudes)* TD No 1 p 155 and s 2.14.

<sup>20</sup> At one time this was required in England and Wales, but no longer: see eg *In re Dolphin's Conveyance* [1970] Ch 654. The position in the United States is similar: see American Law Institute, *Restatement (Servitudes)* TD No 1 pp 164-5 and s 2.14.

<sup>21</sup> (1881) 8 R(HL) 95 at p 103. *Hislop* is also reported in Appeal Cases as *Hislop v Leckie* (1881) 6 App Cas 560. This report is of particular value in providing a full account of the arguments (see pp 566-70). For contemporary discussion of the decision, see articles published at (1880) 24 J Juris 561 & 565.

<sup>22</sup> However, until the law was changed by s 17 of the Land Registration (Scotland) Act 1979, the deed of conditions required to be expressly incorporated by reference into each of the conveyances.

the area comes to be sold off in plots, the deed of conditions is then part of the title of each individual plot.

3.7 Usually a common plan means reciprocal rights of enforcement. Thus if plot A and plot B are subject to the same burdens, imposed originally by the same grantor, the law will usually imply that the owner of each plot can enforce against the owner of the other.<sup>23</sup> In the terminology used in this paper, these are community burdens.<sup>24</sup> Sometimes this rule of enforcement is attributed, perhaps not very accurately,<sup>25</sup> to the doctrine of *jus quaesitum tertio*. But however it is characterised, there is much to be said for the rule. If a plan is for the benefit of the community as a whole, it seems reasonable that it should be enforceable by the members of that community. A similar system operates in England and Wales and in other common law jurisdictions.<sup>26</sup>

3.8 The courts will not imply enforcement rights in every case. Since a person might be a member of a community without realising it, the law requires that some notice of the common plan be given in the deed which creates the burden. A servient proprietor must be able to tell, from an inspection of his own title, that the same burdens may affect his neighbours; and in the absence of notice there are no implied rights to enforce.

3.9 Usually there is no difficulty with notice. In the second of the cases identified by Lord Watson (single grant followed by subdivision), it will be obvious from even a cursory reading that the deed creating the burdens applies to a much wider area than the particular property owned by the individual proprietor.<sup>27</sup> Hence the proprietor knows that others are subject to the same burdens. Similarly, a deed of conditions will always apply to a wider area; and in the Land Register that wider area is often shown on the individual title sheets by means of a supplementary plan, allowing owners to tell at a glance the full extent of the community which is being regulated. Occasionally deeds of conditions are stillborn. Up until 1979 a deed of conditions did not take effect on registration, but required the further step of incorporation into the individual conveyances of the individual plots.<sup>28</sup> If this was not done, the deed of conditions would never come into operation. Section 17 of the Land Registration (Scotland) Act 1979 dispenses with the requirement of incorporation, but the provision can be expressly excluded in the deed of conditions, and this is quite commonly done in practice if developers wish to retain the freedom to impose different conditions on different phases of a development. It follows that, except where s 17 applies, the owner of a plot affected by a deed of conditions cannot automatically assume that the whole area described in the deed is likewise subject to those conditions. In some cases the developer may have chosen not to incorporate the conditions, or to register and incorporate a different deed of conditions. In theory it is even possible that the affected plot is the only property made subject to the conditions, in which case there is no community at all. Thus in deeds of conditions not governed by s 17 it will be necessary to carry out some further research to establish the true position.

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<sup>23</sup> For an exhaustive account of the case law, see McDonald, *Enforcement*.

<sup>24</sup> Para 1.6.

<sup>25</sup> Reid, *Property* para 402.

<sup>26</sup> Gray, *Elements* pp 1159-64, and American Law Institute, *Restatement (Servitudes)* TD No 1, s 2.14, pp 155 ff. Mixed legal systems have also adopted this system: see Silberberg & Schoeman, *Property* pp 394 ff, and Yiannopoulos, *Predial Servitudes* pp 515 ff.

<sup>27</sup> Reid, *Property* para 401; McDonald, *Enforcement* p 19.

<sup>28</sup> Conveyancing (Scotland) Act 1874 s 32.

3.10 The one remaining case is the first of the two situations identified by Lord Watson (successive conveyances). Here the requirement of notice can cause difficulties. A typical example would be a small housing development from the interwar period. If a developer built 20 houses and granted a feu disposition of each, imposing identical burdens, it does not follow that the 20 owners will have mutual rights of enforcement. For that to happen each owner must be able to tell, merely from reading his own feu disposition, that the other houses in the estate are subject to the same burdens. Often he cannot tell.<sup>29</sup> His deed may do nothing more than convey his own property under the burden of certain conditions. The courts in such cases have strained to be helpful.<sup>30</sup> The deed need not spell out the details of a common plan, nor make precise references to other properties. A broad hint will do. Thus there is said to be sufficient notice if the deed imposes on the granter an obligation to insert similar conditions in grants of other properties.<sup>31</sup> There is also sufficient notice if the deed refers, even in quite general terms,<sup>32</sup> to a common plan. One difficulty with rules of this kind is that much comes to depend on the conveyancer's pen. Inevitably conveyancers are not always consistent, even within the same development. Particularly when an estate is sold over a long period of time, the split-off deeds may not be worded in precisely the same way, and these differences may then turn out to affect enforceability. Take the case of 20 plots of ground being sold off subject to identical real burdens. If the dispositions of plots 1 - 15 contain an express obligation on the granter to impose identical conditions on the remaining plots, but the dispositions of plots 16 - 20 omit the obligation, the pattern of reciprocity is broken. The result is a lop-sided community. The titles of plots 1 - 15 contain notice of the common plan. Hence the burdens on those plots can be enforced by all others who are subject to the same burdens, that is to say, by plots 1 - 20.<sup>33</sup> But since the titles of plots 16 - 20 contain no notice of the common plan, the burdens on those plots cannot be enforced by the owner of any other plot.<sup>34</sup> Indeed, unless there is a superior, or a disponer with a right under the rule in *Mactaggart*, the burdens will not be enforceable by anyone, in which case there may be no ground for implying a right of enforcement against others. It will be seen that the burdens on plots 1 - 15 have a double character. In a question with one another they are community burdens, mutually enforceable. But in a question with plots 16 - 20 they are (non-reciprocal) neighbour burdens.

### Combined burdens

3.11 Different types of burden can occur in combination or, to put the point in a slightly different way, the same burdens can sometimes be enforced by different categories of enforcers.<sup>35</sup> Thus conditions which in a question with one set of enforcers are community burdens may also turn out to be enforceable by others, for whom they are neighbour or feudal burdens. This complicates matters for the servient proprietor. In applying the rules described above for the three categories of implied rights he must bear in mind the possibility that more than one category might be relevant. Logically there are three ways in which the categories of burdens might be combined. A burden might be both (1) a feudal

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<sup>29</sup> As in *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95.

<sup>30</sup> Gordon, *Scottish Land Law* paras 22-59 - 22-61; Reid, *Property* para 400; McDonald, *Enforcement* pp 16 - 19.

<sup>31</sup> *McGibbon v Rankin* (1871) 9 M 423.

<sup>32</sup> *Johnston v The Walker Trs* (1897) 24 R 1061.

<sup>33</sup> *Nicholson v Glasgow Asylum for the Blind* 1911 SC 391.

<sup>34</sup> *Bannerman's Trs v Howard and Wyndham* (1902) 10 SLT 2.

<sup>35</sup> See paras 1.9 - 1.11.

and a community burden or (2) a neighbour and a community burden or (3) a feudal and a neighbour burden.<sup>36</sup> We consider these in turn.

**3.12 (1) Feudal and community burdens.** This combination occurs wherever community burdens are created by a grant in feu (or by a deed of conditions executed in association with a grant in feu). The normal rules of community burdens apply to give members of the community implied rights of enforcement, but in addition the superior has a right of enforcement by virtue of his reserved superiority. The abolition of the feudal system will remove the superior's rights but leave intact the rights of the members of the community. Since this is by far the most common example of a combined burden, such burdens will become relatively rare in post-feudal Scotland.

**3.13 (2) Neighbour and community burdens.** If community burdens are created by disposition (or by deed of conditions executed in association with a disposition), it would be unusual for the burdens to be enforceable by someone who is not a member of the community. This means that a combined neighbour and community burden is not often encountered. Nonetheless there are a number of ways in which such a combination might come about.<sup>37</sup> For instance a developer might retain some of the land for himself. Such land would be unburdened, and hence not part of the community. But by operation of the rule in *Mactaggart* it would be a dominant tenement in the real burdens imposed on the other plots. Another example would be where an owner divides his land and disposes plot A while retaining plot B. The disposition imposes real burdens. A year later the purchaser of plot A subdivides and disposes both plots (A1 and A2). Here there is a combination of the rule in *Mactaggart*<sup>38</sup> and the second rule in *Hislop*.<sup>39</sup> By the former, the burdens in the original disposition of plot A are neighbour burdens in favour of plot B. And by the latter, the burdens are community burdens reciprocally enforceable by the owners of plot A1 and plot A2.

**3.14** This analysis may under-state the occurrence of combined burdens. For it is possible to argue that, in *every* case where common burdens are created by disposition, neighbour burdens are bound also to arise.<sup>40</sup> An example explains why. Suppose that a developer builds 20 houses on 20 plots of ground. He then sells them off, by disposition, subject to identical real burdens. The result is a common plan and, hence, a community. Usually the law will imply mutual enforcement rights, in which case the burdens can be classified as community burdens. But if, for one reason or another, no mutual enforcement rights come into being, it would be possible for some of the owners to argue that the burdens were enforceable as neighbour burdens. The argument goes like this. Assume that the plots were disposed in numerical order. When plot 1 was disposed, the developer continued to own plots 2 - 20. Hence, by application of the rule in *Mactaggart*, plots 2 - 20 form the dominant tenement for the burdens imposed on plot 1. This means that, when plots 2 - 20 come to be sold individually, the purchasers, as owners of part of the dominant tenement, can enforce the burdens against plot 1. But plot 1 cannot enforce the burdens against them. Plot 1 was the servient tenement and not the dominant. The position is much the same when plot 2 comes to be sold. The dominant tenement is now plots 3 - 20, and the eventual owners of

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<sup>36</sup> In theory there could also be a fourth possibility, namely a burden which combined all three categories. But this seems to be unknown in practice.

<sup>37</sup> One was mentioned in para 3.10.

<sup>38</sup> Para 3.5.

<sup>39</sup> Para 3.6. This is the rule which applies where there is a block conveyance followed by subdivision.

<sup>40</sup> Reid, *Property* para 404. And see also Gray, *Elements* p 1159.

those plots can enforce against plots 1 and 2. The owner of plot 2 can enforce against plot 1 but not against any of the other plots. Of course, as the sale proceeds, so the dominant tenement begins to shrink. By the time plot 20 comes to be sold there is no dominant tenement left. Hence no one can enforce the burdens against plot 20; but the owner of plot 20 can enforce the burdens against the owners of all of the other 19 plots.

3.15 It is unclear whether the rule in *Mactaggart* can be used in this way. It seems undesirable that an accident of chronology should determine the existence and extent of rights to enforce. A person who buys his house last should not have greater rights than the person who buys his house first. Where the intention is to impose common burdens for a whole community, there is much to be said for the view that those within the community must rely on the rules for community burdens and not on the rules for neighbour burdens. If the rules for community burdens are not satisfied, then the burdens should not be enforceable at all. The law, however, is unclear. In *Botanic Gardens Picture House Ltd v Adamson*<sup>41</sup> the First Division ignored *Mactaggart* and applied the rules of *Hislop* to a development created by disposition. The burdens were held not to be enforceable. The application of *Mactaggart* would have produced a different result. However, *Mactaggart* does not seem to have been put to the court in that case, and in any event the burdens on the plots were not the same. There are no other relevant authorities.

### Feudal and neighbour burdens

3.16 Combined feudal and neighbour burdens might arise by express stipulation. For example, in feuing out land the superior might provide that the burdens are also to benefit some piece of neighbouring ground, whether in the ownership of the superior or of a third party. The burdens could then be enforced both by the superior and by the owner of the neighbouring ground. But it seems unlikely that the same result can be achieved merely by implication. If an owner feus a small part of his estate, the burdens imposed in the deed are enforceable by the granter in his capacity as superior. But they are probably not also enforceable in his capacity as owner of the rest of the estate. That result could be achieved only by extending the rule in *Mactaggart* to grants in feu, and there seems no justification for doing so. One of the purposes of the decision in *Mactaggart* was to save the burdens, for, in a grant by disposition, there is no possible dominant tenement other than the land retained by the granter. By contrast, in the case of a grant in feu, the retained superiority is available to act as the dominant tenement. However, the issue has not come before the courts other than, indirectly and inconclusively, in *Stevenson v Steel Co of Scotland Ltd*.<sup>42</sup>

### Criticisms of the existing law

3.17 **(1) Over-reliant on implied rights.** A number of criticisms may be made of the existing law. First and most obviously, the law is over-reliant on implied rights. All too often the register is silent on the question of rights to enforce, and even where it is not silent implied rights may still arise. This is unsatisfactory both in principle and in practice.<sup>43</sup> In an ideal world the register should make full disclosure of the basis on which land is burdened. If a

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<sup>41</sup> 1924 SC 549.

<sup>42</sup> (1899) 1 F(HL) 91. For a discussion of this case, see Reid, *Property* para 398.

<sup>43</sup> See paras 3.1 and 3.2.

burden is disclosed but title to enforce is not, the servient proprietor is deprived of crucial information.<sup>44</sup>

3.18 **(2) Difficult to operate.** The rules on implied title to enforce are often difficult to operate. Earlier we identified five separate rules, namely:

- (i) the rule that, in a grant in feu, the superior has a right to enforce;<sup>45</sup>
- (ii) the rule that, in a grant by disposition, the granter has a right to enforce as owner of any reserved land (the rule in *Mactaggart*);<sup>46</sup>
- (iii) the rule that, where the grant was one of a number made by the same person and subject to the same or equivalent burdens, the co-grantees have a right to enforce provided that the grant alludes to the common plan (the first rule in *Hislop*);<sup>47</sup>
- (iv) the rule that, where the property is part of a larger area which was granted subject to real burdens, the owners of the other parts of the same area have a right to enforce (the second rule in *Hislop*); and
- (v) the rule that, where the property is part of a larger area which was made subject to a deed of conditions, the owners of the other parts of the same area have a right to enforce.

In practice it is usually a straightforward matter to operate rules (i), (iv) and (v). With rule (i) the only difficulty, sometimes insurmountable, is in tracking down the superior. But rule (i) will in any event disappear with feudal abolition. Rule (iv) is easy enough to operate, although, as will be seen later, it can be criticised on other grounds.<sup>48</sup> The boundaries of the larger area are disclosed in the deed which imposed the burdens and which is part of the servient tenement's title. Much the same is true of rule (v), and, as already mentioned,<sup>49</sup> the title sheet may contain a supplementary plan on which the larger area is shown. These are the easy cases. By contrast, rules (ii) and (iii) can often be operated only with the greatest difficulty.

3.19 Rule (ii) requires an exhaustive investigation into the position of the granter at the time of the original grant. Enquiries must be made as to whether he owned other property in the neighbourhood, and, if so, the details must be retrieved. Often the information is difficult to come by. If the granter owned a substantial estate, it will be necessary to trace other grants made out of the same estate in order to determine how much of the estate was left at the material time. The subsequent history of this residual dominant tenement must then be investigated. Often the tenement will have come to be divided up, perhaps into many different parts, and if so each constituent part continues to form a dominant tenement in the burden, and the consent of its current owner must be obtained for any waiver. The problem is at its worst with old burdens. Where a real burden was created by disposition in 1850, it may require a great deal of detective work in order to identify the current dominant

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<sup>44</sup> As to why the information may be essential, see paras 3.2, 3.22 and 5.5.

<sup>45</sup> Para 3.4.

<sup>46</sup> Para 3.5.

<sup>47</sup> For rules (iii) - (v), see paras 3.6 - 3.10.

<sup>48</sup> Para 3.26.

<sup>49</sup> Para 3.9.

tenements and their owners. But while this will be time consuming and expensive, it will at any rate be possible. With very modern burdens it may turn out not to be possible. The new Land Register is ahistorical. It discloses who owns land today, but not who owned the same land yesterday. Hence if real burdens are created in a disposition which was registered in the Land Register in 1984 or 1995, it is impossible to discover from the Register what other land the granter may have owned at the time of the grant. All that can be discovered is what land he owns today. It is true that the historical information is not entirely lost, for copies of the deeds which led to entries on the Register are kept. However, there is no obligation to make these copies available to the public and the current practice is not to do so.<sup>50</sup> In any event it is not clear whether these could be searched in a manner which would yield the information which is required. As time passes and more and more grants are registered in the Land Register, the problem identified here will become progressively more serious.

3.20 Rule (iii) is more burdensome still. Investigations must be made as to all other grants made by the same granter in respect of the same estate. The grants may be very numerous and, if the granter is a trust or a juristic person, spread over a very long period. Next, each individual grant must then be inspected to determine whether there are burdens imposed and, if so, whether they are the same as, or equivalent to, the burdens in the grant under consideration. Finally, the current owners of these properties must be ascertained, and subdivisions taken into account. The problem with the Land Register mentioned above applies here also.

3.21 Unfortunately, rules (ii) and (iii) are potentially applicable in a very large number of cases. Rule (ii) has to be considered wherever the original grant proceeded by disposition, even where the burdens themselves appear in a separate deed of conditions. And in theory rule (iii) might apply in every case where burdens have been imposed, except where the reservation by the granter of an express right to vary excludes the existence of all implied rights.<sup>51</sup> Even the presence of a deed of conditions does not exclude rule (iii) because the granter might have made other grants from the same estate without such a deed, or subject to a separate deed of conditions. In principle, of course, both rules are perfectly workable, with the possible exception of cases involving the Land Register. All that is required is patience, time and money, and the information will in the end be forthcoming. But in practice the rules are so convoluted and cumbersome that they are widely ignored.<sup>52</sup> The result is that a servient proprietor may often have little idea of who has the right to enforce the burdens in his title. The present law is, for all practical purposes, unworkable.

3.22 This matters. An owner who does not know who can enforce the burdens does not know who to approach for a minute of waiver. He may be driven to making an application to the Lands Tribunal, on the basis that a discharge under the 1970 legislation will at least bind all parties.<sup>53</sup> Or he may obtain a waiver from some only of the dominant proprietors - for example, from the superior - in which case he will have wasted his money because the burdens continue to be enforceable by the others.<sup>54</sup>

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<sup>50</sup> Section 6(5) of the Land Registration (Scotland) Act 1979 requires that the Keeper make available copies only of those deeds which are referred to in a title sheet.

<sup>51</sup> For this exception, see para 3.2.

<sup>52</sup> See para 3.2.

<sup>53</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(4).

<sup>54</sup> Para 3.2.

3.23 Another consequence is that burdens which are not, or are no longer, enforceable continue to clutter up the register, and in practice continue to be observed. A number of the burdens which currently appear on the D Section of title sheets on the Land Register are enforceable by no one and should not be there at all. This problem is about to become very much worse. With the abolition of the feudal system, all burdens currently enforceable by a superior alone will cease to be enforceable and should be deleted from the Register. But in order to identify such burdens it will be necessary to consider, on a case by case basis, the rules for implied enforcement and to determine whether or not they apply. Deletion is appropriate only where they do not apply. This is a task far beyond the resources of the Keeper. An idea of the difficulties which lie ahead is given by the litigation in *Brookfield Developments Ltd v Keeper of the Registers of Scotland*.<sup>55</sup> Here the owners of a *dominium utile* acquired the superiority and consolidated. As usual, the idea was to extinguish the real burdens contained in the feudal link in question. But when the land certificate was issued some of the burdens continued to appear. The Keeper's argument was that, notwithstanding the consolidation of the feu, there might possibly be third party rights, on an application of rule (iii) above. He was not in a position to say whether rule (iii) applied or not. Hence he was not prepared to delete the burdens. In the event, the owners were able to establish to the satisfaction of the Lands Tribunal that rule (iii) did not apply, and the Register was rectified to the effect of deleting the burdens. But the Tribunal supported the general approach taken by the Keeper. According to the Tribunal, the legislation makes a distinction between "subsisting" burdens and "enforceable" burdens. The statutory duty on the Keeper<sup>56</sup> is to retain on the Register all burdens which are "subsisting", and

"subsisting' in the context can only mean appearing on the face of the titles relating to the interest in question as still remaining in being".<sup>57</sup>

A burden which is "subsisting" in this sense might turn out not to be "enforceable". In that case the Register is inaccurate and falls to be rectified. But the task of investigating the titles of neighbouring properties for implied enforcement rights is not one for the Keeper:

"The parties have not said that before the Keeper entered these burdens as being still subsisting, he should have attempted to identify the other feuars who might be concerned and then by an examination of their titles satisfy himself as to whether some or all of them were given a right of enforcement and we would agree that this is not the case. We cannot think that Parliament ever intended the Keeper to be involved in investigations like this and in our opinion the use of the word 'subsisting' was deliberate, to make it clear that the Keeper's duties were simply to enter such burdens as appeared to him from his title examination to be still possibly enforceable."<sup>58</sup>

In view of the complexity of the rules of implied rights, the duty on the Keeper could not, realistically, be put any higher. And if these rules remain unchanged, the Keeper's response to feudal abolition, quite properly, will be to retain on the Register all or almost all feudal burdens on the basis that they might be "still possibly enforceable". That result does not seem acceptable. It would mean that the Register was inaccurate on a massive scale, and that, on the ground at least, feudal abolition would seem to have achieved remarkably little.

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<sup>55</sup> 1989 SLT (Lands Tr) 105.

<sup>56</sup> Under s 6(1)(e) of the Land Registration (Scotland) Act 1979.

<sup>57</sup> 1989 SLT (Lands Tr) 105 at p 110 F.

<sup>58</sup> 1989 SLT (Lands Tr) 105 at p 110 H-I.

3.24 **(3) Uncertain.** If the rules are hard to apply it is mainly because they require the amassing of a great deal of elusive information. The rules themselves are relatively clear, although, inevitably, some uncertainties remain. For example, the interaction of rules (ii) and (iii) is speculative and troublesome.<sup>59</sup> It is not clear beyond doubt that rule (ii) is not capable of applying to grants in feu.<sup>60</sup> And the relative lack of authority on rules (ii), (iv) and (v) means that that not all the details have been fully worked out.

3.25 **(4) Arbitrary.** If sometimes the rules seem arbitrary in their attribution of rights, it should be borne in mind that broadly similar rules have developed, apparently independently, in a number of other legal systems.<sup>61</sup> The rule most open to challenge on this ground is rule (iii). Here much depends on the conveyancer's pen. The use of one form of words will give rise to enforcement rights. The use of another form of words will ensure that no such rights exist. Often these are no more than words of style, used randomly and without any intention either to create rights or to take them away.<sup>62</sup> Indeed it could hardly be otherwise. A conveyancer who wished to create or deny enforcement rights would make express provision to that effect and would not peril the position on language which was open to interpretation either way. Hence in applying rule (iii) the courts are giving words a meaning which was not usually intended by their author.

3.26 **(5) Over-generous.** The rules can sometimes result in enforcement rights being held by a large number of people. It is not clear that this was always intended by the original parties to the deed, or that it is in all cases desirable. Compared to some other countries, the rules in Scotland work mechanically, without any reference to intention or to factors extrinsic to the deeds themselves; and while this promotes certainty, a welcome result, it is sometimes at the expense of over-generosity. This is seen most clearly with rule (iv). Suppose that in 1890 an owner divides his land and sells one part, plot A, by disposition. The burdens in the disposition are, by rule (ii), neighbour burdens enforceable by the owner of the retained plot, plot B, against the owner of plot A. Suppose now that in 1990 plot A is in turn divided up and sold off as four separate plots. By an application of rule (iv) the burdens in the original 1890 disposition become mutually enforceable by the owners of the four constituent parts of plot B. Burdens which were conceived originally for the benefit of neighbouring land have come to regulate relations amongst the owners of the burdened land. Neighbour burdens have grown into community burdens. It is unlikely that this was within the contemplation of the original parties, and in some cases the result may be inappropriate or regrettable. But, while the case is not directly covered by authority, it seems that this is the probable effect of rule (iv).

3.27 **(6) No notice to the dominant proprietor.** Lack of knowledge on the part of the servient proprietor is exceeded only by lack of knowledge on the part of the dominant proprietor. Dominant proprietors, other than superiors, are frequently in the dark about their enforcement rights. Admittedly, with community burdens, which affect them also, they will at least know that the burdens exist and may infer from this the existence of reciprocal rights to enforce. But with neighbour burdens the dominant proprietors may know nothing at all. For real burdens require to be registered only against the servient

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<sup>59</sup> Paras 3.14 and 3.15.

<sup>60</sup> Para 3.16.

<sup>61</sup> See para 3.7.

<sup>62</sup> For example, in *Hislop v MacRitchie's Trs* (1881) 8 R(HL) 95 at p 103 Lord Watson treated the standard clause by which the disponee is bound to repeat or refer to the burdens in future transmissions as being indicative of implied rights. And on the same clause see also *Lees v North East Fife District Council* 1987 SLT 769.

tenement, and in practice hardly ever appear on the title of the dominant tenement. Nor do burdens require to be expressly assigned in successive conveyances of the dominant tenement.<sup>63</sup> Thus there is no reason why a dominant proprietor should know of his rights. The position is the same even if the right to enforce was expressly granted. It follows that a servient owner who contravenes a burden in ignorance of the identity of the dominant owner may often be saved by the fact that the dominant owner, while seeing the act of contravention, knows nothing of the burden. Thus symmetry of ignorance leads to both non-compliance and non-enforcement. In practice the first a dominant proprietor may learn of a burden is when he is approached for a waiver; and, in view of the relative balance of knowledge, requests for waivers are likely to be more common than demands for compliance.

### Options for reform

3.28 The case for reform seems unchallengeable. The law on implied rights is barely workable in practice; and had it been understood more, or disregarded less, it would surely not have survived for so long. But it is less clear how any reform should proceed. There is no difficulty for new burdens. Later in this paper we recommend that the deed creating a burden should, in future, nominate the dominant tenement or tenements, and should be registered against the title of both dominant and servient tenements. The rules for implied enforcement rights would cease to apply.<sup>64</sup> For existing burdens two approaches seem possible. Either implied rights could be abolished, or implied rights could be retained but the rules simplified.

3.29 **Option (1): radical simplification.** It would be possible to justify the retention of implied enforcement rights if the rules could be simplified to the point where they could be easily applied, both by servient proprietors and by the Keeper. In our discussion paper on the abolition of the feudal system we put forward as one possible option a system based on physical propinquity. The chosen measure was 20 metres. Under the suggested system burdens could be enforced by all those whose properties lay within 20 metres of the servient tenement. Those further away would have no enforcement rights.<sup>65</sup> But straightforward as this system is, it received little support on consultation. Three objections in particular were voiced. First, our proposals took away existing rights. A person living 21 metres from the servient tenement might, quite reasonably, object to losing a right to enforce burdens which he considered essential to his amenity. Secondly, our proposals gave rights where none existed before. In some cases this would lead to an unwelcome proliferation of rights to enforce. Thirdly, the sheer variety of burdens made a rule based on distance particularly inappropriate. A 20-metre rule would work well for some burdens but not for others; and it would produce different results in rural areas than in the city. We accept these objections; but we think that they are intrinsic to any scheme which is sufficiently simple to work easily in practice. From this we conclude, reluctantly, that the option of simplification is not available.

3.31 **Option (2): abolition.** If the rules cannot readily be simplified, then abolition, with some exceptions, seems unavoidable. But there are also more positive reasons for supporting this conclusion. Implied rights are frequently accidental. A conveyancer who

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<sup>63</sup> Gordon, *Scottish Land Law* para 23-13; Reid, *Property* para 397.

<sup>64</sup> See paras 7.2 - 7.5 and 7.25-7.27.

<sup>65</sup> Scot Law Com DP No 93, paras 3.40 - 3.49.

had intended to confer enforcement rights would, or should, have done so expressly.<sup>66</sup> Typically implied rights are windfall rights, with the main right to enforce lying elsewhere. The beneficiary of an implied right has often no idea of its existence, has never been approached for a waiver, and would not in practice take steps for its enforcement. Even if he sought to enforce, he might well fail for lack of interest. Often too the burdens concerned are obsolete, and at any rate they are quite likely to be old. For modern deeds tend to be clear about enforcement rights, and it is mainly in older deeds that the possibility of implied rights occurs. There does not seem a strong case for saving rights of this kind. Legislation should not seek to revive rights which, for all practical purposes, are extinct.

3.32 But if implied rights are to be abolished, there would probably have to be exceptions. Some of the affected burdens will turn out to be useful. A relatively small number might possibly be essential. Exceptions must be devised in such a way as to distinguish the useful from the useless. Three may be suggested.

### Three exceptions to abolition of implied rights

3.33 **(1) Burdens in deeds of conditions.** The first exception is for burdens created by deed of conditions. Occasionally such deeds are used as free-standing devices to create neighbour burdens, as when one owner grants a deed of conditions in favour of his neighbour.<sup>67</sup> Our proposals would not affect such deeds. But in the overwhelming majority of cases, deeds of conditions are used to implement a common plan for a community and hence to create community burdens. This appears from the basic legislative provision, s 32 of the Conveyancing (Scotland) Act 1874, which provides that

"... it shall be lawful for any proprietor of lands to execute a deed, instrument, or writing, setting forth the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations under which he is to feu or otherwise deal with or affect his lands, or any part thereof ...".

Since there is a common plan, from a common author, and since all owners within the community have notice, it follows that the mere existence of a deed of conditions is usually sufficient to create mutual rights of enforcement. This is rule (v) of the rules identified earlier.<sup>68</sup> The principle is so well established that it seems never to have been expressly litigated, but it is taken for granted in a number of reported cases where deeds of conditions have been enforced.<sup>69</sup> We think that such implied rights should survive. All the information needed to imply enforceability is manifest from the deed, and hence from the register itself; and the use of a deed of conditions is a strong indication of the existence of a proper, self-regulating community. Without the survival of implied rights, such communities would simply cease to be regulated, with potentially serious consequences. If accepted, this exception would be a significant one because in practice deeds of conditions account for a majority - probably a large majority - of those community burdens which remain of current use and importance.

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<sup>66</sup> Para 3.25.

<sup>67</sup> See paras 7.32 ff.

<sup>68</sup> Para 3.18.

<sup>69</sup> eg, *Wells v New House Purchasers Ltd* 1964 SLT (Sh Ct) 2.

3.34 There is one case where, under the present law, an implied<sup>70</sup> right to enforce would probably be excluded in a deed of conditions. This is where the granter of the deed (typically the superior) reserves a right to waive the burdens.<sup>71</sup> We would be inclined to allow enforcement in this case also, even although this would confer new rights. There are various reasons for taking this view. One is certainty. The existing law is over-reliant on the wording used in the particular deed of conditions, and may give rise to disputes. Another is that, following feudal abolition, it seems wrong to give too much weight to a right of waiver which was often conceived in favour of superiors. Thirdly, there is the danger that otherwise communities which benefit from regulation would be left unregulated. A deed of conditions which currently is enforceable by a superior but by no one else will lapse on the abolition of the feudal system unless enforcement rights are transferred to the community members. Sheltered housing communities, for example, might be left with an administrative vacuum. Not everyone will find this line of reasoning palatable. For some it may seem wrong in principle that enforcement rights should be created where none exist at present. We would greatly welcome the views of consultees.

3.35 **(2) Burdens for the maintenance and use of common facilities.** In our forthcoming report on the abolition of the feudal system we will recommend that feudal burdens should survive to the extent that they regulate the maintenance, reinstatement or use of a common facility, such as shared amenity ground, or a private water system, or the common parts of a tenement. The burdens would be enforceable, not by the former superior, but by those whose property is benefited by the facility. The saving would not extend to obligations of maintenance which have been taken over by public authorities, for example in relation to roads and sewers. The justification for the saving is the self-evident usefulness of burdens of this kind. Much the same considerations apply in the present exercise. It would be unfortunate if basic maintenance burdens were to fail because they rested on implied enforcement rights. We suggest therefore that burdens regulating common facilities should be declared enforceable by the owners of those properties which benefit from the facility.

3.36 **(3) Burdens in respect of which a notice is registered.** In our report on the abolition of the feudal system we will recommend that, in certain limited circumstances, a former superior should be able to preserve feudal burdens by registering a notice which nominates neighbouring land as the new dominant tenement. A similar system of preservation by registration might also be introduced for neighbour and community burdens. Indeed if it were not, those with implied enforcement rights would be placed in a weaker position than former superiors. A detailed scheme is described below,<sup>72</sup> but in outline it would work like this. A right to enforce which at the moment arises only by implication could be preserved and made express by registration of an appropriate notice. Registration would require to be against the title of both the dominant and the servient tenements. There would be a time limit, perhaps of five years, after which all implied rights not yet registered would be lost.

3.37 A number of difficulties would lie in the way of registration. In the case of neighbour burdens a person might be unaware of his enforcement rights. Our proposals would then operate, perhaps not unreasonably, as a type of negative prescription. In the case of community burdens, registration would require the co-operation of some other

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<sup>70</sup> An express right would not of course be excluded. See *Lawrence v Scott* 1965 SC 403.

<sup>71</sup> See eg *Gray v Macleod* 1979 SLT (Sh Ct) 17 at p 21.

<sup>72</sup> Paras 3.43 ff.

members of the community.<sup>73</sup> And in all cases there would be work and expense. Later we say something about reducing the expense of registration.<sup>74</sup> But the burden of work is undeniable and unavoidable. A notice would not be accepted for registration unless the Keeper was satisfied as to the claimed enforcement rights.<sup>75</sup> And in order to make out his claim, the applicant might have to engage in the kind of time-consuming investigations which were described earlier.<sup>76</sup> However, it needs to be emphasised that this is a consequence of the old law and not of the new. It is asking the applicant to do no more than would be necessary if, today, he wished to enforce a particular burden against a particular owner. The merit of the proposals is that the investigation will have to be done only once, for thereafter its results will be publicly available on the Register.

3.38 Probably not many notices would be registered, and we would be content with that result. Most burdens which remain current will fall within the first two exceptions described above. The final exception invokes market forces. A person who did not consider his rights to be of value would not go to the trouble and expense of registering them. The end result is attractive. After five years the position would be absolutely clear on the face of the register. A burden would then be enforceable if and only if -

- (i) express enforcement rights were contained in the original constitutive deed;
- (ii) the burden was constituted in a deed of conditions;
- (iii) the burden regulated maintenance or use of a common facility; or
- (iv) a notice asserting implied enforcement rights had been registered.

In all other cases the burden would be unenforceable and, in the case of the Land Register, could safely be deleted. Many burdens would fall into this category. Of course the deletions could not happen all at once. The Keeper could not be expected to go through thousands of title sheets weeding out burdens. But the spent burdens could be removed routinely on the first occasion the property changed hands after the expiry of the 5-year transitional period. An owner who wanted to expedite the process - because, for example, he intended to breach one of the spent burdens - could apply for rectification.<sup>77</sup> After a few years the position would be transformed. The D section of title sheets would be much shorter than at present. Only live burdens would be listed. The listing would disclose who has title to enforce; and in some cases there would be a mirror entry in the title sheet of the dominant tenement so that dominant proprietors too would have notice of the position.<sup>78</sup> For the first time the Land Register would give an accurate picture in relation to real burdens.

3.39 Implied rights could not arise after the legislation came into force. For new burdens this would mean that the constitutive deed would require to stipulate expressly for rights to

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<sup>73</sup> See paras 3.44 ff.

<sup>74</sup> Para 3.48.

<sup>75</sup> Para 3.52.

<sup>76</sup> Paras 3.18 - 3.20.

<sup>77</sup> As in *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105. There may be an argument that, for resources reasons, no application for deletion of spent burdens should be permissible during the 5-year transitional period.

<sup>78</sup> However, the position would remain unchanged for existing burdens where an *express* right to enforce has been created. Thus there will still be cases where the existence of enforcement rights is not disclosed on the title sheet of the dominant tenement.

enforce.<sup>79</sup> For existing burdens it would mean that a post-legislation subdivision would no longer trigger mutual enforcement rights under rule (iv); and that a post-legislation grant by a common author on the same terms as earlier grants would not create implied rights under rule (iii).

3.40 We suggest that:

**7. (1) Where an existing deed of conditions imposes on two or more properties burdens which are identical or equivalent, the burdens should be mutually enforceable by the owners of those properties and by their successors as owners.**

**(2) Where an existing real burden regulates the maintenance, reinstatement or use of a common facility, the burden should be enforceable by the owners of the property benefited by the facility and by their successors as owners.**

**(3) During a transitional period of five years it should be possible to preserve an implied right to enforce burdens by registering an appropriate notice in accordance with the scheme set out in proposal 8.**

**(4) Subject to the above, at the end of the transitional period all implied rights to enforce burdens should be extinguished.**

**(5) It should cease to be possible for new rights to enforce burdens to arise by implication.**

3.41 While our proposals will lead to a substantial reduction in enforcement rights, those rights which survived would be more prominent and so more likely to be exercised. In itself this should not be unwelcome. If the principle of real burdens is accepted, then there is no reason to complain if the system works openly and effectively. But there is a risk here of prejudice to the servient proprietor. Under the current system burdens are often remarkably ineffective; and an increase in effectiveness requires to be balanced by a freeing up of the grounds for variation and discharge. We return to this important subject in part 5 of the paper.

### **Registration of implied rights to enforce**

3.42 In this section we outline a provisional scheme for the registration of implied rights to enforce. The scheme has been much improved by advice and assistance given to us by the Registers of Scotland.

3.43 **Neighbour burdens.** An implied right to enforce a neighbour burden arises under rule (ii) of the rules identified above (the rule in *Mactaggart*).<sup>80</sup> We suggest that a holder who wishes to preserve such a right should register a notice of preservation in the Land Register or Register of Sasines, as appropriate. The notice would:

- (i) describe the servient tenement(s);
- (ii) describe the dominant tenement(s) and set out the title of the applicant;

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<sup>79</sup> See paras 7.25-7.27.

<sup>80</sup> Paras 3.5 and 3.18.

- (iii) narrate the burdens; and
- (iv) explain the basis on which an implied right of enforcement attaches to the dominant tenement(s).

A proper conveyancing description would be required, or, in Land Register cases, details of the title number. If he wished, the applicant could be selective about the burdens which were included. For example he would probably wish to omit burdens which were clearly obsolete. In some cases this might be a matter for negotiation with the servient proprietor. The notice would require to be registered against the title of both the dominant and the servient tenements, so that if they were in different registers, dual registration would be necessary. If the original dominant tenement had come to be divided, it would be open to the owner of each constituent part to register a separate notice in respect of his own part. Alternatively two or more of the owners could prepare a combined notice. As well as multiple dominant tenements there might also be multiple servient tenements. For example, the original servient tenement might have been divided, or a number of different properties might have been disposed by the same grantor subject to the same burdens. In such cases a combined notice would be allowed, but registration would be required under each of the servient tenements.

3.44 **Community burdens.** Implied rights to enforce community burdens might arise under any of rules (iii), (iv) and (v).<sup>81</sup> Separate provision has already been made for rule (v),<sup>82</sup> and here we are concerned only with rules (iii) and (iv) (the two rules in *Hislop*). The position is potentially complex. Where burdens are designed to regulate an entire community, it makes little sense to allow individuals to preserve enforcement rights for their own interest alone. Ideally, the burdens should either be preserved for everyone or for no one. But there are difficulties about achieving this ideal. It would be unrealistic to require all affected owners to concur in registering a notice. There might be 100 owners or more in a community. Each would want to take legal advice. Some of the owners would be absent. Some properties would be on the point of being sold. Others would be stuck in an executry. Some of the owners might refuse to respond to letters or, if they did respond, would respond negatively. In practice the thing could never be done. Some of the same objections apply even if the participation threshold were reduced to a bare majority of the members of the community. And, at least in cases involving rule (iii), there would be difficulties both in identifying the boundaries of the community, and in calculating the 50% figure.

3.45 In small communities, such as tenements, a rule which required the assent of a majority would work perfectly well. If a tenement consists of 8 flats, then it seems reasonable that burdens should be preserved if 5 of the owners are willing to agree; and obtaining 5 signatures should not be an impossible task. Majority rule is consistent with proposals which we make later for variation and discharge of community burdens.<sup>83</sup> But many communities are much larger than this. An inter-war<sup>84</sup> housing estate might consist of 100 properties. An instrument of sasine of 1839 might apply to half of north Edinburgh. For larger, or indeterminate, communities, the solution seems to lie in allowing registration in

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<sup>81</sup> For a description of these rules, see para 3.18.

<sup>82</sup> Paras 3.33 and 3.34.

<sup>83</sup> Paras 5.7 ff.

<sup>84</sup> In the east of Scotland, at least, a housing estate from this period might well not use a deed of conditions, and would therefore not come within the deeds of conditions exception.

respect of part only of the community. An owner who wished to preserve burdens could approach his immediate neighbours. Together they would form a sub-community. Majority rule would continue to apply, so that 7 proprietors could bring in 12, or 21 could bring in 40. All those affected would require to be part of the existing community and hence currently subject to the burdens. Mutual enforcement rights would need to be demonstrated. The idea is to allow preservation of the *status quo*, and there should be no question of the creation of new rights and obligations. Numbers would be calculated by number of houses or other units rather than by land area. This is simpler and, in this particular context,<sup>85</sup> fairer. A single owner with a massive garden should not be able to preserve burdens in respect of five tenements. In practice we imagine that matters would often proceed consensually and that the number of conscripts might turn out to be low. We suggest a minimum threshold of three signatories, from three different units, to discourage maverick applications.<sup>86</sup> Thus a notice in respect of a sub-community of four would require three signatures. Smaller communities would require unanimity.

3.46 A welcome consequence of this approach is that communities would become smaller. The massive areas created by Victorian conveyancers would be broken up forever. Since sub-communities would survive only where there was the will to make this happen, there would be reasonable prospects of future co-operation; and under proposals made elsewhere in this paper, such communities could then use majority rule to adjust the reprieved burdens or to add new ones.<sup>87</sup>

3.47 The notice procedure would be along the same lines as for neighbour burdens. The owners of a majority of units within the nominated area would execute a notice of preservation which would

- (i) describe the community, ie the area affected by the burdens;
- (ii) narrate the burdens;
- (iii) explain the basis on which a reciprocal right of enforcement impliedly arises; and
- (iv) set out the title of the applicants.

A copy of the notice would require to be sent to every property within the community. Registration would be against the title of each of the affected properties, and in practice this would often mean dual registration in the Land Register and Register of Sasines.

3.48 There is no particular reason why the investigative and preparatory work should be more demanding and expensive for community than for neighbour burdens. But there is a potential problem with registration costs. If a community consists of 40 units, the notice will require to be registered against 40 titles; and if a separate charge is then made for each registration, the costs are likely to be high. Here, however, an administrative solution seems available. The new system of digital mapping used in the Land Register would allow a community notice to be given effect by plotting the community boundaries on the digital map. Thereafter it would be possible to generate automatic entries on the title sheets of the

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<sup>85</sup> For variation and discharge of community burdens, we suggest land area as a fairer measure: see para 5.12.

<sup>86</sup> This is consistent, both with our proposals for variation and discharge, and with our recent recommendations for the law of the tenement. See para 5.14.

<sup>87</sup> See paras 7.79-7.84.

affected properties. In principle it is no more difficult to generate entries for 40 properties than for 2, and therefore it is possible to keep registration fees within reasonable bounds. However, this facility is only available on the Land Register, and in most communities some properties will remain on the Register of Sasines.

3.49 We would be surprised if many notices were to be registered. Usually the burdens will be of insufficient value to justify the cost and trouble of using a procedure which, unavoidably, is quite complex. Most burdens found outside deeds of conditions are either obsolete, or concern maintenance and would be preserved anyway. If a "sunset rule" is introduced,<sup>88</sup> the scope for registering a notice would be further reduced. Nonetheless the procedure seems worth having. A determined owner should be given the means to preserve burdens which he considers to be worthwhile.

3.50 **Simplification of existing rules.** We would not wish to attempt a legislative restatement of the existing rules for implied rights to enforce. If our proposals are accepted, these rules will survive only for the transitional period allowed for registration of a notice. Nor would we wish to propose a simplification of the rules, because any change would alter the categories of those entitled to enforce and so interfere with existing rights. Nonetheless, one clarification seems essential.<sup>89</sup> Earlier we mentioned the difficulties which can arise when rules (ii) (the rule in *Mactaggart*) and (iii) (the first rule in *Hislop*) are both potentially applicable to the same set of facts.<sup>90</sup> This occurs where a number of grants containing identical burdens are made by disposition. We suggest that, for the avoidance of doubt, the solution adopted by the First Division in *Botanic Gardens Picture House Ltd v Adamson*<sup>91</sup> should be accepted as correct. This would mean that a person who is himself subject to the common burdens could not, by relying on rule (ii), treat as neighbour burdens those common burdens which were imposed in dispositions prior in time to his own. Instead the burdens would be community burdens or nothing, all members of the community would be treated in the same way, and if rule (iii) were found to be inapplicable there would be no implied enforcement rights for anyone.

3.51 **Status of entry on Land Register.** Registration of a notice in the Land Register would lead to an entry in the D Section which set out the title to enforce. With neighbour burdens, where the dominant tenement is distinct from the servient, a matching entry would also appear in the A Section of the title sheet of the dominant tenement. In accordance with the usual rules of registration of title, these entries should presumably have the effect of conferring (or, more strictly, confirming) a right, but subject always to the possibility of rectification. Thus a person seeking to enforce a burden could rely on the statement on the Register and would not otherwise be put to proof of his title. But it would remain open to the defender to go behind the Register and challenge the validity of the original notice. If the challenge was successful, the action would fail and the court would order the rectification of the Register.<sup>92</sup> Rectification could also be sought directly at any time by an application to the Keeper in the usual way.<sup>93</sup> It would probably be necessary to allow

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<sup>88</sup> ie a rule which extinguishes a burden after a certain number of years. See paras 5.68 ff.

<sup>89</sup> In our report on the abolition of the feudal system we will also recommend that it be made clear, for the avoidance of doubt, that rule (ii) does not apply in the case of grants in feu.

<sup>90</sup> Paras 3.14 and 3.15.

<sup>91</sup> 1924 SC 549.

<sup>92</sup> Under s 9(1) of the Land Registration (Scotland) Act 1979. In the case of community burdens, the rectification should apply to the whole community and not merely to the land owned by the pursuer.

<sup>93</sup> Land Registration (Scotland) Rules 1980, r 20(1).

rectification even where this was to the prejudice of a proprietor in possession.<sup>94</sup> In practice any prejudice would be relatively slight, except, sometimes, for dominant proprietors in a neighbour burden. It seems an open question whether the payment of indemnity ought also to be excluded.

3.52 Rectification is unlikely to be common. The Keeper will not accept a notice for registration unless he is satisfied as to its validity. In particular he will require to be satisfied that implied enforcement rights exist under the present law. Strictly, the Keeper would not have to examine notices presented for recording in the Register of Sasines, but since such notices will in the end have to be taken account of on first registration in the Land Register, he may take the view that it is better to determine validity now rather than later. Since the Keeper has only limited powers to refuse deeds for the Sasine Register<sup>95</sup> it may be necessary to confer a power to turn away a notice if he is not satisfied as to its validity.

3.53 Registration of a notice does no more than confirm title. That is not the same as saying that the burden can actually be enforced. An enforcer must show interest as well as title, and, unless his property is close by, he may fall at this hurdle.<sup>96</sup> Further, even if both title and interest can be shown, enforcement might still fail. The fact that a burden appears on the register is not conclusive as to its validity, either under the present law or under the reforms proposed in this paper. For example, the burden may be insufficiently clearly drafted to be enforceable,<sup>97</sup> or it may have been extinguished by negative prescription, or acquiescence, or by confusion.<sup>98</sup>

3.54 **Length of transitional period.** Our provisional suggestion is that the transitional period might be 5 years. This is a compromise. A period which was too short might create a sense of panic, and would have resource implications for the registers. A more generous period would allow the position of real burdens to be considered routinely when property changes hands and would reduce additional work for solicitors and their clients. However, considerations of certainty require that the transitional period should not be over-long.

3.55 We now attempt to summarise, in the form of a provisional proposal.

**8. Views are invited on the following scheme for implied rights to enforce:**

- (1) Implied rights to enforce real burdens would be preserved by registration in the Land Register or Register of Sasines of a notice of preservation within the transitional period.**
- (2) The transitional period would be 5 years.**
- (3) Registration would be against both the dominant and the servient tenements.**
- (4) In the case of neighbour burdens, the notice of preservation would be executed and registered by the owner of the dominant tenement.**

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<sup>94</sup> In other words, an additional category would be required in s 9(3)(a) of the 1979 Act.

<sup>95</sup> *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854.

<sup>96</sup> Paras 4.1-4.11.

<sup>97</sup> Paras 4.31-4.37, and 7.19.

<sup>98</sup> Paras 5.38 ff.

(5) In the case of community burdens, the notice of preservation would be executed and registered by the owners of more than 50% of the units in the community (or, where the notice relates to part only of a community, by the owners of more than 50% of the units in that part).

(6) Where a community (or sub-community) comprises three units or fewer, a notice under (5) would be executed and registered by all of the owners in the community (or sub-community).

We also propose that:<sup>99</sup>

9. For the avoidance of doubt, the rule conferring an implied right to enforce as a neighbour burden (the rule in *Mactaggart*) should not be available in a question between properties which are subject to the same (or equivalent) burdens.

### Multiple real rights in the dominant tenement: who can enforce?

3.56 Thus far we have been concerned with the identification of the dominant tenement, that is to say, of the property to which the right to enforce is to attach. But there remains the question of who is to exercise that right.<sup>100</sup> Dominant tenements are often subject to multiple real rights. The property may be owned *pro indiviso*. It may be leased. There may be one or more standard securities. Having identified the property we must now identify those entitled to enforce.

3.57 **Owners.** Obviously, the owner of the dominant tenement has a title to enforce the burdens. If the property is owned in common, the rule is probably that all must concur in any action.<sup>101</sup> The owner must be infeft - or, in post-feudal language, have a registered title<sup>102</sup> - and we see no reason for changing this rule. A person who is not the owner should not have the rights of ownership. The public interest lies in encouraging registration, rather than the reverse; and, particularly in Land Register cases, it is a simple step to complete title by registration.<sup>103</sup> A requirement of registration means that the servient proprietor is not in doubt as to where enforcement rights lie. There is also a technical reason for leaving the law unchanged. While land can have only one owner,<sup>104</sup> it may have a number of uninfert proprietors. For example, A might die owning land. B, having confirmed as executor, might then grant a docket transfer under s 15(2) of the Succession (Scotland) Act 1964 to C, a beneficiary. C, without completing title, could convey the property to D. At some point D would probably complete title by registration, and, on doing so, would become sole owner. But until registration he would merely be one of three uninfert proprietors. There seems no good reason why the burdens should be enforceable by all of B, C and D, and it would be an extremely awkward rule if all three had to concur in any discharge of the burdens.

3.58 **Effect of insolvency.** If the owner of the dominant tenement is sequestrated, the property passes to his trustee in sequestration. Thereafter the trustee can enforce the

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<sup>99</sup> See para 3.50.

<sup>100</sup> We are concerned here only with rights to enforce and not with, eg, rights to discharge or vary, or rights to register a notice of preservation.

<sup>101</sup> Gordon, *Scottish Land Law* para 15-17; Reid, *Property* para 29.

<sup>102</sup> *Gammell's Trs v The Land Commission* 1970 SLT 254.

<sup>103</sup> All conveyances are directly registrable in the Land Register, and recourse to a notice of title is not required. See Land Registration (Scotland) Act 1979 s 3(6).

<sup>104</sup> Although that single right of ownership may of course be shared by a number of people, *pro indiviso*.

burdens, at least so long as he first completes his title by registration. The bankrupt loses his power to enforce.<sup>105</sup> Company liquidation, receivership, and administration produce a similar result but in a different way. The dominant tenement remains the property of the company, but the company falls to be administered by the liquidator,<sup>106</sup> receiver<sup>107</sup> or administrator<sup>108</sup> rather than by its board of directors. The law here seems satisfactory and we do not suggest any change.

**3.59 Heritable creditors.** A heritable creditor cannot usually enforce a real burden,<sup>109</sup> but the position may be different if he comes to take possession. The policy of the legislation is to treat a heritable creditor in possession as virtually an interim owner. For example, he is entitled to rents or other periodical payments,<sup>110</sup> and may grant leases for up to seven years.<sup>111</sup> He must manage and maintain the property, and there is assigned to him all necessary rights to do so.<sup>112</sup> It is doubtful whether these powers include a right to enforce real burdens. However, in relation to burdens there is much to be said for treating a heritable creditor in possession in the same way as a trustee in sequestration or receiver. The debtor-owner has defaulted on his loan and vacated the property. Matters are now out of his hands. The taking of possession by the creditor is usually a prelude to sale. It seems undesirable that, during this period, the right to enforce burdens, and to grant discharges, should rest with the defaulting owner rather than with the creditor in possession. An owner who has lost his house should not be able to grant minutes of waiver in exchange for ready cash. In our recent report on the law of the tenement we recommended that, for the purposes of tenement management schemes, the rights and duties associated with a flat should pass from the owner to the heritable creditor in the event that the creditor entered into possession.<sup>113</sup> The same policy seems appropriate here also. However, if the debtor were to be sequestrated, the heritable creditor would relinquish his rights in favour of the trustee in sequestration.

**3.60 Holders of other real rights.** There is a case for extending the right to enforce to tenants under leases of sufficient duration, and to liferenters, as has occurred in some other jurisdictions.<sup>114</sup> The current law is not clear. In a case concerning rights to sue in respect of river pollution, Lord President Dunedin suggested that

"... the tenant is the assignee of the landlord's title, by the mere force of the lease, to every extent that is necessary to give it to him for his protection in the lease .. In other words, he is the assignee of the landlord's title in so far as is necessary for his own protection in the subjects let."<sup>115</sup>

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<sup>105</sup> Bankruptcy (Scotland) Act 1985 s 32(8).

<sup>106</sup> *Stair Memorial Encyclopaedia* vol 4, para 757. And see Insolvency Act 1986 ss 91(2) and 103.

<sup>107</sup> *Imperial Hotel (Aberdeen) Ltd v Vaux Breweries* 1978 SLT 113, and *Independent Pension Trustee Ltd v LAW Construction Co Ltd* 1997 SLT 1105. But compare *Shanks v Central Regional Council* 1987 SLT 410. For powers of receivers to bring actions, see Insolvency Act 1986 s 55, Sched 2 para 5.

<sup>108</sup> Insolvency Act 1986 s 14(1), (4), Sched 1 para 5.

<sup>109</sup> *Smith v Taylor* 1972 SLT (Lands Tr) 34.

<sup>110</sup> Conveyancing and Feudal Reform (Scotland) Act 1970, Sched 3, sc 10(3).

<sup>111</sup> *Ibid*, s 20(3).

<sup>112</sup> *Ibid*, s 20(5)(b).

<sup>113</sup> Scot Law Com No 162, para 8.26.

<sup>114</sup> Most notably, the United States: see American Law Institute, *Restatement (Servitudes)* TD No 5, ss 5.2-5.5, pp 14-55.

<sup>115</sup> *Fleming v Gemmill* 1908 SC 340 at p 348. And see also C G H Paton & J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) pp 98 - 100.

A broadly similar view is expressed by Sheriff Dobie in relation to liferents.<sup>116</sup> But there are no reported decisions on the enforcement of real burdens,<sup>117</sup> and it seems that there may be no right to enforce a servitude.<sup>118</sup> In theory the right to enforce burdens could be expressly conferred in the deed constituting the lease or liferent, but this is not usually done in practice.<sup>119</sup> There seems no reason for withholding a right to enforce from tenants and liferenters.<sup>120</sup> A tenant in a lease of substantial duration is more likely to be affected by routine breaches of real burdens than the landlord who holds the property only as an investment. And it is an awkward rule in practice if the tenant must ask his landlord to enforce on his behalf, and unclear what happens if the landlord refuses. Nor is there any prejudice to the landlord in extending the right: as the American Law Institute has observed<sup>121</sup>

"The benefit of a restrictive covenant can be enjoyed by both the possessor and the owner or reversioner without diminishing its value to the other, or increasing the costs of performance to the person bound by the restriction."

3.61 Two qualifications may be thought necessary if the right is to be extended. First, the tenant or liferenter should have an interest to enforce. Normally this will mean that he is in natural possession or has prospects of resuming such possession.<sup>122</sup> Interest to enforce is considered elsewhere in this paper.<sup>123</sup> Secondly, it is arguable that the lease or liferent ought to appear from the register. For otherwise the servient proprietor has no means of knowing whether such enforcement rights exist. This would work better for leases than for liferents. All leases exceeding 20 years may be registered<sup>124</sup> and, in Land Register areas, must be registered if a real right is to be created.<sup>125</sup> An automatic exclusion of short leases is probably to be welcomed on other grounds as well. By contrast, a registration requirement would exclude most liferents. Only proper liferents require to be registered, and proper liferents are rare in practice. Perhaps this does not matter. In a trust liferent, the trustee would be able to enforce the burdens, and it may be that that is the more appropriate arrangement.

