



Scottish Law Commission
promoting law reform

| (DISCUSSION PAPER No 128)

Discussion Paper on Land Registration: Registration, Rectification and Indemnity

discussion
paper



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August 2005

DISCUSSION PAPER No 128

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EDINBURGH: The Stationery Office

£21.00

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

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Glossary

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

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

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

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

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

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

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

Long lease. A lease for more than 20 years.

Overriding interests. Real rights constituted other than by registration.

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

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

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

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

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

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

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

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

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

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

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

Abbreviations

Alberta Law Reform Institute, *Land Recording and Registration Act*

Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No 69, 1993)

ARTL

Automated registration of title to land

BGB

Bürgerliches Gesetzbuch (German Civil Code)

First Discussion Paper

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

Henry Report

Scottish Home and Health Department, *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (1969, Cmnd 4137)

Joint Land Titles Committee, *Renovating the Foundation*

Joint Land Titles Committee for Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and Yukon, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990)

Law Com No 271

Law Commission and H M Land Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001)

Registration of Title Practice Book

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

Reid, *Property*

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

Reid Report

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

Ruoff and Roper, *Registered Conveyancing*

R B Roper, C West, M Dixon, D Fox, S R Coveney and S Wheeler, *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (2004; looseleaf)

Part 1 Introduction

Background

1.1 This is our second discussion paper on the subject of land registration. It follows our earlier discussion paper on *Land Registration: Void and Voidable Titles* which was published in 2004.¹ It is intended that a third and final discussion paper will follow in the course of this year. The subject of land registration was included in our *Sixth Programme of Law Reform*² and has now been carried forward to our *Seventh Programme*³ which commenced on 1 January 2005.

The first discussion paper

1.2 In the first discussion paper we examined the principles which underlie the Land Registration (Scotland) Act 1979 and suggested that they were unsatisfactory in a number of respects.⁴ The paper focused on two issues in particular: on the proper balance between facility of transfer and security of title, and on whether the current "positive" system of registration of title (which derives from English law) should be replaced by a "negative" system such as is found in some civilian jurisdictions such as Germany.

Facility of transfer v security of title

1.3 Few would disagree that the acquisition of land should be as safe, simple and as cheap as possible and, equally, that a title, once acquired, should be secure against future challenge. But beyond a certain point these aspirations are irreconcilable. If transfer is to be simple and safe – if an acquirer is to receive a good title merely by inspecting the Register and by taking an apparently valid deed of transfer – it follows that title will sometimes be acquired at the expense of a person who neither consented to the transfer nor, in all probability, was aware that it had taken place. Conversely, if a title is to be secure against future challenge, it must only be capable of being lost (in the ordinary case at least)⁵ by the consensual act of its holder; and for acquirers that implies an exhaustive and time-consuming examination of title in order to ensure that the person purporting to transfer land is also the person who owns it.

1.4 No absolute choice between these aspirations need be made; but of course the more that one is pressed into service the more, necessarily, the other is abandoned. The choice is often presented as being between the protection of the acquirer and the protection of the true⁶ owner – the person who, in some cases, must give up his title so that the acquirer's title is good. But acquirers (if successful) become owners too, and something which was easily

¹ Scot Law Com DP No 125.

² *Sixth Programme of Law Reform* (Scot Law Com No 176, 2000) paras 2.13–2.17.

³ *Seventh Programme of Law Reform* (Scot Law Com No 198, 2005) paras 2.7–2.11.

⁴ For a summary of the operation of the 1979 Act see First Discussion Paper part 2.

⁵ Leaving aside compulsory purchase, diligence, bankruptcy, and other forms of involuntary transfer.

⁶ Since such a person is usually no longer the owner, "true" should probably be placed in inverted commas. But the expression is used so often in the present paper that the inverted commas have been dispensed with.

acquired may just as easily be lost to a future acquirer. As Professor Thomas Mapp has observed:⁷

"Society can opt for either of two legal regimes concerning land ownership: hard to come by, hard to lose; or easy come, easy go. Most likely some rough balance will be sought."

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

1.6 Under the 1979 Act the choice between acquirer and true owner – between transactional ease and security of title – is made on the basis of possession. An acquirer who, at the time of challenge, is in possession is protected against any infirmity in the underlying title, and the true owner must make do with compensation (indemnity) from the Keeper.⁸ But an acquirer who is not in possession must yield title to the true owner, by the process of rectification of the Register, and is compensated in turn.⁹ In the first discussion paper we ventured two criticisms in particular of this solution.¹⁰ In the first place, momentary possession seemed too flimsy and uncertain a basis for so momentous a choice, and one too easily manipulated by individual acts of self-help. Secondly, the solution tilted the balance too far in favour of the acquirer, protecting him even more than was necessary for the purposes of registration of title. Since in practice the acquirer was almost always in possession, the effect of the 1979 Act was almost always to protect the acquirer and almost never to protect the true owner. And so, in particular, those still holding on Sasine titles were exposed to an irrevocable loss in the event that part of their land was included by mistake in a neighbour's title at the time of first registration.

1.7 Our proposed solution was to make a distinction between "Register error" and "transactional error".¹¹ The former is an inaccuracy which already affected the Register at the time of the acquirer's transaction. The latter is an inaccuracy which came to affect the Register only as a result of that transaction – in other words an error arising from the transaction itself. So if, immediately before a transaction, the Register shows the owner as A when the owner should be B, the inaccuracy is a Register error. But if a person acquires land on the basis of a disposition which is forged or otherwise void, the entering of his name on the Register would be (so far as the acquirer is concerned) a transactional error. A system of registration of title requires that an acquirer be protected against Register error. What he sees on the Register must be what he gets. In this discussion paper we call this the "integrity principle": the principle that, in a question with a *bona fide* acquirer, the integrity of the Register can be taken for granted. But there is no matching requirement of protection against transactional error. What goes on in a transaction is a matter for the acquirer and not

⁷ Thomas W Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (1978) para 3.13.

⁸ 1979 Act ss 9(3), 12(1)(b).

⁹ 1979 Act ss 9(1), 12(1)(a).

¹⁰ First Discussion Paper paras 4.22 ff.

¹¹ First Discussion Paper paras 3.15–3.18.

for the Keeper. Strictly, it does not concern the Register at all. It is thus an open question whether, and if so in what way, the acquirer should be protected.

1.8 Our proposal in the first discussion paper was to give more protection to the true owner and less to the acquirer;¹² for, as between two innocent parties, it is the acquirer who has innovated on the *status quo* and the acquirer who has voluntarily assumed the risk of a transaction in land. Thus the true owner should keep the property¹³ for as long as was consistent with the requirements of registration of title. In this way security of title would give way to transactional ease only at the point where the system left no alternative. Two conclusions followed. First, if the error affected the immediate transaction – if, in other words, it was a transactional error which did not involve the integrity of the Register – the property should be awarded to the true owner and not to the acquirer. Instead it was the acquirer who should receive indemnity. Secondly, if, before the true owner could assert his right, the acquirer transferred title to a second acquirer, the second acquirer, if in good faith, should be awarded the property. This is because what was a transactional error in a question with the first acquirer would have become a Register error in a question with the second; for at the time of the second transaction the first acquirer would be named on the Register as owner. This idea of title defects being cured, not in the first transaction but in the second, is perfectly familiar in the other systems of registration of title. In Torrens systems it is known as the principle of "deferred indefeasibility".¹⁴ To this principle we proposed one modification. The true owner should not lose title unless he had also lost possession for a significant period, such as a year. Loss of possession would thus be notice of a potential loss of title, giving the opportunity to investigate and, if necessary, to make a challenge. In the result an acquirer could not rely on the Register alone but must also consider the state of possession.

"Positive" system v "negative" system

1.9 The 1979 Act operates what is sometimes referred to as a "positive" system of land registration.¹⁵ A "positive" system confers (or, as the case may be, varies or extinguishes) a right by the very act of registration and without regard to the validity of the deed itself. A conventional or "negative" system, by contrast, operates within the normal rules of the law of property so that no right can be conferred by a deed which is invalid. Both types of system are fully compatible with the idea of registration of title, the integrity of the Register, and the protection of *bona fide* acquirers, and the choice between them is largely a matter of technique and of convenience. In the first discussion paper we argued that, in a Scottish context, the positive system of the 1979 Act brought mainly disadvantage.¹⁶ It was inflexible and irrational; often it left ownership in the wrong place; and above all it imported bijuralism, and with it unnecessary complexity and uncertainty. A system is "bijural" if it operates with two different sets of laws.¹⁷ By giving an acquirer too much too soon, a positive system must sometimes take back that which has been given; and to know when and whether such a clawback should occur the acquirer's position must be analysed both under the rules of land registration and under the ordinary rules of the law of property. If the results coincide, the

¹² First Discussion Paper paras 4.29 ff.

¹³ Or, in a positive system, have the right to the return of the property by rectification of the Register.

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

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

¹⁶ First Discussion Paper part 5.

¹⁷ First Discussion Paper para 1.11.

acquirer's right is secure; but if they are different – if, in other words, the right would not have been conferred under the ordinary law – the Register is inaccurate and can, in principle, be rectified so as to deprive the acquirer of his right. Such an inaccuracy is referred to in this paper as a "bijural inaccuracy": the acquirer is owner (for the moment) but ought not to be.¹⁸

1.10 Our proposal was that the positive system be replaced by a conventional, negative system. There should be one law of property and not two. But, as already mentioned,¹⁹ that law of property would be modified by the integrity principle so that a *bona fide* acquirer would take free of Register error. In effect our proposal was that the innovations made necessary by registration of title should be properly integrated with the law of property. The result would be clearer, simpler, more principled, and a great deal less prone to accident.

1.11 As we explained in our paper, it would be possible to implement the changes associated with the integrity principle without at the same time making the switch from a positive to a negative system. In that case a person acquiring under a void disposition would become owner at once, as under the present law, but would be vulnerable to the loss of ownership at the instance of the true owner. But the first change works better with the second, just as the policy of the 1979 Act itself would work better under a negative system.

An example

1.12 An example explains the difference between our proposals and the 1979 Act:

A is the registered owner of land. B impersonates A and grants a disposition to C in which A's signature is forged. C registers the disposition and is entered on the Register as proprietor. Later C grants a disposition to D which is registered in turn. Both C and D are in good faith.

Under the 1979 Act each of C and D would acquire ownership on registration; but since the ordinary law of property does not allow a right to pass on a forged deed, the Register would be inaccurate and could in principle be rectified. For as long, however, as the acquirer remained in possession, rectification would be prevented. The effect of our proposals would be different. No title could pass to C on the basis of a forged disposition and A would remain as owner. But what was a transactional error in a question with C would become a Register error in a question with D. D is entitled to rely on the integrity of the Register, and the Register shows C as owner. Accordingly, when D registers a disposition from C, D becomes owner in place of A (assuming possession by C). In showing D as owner the Register is thus accurate and not, as under the 1979 Act, inaccurate.²⁰

1.13 The difference is further illustrated by considering the position of A. Under the 1979 Act A loses ownership at once but in theory can get it back at any time if only the current owner could be dispossessed. Under our proposals A remains owner at first and can have the Register rectified as of right. But once D is registered as owner A's right is lost forever and the position of D (and his successors) is absolutely secure. Thus under the 1979 Act the Register remains inaccurate for years to come, although A's right to seek rectification will

¹⁸ See paras 6.4 and 6.5.

¹⁹ Paras 1.7 and 1.8.

²⁰ Here, and elsewhere in the paper, we assume that inaccuracies transmit against third parties; but the position under the 1979 Act cannot be said to be clear. For a discussion, see First Discussion Paper paras 5.17–5.19.

presumably be eventually cut down by the long negative prescription. Under our proposals the Register is inaccurate only for as long as the registered proprietor is C.²¹

1.14 Both systems would indemnify the unsuccessful party, and under both systems that party is A. But if the narrative had stopped with the registration of C, our proposals would have given ownership to A and indemnity to C.

The results of consultation

1.15 Consultees made valuable comments on points of detail which will be taken into account when, in due course, draft legislation is prepared.²² Most were content with the general approach taken and in particular with the proposals described above. Our advisory committee of experts was likewise supportive of the general approach. We confirm that approach here. One of the purposes of the present paper is to work through some of its implications.

The present paper

1.16 This, our second discussion paper, is concerned with the three central features of registration of title: registration, rectification, and indemnity. It has two main objects. In the first place, it subjects the provisions of the 1979 Act to detailed analysis in order to identify strengths and weaknesses – the parts which should be carried forward into new legislation and the parts which should be discarded and replaced. In the second place, it reformulates the law, old and new, in a manner which is consonant with our more general proposals for reform. Sometimes the very process of reformulation is sufficient to dispose of a difficulty in the present law.

1.17 Part 2 examines the Land Register, and this is followed by a detailed analysis of registration (parts 3–5), rectification (part 6), and indemnification (parts 7–9). A final part (part 10) gives a list of our proposals. Extracts from the 1979 Act, as amended, are given in appendix A.

Our proposals in summary

1.18 Our main proposals can be summarised as follows.

1.19 **Registration.** Although the Register should continue to show only current rights and their current holders, information as to previous rights and holders should be available on request.²³ The legislation on land registration should no longer attempt to account for all the deeds and documents which are eligible for registration,²⁴ nor for the legal effect of such registration:²⁵ instead this should be left to special legislation. Donations should induce first registration.²⁶ Applications in respect of *a non domino* conveyances should continue to be

²¹ And even then, assuming C's possession is for less than 10 years; because, by virtue of another of our proposals, positive prescription will be made fully available for Land Register titles. See First Discussion Paper paras 3.4–3.11.

²² For an example see para 5.29.

²³ Paras 2.45–2.49.

²⁴ Paras 3.14–3.27.

²⁵ Paras 5.46–5.50.

²⁶ Paras 3.28–3.34.

refused if in competition with an existing "live" title.²⁷ Land and charge certificates should cease to be issued.²⁸

1.20 The integrity principle. *Bona fide* acquirers should be able to rely on the integrity of the Register. The "integrity principle" comprises two separate rules. First, a person shown on the Register as owner of land should, in a question with the acquirer, be taken to have become owner of that land on the date stated on the Register, provided that the person was in possession for a year or other prescribed period.²⁹ Secondly, an acquirer should take the land free of all real rights other than (i) those which appeared on the title sheet immediately before registration and (ii) overriding interests.³⁰ There should also be a presumption that the person named on the Register as owner of land is in fact such owner.³¹

1.21 Rectification. Where the Register is inaccurate, rectification should be available without restriction. In particular the Keeper should be bound to rectify an inaccuracy where requested to do so by a qualified person. The Register is "inaccurate" in the sense meant here where it fails to state the actual legal position.³² Under our proposals it is unnecessary to provide special protection for proprietors in possession.

1.22 Indemnity. The rules for payment of indemnity should be re-cast to accommodate the change from a positive to a negative system. At the same time it should be made clear that no indemnity is due in respect of an inaccuracy of which an acquirer was previously aware.³³ In respect of the acquisition, variation or extinction of real rights, the Keeper should warrant that the rights were duly acquired, varied or extinguished to the extent shown on the Register; and in the case of acquisition he should further warrant that there are no subordinate real rights other than those which appear on the Register, and overriding interests.³⁴ But no indemnity should be paid without "eviction", that is to say, without the inaccuracy being founded on by a third party.³⁵ As under the present law a true owner should also be indemnified for loss of rights. Thus indemnity should be paid to a person who loses rights as a result of the operation, in favour of another person, of the integrity principle.³⁶ In addition, indemnity should cover reasonable costs incurred in a successful application for rectification.³⁷ As under the current law, indemnity should be paid in respect both of the principal loss and, subject to some qualifications, of any consequential loss which was reasonably foreseeable. Interest should be payable from the date when the loss was incurred, and any property rights which were lost should be valued as of the same date.³⁸ The Keeper should cease to be liable to pay the judicial costs of an unsuccessful claim for indemnity.³⁹

²⁷ Paras 4.44–4.57.

²⁸ Paras 4.59–4.66.

²⁹ Paras 5.22–5.30.

³⁰ Paras 5.33–5.44.

³¹ Para 5.32.

³² Paras 6.1–6.32.

³³ Paras 7.41–7.44.

³⁴ Paras 7.22–7.48. The warranties replace the payment of indemnity for rectification under the 1979 Act s 12(1)(a).

³⁵ Paras 7.49–7.51.

³⁶ Paras 7.53–7.58.

³⁷ Para 7.59.

³⁸ Paras 9.1–9.38.

³⁹ Paras 9.43–9.56.

The third discussion paper

1.23 A third and final discussion paper will consider a number of miscellaneous topics such as servitudes and real burdens, inhibitions, mapping and boundaries, and caveats. It will also consider whether the Keeper's powers, as currently constituted, are compatible with the European Convention on Human Rights. We intend to publish this paper before the end of 2005.

New terminology

1.24 In developing our proposals for reform we have found it helpful to make use of a number of new terms as a shorthand for particular rules or concepts. Some have already been mentioned in this part. A complete list is given in a glossary at the beginning of this paper.

Which Parliament?

1.25 Legislation to give effect to our proposals would be within the legislative competence of the Scottish Parliament.⁴⁰ The law of land registration is not a reserved matter.⁴¹ Nor are our proposals in conflict with any rights arising under the European Convention on Human Rights.

Acknowledgements

1.26 We are greatly indebted to Registers of Scotland for the loan of a senior member of staff,⁴² and for their continued support, assistance, and encouragement. An advisory group of experts⁴³ made time to review an earlier version of this paper and made valuable suggestions. We are grateful to them. We also acknowledge the help received on a number of matters from our consultant, Professor George Gretton of the University of Edinburgh.

⁴⁰ For which see Scotland Act 1998 s 29.

⁴¹ Reserved matters are listed in sch 5 of the 1998 Act.

⁴² Mr Martin Corbett.

⁴³ Professor Stewart Brymer, University of Dundee and Messrs Thorntons; Professor George Gretton, University of Edinburgh; Professor Roderick Paisley, University of Aberdeen; and Professor Robert Rennie, University of Glasgow and Messrs Harper Macleod.

Part 2 The Land Register

DEFINING THE REGISTER

Component parts

2.1 A register may be defined by reference to form or to content. Content we may leave until part 3. As for form, no definition is offered by the 1979 Act,¹ but in practice the material maintained by the Keeper comprises –

- the title sheets of individual properties²
- the application record
- the index map³
- the index of proprietors,⁴ and
- copies of all deeds and other documents presented for registration.

The indices are primarily aids to searching. The deeds are the basis for registration, which is effected, not by copying the deeds (as in the Register of Sasines), but by making or deleting an entry in the appropriate title sheet. In the case of first registration, or transfer of a part, a new title sheet must be produced.⁵ Finally, the application record is a provisional summary of all applications made immediately on receipt and giving brief details as to the property affected, the type of deed, and the parties.

2.2 Which of these parts constitutes the Register and which does not? The 1979 Act is unclear on a matter on which clarity is desirable, not only for its own sake, but because of the consequences which follow from being part of the Register. Thus the Register, and the Register alone, can be rectified.⁶ The Register is public.⁷ To some extent the system of indemnity depends on the Register.⁸ And, most important of all, registration can be effected only by making or changing an entry in the Register.⁹ No doubt some of these consequences could be separated from the Register itself. There is no necessary connection, for example, between what is part of the Register and what is made available to the public, and indeed under present law and practice there is public access, not only to the title sheets, but to the application record, the index of proprietors, the index map, and to certain deeds. But for

¹ The 1979 Act merely provides, in s 1(1), that the Register is a "register of interests in land".

² 1979 Act ss 5 and 6.

³ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 23(a). The index map is merely one layer within a digital system. In particular it is overlaid on to the OS database.

⁴ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 23(b).

⁵ A new title sheet is also created if the Keeper divides an existing title: see Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 8(b).

⁶ 1979 Act s 9(1).

⁷ 1979 Act s 1(1).

⁸ 1979 Act s 12(1).

⁹ 1979 Act s 5(1).

registration and rectification, at least, the connection with the Register is intrinsic and unavoidable.

2.3 What, then, is the Register? The answer, probably, is the totality of the title sheets and nothing else.¹⁰ Subject to what is said in the next paragraph, the actual deeds can be discounted for this purpose: as is often said, the Land Register is a register of titles and not of deeds. The indices are a guide to the Register rather than the Register itself. Only the position of the application record requires closer consideration. Under the 1979 Act, registration takes place when the application is received and not when, later, the necessary amendments are made to the title sheet.¹¹ Especially in the case of first registrations there may be a significant interval of time between these two dates, during which interval the only official entry is the entry in the application record. Nonetheless, it is thought that the application record is not part of the Register. It is compiled at speed. It is based only on such information as is immediately available from the application forms and deeds, so that the ultimate entry on the title sheet – the product of further reflection and scrutiny – may be in different terms. Most crucially, some of the applications which appear on the application record will in the end be rejected. At best, therefore, the application record is an indication of the paperwork which is currently being processed, and hence of what *might* ultimately appear on the Register. It is not the Register itself. In our view the Register consists of, and only of, the title sheets. The rule in England and Wales appears to be the same.¹² We think that any new legislation should make the position clear beyond doubt.

Title sheets and deeds

2.4 A title sheet comprises four sections, namely:¹³

- A. the property section
- B. the proprietorship section
- C. the charges section, and
- D. the burdens section.

If, as quite often, the charges and burdens sections refer to deeds, are the deeds then part of the title sheet, and hence of the Register? Two types of reference are found in particular. Quite often the deed is merely mentioned by name, and must be consulted for further information. For example, an entry in the charges section will typically read:

"Standard Security by the said John Alan Mactaggart to the ROYAL BANK OF SCOTLAND PLC. Date of Registration: 19 NOV 2003"

In the case of real burdens, however, there is normally a direct, and often lengthy, extract from the deed, giving the full text of the burdens. This is prefaced by details of the deed itself so as to show the provenance of the burdens, their date of creation, the property which they

¹⁰ *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 6 para 706. The Henry Report part I para 4 begins: "The Register shall include a Title Sheet for each separate tenement of lands ..."

¹¹ 1979 Act s 4(3), discussed at paras 4.1–4.3.

¹² Ruoff and Roper, *Registered Conveyancing* para 4.001.

¹³ For full details, see Land Registration (Scotland) Rules 1980 (SI 1980/1413) rr 3–7.

affect and, since 28 November 2004, the property in favour of which they are constituted. For example:

"Deed of Conditions, registered 4 June 2002, by Forest Builders (Scotland) Limited, in respect of subjects of which the subjects in this title form part, contains burdens in the following terms:"

2.5 Where all relevant parts are already transcribed on to the Register, as in this second example, the status of the deed becomes unimportant. But in the case where only a bare reference is given (as with standard securities) it might seem as if the deed itself should be treated as part of the Register, for otherwise the information on the Register is sparse indeed. It seems unlikely, however, that this is the correct analysis. After all, the Keeper has no responsibility for the deed itself. It is not his. The Keeper writes only the entry on the Register. If the entry is brief, that is his decision. If it is inaccurate, it can be rectified. A deed cannot be rectified.¹⁴ It is the raw material of registration and not the Register itself. The contrast with the Register of Sasines is illuminating. In some respects the charges and burdens sections of a title sheet resemble a search sheet in the Sasines Register, for both give short details of deeds which must then be further consulted. But whereas in the Land Register the sheet is the register and the deed is not, in the Register of Sasines matters are exactly the other way round.¹⁵

Storage of data

2.6 In England and Wales it is provided that the register "may be kept in electronic or paper form, or partly in one form and partly in the other".¹⁶ An equivalent power exists, in Scotland, in respect of the Register of Sasines.¹⁷ The Land Register is, and has always been, kept in electronic form only. In effect it is a bundle of data which can be downloaded and authenticated as and when required. The 1979 Act, however, is silent as to form. We think that the opportunity of new legislation should be taken to provide that the Register may be kept electronically or in whatever other medium the Keeper may consider appropriate.

Proposal

2.7 We sum up the discussion in the form of a proposal, on which comments are invited:

1. **Any new legislation should make clear –**
 - (a) **that the Land Register comprises the totality of the title sheets (but not including any deeds referred to in the title sheets); and**
 - (b) **that the Register may be maintained in electronic form or in such other form as the Keeper may direct.**

¹⁴ At least not by the Keeper. For the power of the court to rectify a deed, see Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 8.

¹⁵ Search sheets were introduced as a matter of administrative convenience in the 1870s and do not form part of the statutory register. See L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942) pp 146 ff.

¹⁶ Land Registration Rules 2003 (SI 2003/1417) r 2(1).

¹⁷ Register of Sasines (Scotland) Act 1987 s 1. And see the Register of Sasines (Microcopies) (Scotland) Regulations 1989 (SI 1989/909).

TITLE SHEETS

Primary and secondary rights

2.8 The Land Register comprises "interests in land" – in effect, real rights in land.¹⁸ But not every interest has a title sheet. Implicit in the 1979 Act is a distinction between "primary" interests and "secondary" interests – or, in the terminology adopted in this paper, "primary rights" and "secondary rights".¹⁹ A primary right has its own title sheet. A secondary right is registered by being entered on the title sheet of the primary right to which it most closely relates. This distinction, modelled on the search sheets used in the Register of Sasines, is essentially a practical one. Experience shows that certain rights are routinely encumbered by other rights. A right which encumbers other rights, without itself being encumbered, need only appear on the title sheet of a "parent" right; but a parent right needs a title sheet of its own.

2.9 The secondary rights are any "heritable security, liferent or [other] incorporeal heritable right".²⁰ Corporeal rights are primary rights. The only corporeal right recognised in Scots law is ownership, but separate title sheets are also maintained for long leases (ie leases for more than 20 years).²¹ Thus two primary rights are recognised: ownership of land and long lease.²²

2.10 The position is made more complex in practice by the wide meaning given to "land". Under the doctrine of "separate tenements" it is possible for a stratum of land to be owned separately from ownership of the surface,²³ the two most prominent examples being minerals and flats. Further, the law recognises the possibility of *incorporeal* separate tenements – of rights, in other words, which are treated as land itself. The only important example is the right of salmon fishings, and this too is allowed its own title sheet by the 1979 Act.²⁴ It follows that for the same parcel of land, represented on the title plan only by its surface area, multiple title sheets might exist. Thus if a block of flats has been built, and the minerals reserved by the developer, there could be separate title sheets for the minerals and for each flat. And for each flat (or the minerals) further title sheets might exist to represent the primary rights of ownership and (if the flat was non-residential) long lease.²⁵

¹⁸ Para 3.1.

¹⁹ This appears most clearly from ss 2(2) and 5(1), discussed below.

²⁰ 1979 Act s 5(1).

²¹ Until an amendment to s 28(1) of the 1979 Act by s 76 and sch 12 para 39(11)(b) of the Abolition of Feudal Tenure etc (Scotland) Act 2000 this was contrary to a strict reading of the 1979 Act.

²² Prior to the abolition of the feudal system rights of superiority were also primary rights, with their own title sheet.

²³ Reid, *Property* paras 207–212.

²⁴ This is achieved, rather obliquely, by excluding salmon fishings from "incorporeal heritable right" and hence from the secondary interests listed in s 5(1)(b). See s 28(1) (meaning of "incorporeal heritable right"). The same technique is used in respect of feudal sporting rights preserved by notices registered under s 65A of the Abolition of Feudal Tenure etc (Scotland) Act 2000. Only 65 such notices were registered. The other incorporeal separate tenements – for example the right to gather mussels, or the right of port or ferry – are, properly, denied a separate title sheet.

²⁵ The maximum duration of lease for a dwellinghouse is now 20 years: Land Tenure Reform (Scotland) Act 1974 s 8. Only leases for more than 20 years (ie "long leases") are registrable: Registration of Leases (Scotland) Act 1857 s 1.

Principal title sheets and lease title sheets

2.11 Every property fully on the Register has at least a title sheet for the primary right of ownership; and if the property is subject to a long lease a separate title sheet will exist for that as well. We may call these, respectively, the "principal title sheet" and the "lease title sheet". The principal title sheet is, in effect, the master sheet for the land. All essential information is there, at least in outline, and it is the starting point for any investigation of title. Thus it describes the land, names its owner, and shows any subordinate real rights to which the land is subject.²⁶ The information given in respect of subordinate real rights varies.²⁷ For real burdens the practice is to set out the burdens in full. For standard securities there is a bare reference to the security deed, which must then be consulted for further details. For long leases there is also a bare reference but, where one exists, often to the lease title sheet rather than to the lease itself.²⁸ That title sheet in turn will usually²⁹ give full information in relation to the lease: the name of the current tenant, the rent, the other conditions binding on the landlord or tenant, and any security granted over it. If, as often, there is no long lease, there will only be a single, "principal" title sheet.

A need for reform?

2.12 The basic division into principal title sheets and lease title sheets seems to have worked well in practice and is, so far as we are aware, uncontroversial. It is true that from time to time a subordinate real right which does not have its own title sheet might itself be encumbered by another right – a standard security by a standard security, for example – leading to the slight awkwardness of both levels of right being entered only in the principal title sheet.³⁰ But we are not aware of practical difficulties, or of demand for change. Similarly, we are not aware of any dissatisfaction as to the amount of information given on the principal title sheet in relation to different types of subordinate real right.

2.13 One change in terminology seems worth considering. Mention was made earlier of the charges section of the title sheet. "Charges" is a term of art in England but not in Scotland.³¹ The Scottish term is "rights in security". The only "charge" which may be created in Scotland, the floating charge, is an overriding interest and so appears only rarely on the Register, and in practice the charges section is inhabited mainly by standard securities. The term for the section recommended by the Reid Committee was "heritable securities"³² but

²⁶ The fact that it shows subordinate real rights as well as ownership makes it inappropriate to speak of a "proprietor title sheet".

²⁷ On this matter the 1979 Act s 6(2) gives the Keeper discretion: "The Keeper shall enter a real right or real burden or condition in the title sheet by entering its terms or a summary of its terms therein". Typically in Torrens systems there is nothing more than a reference to the deed. The practice in Scotland is to give more information.

²⁸ Unless the lease remains on the Sasine Register in which case the reference is to the deed, as with standard securities. In both cases a brief schedule of leases gives the term, the rent, and the name of the original tenant.

²⁹ Where, however, the lease is complex, the practice is simply to refer to the lease, which is then included in the land certificate.

³⁰ This was the subject of express provision in part II of the Henry Report, r 40 providing that: "The Keeper shall in the case of a bond over a bond (1) enter the bond in the Charges Section of the Title Sheet of the lands affected (2) enter a note on the existing Charge Certificate to the effect that the bond has been assigned in security of a bond and (3) issue a Sub-Charge Certificate to the creditor in the last mentioned bond."

³¹ *Scottish & Newcastle Breweries Ltd v Liquidator of Rathburne Hotel Co Ltd* 1970 SC 215, 219 *per* Lord Fraser: "The word 'charge', in the sense of a lien or security, is not, I think, a term of art in Scots law, and it is indeed rather unfamiliar, although not entirely unknown".

³² Reid Report para 94.

this was changed to "charges" by the Henry Committee,³³ presumably on the model of the English legislation.³⁴ A modest but useful reform would be to restore the word "securities".

2.14 Accordingly, we propose that:

2. (1) **The existing division of the Register into "principal" title sheets and "lease" title sheets should continue.**
- (2) **There should be no change as to the amount of information given on the principal title sheet in respect of standard securities, real burdens, and other subordinate real rights.**
- (3) **The "charges section" of the title sheet should be re-named the "securities section".**

A PUBLIC REGISTER

Introduction

2.15 From the very beginning the Register of Sasines was "ane publick Register", a register to which any member of the public might have access without special cause. The reason, as explained by the preamble to the Act of 1617,³⁵ was to avoid the "gryit hurt sustened by his Maiesties Liegis" by double grants in respect of the same area of land. By means of registration, such "privat rightis" would "be maid publict and patent to his hienes leigis". The underlying basis is, of course, the publicity principle: the principle that, as real rights affect third parties, so their creation should be attended with due publicity.³⁶ The Land Register follows this long-established tradition. It too is "a public register",³⁷ and it too may be freely consulted.

2.16 No one would argue for fundamental change in this regard; but a Register which makes public the private affairs of individuals and organisations is apt, in the modern law, to raise issues of privacy and confidentiality. The fact that the Register is held on computer, is easily searched, and may be consulted on the internet has the effect of bringing these issues into greater prominence.

Content of the Register: personal rights

2.17 There can be no objection to the publication of real rights as such, for that is the very purpose of the Register. But deeds often contain personal rights as well as real rights, so that, by publication of the real right, there may also be incidental publication of the personal right. In the Register of Sasines, indeed, that result is unavoidable, for it is the deeds that comprise the register; and while in the Land Register a personal right would not normally be

³³ Henry Report part I para 4.

³⁴ Land Registration Rules 1925 (SR&O 1925/1093) rr 2 and 7, now replaced by the Land Registration Rules 2003 (SI 2003/1417) rr 4 and 9.

³⁵ Registration Act 1617 c 16.

³⁶ See Scottish Law Commission, Discussion Paper on *Registration of Rights in Security by Companies* (Scot Law Com DP No 121, 2002) paras 1.3–1.5.

³⁷ 1979 Act s 1(1).

entered as such, a copy of the deed is retained and is often available to the public.³⁸ The question arises as to whether any restriction should be introduced on the incidental disclosure of rights which are personal and, in some cases at least, confidential.

2.18 The Freedom of Information (Scotland) Act 2002 exempts from the general right to information under that Act any information the disclosure of which "would, or would be likely to, prejudice substantially the commercial interests of any person"³⁹ provided that the public interest in disclosing the information is outweighed by that in maintaining the exemption.⁴⁰ As matters stand, this exemption has little impact on the Land Register, where the right of public access exists, to a large extent, independently of the 2002 Act. In England and Wales, however, the equivalent provision in the Freedom of Information Act 2000⁴¹ has been drawn on for the purposes of the legislation on land registration. The exemption in England and Wales works in this way.⁴² A person may ask the registrar to designate a document as an "exempt information document" on the ground that it contains "prejudicial information".⁴³ Information is "prejudicial" if its disclosure is likely to prejudice the applicant's commercial interests or to cause the applicant substantial unwarranted damage or distress.⁴⁴ The first of these derives from the Freedom of Information Act, as already mentioned, and the second from the Data Protection Act 1998 s 10.⁴⁵ The application must explain the basis for the exemption sought and be accompanied by a certified copy of the document with the offending passage or passages removed. The registrar is bound to accept the application for exemption unless he either considers it groundless or is of the view that its acceptance would prejudice the keeping of the register.⁴⁶ Acceptance of the application denotes only a provisional exemption. In the event that a person applies for a copy of an exempt information document, the registrar must decide, on the model of the Freedom of Information Act, whether the "public interest in providing an official copy of the exempt information document to the applicant outweighs the public interest in not doing so".⁴⁷ In reaching his decision, the registrar will take the views both of the person seeking disclosure and, normally, of the original applicant for exemption. Only if the public interest so requires will disclosure be refused.

2.19 A roughly equivalent mechanism has long existed for the Register of Sasines. In preparing a deed for recording it is possible to include, immediately before the testing clause, a clause of direction which specifies that only certain parts of the deed are to be included on the Register.⁴⁸ The omissions do not require to be justified, although if they extended to an essential part of the deed (such as the dispositive clause), the recording would not be effective to confer a real right.⁴⁹ Further, whereas the exemption in England and Wales puts the information into the public domain but seeks to exclude access, the exemption in Scotland prevents the information from reaching the public domain at all.

³⁸ Paras 2.37–2.40.

³⁹ Freedom of Information (Scotland) Act 2002 s 33(1)(b).

⁴⁰ *Ibid* s 2(1).

⁴¹ Section 43(2).

⁴² See generally Ruoff and Roper, *Registered Conveyancing* paras 31.004–31.011.

⁴³ Land Registration Rules 2003 (SI 2003/1417) r 136(1).

⁴⁴ *Ibid* r 131.

⁴⁵ Section 10 does not apply directly to a land register because the information was supplied of consent, and in any event the registrar is complying with his legal obligations in respect of registration. See Data Protection Act 1998 s 10(2)(a) and sch 2 paras 1 and 3.

⁴⁶ Land Registration Rules 2003 (SI 2003/1417) r 136(3), (4).

⁴⁷ *Ibid* r 137.

⁴⁸ Titles to Land Consolidation (Scotland) Act 1868 s 12.

⁴⁹ J M Halliday, *Conveyancing Law and Practice* vol 2 (2nd edn, by I J S Talman, 1997) para 39-20.

2.20 No similar facility exists in respect of the Land Register.⁵⁰ It is not clear that one should now be introduced. In England and Wales the exemption was a response to the opening up of leases and charges to public inspection under the Act of 2002.⁵¹ In Scotland leases and securities have always been as available as any other deed on the register, without apparently giving rise to problems in practice. Indeed the experience in the Register of Sasines is that clauses of direction are not used and are virtually obsolete.⁵² A new exemption, moreover, would require some difficult decisions. Should it be qualified, as in England and Wales, or unqualified, as with clauses of direction? If it is to be qualified, what criteria should apply? Who should determine disputes? And to what extent should the Keeper have discretion to grant and to refuse exemption? Naturally, only personal rights could be eligible for exemption, for the publicity principle requires that real rights be made public. But the exclusion of personal rights can already be achieved, and more simply, by use of a separate document which is not presented for registration. All practitioners are familiar with form B standard securities,⁵³ or with leases where matters which affect the parties personally are separately provided for. It is not clear what would be gained by introducing a formal system of exemption. At best it might be of occasional use for certain types of supporting documentation retained by the Keeper such as pre-registration correspondence.⁵⁴ Our provisional view, however, is that an exemption system would be complex without necessarily being useful. In order to test opinion we ask:

3. Should a system be introduced to exempt from public inspection certain documents or parts of documents? If so what criteria for exemption should be adopted?

Accessing information: the index of proprietors

2.21 A more difficult issue than the content of the Register is the manner in which that content can be accessed. Two methods of searching the Register are provided in the Land Registration Rules – an index map and an index of proprietors⁵⁵ – and the second in particular raises issues both of privacy and personal security. The index of proprietors is an alphabetical list of the names of every person currently entered as proprietor in a title sheet. It is supplemented by an index in respect of the application record. The index of proprietors is available to the public at large by the web-based service, Registers Direct, by application to the Keeper, or by the use of private searchers. A sample page from the index is given as appendix B to this paper.⁵⁶ There is a separate index for each of the 33 registration counties, and a combined search is not possible on Registers Direct although one can be requested from the Keeper. For a search revealing no entries or only one title sheet the fee is £4 + VAT, but a combined search against a particular name in all 33 registration counties costs a minimum of £330 + VAT.

⁵⁰ Section 12 of the 1868 Act is disapplied by the 1979 Act s 29(3) and sch 3.

⁵¹ Land Registration Act 2002 s 66(1)(b). See C Harpum and J Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002* (2004) para 2.15.

⁵² They do not merit even a mention in recent conveyancing texts such as G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) and D A Brand, A J M Steven and S Wortley, *Professor McDonald's Conveyancing Manual* (7th edn, 2004).

⁵³ Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2) and sch 2. In a form B security the personal bond is a separate document and so is not registered.

⁵⁴ Later we suggest that such documentation, currently private, should become available for public inspection: see para 2.41.

⁵⁵ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 23.

⁵⁶ The index is not, however, maintained as a paper document.

2.22 In addition to the name, the index of proprietors gives the person's address, and the title number and short particulars of the property. The address is simply the designation of the person as given in the proprietorship section and derived, ultimately, from the dispositive clause of the most recent conveyance. It may be either a residential or a business address, and, if the former, is usually the person's previous address, being the address at the time of the granting of the conveyance. A significant number of proprietors are bodies corporate or trustees in a trust. Private individuals are not always easy to identify from the index, at least if the name is a common one, for there are no unique identifiers such as dates of birth or national insurance numbers. The index makes no attempt to identify whether different entries showing the same name relate to the same person. Naturally, the property to which a name is linked is not necessarily the place where that person lives.

ECHR article 8

2.23 Article 8 of the European Convention on Human Rights provides that:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

It may be assumed that the maintenance of a public register for land is not, in itself, a breach of article 8; but there is at least an argument that the position may be different in respect of the index of proprietors. Article 8 was pled in *R (Robertson) v Wakefield Metropolitan District Council*,⁵⁷ an English case concerning the electoral register. A challenge was made, not to the register itself, but to its sale for the purposes of direct marketing. The challenge was successful. To allow electors to become the targets of direct marketing was to interfere with their private lives. Hence, the court held, there was a *prima facie* engagement with article 8(1); and the interference could not be justified under article 8(2) in respect that it was not proportionate, owing to the absence of an individual right of objection.

2.24 The index of proprietors, however, appears to be in a different position. The data collected is similar to, and no more sensitive than, that which appears on the electoral register. Normally, therefore, article 8 would not be engaged. What made the difference in *Robertson* was the sale for direct marketing,⁵⁸ but there is no such sale in the case of the index of proprietors. Of course it is true that the index, like the electoral register itself, is open to the public. But neither the nature of the material nor the method by which it can be accessed appears to threaten respect for private and family life.

⁵⁷ [2002] QB 1052. For a later, unsuccessful, challenge to the sale of the electoral register to credit reference agencies, see *R (Robertson) v The Secretary of State* [2003] EWHC 1760. The case was argued mainly on the basis of article 3 of the First Protocol to the ECHR (right to free elections).

⁵⁸ Thus Maurice Kay J: "It is undoubtedly correct that the Strasbourg and domestic authorities on article 8 have been concerned with more obviously sensitive details than simply a name and address" (para 31). But (para 34) "[i]t is necessary to examine not just the information which is disclosed but also the anticipated use to which it will be put".

2.25 Even if article 8(1) were engaged, however, it seems that article 8(2) would prevent an overall breach. Three criteria can be derived from article 8(2).⁵⁹ An interference is justified if it is (i) "in accordance with the law" (ii) in pursuit of a legitimate objective ("in the interests of national security" etc) and (iii) proportionate and "necessary in a democratic society".

2.26 There can be no difficulty as to (i). And a public register of real rights in land is plainly a legitimate objective within (ii), necessary, among other things, for "the economic well-being of the country".

2.27 With (iii) there is more room for debate. It might be argued, for example, that an index of proprietors is needed only in a less advanced register, such as the Register of Sasines, where a satisfactory index by property is unattainable.⁶⁰ The Land Register has a reliable index by property in the form of the index map. An index by person which is open to the public is not only unnecessary but intrusive. The function of a land register, on this view, is to show, for any parcel of land, the name of the owner and the details of other real rights. For that function the index map is sufficient. The index of proprietors goes further in two crucial respects: it shows what a person owns; and in many cases it also shows where the person lives. A public index of proprietors, therefore, is a disproportionate response to the, admittedly sound, objective of publicising real rights in land. This argument seems overstated. The index of proprietors is merely an alternative method of accessing information of a kind which is unobjectionable in itself. Sometimes it is of the greatest practical use. An unpaid creditor can assess the prospects for heritable diligence. A trustee in sequestration or executor can determine the extent of the estate to be administered. A potential creditor can use ownership of land as an indicator of financial standing.⁶¹ Or a research body can plot the distribution of landownership in Scotland. None of these uses is objectionable. Indeed the complaint usually made in respect of public information about land is not that there is too much but that there is too little.⁶² It seems improbable that the index of proprietors is in breach of article 8.