3.62 Any right conferred on tenants and liferenters would be held concurrently with the primary enforcement right held by the owner.<sup>126</sup> But it could quite easily be defeated, for the existing rule by which an exclusive right to discharge burdens rests with the owner would remain. Our reform should not have the effect of requiring additional signatures in a minute of waiver. But if the burden can be discharged by the landlord acting alone, a tenant who is seeking to enforce a burden may find that his action is defeated by a minute of waiver. This result seems acceptable. Even under the present law a dominant proprietor

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<sup>116</sup> W J Dobie, *Manual of the Law of Liferent and Fee in Scotland* (1941) pp 75-6.

<sup>117</sup> Although there is some discussion in *Eagle Lodge Ltd v Keir and Cawder Estates Ltd* 1964 SC 30 at pp 45 and 47.

<sup>118</sup> Reid, *Property* (A G M Duncan) para 481, but compare Gordon, *Scottish Land Law* para 24-77 n 70. The case cited by Professor Gordon was a possessory action. It should be noted that tenants are allowed to *make use of positive servitudes*.

<sup>119</sup> By contrast, provision is often made for the converse situation of where the subjects of lease are a *servient tenement*. See M J Ross & D J McKichan, *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn, 1993) p 266.

<sup>120</sup> The same conclusion was reached by the Ontario Law Reform Commission: see Ontario LRC, *Covenants* p 159.

<sup>121</sup> American Law Institute, *Restatement (Servitudes)* TD No 5, s 5.2, p 18.

<sup>122</sup> An intermediate landlord/tenant has always the prospect of resuming possession (eg in the event of breach) and has a clear interest in the re-letting value of the property. See *McEwan v Steedman and McAlister* 1912 SC 156.

<sup>123</sup> Para 4.8.

<sup>124</sup> Registration of Leases (Scotland) Act 1857, s 1.

<sup>125</sup> Land Registration (Scotland) Act 1979, s 3(3).

<sup>126</sup> By contrast, a trustee in sequestration or heritable creditor in possession would have an exclusive right.

might be defeated by a discharge granted by the Lands Tribunal.<sup>127</sup> And it may be assumed that a tenant would prefer a defeasible enforcement right to no enforcement right at all. In practice the issue may arise only infrequently; and it is always open to a tenant to restrict the landlord's power of discharge by an appropriate provision in the lease.

3.63 In the case of very long leases there may be an argument that the tenant should be viewed as the real owner and that rights of enforcement and discharge should not be left with the landlord. We intend to carry out a full study of the law as it applies to leases of this kind<sup>128</sup> and we would not wish to engage in piecemeal reform as part of the present exercise. But in any case the issue is probably not a live one. With very long leases the burdens are almost invariably conditions of the lease rather than real burdens in the strict sense, and different considerations apply.<sup>129</sup>

3.64 We consider later the parallel question of whether burdens ought to be enforceable against tenants, liferenters, and other temporary possessors of the *servient* tenement.<sup>130</sup>

3.65 **Delegating enforcement.** Enforcement can be delegated to a factor or other manager, who can then sue in his own name. The delegation may either be general,<sup>131</sup> or in respect of a particular litigation.<sup>132</sup> In factored property such as tenements, managers commonly enforce maintenance burdens on behalf of the owners. The present position seems satisfactory. The requirement that delegation be express seems a desirable safeguard for owners. A rule which conferred an implied power on managers would be potentially wide, and open to abuse. We do not advocate such a rule. In practice, the deed of conditions regulating a community may often confer a general power of enforcement on the manager. The model management scheme in appendix 2 does so.<sup>133</sup> But in any event, since each member of a community has an independent title to enforce, it would be sufficient for a manager to obtain the authority of a single owner.

3.66 Summarising the discussion, we suggest that:

**10. (1) The right to enforce a real burden which attaches to a dominant tenement should be exercisable by -**

**(a) the registered owner of the dominant tenement, and**

**(b) any holder of a registered lease or liferent.**

**(2) Where the owner has been sequestered, the right should be exercisable by his registered trustee in sequestration and not by the owner.**

**(3) Subject to (2), where a heritable creditor has taken possession, the right should be exercisable by the creditor and not by the owner.**

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<sup>127</sup> The same situation arises where (i) co-feuars are given express rights to enforce but (ii) the constitutive deed expressly allows the superior to grant a unilateral waiver. See *Lawrence v Scott* 1965 SC 403.

<sup>128</sup> See our *Fifth Programme of Law Reform* (Scot Law Com No 159, 1997) paras 2.36 and 2.37.

<sup>129</sup> See para 1.14.

<sup>130</sup> Paras 4.12-4.20, and 4.28.

<sup>131</sup> *Park v Mood* 1919 1 SLT 170.

<sup>132</sup> *Shinas v Fordyce* (1777) 5 Brown's Supp 572.

<sup>133</sup> Rules 2.4(a) and 3.6(a). For this management scheme, see further paras 7.85-7.87.

**(4) The right to enforce conferred by (1)(b) should not include a right to grant a variation or discharge of the burden.**

## PART 4 OTHER ASPECTS OF ENFORCEMENT

### Interest to enforce

4.1 Title to enforce was considered in part 3. But as well as title, an enforcer must also have interest. Usually, the onus of establishing interest lies with the enforcer, so that if interest is not averred and, if necessary, proved, the action fails. However, interest is presumed (i) in cases involving superiors<sup>1</sup> and (ii) in a question between the original parties.<sup>2</sup> Of these exceptions, the first will disappear with feudal abolition, while the justification for the second - that the parties are in a contractual relationship - will also disappear under the proposal mentioned later,<sup>3</sup> that a real burden should cease to have dual validity as a contractual term. We suggest therefore that, in future, interest to enforce should have to be established in all cases.

4.2 The interest required is often characterised as being "patrimonial" or "praedial", by which is meant interest, not as an individual, but in the capacity as owner of the dominant tenement. The dominant tenement must be injured by the breach.<sup>4</sup> Sometimes it is difficult to separate interest to enforce from the praedial rule, that is to say, from the rule that, in order to achieve initial validity, a burden must affect one property for the benefit of another.<sup>5</sup> In principle, however, the two are quite distinct. The former is a rule of enforcement and the latter a rule of constitution. They operate at different levels of generality. The praedial rule is concerned with the general question of whether a burden is by its nature capable of conferring benefit on the dominant tenement or tenements. The interest to enforce rule is concerned with a specific breach by a specific servient proprietor at a specific time, and by the attempt to found on that breach by a specific dominant proprietor. The specificity makes all the difference. On the particular facts, the dominant and servient tenement may be too far apart for enforcement to be permitted; or the breach may be too trivial to impact on the dominant tenement; or the neighbourhood may have changed in such a way that praedial benefit, present at the time of original constitution, has now largely disappeared. It follows that a burden which easily satisfied the praedial rule might turn out to be unenforceable in particular cases because of lack of interest to enforce. But probably it would not be unenforceable in all cases. The next breach might be more serious; or the dispute might lie between two tenements which are closer together. For community burdens, in particular, proximity is often a decisive factor. I can enforce burdens against the house next door, but not, usually, against the house at the opposite end of the estate.<sup>6</sup>

4.3 There is little authority on interest to enforce. The small number of cases involving superiors can probably be disregarded, not least because they seem to admit interest which is non-patrimonial.<sup>7</sup> There are even fewer cases involving neighbours or members of a community. Probably no one would dissent from the general statement by Lord Wark in

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<sup>1</sup> *Earl of Zetland v Hislop* (1882) 9 R(HL) 40.

<sup>2</sup> *Scottish Co-operative Wholesale Society Ltd v Finnies* 1937 SC 835.

<sup>3</sup> Paras 7.73-7.77.

<sup>4</sup> Reid, *Property* para 407.

<sup>5</sup> For the praedial rule, see paras 7.42-7.54.

<sup>6</sup> *Mactaggart & Co v Roemmele* 1907 SC 1318.

<sup>7</sup> *Menzies v Caledonian Canal Commissioners* (1900) 2 F 953.

*Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas Ltd)*<sup>8</sup> that "observance or non-observance of the condition" must have an "appreciable effect upon the amenity or enjoyment" of the dominant tenement. What is less clear is how "appreciable" the effect must be before an interest to enforce arises. In *Stewart v Bunten*<sup>9</sup> the owner of a house at the end of a block of seven terraced houses was said to have an interest to prevent three of the centre houses from adding an further storey. Lord Gifford considered that the interest, though slight, was nonetheless sufficient to allow enforcement:<sup>10</sup>

"Now, I confess that the defender's interest to enforce the restriction does not appear to be very great. I do not think that the value of the defender's property would be materially affected though the whole centre houses were raised to the front so as to be one story higher than they at present are. And I am disposed to lay out of view the somewhat fanciful interest which it is suggested the defender might have if at any time hereafter he should wish to strike out a window in his eastern gable overlooking his neighbours' roofs. But this is hardly the legal aspect of the case. I think the law sustains it as a sufficient interest that a proprietor in a row of houses wishes them to be maintained so as to shew a uniform or symmetrical front or elevation, and if he has aptly and sufficiently stipulated for this in all the titles it will be given him though his only interest may be an aesthetical one."

This decision may be contrasted with *Maguire v Burges*<sup>11</sup> in which a church was built next door to a doctor's house, contrary to an obligation to build only "tenements and self-contained houses". The doctor averred that<sup>12</sup>

"a church occupying ground designed by the titles for tenements and dwelling-houses would injuriously affect his interests as a medical practitioner and neighbouring proprietor. Further, there is a considerable area of vacant ground still unbuilt upon and subject to similar restrictions ...".

The First Division concluded there was no interest to enforce. In the words of Lord President Dunedin:<sup>13</sup>

"Upon the facts here I think that he has not a shadow of interest. The only thing that he has ever said is that he is a physician, and that if part of the ground is occupied as a church instead of dwellinghouses he will get less practice. That is really so ridiculous as to be quite elusory. Accordingly, I think that here he has failed to shew any interest. A church is not a thing which would deteriorate the neighbourhood."

It is not clear that this summary account does full justice to the doctor's case.

4.4 It is possible to treat *Stewart v Bunten* and *Maguire v Burges* as conflicting authorities. Certainly the objection in *Maguire* seemed not unreasonable. A church is not the same as a house, and the two properties were immediate neighbours. In fact *Maguire* was affected by

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<sup>8</sup> 1939 SC 788 at p 797. And see also Lord Justice-Clerk Aitchison at p 802.

<sup>9</sup> (1878) 5 R 1108.

<sup>10</sup> At p 1115.

<sup>11</sup> 1909 SC 1283.

<sup>12</sup> At p 1284.

<sup>13</sup> At p 1291.

a number of specialities.<sup>14</sup> The real burdens contained a strange repugnancy. On the one hand there was a prohibition of buildings other than tenements and self-contained houses, but on the other hand there was an express right to build a church. Again, the doctor made a tactical mistake in emphasising the effect on his medical practice, which was a personal and not a praedial matter. The decision may also reflect contemporary views on the value of churches. But perhaps the more important point is the difficulty in predicting the outcome of disputes concerning interest to enforce. The obviously trivial can be excluded, of course,<sup>15</sup> but beyond that the concept is intrinsically uncertain, and different courts at different times might, quite reasonably, arrive at different results. A statutory re-statement would not perhaps improve matters very much, for it, too, would be bound to be general, and so subject to a variety of interpretations.

4.5 We would welcome views on whether a statutory statement of interest to enforce is worth attempting. If so, a possible model might be the following. The central idea of interest to enforce is detriment to the dominant tenement. If the dominant tenement is unaffected, there should be no right of action. In our discussion paper on the abolition of the feudal system<sup>16</sup> we suggested, in relation to one of the options for enforcement, that

"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."

On consultation, this proposal attracted some support.<sup>17</sup> It might be improved by glossing the idea of detriment. For the purposes of assessing whether or not detriment had occurred, the court could be directed to have regard to certain factors. In practice, two have shown themselves as of particular importance. One is distance between the two tenements. In the *Aberdeen Varieties* case<sup>18</sup> enforcement failed mainly on the basis that the properties were a half mile apart. Not many burdens would survive so great a distance. Usually, interest to enforce requires contiguity or near-contiguity. But naturally this depends both on the nature of the breach and on the nature of the neighbourhood. In sparsely populated areas, distances will be greater than in towns. The second factor is the extent of the breach. A burden which in itself is of vital importance to the dominant proprietor may be breached in such a manner that his interests are barely touched. An obligation not to build prevents rabbit hutches as well as five-storey blocks of flats. But it seems doubtful whether there is an interest to prevent the building of rabbit hutches, even on the part of an immediate neighbour.

4.6 It would also be possible to build materiality into the core idea of detriment. In Louisiana, for example, a person seeking to enforce a servitude or building restriction must show "a real and actual interest".<sup>19</sup> However, our preliminary view is that this would not be helpful. A requirement of "detriment" is, by itself, an invitation to evaluate materiality. The enforcer must show proper interest. To express the test as being one of "material detriment" might be to raise the threshold too high. Many burdens which are useful in protecting amenity have little or no effect on the value of the dominant tenement. Arguably, the breach

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<sup>14</sup> See also Gloag, *Contract* (2nd edn, 1929) p 256.

<sup>15</sup> *Magistrates of Edinburgh v Macfarlane* (1857) 20 D 156 at p 171 per Lord Justice-Clerk Hope.

<sup>16</sup> Scot Law Com DP No 93 para 3.49.

<sup>17</sup> For example, from the Law Society of Scotland.

<sup>18</sup> *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788.

<sup>19</sup> Louisiana Code of Civil Procedure art 681.

of such a burden would be to the detriment, but not to the "material" detriment, of the dominant tenement.

4.7 Burdens may exist to protect a community as a whole, rather than any particular dominant tenement. This is recognised in our suggested reformulation of the praedial rule, which refers to burdens<sup>20</sup>

"for the benefit of the dominant tenement or (in the case of community burdens) for the benefit of the community or any part of the community."

We would be reluctant to include a corresponding reference to the community in the restatement of interest to enforce. There should be no encouragement to enforce burdens which have nothing to do with the enforcer, under cover of protecting the broader interests of the community. Many community burdens are concerned with localised amenity and have little or no impact on the community as a whole. If a person builds a second garage, contrary to the burdens, it is reasonable that he should face enforcement from his close neighbours. But if they are content with the position, the garage should not be prevented by an action from an owner on the other side of the estate.<sup>21</sup> Of course, sometimes even a remote breach might affect the interests of the community. The residential nature of the whole housing estate is disturbed if an owner starts trading in second-hand cars. But a breach which affects the community in a serious way will also affect its constituent dominant tenements. There will be detriment even to properties which are physically remote, and hence there will be interest to enforce. In practice the person best placed to enforce for the community will often be a factor or manager who, by representing all of the owners, holds the accumulated interests to enforce of each.<sup>22</sup>

4.8 Earlier we invited views on whether tenants and holders of other limited real rights should be able to enforce burdens.<sup>23</sup> The interest of such a person would be measured by his right in the dominant tenement. It would not usually be as strong as the interest of the owner. A tenant whose lease has only six weeks to run has very little interest to enforce a real burden. But if the lease has an unexpired term of 100 years, the interest of a tenant is much the same as that of an owner.

4.9 A definition of interest by reference to detriment would not work in one, quite common, case. A person who pays for a repair or other shared expense must then recover the cost from the other owners in the community. But any detriment arising from a refusal to pay would be to his pocket rather than to his property. Any definition must take account of the problem of reimbursement.

4.10 We invite views on the following proposal and questions:

**11. (1) A person seeking to enforce a burden should require to demonstrate interest.**

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<sup>20</sup> Paras 7.53 and 7.54.

<sup>21</sup> The counter-argument is that breaches may spread, and should therefore be checked at the outset. Yiannopoulos, *Praedial Servitudes* p 516 argues that "any landowner should be entitled to enforce the restrictions before they creep from distant parts of the subdivision to the property next door."

<sup>22</sup> For title to enforce by a factor or manager, see para 3.65.

<sup>23</sup> Paras 3.59-3.66.

(2) Should interest to enforce be reformulated by statute, or left to the courts to develop?

(3) Views are invited on the following possible reformulation:

(a) A person has interest to enforce a burden if -

(i) failure to comply will result in detriment to the dominant tenement (and, where the enforcer's right is less than ownership, to that right also), or

(ii) the enforcer has incurred maintenance or other costs which the person enforced against is bound to reimburse.

(b) For the purposes of assessing detriment, a court shall pay particular regard to -

(i) the distance between the dominant and the servient tenements, and

(ii) the seriousness of the breach or proposed breach.

4.11 If conservation burdens were to be allowed in the future, as suggested earlier,<sup>24</sup> the issue of interest to enforce would require consideration. Conservation burdens would be different from existing burdens. Only a limited, and probably small, number of bodies would be allowed to use such burdens, and there would be no dominant tenement to which a test of detriment could be applied. Our preliminary view would be that interest to enforce conservation burdens should be presumed, but that the presumption should be capable of rebuttal, for example on the ground of triviality of the breach.

### Who is liable?

4.12 Law reform bodies in a number of jurisdictions have in recent years come to consider liability for performance of or compliance with burdens of different types.<sup>25</sup> Their broad conclusions have always been the same. A distinction is made between burdens in the form of positive (or affirmative) obligations, and burdens of any other kind, most notably restrictions. Positive obligations are to be enforceable only against the owner of the servient tenement or, sometimes, against the holders of other long-term rights. By contrast, restrictions are to be enforceable against anyone in possession of the servient tenement. This comes close to the existing law in Scotland.<sup>26</sup>

4.13 **Restrictions etc.** In *Colquhoun's Curator Bonis v Glen's Tr*<sup>27</sup> the superior sought interdict against both the owner and also his lessee to prevent them using the subjects except as a private dwellinghouse for one family only. Interdict was duly granted. In another

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<sup>24</sup> Paras 2.56 - 2.59.

<sup>25</sup> Law Com No 127 part XI; Property Law and Equity Reform Committee, *Positive Covenants affecting Land* (1985) (New Zealand) para 28(a) (since implemented as s 64A of the Property Law Act 1952, inserted by the Property Law Amendment Act 1986, s 3); Ontario LRC, *Covenants* pp 122-4; New South Wales Land Titles Office, *Review of the Law of Positive Covenants affecting Freehold Land* (1994) paras 6.22 - 6.31; American Law Institute, *Restatement (Servitudes)* TD No 5, s 5.2, pp 16-55.

<sup>26</sup> Reid, *Property* para 413.

<sup>27</sup> 1920 SC 737.

case,<sup>28</sup> in which the burden was ultimately held not to be breached, interdict was again sought against both the owner and his lessee. It is not clear, however, whether an action can be brought against the lessee alone. In a later case,<sup>29</sup> in which the issue did not arise for decision, it was said that:

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

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

4.14 This grudging recognition of the liability of non-owners in real burdens may be contrasted with the rule for negative servitudes. A negative servitude is a real right in the fullest and strictest sense, and hence enforceable against anyone who would challenge it. A servitude *non aedificandi*, for example, is a right to prevent building operations, not merely by the owner of the servient tenement, but by anyone at all. If negative servitudes are to be assimilated with real burdens, as was proposed earlier,<sup>30</sup> it will be necessary to decide whether the new real burden, insofar as it imposes restrictions, will be a full real right, or whether it will be enforceable against only a limited category of possessors.

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

4.16 To elevate a restriction into a real right is fair to the dominant proprietor without being unfair to the possessor. A lessee has the opportunity to check his landlord's title before he takes the let, while the lease will usually grant warrandice. A squatter deserves no sympathy.

4.17 The discussion so far has been confined to restrictions. But restrictions and positive obligations (considered below) do not exhaust the possibilities. Later we suggest that conditions along the lines of positive servitudes, allowing limited use of the servient

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<sup>28</sup> *Mathieson v Allan's Trs* 1914 SC 464.

<sup>29</sup> *Eagle Lodge Ltd v Keir and Cawder Estates Ltd* 1964 SC 30 at p 45 per Lord Sorn.

<sup>30</sup> Paras 2.42-2.50.

tenement, should also be capable of being constituted as real burdens.<sup>31</sup> This may already be the law. If restrictions are to take on the real right characteristics of negative servitudes, it would seem to follow that these proposed new burdens should take on the real right characteristics of positive servitudes. A real burden to lay an electricity line, or to park a car, would be of little value if it could not be pled against lessees or squatters.

**4.18 Positive obligations.** If a restriction is to be of value, it must be enforceable against everybody. By contrast, a positive obligation can only be performed once, and needs one debtor only. If the owner is bound, there is no particular need to take the lessee bound also. Further, where, as often, the obligation consists of the payment of money, there is no reason why the debtor needs to be in possession of the servient tenement. Non-possessors can still write cheques. These differences between restrictions and positive obligations are recognised, although not articulated, in the present law.<sup>32</sup> A positive obligation is enforceable only against the owner of the servient tenement. Those with lesser rights, or with no rights,<sup>33</sup> are not bound. In the words of Lord Kinnear:<sup>34</sup>

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

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

**4.19** Of course, not all examples are so clearcut. If a person possesses under a long lease, or a liferent, there is an argument that at least expenditure of an income nature - routine maintenance, cleaning, gardening and the like - should be recoverable directly from him rather than from the owner. The law reform bodies which have considered this issue<sup>35</sup> have usually concluded that lessees holding on long leases should be liable for some or all positive obligations. However, our provisional view is against this solution. The most important thing is to have a clear rule. The parties can then make appropriate adjustments by contract. The rule laid down by the present law is both clear and well understood. It has been relied on in negotiations for existing leases, so that if the rule were changed, the effect of such leases would be changed also. Where a lease places liability on the tenant, as is common in the commercial world,<sup>36</sup> the dominant proprietor might have a right of direct action on the principle of *jus quaesitum tertio*; but in any event the landlord remains liable and can then recover his expenditure from the tenant. Similarly, a (proper) liferenter is liable to the fiar for any expenditure which is of an income nature.<sup>37</sup>

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<sup>31</sup> Paras 7.66 and 7.67.

<sup>32</sup> An underlying difficulty is that an obligation to do something is, necessarily, an obligation against a person and not an obligation in a thing. Hence it is a personal right (albeit of an unusual sort) and not a real right. See Reid, *Property* para 347.

<sup>33</sup> *Wells v New House Purchasers Ltd* 1964 SLT (Sh Ct) 2.

<sup>34</sup> *Macrae v Mackenzie's Tr* (1891) 19 R 138 at pp 145-6.

<sup>35</sup> See para 4.12.

<sup>36</sup> M J Ross & D J McKichan, *Drafting and Negotiating Commercial Leases in Scotland* (2nd edn, 1993) paras 7.28 and 7.29, and Appx 1 style P1 cl 5.6.4.

<sup>37</sup> W J Dobie, *Manual of the Law of Liferent and Fee in Scotland* (1941) pp 205-06. However, Dobie notes difficulties with remedies (p 243).

4.20 There is a special rule for heritable creditors in possession. Traditionally, a heritable creditor who enters into possession is regarded as standing in the place of the owner.<sup>38</sup> He has many of the owner's rights, including the right to lease the property, but also many of his liabilities. By s 20(5) of the Conveyancing and Feudal Reform (Scotland) Act 1970 there is assigned to a heritable creditor "all rights and obligations of the proprietor relating to ... the management and maintenance of the subjects".<sup>39</sup> Among the obligations thus assigned is the obligation to comply with positive real burdens. The use of the concept of assignation suggests that the creditor's liability, like his rights, is exclusive, and that no liability is left with the debtor.

4.21 **Liability of incoming owners.** The rule, therefore, is that liability for burdens in the form of positive obligations lies with the owner of the servient tenement or, in a case where a heritable creditor has taken possession, with the creditor. We would not propose to disturb this rule. However, difficult questions arise when ownership changes.<sup>40</sup> The law here is undeveloped, and rests largely on the decision of the First Division in *Marshall v Callander and Trossachs Hydropathic Co Ltd*.<sup>41</sup> The burden in that case imposed an obligation to build a hydropathic establishment to the value of £15,000, and thereafter to maintain it. The burden then continued:

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

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

4.22 The rule established by *Marshall* is unclear in at least two respects. First, it is uncertain when, precisely, an obligation becomes "prestable". Secondly, while concurrent liability is, it seems, joint and several, it has never been decided how that liability is to be apportioned *inter se*. No doubt the second difficulty could be dealt with easily enough, but the first is more intractable. The facts of *Marshall* provided too easy a test. An obligation to rebuild becomes prestable when the original building is destroyed. Similarly, an obligation to build, say, a wall within two years would become prestable on the expiry of the stipulated period. But the typical positive obligation is a general obligation of maintenance. In *Marshall* itself the owner was taken bound to maintain the buildings. It is unclear when such an obligation becomes prestable. Most buildings would benefit from maintenance of one kind or another. Is a maintenance obligation prestable if the building is not in perfect condition? If so, a purchaser would be able to insist that the seller delivered a perfect house. But if not, there are formidable difficulties in determining how much deterioration must take place before the obligation is triggered.

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<sup>38</sup> Gloag & Irvine, *Law of Rights in Security* (1897) pp 100-1.

<sup>39</sup> On this provision, see *David Watson Property Management v Woolwich Equitable Building Society* 1992 SC(HL) 21.

<sup>40</sup> The difficulties are, of course, confined to positive obligations. All possessors are liable in respect of restrictions, and restrictions do not accumulate arrears. However, a restriction may occasionally mature into a positive obligation. For example, if a restriction on building is breached, the owner is then under a positive obligation (subject to the doctrine of acquiescence) to demolish the building and restore the land to its previous condition.

<sup>41</sup> (1895) 22 R 954. But see also *Rankine v Logie Den Land Co Ltd* (1902) 4 F 1074.

4.23 We suggest for consideration a different rule. Liability should be lost with ownership, and an incoming owner have sole liability for positive obligations, regardless of when they became due. This is similar to the rule which operates in French law,<sup>42</sup> and in legal systems based on French law.<sup>43</sup> Its main advantage is simplicity. In a question with the dominant proprietor, the current owner will always be liable. This does not seem unfair to purchasers. Purchasers read the titles and inspect the property. They know of the obligations, and are able to assess whether or not they have been complied with. If an obligation has been complied with but not paid for, the creditor would normally be a tradesman and the liability contractual. It would not transmit. Later<sup>44</sup> we suggest that a different rule should apply in the case of common repairs, where the creditor might be another dominant proprietor, and the liability real.<sup>45</sup> There would be nothing to prevent parties from making special provision in the missives of sale. In practice, however, outstanding positive obligations are rarely a problem outside tenements and other developments with shared facilities.

4.24 The court in *Marshall* may have been influenced by an apparently brazen attempt to escape liability. In general, however, we have no difficulty with the idea that abandonment should bring property-based liability to an end. If the cost of compliance exceeds the value of the property, abandonment may be a rational choice. The property remains available to the dominant proprietor and could be attached by diligence. Later we suggest that special rules are necessary where non-compliance affects other properties.<sup>46</sup>

4.25 A rule that liability passes with ownership would be unworkable if ownership were to be tested - as it is under the general law - by reference to registration. A seller loses control of the transaction as soon as he has delivered the disposition and yielded possession. Registration is then a matter for the purchaser alone. But a purchaser might choose never to register, and indeed might be tempted so to choose if registration brought liability. The solution of the present law seems apt: a purchaser becomes liable immediately on accepting the delivery of the disposition.<sup>47</sup> This rule is expressed more precisely in the draft bill which accompanies our report on the law of the tenement.<sup>48</sup> For the purposes of determining liability

"... a person becomes an owner (and the last owner ceases to be an owner) when he acquires a right to take entry under a conveyance of the flat concerned (or any document having effect as a conveyance)."

We suggest that this definition be adopted here also. The reference to the last owner ceasing to be an owner avoids the problem of chains of unregistered proprietors which was referred to elsewhere.<sup>49</sup> The reference to other documents which have effect as a conveyance is capable of covering court decrees, such as confirmation of executors, or the act and warrant of a trustee in sequestration. One obvious disadvantage of this whole approach is that the

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<sup>42</sup> Code Civil art 699.

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

<sup>44</sup> Para 4.27.

<sup>45</sup> Eg real burdens might provide that a recreational facility is to be maintained by the owners of 20 different units. If one owner carries out a repair, he can enforce payment, as a real burden, against the remaining 19.

<sup>46</sup> Para 4.27.

<sup>47</sup> *Hyslop v Shaw* (1863) 1 M 535 at pp 575ff per Lord Curriehill.

<sup>48</sup> Tenements (Scotland) Bill cl 29(3) (reproduced in appendix 1 to Scot Law Com No 162).

<sup>49</sup> Para 3.57.

identity of the servient proprietor will not always be apparent from the register. But it seems better to compromise on disclosure than to leave a seller liable into the indefinite future on account of the purchaser's failure to register.

4.26 By s 4(2) of the Conveyancing (Scotland) Act 1874 an owner is liable "for performance of the whole obligations of the feu", including feudal real burdens, unless or until a notice of change of ownership is sent to the superior. In practice, notices are not nowadays sent, but nor is s 4(2) enforced. Its repeal will be recommended in our forthcoming report on the abolition of the feudal system.

4.27 A special rule seems necessary for common repairs and other shared expenses. Most such repairs occur in tenements; and in our report on the law of the tenement we recommended that liability, once acquired, should not be lost by loss of ownership.<sup>50</sup> Unlike individual repairs, common repairs require agreement among the affected owners. Under the scheme proposed for tenements, liability crystallises when the decision to repair is made or, if the owner in question is not present at that time, when notice of the decision is sent to him. Thereafter it cannot be lost by sale of the property, although the incoming purchaser has joint and several liability. In a question between seller and purchaser, underlying liability is with the seller. We suggest that similar rules should apply to common repairs and expenses in housing estates and other non-tenemental property. Partly this is in the interests of consistency. Partly too it is to prevent the seller casting a careless vote for repairs, safe in the knowledge that his successor must pick up the bill. And partly it is to protect purchasers against liabilities which might not be discoverable by visual inspection. A repair which had been carried out but not yet paid for would often attract real liability.<sup>51</sup> Later we canvass views on the introduction of a rule for non-tenemental property which would allow repairs and other expenses to be approved by decision by a majority.<sup>52</sup>

4.28 We propose that:

**12. (1) A real burden which, however expressed, has the effect of imposing a positive obligation should be enforceable against (and only against) -**

**(a) the owner for the time being of the servient tenement; or**

**(b) where a heritable creditor has entered into lawful possession, that heritable creditor.**

**(2) However, an owner who becomes liable under a real burden for maintenance or other costs which are shared with the owner or owners of another property or properties should not cease to be liable on ceasing to be owner; but the new owner should be liable jointly and severally, subject to a full right of relief.**

**(3) A real burden of any other kind should be a real right in the servient tenement, and universally enforceable.**

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<sup>50</sup> See generally, Scot Law Com No 162, part 8.

<sup>51</sup> Under the current law, however, this depends on the wording of the burden. See *David Watson Property Management v Woolwich Equitable Building Society* 1992 SC(HL) 21.

<sup>52</sup> Paras 9.1 ff.

**(4) For the purposes of this proposal, a person becomes an owner (and the last owner ceases to be an owner) when he acquires a right to take entry under a conveyance of the property (or any document having effect as a conveyance).**

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

4.30 **Consistency with rules for right to enforce.** The proposed rules of liability are not identical to the rules proposed earlier for right to enforce.<sup>53</sup> It is not possible, even if it were desirable, to achieve perfect symmetry of creditor and debtor. The distinction between restrictions and positive obligations, so vital from the viewpoint of the servient tenement, is unimportant from the viewpoint of the dominant. Similarly, there is no reason for extending to the dominant tenement the concession about non-registration which is necessary for the servient. The arguments for bringing in tenants seem stronger for the dominant tenement than for the servient. The overall effect of our proposals is that a larger group of people will be subject to the obligation than are able to exercise the right.

## **Interpretation**

4.31 There is in principle a difference between (i) the identification of the text which is to be interpreted and (ii) the method of interpretation which is then to be applied, although this difference is sometimes blurred in practice. So far as (i) is concerned, the rule is that the full terms of a burden must appear in the constitutive deed, and hence on the register. In interpreting these words, the courts cannot seek out additional words. Thus, for this purpose at least, extrinsic evidence is inadmissible. The reason for the rule is to protect third parties who rely on the register. As such it seems both unexceptionable and satisfactory, although later we make a proposal for a minor modification.<sup>54</sup> In this section we are concerned only with (ii), the method of interpretation.

4.32 Real burdens, like servitudes, are interpreted by reference to a presumption in favour of freedom.<sup>55</sup> The rule in other countries is usually the same.<sup>56</sup> But in Scotland, this presumption has become the basis of an interpretative style which verges on hostility. Rather than seeking to make the burden work, the courts are sometimes more concerned with uncovering ambiguity and vagueness. They have not been disappointed. The drafting of burdens is frequently indifferent; but even where it is well done, the intrinsic uncertainty of language, when combined with the difficulty faced by any draftsman of predicting the particular facts which have actually occurred, have given the courts ample scope for action. Many burdens, of course, survive this interpretative scrutiny; but there are also numerous

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<sup>53</sup> For the proposed rules on right to enforce, see paras 3.56 - 3.65.

<sup>54</sup> Para 7.70.

<sup>55</sup> This is number (8) of the rules of preference identified in appendix B to Scot Law Com No 160.

<sup>56</sup> Eg, Louisiana Civil Code art 783; C G van der Merwe & M J de Waal, *The Law of Things and Servitudes* (1993) para 218.

cases in which apparently blameless burdens have either been stripped of much of their effect, or declared void from uncertainty.<sup>57</sup> It is not hard to understand the reasons for this approach, which dates from the last thirty years of the nineteenth century. By that time many real burdens were already seventy or eighty years old, and out of date. But, until 1970,<sup>58</sup> no judicial mechanism was available for their extinction. In its absence the courts seem often to have operated a system of extinction by interpretation. In this Scotland was not unique. In the United States, as the American Law Institute has noted,<sup>59</sup> the presumption in favour of freedom

"has often been employed to invalidate outdated servitudes [ie real burdens] and servitudes whose burdens have increased or whose benefits have decreased significantly since they were created. So employed, the strict construction doctrine .. has provided a vehicle for terminating obsolete servitudes."

In Scotland, judicial hostility was confined to real burdens. Servitudes, as a much more confined class of restriction, were treated with considerable leniency. This difference in approach has been judicially acknowledged, although not justified.<sup>60</sup>

4.33 If the true objection to real burdens is that they are too restrictive, or too long-lasting, or too out-of-date, it seems better to tackle these issues directly.<sup>61</sup> Here the introduction of the Lands Tribunal jurisdiction was an important first step, and the proposals in this paper, if implemented, would carry matters a great deal further. But if interpretation is no longer to be used as a means of extinction, it becomes necessary to consider more carefully what the applicable rules should be.

4.34 In our recent report on interpretation in private law, we recommended that the following general rule should apply in the interpretation of documents and other juridical acts:<sup>62</sup>

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

- (a) the surrounding circumstances; and
- (b) in so far as they can be objectively ascertained, the nature and purpose of the juridical act.

(2) For the purposes of this rule the surrounding circumstances do not include –

- (a) statements of intention;
- (b) instructions, communings or negotiations forming part of the process of preparation of the juridical act;
- (c) conduct subsequent to the juridical act."

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<sup>57</sup> There is a substantial case law, which is reviewed in Reid, *Property* paras 415 ff.

<sup>58</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1.

<sup>59</sup> American Law Institute, *Restatement (Servitudes)* TD No 4, s 4.1, p 2.

<sup>60</sup> *McLean v Marwhirn Developments Ltd* 1976 SLT (Notes) 47.

<sup>61</sup> Scot Law Com No 160, para 7.5.

<sup>62</sup> Private Law (Interpretation) (Scotland) Bill, Sched, rule 1 (in Scot Law Com No 160, appendix A).

There is no bar as such on the admission of extrinsic evidence,<sup>63</sup> but subrule (2) excludes subjective data. Since real burdens often relate to physical objects, the admission of some extrinsic evidence is already established practice.

4.35 The considerations affecting the interpretation of provisions imposing real burdens do not seem obviously different from those which affect other provisions in deeds relating to land and intended for registration. If that is correct, the same general rule should apply. It should be emphasised that our recommended rule is objective in nature. It pays regard to what the parties said, and not to what they intended to say.<sup>64</sup> An objective approach is essential in the case of real burdens, which run with the land and may come to affect many others apart from the original parties.

4.36 The presumption for freedom would remain. So would other applicable rules of preference, such as the *contra proferentem* rule.<sup>65</sup> But rather than founding a whole system of interpretation, these rules would be used only in cases of doubt, where the general rule had failed to produce a clear result.<sup>66</sup> The *contra proferentem* rule would continue to be of use for neighbour burdens, but does not seem applicable to community burdens.<sup>67</sup>

4.37 If the policy goal seems reasonably clear, it is less clear how it is to be achieved. Three possibilities seem worth considering. One would be to do nothing, and wait for legislation implementing our report on interpretation. A second approach would be to incorporate the general rule of interpretation into the proposed legislation on real burdens. It would then apply to real burdens but not to other juridical acts. A third possibility would be to include in the real burdens legislation some very general statement, such as that provisions imposing real burdens are to be interpreted in the same manner as other provisions in deeds relating to land and intended for registration. We do not favour the second approach. The rules of interpretation should not be changed for real burdens alone. The first approach carries risks. There might be a long delay in implementing our report on interpretation. Meanwhile there could be no guarantee that the courts would adopt a more indulgent approach to real burdens. On this point the message from recent case law is rather mixed.<sup>68</sup> The third approach has at least the merit of indicating that real burdens are not less meritorious than other kinds of juridical act affecting land. Accordingly, our provisional proposal is that:

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

## Remedies

4.38 For cases of breach, the usual armoury of remedies is available, including interdict, damages and implement.<sup>69</sup> At one time real burdens in the sense discussed in this paper tended to become confused with pecuniary real burdens,<sup>70</sup> which have as their exclusive and distinctive remedies pointing of the ground and real adjudication. In *Wells v New House*

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<sup>63</sup> Ibid cl 2, explained in part 8 of the report.

<sup>64</sup> Scot Law Com No 160, part 2.

<sup>65</sup> This is number (2) of the rules of preference identified in appendix B to Scot Law Com No 160.

<sup>66</sup> Scot Law Com No 160, part 6.

<sup>67</sup> Reid, *Property* para 415; American Law Institute, *Restatement (Servitudes)* TD No 4, s 4.1, p 6.

<sup>68</sup> *Lothian Regional Council v Rennie* 1991 SLT 465; *Meriton Ltd v Winning* 1995 SLT 76.

<sup>69</sup> Reid, *Property* para 423.

<sup>70</sup> Para 1.1.

*Purchasers Ltd*<sup>71</sup> an owner who had paid certain repairs and insurance costs sought to recover a share from his neighbour by an action for payment. The action was defended on the basis that a real burden could be enforced only by poinding of the ground or real adjudication, and that a personal action was incompetent. The defence was repelled and decree granted. In the court's view the defender had confused real burdens in the modern sense with pecuniary real burdens, which were now obsolete. Even before *Wells* the law was not in doubt. Later we make proposals for the final abolition of pecuniary real burdens.<sup>72</sup>

4.39 In the course of its very full examination of the law of restrictive covenants, the Law Commission of England and Wales recommended that it should be possible for the deed creating a land obligation which involved the carrying out of works to give the dominant proprietor a right, in the event of non-compliance, to enter the servient property and carry out the work himself. The cost could then be recovered.<sup>73</sup> This is probably already the law in Scotland,<sup>74</sup> and clauses of this kind are sometimes encountered in practice.

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

### **Irritancy**

4.41 There is no legal irritancy for real burdens, as there is for feuduty, but traditionally a grant in feu would include a conventional irritancy. Feudal irritancies will disappear with the abolition of the feudal system. In non-feudal grants irritancy clauses are rare, although not unknown. Doubt has been expressed as to their validity due to the absence of any contractual or other nexus between successors of the original parties.<sup>75</sup> A practical problem is that a non-feudal dominant tenement - by contrast to a superiority - can be fragmented into different parts, making it unclear which of the owners is to receive the benefit of the irritancy. But even if irritancies are competent and workable, we see no case for their retention. The remedy is usually out of all proportion to the wrong. In the case of a lease, it may be perfectly reasonable for a landlord to be restored to his property if the tenant does not pay the rent.<sup>76</sup> But an owner who sells his property outright should not have it back without payment just because the purchaser keeps a dog as well as a cat. No doubt the prospect of irritancy encourages compliance. But, as Professor Rennie has pointed out:<sup>77</sup>

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<sup>71</sup> 1964 SLT (Sh Ct) 2.

<sup>72</sup> Paras 9.14-9.15.

<sup>73</sup> Law Com No 127, paras 6.16(c) and 13.28 - 13.31.

<sup>74</sup> *Borland & Co's Tr v Paterson* (1881) 19 SLR 261. However, this was a case between the original parties.

<sup>75</sup> See the discussion in Reid, *Property* para 424.

<sup>76</sup> However, irritancies in leases may also operate unfairly. See Scot Law Com DP No 103 paras 5.11 - 5.18.

<sup>77</sup> R Rennie, "The Theory and Ethics of Irritancy" 1994 JR 283 at p 290.

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

Irritancies can, of course, often be purged, but there is no automatic right to purge a conventional irritancy, and the attitude of the court has varied.<sup>78</sup> We propose, therefore, that

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

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<sup>78</sup> *Ardgowan Estates Ltd v Lawson* 1948 SLT 186; *Anderson v Valentine* 1957 SLT 57; *Precision Relays Ltd v Beaton* 1980 SC 220.

## PART 5 VARIATION AND EXTINCTION

### Introduction

5.1 The normal method of extinguishing a real burden is by minute of waiver. But sometimes the dominant proprietors turn out to be unyielding or greedy or impossible to contact or simply too numerous to make a waiver a practical proposition. In such cases the burdens live on, and the servient proprietor must comply or risk the consequences. Particularly resented is the ransom element in waivers, by which a person who may be perfectly indifferent as to whether a burden survives can name his price for its removal. Here superiors are the main, although not the only, offenders.<sup>1</sup> The position was greatly improved by the introduction, in 1970, of a special jurisdiction in the Lands Tribunal for Scotland for the variation and discharge of burdens.<sup>2</sup> This provides an alternative to protracted negotiations with an obdurate superior or neighbour and has been much used. It also provides a helpful context for such negotiations, and has probably served to contain the cost of minutes of waiver. But the Lands Tribunal is often not a practical alternative to seeking a waiver. A judicial process does not produce instant results. Overall costs may turn out to exceed the costs of a waiver, particularly if the application is opposed. And above all there is a risk of failure. Although many more applications succeed than fail,<sup>3</sup> there can be no guarantee of success.

5.2 The difficulties should perhaps not be overstated. It is in the nature of rights that they can be discharged only by the creditor. If a real burden could be discharged at the option of the debtor it would serve no useful purpose. Real burdens, in a post-feudal world at least, are not random impositions. They protect properties or communities of properties. If dominant and servient proprietors are in dispute as to the continuation of a burden, it should not be assumed that the former is always in the wrong. The burden may have been designed precisely to stop the kind of activity which the servient proprietor now proposes to carry out. The servient proprietor voluntarily agreed to the burden, or at least bought his property with his eyes open, and it may be entirely reasonable to allow the dominant proprietor to insist on his rights. The task of the law here is to strike a balance. On the one hand the law permits the use of real burdens, and hence their enforcement. But on the other hand it must seek to limit and control that use by allowing for the extinction of burdens in cases where it is appropriate to do so. The introduction of the Lands Tribunal jurisdiction had the effect of shifting the balance in the direction of servient proprietors. The view expressed to us in response to our discussion paper on the abolition of the feudal system is that more still needs to be done. It is arguable, at least with hindsight, that the changes made in 1970 did not go far enough. But in any event real burdens seem less well regarded today than in 1970. Some would advocate their abolition.<sup>4</sup> If they are to survive, it should be on the basis that they are more easily discharged. A different point is that the introduction of an improved system of registration for burdens, recommended elsewhere in

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<sup>1</sup> See eg *Harris v Douglass, Erskine v Douglas* 1993 SLT (Lands Tr) 56.

<sup>2</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 and 2.

<sup>3</sup> Paras 6.5, 6.13 and 6.19.

<sup>4</sup> See eg R Callander, *How Scotland is Owned* (1998) pp 155-6. This issue is discussed at length in part 2 of this paper.

this paper, may lead to a higher incidence of enforcement, and hence argues for a correspondingly improved system of discharge.<sup>5</sup>

5.3 Real burdens may be varied or extinguished in a number of different ways. In this part of the discussion paper we consider variation and extinction arising by (i) minute of waiver<sup>6</sup> (ii) acquiescence<sup>7</sup> (iii) negative prescription<sup>8</sup> (iv) abandonment of common burdens<sup>9</sup> (v) confusion,<sup>10</sup> and (vi) compulsory purchase.<sup>11</sup> (vii) The role of the Lands Tribunal is considered separately, in part 6. We have no proposals in relation to the following, relatively unimportant, methods of extinction: (viii) loss of interest to enforce<sup>12</sup> (ix) physical changes affecting either tenement<sup>13</sup> (x) mutuality principle,<sup>14</sup> and (xi) failure to appear on the Land Register, following first registration.<sup>15</sup> Apart from the first, they are not mentioned again in this paper. A final section of this part considers the special problems created by burdens which have become obsolete.<sup>16</sup>

#### **Active discharge: minutes of waiver**

5.4 As already mentioned, the standard method of varying or discharging a real burden is by a minute of waiver granted by the dominant proprietor or proprietors and registered in the Land Register or Register of Sasines. In research by Cusine and Egan this was found to be the route chosen in 64% of the cases examined.<sup>17</sup> This compares with a mere 3% in which applications were made to the Lands Tribunal.<sup>18</sup> An informal letter of consent can be used in place of a minute of waiver if the burden does no more than prohibit an activity "without the consent of" the dominant proprietor.<sup>19</sup> Usually a charge is made for minutes of waiver, and in addition the servient proprietor will be expected to pay the legal expenses of both sides.

5.5 Viewed from the servient tenement, minutes of waiver suffer from three widely acknowledged defects. In the first place, they are too expensive. The price asked by dominant proprietors is often seen as being unreasonably high. Usually it is several hundred pounds, although only rarely more than £1000. However, in 3% of cases examined by Cusine & Egan the price was over £10,000.<sup>20</sup> Legal expenses are likely to add another two or three hundred pounds.<sup>21</sup> Secondly, minutes of waiver are too slow. The dominant proprietor or proprietors can be difficult to identify, particularly in the case of superiors, or

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<sup>5</sup> Para 3.41.

<sup>6</sup> Paras 5.4-5.32.

<sup>7</sup> Paras 5.38-5.40.

<sup>8</sup> Paras 5.41-5.47.

<sup>9</sup> Paras 5.48-5.52.

<sup>10</sup> Paras 5.53-5.60.

<sup>11</sup> Paras 5.61-5.62.

<sup>12</sup> Reid, *Property* para 430.

<sup>13</sup> *Ibid*, para 434.

<sup>14</sup> *Ibid*, para 435.

<sup>15</sup> *Ibid*, para 437.

<sup>16</sup> Paras 5.63-5.82.

<sup>17</sup> Cusine & Egan, *Feuing Conditions* chapter 4 paras 7 and 11 ff, and table 4.7. These figures include 5% who bought the superiority, which is a functional equivalent of minutes of waiver.

<sup>18</sup> *Ibid*, chapter 4 para 14.

<sup>19</sup> Cusine & Egan (chapter 4 paras 9 and 10, and table 4.4) found that a "letter of comfort" was obtained in 22% of all cases. It is unlikely that so high a figure can be wholly accounted for by cases where the consent of the dominant proprietor is required, and it seems that such letters are also being used as cheap and informal minutes of waiver.

<sup>20</sup> *Ibid*, table 4.8.

<sup>21</sup> *Ibid*, table 4.9.

of neighbours whose rights arise by implication under the rules in *Hislop* or *Mactaggart*.<sup>22</sup> Once identified, the dominant proprietors may be slow to answer letters. And if and when they finally agree to grant a waiver, there may be further delays while solicitors negotiate and questions of title are considered. Sometimes the title of the dominant proprietor is found to be defective, causing further delay.<sup>23</sup> Sometimes too the dominant tenement, inopportunately, changes hands during the course of the negotiations. Thirdly, a minute of waiver is rarely a practical proposition if there is more than a small handful of dominant proprietors. A waiver is not binding on those who do not sign it, a rule which is sometimes overlooked in practice.<sup>24</sup> The greater the number of dominant proprietors, the greater the likely costs and delay, and the smaller the chances of reaching agreement. This means that, when faced with 20 - or 100 - neighbours all holding enforcement rights, the servient proprietor is likely to abandon any attempt at consensual discharge and apply instead to the Lands Tribunal. None of these problems can be easily solved, although it is possible to limit their impact. They should be kept in mind in the discussion which follows.

5.6 **Neighbour burdens.** No particular difficulties arise in connection with the discharge of neighbour burdens.<sup>25</sup> Often there is only a single dominant proprietor, and such cases of multiple proprietors as currently exist are likely to be much reduced under our proposal, made earlier, that those holding on implied rights must register a notice of preservation or lose the rights.<sup>26</sup> In practice we imagine that many proprietors will not take the trouble to register.

5.7 **Community burdens.** At present two difficulties affect the discharge of community burdens<sup>27</sup> by minute of waiver. There is the difficulty of identifying those with enforcement rights - or, in other words, of discovering the full extent of the community. And there is also the difficulty of size. A community can be two properties or two hundred, but however big it may be, a minute of waiver must be signed by all its members. A cautious view would be that heritable creditors must also sign. In practice it is usually impossible to obtain the agreement of such a large number of people, so that minutes of waiver are rarely used in cases of housing estates and other communities.<sup>28</sup> The proposal that enforcement rights be registered should go far to solve the first of these difficulties. After the transitional period for registration has elapsed, it will be possible to tell the extent of the community, and its members, from the register.<sup>29</sup> The second difficulty, however, remains.

5.8 In a community it is possible to go about variation and discharge in two different ways. One is to have the burden varied or discharged for the whole community. This means that the original deed of conditions or other constitutive deed is varied in respect of all properties affected by the burdens. The alternative is the traditional method of seeking variation or discharge in respect of one property only. The reasons for seeking the change are likely to determine the method selected. A universal waiver follows on from a collective decision by the whole community to alter the conditions by which the community is governed. An individual waiver arises because one member of the community wants to

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<sup>22</sup> For *Hislop* and *Mactaggart*, see paras 3.5 ff.

<sup>23</sup> As in *McLennan v Warner & Co* 1996 SLT 1349.

<sup>24</sup> Para 3.2.

<sup>25</sup> For the meaning of "neighbour burdens" in the sense used here, see para 1.5.

<sup>26</sup> Paras 3.31 ff (esp at 3.36 ff).

<sup>27</sup> For the meaning of "community burdens" in the sense used here, see para 1.6.

<sup>28</sup> Except in cases where there are no third party rights or (see para 3.2) where such rights are disregarded.

<sup>29</sup> Paras 3.36 ff.

build a garage, or run a business, or do something else which is prohibited by the burdens. In reviewing the problem of community size, it is necessary to treat these two cases separately.

5.9 **Universal waiver.** Communities are defined by rules. It is the presence of common rules, in the form of real burdens, which marks out a community for the purposes of this paper. But most communities are strikingly inactive. In general, the rules are not supported by a mechanism which allows decisions to be made; and those affected are only dimly aware, if indeed they are aware at all, of the fact that others are subject to the same rules. In cases like this the word "community" suggests a much closer relationship than is actually present on the ground. Such communities exist only in the mind of the conveyancer who drafted the real burdens. Of course this is not always so. Modern deeds of conditions quite often provide mechanisms for decision-making, both for tenements and for housing estates, although it should not be assumed that these are always operational in practice. In our recent report on the law of the tenement we recommended the introduction of a simple management scheme for all tenements, both old and new.<sup>30</sup> The broad thrust of the proposals in this paper also is to increase the sense of community. For the first time, the full extent of the community will be readily identifiable from the Land Register;<sup>31</sup> and the abolition of the feudal system will end the vestigial role of the superior. In time this may lead to more active self-regulation.

5.10 It seems self-evident, both that a universal waiver of burdens should follow on from a decision of the community as a whole, and that that decision should not require to be unanimous. For in practice unanimity is usually unattainable, and to require it is to invite paralysis. Where deeds of conditions provide for decision-making, they generally stipulate that decisions can be made by the owners of a majority of properties. Our basic management scheme for tenements likewise provides for majority decision-making.<sup>32</sup> In Louisiana this solution is applied expressly to community burdens.<sup>33</sup> According to article 780 of the Civil Code:<sup>34</sup>

"... [B]uilding restrictions may be amended or terminated for the whole or a part of the restricted area by agreement of owners representing more than one-half of the land area affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for at least fifteen years, or by the agreement of both owners representing two-thirds of the land area affected and two-thirds of the owners of the land affected by the restrictions, excluding streets and street rights-of-way, if the restrictions have been in effect for more than ten years."

This provides a stepped regime. If the burdens are less than ten years old, they cannot be discharged under article 780 at all and unanimity would be required. For burdens between ten and fifteen years' old, the requirement is a two thirds majority, expressed both in terms

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<sup>30</sup> Scot Law Com No 162 paras 5.12 ff.

<sup>31</sup> Paras 3.38, 7.4 f and 7.25 ff.

<sup>32</sup> Scot Law Com No 162 para 5.12.

<sup>33</sup> It has also found favour in some academic commentaries. See Susan French, "Towards a modern law of servitudes: reweaving the ancient strands" (1982) 55 S Californian Law Rev 1261 at pp 1314-6, and Richard A Epstein, "Covenants and Constitutions" (1988) 73 Cornell Law Rev 906 at pp 922-3. The Uniform Planned Community Act 1980 ss 2-117 and 2-118 require majorities of 67% to make amendments and 80% to bring a community to an end.

<sup>34</sup> On this provision, see Yiannopoulos, *Predial Servitudes* pp 520-2.

of land area and number of units. Burdens older than fifteen years can be discharged by a bare majority expressed by land area.

5.11 We suggest that, in principle, community burdens in Scotland should also be capable of discharge in this manner. But, as is clear from article 780, a number of issues of detail require to be considered.

5.12 The first issue is the manner in which numbers are to be counted. This could be done either by land area or by number of properties.<sup>35</sup> Article 780 uses both methods, to some extent. Land area is fairer. Properties may vary considerably in size, and even properties which began as uniform may come to be combined, or subdivided. Land area also avoids the risk, probably remote in practice, of artificial subdivision carried out in order to achieve a majority. Of course land area is less simple to operate. It is easier to count properties than to measure out land. But in most cases measurement would not be especially difficult. If all units are of roughly the same size, counting the units would produce the right answer. If they are not the same size, then the argument based on fairness is much stronger and the additional work which measurement involves seems properly justified. Often an OS plan of the whole community will be available from the Land Register. This may already be the case with burdens created in deeds of conditions, and, under proposals made earlier, would also come to be the case with older burdens created in conveyances.<sup>36</sup> Our preliminary view, therefore, is that numbers should be counted by land area. Some land would have to be excepted from the calculation, such as land owned in common by the whole community, or land taken over by the local or other public authority. Further, land area could not be used with tenements, or in cases where a community included a mixture of tenements and other types of property. Numbers of properties should not be completely disregarded, however. In the early months of a new development, the developer is likely to own more than 50% of the land area. He should not be allowed to make unilateral alterations to the deed of conditions.<sup>37</sup> We suggest therefore that variation or discharge should not be competent unless it is supported by the owners of 20% of the properties, each of such properties being held in separate ownership. Where this condition could not be met - as where, for example, the developer continues to own all of the units - unanimity would be required, as under the present law.

5.13 Next there is the question of how many must agree before a burden can be waived. A bare majority - anything over 50% - seems the obvious figure and is likely to commend itself to most people. However, there may be an argument that this percentage should be lowered in certain cases, such as where the development is large or where the burdens are old. The case for the former seems the stronger. In large developments it may be wholly impractical to obtain the consent of a majority. Even the mechanical task of drafting and revising the deed and arranging for its execution by, say, 100 people would be a formidable one. In our report on the law of the tenement we put forward an optional scheme, known as Management Scheme B, which abandoned majority rule for tenements with more than 30 units and substituted a threshold of 35%.<sup>38</sup> There may be a case for introducing a similar rule here. A reduced threshold might also be applied where burdens are more than a certain

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<sup>35</sup> A third possibility, unattractive in practice, would be market value.

<sup>36</sup> See para 3.48.

<sup>37</sup> Sched 3 of the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159) lists among its indicative list of terms which may be regarded as unfair a term "(j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract".

<sup>38</sup> Scot Law Com No 162, para 6.29, and Scheme B rule 8.11.

age. Elsewhere we canvass views on whether burdens should automatically come to an end on expiry of a certain period of time under a "sunset rule".<sup>39</sup> It could be argued that community burdens of this vintage may equally be showing signs of age and should therefore be more readily discharged. We have no concluded opinion on this issue and would welcome the views of consultees.

5.14 In very small communities, majority rule does not seem appropriate. With small numbers, personal factors can sometimes play an important, and unwelcome, role. In a community of three, two owners ought not to be able to gang up against the third. In our tenement reform we recommended that majority rule should not apply in cases of three or fewer units,<sup>40</sup> and we suggest a similar exception here.

5.15 In the creation of new burdens there is no reason why the constitutive deed should not provide its own rules for discharge.<sup>41</sup> These could be tied into the decision-making structure for the community,<sup>42</sup> and the threshold might be lower than 50%.

5.16 The Louisiana provision excludes burdens which were created within the previous ten years. On balance, we do not support a time limit of this kind. With community burdens, age is not usually the main factor which makes a burden unsuitable. A new burden may as easily be unsatisfactory as an old one. Where a conveyancer has, thoughtlessly, emptied his word processor into a deed of conditions, there seems no particular reason why those affected by the consequences should have to wait ten years before they can act.

5.17 As in Louisiana, it seems acceptable that a discharge should be able to apply to part only of the community. It may be that the burdens only affect that particular part, or there may otherwise be good reasons why one part alone should obtain relief. The base for calculating a majority should be the same as before, since all members of the community have enforcement rights, including those for whom relief is not being sought. The part should, however, be reasonably substantial. Special considerations apply to waivers in relation to individual properties, and a different set of rules is suggested below.<sup>43</sup>

5.18 If a management structure is in place for the community, a decision to discharge burdens would probably be taken in the normal course of business.<sup>44</sup> In new developments this could be expressly provided for in the management scheme. In other cases there might or might not be a meeting to consider the issue. Certainly none should be required. What is required, however, are the signatures of a majority of owners on the minute of waiver. This is a majority of all owners, calculated by reference to land area, and not merely a majority of those who happened to attend a meeting at which the waiver was agreed. After execution the waiver would then require to be registered. The system of digital mapping used in the Land Register allows the registration process to be streamlined. Using the description in the

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<sup>39</sup> Paras 5.68 ff.

<sup>40</sup> Scot Law Com No 162, para 5.27, and Scheme A rule 3.7.

<sup>41</sup> This is allowed by article 780 of the Louisiana Code, and was the approach recommended by the Law Commission for England and Wales (see Law Com No 127 paras 7.59 - 7.65). And see also para 7.80.

<sup>42</sup> For example, if our recommendations on reform of the law of the tenement are implemented, a developer might make appropriate alterations to Management Schemes A or B so that decisions under those schemes could be extended to variation or discharge of burdens.

<sup>43</sup> Paras 5.21 ff.

<sup>44</sup> In the United States homeowners' associations are often empowered to vary burdens, thus avoiding the high transaction costs of contacting every owner. See Richard A Posner, *Economic Analysis of Law* (5th edn) (1998) p 75.

minute of waiver, the boundaries of the community can be plotted on the digital map. Often this would already have been done in response to an earlier deed, such as the original deed of conditions, or a notice of preservation registered under proposals made earlier in this paper. Thereafter it is possible to generate automatic entries on the title sheets of the affected properties, so that in principle the registration costs for a large community should be no greater than for a small community. However, individual recording would be required in respect of units which remained on the Sasine Register. The conveyancing costs, and the cost of registration, would be a matter for the parties to agree, but in the normal case we would expect the costs to be borne by those who support the waiver.<sup>45</sup>

5.19 Our provisional proposals for universal waivers of community burdens may be summarised as follows:

**15. (1) Subject to (3) - (5) below, a community real burden should be capable of being varied or discharged for the whole community or any significant part thereof by a minute of waiver executed by the owners of units representing more than 50% of the land area of the whole community.**

**(2) In calculating the land area for this purpose there should be excluded any land which is owned in common by all the owners in the community or which has been taken over by the local or other public authority.**

**(3) Where a community comprises or includes a tenement, the minute of waiver should be executed by the owners of more than 50% of the units.**

**(4) Where a community comprises three units or fewer, the minute of waiver should be executed by all of the owners in the community.**

**(5) No minute of waiver should be given effect unless it is executed by -**

**(a) the owners of more than 20% of the units, each such unit being held in separate ownership, or**

**(b) the owners of all of the units.**

**(6) Views are invited as to whether the figure of 50% mentioned at (1) should be reduced to 35% where -**

**(a) the community exceeds 30 units, or**

**(b) 40 years have elapsed since the registration of the deed constituting the burdens (or, where there is more than one deed, the last such deed).**

**(7) The above rules should not apply where in the deed creating the burdens (or any variation thereof) alternative rules for discharge are provided.**

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<sup>45</sup> However, the management scheme in force for the community might provide that administrative expenses of this kind are to be borne by everyone.

5.20 Sometimes the discharge of burdens may be part of a larger scheme which includes replacement burdens. New burdens cannot be imposed in a minute of waiver,<sup>46</sup> and it would be necessary to use a deed of conditions. Under the present law a deed of conditions must be executed by all of the affected owners, but later we make the matching proposal that a deed of conditions which varies pre-existing community burdens should be valid if executed by a majority of owners in the community.<sup>47</sup> We also suggest that the decision of the majority should be challengeable before the sheriff on the ground of unfair prejudice to individual owners.<sup>48</sup> There would be merit in extending this right of challenge to cases of variation and discharge.<sup>49</sup> It would rarely be used. Unfair prejudice is much more likely to occur through the imposition of new burdens than through the discharge of existing ones. But cases of oppression of the minority can be imagined. For example, a majority might use its power to discharge its own burdens while leaving in place those which affected the dissenting minority. Or again the discharge of a maintenance burden might have the effect of leaving full liability for repairs on the single member of the community who happened to own the property in question.

5.21 **Individual waiver.** An owner may want a waiver for his own particular property without having any ambition to change the conditions for the community as a whole. Individual waivers are more common than universal waivers, but the requirement that everyone sign makes them impracticable except in the smallest communities. Here reform can provide some relief. One option would be to allow individual waivers to be granted by those most affected, such as immediate neighbours, or those owning property within a stipulated distance (such as 20 metres<sup>50</sup>). Another would be to apply the rule which was proposed earlier for universal waivers, and allow waivers by a majority of the owners in a community.

5.22 Both options have drawbacks. The obvious objection to the first is that whatever distance is fixed will work well only for some burdens. A burden restricting building may affect only the immediate neighbour, while a restriction on use, or an obligation to maintain, may affect neighbours over a much wider area. Any fixed distance is necessarily random and will work only up to a point.<sup>51</sup> A second objection is the undesirability of separating the right to enforce from the right to grant a discharge.<sup>52</sup> The enforcement rights of a non-neighbour could readily be defeated and would be worth little, and there might be a tendency for the community to break up into sub-communities with, in some cases, substantial departures from the original burdens. At that point the community begins to fracture and the benefit of uniform burdens is lost. Further, the practical operation of a fixed distance rule will vary with the size of the community. In a community of 100 the rule would allow relatively ready discharge of burdens. In a community of 10 it would operate much more harshly than a rule which allowed majority discharge. Here again there is evidence of randomness.

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<sup>46</sup> Reid, *Property* para 388

<sup>47</sup> Paras 7.79-7.82.

<sup>48</sup> Paras 7.83 and 7.84.

<sup>49</sup> We formally suggest this at para 7.88.

<sup>50</sup> This figure is based on one of the options which we put forward for implied enforcement rights for feudal real burdens. See Scot Law Com DP No 93, paras 3.40 - 3.49.

<sup>51</sup> See also para 3.29, where similar issues are raised.

<sup>52</sup> In some circumstances, of course, such a separation might be fully justified: see para 3.62.

5.23 Against the second option it can be said that, in large communities at least, there will be little prospect in practice of obtaining a waiver. Further, in cases where a waiver proves possible to obtain there is a danger that those most affected are outvoted by those least affected.<sup>53</sup>

5.24 Later we make a proposal for "passive" discharge by which a burden would be extinguished automatically unless those entitled to enforce went to the trouble of objecting. If they did object, their objections would then have to be justified.<sup>54</sup> Passive discharge is fair to both parties. It improves the prospects for discharge, at least in the case of large communities, while at the same time giving those with a genuine objection the opportunity to assert and justify that objection. In the case of community burdens "passive" discharge may come largely to replace "active" discharge by minute of waiver, and, if that is correct, we would not be inclined to persevere with the first of the two options mentioned above. Its one advantage - relative ease of discharge, in most cases - is achieved in a much more satisfactory manner by the system of passive discharge. We think, however, that the second option is probably worth having, although we do not expect it to be used much in practice. Accordingly, we propose that:

**16. A community real burden should be capable of being varied or discharged in favour of an individual unit by a minute of waiver executed in accordance with proposal 15.**

5.25 In theory, proposal 16 would allow a majority of owners who would not be affected by the waiver to overrule the minority who are. One possible way of dealing with this would be to introduce a rule that the majority who execute the waiver must include the owners of any property which immediately adjoins the property in respect of which a waiver is being sought. The existing and familiar rules for neighbour notification in planning law could be used for the purposes of identifying the property, although some adaptation might be required.<sup>55</sup> We have no settled view on the value of such a rule. No doubt it would achieve greater fairness, but only at the price of greater complexity. Much depends on an assessment of the seriousness of the problem which it is designed to solve. Since a majority would be unaffected by a waiver only in the case of large communities, and since in large communities waivers will, for practical reasons, not be common, it is possible to argue that the problem is too small to justify so elaborate a solution.

**17. We invite views on whether proposal 16 should be modified in the following way:**

**(1) The signatories to a minute of waiver must include the owners of all units in the community which immediately adjoin the unit in respect of which the waiver is being sought.**

**(2) A unit would be considered as immediately adjoining another unit if it is neighbouring land within the definition in article 2(1) of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224.**

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<sup>53</sup> Yet this probably would not be challengeable as unfairly prejudicial: see para 5.20.

<sup>54</sup> See paras 5.33-5.37, and generally Part 6.

<sup>55</sup> See Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224, art 2(1).

5.26 **Combined burdens.** Occasionally the same burdens may be constituted both for the benefit of a community and also for the benefit of a neighbour who is not a member of the community. Under our proposals such combined burdens<sup>56</sup> would be subject to two separate regimes in respect of waivers, so that the minute of waiver would require to be executed both by the neighbour and also by a majority of owners in the community.<sup>57</sup> Incomplete execution would result in incomplete discharge, so that for example a burden waived by the neighbour would continue to be enforceable within the community.

5.27 **Cost of waiver.** It is unrealistic to expect burdens to be discharged for nothing. Valuable rights merit compensation. But what is to be avoided, or at least minimised, are gains of an opportunistic nature which bear no relation to actual loss. Since in practice the price exacted for a waiver is likely to depend on the availability of alternative methods of discharge, the best way of regulating the price is to liberalise the grounds of discharge. The proposals in this part of the discussion paper are directed towards such a liberalisation.

5.28 Where a burden is discharged for an entire community, this is a decision by the community, for the benefit of the community as a whole. Normally there would be no winners or losers, and we would not expect that money would change hands.

5.29 **Unregistered proprietors.** In a recent case Lord Penrose suggested that it might be competent for a servitude to be discharged by an uninfert proprietor.<sup>58</sup> The position for real burdens has not been judicially considered, but the cautious view is that a registered title is required, if only because this is not one of the cases where statute provides for deduction of title.<sup>59</sup> Should this rule be changed? For reasons given elsewhere in this paper,<sup>60</sup> we are not generally sympathetic to the idea of deeds being granted by parties who have not taken the trouble to register their title. But in the case of minutes of waiver, special considerations seem to apply. Often a minute of waiver requires to be granted quickly and at short notice. The precipitating event is frequently a sale of the servient property, and the sale may be lost altogether if the waiver is not obtained in time. If a waiver has a number of granters, as may occur with a community burden, there is a reasonable chance that one or more will not have a registered title. The need to complete title can add to the delays. It may even lead to an argument with the granter, and to a lengthy correspondence. In some cases a person may be perfectly willing to grant a waiver but at the same time deeply reluctant to complete his title. Executors and trustees might fall into this category. Our provisional view is that a registered title should not be required for minutes of waiver. In Sasine titles, however, the granter who had not registered would require to deduce title in the usual way.<sup>61</sup>

5.30 **Holders of subordinate real rights.** Only the owner need sign a minute of waiver, and the consent of those with lesser rights is not required. Consistent with this, our earlier proposal that tenants be given enforcement rights did not extend to conferring a right to grant discharges.<sup>62</sup> Sometimes there is a hesitation about the position of heritable creditors.<sup>63</sup>

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<sup>56</sup> For combined burdens, see para 1.9.

<sup>57</sup> Paras 5.6 and 5.19.

<sup>58</sup> *McLennan v Warner & Co* 1996 SLT 1349 at p 1353 I-L. For a discussion of this case, see G L Gretton, "Servitudes and Uninfert Proprietors" (1997) 2 SLPQ 90.

<sup>59</sup> The main provision on deduction of title is s 3 of the Conveyancing (Scotland) Act 1924.

<sup>60</sup> Para 3.57.

<sup>61</sup> For Land Register titles the midcouples would be submitted to the Register. See Land Registration (Scotland) Act 1979 s 15(3).

<sup>62</sup> Para 3.62.

As a general rule the debtor in a security must not put at risk the position of his creditor. The distinction is between ordinary acts and prejudicial acts. A prejudicial act can be set aside if the creditor did not consent.<sup>64</sup> We doubt whether the granting of a minute of waiver could be regarded as a prejudicial act. Nonetheless, there would probably be value in putting the position beyond doubt in the form of a clear statutory rule.<sup>65</sup> A heritable creditor in possession should, however, sign in place of the owner.<sup>66</sup>

5.31 **A requirement of registration.** Section 18 of the Land Registration (Scotland) Act 1979 provides that, on registration in the Land Register or Register of Sasines, the terms of a minute of waiver

".. shall be binding on the singular successors of the person entitled to enforce the land obligation, and of the person on whom the land obligation was binding."

The provision does not say, in terms, that a minute of waiver which is *not* so registered does not so bind, but it seems a reasonable implication from s 18 that a delivered but unregistered minute of waiver binds only the parties to it.<sup>67</sup> However, the opportunity of legislation should perhaps be taken to make explicit a rule which at present arises only by implication.

5.32 Summing up the last few paragraphs, we suggest that:

**18. (1) A minute of waiver should require to be granted only by the owner of the dominant tenement (or, in a case where a heritable creditor has entered into possession, only by that heritable creditor).**

**(2) For the purposes of (1), a person who has right to property but whose title has not been completed by registration should be treated as an owner.**

**(3) If, but only if, it is registered in the Land Register or Register of Sasines, a minute of waiver should be effective for all purposes and in particular should bind all those holding real rights in the dominant tenement.**

### **Passive discharge: inviting objections**

5.33 A minute of waiver requires a positive act on the part of the dominant proprietor or proprietors. But discharge need not always be so "active". Under the the existing law it is possible for real burdens to be extinguished "passively", by default, following a failure by the dominant proprietor to act. Discharge on the ground of negative prescription is one example. A second is discharge by acquiescence. Both are considered below. In this section, however, we are concerned with a possible new method of passive discharge.

5.34 Our proposal in outline is this. The servient proprietor who wished to have a burden varied or discharged would serve notice on the dominant proprietor or proprietors. The

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<sup>63</sup> This hesitation is found in other jurisdictions also. See Hinde, McMorland and Sim, *Butterworths Land Law in New Zealand* (1997) para 11.038.

<sup>64</sup> *Mitchell v Little* (1820) Hume 661; *Reid v McGill* 1912 2 SLT 246; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363.

<sup>65</sup> We make a similar proposal in relation to deeds of conditions where they are used to vary existing community burdens: see para 7.82.

<sup>66</sup> Para 3.59.

<sup>67</sup> Gordon, *Scottish Land Law* para 22-73; Reid, *Property* para 426.

dominant proprietors would then have a limited period, such as six weeks, to object to the proposed variation or discharge. A proprietor who did not object would be taken to have abandoned his rights, and if no objections were received, the burden would be discharged on registration of an appropriate notice. Where a person did object, the servient proprietor would have the option of opening negotiations, of applying to the Lands Tribunal, or of abandoning his attempt to have the burden discharged.

5.35 A variant of this proposal would be to involve the Lands Tribunal from the start. The servient proprietor would make an initial application to the Tribunal for variation or discharge. The notification process would then be carried out by the Tribunal, as at present. A person objecting to the application would require to set out his grounds for doing so, and pay a fee. It is for consideration whether the onus of proof should be on the objector rather than, as at present, on the applicant. If no objections were made, the Tribunal would issue an order varying or discharging the burden, and an extract order could then be registered.<sup>68</sup> Objections would lead to a hearing unless either the applicant or the objector withdrew. Negotiations might result in a withdrawal. A person who persisted with his objections but who failed at the hearing would be liable for expenses.

5.36 Our provisional view is that there are clear advantages in bringing in the Lands Tribunal from the beginning. In the first place, the Tribunal is well placed to arrange notification, and its involvement would remove evidential worries about whether notification had really taken place. The Keeper of the Land Register could accept at face value an extract order of the Tribunal, whereas a notice executed by the servient proprietor would inevitably lead to further enquiries. Secondly, a dominant proprietor is less likely to object if to do so involves a formal application to the Lands Tribunal, a statement of the grounds of objection, and the payment of a fee. In this way speculative objections would be avoided. A person would object only if he had good grounds for doing so. Thirdly, there are gains of convenience in tying passive discharge into discharge by the Lands Tribunal. Under our proposals there would be a two-stage procedure. Stage 1 would be the initial application and its notification to the dominant proprietors. That might often be sufficient of itself to discharge the obligation. But if objections were made and could not otherwise be dealt with, there would be an automatic progression to stage 2, at which the merits of the objections could be debated in the course of a hearing. This is a simple and streamlined procedure. As against these advantages there is the psychological hurdle of the initial application to the Tribunal. Owners do not like to litigate. But the application procedure would be simple and cheap, and in many - perhaps in most - cases would not result in a hearing.

5.37 A more detailed consideration of this proposed scheme is postponed until part 6.<sup>69</sup> The intention is to make the scheme available both for neighbour burdens and for community burdens, although its main use might turn out to be the latter. An application could not be brought for the universal variation or discharge of a community burden without the concurrence of a stipulated proportion of members of the community (such as 10%).

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<sup>68</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(4).

<sup>69</sup> Paras 6.13-6.15 and 6.27-6.60.

## Acquiescence

5.38 Where a burden is breached, the dominant proprietor has the opportunity to enforce. But if he fails to do so promptly, his right may be lost by acquiescence. Acquiescence may be said to involve four elements.<sup>70</sup> In the first place there must be breach of a burden. Secondly, the breach must be known to the dominant proprietor. Thirdly, the dominant proprietor must take no steps towards enforcement. Fourthly, in reliance on this apparent consent, the servient proprietor must expend significant sums of money. The standard case is where building works are carried out in breach of a burden. Once the work is complete, or substantially advanced, it is too late for the dominant proprietor to object. He must object at once or not at all. A servient proprietor cannot be required to undo work which was carried out in the belief that it was unobjectionable.

5.39 A number of factors limit the usefulness of acquiescence as a means of extinguishing burdens. First, the requirement of significant expenditure confines acquiescence, more or less, to cases involving building work. Breaches involving use rather than construction would not usually fall within the doctrine.<sup>71</sup> Secondly, acquiescence rarely effects a complete extinction of the burden. If a garage is built in breach of a general obligation not to build, the general obligation remains. The servient proprietor could not now proceed to build a greenhouse. It is merely that the burden is relaxed to the extent of allowing the garage.<sup>72</sup> Thirdly, whether acquiescence operates depends on the circumstances, and usually these circumstances are known only to the parties directly involved. There is no fixed, externally verifiable rule, as there is with negative prescription. This means that in practice acquiescence can be quite difficult to establish. Fourthly, and following on from this, a person purchasing the servient tenement is not obliged to accept the assurance of the person selling that a burden has been extinguished by acquiescence. This issue arose recently in *McLennan v Warner & Co.*<sup>73</sup> There it was discovered, at the time when property was being sold, that an extension to the garage was built partly on the route of a servitude of way. It was not seriously disputed that the servitude had been extinguished by acquiescence. Nonetheless it was accepted by both parties that the title was not good and marketable unless there was produced either a court declarator that acquiescence had operated, or an express discharge of the servitude.<sup>74</sup> Fifthly, even where acquiescence is established it is not clear that a successor in the dominant tenement would be bound.<sup>75</sup> If successors are not bound, then acquiescence is no more than a form of personal bar and is not properly extinctive of the burden. In cases of express discharge, by minute of waiver, successors are bound only where there has been registration,<sup>76</sup> and there are difficulties in treating implied discharge more favourably. A dominant proprietor who watches but says nothing should not be in a worse position than one who tells the servient proprietor that he can go ahead. Yet the second situation would probably be classified as express consent and would require registration for successors to be affected. While the law here is undeveloped, it may be that the unifying principle is notice. A purchaser of the dominant tenement should be in no

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<sup>70</sup> See generally Gordon, *Scottish Land Law* paras 22-75 - 22-77 and 23-17, and Reid, *Property* paras 427 and 428.

<sup>71</sup> *Johnston v The Walker Trs* (1897) 24 R 1061.

<sup>72</sup> *Stewart v Bunten* (1878) 5 R 1108.

<sup>73</sup> 1996 SLT 1349.

<sup>74</sup> Lord Penrose agreed (p 1353F): "In my opinion, purchasers of residential property for their own occupation could not be required on any test of reasonableness .. to accept entry to subjects while an issue of this kind remained outstanding ...".

<sup>75</sup> J M Halliday, "Acquiescence, Singular Successors and the Baby Linnet" 1977 JR 89.

<sup>76</sup> See para 5.31.

doubt as to whether a burden has been extinguished. Hence for a minute of waiver to be effective it must be registered. But even if there is nothing on the register, the purchaser has notice of extinction if a burden has been breached in a way which is visually obvious.<sup>77</sup> Since acquiescence almost always involves building works, the breach will usually be obvious. This may be the best way of explaining the decision in *Ben Challum Ltd v Buchanan*<sup>78</sup> where it was taken for granted, without argument, that successors were bound by the acquiescence of a predecessor in relation to building works.

5.40 Acquiescence as it applies to real burdens is part of much wider body of law. We have no proposals for its reform. Except in respect of its effect on successors, acquiescence is as clear and as settled as any equitable doctrine is likely to be. The limitations identified above flow from the very nature of the doctrine and could not readily be altered. In any event, acquiescence is likely to be much less important in the future. Acquiescence operates almost like an inferior brand of negative prescription, and if negative prescription proper becomes more freely available, as is proposed below, acquiescence will be needed only for the short period between the occurrence of a breach and the expiry of the prescriptive period.

### Negative prescription

5.41 It is disputed whether negative prescription applies to feudal burdens,<sup>79</sup> but there can at least be little doubt as to its application to community and to neighbour burdens.<sup>80</sup> The period is twenty years,<sup>81</sup> and burdens fall within s 7 rather than s 8 of the Prescription Act.<sup>82</sup> Under s 7 a burden is extinguished if it has been breached for twenty years<sup>83</sup> without the breach having been judicially enforced.<sup>84</sup> Breach includes a failure to perform a positive obligation (such as to pay for maintenance) and also a failure to observe a restriction (such as a restriction on building).<sup>85</sup> Prescription is interrupted if the servient proprietor complies with the burden, or makes an unequivocal written acknowledgement that the burden subsists.<sup>86</sup> A reference to the burden in a disposition of the property is not an unequivocal written acknowledgement.<sup>87</sup> The running of prescription does not appear to be affected by a change in the ownership of either tenement, so that, like the burden itself, prescription runs with the land.

5.42 There seems a strong case for shortening the period of prescription. To do so would be helpful to the servient proprietor without being unfair to the dominant. Ordinary contractual obligations prescribe after only five years.<sup>88</sup> In our report on the law of the tenement we recommend that maintenance and other obligations affecting a tenement

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<sup>77</sup> A similar view has been expressed in relation to acquiescence in respect of encroachments. See *Brown v Baty* 1957 SC 351.

<sup>78</sup> 1955 SC 348.

<sup>79</sup> Compare Gordon, *Scottish Land Law* para 22-82 with Reid, *Property* para 431.

<sup>80</sup> Gordon, *Scottish Land Law* para 23-20.

<sup>81</sup> As an obligation relating to land, it is excluded from the quinquennial prescription by Sched 1 para 2(e) of the Prescription and Limitation (Scotland) Act 1973. For the meaning of this exclusion, see *Barratt Scotland Ltd v Keith* 1994 SLT 1337 and 1343, and *University of Strathclyde (Properties) Ltd v Fleeting Organisation Ltd* 1992 GWD 14-822.

<sup>82</sup> Section 8 only applies where s 7 does not. Section 7 applies to the extinction of "obligations" and correlative rights. A real burden is an "obligation" in this sense.

<sup>83</sup> Not "relevantly acknowledged", in the terminology of the Act: see s 10(1)(a).

<sup>84</sup> In the terminology of the Act, without a "relevant claim" having been made: see s 9.

<sup>85</sup> Prescription and Limitation (Scotland) Act 1973 s 10(1)(a), (4).

<sup>86</sup> *Ibid*, s 10(1)(b).

<sup>87</sup> *Graham v Douglas* (1735) Mor 10745.

<sup>88</sup> Prescription and Limitation (Scotland) Act 1973 s 6 and Sched 1 para 1(g).

should prescribe after five years.<sup>89</sup> There seems no reason why real burdens should be treated differently. Five years gives ample opportunity to enforce breaches, and a neighbour who delays indefinitely deserves to lose his rights. There would be considerable benefits to the servient proprietor from a reduction in the period. Many properties are affected by breaches of burdens. Many more have been subject to building work, or to a use, which, on a pessimistic view, might possibly be in breach of some vague and elderly burden. The problem usually comes to a head when the property is being sold and the purchaser insists on a minute of waiver. Quite a number of these burdens will perish as a result of the abolition of the feudal system, or of other proposals contained in this paper. But for those burdens which remain a shortened period of prescription will mean that breaches older than five years can safely be disregarded.

5.43 There are two cases where five years might not be the most appropriate period. The first is where a real burden resembles a positive servitude and allows the dominant proprietor to make some use of the servient tenement. We discuss later whether burdens of this type should continue to be permissible;<sup>90</sup> but if they are to be permissible, there is something to be said for retaining the twenty year period, which is also the period which applies to positive servitudes. Arguably, a right to make use of another's property is so substantial and important that it should not be readily extinguished. Moreover, it would be hard to justify applying one rule to positive servitudes and a different rule to real burdens which were functionally identical. At a practical level, there might be difficulties in individual cases in deciding whether a right was properly classified as the one rather than the other.

5.44 A different period may also be appropriate in the case of burdens which impose restrictions on use. But here any change should be in the opposite direction. Article 781 of the Louisiana Civil Code provides that:

"No action for injunction or for damages on account of the violation of a building restriction may be brought after two years from the commencement of a noticeable violation. After the lapse of this period, the immovable on which the violation occurred is freed of the restriction that has been violated."

We would welcome the views of consultees on whether, in the case of restrictions, the prescriptive period should be further reduced to two years. Prescription would then almost be merged with acquiescence. A neighbour would have two years to enforce his rights - much in the same way as, in current conveyancing practice, a buyer of heritable property has two years to enforce his contractual rights against the seller.<sup>91</sup> In some cases acquiescence would bar enforcement before that.<sup>92</sup> But after two years the issue would be closed and there would be no room for further dispute.

5.45 If different periods were to be introduced for quasi-servitudes and for restrictions on use, the five-year period would apply mainly to a residual category of burdens, mainly

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<sup>89</sup> Scot Law Com No 162, para 8.23.

<sup>90</sup> See paras 7.66 and 7.67.

<sup>91</sup> Following s 2 of the Contract (Scotland) Act 1997 (which provides that missives of sale are not superseded in all respects by delivery of the disposition), missives generally provide that they are to remain in force for two years only.

<sup>92</sup> Paras 5.38 - 5.40.

comprising positive obligations.<sup>93</sup> So an obligation to contribute to maintenance would prescribe after five years whereas an obligation to use the property as a dwellinghouse for one family only would prescribe after two years.

5.46 An unresolved question in the law of negative prescription is whether a breach of a burden in one respect has the effect of extinguishing the burden in all respects. The issue arises quite commonly. For example, a burden which prohibits all building on a certain area may be breached by the construction of, say, a garden shed. If the breach continues for the prescriptive period, the right to object to the shed is lost. But is the burden wholly extinguished, leaving the owner free to build a house alongside the shed? Or does the burden survive except insofar as it relates to that particular shed? The same issue arises with burdens which prohibit particular uses, such as commercial use. On one view use for the prescriptive period for piano lessons would free the property of the burden, so that thereafter the owner could open a fast-food shop or a factory. Similarly, it could be argued that a failure to pay £20 for a minor repair would have the effect of extinguishing any obligation of maintenance. Surprisingly, issues of this kind seem never to have been litigated.<sup>94</sup> Nor can any help be obtained from the language of the Prescription Act, which provides simply for the extinction of "obligations" without elucidating the relationship between the obligation and its breach. Our provisional view would be that a minor breach ought not to have the effect of extinguishing an entire burden, and that, as with acquiescence, the extinctive effect of prescription should be confined to the particular breach. But whatever view is taken, the law ought at least to be clarified.

5.47 We propose that:

**19. (1) Subject to (3) below, the period for negative prescription of real burdens should be reduced from 20 years to 5 years.**

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

**(3) Views are invited as to whether the period of negative prescription should be -**

**(a) 20 years in the case of burdens which allow the dominant proprietor to use the servient tenement; and**

**(b) 2 years in the case of burdens which take the form of a restriction.**

### **Abandonment of common burdens**

5.48 A burden which is common to a community is extinguished by abandonment if it has been extinguished for a sufficient number of individual properties within that community.<sup>95</sup> The whole community is then relieved of the burden. The justification is

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<sup>93</sup> For the three types of real burden, see para 1.19.

<sup>94</sup> However in *Walker's Exr v Carr* 1973 SLT (Sh Ct) 77 the view was taken that non-use of a servitude of way by vehicles for the prescriptive period did not of itself extinguish the right to use the same way for pedestrians. See also Yiannopoulos, *Predial Servitudes* p 524 for a discussion of the position in Louisiana, where there are contradictory authorities.

<sup>95</sup> Gordon, *Scottish Land Law* para 22-76; Reid, *Property* para 429. A similar rule operates in Louisiana: see art 782 of the Civil Code.

fairness to the remaining members. In a community a person accepts restrictions on his own property only on the basis that the same restrictions apply to the property of his neighbours. If his neighbours are free of the restrictions, then he should be free also.

5.49 Extinction in individual cases can arise on any of the usual grounds, such as waiver or negative prescription or acquiescence, the most common case in practice. It is not clear how many individual burdens must fall before the burden is lost to the community as a whole. In part this depends on whether the person entitled to enforce the burden is from outside or inside the community - or, in other words, on whether there is at issue a feudal or neighbour burden, or a community burden. Where the enforcer is an outsider, typically a superior, the case law suggests that extinction in fewer than half of the properties may infer abandonment. But there is no clear pattern. In one case one third of the properties was held to be sufficient.<sup>96</sup> In another, admittedly small, development, one half was said not to be enough.<sup>97</sup> More is probably required in the case of burdens which are mutually enforceable within the community, at least where the burdens have been lost by acquiescence. In *Mactaggart & Co v Roemmele*<sup>98</sup> it was said that the fact that owners had acquiesced in breaches of a burden in a remote part of the estate could not be taken as meaning that they had abandoned the right to object to breaches which more immediately affected them. Unlike an outside enforcer, for whom all properties are alike, a member of the community has much greater interest in some properties than in others.

5.50 We have no proposals to alter the rules where the enforcer is from outside the community. With the abolition of the feudal system, such cases will cease to be common, and the existing rules seem adequate. Our proposals are confined to community burdens. Earlier we suggested that it should be possible for a burden to be discharged for a whole community if a minute of waiver is granted by the owners of a bare majority of properties. We further suggested that, in certain cases, the threshold might be reduced to 35%.<sup>99</sup> The doctrine of abandonment can be tied into these proposals by taking account of the number of properties for which the burden has already been extinguished. The proposal would work in this way. Suppose that a community consists of 100 houses, of equal size,<sup>100</sup> and suppose further that in the case of 21 of these houses a particular burden has been discharged, either by waiver or by negative prescription. The 21 would then count towards the majority, so that the burden could be varied or discharged for the whole community by a minute of waiver granted by the owners of only 30 (rather than 51) of the remaining houses. In cases where the threshold was 35%, only 14 further owners need agree to the waiver. If the number of properties with discharges exceeded the threshold figure, the burden would be discharged automatically, without the need for a minute of waiver. If necessary, the Land Register could then be adjusted by an application for rectification. In counting the properties, we would be inclined to treat partial discharges in the same way as full discharges, largely for reasons of convenience. As we saw earlier, both acquiescence and negative prescription tend to produce discharges which leave part of the burden in place, and it would be awkward if individual discharges required to be scrutinised and measured. The counter-argument, of principle, is that a minor breach (such as the building of a garden

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<sup>96</sup> *Calder v Merchant Co of Edinburgh* (1886) 13 R 623.

<sup>97</sup> *Ewing v Campbells* (1877) 5 R 230.

<sup>98</sup> 1907 SC 1318.

<sup>99</sup> Paras 5.9 ff.

<sup>100</sup> Under our proposals, majorities are counted by area and not by numbers of units. See para 5.12.

shed) should not be given the same weight as a major breach (such as the erection of a 5-storey building).

5.51 An advantage of our proposals over the present law is that they use a fixed formula for abandonment and so are relatively certain. But some uncertainty seems unavoidable. A person wishing to know how many must sign the waiver will have to investigate the titles of other properties in the community to ascertain if the burden has already been discharged by individual waiver or by order of the Land Tribunal. In appropriate cases a visual inspection will also be required for signs of breaches which have been in place for longer than the prescriptive period. Where prescription is relied upon, the Keeper will have to be satisfied as to the position before he is willing to accept the minute of waiver. In practice, it will often be easier to collect a few extra signatures than to try to argue some of the less obvious occurrences of negative prescription.

5.52 Our proposal is that:

**20. (1) Where a community burden has been discharged, in whole or in part, in respect of units representing more than 50% of the land area of the community, the burden should be considered to be abandoned for the whole community.**

**(2) The figure of 50% should be reduced to 35% in the cases mentioned in proposal 15(6).**

**(3) For the purposes of proposals 15 and 16, the number of units required for the execution of a minute of waiver of a community burden should be reduced by the units in respect of which the burden has already been discharged, whether in whole or in part.**

## Confusion

5.53 If dominant and servient tenements come to be owned by the same person, in the same capacity, the burden ceases to be enforceable. A person cannot enforce a burden against himself. But it is unclear whether the burden is extinguished outright, or merely suspended pending some future separation of the two properties. The latter view is supported by Professor Gordon:<sup>101</sup>

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

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

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<sup>101</sup> Gordon, *Scottish Land Law* para 23-18. And see also Reid, *Property* para 433.

5.54 First, if extinction occurred automatically on acquiring both tenements, the Land Register would be inaccurate in continuing to show the burdens. In some cases the Keeper might realise what had happened and alter the Register accordingly, but in many cases he would not. Whilst inaccuracy on the Register is sometimes unavoidable,<sup>102</sup> this is an occasion in which it can readily be avoided. If the owner of the combined tenements wishes to have the burdens removed, he should be required to take some active step, such as the registration of a minute of waiver.<sup>103</sup> In practice the issue is most likely to arise when he comes to sell the servient tenement, and whether any steps are then taken may depend on the views of the purchaser.

5.55 Secondly, as Professor Gordon indicates, the register should not mislead a purchaser; and since, in future, burdens will normally be mentioned in the title sheet of the dominant tenement,<sup>104</sup> this includes purchasers of the dominant as well as of the servient tenement. If extinguished burdens remain on the register, a purchaser is likely to assume that they are still in existence. He will have no reason to open investigations as to whether, at any time since the burdens were first created, the two tenements were united in single ownership; and even if he chose to do so, he would find that historical excavation is not possible in the Land Register, which keeps no public records of previous ownership.

5.56 Thirdly, under proposals made elsewhere in the paper, real burdens would be enforceable both by and against certain tenants and other categories of possessor.<sup>105</sup> Here automatic extinction would produce awkward results. For example, if the owner of the dominant tenement acquired the servient tenement at a time when it was leased he would discover that burdens, which formerly were enforceable against the tenant, were extinguished by his very act of purchase.<sup>106</sup>

5.57 Fourthly, automatic extinction creates difficulties for community burdens. If two units in a community come to be owned for a time by the same person, the burdens are extinguished as between these units. This results in what has been described as "pockets of immunity".<sup>107</sup> The units continue to be affected by the burdens. The owners of the units continue to have enforcement rights in respect of the other units in the community. But mutual enforcement rights as between the two units have been lost.

5.58 Finally, while it is probably<sup>108</sup> the law that automatic extinction applies in the case of servitudes, there are important differences between real burdens and servitudes which suggest that, in this instance at least, they should not be treated in the same way. One difference is the fact that servitudes often do not appear on the register, so that the integrity of the register is not a policy concern. Another is the fact that positive servitudes can be created of new by implication on the eventual separation of the two tenements, which in practice removes much of the effect of automatic extinction. By contrast, real burdens cannot be created by implication in this way.

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<sup>102</sup> For example, in the case of real burdens which have been extinguished by negative prescription.

<sup>103</sup> The obvious parallel in the current law is the need, with feudal burdens, to register a minute of consolidation.

<sup>104</sup> Paras 3.31 ff, 7.4 ff and 7.25 ff.

<sup>105</sup> Paras 3.59 ff, 4.12 ff and 4.28.

<sup>106</sup> See P O'Brien, "The extinction of servitudes through confusion" 1995 SLT (News) 228. In England and Wales the Law Commission has recommended that automatic extinction should not occur for as long as the obligation benefits or binds a person with a lesser proprietary interest. See Law Com No 127, p 107.

<sup>107</sup> By the Law Commission: see Law Com No 127, p 108. The Law Commission recommended that community burdens ("development obligations") should be excepted from automatic extinction.

<sup>108</sup> Gordon, *Scottish Land Law* paras 24-96 - 24-98.

5.59 Some, but not all, of these difficulties could be dealt with by way of special exceptions to a rule of automatic extinction, although the exceptions would sometimes be complex.<sup>109</sup> But the attempt does not seem worthwhile. In our view there is much to be said for the simple rule that a combined ownership of the dominant and servient tenements does not, by itself, extinguish real burdens. We suggest therefore that:

**21. A real burden should not be extinguished only because the dominant and servient tenements are owned by the same person in the same capacity.**

5.60 In practice confusion is only likely to be important in cases where there is a single dominant tenement, and usually only neighbour burdens will fall into this category. Where there are multiple dominant tenements, the acquisition by the servient proprietor of one such tenement would, if a minute of waiver was registered, extinguish the burden in relation to that tenement, but the rights of the other dominant proprietors would be unaffected.

### **Compulsory purchase**

5.61 While the law is not free from doubt, it seems likely that the effect of compulsory purchase is to free the land acquired from at least those burdens which might impede the purpose for which the purchase was made.<sup>110</sup> A more resolute view is that all burdens are extinguished, regardless of their nature. It is uncertain whether burdens revive if the acquiring authority subsequently disposes of the land. Plainly the law is in need of clarification. A straightforward approach would be to say that compulsory purchase extinguishes all burdens in all time coming. When we suggested this rule in our discussion paper on the abolition of the feudal system, it commanded broad support.<sup>111</sup> The main advantage is simplicity. On an acquisition by compulsory purchase the entire contents of the D section of the title sheet could be deleted. No one could then be in any doubt as to the legal position. Writing in the *Stair Memorial Encyclopaedia* Mr G F G Welsh offered the refinement that extinction should depend on the existence of a confirmed compulsory purchase order:<sup>112</sup>

"The reasoning behind this approach ... is that it is only when there has been compulsory purchase procedure that the proposals will have been advertised to the public at large and an opportunity of objection provided. In the absence of such an order ... it would be open to the seller and the purchaser by agreement between themselves to take away the rights of third parties without their knowledge."

There is obvious merit in this suggestion. It would mean that a voluntary conveyance, granted in the shadow of compulsory powers, would not have the effect of removing real burdens.

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<sup>109</sup> For example, they would have to deal with the problem of unregistered possessory rights affecting the servient tenement (such as unregistered leases).

<sup>110</sup> *Town-Council of Oban v Callander & Oban Rly Co* (1892) 19 R 912. For a discussion of the issues, see: *Stair Memorial Encyclopaedia* vol 5, *sv* "Compulsory Acquisition" (G F G Welsh) paras 85-7; Gordon, *Scottish Land Law* paras 22-78 and 23-18; Reid, *Property* para 436. Compensation is regulated by s 6(1) of the Railways Clauses Consolidation (Scotland) Act 1845, as applied by the Acquisition of Land (Authorisation Procedure) Scotland Act 1947, s 1(3) and Sched 2 para 1.

<sup>111</sup> Scot Law Com DP No 93, paras 5.36 and 5.37.

<sup>112</sup> *Stair Memorial Encyclopaedia* vol 5, para 86.

5.62 Other approaches are possible. For example it could be provided that real burdens survived except insofar as they impeded the purpose for which the land was acquired. But this would give rise to difficult questions as to which burdens survived and which did not. Another possibility would be to provide for the revival of burdens following a sale by the acquiring authority. But this would not only be administratively awkward, requiring the shadow burdens to remain on the register, it would also carry the danger that the burdens which revived were wholly unsuitable for the land in its transformed state. Our provisional view is against both of these approaches. Instead, we adhere to the proposal made in our previous discussion paper, that, for the avoidance of doubt:

**22. Real burdens should be extinguished in all time coming on the acquisition of land following on from a confirmed compulsory purchase order.**

**Obsolete burdens**

5.63 The abolition of the feudal system will bring many real burdens to an end. Proposals already made in this paper will tend in the same direction. These include the proposal that implied rights to enforce should be phased out over a 5-year period, subject to registration of such rights within that period,<sup>113</sup> and the proposals for improved methods of variation and discharge.<sup>114</sup> The question is whether these proposed changes go far enough or whether more still needs to be done.

5.64 The principal remaining problem is the problem of obsolete burdens. Scotland, almost uniquely,<sup>115</sup> has had burdens for 200 years. Most properties are affected by burdens of one kind or another, and many are affected by two or three different sets of burdens, of different vintages. Many of these burdens are out of date. All conveyancers are familiar with the Victorian building charter, which, in selling land for development, imposes detailed conditions about how the land is to be used. Nothing is left to chance by those charters. Only certain types of buildings can be erected. The plans must be approved in advance. The height, the building line, the type of stone and slate are all specified. Elaborate provision is made for roads and sewage. Today these burdens are spent. The Victorian development was duly built. Probably it was built in accordance with the charter, but even if it was not the right to complain has long since been lost, by acquiescence or by negative prescription. Yet these provisions - long-winded, poorly punctuated, and in faded copperplate - continue to clutter up the titles of almost every Victorian house in Scotland.

5.65 Another familiar Victorian burden is the nuisance clause containing, in the words of Lord Shaw of Dunfermline, "the usual grotesque enumeration of noxious and offensive businesses and trades".<sup>116</sup> The example litigated in one modern case<sup>117</sup> prohibited the carrying on of

"... any soap work candle work tan work slaughter house cattle mart skin work dye work oil work lime work distillery brewery or other manufacture or chemical process of any kind nor to deposit nauseous materials thereon nor to lay any nuisance or

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<sup>113</sup> Paras 3.31 ff.

<sup>114</sup> Paras 5.1-5.62, and see generally for Lands Tribunal applications, Part 6.

<sup>115</sup> A similar problem arises in England and Wales. Other countries came later to restrictive conditions.

<sup>116</sup> *Porter v Campbell's Trs* 1923 SC(HL) 94 at p 99.

<sup>117</sup> *Mannofield Residents Property Co Ltd v Thomson* 1983 SLT (Sh Ct) 71.

obstructions on the roads or streets adjoining said ground nor to do any other act which may injure the amenity of the place and neighbourhood for private residences ...".

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

5.66 Obsolete burdens matter. They may prevent the use of property for a purpose which, in modern conditions, is perfectly reasonable. And even where they do not cause actual harm, they clutter up the register and create unnecessary transaction costs. As the Law Commission observed in relation to England and Wales:<sup>118</sup>

"[E]very time property which is subject to such covenants is acquired the prospective new owner or his professional adviser must consider and advise upon the covenants in detail. He may conclude that they are of no importance, but the need for that work adds time and expense to the conveyancing process ... . With covenants continuing indefinitely, that inconvenience recurs regularly in relation to the same covenants."

Registration of title has made the problems more obvious by bringing all the burdens together in the one place. The result is not attractive. It reflects little credit on our system that the section of the title sheet dealing with burdens (the D Section) is usually longer - sometimes very much longer - than the rest of the title sheet put together. This suggests, misleadingly, that the most important aspect of owning land in Scotland is the restrictions on how that land can be used. The position can only get worse. A hundred years from now the burdens of the nineteenth century are unlikely to seem more inviting or more useful than they do today.

5.67 The present law does not deal well with obsolete burdens. It is true that a person affected by burdens which are obviously out of date will usually enjoy success at the Lands Tribunal. But most people do not make applications to the Lands Tribunal, and should not be required to do so. Litigation does not seem a satisfactory method of dealing with obsolescence. What is lacking under the current law is a systematic method of disposing of obsolete burdens; and a truly effective reform would be one which managed to extinguish all burdens which had become obsolete while at the same time preserving all burdens which were of continuing usefulness. Needless to say, the ideal is much easier to state than to achieve.

5.68 In our discussion paper on feudal abolition we discussed but rejected the idea that the Keeper might delete obsolete burdens on his own initiative.<sup>119</sup> This seemed a task beyond the Keeper's resources, and this conclusion was not challenged on consultation. An alternative proposal, that the Keeper should be able to apply to the Lands Tribunal for a declaration that burdens are obsolete,<sup>120</sup> met with a mixed response and was not supported by the Keeper. We do not persevere with it here. Instead we make a quite different suggestion. If old burdens are often obsolete, one stark way of dealing with the problem would be to abolish all old burdens. It could be provided by legislation that when a burden reaches a certain age (such as 100 or 150 years) it should automatically cease to have effect. Such a rule is sometimes known as a "sunset rule".

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<sup>118</sup> Law Com No 201, para 2.9.

<sup>119</sup> Scot Law Com DP No 93, para 4.36.

<sup>120</sup> Ibid, para 3.99, and proposal 16(iii).

## A sunset rule: in principle

5.69 This is not a new idea. A number of American states limit the duration of covenants and servitudes. In Massachusetts, for example, a law of 1961 provides that all existing restrictive conditions are to cease to have effect after 50 years, while no new condition can be created with a life of more than 30 years.<sup>121</sup> Ontario limits covenants to 40 years.<sup>122</sup> In England and Wales the Law Commission has recommended a limit of 80 years.<sup>123</sup> The Law Reform Commission of Western Australia has recently considered, but rejected, the idea of a sunset rule.<sup>124</sup>

5.70 A sunset rule has obvious attractions. It is both simple and certain.<sup>125</sup> It precludes all argument as to which burdens are and which are not affected. The servient proprietor knows how long he must wait before his property is free of the restriction. The dominant proprietor knows for how long his amenity is secure. And a purchaser of either property will know the position also. Once the time limit has expired it will be a simple matter for the Keeper to delete the burden from the title sheet. Many of the difficulties created by the rules of implied rights to enforce would disappear, since the more modern a burden, the more likely it is to contain express enforcement rights. This means that there would be fewer notices of preservation,<sup>126</sup> and hence less work for the registers.

5.71 But there are also disadvantages. First, and most obviously, the proposed rule is arbitrary and will not work equally well in all cases. Good burdens will perish as well as bad ones, and some bad burdens will survive merely because they happened to be created in the recent past. Age is not the only factor which makes a burden obsolete, and is at best a crude means for determining which burdens should survive. Research by Cusine and Egan shows no strong correlation between the age of a burden and the desire of a servient proprietor to have it discharged.<sup>127</sup> Secondly, since the age of a burden depends on the date when the property was developed, the rule would mean that all property built before, say, 1900 (or 1850) would be wholly unregulated. Georgian townhouses and Victorian villas and tenements would be free of real burdens. Modern developments, for the moment, would not. Thirdly, a sunset rule could not be introduced without some provision for compensation for loss of rights.

5.72 In almost every jurisdiction in which a time limit for burdens has been introduced or recommended, provision is also made for renewal at the end of the period of initial validity. Sometimes the renewal period is shorter than the initial period. In Massachusetts, for example, burdens are valid for an initial period of 30 years, but may thereafter be renewed for 20 years at a time.<sup>128</sup> Usually there is no limit to the number of times a burden can be renewed. Renewal is by the owner of the dominant tenement and does not require the

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<sup>121</sup> Massachusetts General Laws ch 184 ss 27 and 28 (inserted by an Act of 1961 ch 448).

<sup>122</sup> Land Titles Act c 230 s 118(9); Registry Act c 445 ss 104 & 106. And see also Ontario LRC, *Covenants* pp 56-7.

<sup>123</sup> Law Com No 201, Part III.

<sup>124</sup> Law Reform Commission of Western Australia, *Report on Restrictive Covenants* (Project No 91) (1997) paras 5.11 and 5.12.

<sup>125</sup> Stewart E Sterk, "Freedom from freedom of contract: the enduring value of servitude restrictions (1985) 70 Iowa Law Rev 615 at p 655: "durational limitations virtually eliminate the uncertainty inherent in the other doctrinal rules, and consequently make litigation over the continued enforceability of a restriction unnecessary".

<sup>126</sup> For notices of preservation, see paras 3.36 ff.

<sup>127</sup> Cusine & Egan, *Feuing Conditions*, tables 3.8 and 5.6. Around one third of the burdens in respect of which discharge was sought were less than 40 years old.

<sup>128</sup> Massachusetts General Laws ch 184 s 27(b) (inserted by an Act of 1961 ch 448).

consent of the owner of the servient tenement. Renewal meets the main disadvantage mentioned above. It converts an arbitrary rule into a sophisticated one.<sup>129</sup> The basic rule of a fixed time limit remains, but the rule is then made responsive to the particular needs of particular properties by allowing for the possibility of renewal. Our provisional view is in favour of a sunset rule, but accompanied by renewal. Thus we propose that:

**23. A sunset rule should be introduced for existing real burdens (that is to say, a rule that existing burdens come to an end at the expiry of a period fixed by statute), but subject to the possibility of renewal.**

#### **A sunset rule: in detail**

5.73 **Renewal.** Two models can be found in other jurisdictions. One allows renewal by the registration of an appropriate notice.<sup>130</sup> The other requires an application to a court or tribunal in which the applicant must justify the continuation of the burden.<sup>131</sup> The first seems too undemanding. It would provide a cheap and easy way of making burdens last for ever. The dominant proprietor would in most cases surely renew, except by inadvertence; and in the absence of any control mechanism, he would be free to renew burdens which conferred no real advantage beyond the prospect of money for minutes of waiver. We think that renewal should be discretionary and should require an application to the Lands Tribunal. The Tribunal would grant the application only if satisfied that it was reasonable to do so having regard to certain factors to be prescribed by legislation. In part 6<sup>132</sup> we identify factors in the context of applications for variation and discharge which would be suitable for the present purposes also. The onus of proof would rest on the applicant. The application would be made by the dominant proprietor and notified to the servient. There would be a threshold requirement for community burdens, as elsewhere in our proposals.<sup>133</sup> An application would require the support of the owners of properties representing more than 10% of the land area of the whole community. A burden unable to command even that modest a level of support would not deserve to survive. The burdens would require to be renewed for the whole community or not at all, and it would not be open to an applicant to target certain neighbours only, thus converting a community burden into a neighbour burden. Under proposals made later,<sup>134</sup> an application to the Tribunal would not be necessary where a majority of owners in the community were willing to renew the burdens, whether in their existing or in a revised form.

5.74 Special protection might be needed for the servient proprietor. There is a danger of being drawn into litigation against his will. He may feel bound to defend an application for renewal, while at the same time being deeply reluctant to invest the necessary time and expense. As against this it might be said that he is no worse a position than a dominant proprietor faced with an application for variation or discharge, and that it should not be supposed that servient proprietors are more worthy of protection than dominant proprietors. On this view, if a servient proprietor chooses not to oppose an application, then

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<sup>129</sup> Carol M Rose, "Servitudes, security and assent: some comments on Professors French and Reichman" (1982) 55 S Californian Law Rev 1403 at p 1414.

<sup>130</sup> This is the model favoured in North America.

<sup>131</sup> This was the model recommended by the Law Commission in respect of England and Wales: see Law Com no 201, paras 3.34 - 3.75.

<sup>132</sup> Paras 6.27 ff.

<sup>133</sup> Para 6.52.

<sup>134</sup> Paras 7.79-7.82.

he must accept the continuation of the burdens. We would welcome the views of consultees. If assistance were thought to be desirable, two devices in particular seem available. One would be to provide that unopposed applications should not be granted automatically<sup>135</sup> but should be subject to the scrutiny of the Tribunal. This proposal found favour with the Law Commission in England and Wales,<sup>136</sup> but has obvious resource implications for the Tribunal. Secondly, in the event of an application being opposed it would be possible to make some special rule about expenses, which would either relieve the servient proprietor of all costs or would restrict his liability to his own costs in the event of an unsuccessful defence.<sup>137</sup>

5.75 We think that renewal should probably be permitted only once, and for a shorter period than the period of initial validity. One way of achieving this would be to treat a renewed burden in the same way as a new burden. Under proposals made later a new burden would last for a maximum period of 80 or 100 years - less possibly in the case of neighbour burdens - and would not be capable of renewal.<sup>138</sup> Depending on the period of initial validity which is selected,<sup>139</sup> a burden which was renewed would have achieved a total duration of up to 250 years. After so prolonged a sunset there does not seem a strong case for a further period of validity.

5.76 **Compensation.** An unsuccessful application means a loss of rights. If, as often, the reason for failure is that the burden was obsolete and of no value, there will be no financial loss to the applicant. But in the balancing of the statutory criteria the Lands Tribunal may sometimes refuse an application even where some residual value remains. Issues of compensation then arise. Under the present law, a variation or discharge of a burden by the Lands Tribunal can be accompanied by an award of compensation under one (but not both) of the following heads:<sup>140</sup>

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

We suggest that the same heads of compensation be available where an application for renewal is refused. This would put the servient proprietor in the same position as if the burden had been brought to an end by a successful application for its discharge. In practice compensation would rarely be rewarded. In cases where it was, a servient proprietor might sometimes prefer the continuation of the burden. The benefit of freedom may be attractive only where it is free of charge. We think that the servient proprietor should be given the choice. If he is unwilling to pay compensation he should have the option of accepting in its place renewal of the burden.

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<sup>135</sup> We propose later that unopposed applications for variation or discharge should be granted automatically: see paras 6.13-6.15.

<sup>136</sup> Law Com No 201, para 3.35.

<sup>137</sup> For the equivalent proposals in England and Wales, see Law Com No 201 paras 3.72 - 3.74.

<sup>138</sup> Paras 7.6-7.14.

<sup>139</sup> See paras 5.78 and 5.79.

<sup>140</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(4).

5.77 **Exceptions.** Burdens which regulate the maintenance, reinstatement or use of a common facility (such as shared amenity ground or a private water system) seem essential and would need to survive any sunset period. Burdens of this kind could not be described as obsolete. This suggested saving is consistent both with our proposals in relation to implied enforcement rights<sup>141</sup> and also with our recommendations about feudal burdens in our forthcoming report on feudal abolition. However, a maintenance burden should not survive where the obligation has been taken over by a local authority or other public body. So Victorian burdens about streets and sewers would not be saved. A second possible exception might be for conservation burdens. It might seem illogical to provide for the automatic extinction of a burden the whole purpose of which is to preserve historical integrity. History does not become out of date. Nonetheless our provisional view is against this exception. However well-intentioned, a conservation burden will be rooted in the ideas of its time. It seems right that after 100 or 150 years it should require to be reviewed in the same way as any other burden. In any event, conservation burdens may also be concerned with environmental matters, which are subject to rapid scientific and social change.

5.78 **Duration.** The most difficult issue is duration.<sup>142</sup> Probably the sunset period could not be less than 100 years. A shorter period would strike at burdens created in the present century, the majority of which are unlikely to be obsolete. Our preference is for a rather longer period - at least 150 years, and perhaps longer still. Partly this is due to caution. There is no empirical data as to the usefulness of burdens as measured by age. Any fixed period is no more than an educated guess. If the choice lies between abolishing too much or too little, we would prefer to abolish too little. The survival of obsolete burdens seems a reasonable price to pay for the survival of burdens which have continuing utility. Even if the period is long, a sunset rule will in the end take care of the obsolete burdens. This conclusion is reinforced by practical considerations. At first sight the availability of renewal might seem to argue for a shorter initial period. In our view it argues for a longer one. Real burdens have been in existence for 200 years or more. If the initial period were set at 100 years, the effect of the legislation would be to extinguish at one go the first 100 years' worth of burdens except to the extent that they were renewed. The results would scarcely be manageable. A large number of owners would be affected. There might be something akin to panic. But at the least there would be a rush to renew, and intense pressure on owners, their advisers, and on the Lands Tribunal. We are mindful of the fact that the recommendation of an 80-year sunset period by the Law Commission of England and Wales was rejected by the then government "due to concerns about the potential costs to the public of using the scheme".<sup>143</sup> There seems much to be said for proceeding at a more leisurely, and orderly, pace.

5.79 It is possible to argue that neighbour burdens should be treated less generously than community burdens.<sup>144</sup> Neighbour burdens are one-way. A person takes a benefit without incurring a corresponding obligation. Even aside from issues of obsolescence, therefore, there might be value in requiring the dominant proprietor to justify and seek renewal of his burden after a rather shorter period. If the period fixed for community burdens were 150

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<sup>141</sup> Para 3.49.