2.28 That is not quite the end of the matter, however. Article 8 sets only minimum standards. Even if article 8 is not breached, there may be a view that the information contained in the index of proprietors ought to be controlled in some way, or made less available.⁶³ We return to that subject briefly at the end of the present section.

Personal safety

2.29 Through the index of proprietors a person can be linked with a property. In a small number of cases – public figures at risk from terrorism, for example, or those seeking to escape from a violent partner – the result may pose a threat to personal safety. It seems necessary to consider whether individual names can and should be "hidden" from the

⁵⁹ See eg *R (Robertson) v Wakefield Metropolitan District Council* [2002] QB 1052 at para 35; R Reed and J Murdoch, *A Guide to Human Rights Law in Scotland* (2001) paras 6.20 ff.

⁶⁰ We are informed that it would be difficult to search the Register of Sasines without an index of proprietors.

⁶¹ Scottish Law Commission, Report on *Registration of Rights in Security by Companies* (Scot Law Com No 197, 2004) para 3.9.

⁶² Land Reform Policy Group, *Identifying the Solutions* (1998) ch 6; Land Reform Policy Group, *Recommendations for Action* (1999) para 8.2; Scottish Executive, *Land Reform: Proposals for Legislation* (SE/1999/1) ch 6.

⁶³ It is perhaps worth adding that to publicise information (eg through an index of proprietors) which is already in the public domain (ie on the Land Register) does not amount to a breach of confidence and so does not give rise to a remedy in private law. See *Elliott v Chief Constable of Wiltshire*, *The Times*, 5 December 1996.

possibility of public search. Currently, a facility of this kind is available in at least three land registers (those of New Zealand, Tasmania and Victoria).⁶⁴

2.30 A possible model is provided in the companies legislation. Companies House forms routinely require the home address of directors. Since April 2002, however, directors have been able to apply to the Secretary of State for a "confidentiality order" which, if granted, lasts for five years and can be renewed.⁶⁵ For as long as an order is in force the home address is confidential and is not disclosed on a normal search of a company file.⁶⁶ A confidentiality order is granted only where the Secretary of State is satisfied⁶⁷

"that the availability for inspection by members of the public of particulars of the individual's usual residential address creates ... a serious risk that the individual, or a person who lives with him, will be subjected to violence or intimidation ..."

The subject was reconsidered as part of the recent Company Law Review and it is now proposed that in future every director should have the option of providing only a service address for the public record.⁶⁸

2.31 The parallels are, of course, inexact. The property disclosed by the index of proprietors is not always a home address. Nor, necessarily, is the address which appears in the index itself. Furthermore, a person concerned about security or privacy can take title through a nominee or a company, albeit at some cost to the utility of the Register as a whole.⁶⁹ But the main argument against a system of confidentiality orders is that it is of doubtful value. No one seeking to find a home address would begin with the Land Register. Many people are not owner-occupiers but live in rented accommodation which appears in the Register only in the name of their landlord. Many others who live in owner-occupied accommodation are not the registered owner. Many houses are still in the Sasine Register and would not be disclosed by a search of the Land Register.⁷⁰ In short, a search in the index of proprietors is an inefficient and unreliable method of discovering information which is already readily discoverable by other means, such as the telephone directory or the electoral roll. Some commercial organisations offer a tracing service.

2.32 The electoral roll deserves further mention. Following the decision in *Robertson*, discussed earlier,⁷¹ a statutory instrument was enacted providing for two separate versions of the register.⁷² Anyone can opt out of the "edited register", which is made available for commercial sale, but not of the "full register".⁷³ Yet the full register is made available for inspection by any member of the public, subject to certain safeguards, both at council offices

⁶⁴ This rests on practice rather than on legislation. In New Zealand the Domestic Violence Act 1995 part 6 makes provision for the victims of domestic violence, including the removal of names from registers such as the electoral roll.

⁶⁵ Companies (Particulars of Usual Residential Address) (Confidentiality Orders) Regulations 2002 (SI 2002/912) regs 2–5 and 10.

⁶⁶ Companies Act 1985 s 723C (inserted by the Criminal Justice and Police Act 2001 s 45(2)).

⁶⁷ Companies Act 1985 s 723B(3).

⁶⁸ Department of Trade and Industry, *Company Law Reform* (2005, Cm 6456) para 5.3.

⁶⁹ This has been described as "an equivalent device to ex-directory telephone numbers": see Law Commission, *Second Report on Land Registration: Inspection of the Register* (Law Com No 148, 1985) para 17(v).

⁷⁰ For the Register of Sasines the search sheet proprietors index is available in electronic form for as far back as 1905 and is searchable on Registers Direct.

⁷¹ Paras 2.23 ff.

⁷² Representation of the People (Scotland) (Amendment) Regulations 2002 (SI 2002/1872), amending the Representation of the People (Scotland) Regulations 2001 (SI 2001/497).

⁷³ Representation of the People (Scotland) Regulations 2001 (SI 2001/497) reg 93 (as amended).

and at suitable public venues such as libraries.⁷⁴ Although the topic has sometimes been discussed,⁷⁵ there is no facility for anonymous registration, and indeed it is a criminal offence to fail to provide a registration officer with such information as is required to maintain the register.⁷⁶

Three options for reform

2.33 Is reform needed in respect of access to the Land Register by means of the index of proprietors? Three broad options seem available. One is to withdraw the index altogether from the public domain. In England and Wales the equivalent index has never been publicly available, although it should be borne in mind that the register itself was not public until 1990. A second option is to continue to make the index available to the public but to block access in respect of individuals whose personal security is at risk. A third option is to leave matters as they are.

2.34 These options represent different assessments of the arguments set out above. The first responds to fears both as to privacy and as to personal security. The second assumes that privacy is adequately provided for but that personal security requires attention. The third, which we provisionally favour, considers the problem as too slight to justify legislative intervention, at least at present. A possible compromise would be to make no provision by primary legislation but to reserve powers to make regulations at some time in the future in the event that personal security became of greater concern.

2.35 Certain categories of person will always need access to the full index, and in the event that general access is restricted, as in the first two options, special rules will be needed for them. In England and Wales,⁷⁷ certain named persons and organisations can consult the index of proprietors' names, including administrators, liquidators, trustees in sequestration, a chief officer of police, the Inland Revenue,⁷⁸ the Director of Public Prosecutions, the Lord Advocate, the Department of Trade and Industry, and Scottish Ministers.⁷⁹ In addition, any person can search either his own name "or the name of some other person in whose property he can satisfy the registrar that he is interested generally".⁸⁰ The rules in respect of disclosure of directors' home addresses concealed by a confidentiality order follow much the same pattern.⁸¹

⁷⁴ Representation of the People (Scotland) Regulations 2001 (SI 2001/497) regs 7(3) and 43(1), (1A) (as amended).

⁷⁵ In its Report and Recommendations on *The electoral registration process* (May 2003) paras 5.16–5.22, the Electoral Commission recommends the introduction of anonymous registration in the case of voters able to demonstrate a genuine threat to their safety.

⁷⁶ Representation of the People (Scotland) Regulations 2001 (SI 2001/497) reg 23.

⁷⁷ Ruoff and Roper, *Registered Conveyancing* para 30.018.

⁷⁸ The Land Registration (Amendment) Rules 2005 (SI 2005/1766), due to come into force on 24 October 2005, make the necessary changes to the Land Registration Rules 2003 (SI 2003/1417) in light of the creation of H M Revenue and Customs to replace the Inland Revenue and H M Customs and Excise.

⁷⁹ Land Registration Rules 2003 (SI 2003/1417) r 140 and sch 5.

⁸⁰ Land Registration Rules 2003 (SI 2003/1417) r 11(3).

⁸¹ Companies (Particulars of Usual Residential Address) (Confidentiality Orders) Regulations 2002 (SI 2002/912) reg 13 and sch 1.

2.36 We would welcome the views of consultees on the following question:

4. Should the index of proprietors –

- (a) cease to be available to the public (subject to exceptions);**
- (b) remain available to the public but with a facility for "hiding" a name (subject to exceptions) where its disclosure would create a serious risk that the person concerned, or a person living with that person, would be subjected to violence or intimidation; or**
- (c) remain available to the public on the present, unqualified, basis?**

OTHER INFORMATION HELD BY THE KEEPER

Deeds

2.37 Any deed which induces registration is copied and the copy retained by the Keeper.⁸² Until February 2001 deeds were kept on microfiche but today they are scanned and stored electronically. Unlike the position for the Register of Sasines, however, not all deeds are accessible to the public as of right. Section 6(5) of the 1979 Act requires the Keeper to issue an official copy, known as an "office copy", only of a "document referred to in a title sheet". In practice the distinction is between conveyances and other deeds. The former give rise to an entry on the A (property) and B (proprietorship) sections of the title sheet, and the latter – creating subordinate real rights and other encumbrances – to an entry on the C (charges) and D (burdens) sections. In the charges and burdens sections the deed is invariably referred to, sometimes without much in the way of further information, and so is available under section 6(5). In the property and proprietorship sections, there is usually no mention of a deed at all. So if Alice, the registered owner, grants a disposition to Bruce, registration is effected by deleting Alice's name in the proprietorship section and substituting the name of Bruce. The disposition itself is not mentioned in the proprietorship section and, unless it happens to create real burdens or servitudes (in which case it will appear in the burdens section), it is not mentioned elsewhere in the title sheet. No copy, therefore, can be obtained under section 6(5).

2.38 Usually this situation is perfectly satisfactory. A potential acquirer wishing to discover the details of a standard security or notice of improvement grant must, and can, examine the deed. But for investigation as to ownership there is no need to consult prior dispositions: the fact that the seller is named as owner in the proprietorship section is sufficient evidence of title to grant. The curtain principle⁸³ dictates that the Register, in this respect, should be final. Nonetheless cases will sometimes occur where previous dispositions need to be consulted. An exclusion of indemnity, for example, means that the title is considered doubtful and is not guaranteed. No acquirer for value could take such a title without an examination of the prior writs. Subordinate real rights may raise similar issues. The holder of a standard security, or

⁸² In view of the importance of deeds, there would seem to be merit in converting this sensible practice into a statutory duty.

⁸³ I.e. the principle that the Register is the sole source of information about the title and that there is no need to look behind it. See First Discussion Paper para 1.14.

servitude, is not, in that capacity, a proprietor in possession and hence is not protected against rectification if the right is invalid.⁸⁴ Indemnity is paid instead.⁸⁵ A person wishing to acquire an existing subordinate real right but who would not be content with indemnity must check the title of the granter at the time of the original grant. In some cases that would inevitably involve the scrutiny of prior writs. Finally, if the Register is believed to be inaccurate, the inaccuracy may be impossible to demonstrate if access to previous dispositions is denied.

2.39 At the time of the 1979 Act there may have been an anxiety that those schooled in the rigorous examination of title required under the Sasine system would hold on to old practices even under registration of title. To deny conveyancers the titles was to remove the temptation. Today the position looks different. No conveyancer would look behind the title sheet unless there were overwhelming reasons for doing so. And where such reasons exist, it is a harsh doctrine that access should be denied – that, in the words of Lord President Hope:⁸⁶

"those who dealt with the proprietors of interests registered under the Act would be, to a material extent, in a worse position than those who deal with the proprietors of interests of land registered in the Register of Sasines, whose progress of titles they can search and who are protected by the operation of positive prescription."

2.40 We do not think that there are any grounds, either of principle or practice, for distinguishing in this matter between those deeds which are mentioned on the title sheet and those which are not. No such distinction was made by the Henry Committee,⁸⁷ and none is made in England and Wales.⁸⁸ In our view both classes of deed should be made available to anyone willing to pay the price of an office copy. The Keeper has indicated that he too supports this position. Indeed under the Freedom of Information (Scotland) Act 2002, copies of prior writs will usually be available as part of the citizen's general entitlement to information held by public authorities.⁸⁹

Application forms and other documents

2.41 Probably the right of public access should extend to other documentation which relates to an application and has been retained by the Keeper. That, broadly, is already the effect of the Freedom of Information Act. In England and Wales all documents relating to an application are available for public inspection.⁹⁰ In Scotland, apart from the deed itself, the Keeper retains an electronic copy of the application form and, more rarely, of correspondence. Neither is likely to be of much interest to a subsequent acquirer of the land.

⁸⁴ Invalid, that is, under general law as opposed to under the rules of land registration. For a discussion of this "bijuralism" see the First Discussion Paper para 1.11.

⁸⁵ First Discussion Paper paras 4.53–4.55.

⁸⁶ *Short's Tr v Keeper of the Registers of Scotland* 1994 SC 122, 141B. This statement was made in the context of the possible registration of a decree of reduction, but it applies to any case where a title is potentially vulnerable to challenge. In our First Discussion Paper, paras 3.4–3.11, we have already proposed the full restoration of positive prescription.

⁸⁷ Henry Report part I para 58(1).

⁸⁸ Land Registration Act 2002 s 66(1).

⁸⁹ Freedom of Information (Scotland) Act 2002 s 1(1). By sch 1 para 12 the Keeper of the Registers of Scotland is a Scottish public authority and hence subject to the Act. Exceptions to the general entitlement are listed in part 2 of the Act but it is thought that none would prevent the release of prior writs.

⁹⁰ Land Registration Act 2002 s 66(1)(c). And see Ruoff and Roper, *Registered Conveyancing* para 31.001.

Deeds as interpretative aids

2.42 One possible use of deeds deserves fuller consideration. It is perhaps the cardinal rule of interpretation that, in the words of Gloag:⁹¹

"The meaning of any expression is to be arrived at on a consideration of the context and of its relation to the whole deed."

To this established rule⁹² the Land Register presents certain obstacles. By its very nature, registration of title tends to break deeds into pieces, and to display the pieces in a different order, and with omissions, in the title sheet. Nor is the provenance always disclosed, so that it may not be possible to tell that the wording given in, say, the property section comes from the same deed as a later entry in the burdens section. Usually this does not matter, for the words will be clear and readily understandable on their own. But words which, read by themselves, are opaque and uncertain are likely to take on a clearer meaning if read in the context of the whole deed from which they are derived. Yet it is uncertain whether, under the 1979 Act, the deed can be used as an aid to interpretation.⁹³

2.43 It is, of course, possible to argue that recourse to prior deeds, even on an occasional basis, is a breach of the curtain principle and ought not to be permitted.⁹⁴ In our view, this apparently principled stand does not survive close scrutiny. In practice it is often necessary to read deeds in respect of rights entered in the charges and burdens sections, for the reason that the deed is listed with little or nothing in the way of further details. It is not clear why the position should be different in a case where the entry on the Register happens to be fuller or where the deed itself is not mentioned. The fact, for example, that real burdens are usually given in full should not – and, arguably, does not – prevent recourse to the originating deed for assistance in matters of interpretation.⁹⁵ Otherwise a practice which is intended to be helpful might obstruct the proper understanding of the words which appear on the Register. Another consideration also supports this line of reasoning. Most of the real burdens on the Land Register originated in Sasine deeds and were constituted, often many years ago, by recording in the Register of Sasines. Until such time as they were translated to the Land Register, they could, as a matter of course, be read in the context of the whole deed. If first registration prevented this practice from continuing, the result, in at least some cases, would be to change the meaning of the burdens.

⁹¹ W M Gloag, *The Law of Contract* (2nd edn, 1929) p 399.

⁹² We recommend its retention in our Report on *Interpretation in Private Law* (Scot Law Com No 160, 1997) para 2.16. And see the draft bill, sch, para 1(1).

⁹³ The difficulty, indeed, was anticipated more than a century ago by J S Sturrock: "Registration of Title and Scottish Conveyancing" (1908-09) 20 JR 1, 13: "[T]here must often be instances in which, even if the Deed is referred to in the notes on the Register, the perusal of the Deed must be necessary for the proper understanding of the rights or conditions which are conferred or imposed by it".

⁹⁴ Thus Lord Philip in *Marshall v Duffy* 2002 GWD 10-318 at paras 21 and 22: "[T]he purpose of the Land Registration (Scotland) Act 1979 was to provide a title guaranteed to be valid by an indemnity from the Keeper of the Register. The intention was that the Register should be the only measure of the title and that it should contain all the information relevant to the particular heritable interest ... The entries in the Register represent the definitive measure of the parties' rights ... In the absence of any conclusion for reduction or rectification of the titles, there is no justification for going behind the terms of these titles. To do so would defeat the purpose of the 1979 Act." The context, however, was an error in transcription and not interpretation.

⁹⁵ On the contrary, as with a standard security, the mention of the deed can be taken as a positive indication that it is available for consultation. In *Marshall v Duffy* 2002 GWD 10-318 no deed was mentioned. Section 6(2) of the 1979 Act gives rise only to a *presumption* that a summary of a real burden is a correct statement of its terms.

General information about land

2.44 In England and Wales the registrar may publish information about land "if it appears to him to be information in which there is legitimate public interest".⁹⁶ In Scotland there is a power to charge for information and hence, if only by implication, a power to provide it.⁹⁷ We do not propose a change in substance although a more overt oblique power would seem desirable. If the demand exists, the Keeper ought to be able to continue to present data in suitably customised form in return for a fee. Currently he provides details of property prices in several different packages.⁹⁸

Spent rights

2.45 The Land Register is ahistorical. Only the current state of the title is shown, and rights which formerly existed but have now been extinguished are not included. The result is that, in this respect at least, the Land Register is less informative than the Register of Sasines. In the Sasine Register it is possible to trace all previous owners from at least the time of the establishment of search sheets in the 1870s. From the Land Register it is not possible to know who owned the property yesterday.⁹⁹

2.46 Increasingly this has come to be seen as a disadvantage.¹⁰⁰ Quite apart from natural curiosity, there may be good reasons for wanting to know who owned a particular property at a particular time, or indeed whether a particular person owned property at all. Liability of various kinds depends on ownership of property.¹⁰¹ The doctrine of confusion in respect of servitudes and leases presupposes the ready availability of information as to past title. One of the standard rules of implied enforcement rights in respect of real burdens requires information as to what other land was owned by the grantor of a disposition at the time of the grant.¹⁰² If anything, our proposals for reform will make the matter more pressing. If, by virtue of the integrity principle, a *bona fide* acquirer is to be protected against Register error (ie an error already on the Register at the time of acquisition),¹⁰³ some means is required of determining the state of the Register at the relevant time.¹⁰⁴ Similarly, the proposed reintroduction of positive prescription¹⁰⁵ will make it necessary to trace the chain of owners, so that title can be matched with possession.

2.47 For the future, the solution seems relatively simple. The deletion of a right should not lead to the loss of the information. Instead the information should be stored in a form in which it is readily accessible to anyone wishing to consult it. Probably the correct place is not on the title sheet itself, for it would soon become cluttered and difficult to use. Instead it

⁹⁶ Land Registration Act 2002 s 104.

⁹⁷ Land Registers (Scotland) Act 1868 s 25.

⁹⁸ See the following websites: www.ScotlandsHousePrices.gov.uk; www.ros.gov.uk/businesscustomers/lpd.html; www.ros.gov.uk/pdfs/rsd.pdf.

⁹⁹ Although this information may sometimes be discoverable in other ways, including from earlier land certificates or office copies of the title sheet.

¹⁰⁰ The experience in England and Wales has been the same: see Law Com No 271 paras 9.58–9.60.

¹⁰¹ Eg the Title Conditions (Scotland) Act 2003 s 10 (continuing liability of former owner in respect of real burdens).

¹⁰² This is the rule derived from *J A Mactaggart & Co v Harrower* (1906) 8 F 1101, and which is preserved until 2014 by the Title Conditions (Scotland) Act 2003 s 49(2). We have previously drawn attention to the difficulty presented by an ahistorical register for this rule: see our Report on *Real Burdens* (Scot Law Com No 181, 2000) para 11.22.

¹⁰³ Paras 5.21 ff.

¹⁰⁴ Often, of course, a land certificate, updated by a form 12 or form 13 report, would provide sufficient evidence.

¹⁰⁵ First Discussion Paper paras 3.4–3.11.

seems preferable that the information be held in a file which sits behind the title sheet and can be accessed from it, for example on Registers Direct. We understand that such an arrangement is feasible at a technical level. As a minimum the file should contain details of previous owners (ie of the entries which have been removed from the proprietorship section). It is less important, but still desirable (for example for the purposes of determining Register error), that it should also extend to deleted securities, real burdens, and other encumbrances; but here a balance must be struck between the potential usefulness of the information and the resulting increase in work for the Keeper. The views of consultees as to the former would be welcome.

2.48 A more difficult question concerns information which is already lost. For each title now on the Register there is an information gap which began on the date of first registration and, in the case of some titles, extends for 20 years or more. In theory the Keeper could retrieve this information by examining the copy deeds which are held for each property. But the meagre demand for such information would not justify the substantial expenditure of resources which its retrieval would require. We do not think, therefore, that the Keeper should restore excised information as a matter of course. On the other hand, there seems no reason why such information should not be made available, on a case by case and no doubt occasional basis, to a person who is willing to pay the economic cost of retrieval.¹⁰⁶

Proposals

2.49 We invite views on the following proposals and question:

5. **(1) The Keeper should make available, on request, a copy of any deed or document held by him in respect of an application to the Register.**
- (2) An entry on the Register which transcribes words from a deed should, in a case of doubt, be interpreted in the context of the whole deed.**
- (3) The Keeper should continue to be able to make information about land available on payment of a fee.**
- (4) Where the name of a person entered as proprietor is deleted from the Register, the information contained in that entry should be stored in a readily retrievable form and should be made available on request.**
- (5) Should the same rule apply to other entries (for example entries in relation to standard securities) which are deleted from the Register?**
- (6) The Keeper should make available, on request, information as to the ownership of any property during the period between first**

¹⁰⁶ In England and Wales the Land Registration Act 2002 s 69(1) provides that: "The registrar may on application provide information about the history of a registered title".

registration and the coming into force of the proposed legislation; but the Keeper should not be bound to compile this information except in response to such request.

Part 3 Registration (1): nature and eligibility

TITLES OR DEEDS?

Registration of titles

3.1 It is explained at the very opening of the 1979 Act that the Land Register is "a public register of interests in land in Scotland".¹ "Interest in land" is defined to mean:²

"(a) any right in or over land, including any heritable security or servitude but excluding any lease which is not a long lease; and

(b) where the context admits, includes the land."

A "right in or over land" is, in the language of property law, a real right in land – a conclusion which is fortified by the examples given (heritable security and servitude). The Land Register, therefore, is conceived as a register of land and of real rights in that land. It is a register of title and not, as with the Register of Sasines, a mere register of deeds.

3.2 This way of looking at the Register is reinforced by section 2 of the 1979 Act, which sets out an apparently exhaustive list of the circumstances in which registration is permitted. According to section 2 the registration is allowed of, and only of: the grant of an interest in land; its transfer; and any other transaction or event which is capable of affecting the title to a registered interest in land, including variation and discharge. The language is of rights and not of deeds; and deeds do not appear in the Act until section 4 and then only obliquely in the context of a rule that³

"an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require."

No formal link is made between deed and interest in land, and so far as appears from the Act an interest in land could be conferred by the Keeper without any deed at all.

Registration of deeds and other documents

3.3 Other legislation, however, suggests a different approach. The statute book – even after 1979 – is replete with provisions allowing the registration, not of real rights, but of agreements, notices and documents of various kinds.⁴ A complete list could hardly be attempted, but it includes:

¹ 1979 Act s 1(1).

² 1979 Act s 28(1), as substituted by the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 76, sch 12 para 39(11)(c).

³ 1979 Act s 4(1).

⁴ It may be that these can be viewed as "transactions" within s 2(4)(c) of the 1979 Act.

- planning agreements under section 75 of the Town and Country Planning (Scotland) Act 1997;
- numerous other agreements on the same model, such as agreements with Scottish Enterprise and Highlands and Islands Enterprise,⁵ agreements with Scottish Natural Heritage,⁶ nitrate sensitive area agreements,⁷ agreements as to the use of land near roads,⁸ agreements stopping up private means of access to roads,⁹ management agreements with a National Park authority,¹⁰ and litter agreements with a litter authority;¹¹
- tree preservation orders;¹²
- notices by a planning authority in respect of compensation for depreciation following revocation or modification of planning permission, and the discharge of such notices;¹³
- planning agreements in relation to Crown use;¹⁴
- suspension orders in relation to mineral workings;¹⁵
- intervention orders and guardianship orders under the Adults with Incapacity (Scotland) Act 2000, and the amendment of such orders;¹⁶
- orders applying the code for the management of houses let as lodgings or occupied by members of more than one family, and control orders (and notices of revocation of such control orders) in relation to such houses;¹⁷
- notices in relation to improvement grants;¹⁸
- charging orders;¹⁹
- suspended forfeiture orders and forfeiture certificates in respect of the proceeds of crime;²⁰
- notices for the reallocation of feudal real burdens;²¹

⁵ Enterprise and New Towns (Scotland) Act 1990 s 32.

⁶ Natural Heritage (Scotland) Act 1991 s 5(8), and Conservation (Natural Habitats, &c.) Regulations 1994 (SI 1994/2716) reg 16.

⁷ Control of Pollution Act 1974 s 31C.

⁸ Roads (Scotland) Act 1984 s 53.

⁹ Roads (Scotland) Act 1984 s 72.

¹⁰ National Parks (Scotland) Act 2000 s 15.

¹¹ Litter Act 1983 s 8.

¹² Town and Country Planning (Scotland) Act 1997 s 161(1).

¹³ Town and Country Planning (Scotland) Act 1997 ss 79(1), 81(7).

¹⁴ Town and Country Planning (Scotland) Act 1997 s 250.

¹⁵ Town and Country Planning (Scotland) Act 1997 sch 8 para 8.

¹⁶ Adults with Incapacity (Scotland) Act 2000 ss 56, 61, 78.

¹⁷ Housing (Scotland) Act 1987 ss 159, 178 and 186.

¹⁸ Housing (Scotland) Act 1987 s 246(7).

¹⁹ Housing (Scotland) Act 1987 sch 9.

²⁰ Proceeds of Crime (Scotland) Act 1995 ss 21(10)(b), 24(6).

²¹ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 18.

- notices for the conversion of feudal real burdens into personal real burdens;²²
- notices reserving the right to claim compensation in respect of development value burdens;²³
- notices preserving neighbour burdens;²⁴
- notices of potential liability for costs of repairs;²⁵
- orders and agreements in respect of land connected with civil aviation;²⁶
- management agreements in respect of agricultural land in environmentally sensitive areas, and the termination of such agreements;²⁷
- certain orders and agreements in relation to new towns;²⁸
- nature conservation orders, and related orders and notices;²⁹ and
- land management orders, and orders amending or revoking such orders.³⁰

3.4 The language of this very miscellaneous collection of provisions is clear on one thing at least: in almost every case³¹ what is registered is, not a right, but a document or deed; and no distinction is made between registration in the Land Register and recording in the Register of Sasines. Indeed, even the 1979 Act itself, in a later provision, allows for the registration of a document, namely a docquetted plan under section 19 of that Act in respect of a discrepancy in common boundaries.

Standard v non-standard cases

3.5 The resulting picture is confused and confusing. On the one hand the 1979 Act insists, for the most part, that only interests in land – real rights in land – are to be registered; but, on the other hand, a large and growing body of legislative provisions requires the registration of deeds, notices and other documents. It is tempting to see in this discrepancy a difference based on type of right. Although numerous, the provisions listed above are not often encountered in practice. They represent an anomaly which would be troublesome only if it were commonplace. But in the case of standard real rights in land (ownership, standard security, proper liferent, servitude, real burden, and long lease) section 2 of the 1979 Act applies to its full extent, and the theory of registration of title is undisturbed. Thus on this view one registers rights in a case involving the standard real rights, and deeds in the non-

²² Abolition of Feudal Tenure etc (Scotland) Act 2000 ss 18A, 18B, 18C, 27, 27A.

²³ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 33.

²⁴ Title Conditions (Scotland) Act 2003 s 50.

²⁵ Title Conditions (Scotland) Act 2003 s 10A; Tenements (Scotland) Act 2004 s 13.

²⁶ Civil Aviation Act 1982 s 55.

²⁷ Agriculture Act 1986 ss 18(3), 19(1) and (3).

²⁸ New Towns (Scotland) Act 1968 ss 1A and 6.

²⁹ Nature Conservation (Scotland) Act 2004 s 25 and sch 2 para 15.

³⁰ Nature Conservation (Scotland) Act 2004 s 33 and sch 3 para 14.

³¹ But in respect of notices registered under part 4 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 "registering" is defined in s 49 to mean "registering an interest in land (or information relating to such an interest) in the Land Register of Scotland or, as the case may be, recording a document in the Register of Sasines".

standard cases for which specific provision is made by statute. Accordingly, the Land Register, while mainly a register of title, is also, to a small extent, a register of deeds. It seems certain, however, that this analysis is incorrect, for two reasons.

3.6 In the first place, even with standard real rights there is always a deed. Section 1(2)(b) of the Requirements of Writing (Scotland) Act 1995³² provides that –

"a written document complying with section 2 of this Act shall be required for –

(b) the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law;"

The previous law, which the 1995 Act replaced, was to the same effect. The point is indeed a fundamental one. Usually, the creation, transfer, variation or extinction of real rights in land is a consensual juridical act requiring the formality of writing. It is a criticism of the 1979 Act that it recognises neither the juridical act nor the need for writing.³³ Under automated registration of title to land (ARTL), due to be introduced in 2006, a deed will continue to be used, albeit in electronic form; and even if, in the long term, this virtual deed is dispensed with, a juridical act will continue to be necessary for the creation of real rights, whatever name it is given and whatever form it takes.

3.7 Three exceptions are allowed by section 1(2)(b): court decree, enactment, and rule of law.³⁴ Court decrees sometimes convey rights, as in the case of confirmation of executors or the act and warrant in favour of a trustee in sequestration. The role of legislation ("enactment") and the common law ("rule of law") is confined mainly to the extinction of rights, for example by negative prescription or performance. Occasionally, legislation also provides for rights to be transferred, for example to new statutory bodies following a reorganisation.³⁵ Of the three exceptions, it will be seen that only the first involves an actual document or deed (court decree). But as extinction without a deed leads to rectification and not registration,³⁶ it seems that it is only in the, unusual, case of transfer by legislation or by common law³⁷ that there is registration in the absence of a deed. The virtual universality of deeds is acknowledged by the request, in the application form for registration, for the "Name of Deed in respect of which registration is required".³⁸

3.8 The second reason concerns registration law and practice. In terms of the 1979 Act, registration is completed by making such amendment as is necessary to the appropriate title sheet or sheets.³⁹ No distinction is made between standard and non-standard rights, and none is made in practice. In completing registration, the Keeper sometimes reproduces the deed in full. Sometimes he gives only what appears to be the relevant part. Sometimes he

³² As amended by the Abolition of Feudal Tenure etc (Scotland) Act 2000 sch 12 para 58. The amendment is the substitution of "real right in land" for "interest in land".

³³ See, in respect of non-recognition of the consensual act, First Discussion Paper para 5.30.

³⁴ Further, by s 1(7) the requirement of writing does not apply to leases of a year or less. Such leases, however, are not registrable in the Land Register and need not be considered further.

³⁵ For example, Local Government etc (Scotland) Act 1994 s 15. The Prescription and Limitation (Scotland) Act 1973 s 3 provides for the creation of servitudes or public rights of way by prescription, but both are overriding interests.

³⁶ Paras 6.18 and 6.19.

³⁷ Perhaps the only case of transfer by common law is the automatic acquisition of a co-owner under a survivorship destination. But this too seems better classified as rectification.

³⁸ Forms 1–3, set out in the Land Registration (Scotland) Rules 1980 (SI 1980/1413) sch A.

³⁹ 1979 Act s 5(1). And see also s 6(2).

summarises its terms. In the case of a standard security only the briefest details are entered on the title sheet,⁴⁰ but the full security is attached to the charge certificate which is given to the heritable creditor. In only one case, but an important one, is the Keeper's practice different. The terms of a deed of transfer – a disposition or assignation – are not given, or summarised, on the Register.⁴¹ Instead, the name of the existing holder of the right in question (normally the granter of the deed) is replaced with the name of the new holder (the grantee). In the case of a disposition, for example, the name of the proprietor in the B section of the title sheet is changed, but the deed itself is not mentioned and, from the point of view of the Register, is invisible.

Some conclusions

3.9 A number of conclusions may be drawn from this account. First, the difference between standard rights and non-standard rights is a difference of language rather than of substance. In both cases there is a deed,⁴² and in both registration proceeds in much the same way. In suggesting otherwise the legislation misleads.

3.10 Secondly, and despite the prominent role given to deeds in practice, the Land Register is not a register of deeds. In the Register of Sasines it is the very deeds which constitute the register. In the Land Register the deeds are no more than the raw material from which the entries on the Register are derived. In carrying out the process of registration, the Keeper's task is to interpret the deeds, to note their terms, and, where appropriate, to give them legal effect. It is the resulting entries which constitute the Register. Once the entry is made, the role of the deeds is, usually, at an end. The curtain principle⁴³ dictates that acquirers should consult the Register alone; and by the Register is meant the title sheets and not the background deeds.⁴⁴

3.11 But, thirdly, if the Land Register is not a register of deeds, nor is it precisely – as the 1979 Act would suppose⁴⁵ – a register of real rights in land. It is true that registration normally leads to, or is connected with, real rights, although there are some doubtful cases (for example, a notice under section 33 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 reserving the right to claim compensation in respect of the extinction of development value burdens). But registration is not the only method by which entries come to be made in the Register.⁴⁶ In the present context particular mention must be made of section 6(1)(g) which empowers the Keeper, in making up and maintaining title sheets, to enter "such other information as the Keeper thinks fit". The *Registration of Title Practice Book* explains how this discretion is exercised in practice:⁴⁷

"The general nature of section 6(1)(g) precludes the compilation of a definitive list of the types of information that the Keeper is prepared to note. The most frequent items of information to be noted include: house names, letters from superiors regarding non-enforceability of burdens, letters regarding adoption of roads by local authorities,

⁴⁰ Para 2.4.

⁴¹ Unless it happens to contain real burdens or servitudes, in which case the burdens or servitudes are reproduced.

⁴² Subject to the minor exceptions mentioned in para 3.7.

⁴³ I.e. the principle that the Register is the sole source of information about the title and that there is no need to look behind it. See First Discussion Paper para 1.14.

⁴⁴ Para 2.3.

⁴⁵ 1979 Act s 1(1).

⁴⁶ See paras 6.33 ff.

⁴⁷ *Registration of Title Practice Book* para 2.14.

and the line of boundaries. Similarly, it is not possible to be prescriptive about which types of information the Keeper is unwilling to note. However, in general, the Keeper would not wish to enter in the title sheet information which can be deemed personal to individuals identified in the title sheet. For example, the Keeper would be unwilling to note details of a creditor's obligation to make further advances."

3.12 Section 6(1)(g) is supplemented by further provisions. For example, the Keeper is directed to note the price paid by the current owner,⁴⁸ or the absence of occupancy rights under the Matrimonial Homes (Family Protection) (Scotland) Act 1981;⁴⁹ and he is able to include statements as to indemnity.⁵⁰ This trend is probably to be welcomed. A register for the whole of Scotland, electronic, map-based and available on the internet, has obvious potential as a repository of information about land.⁵¹ But in that case it becomes all the more important to achieve a clear separation between the function of the Register as a source of real rights and its function as a source of information. And it also becomes misleading to persist with the idea of the Register as merely a "register of interests in land".⁵²

Are deeds registered?

3.13 There remains the problem of how the process of registration is best described. Although the applicant presents a deed⁵³ to the Register, what is then registered is not the deed itself but certain matters derived therefrom. Viewed strictly, the deed is merely the cause of the entry on the Register, or, as the application form expresses it, the "[deed] in respect of which registration is required". Whether the whole process can properly be described as registration of a deed is perhaps a matter of taste. To say that the applicant presents a deed for registration, and that the Keeper registers it by making an appropriate entry on the Register, seems acceptable at least as a matter of language; and from here it is an easy jump to speak of registration of deeds in the Land Register. That convenient shorthand indeed is the language used in the scheme prepared by the Henry Committee.⁵⁴

WHAT CAN BE REGISTERED

Register of Sasines

3.14 The foundation statute for the Register of Sasines, the Registration Act of 1617, gave a list of those deeds in respect of which recording was permitted. The list was, and remains:

"Reuersiounes regresses bandis and writtis for making of reuersiounes or regresses assignatiounes thairto dischargis of the same renunciatiounes of wodsettis and grantis off redemptioun and siclyk all instrumentis of seasing ..."

To modern eyes the list seems remarkably narrow, but it was not until the middle of the nineteenth century that legislation began to permit the recording of other deeds. Thereafter

⁴⁸ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 5(g).

⁴⁹ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 5(j).

⁵⁰ 1979 Act s 12(2).

⁵¹ Nonetheless the Land Register was not used in respect of community interests in land under part 2 of the Land Reform (Scotland) Act 2003, with the result that a new register (the Register of Community Interests in Land) had to be established.

⁵² 1979 Act s 1(1).

⁵³ Or, in a case involving ARTL, an electronic juridical act.

⁵⁴ Henry Report part I para 19.

the position was rapidly transformed.⁵⁵ Among the first new deeds to be allowed were long leases, conveyances, and heritable securities. Many more have been added since.⁵⁶ Halliday comes close to the truth when he states that:⁵⁷

"As the register is a statutory creation, only types of writ authorised by statute may be recorded in it."

3.15 But unexpected omissions remain. Until the Title Conditions (Scotland) Act 2003 came fully into force on 28 November 2004,⁵⁸ there was no statutory authority for recording a grant of servitude. There is still none for variation of servitude. Authority for the recording of the discharge of a servitude or real burden dates only from 1979.⁵⁹ The Registration of Leases (Scotland) Act 1857 provides for recording in respect of the grant of a long lease, its assignation and discharge, but not for variation.⁶⁰ In the case of proper liferents the omission is discharge.⁶¹ The effect of these statutory shortcomings is not entirely clear, but the practice seems generally to have been to allow recording, justified if necessary by a generous interpretation of the Act of 1617.

Land Register

3.16 The legislation for the Land Register contains a translation provision so that, with certain exceptions, all references to recording in the Register of Sasines in the pre-1979 statute book are read as including registration in the Land Register.⁶² At a stroke, therefore, the innumerable provisions for the recording of particular deeds were extended to the Land Register. Since 1979 the tradition of special legislation has continued. The recent codification of the law of real burdens, for example, contains a number of references to registration in the Land Register and Register of Sasines.⁶³ In view of the diversity of things that might be registered, the use of special legislation is both necessary and also desirable.

3.17 With the translation provision in place, all that was required of the 1979 Act was a further short provision to fill in the gaps mentioned above. In the event, the Act was more ambitious, venturing, in section 2, a complete statement of eligibility for registration. Thus there is to be registered:

- the transfer of a registered interest in land;⁶⁴

⁵⁵ L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942) pp 161–2.

⁵⁶ Some of the less common ones are listed in para 3.3.

⁵⁷ J M Halliday, *Conveyancing Law and Practice* vol 2 (2nd edn, by I J S Talman, 1997) para 39-04.

⁵⁸ Title Conditions (Scotland) Act 2003 s 75.

⁵⁹ 1979 Act s 18. This is now repealed, and replaced by the Title Conditions (Scotland) Act 2003 ss 15, 78.

⁶⁰ Registration of Leases (Scotland) Act 1857 ss 1, 3, 13. By s 14 reductions may also be registered but not, probably, irritancies (but compare A McAllister, *Scottish Law of Leases* (3rd edn, 2002) para 7.15). An irritancy takes effect without registration: see G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) pp 234–7.

⁶¹ The Abolition of Feudal Tenure etc (Scotland) Act 2000 s 65 applies only to creation.

⁶² 1979 Act s 29(2), (3).

⁶³ Title Conditions (Scotland) Act 2003 especially part 1. By s 122(1), "registering", in relation to any document, means registering an interest in land or information relating to an interest in land (being an interest or information for which that document provides) in the Land Register of Scotland or, as the case may be, recording the document in the Register of Sasines".

⁶⁴ 1979 Act s 2(4)(a), (b). This includes "absorption", ie the consolidation of a feu or the leasehold equivalent. The former disappeared with the abolition of the feudal system. The latter seems not to require separate provision, for the termination of a lease is not materially different from termination of any other subordinate real right.

- the creation of a subordinate real right over such an interest;⁶⁵ and
- "any other transaction or event which (whether by itself or in conjunction with registration) is capable under any enactment or rule of law of affecting the title to a registered interest in land but which is not a transaction or event creating or affecting an overriding interest".⁶⁶

One might expect to find in such a list the standard juridical categories of creation, transfer, variation and extinction.⁶⁷ In fact, only the first two appear by name, although variation and extinction are presumably included in the residual category (section 2(4)(c)) of "any other transaction or event".⁶⁸

3.18 Why a residual category was thought necessary at all is unclear. According to the *Registration of Title Practice Book*, the reason lies in the broad role conceived for registration. The residual category, it is said:⁶⁹

"allows a much wider range of deeds and other documents to be registered in the Land Register than can be recorded in the Sasine Register ... Moreover, an event may be registrable where there is no transaction or deed at all."

The examples given are the following:

- (i) deed of assumption and conveyance (of trustees);
- (ii) minute of resignation of trustees;
- (iii) minutes of meeting appointing new trustees where the statutory provisions as to the continuing infestment of *ex officio* trustees do not apply;
- (iv) certificate of incorporation on change of name of company;
- (v) docket in terms of section 15(2) of the Succession (Scotland) Act 1964;
- (vi) confirmation in favour of executors;
- (vii) the operation of negative prescription; and
- (viii) death of a co-proprietor holding under a survivorship destination.

Further examples are added in the annotations to section 2(4)(c) in the original version of the *Practice Book*.⁷⁰

- (ix) minute of waiver;

⁶⁵ 1979 Act s 2(3). The term is not used by the provision, which applies to (i) a heritable security, (ii) a liferent, and (iii) an incorporeal heritable right. Puzzlingly, (iii) includes (i) and (ii). In (ii) liferent is presumably proper liferent.

⁶⁶ 1979 Act s 2(4)(c).

⁶⁷ See eg Requirements of Writing (Scotland) Act 1995 s 1(2).

⁶⁸ 1979 Act s 2(4)(c). The residual nature of the category is indicated by the word "other".

⁶⁹ *Registration of Title Practice Book* para 2.12.

⁷⁰ *Registration of Title Practice Book* (1st ed) para C.15.

- (x) deed of declaration of conditions;
- (xi) notice of payment of improvement grant;
- (xii) forestry dedication agreement; and
- (xiii) tree preservation order.

3.19 The list, however, is puzzling. Of the items mentioned, three ((i), (v) and (vi)) are transfers and so are registrable, not under the residual category, but under the nominate category for transfer;⁷¹ four ((ii), (iv), (vii) and (viii)) involve correction of an existing entry following a change which has already occurred and so are properly classified as rectification and not as registration;⁷² and five ((ix)–(xiii)) are already the subject of express provision in special legislation.⁷³ In other words, in respect of three of the examples the residual category is inapplicable, in respect of four it overlaps with rectification, and in respect of five it is unnecessary.