<sup>142</sup> The starting point for any extinctive period would be the date on which the burden was first constituted (normally the date of registration of the constitutive deed). In a case where a community burden had been varied for the whole community, the starting date might perhaps be the date of such variation.

<sup>143</sup> Hansard HL 17 Oct 1995 WA 91.

<sup>144</sup> For the equivalent proposals for new burdens, see paras 7.12-7.14.

years, a corresponding period for neighbour burdens might be 100 years; or if community burdens were to be extinguished after 100 years, neighbour burdens might be extinguished after 75. We have no concluded view on whether separate treatment is justified, and would welcome the views of consultees. No doubt consultees will be influenced by their assessment of the value of, and justification for, neighbour burdens, a subject which was canvassed in part 2,<sup>145</sup> as well as by a consideration of the practical issues mentioned earlier.<sup>146</sup>

**5.80 Transitional period.** A sunset rule could not take effect immediately. A transitional period would be required to allow the burdens at risk to be identified and, where appropriate, applications for renewal to be made to the Lands Tribunal. Earlier we suggested a transitional period of five years for the registration of notices of preservation of implied rights to enforce.<sup>147</sup> Until this task has been completed it would be difficult for owners to assess the extent of burdens, particularly as they affect communities. We suggest therefore that the transitional period for renewal applications should not begin until this first transitional period is finished. Probably it should last five years also.<sup>148</sup> The effect of this proposal would be that no burden would be extinguished under the sunset rule until ten years after the legislation had come into effect.

**5.81 New burdens.** We are concerned here only with burdens which are already in existence at the time when the legislation comes into force, and we defer until part 7 a consideration of how the sunset rule might operate in respect of new burdens.<sup>149</sup>

**5.82** We invite views on the following proposals and questions:

**24. (1) Except insofar as they are renewed, all existing burdens should be extinguished at the end of a specified period after the date of constitution.**

**(2) Views are invited as to whether the specified period should be -**

**(i) in the case of community burdens and conservation burdens (a) 200 years (b) 150 years (c) 100 years or (d) some other figure;**

**(ii) in the case of neighbour burdens (a) 150 years (b) 100 years (c) 75 years or (d) some other figure.**

**(3) There should be excepted from extinction any burden which regulates the maintenance, reinstatement or use of a common facility.**

**(4) Views are invited as to whether other exceptions are necessary.**

**(5) There should be a transitional period of 10 years.**

**(6) At any time prior to the expiry of the specified period it should be possible to apply to the Lands Tribunal for renewal of a burden.**

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<sup>145</sup> See in particular paras 2.9-2.34.

<sup>146</sup> At para 5.78.

<sup>147</sup> Para 3.54.

<sup>148</sup> That was also the period recommended by the Law Commission of England and Wales in relation to its proposed sunset rule: see Law Com No 201, para 3.28.

<sup>149</sup> See paras 7.6-7.14.

- (7) The application should be made by the dominant proprietor or, in the case of a community burden, by the owners of properties representing more than 10% of the land area of the community.
- (8) The Lands Tribunal should grant the application if satisfied that it is reasonable to do so having regard to the factors listed in proposal 27.
- (9) Views are invited as to whether -
- (i) unopposed applications should not be granted without a consideration of the merits; and
  - (ii) in opposed applications, the expenses of both sides should be met by the applicant.
- (10) In the event of an application being refused, the applicant should be entitled to claim compensation under one (but not both) of the heads listed in s 1(4) of the Conveyancing and Feudal Reform (Scotland) Act 1970.
- (11) An owner against whom compensation is awarded should have the option of accepting in its place renewal of the burden in respect of which the award was made.
- (12) A burden which is renewed should be treated as a new burden, and subject to the durational limits mentioned in proposal 38.
- (13) Renewal for a further period should not be permitted.

## PART 6 THE LANDS TRIBUNAL FOR SCOTLAND

### Applications for variation and discharge of burdens

6.1 Until 1971 no judicial mechanism existed for the variation or discharge of real burdens. This meant that, in the normal case,<sup>1</sup> discharge could be obtained only by opening negotiations with the dominant proprietor or proprietors for a minute of waiver. It was a one-sided negotiation. If the dominant proprietor refused a waiver, his refusal could not be challenged. If he asked for a substantial payment, the choice was to pay or to abandon the development which was prevented by the burden. The position was changed by the Conveyancing and Feudal Reform (Scotland) Act 1970, following on a recommendation by the Halliday Committee.<sup>2</sup> Under the 1970 Act power to vary or discharge "land obligations" is given to the Lands Tribunal for Scotland. "Land obligations" include real burdens, servitudes, and conditions in long leases,<sup>3</sup> but in practice most of the applications to the Tribunal have concerned real burdens. The number of applications is not large, around 60 a year, of which as many as half might later be withdrawn.<sup>4</sup> Research by Cusine and Egan found that Lands Tribunal applications accounted for only 3.4% of cases in which variation or discharge was thought to be required.<sup>5</sup> Like most judicial processes, therefore, the Lands Tribunal is seen as a last resort. But its very availability affects the course of negotiation, for compromise is more likely if one of the parties has another means of achieving his ends, and the dominant proprietor will bear in mind that the Lands Tribunal only rarely awards compensation.<sup>6</sup>

6.2 The Lands Tribunal was set up under powers contained in the Lands Tribunal Act 1949. It comprises a President and such other members as the Lord President of the Court of Session may determine. The President of the Tribunal requires to be a person appearing to the Lord President to be suitably qualified by the holding of judicial office or by experience as an advocate or solicitor. The other members require to be similarly qualified, or individuals experienced in the valuation of land, appointed after consultation with the chairman of the Scottish Branch of the Royal Institution of Chartered Surveyors. Usually two members of the Tribunal sit at any one time although members may sit singly. However, on a major case, or in order to review a previous decision, a full Tribunal will sit and a decision is taken by majority.<sup>7</sup> Although based in Edinburgh, the Tribunal is peripatetic and tends to hold hearings near the *locus*.

6.3 Application for variation or discharge of a land obligation is made by the servient (or "burdened") proprietor<sup>8</sup> on a form prescribed in the Lands Tribunal Rules.<sup>9</sup> A copy of the form is reproduced in appendix 1. It is commendably straightforward. The applicant is

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<sup>1</sup> But of course a burden might be extinguished for other reasons, such as negative prescription. See part 5, esp at paras 5.38 ff.

<sup>2</sup> Halliday Committee paras 25-7.

<sup>3</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2).

<sup>4</sup> Unless otherwise stated, all statistics in this part of the discussion paper were provided by the Lands Tribunal. We wish to express our thanks to the Clerk to the Tribunal, Mr Neil Tainsh, for making the figures available.

<sup>5</sup> Cusine & Egan, *Feuing Conditions* chap 4, para 14.

<sup>6</sup> For compensation, see paras 6.46-6.47.

<sup>7</sup> *Stair Memorial Encyclopaedia* sv "Courts and Competency" (Lord Elliott) vol 6 para 1140.

<sup>8</sup> Conveyancing and Feudal Reform (Scotland) Act 1970, s 1(3) and 2(6).

<sup>9</sup> Lands Tribunal for Scotland Rules 1971 r 3 and form 1.

required to (i) indicate whether he seeks full discharge or something less (ii) identify the burden and the deed in which it is created (iii) identify the servient tenement (iv) identify the dominant (or "benefited") proprietors (v) outline the circumstances which have led to the application and (vi) indicate which of the three statutory grounds for variation or discharge is being founded on. The application is normally<sup>10</sup> accompanied by evidence of the applicant's title, the deed containing the burden, a large scale plan of the location identifying adjacent properties, and any grant of planning permission which has been obtained for the proposed development. Clearly a certain amount of work is involved in the preparation of an application, but most of the required information is readily available, at least to a solicitor. No more than a "concise statement" of the grounds of application ((v) above) is needed, and the form allocates only a single A4 sheet for this purpose. But there must be enough to give a proper notice of the basis of the application. Sometimes this standard is not met, as in *Co-operative Wholesale Society v Ushers Brewery*:<sup>11</sup>

"The pleadings in this case (comprising the application, the objections thereto and the applicants' answers to the objections) failed to give proper notice ... of the main grounds upon which the application was based ... . The Tribunal have no wish to encourage meticulous detail and the close scrutiny of pleadings which one finds in court actions - for we must, as a Tribunal, remain readily accessible to the layman. Nevertheless, it is an illusion to suppose that informality involving complete surprise saves time and expense. It may do the precise reverse if, as here, the pleadings fail to focus beforehand the main issues between the parties."

In cases where there is a risk of unfairness through absence of notice, the application is likely to be returned for amendment.

6.4 Once an application has been received, the Lands Tribunal must take a number of steps right away. The application and the accompanying papers need to be looked over. The applicant's title must be scrutinised. Research at the registers is required to identify dominant proprietors. This is especially so in cases where there may be implied rights to enforce.<sup>12</sup> The next step is to notify all dominant proprietors, as well as any servient proprietor (such as a *pro indiviso* owner)<sup>13</sup> who is not a party to the application. At the discretion of the Tribunal a notice may also be served on "affected" proprietors, that is to say, on neighbours who have no title to enforce but who would nonetheless be affected by the proposed variation or discharge.<sup>14</sup> The notice stipulates a period, usually 21 days,<sup>15</sup> within which objections or representations must be made. If this timetable is not met, the chance to object is lost,<sup>16</sup> unless the Tribunal is willing to grant an extension.<sup>17</sup> No form is prescribed for objections, and in practice they may amount to no more than a letter of complaint. The applicant has the opportunity to answer objections by way of written adjustment, and in some cases further adjustments are required to bring the issues into focus.

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<sup>10</sup> Note 1 to the prescribed style of application says simply that "it will be in the applicant's own interest" to include these items.

<sup>11</sup> 1975 SLT (Lands Tr) 9 at p 11.

<sup>12</sup> See generally paras 3.1 ff. A person who is missed as holding an implied right to enforce may often receive notification as an affected proprietor.

<sup>13</sup> If the servient tenement is owned in common, any one *pro indiviso* owner can make application to the Lands Tribunal. See Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(6).

<sup>14</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(1), (2).

<sup>15</sup> It cannot be shorter than 14 days. See Lands Tribunal for Scotland Rules 1971 r 4(2).

<sup>16</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(2).

<sup>17</sup> Under rule 28 of the Lands Tribunal for Scotland Rules 1971.

6.5 Many applications are unopposed. A survey of 40 recent applications, mainly from 1997, showed that 50% were unopposed.<sup>18</sup> This figure includes cases where there was initial opposition which was subsequently withdrawn, whether because of negotiations or for some other reason. Where an application is unopposed the Tribunal will normally dispense with a hearing<sup>19</sup> and dispose of the case on the basis of the applicant's written submissions. In theory an unopposed application might still fail, because the Tribunal might not be satisfied that the statutory grounds have been made out, but in practice failure is rare. All 20 unopposed applications in the recent survey were granted. The survey shows the average time taken between submission of the application and the making of the Tribunal order as 14 weeks. However, this figure requires to be interpreted. A number of the applications were returned for amendment or further information, typically by way of deeds or plans or neighbouring proprietorship details. In certain cases questions of competence and jurisdiction required to be considered. Some applications began life as opposed cases. The Lands Tribunal considers that an unopposed application which is properly prepared and fully documented can be disposed of within 8 weeks.

6.6 If the substance of an application is objected to, the Tribunal will fix a hearing of the parties involved. However, even where the application is opposed the Tribunal may, of consent, dispense with a hearing and consider the application on the basis of written submissions alone.<sup>20</sup> Where there is a hearing the witnesses give evidence on oath and are cross-examined in the usual way. Under its rules the Tribunal may regulate its procedure as it sees fit.<sup>21</sup> The procedure is similar to that of the Court of Session or a sheriff court, but without rigid adherence, and the Tribunal aims to be as flexible as possible.<sup>22</sup> Almost always a hearing is followed by a site inspection, which is regarded as of considerable value. The recent study showed 37 weeks as the average time for the disposal of an opposed application.

6.7 The Tribunal's decision is given in writing and includes a statement of reasons.<sup>23</sup> The Tribunal is entitled to impose substitute burdens as a condition of granting an application.<sup>24</sup> In unopposed cases the Tribunal's order takes effect immediately, but in opposed cases there is a delay of 21 days.<sup>25</sup> An appeal lies on a point of law to the Court of Session and thereafter to the House of Lords. Alternatively, a party may require the Tribunal to state a case for the opinion of the Court of Session.<sup>26</sup> Once an order is extracted and registered, it is binding on all persons having interest.<sup>27</sup> The fact that all dominant proprietors are affected, whether they opposed the application or not, makes Lands Tribunal applications particularly attractive for community burdens or in other cases of multiple dominant proprietors, and for cases in which a dominant proprietor cannot be identified.

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<sup>18</sup> Similarly, the study by Cusine & Egan (chapter 5, para 18) produced a figure of 48% for unopposed applications.

<sup>19</sup> Lands Tribunal for Scotland Rules 1971 r 31.

<sup>20</sup> *Ibid.*

<sup>21</sup> Lands Tribunal for Scotland Rules 1971 r 20.

<sup>22</sup> Douglas Pentland, "Procedure in the Lands Tribunal for Scotland" 1993 3 Property Law Bulletin 3 at p 3; *Stair Memorial Encyclopaedia* sv "Courts and Competency" (Lord Elliott) vol 6 para 1152.

<sup>23</sup> Lands Tribunal for Scotland Rules 1971 r 32(1).

<sup>24</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(5).

<sup>25</sup> Lands Tribunal for Scotland Rules 1971 r 5(1).

<sup>26</sup> Tribunals and Inquiries Act 1992 s 11(1),(7).

<sup>27</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(4).

## Cost

6.8 The fee for an initial application to the Lands Tribunal is currently £130. A further £88 is payable on the making of an order at the end of the case. Thus the total fee for an unopposed application is £218.<sup>28</sup> There may also be incidental costs, which in the case of advertising may be quite substantial. A further fee will be due to the solicitor who prepared the application. Nonetheless a minute of waiver might not be significantly cheaper.<sup>29</sup> Costs rise, however, if the application is opposed and a hearing becomes necessary. The daily fee during a hearing is £155. In addition there are legal expenses, both for preparation of the case and for representation at the hearing. The Tribunal has a discretion in respect of expenses,<sup>30</sup> but will not usually award expenses against an objector. Thus if the applicant fails he must pay the expenses of both sides, but if he succeeds he remains liable for his own expenses. The Tribunal has explained that it would not be appropriate to award expenses against the dominant proprietor when he was endeavouring to stand on his existing rights, unless he had acted unreasonably or vexatiously.<sup>31</sup> Reference was made to the similar practice adopted by the English Lands Tribunal in relation to their equivalent jurisdiction for restrictive covenants.

6.9 The current practice on expenses seems historically determined. In 1971 it must have seemed a radical step to discharge burdens against the wishes of the dominant proprietor, often without payment of compensation. Simple justice might seem to require that a person whose rights were being taken away should not be penalised on expenses for choosing to defend them. Today attitudes have changed. Real burdens can no longer be treated as if they were contracts freely entered into. A purchaser is not usually in a position to negotiate on the burdens which affect his property. Either he accepts the burdens or he gives up the property. The view was expressed earlier that burdens which last for ever require to be justified.<sup>32</sup> It seems not unreasonable that a person who tries to do so, but fails, should be liable for the expenses of the person seeking to have the burden discharged. In short, there seems no reason for departing from the usual rule of litigation that expenses follow success.

6.10 The current practice on expenses discourages applicants while encouraging objectors. Both effects seem undesirable. The Lands Tribunal should be a reasonable alternative to a minute of waiver, and not merely a last resort. Once the principle of judicial variation or discharge is accepted, as it was in 1970, artificial barriers should not be put in the way of its practical realisation. A person with a good case should not have to fear expenses. It also seems wrong to encourage objectors. Many objections are, of course, fully justified, and if argued successfully, should lead to an award of expenses. But some objections are speculative or trivial, and their only purpose may be to persuade the applicant to negotiate a waiver. There should be no encouragement to defend the barely defensible. A dominant proprietor who ran a risk on expenses would think more carefully before objecting to an application.

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<sup>28</sup> The Lands Tribunal fees are set out in Sched 2 to the Lands Tribunal for Scotland Rules 1971 (as substituted by SI 1996/519).

<sup>29</sup> See para 5.5.

<sup>30</sup> Lands Tribunal for Scotland Rules 1971 r 33(1).

<sup>31</sup> *Harris v Douglass, Erskine v Douglass* 1993 SLT (Lands Tr) 56 at p 59I; *Meehan v Craig's Trs* 18 September 1996 (unreported).

<sup>32</sup> See paras 2.1 ff.

6.11 Speculative objections might also be discouraged in another way. A person who wishes to defend an action in the sheriff court must pay the same fee, currently £45, as was paid by the pursuer to lodge the initial writ.<sup>33</sup> At the moment no fee is payable for objecting to a Lands Tribunal application. There seems a case for reviewing this rule also, although the fee might be lower than the fee payable by the applicant.

6.12 We provisionally propose that:

**25. (1) As a general rule, the award of expenses in the Lands Tribunal should follow success.**

**(2) A fee should be payable by a person who wishes to object to an application.**

The first proposal would not require legislation.

### **Unopposed applications: automatic discharge**

6.13 The 1970 Act does not distinguish between opposed and unopposed applications. In both cases the Lands Tribunal is bound to consider the merits of proposal, and may grant the application only where it is satisfied that the statutory grounds for variation and discharge have been properly made out.<sup>34</sup> For unopposed applications the normal practice of the Tribunal is to dispense with a hearing and to make a decision on the basis of the written application.<sup>35</sup> It would be unusual for the application not to succeed.<sup>36</sup> As many as 50% of all applications are unopposed.<sup>37</sup>

6.14 Usually an unopposed application can be processed quickly, and its consideration will not take up a great deal of the Tribunal's time. Nonetheless there would be savings, both of time and of resources, if the Tribunal were no longer required to consider the merits of applications in cases where they are unopposed.<sup>38</sup> There are also other grounds for supporting such a change. A dominant proprietor should not assume that his right will last for ever; and if that right is challenged, it is not unreasonable that he should have to defend it or lose it. If the right is important to him, he will no doubt defend it. If it is unimportant, then the restriction on the servient property is probably not justifiable and the application deserves to succeed. To some extent the change proposed here merely formalises existing practice. Our proposal is that:

**26. An application for variation or discharge of a real burden which is not opposed should be granted as of right.**

6.15 Our proposal would cover cases where the application was initially opposed but the opposition later fell away, often because an agreement was reached with the objector. The procedure which was then adopted would depend on the circumstances. If the objectors were the sole dominant proprietors, the simplest solution might be to prepare a minute of waiver, thus avoiding the fee charged by the Lands Tribunal for making an order (currently

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<sup>33</sup> Sheriff Court Fees Order 1997 (SI 1997/687) Sched 1, paras 6 and 20.

<sup>34</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(3).

<sup>35</sup> W Ruark, "The Lands Tribunal - Six Years On" (1977) 22 JLSS 127 at p 128.

<sup>36</sup> All of the unopposed applications in the survey mentioned in para 6.5 were granted.

<sup>37</sup> Para 6.5.

<sup>38</sup> In essence, this is the scheme for passive discharge, described at paras 5.33 - 5.37.

£88). However, if other dominant proprietors did not object, and expressed no views, the safe course would be for the objectors to withdraw and for the application to be granted by the Tribunal. This is because an order of the Lands Tribunal, unlike a minute of waiver, is binding on all parties.<sup>39</sup> This highlights one advantage of using the Tribunal. A servient proprietor need only negotiate with those who object. If no one objects, the burden is discharged automatically. Proposals made earlier may discourage unfounded objections.<sup>40</sup> If some object but not others, the applicant has the choice of proceeding to a hearing or of coming to some arrangement with the objectors.

### **Opposed applications: the three statutory grounds**

6.16 Section 1(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970 provides three separate grounds on which variation or discharge may be sought. These are that:

"(a) by reason of changes in the character of the land affected by the obligation or of the neighbourhood thereof or other circumstances which the Tribunal may deem material, the obligation is or has become unreasonable or inappropriate; or

(b) the obligation is unduly burdensome compared with any benefit resulting or which would result from its performance; or

(c) the existence of the obligation impedes some reasonable use of the land."

The grounds are alternative and not cumulative, and the Lands Tribunal can grant an application on the basis of a single ground.

6.17 The grounds have different purposes. Ground (a) is primarily concerned with obsolescence.<sup>41</sup> Where circumstances change, a burden may become obsolete. If so, it confers no benefit on the dominant proprietor and should be discharged.<sup>42</sup> Ground (c) shifts the focus from the dominant to the servient property by examining the use which the servient proprietor wishes to make. Owners, it implies, should not be prevented from making reasonable use of their property.<sup>43</sup> Ground (c) is exclusively concerned with restrictions. Its counterpart for burdens in the form of positive obligations is ground (b), although that ground has also been used in cases of restrictions.<sup>44</sup> Ground (b) is directed at obligations (and especially at maintenance obligations) which have become unduly burdensome for one reason or another, such as the poor state of repair of the thing which is to be maintained, or the unavailability of a stipulated building material.<sup>45</sup>

6.18 Two of these were not newly invented in 1970. At the suggestion of the Halliday Committee,<sup>46</sup> grounds (a) and (c) were modelled closely on s 84 of the Law of Property Act

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<sup>39</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(4).

<sup>40</sup> Paras 6.8 - 6.12.

<sup>41</sup> This is made explicit both in the Halliday Report para 26 ("that by reason of changes in the character of the property or the neighbourhood or other circumstances which it may deem material, the condition or servitude has become obsolete or inappropriate or of little practical value to the person or persons entitled to enforce it") and in s 84(1)(a) of the Law of Property Act 1925, on which Halliday's recommendation was based.

<sup>42</sup> Eg, *Sinclair v Gillon and Another* 1974 SLT (Lands Tr) 18.

<sup>43</sup> Eg, *Bachoo v George Wimpey & Co* 1977 SLT (Lands Tr) 2.

<sup>44</sup> Eg, *Murrayfield Ice Rink Ltd v Scottish Rugby Union* 1972 SLT (Lands Tr) 20.

<sup>45</sup> Eg, *West Lothian Co-operative Society Ltd v Ashdale Land and Property Co Ltd* 1972 SLT (Lands Tr) 30.

<sup>46</sup> Halliday Committee para 26. Oddly, the Halliday Committee did not acknowledge the source.

1925,<sup>47</sup> which provides for the variation and discharge of restrictive covenants in England and Wales.<sup>48</sup> Section 84 has influenced not only Scotland but also a number of other Commonwealth jurisdictions in which judicial variation of burdens has come to be introduced, including Northern Ireland,<sup>49</sup> New Zealand,<sup>50</sup> Western Australia,<sup>51</sup> New South Wales,<sup>52</sup> Victoria,<sup>53</sup> Queensland,<sup>54</sup> Trinidad and Tobago,<sup>55</sup> and British Columbia.<sup>56</sup> In 1970 only ground (b) was new. There is no equivalent in the 1925 Act, which deals with restrictions and not with positive obligations,<sup>57</sup> and the ground was not prefigured in the Halliday Report.

6.19 If the intention behind the 1970 reforms was that most burdens should be capable of discharge, that intention has been fully realised in practice. Applications to the Lands Tribunal are much more likely to succeed than to fail. The available statistics are striking. A study of 40 recent cases shows an overall success rate of 85%.<sup>58</sup> The figure includes those cases - 20 out of the 40 - in which the application was unopposed; but even in opposed cases the success rate was 70%. A slightly older study shows a similar pattern.<sup>59</sup> Of the 33 cases examined, the application was granted in 29, a success rate of 88%. For opposed cases the success rate was 76%.<sup>60</sup> These figures are likely to reassure most servient proprietors, and it has not been suggested to us that they are unfair to dominant proprietors. In our discussion paper on the abolition of the feudal system we commented that the existing statutory grounds

"seem to us to be reasonable and afford sufficient flexibility to burdened proprietors, while adequately protecting the position of benefited proprietors."<sup>61</sup>

On consultation this view was not challenged, and we adhere to it in this paper. In fact it seems likely that the high success rates enjoyed at present will decline in the future, even on the same statutory criteria. But they will decline for good reasons rather than for bad. Many of the burdens currently litigated are feudal and may be supported by little in the way of interest to enforce. It is hardly surprising that so many are discharged.<sup>62</sup> After feudal

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<sup>47</sup> As amended by the Law of Property Act 1969 s 28.

<sup>48</sup> For the background, see W M Gordon "Variation and Discharge of Land Obligations" in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of J M Halliday* (1987) pp 67 - 90.

<sup>49</sup> The Property (Northern Ireland) Order 1978 (SI 1978/459).

<sup>50</sup> Property Law Act 1952 s 126G (inserted by Property Law Amendment Act 1986, s 4).

<sup>51</sup> Transfer of Land Act 1893 s 129C(1) (referred to in Law Reform Commission of Western Australia, *Report on Restrictive Covenants* Project No 91 (1997), paras 2.21-2.23).

<sup>52</sup> Conveyancing Act 1919 s 89(1) (inserted by Conveyancing (Amendment) Act 1930, s 19) *Report on Restrictive Covenants* (1997) paras 2.21 ff).

<sup>53</sup> Property Law Act 1958 (1958 Consolidating Acts no 6344) s 84(1).

<sup>54</sup> Property Law Act 1974 s 181(1).

<sup>55</sup> Land Law and Conveyancing Act 1981 no 19 s 166(2).

<sup>56</sup> Property Law Act RSBC 1979 c 340 s 31(2). Legislation along similar lines has also been recommended for Ontario: see Ontario LRC, *Covenants* pp 139-44.

<sup>57</sup> Positive covenants do not run with the land in England and Wales, a position recently confirmed by the House of Lords in *Rhone v Stephens* [1994] 2 AC 310.

<sup>58</sup> This is the study referred to in para 6.5.

<sup>59</sup> Cusine & Egan, *Feuing Conditions* Table 5.11.

<sup>60</sup> One of the cases included here as refusal actually involved a partial grant of the application.

<sup>61</sup> Scot Law Com DP No 93, para 3.99.

<sup>62</sup> In introducing clause 1 of the 1970 Bill to the Scottish Grand Committee the Secretary of State for Scotland (Mr William Ross) commented that: "The main aim of the Clause is to bring to an end the present situation in which superiors, by the arbitrary exercise of autocratic powers, can frustrate the reasonable use or development of land by vassals .." (HC, Standing Committees 1969-70 vol VI, col 6) (our emphasis).

abolition only community burdens<sup>63</sup> and neighbour burdens<sup>64</sup> will remain, and both protect interests which are altogether more substantial.

### The case for reformulating the statutory grounds

6.20 If there is a case for reformulating the grounds for variation and discharge, it does not rest on broad matters of policy, for, judged by that criterion, the existing grounds seem satisfactory enough. But the form in which the rules are presented creates some difficulties, and in any event some adaptation is required as a result of proposals made elsewhere in this paper. The case for a reformulation can be summarised under three headings.

6.21 **(1) Existing grounds are self-contained.** Each of the three statutory grounds is self-contained and, if pled, must be considered separately by the Lands Tribunal. There is no question of balancing the grounds one against the other. If the applicant succeeds under ground (c) it does not matter that he previously failed under ground (a). Success under one ground means success for the whole application. This is artificial. Ground (a) is directed particularly at the position of the dominant proprietor and ground (c) at the position of the servient. They cannot readily be separated. In practice most applications are taken, and granted, under ground (c), which is the widest of the three grounds.<sup>65</sup> Yet ground (c) requires that the Tribunal consider only whether some reasonable use of the land is impeded. On a narrow reading, the interest of the dominant proprietor is of no relevance. That would be a matter for ground (a) and not for ground (c), and ground (a) is a wholly separate head. Pushed to its limits, this approach would require the Tribunal to allow any use which was reasonable, without regard to its effect on the position of the dominant proprietor.

6.22 Fortunately, this approach has not been followed. In *Murrayfield Ice Rink Ltd v Scottish Rugby Union Trustees*,<sup>66</sup> for example, Lord Justice-Clerk Grant commented that

"I am unable to see ... why ... amenity should not be taken into account in deciding whether the proposed use which is alleged to be impeded is reasonable. Reasonableness is something that depends on the whole surrounding circumstances. In considering whether a particular proposed use of certain land or buildings is 'reasonable' within the meaning of head (c) it is, in my opinion, essential to look at the whole picture and not at 'reasonableness' in the abstract. For example, if A conveys a part of his extensive garden to B (who is a market gardener) under the burden that the land conveyed shall not be built upon, the time may come when, from the point of view of a singular successor of B it is 'reasonable' that he should build a house, or a hotel, or some business premises on that land. ... In deciding, however, whether the particular proposed use is 'reasonable' it is, in my opinion, essential to take into account the effect on the amenity of the land still held by A (or his successor)."

In one respect, the Act positively encourages this broader approach, s 1(4) providing that

".. the Tribunal may refuse to vary or discharge a land obligation on the ground specified in subsection 3(c) of this section if they are of the opinion that, due to

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<sup>63</sup> For the meaning of community burdens, see para 1.6.

<sup>64</sup> For the meaning of neighbour burdens, see para 1.5.

<sup>65</sup> *Cusine & Egan, Feuing Conditions* table 5.9 found that 61% of applications were made on ground (c).

<sup>66</sup> 1973 SC 21 at pp 29-30.

exceptional circumstances related to amenity or otherwise, money would not be an adequate compensation for any loss or disadvantage which a benefited proprietor would suffer from the variation or discharge."

Where the circumstances are less than "exceptional" the interests of the dominant proprietor can still be taken into account but, as we have seen, are given no special prominence, and in most applications under ground (c) reasonableness is measured in the context of the neighbourhood as a whole. With the abolition of feudal burdens, this is likely to seem less satisfactory than it does at present. In neighbour burdens the dominant proprietor may often have a strong interest in the continuation of the restriction, while community burdens raise wider issues involving the community as a whole. The current structure of s 1(3) does not seem well designed for balancing competing, and disparate, considerations.

6.23 The current structure of s 1(3) comes from s 84 of the Law of Property Act 1925, although s 84 avoids the specific problem identified above by preventing the discharge of a restriction on the ground of reasonable use (the equivalent of ground (c)) if the restriction confers on the dominant proprietor "practical benefits of substantial value or advantage".<sup>67</sup> The structural problem, however, remains. It is easily solved. The grounds could be taken out of their self-contained compartments and treated as a series of indicators as to the reasonableness or otherwise of granting the application. On this approach there would be a single ground for granting an application, such as reasonableness; but in assessing reasonableness the Tribunal would have to have regard to a number of specific factors. This approach is already found in the legislation which applies to Northern Ireland.<sup>68</sup> Its basis is proportionality. In each case the Tribunal must evaluate all of the relevant factors to determine whether the balance of argument lies in favour of, or against, discharge. In substance this may not be very different from the approach which is currently adopted in Scotland. There seems much to be said in its favour.

6.24 **(2) Existing grounds overlap.** There is an overlap among and between the existing three grounds. Grounds (b) and (c), for example, may both involve considerations of general amenity.<sup>69</sup> While ground (b) requires, in terms, that the interests of the servient proprietor be weighed against those of the dominant, this may also occur in ground (c).<sup>70</sup> The change of circumstances required for ground (a) may also determine the reasonableness, or otherwise, of the use proposed under ground (c).<sup>71</sup> This overlapping is related to the structural weakness identified earlier, for if each ground is to be considered in isolation, it is inevitable that there should be encroachment on to the territory of the others. Since an applicant can succeed on a single ground, he should not be able to succeed on too restricted a view of the issues. Overlap, however, is inefficient. It means that arguments will tend to be repetitious, imposing additional work both on the parties and on the Tribunal.

6.25 **(3) Other reform proposals.** The current grounds seem drafted with feudal burdens particularly in mind. Certainly they make no special provision for community burdens, with their intricate pattern of rights and obligations. This argues for change. In the near future feudal burdens are likely to be abolished, and community burdens to become a great

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<sup>67</sup> Law of Property Act 1925 s 84(1A)(a) (inserted by Law of Property Act 1969, s 28(2)).

<sup>68</sup> The Property (Northern Ireland) Order 1978 art 5. For a commentary on this provision, see Norma Dawson, "Modification and Extinguishing of Land Obligations under the Property (NI) Order 1978" (1978) 29 NILQ 223.

<sup>69</sup> Eg, *McArthur v Mahoney* 1975 SLT (Lands Tr) 2.

<sup>70</sup> Para 6.22.

<sup>71</sup> Eg, *Manz v Butter's Trs* 1973 SLT (Lands Tr) 2.

deal more prominent than at present. Some adjustments to the grounds seem to be required. Other proposed reforms may require further adjustments. For example, if consultees take the view that the onus of proof should be on the objector and not on the applicant,<sup>72</sup> it would not be possible to continue with the grounds in their present form.

**6.26 Evaluation.** Change has costs. The current rules for variation and discharge are familiar and have been interpreted by a substantial body of case law. Changing the grounds would mean, to some extent, starting again. Nonetheless our provisional view is that change is necessary and desirable. A possible reformulation of the grounds of variation and discharge is set out below.

### **A possible reformulation**

**6.27** With some hesitation, we offer a possible reformulation of the grounds for variation and discharge of burdens. The structure follows that adopted in Northern Ireland. There would be one ground of discharge only. A burden would be varied or discharged by the Lands Tribunal if, in all the circumstances, it was reasonable to do so. In reaching its decision the Tribunal would have regard to a number of factors listed in the legislation. Sometimes the factors would all point towards the same result, but in cases where they did not, some evaluation would be required by the Tribunal, and a view taken as to their relative weight and importance.<sup>73</sup> In preparing a list of factors, we have been influenced mainly by two considerations. In the first place, the list should not be too long. The factors are to help the Tribunal reach a view on reasonableness. They are not intended to circumscribe its discretion, or to encourage prolonged debate. Secondly, each factor must be clear and relatively narrow. So far as possible there should be no overlap between them. Some factors will be directed at the position of the dominant proprietor. Others will consider the impact of the burden on the servient proprietor. A third category will consider some broader issues. There should be no room for doubt as to which is which.

### **Factors bearing on the dominant tenement**

**6.28 Change of circumstances.** Of the current grounds, only the first pays special regard to the dominant tenement. But it does so indirectly. In order to succeed on this ground it is necessary to show that changes have occurred since the burden was first created. In terms of the provision, this can be a change in the dominant or servient tenements, in the neighbourhood or a change of some other kind. If there is no change, the ground is not established.<sup>74</sup> The provision does not in terms say why change matters - by contrast to the legislation in England.<sup>75</sup> But, as in England, the underlying idea appears to be obsolescence. Where there has been change there may be obsolescence; and where there is obsolescence, a burden no longer confers a meaningful benefit on the dominant tenement. It might be possible to subsume change of circumstance under the more general heading of absence of benefit (which is considered separately below).<sup>76</sup> But in view of its obvious importance, and prominence, we think there are advantages in its retention as a separate criterion.

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<sup>72</sup> Paras 6.48-6.49.

<sup>73</sup> There is an obvious resemblance here to the Tribunal's task under ground (b).

<sup>74</sup> The final words of ground (a) ("other circumstances which the Tribunal may deem material") can be read as not requiring change, but the Lands Tribunal has taken a different view. See Gordon, *Scottish Land Law* para 25-20.

<sup>75</sup> Law of Property Act 1925 s 84(1)(a).

<sup>76</sup> However, there may be changes which affect the reasonableness of a burden only from the point of view of the servient tenement. There would then be no reduction in the benefit conferred on the dominant tenement.

Accordingly, we suggest that, in considering the question of reasonableness, the Lands Tribunal should have regard to

**any change of circumstances since the burden was first created, including changes in the character of the dominant and servient tenements and of the neighbourhood thereof.**

This preserves a ground of discharge which is well understood and on which there is a developed jurisprudence. As compared to some of the other grounds, change of circumstance has the advantage of being relatively concrete, and hence relatively easy to evaluate.

6.29 **Extent of benefit.** Even if nothing has changed, a burden may confer little or no benefit. The burden may have been pointless, or almost so,<sup>77</sup> from the very start. It is unusual for burdens to be negotiated individually. Often a deed of conditions is registered even before the property is marketed. Thereafter it is too late to demand change. The purchaser must either accept the conditions or give up the property. In any event, a subsequent purchaser has no opportunity to negotiate. Thus real burdens should not be viewed in the same light as contracts individually negotiated and freely entered into.<sup>78</sup> Nor should it be assumed that burdens are written with the particular property in mind. Sometimes they owe more to a conveyancer's bank of styles than to the wishes of the original parties or the needs of the property. A style may have been used inappropriately or unwisely. In our view, a burden which was always pointless should not be treated more favourably than one which once had a purpose which has now disappeared. Accordingly, we suggest that the Tribunal should have regard to

**the extent to which the burden confers benefit on the property owned by a person who objects to the application.**

Only a modest degree of benefit is required for interest to enforce.<sup>79</sup> But unless a burden confers benefit which is reasonably substantial, there does not seem a strong case for resisting its discharge. A similar approach is taken in England and Wales, where the statutory test is expressed as being that the burden does not secure "practical benefits of substantial value or advantage".<sup>80</sup> It does not follow that a finding of substantial benefit would always save a burden. It is just one of the factors which the Tribunal would have to take into account in reaching a view on reasonableness. Other factors might suggest a different conclusion. In appropriate cases compensation might be payable to the dominant proprietor.<sup>81</sup>

6.30 The test of benefit should be confined to those who object. This is consistent with the proposal, made earlier, that unopposed applications should be granted without further

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<sup>77</sup> If it was completely pointless, the burden would be unenforceable for lack of praedial benefit, although the Tribunal is not currently empowered to pronounce on enforceability.

<sup>78</sup> The importance of individual negotiation of terms is recognised in the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159, which (by r 3(1)) applies only to terms which were not individually negotiated.

<sup>79</sup> Paras 4.2 ff.

<sup>80</sup> Law of Property Act 1925 s 84(1A)(a). And see also The Property (Northern Ireland) Order 1978 (SI 1978/459) art 5(5)(e) ("whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit").

<sup>81</sup> For compensation, see paras 6.46 and 6.47.

inquiry.<sup>82</sup> In choosing not to object a person surrenders his interest in the burden, at least for the duration of the application,<sup>83</sup> and if the burden ultimately survives, it should not be on his account. However, special considerations seem to apply to community burdens, and later we suggest that the interests of the community as a whole should be elevated into a separate factor.<sup>84</sup> No account need be taken of a person who is not a dominant proprietor. It is true that, while real burdens are concerned with arrangements between particular properties or within a particular community, they sometimes confer windfall benefit on third parties. But the loss of windfall benefit should not be a factor with which the Tribunal is concerned.<sup>85</sup>

### **Factors bearing on the servient tenement**

6.31 In principle there can be three types of burden. A burden may impose a restriction (such as a restriction on building), or it may impose a positive obligation (such as an obligation to maintain a wall), or again it may give the dominant proprietor a right to make some limited use of the servient tenement.<sup>86</sup> Each is different in character and effect, and, in considering the impact of a burden on the servient tenement, these differences need to be borne in mind.

6.32 Two approaches seem possible. One would be to have a single factor directed to the extent of the burden as viewed from the servient tenement. This would be the direct counterpart of the factor for the dominant tenement described above. The other approach would be to have a separate factor for each of the burden types. The present law mixes these approaches. Ground (b) manages to be, at the same time, both a separate factor for positive obligations, and also a general factor which might apply to all burdens. By contrast, ground (c) is aimed primarily at burdens in the form of restrictions, although it is also capable of covering rights of limited use, at least to the extent that such rights prevent the use of the property by the servient proprietor. But, wide though it is, ground (c) does not cover all cases of restrictions. A person might wish to have a restriction removed without having any particular use in mind. For example, he might wish to have a burden removed only so that the property is more attractive to potential purchasers. In such a case an application would require to be made under ground (b) and not ground (c).

6.33 We think there is merit in isolating different burden types, for this gives clearer guidance both to the Tribunal and to those who appear before it. Our provisional suggestion is that, in considering the reasonableness of an application, the Lands Tribunal should have regard to

**the extent to which the burden impedes enjoyment of the servient property; and**

**whether compliance with the burden is impracticable or unreasonably expensive.**

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<sup>82</sup> Paras 6.13 - 6.15.

<sup>83</sup> Of course, if the burden survives, he will continue to be able to enforce it. An unsuccessful application leaves matters as they were before.

<sup>84</sup> Para 6.39.

<sup>85</sup> However, the interests of third parties may be relevant to the impeding reasonable use factor, as indeed they are at present.

<sup>86</sup> See paras 1.19 and 7.64 ff.

The first is intended to cover both restrictions and also obligations which allow for some limited use of the servient tenement. It is the equivalent of the existing ground (c), although wider insofar as it does not require an intended use for the property.<sup>87</sup> The second covers positive obligations. It is directed particularly at a standard problem affecting maintenance obligations, which is that, since buildings cannot last for ever, a perpetual obligation to maintain will at some stage cease to be appropriate. Similar considerations arise if the cost of repair has become disproportionate to the value of that which is to be repaired. Our suggested wording is an adaptation of wording recommended for the same purpose by the English Law Commission.<sup>88</sup>

6.34 Both factors are to be weighed against other relevant factors. A burden should not be discharged *only* because it imposes a substantial impediment on the servient property. The burden may be recent. Nothing may have changed since it was first imposed. Substantial impediment to the servient property may be balanced, or even outweighed, by substantial advantage to the dominant. Taking all the circumstances into account, the burden may be reasonable, and hence its discharge unreasonable.

### **Factors bearing on broader issues**

6.35 While the dominant and servient tenements will be at the centre of any debate on variation and discharge, there may be scope for a consideration of wider issues. Four seem worth mentioning here.

6.36 **Age of the burden.** First, it is suggested that the Tribunal should have regard to **the age of the burden.**

Of course old is not necessarily bad. A burden from the Victorian period may continue to protect some essential interest of the dominant proprietor, or provide for the proper maintenance of a shared facility. But age is at least a rough and ready indicator of the usefulness of a burden. And if a burden has already lasted 100 years, the Tribunal should perhaps hesitate before allowing it to continue for another 100. Conversely, a burden which is freshly minted is probably entitled to the benefit of the doubt. The use of age in this way is consistent with proposals made elsewhere in this paper for durational limits on real burdens.<sup>89</sup>

6.37 The introduction of age as a formal criterion may render unnecessary the rule that an application may not be brought in respect of a burden which is less than two years old.<sup>90</sup> Of course in practice the Tribunal is most unlikely to discharge a burden in the first two years of its life, but a discretionary rule is more flexible than a fixed rule.

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<sup>87</sup> One result of this wider approach is to remove the need to consider the reasonableness of any proposed use. Not everyone may regard this as an improvement. The issue is discussed more fully at paras 6.43-6.45.

<sup>88</sup> See Law Com No 127 para 18.48. The wording is: "as a result of changes in circumstances, performance of the obligation (a) has ceased to be reasonably practicable, or (b) has become unreasonably expensive when compared with the benefits it gives". Almost identical wording was subsequently recommended by the Ontario Law Reform Commission: see Ontario LRC, *Covenants* p 142. For a more specific statement of this principle, in the context of tenement repairs, see Scot Law Com No 162 paras 5.22 and 7.8.

<sup>89</sup> Paras 5.68 ff and 7.6-7.14.

<sup>90</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(5).

6.38 **Planning and other consents.** We suggested earlier that the Tribunal's current practice of treating planning consent as a factor of varying materiality should be elevated into a formal statutory criterion, thus bringing Scotland into line with a number of other jurisdictions.<sup>91</sup> Our proposed rule would apply only to specific grants of planning permission, and would not cover cases where a general planning permission exists under the General Permitted Development Order.<sup>92</sup> To planning consent may usefully be added other consents from regulatory bodies, for example in relation to fire safety or liquor licensing. We suggest therefore that the Tribunal should have regard to

**whether appropriate consents from planning or other regulatory authorities have been given.**

6.39 **Interests of the community.** A third possible factor is relevant to community burdens only. We suggest that the Tribunal should have regard to

**in the case of a community burden, the effect of the proposed change on the community as a whole.**

The variation or discharge of a community burden may be sought in respect of one property only or, much more rarely, for the community as a whole.<sup>93</sup> In the second case the broader interests of the community are clearly a factor which the Tribunal would wish to take into account. But the same may be true in the first case also. If a single unit is freed of a burden, the whole community may be affected. For example, the residential nature of a community might be threatened by the removal of a burden prohibiting commercial use. In such a case the interests of the servient proprietor must be balanced against the interests, not merely of those who object to the application, but of the community as a whole. The distinctive interest of a community in this context has also been recognised by the Law Commission in England and Wales.<sup>94</sup>

6.40 **Other material circumstances.** The list of factors is not intended to be exhaustive. In reaching an assessment of the reasonableness of an application, the Tribunal should also be able to take into account

**any other material circumstances.**

Our provisional view is that this final factor should not be limited to matters *ejusdem generis* with those which precede it. For example in *Lothian Regional Council v George Wimpey & Co Ltd*<sup>95</sup> the Tribunal had regard to the public interest in a supply of supported accommodation for children in care, a use which was prevented by the burden. The application was nonetheless refused. In fact recourse to public interest is unusual, both in Scotland and also in England and Wales, where public interest is listed in the legislation as a formal criterion.<sup>96</sup>

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<sup>91</sup> Paras 2.36-2.41, esp at para 2.41.

<sup>92</sup> Town and Country Planning (General Permitted Development) (Scotland) Order 1992 (SI 1992/223). This mirrors the approach currently taken by the Lands Tribunal: see *Stoddart v Glendinning* 1993 SLT (Lands Tr) 12 at p 17A-B.

<sup>93</sup> Paras 6.52 and 6.53.

<sup>94</sup> Its recommendation was that the Lands Tribunal should have regard to "(a) the effect of the change proposed on the development land as a whole, and (b) the question whether the change is consistent with the general purposes of the scheme". See Law Com No 127 para 18.57.

<sup>95</sup> 1985 SLT (Lands Tr) 2.

<sup>96</sup> Law of Property Act 1925 s 84(1A)(b) (inserted by the Law of Property Act 1969 s 28(2)). See on this provision: *Re SJC Construction Company Limited's Application* (1974) 28 P&CR 200 (affd on a different point at (1975) 29 P&CR

Doubtless one reason is that while government policy can change over time, a variation or discharge of a real burden is in principle perpetual. Sometimes, of course, public policy reflects fundamental and therefore long-lasting values of society - akin to the doctrine of *contra bonos mores* - but even what appear to be the most basic values can rapidly change. The invocation of public interest does not imply that the burden is intrinsically objectionable. The restriction in *Lothian Regional Council* was the familiar one requiring the property to be used as a private dwellinghouse for one family only. A burden which is of itself contrary to public policy is void from the outset and need not be complied with.<sup>97</sup>

6.41 We now put the various factors together in the form of a proposal. We propose that:

**27. The Lands Tribunal should, on application, vary or discharge a real burden if satisfied that it is reasonable to do so having regard to -**

- (a) any change of circumstances since the burden was first created, including changes in the character of the dominant and servient tenements and of the neighbourhood thereof;
- (b) the extent to which the burden confers benefit on the property owned by a person who objects to the application;
- (c) the extent to which the burden impedes enjoyment of the servient property;
- (d) whether compliance with the burden is impracticable or unreasonably expensive;
- (e) the age of the burden;
- (f) whether appropriate consents from planning or other regulatory authorities have been given;
- (g) in the case of a community burden, the effect of the proposed change on the community as a whole; and
- (h) any other material circumstances.

We also propose that:

**28. The rule that no application may be made to the Lands Tribunal until the expiry of two years from the date of creation of a burden should cease to have effect.**

There may be reservations about the use, in proposal 27, of factors as a means of explicating a general discretion, although the technique is familiar enough in other legislation. It is true that factors are less useful than they might at first sight appear. For if factors point in different directions, no guidance is provided as to how they are to be weighted; and there is

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322); *Re Lloyd's and Lloyd's Application* (1993) 66 P&CR 112; and *Re Solarfilms (Sales) Ltd's Application* (1993) 67 P&CR 110.

<sup>97</sup> Paras 7.55 - 7.63.

in any event nothing to stop the court from taking into account factors which are not included on the list. From this it is possible to argue that a list of factors is at best unhelpful and at worst misleading, and that a general discretion does not benefit from further explanation. Be that as it may, however, we think that there are advantages in the use of factors in this particular case. Factors are used in the current law, and so are familiar, both to the Lands Tribunal and to those who appear before it. They assist in the formulation of argument and, at least in the form set out in proposal 27, give a good indication of the issues which are likely to be viewed as of importance. So far as we are aware, their use has not been criticised. However, we would welcome further views on this question.

6.42 While our proposals are couched in terms of real burdens only, we do not overlook the fact that the jurisdiction of the Lands Tribunal extends to other "land obligations", most notably to servitudes and to conditions in registered leases. It would be undesirable to have two separate sets of criteria for variation and discharge, but we see no particular difficulty in applying the reformulated grounds more widely so as to include all land obligations. Accordingly we suggest that:

**29. The grounds for variation and discharge set out in proposal 27 should apply to all land obligations and should replace the existing grounds.**

#### **Reasonableness of proposed use**

6.43 The reasonableness of the applicant's proposed use is absent from our list of factors for variation and discharge. This follows the example of Northern Ireland rather than of England, and is a departure from the current position in Scotland, where ground (c) allows discharge where

"the existence of the obligation impedes some reasonable use of the land."

Ground (c) has given rise to the obvious difficulty of how reasonableness is to be measured. A use which is reasonable to the applicant is likely to appear thoroughly unreasonable to a person who opposes the application. Hence, unless it is simply to take sides, the Tribunal must seek out some objective measure of reasonableness. This it has tried to do by considering the wider public interest. For example, in *Main v Lord Doune*<sup>98</sup> an application was made for a variation to allow use of residential premises as a nursery school. In deciding that a nursery school was a reasonable use of the land within ground (c), the Tribunal took into account the need for a nursery school in the area in question and the probable traffic patterns which might result. Planning permission had already been granted, so that, to some extent, the Tribunal was acting as a second planning authority. This approach may not represent current practice. In a recent case the Tribunal refused to consider evidence that a proposed use would increase traffic and endanger safety, on the basis that this was an issue for the planning authority and that planning permission had already been granted. As the Tribunal explained:<sup>99</sup>

"We are not without sympathy for the objectors' point of view. ... But the proper authorities charged with the duty of considering such matters in the public interest have considered the proposed development and have come to the view that it is

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<sup>98</sup> 1972 SLT (Lands Tr) 14.

<sup>99</sup> *T & I Consultants Ltd v Cullion* 1998 Hous LR 9 at p 10.

reasonable to permit it to proceed, subject to the conditions they have imposed. And it does not seem to us that it can have been the intention of Parliament when enacting the procedures laid down in the 1970 Act that those procedures should be used in such a way as would enable members of the public to, in effect, appeal to the tribunal against any decision with which they, in the public interest, disagree. The remit of the tribunal is not to deal with matters of public interest but to consider whether private contracts, in the form of land obligations, should continue to have effect."

6.44 Our provisional view is the Tribunal should cease to be concerned with matters such as this. It is not clear why an obligation which was conceived for the protection of a private interest should come to be evaluated by reference to the public interest. The public interest seems more properly a matter for planning authorities and other regulatory agencies. In deciding whether to vary or discharge a burden, the Tribunal should focus on the respective private interests of the dominant and servient tenement. This would draw a clear line between public regulation and private regulation, and at the same time cohere with other aspects of our proposals, such as the abolition of feudal burdens (which are often quasi-public in nature), and the discarding of the category of affected proprietors. A different point is that ground (c) seems to put reasonableness in the wrong place.<sup>100</sup> It might be thought that the central issue should be the reasonableness of the burden rather than of the use. It is not clear why it matters whether a proposed use is reasonable or unreasonable. In general, an owner can use his property as he wishes, provided that no harm is done to anyone else. If he chooses to act selfishly, or foolishly, it is perhaps not for the Lands Tribunal to stop him.

6.45 This is not to say that use is irrelevant. Applications for variation (as opposed to complete discharge) are almost always tied to a particular use. In such a case the Tribunal will need to consider the impact of that use on the dominant and on the servient tenements,<sup>101</sup> and, in the case of a community burden, on the wider community also.<sup>102</sup> But beyond that seems the province of regulatory law.

## Compensation

6.46 The Tribunal can order payment of compensation on one, but not both, of the following heads:<sup>103</sup>

"(i) a sum to compensate for any substantial loss or disadvantage suffered ... in consequence of the variation or discharge; or

(ii) a sum to make up for any effect which the obligation produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the interest in land affected by it."

The loss of a chance to charge for minutes of waiver has not been treated as a proper ground of compensation, partly because of a natural reluctance to take account of speculative gain, and partly because

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<sup>100</sup> Compare here ground (a).

<sup>101</sup> Proposal 27(b) and (c).

<sup>102</sup> Proposal 27(g).

<sup>103</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(4).

"An adjudication on fair considerations for waivers is not a proper valuation exercise. It depends in the last resort ... upon the anxieties of the proprietor of the *dominium utile* and the degree of pressure which the benefited proprietor or proprietors ... can bring to bear on him."<sup>104</sup>

Since this is the main loss that proprietors are likely to suffer, compensation is not often awarded. A recent study of 29 successful applications to the Tribunal showed that compensation was sought in 8 cases and granted in 2.<sup>105</sup> Occasionally the figures awarded can be high. In a recent case, where the purpose of the burden was to reserve development value, the Tribunal made an award of £206,000.<sup>106</sup> But a more typical award would be two or three thousand pounds.<sup>107</sup> We are not aware of any suggestions that compensation should be more widely available.

6.47 The current legislation seems broadly satisfactory.<sup>108</sup> In England and Wales, where the provisions are almost identical, it was recommended by the Law Commission that head (ii) be abandoned.<sup>109</sup> Head (ii) has been little used in Scotland and, with the abolition of feudal burdens, will be used less in the future. It is appropriate only for non-reciprocal burdens, and so could not be used for community burdens. Nonetheless we would hesitate to support a change which would reduce the prospects of recovering compensation, and head (ii) will continue to be useful in certain types of case.<sup>110</sup>

### **Burden of proof**

6.48 The burden of proof is on the applicant, and the application fails if the statutory grounds are not demonstrated.<sup>111</sup> An application to the Lands Tribunal is, in this respect, no different from other types of litigation. Of course the rule could be changed. If the burden of proof were to be placed on the objector, an application for variation or discharge would, in effect, be a call to justify.<sup>112</sup> The reformulated grounds described earlier<sup>113</sup> could be retained, but the Tribunal's discretion would be directed to the question of whether the application for variation or discharge should *not* be granted. If the objector failed to make his case, the application would succeed. One advantage of this approach is that it might encourage applications while at the same time discouraging objections.<sup>114</sup> If no grounds of application required to be stated, the application form would be simpler and easier to complete. And an objector whose interest was speculative might be reluctant to spend time, and possibly money, on preparing a proper statement of objections.

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<sup>104</sup> *Robertson v Church of Scotland General Trustees* 1976 SLT (Lands Tr) 11. And see also: *McVey v Glasgow Corporation* 1973 SLT (Lands Tr) 15; *Manz v Butter's Trs* 1973 SLT (Lands Tr) 2; *Keith v Texaco Ltd* 1977 SLT (Lands Tr) 16; *Ness v Shannon* 1978 SLT (Lands Tr) 13; and *Harris v Douglass, Erskine v Douglas* 1993 SLT (Lands Tr) 56.

<sup>105</sup> Cusine & Egan, *Feuing Conditions* chapter 5, para 21.

<sup>106</sup> *Cumbernauld Development Corporation v County Properties and Developments Ltd* 1996 SLT 1106.

<sup>107</sup> Cusine & Egan, *Feuing Conditions* chapter 5, para 21.

<sup>108</sup> But see W M Gordon, "Variation and Discharge of Land Obligations" (in D J Cusine (ed), *A Scots Conveyancing Miscellany: Essays in Honour of Professor J M Halliday* (1987) 67 at p 84).

<sup>109</sup> Law Com No 127 18.18. For some technical criticisms of head (ii) which would also apply to the Scottish provision, see para 18.17 n 4.

<sup>110</sup> See eg *Cumbernauld Development Corporation v County Properties and Developments Ltd* 1996 SLT 1106.

<sup>111</sup> *Bolton v Aberdeen Corporation* 1972 SLT (Lands Tr) 26; *Murrayfield Ice Rink Ltd v Scottish Rugby Union Trustees* 1973 SC 21.

<sup>112</sup> This comes close to the Law Commission's recommendation in respect of covenants which are older than 80 years. See Law Com No 201 paras 3.34 ff, and especially para 3.41.

<sup>113</sup> Para 6.41.

<sup>114</sup> Both results seem desirable: see para 6.10.

6.49 There are also counter-arguments. A reversal of the onus of proof could not be justified for other land obligations, and in particular for the terms of a lease. But if the change were made for real burdens alone, there would be the inconvenience of having two different rules. In any event it may be questioned whether a change in onus would have much effect on the level of applications and objections. In practice an applicant would continue to require professional help in order to identify and describe the affected land, the dominant proprietors, and the burden itself.<sup>115</sup> The application form would not be much simplified by the omission of a statement of grounds. In fairness to the objectors it would still be necessary to outline the circumstances which have led to the application. Similarly, it is not clear that requiring an objector to justify the refusal of the burden goes much beyond what is asked already. Finally, it should not be assumed that a change in burden of proof would increase the success rates. It is possible that it would have the opposite effect. The attractiveness of a burden depends on the side from which it is viewed.<sup>116</sup> A debate led by the objector is likely to give prominence to the position of the dominant tenement. Our provisional view is against changing the burden of proof.<sup>117</sup> Nonetheless

**30. Views are invited as to whether the burden of proof should be on the person who objects to an application rather than on the applicant.**

**Who can apply?**

6.50 An application can be made only by the "burdened proprietor", that is to say, by the owner of the servient tenement.<sup>118</sup> If the property is owned in common, any *pro indiviso* owner can apply.<sup>119</sup> It is thought that the applicant must have a registered title, and certainly there is nothing in the legislation to suggest that "proprietor" does not carry its normal meaning. In practice, questions about burdens often arise at the time when property is being sold, and the sale may be conditional on a particular burden being discharged. In that case any application to the Tribunal must be made in the name of the seller, unless the purchaser has already become owner; but if ownership then changes, the seller can withdraw from the proceedings in favour of the purchaser.<sup>120</sup>

6.51 Elsewhere in this paper we suggest that burdens might in future become enforceable against non-owners in possession, such as tenants or liferenters.<sup>121</sup> However, we do not think it appropriate to extend application rights to the holders of subordinate real rights or other non-owners.<sup>122</sup>

6.52 The present law allows an application only in respect of the applicant's own land. For community burdens this rule seems unduly restrictive. Depending on the circumstances, there may be little point in having a burden varied or discharged for an individual property or properties unless it is also varied or discharged for the community as

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<sup>115</sup> Para 6.3.

<sup>116</sup> Para 2.32.

<sup>117</sup> However, if provision is made for the discretionary renewal by the Tribunal of burdens which would otherwise be extinguished by elapse of a durational limit, the onus of proof would be on the dominant proprietor, as the person seeking to have the burdens continued. See para 5.73.

<sup>118</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(3).

<sup>119</sup> *Ibid*, s 2(6)(i).

<sup>120</sup> Lands Tribunal for Scotland Rules 1971 r 26 and 27.

<sup>121</sup> Paras 4.12 ff and para 4.28.

<sup>122</sup> See the discussion in *Eagle Lodge Ltd v Keir and Cawder Estates Ltd* 1964 SC 30.

a whole. This may be particularly true in relation to maintenance obligations.<sup>123</sup> If universal discharge is to be allowed, however, it is necessary to decide who can make the necessary application. Earlier we suggested that a majority of owners should be able to bind the whole community by minute of waiver.<sup>124</sup> In some cases we suggested that the threshold might be reduced to 35%. While we do not think that any one owner should be able to apply for a universal variation or discharge of a community burden, the threshold should be much lower than 35%. We suggest for consideration a figure of 10%. As with universal minutes of waiver, this would be calculated by land area and not by number of properties.<sup>125</sup>

6.53 We propose therefore that:

**31. (1) An application for the variation or discharge of a neighbour burden, or of a community burden in respect of a particular property, should require to be brought by an owner of that property.**

**(2) An application for the variation or discharge of a community burden in respect of the whole community, or any significant part thereof, should require to be brought by the owners of properties representing more than 10% of the land area of the whole community.**

#### **Who can object?**

6.54 The present law recognises two classes of objector. In the first place there are the owners of the dominant tenement or tenements. And in the second place there are the "affected proprietors", that is to say, those other persons who appear to the Tribunal to be affected by the application - in practice close neighbours and the like.<sup>126</sup> Dominant proprietors have a right to be notified of the application, and a right to be heard by the Tribunal. Affected proprietors have no such rights, and the Tribunal has a discretion both as to notification and as to whether or not the proprietor is heard. Nonetheless, in practice they often are heard.

6.55 This special status seems a legacy of the feudal system. For while feudal burdens generally benefit neighbours, they are often enforceable only by the superior. Hence, in the absence of special status, those most affected by an application for discharge would have no say in its disposal. In a post-feudal world the position will be quite different. Many burdens will perish, either as a direct result of feudal abolition or under proposals made in this paper. Those which survive will be scrupulously attributed to a particular community or, in the case of neighbour burdens, to a particular dominant tenement. Their purpose will be to protect those private interests, and no others. The shadow planning regime operated by superiors will cease to exist. There does not seem a strong case for giving special rights to those whose interests the burdens are not intended to protect. We propose therefore that:

**32. The special status given to affected proprietors should be discontinued.**

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<sup>123</sup> *Mrs Young and others* 1978 SLT (Lands Tr) 28.

<sup>124</sup> Paras 5.9 ff.

<sup>125</sup> See para 5.12.

<sup>126</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(2).

6.56 While, under proposals made earlier, tenants and others might be given a right to enforce real burdens,<sup>127</sup> we think that only an owner of a dominant tenement should be entitled to object to an application for variation or discharge. This is consistent with our proposals for minutes of waiver.<sup>128</sup> The owner should require to have a title completed by registration. This repeats an apparent requirement of the present law, as well as being supported by practicalities. In giving notice to potential objectors the Lands Tribunal relies on the register. A person who has failed to complete title will not appear on the register and so will not receive notification.

6.57 The present law may not require interest to enforce,<sup>129</sup> so that an objector who has title but not interest might be heard by the Tribunal. If that is the rule, it would be possible to change it. On one view, a person who has no interest recognised by law and who could not himself have enforced the burden should not be able to object to its discharge. That approach would be consistent with our treatment of affected proprietors. However, the problem does not seem sufficiently large to justify special provision. Under proposals made earlier, the Tribunal will have regard to the benefit which the burden confers on the objector.<sup>130</sup> An objector who had no interest to enforce would receive no benefit, with the result that his objection would probably<sup>131</sup> fail. He would then be liable for expenses.<sup>132</sup> This means that a person without interest to enforce is unlikely to press his objections. We suggest below that such a person should not be entitled to individual notification of an application for variation or discharge.<sup>133</sup>

## Notification

6.58 Applications for variation and discharge are notified by the Lands Tribunal to the dominant proprietors.<sup>134</sup> Notification triggers a period, usually of 21 days, during which objections and representations must be made. The period can be extended at the discretion of the Tribunal.<sup>135</sup> A person who fails to respond timeously loses both his right to object and also his right to claim compensation. Notification must normally be in writing. However, it may also be given by advertisement in respect of proprietors who cannot by reasonable inquiry be identified or found.<sup>136</sup> The complexity of the rules on implied rights to enforce means that reasonable inquiry is sometimes not sufficient to identify all of the dominant proprietors; and even where identification is possible, the numbers involved may be so large as to make individual notification impracticable. In both cases, a newspaper advertisement is used instead. Where numbers are unreasonably large, the Tribunal's practice is determined by a consideration of interest to enforce. Individual notices are served on those properties lying within an area of enforceability drawn by the Tribunal. Properties lying

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<sup>127</sup> See paras 3.59 ff.

<sup>128</sup> Para 5.30.

<sup>129</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(6), where "benefited proprietor" is defined as a person "entitled" to enforce a burden.

<sup>130</sup> Paras 6.29 and 6.30.

<sup>131</sup> However, in the case of a community burden he might successfully argue for the interests of the community as a whole. See para 6.39.

<sup>132</sup> Paras 6.8-6.10.

<sup>133</sup> Para 6.58.

<sup>134</sup> Para 6.4.

<sup>135</sup> Lands Tribunal for Scotland Rules 1971 r 28.

<sup>136</sup> *Ibid*, r 4(1)(a).

outside this area must make do with the newspaper advertisement.<sup>137</sup> It is not clear that this sensible practice is sanctioned by the legislation.

6.59 Under our proposals, difficulties of identification and of numbers will largely disappear. With the abolition of implied enforcement rights, communities will shrink in size, where they do not disappear altogether; and at the end of the 5-year transitional period the identity of the dominant tenement or tenements will be disclosed on the register in the title of the servient tenement.<sup>138</sup> In most cases, therefore, it should be a straightforward task to serve individual notices on individual owners. Nonetheless, the alternative of advertising should be left open for the unusual case where notification is not practical. In the case of large communities the Tribunal should have the option of not notifying those who are plainly without interest to enforce - thus bringing the law into line with current practice.

6.60 In theory the Tribunal might fail to notify an owner, whether by administrative error, or because of a misjudgement in relation to interest to enforce. This can occur also under the existing law although no examples have been brought to our attention. No doubt in most cases the owner would not in any case have responded to a notice and will not be prejudiced. Occasionally this will not be so. If an owner finds out about an application while it is still pending, he would presumably be allowed to lodge a late objection. But if the application has already been disposed of by the Tribunal, the position is much more difficult. We do not think it realistic to allow the owner to re-open the merits of the case. The Tribunal's order will already have been extracted and registered.<sup>139</sup> In a Land Register title, the burden will have been deleted from the title sheet. Even if it were permissible to reduce the Tribunal's order, the reduction could not in practice be given effect to on the Land Register because of the protection given to a proprietor in possession.<sup>140</sup> Nor is this protection a mere technicality. In principle, a person who buys on the faith of the Register should not be vulnerable to the possibility of excised burdens being revived. It seems that the best that can be done for an unnotified owner would be to preserve any rights he might have had to claim compensation. Under the new law, errors in notification are likely to be extremely rare.

6.61 We propose that:

**33. (1) The notification of an application to a dominant proprietor by the Lands Tribunal should normally be given in writing.**

**(2) However, it should be competent to give notice by advertisement in respect of a dominant proprietor who cannot by reasonable inquiry be identified or found, or who appears to have no interest to enforce.**

**(3) A dominant proprietor who should have been, but was not, notified in writing should retain a right to claim compensation for the variation or discharge even after the application has been disposed of by the Lands Tribunal.**

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<sup>137</sup> We owe this information to the Lands Tribunal's response to Scot Law Com DP No 93.

<sup>138</sup> See generally paras 3.31-3.55.

<sup>139</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 2(4).

<sup>140</sup> Land Registration (Scotland) Act 1979 s 9(3). And see *Short's Tr v Keeper of the Registers of Scotland* 1996 SLT 166.

## Jurisdiction

6.62 **Validity of burdens.** Not all burdens which appear on the register are enforceable. A burden may be too vague to enforce; or there may be an error in the deed of constitution; or again there may be no subsisting dominant tenement. Where a burden is unenforceable, it cannot under the present law be varied or discharged by the Lands Tribunal. The power of the Tribunal is limited to valid burdens. A burden which is invalid does not require to be varied or discharged.<sup>141</sup> But while sound in theory, this rule is awkward in practice. The Tribunal has no formal power to pronounce on the validity of burdens. Only the ordinary courts can do that. Accordingly, if the Tribunal decides that a burden is unenforceable, the only course open to it is to dismiss the application. This result is unlikely to satisfy the litigants. As the Tribunal put it in one case:<sup>142</sup>

"Dismissal may not be regarded by the parties as a satisfactory or helpful outcome to this application, particularly as our disposal of the matter is not in the form of a declarator that there is no subsisting burden."

A formal declarator that the burden is unenforceable can only come from the ordinary courts. But an applicant who has funded one litigation is likely to shrink from funding a second.

6.63 Two reforms would transform the situation. Firstly, and most obviously, the Tribunal could be empowered to determine the validity of burdens. That would be a change of form rather than of substance, for in substance the Tribunal already

"have to explicate their statutory jurisdiction under s 1 of the 1970 Act by deciding whether they are confronted by an enforceable land obligation which they can then vary or discharge in terms of s 1(2) of that Act."<sup>143</sup>

The power to determine validity has been conferred on the Lands Tribunal both in England and Wales<sup>144</sup> and in Northern Ireland.<sup>145</sup> It is difficult to see why it should be denied to the Lands Tribunal in Scotland. The ordinary courts would continue to have jurisdiction, exercised concurrently.

6.64 Any new jurisdiction would need to be defined. In Northern Ireland the Tribunal<sup>146</sup>

"... may make an order declaring -

- (a) whether or not the land is, or would in any given event be, affected by an impediment;
- (b) the nature or extent of the impediment;

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<sup>141</sup> *Murrayfield Ice Rink Ltd v Scottish Rugby Union Trustees* 1972 SLT (Lands Tr) 20; *Solway Cedar Ltd v Hendry* 1972 SLT (Lands Tr) 42.

<sup>142</sup> *McCarthy & Stone (Developments) Ltd v Smith* 1995 SLT (Lands Tr) 19 at p 26B.

<sup>143</sup> *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105 at p 109A. An example of this process is *Co-operative Wholesale Society v Ushers Brewery* 1975 SLT (Lands Tr) 9.

<sup>144</sup> Law of Property Act 1925 s 84(2).

<sup>145</sup> The Property (Northern Ireland) Order 1978 art 4(1).

<sup>146</sup> *Ibid.* This is modelled on the English legislation.

- (c) whether the impediment is, or would in any given event be, enforceable and, if so, by whom."

This provision seems along the right lines for Scotland also. The Tribunal would need power to determine whether the burden is enforceable in relation to the applicant's land; the proper interpretation of the burden, and in particular whether it prevents or restricts the use which the applicant proposes; and the question of title to enforce. By contrast, interest to enforce may fluctuate over time, and seems a matter for the ordinary courts to determine in the course of an action of enforcement.

6.65 An effect of this change is that some applications would come to have two separate bases. The applicant would argue both that the burden is unenforceable, and alternatively that it should be varied or discharged. There seems no particular reason why the alternative argument should not be brought first, at the option of the applicant. Sometimes it might be easier to make the case for discharge than to satisfy the Tribunal on some abstruse point of the law of constitution of real burdens. If the burden is duly discharged, the applicant is unlikely to be troubled by the thought that it was invalid all along. But this would require a second change in the law. At the moment the Tribunal can only vary or discharge burdens which are valid. We suggest that in the future it should be empowered to vary or discharge purported burdens, without preliminary inquiry as to validity.

6.66 Our proposals can be summarised in this way:

**34. The Lands Tribunal should be empowered -**

**(a) to vary or discharge a real burden or purported real burden; and**

**(b) to declare**

**(i) whether a burden affects the land of the applicant;**

**(ii) the extent and effect of the burden; and**

**(iii) the identity of the dominant tenement or tenements.**

6.67 **Enforcement of burdens.** At the moment burdens are enforced in one court but discharged in another. Sometimes this may be inconvenient. If the true defence to an enforcement action, brought in the ordinary courts, is that the burden should be varied or discharged, the action will require to be sisted in order to allow an application to the Lands Tribunal. It seems worth exploring whether enforcement and discharge could be brought together. Two approaches seem possible. One would be to allow the ordinary courts, in appropriate cases, to exercise the jurisdiction of the Lands Tribunal. This would not replace the Tribunal as the normal forum for variation or discharge, but it would enable the ordinary courts to deal with the matter if it arose incidentally in the course of some other action, such as an action for enforcement. The other possibility would be to confer on the Tribunal jurisdiction in matters of enforcement. This jurisdiction could be held concurrently with the ordinary courts. The first approach has been recommended for England and Wales by the Law Commission,<sup>147</sup> while the second approach was suggested in our discussion

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<sup>147</sup> Law Com No 127 paras 19.7-19.11.

paper on the abolition of the feudal system.<sup>148</sup> They are not, of course, mutually exclusive, and it can be argued that both would be useful reforms. The conferral of enforcement jurisdiction on the Lands Tribunal would also have the effect of giving a choice of forum to dominant proprietors, which might be welcome to some, particularly those based in Edinburgh.

6.68 There are possible disadvantages. The conferral of enforcement jurisdiction on the Lands Tribunal would be a novelty which might have implications for the way in which the Tribunal works. At the least, it would require a consideration of issues such as the availability of interim interdict, the introduction of a caveat system, the use of civil imprisonment and other sanctions for non-compliance, and so on.<sup>149</sup> The change could be made, no doubt, but it would be complex, and have implications for the workload of the Tribunal, and hence for resources. The conferral of Lands Tribunal jurisdiction on the ordinary courts will be unwelcome to those who would wish to object to variation or discharge but who would shrink from the expense and formality of the sheriff court or Court of Session.

6.69 A practical barrier to considering discharge in the course of an action concerned with enforcement is that the proper parties might not be in court. If an owner in a housing estate seeks to enforce a burden against his neighbour, the issue of variation or discharge could not be considered without the owners of the remaining 98 houses. In circumstances like this a separate application to the Lands Tribunal seems unavoidable. This suggests that a conjoined jurisdiction may turn out to be less useful than it might seem. For different reasons there may be reason to doubt whether the Lands Tribunal would be attractive as a forum for enforcement. The balance of argument may therefore lie against change. However, we have no concluded opinion on this subject and therefore:

**35. We would welcome views on whether -**

- (a) the Lands Tribunal should be given jurisdiction in the enforcement of real burdens, and**
- (b) the ordinary courts should be able to exercise the powers of the Lands Tribunal in relation to variation and discharge where, in the course of other proceedings, it is appropriate to do so.**

6.70 **Planning and conservation burdens.** Earlier we discussed planning and conservation burdens, that is to say, perpetual restrictions on land imposed for the benefit of a planning authority or a conservation body such as the National Trust for Scotland.<sup>150</sup> These resemble real burdens, and may just as easily become obsolete or unreasonable. But since they do not come within the jurisdiction of the Lands Tribunal,<sup>151</sup> an owner seeking variation

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<sup>148</sup> Scot Law Com DP No 93 paras 3.88 ff. On consultation there was opposition to any suggestion that the jurisdiction of the Lands Tribunal might be exclusive.

<sup>149</sup> Scot Law Com DP No 93 paras 3.89-3.94.

<sup>150</sup> See paras 2.56 ff.

<sup>151</sup> This is because such a burden is not "enforceable by a proprietor of an interest in land, by virtue of his being such proprietor": see Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2). In other words, there is no dominant tenement. For a discussion, see J Rowan-Robinson and Eric Young, *Planning by Agreement in Scotland* (1989) pp 63-6.

or discharge must open negotiations with the appropriate enforcing authority.<sup>152</sup> A negative decision might possibly be the subject of judicial review, but for all practical purposes is likely to bring the matter to an end. The position is different in England and Wales. From the very beginning it was possible to apply to the Lands Tribunal in respect of planning and conservation burdens.<sup>153</sup> More recently, a special procedure has been introduced for planning obligations (the equivalent of s 75 agreements) involving an application to the local planning authority, with the possibility of an appeal to the Secretary of State.<sup>154</sup> The jurisdiction of the Lands Tribunal has been excluded,<sup>155</sup> although it remains for conservation burdens and for pre-existing planning obligations.

6.71 Arguably a planning authority is in a better position than the Lands Tribunal to consider matters of general public interest, and there may be much to be said for adopting the English model. Such matters are, however, beyond the scope of the present paper. A modestly useful reform might be to extend the jurisdiction of the Lands Tribunal so as to include planning and conservation burdens. Accordingly:

**36. We invite views as to whether the Lands Tribunal should be given jurisdiction for the variation and discharge of planning and conservation burdens.**

If jurisdiction was to be extended in this way, it would probably be necessary to make some adjustments to the criteria which the Tribunal is asked to apply.

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<sup>152</sup> However, an access agreement made under s 13 of the Countryside (Scotland) Act 1967 may, by s 13(3), make provision for revocation or variation.

<sup>153</sup> Section 84(1) of the Law of Property Act 1925 applies to "any restriction arising under covenant *or otherwise*".

<sup>154</sup> Town and Country Planning Act 1990 ss 106A and 106B (as inserted by s 12 of the Planning and Compensation Act 1991).

<sup>155</sup> Town and Country Planning Act 1990 s 106A(10).

## PART 7 CREATION OF NEW REAL BURDENS

### Introduction

7.1 If the proposals made in Part 2 are accepted, it will continue to be possible to create both community burdens<sup>1</sup> and neighbour burdens,<sup>2</sup> but will no longer be possible to create feudal burdens. In certain cases it will also be possible to create conservation burdens.<sup>3</sup> In this part of the paper we are concerned with how new burdens are to be created.

### Writing and registration

7.2 Real burdens require, and have always required, writing followed by registration in the Register of Sasines or Land Register. That is as it should be. A strength of the Scottish system is the principle of the faith of the registers by which an owner - or potential purchaser or creditor - has only to look at the register to find out about the burdens and obligations which affect a property. To this principle there are some exceptions, known in registration of title as overriding interests.<sup>4</sup> But for the most part overriding interests are either clear from the ground, as often with positive servitudes, or they are the creation of statute and include special protections for third parties.<sup>5</sup> Naturally, we have no intention of adding to the exceptions. It seems clear that the existing rule for real burdens should be preserved.<sup>6</sup>

7.3 The rule for positive<sup>7</sup> servitudes is different. Servitudes can be created (i) expressly in writing (ii) by implication or (iii) by positive prescription.<sup>8</sup> Servitudes created by methods (ii) and (iii) will not appear on the register. Servitudes created by method (i) are in practice usually registered, but this is not a formal requirement, and a real right can be acquired merely by the exercise of the servitude.<sup>9</sup> There is much to be said for formalising current practice, and for introducing a rule that servitudes created in writing should in future require to be registered. The public interest is in favour of transparency, and registration does not seem too high a price to pay for an immediate grant of servitude. A person who did not choose to register would have to wait 20 years, for the running of prescription, or rely on the rules of implied servitudes.

7.4 Unlike other real rights, real burdens<sup>10</sup> and servitudes affect two pieces of property and not one, for as well as property which is subject to the burden (the servient tenement) there is also property which receives the benefit (the dominant tenement). Yet in general registration is required only in respect of one of the properties, with the result that the

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<sup>1</sup> For the meaning of community burdens, see para 1.6.

<sup>2</sup> For the meaning of neighbour burdens, see para 1.5.

<sup>3</sup> Paras 2.56 ff.

<sup>4</sup> Land Registration (Scotland) Act 1979 s 28(1).

<sup>5</sup> An example would be occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The protection for third parties is in s 6(3).

<sup>6</sup> For the effect of registration, see paras 7.71 ff.

<sup>7</sup> At paras 2.42 ff we suggest the assimilation of negative servitudes to real burdens. Hence we deal here only with positive servitudes.

<sup>8</sup> See generally Gordon, *Scottish Land Law* paras 24-26 ff.

<sup>9</sup> Gordon, *Scottish Land Law* paras 24-29 and 24-32.

<sup>10</sup> Other than conservation burdens.

owner of the other property may often be unaware of the right. Thus neighbour burdens require to be registered under the title of the servient tenement only,<sup>11</sup> and in practice are almost never registered under the title of the dominant. Servitudes may be registered under the title of either tenement, but need not be registered under both.<sup>12</sup> Only with community burdens, where there is concurrence of dominant and servient tenements, is full registration achieved. The present system is not satisfactory.<sup>13</sup> Proper transparency could be achieved only by a requirement of dual registration. We suggest therefore that in future real burdens and servitudes should require to be registered under the title of both the dominant and the servient tenements. This is consistent with the proposal made earlier for dual registration of notices of preservation of implied enforcement rights.<sup>14</sup> If the title to one tenement is on the Land Register and the other remains on the Register of Sasines, it would be necessary to apply to both registers.

7.5 Our proposal is that:

**37. (1) Real burdens should continue to require writing and registration.**

**(2) Positive servitudes which are created expressly in writing should become real rights only on registration.**

**(3) By "registration" is meant registration in the Land Register or, as the case may be, the Register of Sasines against both the dominant and the servient tenements.**

#### **A sunset rule**

7.6 **The problem of obsolescence.** Burdens are created without much thought about how long, ideally, they ought to last. Almost always the constitutive deed is silent on the question of duration; and, in the absence of express provision, real burdens last for ever. That does not seem satisfactory. Most if not all burdens become obsolete in the end. If burdens are allowed to proliferate without limitation, property will increasingly be encumbered by ageing and inappropriate restrictions. In Scotland there are already 200 years of burdens. We would not wish to add to those existing burdens the product of a further 200 years.

7.7 Here we have two proposals to make. In the first place, we suggest that a constitutive deed should, in the future, state the duration of the burdens which are being imposed. This would at least serve to concentrate minds, and for the first time duration might become a matter for negotiation. In the absence of a stipulated duration, the burdens would fail. Secondly, we propose that there should be an outer limit on duration, or in other words a sunset rule. The period should not be too short. The aim is to deal with the problem of obsolescence rather than to express disapproval of burdens. We suggested earlier that existing burdens should expire either 100 or 150 years after creation.<sup>15</sup> There is a case for using the same period here, for otherwise a burden created immediately before the legislation came into force would have a different duration from one created immediately

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<sup>11</sup> Reid, *Property* para 389.

<sup>12</sup> *Balfour v Kinsey* 1987 SLT 144.

<sup>13</sup> Paras 1.24 - 1.26.

<sup>14</sup> Para 3.43.

<sup>15</sup> Paras 5.68 ff.

afterwards. But it can also be argued that for new burdens the period should be shorter.<sup>16</sup> The pace of social and economic change is likely to continue to increase in the future, so that burdens will become obsolete more quickly. Further, special factors mean that the period suggested for existing burdens may be artificially long.<sup>17</sup> We suggest for consideration that the permitted duration of new burdens should be either 80 years or 100 years. This rule would apply to all burdens, including community burdens and conservation burdens.

7.8 It would be possible to have a still shorter period if some mechanism were then provided for renewal. In Massachusetts, for example, the initial duration of a restrictive condition is 30 years, but it can be renewed indefinitely for 20 years at a time.<sup>18</sup> Our provisional view, however, is against renewal. Renewal interferes with certainty, which is one of the perceived advantages of using real burdens.<sup>19</sup> Renewal is also burdensome both for dominant proprietors and for their advisers. Solicitors would need to be constantly vigilant, and a client who missed a renewal deadline might seek to hold his solicitor responsible.<sup>20</sup> The new law would be more complex than the law which it replaces. In our discussion of existing burdens, we suggested that some kind of renewal provision was an unavoidable accompaniment to a sunset rule.<sup>21</sup> Here it is avoidable, and in our view ought probably to be avoided. We would prefer a relatively long period, with no renewal, to a shorter period which allowed the possibility of renewal.

7.9 In the absence of a renewal mechanism, it would remain open to the parties to agree to the creation of fresh burdens, whether in the same or in different terms. For neighbour burdens this would be like a minute of waiver in reverse, and the servient proprietor would need to be persuaded, and, in most cases, paid. Community burdens could be preserved by agreement within the community, and under proposals made below, agreement by a majority would suffice if the existing burdens were still in place.<sup>22</sup>

7.10 Durational limits should not apply to burdens which regulate the maintenance and use of a common facility, such as a road, or a water supply system, or the common parts of a tenement. Common facility burdens are likely to be needed for as long as the facility itself is in use and operational. In some cases that might be much longer than 80 or 100 years. Maintenance obligations are less likely to become obsolete than restrictions on use and, while a common facility burden should not last for ever, the problem of endurance seems self-regulating. For as long as the facility continues in use, the burden would continue also. Thereafter it would fall automatically.<sup>23</sup> If, before then, compliance with the burden became unreasonable, it would either not be enforced in practice or it would be extinguished by the Lands Tribunal. There are a number of other places in this paper where we have suggested separate treatment for common facility burdens.<sup>24</sup>

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<sup>16</sup> In Massachusetts existing restrictive conditions expire after 50 years, and new ones after 30 years. See Massachusetts General Laws ch 184 ss 27 and 28 (inserted by an Act of 1961 ch 448).

<sup>17</sup> These are (i) the difficulty of interfering with existing rights and (ii) the practicalities of operating a renewal scheme. See paras 5.78, and generally on the difficulties of interfering with existing rights see the First Protocol to the European Convention on Human Rights, Art 1.

<sup>18</sup> Massachusetts General Laws ch 184 s 27(b).

<sup>19</sup> Paras 2.16 and 2.17.

<sup>20</sup> This point was made strongly by Professor Robert Rennie at our seminar.

<sup>21</sup> Para 5.71-5.72.

<sup>22</sup> Paras 7.79 ff.

<sup>23</sup> Reid, *Property* para 434.

<sup>24</sup> Paras 3.35 and 5.77.

7.11 We would welcome views as to whether any other exceptions are necessary to the principle of expiry at the end of a fixed duration.

7.12 **Neighbour burdens.** Neighbour burdens may merit less favourable treatment. In community burdens the restraints under which an owner may chafe are at any rate imposed for the benefit of the community as a whole and are matched by corresponding restraints on other properties. In neighbour burdens the restraints are one-way and are often<sup>25</sup> for the narrow albeit legitimate benefit of the dominant tenement. It can be argued that a person who does not accept restrictions on his own property should not have an unlimited right to insist on restrictions on the property of someone else; and from this it might seem to follow that the durational limits on neighbour burdens should be greater than is required merely to deal with obsolescence. A similar point was made earlier in relation to existing neighbour burdens.<sup>26</sup>

7.13 We have no concluded view on this subject and would welcome the views of consultees. If the principle of a shorter duration were to be accepted, it would be necessary to decide what that duration should be. For a burden to protect amenity in a meaningful way, the period of its duration must not be too short. A person selling part of his land for development should be able to protect the remainder of his property for a generation or more. Otherwise he might not sell at all.<sup>27</sup> But, on this approach, the period must not be so long as to be unfair to successors in the servient tenement. In other countries the permitted period ranges from 21 years to 80 years, although subject to renewal. A reasonable compromise might be 40 or 50 years. In practice, the benefit of whatever period is selected will be felt by the servient proprietor some years prior to its expiry, if only because the price of a minute of waiver is likely to fall rapidly as a burden reaches the end of its life.

7.14 We invite views on the following propositions and questions:

**38. (1) A condition should not be effective as a real burden unless its duration is specified in the constitutive deed.**

**(2) The duration should not exceed a maximum figure to be specified in legislation.**

**(3) Views are invited as to whether -**

**(i) the maximum duration for community burdens and conservation burdens should be (a) 80 years (b) 100 years or (c) some other figure;**

**(ii) the maximum duration for neighbour burdens should be (a) 40 years (b) 50 years or (c) some other figure.**

**(4) A dominant proprietor should have no right to renew a burden on expiry of its duration.**

**(5) The durational limit should not apply to burdens which regulate the maintenance, reinstatement or use of a common facility.**

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<sup>25</sup> Often, but, as Professor Kevin Gray pointed out at our seminar, not always.

<sup>26</sup> Para 5.79.

<sup>27</sup> Paras 2.16 & 2.17.

**(6) Views are invited as to whether other exceptions to the durational limit are necessary.**

### The words used

7.15 **The words "real burden".** At present no special words need be used to create a real burden. This rule was fixed by the decision in *Tailors of Aberdeen v Coutts* in 1840:<sup>28</sup>

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

Practice varies. Sometimes there is no mention of "real burden". More usually the list of conditions to be imposed is preceded or followed by a string of explicative synonyms, for example:<sup>29</sup>

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

There may also be an irritancy clause, at least in grants in feu.

7.16 We suggest that in future the use of the term "real burden"<sup>30</sup> should be a formal requirement for constitution. "Community burden" and "neighbour burden" might be permitted as alternatives. Law reform bodies in other jurisdictions have reached the same conclusion.<sup>31</sup> Technical language makes for certainty. At the moment it may be unclear whether a condition in a conveyance is intended to bind only the parties to it or whether it is intended to run with the land;<sup>32</sup> and even where it is to run with the land, it may be unclear whether the condition is a real burden or a servitude. As matters stand, a purchaser may be uncertain whether a condition found on the register is binding on him at all. In the days before an agreed terminology emerged, it was natural that the courts should adopt a flexible attitude.<sup>33</sup> But the problem of terminology has now disappeared, or in any event will disappear following the proposed legislation. We do not think that our proposal is unduly burdensome. A person wishing to grant a standard security must use the words "standard security".<sup>34</sup> It seems not unreasonable that the granter of a real burden should also have to use technical language.

7.17 **Scheduling.** It would be possible to go further and provide a mandatory statutory style. A less far-reaching proposal would be to require that real burdens created in conveyances be collected together into a separate schedule. The use of schedules was first suggested by the Halliday Committee,<sup>35</sup> and was supported both in the green paper of 1972<sup>36</sup> and by this Commission in its discussion paper on the abolition of the feudal system.<sup>37</sup>

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<sup>28</sup> (1840) 1 Rob 296 per Lord Corehouse at pp 306-7.

<sup>29</sup> This is based on Halliday, *Conveyancing* vol 2, para 32-83.

<sup>30</sup> Or its replacement term if a suitable replacement is identified. See para 9.16.

<sup>31</sup> Law Com No 127 paras 8.13 - 8.15; Ontario LRC, *Covenants* pp 116 ff.

<sup>32</sup> Reid, *Property* para 390.

<sup>33</sup> Para 1.1.

<sup>34</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2) and Sched 2 forms A and B.

<sup>35</sup> Halliday Committee paras 77 - 80.

<sup>36</sup> Scottish Home and Health Department, *Land Tenure Reform in Scotland* (1972) para 87.

<sup>37</sup> Scot Law Com DP No 93 paras 3.21 and 3.22.

There are two suggested advantages. One is that it would make real burdens easier to find, both for those examining title in Sasine transactions, and for the Keeper in making up a title sheet on first registration. The other is that, once found, real burdens would then be easier to understand. By convention dispositions, however long, are drafted as a single sentence, and the burdens, however numerous, are a part of this sentence. Those uninitiated in the arts of conveyancing are likely to be discouraged, if not defeated, by this practice. Real burdens would often be more comprehensible if they were set out in the form of numbered rules.<sup>38</sup> That could be achieved in a schedule but not in the body of a disposition. We accept that there would often be clear advantages in the use of a schedule. But we hesitate to make it compulsory. In responding to our earlier discussion paper, both the Law Society and the Registers of Scotland were opposed to compulsion. On further reflection, we are inclined to agree. There is nothing to prevent the use of schedules at the moment. Sometimes they are used. If scheduling is seen to be obviously superior, then no doubt it will come to be used more often. For Land Register titles a form of scheduling already operates at the point of registration, because all real burdens are extracted and put together in a separate section of the title sheet. The Land Register is expected to be operational for the whole country by 2003,<sup>39</sup> and the number of properties held on the Land Register is now rapidly increasing.

7.18 In summary, we suggest that:

**39. (1) A condition should not be effective as a real burden unless the words "real burden" or "community burden" or "neighbour burden" are used in the constitutive deed.**

**(2) Subject to (1) and to proposal 38, there should be no statutory form for the creation of real burdens, and no requirement that burdens created in conveyances be placed in a separate schedule.**

7.19 **Precision.** Real burdens require to be precisely drawn. It is not enough that the original parties knew what the words meant. Burdens run with the land and are often enforced by and against successors who have no knowledge of the background circumstances. Unavoidably, therefore, the rules for burdens are stricter than the rules for contracts. A burden must be framed so that a successor can understand the nature and extent of the obligation imposed. We have no proposals to disturb this well-settled rule, although elsewhere we make suggestions as to the way in which the words used fall to be interpreted.<sup>40</sup>

7.20 **Obligations to pay.** The requirement of precision may cause difficulties for obligations to pay, in particular in relation to maintenance. Maintenance obligations tend to be framed in one of two ways. Either there is a direct obligation to maintain, or there is an obligation to pay for the cost of maintenance. Both are common. The second presupposes that the maintenance will be carried out by someone else but paid for by the obligant, and is especially useful where the obligant does not own the thing which is to be maintained. For example, in a tenement each flat owner may be taken bound to maintain the roof, which, at common law at least, is the sole property of the owners on the top floor. But while a direct obligation to maintain is valid, doubts have sometimes been expressed as to the validity of

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<sup>38</sup> As in appendix 2 to this paper.

<sup>39</sup> The projected timetable is set out at 1997 SLT (News) 218.

<sup>40</sup> Paras 4.31 ff.

an obligation to pay for the cost of maintenance.<sup>41</sup> Functionally, of course, there is little difference between the two.<sup>42</sup> Nor could it really be said that one is any less precise than the other. Nonetheless, it has sometimes been argued that an obligation to pay for maintenance is invalid on the basis that it is an obligation to pay an uncertain sum of money. Such an obligation, or so the argument goes, is insufficiently precise to run with the lands. A successor must know how much he has to pay. If the burden does not tell him, the burden is unenforceable.

7.21 It may be doubted whether this is really the law. The argument derives from, but may misunderstand, the decision of the House of Lords in *Tailors of Aberdeen v Coutts*.<sup>43</sup> One of the conditions before the court in that case was an obligation

"... to pay me or my foresaids a proportion of two third parts of the expense of forming and enclosing the area in the middle of said square ...".

Reversing the Court of Session, the House of Lords held that the condition was not enforceable as a real burden. For this there were two reasons.<sup>44</sup> In the first place, neither by content nor by form did the condition appear to be a real burden. In the second place, it was an obligation to pay an uncertain sum of money. The difficulty with content was, presumably, that there was a single and not a continuing obligation. The second ground is derived from the law of pecuniary real burdens and may proceed from a confusion between the two types of burden.<sup>45</sup> It seems reasonably clear from the judgment given by Lord Brougham that the two grounds were viewed cumulatively, and that one alone would not have been sufficient to invalidate the burden.<sup>46</sup> Hence the decision does not seem to be a direct authority against obligations to contribute to maintenance. An obligation to contribute which was clearly marked as a real burden would apparently fare differently.<sup>47</sup>

7.22 There is very little other authority on this subject. An obligation to pay for the cost of completing a roadway failed in *Magistrates of Edinburgh v Begg*.<sup>48</sup> But, as in *Tailors of Aberdeen*, this was a single and not a continuing obligation. A later case upheld an obligation to pay for future maintenance.<sup>49</sup> A modern decision of the House of Lords<sup>50</sup> reaffirms

"the doctrine that an obligation to pay an indefinite sum of money cannot be constituted a real burden or condition of the title binding on singular successors."

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<sup>41</sup> Halliday, *Conveyancing* vol 2 para 34-28; R Rennie, "The Reality of Real Burdens" 1998 SLT (News) 149 at pp 151-2.

<sup>42</sup> Hence the Law Commission of England and Wales had no hesitation in recommending the enforceability of obligations to pay for the cost of maintenance. See Law Com No 127 paras 6.6(d) and 6.10(e).

<sup>43</sup> (1840) 1 Rob 296.

<sup>44</sup> These are found in the speech of Lord Brougham at p 340.

<sup>45</sup> There is evidence of such confusion elsewhere in the judgments. See Reid, *Property* para 384.

<sup>46</sup> See Lord Brougham at p 340: "In a matter confessedly of some nicety, and on which I have had great doubts, it seems the safe course to consider this obligation as it directly and apparently is, - an obligation to pay an indefinite sum [of money], unconnected with the *naturalia* of the right. *The obligation to pay the expense or any proportion of the expense of repairing, immediately connected with the subject granted, would clearly stand in a different predicament.*" (emphasis added).

<sup>47</sup> Reid, *Property* para 418(4).

<sup>48</sup> (1883) 11 R 352.

<sup>49</sup> *Wells v New House Purchasers Ltd* 1964 SLT (Sh Ct) 2. And see also *Tenant v Napier Smith's Trs* (1888) 15 R 671 at p 680 per Lord Justice-Clerk Moncreiff.

<sup>50</sup> *David Watson Property Management v Woolwich Equitable Building Society* 1992 SC(HL) 21 at p 36 per Lord Mackay of Clashfern.

But the burden under scrutiny was a direct obligation to maintain,<sup>51</sup> and so the remarks were *obiter*.

7.23 The issue is wider than maintenance costs. Service charges in modern developments may cover many other matters, including the provision of security, the management of recreational facilities, cleaning and gardening, and administrative costs. Since expenditure will vary from year to year, it would be impossible to give specific figures in the deed of conditions. Sometimes there may be a question as to whether costs of this kind confer praedial benefit, a subject which is pursued below.<sup>52</sup> But such costs should not fail as real burdens merely on the ground that the amount due is not specified.

7.24 The opportunity should be taken to settle the law beyond doubt. We propose that:

**40. (1) For the avoidance of doubt, it should be provided that an obligation to make payments should not fail as a real burden only on the ground that no definite amount is stated.**

**(2) This rule should apply to obligations already created as well as to obligations to be created in the future.**

The importance of the issue seems to justify clarifying the law for the past as well as for the future. Otherwise doubt would continue to attach to the innumerable burdens already drafted in the form of an obligation to pay, with potentially serious consequences for the maintenance and management of the properties concerned.

7.25 **Identification of the affected properties.** Community burdens could not sensibly be created without a proper identification of the boundaries of the community. That is already a requirement under the existing law. Thus a deed of conditions prepared by a developer will contain a conveyancing description of the development. In the case of neighbour burdens, the law is more lenient. The servient tenement must be identified, of course,<sup>53</sup> but there is no equivalent requirement in relation to the dominant tenement.<sup>54</sup> In practice deeds are often silent as to dominant tenements, and enforcement depends on the law of implied rights. Earlier we described this reliance on implied rights as one of the most serious shortcomings of the existing law.<sup>55</sup> It is easily remedied. We propose that in future a deed which creates neighbour burdens must describe both the dominant and the servient tenements. If it fails to nominate and describe a dominant tenement, no burden will be created. It should no longer be possible for enforcement rights to arise by implication.<sup>56</sup> Similar recommendations have been made by law reform bodies in England and Wales<sup>57</sup> and in Ontario.<sup>58</sup> This approach accords with our earlier proposal that neighbour burdens should be registered under the title of both the dominant and the servient tenements.<sup>59</sup>

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<sup>51</sup> The burden is quoted only in the first instance report: 1989 SLT (Sh Ct) 4.

<sup>52</sup> Paras 7.42 ff.

<sup>53</sup> Reid, *Property* para 410.

<sup>54</sup> *Ibid* paras 397 ff.

<sup>55</sup> Paras 1.24 - 1.27 and 3.1 - 3.3.

<sup>56</sup> This has already been the subject of a proposal: see paras 3.39 and 3.40, and proposal 9(5).

<sup>57</sup> Law Com No 127 paras 4.12, 8.16, 8.21 and 8.22.

<sup>58</sup> Ontario LRC, *Covenants* p 116 f.

<sup>59</sup> Paras 7.4 and 7.5.

7.26 Ideally, the affected property should be described by plan. But we do not think that this should be a formal requirement. It should be sufficient if the property can be identified. There will be some cases, such as tenements, where a plan would not be appropriate. In practice most new burdens will fall to be registered in the Land Register<sup>60</sup> and will be subject to s 4(2)(a) of the Land Registration (Scotland) Act 1979 which provides that the Keeper must reject an application if

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

The Keeper's practice is usually to require a plan.<sup>61</sup> Where property is already registered in the Land Register it will be sufficient to give the title number.<sup>62</sup>

7.27 We propose that:

**41. (1) The constitutive deed for a community burden must nominate and describe the community which is to be affected by the burden.**

**(2) The constitutive deed for a neighbour burden must nominate and describe the dominant and the servient tenements in the burden.**

**(3) The description must be sufficient to identify the property.**

7.28 An incidental advantage of our proposal is that community and neighbour burdens will be clearly distinguished.<sup>63</sup> Where a deed nominates one property only and provides for mutual enforceability, the burdens are community burdens. Conversely, if the burdens are declared to be for the benefit of a second property, we are in the realm of neighbour burdens. In practice it may be found convenient to use the terms "neighbour burdens" and "community burdens" in the deed, although this should not be a requirement.<sup>64</sup> In any event the distinction will be clear.

### **The deeds used**

7.29 At present, burdens can be created either in a conveyance or in a deed of conditions. Following the abolition of the feudal system, the only conveyance in regular use will be the disposition. We considered, but in the end rejected, the idea of limiting burdens to deeds of conditions. The arguments in favour of this change are similar to the arguments in favour of scheduling,<sup>65</sup> namely that the middle of a conveyance of land is not a good place to insert permanent restrictions on use. The argument against is practical. In some situations it is plainly much more convenient to use a disposition than a deed of conditions. This is particularly the case with neighbour burdens. If A divides his land and sells half to B, imposing real burdens, it would increase costs if the burdens could not be included in the disposition. It would be necessary to prepare, and register, a separate deed of conditions.

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<sup>60</sup> The whole country is scheduled to be operational for registration of title by 2003. It is unlikely that legislation implementing the proposals in this paper would come into force much before then.

<sup>61</sup> Registration of Title Practice Book paras E.39 and E.42.

<sup>62</sup> Land Registration (Scotland) Rules 1980 r 25 and Sched B.

<sup>63</sup> Which may be of importance if each type of burden can competently run for different durations under the sunset rule: paras 5.79 and 7.12 ff.

<sup>64</sup> However, if they are not used, the words "real burden" must be used: see para 7.6.

<sup>65</sup> See para 7.17.

Even if a single burden were being imposed, the separate deed would be necessary. These objections seem too strong, and we do not recommend the change. In practice, dispositions are likely to be used mainly for neighbour burdens and deeds of conditions for community burdens.

7.30 At present, neither deed operates with optimum flexibility. A disposition can create burdens only over the property which is being conveyed. A deed of conditions, at least on one view, can be used only when a conveyance is in prospect. Today neither restriction seems justified.

7.31 **Dispositions: burdens on the retained property.** In practice burdens are only created in break-off dispositions, that is to say, in dispositions where the granter is conveying one part of his property while retaining another.<sup>66</sup> A break-off disposition will often contain both real burdens and servitudes. But whereas servitudes can be imposed on both properties,<sup>67</sup> real burdens can be imposed only on the property which is being conveyed.<sup>68</sup> An example makes the point clearer. Suppose that A wishes to sell part of his land to B. A fence separates the two plots. In the disposition it is provided that the fence is to be maintained at the joint expense of the owners of both plots. Burdens of this kind are commonly encountered. Yet they are unenforceable in relation to the retained plot. In a disposition a burden can be created only by reservation and not by grant. A can reserve for himself and his successors a burden over B's plot; but he cannot grant to B and his successors a burden over his own plot. The result is that while B's successors must maintain the fence, A's successors need not. As the law currently stands, there are good reasons for this rule.<sup>69</sup> In the example just given, the disposition would be registered on the title sheet or search sheet of the disposed property only, and there would be no matching entry on the title sheet<sup>70</sup> of the retained property. But since real burdens require to be registered against the servient tenement, the retained property could not be a servient tenement in relation to the burden. These difficulties fall away if the proposal made earlier, for registration against both tenements, is accepted.<sup>71</sup> Registration against both tenements would mean that the burdens would appear from either title. The successors of A would have as much notice of the burden as the successors of B. Thus dual registration allows the imposition of burdens on the property retained by the granter.

7.32 **Deeds of conditions as self-standing deeds.** Deeds of conditions rest on two statutory provisions, s 32 of the Conveyancing (Scotland) Act 1874 and s 17 of the Land Registration (Scotland) Act 1979. It is quite clear from s 32 that deeds of conditions were not originally intended to be self-standing, and that they were merely a convenient method of incorporating real burdens into subsequent conveyances. Section 32 provides that

".. it shall be lawful for any proprietor of lands to execute a deed, instrument or writing, setting forth the reservations, real burdens, conditions, provisions, limitations,

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<sup>66</sup> In theory burdens could be also be created in a standard disposition where the granter conveys all his property, provided that some property belonging to a third party was nominated as dominant tenement. But this is almost never done in practice.

<sup>67</sup> Reid, *Property* para 450 (A G M Duncan).

<sup>68</sup> *Jolly's Exr v Viscount Stonehaven* 1958 SC 635.

<sup>69</sup> One reason might be that, traditionally, real burdens were regarded as inherent qualifications of a grant. The burden qualified the infetment of the grantee. This idea was particularly associated with feudal burdens.

<sup>70</sup> However, in the Register of Sasines the search sheet would list the disposition and cross-refer to the new search sheet opened in respect of the conveyed plot.

<sup>71</sup> Paras 7.4 and 7.5.

obligations, and stipulations under which he is to feu or otherwise deal with or affect his lands, or any part thereof ..."

The paradigm case was, and remains today, the sale of a number of plots in the same development. Prior to the 1874 Act each individual conveyance required to contain the list of real burdens. After 1874 the burdens could be listed in advance in a separate deed of conditions which could then be incorporated by reference into the individual conveyances. Registration of the deed of conditions achieved nothing by itself. The burdens became effective only by incorporation into and registration of the conveyance. Hence the basic theory remained unimpaired, that burdens could be created only in a conveyance of the servient tenement.<sup>72</sup>

7.33 The position may have been altered by s 17 of the 1979 Act. This provides that, except where the deed says otherwise, a deed of conditions takes effect on registration. Incorporation is no longer required. Some of the difficulties created by this provision are considered below,<sup>73</sup> but the important question for the moment is whether s 17 has the effect of liberating deeds of conditions from conveyances, thus making it possible for an owner to create burdens even where he has no intention of parting with his property. If that were so, a deed of conditions could be used in the same way as a deed of servitude. An owner could create real burdens in favour of his neighbour; or the owners of two or more properties could create community burdens.

7.34 The law cannot be considered as settled. There are two obstacles in the way of using deeds of conditions as self-standing deeds. The first, that the burdens are conceived in favour of a third party (such as a neighbour) rather than in favour of the granter, was cleared by the decision of the First Division in *Gorrie & Banks Ltd v Burgh of Musselburgh*.<sup>74</sup> In that case an owner recorded a deed in 1913 in which he purported to burden his land in favour of his superior. When he came to sell the land in 1920 he incorporated the 1913 deed into the disposition by reference. It was held that the 1913 deed became effective in 1920, as a result of the incorporation. The court seemed untroubled by the fact that the burdens were not conceived in favour of the granter of the 1920 disposition. The second obstacle is more troublesome. In *Gorrie & Banks* there was incorporation into a subsequent conveyance. Section 17 of the 1979 Act removes the need for incorporation, but it may not remove the need for a subsequent conveyance. The governing provision remains s 32 of the 1874 Act, and s 32 requires that a deed of conditions contain the burdens under which the granter "is to feu or otherwise deal with or affect his lands". Of course the property will in the end be conveyed, if only after the granter's death. But it is not clear that a deed of conditions can be used if the granter does not have a conveyance in contemplation, even if, as in *Gorrie & Banks*, the conveyance is to be a number of years hence.

7.35 These doubts should be put to rest. It is clearly desirable that deeds of conditions should be capable of being used as self-standing deeds. A person should not have to convey his own property in order to grant real burdens in favour of his neighbour; and a mechanism should be available for existing communities to achieve self-regulation.<sup>75</sup> In our

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<sup>72</sup> As Burns expressed it, burdens must be imposed as "qualifications of a simultaneous infeftment". See J Burns, *Conveyancing Practice* (4th edn, 1957, by F MacRitchie) p 433.

<sup>73</sup> Para 7.72.

<sup>74</sup> 1974 SLT 157. The position would have been different prior to the 1874 Act: see *Campbell's Trs v Glasgow* (1902) 4 F 752.

<sup>75</sup> For self-regulation of existing communities, see paras 7.79 ff.

report on the law of the tenement we recommended that owners should be able to change the management scheme in force for a tenement by means of a deed of conditions, used as a self-standing deed.<sup>76</sup>

7.36 We propose that:

**42. (1) In a conveyance, it should be competent to impose burdens on the property being retained by the granter as well as on the property being conveyed.**

**(2) In a deed of conditions, it should be competent to impose burdens on land which is not to be conveyed.**

### **Who must grant?**

7.37 **Owners.** A real burden must of course be granted by the owner of the servient tenement. The rule *nemo dat quod non habet* applies. I cannot grant a real burden over my neighbour's garden. Thus, whether the deed used is a disposition or deed of conditions, it must be executed by the owner of the property which is to be burdened. In the case of a disposition, the burden will become effective on registration, at the same moment as the granter ceases to own. Where property is owned in common, all the *pro indiviso* owners must join in the grant.<sup>77</sup> Trustees lack implied power to grant a real burden<sup>78</sup> although, in theory at least, such a power might be contained in the deed of trust.

7.38 **Unregistered granters.** A disposition can be granted by a person who holds a delivered conveyance even although he has not completed his title by registration. In feudal language, the grantor of a disposition may be uninfert. In the case of Sasine titles the disposition must contain a clause of deduction of title.<sup>79</sup> The corresponding rule for deeds of conditions is disputed. Section 32 of the Conveyancing (Scotland) Act 1874 provides that a deed of conditions must be granted by the "proprietor of lands". Professor Halliday took this to mean that the grantor must have a registered title, on the basis that no provision was made for deduction of title.<sup>80</sup> However, in *Fraser v Magistrates of Aberdeen*<sup>81</sup> Lord Keith concluded that:

"There is nothing in section 32 to indicate that the word 'proprietor' is used in the sense of an infert proprietor, or a proprietor under an unfeudalised conveyance, and I can find no assistance from any other provision of the Act. But looking to the general intendment of section 32, I see no reason to suppose that the word was used in any limited sense, and in my opinion it is apt in its context to describe a person who has such rights to deal with the subjects as [the grantor] had."

In that case the grantor's right to the property rested on contract. In fact Lord Keith's remarks were *obiter*. The grantor had already registered his title by the time that the deed of conditions came to be registered. Further, since the conveyancing was carried out before s

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<sup>76</sup> Scot Law Com No 162 para 3.20.

<sup>77</sup> Reid, *Property* para 28.

<sup>78</sup> Real burdens are not included in the list of general powers contained in s 4 of the Trusts (Scotland) Act 1921.

<sup>79</sup> Conveyancing (Scotland) Act 1924 s 3. This also applies to dispositions inducing first registration in the Land Register. No deduction of title is required once a title is on the Land Register: see Land Registration (Scotland) Act 1979 s 15(3).

<sup>80</sup> D J Cusine (ed), *The Conveyancing Opinions of J M Halliday* (1992) Opinion No 122, pp 517-9.

<sup>81</sup> Outer House, 11 April 1974, unreported. (See p 12 of the transcript.)

17 of the Land Registration (Scotland) Act 1979, the deed of conditions was not, of itself, an effective grant of real burdens, and its validity rested on whether or not it had been incorporated into a valid conveyance. Thus the status of the granter of the deed of conditions was less important than the status of the granter of the conveyance. Section 17 alters the perspective. If a deed of conditions can be used as a freestanding grant, the position of the granter is of heightened importance.

7.39 Not many conveyancers would accept that a deed of conditions can be granted by a person holding under missives. Certainly under the general law such a person has no right to burden land. Thus the effective choice seems between a person holding on a delivered conveyance and a person who has completed title by registration. Here Professor Halliday's views are strongly persuasive. In the absence of a provision for deduction of title it is difficult to see how an unregistered disponee could grant a deed of conditions. Hence the present law seems to require registration. We would be disinclined to change that rule. A person should not be allowed to burden land which he does not yet own. Registration, with its attendant publicity, is in the public interest, and legislation should not encourage people to avoid registration.<sup>82</sup> No doubt from time to time there may be good reasons for departing from this rule.<sup>83</sup> Later, for example, we suggest that the requirement of registration might be dispensed with in the case of a deed of conditions which is used to vary community burdens.<sup>84</sup> But in the case of an ordinary deed of conditions we think that the requirement of registration should remain.

7.40  **Holders of subordinate real rights.** Only the owner need grant the disposition or deed of conditions. But the grant of new burdens might prejudice the holders of existing real rights in the servient tenement. Naturally, this will not often be so. For a heritable creditor to be prejudiced, the burdens would have to reduce the value of the property to such an extent that the security was imperilled. Not many burdens have so dramatic an effect. Prejudice to a tenant will be more common. Under proposals made earlier, tenants will be subject to all burdens which take the form of restrictions.<sup>85</sup> Hence if a landlord grants a deed of conditions in favour of a neighbour, the tenant might find that his use of the property is subject to unexpected and unwelcome restrictions. The remedy lies in warrandice.<sup>86</sup> Absolute warrandice in a lease or security protects against future acts to the prejudice of the grantee.<sup>87</sup> In addition, the standard conditions in a standard security might be varied so as to prohibit the burdening of the property. If prejudice can be established, warrandice would be triggered and damages due to the tenant and heritable creditor. Alternatively, the tenant or creditor could seek reduction of the real burdens on the basis of the rule against "offside goals".<sup>88</sup> This requires bad faith on the part of the creditor in the real burdens. A person who accepts a grant of burdens in the knowledge of a possible breach of a prior grant of warrandice has no defence to an action of reduction.<sup>89</sup> Bad faith also allows the reduction to be given effect to by rectification of the Land Register, even against a

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<sup>82</sup> See para 3.57.

<sup>83</sup> As with minutes of waiver: see para 5.29.

<sup>84</sup> See para 7.80.

<sup>85</sup> See paras 4.13 ff.

<sup>86</sup> For standard securities, see Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2). For leases, see G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) pp 128-9.

<sup>87</sup> Reid, *Property* para 706.

<sup>88</sup> See generally, Reid, *Property* paras 695 ff. In the case of securities, this may be no more than a reworking of the rule that a heritable creditor can challenge grants prejudicial to his security. See: *Mitchell v Little* (1820) Hume 661; *Reid v McGill* 1912 2 SLT 246; *Edinburgh Entertainments Ltd v Stevenson* 1926 SC 363.

<sup>89</sup> *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74.

proprietor in possession.<sup>90</sup> If the security or lease was registered, there will always be bad faith.