Overlap with rectification

3.20 Only the overlap with rectification has the potential for harm. In principle a clear separation is made in the 1979 Act between registration and rectification. Where competent, registration is allowed freely and without restraint, whereas rectification is restricted if it will prejudice a proprietor in possession. And while registration is unconnected with the system of indemnity, rectification, or its refusal, normally leads to an indemnity payment. These quite different results point to mutual exclusivity. There should not be a choice between registration and rectification. So if the appropriate method of entering the Register is by registration, it should not be possible to trigger an indemnity claim by recourse to rectification.⁷⁴ Or, conversely, if rectification is the appropriate method of entering the Register, registration should not be available as a means of circumventing the protection conferred on the proprietor in possession. Yet mutual exclusivity is prevented by section 2(4)(c) (the residual category). It is necessary to consider how.

3.21 Under section 9(1) of the 1979 Act rectification is allowed, in principle, wherever there is an "inaccuracy" in the Register; and an inaccuracy may be either initial (ie the entry was always wrong) or supervening (ie the entry was correct at first but has become wrong due to some later occurrence).⁷⁵ Since a supervening inaccuracy must always be the result of a "transaction or event which ... is capable ... of affecting the title to a registered interest in land", it seems that the alternative of registration under section 2(4)(c) must always arise. This overlap has been the subject of litigation. In *Short's Tr v Keeper of the Registers of*

⁷¹ Ie under s 2(4)(a) and not s 2(4)(c). It is true that none of these documents is registrable in the Register of Sasines, but this is due only to the absence of a proper description. They are registrable in the Land Register not because of s 2(4)(c) but because of the generous interpretation of s 4(2)(a) by which the title number can be marked on the document. See *Registration of Title Practice Book* para 2.12.

⁷² See paras 6.39–6.41.

⁷³ That leaves only (iii). The standard view is that the mere appointment of a trustee – even (outside the special statutory provisions) of a trustee *ex officio* – has no effect on the title to land. See Reid, *Property* para 35; W A Wilson and A G M Duncan, *Trusts, Trustees and Executors* (2nd edn, 1995) para 20-16. If that is correct, the example appears to be wrong, and s 2(4)(c) would not apply.

⁷⁴ Assuming the application for rectification is successful, the indemnity would be payable, not to the applicant, but to the person whose rights are thereby affected. See 1979 Act s 12(1)(a).

⁷⁵ Para 6.18.

*Scotland*⁷⁶ dispositions were reduced as gratuitous alienations under section 34 of the Bankruptcy (Scotland) Act 1985. But although the reduction had the effect of making the Register inaccurate, rectification was prevented by the presence of a proprietor in possession. Accordingly, the trustee sought to register the reduction under section 2(4)(c). The court accepted that reduction was capable of falling within that provision but doubted whether this was consistent with the scheme of the Act. In the words of Lord Jauncey, in the House of Lords:⁷⁷

"It is difficult to conceive of any event having a more dramatic effect at common law upon the title to a proprietary interest in land than a decree of reduction of the very deed upon which the title depends – a decree which has the effect of revesting the interest in the original disponer or his representative. I am therefore in entire agreement with the Lord President that a decree of reduction of a disposition is an event which is capable of affecting the title of the disponee to a registered interest deriving therefrom. The question however remains whether, when sec 2(4)(c) is read in the context of the Act as a whole, its *prima facie* meaning must be displaced."

With some hesitation, the House of Lords concluded that the *prima facie* meaning could not stand and that registration would not be allowed.⁷⁸

3.22 Inevitably, the decision leaves much that is uncertain. On one view it ends the overlap altogether by excluding registration in any case involving supervening inaccuracy. That would mean that examples (ii), (iv), (vii) and (viii) above⁷⁹ must enter the Register by rectification. Another view is that the decision is confined to reductions, in which case the overlap remains in other cases.⁸⁰ A third possibility is that each case must be tested against the scheme of the Act. Where the scheme requires that registration be excluded, section 2(4)(c) will not apply. Otherwise the applicant will have a choice between registration and rectification.

3.23 These results, hardly satisfactory under the existing law, are avoided by our proposed new scheme. Under that scheme the distinction between registration and rectification is functional rather than substantive, and, by contrast to the present law, rectification is neither restricted nor tied to indemnity.⁸¹ Of course, as a matter of conceptual tidiness it is desirable that registration and rectification should be clearly distinguished. Later we suggest how this might be done.⁸² But some marginal overlap would not lead to difficulties in practice.

⁷⁶ 1994 SC 122 affd 1996 SC (HL) 14.

⁷⁷ 1996 SC (HL) 14, 24B.

⁷⁸ In the Court of Session there was also discussion of s 46 of the Conveyancing (Scotland) Act 1924, one of the sections applied to the Land Register by the translation provision (ie 1979 Act s 29(2)). Section 46 allows registration of a reduction of "a deed, decree or instrument recorded in the Register of Sasines". This was held to be inapplicable on the basis that, in the Land Register, no deed, decree or instrument is actually registered. See 1994 SC 122 at 133H–134C *per* Lord Coulsfield, and at 142F–H *per* Lord President Hope.

⁷⁹ Para 3.18.

⁸⁰ As Lord Jauncey noted (at p 26C), counsel for the Keeper "accepted that defeasance or forfeiture of an interest would be registrable under sec 2(4)(c) although he was unable to advance any reason in principle why there should be a distinction between these events and reduction".

⁸¹ Paras 6.20 and 6.21.

⁸² Paras 6.39–6.41.

A replacement provision

3.24 In any new legislation it will be necessary to retain a provision as to eligibility for registration, if only because of omissions in the special legislation.⁸³ But it seems possible to improve on section 2. In our view, a replacement provision should have regard to the following principles. First, eligibility for registration is best set out in special legislation which deals with the rights and deeds in question. No general provision in a registration statute can cover the ground adequately or achieve the required level of certainty. (As will be seen later,⁸⁴ the same point applies, with perhaps even greater force, to attempts to describe the *effect* of registration.) Secondly, a general provision should have a merely residual character and should acknowledge the primacy of the special legislation. Thirdly, the general provision should be tightly drawn and should exclude matters in respect of which registration would not be appropriate. Fourthly, the provision should work with recognised juridical concepts, and should avoid expressions such as "transaction or event ... affecting the title". Finally, the provision should, so far as possible, avoid any overlap with the equivalent provision on rectification.

3.25 In the light of these principles, we suggest the following rule, on which comment is invited:

6. (1) Subject to (2), registration should be competent only if authorised by some other enactment.

(2) Where a subordinate real right in land is constituted by registration, there should be registrable any –

- (a) transfer;**
- (b) variation; or**
- (c) extinction;**

of that right which is effected by deed or other juridical act.

3.26 Paragraph (1) acknowledges the place of the special legislation. Paragraph (2) is the residual general provision. A subordinate real right is any real right other than ownership.⁸⁵ Ownership itself is already provided for in special legislation,⁸⁶ as is the creation of subordinate real rights.⁸⁷ Thus the lacuna for which provision must be made is the transfer, variation and extinction of certain subordinate real rights.⁸⁸ The requirement that the right in question must itself have been constituted by registration excludes overriding interests.⁸⁹ It will be seen that registration under this proposal involves a deed or other juridical act

⁸³ Para 3.15.

⁸⁴ Paras 5.46–5.50.

⁸⁵ See Abolition of Feudal Tenure etc (Scotland) Act 2000 s 2(1); Reid, *Property* para 6.

⁸⁶ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 4.

⁸⁷ Thus: Registration of Leases (Scotland) Act 1857 s 1 (long lease); Conveyancing and Feudal Reform (Scotland) Act 1970 s 9(2) (standard security); Abolition of Feudal Tenure etc (Scotland) Act 2000 s 65 (proper liferent); Title Conditions (Scotland) Act 2003 s 4 (real burdens); Title Conditions (Scotland) Act 2003 s 75 (servitudes).

⁸⁸ Para 3.15.

⁸⁹ An overriding interest is, more or less, a real right in land constituted other than by registration.

(including court interlocutors and acts in electronic form).⁹⁰ Thus where a subordinate real right is extinguished, not by discharge but by negative prescription, the change in the Register would be made by rectification and not by registration. Proposal 6 considers only eligibility for registration and not its effect (a topic for later);⁹¹ but it should be mentioned now that registration is constitutive (or, as the case may be, extinctive) of rights – that, in other words, it not only publicises juridical acts but causes them to take effect.

3.27 It seems worth mentioning that proposal 6, although independently conceived, comes close to the clause recommended by the Henry Committee but not, in the event, brought forward into the 1979 Act. That clause is:⁹²

"[I]t shall be competent to apply in the prescribed manner for the registration of all deeds by which rights to registered lands are vested in or transmitted to any person or are varied or discharged."

FIRST REGISTRATION

Compulsory first registration

3.28 The 1979 Act was brought into force gradually, registration county by registration county, and since 1 April 2003 it has applied throughout Scotland.⁹³ That does not mean that the Land Register has replaced the Register of Sasines. To move from the old register to the new requires, in every case, an exhaustive examination of title, the plotting of the land on the Ordnance Map, and the preparation of a title sheet. This process, often complex and sometimes slow, makes considerable demands on the resources of Registers of Scotland. Accordingly, the 1979 Act provides for a phased conversion of titles. Registration for the first time in the Land Register ("first registration") is triggered by a transaction, and only certain transactions qualify for this purpose.

3.29 The relevant rules are set out in the first two subsections of section 2. If feudal transactions are ignored, as they now may be,⁹⁴ first registration is triggered by:

- the transfer of ownership of udal land;
- the transfer of ownership of other land for valuable consideration or in consideration of marriage; and
- the grant or transfer of a long lease.

⁹⁰ Paras 3.1–3.13.

⁹¹ Paras 5.46–5.50.

⁹² Henry Report part I para 19.

⁹³ The Land Registration (Scotland) Act 1979 (Commencement No 16) Order 2002 (SSI 2002/432). The final counties to be brought on to the Register were Banff, Moray, Ross and Cromarty, Caithness, Sutherland, and Orkney and Shetland.

⁹⁴ The feudal transactions were the grant of a feu, and, in a case where the immediate superiority was already on the Land Register, a disposition *ad rem*. Transfers of kindly tenancies also induced first registration. Puzzlingly, contracts of ground annual were included as a trigger event even although they had ceased to be competent by virtue of the Land Tenure Reform (Scotland) Act 1974 s 2. All were removed by the Abolition of Feudal Tenure etc (Scotland) Act 2000 s 76(1), sch 12 para 39(2).

The connecting factor is that both land and long lease are primary rights⁹⁵ with a title sheet of their own, so that in each case the application is in respect of "proprietorship". By contrast, secondary rights, which are entered only on the title sheet of a primary right, are excluded and must await the first registration of the relevant primary right. So a standard security granted over land which is still in the Register of Sasines must, likewise, be recorded in that Register.⁹⁶

3.30 The requirement of valuable consideration was taken from the English Act of 1925.⁹⁷ Its justification was partly to ease the workload at Register House and partly to save donees, who might not otherwise examine title, from the trouble of a first registration.⁹⁸ The requirement was, however, waived in the case of udal land and long leases in order to bring on to the Register rights which, under the Sasine system, did not have to be registered at all.⁹⁹

3.31 In considering whether the number of trigger events should be increased it is necessary to balance two competing considerations. On the one hand, there is the obvious desirability of moving towards a complete Register, containing all land currently still recorded in the Register of Sasines. But on the other hand, there is the question of resources and costs, both for the Register and for those whose properties are subject to first registration.

3.32 An easy first step would be to remove the requirement of valuable consideration, as has already been done in England and Wales.¹⁰⁰ This would lead to a modest increase in the volume of first registrations while at the same time bringing to an end the difficulties which have sometimes arisen in determining when a consideration is to be treated as "valuable".¹⁰¹ As well as ordinary donations and *a non domino* dispositions, the transactions which would then induce first registration would include deeds of assumption and conveyance of trustees, transfers on death, and transfers by statute from one public body to another. As at present, however, such grantees would often be content with an unregistered title, and so first registration would not much occur in practice.

3.33 A more radical step would be to extend first registration to transactions involving one or more of the secondary rights. At the moment, for example, the grant of a lease results in first registration of the tenant's interest only;¹⁰² but as the Keeper must examine the landlord's interest, to determine title to grant, it would be possible to require that it too be registered. Or the grant of a standard security might be a trigger for registration, both of the security and of the land over which the security was granted, the latter being necessary to provide a title sheet in which the security could be entered. A practical difficulty is that the right might affect part only of the grantor's land, raising the question of whether compulsory registration should likewise be confined to that part. A further possibility is that a break-off disposition could be the trigger for the registration of such land as remained in the hands of

⁹⁵ For the distinction between primary rights and secondary rights, see paras 2.8–2.10.

⁹⁶ See 1979 Act s 8, a provision which largely re-states the general law.

⁹⁷ Land Registration Act 1925 s 123(1).

⁹⁸ Reid Report para 91.

⁹⁹ See 1979 Act s 3(3) which makes registration a condition of obtaining a real right in respect of udal land and long leases.

¹⁰⁰ Land Registration Act 1997 s 1, implementing Law Commission and H M Land Registry, *Transfer of Land: Land Registration* (Law Com No 235, 1995) part II. The current provision is the Land Registration Act 2002 s 4(1)(a).

¹⁰¹ As to which see *Registration of Title Practice Book* para 2.5.

¹⁰² 1979 Act s 2(1)(a)(i).

the granter. These ideas are perhaps more for the future than for the present.¹⁰³ With many counties still at an early stage of registration, the rate of first registrations, and the workload on the Registers, are likely to be broadly satisfactory for some years to come. But when the workload diminishes, it would be useful to be able to add new trigger events by statutory instrument. In that way, the coverage of the Register would continue to be extended at a manageable pace.

3.34 Our proposal is that:

7. First registration should be triggered by –

- (a) the transfer of ownership of land (whether or not for valuable consideration);**
- (b) the grant or transfer of a long lease; and**
- (c) such other transactions as may from time to time be nominated by statutory instrument.**

Voluntary first registration

3.35 Following a trigger event, registration must take place in the Land Register and not in the Register of Sasines.¹⁰⁴ In that sense first registration is mandatory and can be avoided only by choosing not to register at all. But the 1979 Act also allows voluntary first registrations.¹⁰⁵ An owner of land held on a Sasine title can apply for registration even in the absence of a transaction. The same is true of a lessee under a long lease.¹⁰⁶ The Keeper is not bound to accept the application, and will not usually do so unless there are "obvious benefits to him".¹⁰⁷ In practice he refuses many more applications than he accepts. The Keeper's decision cannot be appealed to the Lands Tribunal¹⁰⁸ but could presumably be the subject of judicial review. The *Registration of Title Practice Book* gives as an example of an application which might be accepted the case of an area of land which is shortly to be developed for housing.¹⁰⁹ On the other hand the Keeper is unlikely to accept an application in respect of a difficult title with uncertain boundaries.

3.36 Plainly, the facility of voluntary registration should be retained. It can be of value to the Keeper. It assists completion of the Register. Above all, it is of use to the citizen. There may be cogent reasons for seeking first registration. For developers, to register a title now may be to reduce transaction costs in the future. A person whose title is in question or whose boundaries are in doubt may wish to hasten the day when the Keeper must offer a definitive view. Or again voluntary first registration can be used to secure, and to publicise, a

¹⁰³ For example, for as long as a great deal of land remains on the Sasine Register, a requirement that all standard securities be registered in the Land Register would have a significant impact on the cost of re-mortgaging, and hence on the re-mortgaging market itself.

¹⁰⁴ 1979 Act ss 3(2), 8(4).

¹⁰⁵ 1979 Act s 2(1)(b). Section 11, which gave the Keeper a discretion to allow registration in counties not yet operational for registration of title, is now spent and can be repealed.

¹⁰⁶ The effect of s 2(2) is that registration is possible only in respect of those interests in land which command their own title sheet.

¹⁰⁷ *Registration of Title Practice Book* para 2.9. And see also para 2.8. The Keeper has of course a general discretion in relation to all applications: see paras 4.11 ff.

¹⁰⁸ 1979 Act s 25(4).

¹⁰⁹ Para 2.9.

right which unquestionably exists. Among other benefits this avoids the occasional vulnerability of Sasine titles to loss of land mistakenly included in the title sheets of neighbours.¹¹⁰

3.37 Whether the Keeper should retain a discretion to refuse voluntary registration is more difficult to say. Ideally, the benefits of the Land Register should be available to anyone willing to meet the relevant costs. The only hesitation concerns resources. A sudden decision to switch registers on the part of a major landowner could create acute, if temporary, difficulties for Registers of Scotland. And even if the rate of applications was modest, as might normally be expected, there is a danger of a disproportionate number of difficult cases, requiring lengthy and expensive investigation and putting at risk the turnaround times for other applications. The problem should not be over-stated. Difficult cases occur in the course of normal registration, and ultimately all will have to be dealt with. At worst, voluntary registration would bring some forward by a few years. Already 40% of all titles are on the Register. By the time any new legislation came into force this percentage would have increased substantially, and the majority of difficult cases will already have been dealt with. Our provisional view, therefore, is that any increase in business resulting from voluntary registration would be manageable, and that there is no compelling case for retaining a discretion to refuse such registration. The view of a working party of the Law Society of Scotland's Conveyancing Committee is the same.¹¹¹ In England and Wales there is an absolute right to voluntary registration.¹¹² In the event that the strain on resources was judged too severe, it would be possible to delay commencement of the relevant provision until such time as most ordinary first registrations had been processed.

3.38 We propose that:

8. (a) **It should continue to be possible for an owner of land or a lessee under a long lease to apply at any time for first registration.**
- (b) **The Keeper should cease to have a discretion to refuse such an application merely on the basis that it is voluntary.**

Completing the Register

3.39 As just mentioned, some 40% of titles are already held on the Land Register, and the percentage is likely to increase quite sharply in the course of the next few years. In Renfrew, the first county to adopt the Land Register (in 1981), the figure is two thirds; and if the pattern there is reproduced elsewhere, it seems likely that around two thirds of titles in Scotland will be on the Land Register by 2020. At some point, however, the incidence of first registrations will slow down and, eventually, come close to stopping altogether. Yet not all properties will be on the Register. Under current arrangements first registration is compulsory only if there is a transaction; and even if the class of transactions were widened to include, for example, the grant of a standard security,¹¹³ not all properties would be affected. To a disproportionate extent the unaffected properties are likely to be publicly

¹¹⁰ For which see First Discussion Paper paras 4.30 and 4.31.

¹¹¹ *Memorandum* to the Scottish Law Commission by the Law Society of Scotland's Conveyancing Committee Working Party (29 April 2003) p 3.

¹¹² Land Registration Act 2002 s 3.

¹¹³ See para 3.33.

owned. One estimate is that more than 10% of the land mass of Scotland is in public ownership.¹¹⁴

3.40 Self-evidently, it is desirable that the Register should be as complete as possible as soon as possible. Among the advantages are:

(i) *Simplification of conveyancing.* Conveyancing which was simple, and therefore cheap, was one of the main purposes behind the introduction of registration of title.¹¹⁵ For as long as some properties remain on the Sasine Register, the complexities of the old system will remain, and it will continue to be necessary to train lawyers in that system.

(ii) *Closure of the Register of Sasines.* To operate two quite different registers for land is inefficient and confusing. Completion of the Land Register would allow the Register of Sasines to be discontinued.

(iii) *Information about ownership.* As a map-based register, the Land Register is an important source of information on ownership of land in Scotland. Until such time as it is completed, such information will continue to be patchy and difficult to uncover.¹¹⁶ The Land Reform Policy Group, established by the Secretary of State for Scotland in 1997, concluded that the completion of the Register had an important role to play in the provision of information about land.¹¹⁷

3.41 There are, however, practical difficulties in achieving a wider coverage.¹¹⁸ If first registration is to be uncoupled from transactions, it will be necessary to devise criteria as to which properties are to be affected, and when. For example, one method of ensuring maximum coverage by area would be to require the registration, by a certain date, of all holdings above a certain size.¹¹⁹ On the basis of research conducted in 1995, a figure of 10,000 acres (4,000 hectares) would affect 268 properties and account for 39% of the total land area of Scotland, while a figure of 1,000 acres (400 hectares) would affect 1411 properties and account for 58% of the land area.¹²⁰ The cost of registration in the second case was estimated by Registers of Scotland in 1998 as lying in the range £5 million to £15 million.¹²¹ Some of these properties, of course, would be on the Register already. A different approach would be to make access to public grants and other assistance dependent on registration.¹²² A third possibility would be to require, or at least to encourage, first registration of land in public ownership.

¹¹⁴ A Wightman, *Who Owns Scotland* (1996) p 157, table 1.

¹¹⁵ Reid Report paras 61, 62 and 88.

¹¹⁶ A Wightman, *Who Owns Scotland* (1996) pp 26–8 and 225–6. But even a complete Land Register would not disclose beneficial entitlement in a case where the registered owner is a company or a trust. See Scottish Executive, *Land Reform: Proposals for Legislation* (SE/1999/1) paras 6.6 and 6.7.

¹¹⁷ See in particular the Group's paper on *Identifying the Solutions* (September 1998) chap 6.

¹¹⁸ In England and Wales, the Law Commission and H M Land Registry have been conscious of this difficulty. See Law Com No 271 para 2.11.

¹¹⁹ This would have been the effect of an amendment to the Land Registration (Scotland) Bill pressed, unsuccessfully, by Mr Dennis Canavan MP: see *Hansard*, First Scottish Standing Committee, 27 March 1979, cols 14–28.

¹²⁰ A Wightman, *Who Owns Scotland* (1996) p 158, table 2.

¹²¹ Land Reform Policy Group, *Identifying the Solutions* (1998) p 34.

¹²² In considering this option, the Land Reform Policy Group's conclusion was: "Probably yes but not yet: scheme by scheme action would be necessary. Perhaps this should be considered as a fallback option if other options fail." See *Identifying the Solutions* (1998) p 36.

3.42 Whatever form compulsion took there would be difficulty in ensuring compliance. It is unclear what sanctions could be applied. A person who refused to register could not be deprived of ownership. It would be awkward, and in some cases impossible, for the Keeper to register a property against the will of the owner. The use of fines seems unattractive. Needless to say, any scheme would need to have regard to the European Convention on Human Rights. In practice much may depend on whether public money were available to fund, or at least to subsidise,¹²³ the cost of bringing properties on to the Register.

3.43 Inevitably, completion of the Register is an aspiration rather than a fully achievable goal. Even if some means could be found of persuading, or forcing, all known owners of all identifiable land to convert to the Register, not all land would be accounted for. And any shortfall affecting land in its narrow sense would be much more pronounced in relation to minerals and salmon fishings, both of which are separately accounted for in the Register.

3.44 The issue of completing the Register was not lost on the framers of the 1979 Act. In terms of that Act Ministers may provide by statutory instrument¹²⁴

"that interests in land of a kind or kinds specified in the order ... shall be registered; and the provisions of this Act shall apply for the purposes of such registration with such modifications, which may include provision as to the expenses of such registration, as may be specified in the order."

As the reference to "expenses of such registration" shows, the intention was that conversion should be at public expense.¹²⁵ No order, however, has been made under this provision and none seems in prospect.

3.45 Any new legislation could not do less than the 1979 Act. It is not clear, however, that it could usefully do more. The rate of additions to the Register is likely to remain stable, and satisfactory, for some years to come, and can be maintained by adding to the list of transactions which induce first registration. The question of whether conversion should ultimately be required even in the absence of a transaction, and if so on what terms, is both a political matter and a matter for the future. In a paper published in 1999¹²⁶ the Scottish Executive concluded that compulsory registration

"would be very costly in the short term. After 10 to 15 years of the operation of Registration of Title in any county, most properties will have been registered on sale. That will be the right time to consider what additional measures could be put in place to ensure that all land is contained in the Land Register."

There seems nothing to be gained from second-guessing future conditions by means of detailed provision in primary legislation. We propose, therefore, that:

¹²³ A possibility considered by the Land Reform Policy Group: see *Identifying the Solutions* (1998) p 35. Its view was that "costs could well outweigh benefits".

¹²⁴ 1979 Act s 2(5).

¹²⁵ In moving that these words be added, the Lord Advocate (Ronald King Murray QC, MP) explained that: "The amendment enables the order to provide for moving these interests from the register of sasines to the land register at public expense ... [W]hen clause 2(5) comes to be used, it is considered that the expense of transferring the interest should not fall on the proprietor but on public funds". See *Hansard*, First Scottish Standing Committee, 27 March 1979, cols 12–13.

¹²⁶ Scottish Executive, *Land Reform: Proposals for Legislation* (SE/1999/1) para 6.3.

9. **Ministers should continue to have power to provide by statutory instrument for the registration of unregistered land in such circumstances and on such terms as they may determine.**

Part 4 Registration (2): procedure

DATE OF REGISTRATION

Receipt of application or appearance on the Register?

4.1 An application for registration does not immediately lead to an entry on the Register. Before an entry can be made the Keeper must check the application form, examine the deed or deeds, and match the application with the current state of the registered title. Sometimes he must do more. Additional deeds or information may be needed from the applicant; a survey may be necessary; and in the case of first registrations there is the arduous and time-consuming task of a full examination of the Sasine title followed by the making up of a title sheet. Once ARTL is in operation, the gap between application and entry on the Register will be reduced to less than 24 hours, at least in most cases, but for non-ARTL transactions, such as first registrations and dealings in part, the registration process will continue to occupy weeks or months. From a legal point of view, the important question is the status of the applicant's right while it is in progress.

4.2 Here the law has a choice: either a title is not regarded as "registered" until the appropriate entry is made on the Register, or else it is regarded as "registered" at some earlier point such as when the application is received. The rule for the Land Register, as for the Register of Sasines, is the latter. Provided that the application is ultimately accepted by the Keeper, the date of registration is the date on which the application is received.¹ We are not aware of any suggestion that this rule be changed, and there are important reasons for its retention.² If registration occurred only when the entry on the Register was made, the applicant would have to wait for his real right, and sometimes wait for a long time.³ That is neither efficient nor fair. Nor is it demanded by the publicity principle,⁴ for the fact of the application is already in the public domain through the application record (discussed below).⁵ In the case of a sale, such a rule would prolong the ownership of the seller long beyond the point where the price had been paid and possession ceded. In the case of a minute of waiver or discharge it would prolong the life of the right on whose extinction the grantee may be relying. And it would disadvantage the applicant in any competition with a right (such as a floating charge) for which registration in the property register is not required.

4.3 It is true that for registration to take place *before* an entry in the Register is made gives rise to a certain conceptual awkwardness, discussed below. But the rule is a good one and should, in our view, be retained.⁶ We propose, therefore, that:

¹ 1979 Act s 4(3).

² Apart from those mentioned in the text, another is that the rule copes well with the case where the applicant dies after the application is lodged but before the entry is made on the Register. The conferral of the right is thus unaffected by the supervening death.

³ The usual rule is that the real right is acquired on the date of registration: see 1979 Act s 3(4). See para 5.48.

⁴ Ie the principle that real rights be duly publicised.

⁵ Paras 4.7–4.8.

⁶ For the question of whether registration should be by day, or by time within a day, see paras 5.59–5.69.

10. The date of registration should continue to be the date on which the application is received.

Conceptual difficulties

4.4 The idea of backdating the creation of a right is familiar enough from the law of inhibitions⁷ and bankruptcy.⁸ But it is not free from conceptual difficulty. Suppose, for example, that Anne grants a disposition to Brian, that Brian's application is received and recorded in the application record on 1 June, but that his name is not entered on the Register until 1 September. Under the 1979 Act the date of registration is 1 June; but that this was the case could only be known for certain when, on 1 September, the registration process was completed and, with it, the possibility of rejection eliminated. How is this situation to be analysed? One view would be that Anne remained owner until 1 September, when Brian was invested with ownership retrospectively. Another view would be that Anne ceased to be owner on 1 June, but that this was not knowable until 1 September. The first view involves a re-writing of history, the second an immediate but provisional conferral of ownership. On the first view a person who transacted with Anne on 26 August would be transacting with the owner, but a week later, on 2 September, would be found to have been transacting with a non-owner. Any deed granted by Anne would be valid on 31 August and invalid on 2 September. The second view avoids these difficulties. Brian would be owner all along, and any deed granted by Anne would be a deed by a non-owner. Admittedly no one could be sure of Brian's title until they were sure that the application was to be accepted. But inquiries could be made of the Keeper even before 1 September, and in practice the risk of the application being rejected is no higher than, say, the risk that Anne's signature on the disposition was forged. There is no novelty here: lack of absolute certainty is a familiar and unavoidable part of conveyancing.⁹

4.5 At a conceptual level the second view is much to be preferred. Indeed it seems implicit in the 1979 Act.¹⁰ Among other advantages it serves to clarify the relationship between the title and the Register. Title can be seen to flow not so much from the Register as from registration. Title was conferred on 1 June and not on 1 September. The Register takes three months to catch up with the fact of registration, and until it does so it is, strictly (but quite properly), inaccurate.¹¹ When it comes to be corrected, by replacing Anne's name with Brian's, the correction is not retrospective,¹² for in order for Brian to own from 1 June it is not necessary to deem that his name was on the Register on that day. The state of the

⁷ Titles to Land Consolidation (Scotland) Act 1868 s 155; Act of Sederunt (Rules of the Court of Session Amendment No 6) (Diligence on the Dependence) 2003 (SSI 2003/537).

⁸ Bankruptcy (Scotland) Act 1985 s 31(1).

⁹ In neither case, of course, is a third party acquirer affected. Both under the present law and our proposed reform, a person acquiring in good faith from the registered proprietor will receive a good title.

¹⁰ Thus s 3(1)(a) attributes the conferral of a real right to "registration" and not to the appearance of the right on the Register; and "registration" occurs when the application is received. It is true that the conferral is contingent on acceptance of the application; but acceptance is not the same as entry on the Register, and in some cases the Keeper's policy is to indicate at quite an early stage that the application has been accepted.

¹¹ As the language used here suggests, it would be possible for both registration and rectification to be seen as two different aspects of the genus "correction". That, more or less, is the approach taken in the Canadian Model Land Recording and Registration Act s 5.4(1): see Joint Land Titles Committee, *Renovating the Foundation* p 101. See further paras 6.35 ff.

¹² From this it would follow, for example, that if the applicant's title is itself flawed and so results in an inaccuracy, the inaccuracy is present on the Register only from the day on which the relevant entry is made and not from the date of registration. This has obvious implications for rectification.

Register at any point of time is a question of fact; and on 1 June it showed Anne as owner and not Brian.

The three stages

4.6 The legislation recognises three distinct stages in the registration process: (i) the application is received; (ii) it is accepted or rejected; and, if the application is accepted, (iii) registration is completed by means of an entry on the Register.¹³ The question of turnaround times will be considered in the third discussion paper.

Application record

4.7 One legislative omission is the application record. As a matter of practice, all applications are entered there on the day of receipt, giving brief details as to the parties, property, type of deed, and whether the application is a dealing or a first registration. The first page of the application form is designed to make this information easy to extract.¹⁴ The application record is kept in electronic form and is available on Registers Direct. Since the entry in the application record is the only public notice of the date of receipt, and hence of registration, the Henry Committee went so far as to recommend that¹⁵

"... the date and order of entry in the Presentment Book or other Application Record system shall be deemed to be the date and order of registration ..."

4.8 We are content that the date of receipt should continue to be the date of registration,¹⁶ but consider that the important role of the application record should be acknowledged in the Land Registration Rules, if not in the primary legislation itself.

Acceptance

4.9 An application is not "accepted" merely by being entered in the application record,¹⁷ for it has still to be examined to determine whether it is in order.¹⁸ At this point further information or documentation can be requisitioned and must usually be supplied within a specified period which cannot be less than 60 days.¹⁹ If it is not supplied, the Keeper has the option of rejecting the application or, if necessary, of accepting it subject to exclusion of indemnity. Rejection is considered in the next section.

4.10 Although "acceptance" marks the moment at which the date of receipt is shown to be the date of registration, it is not, as practice has evolved, a distinct stage in the process; for while the Keeper may sometimes reject an application, there is no precise moment at which he can be regarded as having accepted it. Nor, in the normal case, is acceptance intimated to the applicant. Instead, the Keeper's staff continue to work their way through the

¹³ 1979 Act ss 4(3) and 5(1).

¹⁴ *Registration of Title Practice Book* para 5.2.

¹⁵ Henry Report part I para 7(4). This followed s 142 of the Titles to Land Consolidation (Scotland) Act 1868.

¹⁶ While an entry is made in the application record on the same *day* as the application is received, it cannot be made at the same *time* within that day. Thus, if there were to be an eventual move to registration by time, as discussed below, it would be easier to focus on receipt than on entry in the application record.

¹⁷ Although it can be rejected before that time on the grounds that it is not an "application" within the Act, typically because the application form has not been signed. See *Registration of Title Practice Book* para 5.2.

¹⁸ 1979 Act s 4(3)(a): "where the application, after examination by the Keeper, is accepted by him ..."

¹⁹ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 12. The *Registration of Title Practice Book* para 5.18 mis-states the rule as being "up to 60 days".

application until, finally, matters are completed by an entry in the Register. Nonetheless the idea of "acceptance" remains a useful one. Under the 1979 Act there are cases where the Keeper must or, as the case may be, must not "accept" an application.²⁰ And if an applicant needs to have early confirmation as to the date of registration – as, for example, with deeds of conditions which are to be referred to in subsequent dispositions – it is convenient if the Keeper can formally accept the application ahead of its appearance on the Register. We think that the law works well and, subject to consultees' views, should not be changed. More is said below about acceptance and rejection.

ACCEPTANCE AND REJECTION

The current law

4.11 In certain circumstances, which are set out in section 4(2) of the 1979 Act and discussed below,²¹ an application for registration falls to be rejected. But it is less clear when an application becomes one which the Keeper is bound to accept. The relevant provision, section 4(1), is in the following terms:

"Subject to subsection (2) below, an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require."

4.12 At first sight this appears to impose an obligation to accept all applications which are not expressly excluded by section 4(2). But what is given by the first half of the provision may possibly be taken away by the second. For the Keeper can, naturally, demand evidence as to title; and if that evidence is not produced, the obligation to register falls away and the application can be rejected. Much turns on the scope of this power. On one view, it allows the Keeper to requisition only such evidence as is reasonably available to the applicant, with the result that, provided the evidence is produced, the Keeper must register – even if the evidence is unsatisfactory and does not sufficiently vouch for the applicant's title. A different view is that the power extends from form to content. Not only, on this second view, must the evidence be produced but it must also be found to be satisfactory. Otherwise the obligation to register falls.

4.13 The effect of the first view is to impose on the Keeper a duty to register, subject only to the applicant's compliance with certain administrative requirements. The effect of the second is to confer a broad discretion. Take for example the case of a disposition *a non domino* which induces first registration. On the first view the Keeper can ask for only such deeds as actually exist – the disposition itself, the writs referred to for burdens and so on. On the second he can request a full prescriptive progress of titles and other evidence which, by the very nature of an *a non domino* application, could not be produced. Thus on the second view of section 4(1) an *a non domino* conveyance can always be rejected. On the first view it must always be accepted, subject only to section 4(2). It may possibly be of significance

²⁰ 1979 Act s 4(1), (2), discussed at paras 4.11 ff.

²¹ Paras 4.25 ff.

that, where a *non domino* conveyances are in fact rejected, the justification used by the Keeper is section 4(2) and not section 4(1).²²

4.14 Like a number of other provisions in the Act, section 4(1) contains more ideas than can conveniently be included within a single subsection. To be understood it must be disaggregated. Taken together, the first two subsections of section 4 cover (or may cover) the following topics:

- a rule as to the requisitioning of evidence
- a rule as to the circumstances in which applications must be accepted
- a rule as to the circumstances in which applications must be rejected
- a rule as to the circumstances in which applications may be accepted or rejected

Each requires separate consideration.

Requisitioning of evidence

4.15 The Land Registration Rules lay down certain requirements for all applications for registration.²³ Thus an application must be made on a prescribed form; except in the case of first registrations, it must be accompanied by a certificate of title (usually the land certificate); and any documents submitted must be listed in an inventory of writs (form 4). To these might usefully be added, in any future legislation, a requirement that the applicant produce the deed on the basis of which registration is being sought. (In practice, of course, it would always be produced.)

4.16 Often this minimum list is sufficient to allow the Keeper to judge an application and give it effect. But often, and especially in first registrations, it is not. The further evidence which the Keeper then standardly requires is set out in the *Registration of Title Practice Book*²⁴ and could be incorporated into the Land Registration Rules if that were thought to be helpful. But no list could ever be exhaustive. Only a review of an individual application will reveal what else is needed; and it seems inevitable that the Keeper should retain his general power to call for "such documents and other evidence as he may require".

4.17 Two clarifications of the Keeper's power might possibly be of help. First, it seems worth stating in legislation what would no doubt be taken for granted by a court on appeal, namely that any requisitions must be reasonable. Even if the Keeper is a lover of art, he should not be able to insist on a painting in oils of the property to which an application relates. Secondly, the Keeper should not be able to ask for the impossible. An applicant can be told to obtain affidavits as to possession, or a better plan,²⁵ or a deed referred to for burdens; but he cannot be expected to produce a non-existent writ which would fill a gap in the prescriptive progress of title. The applicant should produce that which he has or can

²² Specifically para (c) (frivolous or vexatious): see *Registration of Title Practice Book* para 6.4. But compare I A Davis, "Positive Servitudes and the Land Register" (1999) 4 SLPQ 64, 66–7: "Section 4(1) of the Act authorises the Keeper to set the standard of evidence required for acceptance of an application".

²³ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 9.

²⁴ *Registration of Title Practice Book* paras 5.10 ff.

²⁵ Plans are, however, the subject of express provision in the 1979 Act: see s 4(2)(a), discussed at para 4.26.

reasonably obtain. It is then for the Keeper to form a judgment on the basis of such evidence as is produced.

4.18 We propose that:

- 11. An application for registration should continue to be made in a manner to be prescribed and the Keeper should continue to have power to requisition such further evidence as is available and as he may reasonably require.**

4.19 The requisitioning of evidence is a separate matter from the merits of the evidence (or lack of evidence) which results. Both are, or may be, grounds for rejection of an application, but they are separate grounds. If evidence requested by the Keeper is not produced, the application may be rejected without further inquiry. But if the evidence sought is duly supplied, the decision as to acceptance or rejection must proceed on other grounds. To those grounds we now turn.

Applications which must be accepted

4.20 In England and Wales, an application can be rejected only if it is "substantially defective".²⁶ Similar in effect was the rule proposed by the Henry Committee that, subject to a small number of exceptions, "[o]n receipt of an application for registration the Keeper shall register the title to lands".²⁷ As already mentioned, it is not clear whether a rule of this kind has been carried over into the 1979 Act. Yet it is uncontroversial and modestly useful. If an application is good, the Keeper should be bound to accept it. There should be no element of discretion.²⁸ To refuse registration is to deny the applicant the right which is vouched by his deed.

4.21 Occasionally the Keeper and the applicant may disagree as to the strength of an application. If the Keeper rejects an application which ought to have been accepted, and loss then follows, he should be liable for that loss. It is not clear that that is the result of the present law. Such cases, however, will be rare indeed.

4.22 Even if it were possible, it does not seem necessary for legislation to give an exhaustive definition of a "good" application; but some guidelines might be helpful. There are two main elements. In the first place, the deed (or other document) which forms the basis of the application must itself be valid, and hence capable, following registration, of conferring the right in question.²⁹ That means that the deed must be properly drawn and executed and that it must be granted by a person with title and capacity to do so. In the second place, the application itself must be in order in the sense already discussed. Thus the correct form

²⁶ Land Registration Rules 2003 (SI 2003/1417) r 16(3).

²⁷ Henry Report part I para 8.

²⁸ C C Campbell, "The Land Register and the Keeper's Discretion" (1999) 4 SLPQ 277, 292: "It should ... be provided that the Keeper has no discretion to refuse to register any title so far as it is valid".

²⁹ For this purpose account must be taken of the integrity principle (for which see paras 5.21 ff). For example if, during the registration process, the Keeper discovers that the person shown on the Register as proprietor and from whom the applicant acquired was wrongly entered there, he must nonetheless accept the application unless he is confident that the applicant knew of the inaccuracy at the time when the application was made. This is because, following registration of the acquirer's title (and assuming good faith), the inaccuracy would be extinguished and hence the title good.

must be used, and be correctly completed; and it must be supported by the prescribed documentation and by such further documentation as the Keeper may reasonably require.

4.23 It should not matter that a deed is, or may be, voidable. The concern is with the position as of now and not with the position as it may be in the future. A voidable deed is good unless or until it is reduced. If, later, a deed were to be reduced, the reduction could be given direct effect on the Register on the basis of proposals put forward in our previous discussion paper.³⁰ But in the meantime the applicant is entitled to the benefits which only registration can confer – to the real right brought about by registration, and to the prospect that, with the running of positive prescription, any ground of challenge will come to be extinguished.

4.24 We propose that:

- 12. (1) The Keeper should be bound to accept an application for registration if it appears to him that –**
 - (a) the deed or document on which the application is based is valid; and**
 - (b) the application is in order.**
- (2) For the purposes of (1)(a) a deed or document is valid if (but not only if) the result of registration would be to confer (or, as the case may be, vary or extinguish) the right in question.**

Applications which must be rejected: introduction

4.25 Section 4(2) sets out six grounds on which an application must always be rejected. It is necessary to decide whether these grounds should be retained, and whether others should be added.

Paragraph (a): land insufficiently described

4.26 Paragraph (a) of section 4(2) requires the Keeper to 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". This provision is, we think, uncontroversial. Since the Land Register is map-based, the Keeper cannot give effect to an application unless he is clear as to the land which is involved; and the obligation to provide the necessary information falls, quite properly, on the applicant. The *Registration of Title Practice Book* sets out the type of information which the Keeper requires.³¹ If it is not forthcoming, the application will, necessarily, be rejected.

Paragraph (d): no title number

4.27 Paragraph (a) is important mainly for first registrations and dealings in part. In the case of dealings in whole the equivalent provision is paragraph (d), although compliance with that paragraph will have the incidental effect of compliance with paragraph (a).

³⁰ First Discussion Paper paras 6.11 ff. And see also para 6.24.

³¹ *Registration of Title Practice Book* pp 89–91 and 118–9. See also "Land Register Update – certified plans" (2001) 46 JLSS Aug/15.

Paragraph (d) requires that, once an interest in land has been registered in the Land Register, any deed relating to that interest must "bear a reference to the number of the title sheet of that interest". There is some duplication with forms 2 and 3, which require a list of the title numbers affected by the application,³² and we would welcome the views of consultees as to whether one of those requirements could be dispensed with. If, however, paragraph (d) (at least) is to survive, it seems capable of improvement. In particular, in its present form it leaves open the question of (i) *which* title number must be referred to and (ii) *where* in the deed the number must be entered.