7.41 The law strikes a careful balance between existing right-holders and the acquirers of new real burdens. An acquirer is protected if he does not know of the prior right. Otherwise he must take the risk of reduction by a tenant or heritable creditor. In practice, the risk, if there is one, is avoided by taking the consent of the tenant or creditor. In most cases this seems satisfactory. At any rate it is difficult to see how it could be easily improved. To require the tenant or creditor to sign the deed in all cases would give too much power to the holders of subordinate rights, while to give blanket protection to an acquirer of real burdens would override existing rights in a manner which seems unacceptable. The present rule applies to other encumbrances also,<sup>91</sup> and seems a stable compromise. Later we suggest that a different rule should apply to deeds of conditions which vary existing community burdens.<sup>92</sup>

### The praedial rule

7.42 A real burden must be praedial and not personal - or, in other words, it must be concerned with property and not merely with its owner. Further, a burden must be praedial with respect to *both* tenements. As well as having some connection with the servient tenement, the burden must also confer benefit on the dominant tenement. The same rule applies to servitudes, and to other types of real condition.<sup>93</sup> This rule is not, of course, peculiar to Scotland. Civil law jurisdictions impose a requirement of utility (*utilitas*) to the dominant tenement,<sup>94</sup> while common law jurisdictions stipulate that the burdens must "touch and concern" the dominant and servient properties.<sup>95</sup> The rule has the modestly useful function of excluding the obviously personal. A real burden cannot be used to impose an obligation to buy a new car, or to enter into a contract of employment, or to pay an annuity. A real burden runs with the land only because it has something to do with the land. Its justification lies in the need to regulate communities, or to protect owners from their neighbours.<sup>96</sup> An obligation which does no more than express the personal, and possibly idiosyncratic, preferences of the parties to it should not be elevated into a quasi-real right, for this would be to encroach unreasonably and unjustifiably on the freedom of an owner to use his own property as he pleases.<sup>97</sup>

7.43 In some jurisdictions the praedial rule, or its equivalent, has been used as a means of striking down burdens which are deemed undesirable for other reasons. For example, in the United States there has been a long-running controversy as to the validity of trading

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<sup>90</sup> Land Registration (Scotland) Act 1979 s 9(3)(a)(iii).

<sup>91</sup> Much the same issue arises in relation to grants of servitude. See Reid, *Property* para 449 (A G M Duncan).

<sup>92</sup> See para 7.82.

<sup>93</sup> Reid, *Property* para 348.

<sup>94</sup> Eg Code Civil art 637; BGB arts 1018 & 1019.

<sup>95</sup> Eg Gray, *Elements* pp 1129-31 and 1143-7.

<sup>96</sup> Rankine, *Landownership* (4th edn, 1909) p 369, quoted and approved in *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788.

<sup>97</sup> Thus Uriel Reichman, "Toward a Unified Concept of Servitudes" (1982) 55 S California Law Rev 1177 at p 1233: "Private property is sanctioned by society not only to promote efficiency, but also to safeguard individual freedom. Servitudes are a kind of private legislation affecting a line of future owners. Limiting such 'legislative powers' to an objective purpose of land planning eliminates the possibility of creating modern variations of feudal serfdom." For a fuller statement of Reichman's argument, see Uriel Reichman, "Judicial supervision of servitudes" (1978) 7 Journal of Legal Studies 139 at pp 143 ff. There he analyses the socio-economic justification for the rule.

restrictions conceived for the commercial benefit of a neighbour. At first the courts were inclined to reject such restrictions as being personal in nature, and as failing to touch and concern the dominant property. More recently, the restrictions have tended to be upheld.<sup>98</sup> The same issue arose in England in *Newton Abbot Co-operative Society Ltd v Williamson & Treadgold Ltd*,<sup>99</sup> where an ironmonger sold land opposite her business premises ("Devonia") subject to a restrictive covenant prohibiting its use as ironmongers or for the sale of ironmongery products. The covenant was held to be enforceable. While conceding that the covenant was taken for the benefit of the ironmonger's business, in order to prevent competition, the court thought that this was not its sole purpose.<sup>100</sup>

"Mrs Mardon may well have had it in mind that she might want ultimately to sell her land and the business and the benefit of the covenant in such manner as to annex the benefit of the covenant to Devonia for, by so doing, she would get an enhanced price for the totality of the assets which she was selling ... Devonia could be sold at an enhanced price to someone intending to carry on the business of an ironmonger, because, if, as part of the sale transaction, he obtained the benefit of the covenant, he could prevent competition from the defendants' premises opposite."

The approach in Scotland is, or appears to be, different. The leading authority is the decision of the Second Division<sup>101</sup> in *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*,<sup>102</sup> which concerned a prohibition on the use of a theatre for certain categories of play. The dominant tenement was another theatre half a mile away. Although the praedial rule was duly discussed, the central argument was whether the burden was in restraint of trade.<sup>103</sup> The court thought that it was, but in the event the burden failed on other grounds.

7.44 The American Law Institute has suggested that the touch and concern rule be abandoned and replaced by a series of specific policy-based grounds (such as restraint of trade) on which a burden might be disallowed.<sup>104</sup> We would not go quite so far. At the margins the praedial rule continues to serve a useful function in eliminating the obviously personal.<sup>105</sup> But while the rule seems worth preserving, we think that it should be expressed in broad and general language, and should not be the main filter for real burdens. For this there are a number of reasons.

7.45 First, it seems hardly possible to produce a precise statement of the praedial rule. In all but the most extreme cases, the question of whether something is personal or praedial is open to argument and is a subject on which reasonable people might disagree. Most burdens are capable of producing at least *some* praedial benefit. The restriction in the *Newton Abbot* case was said to make the dominant tenement more attractive to ironmongers. By the same token a prohibition on the use of electricity would make the dominant tenement more attractive to those who reject technological advance. The point is that most purchasers

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<sup>98</sup> Lawrence Berger, "A policy analysis of promises respecting the use of land" (1970) 55 Minnesota Law Rev 167 at pp 213-4.

<sup>99</sup> [1952] Ch 286.

<sup>100</sup> At pp 293-4 per Upjohn J.

<sup>101</sup> The decision was reversed by the House of Lords on a different point: see 1940 SC(HL) 52.

<sup>102</sup> 1939 SC 788.

<sup>103</sup> See in particular the judgment of Lord Wark.

<sup>104</sup> American Law Institute, *Restatement (Servitudes)* TD No 7 s 3.1, pp 39 ff (for the most recent revised version of s 3.1) and TD No 2 s 3.2-3.7, pp 20 ff.

<sup>105</sup> This problem is dealt with by the American Law Institute through s 3.5 which invalidates conditions which lack a rational justification. See TD No 2 s 3.2, pp 22-3 and s 3.5, pp 76 ff.

are neither ironmongers nor Luddites. A further problem is that definitions of praedial benefit suffer from circularity. The conclusion justifies the argument. For just as an obligation runs with the land because it is praedial, so an obligation is praedial if it runs with the land. The very fact of running with the land serves to make the obligation praedial.<sup>106</sup>

7.46 Secondly, definitional vagueness allows the rule to be used for quite other purposes.<sup>107</sup> For example, an obligation can be struck down for lack of praedial benefit when the real objection is that it is in restraint of trade. It seems unsatisfactory that policy issues should be dressed up in the form of an arid debate on the meaning of the praedial rule; and by narrowing the praedial rule, and in unpredictable ways, such debate casts doubt on the validity of other obligations which, from the point of view of legal policy, are unobjectionable or even desirable.<sup>108</sup> It would seem better to face policy issues directly. This may already be the approach taken in Scotland. The use of restraint of trade in the *Aberdeen Varieties* case was mentioned above. Much earlier, in *Tailors of Aberdeen v Coutts*,<sup>109</sup> it was said that a real burden

"must not be contrary to law, or inconsistent with the nature of this species of property; it must not be useless or vexatious; it must not be contrary to public policy, for example, by tending to impede the commerce of land, or create a monopoly."

7.47 Thirdly, and following on from the last point, other and better methods are available for filtering burdens. In particular, a burden will suffer from initial failure if it is contrary to public policy,<sup>110</sup> and an initially valid burden can be varied or discharged by the Lands Tribunal on grounds of reasonableness.<sup>111</sup>

7.48 Finally, a wide statement of the rule has the merit of providing flexibility for the future. In the words of an American commentator:<sup>112</sup>

"Matters which were looked upon in the past as indicative of hypersensitivity or extreme fine taste, and accordingly merely personal, have become a market commodity today. Thus, the right to prospect, to wander at large in a park, or to swim have all been transformed in recent decades into fully-fledged property interests. ... It is clear, therefore, that the outer fringe of the rule is rather elastic and the courts may grant recognition to new types of land obligations. In this sense, the vagueness of the rule is not without its advantages: it enables the judiciary to respond to changing realities and needs."

As the examples quoted show, American law has gone further than Scots law has, or perhaps will, but the general point stands.

7.49 The praedial rule is probably already wide in Scotland. Certainly there is no reported case in which a burden has been struck down for failing the praedial test. But the

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<sup>106</sup> Lawrence Berger, "A policy analysis of promises respecting the use of land" (1970) 55 Minnesota Law Rev 167 at pp 210-11.

<sup>107</sup> American Law Institute, *Restatement (Servitudes)* TD No 2 s 3.2 p 20.

<sup>108</sup> American Law Institute, *Restatement (Servitudes)* TD No 7 s 3.1 (as revised) p 57.

<sup>109</sup> (1840) 1 Rob 296 at p 307 per Lord Corehouse.

<sup>110</sup> Paras 7.55 ff.

<sup>111</sup> See generally part 6.

<sup>112</sup> Uriel Reichman, "Judicial Supervision of Servitudes" (1978) 7 J of Legal Studies 139 at p 155.

law is not entirely settled and there is little in the way of authority, partly because, on one view, the praedial rule either did not apply, or at least did not apply in the same way, to feudal burdens.<sup>113</sup> One important area of uncertainty is whether rules governing residents' associations or providing other forms of management are sufficiently praedial to be constituted as real burdens.<sup>114</sup> It seems plain that the praedial rule requires to be clarified, and restated.

7.50 The rule may now be examined in greater detail. It has two aspects.

7.51 In the first place, a burden must have some close connection with the servient tenement. Where the burden takes the form of a restriction, the restriction must apply to all or part of the servient tenement. Where the burden takes the form of a positive obligation, the obligation must bind the owner of the servient tenement and must relate to that tenement, either directly or indirectly. A positive obligation which benefits a dominant tenement but which does not also benefit the servient cannot be constituted as a real burden. For example, the successive owners of a house in Glasgow could not be taken bound to maintain the garden wall of a house in Aberdeen. For a valid real burden to be created, the garden wall must be situated either in the dominant or the servient tenement, and if the former, the dominant tenement must be sufficiently close to the servient for the latter to take some benefit from the act of maintenance. Of course "benefit" is being used here in a special sense. Doubtless the servient proprietor would greatly prefer if sole liability for maintenance rested with his neighbour. As its name suggests, a real burden is, first and foremost, a burden. But compliance with the burden will at least be of use to the servient tenement.

7.52 The second aspect causes greater difficulty. This is that the burden must enure to the benefit of the dominant tenement. Mention was made earlier of the difficult distinction between praedial and personal benefit.<sup>115</sup> It is a condition of praedial benefit that the two properties be reasonably close together, although they need not be contiguous.<sup>116</sup> In practice, disputes tend to arise at the point of enforcement rather than at the point of creation, and the issue of praedial benefit becomes subsumed into the issue of interest to enforce. The relationship between praedial benefit and interest to enforce was discussed in Part 4.<sup>117</sup>

7.53 The praedial rule has developed mainly in the context of servitudes and neighbour burdens, and authority is lacking as to its application to community burdens. However, the standard formulation can easily be adapted. Since a community is no more than a collection of dominant (and servient) tenements, it would be possible to characterise a community burden as one which enures to the benefit of those tenements. But it seems more helpful to recognise the distinctive role of the community itself. On this approach, the praedial test is satisfied if the burden confers benefit on the community, or on any part of the community.<sup>118</sup> A formulation along these lines would serve to remove the doubts mentioned earlier in relation to management obligations. Whatever may be the position of individual dominant tenements, it is normally in the interests of the community as a whole that there should be management structures, that a factor should be employed and paid, that equipment should

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<sup>113</sup> Gordon, *Scottish Land Law* paras 22-51 and 22-52.

<sup>114</sup> Reid, *Property* para 391; R Rennie, "The Reality of Real Burdens" 1998 SLT (News) 149 at pp 149-51.

<sup>115</sup> Para 7.45.

<sup>116</sup> *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* 1939 SC 788.

<sup>117</sup> Para 4.2.

<sup>118</sup> Law Com No 127 para 6.10

be bought, that the use of common facilities should be regulated, and that service charges should be levied. It is unobjectionable that the equipment will often be moveable - lawnmowers, cleaning materials, and the like - provided that it is for the benefit of the community, which, comprising land, is itself heritable. It is likewise unobjectionable if direct enforcement rights are conferred on a residents' association or on a factor, because such third parties merely act on behalf of all the owners in the community.<sup>119</sup> Special communities may legitimately have special needs. For example, a prohibition on occupation by residents under the age of 60, out of place in a normal housing estate, would be treated as praedial in a sheltered housing complex where the houses are specially adapted for elderly people, where the services of a warden are provided, and where the viability of the whole complex would be threatened by an influx of younger people.<sup>120</sup>

7.54 Our proposal is that:

**43. The praedial rule should be clarified and restated on the following lines:**

**(1) A real burden must burden the servient tenement for the benefit of the dominant tenement or (in the case of a community burden) for the benefit of the community or any part of the community.**

**(2) A positive obligation constituted as a neighbour burden must also confer benefit on the servient tenement.**

### **Policy-based grounds of invalidity**

7.55 A wide praedial rule requires to be balanced by policy-based grounds of invalidity. For example, the American Law Institute recently recommended the following provision.<sup>121</sup>

"3.1 A servitude<sup>122</sup> ... is valid unless it is illegal or unconstitutional or violates public policy.

Servitudes that are invalid because they violate public policy include, but are not limited to:

- (1) Servitudes that are arbitrary, spiteful or capricious;
- (2) Servitudes that unreasonably burden fundamental constitutional rights;
- (3) Servitudes that impose unreasonable restraints on alienation ...;
- (4) Servitudes that impose unreasonable restraints on trade or competition ...; and
- (5) Servitudes that are unconscionable ...".

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<sup>119</sup> Olin L Browder, "Running Covenants and Public Policy" (1978) 77 Michigan Law Rev 12 at p 37 f: "[O]ne can consider the corporate enforcement agency merely a representative of the lot owners themselves or an intermediary between one lot owner and all others, so that in substance the benefit of the covenant touches and concerns the land of all other lot owners. In this case, it hardly seems necessary that the intermediate agency, corporate or otherwise, own land within the subdivision with which the benefit of the covenant will run."

<sup>120</sup> However, in the United States, burdens have been allowed which exclude children and young adults. For illustrative cases, see American Law Institute, *Restatement (Servitudes)* TD No 7 s 3.1, pp 96-8.

<sup>121</sup> American Law Institute, *Restatement (Servitudes)* TD No 7 s 3.1, p 40.

<sup>122</sup> As used here "servitude" includes real burden.

In Scotland, initial invalidity is more likely to arise on a policy-based ground than on a failure of the praedial test. But neither is common. The grounds which have been recognised hitherto are listed below.

7.56 **(1) Illegality.** A real burden must not be "contrary to law".<sup>123</sup> So for example a real burden which prohibited ownership or residence by reference to race or gender would be unlawful by statute, and hence void.<sup>124</sup>

7.57 **(2) Repugnancy with ownership.** A burden must not be so severe that it negates the idea of ownership. While a servient proprietor may of course be restricted, his fundamental rights must not be disturbed. According to Lord Young:<sup>125</sup>

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

A positive obligation is more likely to be viewed as repugnant than a mere restriction. As has been observed, there is an obvious difference between an obligation not to sell alcohol (which is perfectly enforceable) and an obligation that alcohol must be sold (which almost certainly is not).<sup>126</sup> Somewhere between the two is an obligation that the property must be used for no purpose other than the sale of alcohol. Here at least the owner has a choice. He need not sell alcohol if he does not want to; but if he chooses not to, he cannot use the property at all. A mere restriction is most likely to be viewed as repugnant where it involves the prohibition of a juridical act, such as selling the property, or granting a lease over it. A qualified prohibition may fall into a different category.<sup>127</sup> For example, rights of pre-emption have been held enforceable.<sup>128</sup> Similarly, a prohibition limited by time might be acceptable if the period was not too long. The unqualified surrender of the right to manage property, found sometimes in sheltered housing, is probably unenforceable on the basis of repugnancy.

7.58 **(3) Restraint of trade.** In a well-known English case, *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*,<sup>129</sup> the House of Lords held that the doctrine of restraint of trade does not apply to perpetual restrictions on land. This was on the basis that a purchaser of land does not give up a right which he already had, since the restriction was already in place before the purchase took place. The highly technical nature of this ground has been criticised,<sup>130</sup> but in any event the rule which it supports does not apply in Scotland. A case decided in 1770 held that an obligation to use a particular smithy for the manufacture of

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<sup>123</sup> *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296 at p 307 per Lord Corehouse.

<sup>124</sup> Sex Discrimination Act 1975 ss 30 and 77; Race Relations Act 1976 ss 21 and 72. An alternative ground of invalidity would be public policy. In *Shelley v Kraemer* (1948) 334 US 1 the US Supreme Court decided that burdens restricting residence on grounds of race were unconstitutional.

<sup>125</sup> *Earl of Zetland v Hislop* (1881) 8 R 675 at p 681.

<sup>126</sup> Reid, *Property* para 391.

<sup>127</sup> Compare here s 3.4 of the draft Restatement (American Law Institute, *Restatement (Servitudes)* TD No 2 p 52): "A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint."

<sup>128</sup> *Matheson v Tinney* 1989 SLT 535. Our proposals for rights of pre-emption are contained in paras 8.22 ff.

<sup>129</sup> [1968] AC 269.

<sup>130</sup> J D Heydon, "The Frontiers of the Restraint of Trade Doctrine" (1969) 85 LQR 229.

ironwork was not enforceable.<sup>131</sup> Later, in *Tailors of Aberdeen v Coutts*,<sup>132</sup> it was said of such restrictions that they

"have fallen into disuse, but they have never been declared illegal by statute. The Court, however, at present refuses to enforce them, as being inconsistent with public policy; for it would be a plain injury to the community, if the proprietor of a piece of land could not employ the brewer or the smith most convenient for himself, or whose work he most approved."

The only exception to the prohibition of monopolies was thirlage, by then a well-established servitude.<sup>133</sup>

7.59 Conditions preventing competition have also been challenged as in restraint of trade. The burden considered in the leading case of *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd* prohibited the use of a theatre for the performance of certain kinds of entertainment. The dominant tenement was another theatre half a mile away. *Giblin v Murdoch*<sup>134</sup> concerned a restriction contained in missives of sale which prevented the purchaser of a hairdresser's shop from carrying on a ladies' hairdressing business for five years. This was to protect a second shop in the neighbourhood which continued to be operated by the seller. Both burdens were considered to be void as in restraint of trade. In *Giblin* Sheriff G H Gordon QC took the view that the standard justification for trading restrictions, that they facilitated the sale of goodwill, had no application to a case where the restriction was imposed on the buyer rather than on the seller. In the absence of such a justification, he considered the provision to be unreasonable and hence unenforceable. A similar conclusion was reached by Lord Wark in *Aberdeen Varieties*:<sup>135</sup>

"What they [the dominant proprietors] are really trying to do is to enforce a contract in restraint of trade. That is the real purpose of the restriction. While a restriction on the use of a building may incidentally have that effect, I do not think such a restriction can be imposed solely for that purpose. Moreover, a contract in restraint of trade can only be recognised by the law if it is reasonable in the interest of both parties, and I think the law regards all such restrictions as unreasonable unless the contrary is shown. I am unable to understand how such a contract can ever be shown to be reasonable if it is enforceable in perpetuity. Having regard therefore, as the Court is entitled to do, to the purpose of the restriction, I think it is bad as being contrary to public policy."

The case, however, was decided mainly on other grounds. A later decision of the sheriff court came to the same conclusion on similar facts.<sup>136</sup>

7.60 Not all restrictions on trade are contrary to public policy. For example, a prohibition on trade within a housing estate is a legitimate device to protect the residential character of the community, and is frequently found in deeds of conditions. Another example comes

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<sup>131</sup> *Yeaman v Crawford* (1770) Mor 14,537.

<sup>132</sup> (1840) 1 Rob 296 at pp 317-8 per Lord Corehouse.

<sup>133</sup> See also *Campbell v Dunn* (1823) 2 S 341, (1825) 1 W & S 690 (obligation to use superior's law agents), discussed in *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296 at pp 318-9. This clause was made void by s 22 of the Conveyancing (Scotland) Act 1874.

<sup>134</sup> 1979 SLT (Sh Ct) 5.

<sup>135</sup> 1939 SC 788 at p 797.

<sup>136</sup> *Phillips v Lavery* 1962 SLT (Sh Ct) 57.

from the facts of *Co-operative Wholesale Society v Ushers Brewery*.<sup>137</sup> Here a small shopping precinct was constructed on a housing estate. There were only three units - a supermarket, a pub and a betting shop. The title of each was subject to a burden which prevented it from being used for the business of either of the other units. The evident purpose of the restrictions was to secure the economic viability of the precinct as a whole. In those circumstances the Lands Tribunal decided that there was no restraint of trade. It is possible to think of examples where the same might be true of private monopolies. A block of flats might have a common heating system, which everyone was bound to use, or at least to pay for. Once again, the restriction is justified by the needs of the community as a whole. In its origins, thirlage would presumably have had the same justification.

7.61 The position is different if the sole or main purpose is restraint of trade. A real burden which prohibits a particular trade or trades for the commercial benefit of the dominant proprietor is not enforceable, as the law currently stands. It is not clear that this rule is satisfactory. Certainly other legal systems are more accommodating. English law seems to accept that commercial benefit can be protected.<sup>138</sup> The position in Germany<sup>139</sup> and France<sup>140</sup> is similar, although subject to qualification. In the United States the reasonableness of the restriction is tested against the familiar criteria developed by the law of restraint of trade. The result is not always to strike it down. As the American Law Institute observes:<sup>141</sup>

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

It can be argued that the American approach is more sophisticated and responsive than the approach currently favoured in Scotland. It is based on the view that, in the modern world, a restraint of trade is not necessarily contrary to public policy. The emphasis is on effect rather than purpose. Whether the effect of a restraint is reasonable depends on the facts and circumstances. We would welcome the views of consultees on whether the American approach is preferable to a simple attitude of striking down all burdens which have as their main purpose a restraint of trade.

7.62 **(4) Public policy.** Of the grounds of invalidity so far considered, all but the first seem founded on public policy. There is in addition a residual category of public policy, just as there is in the law of contract.<sup>142</sup> Various possible factors are mentioned by the American Law Institute in the draft Restatement which was quoted earlier.<sup>143</sup> One ("servitudes that are arbitrary, spiteful, or capricious") was already present in the analysis of the court in *Tailors of*

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<sup>137</sup> 1975 SLT (Lands Tr) 9.

<sup>138</sup> Gray, *Elements* p 1145.

<sup>139</sup> *Münchener Kommentar zum BGB* art 1019, para 3.

<sup>140</sup> Cass Com 15 July 1987, D 1988, 360 note Atias and Mouly; Cass Civ 3e 24 March 1993, RTDCiv 1993, 771, obs Zenati.

<sup>141</sup> American Law Institute, *Restatement (Servitudes)* TD No 2, s 3.6, p 90.

<sup>142</sup> See generally W W McBryde, *The Law of Contract in Scotland* (1987) chap 25.

<sup>143</sup> Para 7.55.

*Aberdeen* ("useless or vexatious"),<sup>144</sup> although a burden which is capricious or vexatious is likely to fall at other hurdles also, such as the praedial rule, or interest to enforce.

7.63 We invite views on the following proposition and question:

**44. (1) A real burden should be invalid if it is -**

**(a) illegal, under any enactment or rule of law, or**

**(b) contrary to public policy, as repugnant with the idea of ownership, or in unreasonable restraint of trade, or for any other reason.**

**(2) Views are invited as to how the "reasonableness" of a restraint of trade should be assessed.**

### Permitted types of obligation

7.64 **(1) Restrictions.** Many real burdens take the form of restrictions, that is to say, of obligations not to do something. But while the English restrictive covenant is confined to restrictions, as its name suggests, the real burden in Scotland has always been wider.<sup>145</sup>

7.65 **(2) Positive obligations.** From the very beginning, the real burden was capable of encompassing positive, or affirmative, obligations, such an obligation of maintenance or an obligation to use the property for a particular purpose.<sup>146</sup> Here Scotland was, and to some extent remains, unusual. Servitudes in civil law systems cannot in general impose affirmative obligations, except incidentally, in support of an obligation of some other type.<sup>147</sup> A servitude obligation must be *in patiendo* and not *in faciendo*. This rule has been received in Scotland in respect of servitudes,<sup>148</sup> but does not apply to real burdens. In English law, positive obligations cannot be imposed either as easements or as (freehold) covenants.<sup>149</sup> The obvious inconvenience which results has produced a flight to leasehold tenure, where positive obligations are competent. The English rule was exported with the rest of the common law, but is now beginning to be departed from. The United States has allowed positive covenants for many years.<sup>150</sup> Positive covenants were introduced to New Zealand by statute in 1986,<sup>151</sup> and their introduction has been recommended by law reform bodies in England and Wales,<sup>152</sup> Ontario,<sup>153</sup> and New South Wales.<sup>154</sup>

7.66 **(3) Rights to use servient tenement.** If Scotland is ahead of most countries in its recognition of positive obligations, it is trailing rather behind in relation to obligations

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<sup>144</sup> *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296 at p 307 per Lord Corehouse.

<sup>145</sup> Para 1.19.

<sup>146</sup> Reid, *Property* para 391. *Tailors of Aberdeen v Coutts* (1840) 1 Rob 296 was a case about positive obligations.

<sup>147</sup> For Germany, see BGB arts 1018 and 1021, and *Münchener Kommentar zum BGB* art 1018 para 41. For France, see Code Civil arts 698 and 699.

<sup>148</sup> Gordon, *Scottish Land Law* para 24-17.

<sup>149</sup> *Rhone v Stephens* [1994] 2 AC 310.

<sup>150</sup> American Law Institute, *Restatement (Servitudes)* TD No 7, s 3.1, p 42. And see also Louisiana Civil Code art 778.

<sup>151</sup> Property Law Act 1952 s 64A (inserted by the Property Law Amendment Act 1986 s 3). There has been similar legislation in Trinidad and Tobago: see Land Law and Conveyancing Act 1981 s 118.

<sup>152</sup> Law Com No 127 paras 6.6 and 6.10.

<sup>153</sup> Ontario LRC, *Covenants* p 102.

<sup>154</sup> New South Wales Land Titles Office, *Review of the Law of Positive Covenants affecting Freehold Land* (1994) para 3.10.

involving use of the servient tenement. The right to make some limited use of the servient tenement is almost always classified as a servitude or easement, even in those countries which have a dual system of easements and covenants. In Scotland the right is a positive servitude. Typical examples are rights of way, rights of pasturage, and rights to take and lead water (*aquaehaustus* and *aquaeductus*). There is a certain neatness in confining such rights to servitudes. Taken together with the abolition of negative servitudes, proposed earlier,<sup>155</sup> it would mean that obligations falling within the first two categories identified above could be constituted only as real burdens, whereas obligations in the final category could be constituted only as servitudes. But there is a difficulty with this exclusive approach. Despite *obiter dicta* to the contrary, the class of positive servitudes appears to be more or less closed.<sup>156</sup> No new servitude has been recognised for 200 years.<sup>157</sup> The law of servitudes stopped when the law of real burdens began, in the closing years of the eighteenth century. Recent case law is scarcely encouraging. In *Mendelssohn v The Wee Pub Co Ltd*<sup>158</sup> the court declined to recognise as a servitude the right to place a shop sign on another's wall, partly on the basis that shop signs were known to the Romans but no servitude right existed in Roman law. In *Neill v Scobbie*<sup>159</sup> the court refused recognition of a right to lead a private electricity line. It may be doubted whether there is a servitude right to park a car<sup>160</sup> or to place an advertising hoarding on the servient tenement. By contrast, there has been a much greater willingness in other countries to allow new servitudes provided they conform to the essential features of the right.

7.67 The current rule in Scotland seems unduly restrictive. No policy purpose is served by disallowing the hanging of signs, or the cabling of electricity, or the parking of cars. One way forward might be a reform of the law of positive servitudes. But there is a natural reluctance to add to the number of rights which can be constituted by prescription and without registration. A purchaser who cannot find out about servitudes by inspecting the register has at least the reassurance of knowing that only a limited range of servitudes are permitted. A more promising approach would be to adjust the law of real burdens so as to encompass rights to make use of the servient tenement. This may already be the law. While real burdens involving use have failed on a number of occasions, the ground of failure does not seem to have been the nature of the burden.<sup>161</sup> A modern case suggests that there is no objection to burdens of this type. In *B & C Group Management v Haren*<sup>162</sup> a title condition permitted the dominant proprietor (a superior) to form, complete and thereafter use a road on the servient tenement. In holding that this was a valid real burden, Lord Cullen said that:<sup>163</sup>

"I was not referred to any authority which persuaded me that the scope for real conditions was confined to an obligation on the part of the feuar to do, or refrain from doing, an act. In my opinion there is no reason in principle why it may not extend to an obligation to suffer or endure an act on the part of the superior."

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<sup>155</sup> Paras 2.42-2.50.

<sup>156</sup> Gordon, *Scottish Land Law* para 24-24.

<sup>157</sup> The last was the servitude of bleaching, in *Sinclair v Magistrates of Dysart* (1779) Mor 14,519, (1780) 2 Pat 554.

<sup>158</sup> 1991 GWD 26-1518.

<sup>159</sup> 1993 GWD 13-887.

<sup>160</sup> Reid, *Property* para 487 (A G M Duncan).

<sup>161</sup> *Ibid*, para 391.

<sup>162</sup> 4 December 1992, Outer House (unreported).

<sup>163</sup> At pp 13-14 of the transcript.

We agree that there is no reason in principle against such a conclusion, and we think it would be of value to put the law beyond doubt. Accordingly we propose that:

**45. It should be possible for a right to make use of the servient tenement to be constituted as a real burden.**

Only limited and, probably, non-exclusive rights could be so constituted. The limitations mentioned earlier would apply.<sup>164</sup> A real burden could not reproduce the effects of a lease. But, for example, fishing and other recreational rights seem sufficiently non-exclusive, and sufficiently praedial,<sup>165</sup> to be constituted as real burdens.<sup>166</sup>

## **Registration**

7.68 **Mechanics.** The burden requires to be registered in the Land Register or the constitutive deed in the Register of Sasines. In the case of the Register of Sasines the deed is copied and then returned to the person who presented it. Hence the full terms of the burden appear on the Register. By contrast, in the Land Register the Keeper is entitled to summarise the burden,<sup>167</sup> although his normal practice is to reproduce it in full. Any summary is, by statute, presumed to be a correct statement of the terms of the burden,<sup>168</sup> although the presumption could doubtless be overcome by reference to the original deed. The details of the burden appear on the D. Section of the title sheet.<sup>169</sup> Registration is normally against the servient tenement only, but we have already proposed the introduction of dual registration.<sup>170</sup>

7.69 **Full terms rule.** The full terms of the burden must appear on the register, for otherwise a successor would not know the extent of his rights or obligations. This rule was settled as early as *Tailors of Aberdeen*:<sup>171</sup>

"They [the cases] prove incontestably the necessity of making whatever obligation is to be cast upon purchasers apparent on the face of the title, and that not merely by giving him a general notice that there is such a burden, but by specifying its exact nature and amount; not merely calling his attention to it, and sending him to seek for it in a known and accessible repository, or even referring to it as revealed in the same repository, but of disclosing it fully upon the face of the title itself."

To appear on the register, the terms must first appear in the constitutive deed. If the entry on the Land Register does not correspond with the terms of the deed, the Register would be inaccurate and could in principle be rectified, although in practice this would often be prevented by the existence of a proprietor in possession.<sup>172</sup>

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<sup>164</sup> Paras 7.55 - 7.63.

<sup>165</sup> At least on the suggested wider reformulation of the praedial rule: see paras 7.42-7.54.

<sup>166</sup> *Harper v Flaws* 1940 SLT 150. But compare *Beckett v Bisset* 1921 2 SLT 33.

<sup>167</sup> Land Registration (Scotland) Act 1979 s 6(2).

<sup>168</sup> *Ibid.*

<sup>169</sup> Land Registration (Scotland) Rules 1980 r 7(1)(a).

<sup>170</sup> Paras 7.4 and 7.5.

<sup>171</sup> (1837) 2 Sh & Macl 609 at p 663 per Lord Brougham.

<sup>172</sup> Land Registration (Scotland) Act 1979 s 9.

7.70 Sometimes the full terms rule leads to unwelcome results. In *Aberdeen Varieties Ltd v James F Donald (Aberdeen Cinemas) Ltd*<sup>173</sup> the Second Division was asked to rule on the validity of the following burden:

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

The reference to an act of parliament was held to be fatal. A purchaser could not know the extent of the burden merely from the registered deed. Hence the burden was unenforceable. This decision appears to invalidate the numerous burdens which apportion liability for common repairs by reference to rateable value, for rateable value can only be determined by consulting the valuation roll. Apportionment by reference to feuduty is also probably invalid, unless the amounts of feuduty are given in the constitutive deed. Our report on the law of the tenement contains recommendations designed to solve this difficulty so far as tenements are concerned,<sup>174</sup> but it seems clear that the full terms rule requires to be reconsidered. In our view it would not be unreasonable to expect a purchaser - or, in practice, his advisers - to consult the statute book, the valuation roll, other deeds registered in the Register of Sasines, or other documents which are publicly and readily available in Scotland. In the case at least of maintenance obligations, there seem strong grounds for applying this rule retrospectively, for in practice such obligations are treated as perfectly enforceable. Accordingly we propose that:

**46. (1) A real burden should not be unenforceable only because it incorporates information which is contained in an act of parliament or statutory instrument, public register, public records, or other document in Scotland which is available to the general public.**

**(2) This rule should be deemed always to have applied in the case of real burdens of maintenance.**

In all other respects, the full terms rule would survive. On normal principles of certainty,<sup>175</sup> the incorporation of material from outside the register would require to be done expressly and in such a manner that the material could be readily identified.

7.71 **Effect of registration.** The creation of a real burden is completed by registration. It appears that registration in the Land Register is curative of any defect of title or capacity on the part of the grantor.<sup>176</sup> Hence it would in theory be possible to create burdens over property which one did not own. However, if the defect in title was discovered, as usually it would be, the Keeper would either refuse to register, or register subject to exclusion of indemnity. The curative effect does not apply to burdens registered in the Register of Sasines, nor to burdens which were first registered there but which now appear on the Land Register following on first registration. Burdens falling into the second category reach the

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<sup>173</sup> 1939 SC 788.

<sup>174</sup> Scot Law Com No 162 para 5.61.

<sup>175</sup> Para 7.19.

<sup>176</sup> Land Registration (Scotland) Act 1979 s 3(1)(b). For the curative effect of the Land Register, see K G C Reid, "A Non Domino Conveyances and the Land Register" 1991 JR 79.

Register, not by registration under s 2 of the 1979 Act, but by being "entered" under s 6(1). Even where it does apply, the curative effect is confined to formal defects in the constitutive deed. It does not serve to cure burdens which are inherently bad on account of content, or lack of precision, or absence of anyone with a title and interest to enforce.<sup>177</sup> Consequently, the fact that a burden appears on the Land Register does not guarantee its validity or enforceability, and no indemnity will be paid if the burden turns out to be unenforceable.<sup>178</sup> Similarly, a burden recorded in the Register of Sasines is not necessarily valid.

7.72 While a real burden cannot become effective without registration, registration does not always mark the moment when the burden comes into force. For example, the constitutive deed might provide for a later date. Special considerations apply to deeds of conditions. Section 17 of the Land Registration (Scotland) Act 1979 provides that a land obligation in a deed of conditions shall, on registration

"become a real obligation affecting the land to which it relates, unless it is expressly stated in such deed that the provisions of this section are not to apply to that obligation."

This provision is not entirely satisfactory.<sup>179</sup> "Real obligation" is not a term of art and its meaning is unexplained and obscure. More importantly, a burden cannot become real in the absence of a dominant tenement. Usually, deeds of conditions are registered by developers, who are sole owners of the land affected. Hence at the time of registration there is only a servient tenement. A dominant tenement does not emerge until the first unit is sold, and until then the developer would be free to remove the burdens by executing and registering a minute of waiver in his own favour.<sup>180</sup> In practice, s 17 is often excluded by developers. We think that s 17 could with advantage be recast, although we make no formal proposal here.

7.73 **Continuing contractual effect.** Even before registration, the burdens are effective at a contractual level, although successors would not be bound.<sup>181</sup> Contractual liability commences with acceptance of delivery of the disposition or other constitutive deed. It is less clear when it terminates. Three views seem possible. Contractual liability may finish when real liability begins, so that once the deed is registered, the obligations bind only as real burdens and no longer as contractual terms. A second view is that, following registration, there is concurrent liability both as a contract and as a real burden, and that contractual liability remains for as long as the two tenements are in the hands of the original parties. A variant on this view would be that contractual liability survives the departure of the original dominant proprietor, provided he assigned his contractual rights to his successor, but would not survive the departure of the original servient proprietor. A third view is that contractual liability continues regardless of events, and will come to an end only under the normal rules of contract law. Thus the original parties would remain bound even after they had disposed of their respective properties.

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<sup>177</sup> This is because of the caveat to s 3(1): "insofar as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or, as the case may be, of being affected as a real right".

<sup>178</sup> Land Registration (Scotland) Act 1979 s 12(3)(g). However, indemnity is paid if the Keeper has expressly assumed responsibility for the enforceability of the burden.

<sup>179</sup> For that reason it was excluded for the deeds of conditions recommended as part of our tenement exercise. See cl 5(5) of the Tenement (Scotland) Bill included in Scot Law Com No 162.

<sup>180</sup> For Land Register titles, a similar problem is caused by s 3(4) of the Land Registration (Scotland) Act 1979 (which provides that a real right or obligation is created as at the date of registration).

<sup>181</sup> Reid, *Property* para 392.

7.74 The choice has practical consequences. The concurrent liability allowed by the second view would put the dominant proprietor in a favourable position. If the real burden were discharged by the Lands Tribunal, he would retain the right to enforce the contract, for the Tribunal has no power in relation to contracts.<sup>182</sup> Again, real burdens would prescribe after five years, on a proposal made earlier in this paper,<sup>183</sup> but contractual obligations would remain in force for twenty.<sup>184</sup> Even if the real burden survived, the dominant proprietor might prefer to sue in contract in order to avoid the rules on interest to enforce.<sup>185</sup>

7.75 The third view encompasses the second but goes further still by allowing the contract to survive loss of ownership. At that point real liability and contractual liability would part company. The new owners of the two properties would be connected by real burden, while the original parties would continue to be connected by contract. Thus the original servient proprietor would still be bound to comply with conditions in respect of land which he no longer owned.

7.76 It is not clear which of these views represents the current law. The third seems so obviously unmeritorious that it can probably be excluded.<sup>186</sup> Arguably there is an implied term that the obligations are to bind contractually only for as long as the original parties remain as owner. It is true in *Scottish Co-operative Wholesale Society Ltd v Finnie*<sup>187</sup> the Second Division held that a disponer retains enforcement rights even where he does not own a dominant tenement; but in that case no dominant tenement had ever existed, so that the conditions were always contractual in nature. In an earlier case, a disponer who had sold the original dominant tenement was held to have no enforcement rights, although this was in a question with a successor of the original servient proprietor and did not raise issues of contractual liability.<sup>188</sup> No definitive choice has ever been made between the second and the first views.

7.77 Our provisional preference is for the first view. The concurrent liability produced by the second view is complicated, and productive of random advantage for the dominant proprietor. Where parties have successfully created a real burden, there is much to be said for abandoning the law of contract. We suggest therefore that:

**47. An obligation which has become enforceable as a real burden should cease to be enforceable as a contractual term.**

### Transmission of burdens

7.78 Once created, real burdens run with both dominant and servient tenements. There is no requirement that the burdens be assigned or otherwise mentioned in individual conveyances.<sup>189</sup> They could not be severed from the property even if the parties so wished.<sup>190</sup>

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<sup>182</sup> The Lands Tribunal can only discharge "land obligations": see Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2), (3).

<sup>183</sup> Paras 5.41 - 5.47.

<sup>184</sup> Because they are obligations relating to land: see Prescription and Limitation (Scotland) Act 1973 Sched 1 para 2(e).

<sup>185</sup> *Scottish Co-operative Wholesale Society Ltd v Finnie* 1937 SC 835.

<sup>186</sup> The Law Commission recommended that it should not apply in England and Wales: see Law Com No 127 para 11.32.

<sup>187</sup> 1937 SC 835.

<sup>188</sup> *J A Mactaggart & Co v Harrower* (1906) 8 F 1101 at p 1105 per Dean of Guild.

<sup>189</sup> *Braid Hills Hotel Co Ltd v Manuels* 1909 SC 120.

<sup>190</sup> *Bannerman's Trs v Howard & Wyndham* (1902) 10 SLT 2 at p 3 per Lord Moncreiff.

In Land Register titles, the burdens already appear on the title sheet of the servient tenement and, under proposals made earlier,<sup>191</sup> may in future appear on the title sheet of the dominant tenement. A conveyance of registered land incorporates the contents of the title sheet.<sup>192</sup> In Sasine titles it was at one time common for the constituent deed to require that the burdens be repeated, or referred to, in all future transmissions of the servient tenement, on pain of nullity. Failure to mention the burdens risked, and risks still, the invocation of the irritancy, although whether the irritancy is enforceable seems an open question. With the abolition of irritancy, proposed elsewhere in this paper,<sup>193</sup> it is difficult to see how this requirement could be enforced. It seems logical that the requirement should be removed, as has already been done by statute in the case of heritable securities.<sup>194</sup> Abolition could be accompanied by the repeal of sections 9(3) and 9(4) of the Conveyancing (Scotland) Act 1924 which make provision for curing titles in cases where burdens have been mistakenly omitted. Section 9(4) allows the recording of a deed of omitted conditions, while s 9(3) cures past omissions if the deed in favour of the current owner includes the burdens. Our formal proposal is that:

**48. (1) Any requirement in any deed that burdens be repeated in future deeds relating to the same property should cease to have effect, and no deed should be challengeable on the ground of failure to comply with such a requirement.**

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

In practice, Sasine conveyances are likely to continue to refer to burdens, if only to avoid claims in warrandice in respect of latent burdens.<sup>195</sup>

## **Community burdens**

**7.79 Variation and replacement.** As communities change, so community burdens may need to change also. In the course of time a community might wish to introduce a management structure, or set up a sinking fund, or invest in recreational facilities, or modify a bar on trade so as to allow office workers to work from home. New ventures may need new regulation. Old burdens may have become obstructive and inappropriate. Under proposals made earlier, community burdens (other than those for maintenance) will lapse automatically after 80 or 100 years and steps may need to be taken for renewal or replacement.<sup>196</sup> All this argues for a flexible method of altering, and augmenting, existing burdens. Here the present law fails by requiring unanimity among owners - a target which, in larger communities at least, is almost unobtainable. We suggest instead that a bare majority of owners should be able to bind the others, and that in some cases the figure might be lower still. A detailed scheme was outlined earlier in connection with minutes of waiver and we adopt it again here.<sup>197</sup> A deed varying or replacing burdens would be effective provided it was executed by the owners of units representing more than 50% of the land area of the community. Views are sought as to whether the figure of 50% should be reduced

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<sup>191</sup> Paras 3.38, 3.55 and 7.5.

<sup>192</sup> Land Registration (Scotland) Act 1979 s 15(2).

<sup>193</sup> Para 4.42.

<sup>194</sup> Conveyancing (Scotland) Act 1924 s 9(1) and (2). These provisions could be repealed and replaced with a provision which applies to all deeds.

<sup>195</sup> Reid, *Property* para 396.

<sup>196</sup> Paras 5.69-5.80 and 7.6-7.11.

<sup>197</sup> Paras 5.7 - 5.19.

to 35% where either 40 years have elapsed since the registration of the original deed of constitution or where the community exceeds 30 units. If a community comprises or includes a tenement, the majority would be calculated by reference to number of units and not to land area.<sup>198</sup> In order to prevent a developer from using his voting power to make changes as units are being sold, there would be a second threshold of 20% of units, by number, each of which would require to be in separate ownership. Where a community consists of three units or fewer, the deed would require to be executed by all the owners. All community burdens could be varied in this way, including burdens imposed before the passing of the legislation.

7.80 The rules just described are intended as default rules only. In creating community burdens of new, parties would be free to lay down their own rules for variation and replacement. For example, the model management scheme mentioned below requires a majority of units by number rather than a majority determined by land area.<sup>199</sup> Another possible change, particularly for larger communities, would be to have a threshold which is lower than 50%.

7.81 In all cases the deed used would be a deed of conditions. This is consistent with the recommendation in our tenement report that the management scheme for tenements be alterable by deed of conditions.<sup>200</sup> Since the imposition of new burdens is likely to be accompanied by the discharge of some existing burdens, we suggest that a deed of conditions should be capable of being used for both purposes and that it should not be necessary to have a separate minute of waiver.

7.82 We suggested earlier (1) that a minute of waiver might be executed by an unregistered proprietor and that, once registered, a minute of waiver would bind all those holding real rights in the community,<sup>201</sup> but (2) that an ordinary deed of conditions should not benefit from either of those concessions.<sup>202</sup> Where, however, a deed of conditions is used to vary or replace existing community burdens, the rules should be the same as for minutes of waiver. This is partly for reasons of convenience, but partly also because much the same policy considerations apply. A deed varying or replacing burdens will often have to be signed by a large number of people. Collecting signatures will be a difficult task. It would increase the difficulties to require that all of the signatories have a completed title; and it would make matters considerably worse if it were also necessary to collect the signatures of heritable creditors, lessees and other holders of subordinate real rights. In practice there is unlikely to be prejudice to creditors and lessees. A deed of variation and replacement will require majority agreement. Changes will usually be modest and - if the majority acts rationally - for the benefit of the community as a whole. In any case, it is difficult to argue that heritable creditors and lessees should be put in a more favourable position than the minority of owners whose consent and signatures are not required.

7.83 **Reduction.** Occasionally the majority may behave unwisely, or even unfairly. A determined individual might persuade a majority to sign up to a change which was in his own interests but not in the interests of anyone else. Or a change which benefited the

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<sup>198</sup> This is consistent with the recommendations in our report on the law of the tenement: see Scot Law Com No 162 paras 5.12 - 5.18.

<sup>199</sup> Model management scheme (appendix 2) r 12.1(b).

<sup>200</sup> Scot Law Com No 162 para 3.20.

<sup>201</sup> Paras 5.29 and 5.30.

<sup>202</sup> Paras 7.38-7.41.

community as a whole might be unfair to some of its members. For example, a person who had acquired a unit for the purposes of carrying on a business would be prejudiced by the introduction of a burden which prohibited business use. Yet the effect of such a prohibition might be generally beneficial. Again, the redistribution of maintenance obligations would prejudice those whose liability was increased.

7.84 It seems obvious that the actions of the majority should be subject to some kind of review. In our report on the law of the tenement we recommended that decisions taken by a majority under a management scheme should be capable of being annulled by the sheriff if either they were not in the best interests of the owners or if they were unfairly prejudicial to one or more owner. Decisions required to be notified to all owners as they were taken, and a period of 21 days thereafter was set aside for applications to the sheriff.<sup>203</sup> It is desirable that the review procedure for tenements should not be different from that for other properties, and a tenement should not be subject to two different procedures depending on whether the act reviewed concerns a management scheme or a real burden. In fact the model proposed for tenements can be readily adapted for real burdens. Since what is being reviewed is a deed rather than a decision, the appropriate sanction would be reduction. Reduction<sup>204</sup> is normally reserved to the Court of Session, but there seems no particular difficulty in giving the sheriff jurisdiction in this limited case. The grounds for review would be the same as for tenements. An application to the sheriff should be competent within 21 days of notification of the deed or, if no notification was given, within 5 years of its registration. In view of the size of some communities we do not think that notification should be compulsory. Reduction would not be retrospective in effect. For deeds on the Land Register it would be necessary to amend the Land Registration (Scotland) Act 1979<sup>205</sup> to allow rectification to take place, following the reduction.

7.85 **Model management scheme.** Many communities consist merely of a collection of individual units, without shared facilities. Traditional housing estates are often like this. But in modern developments, shared facilities are common. Sometimes this amounts to no more than a shared garden, or parking area, but it may also include recreational facilities such as a swimming pool or gymnasium or health club, or, as in sheltered housing, medical and care facilities. In the United States, housing communities can sometimes represent small municipalities, with their own security guards, sports facilities, and shops. This is a developing trend. The American Law Institute commented earlier this year<sup>206</sup> that such "common interest communities"

"provide an increasing share of the housing available to Americans at all income levels. Their popularity is due to many factors, but important among them is their ability to increase the amenities available to residents by providing a workable mechanism for sharing enjoyment and spreading the costs across a stable base of contributors. Another important fact is the mechanism they provide for controlling the community environment through provision of services, imposition of design controls, enactment of rules and regulations, and enforcement of servitudes [ie real burdens]. The size and scope of common interest communities vary widely, from those that have little power to affect the lives of their members or others to those that take the place of traditional

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<sup>203</sup> Scot Law Com No 162 paras 5.19 - 5.25.

<sup>204</sup> Other than *ope exceptionis*.

<sup>205</sup> By adding a new exception to s 9(3), as was done for judicial rectification.

<sup>206</sup> American Law Institute, *Restatement (Servitudes)* TD No 7 ch 6, pp 123-4.

towns. Many associations provide services that complement or provide a substitute for government services. Parks and other recreational facilities, street maintenance, security and utilities may be provided by associations."

Private communities in such an elaborate and complex form may never reach Scotland. But even in Scotland the trend is towards an increased number and range of shared facilities.

7.86 Shared facilities require to be managed and maintained. Doubts as to whether this could be achieved by real burdens will be removed by the reformulation of the praedial rule proposed earlier.<sup>207</sup> A developer can thus make appropriate provision in the deed of conditions. In our report on the law of the tenement we put forward a model management scheme, known as Management Scheme B, for the management and maintenance of the shared parts of a tenement.<sup>208</sup> This is intended as an optional scheme, which a developer can use if he wishes, either in its original or in an amended version. Alternatively he can make his own arrangements, as at present. The tenement scheme is available only for developments which comprise, or at least include, tenements.<sup>209</sup> We would welcome views as to whether this scheme, or some scheme like it, should be made more widely available.<sup>210</sup>

7.87 In order to draw responses we have reproduced the model scheme in Appendix 2, with some minor alterations to make it more suitable for non-tenemental property. Its main features can be summarised as follows.<sup>211</sup> The community is governed by an owners' association, which is a body corporate but not a company. The complex rules of company law do not apply. An owner of a unit is automatically a member of the association. The members meet once a year, but between meetings the association is run by a manager, assisted by an advisory committee of owners. The main function of the association is to manage and maintain the shared facilities. Provision is made for annual budgeting, the levying of a service charge and, if desired, the building up of a reserve fund for long-term repairs or other projects. An attempt has been made to make the drafting as simple as is consistent with legal certainty. The distinctive feature of the scheme is the status of the association as a body corporate governed by simple and informal rules. By contrast, any body corporate created under the present law would require to be governed by the Companies Acts.

7.88 Summing up, we invite views on the following propositions and question:

**49. (1) Community burdens should be capable of being varied, discharged or replaced by a deed of conditions executed in accordance with proposal 15.**

**(2) Alternative provision for execution may be made in the constitutive deed (or any variation thereof).**

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<sup>207</sup> Paras 7.42-7.54.

<sup>208</sup> Scot Law Com No 162 paras 3.17 - 3.20, and part 6.

<sup>209</sup> Tenements (Scotland) Bill cl 5(1)-(3) (reproduced in appendix 1 to Scot Law Com No 162). For a much earlier attempt at providing a statutory framework for management, see the Dwelling Houses (Scotland) Act 1855 (now repealed).

<sup>210</sup> If that were done, it would not be necessary to enact Scheme B for tenements. The model management scheme would be available for property of all types, including tenements. This would result in a shortening and simplification of the proposed tenements legislation.

<sup>211</sup> For a more detailed discussion, see Scot Law Com No 162, part 6.

- (3) A person should be entitled to execute the deed as owner even if his right has not been completed by registration.
- (4) On registration in the Land Register or Register of Sasines, the deed of conditions should be effective for all purposes and should bind all those holding real rights in a unit or in any other part of the community.
- (5) If, in relation to a deed of conditions executed under this proposal or a minute of waiver executed under proposal 15, the sheriff is satisfied that -
- (a) the deed is not in the best interests of the community, or
  - (b) the deed is unfairly prejudicial to one or more of the owners,
- he should be able to make an order reducing the deed in whole or in part.
- (6) An application under (5) should be available to any owner who was not a signatory to the deed, and should be made -
- (a) in a case where he was notified of the deed, within 21 days of the notification;
  - (b) in any other case, within 5 years of registration of the deed.
- (7) Views are invited as to whether a model management scheme should be made available as an option for the management of communities and for the maintenance of shared facilities.

## PART 8 PRE-EMPTION, REDEMPTION, REVERSION AND OTHER OPTIONS TO ACQUIRE

### Classification

8.1 Pre-emption, redemption and reversion are all examples of options to acquire property. Other examples also exist, although without a special name. Naturally options can arise in relation to property of all types, but in this paper our interest is confined to land and buildings.

8.2 **Pre-emption.** A right of pre-emption is a right of first refusal in the event that the owner is willing to sell.<sup>1</sup> Its value to the holder (A) depends on the future conduct of the owner (B). The triggering event is B's decision to sell. If B chooses to sell, A can exercise his option to buy; but if B chooses not to sell, the option does not arise. In practice A was often the previous owner of the property, so that right of pre-emption was a condition of the sale from A to B. Much more rarely, the sale was the other way around. For example, B might sell part of his property to A while conferring on A a right of first refusal in the event that he later came to sell the rest.<sup>2</sup> A right of pre-emption might also be granted to someone with no previous or current connection with the property, although this is uncommon in practice.

8.3 **Redemption.** A right of redemption is a right of repurchase, whether at the option of the holder, or at some fixed point in time, or on the occurrence of some future event such as the death of the owner or the granting of planning permission. Unlike a pre-emption, the option does not depend on a decision made by the owner of the property. Redemption is the buying back of that which one formerly had, and usually the redemption was inserted as a condition of a sale by the holder of the right.

8.4 **Reversion.** The relationship between reversion and redemption is one of genus and species.<sup>3</sup> Reversion includes, but is wider than, redemption. A right of reversion is a right to reacquire property upon the fulfilment of a condition or conditions. Unlike redemption, the exercise of the right may not involve the payment of money or value. Bankton writes that:<sup>4</sup>

"A conventional reversion, is that whereby the granter of a disposition of lands has a right to redeem the same, upon payment of a certain sum, or performing other conditions agreed upon between him and the creditor."

The reference to "creditor" rather than to "owner" is because the main use of reversions was in the grant of wadsets and of their later equivalent, securities constituted by *ex facie* absolute disposition. A, having borrowed money from B, secured the loan by disposing to B heritable property. But the disposition was subject to a reversion on the repayment of the

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<sup>1</sup> The definitions of the institutional writers are couched in feudal terms. For example, Bell, *Principles* s 864: "The Clause of Pre-emption is an obligation by the vassal to give the first offer to the superior if he means to sell his land." See also Erskine II.5.28, and Bell, *Commentaries* II, 27.

<sup>2</sup> eg Halliday, *Opinions* pp 472-4.

<sup>3</sup> The only modern legislative provision, s 12 of the Land Tenure Reform (Scotland) Act 1974, refers to "a right of redemption or reversion".

<sup>4</sup> Bankton II.10.8. And see also Stair II.10.3; Erskine II.8.2; and Bell, *Principles* s 902.

loan. Depending on the size of the loan, the amount payable for the reversion was often much smaller than the value of the property.

8.5 Sometimes "reversion" is used in the sense of disencumbering. In s 12 of the Land Tenure Reform (Scotland) 1974, where otherwise reversion is used in its normal and strict sense, reference is made to "the right of a lessor to the reversion of a lease". A similar usage would be the right of a debtor to the reversion of a standard security. The underlying idea seems to be that when a lease or security comes to an end, it is handed back - or reverts - to the owner, and the owner is restored to his full rights. As an account of the extinction of real rights this may leave something to be desired, but in any event we do not follow this strained usage in this paper.

8.6 **Innominate options.** There are also options without names. The main example not already mentioned is where a third party has a right to acquire at a time of his choosing, or on the occurrence of some event.<sup>5</sup> In the commercial world many options are like this.<sup>6</sup> They are distinguished from rights of redemption and reversion by the fact that the person entitled to exercise the right is not a previous owner.

8.7 **Methods of classification.** Options to acquire can be classified in more than one way. A possible defining feature would be whether value has to be given in exchange for the option's exercise. Another would be whether the option is held by a previous owner or by a stranger to the property. For present purposes, however, it is more useful to classify by reference to the type of event which triggers the option. The trigger event might be wholly within the control of the holder of the right, so that the option can be exercised at will. Or the trigger event might be within the control of the owner. An intermediate possibility is that the option is triggered by an event outside the control of either party. In practice these three categories reduce readily to two. On the one hand there are those options which are triggered by the owner; and on the other hand there are those options which are triggered in some other way. Rights of pre-emption fall into the first category. A right of pre-emption is triggered by the owner's decision to sell. All other options to acquire, including rights of redemption and reversion, fall into the second. It seems hardly necessary to say that, from the point of view of an owner, the first is far less burdensome than the second.