4.28 The difficulty, in relation to (i), is that secondary rights do not have a title sheet.³³ Take the case of a deed of assignation of a standard security. How is paragraph (d) to be complied with? Is the proper response to give no title number in the assignation, on the basis that the real right in land to which the assignation directly relates is the standard security? Or is paragraph (d) to be read as requiring a reference to the primary right with which the deed is most closely connected – in the present case the (ownership of the) land? Plainly the latter is the information needed by the Keeper and, if the position is in doubt, the wording of the provision should be re-worked.

4.29 As respects (ii), the normal practice is to give the title number as part of the description of the land affected by the deed. Where this is not done, however, the Keeper does not insist on a freshly executed deed and is willing to accept a note of the title number "on the first page ... preferably at the top but certainly not on the backing".³⁴ This sensible accommodation with reality may be within the spirit of paragraph (d), but whether it is within the letter is, perhaps, less clear and should be put beyond doubt.

4.30 It is important to distinguish the requirements of paragraphs (a) and (d) from the rules of the general law as to descriptions in deeds. The former concern the transmission of information to the Keeper, the latter the substantive validity of the deed itself. For the former, and in particular for paragraph (a), the deed is only one part, albeit the most important, of the material which is being presented. If it is inadequate, it can be supplemented by other material – in practice by a self-standing plan prepared by the applicant. For the latter, however, the deed is everything, so that if the words are insufficient the deed is void. As it happens, the requirements of the general law in relation to descriptions are not onerous: so long as the land can be identified, if necessary by extrinsic evidence, the description is sufficient and the deed valid.³⁵ Good practice, naturally, requires a great deal more. Thus rule 25 of the Land Registration (Scotland) Rules 1980 provides that:

"Land in respect of which an interest has been registered shall be sufficiently described in any deed relating to that interest if it is described by reference to the number of the title sheet of that interest, in or as nearly as may be in, the manner prescribed by Schedule B to these rules."

The standard words of description provided by schedule B are "the subjects registered under Title Number(s) ..." It seems, however, that rule 25 is permissive rather than mandatory,³⁶ so

³² Question 7.

³³ See paras 2.8 ff.

³⁴ *Registration of Title Practice Book* para 5.17.

³⁵ See eg G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) para 12-14.

³⁶ Rule 25 merely gives a method which, if it is used, results in the land being sufficiently described. There is no suggestion that other methods could not also be used, in accordance with longstanding law and practice. Indeed

that a deed which made no mention of the title number would still be legally effective provided that the land was capable of identification. Paragraph (d) of section 4(2) could then be complied with by endorsing the title number at the top of the deed in the manner already mentioned. We would welcome views as to whether rule 25 ought now to be mandatory. Almost always, of course, it is complied with. But if a deed is granted shortly after an application for first registration or a dealing in part, and different law agents are involved, there may sometimes be difficulty in getting hold of the title number, even assuming one exists. Any general requirement, therefore, would need an exception to accommodate this difficulty.

Paragraph (aa): superiorities

4.31 Paragraph (aa) prevents an application in respect of a right which was extinguished by the abolition of the feudal system. Added by the Abolition of Feudal Tenure etc (Scotland) Act 2000,³⁷ this provision is transitional in character and will probably not need to be repeated in any new legislation. Its primary role is to ensure that, in the transfer of a title which formerly comprised mixed estate (ie a mixture of *dominium utile* and *dominium directum*), there is excluded any land that was held only on a superiority title.³⁸ Insofar as a provision is thought to be necessary in future legislation, the point will be covered by our proposed re-casting of the grounds of eligibility for registration.³⁹

Paragraph (b): souvenir plots

4.32 **The principle.** So-called "souvenir plots" may quite often fall foul of paragraph (a) as being too small to be located on the Ordnance Map.⁴⁰ We understand that even on the normal mapping of 1:1250, visual identification is difficult for areas of less than 1.5 square metres, and that in practice souvenir plots are usually in rural areas where the scale is likely to be 1:10,000. But in any event, special provision is made by paragraph (b) of section 4(2) for the rejection of applications in relation to souvenir plots. One should pause to ask why. As long as a plot can be identified on the map, there is no technical obstacle to its registration. Nonetheless, the registration of souvenir plots is seen as a poor use of limited resources. The matter was put in this way in the first edition of the *Registration of Title Practice Book*:⁴¹

"The provisions of section 4(2)(b) are not evidence of a stuffy bureaucracy. A scheme to sell off 1000 one square foot plots and register the titles thereto would employ the Keeper and his staff, public servants, in a way which could be detrimental to the expeditious registration of the titles of those whose interest was practical rather than sentimental or commemorative."

it might be said that s 4(2)(d) is necessary precisely because the title number might not be mentioned in the body of the deed. Section 15(1) of the 1979 Act, which on this point duplicates rule 25, is also merely permissive.

³⁷ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 3.

³⁸ Scottish Law Commission, Report on *Abolition of the Feudal System* (Scot Law Com No 168, 1999) paras 2.10–2.13.

³⁹ Paras 3.24–3.27. It is proposed that, in future, eligibility for registration should normally be determined only by special legislation (ie legislation other than that on land registration). There is no special legislation which allows registration in respect of (former) superiorities.

⁴⁰ Para 4.26.

⁴¹ Para C.31.

To this practical argument may be added an understandable reluctance to appear to endorse schemes which, in some cases at least, may involve an element of deception or represent a poor bargain.

4.33 But there are counter-arguments. Since ownership of land can be acquired only by registration, to deprive purchasers of the opportunity to register is to deprive them of the opportunity of ownership. If the original purchase was a bad bargain, it is made worse by paragraph (b). In the absence of registration, the purchaser is vulnerable to the insolvency of the souvenir plot provider, and to the possibility that the same plot is re-sold to someone else. The latter in particular seems an obvious risk, for without registration there is no practical check on the repeated sale of the same plot. Further, the continued refusal of souvenir plots would, in the long run, prevent the development of a complete and accurate Register. For if the souvenir plot provider held on a Sasine title, the land would remain indefinitely on that Register; and if the title was already on the Land Register, it would continue to stand in the name of the provider notwithstanding that it had long since been sold.

4.34 In England and Wales, the restrictions on registration of souvenir plots, introduced in 1972, were abandoned by the Land Registration Act 2002.⁴² In our provisional view, the same course of action should now be adopted in Scotland. If a plot was too small to be identified on the map, it would of course fall to be rejected under paragraph (a) (or its replacement). Otherwise it should be accepted for registration.

4.35 **The details.** If, contrary to our provisional view, a prohibition on souvenir plots were to be retained, it might be necessary to refine the current definition. In terms of paragraph (b), a souvenir plot is

"a piece of land which, being of inconsiderable size or no practical utility, is unlikely to be wanted in isolation except for the sake of mere ownership or for sentimental or commemorative purposes".

4.36 This definition, which is a close copy of the former provision in England and Wales,⁴³ has caused some difficulty in practice and involved the Keeper in, sometimes lengthy, correspondence. The difficulty arises mainly from the disjunctive "or" between "inconsiderable size" and "practical utility". By itself neither seems a sufficient definition of souvenir plot. For example, an area of inconsiderable size might nonetheless serve a vital function, for example to park a car or widen a road; or again an area of no practical utility might be so extensive that its exclusion from the Register would be absurd. Matters are not improved by the examples given in the second half of the definition. It is not clear why motives of sentiment or commemoration should be a barrier to registration. A rich foreigner of Scottish extraction might buy 1000 hectares for reasons which are entirely "sentimental". "Commemorative purposes" extends not only to postage-stamp plots but also to war memorials and graveyards. If the concept of souvenir plot is to be retained, therefore, the "or" should become an "and" and the examples dropped. Thus a souvenir plot would simply be one which is of inconsiderable size *and* of no practical utility.

⁴² Ruoff and Roper, *Registered Conveyancing* paras 20.030 and 20.031.

⁴³ Land Registration and Land Charges Act 1971 s 4(5).

Paragraph (c): applications which are frivolous or vexatious

4.37 Paragraph (c) of section 4(2), prohibiting applications which are "frivolous or vexatious", is used to exclude the more obviously speculative type of a *non domino* deed. Under a proposal made below, however, that function would be taken over by a special provision.⁴⁴ It is not clear that there will then be any role for paragraph (c). If an application is made in respect of a deed which is valid, and which relates to land of a sufficient size to be plotted on the Ordnance map, it seems doubtful whether it should ever be classified as frivolous or vexatious. Indeed if paragraph (b) (souvenir plots) is abandoned, as suggested above, but paragraph (c) retained, there is a danger that souvenir plots would continue to be excluded. Our provisional view, therefore, is in favour of dispensing with (c).

Paragraph (e): non-payment of fee

4.38 Paragraph (e), the final paragraph of section 4(2), requires pre-payment of the fee for registration. This provision, which was added by the Land Registers (Scotland) Act 1995, replaced the former system whereby the fee was payable only on completion of registration. From the point of view of Registers of Scotland it has been a considerable success, reducing the incidence of bad debt and easing cash flow. Plainly it should be retained.⁴⁵ Later we suggest that pre-payment might usefully be extended to applications for rectification.⁴⁶

Deed not self-proving

4.39 Under the Requirements of Writing (Scotland) Act 1995 a deed is formally valid merely by being subscribed by the granter but is self-proving ("probative") only if it is witnessed (or equivalent). As a matter of risk management the Keeper will accept for registration only deeds which are self-proving; but whereas for the Register of Sasines this is a matter of express provision (subject to exceptions) in section 6 of the 1995 Act, for the Land Register the practice rests on the Keeper's general discretion, under section 4(1) of the 1979 Act, to requisition such evidence as he wishes. We think that section 6 could with advantage be extended to the Land Register. This is partly in the interests of transparency, to prevent a fixed rule continuing to be disguised as an apparent discretion, but it also takes account of the proposed reformulation of the power to requisition evidence, discussed earlier.⁴⁷ Section 6 makes exceptions for court decrees and for documents where "registration is required or expressly permitted under any enactment".⁴⁸ Subject to these exceptions, an application to the Land Register would be rejected if the deed on which it was based was not self-proving. ARTL transactions would be exempted.

Additional grounds for rejection

4.40 In conjunction with the Ordnance Map, the Keeper uses the Address Point Gazetteer as a means of identifying the location (but not the extent) of properties. The Gazetteer, which is used by a wide range of organisations, provides a standard address format for all

⁴⁴ Paras 4.44–4.57.

⁴⁵ In order to accommodate electronic payment, however, the word "tendered" should be replaced.

⁴⁶ Para 6.31.

⁴⁷ For which see paras 4.15–4.19.

⁴⁸ Arguably this exception is too wide. It was intended to catch the miscellaneous documents provided by statute, some of which are listed in para 3.3. But it seems to extend to those standard deeds which are the subject of statutory provision, such as dispositions, long leases, and standard securities.

properties based on postcodes. The Keeper has indicated to us that it would be of assistance if applications for first registration contained the postcode of the property in question. In response a working party of the Law Society of Scotland's Conveyancing Committee suggested that "the additional work involved in providing postcodes in respect of each matter would outweigh the benefits to the Keeper".⁴⁹ We would welcome the views of consultees. If a requirement for postcodes were to be introduced, it is for consideration whether this should be included as a formal ground of refusal in a re-enacted version of section 4(2), or whether it would be simpler to have an appropriate question in form 1.

4.41 Section 4(2) is supplemented by rule 9 of the Land Registration Rules, previously mentioned,⁵⁰ which requires that applications be made on a prescribed form and be accompanied by certain documentation. Failure to comply is a further ground for rejection. Later we propose an additional ground of rejection in respect of certain classes of a *non domino* deed.⁵¹ We are not aware of any other grounds which should lead to the automatic rejection of applications, but we would welcome the views of consultees.

Applications which must be rejected: in summary

4.42 Our discussion of grounds on which an application must be rejected may be summarised in the form of the following proposals and questions:

- 13. (1) The Keeper should be bound to reject an application for registration if –**
 - (a) it relates to land which is not sufficiently described to enable him to identify it by reference to the Ordnance Map (or any map replacing that map);**
 - (b) payment of the registration fee has not been made; or**
 - (c) the deed on which the application is based is not self-proving.**
- (2) At present it is permissive, but not mandatory, for registered land to be described in a deed by reference to the title number. Should a description by title number be mandatory?**
- (3) Having regard to the fact that the title numbers affected by an application must already be listed on the application form, should it continue to be a requirement that the title number is given somewhere in the deed?**
- (4) If the answer to (3) is yes, the rule should be that the Keeper is bound to reject an application if the deed in respect of which it is made fails to mention (whether within the text of the deed or otherwise) the**

⁴⁹ *Memorandum* to Scottish Law Commission by the Law Society of Scotland's Conveyancing Committee Working Party (29 April 2003) p 5.

⁵⁰ Para 4.15.

⁵¹ Paras 4.44–4.57.

number of the title sheet of the primary right to which the deed most directly relates.

(5) The Keeper should no longer reject applications only on the ground that they –

(a) relate to souvenir plots, or

(b) are frivolous or vexatious.

(6) Should applications for first registration require to include the postcode of the property?

Exclusion of indemnity

4.43 While the Keeper must usually accept an application for registration, he is not bound to indemnify the resulting title. Section 12(2) of the 1979 Act provides that

"... the Keeper may on registration in respect of an interest in land exclude, in whole or in part, any right to indemnity under this section in respect of anything appearing in, or omitted from, the title sheet of that interest."

In our earlier discussion paper we proposed the retention of this discretion,⁵² a proposal endorsed by consultees. In practice the discretion is less wide than the statutory wording implies. In particular the Keeper would not withhold indemnity where, as almost always, the title is good – and if he were to attempt to do so we have no doubt that his decision could be successfully challenged. There seems merit in expressing this limitation on the face of the legislation.⁵³ Accordingly, we propose that:

14. The Keeper's power to exclude indemnity should not apply in respect of an application covered by proposal 12.

If good titles are to be indemnified, it does not follow that bad titles are not. On that issue the Keeper would continue to have a discretion.⁵⁴

DEEDS GRANTED A NON DOMINO

Positive prescription

4.44 As well as registering deeds that are good, the Keeper sometimes registers deeds that are bad. If at first sight this seems surprising, it is made unavoidable by the rules of positive prescription. In Scotland prescription requires not merely possession but also a prior registered deed which bears to convey the land in question (resulting, in the case of the Land Register, in an appropriate entry on the Register).⁵⁵ In other words, prescriptive

⁵² First Discussion Paper paras 3.42–3.46.

⁵³ C C Campbell, "The Land Register and the Keeper's Discretion" (1999) 4 SLPQ 277, 283–4.

⁵⁴ As to how the discretion is exercised, see *Registration of Title Practice Book* para 7.17.

⁵⁵ Prescription and Limitation (Scotland) Act 1973 s 1(1). Whether positive prescription results in acquisition of ownership, or merely in blocking future challenges, is controversial: see D Johnston, *Prescription and Limitation*

acquisition presupposes that void deeds be accepted for registration; and the registration of *a non domino* conveyances (ie conveyances granted by non-owners) is a well-established feature of legal practice in Scotland.

4.45 Usually, conveyances *a non domino* are registered with exclusion of indemnity, thus preventing a claim against the Keeper while at the same time allowing the entry to be removed by rectification at the instance of the "true" owner even where the grantee is in possession.⁵⁶ Without exclusion of indemnity, positive prescription cannot run. Under our proposals the position would be different: until the required period of possession had been completed, rectification would be available as of right and would not depend on exclusion of indemnity;⁵⁷ but in the meantime positive prescription would run.⁵⁸ Nonetheless exclusion of indemnity would remain of significance. For example, where indemnity was excluded a future acquirer could not be in good faith so as to take a title free from infirmity;⁵⁹ and, as under the present law, an exclusion of indemnity would relieve the Keeper of any claims.

Ownership conferred too soon

4.46 If an *a non domino* conveyance is accepted for registration and duly registered, the grantee becomes owner, not after ten years' possession as under the Sasine system, but at once. And since the grantee is now owner, the true owner is divested and ceases to be owner. To confer ownership at once is to confer it too soon.⁶⁰ Such a result is awkward enough even if the grantee will in the end perfect his title by prescription, for it gives him now that which is properly earned only after ten years. But the result seems unacceptable in a case where, due to lack of possession, prescription will never run at all. It means that ownership is acquired by a person with no more claim to the property than having drawn up and registered a disposition in his own favour. The solution lies in the proposal made in our first discussion paper, and approved by most consultees, that the current "positive" system of land registration be replaced by a conventional or negative system in which the title of an acquirer would depend on the validity of his deed.⁶¹ The grantee of an *a non domino* conveyance would not, therefore, become owner on registration. Instead, as with the Sasine system, ten years' possession would be needed to produce that result. If the necessary possession was not achieved, ownership would never be acquired.

Speculative conveyances

4.47 Another difficulty concerns speculative conveyances. Traditionally *a non domino* conveyances were used to delimit boundaries, to solve problems of missing deeds, or to acquire land which was lying waste and had no discernible owner. Prescription thus resolved boundary disputes, regularised titles, or brought back into economic activity land which had come to be abandoned. During the 1990s, however, *a non domino* conveyances began to be used in a more predatory manner. If, for example, a house lay empty, it might happen that an *a non domino* disposition was presented for registration in the hope that possession could

(1999) paras 14.04 ff. A negative system of registration of title requires the former result, and it will probably be necessary to put the position beyond doubt by an amendment to the 1973 Act.

⁵⁶ 1979 Act s 9(3)(a)(iv).

⁵⁷ Para 6.21.

⁵⁸ First Discussion Paper paras 3.4–3.11.

⁵⁹ Under the integrity principle: see para 5.29.

⁶⁰ C C Campbell, "The Land Register and the Keeper's Discretion" (1999) 4 SLPQ 277, 283: "It is not appropriate that a defective title should be given the same status as a valid title".

⁶¹ First Discussion Paper part 5.

be taken, and retained, for the ten years of positive prescription. Usually there was an owner readily traceable from one of the registers. The Keeper's response was to monitor more closely applications made in respect of a *non domino* conveyances. The purpose, it was explained in an article published in 1997, was "to intercept and challenge those deeds for which no obvious reason exists and which conflict with existing title. If the presenter is unable to show good cause for registration the deed may be rejected".⁶²

4.48 There is little to be said in favour of speculative conveyances and much to be said against. Such conveyances put ownership at risk. Particularly in the case of open land, title may be lost even to slight acts of possession. In *Hamilton v McIntosh Donald Ltd*,⁶³ the leading modern case, a hostile prescriptive title was acquired on the basis of such intermittent acts as the boring of holes, the extraction of peat, some seasonal rough shooting, and the commissioning of surveys. The possession which was proved was, as Lord Wylie accepted, "limited and indeed almost casual" and "exceeding thin".⁶⁴ Yet it was sufficient to displace the person previously registered as owner. At least in some cases, therefore, ownership can be lost by "oversight or inadvertence"⁶⁵ or even by tolerance of the occasional use of others. Indeed for those with substantial landholdings – including local authorities and other public bodies – it may hardly be possible to protect ownership against a determined trespasser. In our first discussion paper we emphasised the importance of security of title and made proposals to protect owners against certain categories of acquirer favoured by the 1979 Act.⁶⁶ But loss to a speculative acquirer is no less a threat to security of title; and, unlike loss under the 1979 Act, this comes without the consolation of indemnity from the Keeper.⁶⁷

4.49 But even if speculative deeds were desirable in themselves, they would encounter difficulties with the European Convention on Human Rights. In *Beaulane Properties Ltd v Palmer*⁶⁸ the operation of adverse possession, a doctrine comparable to positive prescription in Scotland, was held by the High Court in England to be contrary to article 1 of the First Protocol of the ECHR to the extent that it operated against registered owners of land.⁶⁹ For there was a deprivation of property without either compensation or a furtherance of legitimate aims of public policy:⁷⁰

"In my opinion, the expropriation of registered land without compensation in circumstances such as exist in this case does not advance any of the legitimate aims of the statutory provisions and is disproportionate ... In essence, the registered owner loses his land because he has failed to take steps to get rid of a trespasser within a 12 year period. But as the present case, *Pye*⁷¹ and other cases show, the acts of trespass may not be obvious, or may be trivial and entirely harmless. Further, the owner may not know the law, and may not realise that the failure to take steps to put an end to a situation which is doing him no harm may be prejudicing his position.

⁶² A M Falconer and R Rennie, "The Sasine Register and Dispositions *a non domino*" (1997) 42 JLSS 72. See also *Registration of Title Practice Book* para 6.4.

⁶³ 1994 SC 304.

⁶⁴ 1994 SC 304, 337D.

⁶⁵ *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, para 73 *per* Lord Hope of Craighead.

⁶⁶ For a summary and further references, see paras 1.3–1.8.

⁶⁷ Rather unnecessarily, this point is made explicit by the 1979 Act s 12(3)(a). For a discussion see paras 8.8–8.10.

⁶⁸ [2005] All ER (D) 413.

⁶⁹ The solution was to read down the legislation so as to impose the more rigorous test for possession favoured by the previous law: see para 213.

⁷⁰ [2005] All ER (D) 413, para 196 *per* Nicholas Strauss QC, Deputy Judge.

⁷¹ *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

There is little or no fault involved. On the other side, the trespasser will usually know that he is trespassing,⁷² will already have benefited from the acts of trespass, and will have done nothing whatsoever to deserve the windfall of being given the property in return for having illegitimately used it for a long time. There is no justification for what is essentially a transfer of property without compensation from the deserving to the undeserving ..."

This reasoning would seem equally applicable to positive prescription insofar as it involves speculative conveyances.

4.50 Thus far we have concentrated on loss of title. But even where title is not actually lost (or not for good)⁷³ – even where, in other words, the grantee fails to retain possession for the ten years required by positive prescription – a speculative conveyance can seriously inconvenience the registered owner. The problem begins with the absence of notice; for while the Keeper must usually notify those affected by his decisions (such as a decision to register), it is provided by the Land Registration Rules⁷⁴ that

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

This means that the owner may know nothing of a competing title until he comes to sell the property. Its sudden discovery, unexpected and unwelcome, is likely to stop the sale in its tracks until such time as the competing title can be removed from the Register. In practice this will often involve an action of reduction of the *a non domino* conveyance. For an owner caught in this way, the Register has not provided the security of title which might reasonably have been expected.

Possible solutions

4.51 The objections just described do not apply to all deeds granted *a non domino*. As already mentioned, an *a non domino* deed may often serve a purpose which is useful and beyond reproach.⁷⁵ Some means, therefore, must be found of distinguishing unworthy deeds from those which are worthy, and of excluding prescription in the case of the former. What is needed, in short, is both a criterion and a mechanism.

4.52 **Criterion.** We have no quarrel with the criterion currently employed by the Keeper, which provides for the rejection of any deed which is being "utilised by persons seeking to obtain control of property clearly belonging to other people".⁷⁶ But there is scope for argument as to the details. Some of those responding to our preliminary consultation felt that the Keeper's policy was applied too broadly. Consultees complained of an unwillingness to accept applications for first registration to the extent that they involved land not shown within the OS boundaries, even if the land had in fact been possessed. An equivalent problem in tenements concerns claims for sole ownership of particular areas of garden ground. The

⁷² In Scotland, where a registered deed must precede the possession, the trespasser is almost bound to know that the land is not his.

⁷³ Under the positive system operated by the 1979 Act there will always be initial loss of title, but subject to the possibility of restoration following an application for rectification.

⁷⁴ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 21(2).

⁷⁵ Para 4.47.

⁷⁶ *Registration of Title Practice Book* para 6.4.

position would be clarified if a statutory rule were to replace what is currently a matter of the Keeper's discretion. In our preliminary view such a rule should exclude deeds granted *a non domino* only where some other person who would have had title to grant the deed can be identified. For Land Register titles the position will usually be clear one way or another, but for titles still held on the Register of Sasines the identity of the owner may be a matter of doubt and, if so, the doubt should be resolved in favour of the applicant for registration. It remains for further consideration whether, and if so how, the rule should apply to such parts of the foreshore and seabed as are held by the Crown under its residual title.⁷⁷

4.53 Very occasionally land which is clearly owned has also, equally clearly, been abandoned. In that case there should be no objection to a deed granted *a non domino*. As was observed in the *Beaulane Properties* case: "Where land has been abandoned, it is in the public interest that it should be acquired by someone else who wants it and will use it".⁷⁸

4.54 **Mechanism.** Two main approaches seem available for giving effect to the criterion just discussed. One is for the Keeper to reject all deeds which fall within it. The other is to accept the deed but to notify the owner.

4.55 The second method (notification of the owner) is now in use in England and Wales.⁷⁹ It has some attractions. It would remove from the Keeper a potentially difficult decision as to whether applications should be accepted. Instead all applications would be accepted, the applicant entered on the title sheet as owner, and the position thereafter governed by market forces. If there was no identifiable owner there could be no notification and hence little likelihood of a challenge within the ten years of prescription. But if an owner were identified and notified it would then be for that person to decide whether to seek to undo the registration by applying for rectification of the Register. But there are drawbacks to this approach. If the first method (rejection) requires certainty on the part of the Keeper as to the *existence* of an owner, the second method requires something more demanding still, namely certainty as to the owner's actual identity and whereabouts. In some cases this may require a considerable amount of research.⁸⁰ Matters are also awkward for the true owner.⁸¹ If he is to avoid problems with future purchasers, or the ultimate loss of the property, he has little choice but to apply for rectification. The result is additional work both for the owner and for the Keeper even if, under a proposal made later in this paper, the Keeper is liable for the cost.⁸² And there seems little benefit to anyone in allowing the initial registration if it is to be undone so soon by rectification.

4.56 The first method (initial rejection), therefore, seems preferable. It merely adds another ground on which registration must be refused by the Keeper,⁸³ and it has the advantage of reproducing current practice. At present that practice rests on paragraph (c) of section 4(2), which requires that an application be rejected where "it is frivolous or vexatious". The scope of this provision, however, is unclear.⁸⁴ No doubt if an application is

⁷⁷ The current law is that the Keeper must notify the Crown Estate Commissioners as to *a non domino* conveyances of the foreshore (only). See 1979 Act s 14. We will return to the subject of the seabed, and other water boundaries, in the third discussion paper.

⁷⁸ *Beaulane Properties Ltd v Palmer* [2005] All ER (D) 413, para 187 *per* Nicholas Strauss QC, Deputy Judge.

⁷⁹ Land Registration Act 2002 sch 6 para 2. For background, see Law Com No 271 part XIV.

⁸⁰ In England and Wales the difficulty is largely avoided by restricting the rule to registered land.

⁸¹ Para 4.50.

⁸² Para 7.59.

⁸³ For the other grounds, see paras 4.25–4.42.

⁸⁴ See also para 4.37.

made in respect of Holyrood Palace – the example given in the first edition of the *Registration of Title Practice Book*⁸⁵ – it could readily be dismissed as "frivolous". But it is not "frivolous" to seek to acquire more attainable property; and if it is "vexatious", that is perhaps a charge which could be levelled at any deed which is designed to take ownership without consent – or in other words, at most or all conveyances *a non domino*. In short, the wording of paragraph (c) provides little in the way of guidance, leaving the Keeper in a difficult position and his decisions open to challenge. More specifically, it does not provide clear authority for the Keeper's current practice. Any new legislation should put that right.⁸⁶

4.57 Our proposal is that:

- 15. (1) The Keeper should be bound to reject an application for registration in respect of a deed where or to the extent that –**
 - (a) the person granting the deed did not have title to do so; and**
 - (b) a person who would have had such title can be identified.**
- (2) But there should be no duty to reject if it appears to the Keeper that the person with title has ceased to assert that title.**

Applications which may be accepted or rejected

4.58 Usually, under our proposals, the Keeper must accept an application.⁸⁷ Far less usually an application must be rejected. Taken together these rules dispose of most, but not all, cases. Thus, if the deed is valid, the application must be accepted; but if the deed is invalid, however, and none of the mandatory grounds for rejection applies, our proposals leave the position open. Here we are content that the Keeper should have a discretion. While often an invalid deed would be rejected, there may sometimes be circumstances where the better course would be acceptance – for example, if the defect is of a technical nature such that there are unlikely to be competing claims. Similarly, the Keeper would usually choose to accept an *a non domino* deed other than a deed which, under our proposals, he is bound to reject. We propose therefore that:

- 16. In the residual cases not covered by proposals 12, 13 and 15, the Keeper should have a discretion either to accept an application or to reject it.**

LAND CERTIFICATES AND CHARGE CERTIFICATES

The present law

4.59 The Land Register, which exists only in electronic form,⁸⁸ can be consulted by means of an internet-based service known as Registers Direct, allowing for the downloading of title

⁸⁵ Para C.32.

⁸⁶ A provision is needed only for the Land Register. This is because, under our proposals, *all* conveyances, included those granted without consideration, would in future be registered only in that Register: see para 3.34.

⁸⁷ Paras 4.20–4.24.

⁸⁸ See generally part 2.

sheets. In addition, an official copy of any title sheet, known as an office copy, can be obtained from the Register by any person at any time.⁸⁹ An office copy is "sufficient evidence of the contents of the original".⁹⁰ But that is not all. On completion of registration in respect of a primary right,⁹¹ the new owner or lessee is issued with a land certificate.⁹² Like an office copy, this is an official copy of the title sheet; but unlike an office copy, only one land certificate can normally be issued for each property.⁹³ This gives the land certificate a special status. It is the certificate of title for the property – the "title deed", in lay language – and as such passes with the property itself to successive owners. Usually it is lodged with the lender for as long as there is a secured loan. Most importantly, it must be produced to the Keeper on most transactions affecting the property.⁹⁴

4.60 In general no certificate of title is issued to the acquirer of a secondary right, such as a servitude or liferent. Heritable securities, however, are an exception, for on registration of a standard security a charge certificate is issued to the creditor.⁹⁵ This comprises

- (i) the original security deed;
- (ii) a sheet giving details of the title number, property, name of proprietor, date on which the security was registered, and any other securities which have the same, or preferred, ranking; and
- (iii) a cover sheet with certain general information and a note of the latest date on which the certificate was made to agree with the title sheet.

A charge certificate both gives less information and also more information than a title sheet (and hence a land certificate). Thus it gives only rudimentary information about the property and none about the burdens; but it gives the full text of the security itself.⁹⁶ As with a land certificate, a charge certificate must be produced to the Keeper on any subsequent transaction, such as an assignation of the security or its restriction, variation or discharge.⁹⁷

Should certificates of title be abandoned?

4.61 Under ARTL, all communications with the Register will be electronic, with the result that no land or charge certificate will be submitted to the Keeper. That does not of itself preclude a system of certificates of title, but such a system would be largely pointless. For practical purposes, therefore, ARTL is incompatible with certificates of title.

4.62 In theory it would be possible to abandon certificates of title in ARTL transactions but to retain them in paper transactions. We doubt whether this is worth the trouble. By far the

⁸⁹ 1979 Act s 6(5).

⁹⁰ 1979 Act s 6(5).

⁹¹ For terminology see paras 2.8 and 2.9.

⁹² 1979 Act s 5(2). Land certificates are form 6 of sch A to the Land Registration (Scotland) Rules 1980 (SI 1980/1413). For further discussion, see *Registration of Title Practice Book* para 5.80.

⁹³ If a copy is lost, however, a substitute certificate may be issued: see para 4.62. Further, the Keeper will occasionally issue two land certificates for the same property – for example where it is held in common by two unconnected persons especially if they acquired their rights at different times, or where two competing claims are registered in respect of the same property, one with and one without exclusion of indemnity.

⁹⁴ Land Registration (Scotland) Rules 1980 rr 9(3) and 18.

⁹⁵ 1979 Act s 5(3). Charge certificates are form 7 of sch A to the Land Registration (Scotland) Rules 1980 (SI 1980/1413). For further discussion, see *Registration of Title Practice Book* para 5.84.

⁹⁶ By contrast the title sheet gives only the merest summary.

⁹⁷ Land Registration (Scotland) Rules 1980 (SI 1980/1413) rr 9(3) and 18.

most common transaction which will continue to be done on paper will be first registrations where, by definition, no land certificate is yet in existence. For the relatively small number of other transactions it seems questionable whether an exception can be justified. It is true that land certificates have certain benefits. They provide a paper record of the title which is useful for the acquirer, the acquirer's solicitor, and for the lender; and they operate as a check on fraud in respect that a person without a land certificate cannot usually apply for registration. But the first benefit can be met as well by an office copy as by a land certificate (an issue explored in the next section), while the second seems exaggerated. Surprisingly often, a person who commits fraud is also a person (such as relative) who is able to get hold of the land certificate; and if he is not, he may be able to convince the Keeper that the original has been lost and that a substitute certificate should be issued.⁹⁸ Nowadays the checks on the identity of clients under the Money Laundering Regulations seem a more powerful weapon in the fight against fraud than a requirement that a land certificate be produced.⁹⁹ That requirement, indeed, can be an impediment to swift conveyancing. Once a loan is repaid, the land certificate is returned by the lender to the borrower and, as one consultee pointed out to us,¹⁰⁰ it may then be lost, resulting in "considerable difficulties and delays in the completion of the transaction". In the financial year 2004/05 alone some 3630 replacement land and charge certificates were issued by the Keeper. If land and charge certificates are routinely lost and replaced, their value as a unique badge of title is open to question.

4.63 In England and Wales no land or charge certificate has been issued since 13 October 2003, largely in anticipation of the move towards electronic conveyancing.¹⁰¹ In our preliminary view, certificates of title should also cease to be issued in Scotland.

Office copies: issued automatically or on request?

4.64 The replacement for land certificates in England and Wales is a "title information document" which is issued automatically following completion of registration.¹⁰² In Scotland an office copy of the title sheet would continue to be available,¹⁰³ and the only question is whether it should be issued automatically at the end of the registration process (as currently with land certificates) or whether it should be issued only if specially requested by the applicant. If the latter method were to be adopted, an office copy could be requested by ticking a box in the application form (or electronic equivalent) and by payment of an additional fee. It may be assumed that office copies would be available in electronic as well as paper format, giving a further option to the applicant.

4.65 In favour of automatic issue are arguments of transparency and efficiency. An office copy both informs the solicitor and client and also gives the opportunity to verify the accuracy of the entry in the Register. On the other hand solicitors, and their clients, may increasingly prefer to consult the Register online, both as a matter of convenience and in order to receive information which is fully up-to-date. In that case they would be content with a simple confirmation of registration (perhaps by e-mail) and should not have to pay for an

⁹⁸ For the Keeper's power to issue a substitute certificate of title, see Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 19.

⁹⁹ G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) paras 1-04, 1-08 and 1-09. The current regulations are the Money Laundering Regulations 2003 (SI 2003/3075).

¹⁰⁰ Mr Ross MacKay of Henderson Boyd Jackson WS.

¹⁰¹ Ruoff and Roper, *Registered Conveyancing* para 4.010.

¹⁰² Ruoff and Roper, *Registered Conveyancing* para 4.010.

¹⁰³ Although perhaps with a more winning, and accurate, name.

office copy which they may not want and which would only give the position as at a certain date.

4.66 The discussion can be summarised in the form of a proposal and a question:

17. (1) Land certificates and charge certificates should cease to be issued.

(2) In their place, should an office copy of the title sheet be issued, following the completion of registration (and whether in paper or electronic form) –

(a) automatically or

(b) only at the option of the applicant?

Part 5 Registration (3): the protection of acquirers

CURRENT LAW

Section 3(1)

5.1 The protection of acquirers turns on the effect of registration. Under the present law, the position is governed by section 3(1) of the 1979 Act, which is in the following terms:

"Registration shall have the effect of –

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

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

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

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

In this subsection, 'enactment' includes section 19 of this Act."

5.2 Section 3(1) lies at the very heart of the scheme of the Act, indeed of the whole idea of registration of title. Its meaning, however, is not free from doubt. A starting point is the distinction between "the registered interest in land" (the subject of paragraph (a)) and "any registered right or obligation relating to the registered interest in land" (the subject of paragraphs (b) and (c)). The latter, evidently, is subordinate in function to the former, to which it "relates"; and it may be that the difference in terminology – "right and obligation" rather than "interest in land" – is intended to indicate a right of a different kind.

5.3 A difficulty is whether paragraphs (a) – (c) are intended as alternative or as cumulative. Take the standard case of registration on the basis of a disposition. A disposition conveys ownership, and ownership is presumably, on registration, a "registered interest in land". So paragraph (a), at least, applies, conferring on the grantee "a real right in and to" the "interest" – or, in other words (if rather puzzlingly), a real right (of an unspecified type) in and to a real right of ownership. But this double real right may not be all. If the land comes with pertinents, such as a right of common property in some other land (as, typically, in the case of a tenement flat), "a real right" is, equally, conferred in relation to the pertinent. That effect is achieved by paragraph (a) alone, although it seems that paragraph (b) would also

be capable of applying, on the basis that a pertinent is a right which "relates" to another right. In that case paragraph (b) would merely duplicate the effect of paragraph (a).

5.4 The manner in which paragraph (b) might have independent effect is less clear. In the commentary on the Act which was included in the first edition¹ of the *Registration of Title Practice Book*,² paragraph (b) was explained by this example:

"If ... a registered proprietor disposes part of his subjects, the rights and obligations created in the Disposition will be made real by registering in the Land Register. There will, on registration, be two relevant Title Sheets relating to the transaction, one for what remains vested in the grantor after registration, and another (a new Title Sheet) in respect of what has been disposed to the grantee. What is a right in the Property Section of one Title Sheet will normally appear as an obligation in the Burdens Section of the other Title Sheet."

5.5 The suggestion appears to be that paragraph (b) applies to ancillary rights and obligations found in break-off dispositions, most notably real burdens and servitudes. But even if that is correct, the role of paragraph (b) is neither distinctive nor necessary. From the point of view of the benefited property, the real burden or servitude is a pertinent, and so is created as a real right by paragraph (a). Indeed that paragraph makes express reference to "servitude". And a right which is thus made real must, necessarily, affect the burdened property, and do so without further provision.

5.6 It is possible to approach paragraphs (a) and (b) in a different way. The right to an interest in land conferred under paragraph (a) is so conferred "subject only to the effect of any matter entered in the title sheet of *that interest*". This suggests, although without proving,³ that paragraph (a) is confined to those interests in land which command their own title sheet, or in other words to the primary rights of ownership and long lease.⁴ Other aspects of the paragraph may support this interpretation. Thus the registration of a person "as entitled" to the interest suggests an entry in a proprietorship section; and only primary rights are likely to have "pertinents". If paragraph (a) were to be restricted to primary rights, then paragraph (b) would be needed to account for secondary rights such as standard securities. Once again, the statutory language is of some assistance, for a secondary right can readily be categorised as "relating to" a primary right.⁵ A merit of this analysis is to ascribe a distinctive role to paragraph (b).⁶ Whether it is correct, however, is difficult to say.

5.7 Nothing has yet been said about paragraph (c). If the paragraphs of section 3(1) are to be applied cumulatively, then the registration of a disposition might be said to invoke paragraph (c) as well as the two earlier paragraphs, for to make a person owner is to "affect" a registered real right. But if, as just suggested, they are to be applied only in the alternative,

¹ But not in the current (second) edition.

² Para C.20.

³ For if an interest in land has no title sheet, then the only consequence is nothing can be entered in such a title sheet and therefore that the interest is not subject to any such rights.

⁴ For primary and secondary rights, see paras 2.8 ff.

⁵ A difficulty with this argument, however, is that one of the primary rights (long lease) "relates" to the other (ownership) in just the same way as a standard security "relates" to ownership. Indeed under the feudal system, the various estates of ownership all "related" to one another.

⁶ Distinctive but still not actually necessary. There seems no reason why secondary rights cannot be accommodated under paragraph (a). It is true that paragraph (b) deals with both rights and obligations whereas paragraph (a) deals with rights alone. But while not all rights have correlative obligations, all obligations have correlative rights. This means that a separate provision for obligations is unnecessary, for the obligation would be encompassed within the right.

the main (or perhaps only) purpose of paragraph (c) is to deal with variation and discharge, typically of standard securities or real burdens.⁷ A difficulty, however, is the vagueness of the word "affecting", and the failure, here as elsewhere in the Act,⁸ to work with established juridical concepts.⁹

Three rules

5.8 Whatever the difficulties of the text, however, certain legal effects have come to be attributed to section 3(1). The most important of these can be reduced to three rules:

- on registration a real right is created or transferred;
- on registration a real right is varied or extinguished; and
- on registration a person acquiring a primary right (whether by creation or transfer) takes free of all encumbrances other than those entered on the title sheet and overriding interests.

Each rule requires closer examination.

Rule (1): creation or transfer of real rights

5.9 As with the Register of Sasines, registration in respect of an appropriate deed (such as a disposition or standard security) has the effect of conferring ownership or other real right. Unlike that Register, however, a real right is created whether justified by the deed or not. Indeed the right would be created even if there were no deed, because section 3(1) requires merely that an entry is made in the Register. This "positive" effect¹⁰ of registration does not appear clearly from the statutory wording and may even have been unintended. Today, however, it is well established.¹¹ The result is to protect an acquirer by the invariable and immediate conferral of title – by "immediate indefeasibility" in the language of Torrens systems. The title so conferred may not last, however. Although no hint is given in section 3(1), there is an important distinction between primary rights and secondary rights. The acquirer of a primary right who is in possession takes free from future challenge, for there cannot usually be rectification against a proprietor in possession (unless fraudulent or careless).¹² But the holder of a secondary right does not qualify as a "proprietor" in possession and remains vulnerable to rectification until the ground of challenge is cut off by long negative prescription.¹³ Only primary rights, therefore, are protected under the Act, although the loss of a secondary right is compensated by payment of indemnity.

5.10 The "positive" effect is achieved by unexpected means. If A disposes to B and A's title is bad or the disposition blundered, it is natural that, as the Act provides, the good title received by B should be attributed wholly to registration and not at all to A or to A's deed.

⁷ This interpretation has the support of para C.21 of the first edition of the *Registration of Title Practice Book*.

⁸ Para 3.24.

⁹ A further difficulty is that paragraph (c) applies only insofar as the right in question is capable of being "affected as a real right". The meaning of this expression is obscure, but it does not readily conjure up the idea of extinction.

¹⁰ For "positive" and "negative" systems of land registration see para 1.9.

¹¹ First Discussion Paper paras 5.1–5.6.

¹² 1979 Act s 9(3)(a).

¹³ First Discussion Paper para 4.53.

But the attribution is unchanged even where, as almost always, both A's title and the disposition were good. The exception thus dictates the rule. Even in an ordinary transaction, therefore, title flows from the Register and not from the deed and the previous owner. Despite the outward form of the transaction, B takes, not the title of A, but a new statutory title. In the traditional language of property law, the acquisition is original and not derivative.¹⁴ And, in conferring a new title on B, the Act (although it does not say so) must be taken to have extinguished the existing title held by A.

5.11 The effect of section 3(1) in respect of secondary rights is not always clear. Take the case of a standard security. In terms of the draft scheme given in the Henry Report the rule was that¹⁵

"... as at the date of registration of a heritable security there shall vest in the creditor, registered as entitled thereto, a real right in and to the security and all enabling rights and powers effering thereto and specifically to the amount of the debt stated to be outstanding ..."

Three rights were thus to be conferred: a real right in security; such ancillary rights as attach to that real right; and a personal right to the debt. In the 1979 Act, however, no special provision is made for heritable securities and the matter rests on section 3(1). Plainly section 3(1) confers a real right in security, and equally plainly (and, in our view, quite properly) it does not confer a personal right to the debt. The position of ancillary rights, however, is obscure. Under the Conveyancing and Feudal Reform (Scotland) Act 1970 certain standard conditions are implied into all standard securities, and these conditions may be, and usually are, varied and augmented by the parties. Do standard conditions become real under section 3(1)? A number of difficulties stand in the way of that result. The conditions are unlikely to be set out in the security deed itself; even if they are so set out, they will not in practice be entered on the Register;¹⁶ and even if these hurdles can be overcome, it is not clear that any of the paragraphs in section 3(1) can be read as applying to standard conditions.¹⁷ In one sense this may not matter very much, because the standard conditions are probably real by force of statute and without registration.¹⁸ But if section 3(1) does not apply there can be no "positive" effect and hence no possibility of rescuing a condition which is otherwise invalid. More importantly, the example shows the difficulty of applying the very general provisions of section 3(1) beyond the case of ownership for which they appear to have been designed.

Rule (2): variation or extinction of real rights

5.12 The positive effect operates to extinguish as well as to create. So if the creditor's signature is forged on a discharge of a standard security, the security is discharged nonetheless, following registration, and will be removed from the Register. The same principle applies to variation, as for example a minute of waiver with respect to a real burden.

¹⁴ Reid, *Property* para 597.

¹⁵ Henry Report part I para 26(a).

¹⁶ Para 2.4.

¹⁷ Paragraph (b) is the most promising but, as already seen, its meaning and scope are unclear.

¹⁸ Conveyancing and Feudal Reform (Scotland) Act 1970 s 11(2). And see K G C Reid, "Real Conditions in Standard Securities" 1983 SLT (News) 169, 171–3.

Rule (3): extinction of omitted encumbrances

5.13 In terms of paragraph (a) of section 3(1), a primary right acquired on registration is "subject only to the effect of any matter entered in the title sheet of that interest [ie the primary right] under section 6 of this Act so far as adverse to the interest or that person's entitlement to it and to any overriding interest whether noted under that section or not". To understand this provision it is necessary to know that encumbrances¹⁹ are entered on the Register under section 6,²⁰ and that an overriding interest includes a right which is made real other than by registration, for example a short lease. The result, at first sight, is just the familiar and elementary rule that acquirers are affected by real rights (whether constituted by registration or otherwise) but not by personal rights. The only surprise is that a rule of the general law should have found its way into a statute on land registration, and that, having done so, should be expressed in so narrow a form. Yet in one respect the statutory rule goes beyond the rule of the general law.

5.14 That respect is omissions from the Register, a problem which has no counterpart in the Register of Sasines. Thus it occasionally happens that a right created by registration fails to appear on the title sheet. Usually this is a right which was created by registration in the Register of Sasines and which was missed out of the title sheet at the time of first registration, whether deliberately (the right being taken to be extinguished or obsolete) or by accident.²¹ Much more rarely the omission occurs later on. Where the cause of omission is the registration of a void discharge, the position is governed by rule (2) as already described. But in other cases of omission rule (3) is needed. Rule (3) (like rule (1)) approaches matters from the standpoint of the acquirer. An acquirer is subject only to such rights as appear on the title sheet. If a right is omitted on first registration, it is extinguished at that time. If it is omitted subsequently – due to human or machine error – it is extinguished, not at the time of omission, but at the time of registration of the title of the next acquirer.

5.15 In our first discussion paper we drew attention to the problem of bijuralism (ie the applicability of two different systems of property law to the same transaction) and explained its unavoidable connection with the "positive" system of land registration employed by the 1979 Act (and hence with the first two rules described above).²² But bijuralism affects this third rule also. Suppose for example that a standard security, constituted by registration in the Register of Sasines, is omitted from the title sheet at the time of first registration. By the rule just described the security is extinguished. But whether the Register is then regarded as accurate or inaccurate is determined, not by the rules of land registration, but by those of the ordinary law of property; and since, under those rules, the security would not have been extinguished, the Register is inaccurate and can, in principle, be rectified. In the result, the security is in a state of suspended animation. It is extinguished for the moment but capable of revival by rectification (subject to the protections for a proprietor in possession). If, in the meantime, a further standard security had been granted, there is a crisis in ranking. Since

¹⁹ Ie secondary rights which burden the primary right in question.

²⁰ We overlook here the difficulty that a secondary right (such as a standard security) which is created after first registration enters the Register under s 5 and therefore not, it seems, under s 6. Thus on a literal reading of s 3(1)(a) an acquirer would take free of such rights.

²¹ See eg *Keeper of the Registers of Scotland v M R S Hamilton Ltd* 1999 SC 116 (omission of leasehold casualties).

²² First Discussion Paper paras 1.11 and 5.15–5.22. And see also para 1.9 above.

rectification is not retrospective,²³ it seems arguable that the original security should rank only from the date of rectification.²⁴ An alternative view is that it should rank from the original date of registration, so that the other security, having begun its life in first place, is now demoted to second. As this example illustrates, the results of bijuralism are always cumbersome and sometimes uncertain. Later we explain how it is possible to retain a rule along the lines of rule (3) but without invoking bijuralism.²⁵

A missing rule?

5.16 The Register is not confined to real rights. There is frequent provision in the statute book for the registration of other deeds, notices, and documents. A representative list was given in part 3.²⁶ In one sense it does not matter whether section 3(1) applies to documents of this kind because a better guide to the effect of registration is always likely to be given by the enabling statute in question. But the "positive" effect of section 3(1) would be important if the document turned out to be invalid, whether as to form, content, or execution. If section 3(1) is to apply, the relevant paragraph can only be paragraph (c). In favour of section 3(1) applying are (i) that a registered document might be said, in a broad sense, to be capable of "affecting" a real right, as paragraph (c) requires, (ii) that the very use of "affecting" seems to refer back to the, apparently universal, provision as to eligibility for registration in section 2(4)(c), and (iii) that provisions of the Act tend to be designed to cover all cases. Against section 3(1) applying are (i) that paragraph (c) is, on one view, confined to secondary rights²⁷ whereas most documents would "affect" only a primary right and (ii) that it is not clear that a right affected by a notice could be said to be "affected as a real right", as required by section 3(1). As in a number of other matters concerning section 3(1), the point must be regarded as undecided.

PROPOSALS FOR REFORM

Introduction

5.17 Section 3(1) is concerned with protecting acquirers against title defects of which they are innocent. But, as our first discussion paper pointed out, such protection can be given in two different ways.²⁸ Either the acquirer is allowed to retain the property, despite the radical defect of title; or else the property is restored to the true owner and the acquirer is compensated with money (ie with payment of indemnity). An acquirer, in other words, can be given either the property or its value – either the "mud" or the "money". Expressed broadly, the policy of the 1979 Act is to give the mud to the acquirer of a primary right²⁹ and the money to the acquirer of a secondary right. And this policy is achieved by conferring an

²³ *Stevenson-Hamilton's Exrs v McStay* 1999 SLT 1175; *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271.

²⁴ A J McDonald, "Rectification and Indemnity in the Land Register" (2002) 56 *Greens Property Law Bulletin* 1, 2. If that is correct, the creditor would lose his ranking without, apparently, having any claim for indemnity (rectification having been allowed, not refused: see para 7.13).

²⁵ Paras 5.33 ff.

²⁶ Para 3.3.

²⁷ Para 5.7.

²⁸ First Discussion Paper para 4.2.

²⁹ Ie ownership and long lease.

immediate title on the acquirer which, in the second case only, is removed in the event of a challenge.

5.18 Two alterations to this system were put forward in our earlier discussion paper.³⁰ In the first place, an acquirer of a primary right would no longer receive the property if the error occurred as part of the current transaction (as for example a forged or blundered deed). Such "transactional error" would give entitlement to money and not to the mud, and the mud would be due only in respect of "Register error" (ie a mistake already on the Register at the time of the acquisition). In the second place, the technique for protection would change. Registration would cease to be "positive" in character. The matter would instead be regulated by the ordinary rules of the law of property but as amended so as to give protection against Register error. Thus where the error lay in the Register but not in the transaction, a good title would be assured; but where it lay in the transaction no title would be conferred. The reasons for these proposed changes need not be repeated. The proposals were accepted by almost all of our consultees and form the basis of our current policy. Here our concern is simply with their implications for the rules currently set out in section 3(1).

From three rules to two

5.19 Of the three rules identified as deriving from section 3(1),³¹ the second (variation or extinction on registration) may be discarded right away. It is uncommon for a right to be removed from the Register in error, but where it occurs the person in need of protection is not the current owner but a future acquirer, and the necessary protection is already conferred by rule (3).³²

Example. A is the owner of land burdened by a standard security. In 2008 A repays the loan and registers a discharge of the security. In fact, and unbeknownst to A, the signature on the discharge was forged by an employee of the lender, who also appropriated the loan repayment. In 2011 A sells the land to B, who is registered as owner.

Rule (2) (if it were to be continued) would extinguish the security in 2008, on registration of the forged discharge. Rule (3) would extinguish it only in 2011, following the registration of B's title. As a matter of legal policy, it is plain that B should take free of the security. But there seems no good reason for extinguishing the security before 2011. In the event that the security was enforced between 2008 and 2011 A would, however, be entitled to indemnity.³³ In other words, and as usually under our proposals, there would be full protection against Register error (the omission of the (still valid) security from the Register) but not against transactional error (the forgery of the discharge).

³⁰ Summarised at paras 1.2–1.14 above.

³¹ Paras 5.8–5.16.

³² Under rule (3) only the acquirer of a *primary* right takes free of the encumbrances. But an acquirer of a secondary right would be entitled to indemnity: see paras 7.47 and 7.48.

³³ Under our scheme this would be under the Keeper's warranty as to title: see paras 7.29 ff.

5.20 The other rules remain central to the protection of acquirers but they need to be adapted to accommodate the changes already mentioned. As currently drafted the rules are the source of the bijuralism which has caused so much difficulty with the 1979 Act. Any reformulation must ensure that one law of property applies and not two. Indeed the rules mark the changes necessary to the general law of property in order to accommodate the policy objectives of registration of title.

Integrity principle

5.21 It must be possible for an acquirer to rely on the Register without further inquiry, for that is the main practical benefit of registration of title. What he sees must be what he gets. Almost always, of course, the Register is accurate and no difficulty arises. But an inaccuracy, where it exists, cannot be allowed to prejudice a *bona fide* acquirer. Such an acquirer must be able to trust the integrity of the Register. This principle – which we call the "integrity principle" – has two aspects which correspond to rules (1) and (3) identified above. In the first place, the person named as owner on the Register can be taken as owner, so that in accepting title from that person a *bona fide* acquirer becomes owner in turn. And in the second place, the title is burdened only by those encumbrances listed on the title sheet, and by overriding interests. If other encumbrances exist but are not listed, they are extinguished as a result of the transaction. Each rule is now considered in turn.

The first rule: registered proprietor taken to be owner

5.22 Under the 1979 Act the registered proprietor is owner even where the underlying title is bad. Under our scheme he is owner only where the title is good, but, in a question with a *bona fide* acquirer, is *taken to be owner* in all cases. From the acquirer's point of view the result is the same: a disposition from the registered owner will secure a good title.

5.23 **Relevant date.** The relevant date, under the 1979 Act, is the date of registration. By section 3(1)(a), a person becomes owner on that date. Whether he remains owner thereafter is for the acquirer to check. Our first thought was that it might be possible to bring this date forward. Thus the rule might be that, in a question with a *bona fide* acquirer, the person shown on the Register as owner immediately before the acquirer registers his title is deemed to be owner *on that day*. Further reflection exposed the difficulties. The person shown as owner might have died in the months or years since his title was originally registered or, in the case of a company or other juristic person, have been dissolved. In that case the rule would require a conveyance from a person who no longer exists. Alternatively, the Register might be out-of-date. A person might be owner but not yet appear on the Register. This is because registration is drawn back to the date on which the application was received.³⁴ If A has disposed to B, and B has applied for registration but does not yet appear on the Register, it is contrary to principle that an acquirer should be able to take from A. For B is owner and not A. Yet that would be the effect of a rule in the form suggested.

5.24 If, however, the solution is to follow the 1979 Act, it is possible to improve on that Act in at least one respect. Registration, although the normal method of entering the Register, is not the only method.³⁵ A person may be entered as owner by rectification³⁶ or, as in a recent

³⁴ Paras 4.1 ff.

³⁵ Para 6.33.

³⁶ 1979 Act s 9(1).

case, as a result of human or machine error unconnected with any application for registration.³⁷ The 1979 Act does not provide for such cases. If a person enters the Register by registration he becomes owner. If he enters by some other method, the effect is, at best, a matter of inference from the scheme of the Act. The omission is easily put right. Under our proposed rule, a person entered as proprietor in the Register would be taken to be owner on the date that the entry was made, without regard to the reason for the entry.

5.25 Minerals. Should the rule extend to minerals? In other words, if a person is taken to be owner of land under our proposed rule, should that ownership extend to the minerals under the surface? In principle, minerals belong to the owner of the surface, for land is owned *a coelo usque ad centrum*; but minerals can be separated from the surface either by express conveyance or, much more commonly, by reservation. Indeed a reservation of minerals was almost standard in grants of feu. Where minerals are severed, they are held as separate tenements and command their own title sheet. But unless excluded expressly from the title sheet of the surface, they are included there also by implication.³⁸ The result is, or can be, a collision of titles, which is made more acute by the positive system of conferral of ownership adopted by the 1979 Act.

5.26 So far as minerals are concerned, the title sheet of the surface can take one of three forms:³⁹

- (i) an express exclusion of the minerals;
- (ii) an express inclusion of the minerals (typically with an exclusion of indemnity); and
- (iii) silence.

The effect of (i) and (ii) is self-evident and need not be further discussed. In relation to (iii) the *Registration of Title Practice Book* speaks of "a rebuttable presumption that the minerals are included",⁴⁰ but in fact a positive system of land registration goes further, conferring actual ownership of the minerals in question. That ownership is not, however, guaranteed, for no indemnity is payable under the Act where "the loss arises in respect of an interest in mines and minerals and the title sheet of any interest in land which is or includes the surface land does not expressly disclose that the interest in mines and minerals is included in that interest in land".⁴¹ The policy of the Act here is unexceptionable. Titles to minerals are difficult and obscure, and prescriptive possession problematic. If the Keeper is uncertain as to the position, it is sensible that he should say nothing on the title sheet, and equally sensible that such silence should not lead to liability. But the legislation places the exception in the wrong place. Rather than conferring ownership but withholding indemnity – the solution of the 1979 Act – it seems better not to confer ownership at all.

³⁷ *Safeway Stores plc v Tesco Stores Ltd* 2004 SC 29. For a discussion of this issue, see K G C Reid and G L Gretton, *Conveyancing 2001* (2002) pp 114–5.

³⁸ Because of the rule, already mentioned, that land is owned *a coelo usque ad centrum*. Thus a disposition of land which neither expressly includes nor reserves the minerals is taken to carry the minerals – even if the minerals have previously been elevated into a separate tenement. The rule for legal separate tenements (such as salmon fishings) is different. See Reid, *Property* para 209.

³⁹ On the treatment of minerals on the Land Register, see generally *Registration of Title Practice Book* paras 6.88 ff and R Rennie, *Minerals and the Law in Scotland* (2001) ch 6.

⁴⁰ *Registration of Title Practice Book* para 6.88.

⁴¹ 1979 Act s 12(3)(f). There is a similar provision in the legislation for England and Wales: see Land Registration Act 2002 sch 8 para 2.

5.27 The implications for our proposed rule seem clear. Except where minerals are expressly included in the title sheet, it should not be taken that the person shown as owner of the land is owner also of the minerals. As at present that should be a matter for separate investigation by the acquirer. If the minerals turn out to be owned, title will of course pass to the acquirer; but if they are not owned there will be neither title nor (as under the present law) a claim in indemnity.⁴²

5.28 **Pertinents.** Section 3(1)(a) confers ownership not merely in respect of the land but also "in and to any right, pertinent or servitude, express or implied, forming part of the interest". There is an argument that our rule should be less extensive. Obviously, a genuine pertinent should pass with the land to which it is attached. But not all pertinents listed in the property section would withstand careful scrutiny, and some at least are the product of wishful thinking on the part of the person who drafted the original deed. Rights of common property, for example, might contradict other rights in common held on other titles or might otherwise have no proper basis for existence. In the Sasine system an invalid pertinent is not improved by registration, and there is something to be said for applying the same rule to the Land Register. But whatever the merits of that approach it is probably too late for it to be adopted. All pertinents already listed in title sheets have been validated by the "positive" effect of registration. If the proposed new legislation were to adopt a less generous approach, this would discriminate against properties still held on Sasine titles and awaiting first registration. Although this is a question on which we would welcome the views of consultees, our provisional view is to allow a *bona fide* acquirer the pertinents as listed in the property section, regardless of their underlying validity. The incorporeal pertinents (servitudes and real burdens), however, raise special issues which can be postponed until the third discussion paper.

5.29 **Exceptions.** In three cases the rule would not operate. These were examined in the first discussion paper and need be mentioned only briefly here. One is where the acquirer knew, as a positive fact, that the entry in the Register is incorrect. In that case he would not be in good faith.⁴³ A second is where the property was not possessed by the person from whom he acquired (or by a predecessor of that person). The period of possession is a matter for further deliberation but would not be less than a year. If part of the property was possessed and part not, the rule would operate only in respect of the part which was possessed.⁴⁴ Following the views expressed by some consultees,⁴⁵ we are now inclined to allow the possession of the acquirer to supplement that of the granter, so that an acquirer who possessed for a year (or other prescribed period) could be sure of his title even if there had been no possession by the granter.⁴⁶ The third exception is where, or to the extent that, indemnity was excluded.⁴⁷ So if A is registered as proprietor of 10 hectares but indemnity is excluded in respect of one hectare, the rule would operate only in respect of 9 hectares.

⁴² Para 7.46.

⁴³ First Discussion Paper para 7.11.

⁴⁴ First Discussion Paper paras 4.49 and 4.50.

⁴⁵ Notably the Keeper of the Registers of Scotland and Mr Donald B Reid.

⁴⁶ This helps the acquirer without infringing on the policy objective, which is that the true owner should not lose title unless he has first lost possession for the prescribed period. Whether that loss of possession occurs before or after the purported acquisition seems unimportant. To some extent this suggested change reintroduces the idea of protection for a proprietor in possession, but with the crucial differences (i) that the possession must endure for a prescribed period and (ii) that after that period is finished the acquirer is absolutely secure and need have no anxiety about future loss of possession.

⁴⁷ First Discussion Paper para 7.12.

5.30 Our proposal is that:

18. (1) **A person shown on the Register as owner of land should, in a question with an acquirer of that land, be taken to have become owner of that land on the date stated on the Register.**
- (2) **But (1) should not apply where at the time of registration of his title the acquirer knew that the entry in the Register was inaccurate.**
- (3) **Nor should (1) apply to the extent that –**
 - (a) **the person shown on the Register as owner did not possess the land for a specified period (and for this purpose any possession by the acquirer may be aggregated with the possession of that person); or**
 - (b) **indemnity was excluded with respect to that person's ownership.**
- (4) **"Land" in (1) does not include minerals unless minerals are expressly included in the title sheet.**

5.31 Although the rule is expressed in the language of ownership of land it would apply equally to the primary right of long lease (including the *grant* of such a lease). But it would not apply to secondary rights: as under the present law, the acquirer's entitlement would be to indemnity and not to the right itself. In the third discussion paper, however, we will consider whether an exception ought to be made for servitudes.

Presumption that registered proprietor is owner

5.32 The rule just described can be characterised as an irrebuttable presumption in favour of a *bona fide* acquirer. This raises the question of whether there might be value in a more general, but rebuttable, presumption that a person named on the Register as owner is indeed the owner.⁴⁸ The obvious parallel is the presumption of ownership from possession which arises in the case of corporeal moveables. But whereas a possessor of moveables is often not the owner, it would be rare indeed for ownership of land to lie in someone other than the person named on the Register. A presumption of ownership from registration would thus be a stronger presumption and more easily justified. The issue is important mainly in relation to title to sue. A pursuer whose claim is founded on ownership of land must first establish his right; and while for Sasine titles this may require a full prescriptive progress coupled with proof of possession, for Land Register titles only a land certificate is needed.⁴⁹ A presumption of ownership would allow a continuation of this convenient practice: if by being named on the title sheet the pursuer is presumed to be owner, it would be for the defender to prove that he was not. We propose therefore that:

19. **A person named on the Register as the owner of land should be presumed to be the owner of that land.**

⁴⁸ The presumption might apply even where indemnity had been excluded, although in such a case it would naturally be weaker.

⁴⁹ Reid, *Property* paras 142–7.

The second rule: title subject only to listed rights and overriding interests

5.33 For an acquirer to be fully protected the first rule must be supplemented by a second, on the subject of encumbrances. Encumbrances – subordinate real rights – can be of two kinds. First, there are those real rights which are constituted only by registration. Most subordinate real rights come into this category. But, secondly, there are also a small number of real rights which are, or may be, constituted without registration. These are referred to by the 1979 Act as "overriding interests". The subject of overriding interests may be left over until the third discussion paper, and our concern here is only with rights made real by registration.

5.34 If a right is made real by registration – whether in the Land Register or, at an earlier stage in the title's history, in the Register of Sasines – it will appear in the charges or burdens section of the title sheet. Very occasionally it may have been omitted, sometimes deliberately, more usually by accident. Our proposed integrity principle requires that a *bona fide* acquirer is affected only by such rights as the Register discloses. The relevant date is the day of registration of the acquirer's title, for an acquirer should keep an eye on the Register until the last possible moment.⁵⁰ The doctrine of race to the Register⁵¹ presupposes as much. But an encumbrance which was missing on that day should not be capable of being restored to the Register.

5.35 The rule just described is familiar from the 1979 Act.⁵² But in one important respect our version would be different. On registration of the acquirer's title the missing encumbrance is extinguished once and for all. It does not remain in a state of suspended animation, as under the 1979 Act, able to be revived if the acquirer (or a successor of the acquirer) loses possession.⁵³ Extinction thus operates at the level of property law and not merely at the level of registration law. Until the acquirer's title is registered, the Register is inaccurate and the encumbrance can be restored. But once registration takes place, the encumbrance is extinguished and there is no inaccuracy to correct.⁵⁴

5.36 Sometimes an encumbrance has been varied. In that case the acquirer will, naturally, be affected by the right as varied and not by the right as originally created. If, however, the variation has come to be omitted from the Register it does not affect the acquirer and so ceases to take effect.

5.37 Our proposal is that:

- 20. (1) On becoming owner on registration an acquirer should take the land free of all subordinate real rights other than –**
- (a) such rights as appeared on the title sheet on the day of registration (or, having the same or a prior date of**

⁵⁰ The date of registration is preferred to the date immediately before registration because the latter would have the effect of freeing the acquirer from rights (such as his standard security) which shared his own date of registration. The 1979 Act s 3(1)(a) uses a potentially much later date, namely the date on which the entry is actually made on the Register, but under our system this would give the Keeper the opportunity to reinstate an encumbrance which was missing at the time the application for registration was received.

⁵¹ I.e. the doctrine that, in a competition of rights, the first to be made real (typically by registration) is preferred.

⁵² This is rule (3) described at paras 5.13–5.15.

⁵³ Para 5.15.

⁵⁴ See also the example given in para 5.19.

registration to that of the acquirer, were omitted from the title sheet only because the registration process was incomplete);

(b) any rights which, although omitted from the title sheet, were known to the acquirer; and

(c) overriding interests.

(2) Accordingly, any subordinate real right which –

(a) affected the land before the day of registration but

(b) did not fall within (1)

would be extinguished on that day.

(3) The reference in (1)(a) to "rights" includes rights as varied.

(4) This proposal does not apply to first registrations.

5.38 A number of remarks may be made about this proposal. In the first place, it presupposes that the transfer was successful; for if it fails there is no reason for extinguishing encumbrances.⁵⁵ It is for further consideration whether the proposal should apply where the acquisition, while delayed, is successful ultimately due, for example to accretion or to the fortifying possession of the acquirer.⁵⁶

5.39 Secondly, the proposal is confined to real rights. It is about disappointed expectations. An acquirer expects to find the real rights set out in the Register. If they are not there, he should not be affected by them. Of course, an acquirer will be subject to *other* rights and obligations covering matters such as planning permission, building control, and contaminated land, but these are not matters for the Land Register and an acquirer would not expect to find them there. They are not part of our proposal. One of the weaknesses of the equivalent rule in the 1979 Act is a failure to distinguish real rights from other rights.⁵⁷

5.40 Thirdly, by making the acquirer subject to rights not yet on the Register but with equality or priority of registration, the proposal acknowledges the gap between (i) the date of registration and (ii) the date on which an encumbrance actually appears on the Register.⁵⁸ So if a standard security previously granted by the seller is registered on 1 March and the disposition in favour of the acquirer on 3 March, the acquirer takes subject to the standard security – despite the fact that, on 3 March, the security would not appear on the Register. This is just the familiar doctrine of priority by date of registration. In practice the acquirer would know of the security by means of a search in the application record.

⁵⁵ If, however, a period of post-registration possession is needed in order to supplement the possession of the grantor, the encumbrance is extinguished only when that period of possession is completed.

⁵⁶ For the potential significance of such possession see para 5.29.

⁵⁷ 1979 Act s 3(1)(a): "subject only to the effect of any *matter* entered in the title sheet of that interest ... and to any overriding interest". The vagueness of "matter" necessitates a wide definition of overriding interest. We return to this topic in the third discussion paper.

⁵⁸ Paras 4.1–4.3.

5.41 Fourthly, the acquirer must be in good faith. An encumbrance which is omitted from the Register but known to the acquirer is not extinguished by the transfer and continues to affect the land. It is a curiosity of the present law that an acquirer takes free even of rights which he knows to exist, leaving the Keeper to indemnify the (former) holder of the right.⁵⁹ Under the proposal chronology will be important:

Example 1. A is registered as owner in 2000, a first registration. By mistake a real burden is omitted from the Register. Being a first registration, A's registration does not extinguish the burden.⁶⁰ B buys from A in 2004. He knows of the real burden. Hence the burden is not extinguished by the registration in favour of B, and can be reinstated in the Register by rectification.

Example 2. The same except that A sells to B in 2002 and B to C in 2004. B did not know of the burden but C does know. Since the burden was extinguished by the transfer to B in 2002, C's knowledge is now irrelevant. He knows of a burden which has already been extinguished. Hence the burden does not affect C.

5.42 Fifthly, and by contrast to the first rule described earlier,⁶¹ good faith does not require to be supplemented by possession; for there is no plausible connection between possession and the existence or otherwise of encumbrances. This is a deliberate departure from the position under the 1979 Act where the general requirement of possession is sometimes used inappropriately.⁶²

5.43 Sixthly, the rule does not validate an encumbrance which is otherwise invalid. It merely sets out the worst case. The acquirer knows, by consulting the Register, that he is affected by the encumbrances mentioned there provided they are valid. If one or more turns out to be invalid, he is unlikely to complain. Only *primary* rights are validated by our proposals.⁶³

5.44 Finally, the position of invalid variations should be mentioned.⁶⁴ Normally, of course, a variation will be valid. But if it is invalid, the role of the Register is again to present the worst case. Thus a variation which *increases* the burden of the encumbrance is not validated merely by transfer of the land to a *bona fide* acquirer; but one which *reduces* the burden must be given effect if the Register is not to mislead. The operation of this latter rule, and its limitations, can be seen in the case most commonly encountered in practice, namely minutes of waiver of real burdens. If a real burden is shown as qualified by a minute of waiver,⁶⁵ the waiver can be taken by an acquirer at its face value and there is no need to investigate its validity (eg as to execution, or capacity). But, naturally, the waiver takes effect only in accordance with its terms. Thus the burden is waived only to the extent that the deed provides; and if there are three benefited properties but the waiver is granted by the owners

⁵⁹ Except where, unusually, the inaccuracy was caused by the fraud or carelessness of the acquirer. See *Douglas Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513.

⁶⁰ Para 5.45.

⁶¹ Ie the rule, in proposal 18, that a person shown on the Register as owner may be taken as owner by a *bona fide* acquirer. For the requirement of possession see para 5.29.

⁶² First Discussion Paper para 4.22.

⁶³ Ie under the first rule. The 1979 Act in effect operates the same principle.

⁶⁴ For valid but omitted variations see para 5.36.

⁶⁵ The Keeper's practice is to add the minute of waiver to the burdens section rather than to give it effect by altering the text of the original burden. If the latter course were to be adopted, the burden would affect an acquirer only as altered – even if it turned out that the waiver had been granted by the owners of some, but not all, of the benefited properties.

of only two, the burden remains unaltered in a question with the owner of the third. The present law is the same.

First registrations

5.45 For the integrity principle to apply there must first be an entry on the Register. Consequently, the rules just described do not apply to first registrations, which are in substance Sasine transactions. Thus an error made on first registration could be put right by the Keeper for as long as the original acquirer remained as owner,⁶⁶ but indemnity would then normally be due.⁶⁷

Effect of registration

5.46 One aspect of section 3(1) of the 1979 Act has not yet been mentioned: this is that it sets out a general rule as to the effect of registration. Thus it is provided that registration has the effect of vesting the right in question as a real right, of making any registered right or obligation real, and of affecting any registered real right or obligation; but this is qualified by the necessary caveat: "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". Thus if a right is capable of being made real, registration marks the moment at which this occurs. If, however, a right is not capable of becoming real, section 3(1) makes no provision.

5.47 In a positive system of land registration a legislative statement of this kind could hardly be avoided. A negative system is likely to be more cautious. Thus the Registration Act 1617 sets out only the consequences of *non*-registration: if a deed is not registered in the Register of Sasines it will "mak no faithe in Judgment by way off actioun or exceptioun in preiudice of a third partie who hath the acqyred ane perfyit and lauchfull right to the saidis landis and heretages". This formula reflects the fact that, by 1617, the rules for the creation and extinction of rights were already established by common law, leaving to the Act only the task of explaining how the new Register fitted in. But it also reflects the fact that, in a negative system, registration is a necessary, but not a sufficient, condition of legal effectiveness. Registration has no effect *on its own*: it has effect if, and only if, certain other conditions are satisfied, such as that the granter had title and capacity to grant, and that the deed was valid both as to content and form. Consequently, to provide for the effect of registration is no more helpful than to provide for, say, the effect of there being title and capacity in the granter. It is to answer the wrong question. The right question is, what must be done in order to create, vary or discharge the particular real right? To that question, however, the statute book already provides the answers. For example:

- ownership of land is transferred on registration of a conveyance;⁶⁸
- a standard security is created on registration of the appropriate deed;⁶⁹

⁶⁶ It is a transactional and not a Register error: see para 3.21 of our First Discussion Paper.

⁶⁷ Under the proposed Keeper's warranties in respect of title and encumbrances: see paras 7.22 ff.

⁶⁸ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 4(1). This rule, which is given for the (negative) Sasine system, would be the appropriate one under our proposed new system.

⁶⁹ Conveyancing and Feudal Reform (Scotland) Act 1970 s 11(1).

- a proper liferent is created on registration of the appropriate deed or on such later date as the deed may specify;⁷⁰
- a long lease is created on registration of the appropriate deed;⁷¹
- a servitude is created on registration of the appropriate deed or, if later, when the benefited and burdened properties come to be separately owned;⁷² and
- a real burden is created on registration of the appropriate deed or on such later date as the deed may specify.⁷³

5.48 These examples expose another difficulty with general rules. Such a rule must specify when as well as what. Thus section 3(1) of the 1979 Act is supplemented by section 3(4) which provides that:

"The date at which a real right or obligation is created or as from which it is affected under this section shall be the date of registration."

Unfortunately the position is too diverse to be encapsulated in a single rule. As it is, section 3(4) misleads, being correct in respect of only three real rights.

5.49 Thus far the focus has been on standard rights. As was seen in part 3, however, registration is also competent in respect of innumerable notices and documents, leading to the creation, or publication, of a group of rights which are not easily classified.⁷⁴ On such non-standard rights the 1979 Act is, or may be,⁷⁵ silent. Any replacement legislation would likewise leave the effect of registration to the particular statutes which authorise the particular registration.

5.50 We propose, therefore, that:

21. There should be no general rule as to the effect of registration.

In making this proposal we do not exclude the possibility of a limited provision, if only to match the provisions as to eligibility for registration.⁷⁶ But such matters turn largely on drafting and can be left until a later stage of the project.

COMPETING RIGHTS

Three cases and two principles

5.51 Often property is, or may be, subject to more than one real right. Three main types of case can be identified. One is where the rights are incompatible, so that if one right

⁷⁰ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 65(1). Again this is the rule for Sasine transactions.

⁷¹ Registration of Leases (Scotland) Act 1857 s 2.

⁷² Title Conditions (Scotland) Act 2003 s 75. This is the rule for servitudes created in writing, but a servitude can also be created by implication or by positive prescription.

⁷³ Title Conditions (Scotland) Act 2003 s 4(1).

⁷⁴ Para 3.3.

⁷⁵ Para 5.16.

⁷⁶ Paras 3.24–3.27.

succeeds the other must fail. Competing rights of ownership are the most important example: if A disposes property to B and again to C, only one of B or C can become owner, so that ownership by B necessarily excludes ownership by C. The next case is where the rights are compatible, so that each can co-exist with the other. Most real rights are like this. Thus D's lease can co-exist with E's standard security, F's servitude with G's real burden, or indeed H's servitude with I's servitude. The final case is where the rights are compatible but the spoils are finite. As a result the rights require to be ranked so that, in the event of a shortfall, the holder of the first-ranked right takes at the expense of the holder of the second-ranked right. Probably the only example is competing rights in security.

5.52 A competition of rights, when it arises, is regulated by two main principles. Needless to say, these are not unique to Scotland but are found in other jurisdictions which recognise real rights in the sense of the civil law. The main principle is "first in time first in right" (*prior tempore potior jure*): the real right which is acquired first is preferred to the real right which is acquired second. In the case of land law this is sometimes characterised as involving a race to the register, in acknowledgement of the fact that registration is often the way in which real rights are acquired.⁷⁷ But the principle neither depends on registration nor is confined to land law. The other, and in this context subsidiary, principle is that "only an owner can grant a right" (*nemo plus juris ad alium transferre potest, quam ipse habet*⁷⁸ or often *nemo dat quod non habet*). It is thought that all competitions of real rights can be solved by the first principle alone, but that in some cases the second principle is also engaged, leading to the same result. Thus if A, the owner of land, disposes to B and then again to C, and C registers his disposition first, the result is for C to become owner at the expense of B. That result can be explained on the basis that C was the first to obtain a real right. But, equally, it can be explained on the basis that, C having become owner on registration, the disposition in favour of B was granted by a person who no longer owns.

Real Rights Act 1693

5.53 Aspects of the first principle can be found in the Real Rights Act 1693 (c 22). As originally enacted its operative words were as follows:

" ... All Infefments whether of property or annual-rent, or other Reall Rights, wherupon Sasines for hereafter shall be taken, shall in all Competitions be preferable and preferred, according to the date and priority of the Registrations of the Sasines, without respect to the distinction of Base and publick Infefments, or of being clad with possession, or not clad with possession in all time comeing."

As a statement of the principle this is of course far from complete. It is confined to real rights completed by sasine, thus excluding, for example, long leases and servitudes;⁷⁹ it gives no guide as to competitions with real rights which are perfected other than by registration; and it takes no account of the possibility of ranking agreements in respect of heritable securities. Evidently, however, the Act was not intended as a broad statement of a principle of property law. Rather its purpose was the narrow one of dealing with a doubt which had arisen about base and public infefments. Before the establishment of the Register of Sasines in 1617 the rule had been that a later public infefment was preferred to an earlier base infefment unless

⁷⁷ See, most recently, *Burnett's Tr v Grainger* 2004 SC (HL) 19, paras 139 ff *per* Lord Rodger of Earlsferry.

⁷⁸ D. 50, 17, 54 (Ulpian).

⁷⁹ The point is of course anachronistic. In 1693 instruments of sasine were the main deeds eligible for registration. See para 3.14.

the base infeftment was followed by possession.⁸⁰ Whether that rule had been changed by the Registration Act 1617 was uncertain, "to the great Confusion and detriment of real Rights".⁸¹ The Act of 1693 resolved the doubts. In the appendix printed at the end of the second edition of his *Institutions*, published in the same year as the Act, Viscount Stair explained its effect as being the "taking away the difference betwix *Publick* and *Privat* (or *Base*) Infeftments".⁸² The first sasine to be registered would always prevail, regardless, as the Act says, of whether the infeftment was base or public or with or without possession.

5.54 Although designed only to solve a problem of feudalism (and one which disappeared with the abolition of base infeftment in 1874),⁸³ the Real Rights Act won a temporary reprieve in the Abolition of Feudal Tenure etc (Scotland) Act 2000. Instead of being repealed it was de-feudalised.⁸⁴ Since 28 November 2004 the operative part has read simply:

"... real rights in land shall in all competitions be preferable and preferred according to the date and priority of registration in the General Register of Sasines".

As with the original version, and for much the same reasons, this falls some way short of a statement of general principle.

1979 Act section 7

5.55 The Real Rights Act 1693 does not apply to the Land Register.⁸⁵ Its replacement is section 7 of the 1979 Act, which provides that:

"(2) Titles to registered interests in land shall rank according to the date of registration of those interests.

(3) A title to a registered interest and a title governed by a deed recorded in the Register of Sasines shall rank according to the respective dates of registration and recording.

(4) Where the date of registration or recording of the titles to two or more interests in land is the same, the titles to those interests shall rank equally."

5.56 Unlike the 1693 Act, this provision allows, in subsection (1) (not quoted), for the possibility of ranking agreements. But in other respects it is not free from difficulty. The replacement of competing real rights (the language of the 1693 Act) with the narrower concept of ranking suggests, but does not prove, that section 7 is concerned only with the third of the three cases identified above (heritable securities).⁸⁶ If, however, section 7 is to be read as extending also to the first of these cases (incompatible rights), it seems

⁸⁰ Base infeftment arose when a transferee was initially infeft as the vassal of the transferor. Public infeftment required the further step of taking entry with the transferor's superior by means of a charter of resignation or confirmation. See Reid, *Property* (G L Gretton) para 100.

⁸¹ Stair II.3.27 (2nd edn, 1693): "Yet the preference of publick Infeftments, to prior base Infeftments, not clad with possession, being fixed by Custom from this Statute, before the Act for Registration of seasins, by the space of threescore seventeen years, hath been still continued, to the great Confusion and detriment of real Rights".

⁸² Appendix, para II. See also Hume, *Lectures* IV, 178.

⁸³ Section 4 of the Conveyancing (Scotland) Act 1874 provided that the registration of a disposition in the Register of Sasines had the effect of giving entry with the transferor's superior.

⁸⁴ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 76(1) and sch 12 para 3.

⁸⁵ 1979 Act s 29(3) and sch 3 para 1.

⁸⁶ Para 5.51. If that is correct, s 7 is more truly a successor of s 120 of the Titles to Land Consolidation (Scotland) Act 1868 (disapplied to the Land Register by the 1979 Act s 29(3) and sch 3 para 7(e)) than of the Real Rights Act 1693.

irreconcilable with the positive system of registration of title apparently introduced by section 3(1)(a). Take the example used earlier, where C, the second to receive a disposition, was the first to register.⁸⁷ If the first to register is always to be preferred, as section 7 says, then C takes the property and B is defeated. But if a person always receives a real right on registration, as section 3(1)(a) appears to say, B becomes owner even although he registers second, and accordingly C ceases to be owner.⁸⁸ The conflict is, indeed, stark. Section 7 espouses "first in time, first in right" and section 3(1)(a) "last in time, first in right".⁸⁹ The only way to avoid the repugnancy may be to read section 7 as confined to heritable securities.

5.57 It would be possible to re-write section 7 in order to eliminate these difficulties. Our provisional view, however, is that section 7 should be repealed without replacement, for three reasons. In the first place, it is unnecessary. The rule that real rights rank in order of creation is a fundamental and undisputed principle of our law. It applies across the whole field of property law. The 1693 Act was intended as a solution to a specific problem and not as a statement of general principle. The matter is better left to the common law. Secondly, section 7 is incomplete, in respect that it neglects real rights created other than by registration (such as floating charges, short leases, and servitudes). In a statute concerned only with registration that is perhaps hardly to be avoided. Thirdly, and most importantly, section 7 does not give the rule correctly. It confuses date of registration with date of creation of a real right – the machinery with the legal effect. Real rights are sometimes created *later than* registration, as has been seen.⁹⁰ Hence to provide that real rights rank by date of registration is to give an example and not a rule. The rule is that real rights rank by date of creation. But so pure a rule of property law would be out of place in legislation concerned only with the mechanics of land registration.

5.58 If section 7 is to be repealed without replacement, the opportunity should also be taken to repeal the Real Rights Act 1693.⁹¹ Accordingly we propose that:

22. The principle that, in a competition, real rights are preferred by order of creation, should be left to the general law. Accordingly there should be repealed without replacement –

- (i) the Real Rights Act 1693; and**
- (ii) section 7 of the Land Registration (Scotland) Act 1979.**

TIME OF REGISTRATION

Day or time of day?

5.59 The Henry Committee recommended that registration should be by time of day, so that a deed arriving at 9.00 am would be treated as registered ahead of one which arrived at 10.00 am.⁹² As with the then rule for the Register of Sasines,⁹³ deeds arriving in the same

⁸⁷ Para 5.52.

⁸⁸ Of course in practice the Keeper might reject B's application for registration. But the legal conflict remains.

⁸⁹ Reid, *Property* para 685.

⁹⁰ Paras 5.47 and 5.48.

⁹¹ It is arguable that the repeal should also extend to ss 120 and 142 of the Titles to Land Consolidation (Scotland) Act 1868.

⁹² Henry Report part I para 7(3), (4).

⁹³ Titles to Land Consolidation (Scotland) Act 1868 s 142. This was amended by the 1979 Act s 29(4) and sch 4 so that all deeds arriving on the same day are taken to be registered contemporaneously.

post would be regarded as having arrived at the same time.⁹⁴ These recommendations were not accepted, partly, it may be, because they advantaged solicitors who could present deeds in person. Under the 1979 Act registration is by day and not by time of day, so that all deeds arriving on the same day are treated as registered at the same time.⁹⁵

5.60 For as long as deeds continue to be lodged in a physical form, this rule seems satisfactory and we have no proposal that it be changed. But whether it will operate so well in the light of ARTL – and, for non-ARTL cases, of e-lodgement – seems open to question. If time of receipt can be measured to the nearest second, it may seem unnecessarily crude to equalise by blocks of 24 hours. In a case of competition of rights it may also be unfair. This, however, is a matter for the future. ARTL is unlikely to be the predominant method of registration for a number of years to come. Until that time arrives registration should continue to be by day and not by time of day. The fact that the Register of Sasines operates the same system is a further reason for staying with the current arrangements. It would, however, seem helpful to allow an eventual change to be made by statutory instrument.