## Juridical nature

8.8 Options can be set up in a number of different juridical guises. Four, at least, are available as the law currently stands, while a fifth has been attempted but not successfully.

8.9 **(1) Contract.** An option is often no more than an ordinary contract. As such it is perfectly effective for as long as the obligant continues to own the property, but if he sells to someone else the option is usually defeated. Sometimes a sale would be in breach of a term of the option agreement, whether express or implied, so that damages would be due. Further, if the purchaser knew of the option, and hence of the breach, his title would be reducible on the basis of the rule against "offside goals".<sup>7</sup> In practice, purchasers do not usually know of the contractual obligations of their authors, although an option contained in

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<sup>5</sup> Other than, of course, the owner's decision to sell. An option dependent on such a decision is a right of pre-emption.

<sup>6</sup> eg *Stone v MacDonald* 1979 SC 363.

<sup>7</sup> Reid, *Property* para 698(1).

a deed recorded in the Register of Sasines would be publicly available and hence within the constructive knowledge of a purchaser.<sup>8</sup> By contrast, the Land Register would not normally extract from a deed an obligation which was merely contractual in effect.

8.10 **(2) Standard security.** A contractual option can be secured by a standard security granted over the property to which the option referred.<sup>9</sup> This gives some additional protection to the holder of the option. Admittedly the statutory remedies available on default seem scarcely appropriate for non-pecuniary obligations. But a security will at least alert a purchaser to the existence of the option, and put him in bad faith for the purposes of the rule against offside goals. In practice the holder will be contacted and a discharge sought, and as part of the negotiations the option might come to be renewed.

8.11 **(3) Real burden.** An option can be constituted as a real burden, and rights of pre-emption in particular are commonly inserted in grants of feu made in rural areas. If constituted as a real burden, an option would in theory run with the land and bind successive owners of the affected property. But in practice a number of factors have reduced the effectiveness of options constituted as real burdens.

8.12 In the first place, by s 9 of the Conveyancing (Scotland) Act 1938 an option in the form of a right of pre-emption is limited to a single chance to buy. If the property is offered to the holder of the right, he must either accept the offer or lose his option. There is no second chance. Either way the real burden is extinguished. Thus a pre-emption constituted as a real burden is usually no more durable than a pre-emption constituted as an ordinary contract, although some differences remain.<sup>10</sup> Section 9 is retrospective, but only for pre-emptions in grants in feu.

8.13 Secondly, by s 12 of the Land Tenure Reform (Scotland) Act 1974 an option in the form of a right of redemption or reversion is restricted in duration to 20 years. It will still run with the land, but only for a short period. This provision is not retrospective and does not affect redemptions created prior to 1 September 1974.<sup>11</sup>

8.14 Thirdly, options not falling into either of the above categories, while not restricted by statute, are difficult to constitute as real burdens for other reasons. Most real burdens are created by or in association with a conveyance, and are for the benefit of the granter of that conveyance. This makes them suitable for redemptions and pre-emptions. The granter is given a right to reacquire his former property. They are less suitable for conferring options on third parties who have no previous connection with property. Technically such a real burden would be possible, for a real burden can be created in favour of a *tertius*. But in practice options are rarely or never created in this way.

8.15 Fourthly, pre-emptions and redemptions are constituted either as feudal or as neighbour burdens,<sup>12</sup> more usually the former. Following feudal abolition, only neighbour burdens will continue to be available. That creates a number of difficulties. The granter (or other holder) will need to own neighbouring land which is capable of acting as a dominant

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<sup>8</sup> *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74.

<sup>9</sup> Standard securities can secure obligations of any kind, including obligations *ad factum praestandum*. See Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(8)(c).

<sup>10</sup> For the differences, see para 8.23.

<sup>11</sup> See further paras 8.21, 8.48 and 8.50.

<sup>12</sup> For the meaning of neighbour burdens, see para 1.5.

tenement. It will need to be shown that the option is for the praedial benefit of that land rather than merely for the personal benefit of its owner.<sup>13</sup> And obvious but unchartered difficulties occur in the event that the dominant tenement is divided and its constituent parts come to be held by different people.<sup>14</sup>

8.16 Finally, the most effective remedy for checking breaches of pre-emptions and redemptions is irritancy. But under proposals made both here<sup>15</sup> and in our forthcoming report on the abolition of the feudal system, irritancy will cease to be available as a remedy for real burdens. It will continue to be possible to reduce dispositions granted in breach of pre-emptions and redemptions.<sup>16</sup>

8.17 **(4) Reversion Act 1469 (c 3).** The Reversion Act of 1469 provides as follows:

"ITEM As tuiching the new Inuentionis of selling of landis be chartir and sesing and takin again of Reuersionis And It happin the byare to sell again the samyn land to ane vthir persone It is now sene expedient in this present parliament and according to law and conscience that the sellare sall haue Recourse to the samyn landis sauld be him vnder lettre of Reuersione to quhatsumeir handis the said lettre cummys payand the mone and schawand the Reuersione and haue sic priuelege and fredome aganis the personis that haldis the said landis as he suld haue again the principale first byare."

The 1469 Act needs to be read together with the Registration Act 1617 (c 16), which provides for the recording of reversions in the Register of Sasines. In 1469 reversions were evidently "new Inuentionis". The effect of the Act is that reversions run with the land provided they have been registered under the Act of 1617. The holder of the reversion is to have "sic priuelege and fredome" against a future owner ("the personis that haldis the said landis") as he had against the original grantee ("the principale first byare"). In effect, the 1469 Act creates a real burden in favour of a person, for there is no requirement that the reversioner hold a dominant tenement.<sup>17</sup> This Act was designed for wadsets, and was later used to protect the reversionary interest of a creditor under a security constituted by an *ex facie* absolute disposition. But while the Act has tended to be discussed in the context of security rights,<sup>18</sup> there is nothing in its wording to prevent its use for a wider category of reversions arising on sale. The Act is now subject to s 12 of the Land Tenure Reform (Scotland) Act 1974, mentioned above, which limits new reversions to 20 years.

8.18 **(5) Lease.** For completeness, it should be mentioned that an option to acquire cannot be made to run with the land by being made a term of a lease. This was decided in *Bissett v Magistrates of Aberdeen*<sup>19</sup> where it was held that an option to buy conferred on the tenant was not *inter naturalia* of the lease and so did not bind a successor of the original landlord.

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<sup>13</sup> For the praedial rule, see paras 7.42-7.54.

<sup>14</sup> For this problem, see further paras 8.42-8.47.

<sup>15</sup> Para 4.41.

<sup>16</sup> *Matheson v Tinney* 1989 SLT 535; *Roebuck v Edmunds* 1992 SLT 1055. This is an application of the rule against offside goals. Since the pre-emption or redemption appears on the register, an incoming purchaser is treated as being in bad faith.

<sup>17</sup> For real burdens in favour of a person, see paras 2.53-55.

<sup>18</sup> Mackenzie, *Observations on the Acts of Parliament* (1686) p 67; Erskine II.8.9. But compare Craig *Jus Feudale* II.6.1 and Stair I.14.4.

<sup>19</sup> (1898) 1 F 87. However, if the new landlord knows of the option, he will be affected on the basis of the rule against offside goals: see *Davidson v Zani* 1992 SCLR 1001.

8.19 **Evaluation.** Of the four available methods of constituting options to acquire, methods (1) and (2) are unexceptionable and will not be discussed further here. Parties are generally free to contract as they wish, and there is no reason why the obligations arising under such a contract should not be secured by a standard security. The use of real burdens (method (3)) raises difficult issues which are discussed below. The Reversion Act 1469 (method (4)) should presumably be repealed.<sup>20</sup> It has been unnecessary since 1970, when securities constituted by *ex facie* absolute dispositions ceased to be competent. Their replacement, the standard security, is a right in security in the strict sense, ownership remaining with the debtor. This means that there is no ownership in the creditor which could be the subject of a reversion. In practice the 1469 Act has been forgotten about. We would not wish it to be revived. Outside the field of securities, reversions are potentially too oppressive to be elevated into real rights.<sup>21</sup> Accordingly we propose that:

**50. The Reversion Act 1469 (c 3) should be repealed.**

**Redemptions, reversions and other options**

8.20 In this and the following section we consider whether it should continue to be possible for options to acquire to be constituted as real burdens. The next section<sup>22</sup> considers rights of pre-emption. In this section we are concerned with other options, that is to say, with options which are triggered other than by the actions of the owner of the property.<sup>23</sup>

8.21 Options falling into this category are potentially oppressive in that the owner has no control over when, or whether, the option is to be exercised. A person may lose his property without his consent and, in some cases, without adequate compensation. This is private compulsory purchase. It is one thing for an owner to agree to redemption by contract. Then there is an initial act of consent and, sometimes, the payment of money. But it is another thing entirely for a successor of that owner to be bound. This does not seem an appropriate use of real burdens. It may even be challengeable as being repugnant to ownership,<sup>24</sup> although the real burden has been upheld in two reported cases, both in the context of a grant in feu.<sup>25</sup> However, doubt was expressed as to whether successors would be bound if the repurchase price was no more than "elusory".<sup>26</sup> Since 1974 redemptions have been restricted to a duration of 20 years.<sup>27</sup> We would now go further and propose that, in future, options to acquire (other than pre-emptions) should not be capable of being constituted as real burdens at all. Such options should remain in the realm of contract law, supported, if need be, by the grant of a standard security. Our formal proposal is that:

**51. It should no longer be possible for a right of redemption or reversion or other option to acquire (but not including a right of pre-emption) to be constituted as a real burden.**

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<sup>20</sup> Consequential amendments would presumably also be necessary, for example to the Registration Act 1617. A minor but related act which should also be repealed is the Redemptions Act 1661.

<sup>21</sup> Para 8.21.

<sup>22</sup> Paras 8.22-8.47.

<sup>23</sup> For this distinction, see para 8.7.

<sup>24</sup> Paras 7.57 and 7.63.

<sup>25</sup> *Strathallan v Grantley* (1843) 5 D 1318; *McElroy v Duke of Argyll* (1902) 4 F 885.

<sup>26</sup> *McElroy v Duke of Argyll* (1902) 4 F 885 at p 889 per Lord Kyllachy.

<sup>27</sup> Land Tenure Reform (Scotland) Act 1974 s 12.

## Rights of pre-emption

8.22 **Contract or real burden?** After the abolition of the feudal system, the only real burden available for rights of pre-emption will be the neighbour burden. Further, the duration of such a burden will be subject to s 9 of the Conveyancing (Scotland) Act 1938, which limits its holder to a single opportunity to accept or refuse an offer to acquire. The question is whether more needs to be done. The choice lies between leaving the law as it is, or barring the use of real burdens altogether so that pre-emptions are in future confined to contracts. Both produce similar results. Issues with successors become important only when the affected property is transferred; but since transfer will usually induce an offer back to the holder of the right, a right of pre-emption will in most cases be extinguished by s 9 before the property reaches the hands of a successor. In other words, the effect of s 9 has been to reduce the real burden to little more than a contract. Professor Halliday put the point in this way:<sup>28</sup>

"In view of the provisions of the modern statutes ... it is not now permissible to create a right of pre-emption which can be effective against the lands in all time coming ... since on the occasion of the first sale the offer must be made to the superior or grantor of the original disposition and, if not then accepted, becomes null in all time coming. Accordingly a clause of pre-emption ... can create only a contractual or personal obligation ... ."

8.23 Yet differences remain. There can sometimes be transfer without an offer back to the holder of the pre-emption; and while a contractual right of pre-emption would then be defeated,<sup>29</sup> a real burden would survive and be enforceable against the new owner. There are at least three cases in which this might occur:

- (i) *Sale without offering back.* The property might be sold without first offering it back to the holder of the right of pre-emption. Such a breach of pre-emption is more common than might be supposed.<sup>30</sup> But even where the holder is approached, the approach may fall short of the formal offer required by s 9 as a condition of extinguishing the pre-emption.<sup>31</sup> Hence a pre-emption in the form of a real burden would survive and be enforceable against the new owner.
- (ii) *Gift.* Pre-emptions are triggered by sale but not, or at least not usually,<sup>32</sup> by gift. Hence if property is given away, whether during the lifetime of the owner or as a result of his death, the pre-emption does not apply. The donee or legatee would take the property free of a pre-emption which was contractual in nature, although not of one which had been constituted as a real burden.
- (iii) *Sale under compulsion.* In *Ross & Cromarty District Council v Patience*<sup>33</sup> it was held by the House of Lords that the exercise by a tenant of a statutory right to buy under the Housing (Scotland) Act 1987 was not a sale which triggered a right of pre-emption.

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<sup>28</sup> Halliday, *Opinions* p 421.

<sup>29</sup> Although if (i) the transfer was in breach of the pre-emption and (ii) the transferee was gratuitous or in bad faith, the conveyance could be reduced on the principle of offside goals. See para 8.9.

<sup>30</sup> For two quite recent examples, see *Matheson v Tinney* 1989 SLT 535 and *Roebuck v Edmunds* 1992 SLT 1055.

<sup>31</sup> Para 8.38.

<sup>32</sup> Occasionally gift is included. See Halliday, *Conveyancing* para 32-73, and Halliday, *Opinions* pp 466-71. If pre-emptions were to be competent real burdens in the future, we would wish to exclude cases of gift.

<sup>33</sup> 1997 SC(HL) 46.

In their Lordships' view, pre-emption was concerned only with voluntary sales. Here the sale was involuntary. Hence the council could sell to the tenant without first having to offer the property back to the holder of the pre-emption right. Although defeated on this occasion, the pre-emption would presumably survive for another day and would be triggered if the former tenant came to sell.<sup>34</sup> Other cases of involuntary sale would fall under the same rule, for example sale arising from compulsory purchase. Professor Halliday's view was that a sale by a heritable creditor in enforcement of a security is properly classified as a voluntary sale.<sup>35</sup>

**8.24 Arguments in favour of contract.** We have already proposed that rights of redemption and other options to purchase should in future be created as contracts only and not as real burdens.<sup>36</sup> A number of arguments support the same conclusion for rights of pre-emption.

**8.25 Simplicity.** Pre-emptions are real burdens in name alone. By and large they operate only as contracts, whatever the outward form. It would simplify the law, without changing much in practice, if it ceased to be competent to create pre-emptions as real burdens. This would be the logical conclusion of the reform process begun in 1938 and continued in 1970 and 1974.<sup>37</sup>

**8.26 Technical difficulties.** Later we identify a number of technical problems concerning the exercise of rights of pre-emption.<sup>38</sup> While some of these affect all pre-emptions, however constituted, the problem created by division of the dominant tenement applies to real burdens alone. This suggests that the *status quo* is not an option. If pre-emptions are to continue as real burdens, it will be necessary to introduce amending legislation. It is not clear that this is worth the trouble.

**8.27 Over-availability.** For as long as pre-emptions can be constituted as real burdens, they are too easy to use. A pre-emption is created by a short clause in a deed which is already being drawn up for other reasons. The temptation to add a pre-emption can be hard to resist, and yet in practice pre-emptions are rarely exercised. In the result, titles are often burdened for no very good reason. In parts of rural Scotland rights of pre-emption are inserted into conveyances almost as a matter of style. The law ought to be more demanding. If a seller could be sure of bringing in successors only by securing his pre-emption with a standard security,<sup>39</sup> pre-emptions would be used more sparingly and with more regard to when they were required.

**8.28 Arguments in favour of real burden.** But there are also counter-arguments which support the continuing value of using real burdens as a means of creating rights of pre-emption.

**8.29 Acceptable on policy grounds.** Over-use by superiors has given pre-emption a bad name. On the whole it is not deserved. Rights of pre-emption can be useful for a seller

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<sup>34</sup> McDonald, *Conveyancing Manual* para 33.13.

<sup>35</sup> Halliday, *Opinions* pp 477-9.

<sup>36</sup> Paras 8.20 and 8.21.

<sup>37</sup> Important amendments were made to s 9 of the Conveyancing (Scotland) Act 1938 by s 46 of the Conveyancing and Feudal Reform (Scotland) Act 1970 and by s 13 of the Land Tenure Reform (Scotland) Act 1974.

<sup>38</sup> Paras 8.34-8.47.

<sup>39</sup> Para 8.10.

without being oppressive to a buyer. An estate owner may be more inclined to sell if there is an opportunity for reacquisition, and the abolition of pre-emption might have the effect of making less land available, particularly in rural Scotland. This potential benefit to the seller is achieved without much in the way of burden on the buyer. As has been observed by the Lands Tribunal<sup>40</sup>

"a right of pre-emption is not so much burdensome as inconvenient in that any sale is rendered conditional rather than immediate."

The owner can still sell. He will still receive the market value. The only restriction is that he may not be able to choose the purchaser. Many obligations recognised as real burdens or servitudes are far more burdensome than this. Pre-emption might perhaps be oppressive if it was of perpetual duration, but that has not been the law since 1938.

8.30 Pre-emptions are well known in other countries, although they do not always run with the land.<sup>41</sup> In the United States, rights of first refusal are valid provided that they are reasonable, reasonableness being measured by reference to the following criteria:<sup>42</sup>

"If the right to purchase is on the same terms and conditions as the owner may receive from a third party, if the procedures for exercising the right are clear, and if the period within which it must be exercised is relatively short, the right of first refusal is valid unless the purpose is not legitimate."

A valid right of first refusal runs with the land without limit of time.

8.31 *Better than the alternative.* It is not certain that contractual rights of pre-emption would be an improvement on real burdens. A contractual right can be made to do much of the work of real burdens, but only if its terms are more severe. In the absence of real burdens, there would probably be a stiffening of the terms of contractual options. Redemptions might be preferred over pre-emptions; or, where pre-emptions were used, the option might be triggered by gift as well as by sale. This last point is important. A true pre-emption strikes only at sale, and donation is unaffected. The only restriction in a pre-emption is that, if an owner wishes to sell, he must give first refusal to the holder of the right. But if he wants to give the property away he is free to do so. In this way a person who wishes only to make a gift is not forced to make a sale; and pre-emption does not prevent property from being handed down a family. Here real burdens protect the interests of both parties. The owner can make the gift; and the holder of the pre-emption retains his right for use against the donee, should the donee wish to sell. By contrast, a contract could protect the holder only at the cost of extending the pre-emption to gift, for otherwise a gift would defeat the pre-emption.

8.32 *Publicity.* Real burdens appear on the register, and, under proposals made earlier, will require to be entered against the title of both dominant and servient tenements.<sup>43</sup> They are too public to be overlooked. By contrast, a contractual pre-emption might easily escape

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<sup>40</sup> *Banff and Buchan District Council v Earl of Seafield's Estate* 1988 SLT (Lands Tr) 21 at p 22.

<sup>41</sup> See eg Gray, *Elements* p 146 (England and Wales); G W Hinde and D W McMorland, *Butterworths Land Law in New Zealand* (1997) paras 2.142 ff; Silberberg & Schoeman, *Property* pp 57 ff (South Africa); W L Hargrave (1987-8) 48 *Louisiana Law Rev* 456 at pp 472-4.

<sup>42</sup> American Law Institute, *Restatement (Servitudes)* TD No 2, p 57, para 3.4f.

<sup>43</sup> Paras 7.25 ff.

notice. The owner might forget about it. Even if he remembered, he might fail to tell his solicitor when the property came to be sold. The file containing the contract might be destroyed as part of a routine disposal of old files. There would be nothing to alert a purchaser. Of course, a contractual pre-emption might appear on the register in the form of a standard security. But if it did not, there is danger of the right being lost by inadvertence.<sup>44</sup>

8.33 **Evaluation.** There is merit in both sets of argument, and we have not reached a concluded view on whether it should continue to be possible to create pre-emptions as real burdens. We would welcome the views of those with experience in this matter.

**52. Views are invited as to whether it should continue to be possible for a right of pre-emption to be constituted as a real burden.**

**Reform of pre-emptions**

8.34 If it is decided that pre-emption should survive as a real burden, it will be necessary to consider reform of the manner in which the right is exercised. There are two main issues.

8.35 **(1) Price and other conditions.** In a pre-emption, the price and other conditions are usually determined by reference to an offer made by a third party. A typical clause of pre-emption would be the following:<sup>45</sup>

It shall not be in the power of the disponee or his successors in the ownership of the subjects hereby disposed or any part thereof to sell, alienate or dispose of the said subjects or any part thereof to any person until he or they have first offered the same in writing to me or my successors as proprietors for the time being of [*the dominant tenement*] being at such price and on such other conditions as any other person shall have offered for the same.

Price and other conditions are determined by market forces. This protects the owner, for even if the right of pre-emption is exercised, the owner is making the same bargain which he would have made on the open market. However, this method of proceeding has some serious disadvantages.

8.36 In the first place, it is unfair to the third party. He is being duped into offering for a property which, despite appearances to the contrary, was not being sold on the open market. His offer could not be accepted. Its only purpose was to fix the terms for a sale to someone else. This does not seem at all satisfactory. The third party will have invested time and money. He will have paid fees to lawyers and surveyors. But he will have gained nothing in return.

8.37 In the second place, it is potentially unfair to the holder of the right of pre-emption. He must either pay whatever price is offered for the property or lose his right. In some cases there may be a risk of collusion between the owner and the third party.

8.38 In the third place, the procedure is slow. A right of pre-emption is extinguished by s 9 of the 1938 Conveyancing (Scotland) Act if, and only if, "an offer has been made" to the

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<sup>44</sup> Subject to a possible claim for damages.

<sup>45</sup> Based on Halliday, *Conveyancing* vol II, para 32-80.

holder of the right. Read together with a typical clause of pre-emption, this means a written offer on the same terms and conditions as offered by a third party. The holder then has 21 days to accept or refuse. This time scale is hardly workable in practice. The pre-emption offer cannot be sent until the property has been marketed, a closing date set, and offers received. The seller must then wait 21 days. If, at the end of that period, the holder of the pre-emption decides not to buy, the owner may find that the other interested parties have lost patience and that the property requires to be re-marketed. It is hardly surprising that, in practice, the owner writes to the holder before the property is marketed in order to discover his intentions. If the holder indicates that he does not wish to buy, the property is marketed and sold in the normal way. Quite often no formal offer is ever made to the holder, with the result that s 9 is not satisfied and the pre-emption survives the sale.

8.39 The key to reform is to change the method of determining the price. If the price could be determined in advance, the issue of the pre-emption could be settled before the property goes on the market. The holder could be approached and asked his intentions. As now he would have 21 days to make up his mind. If he decided not to buy, that would be conclusive, the pre-emption would be extinguished for all time, and the property could be put on the open market. On the production of evidence of refusal the Keeper could then delete the pre-emption from the title sheet. If, however, he decided to buy, the property would not be put on the open market, and the price would be fixed in some other way. A possible model is s 9(3) of the Church of Scotland (Property and Endowments) Amendment Act 1933 which provides, in relation to a statutory right of pre-emption for ground on which churches and manses are built, that the sale is to be

"at such price ... and on such terms as may be agreed upon between ... [the parties] or, as failing agreement, may be determined by an arbiter appointed by the sheriff on the application of either party".<sup>46</sup>

No doubt this could be improved upon, for example by indicating the factual basis on which the arbiter is to reach his decision. We suggest for consideration that no right of pre-emption should be constituted as a real burden unless the price and other conditions are determined by agreement, or arbitration, or by some other method which does not involve the property being placed on the open market.

8.40 There is an argument that any new scheme should be extended to existing rights of pre-emption. Certainly the problems are much the same. A possible objection is that this would involve some re-writing of the clause agreed by the original parties.

8.41 We invite views on the following proposals:

**53. (1) In the event that an owner wishes to sell, a written enquiry should be made of the holder of any right of pre-emption as to whether he intends to exercise the right.**

**(2) If within a period of 21 days the holder states in writing that he intends to exercise the right, he should then be bound to purchase the property -**

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<sup>46</sup> For an earlier version of this formula, see s 123 of the Lands Clauses Consolidation (Scotland) Act 1845.

- (a) on terms and conditions determined by or in accordance with the clause of pre-emption (not being terms and conditions which require the exposure of the property on the open market), or
  - (b) where (a) does not apply, on such terms and conditions as may be agreed by the parties or, failing agreement, as may be determined by an arbiter appointed by the sheriff on the application of either party.
- (3) If the holder does not so state, as provided in (2), the right of pre-emption should be extinguished.
- (4) The above rules should apply to any new right of pre-emption created as a real burden.
- (5) Views are invited as to whether the rules should apply to any existing right of pre-emption created as a real burden.

8.42 **(2) Division of the dominant tenement.** A superiority cannot be divided.<sup>47</sup> Hence, in a feudal real burden, there is a single holder (the superior) whose identity, in principle at least, is quite clear. The position is otherwise with neighbour burdens. The original dominant tenement in a right of pre-emption might come to be divided into 100 different plots. Where then does the right of pre-emption lie? Is there a separate right in the owner of each plot? In that case the servient proprietor must make 100 offers. If more than one is accepted, it is not clear how the competing claims are to be reconciled. An alternative view is that the right of pre-emption attaches to one plot only. But to which one? If the original dominant tenement remains substantially intact, then a commonsense answer would nominate this property rather than the small plots which have been broken off from it.<sup>48</sup> But the facts will not always be so simple. Under the law as it currently stands, there is no answer to any of these questions. This is a problem for the past, but also for the future. For if pre-emptions are to be constituted as real burdens in the future, it can only be as neighbour burdens. Some kind of solution must be found.

8.43 It is unlikely that there is a perfect solution. But we suggest that the beginnings of a solution might be achieved by the application of two broad principles. One is that, following subdivision, a right of pre-emption should attach to one only of the subdivided parts. The other is that it is for the person carrying out the subdivision to nominate the plot in question. One way of achieving this second principle would be by a rule that, unlike other real burdens, the benefit of a pre-emption should not pass automatically with the dominant tenement. Instead it should require to be expressly assigned. If it were not assigned, it would not pass; and if, as a result, the right came to be left with a person who no longer owned a part of the dominant tenement, the right would be extinguished. In practice it would not be necessary to require an express assignation in every case. There should be no such requirement where the whole of the dominant tenement is being conveyed. Nor should it be required in a conveyance of the residue or surviving part of the dominant tenement. But assignation would be required in relation to other constituent parts. This

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<sup>47</sup> *Maxwell v McMillan* (1741) Mor 8817 and 15015; *Duke of Montrose v Colquhoun* (1781) Mor 8822 affd (1782) 6 Pat 805; *Cargill v Muir* (1837) 15 S 408.

<sup>48</sup> See the example given by David Neuberger QC in *Marchant v Onslow* [1995] Ch 1 at p 8 C-E.

would mean that a small plot sold for building would not receive the benefit of the pre-emption unless the right was expressly assigned in the conveyance.

8.44 Some examples make these principles clearer.

*Example 1.* The whole dominant tenement is owned by A. He marks out three separate plots, which he conveys to B, C and D. Then he conveys the remainder of the tenement to E. None of the conveyances contains an express assignment.

The right of pre-emption would have passed to E. Such a right passes by implication in a conveyance of the surviving part of the dominant tenement. No one else would have the right.

*Example 2.* The whole dominant tenement is owned by A. He marks out three separate plots, which he conveys to B, C and D. Then he conveys the remainder of the tenement to E. The conveyance to C contains an express assignment of the right of pre-emption. C now conveys part of his plot to F. Later he conveys the remainder of the plot to G. Neither conveyance mentions the right of pre-emption.

The right of pre-emption would have passed first to C, by virtue of the express assignment, and thereafter to G, as part of a conveyance of the surviving part of the (new) dominant tenement. No one else would have the right.

*Example 3.* The whole dominant tenement is owned by A. He marks out three separate plots, which he conveys to B, C and D. Then he divides the remainder of the tenement into two further plots, which he conveys, at the same time, to E and F. None of the conveyances contains an express assignment.

The right of pre-emption has not left A. The fact that the conveyances to E and F were simultaneous means that there was no single conveyance of the surviving part of the tenement. But since A no longer owns any part of the dominant tenement, the right of pre-emption is extinguished.

8.45 These rules are unavoidably complex. In practice they are likely to be made simpler by two factors. In the first place, a conveyancer who is alert to the difficulties will nominate a small dominant tenement, even where the holder owns other adjacent land. Secondly, a right of pre-emption can be exercised only once, and so is likely to have a short life. In many cases the problem of subdivision will not actually arise.

8.46 The proposed new rules could be made to apply to any conveyance granted after they came into force. It would not matter for this purpose that the right of pre-emption itself pre-dated the legislation. But they could not apply to conveyances granted before the legislation, under a background law which did not require assignments. Such conveyances would continue to be governed by the existing law.

8.47 We propose that:

**54. (1) In the event of subdivision of the dominant tenement in a right of pre-emption, the benefit of the pre-emption should be capable of attaching to one part only of the subdivided whole.**

- (2) The benefit of a pre-emption should pass by implication -
- (a) in any conveyance of the whole dominant tenement;
  - (b) in any conveyance of the surviving part of a dominant tenement.
- (3) Except in the cases mentioned in (2), the benefit of a pre-emption should not pass without express assignation.
- (4) A right of pre-emption should be extinguished if it comes to be separated from a dominant tenement.
- (5) The above rules should apply to any future conveyance, in whole or in part, of the dominant tenement, regardless of when the pre-emption was created.

### Old pre-emptions and redemptions

8.48 Section 9 of the Conveyancing (Scotland) Act 1938 applies to all pre-emptions created in grants in feu regardless of date. But when s 9 was amended in 1974 to apply to dispositions - in effect, to neighbour burdens - the change was not retrospective and affected only deeds granted after 1 September 1974.<sup>49</sup> Similarly, s 12 of the Land Tenure Reform (Scotland) Act (which limits rights of redemption to 20 years) is not retrospective in effect. This means that, as the law currently stands, there are no limitations of duration on pre-1974 pre-emptions if they were created as neighbour burdens, and on pre-1974 redemptions whether created as neighbour or as feudal burdens.

8.49 Proposals made elsewhere in this paper will improve matters. Neighbour burdens which rest on implied enforcement rights - in practice the majority of such burdens - will require to be reasserted by the registration of a notice of preservation within 5 years.<sup>50</sup> If they are not registered they will be lost.<sup>51</sup> Those which survive will then be subject to a "sunset rule" of 75 or 100 years, although with the possibility of renewal by application to the Lands Tribunal.<sup>52</sup> Variation and discharge will be easier, whether by the Lands Tribunal<sup>53</sup> or otherwise, and there will be a short negative prescription of five years.<sup>54</sup> Under recommendations to be made in our forthcoming report on the abolition of the feudal system, most feudal burdens will be extinguished, and those which survive will be treated as neighbour burdens.

8.50 It may be that nothing further needs to be done. Some respondents to our discussion paper on feudal abolition<sup>55</sup> suggested that the 1974 Act reforms might be made retrospective, so that all pre-emptions and redemptions would be caught. However, we do not think that this could be done without compensation, and we are reluctant to introduce a compensation scheme for what may turn out to be a small problem. If further reform is thought to be

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<sup>49</sup> Conveyancing (Scotland) Act 1938 s 9(3) (inserted by the Land Tenure Reform (Scotland) Act 1974 s 13).

<sup>50</sup> Professor Halliday took the view that a neighbour pre-emption which rested on implied enforcement rights was invalid from the start. See Halliday, *Opinions* pp 475-6. But this seems to overlook the decision in *J A Mactaggart & Co v Harrower* (1906) 8 F 1101.

<sup>51</sup> Paras 3.36 ff.

<sup>52</sup> Paras 5.69 ff.

<sup>53</sup> *Banff and Buchan District Council v Earl of Seafield's Estate* 1988 SLT (Lands Tr) 21.

<sup>54</sup> See generally part 5.

<sup>55</sup> Scot Law Com DP No 93.

required, a simpler approach would be to apply a shortened sunset rule to pre-emptions or redemptions. For example, it might be provided that pre-emptions and redemptions lapse after 40 years - or even after 20 years. The availability of renewal, with the alternative of compensation, would remove any difficulty about applying this rule to pre-1974 rights.

**55. Views are invited as to whether in the case of rights of pre-emption and redemption, the specified period for the purposes of proposal 24(2)(ii) (the sunset rule as it applies to neighbour burdens) should be reduced and, if so, whether the new period should be (a) 40 years (b) 20 years or (c) some other figure.**

### **Statutory pre-emptions and redemptions**

8.51 **Churches.** In responding to our discussion paper on the abolition of the feudal system the Church of Scotland asked us to consider the repeal of two statutory pre-emptions affecting churches.<sup>56</sup> These were

- section 22(2)(h) of the Church of Scotland (Property and Endowments) Act 1925, which gives the relevant local authority a right of pre-emption in respect of burgh churches at a price restricted, in the usual case, to the amount spent by the General Trustees in the previous 40 years on the repair, enlargement or renewal of the church; and
- section 9(3) of the Church of Scotland (Property and Endowments) (Amendment) Act 1933, which gives a right of pre-emption in respect of Parliamentary churches and manses to the owner of adjoining land in a case where (i) his predecessor in title made the original grant for the church or manse and (ii) that grant was made without valuable consideration.

Both provisions are said to be difficult to operate in practice. In relation to the first, it is not suggested that there be repealed the standard right of pre-emption, at market value, which is given to local authorities by s 22(3) of the 1925 Act.<sup>57</sup> The second provision applies only to a small number of churches and manses,<sup>58</sup> and does not confer a right to buy at undervalue.

**56. We invite views as to whether there should be repealed -**

**(a) s 22(2)(h) of the Church of Scotland (Property and Endowments) Act 1925, and**

**(b) s 9(3) of the Church of Scotland (Property and Endowments) (Amendment) Act 1933.**

8.52 **Other examples.** The statute book contains other examples, both of pre-emptions and redemptions. Land acquired for compulsory purchase but which turns out to be superfluous is subject to a right of pre-emption or, if the land is not sold within a certain period, to a right of redemption without payment.<sup>59</sup> If land acquired under the Small Holdings Act 1892 ceases to be used for agricultural purposes, there is a right of pre-emption

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<sup>56</sup> A third statutory pre-emption, contained in s 37 of the Church of Scotland (Property and Endowments) Act 1925, was repealed by s 49 and schedule 11, Part III of the Conveyancing and Feudal Reform (Scotland) Act 1970.

<sup>57</sup> However, it may be necessary to amend this provision to bring it into line with proposal 53.

<sup>58</sup> Listed in sched 10 of the 1925 Act and s 15 of the 1933 Act.

<sup>59</sup> Lands Clauses Consolidation (Scotland) Act 1845 ss 120 and 121.

in favour of the local authority, or the owner of the estate from which the land was taken, or the owner of adjoining land.<sup>60</sup> Surplus land acquired between 1919 and 1921 by the Board of Agriculture for Scotland under the Land Settlement (Scotland) Act 1919 and now held by the Secretary of State must be offered back to the person from whom it was purchased or his successor before it can be sold to anyone else.<sup>61</sup> When a road is stopped up, the solum vests in the owner or owners of the land which adjoins the road.<sup>62</sup> There are reversions provided for in the Entail Sites Act 1840 and the School Sites Act 1841. With the exception of the last two statutes, which are considered separately below, we have no proposals for repeal or amendment, although we would welcome the views of consultees.

### The School Sites Act 1841

8.53 The purpose of the School Sites Act 1841<sup>63</sup> was to facilitate the grant of land out of private estates for the building of schools and schoolhouses. Originally these were voluntary schools, privately funded, and the land was often given without payment. Legislation was necessary because sometimes the land was entailed, and the heir of entail in possession was not free to grant the necessary conveyances. The first grantees were private individuals who held as trustees, but over time their functions were taken over, first by education boards, under the Education (Scotland) Act 1872,<sup>64</sup> and later by education authorities. Today sites originally granted under the School Sites Act are held by local councils in their capacity as education authorities. Following school closures, some of the sites have been sold to private individuals.

8.54 The 1841 Act applied to England and Wales as well as to Scotland, but later the legislative history diverged. The Act was repealed, for Scotland only, by the Education (Scotland) Act 1945, with effect from 2 July 1945.<sup>65</sup> However, since the repeal was declared not to affect

"the title of an education authority to any property vested in or held in trust for them at the appointed day"<sup>66</sup>

it has generally been assumed that the statutory reversion, discussed below, survived the repeal. Later legislation took this for granted.<sup>67</sup> The 1841 Act continues to apply in England and Wales, although its effect has been modified by the Reverter of Sites Act 1987.

8.55 **Statutory reversion.** In terms of the Act the site was to be held by the grantees and their successors only for as long as it was used for its original purpose. By a proviso to s 2

"upon the said land so granted as aforesaid, or any part thereof, ceasing to be used for the purposes in this Act mentioned, the same shall thereupon immediately revert to and become a portion of the said estate .. as fully to all intents and purposes as if this Act had not been passed, any thing herein contained to the contrary notwithstanding."

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<sup>60</sup> s 11. This provision also applies in England and Wales.

<sup>61</sup> Land Settlement (Scotland) Act 1919 s 6(5).

<sup>62</sup> Roads (Scotland) Act 1984 s 115. This is subject to "any prior claim of any person by reason of title".

<sup>63</sup> As modified and extended by the School Sites Acts of 1844, 1849 and 1852.

<sup>64</sup> Particularly ss 38 and 39.

<sup>65</sup> s 88 and Sched 5. For commencement, see The Education (Scotland) Act 1945 (Appointed Days) (No 1) Order 1945 (SR&O 1945/787).

<sup>66</sup> Education (Scotland) Act 1945 s 88 (proviso (ii)).

<sup>67</sup> Education (Scotland) Act 1980 ss 22(2), (3) and 106.

One reading of this proviso is that, in the event of cessation of use, there is an automatic reversion of the land, without the need for any conveyancing. That would mean that, as soon as school doors are closed for the last time, ownership passes from the education authority to the person entitled to the reversion. In *Houldsworth v School Board of Cambusnethan*,<sup>68</sup> one of only two Scottish cases on the Act, the pursuer successfully concluded for

"declarator that the whole right, title and interest in the said piece of land conveyed in 1858 had reverted to the first named pursuer and now belonged to him."

However, much more recently, in *Hamilton v Grampian Regional Council*,<sup>69</sup> the First Division took the view that the person in right of a reversion could not become owner without registration in the Register of Sasines or Land Register. Without registration his right was merely personal. According to Lord President Hope:<sup>70</sup>

"The operation of the reversion, by force of statute, is not enough to transfer the real right in the property to the grantor. Its effect is to enable the grantor, upon the basis of the personal right given to him by the reversion, to enforce that right against all parties acting in conflict with it, to challenge the deeds of others and to obtain a recorded title to the property by the registration of his interest as proprietor on the Register of Sasines."

The precise nature of this personal right is not explored. In particular it is unclear whether the statutory reversion is itself a conveyance, which might then be used as the basis of a notice of title, or whether, like ordinary reversions,<sup>71</sup> it is no more than an entitlement to the grant of such a conveyance from the education authority.

8.56 Another interpretative difficulty concerns the identity of the person who is to receive the reversion.<sup>72</sup> The site is to go back to the granter, of course, but it is unclear whether this is in a personal capacity or in his capacity as owner of the larger subjects from which the site was originally taken. Since in practice the granter is always dead, the issue resolves into whether the reversion is in favour of his heirs or of his successors as owners of the larger subjects. In other words, the question is whether the reversion is personal or praedial. The position adopted in England and Wales is that the reversion is praedial.<sup>73</sup> However, if the site was free-standing and not part of other subjects belonging to the granter, the reversion is personal and runs in favour of his heirs.<sup>74</sup> The rule in Scotland is probably the same. The issue did not arise for decision in the *Houldsworth* case because the claimant was both the heir and also the current owner of the larger subjects; and while the judgments can be read as favouring a personal reversion, a majority<sup>75</sup> of the First Division in *Hamilton* concluded that the reversion arising under the 1841 Act is praedial in character, except where there is no *praedium* to which it can attach. An obvious difficulty with this approach is that the larger subjects may have become fragmented, so that it is unclear who is to benefit from the

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<sup>68</sup> (1904) 7 F 291.

<sup>69</sup> 1995 GWD 8-443 affd 1996 GWD 5-277.

<sup>70</sup> At p 17 of the transcript.

<sup>71</sup> For which see para 8.3.

<sup>72</sup> See Law Com No 111, paras 29 - 37.

<sup>73</sup> *Marchant v Onslow* [1995] Ch 1.

<sup>74</sup> *Re Cawston's Conveyance* [1940] Ch 27.

<sup>75</sup> It was accepted on both sides that the reversion was praedial, but Lord President Hope expressed reservations about this approach (at p 21 of the transcript).

reversion. The answer may depend on the extent of the fragmentation. If the original estate has retained its identity, the site would presumably revert to the estate, notwithstanding that a great deal of other land had been sold. The deputy judge in *Marchant v Onslow* gave this example:<sup>76</sup>

"If one acre of a 200-acre estate were the subject of a grant under section 2, and thereafter the estate owner conveyed, say, three 5-acre plots for the purpose of building and selling off a number of houses, it seems to me that, if the site were to revert, a practical application of section 2 would result in the site reverting in full to the owner of the balance of the 184 acres on the basis that these are in reality the lands the estate referred to in the proviso."

The position would be different if the 184 acres had been sold for housing. Then there would be no surviving estate, and no obvious destination for the reversion. What would happen then is unclear. The owner of each house might receive a one six hundredth *pro indiviso* share in the site. Or perhaps the site would revert only to those whose property was contiguous. The point has never been decided. In Scotland the feudal system has probably served to preserve the identity of the original estate, for a person can feu most or all of his property while still remaining a titular proprietor. In many cases, ownership of the "lands of X" signifies a great deal more *dominium directum* than *dominium utile*.<sup>77</sup>

**8.57 Extinction of right of reversion.** Reversions are often not claimed. Partly this is because there may be doubt as to where entitlement lies. Partly too it is because the creditor in a reversion may be unaware of his rights, for only the title to the servient tenement is likely to refer to the 1841 Act. In practice a school is often closed and the site sold or used for another purpose without any claim being made. The fate of the reversion is then uncertain. In some circumstances it might be extinguished. But if it survives, its holder could make a claim many years after the original sale, and take the benefit of any improvements made on the site. There seem four possible ways in which a right of reversion might be extinguished.

8.58 (i) *Site held privately on 2 July 1945.* When the 1841 Act was repealed in 1945, the statutory reversion was saved only in respect of sites vested in or held in trust by an education authority as at that day. Consequently, any site previously sold by an education authority ceased to be subject to the reversion.

8.59 (ii) *Site sold prior to 2 July 1945 under s 14 of the 1841 Act.* Section 14 of the 1841 Act empowered trustees - and later education authorities - to sell or exchange the original site for another "more convenient and eligible site". Where this was done, it seems that the reversion applied neither to the original site nor to its replacement.<sup>78</sup> This gave education authorities an easy means of defeating the reversion. However, s 14 was repealed in 1945 along with the rest of the Act, and its extinctive effect for pre-1945 sales merely duplicates the extinction already described at (i).

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<sup>76</sup> [1995] Ch 1 at p 8 D-E.

<sup>77</sup> The pursuer in the *Hamilton* case was described as heritable proprietor of the lands and estates of the Marquisate, Earldom and Lordship of Huntly.

<sup>78</sup> Although not expressly decided, this point was taken for granted both in *Houldsworth* (per Lord Kyllachy at p 296) and in *Hamilton* (per Lord Johnston at p 23 of the transcript). In the case of England and Wales, provision is made by s 6(1)(b) of the Reverter of Sites Act 1987.

8.60 (iii) Site sold prior to 1 January 1947 under s 36 of the Education (Scotland) Act 1872. Section 36 of the 1872 Act authorised school boards to sell the site of discontinued schools. Such a sale probably extinguished the reversion.<sup>79</sup> Section 36 was not repealed until 1 January 1947, thus extending by 18 months the extinction described at (i). Successor legislation assimilated sites held under the 1841 Act to educational endowments, and removed any suggestion of automatic extinction by making express, if limited, provision for bringing the reversion to an end.<sup>80</sup>

8.61 (iv) Prescription. A right of reversion is a personal right, but its juridical status is otherwise unclear.<sup>81</sup> There are two broad possibilities. Either a reversion is a right to receive a conveyance, or it has itself the status of such a conveyance. The choice affects the operation of prescription.

- If a reversion is a conveyance, it can be extinguished by positive prescription but not by negative. The effect of positive prescription is to render a title "exempt from challenge",<sup>82</sup> and a rival conveyance is a "challenge" to the title. Hence if a person has possessed for 10 years on the basis of a recorded title which is not *ex facie* invalid, the title is unchallengeable and the reversion is defeated. A possible difficulty is that a title which referred to the 1841 Act, whether directly or by incorporation of a prior deed which so referred, might be insufficient to override the reversion. To be sure of positive prescription it would be necessary for the disposition from the education authority to a third party purchaser to omit any mention of the Act. A second difficulty is that positive prescription does not operate in respect of Land Register titles unless indemnity is excluded.<sup>83</sup> A title which was registered with full indemnity would be vulnerable to rectification by the holder of the reversion if the proprietor in possession was in bad faith.<sup>84</sup> Negative prescription is excluded because a right "to take any steps necessary for making up or completing title to any interest in land" is imprescriptible.<sup>85</sup>
- If reversion is merely a right to receive a conveyance, it is subject to negative prescription, after 20 years,<sup>86</sup> but not to positive. Positive prescription is excluded because a right to receive a conveyance is less a "challenge" to the obligant's title than an affirmation of its validity.

8.62 **The need for reform.** The continued existence of the reversion is troublesome. On the one hand it is rarely exercised. But on the other hand the risk that it might be exercised can have the effect of sterilising the land. Once a school is closed it is not clear what can be done with the site. It cannot easily be sold, for the possibility, however remote, that the reversion might be exercised prevents the title from being marketable. A purchaser is likely

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<sup>79</sup> That at least was the view expressed in *Hamilton* by the Lord President (at p 8 of the transcript) and by Lord Johnston (at p 26 of the transcript).

<sup>80</sup> The successor legislation was s 117 of the Education (Scotland) Act 1946, later replaced by s 119 of the Education (Scotland) Act 1962. The current provision, described in para 8.62, is s 106 of the Education (Scotland) Act 1980. This provision withdraws schools from the category of educational endowments, with the result that the standard sale provisions contained in s 22 apply.

<sup>81</sup> Para 8.55.

<sup>82</sup> Prescription and Limitation (Scotland) Act 1973 s 1(1).

<sup>83</sup> *Ibid* s 1(1)(b)(ii).

<sup>84</sup> Land Registration (Scotland) Act 1979 s 9(3)(a)(iii).

<sup>85</sup> Prescription and Limitation (Scotland) Act 1973 Sched 3(h).

<sup>86</sup> *Ibid* s 7. (As amended by the Consumer Credit Act 1987, schedule 1, part II.) See *Macdonald v Scott's Exrs* 1981 SC 75, and *Stewart's Exrs v Stewart* 1993 SLT 440, 1994 SLT 466. Short negative prescription is excluded by para 2(e) of sched 1.

to reject the title or accept it only on the basis of title insurance. But if the site is not to be sold, there are difficulties about using it for a different purpose. In particular, an education authority will be reluctant to put up a new building if there is a risk that the whole site, including the building, might then revert under the 1841 Act. Admittedly, provisions in the Education (Scotland) Act 1980 allow for the overriding of the reversion, on application to the Secretary of State or Court of Session.<sup>87</sup> But they can be used only where the person entitled to the reversion cannot after due enquiry be found or where he has consented to relinquish his rights. In most cases due enquiry would have the effect of yielding the name of the person entitled to the reversion, and he would presumably be unwilling to relinquish his rights without payment.

8.63 Two factors may make reform more urgent. First, there is evidence that the School Sites Act is attracting the attention of title raiders. Secondly, a substantial number of old schools and schoolhouses have now passed into private ownership. In many cases they have been improved and refurbished. Usually they were bought in good faith. Their current owners may be vulnerable to the revival of a dormant reversion.

8.64 **Reform in England and Wales.** A working party set up by the Law Commission recommended that those holding reversions, including future reversions, should be required to register their interest within three years. Failure to do so would extinguish the reversion.<sup>88</sup> However, these recommendations were not adopted. The Reverter of Sites Act 1987 shows greater consideration for the rights of reversion holders. Rights of reversion are converted into trust rights. Upon a site ceasing to be used for its original purpose, a trust of land arises. The trustees hold for the person who, but for the Act, would have been entitled to the reversion. But since the trustees are allowed to sell without the consent of the beneficiary, the beneficiary's right resolves into a claim on the sale proceeds.<sup>89</sup> An attempt must be made to find the beneficiary.<sup>90</sup> If the beneficiary fails to claim,<sup>91</sup> the trustees can then apply to the Charity Commissioners for a variation of the trust purposes.<sup>92</sup> Variation extinguishes the right of the beneficiary, subject to a claim for compensation which remains open for five years.<sup>93</sup>

8.65 **Possible reform in Scotland.** Under the 1987 Act a reversion is transformed from a right to the property to a right to the proceeds of its sale. This allows the property to be sold while at the same time preserving the right of the reversion holder. It is true that his right is reduced to a claim for money. But the land is unlikely to be of particular value to him after so long an interval; and especially in cases where the land is now in private hands, there seems much to be said for preserving the existing state of possession and for awarding monetary compensation in its place. We think that the 1987 Act solution could be adapted for use in Scotland. It would be unnecessary to have recourse to a trust. Only education authorities would be affected, and they are already subject to sufficient statutory control. All rights of reversion could be converted into rights to claim compensation from the

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<sup>87</sup> Education (Scotland) Act 1980 ss 22 and 106. Section 22 applies to "educational establishments", ie to schools (see the definition in s 135(1)). Section 106 applies to a site used for other purposes.

<sup>88</sup> Law Com No 111, paras 84 ff.

<sup>89</sup> Reverter of Sites Act 1987 s 1 (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sched 2 para 6).

<sup>90</sup> Ibid s 3.

<sup>91</sup> Ibid s 2(6).

<sup>92</sup> Ibid s 2(1)-(3).

<sup>93</sup> Ibid s 2(1)(a), (4).

education authority. The property itself would be free of the reversion. The conversion would apply to such existing rights of reversion as had not been extinguished as well as to new rights arising as and when sites ceased to be used for the purposes of the 1841 Act. Like other creditors, the (former) reversion holder would have 5 years to claim compensation. Thereafter the claim would be extinguished by prescription. For the purposes of assessing compensation, the property would be valued at the date at which the claim first arose or, in the case of reversions already in existence at the time of the legislation, at the date of the legislation.

8.66 A scheme along the above lines would seem fair to all parties. The reversion holder receives monetary compensation; the education authority can sell the property but must pay the proceeds to the reversion holder if a claim is made within 5 years; and the purchaser receives an unchallengeable title. The scheme prevents the property being sterilised, and yet is not unduly redistributive of rights. The present law would give the reversion holder the property and the purchaser monetary compensation, by means of a claim in warrandice against the education authority. The proposed new law would reverse the position of purchaser and reversion holder, but has no effect on the position of the education authority, which must pay compensation in both cases.

8.67 A difficult question is whether the education authority should be under a positive duty to identify and notify the reversion holder. Section 3 of the 1987 Act makes provision for newspaper advertisements, for affixing a notice on the land, and for taking other steps to trace and identify the person in question. No doubt if sufficient effort is made, a claimant could be identified in most cases. However, a number of arguments can be made against the introduction of such a duty. First, it is not a usual task of a debtor to identify and alert his creditor. It is plainly against his interests to do so. There is no such duty on education authorities at the moment.<sup>94</sup> Secondly, the duty might in practice be hard to discharge. Difficulties in identifying the person entitled to a reversion were mentioned earlier.<sup>95</sup> These difficulties seem within tolerance if the number of claims is small, but if there is to be a potential claimant in every case, the situation might become unmanageable. While in theory it might be possible to include in any reform a clarification of the rules of entitlement, such a clarification would itself be complex, and would be challengeable on the ground that the interpretation adopted extinguished existing rights.<sup>96</sup> Thirdly, it is not clear that reversion holders are more worthy of protection than ordinary creditors. Some may feel that they are less worthy. The original grant is usually remote in time. Often the claimant has no family connection with the granter. He may be no more than a title raider. And the value of the land has been inflated by the buildings erected on it. Finally, extinction without notification was a feature of the 1841 Act from the beginning. A sale under s 14 brought the reversion to an end.<sup>97</sup> Prescription has the same effect.<sup>98</sup> A requirement of notification would in most cases prevent extinction. It seems doubtful that this is a move in the right direction. However, we would welcome the views of consultees on this difficult subject.

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<sup>94</sup> Except where it is sought to extinguish a reversion under ss 22 and 106 of the Education (Scotland) Act 1980.

<sup>95</sup> Para 8.56.

<sup>96</sup> A reform recommended by a working party set up by the Law Commission (Law Com No 111 para 103) was not included in the 1987 Act.

<sup>97</sup> Para 8.59.

<sup>98</sup> Para 8.61.

8.68 We invite views on the following proposals and question:

**57. (1) All rights of reversion under s 2 of the School Sites Act 1841 should be converted into a right to claim compensation from the relevant education authority.**

**(2) The measure of compensation should be the value of the site -**

**(a) at the date when the claim becomes prestable, or**

**(b) if the claim was already prestable at the date when the legislation came into force, at that date.**

**(3) A claim should be subject to the short negative prescription.**

**(4) Views are invited as to whether education authorities should be under a duty to seek out and notify potential claimants.**

### **Other statutory reversions**

8.69 **Entail Sites Act 1840.** The Entail Sites Act, which applies only in Scotland, allows heirs of entail in possession to feu or lease small quantities of land as sites for churches and schools, and for houses for ministers and schoolmasters. The grant is to be made in trust, for the specified purposes.<sup>99</sup> Subsequent alienation or burdening of the land is prohibited,<sup>100</sup> and in the event of the specified purposes being departed from the heir of entail in possession can apply to the sheriff for forfeiture,<sup>101</sup> in which case the land shall be

"in all time thereafter, free from and unaffected by such feu charter or lease, and .. be again subject to the destination and fetters of the entail of such estate."

In theory it would be possible to apply to this Act the scheme already devised for the School Sites Act 1841. However, a number of factors argue in favour of outright repeal. First, in our forthcoming report on the abolition of the feudal system we will recommend the statutory termination of any entails which remain. This means that the forfeiture provisions of the 1840 Act could not be preserved without substantial amendment. The task seems scarcely worthwhile. Secondly, even as matters stand, few if any of the estates from which grants under the Act were made remain entailed. Hence there are no, or almost no, heirs of entail in possession in a position to invoke the forfeiture provisions. Thirdly, forfeiture by application to the sheriff is closer to irritancy than to reversion. Our policy, in this paper<sup>102</sup> and in our forthcoming report on feudal abolition, is to abolish irritancy insofar as it applies to *dominium*. Fourthly, consideration was paid for the original grant in the form of feuduty or rent, although admittedly this could be "inadequate and below the just avail or value". Lastly, repeal of the 1840 Act would not affect the trust created by the original conveyance. Our proposal, therefore, is that:

**58. The Entail Sites Act 1840 should be repealed.**

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<sup>99</sup> Entail Sites Act 1840 ss 1 and 3.

<sup>100</sup> Ibid s 6.

<sup>101</sup> Ibid s 7. The effect is actually a statutory irritancy rather than automatic reversion.

<sup>102</sup> Para 4.41.

8.70 We would be grateful to consultees for information on other statutory reversions. Section 33 of the Volunteer Act 1863, which related to land provided for rifle ranges, was repealed by the Military Lands Act 1892. We have been unable to trace any further examples.

## PART 9 DURATION OF LEASES AND MISCELLANEOUS

### Duration of leases

9.1 Our proposals for reform, if implemented, will reduce the availability and the scope of real burdens. Feudal burdens will disappear with the abolition of the feudal system; and while neighbour burdens and community burdens are likely to remain, they will be subject to a variety of restrictions, including restrictions as to duration. With the withdrawal of feudal burdens, it will no longer be possible for a person to sell all of his land and yet to retain some measure of control, for if there is no dominant tenement there can be no real burdens. These changes are likely to encourage avoidance devices which, if not checked, might undo some of the effect of the proposed reform.

9.2 An obvious avoidance device is the long lease. Functionally, an exceptionally long lease is not readily distinguishable from a grant in feu; and the conditions imposed on the "tenant" are not readily distinguishable from real burdens imposed on a feudal vassal. Hence a person who wished to alienate all of his land but to impose real burdens could achieve much the same effect by use of a 1000-year lease.<sup>1</sup> To continue to allow such leases would be to allow the feudal system by other means. In France, the abolition of the feudal system, on 11 August 1789, was followed by a law of 18-29 December 1790, which restricted leases to 99 years.<sup>2</sup> The *Encyclopédie Dalloz*<sup>3</sup> comments that this was prompted "par la crainte d'un retour, par ce biais, aux tenures féodales". Other civil law systems also restrict the length of leases. In Italy, for example, a lease cannot normally exceed 30 years.<sup>4</sup> In Germany, leases for more than 30 years can be terminated by either party.<sup>5</sup> Common law countries do not usually restrict the duration of leases.<sup>6</sup>

9.3 In Scotland, restrictions on duration were mooted in the Halliday Report,<sup>7</sup> and then in the White Paper of 1969 on Land Tenure in Scotland, which proposed a maximum length of 60 years, with a shorter period for residential leases.<sup>8</sup> The Green Paper of 1972 was more cautious. While residential leases should be restricted to 20 years, non-residential leases should remain unrestricted. This was because:<sup>9</sup>

"Non-residential long leases are largely free from the social objections to residential long leases - industrial and commercial tenants, unlike residential tenants, normally have the advice and resources available to them to make appropriate financial provision for the termination of the tenancy. The Government for their part take the view that to impose a limit on the length of non-residential leases would tend to inhibit economic

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<sup>1</sup> Ultra-long leases, often for 999 years, are found in some parts of Scotland. See our Report on Leasehold Casualties (Scot Law Com no 165, 1998).