Equalisation: some problems

5.61 Occasionally equalisation gives rise to problems. Professor A J McDonald gives the following example:⁹⁶

"If A sells his property and disposes it to both B and C, and if B and C each apply for registration of their respective dispositions on the same day, those titles rank equally. The Keeper would be bound to register both dispositions; and would make up one Title Sheet to show each of B and C as proprietors of the whole subjects so registered. But, at the same time, he would exclude indemnity for each of B and C in respect of the other's entitlement."

The legal effect, as Professor McDonald acknowledges, is unclear. Is B owner, or C? Or does each have a one half *pro indiviso* share?⁹⁷ Any new legislation should resolve the doubt.

5.62 Professor McDonald's example involves the first of the three cases identified earlier (incompatible rights),⁹⁸ and indeed equalisation creates problems for any case of incompatible rights. Suppose, for example, that there is equalised registration of two leases of the same property by the same grantor but with different grantees and on different terms. Both leases are valid in the sense of having been granted by the owner and duly registered; but only one can take effect. On what basis is the Keeper to choose between them? By date of execution? By length of lease? By alphabetical order of name of the grantee? Perhaps the only way of avoiding random selection would be for the Keeper to reject both deeds and require that they be re-granted – in effect leaving the parties to sort the problems out.⁹⁹ It should be made clear that he has power to do so.

⁹⁴ Henry Report part I para 25(2).

⁹⁵ 1979 Act ss 4(3), 7(2).

⁹⁶ A J McDonald, *Registration of Title Manual* (1986) para 7.9.

⁹⁷ The solution suggested in Reid, *Property* para 684 n 3.

⁹⁸ Para 5.51.

⁹⁹ In cases of competing grants of the same property an alternative (but perhaps no fairer) solution would be to give each grantee a one half share.

Three examples

5.63 If the examples just given are difficult, they are also rare or even unknown. A case which is no less difficult but much more common involves a mixture of ownership and subordinate real rights. Take the following examples:

Example 1. A disposes part of his land to B. The disposition reserves real burdens in favour of A as owner of the land that is being retained.

Example 2. A disposes his land to B. A grants a standard security over the land. Both disposition and standard security are registered on the same day.

Example 3. A disposes his land to B. B grants a standard security over the land. Both disposition and standard security are registered on the same day.

5.64 In the first example A is making two grants in the same deed.¹⁰⁰ He is granting ownership to B, but also real burdens to himself as owner of other land.¹⁰¹ There is, of course, no difficulty as to the grant of ownership, but the grant of real burdens is valid if and only if A is owner at the relevant time and so has title to grant. That time is not, it is thought, the moment of registration itself, for even in the case of the first grant the grantor ceases to be owner at that moment. Rather ownership in A is needed *immediately prior to registration*.¹⁰² If that is correct, the second grant is valid, as indeed is universally assumed. A is granting the real burdens, and immediately prior to registration A was still the owner of the land.

5.65 Once the first example is solved, the second is easy. The standard security is valid for the same reason as the real burdens, ie that, immediately before registration, A continued to own the land. This example is of course highly unusual. It is included only for the light which it sheds on the third example, which represents standard conveyancing practice.

5.66 If the security is valid in the second example it must be invalid in the third; for if the owner at the relevant time was A it could not also be B. So the lender is left unsecured. Fortunately, the invalidity is shortlived, for in almost every case accretion will operate to perfect the lender's title.¹⁰³ Nonetheless it seems unsatisfactory that a result which ought to be achieved by the ordinary rules of land registration is left to depend on a doctrine which is designed for a different purpose; and in some, admittedly unusual, cases – where the warrandice in the security is not absolute, or where there is supervening insolvency of the lender – accretion would not operate at all. The problem, such as it is, is easily solved by a rule that the disposition is deemed to have been registered before any deed by the grantee.

¹⁰⁰ Two separate deeds might have been used: (i) a disposition by A to B and (ii) a deed creating real burdens by A to A. Sometimes the imposition of real burdens (or servitudes) is characterised as a reservation, much in the same way as one might hold back minerals or some actual land. But it is not clear that this is any more than a figure of speech. Certainly s 4(2)(b) of the Title Conditions (Scotland) Act 2003 requires that a real burden be "granted by or on behalf of the owner of the land which is to be the burdened property".

¹⁰¹ The grant of the real burdens is by A and not by B – if only because a grant by B would need to be executed by B under the Requirements of Writing (Scotland) Act 1995 s 1(2)(b).

¹⁰² See Scottish Law Commission, Report on *Real Burdens* (Scot Law Com No 181, 2000) para 3.16.

¹⁰³ Accretion is the doctrine by which a grant by a non-owner is validated if, later, the grantor becomes owner.

Compatible rights

5.67 The problems just described are avoided where rights are compatible, as in the remaining cases previously identified.¹⁰⁴ Indeed if two standard securities by the same granter are registered on the same day (the third case), the result is the familiar one of *pari passu* ranking.

Competitions with unregistered real rights

5.68 In theory a right made real by registration might come into competition with a right made real in some other way, usually by possession. Thus suppose that A grants a 10-year lease to B and a disposition to C. B takes possession on the same day as C's registration, but whereas B possesses at 10.00 am, C does not register until 11.00 am. Is the lease good or bad? The answer turns on whether B's act of possession is treated as preceding C's act of registration. Registration is, of course, equalised by day; but this leaves open the question of whether it is deemed to take place at the beginning of the day (in which case it would defeat B's lease) or at the end (in which case it would not). Although competitions of this kind will rarely, if ever, occur, it seems desirable to settle on a rule. We suggest for discussion that registration should be deemed to take place at the beginning of the day.¹⁰⁵ It would probably be necessary to extend the same rule to the Register of Sasines.

5.69 Our various proposals on time of registration can be summarised in this way:

23. (1) Registration should be deemed to occur at the beginning of the day on which the application is received (all applications received on the same day thus being deemed to be registered at the same time).

(2) But Scottish Ministers should be able to provide by statutory instrument that the time of registration is, instead, the time at which the application is received.

(3) Where –

(a) two or more applications are received on the same day, and

(b) having regard to the nature of the rights in question, one could not be given effect without excluding the other

the Keeper should be bound to reject both applications, and any future application in respect of the same deeds.

(4) Where, on the same day, applications are received in respect of –

(a) the transfer of property, and

(b) a deed by the person in whose favour the transfer is being made

¹⁰⁴ Para 5.51.

¹⁰⁵ Such a rule would, however, be superseded in the event of a change to registration by time of day.

and the applications are accepted by the Keeper, the transfer should be deemed to be registered immediately before the registration in respect of the deed.

Part 6 Rectification

CURRENT LAW

Introduction

6.1 In principle, an inaccuracy on the Register can be rectified by the Keeper under section 9 of the 1979 Act. The meaning of "rectification" is clear enough: according to section 9(1) the Keeper rectifies the Register by "inserting, amending or cancelling anything therein". That means that omissions can be added and existing entries corrected or removed. "Inaccuracy", however, is undefined. Yet its meaning is not self-evident.

Actual inaccuracy

6.2 Since title flows from the Register it is difficult at first sight to see how the Register can ever be inaccurate; for under a positive system of registration of title any entry on the Register is, by definition, a correct statement of the legal position. But there are qualifications.¹ Registration operates "positively" only at the time when an entry is made, so that an entry which was originally correct might become incorrect due to supervening events.² For example, the person named as owner might die;³ or ownership might be acquired by another by positive prescription or, if the land is also registered under a different title sheet, by the positive effect of registration of title; or again a subordinate real right listed on the Register may come to be extinguished by an extrinsic event such as negative prescription or acquiescence or by statute.⁴

6.3 Not all inaccuracies affect the substance of a right. Minor clerical errors are not uncommon. Thus a real burden might be mistranscribed; or the address or occupation of the registered owner might be incorrect; or there might be a, generally trivial, typing error.

Bijural inaccuracy

6.4 The inaccuracies so far described may be called "actual" inaccuracies. This signifies that the Register really is wrong – that is to say, that the right mentioned on the Register is mis-stated or has been extinguished. But "inaccuracy" also has a second and quite different meaning. To understand why it is necessary to recall that the Act operates bijurally, with two separate but parallel systems of law.⁵ The actual legal position is determined by the rules of

¹ In addition to the one mentioned in the text there is a second possible qualification. This is where an existing subordinate real right (such as a standard security) is included on the Register at the time of first registration but is then omitted, by human or machine error. If the omission coincided with a change of ownership, the subordinate right would be extinguished by virtue of s 3(1)(a) of the 1979 Act and the resulting inaccuracy would be "bijural" (for which see para 6.4 below). But if the omission was an isolated incident, the right would remain perfectly valid so that the inaccuracy would be "actual". When the property was next transferred, however, the omitted right would be extinguished by s 3(1)(a), thus converting an actual inaccuracy into a bijural inaccuracy. See further paras 5.13–5.15.

² First Discussion Paper para 5.12.

³ We do not enter into here the difficult question of the ownership of property after a person's death.

⁴ *Brookfield Developments Ltd v Keeper of the Registers of Scotland* 1989 SLT (Lands Tr) 105.

⁵ First Discussion Paper paras 1.11, 2.11–2.15, and part 5.

land registration while the ordinary rules of property law determine what the legal position *ought to be*. Usually the result given by the two sets of rules coincide; but if the result is different the Register is inaccurate within section 9(1). An inaccuracy of this kind may be termed a "bijural" inaccuracy. Lord President Hope expresses the idea of bijural inaccuracy in this way:⁶

"[O]ne can say that an entry is inaccurate if it appears that at the time it was made or in the light of subsequent events it ought not to have been made. If the deed which has been reduced was one which has been accepted by the Keeper as evidence of the title which he has been asked to register, it must follow that there is an inaccuracy on the register."

6.5 An example explains the difference between actual and bijural inaccuracy.⁷ Suppose that Adam is named in the proprietorship section as owner of land. If Adam has since died he is no longer owner and the Register is "actually" inaccurate. But if Adam, though still alive, acquired title through a forged disposition, the Register is "bijurally" (but not "actually") inaccurate. For although Adam is owner, he ought not to be. He is owner only by virtue of the positive effect of land registration. By the ordinary rules of property law no title could pass under a forged disposition.

Effect of rectification

6.6 Although the 1979 Act is careful to describe the effect of *registration*,⁸ it has nothing to say about the effect of *rectification*. That might lead one to suppose that rectification has no effect, and sometimes indeed that will be so. But often the effect of rectification is no less far-reaching than that of registration.

6.7 The effect of rectification depends on the type of inaccuracy involved. Rectification in respect of an actual inaccuracy can have no legal effect. For the Register is simply wrong. The right is mis-transcribed or, as the case may be, already extinguished. To remove it from the Register is not to extinguish it again. It is no doubt partly for this reason that the Keeper corrects clerical error without insisting on a formal application for rectification.⁹

6.8 The position for bijural inaccuracies is different. If, in respect of a bijural inaccuracy, a right is removed from, or restored to, the Register the effect is no less extinctive or creative than registration itself. It is true that the Act does not say this; but any other view would make the scheme of the Act unworkable. Take again the example of Adam's forged disposition. On being registered as owner, Adam acquires the real right of ownership. But while the Register is "actually" accurate it is "bijurally" inaccurate. The bijural owner (ie the person who ought to be owner) is Brenda, the person with the previous registered title and whose signature was forged on the disposition. Suppose that Brenda now applies to the Keeper for rectification. If Adam forged the disposition he is not protected by section 9(3) of the Act (discussed below), and so the Keeper will delete Adam's name and replace it with that of Brenda. What is the legal effect? The result must be that Adam ceases to be owner and that Brenda is restored to ownership in Adam's place.

⁶ *Short's Tr v Keeper of the Registers of Scotland* 1994 SC 122, 140F.

⁷ See also First Discussion Paper paras 2.11–2.15.

⁸ See generally part 5.

⁹ *Registration of Title Practice Book* para 7.2.

6.9 Important implications flow from these differences. If rectification of an actual inaccuracy changes nothing, it follows that such rectification can be allowed without restriction and, equally, that there is no loss for which indemnity can be due. The position is otherwise for rectification in respect of bijural inaccuracies. Unfortunately, these differences are largely overlooked by the Act.

6.10 The question of indemnity can be left until later in the paper.¹⁰ Of immediate concern is the question of restrictions on rectification.

Restrictions on rectification

6.11 On being found to be inaccurate it might be assumed that the Register will be rectified forthwith. Mistakes, one intuitively supposes, should be put right, and as quickly as possible. And indeed for actual inaccuracies that seems to be the position. But to rectify in respect of a bijural inaccuracy is often to undo the effect of the original registration; and if bijural inaccuracies could always be rectified, no acquirer could rely on the Register. In consequence a bijural system requires that inaccuracies are often *not* rectified and that the Register remains incorrect. Under the 1979 Act the determining feature is the state of possession. Generally speaking, the Register cannot be rectified if rectification "would prejudice a proprietor in possession".¹¹ That allows rectification in respect of an actual inaccuracy, for something which has no legal effect can cause no prejudice. But it disallows many cases of bijural inaccuracy. The policy is that acquirers who take possession should, in general, be protected against rectification.

6.12 Even here, however, there are exceptions. In seven cases rectification is allowed notwithstanding that it causes prejudice to a proprietor in possession. These are where:¹²

- (i) the inaccuracy was caused wholly or substantially by the fraud or carelessness of the proprietor in possession;
- (ii) all interested parties consent;
- (iii) the rectification relates to a matter in respect of which indemnity was excluded by the Keeper;
- (iv) the rectification gives effect to the judicial rectification of a document under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985;
- (v) the purpose of the rectification is to note an overriding interest or to correct any information relating to an overriding interest;
- (vi) the purpose of the rectification is to remove rights extinguished by the Abolition of Feudal Tenure etc (Scotland) Act 2000; and
- (vii) the purpose of the rectification is to remove real burdens extinguished by the Title Conditions (Scotland) Act 2003.

¹⁰ See especially paras 8.8–8.10.

¹¹ 1979 Act s 9(3)(a).

¹² 1979 Act s 9(3), (3B).

6.13 The policy factors behind these exceptions need not be discussed here. What is of interest is the failure to distinguish bijural inaccuracy from actual inaccuracy. The latter has no place in a list of cases allowing rectification to the prejudice of a proprietor in possession, for the simple reason that the rectification of an actual inaccuracy can never be to the prejudice of anyone. Yet exceptions (v)–(vii) relate *only* to actual inaccuracy. As the *Registration of Title Practice Book* notes in relation to exception (v), "[r]ectification of the register, to note, or correct any information in the register relating to an overriding interest ... *merely reflects the existing legal position*".¹³ No rights are created or lost. No prejudice is caused.¹⁴

6.14 The same confusion could be found in section 82 of the (English) Land Registration Act 1925, on which section 9 of the 1979 Act was modelled. It is avoided in the replacement legislation for England and Wales by a new overarching category of "alteration" of which "rectification" (defined as the correction of a mistake to the material prejudice of the title of a registered proprietor) is merely one example.¹⁵ Under our proposals, but for a different reason, the difficulty will fall away.¹⁶

Difficulties in summary

6.15 The above analysis suggests a number of difficulties with section 9. "Inaccuracy" is used in two different senses, neither being defined in the legislation. The effect of rectification is likewise undefined. Rectification in respect of actual inaccuracy is confused with rectification in respect of bijural inaccuracy. Above all, bijuralism requires that the Register be kept in an inaccurate state and that requests for rectification be refused.

6.16 Two further difficulties were discussed elsewhere and need only brief mention here. One is the awkwardness of tying immunity from rectification to momentary acts of possession. The doctrine of proprietor in possession is unsatisfactory in principle and, sometimes, difficult to operate in practice.¹⁷ The other difficulty is the overlap between rectification and registration, giving rise in some cases to a choice as to how a change is made to the Register. Potentially this means that the restrictions on rectification can be avoided by an application for registration and, conversely, that the non-availability of indemnity in respect of registration can be avoided by an application for rectification. Proposals made earlier will clarify and limit the scope of registration.¹⁸ A clear account of the scope of rectification will do the rest.

¹³ *Registration of Title Practice Book* para 7.6. Law Com No 271 para 10.7(2) is to similar effect: "Rectification in such a case [ie in respect of overriding interests] ... does no more than update the title and the registered proprietor is in no worse position than he or she was before".

¹⁴ For exceptions (vi) and (vii) see respectively Scottish Law Commission, Report on *Abolition of the Feudal System* (Scot Law Com No 168, 1999) para 2.47 and Report on *Real Burdens* (Scot Law Com No 181, 2000) para 11.86.

¹⁵ Land Registration Act 2002 sch 4 para 1. And see also Law Com No 271 paras 10.6 and 10.7.

¹⁶ Para 6.17.

¹⁷ First Discussion Paper paras 4.22–4.28.

¹⁸ Paras 3.20–3.27.

PROPOSALS FOR REFORM

Introduction

6.17 Even if section 9 were beyond reproach, it would be necessary to alter the rules of rectification to accommodate the move from a positive to a negative system of registration of title. Merely by making that change many of the difficulties with section 9 fall away. For the move from a positive to a negative system results in the abandonment of bijuralism; and without bijuralism there can be no bijural inaccuracy. Under our scheme all inaccuracies are actual inaccuracies. Rectification of these neither creates nor extinguishes rights but has only the modest function of bringing the Register into line with the actual legal position. The result is a much simpler system than is possible under current arrangements. Its key elements are set out in the paragraphs that follow.

Meaning of "inaccuracy"

6.18 Under our scheme "inaccuracy" means actual inaccuracy. The Register is inaccurate if, and only if, it fails to reflect the true legal position.¹⁹ That can come about in more than one way. For example the Register may list a right which has come to be extinguished; or it may list inaccurately a right which still exists. The error may be trivial or of fundamental importance; and it may be present at the time the entry is made or it may arise from supervening events, such as the extinction of a right by prescription.

6.19 The Register can be inaccurate by omission as well as by inclusion, but only in respect of rights which were originally constituted by registration, or by recording in the Register of Sasines. So if a standard security which was recorded in the Register of Sasines is omitted from the title sheet on first registration, the Register is inaccurate. The standard security exists still and ought to be on the Register.²⁰ By contrast if a servitude constituted by prescription is omitted from the title sheet there is no inaccuracy. The servitude exists still but, as an overriding interest, need not be included on the Register.

Severance of connection with indemnity

6.20 Being without substantive effect rectification does not give rise to loss. Therefore there is no call on indemnity, and the existing connection between rectification and indemnity is severed. For reasons considered elsewhere in the paper that is of itself an important gain.²¹

Rectification unrestricted

6.21 Even under the 1979 Act it is always possible to rectify in respect of actual (as opposed to bijural) inaccuracies. And since under our scheme all inaccuracies will be actual, rectification will likewise be unrestricted. If the Register is inaccurate it should, and can, be

¹⁹ Much the same expression is used in respect of the negative system of registration of title in Germany. See § 894 BGB: "... mit der wirklichen Rechtslage nicht im Einklange ..."

²⁰ It exists still under our scheme because the integrity principle does not apply on first registration. See para 5.45.

²¹ Paras 7.7 and 7.12–7.18. Note, however, that rectification is one (but only one) form of eviction for the purposes of the proposed Keeper's warranties: see paras 7.49–7.51.

rectified. No rights are lost or gained as a result. It follows that the current provisions protecting a proprietor in possession are not required.

An example

6.22 At this stage it may be helpful to give an example:

Z, the registered proprietor, grants a disposition to A. Z is mentally infirm and lacks legal capacity with the result that the disposition is void. Nonetheless A is registered as owner. Later A disposes to B who is registered as owner in turn. Both A and B are in good faith. B is now in possession. Z's guardian seeks rectification of the Register.

Under our scheme, for as long as A continued to be named as proprietor on the Register, Z's guardian could have succeeded in an application for rectification. This is because (i) Z was owner and not A,²² (ii) in showing A as owner the Register was therefore (actually) inaccurate, and (iii) under our scheme an inaccuracy can be rectified as of right. But with the transfer to B the position is changed. As a *bona fide* acquirer relying on the Register, B becomes owner on registration.²³ In showing B as owner the Register is correct. Hence there is no inaccuracy in respect of which rectification can be sought.²⁴ The 1979 Act would equally protect B but for different reasons. B would be owner (as A was before) by virtue of the positive effect of registration.²⁵ But in showing B as owner the Register would be (bijurally) inaccurate.²⁶ In principle Z, the bijural owner, would be entitled to have his name restored to the Register. But for as long as B remained in possession no rectification would be possible.²⁷

6.23 The example illustrates some of the merits of the proposed new approach. Only one set of rules applies and not two; and at each stage of events these rules give a simple answer. At first Z is owner and the Register is inaccurate. Thereafter ownership is lost to B and the Register is accurate once more. There is no bijuralism or bijural owner; there is no doctrine of proprietor in possession; and the inaccuracy of the Register is a shortlived and not a continuing state.

Judicial reduction and rectification

6.24 One technical matter deserves brief mention. Where, following registration, the deed on which the registration was based is reduced, the Register becomes inaccurate.²⁸ But whereas under the 1979 Act the inaccuracy is bijural, under our scheme it will be an actual inaccuracy.²⁹ This is because, under our scheme, the validity of a title depends on the

²² For transactional error is not cured under our scheme.

²³ By virtue of the integrity principle. See paras 5.21–5.30.

²⁴ Instead Z would be entitled to indemnity: see paras 7.53–7.58.

²⁵ 1979 Act s 3(1)(a).

²⁶ This assumes what is not entirely certain, namely that under the 1979 Act infirmity of title transmits against successors: see First Discussion Paper paras 5.17–5.19.

²⁷ 1979 Act s 9(3)(a). Presumably Z's right to rectify is lost after 20 years due to negative prescription.

²⁸ It is not inaccurate *before* reduction: see K G C Reid and G L Gretton, *Conveyancing 2000* (2001) pp 110–1, discussing *Higgins v North Lanarkshire Council* 2001 SLT (Lands Tr) 2.

²⁹ If it were not, reduction would not lead to rectification, an unacceptable result.

validity of the underlying deed, so that if the deed is null the title is null likewise.³⁰ The position is the same if, instead of being reduced, the deed is rectified by the court under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Thus suppose that, as a result of clerical error, a disposition from A to B conveys 5 hectares instead of 4. B is duly registered as owner of the 5 hectares. Later the disposition is rectified by the court so as to convey only 4 hectares. Under our scheme, B ceases to own the extra hectare from the moment that the court order is pronounced.³¹ Hence there is an actual inaccuracy on the Register which can be rectified. Under the 1979 Act the analysis is different although the end result is the same. An order for rectification has no effect on B's ownership as such, for his title flows from the Register and not from the (now rectified) deed. But, following the decree, the inclusion of the additional hectare on the Register is a bijural inaccuracy. A special provision allows rectification even against a proprietor in possession where it is consequential on an order under section 8 of the 1985 Act.³² No such special provision is needed under our scheme.

Bringing rectification about

6.25 In terms of section 9(1) an inaccuracy can be rectified if –

- (i) the Keeper, acting unprompted, so decides;
- (ii) the Keeper so decides following an application for rectification; or
- (iii) the Keeper is ordered to rectify by the court or the Lands Tribunal.

6.26 (i) and (iii) are uncontroversial and should be retained. In relation to (i) we think that the Keeper should continue to have a power rather than a duty for, as at present, there may be circumstances where he accepts for registration a title which he knows to be imperfect but in respect of which a challenge seems improbable.³³ Deliberate inaccuracy has a limited but important role under registration of title, registration in respect of an *a non domino* disposition being a familiar example.³⁴ In cases where the Keeper decides to rectify unprompted there may be merit in a requirement (as in England and Wales)³⁵ that he notify the affected owner.

6.27 In relation to (ii) we doubt whether acceptance of an application for rectification should continue to be a matter of discretion. If the Register is inaccurate, there should be an absolute entitlement to have it put right. This is of particular importance in relation to omitted rights, for a right which continues to be omitted risks being lost when the property is next transferred.³⁶ Our proposal here is consistent with the proposal, made earlier in the paper, that if an application for *registration* is good, the Keeper should be bound to accept it.³⁷ It also mirrors the position in England and Wales where applications for alteration must be

³⁰ It is for consideration whether a reduction should take effect only on registration. Of course it is true that a reduction which has not reached the Register could not be pled against a *bona fide* acquirer. That follows from the integrity principle which, in this context, is the equivalent of the Conveyancing (Scotland) Act 1874 s 46(1). But a requirement of registration would have the merit of reducing the incidence of off-Register transfers.

³¹ In effect the order creates a transactional error which thus has a direct effect on B's title.

³² 1979 Act s 9(3)(b).

³³ For a striking example, see Dmitri Ross, "How safe are your titles?" (2005) 50 JLSS May/56.

³⁴ Paras 4.44 ff.

³⁵ Land Registration Rules 2003 (SI 2003/1417) r 128(2).

³⁶ In under the integrity principle: see paras 5.33 ff.

³⁷ Paras 4.20–4.24.

accepted "unless there are exceptional circumstances which justify not making the alteration".³⁸

Application procedure

6.28 Who may apply for rectification? An application for *registration* can only be made by "the person in whose favour a real right will be created or affected by registration".³⁹ For rectification the legislation is silent,⁴⁰ and the Keeper's stated practice is rather indeterminate: an application will be considered "from anyone who can show title and interest to sue before the court or the Lands Tribunal for Scotland".⁴¹ The issue has been judicially considered just once, in *Wilson v Keeper of the Registers of Scotland*.⁴² The case concerned an application for rectification of a proprietorship section to the effect of substituting Inverclyde District Council for the current owner. In this context the Council was acting as trustee. The application, however, was not made by the Council but by members of the public as beneficiaries under the trust. It was held that there was no entitlement to apply for rectification. Only the Council could apply:⁴³

"It was obvious that if anyone had a title to seek such a rectification it must be Inverclyde District Council. Assuming that the appellants [the beneficiaries] were entitled to make a 'request' within the meaning of s 9(1), it would nevertheless be bizarre if the register could be rectified in the way proposed, with the result that persons who were deliberately not requesting any alteration were to find themselves entered on the register as proprietors. Ownership of property could bring with it liabilities, and it would be odd indeed if a body such as Inverclyde District Council which had declined to enter the process, and which appeared to be opposed to the proposed rectification, could be entered into the register in the way suggested by the appellants."

6.29 This was a case of proposed *bijural* rectification, which would give rise to a change of ownership. Under our scheme, where no rights will be altered by rectification, it is possible to be more relaxed. *Wilson* would confine applications to the holder of the right in respect of which rectification is sought. We think that the class of potential applicants could safely be extended to anyone else who holds a real right in the same land as well as to any person entitled to acquire such a real right (for example a person who has concluded missives to acquire the land).⁴⁴

6.30 Rectification issues are sometimes complex, requiring the consideration of a considerable amount of material. In the case of registration the Keeper can requisition further information or documentation from the applicant and, if it is not forthcoming within a specified period (which cannot be less than 60 days), reject the application.⁴⁵ A similar power would seem desirable in respect of rectification. An incidental advantage would be to provide

³⁸ Land Registration Act 2002 sch 4 para 6(3).

³⁹ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 9(1). An application for dual registration in relation to real burdens or servitudes can, however, be made by the grantor of the deed as well as the grantee: see r 9(4), inserted by the Land Registration (Scotland) Amendment Rules 2004 (SSI 2004/476) r 6(b).

⁴⁰ The legislation in England and Wales is equally silent.

⁴¹ *Registration of Title Practice Book* para 7.5.

⁴² 2000 SLT 267.

⁴³ 2000 SLT 267, 274B–C *per* Lord McCluskey.

⁴⁴ In Germany an application for rectification can be made by (i) the holder of the right in respect of which correction is sought and, if the right on the Register is extinguished, (ii) any person who is prejudiced by its continued presence on the Register. See § 894 BGB.

⁴⁵ 1979 Act s 4(1); Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 12. See para 4.09.

a ready means for the disposal of unmeritorious applications or of applications which were being made tactically or vexatiously.

6.31 In the case of registration a requirement of pre-payment of fees was introduced by the Land Registers (Scotland) Act 1995 and has eliminated problems previously encountered with cash flow and bad debt. We think that it could with advantage be extended to rectification.⁴⁶ If the application was successful, the fee should be reimbursed as an expense of rectification for which (under a proposal made in part 7)⁴⁷ indemnity would be due. But if the application failed the fee should be retained – contrary to current practice – as payment for the work carried out by Registers of Scotland.⁴⁸

Proposal

6.32 The foregoing discussion may be summarised in the form of a proposal:

- 24. (1) Where the Register is inaccurate, rectification should be available without restriction.**
- (2) The Register is inaccurate where, in respect of an entry or omission, it fails to state the actual legal position. But the Register is not inaccurate where it omits an overriding interest.**
- (3) The Keeper should continue to rectify an inaccuracy where –**
 - (a) at his discretion he so decides**
 - (b) he is ordered to do so by the court or the Lands Tribunal.**
- (4) The Keeper should be bound to rectify an inaccuracy where he is requested to do so by application.**
- (5) Only the following should be able to apply for rectification –**
 - (a) the person who holds the right in respect of which the application is being made; and**
 - (b) any person who holds a real right in the same land or who has a right to acquire such a real right.**
- (6) An application for rectification should be accompanied by a fee which should be retained in the event that the application is unsuccessful.**

⁴⁶ And indeed to applications for noting overriding interests (form 5) and, if they survive (for which see paras 4.59 ff), applications for certificates of title to correspond with the title sheet (form 8).

⁴⁷ Para 7.59.

⁴⁸ Consideration should also be given to raising the fee from its current, nominal, level of £25 to a level which more accurately reflects the amount of work involved.

(7) The Keeper should be entitled to requisition from the applicant such further evidence as is available and he may reasonably require, and, in the event that it is not forthcoming within a reasonable period (being a period of at least 60 days), to reject the application.

ENTRY TO THE REGISTER BY OTHER MEANS

Diversity

6.33 An entry in the Register of Sasines can come about in only one way, by registration. By contrast, the position for the Land Register is much more complex. Thus the Keeper can make (and, often, alter or remove) an entry in the Land Register by –

- (i) registration⁴⁹
- (ii) rectification⁵⁰
- (iii) the making up of a title sheet on first registration⁵¹
- (iv) the maintaining of a title sheet thereafter⁵²
- (v) the noting of an overriding interest⁵³
- (vi) an act in the exercise of a specific statutory power.

6.34 Registration and rectification are self-explanatory. The making up of a title sheet, although part of a registration process, will usually involve bringing on to the Register for the first time certain existing rights which were constituted by registration in the Register of Sasines. In maintaining the title sheet thereafter the Keeper must have regard to the matters mentioned in section 6(1) although in practice the only supervening right not covered by a separate act of registration is likely to be an inhibition or other entry in the Personal Register. In relation to overriding interests the Keeper has sometimes a power to note and sometimes a duty. Finally, the Keeper is affected by miscellaneous rights and duties imposed by the Land Registration (Scotland) Rules 1980 and other legislation. For example, if the Keeper is satisfied that a matrimonial home is unaffected by the occupancy rights of a non-entitled spouse he is directed to enter a statement to that effect on the title sheet.⁵⁴ Or if he is satisfied that a real burden subsists by virtue of sections 52 to 56 of the Title Conditions (Scotland) Act 2003 or section 60 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 he can (and after 28 November 2014 must) enter a statement to that effect and, if possible, describe the benefited property.⁵⁵

⁴⁹ 1979 Act s 2.

⁵⁰ 1979 Act s 9.

⁵¹ 1979 Act s 6(1).

⁵² 1979 Act s 6(1).

⁵³ 1979 Act s 6(4).

⁵⁴ Land Registration (Scotland) Rules 1980 (SI 1980/1413) r 5(j).

⁵⁵ Title Conditions (Scotland) Act 2003 s 58.

In search of unity

6.35 An obvious question is whether this rather complex set of arrangements can be simplified – whether, in other words, diversity can be replaced by unity. For example a substantial measure of unity is achieved by the model legislation prepared for the provinces and territories of Canada; for once first registration is achieved, the Register can usually be altered only by a single process known as "revision of registrations", encompassing both registration and rectification.⁵⁶ The result is simple and elegant. But there are a number of reasons for supposing that this solution is not available for Scotland.

Effect of entry

6.36 One reason is that not all methods of entering the Register have the same effect.⁵⁷ Most indeed have no effect at all. A right which is added by rectification existed before it was added and would continue to exist even if rectification had not taken place. A right previously created by the registration of a deed in the Register of Sasines is not created again merely by being entered in a title sheet on first registration of the land to which it relates.⁵⁸ The same is true of the noting of an overriding interest or the entering of an inhibition under section 6(1)(c). Entries of this kind are made partly for the purposes of information and partly for the protection of future acquirers who are entitled (with some exceptions) to receive the title in the state disclosed by the Register. The effect of registration is, however, quite different. Registration is constitutive or, as the case may be, extinctive of real rights; and for this reason alone there could be no assimilation of the different methods of entering the Register.

Relationship to inaccuracy

6.37 Other differences also stand in the way of assimilation. Thus if registration is distinguished from other modes of entry by its legal effect, so rectification is distinguished by its relationship to the accuracy or otherwise of the Register. Rectification is a response to inaccuracy. If the Register is accurate there can be no rectification; and if the Register is inaccurate rectification is the exclusively correct response.

Powers and duties of the Keeper

6.38 A further source of difference concerns the powers and duties of the Keeper. The Keeper may rectify the Register unprompted and, under our proposals, must do so on request.⁵⁹ Much the same is true of the noting of overriding interests although there are differences of detail. Other modes of entry occupy distant extremes. Entering the information required by section 6(1) is a matter of duty not of choice. By contrast, the Keeper has neither a duty nor indeed a power to make an entry by registration unless he is requested to do so. No doubt some of these differences could be reduced or even eliminated; but for the most part they exist for good reason and require to be continued.

⁵⁶ Joint Land Titles Committee, *Renovating the Foundation* pp 23 ff.

⁵⁷ Under a positive system, registration and rectification (at least in respect of bijural inaccuracies) are likely to have the same effect: see para 6.8.

⁵⁸ It is important to realise that the right is not being registered but merely entered under s 6(1). Only the right the transfer of which induced first registration is being registered. See *Registration of Title Practice Book* para 5.29.

⁵⁹ Para 6.27.

Rectification and registration

6.39 If methods of entry cannot be assimilated they should at least be properly distinguished. A persistent criticism of the current law is its failure to distinguish adequately between registration and rectification despite the fact that, under the 1979 Act, a great deal turns on the difference.⁶⁰ Under our scheme the importance of the difference is much diminished; yet they are entirely distinct. Rectification involves an inaccuracy. Registration involves a deed or other document.

6.40 The second proposition⁶¹ is not absolute. Very occasionally registration can take place without a deed, as where a conveyance of land is effected by statute;⁶² and, hardly less occasionally, rectification can be prompted by a document, such as an extract decree of reduction.

6.41 To the first proposition,⁶³ however, there are no exceptions. Registration may create a *new* inaccuracy⁶⁴ but it can never be a response to an *existing* inaccuracy. So if, preparatory to registration, A delivers a disposition to B, there is no inaccuracy in the fact that the Register continues to show A as owner. For in Scotland, unlike in some other countries, ownership is not generally transferred by an event off the Register, such as conclusion of a contract of sale or delivery of the conveyance.⁶⁵ On the contrary, registration is constitutive of rights and not merely evidence of a right already created by other means. Far from correcting an inaccuracy, therefore, registration creates a right. And what is true of creation is true equally of extinction. If a real burden is extinguished by minute of waiver its removal from the Register is by way of registration; but if extinguished by negative prescription it is removed by rectification, for the burden has already ceased to exist before the Register can be altered.

⁶⁰ Paras 3.20–3.23.

⁶¹ Ie that registration involves a deed or other document.

⁶² Para 3.7. If the statute conferred ownership itself rather than, as usually, having effect as a conveyance which then requires to be completed by registration, the Register would be inaccurate in continuing to show the name of the former owner and the appropriate method of entering the new owner would be rectification.

⁶³ Ie that rectification involves an inaccuracy.

⁶⁴ As for example where the deed which occasions the registration is void.

⁶⁵ *Sharp v Thomson* 1997 SC (HL) 66; *Burnett's Tr v Grainger* 2004 SC (HL) 19.

Part 7 Indemnity (1): in principle

CURRENT LAW

Introduction

7.1 The third of Ruoff's principles of registration of title is the insurance principle "which, whilst upholding the correctness of the register book declares that if through human frailty a flaw appears in the mirror of title, anyone suffering loss will be put in the same position, so far as money can do it, as if the reflection were a true one".¹ In the language of the 1979 Act, this means that if the Register is inaccurate, indemnity will usually be payable by the Keeper. The analogy with insurance should not, however, be pressed too hard. It is a convenient conceptualisation for payments where the title of the acquirer is bad; but it accounts less well for cases where the title is good but at the expense of a person who must then be compensated for his loss.² In other respects too the analogy with insurance is inexact.

7.2 We have no proposals to disturb the principle of indemnity. In responding to our first discussion paper consultees supported the retention of the title guarantee even in respect of transactional error.³ But the current law is defective in a number of respects and will in any event require some adjustment in order to fit with our other proposals.

Cost

7.3 Over the last ten years some 685 claims for indemnity were received by the Keeper, of which 430 resulted in payment. During this period the amount paid in indemnity annually averaged £131,000, although this figure conceals considerable fluctuations from year to year. In general it may be said that the figures are tending to rise, with the largest amount (£410,417) being paid in the most recent year (2003-04).⁴ When legal expenses are added, indemnity accounts for almost 1% of fee income. In addition, a considerable amount of staff time is spent processing claims. The experience in England and Wales has been much the same.⁵

Four grounds

7.4 The provisions on indemnity in the 1979 Act follow closely those in the Henry Report, which were in turn modelled on section 83 of the (English) Land Registration Act 1925.⁶ They comprise a rule and a series of exceptions. The exceptions may be left until part 8. The rule, which is set out in section 12(1), provides four grounds on which indemnity will be paid:

¹ T Ruoff, "An Englishman Looks at the Torrens System" (1952) 26 ALJ 118. The other principles are the mirror principle and the curtain principle. See First Discussion Paper para 1.14.

² Such a person cannot sensibly be thought of as having "insured" his title. If, as often, the title is still held on the Sasine Register, there has not even been the notional payment of a premium.

³ First Discussion Paper part 3.

⁴ The figures are published in the annual reports of Registers of Scotland.

⁵ The amount paid out in indemnity in England and Wales is around 0.6% of fee income. See R Smith, "The role of registration in modern land law", in L Tee (ed), *Land Law: Issues, debates, policy* (2002) p 53.

⁶ Henry Report part I para 48 (and especially note 1).

"Subject to the provisions of this section, a person who suffers loss as a result of –

- (a) a rectification of the register made under section 9 of this Act;
- (b) the refusal or omission of the Keeper to make such a rectification;
- (c) the loss or destruction of any document while lodged with the Keeper;
- (d) an error or omission in any land or charge certificate or in any information given by the Keeper in writing or in such other manner as may be prescribed by rules made under section 27 of this Act,

shall be entitled to be indemnified by the Keeper in respect of that loss."

Our concern is mainly with paragraphs (a) and (b). Their central ideas are rectification and hence necessarily (although the word does not appear) inaccuracy.

7.5 In cases where indemnity is likely to be in issue, there are generally two innocent parties. There is the acquirer, who has bought the property, been entered on the Register and so become owner even although his title was defective; and there is the true owner, the person from whom ownership has been taken without consent. If the Register is rectified, the true owner recovers the property. If rectification is refused, ownership remains with the acquirer. In either case there is loss and hence the need for payment of indemnity – to the acquirer in the first case and to the true owner in the second. The first case is covered by paragraph (a) of section 12(1) and the second by paragraph (b).

7.6 Experience of operating section 12 has drawn attention to its shortcomings. In some respects it is too wide; in others it is too narrow; and the link with rectification required by paragraphs (a) and (b) has resulted in inflexibility and uncertainty. All are discussed further below, beginning with the link with rectification.

The link with rectification

7.7 To tie indemnity to rectification is to place too much importance on the way in which an error on the Register happens to be put right.⁷ The well-known litigations arising out of the sequestration of Mr Alexander Short illustrate the difficulty. Mr Short sold two flats to a Mr Chung at substantially below market value. Mr Chung disposed the flats to his wife without payment, and Mrs Chung was duly entered on the Register as proprietor. Later Mr Short was sequestrated and his trustee succeeded in reducing the various dispositions as gratuitous alienations.⁸ The question was then how to have Mrs Chung removed from the Register. Three methods seemed possible. One was to register the reduction. The second was to use the reduction as the basis of an application for rectification. The third was to return to the court and ask for an order ordaining Mrs Chung to grant a disposition to the trustee, which disposition could then be registered. Of these three possible methods, the first was refused by the court⁹ and the second was unavailable for as long as Mrs Chung was in possession of the flats.¹⁰ Eventually the trustee pursued the third method, with success.¹¹

⁷ It also presupposes a clearer distinction between rectification and registration than is currently the case: see paras 3.20–3.23.

⁸ *Short's Tr v Chung* 1991 SLT 472.

⁹ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14.

¹⁰ This is the protection for proprietors in possession: see 1979 Act s 9(3).

¹¹ *Short's Tr v Chung (No 2)* 1999 SC 471.

The interest for present purposes lies in the consequences for indemnity. There was no difference in substance between any of the methods just described. Each proceeded on the same legal basis (the gratuitous alienation). Each was designed to remove Mrs Chung from the Register so as to make the flats available to Mr Short's creditors. And, whichever method was used, Mrs Chung, a *bona fide* acquirer, was equally worthy (or unworthy) of compensation for the loss of the flats. Yet the indemnity consequences were not the same. If Mrs Chung had been removed from the Register by rectification – if, in other words, she had either given her consent¹² or had not been in possession – she would have been entitled to indemnity. But because her removal was by registration no indemnity was due. Whatever the merits of Mrs Chung's claim, the difference in result seems impossible to justify.¹³ Other similar cases can readily be envisaged.¹⁴

Too wide

7.8 Section 12(1) can be criticised as being framed too widely.

7.9 In the first place, there is no restriction as to content. Indemnity extends not merely to real rights – the core business of the Register – but to *anything* that, for one reason or another, has found its way on to a title sheet. Thus if there is an inaccuracy in a notice of potential liability for costs in relation to common repairs,¹⁵ or in a notice reserving the right to claim compensation for a development value burden,¹⁶ indemnity is payable, at least in principle. The same is true of mere information. So if the person registered as proprietor is stated to be a chartered accountant and not (as is actually the case) a turf accountant, or if the price stated as paid for the property is wrong, the Register is inaccurate and issues of indemnity arise. In the first two examples indemnity is avoided only by means of an express exception in the legislation.¹⁷

7.10 In the second place, there is no restriction as to claimant. It can plausibly be said that the purpose of indemnity is to protect those who register, those who consult the Register with a view to making an application for registration, and those who lose rights as a result of the registration of others.¹⁸ But if that is correct, this purpose is not fully reflected in the provision; for in theory indemnity is widely available even if in practice the structure of section 12(1) tends to limit claims by casual third parties.

7.11 In the third place, there is no restriction as to time. The Register is guaranteed as accurate, not on a particular day, but on all days. The Keeper warrants to the acquirer not only that he has become owner but that he will *remain* owner until such time as he

¹² 1979 Act s 9(3)(a)(ii).