<sup>2</sup> And see also Code Civil art 1709, and Code Rural art L 451-1.

<sup>3</sup> sv "Bail" para 136.

<sup>4</sup> Codice Civile art 1573. But by art 1607 dwellinghouses can be leased for the life of a tenant and for two years thereafter.

<sup>5</sup> BGB art 567.

<sup>6</sup> eg Gray, *Elements* p 686; American Law Institute, *Restatement of the Law, Second, Property 2d, Landlord and Tenant* (1977) s 1.4, and comment f.

<sup>7</sup> Paras 168-71.

<sup>8</sup> *Land Tenure in Scotland: A Plan for Reform* (1969, Cmnd 4099) paras 41-5.

<sup>9</sup> Scottish Home and Health Department, *Land Tenure Reform in Scotland* (1972) para 66.

development in Scotland and that it would be wrong to introduce any statutory restriction which is not absolutely necessary."

Accordingly, the legislation which followed, in 1974,<sup>10</sup> was confined to residential leases, imposing a limit of 20 years. In our view the position of non-residential leases should be reconsidered. We recognise, of course, the economic importance of commercial leases and we recognise that in many commercial contexts, for good reasons, a lease is preferred by both parties to an outright sale. We also recognise that certain major developments, such as town centre retail proposals, are in practice fundable only by means of a long ground lease to the principal developer. In such cases the granting of a long lease is in no sense a means of circumventing the incidents of feudal tenure. But at some point leases begin to shade into ownership. A grant for 40 years is just a lease. A grant for 400 years is quasi-ownership. To continue to allow extremely long leases is to invite avoidance of the abolition of the feudal system and of the proposed reforms of the law of real burdens.

9.4 If the principle of durational limits is accepted, the difficulty then lies in finding the appropriate period. The 60 years proposed by the 1969 white paper would be sufficient for most commercial leases but not for ground leases. There may be something to be said for the 99 years favoured in France, or for a slightly longer period such as 125 or 150 years. Some consultees may wish to argue for a longer period still. There may also be a view that different categories of non-residential lease should be subject to different durational limits. We invite views on the following proposal and questions:

**59. (1) A maximum duration for leases should be introduced.**

**(2) Views are invited as to whether the maximum duration should be (a) 60 years (b) 99 years (c) 150 years (d) 200 years or (e) some other period.**

**(3) Should the duration vary depending on the type of lease and, if so, what types of lease should be distinguished for this purpose?**

9.5 The introduction of a durational limit would not, of course, affect the principle of tacit relocation, nor the provisions for security of tenure contained in the Housing (Scotland) Act 1988, the Agricultural Holdings (Scotland) Act 1991, and other statutes. Nor would it affect existing long leases, which we hope to look at again in a separate exercise.<sup>11</sup>

### **Contractual chains**

9.6 Another possible avoidance device is the contractual chain. On this model the desired conditions would be imposed, not as real burdens, but as contractual terms; but the purchaser would then be under an obligation to impose like terms - including a further obligation to impose like terms in the future - on the next purchaser. If the device worked properly, successive owners would be subject to contractual conditions conceived in favour of the original seller, who could enforce on the principle of *jus quaesitum tertio*.<sup>12</sup> A similar device, of indemnity covenants, is used quite commonly in England as a means of achieving

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<sup>10</sup> Land Tenure Reform (Scotland) Act 1974 ss 8 - 10.

<sup>11</sup> Scot Law Com No 161 paras 2.44 - 2.46.

<sup>12</sup> Alternatively, successive purchasers could be made to enter into direct contractual relations with the original seller.

the positive covenants which are denied under the existing law.<sup>13</sup> It may be that the idea would not catch on in Scotland. Certainly it is no substitute for a proper real burden. The difficulties disclosed by the English experience are described by the Law Commission in this way:<sup>14</sup>

"[L]ike all chains, it is only as strong as its weakest link and in practice it remains strong only so long as all the ex-owners remain alive, traceable and financially solvent. The fact that this situation will be of relatively short duration is too obvious to need stress. And when one of the links does break, everyone is left dissatisfied (except the fortunate current owner of the burdened land who is free thereafter to ignore the covenant). The owner of the benefited land can still make a claim against the original covenantor [ie the original purchaser] if he is alive and can be found, and the covenantor's liability can be passed down the chain of indemnities until it gets to the broken link. At that point, however, someone is left, purely by accident, with a liability which he ought to be able to pass on but cannot. And the benefiting owner cannot obtain, even indirectly, what he really wants, which is actual compliance with the covenant."

Notwithstanding this discouraging assessment, there is a risk that contractual chains will begin to be used in Scotland. That would be undesirable, not only because of the avoidance potential, but because it would complicate conveyancing and lead to land being burdened by conditions which did not appear on the register. Whether the problem is sufficiently serious to merit legislative intervention is a more difficult matter, on which we would welcome guidance.

#### **60. Views are invited as to whether contractual chains should be declared unenforceable.**

9.7 We would welcome views as to whether there are other avoidance devices on which legislation might be required.

#### **Shared costs**

9.8 The first of our miscellaneous topics is decision making in relation to shared costs. Real burdens are commonly used to apportion liability for costs among different properties.<sup>15</sup> Usually these are maintenance or running costs relating to an item of mutual benefit, such as a private road or shared recreational facilities. Shared costs are a standard feature of tenement titles, but they are also found outside tenements, for example in housing estates and other communities. Our recommendations for a comprehensive reform of the law of the tenement were published earlier this year,<sup>16</sup> and our concern here is limited to non-tenemental property.

9.9 There are two main issues. The first concerns decision-making. Under the general law<sup>17</sup> shared costs cannot be incurred without the unanimous agreement of those who are

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<sup>13</sup> D G Barnsley, *Barnsley's Conveyancing Law and Practice* (3rd edn, 1988) pp 505 and 509 ff. See also Gray, *Elements* pp 1134 f.

<sup>14</sup> Law Com No 127, para 3.33.

<sup>15</sup> This may also be done either directly or in the form of an obligation to maintain which is imposed on a number of different properties.

<sup>16</sup> Scot Law Com No 162.

<sup>17</sup> But see the special rule for necessary repairs to common property, discussed at para 9.3.

bound to pay. But in practice unanimity is difficult to achieve. Particularly in larger communities there will often be at least one owner who is unwilling to commit the necessary funds. The dissenting owner can then override the wishes of the overwhelming majority. Roads and other shared facilities may be denied essential maintenance because of the persistent veto of a single owner. In our report on the law of the tenement we recommended that unanimity should be replaced by majority decision-making,<sup>18</sup> and the same rule seems appropriate for non-tenemental property also. As with tenements, votes should be allocated on the basis of one for each unit of property affected by the burden, and unanimity should continue to be required in cases of three units or less. These rules would not displace any special provision made by the burdens themselves.

9.10 Our proposal is confined to real burdens. It is not intended to affect cases of shared maintenance which arise under the general law of common property, without reference to real burdens.<sup>19</sup> Nor is it intended to disturb the rule of common property which allows any one *pro indiviso* owner to carry out necessary maintenance and to recover the cost. By contrast to our recommendations for tenements,<sup>20</sup> we are not seeking to provide a single regime for maintenance. Non-tenemental property is too varied in character for this to be feasible or, perhaps, desirable.

9.11 In our tenement report we made provision for the judicial annulment of a decision where it could be shown to be unfairly prejudicial to an owner, or not in the best interests of all the owners.<sup>21</sup> This could not easily be extended to non-tenemental property.<sup>22</sup> An appeal procedure requires a clear starting-point from which the days of appeal can run, as well as a clearly understood rule that, during the days of appeal, no expenditure is to be incurred. In short, it requires a level of formality which, for present purposes, seems over-ambitious.

9.12 A second issue is the crystallisation of liability in the context of change of ownership. Earlier we proposed that<sup>23</sup>

an owner who becomes liable under a real burden for maintenance or other costs which are shared with the owner or owners of another property or properties should not cease to be liable on ceasing to be owner; but the new owner should be liable jointly and severally, subject to a full right of relief.

This proposal is workable only if there are clear rules as to the time at which an owner "becomes liable" for shared expenditure. Once again it seems possible to borrow, in a simplified form, proposals which have already been developed in the context of tenements.<sup>24</sup> Broadly speaking, expenditure can be categorised as being either (i) one-off (for example a particular repair to a particular thing, such as a road) or (ii) continuing (such as lighting and heating costs, or the cost of insurance). One-off costs are individually sanctioned. Continuing costs are not, or not usually. This argues for different treatment. We suggest that, while liability for continuing costs should be regarded as accruing on a day-to-day

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<sup>18</sup> Scot Law Com No 162 paras 5.12 - 5.18 and 5.27.

<sup>19</sup> Routine maintenance of common property is a shared obligation as a matter of general law: see Reid, *Property* para 25.

<sup>20</sup> See in particular Scot Law Com No 162 para 10.30.

<sup>21</sup> Scot Law Com No 162 paras 5.19 - 5.25.

<sup>22</sup> Except perhaps in cases where the model management scheme (discussed in paras 7.85 ff) is used.

<sup>23</sup> Paras 4.27 and 4.28, and proposal 12.

<sup>24</sup> Scot Law Com No 162, paras 8.5 - 8.8.

basis, liability for one-off costs should crystallise when the decision to incur the costs is made. A difficulty is that it will not always be clear when a decision is made. Sometimes decisions are made at proper meetings, convened for that purpose. But sometimes they are a result of a head count achieved by knocking on sufficient doors to achieve the necessary majority. We suggest that, in relation to a particular owner, the date on which a decision is treated as made should be (a) the date of any meeting or (b) where no meeting was held (or where one was held but the owner did not attend) the date on which he is informed of the decision.

9.13 We propose that:

**61. (1) Where, in terms of a real burden, liability for maintenance or other costs is to be shared by the owners of four or more properties, a decision to incur such costs in any particular case should bind all the owners if it is made by a majority of owners, one vote being allocated to each property.**

**(2) However, the above rule should not apply -**

**(a) to tenements; or**

**(b) to other property, to the extent that different provision is made in the titles.**

**(3) For the purposes of proposal 12(2), an owner should be treated as becoming liable under a real burden -**

**(a) in the case of continuing costs, on a day-to-day basis; and**

**(b) in any other case, on the date when the decision to incur the costs is made.**

**(4) A decision should be regarded as made, within (3)(b) above -**

**(a) where the decision is made at a meeting attended by the owner, on the date of the meeting; or**

**(b) in any other case, on the date on which he is informed of the decision.**

### **Pecuniary real burdens**

9.14 A pecuniary real burden<sup>25</sup> is a heritable security constituted by reservation in a conveyance.<sup>26</sup> A conveys to B but reserving in his own favour, or in favour of a third party, a right in security in respect of some existing obligation. At one time popular for securing family loans, pecuniary real burdens passed out of regular use in the course of the nineteenth century, although various provisions remain on the statute book.<sup>27</sup> Today pecuniary real burdens are obsolete and are never used.<sup>28</sup> Indeed on one view they ceased to

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<sup>25</sup> For nomenclature, see para 1.1.

<sup>26</sup> See generally: Gordon, *Scottish Land Law* paras 20-103 - 20-112; Reid, *Property* para 383; and Halliday, *Conveyancing* vol II paras 50.02 - 50.08.

<sup>27</sup> Conveyancing (Scotland) Act 1874 s 30; Conveyancing (Scotland) Act 1924 sched A form 1, note; sched B note 4; sched K note 4.

<sup>28</sup> Their abolition was proposed in our discussion paper no 78 on *Adjudications for Debt and Related Matters* (vol 2, paras 8.7 - 8.9).

be competent in 1970, when the standard security was introduced.<sup>29</sup> This is because, by s 9(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970

"A grant of any right over an interest in land for the purpose of securing any debt by way of a heritable security shall only be capable of being effected at law if it is embodied in a standard security."

Doubts remain, however.<sup>30</sup> A pecuniary real burden is not the "grant" of a right in security, but a reservation. Nor is it clear that a pecuniary real burden falls within the definition of "heritable security" in s 9(8)(a), which is

"any security capable of being constituted over any interest in land by disposition .. of that interest in security of any debt .."

An outright disposition on sale, reserving a pecuniary real burden, cannot easily be characterised as a disposition in security of a debt. At any rate, subsequent legislation took the pecuniary real burden for granted. Section 5(5) of the Land Tenure Reform (Scotland) Act 1974<sup>31</sup> provides in the context of the redemption of feuduty that unpaid redemption money is secured as a real burden on the feu; and, more striking still, s 72(7) of the Housing (Scotland) Act 1987 provides that the liability to repay the discount given for sales of council houses under the right-to-buy legislation

"shall not be imposed as a real burden in a disposition of any interest in the house."

9.15 These doubts should be removed. We propose that:

**62. For the avoidance of doubt, it should be provided that it is no longer competent to create pecuniary real burdens.**

New feuduties and ground annuals, both of which were secured by a type of real burden, have not been competent since 1974.<sup>32</sup> Existing pecuniary real burdens, such as they are, will survive until extinguished either by payment or by prescription.

## Names

9.16 From time to time it has been suggested to us that the term "real burden" is unsatisfactory, and that consideration ought to be given to finding a replacement. The term has been criticised as old-fashioned and obscure, and as unduly negative in character. At present we are not persuaded that the term should be replaced. Any technical term, including any replacement term, is likely to seem obscure to a non-lawyer; and "real burden" has at least the advantage of being hallowed by long usage, and of being well understood by those who deal professionally with property. The task of amending all the legislative provisions where it is used would be considerable and, of course, it is used in countless private deeds which will remain of practical importance for many years to come. In any event, it is difficult to find a suitable replacement. "Land obligation" has a special statutory

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<sup>29</sup> Halliday, *Conveyancing* vol II para 50.01.

<sup>30</sup> Gordon, *Scottish Land Law* para 20-103; K G C Reid, "What is a real burden?" (1984) 29 JLS 9 at pp 12-13.

<sup>31</sup> Which will be repealed as a result of the abolition of the feudal system.

<sup>32</sup> Land Tenure Reform (Scotland) Act 1974 ss 1 and 2.

meaning in the context of variation and discharge by the Lands Tribunal,<sup>33</sup> and so is not available. "Land condition", which was first suggested by the Halliday Committee,<sup>34</sup> is such a modest improvement as hardly to seem worth the effort. If there are better names, as there may be, we have so far failed to find them.

**63. We invite views as to whether "real burden" should be changed to some other name and, if so, as to what that other name should be.**

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<sup>33</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 s 1(2).

<sup>34</sup> Halliday Committee, para 25. And see also Scot Law Com DP No 93 paras 3.3 - 3.8.

## PART 10 SUMMARY OF PROPOSALS

### Part 2: Abolition or restriction?

1. It should continue to be competent to create community burdens, and existing community burdens should remain enforceable.

(Paragraph 2.7)
2. It should continue to be competent to create neighbour burdens, and existing neighbour burdens should remain enforceable.

(Paragraph 2.34)
3. It should no longer be possible to create negative servitudes.

(Paragraph 2.49)
4. We would welcome views on whether -
  - (a) existing negative servitudes should be registered and otherwise fully assimilated with real burdens, or
  - (b) existing negative servitudes should be retained as a separate juristic category but made subject to extinction on the expiry of a fixed period in accordance with proposal 24.

(Paragraph 2.50)
5. The existing rule that real burdens are conceived in favour of a property and not a person should not be disturbed.

(Paragraph 2.55)
6. Conservation burdens should be introduced.

(Paragraph 2.59)

### Part 3: Title to enforce

- 7.(1) Where an existing deed of conditions imposes on two or more properties burdens which are identical or equivalent, the burdens should be mutually enforceable by the owners of those properties and by their successors as owners.
- (2) Where an existing real burden regulates the maintenance, reinstatement or use of a common facility, the burden should be enforceable by the owners of the property benefited by the facility and by their successors as owners.

- (3) During a transitional period of five years it should be possible to preserve an implied right to enforce burdens by registering an appropriate notice in accordance with the scheme set out in proposal 8.
- (4) Subject to the above, at the end of the transitional period all implied rights to enforce burdens should be extinguished.
- (5) It should cease to be possible for new rights to enforce burdens to arise by implication.

(Paragraph 3.40)

8. Views are invited on the following scheme for implied rights to enforce:

- (1) Implied rights to enforce real burdens would be preserved by registration in the Land Register or Register of Sasines of a notice of preservation within the transitional period.
- (2) The transitional period would be 5 years.
- (3) Registration would be against both the dominant and the servient tenements.
- (4) In the case of neighbour burdens, the notice of preservation would be executed and registered by the owner of the dominant tenement.
- (5) In the case of community burdens, the notice of preservation would be executed and registered by the owners of more than 50% of the units in the community (or, where the notice relates to part only of a community, by the owners of more than 50% of the units in that part).
- (6) Where a community (or sub-community) comprises three units or fewer, a notice under (5) would be executed and registered by all of the owners in the community (or sub-community).

(Paragraph 3.55)

9. For the avoidance of doubt, the rule conferring an implied right to enforce as a neighbour burden (the rule in *Mactaggart*) should not be available in a question between properties which are subject to the same (or equivalent) burdens.

(Paragraph 3.55)

- 10.(1) The right to enforce a real burden which attaches to a dominant tenement should be exercisable by -
  - (a) the registered owner of the dominant tenement, and
  - (b) any holder of a registered lease or liferent.
- (2) Where the owner has been sequestrated, the right should be exercisable by his registered trustee in sequestration and not by the owner.

- (3) Subject to (2), where a heritable creditor has taken possession, the right should be exercisable by the creditor and not by the owner.
- (4) The right to enforce conferred by (1)(b) should not include a right to grant a variation or discharge of the burden.

(Paragraph 3.66)

#### **Part 4: Other aspects of enforcement**

- 11.(1) A person seeking to enforce a burden should require to demonstrate interest.
  - (2) Should interest to enforce be reformulated by statute, or left to the courts to develop?
  - (3) Views are invited on the following possible reformulation:
    - (a) A person has interest to enforce a burden if -
      - (i) failure to comply will result in detriment to the dominant tenement (and, where the enforcer's right is less than ownership, to that right also), or
      - (ii) the enforcer has incurred maintenance or other costs which the person enforced against is bound to reimburse.
    - (b) For the purposes of assessing detriment, a court shall pay particular regard to -
      - (i) the distance between the dominant and the servient tenements, and
      - (ii) the seriousness of the breach or proposed breach.

(Paragraph 4.10)

- 12.(1) A real burden which, however expressed, has the effect of imposing a positive obligation should be enforceable against (and only against) -
  - (a) the owner for the time being of the servient tenement; or
  - (b) where a heritable creditor has entered into lawful possession, that heritable creditor.
- (2) However, an owner who becomes liable under a real burden for maintenance or other costs which are shared with the owner or owners of another property or properties should not cease to be liable on ceasing to be owner; but the new owner should be liable jointly and severally, subject to a full right of relief.
- (3) A real burden of any other kind should be a real right in the servient tenement, and universally enforceable.

- (4) For the purposes of this proposal, a person becomes an owner (and the last owner ceases to be an owner) when he acquires a right to take entry under a conveyance of the property (or any document having effect as a conveyance).

(Paragraph 4.28)

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

(Paragraph 4.37)

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

(Paragraph 4.41)

### **Part 5: Variation and extinction**

- 15.(1) Subject to (3) - (5) below, a community real burden should be capable of being varied or discharged for the whole community or any significant part thereof by a minute of waiver executed by the owners of units representing more than 50% of the land area of the whole community.

- (2) In calculating the land area for this purpose there should be excluded any land which is owned in common by all the owners in the community or which has been taken over by the local or other public authority.

- (3) Where a community comprises or includes a tenement, the minute of waiver should be executed by the owners of more than 50% of the units.

- (4) Where a community comprises three units or fewer, the minute of waiver should be executed by all of the owners in the community.

- (5) No minute of waiver should be given effect unless it is executed by -

- (a) the owners of more than 20% of the units, each such unit being held in separate ownership, or
- (b) the owners of all of the units.

- (6) Views are invited as to whether the figure of 50% mentioned at (1) should be reduced to 35% where -

- (a) the community exceeds 30 units, or
- (b) 40 years have elapsed since the registration of the deed constituting the burdens (or, where there is more than one deed, the last such deed).

- (7) The above rules should not apply where in the deed creating the burdens (or any variation thereof) alternative rules for discharge are provided.

(Paragraph 5.19)

16. A community real burden should be capable of being varied or discharged in favour of an individual unit by a minute of waiver executed in accordance with proposal 15.

(Paragraph 5.24)

17. We invite views on whether proposal 16 should be modified in the following way:

- (1) The signatories to a minute of waiver must include the owners of all units in the community which immediately adjoin the unit in respect of which the waiver is being sought.
- (2) A unit would be considered as immediately adjoining another unit if it is neighbouring land within the definition in article 2(1) of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992, SI 1992/224.

(Paragraph 5.25)

- 18.(1) A minute of waiver should require to be granted only by the owner of the dominant tenement (or, in a case where a heritable creditor has entered into possession, only by that heritable creditor).
- (2) For the purposes of (1), a person who has right to property but whose title has not been completed by registration should be treated as an owner.
- (3) If, but only if, it is registered in the Land Register or Register of Sasines, a minute of waiver should be effective for all purposes and in particular should bind all those holding real rights in the dominant tenement.

(Paragraph 5.32)

- 19.(1) Subject to (3) below, the period for negative prescription of real burdens should be reduced from 20 years to 5 years.
- (2) A burden should be extinguished only to the extent of the particular breach which induced the prescription.
- (3) Views are invited as to whether the period of negative prescription should be -
- (a) 20 years in the case of burdens which allow the dominant proprietor to use the servient tenement; and
  - (b) 2 years in the case of burdens which take the form of a restriction.

(Paragraph 5.47)

- 20.(1) Where a community burden has been discharged, in whole or in part, in respect of units representing more than 50% of the land area of the community, the burden should be considered to be abandoned for the whole community.
- (2) The figure of 50% should be reduced to 35% in the cases mentioned in proposal 15(6).
- (3) For the purposes of proposals 15 and 16, the number of units required for the execution of a minute of waiver of a community burden should be reduced by the units in respect of which the burden has already been discharged, whether in whole or in part.

(Paragraph 5.52)

21. A real burden should not be extinguished only because the dominant and servient tenements are owned by the same person in the same capacity.

(Paragraph 5.59)

22. Real burdens should be extinguished in all time coming on the acquisition of land following on from a confirmed compulsory purchase order.

(Paragraph 5.62)

23. A sunset rule should be introduced for existing real burdens (that is to say, a rule that existing burdens come to an end at the expiry of a period fixed by statute), but subject to the possibility of renewal.

(Paragraph 5.72)

- 24.(1) Except insofar as they are renewed, all existing burdens should be extinguished at the end of a specified period after the date of constitution.

- (2) Views are invited as to whether the specified period should be -

- (i) in the case of community burdens and conservation burdens (a) 200 years (b) 150 years (c) 100 years or (d) some other figure;

- (ii) in the case of neighbour burdens (a) 150 years (b) 100 years (c) 75 years or (d) some other figure.

- (3) There should be excepted from extinction any burden which regulates the maintenance, reinstatement or use of a common facility.

- (4) Views are invited as to whether other exceptions are necessary.

- (5) There should be a transitional period of 10 years.

- (6) At any time prior to the expiry of the specified period it should be possible to apply to the Lands Tribunal for renewal of a burden.

- (7) The application should be made by the dominant proprietor or, in the case of a community burden, by the owners of properties representing more than 10% of the land area of the community.
- (8) The Lands Tribunal should grant the application if satisfied that it is reasonable to do so having regard to the factors listed in proposal 27.
- (9) Views are invited as to whether -
  - (i) unopposed applications should not be granted without a consideration of the merits; and
  - (ii) in opposed applications, the expenses of both sides should be met by the applicant.
- (10) In the event of an application being refused, the applicant should be entitled to claim compensation under one (but not both) of the heads listed in s 1(4) of the Conveyancing and Feudal Reform (Scotland) Act 1970.
- (11) An owner against whom compensation is awarded should have the option of accepting in its place renewal of the burden in respect of which the award was made.
- (12) A burden which is renewed should be treated as a new burden, and subject to the durational limits mentioned in proposal 38.
- (13) Renewal for a further period should not be permitted.

(Paragraph 5.82)

## **Part 6: The Lands Tribunal for Scotland**

25.(1) As a general rule, the award of expenses in the Lands Tribunal should follow success.

- (2) A fee should be payable by a person who wishes to object to an application.

(Paragraph 6.12)

26. An application for variation or discharge of a real burden which is not opposed should be granted as of right.

(Paragraph 6.14)

27. The Lands Tribunal should, on application, vary or discharge a real burden if satisfied that it is reasonable to do so having regard to -

- (a) any change of circumstances since the burden was first created, including changes in the character of the dominant and servient tenements and of the neighbourhood thereof;

- (b) the extent to which the burden confers benefit on the property owned by a person who objects to the application;
- (c) the extent to which the burden impedes enjoyment of the servient property;
- (d) whether compliance with the burden is impracticable or unreasonably expensive;
- (e) the age of the burden;
- (f) whether appropriate consents from planning or other regulatory authorities have been given;
- (g) in the case of a community burden, the effect of the proposed change on the community as a whole; and
- (h) any other material circumstances.

(Paragraph 6.41)

28. The rule that no application may be made to the Lands Tribunal until the expiry of two years from the date of creation of a burden should cease to have effect.

(Paragraph 6.41)

29. The grounds for variation and discharge set out in proposal 27 should apply to all land obligations and should replace the existing grounds.

(Paragraph 6.42)

30. Views are invited as to whether the burden of proof should be on the person who objects to an application rather than on the applicant.

(Paragraph 6.49)

- 31.(1) An application for the variation or discharge of a neighbour burden, or of a community burden in respect of a particular property, should require to be brought by an owner of that property.

- (2) An application for the variation or discharge of a community burden in respect of the whole community, or any significant part thereof, should require to be brought by the owners of properties representing more than 10% of the land area of the whole community.

(Paragraph 6.53)

32. The special status given to affected proprietors should be discontinued.

(Paragraph 6.55)

- 33.(1) The notification of an application to a dominant proprietor by the Lands Tribunal should normally be given in writing.

- (2) However, it should be competent to give notice by advertisement in respect of a dominant proprietor who cannot by reasonable inquiry be identified or found, or who appears to have no interest to enforce.
- (3) A dominant proprietor who should have been, but was not, notified in writing should retain a right to claim compensation for the variation or discharge even after the application has been disposed of by the Lands Tribunal.

(Paragraph 6.61)

34. The Lands Tribunal should be empowered -

- (a) to vary or discharge a real burden or purported real burden; and
- (b) to declare
  - (i) whether a burden affects the land of the applicant;
  - (ii) the extent and effect of the burden; and
  - (iii) the identity of the dominant tenement or tenements.

(Paragraph 6.66)

35. We would welcome views on whether -

- (a) the Lands Tribunal should be given jurisdiction in the enforcement of real burdens, and
- (b) the ordinary courts should be able to exercise the powers of the Lands Tribunal in relation to variation and discharge where, in the course of other proceedings, it is appropriate to do so.

(Paragraph 6.69)

36. We invite views as to whether the Lands Tribunal should be given jurisdiction for the variation and discharge of planning and conservation burdens.

(Paragraph 6.71)

### **Part 7: Creation of new real burdens**

37.(1) Real burdens should continue to require writing and registration.

- (2) Positive servitudes which are created expressly in writing should become real rights only on registration.

- (3) By "registration" is meant registration in the Land Register or, as the case may be, the Register of Sasines against both the dominant and the servient tenements.

(Paragraph 7.5)

- 38.(1) A condition should not be effective as a real burden unless its duration is specified in the constitutive deed.
- (2) The duration should not exceed a maximum figure to be specified in legislation.
- (3) Views are invited as to whether -
- (i) the maximum duration for community burdens and conservation burdens should be (a) 80 years (b) 100 years or (c) some other figure;
  - (ii) the maximum duration for neighbour burdens should be (a) 40 years (b) 50 years or (c) some other figure.
- (4) A dominant proprietor should have no right to renew a burden on expiry of its duration.
- (5) The durational limit should not apply to burdens which regulate the maintenance, reinstatement or use of a common facility.
- (6) Views are invited as to whether other exceptions to the durational limit are necessary.

(Paragraph 7.14)

- 39.(1) A condition should not be effective as a real burden unless the words "real burden" or "community burden" or "neighbour burden" are used in the constitutive deed.
- (2) Subject to (1) and to proposal 38, there should be no statutory form for the creation of real burdens, and no requirement that burdens created in conveyances be placed in a separate schedule.

(Paragraph 7.18)

- 40.(1) For the avoidance of doubt, it should be provided that an obligation to make payments should not fail as a real burden only on the ground that no definite amount is stated.
- (2) This rule should apply to obligations already created as well as to obligations to be created in the future.

(Paragraph 7.24)

- 41.(1) The constitutive deed for a community burden must nominate and describe the community which is to be affected by the burden.
- (2) The constitutive deed for a neighbour burden must nominate and describe the dominant and the servient tenements in the burden.

(3) The description must be sufficient to identify the property.

(Paragraph 7.27)

42.(1) In a conveyance, it should be competent to impose burdens on the property being retained by the granter as well as on the property being conveyed.

(2) In a deed of conditions, it should be competent to impose burdens on land which is not to be conveyed.

(Paragraph 7.36)

43. The praedial rule should be clarified and restated on the following lines:

(1) A real burden must burden the servient tenement for the benefit of the dominant tenement or (in the case of a community burden) for the benefit of the community or any part of the community.

(2) A positive obligation constituted as a neighbour burden must also confer benefit on the servient tenement.

(Paragraph 7.54)

44.(1) A real burden should be invalid if it is -

(a) illegal, under any enactment or rule of law, or

(b) contrary to public policy, as repugnant with the idea of ownership, or in unreasonable restraint of trade, or for any other reason.

(2) Views are invited as to how the "reasonableness" of a restraint of trade should be assessed.

(Paragraph 7.63)

45. It should be possible for a right to make use of the servient tenement to be constituted as a real burden.

(Paragraph 7.67)

46.(1) A real burden should not be unenforceable only because it incorporates information which is contained in an act of parliament or statutory instrument, public register, public records, or other document in Scotland which is available to the general public.

(2) This rule should be deemed always to have applied in the case of real burdens of maintenance.

(Paragraph 7.70)

47. An obligation which has become enforceable as a real burden should cease to be enforceable as a contractual term.

(Paragraph 7.77)

48.(1) Any requirement in any deed that burdens be repeated in future deeds relating to the same property should cease to have effect, and no deed should be challengeable on the ground of failure to comply with such a requirement.

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

(Paragraph 7.78)

49.(1) Community burdens should be capable of being varied, discharged or replaced by a deed of conditions executed in accordance with proposal 15.

(2) Alternative provision for execution may be made in the constitutive deed (or any variation thereof).

(3) A person should be entitled to execute the deed as owner even if his right has not been completed by registration.

(4) On registration in the Land Register or Register of Sasines, the deed of conditions should be effective for all purposes and should bind all those holding real rights in a unit or in any other part of the community.

(5) If, in relation to a deed of conditions executed under this proposal or a minute of waiver executed under proposal 15, the sheriff is satisfied that -

(a) the deed is not in the best interests of the community, or

(b) the deed is unfairly prejudicial to one or more of the owners,

he should be able to make an order reducing the deed in whole or in part.

(6) An application under (5) should be available to any owner who was not a signatory to the deed, and should be made -

(a) in a case where he was notified of the deed, within 21 days of the notification;

(b) in any other case, within 5 years of registration of the deed.

(7) Views are invited as to whether a model management scheme should be made available as an option for the management of communities and for the maintenance of shared facilities.

(Paragraph 7.88)

## **Part 8: Pre-emption, redemption, reversion and other options to acquire**

50. The Reversion Act 1469 (c 3) should be repealed.

(Paragraph 8.19)

51. It should no longer be possible for a right of redemption or reversion or other option to acquire (but not including a right of pre-emption) to be constituted as a real burden.

(Paragraph 8.21)

52. Views are invited as to whether it should continue to be possible for a right of pre-emption to be constituted as a real burden.

(Paragraph 8.33)

- 53.(1) In the event that an owner wishes to sell, a written enquiry should be made of the holder of any right of pre-emption as to whether he intends to exercise the right.

- (2) If within a period of 21 days the holder states in writing that he intends to exercise the right, he should then be bound to purchase the property -

- (a) on terms and conditions determined by or in accordance with the clause of pre-emption (not being terms and conditions which require the exposure of the property on the open market), or
- (b) where (a) does not apply, on such terms and conditions as may be agreed by the parties or, failing agreement, as may be determined by an arbiter appointed by the sheriff on the application of either party.

- (3) If the holder does not so state, as provided in (2), the right of pre-emption should be extinguished.

- (4) The above rules should apply to any new right of pre-emption created as a real burden.

- (5) Views are invited as to whether the rules should apply to any existing right of pre-emption created as a real burden.

(Paragraph 8.41)

- 54.(1) In the event of subdivision of the dominant tenement in a right of pre-emption, the benefit of the pre-emption should be capable of attaching to one part only of the subdivided whole.

- (2) The benefit of a pre-emption should pass by implication -

- (a) in any conveyance of the whole dominant tenement;
- (b) in any conveyance of the surviving part of a dominant tenement.

- (3) Except in the cases mentioned in (2), the benefit of a pre-emption should not pass without express assignment.

- (4) A right of pre-emption should be extinguished if it comes to be separated from a dominant tenement.

- (5) The above rules should apply to any future conveyance, in whole or in part, of the dominant tenement, regardless of when the pre-emption was created.

(Paragraph 8.47)

55. Views are invited as to whether in the case of rights of pre-emption and redemption, the specified period for the purposes of proposal 24(2)(ii) (the sunset rule as it applies to neighbour burdens) should be reduced and, if so, whether the new period should be (a) 40 years (b) 20 years or (c) some other figure.

(Paragraph 8.50)

56. We invite views as to whether there should be repealed -

- (a) s 22(2)(h) of the Church of Scotland (Property and Endowments) Act 1925, and
- (b) s 9(3) of the Church of Scotland (Property and Endowments) (Amendment) Act 1933.

(Paragraph 8.51)

- 57.(1) All rights of reversion under s 2 of the School Sites Act 1841 should be converted into a right to claim compensation from the relevant education authority.

- (2) The measure of compensation should be the value of the site -

- (a) at the date when the claim becomes prestatable, or
- (b) if the claim was already prestatable at the date when the legislation came into force, at that date.

- (3) A claim should be subject to the short negative prescription.

- (4) Views are invited as to whether education authorities should be under a duty to seek out and notify potential claimants.

(Paragraph 8.68)

58. The Entail Sites Act 1840 should be repealed.

(Paragraph 8.69)

## **Part 9: Duration of leases and miscellaneous**

- 59.(1) A maximum duration for leases should be introduced.

- (2) Views are invited as to whether the maximum duration should be (a) 60 years (b) 99 years (c) 150 years (d) 200 years or (e) some other period.

- (3) Should the duration vary depending on the type of lease and, if so, what types of lease should be distinguished for this purpose?

(Paragraph 9.4)

60. Views are invited as to whether contractual chains should be declared unenforceable.

(Paragraph 9.6)

- 61.(1) Where, in terms of a real burden, liability for maintenance or other costs is to be shared by the owners of four or more properties, a decision to incur such costs in any particular case should bind all the owners if it is made by a majority of owners, one vote being allocated to each property.

- (2) However, the above rule should not apply -

(a) to tenements; or

(b) to other property, to the extent that different provision is made in the titles.

- (3) For the purposes of proposal 12(2), an owner should be treated as becoming liable under a real burden -

(a) in the case of continuing costs, on a day-to-day basis; and

(b) in any other case, on the date when the decision to incur the costs is made.

- (4) A decision should be regarded as made, within (3)(b) above -

(a) where the decision is made at a meeting attended by the owner, on the date of the meeting; or

(b) in any other case, on the date on which he is informed of the decision.

(Paragraph 9.13)

62. For the avoidance of doubt, it should be provided that it is no longer competent to create pecuniary real burdens.

(Paragraph 9.15)

63. We invite views as to whether "real burden" should be changed to some other name and, if so, as to what that other name should be.

(Paragraph 9.16)

# Appendix 1

Before completing this form, please read the notes on page 4

## APPLICATION UNDER SECTION 1 OF THE CONVEYANCING AND FEUDAL REFORM (SCOTLAND) ACT 1970

To: The Lands Tribunal for Scotland  
1 Grosvenor Crescent  
Edinburgh  
EH12 5ER

(Alternative address for  
Members of Rutland Exchange  
Box 259  
Rutland Exchange  
Edinburgh)

1. \*I/We, .....  
.....  
.....

Name and address  
of Applicant (s) \*

proprietor(s) \* of the subjects known as  
.....  
.....

Here distinguish the  
subjects sufficiently  
to enable them to be  
identified

which subjects are under burden of the land  
obligation(s) \*of which particulars are set out in  
paragraph 2, hereby apply for the land obligation(s) \*

- \* to be discharged wholly
- \* to be discharged to the  
extent of .....
- \* to be varied by .....

The circumstances rendering necessary the application are set out in paragraph 3. The statutory basis of the application is set out in paragraph 4.

\* Strike out words or letters not applicable.



3. Details of Application

(Here give a concise statement of the circumstances which have led to the application)

4. Statutory basis of application

Here specify which of the circumstances referred to in section 1(3) of the Conveyancing and Feudal Reform (Scotland) Act 1970 is/are considered relevant.

Date .....

To be signed by the burdened proprietor(s) or his/their

Signed .....

Solicitor who should add his designation and the words "Agent

.....

of ..... (name of applicant(s))"

NOTES FOR THE INFORMATION OF APPLICANTS

1. (a) The applicant should enclose with this application a copy of the conveyance, deed, instrument or writing under which the land obligation(s) was/were created, together with a copy of the applicant's title, a large scale plan of the location identifying adjacent properties and any grant of planning permission which has been obtained for any proposed development, with any plans relating to it. It will be in the applicant's own interest to identify the proprietors of the adjacent properties.

(b) An application fee is payable and payment should accompany this application. Full details of current fees can be obtained from the Clerk to the Tribunal but it should be noted that fees are payable for any hearing which is arranged and also for an order granting the application. The cost of an advertisement is also recoverable from an applicant – advertisements are invariably required in applications involving missing superiors, alcohol and major developments which may have widespread implications.

2. At any hearing (usually held near the subjects) relating to this application you will be required to adhere to the case set out above unless the Tribunal consider that the introduction of new material would not prejudice the interests of other parties.

3. Section 1(3) of the 1970 Act reads as follows:-

"Subject to the provisions of this section and of section 2 of this Act, the Lands Tribunal, on the application of any person who, in relation to a land obligation, is a burdened proprietor, may from time to time by order vary or discharge the obligation wholly or partially in relation to the interest in land in respect of which the application is made, on being satisfied that in all the circumstances,

(a) by reason of changes in the character of the land affected by the obligation or of the neighbourhood thereof or other circumstances which the Tribunal may deem material, the obligation is or has become unreasonable or inappropriate; or

(b) the obligation is unduly burdensome compared with any benefit resulting or which would result from its performance; or

(c) the existence of the obligation impedes some reasonable use of the land."

4. Section 1(4) of the 1970 Act provides that the Tribunal may direct a successful applicant to pay compensation to a benefited proprietor.

5. The Tribunal have discretion to deal with claims for expenses as they think fit.

**MODEL MANAGEMENT SCHEME**

**PART I**

**THE OWNERS' ASSOCIATION**

**RULE 1**

**ESTABLISHMENT, STATUS ETC.**

- |     |  |                             |
|-----|--|-----------------------------|
| 1.1 | The association is established on the day on which this scheme takes effect.   | Establishment.              |
| 1.2 | The association shall be a body corporate to be known as "The Owners' Association of " with the addition of the address of the community.                          | Status.                     |
| 1.3 | The members are the persons who, for the time being, are the owners of the units; and where two or more persons own a unit both (or all) of them shall be members. | Members of the association. |
| 1.4 | The address of the association shall be that of the manager.   | Address of association.     |

## RULE 2

### FUNCTION, POWERS AND ENFORCEMENT

- 2.1 The function of the association is to manage the community for the benefit of the members. Function of association.
- 2.2 The association shall have power to do anything necessary for or in connection with the carrying out of the function mentioned in rule 2.1 and in particular may - Powers of association.
- (a) carry out maintenance, improvements or alterations to the scheme property,
  - (b) enter into a contract of insurance in respect of the community or any part of it (and for that purpose the association shall be deemed to have an insurable interest),
  - (c) purchase, or otherwise acquire or obtain the use of, moveable property,
  - (d) require owners to contribute by way of service charge to association funds,
  - (e) open and maintain in the name of the association an account with any bank or building society,
  - (f) invest in the name of the association any money held on behalf of the association,
  - (g) borrow money,
  - (h) engage employees or appoint agents, or
  - (i) act in accordance with any other powers conferred under or by virtue of this scheme.
- 2.3 This scheme shall be binding on the association, the manager and the members. Scheme to be binding.
- 2.4 The association may enforce - Enforcement of scheme.
- (a) the provisions of this scheme,
  - (b) any obligation owed by any person to the association.

## RULE 3

### THE MANAGER

- 3.1 The association shall have a manager who, subject to rule 3.2, shall be a person (who may be a member or a firm) appointed by the association at a general meeting. Association to have manager.
- 3.2 Where a person nominated as the first manager in the deed of conditions applying this scheme as respects the community has confirmed that he is willing to act as manager he shall - Appointment by relevant deed of conditions.
- (a) act as such until the first annual general meeting is held,
  - (b) be entitled to reasonable remuneration, and
  - (c) be eligible for reappointment.
- 3.3 The association may at a general meeting remove from office the manager before the expiry of his term of office. Power to remove manager.
- 3.4 Any actings of the manager shall be valid notwithstanding any defect in his appointment. Validity of actings of manager.
- 3.5 The manager shall be an agent of the association. Manager to be agent.
- 3.6 Subject to this scheme, any power conferred on the association under or by virtue of this scheme shall be exercisable by - Exercise of powers.
- (a) the manager, or
  - (b) the association at a general meeting.
- 3.7 Any duty imposed on the manager under or by virtue of this scheme shall be owed to the association and to the members. Duties owed to association and members.
- 3.8 The manager shall comply with any direction given by the association at a general meeting as respects the exercise by him of the powers conferred under or by virtue of this scheme. Manager to comply with directions.

## **RULE 4**

### **EXECUTION OF DOCUMENTS**

4. A document is signed by the association if signed on behalf of the association by -

- (a) the manager, or
- (b) a person nominated for the purpose by the association at a general meeting.

Execution of documents by association.

**RULE 5**  
**WINDING UP**

- |  |                                       |
|--|---------------------------------------|
| 5.1 The manager shall commence the winding up of the association on the date on which this scheme ceases to apply as respects the community.   | Commencement of winding up.           |
| 5.2 The manager shall, as soon as practicable after the commencement of the winding up, use any association funds to pay any debts of the association; and thereafter he shall distribute in accordance with Part II of this scheme any remaining funds among those who were, on the date when the winding up commenced, owners of units in the community. | Distribution of funds.                |
| 5.3 The manager shall -<br><br>(a) prepare the final accounts of the association showing how the winding up was conducted and the funds were disposed of, and<br><br>(b) not later than 6 months after the commencement of the winding up, send a copy of those accounts to each owner.  | Final accounts.                       |
| 5.4 Subject to rule 5.5, the association shall be dissolved at the end of the period of 6 months beginning with the commencement of the winding up.  | Automatic dissolution of association. |
| 5.5 At any time before the end of the period of 6 months mentioned in rule 5.4, the members may determine that -<br><br>(a) the association shall continue for such period as they may specify, and<br><br>(b) that it shall be dissolved at the end of the period so specified.   | Delayed dissolution.                  |
| 5.6 Notwithstanding the disapplication of this scheme, rule 5 and any other rule relating to the winding up of the association shall continue to have effect.  | Saving for certain rules.             |

**PART II**  
**GENERAL RULES**

**RULE 6**

**APPOINTMENT OF MANAGER**

6.1 The association shall -

- (a) at the first annual general meeting, and
- (b) where the manager's period of office expires or a vacancy occurs, at any subsequent general meeting,

Appointment of manager.

appoint on such terms and conditions as the association may decide the person who is to be the manager.

6.2 Not later than one month after the date of a general meeting at which a person is appointed to be manager -

- (a) that person, and
- (b) on behalf of the association, a member,

Certificate of appointment.

shall sign a certificate recording the making, and the period, of the appointment.

## RULE 7

### DUTIES OF MANAGER

7. The manager shall manage the scheme property for the benefit of the members and in particular shall -

Duties of manager.

- (a) carry out regular inspections of the scheme property,
- (b) arrange for the carrying out of maintenance to scheme property,
- (c) fix the financial year of the association,
- (d) keep, as respects the association, proper financial records and prepare the accounts of the association for each financial year,
- (e) implement any decision made by the association at a general meeting,
- (f) enforce -
  - (i) the provisions of the scheme, and
  - (ii) any obligation owed by any person to the association, and
- (g) keep a record of the name and address of each member.

## RULE 8

### GENERAL MEETINGS: PROCEDURE

- 8.1 The first annual general meeting shall be called by the manager and shall be held not later than 12 months after the day on which, in accordance with rule 1.1, the association is established. First annual general meeting.
- 8.2 The manager shall call an annual general meeting each year; and a meeting so called shall be held no more than 15 months after the date on which the previous annual general meeting was held. Annual general meetings.
- 8.3 The manager may call a general meeting at any time and shall call a general meeting if - Other general meetings.
- (a) a revised draft budget is required to be considered,
  - (b) he is required to do so by members holding not less than 25 per cent of the total number of votes allocated, or
  - (c) he is required to do so by a member of the advisory committee.
- 8.4 Any member may call a general meeting if - Member's right to call meeting in certain circumstances.
- (a) the manager fails to call a general meeting -
    - (i) in a case where paragraph (b) or (c) of rule 8.3 applies, not later than 14 days after being required to do so as mentioned in those paragraphs, or
    - (ii) in any other case, in accordance with this scheme, or
  - (b) the association does not have a manager.
- 8.5 Where under rule 8.4 a general meeting is called by a member - Procedure where member calls meeting.
- (a) any rule imposing a procedural or other duty on the manager in relation to general meetings (other than the duty imposed by rule 8.6(b)) shall apply as if it imposed the duty on the member, and
  - (b) if there is a manager, the member shall send him a notice stating the date and time fixed for the meeting and the place where it is to be held.

8.6 Not later than 14 days before the date fixed for a general meeting the manager shall call the meeting by sending to each member - Calling of meeting.

- (a) a notice stating -
  - (i) the date and time fixed for the meeting and the place where it is to be held, and
  - (ii) the business to be transacted at the meeting, and
- (b) if the meeting is an annual general meeting, copies of the draft budget and (except in the case of the first annual general meeting) the accounts of the association for the last financial year.

8.7 Any inadvertent failure to comply with rule 8.6 as respects any member shall not affect the validity of proceedings at a general meeting. Validity of proceedings.

8.8 A general meeting shall not begin unless there is a quorum; and if there is still no quorum twenty minutes after the time fixed for a general meeting then - Quorum necessary for meeting to begin.

- (a) the meeting shall be postponed until such date, being not less than 14 nor more than 28 days later, as may be specified by the manager, and
- (b) the manager shall send to each member a notice stating the date and time fixed for the postponed meeting and the place where it is to be held.

8.9 A meeting may be postponed only once; and if at a postponed meeting the provisions in rule 8.8 as respects a quorum are not satisfied, then the members who are present or represented shall be deemed to be a quorum. No quorum at postponed meeting.

8.10 If a general meeting has begun, it may continue even if the number of members present or represented ceases to be a quorum. Quorum need not be maintained.

8.11 For the purposes of rule 8 a quorum is - Number required for quorum.

- (a) where there are no more than 30 units in the community, members present or represented holding 50 per cent of the total number of votes allocated,

- (b) where there are more than 30 units, members present or represented holding 35 per cent of the total number of votes allocated.

8.12 The members present or represented at a general meeting shall elect one of their number or the manager to be chairman of the meeting; and on being so elected the chairman shall take charge of the organisation of the business of the meeting.

Election of chairman.

8.13 Any member present or represented at a general meeting may nominate additional business to be transacted at that meeting.

Additional business.

8.14 Except where he is unable to do so because of illness or for some other good reason, the manager shall attend each general meeting and shall -

Manager to attend and keep record of business transacted.

- (a) keep a record of all the business transacted at a general meeting, and
- (b) not later than 21 days after the date of a general meeting, send a copy of the record of business to each member.

## RULE 9

### GENERAL MEETINGS: VOTING

- 9.1 For the purpose of voting on any proposal at a general meeting one vote is allocated as respects each unit; and any right to vote is exercisable by the owner of that unit or by someone (not being the manager) nominated in writing by the owner to vote as respects the unit. Allocation and exercise of votes at general meeting.
- 9.2 If a unit is owned by two or more persons the vote allocated as respects that unit may be exercised by either (or any) of them; but if those persons disagree as to how the vote should be cast then no vote shall be counted as respects that unit. Exercise of vote where two or more persons own unit.
- 9.3 Except as mentioned in rule 12.1, a decision is made by the association at a general meeting by majority vote of all the votes cast. Decision by majority.
- 9.4 Voting on any proposal shall be by show of hands; but the chairman may determine that voting on a particular proposal shall be by ballot. Method of voting.

## RULE 10

### FINANCIAL MATTERS

- 10.1 Before each annual general meeting the manager shall prepare, and submit for consideration at that meeting, a draft budget for the new financial year. Duty of manager to prepare annual budget.
- 10.2 A draft budget shall set out - Content of draft budget.
- (a) the total service charge and the date (or dates) on which the service charge (or instalments) will be due for payment,
  - (b) an estimate of any other income that the association is likely to have and the source of that income,
  - (c) an estimate of the expenditure of the association, and
  - (d) the amount (if any) to be deposited in a reserve fund.
- 10.3 The association may at a general meeting - Consideration of draft budget by association.
- (a) approve the draft budget subject to such variations as may be specified, or
  - (b) reject the budget and direct the manager to prepare a revised draft budget for consideration by the association at a general meeting to be called by the manager and to take place not later than two months after the date of the meeting at which the budget was rejected.
- 10.4 At a general meeting at which a revised draft budget is to be considered, the association may approve or reject the budget as mentioned in rule 10.3(a) and (b). Revised draft budget.
- 10.5 Subject to rule 10.6, the manager may from time to time determine that an additional service charge shall be payable by the members to enable the association to meet any expenses that are due (or soon to become due) and which could not otherwise be met (or met in full). Additional service charge.

- 10.6 In any financial year the total amount of any additional service charge determined under rule 10.5 shall not exceed 25 per cent of the total service charge for that year as set out in the budget approved by the association; but in calculating that percentage no account shall be taken of any additional service charge payable in respect of the cost of emergency work (as defined in rule 13.3). Limit on amount of additional service charge.
- 10.7 If in any financial year the manager considers that any additional service charge exceeding the percentage mentioned in rule 10.6 should be payable, he shall prepare and submit to the association at a general meeting a draft supplementary budget setting out the amount of the additional service charge and the date (or dates) on which the charge (or instalments) will be due for payment; and rules 10.3, 10.4 and 11.3(a) shall apply as respects that draft supplementary budget as they apply as respects a draft budget and revised draft budget. Supplementary budget.
- 10.8 Any association funds shall be - Association funds.
- (a) held in the name of the association and,
  - (b) subject to rule 10.9, deposited by the manager in a bank or building society account.
- 10.9 The manager shall ensure that any association funds - Special treatment of certain funds.
- (a) which are likely to be held for some time are -
    - (i) deposited in an account which is interest-bearing, or
    - (ii) invested in such other way as the association may at a general meeting decide,
  - (b) forming a reserve fund are kept separately from other association funds.

## RULE 11

### SERVICE CHARGE

11.1 Subject to rule 11.2, the amount of any service charge imposed under this scheme shall be the same as respects each unit. Amount of service charge.

11.2 The association may at a general meeting decide as respects a particular owner and in relation to a particular payment that no service charge (or a service charge of a reduced amount) shall be payable. Service charge exemption.

11.3 When the draft budget has been approved in accordance with this scheme, the manager - Manager to collect service charge.

- (a) shall send to each owner a notice requiring payment, on the date (or dates) specified in the budget, of the service charge (or instalments) so specified, and
- (b) may send to each owner at any time a notice -
  - (i) requiring payment, on the date (or dates) stated in the notice, of an additional amount of service charge determined under rule 10.5, and
  - (ii) explaining why the additional amount is payable;

and on receipt of such a notice each owner is liable on such date (or dates) for the amount to which the notice relates.

11.4 Where two or more persons own a unit - Liability where two or more persons own unit.

- (a) they are jointly and severally liable for the service charge for which the owner of that unit is liable, and
- (b) as between themselves they are liable for the service charge in the proportions in which they own the unit.

11.5 Where an owner is liable for a service charge but the service charge cannot be recovered for some reason such as that -

Redistribution of share of costs.

(a) the estate of that owner has been sequestrated, or

(b) he cannot be contacted,

then that service charge shall be shared equally among the other owners or, if they so decide, that service charge shall be met out of any reserve fund; but that owner shall be liable to each of the other owners for any share paid.

11.6 Where any service charge (or part of it) remains outstanding not less than 28 days after it became due for payment, the manager may send a notice to the owner concerned requiring him to pay interest on the sum outstanding at such rate (being a reasonable rate) and from such date as the manager may specify in the notice.

Interest payable on overdue service charge.

## RULE 12

### SPECIAL MAJORITY DECISIONS

- 12.1 The association may determine -
- (a) to make rules governing the use of the scheme property,
  - (b) vary or replace this management scheme,
  - (c) to use any reserve fund to pay for such expenditure of the association as may be specified, or
  - (d) subject to consent being obtained as mentioned in rule 12.2, to use any money held on behalf of the association to carry out improvements or alterations to scheme property (not being improvements or alterations which are reasonably incidental to maintenance);

Special majority required.

but only if they so determine at a general meeting by majority vote of all the votes allocated.

12.2 Where any scheme property is not common property, a determination mentioned in rule 12.1(c) may be implemented only if at the time when it is proposed to carry out the work the owner of the property in question consents in writing to the improvements or alterations being made.

Consent of owner to be given where not common property.

## RULE 13

### EMERGENCY WORK

- 13.1 Any member may instruct or carry out emergency work. Power to instruct etc.
- 13.2 The association shall reimburse any member who pays for emergency work. Reimbursement of member.
- 13.3 For the purposes of this rule, "emergency work" means work which requires to be carried out to scheme property - Meaning of "emergency work".
- (a) to prevent damage to any part of the community, or
  - (b) in the interests of health or safety,
- in circumstances in which it is not practicable to consult the manager, or call a general meeting, before carrying out the work.

## **RULE 14**

### **ADVISORY COMMITTEE**

14.1 The association may at a general meeting elect such number of the members as they may specify to form an advisory committee whose functions shall be to provide the manager with advice relating to the exercise of his powers under or by virtue of this scheme.

Power to elect advisory committee.

14.2 Where an advisory committee is formed, the manager shall from time to time seek advice from the committee.

Manager to consult advisory committee.

## RULE 15

### MISCELLANEOUS

15.1 Any member may require the manager to allow him to inspect a copy of any document, other than any correspondence with another member, which relates to the management of the community; and the manager shall, if the document is in his possession or it is reasonably practicable for him to obtain a copy of it, comply with the requirement.

Information about management of community.

15.2 Any member who sells or otherwise disposes of his unit shall, before the date on which the person to whom the unit is to be sold (or otherwise transferred) will be entitled to take entry, send a notice to the manager stating -

Notice to manager on sale of unit etc.

- (a) the entry date and the name and address of that person,
- (b) the name and address of the solicitor or other agent acting for that person in the acquisition of the unit, and
- (c) an address at which the member may be contacted after that date.

15.3 Any document which requires to be sent to a member under or in connection with this scheme may be sent by -

Service of documents.

- (a) delivering the document to his unit,
- (b) posting it to that address or such other address as he is known to have, or
- (c) transmitting it to him by electronic means.

15.4 Any funds distributed under rule 5.2 shall be shared equally among the owners.

Distribution of funds on winding up.

**PART III**

**INTERPRETATION**

**RULE 16**

**INTERPRETATION**

16.1 For the purposes of this scheme, "scheme property" means [*define the property to be covered by the scheme*].

Meaning of "scheme property".

16.2 In this scheme, unless the context otherwise requires -

Other definitions.

"advisory committee" means any such committee formed in pursuance of rule 14.1,

"association" means the owners' association of the community established under rule 1.1,

"general meeting" means an annual or other general meeting of the association,

"maintenance" includes repairs or replacement, cleaning, painting and other routine works, gardening, and the day-to-day running of the scheme property; but does not include demolition, alteration or improvement unless reasonably incidental to the maintenance,

"manager" means the person appointed to be manager of the association,

"member" means a member of the association, and

"reserve fund" means money held on behalf of the association to meet the cost of long-term maintenance, improvement or alteration of scheme property or to meet such other expenses of the association as the association may determine.

**PART IV**

**CONDUCT RULES**

*[List here any real burdens regulating the community or any part of the community.]*