¹³ Under the proposals set out later in this part, no indemnity would be paid to Mrs Chung. This is because her title would be guaranteed only as at the date of initial registration.

¹⁴ For example an order under s 5(2) of the Presumption of Death (Scotland) Act 1977 might take the form either of a reconveyance (resulting in registration and no indemnity) or a reduction (resulting in rectification and indemnity). A more involved example is the following: Z is the registered owner of land. A draws up a disposition from Z to A in which Z's signature is forged. A grants a standard security to B Bank. Both the disposition and the standard security are registered. Z remains in possession. Since the Register is inaccurate and A is not in possession, Z can have the Register rectified at any time. If he does so, indemnity will be paid to the Bank under s 12(1)(a) of the 1979 Act. But if A forges a discharge of the security, the security is removed by registration and not by rectification and no indemnity is due to the Bank.

¹⁵ Title Conditions (Scotland) Act 2003 s 10A; Tenements (Scotland) Act 2004 s 13.

¹⁶ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 33.

¹⁷ 1979 Act s 12(3)(cc), (q). In the third case the current structure of s 12(1) would probably exclude a claim at least in most cases.

¹⁸ See paras 7.60 and 7.61 for discussion.

voluntarily cedes ownership to someone else. Since, however, this would encompass such future misfortunes as diligence, insolvency, or reduction, it becomes necessary for section 12(3) to list and exclude all the grounds on which title is likely to be lost. For example, no indemnity is given for rectification following certain types of reduction or for the acquisition of title by another by positive prescription.¹⁹ What is given with one hand is thus, by and large, removed with the other, although not all types of loss are identified. A more efficient, and transparent, approach would be to limit the guarantee at the outset.

Too narrow

7.12 But if section 12(1) is too wide it is also too narrow. This can be seen particularly from the perspective of the true owner, who is the typical casualty of registration of title. If a person loses ownership because of the (wrongful) registration of another, there are (as has been seen) two possible outcomes. One is that the Register is rectified and his position restored. The other is that rectification is refused – usually because the acquirer is a proprietor in possession – and the true owner is paid indemnity.²⁰ Both give rise to difficulty.

7.13 If the Register is rectified, the true owner recovers the property but has no entitlement to indemnity. Yet it is easy to see how loss might have been incurred. The property might be worth less now than before, for the acquirer – temporarily the owner – might have neglected it, or exploited its capital by selling timber or minerals.²¹ Furthermore, rectification is not retrospective, meaning that there is no claim for the fruits of ownership during the period when the Register was inaccurate and ownership in the acquirer. The true owner is restored in the present but the Act does not compensate for the lost profits of the past.²² Problems may also be caused by timing. In particular if, as often, the inaccuracy is discovered only when the true owner wishes to sell, the sale is unlikely to go ahead until the title problem has been resolved. In the meantime the seller must suffer the inconvenience and cost of delay, which may include lost advertising and legal costs, and the cost of bridging finance for a new property.²³ In all of this the true owner is wholly innocent.²⁴ He has been deprived of property without consent, fault and, initially at least, knowledge. This is the price of giving protection to acquirers – the price, in other words, of having a system of registration of title at all. But it seems unacceptable that there should not be compensation in full.

7.14 This difficulty affects equally the second case, where rectification is refused and indemnity paid.²⁵ The issue arose sharply in *M R S Hamilton Ltd v Keeper of the Registers of Scotland*.²⁶

¹⁹ 1979 Act s 12(3)(a), (b).

²⁰ 1979 Act s 12(1)(a), (b).

²¹ The example given by the Law Commission in reviewing the equivalent provision in the English legislation: see Working Paper on *Transfer of Land: Land Registration (Third Paper)* (Law Com WP No 45, 1972) para 96. Conversely, the true owner would benefit if the land had been improved, although an acquirer who had no reason to doubt his title would then have a claim for recompense.

²² *Freer v Unwins Ltd* [1976] Ch 288 is an example from England.

²³ *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271, 282E per Lord President Rodger.

²⁴ At least in the normal case. But see para 7.21 below.

²⁵ Section 12(1)(b) provides for payment of indemnity for loss caused by "the refusal or omission of the Keeper to make such a rectification". It is possible to read this provision as covering only those cases where (i) the Keeper was able to rectify but yet (ii) chose not to do so. Hence if the Keeper was unable to rectify due to the presence of a proprietor in possession, no indemnity would be due. Fortunately the courts have resisted this reading: see eg *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271, 282 I per Lord President Rodger.

²⁶ 2000 SC 271.

7.15 In registering the title to an ultra-long lease the Keeper omitted the obligation to pay leasehold casualties. That was in 1986. In 1994 the landlord sought rectification to restore the casualties. As the tenant was in possession rectification was refused. Indemnity was then claimed under section 12(1)(b). A dispute arose as to whether the landlord could be compensated for the loss of casualties during the period from 1986 to 1994, that is to say, before the request for rectification was made. The head of claim was rejected by the First Division. Indemnity under section 12(1)(b) must arise from refusal of rectification.²⁷ It was therefore necessary to inquire as to the claimant's position in the event that rectification had been allowed. As rectification is not retrospective, no entitlement would have arisen in respect of casualties for the period before rectification. Hence indemnity could not confer that which rectification would not allow.

7.16 The result is not satisfactory. Professor A J McDonald, who was a member of the Henry Committee, has commented in relation to the decision that:²⁸

"The [Henry] Committee were clearly of the view that any loss sustained by any *bona fide* party as a result of any inaccuracy in the Register, however caused, must be indemnified by the Keeper ...²⁹ If, however, a claimant is to be restricted in his claim and is to be indemnified only for loss suffered, or deemed to have been suffered, at or after the date of the deemed refusal of the Keeper to rectify, then, in a variety of situations the claimant will be compensated only partially for his loss, or in some cases may not be compensated at all ... [I]f the section is to be so construed, that creates a serious flaw in the indemnity provisions in the Act and an amendment of those provisions, particularly in s. 12(1)(b) is therefore urgently required."

Inaccuracy not rectification

7.17 To the difficulty just described the obvious solution is to allow indemnity for the initial inaccuracy and not merely for the refusal of rectification. In England and Wales that was already the position under the 1925 Act.³⁰ Furthermore, the lacuna in that Act which prevented indemnity where rectification was allowed was removed by amending legislation in 1997.³¹ The corresponding provision in the Land Registration Act 2002 now reads:³²

"A person is entitled to be indemnified by the registrar if he suffers loss by reason of ... a mistake whose correction would involve rectification of the register".

7.18 In Scotland too it seems necessary to shift the focus from rectification to the inaccuracy itself. Indeed one of the arguments in *Hamilton* was that the necessary provision existed already, in the form of section 12(1)(d). This requires the payment of indemnity for

²⁷ Indemnity is also due for an "omission" to rectify. In *Hamilton* something was made of the idea that, as the problem of leasehold casualties had been known about since 1992, the Keeper had "omitted" to rectify the Register at that time. See pp 280H–281B.

²⁸ A J McDonald, "Rectification and Indemnity in the Land Register" (2001) 55 *Greens Property Law Bulletin* 3, 4–5. In the second half of the article (published at (2002) 56 *Greens Property Law Bulletin* 1) Professor McDonald gives a number of examples of situations where, in his view, the result would then be unjust or anomalous.

²⁹ In similar vein it has been observed for England and Wales that: "It was certainly the intention of those who drafted the Land Registration Act 1925 that in all cases in which loss was suffered as a result of an error or omission in the register, indemnity should be payable." See *Transfer of Land: Land Registration* (Law Com No 235, 1995) para 4.2.

³⁰ Land Registration Act 1925 s 83(2).

³¹ Land Registration Act 1925 s 83(1)(b), as inserted by the Land Registration Act 1997 s 2. This implemented the Law Commission's *Third Report on Land Registration* (Law Com No 158, 1987) para 3.28.

³² Land Registration Act 2002 sch 8 para 1(1)(b). The correction of a mistake involves rectification if it prejudicially affects the title of a registered proprietor: see sch 8 para 11(2).

loss resulting from "an error or omission in any land or charge certificate". It is possible to read paragraph (d) as including the case where a land certificate is an accurate transcription of the Register but the Register itself is inaccurate. Indemnity thus extends beyond the copy to the source.³³ That view, however, was rejected by the First Division, which has confined the provision to errors of transcription.³⁴

Fraud and carelessness

7.19 A person who is author of his own misfortune has no claim for indemnity. The main provision is section 12(3)(n) which excludes a claim where "the claimant has by his fraudulent or careless act or omission caused the loss". If fraud or carelessness merely contributed to the loss without being its sole cause, there is a proportionate reduction in indemnity.³⁵ While, however, the principle is unexceptionable, its application has sometimes caused difficulty. In the discussion that follows it is helpful to separate (i) claims for indemnity by the acquirer from (ii) claims by the true owner.

7.20 **Claims by the acquirer.** An acquirer has a claim for indemnity if there is an inaccuracy on the Register which results in rectification.³⁶ From the acquirer's point of view such an inaccuracy is due either to Register error³⁷ or transactional error.³⁸ The fraud and carelessness test is reasonably apt for transactional error. For Register error, however, it is substantially inoperative. The difficulty was exposed by *Dougar Properties Ltd v Keeper of the Registers of Scotland*.³⁹ By mistake the Keeper included on the title sheet a right which did not attach to the property. Subsequently the pursuers bought the property in full knowledge of the mistake. When the Keeper rectified the Register by removing the right, the pursuers sought payment of £1.39 million in respect of its value. Indemnity was held to be payable, subject to proof of loss. Mere knowledge, it was said, was not carelessness; and the knowledge in this case was not accompanied by an act or omission which could itself be characterised as careless. In the absence of carelessness (or fraud), therefore, the Keeper must indemnify the pursuers for their loss. The result is startling. A person who inspects the Register, knows it to be wrong, and proceeds with the transaction with his eyes open, can nonetheless claim indemnity in respect of the error. It is as if one could buy a defective car at a price adjusted to take account of the defect and yet still claim from some benevolent and unworldly insurer a sum in compensation. If the current provisions of the 1979 Act are unworldly, they ought to be changed. The missing ingredient is, of course, good faith (in the sense of absence of knowledge). Earlier we proposed that good faith be a prerequisite for the integrity principle.⁴⁰ The same rule should apply in respect of claims for indemnity.

³³ *M R S Hamilton Ltd v Keeper of the Registers of Scotland (No 1)* 1999 SLT 829, 834F–I per Lord Hamilton.

³⁴ *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271, 281–3 per Lord President Rodger. In fact, since a land certificate is simply printed out from the current version of the title sheet held on the Keeper's computer system, the chances of an error of transcription are remote.

³⁵ 1979 Act s 13(4). In England and Wales the position until 1997 was that any fraud or carelessness was sufficient to exclude a claim for indemnity. See Law Commission, *Third Report on Land Registration* (Law Com No 158, 1987) para 3.27. The current provision, which is contained in the Land Registration Act 2002 sch 8 para 5, follows the 1979 Act in respect of carelessness by distinguishing contribution from sole cause; but any fraud is still sufficient to prevent a claim.

³⁶ 1979 Act s 12(1)(a).

³⁷ ie an inaccuracy which was already on the Register.

³⁸ ie an inaccuracy caused by the current transaction (eg a forged disposition).

³⁹ 1999 SC 513.

⁴⁰ ie the principle that a *bona fide* acquirer can trust the integrity of the Register and so receive a title free of Register error. See paras 5.21, 5.29 and 5.30.

7.21 **Claims by the true owner.** A true owner's claim arises in respect of the loss of property to the acquirer; for if matters cannot be put right by rectification, the true owner must be paid off with indemnity.⁴¹ Rarely will any of this be the true owner's fault. Typically he was not a party to the acquirer's transaction, has had no contact with the Register, and will not immediately be aware of the acquirer's title. Occasionally, of course, there may be an element of culpability. In failing to assert his rights the true owner may have misled the acquirer, and the Keeper, into supposing that matters were other than they are. Such failure, if persisted in for 10 years, can lead to a loss of rights by positive prescription,⁴² in respect of which no indemnity is, or should be, due. Neglect which is palpable but less prolonged might reasonably serve to reduce the indemnity otherwise payable. That is the effect of the current legislation.⁴³ Even more occasionally, carelessness may give way to actual fraud. For example, the transaction might be collusive, and carried out with the sole intention of extracting money from the Keeper. Here again the present provisions seem satisfactory.

THE KEEPER'S WARRANTIES

Introduction

7.22 New provisions on indemnity are needed to eradicate the deficiencies just described. But they are also needed to accommodate the changes discussed elsewhere in this paper.

7.23 The central change concerns a person acquiring on the basis of an invalid deed. Under the 1979 Act that person becomes owner on registration notwithstanding the invalidity, and in the event that the Register is rectified and the true owner restored, the acquirer is entitled to indemnity for the loss of ownership. This result is achieved by a combination of sections 3(1) and 12(1)(a). The former confers ownership. The latter provides compensation for its eventual loss.

7.24 The position under our proposals is different. Whether the acquirer becomes owner in the first place depends on whether the invalidity is the result of Register error or of transactional error. If there is Register error, the acquirer will normally become owner by virtue of the integrity principle described in part 5.⁴⁴ Further, as ownership is conferred as a matter of property law,⁴⁵ the Register is not inaccurate in showing the acquirer as owner. By contrast to the 1979 Act, therefore, a person who becomes owner will remain owner, and no question of indemnity arises.⁴⁶

7.25 The rule for transactional error is different. Under our proposals ownership is not conferred by registration; the Register is therefore inaccurate and can be rectified; and indemnity is due to the acquirer in respect of the inaccuracy. But this is not indemnity for loss, at least in a simple sense. Under the 1979 Act, the acquirer first gains and then loses ownership and is indemnified accordingly. Under our proposals, however, the acquirer was

⁴¹ 1979 Act s 12(1)(b).

⁴² Under our proposals, positive prescriptive would run even where indemnity had not been excluded: see First Discussion Paper paras 3.4–3.11.

⁴³ I.e. 1979 Act ss 12(3)(n) and 13(4), discussed above.

⁴⁴ Paras 5.21 ff.

⁴⁵ I.e. not merely by registration law.

⁴⁶ Paras 6.22 and 6.23.

never owner and, having gained nothing on registration, has nothing to lose on rectification. Of course he is likely to have losses of other kinds – the price, for example, paid in exchange for a bad title – but such losses will often pre-date registration (let alone rectification). This means that under our proposals the payment of compensation requires to be re-characterised.

7.26 The subject is best approached through section 3(1) of the 1979 Act. Under that section an acquirer, on registration, becomes owner subject only to those encumbrances entered on the title sheet (plus overriding interests).⁴⁷ The Register is deemed correct by force of statute. Under our proposals the Register is not necessarily correct; but, for that very reason, the Keeper should *warrant* that it is correct so that, if it is not, the acquirer has a claim for indemnity. Just as the seller warrants title, through the warrandice clause in the disposition, so the Keeper should warrant the state of the Register following registration. And in order that the protection of the acquirer is not lessened by our reform, the warranty must be co-extensive with section 3(1)(a). As compared to the 1979 Act the difference is thus one of technique and not of substance. Whereas under the 1979 Act indemnity is paid for loss of a right (once good but now bad), under our proposals indemnity is paid by virtue of the warranty that the right (always bad) was good. In either case the quantum is likely to be the same.⁴⁸

7.27 Even under our scheme an important role remains for indemnity for ordinary loss. We return to that subject below.⁴⁹ But first it is necessary to consider the Keeper's warranty in more detail.

Two warranties

7.28 Two separate warranties are needed, corresponding to and supplementing the two substantive rules which give effect to the integrity principle.⁵⁰ There is thus a warranty as to title and a warranty as to encumbrances. Of course, where the integrity principle applies, the acquirer is already fully protected; but where it does not apply the acquirer needs the further protection of a warranty from the Keeper. In this connection it is important to recall that the integrity principle does not apply on first registration and that it is restricted to the acquisition of primary rights.

Warranty as to title

7.29 For ease of exposition we begin by setting out the proposed warranty as to title. A detailed explanation then follows. Our proposal is that:

- 25. (1) On registration of the acquisition, variation or discharge of a real right the Keeper should warrant to the applicant that the real right is duly acquired, varied or discharged to the extent shown on the Register.**

⁴⁷ Paras 5.1 ff.

⁴⁸ For quantum see part 9.

⁴⁹ Paras 7.52 ff.

⁵⁰ These are the rules (i) that a person shown on the Register as owner of land should, in a question with an acquirer of land, be taken to have become owner of that land on the date stated in the Register; and (ii) that on becoming owner on registration an acquirer should take the land free of all subordinate real rights other than those shown on the Register (or overriding interests). See paras 5.21 ff.

(2) In warranting the acquisition of a real right the Keeper should be taken as further warranting that –

- (a) the right exists;**
- (b) it is of the type specified;**
- (c) it is held by the person who is named as holder; and**
- (d) it is a right over the land described (including the pertinents of that land).**

(3) The warranty should not apply insofar as the Register shows an acquisition, variation or discharge more extensive than was sought by the applicant.

(4) Nor should it apply to the extent that, at the time of registration, the applicant knew (or ought to have known) that the right was not acquired, varied or discharged; but for this purpose an applicant can take the Register as having previously been accurate unless he knew that it was not accurate.

(5) Nor should it apply to the extent that indemnity is excluded by the Keeper.

(6) Nor should it apply to the acquisition of a real right in minerals except where a right to minerals is expressly included in the title sheet.

Only registration

7.30 If it is to mirror section 3(1), the warranty as to title must apply to all cases of registration but to no other cases.

7.31 Positively, that means that the warranty applies to the acquisition of all real rights and not merely to primary rights such as ownership.⁵¹ Further, it extends to the other juristic acts in respect of which registration is possible, that is to say, to variation and extinction of real rights.

7.32 Negatively, it means that no warranty is extended to the holder⁵² of a right which enters the Register in some other way. The main exclusions are (i) rights entering by rectification; (ii) rights entering by noting; and (iii) rights constituted by deeds recorded in the Register of Sasines and which are entered on the Land Register on first registration. All three require further consideration.

7.33 **Rectification.** Under the current law, rectification has often the same effect as registration, that is to say, it results in the creation, transfer, variation or extinction of real

⁵¹ Compare the integrity principle, which is confined to primary rights: see para 5.31.

⁵² Later we consider indemnity for a person who *loses* rights as a result of an entry being made in the Register: see paras 7.53–7.58.

rights.⁵³ Under the proposed new law it will have no substantive effect. The right will already have been created, transferred, varied or extinguished as a matter of the general law. That is why rectification is to be allowed without restriction. Its purpose is merely to bring the Register into line with the actual legal position.⁵⁴ But if no right is being created, or extinguished, there is no place for a warranty by the Keeper.

7.34 Noting. The same may be said of the noting of overriding interests. A real right falling into this category exists independently of registration. The purpose of noting is merely to publicise a right which was created previously by other means. A warranty to its holder would be out of place. The present law is the same: no indemnity is payable under the 1979 Act in respect of overriding interests.⁵⁵

7.35 First registration. On first registration the Keeper is directed by the legislation to make up a title sheet in which all subsisting rights affecting the property are included.⁵⁶ Such rights might include real burdens or, less commonly, a standard security. By entering the rights in the title sheet, the Keeper is not registering them.⁵⁷ No application for registration has been made by the creditor in the real burden or standard security. The only application being made is in respect of ownership, and the only right being registered is the ownership of the applicant. In respect that they are created other than by registration in the Land Register, pre-existing Sasine rights resemble overriding interests. And like overriding interests, they are, in effect, excluded from the indemnity system under the current law.⁵⁸ We propose no change. If a creditor registers a standard security in the Land Register and the security turns out to be void, it is proper that indemnity should be paid. But if the security was originally recorded in the Register of Sasines but is now on the Land Register, indemnity is difficult to justify, for the position of a creditor should not be improved by the accident of first registration.

Only the applicant

7.36 The warranty is not to all and sundry but only to the applicant for registration.⁵⁹ And, as with many consumer transactions in everyday life, the warranty is purchased, in this case by a (small) part of the fee paid for registration.⁶⁰

⁵³ Paras 6.6–6.8.

⁵⁴ Paras 6.17–6.20.

⁵⁵ 1979 Act s 12(3)(h).

⁵⁶ 1979 Act ss 5(1)(a)(i), 6.

⁵⁷ Para 6.34.

⁵⁸ This is easiest to explain by an example. A standard security is recorded in the Register of Sasines. Unbeknownst to the creditor, the signature of the debtor was forged. Later, on the occasion of first registration, the security is entered in the charges section of the title sheet. Later still, the forgery comes to light and the Register is rectified by removing the security. No indemnity is due because the creditor has suffered no loss. The security was void when first recorded in the Register of Sasines. It was equally void when translated to the Land Register for, not being registered there, it did not benefit from the positive effect of s 3(1). Since the security is, and always has been, void, the creditor has no right which can be lost by rectification.

⁵⁹ In the case of dual registration of real burdens and servitudes – where the application may in practice be made by the burdened owner – it will need to be made clear that "applicant" means the benefited owner (ie the person in whose favour the right is constituted). And since a granter can sometimes register a discharge (Title Conditions (Scotland) Act 2003 s 69(3)) it must be made clear that "applicant" means the person who benefits from the deed.

⁶⁰ Compare "normal" indemnity where, typically, nothing has been paid to the Keeper. See paras 7.52 ff.

Only real rights

7.37 Following section 3(1), the warranty is confined to real rights. This meets a criticism of the current law which was mentioned earlier.⁶¹ But it is necessary to be clear as to which aspects of real rights are being guaranteed.⁶² We suggest, for the purposes of discussion, that the Keeper should warrant, in relation to any real right the acquisition of which is entered on the Register:

- that the right exists
- that it is of the type specified
- that it is held by the person named as the holder, and
- that it is a right over the land described (including pertinents of that land).

So if the applicant is entered as proprietor in the B section of the title sheet, the Keeper warrants to him that he is owner of the land (including pertinents)⁶³ which was described in the A section. Or if a person is entered in the C section as holder of a standard security, it is warranted that the security exists, that it burdens the property described in the A section, and that the applicant is the holder. But there is no warranty as respects the personal bond or the amount due under the security because these are matters of contract and not of real right.

Only for today

7.38 The warranty is for one day only – the day of registration. The acquirer's title is guaranteed on registration, but there is no guarantee that it might not be lost by later events such as reduction, insolvency, or prescription. The policy is that events which are the responsibility of the acquirer should not, in general, be paid for by the Keeper. Thus in this respect the Keeper's warranty follows section 3(1) and not section 12(1)(a).⁶⁴

Only that the right is acquired (or varied or extinguished)

7.39 Following on from what has just been said, the warranty is merely that the right in question is acquired (or varied or extinguished). The title is warranted not to be void. But it might be voidable, for a voidable title is good unless or until it is reduced.⁶⁵ Most consultees supported the view expressed in our first discussion paper that voidable titles should be left to the general law, and should be neither upgraded nor indemnified by the legislation on land registration.⁶⁶ Our proposal on warranty as to title gives effect to that view.

⁶¹ Para 7.9.

⁶² It may also be desirable to define "real right" as meaning the classic real rights: ownership, lease, security, proper liferent, real burden, and (registered) servitude.

⁶³ The integrity principle likewise extends to pertinents: see para 5.28.

⁶⁴ For criticism of this aspect of s 12(1)(a), see para 7.11.

⁶⁵ First Discussion Paper para 3.1.

⁶⁶ First Discussion Paper part 6.

Not for administrative mistake

7.40 Occasionally the Keeper is inadvertently generous by, for example, giving more land than is vouched for by the deed. In the first discussion paper we suggested that the products of such "administrative mistake" should not be covered by the state guarantee. Thus the acquirer should be entitled neither to retain the windfall gain nor to indemnity for its loss.⁶⁷ Consultees were in favour of this approach and we remain persuaded of its merits. For present purposes it means that the Keeper's warranty as to title does not apply insofar as registration results in an acquisition (or variation or discharge) more extensive than was sought by the applicant.⁶⁸

Not for bad faith

7.41 Obviously, bad faith should prevent a claim. The Keeper should not warrant a title if the applicant knew of a defect all along. Bad faith replaces the fraud and carelessness test of the present law and avoids the difficulties of that test which were mentioned earlier.⁶⁹ Consultees responding to our first discussion paper were generally in favour of a bad faith test.⁷⁰

7.42 Bad faith in this context means knowledge, and usually knowledge will include constructive knowledge: not only that which the applicant knew but that which he reasonably ought to have known. So if title is last registered in the names of Mr and Mrs Smith and the survivor but the disposition runs in the name of Mrs Smith alone it is for the applicant to check that the survivorship clause has been triggered by the death of Mr Smith. If he does not trouble with a death certificate and it turns out that Mr Smith is still alive, he will be fixed with knowledge of Mrs Smith's absence of title. That example is drawn from registered land but with first registrations the field of potential inquiry is much wider, and with it the scope for constructive knowledge. In only one case is constructive knowledge irrelevant. An applicant should be able to rely on the Register without further inquiry. If it discloses that Mr and Mrs Smith became owners on 12 February 2005, that information may be accepted as correct unless known to be wrong. This is consistent with the proposal made earlier that a person named on the Register as owner should be presumed to be owner.⁷¹ Another way of expressing the point is to say that constructive knowledge is relevant for transactional error but not for Register error.⁷²

7.43 As most consultees responding to our first discussion paper accepted, the relevant date for knowledge is the date of registration.⁷³ The obvious alternative – the date on which the transaction actually settled – seems too early, particularly when it is recalled that in applying for registration the applicant is also applying for insurance cover, and that a person ought not to be able to insure a risk which he knows already to have come to pass.

⁶⁷ First Discussion Paper paras 3.35–3.41.

⁶⁸ This is sufficiently broad to cover the case where, on first registration, the Keeper omitted an encumbrance which was recorded in the Register of Sasines. But the acquirer would equally be prevented from claiming under the warranty due to his constructive knowledge of the encumbrance, on the principle discussed in the next section.

⁶⁹ Paras 7.19–7.21.

⁷⁰ First Discussion Paper paras 7.8–7.20.

⁷¹ Para 5.32.

⁷² First Discussion Paper para 7.13.

⁷³ First Discussion Paper paras 7.17–7.19.

7.44 At present the application forms for registration contain detailed (and sometimes esoteric) questions designed, in part, to demonstrate a connection between what the applicant said and what the Keeper then did. This means that if, later, things go wrong and a claim for indemnity is made, the Keeper may be able to find in the form some evidence of fraud or carelessness which "caused" the inaccuracy on the Register.⁷⁴ The proposed bad faith test avoids issues of causation by asking, not what the applicant did or said, but what he knew or ought to have known. One benefit may be a shortening of the application forms.

Not where indemnity excluded

7.45 If or to the extent that indemnity is excluded, no payment by the Keeper is due under the present law.⁷⁵ It goes without saying that the same should be true in respect of the proposed Keeper's warranty.⁷⁶

Not for minerals

7.46 It is often uncertain whether the person who owns the land is also owner of the minerals. Under the present law, therefore, no indemnity is payable unless the Keeper is sufficiently confident as to the position as to include a right to the minerals in the title sheet.⁷⁷ We have no proposals for change. It will be recalled that minerals are likewise excluded from the integrity principle.⁷⁸

Warranty as to encumbrances

7.47 There is also a second Keeper's warranty. For just as the first rule giving effect to the integrity principle (registered proprietor taken to be owner) must be supplemented by a warranty as to title, so the second rule⁷⁹ (no latent encumbrances) must be supplemented by a warranty as to encumbrances. The reason is the same: that the integrity principle does not (and should not) cover all cases. In particular it does not extend to the acquisition of *secondary* rights. Our proposal, which is modelled on the relevant part of the integrity principle, is that:

- 26. On registration of the acquisition of a real right the Keeper should further warrant that the right is unaffected by subordinate real rights other than –**
- (a) such rights as appear on the title sheet (or, having a date of registration prior to that of the acquirer, were omitted from the title sheet only because the registration process was incomplete);**
 - (b) any rights which, though omitted from the title sheet, were known (or ought to have been known) to the applicant; and**
 - (c) overriding interests.**

⁷⁴ *Registration of Title Practice Book* para 7.30.

⁷⁵ Land Registration (Scotland) Act 1979 s 12(2).

⁷⁶ Perhaps re-named as exclusion of "warranty". The right to "indemnity" in the narrow sense considered later in this part cannot be excluded by the Keeper.

⁷⁷ 1979 Act s 12(3)(f).

⁷⁸ Paras 5.25–5.27.

⁷⁹ Paras 5.33–5.44.

7.48 Taken together with the integrity principle, the overall effect of this warranty is broadly in line with the present law.⁸⁰ However, its practical importance is slight, partly because the protection does not (and should not) extend to overriding interests⁸¹ and partly because real rights constituted by registration are rarely omitted from the Register.

The need for eviction

7.49 For a claim to lie in ordinary warrandice not only must the title be defective but the defect must be founded on by a person entitled to do so. There must, in other words, be "eviction" of the grantee. A defect which is undiscovered or allowed to lie undisturbed does not give rise to a claim in warrandice.⁸² Section 12(1)(a) of the 1979 Act operates in much the same way, requiring rectification of the Register before indemnity is payable. There are solid reasons for retaining this rule. An acquirer with a bad title but undisturbed possession has little of which to complain. The property is his to use as he wishes; at a time of his choosing it can be sold, in which case, under our proposals, the integrity principle will operate in favour of the purchaser; and if no sale takes place positive prescription will, after ten years, put right whatever is currently wrong.⁸³ A technical advantage of a requirement of eviction is to give a date of loss for the purposes of indemnity which is both reasonably clear and also an appropriate base line for the running of interest.⁸⁴

7.50 Eviction is not the same as physical ejection. Its core idea is a judicial process initiated by the challenger and in which a preferential right is established. Less, however, will do.⁸⁵ Thus an acquirer is evicted for the purposes of warrandice if he concedes a judicial claim to which there is no reasonable defence. Rectification of the Register at the initiative of the challenger is also, probably, sufficient eviction. If, as we later suggest, the Keeper's consent is needed to defend a court action by a challenger in order for the costs to be recoverable in indemnity, the refusal of such consent should also count as eviction.⁸⁶

7.51 Our proposal is that:

- 27. (1) No claim should lie under the Keeper's warranties unless the claimant is first evicted by a person founding on the title defect to which the warranty relates.**

⁸⁰ The main difference concerns the acquisition of primary rights on first registration. Section 3(1)(a) would extinguish any encumbrances which the Keeper failed to enter on the title sheet. Under our proposals the integrity principle would not apply to what is really a type of administrative mistake (for which see paras 3.35–3.41 of the First Discussion Paper). And while the Keeper's warranty is available in theory, it would in practice be excluded on the basis that the encumbrance ought to have been discovered by the applicant in the course of his examination of the Sasine title.

⁸¹ In Law Com No 235 part IV the Law Commission in effect departed from the recommendation made in Law Com No 158 paras 2.9–2.14 that indemnity should extend to overriding interests. As Roger Smith has commented, the proposal came to be regarded as "foolhardy" due to "the impossibility of quantifying likely claims": see "The role of registration in modern land law" in L Tee (ed), *Land Law: Issues, debates, policy* (2002) p 53.

⁸² Reid, *Property* para 707. But eviction is not required where the title defect is the existence of a subordinate real right.

⁸³ In the First Discussion Paper we proposed the restoration of positive prescription for registered titles: see paras 3.4–3.11.

⁸⁴ Paras 9.4–9.11. For interest to run from the date of the acquirer's registration rather than from the date of eviction would be to over-compensate the acquirer.

⁸⁵ Reid, *Property* para 707.

⁸⁶ Paras 9.34 and 9.35.

- (2) **A claimant is evicted if, in respect of the title defect –**
- (a) **its existence is judicially determined;**
 - (b) **the claimant concedes a court action to which there was no reasonable defence;**
 - (c) **the claimant applies to the Keeper for consent to defend a court action, in terms of proposal 40(1)(c), and consent is refused; or**
 - (d) **the Register is rectified against the claimant.**

INDEMNITY

Introduction

7.52 The Keeper's warranties replace section 12(1)(a) of the 1979 Act (indemnity for rectification). But indemnity is needed in other cases as well including, but not restricted to, the cases covered by the remaining paragraphs of section 12(1). This, however, is indemnity in the more familiar sense of compensation for direct loss as opposed to loss through the mediation of a warranty.

Loss due to the integrity principle

7.53 The integrity principle gives to the *bona fide* acquirer a title free from Register error; but in the process the rights of others are extinguished. These are the (unavoidable) casualties of a system of registration of title. Plainly they must be compensated in full for their loss. Thus we propose that:

- 28. A person who loses a right as a result of the operation, in favour of another person, of the integrity principle (ie proposals 18 and 20) should be indemnified by the Keeper for his loss.**

7.54 The loss must be attributable to the integrity principle. This is compensation for registration of title. So a person who so neglects his property that he loses title to the prescriptive acquisition of a rival would not be compensated, any more than he would under the present law.

7.55 The proposal is the equivalent of section 12(1)(b) (indemnity for refusal of rectification), but it is different in some important respects. Under the 1979 Act rights are neither definitely lost nor gained. More precisely, there is always the possibility that a right which has been lost – by registration of another in one's place – can be restored by rectification. Thus the important event is not the loss of the right but the refusal of rectification. Indeed, even a refusal is not definitive because a later application for rectification might be successful if, in the meantime, the person registered as proprietor has lost possession. This model has implications for the working of indemnity. It tends to tie indemnity to the refusal of rectification rather than to the initial (but provisional) loss of the

right, leading to the difficulties discussed earlier.⁸⁷ Furthermore, it creates the awkwardness of a person being compensated for a refusal to rectify today when there remains the prospect of rectification tomorrow. By contrast, our proposed scheme is simple and clearcut. Indemnity is due, not because the Register is inaccurate but because it is accurate – because, in other words, the acquirer is truly the owner. When the integrity principle operates in favour of an acquirer, the matching loss of right is immediate and irrevocable, and gives rise to an immediate claim for indemnity.

7.56 There is no entitlement to indemnity under section 12(1)(b) where "the claimant has by his fraudulent or careless act or omission caused the loss"; and where fault is a contributory, but not sole, cause there is a corresponding reduction in indemnity.⁸⁸ If the principle is unexceptionable⁸⁹ some attention is needed in respect of the details. The difficulties with the fraud and carelessness test were set out in the first discussion paper, and usually we have suggested its replacement by a test based on good faith.⁹⁰ But good faith is not appropriate in respect of proposal 28; for the question there is not, or not merely, what the claimant knew, but whether the claimant could, and should, have avoided the loss for which indemnity is now being claimed.⁹¹ If the claimant is at fault, his claim should be reduced accordingly.

7.57 "Fault" in the 1979 Act is rendered as fraud or carelessness. That a fraudulent claimant should receive nothing is self-evident and needs no discussion here. Carelessness, a wider and vaguer term, is delimited by requirements of knowledge and foreseeability.⁹² A claimant who knows his right to be at risk but takes no action may be "careless" and so bear some responsibility for his loss. In the context of proposal 28 this is likely to mean that he knows either of the error or omission in the Register or that his land, or part of it, is being possessed by another.⁹³ This, however, is hardly decisive for, even in the face of knowledge, a claimant might reasonably conclude that action was unnecessary or premature. Further, even if carelessness is established it is unlikely to be more than a contributory cause of a loss which was due above all else to the original mistake in the Register following an application on the part of some other person.

7.58 Whether the replacement legislation should refer to "fault" – the language of contributory negligence⁹⁴ – or persevere with fraud and carelessness⁹⁵ is a decision for another day. But the principle at least seems clear. Thus we propose that:

⁸⁷ Paras 7.7 and 7.12–7.18.

⁸⁸ 1979 Act ss 12(3)(n), 13(4).

⁸⁹ Similarly, bad faith would prevent a claim under the Keeper's warranties. On the other hand, neither fault nor bad faith seems relevant to the remaining heads of indemnity considered in this part.

⁹⁰ First Discussion Paper paras 7.1–7.20.

⁹¹ We are grateful to the Keeper for pointing out, in response to our First Discussion Paper, that there is likely to continue to be a role for fraud and carelessness.

⁹² *Doubar Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513, 532G–I per Lord Macfadyen. In the corresponding English provision (s 83(5) of the Land Registration Act 1925) "lack of proper care" was substituted by the Land Registration and Land Charges Act 1971 s 3(1) for "any act, neglect or default" precisely to avoid the idea of an open-ended duty by the claimant to preserve his right. For robust criticism of the earlier version, see S Cretney and G Dworkin, "Rectification and Indemnity: Illusion and Reality" (1968) 84 LQR 528, 545 ff.

⁹³ This is because the integrity principle requires possession by the person shown as owner: see para 5.29.

⁹⁴ Law Reform (Contributory Negligence) Act 1945 s 1. "Fault" is defined in s 5(a) to mean "wrongful act, breach of statutory duty or negligent act or omission which gives rise to liability in damages, or would apart from this Act, give rise to the defence of contributory negligence". Cretney and Dworkin (above, at p 555) favour the language of contributory negligence.

⁹⁵ As in England and Wales: see Land Registration Act 2002 sch 8 para 5.

- 29. Indemnity payable under proposal 28 should be reduced if and to the extent that the loss was attributable to fault on the part of the claimant.**

Loss incidental to rectification

7.59 Under the rule just discussed a person who is deprived of a right is entitled to indemnity. But the right is not lost at the very moment that the name is excised from the Register. Rather loss, under our scheme, is postponed until the property is sold on – until transactional error has matured into Register error – for only then does the integrity principle apply in favour of the acquirer. Until then the true owner can insist on rectification of the Register.⁹⁶ Rectification, however, is unlikely to be cost-free. At best the true owner will need the services of a lawyer.⁹⁷ At worst he may have lost the chance of a sale, for in practice the rival entry on the Register may come to light only when he sells and a form 12 report is obtained for the benefit of a potential purchaser. It is a criticism of the current law that such costs are not recoverable.⁹⁸ In 1997 the English legislation was amended in order to allow recovery. The relevant provision read:⁹⁹

"if, notwithstanding the rectification, the person in whose favour the register is rectified suffers loss by reason of an error or omission in the register in respect of which it is so rectified, he also shall be entitled to be indemnified."

In similar vein, we propose that:

- 30. Where an inaccuracy in respect of a real right is rectified, the person in whose favour the rectification is made should be indemnified by the Keeper for –**
- (a) the reasonable costs of the application for rectification; and**
 - (b) any other loss caused by the inaccuracy.**

The proposal is expressed generally and so applies not only to the true owner – the typical victim of inaccuracy – but to any person in whose favour the Register is rectified.

Loss incurred by other parties

7.60 Thus far, the parties who would be entitled to indemnity under our proposals are restricted to:

- applicants for registration (if successful)¹⁰⁰
- applicants for rectification (if successful)¹⁰¹
- those losing rights as a result of the integrity principle.¹⁰²

⁹⁶ Paras 6.17 ff.

⁹⁷ Legal expenses arise likewise where a person is seeking indemnity and not rectification. They too are recoverable, if reasonable: see paras 9.26 and 9.33.

⁹⁸ Para 7.13.

⁹⁹ Land Registration Act 1925 s 83(1)(b), as substituted by the Land Registration Act 1997 s 2. The current provision is altogether wider in scope: see Land Registration Act 2002 sch 8 para 1(1)(b).

¹⁰⁰ Under the Keeper's warranties: see paras 7.22 ff.

¹⁰¹ Para 7.59.

¹⁰² Paras 7.53–7.58.

This is slightly wider than under the current law but, like that law, it does not extend to the public at large. Thus a person who consults the Register for reasons other than the acquisition or restoration of a right has no claim for indemnity if it turns out that the Register was inaccurate. Examples might include a lender seeking to establish the property holdings of a potential borrower or a litigant investigating the ownership of land for the purposes of founding jurisdiction.

7.61 In England and Wales there is now no restriction as to claimant, although the change, in the 2002 Act,¹⁰³ does not seem to have been the subject of discussion or consultation.¹⁰⁴ Our provisional view is that the rule in Scotland should remain as it is. The Keeper, of course, makes strenuous efforts to ensure the accuracy of the Register. But it can become wrong for reasons beyond the Keeper's knowledge or control. A particular difficulty is that an entry, correct at the time it was made, may become inaccurate due to supervening events such as reduction of a deed or its judicial rectification.¹⁰⁵ It is proper that the Keeper should warrant the accuracy of the Register to an *acquirer*.¹⁰⁶ Indeed it is unavoidable if registration of title is to achieve the transactional ease for which it was designed. But there seems no strong reason why the warranty should extend to casual third parties. The Keeper has no control over the uses made of the Register, and hence of potential liability under a warranty framed in general terms. Those charged with keeping other public registers do not guarantee their accuracy. We do not think that the Land Register should be in a different position. In order to elicit views, however, we make the negative proposal that:

31. The Keeper should not warrant the accuracy of the Register to the public at large.

Mistake in information given by the Keeper

7.62 The Register may be correct but the information given as to the Register wrong. If a person requests – and, it may be, pays for – information from the Keeper but the information given is incorrect, section 12(1)(d) imposes liability on the Keeper for any loss that results. In many cases there would already be liability under the ordinary law of contract or delict.¹⁰⁷ Unlike its English counterpart,¹⁰⁸ section 12(1)(d) is expressed rather generally, applying to "any information given by the Keeper in writing"; but since errors are unlikely to be made in the reproduction of existing documents and data,¹⁰⁹ the provision is in practice concerned with documents which have been newly prepared for the person seeking the information.

¹⁰³ Land Registration Act 2002 sch 8 para 1(1)(b): "A person is entitled to be indemnified by the registrar if he suffers loss by reason of ... a mistake whose correction would involve rectification of the register". Previously, as in Scotland under the 1979 Act s 12(1)(a), only loss *resulting from rectification* (and not from the error itself) was covered: see Land Registration Act 1925 s 83(1).

¹⁰⁴ Indeed the Law Commission's view was that, although the indemnity provisions were "completely recast in accordance with the style of" the 2002 Act, "[t]he substance of them has not ... been altered in any significant way". See Law Com No 271 para 10.29.

¹⁰⁵ Thus if a warranty were to be introduced, it would probably have to be confined – as in the case of warranty to acquirers – to the accuracy of individual entries at the time they were made.

¹⁰⁶ Para 7.26.

¹⁰⁷ See eg *Runciman v Borders Regional Council* 1987 SC 241. In the Henry Report part I para 48(1)(b) the right to indemnity under this head was followed by the words "or generally by reason of any error caused by the act, neglect or default of the Keeper".

¹⁰⁸ Which applies only to official searches and official copies: see Land Registration Act 2002 sch 8 para 1(1)(c),(d). The equivalent provision of the Land Registration Act 1925 (s 83(3)) was confined to official searches.

¹⁰⁹ As discussed in para 7.18, the reference in s 12(1)(d) to errors in land and charge certificates has been interpreted as meaning only an error in reproduction. Land and charge certificates may be discontinued under our proposals: see paras 4.59–4.66.

Almost always these are reports, such as a form 10 report. The number of claims is significant: more than a quarter of the total amount paid in indemnity in the last 15 years was attributable to errors in reports, typically the omission of an inhibition or a standard security. It seems uncontroversial that reports and other information should continue to be covered by the Keeper's indemnity. We propose therefore that:

- 32. Loss caused by errors in reports and other information supplied by the Keeper should continue to be indemnified by the Keeper.**

Loss or destruction of any document while lodged with the Keeper

7.63 Similarly uncontroversial is section 12(1)(c), which imposes liability on the Keeper for documents lost or destroyed while in his custody. There is an equivalent provision in the English legislation.¹¹⁰ We propose therefore that:

- 33. Loss caused by the loss or destruction of any document while lodged with the Keeper should continue to be indemnified by the Keeper.**

SOME WORKED EXAMPLES

7.64 It may be helpful to finish with some worked examples which illustrate both the operation of indemnity and its interaction with the protections for the *bona fide* acquirer (ie the integrity principle). The examples show the solutions both of the 1979 Act and of our proposals for reform.

7.65 **Example 1.** A is registered as owner. The disposition in his favour purports to be granted by Z, the last registered owner but, unbeknownst to A, Z's signature has been forged.

1979 Act. A becomes owner on registration but the Register is inaccurate.¹¹¹ If A is in possession, the Register cannot be rectified and indemnity is paid to Z.¹¹² If A is not in possession, the Register can be rectified and indemnity is paid to A.¹¹³

Our proposals. As this is a transactional error and not a Register error, the integrity principle does not operate in favour of A. Thus Z remains owner and can have the Register rectified. Any necessary expenses, and other losses, will be refunded by the Keeper.¹¹⁴ Indemnity is paid to A.¹¹⁵

7.66 **Example 2.** Same as example 1 but A re-sells to B who is registered as owner. B is in good faith.

¹¹⁰ Land Registration Act 2002 sch 8 para 1(1)(f).

¹¹¹ 1979 Act s 3(1)(a).

¹¹² 1979 Act ss 9(3), 12(1)(b).

¹¹³ 1979 Act ss 9(1), 12(1)(a).

¹¹⁴ Para 7.59.

¹¹⁵ For breach of the Keeper's warranty as to title, see para 7.29.

1979 Act. B becomes owner on registration but the Register is inaccurate.¹¹⁶ If B is in possession, the Register cannot be rectified and indemnity is paid to Z.¹¹⁷ If B is not in possession, the Register can be rectified and indemnity is paid to B.¹¹⁸

Our proposals. With the transfer to B a transactional error has become a Register error (because, at the time B acquired, A was entered on the Register as owner). If A was in possession for the prescribed period the integrity principle operates to confer ownership on B.¹¹⁹ The Register is therefore accurate. Indemnity is paid to Z.¹²⁰ If A was not in possession the integrity principle does not operate, and Z remains owner and can procure rectification. Indemnity is then paid to B.¹²¹

7.67 Example 3. Same as example 2 but B knows of the forgery.

1979 Act. The result is the same as before. Although in bad faith, B is not, probably, fraudulent or careless; and even if he is, he has not "caused" an inaccuracy which already existed at the time of his acquisition.¹²² B thus becomes owner on registration but the Register is inaccurate.¹²³ If B is in possession, the Register cannot be rectified and indemnity is paid to Z.¹²⁴ If B is not in possession, the Register can be rectified and indemnity is paid to B.¹²⁵

Our proposals. The result is different from before. Bad faith excludes both the integrity principle and any claim for indemnity.¹²⁶ Z remains owner and can procure rectification (together with the expenses of rectification).¹²⁷

7.68 Example 4. A disposition in favour of A is recorded in the Register of Sasines in 2000. Although it purports to be granted by Z, the then owner, Z's signature has, unbeknownst to A, been forged. In 2007 A resells to B inducing a first registration. B, who is in good faith, is registered as owner.

1979 Act. Z remains owner until 2007 when, following registration, ownership is acquired by B.¹²⁸ The Register, however, is inaccurate. If B is in possession the Register cannot be rectified and indemnity is paid to Z.¹²⁹ If B is not in possession the Register can be rectified and indemnity is paid to B.¹³⁰

¹¹⁶ 1979 Act s 3(1)(a). In this, and subsequent, examples, it is assumed that an inaccuracy is not cured by transfer to a third party. But the law on this point cannot be taken as settled: see First Discussion Paper paras 5.17–5.19.

¹¹⁷ 1979 Act ss 9(3), 12(1)(b).

¹¹⁸ 1979 Act ss 9(1), 12(1)(a).

¹¹⁹ Paras 5.22–5.30. The prescribed period is likely to be relatively short, for example one year.

¹²⁰ For loss of ownership due to the integrity principle, see para 7.53.

¹²¹ For breach of the Keeper's warranty as to title, see para 7.29.

¹²² Para 7.20.

¹²³ 1979 Act s 3(1)(a).

¹²⁴ 1979 Act ss 9(3), 12(1)(b).

¹²⁵ 1979 Act ss 9(1), 12(1)(a).

¹²⁶ Paras 5.29 and 7.41–7.44.

¹²⁷ Para 7.59.

¹²⁸ 1979 Act s 3(1)(a).

¹²⁹ 1979 Act ss 9(3), 12(1)(b).

¹³⁰ 1979 Act ss 9(1), 12(1)(a).

Our proposals. As B does not act on the faith of the Register, the integrity principle does not apply. In other words, the forgery is a transactional error¹³¹ and not a Register error. Thus Z remains owner throughout and can have the Register rectified. Any necessary expenses, and other losses, will be refunded by the Keeper.¹³² Indemnity is paid to B.¹³³

7.69 Example 5. A is registered as owner of 8 hectares, a first registration. In fact the disposition conveyed (and purported to convey) only 7 hectares, the final hectare being the property of Z.

1979 Act. A becomes owner of all 8 hectares on registration but the Register is inaccurate in respect of the additional hectare.¹³⁴ If A is in possession, the Register cannot be rectified and indemnity is paid to Z.¹³⁵ If A is not in possession, the Register can be rectified and indemnity is paid to A.¹³⁶

Our proposals. As this is a transactional error and not a Register error, the integrity principle does not apply. Thus Z remains owner of the 1 hectare and can insist on rectification of the Register. Any necessary expenses will be refunded by the Keeper.¹³⁷ Since title to the additional hectare had not been sought by A – since, in other words, it was an administrative error on the part of the Keeper – no indemnity is due to A.¹³⁸

7.70 Example 6. Same as example 5 but A re-sells the 8 hectares to B who is registered as owner. B is in good faith.

1979 Act. B becomes owner of all 8 hectares on registration but the Register is inaccurate in respect of the additional hectare.¹³⁹ If B is in possession the Register cannot be rectified and indemnity is paid to Z.¹⁴⁰ If B is not in possession the Register can be rectified and indemnity is paid to B.¹⁴¹

Our proposals. With the transfer to B a transactional error has become a Register error (because, at the time B acquired, A was entered on the Register as owner). If A was in possession of the additional hectare for the prescribed period, the integrity principle operates to confer ownership on B.¹⁴² The Register is therefore accurate. Indemnity is paid to Z.¹⁴³ If (as is much more likely) A was not in possession of the additional hectare for the prescribed period, the integrity principle does not operate, and Z remains owner and can procure rectification. Indemnity is paid to B.¹⁴⁴

¹³¹ Albeit not one affecting the immediate transaction undertaken by B. Compare example 2. Under our proposals, an acquirer on first registration is entitled to indemnity rather than to the property.

¹³² Para 7.59.

¹³³ For breach of the Keeper's warranty as to title, see para 7.29.

¹³⁴ 1979 Act s 3(1)(a).

¹³⁵ 1979 Act ss 9(3), 12(1)(b).

¹³⁶ 1979 Act ss 9(1), 12(1)(a).

¹³⁷ Para 7.59.

¹³⁸ Para 7.40.

¹³⁹ 1979 Act s 3(1)(a).

¹⁴⁰ 1979 Act ss 9(3), 12(1)(b).

¹⁴¹ 1979 Act ss 9(1), 12(1)(a).

¹⁴² Paras 5.22–5.30. The prescribed period is likely to be relatively short, for example one year.

¹⁴³ For loss of ownership due to the integrity principle, see para 7.53.

¹⁴⁴ For breach of the Keeper's warranty as to title, see para 7.29.

7.71 **Example 7.** Z is the registered owner of property. By fraudulent misrepresentations A induces Z to sign a disposition in A's favour. A is registered as owner in turn. Later Z obtains a reduction of the disposition.

1979 Act. A becomes owner but the Register, accurate at the time of A's initial registration, becomes inaccurate as a result of the reduction. As A's fraud led to the reduction, and hence the inaccuracy, the Register can be rectified against him.¹⁴⁵ Thus Z can be restored as owner. No indemnity is paid.¹⁴⁶

Our proposals. A becomes owner but ownership is lost with the reduction. The Register is then inaccurate and can be rectified.¹⁴⁷ No indemnity is paid.¹⁴⁸

7.72 **Example 8.** Same as example 7 but, before Z can reduce, A re-sells to B, who is registered as owner. B knows of the original fraud. Hence Z reduces both the disposition in favour of A and the disposition in favour of B.¹⁴⁹

1979 Act. B becomes owner but the Register, accurate at the time of B's initial registration, becomes inaccurate as a result of the reduction. But while the reduction, and hence the inaccuracy, were caused by B's bad faith, the 1979 Act penalises only fraud or carelessness, neither of which appear to have been present.¹⁵⁰ Accordingly, if B is in possession, the Register cannot be rectified and indemnity is paid to Z.¹⁵¹ If B is not in possession, the Register can be rectified and indemnity is paid to B.¹⁵²

Our proposals. B becomes owner but ownership is lost with the reduction. The Register is then inaccurate and can be rectified.¹⁵³ No indemnity is paid.¹⁵⁴

7.73 **Example 9.** Same as example 8 but B is both in good faith and a donee. The fact of donation allows Z to reduce the two dispositions, as before.¹⁵⁵

1979 Act. The result is the same as before. There has been no fraud or carelessness on the part of B. Depending on the state of possession, B either keeps the property or receives indemnity.

Our proposals. The result is also the same as before. As under the general law, B loses the property without receiving indemnity.

7.74 **Example 10.** A, the registered owner of land, seeks a minute of waiver of a real burden. By mistake, the waiver is obtained, not from the owner of the benefited property, but

¹⁴⁵ Even if in possession: 1979 Act s 9(3)(a)(iii).

¹⁴⁶ 1979 Act s 12(3)(n).

¹⁴⁷ First Discussion Paper para 6.18.

¹⁴⁸ Because the Keeper's warranty does not extend to supervening events such as reductions: para 7.38.

¹⁴⁹ If B had been in good faith a reduction would not have been possible as a matter of the general law: see Reid, *Property* para 692.

¹⁵⁰ Para 7.20.

¹⁵¹ 1979 Act ss 9(3), 12(1)(b). It seems an open question whether Z could avoid the restrictions placed on rectification by seeking, not a reduction, but a reconveyance from B. See *Short's Tr v Chung* 1999 SC 471, and G L Gretton and K G C Reid, *Conveyancing* (3rd edn, 2004) para 8-17.

¹⁵² 1979 Act ss 9(1), 12(1)(a).

¹⁵³ First Discussion Paper para 6.18.

¹⁵⁴ Because the Keeper's warranty does not extend to supervening events such as reductions: para 7.38.

¹⁵⁵ Reid, *Property* para 692.

from the owner of other, adjacent property. On the waiver being registered the Keeper deletes the burden.

1979 Act. The burden is duly waived on registration but the Register is inaccurate.¹⁵⁶ Probably A has been "careless" in obtaining a waiver from the wrong person and, arguably, that carelessness has "caused" the inaccuracy.¹⁵⁷ If that is correct, the Register can be rectified by the owner of the benefited property, and no indemnity is paid to A.¹⁵⁸

Our proposals. As the minute of waiver is void, it does not operate to waive the burden on registration. The Register can be rectified by the owner of the benefited property, and no indemnity is paid to A.¹⁵⁹

7.75 Example 11. Same as example 10 but A re-sells to B who is registered as owner. B is in good faith.

1979 Act. The burden was duly waived on the initial registration of the minute of waiver but the Register was, and remains, inaccurate. If B is in possession, the Register cannot be rectified and indemnity is paid to the owner of the benefited property.¹⁶⁰ If B is not in possession, the Register can be rectified and indemnity is paid to B.¹⁶¹

Our proposals. With the transfer to B a transactional error has become a Register error (because, at the time B acquired, the Register omitted the burden). The integrity principle operates to make the waiver good.¹⁶² The Register is therefore accurate. Indemnity is paid to the owner of the benefited property.¹⁶³

7.76 Example 12. In a form B¹⁶⁴ standard security granted to Bank A the granter's signature is forged, unbeknownst to the Bank. The security is duly registered.

1979 Act. On registration Bank A receives a real right in security but the Register is inaccurate and can be rectified.¹⁶⁵ On rectification indemnity is paid to Bank A.¹⁶⁶

Our proposals. Registration does not make a bad security good. The Register is inaccurate and can be rectified. Indemnity is paid to Bank A.¹⁶⁷

¹⁵⁶ 1979 Act s 3(1)(c).

¹⁵⁷ Alternatively it can be argued that, since the Keeper chose to accept the minute of waiver for registration, the inaccuracy was "caused" by the Keeper. See First Discussion Paper para 7.6. If that is correct, the Register could not be rectified if A was in possession.

¹⁵⁸ 1979 Act ss 9(3)(a)(iii), 12(3)(n).

¹⁵⁹ This is because A knew, or ought to have known, that the deed was granted by the wrong person, and hence that the burden was not varied as indicated on the Register. See paras 7.41–7.44.

¹⁶⁰ 1979 Act ss 9(3), 12(1)(b). As a matter of legal policy it is difficult to see why account should be taken of possession in a case such as this.

¹⁶¹ 1979 Act ss 9(1), 12(1)(a).

¹⁶² Paras 5.33–5.44.

¹⁶³ For loss of real burdens due to the integrity principle, see para 7.53.

¹⁶⁴ A form B standard security secures a personal bond contained in a separate deed. A form A security (where the bond is part of the security) would complicate the example because the underlying obligation to pay would itself be invalid.

¹⁶⁵ 1979 Act ss 3(1)(a), 9(1). A heritable creditor is not a proprietor in possession: see *Kaur v Singh* 1999 SC 180.

¹⁶⁶ 1979 Act s 12(1)(a).

¹⁶⁷ For breach of the Keeper's warranty as to title, see para 7.29.

7.77 **Example 13.** Same as example 12 but Bank A assigns the security to Bank B which is registered as its holder. Bank B is in good faith.

1979 Act. The result is the same as before. The security remains valid and the Register inaccurate. On rectification indemnity is paid to Bank B.

Our proposals. The result is also the same as before: although the assignation converts a transactional error into a Register error, the integrity principle does not operate in respect of secondary rights such as a standard security.¹⁶⁸ Thus the security is bad and indemnity payable to Bank B.

¹⁶⁸ Para 5.31.

Part 8 Indemnity (2): Exceptions and Subrogation

Introduction: the six heads of claim

8.1 In part 7 we set out our proposals on grounds of indemnity. Six heads of claim were identified:

- (i) by a person whose right is accepted for registration (an "acquirer") in respect of the Keeper's warranty as to title;¹
- (ii) by a person whose right is accepted for registration (an "acquirer") in respect of the Keeper's warranty as to encumbrances;²
- (iii) by a person (the "true owner") who loses rights by the operation of the integrity principle in favour of an acquirer;³
- (iv) by a person (the "true owner") in whose favour an inaccuracy in the Register is rectified, in respect of any loss arising out of that inaccuracy;⁴
- (v) by a person who suffers loss as a result of errors in reports and other information supplied by the Keeper;⁵ and
- (vi) by a person who suffers loss as a result of the loss or destruction of any document while lodged with the Keeper.⁶

In this and the next part we consider a number of other matters which affect claims for indemnity.

CASES WHERE NO INDEMNITY DUE

Section 12(3)

8.2 In England and Wales the grounds on which indemnity may be claimed admit of only two exceptions – for fraud and carelessness and in respect of mines and minerals.⁷ Both are found in Scotland also, but they are only two exceptions of many listed in section 12(3). As originally enacted, section 12(3) contained 14 separate exceptions. Today there are 19 and

¹ Para 7.29.

² Para 7.47.

³ Para 7.53.

⁴ Para 7.59.

⁵ Para 7.62.

⁶ Para 7.63.

⁷ Land Registration Act 2002 sch 8 paras 2 and 5.

the list continues to grow as new legislation is passed. The Adults with Incapacity (Scotland) Act 2000 is a typical example.

8.3 The Adults with Incapacity Act introduced a new regime for adults with mental health problems. In place of the traditional *curator bonis* the Act provided for the appointment of "intervenor" and "guardians" to act on behalf of adults with incapacity. In view of the risk that an intervenor or guardian might (like any other agent) exceed his powers, or continue to act once those powers had come to an end, the 2000 Act contained a series of provisions designed to protect a person acquiring land in good faith and for value. At the same time the Act amended the 1979 Act by adding a new paragraph (kk) to section 12(3). This prevents a claim for indemnity in respect of loss where "the loss is suffered by an adult within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4) [ie an adult with incapacity] because of the operation of sections 24, 53, 67, 77 or 79 of that Act, or by any person who acquires any right, title or interest from that adult". This example shows the difficulty of the approach adopted by the 1979 Act. Statutory provisions to protect *bona fide* acquirers over owners are common.⁸ If each new provision must be accompanied by a new paragraph in section 12(3), preventing a claim by the former owner, there can be no end to the list of exceptions. As it happens, however, the inclusion of such provisions is based on a misapprehension, discussed in the next paragraph.

The need for inaccuracy

8.4 As previously mentioned, the two main heads of indemnity are found in paragraphs (a) and (b) of section 12(1). They bear repetition here:

"Subject to the provisions of this section, a person who suffers loss as a result of –

(a) a rectification of the register made under section 9 of this Act;

(b) the refusal or omission of the Keeper to make such a rectification;

shall be entitled to be indemnified by the Keeper in respect of that loss."

8.5 Need the Register be inaccurate for a claim to arise? Paragraph (a) of section 12(1) presupposes as much, for rectification under section 9 is possible only in respect of an inaccuracy on the Register. Paragraph (b), however, might be regarded as leaving the position open, for an application for rectification may be refused both because (i) the Register is accurate, or because (ii) although it is inaccurate, the Keeper cannot or will not make the necessary change. A little reflection, however, shows that only a refusal of the second type can fall within paragraph (b), for if a person could claim indemnity in respect of an *accurate* entry in the Register there could be no limit to the number and type of claims, and no policy justification for requiring payment. It would mean that any person could make a claim to any property at any time and, when met with the argument that the person shown as owner is and should be the owner, that the Register is accurate, and that accordingly no rectification is possible, could then claim the value of the property as his "loss". This absurd result is avoided only by confining paragraph (b), like paragraph (a), to cases where the Register is inaccurate.

⁸ See para 8.7.

8.6 If, however, indemnity is payable only where there is inaccuracy, it follows that there is no place, in the list of exceptions in section 12(3), for cases where the Register is accurate. Yet one such case has already been mentioned. Where a guardian conveys land in excess of his powers, a loss may have been incurred by the adult with incapacity.⁹ But it is not a loss brought about by the 1979 Act, for the result would be exactly the same if the disposition had been registered in the Register of Sasines. Rather the loss arises under the general law. It follows that, in showing the disponee as owner in place of the adult with incapacity, the Register is perfectly accurate. It cannot be rectified. Nor can indemnity be claimed under paragraph (b) of section 12(1). The remedy of the adult is against the guardian and not the Keeper. Paragraph (kk) is thus included in section 12(3) in error.

8.7 The point is a larger one. It applies to all cases of *bona fide* acquisition and not merely to acquisition under the Adults with Incapacity Act. Two other such instances are included in section 12(3), equally in error. These are acquisitions from a trustee under section 2 of the Trusts (Scotland) Act 1961, and from an executor under section 17 of the Succession (Scotland) Act 1964.¹⁰ More striking than the inclusions are the omissions. The statute book is replete with cases of *bona fide* acquisition. Some are well-known, such as the protection given to acquirers from companies¹¹ or from heritable creditors exercising a power of sale.¹² Yet apart from the cases already mentioned, all are overlooked by the Act.¹³ Of course, if one of these cases is needed in section 12(3) then all are needed; but the truth is that none is needed for the simple reason that the Register is accurate.

The two senses of inaccuracy

8.8 To this first misapprehension may be added a second. As already seen, the bijural nature of the 1979 Act scheme gives to "inaccuracy" two distinct meanings.¹⁴ The Register is inaccurate where it mis-states the actual legal position, that is to say, the result produced by the law of land registration. That is "actual" inaccuracy. But an entry which is "actually" accurate may be inaccurate "bijurally" if it is incorrect by reference to the underlying (and temporarily suppressed) law of property. So if the person shown on the Register as owner is dead, the Register is "actually" inaccurate. But if the person is alive but acquired title under an *a non domino* disposition, the Register is "actually" accurate (for the person is indeed the owner) but "bijurally" inaccurate (because, under the normal rules of the law of property, no title can pass under such a disposition).¹⁵ Either type of inaccuracy allows rectification; but rectification (or its refusal) causes loss only in the case of bijural inaccuracy. For the case of actual inaccuracy no rights are lost or gained *as a result of rectification*. On the contrary the rights were lost or gained previously and by other means, which is why the Register is inaccurate. Putting the Register right is a matter of administrative convenience and not of substantive right.

⁹ If, however, the land is sold for full value, there is at any rate no financial loss for which indemnity would be needed.

¹⁰ 1979 Act s 12(3)(j)(i). By contrast to the position under the Adults with Incapacity Act, the transfers would (but for the provision) be voidable and not void.

¹¹ Companies Act 1985 s 35A.

¹² Conveyancing (Scotland) Act 1924 s 41(2), as applied to standard securities by the Conveyancing and Feudal Reform (Scotland) Act 1970 s 32.

¹³ Examples of overlooked provisions are: Presumption of Death (Scotland) Act 1977 s 5(5); Family Law (Scotland) Act 1985 s 18(3); Bankruptcy (Scotland) Act 1985 ss 32(6), 34(4), 36(5); Insolvency Act 1986 sch B1 para 59(3), inserted by the Enterprise Act 2002 s 248, sch 16.

¹⁴ Paras 6.1–6.5.

¹⁵ At least in the absence of positive prescription.

8.9 Since section 12(1) is thus confined to bijural inaccuracy there can be no reason for making exceptions for cases of actual inaccuracy. Yet four such exceptions are listed in section 12(3):

- (i) *Paragraph (a): where a contrary title has been acquired by positive prescription.* If the Register shows the previous owner as proprietor, it is inaccurate to that extent and can be rectified.¹⁶ But ownership has been lost whether rectification takes place or not, and was lost by prescription and not by registration of title.
- (ii) *Paragraph (cc): where rights have been lost as a result of the Abolition of Feudal Tenure etc (Scotland) Act 2000 or certain provisions of the Title Conditions (Scotland) Act 2003.* The former abolished the feudal system and hence all superiors' rights. The latter abolished implied rights to enforce real burdens. The reference to the Acts is self-revealing: if the rights in question have *already* been abolished by statute there can be no further loss by correcting matters on the Register.
- (iii) *Paragraph (h): where there is an error or omission in the noting of an overriding interest.* An overriding interest is, roughly speaking, a real right created other than by registration. Since such a right exists independently of the Register, its validity and scope are unaffected by whether, or how, it is referred to there. An inaccurate entry does no harm. Nor does its rectification.¹⁷
- (iv) *Paragraph (k): where an office copy of the land certificate omits or mis-states an inhibition or other entry in the Personal Register.* While the Keeper must enter on the title sheet any subsisting entry in the Personal Register,¹⁸ it is in practice impossible to keep the title sheet up to date in the period between applications for registration. This means that a title sheet inspected between registrations might omit an inhibition or other entry. Yet this would not give rise to a claim for indemnity. An omitted inhibition would be added to the Register by being "entered" under section 6(1) and not by rectification under section 9(1), thus preventing a claim under paragraph (a) of section 12(1).¹⁹ And even if this was treated as rectification no loss would arise, for the legal status of the inhibition is unaffected: an inhibition is constituted by registration in the Personal Register and not by being entered on the Land Register.

8.10 As before the omissions are as striking as the inclusions. Provision is made for rights lost as a result of the abolition of the feudal system but not for rights lost on other grounds such as negative prescription or discharge by the Lands Tribunal. Provision is made for contrary rights acquired by positive prescription on a Land Register title but not for rights

¹⁶ For an example see *Registration of Title Practice Book* para 7.18.

¹⁷ Despite para (h) the *Registration of Title Practice Book* para 7.25 suggests that "[i]ndemnity may, however, be payable where the Keeper has omitted to note, or made an error in noting, the discharge of or freedom from an overriding interest". But it is difficult to see under which paragraph of s 12(1) a claim might lie.

¹⁸ 1979 Act s 6(1)(c).

¹⁹ Nor do the other paragraphs of s 12(1) apply. In particular para (d) does not apply to an omission from the title sheet itself but only to errors of transcription: see para 7.18 above.

acquired by positive prescription on a Sasine title.²⁰ The resulting picture is confusing and confused: bijuralism, it seems, is so complex that its implications are apt to escape even those responsible for its introduction.²¹

Future events

8.11 Bijural inaccuracy. An entry which is accurate when first made may become inaccurate due to later events. Reduction of the deed on which the entry was based is the standard case. The resulting inaccuracy is bijural, so that there will in principle be a claim under section 12(1). If the inaccuracy is duly rectified, the claim is under paragraph (a); if rectification is refused, the claim is under paragraph (b). Both require further consideration.

8.12 Section 12(1)(a). As already noted, section 12(1)(a) places no limit as to time.²² The Keeper warrants not only that the acquirer became owner on registration but that he will remain owner until such time as ownership is voluntarily ceded to someone else. But having thus given too much in section 12(1)(a) it becomes necessary to draw it back in section 12(3). This is done by excluding all the cases which it was possible to identify in which a registered title might come to be set aside. Five such cases are listed in section 12(3):

- *paragraph (a)*: right defeated by prescriptive acquisition by another;²³
- *paragraph (b)*: reduction as gratuitous alienation or fraudulent preference or as avoidance transactions in the law of husband and wife;
- *paragraph (c)*: right set aside following the variation or recall of a declarator of death;²⁴
- *paragraph (j)(ii)*: reduction of transfers by trustees;
- *paragraph (p)*: judicial rectification of deeds.

As before the list is incomplete. In particular it omits the numerous cases in which reduction is competent at common law.

8.13 Section 12(1)(b). Four of the five cases just listed are needed also for the purposes of section 12(1)(b).²⁵ For if the person whose right is set aside is a proprietor in possession and was not fraudulent or careless, rectification is generally impossible and the person who is prejudiced by the inaccuracy is, in principle, entitled to indemnity.²⁶

8.14 Our proposals. Our proposals dispense with the need for these exceptions. With the abandonment of bijuralism, all inaccuracies are "actual" and not "bijural", and rectification is always possible. Section 12(1)(b) can thus be repealed without direct replacement.²⁷ As for

²⁰ Take for example the following. A owns land on a Sasine title. He disposes to B. The transaction induces a first registration so that B is registered in the Land Register without exclusion of indemnity. Nonetheless A continues in possession with the result that, after 10 years, ownership is reacquired.

²¹ For the difficulties with bijuralism, and the proposal that it be abandoned, see First Discussion Paper, part 5.

²² Para 7.11.

²³ In fact this exception is unnecessary since it concerns an "actual" inaccuracy: see para 8.8 above.

²⁴ Presumption of Death (Scotland) Act 1977 s 5(2). The exception is necessary only if the court orders reduction of a deed or, directly, rectification of the Register. An order for a reconveyance would not attract indemnity under s 12(1).

²⁵ The exception is s 12(3)(p). This is because effect can be given to a rectified document even where this prejudices a proprietor in possession: see s 9(3)(b).

²⁶ For an example, see *Registration of Title Practice Book* para 7.20.

²⁷ A functional replacement is entitlement to indemnity for loss due to the integrity principle: see paras 7.52–7.54.

section 12(1)(a), its equivalent under our proposals, the Keeper's warranty as to title, does not extend to future events.²⁸

Proposals for reform

8.15 Those exceptions in section 12(3) which are unnecessary under the present law are, equally, unnecessary under the law which we propose.²⁹ In addition, the proposed new law would remove the need for those exceptions which are concerned with future events.³⁰ Of the ten exceptions which would then remain, three involve real burdens and servitudes³¹ and may be left over until our third discussion paper. Elsewhere we have proposed the retention of two others, the exceptions for fraud and carelessness (albeit usually reformulated to encompass bad faith) and for minerals.³² The exception in respect of the content of notices of potential liability for costs³³ can be dispensed with as not affecting real rights.³⁴ The remaining exceptions are concerned with the way in which entries are made in the Register, and prevent indemnity being paid for loss in respect of³⁵ –

- (i) an inaccuracy in the delineation of boundaries which could not have been rectified by reference to the ordnance map;
- (ii) a failure to enter the area of land, or a mistake in that area;
- (iii) a failure to enter, in the title sheet of the landlord's interest, more than the bare details of a long lease;
- (iv) a mistake as to the amount due under a heritable security.

8.16 These may be dealt with shortly. The first exception reflects limits of scaling and needs to be retained.³⁶

8.17 The requirement to enter the area (exception (ii)) applies only for land extending to two hectares or more.³⁷ It seems not only unnecessary but also potentially confusing in the event that area and boundaries do not coincide. If the requirement were to be dropped, the exception would fall with it.

8.18 The third exception can likewise be dispensed with. Unlike the position in respect of area, there is no statutory requirement to enter particular information about leases. The entry normally made in respect of another prominent real right, the standard security, is extremely brief yet is not thought to be a ground for excepting indemnity.³⁸ The same is true for an entry in respect of the real right of lease.

²⁸ Para 7.38.

²⁹ Paras 8.4–8.10

³⁰ Paras 8.11–8.14.

³¹ 1979 Act s 12(3) (g), (gg), (l).

³² Respectively paras 7.19–7.21, 7.41–7.44, 7.56–7.58, and para 7.46.

³³ 1979 Act s 12(3)(q).

³⁴ Para 7.9. Under our proposals, indemnity would not extend to mere notices, thus there is no need for specific exceptions.

³⁵ 1979 Act s 12(3)(d), (e), (m), (o).

³⁶ See further *Registration of Title Practice Book* para 7.21.

³⁷ 1979 Act s 6(1)(a).

³⁸ Para 2.4.

8.19 The fourth exception also falls. Since, under our scheme, the Keeper's warranty is confined to real rights, it would not extend to the amount from time to time due under a heritable security, which is a matter of contract between the creditor and debtor.

8.20 We now draw the discussion together. Of the 19 exceptions currently in section 12(3), only three need be carried forward into the new scheme.³⁹ This can be expressed in the proposal that:

- 34. Indemnity should be paid in accordance with proposals 25 - 33 except –**
- (a) in the circumstances mentioned in proposals 25(4), 26(b) and 29 (claimant in bad faith or fraudulent or careless);**
 - (b) in the circumstances mentioned in proposal 25(6) (claim in respect of minerals); and**
 - (c) in respect of an error in the delineation of boundaries which could not have been corrected by reference to the Ordnance Map.**

8.21 Three comments may be added. First, in all cases other than the first, the exception is applicable only to the Keeper's warranty as to title and not to other causes of indemnity. Secondly, not only is the list much shorter than in the 1979 Act but it is complete and should not require to be augmented in response to new legislation. Finally, the list is in line with that found in the legislation for England and Wales.⁴⁰

RECOURSE AGAINST OTHERS

Current law

8.22 If there is a ground for indemnity, an immediate claim can be made against the Keeper. There is no requirement, at least in the normal case,⁴¹ that the claimant first exhaust such remedies as he may have against other parties. Indemnity operates on the basis of what Ruoff has described as the "insurance principle":⁴² when the event insured against occurs the insurer pays out, and it is for the insurer, subrogated to the rights of the claimant, to consider whether a remedy might lie against a third party. Subrogation is expressly provided for by section 13:

"(2) On settlement of any claim to indemnity under the said section 12, the Keeper shall be subrogated to all rights which would have been available to the claimant to recover the loss indemnified.

(3) The Keeper may require a claimant, as a condition of payment of his claim, to grant, at the Keeper's expense, a formal assignation to the Keeper of the rights mentioned in subsection (2) above."

³⁹ But this is subject to our proposals on real burdens and servitudes in the third discussion paper.

⁴⁰ Land Registration Act 2002 sch 8 paras 2 and 5. See para 8.2 above. The third exception, however, is unknown in England and Wales owing to the general boundaries rule.

⁴¹ But see paras 8.26–8.28.

⁴² First Discussion Paper para 1.14.

We understand that the Keeper pursues third parties on the basis of subrogation in appropriate cases.

Exhaustion of remedies: transactional error

8.23 A possible criticism of the present law is a failure to distinguish between (i) claims by the true owner for loss of property to an acquirer and (ii) claims by an acquirer.⁴³ True owners, it may be accepted, are the passive victims of registration of title and should be compensated without question. Acquirers, however, may be in a different position. An acquirer can be affected either by Register error or by transactional error. The former is the province of the Keeper and, quite rightly, results in an immediate claim for indemnity. But transactional error is not an error in the registration process and, on one view, should not be covered by indemnity at all – a view considered but rejected in the first discussion paper.⁴⁴ It would be possible to provide a less favourable regime for transactional error than for Register error. After all, an acquirer is, or should be, in control of his own transaction. And if things go wrong there are likely to be other parties whom he could pursue: the disponent on the basis of warrandice, or his own solicitor for professional negligence or, in the case of forgery, the person responsible for the fraud. Should the acquirer not have to pursue these claims before making a claim against the Keeper? The indemnity fund would then be a last resort, available only where other remedies had failed.

8.24 As adapted to our scheme this suggestion would prevent a claim on the Keeper's warranty as to title or encumbrances until the claimant had pursued all other remedies which were reasonably available. The proposal has obvious attractions. But there are also weighty arguments against it. First, it is inefficient. Usually it is the Keeper who is in the better position – who has the time and the resources – to make a claim against a third party. Secondly, the difficulties facing an individual litigant should not be underestimated. Litigation involves expense, delay and uncertainty. Each may present an insuperable practical and psychological barrier to a person who, in many cases, has just lost his only significant asset. The experience in New South Wales was that "[s]ome claimants become so frustrated with litigation that they decide to bear the loss themselves".⁴⁵ Thirdly, the proposal is at odds with consumer expectations. In registering a deed a person does not expect to be buying litigation. On the contrary, registration of title is designed to produce both facility of transfer and certainty of title.⁴⁶ Fourthly, the proposed change would, for the consumer, be a change for the worse. It would be a move from a system of insurance to a system where indemnity was a fund of last resort. Consumers in Scotland would be less well protected than those in England and Wales, where the insurance principle has recently been reaffirmed by legislation.⁴⁷ Finally, it should be recalled that indemnity is not free but is paid for by a (hidden) premium in the fee for registration. In return the consumer is entitled to a reasonable degree of protection. It may be questioned whether he would favour lower protection even if this meant (slightly) lower fees.

8.25 In the light of these arguments our preliminary view is in favour of the *status quo*. We propose therefore that:

⁴³ Respectively heads of claim (iii) and (i)/(ii): see para 8.1.

⁴⁴ First Discussion Paper paras 3.21–3.34.

⁴⁵ New South Wales Law Reform Commission, Issues Paper on *Torrens Title: Compensation for Loss* (IP No 6, 1989) para 2.11.

⁴⁶ First Discussion Paper para 4.4.

⁴⁷ Land Registration Act 2002 sch 8.

35. There should continue to be no requirement that a person exhausts other remedies before making a claim to the Keeper for indemnity.

That, however, leaves open the question of the effect of bad faith and professional negligence.

Bad faith and professional negligence

8.26 As currently framed, our scheme does not allow a claim under the Keeper's warranty as to title if, at the time of registration, the acquirer knew, or ought to have known, that the right was not acquired.⁴⁸ The present law is broadly to the same effect although the concept used is fraud and carelessness.⁴⁹ The implications for indemnity have not been sufficiently noticed. Suppose, for example, that a disposition is void due to the negligence of the acquirer's solicitor. Potentially the acquirer has a claim for indemnity; but since the actings of the agent are also the actings of the principal,⁵⁰ the acquirer (like his solicitor) "ought to have known" of the invalidity in the disposition. Hence no indemnity is due. Instead the acquirer must claim from his solicitor. This comes close to a rule of exhaustion of remedies. If the solicitor is negligent, the acquirer is fixed with constructive knowledge of the defect and must recover from the solicitor, who is protected by professional indemnity insurance. If, however, the solicitor is not negligent, there is no constructive knowledge and a claim may instead be made against the Keeper.⁵¹ Not only acquirers are affected. A true owner might lose property due to the negligence of his solicitor, for example in conveying too much to the acquirer. Once again his claim would lie against the solicitor and not against the Keeper.

8.27 Is this result satisfactory? Plainly it suffers from some of the difficulties, already described,⁵² of a rule of exhaustion of remedies. In particular the claimant must form a view as to the conduct of his solicitor and, depending on that view, pursue a claim (perhaps unsuccessfully). But there are things to be said in its favour. The claimant chose the solicitor. The solicitor is fully insured. If the solicitor acted negligently it may not be unreasonable that the inconvenience of a claim should lie with the person who engaged him and not with the Keeper. It is of interest to note that in New South Wales, which has recently moved from a rule of exhaustion of remedies to a rule allowing immediate claims for indemnity, indemnity is nonetheless excluded⁵³ –

"to the extent to which the loss or damage:

(i) is a consequence of any fraudulent, wilful or negligent act or omission by any solicitor, licensed conveyancer or real estate agent, and

(ii) is compensable under an indemnity given by a professional indemnity insurer."

8.28 In Scotland this result could be avoided by a rule which declined to attribute to a claimant the knowledge (and carelessness) of his solicitor. The claimant could then recover

⁴⁸ Paras 7.41–7.44. Good faith is also necessary in respect of the Keeper's warranty as to encumbrances: see para 7.47.

⁴⁹ 1979 Act s 12(3)(n).

⁵⁰ See eg *Prestige Properties Ltd v Scottish Provident Institution* [2003] Ch 1, para 58 (a land registration case involving a claim for indemnity).

⁵¹ First Discussion Paper para 7.14.

⁵² Para 8.24.

⁵³ Real Property Act 1900 s 129(2)(b), inserted by the Real Property Amendment (Compensation) Act 2000 s 3, sch 1 para 12.

from the Keeper allowing the Keeper to recover in turn from the solicitor. We express no opinion as to whether such a rule is desirable, and simply ask consultees:

36. For the purposes of a claim for indemnity, should the knowledge and conduct of the claimant's solicitor cease to be treated as the knowledge and conduct of the claimant?

Beyond subrogation

8.29 There is subrogation in England and Wales as in Scotland. But in two respects the English legislation goes further. First, the registrar can recover the amount paid in indemnity "from any person who caused or substantially contributed to the loss by his fraud".⁵⁴ This is a direct right of action and not merely a right deriving from the claimant. The provision dates from the Act of 1925⁵⁵ and was included in the recommendations of the Henry Committee.⁵⁶ Its omission from the 1979 Act is presumably because it was thought to be unnecessary. We tend to agree. As originally enacted the 1925 Act did not make proper provision for subrogation but gave the registrar specific rights in respects of fraud and of covenants of title.⁵⁷ Once full subrogation was introduced by amendment in 1997,⁵⁸ a separate provision for fraud may have ceased to be necessary. This is because any fraud which caused the loss would be actionable by the claimant and hence available to the registrar under the principle of subrogation.⁵⁹ Nonetheless, as has been seen, the fraud provision has survived in the 2002 Act. We do not think that it is needed in the legislation for Scotland.

8.30 Secondly, the English legislation subrogates the registrar to the rights, not only of the claimant, but of the person who gained the property at the claimant's expense. The provision dates from 1997 and followed a recommendation of the Law Commission.⁶⁰ As re-stated in the 2002 Act⁶¹ it is to the effect that, where the Register has been rectified, the registrar can enforce

"any right of action (of whatever nature and however arising) which the person in whose favour the register has been rectified would have been entitled to enforce had it not been rectified".

8.31 This provision can be made to work in a positive system of land registration where the true owner loses title on the registration of the acquirer and recovers it only when the Register is rectified. Under the negative system which we propose, however, there would be no initial loss and no right of action. The provision could not readily be adapted for such a system. The closest equivalent under our scheme would be a rule directed at the intermediate party in a case where title is ultimately perfected by the integrity principle. Thus suppose that A seeks to acquire land owned by Z. A disposition is executed by Z in A's

⁵⁴ Land Registration Act 2002 sch 8 para 10(1)(a).

⁵⁵ Land Registration Act 1925 s 83(9).

⁵⁶ Henry Report part I para 48(h).

⁵⁷ Land Registration Act 1925 s 83(9), (10).

⁵⁸ Land Registration Act 1997 s 2, substituting a new s 83(10)(b)(i) in the 1925 Act. This implemented a recommendation of the Law Commission: see *Third Report on Land Registration* (Law Com No 158, 1987) para 3.33.

⁵⁹ See examples 1.1 and 1.2 in Ruoff and Roper, *Registered Conveyancing* paras 47.022–47.024.

⁶⁰ Law Commission and H M Land Registry, *Transfer of Land: Land Registration* (Law Com No 235, 1995) para 4.10. The provision was contained in a new s 83(10)(b)(ii) which was added to the Land Registration Act 1925 by the Land Registration Act 1997 s 2.

⁶¹ Land Registration Act 2002 sch 8 para 10(2)(b).

favour and duly registered, but it is void due to Z's lack of capacity. At this stage Z is still owner and not A; and A potentially has a claim against his solicitor for negligence. Suppose further that A now sells to B. B is in good faith and so becomes owner under the integrity principle. Z then claims indemnity from the Keeper. The Keeper is subrogated to Z's rights, but Z has no claim against A's solicitor and A's own claim has been extinguished by the contingency of his successful sale to B. It would be possible to provide that the Keeper is to have the claim to which A would have been entitled if the sale had not taken place. We are not, however, attracted by this suggestion. The provision would be complex to draft and difficult to apply; it might operate in ways which were unexpected and unwelcome; and it would bring little actual benefit to the Keeper. Subject to the views of consultees we are not inclined to take the idea further.

Part 9 Indemnity (3): Quantum

THE PRINCIPAL LOSS

Introduction

9.1 Indemnity should cover that loss which was sustained by the claimant, no more and no less. Naturally the loss "must be demonstrable, real and actual, as opposed to hypothetical or speculative";¹ and it must arise directly out of the head of claim in question.² Behind these simple principles, however, lie a number of difficulties.

Basis of valuation

9.2 Often the claim will be in respect of the loss of property. Under our proposals that will be so where:

- ownership or another real right is extinguished by the integrity principle.³ For example: by mistake A is registered as owner of land belonging to Z; A disposes to B, a *bona fide* acquirer, who is registered as owner in turn. The integrity principle extinguishes the ownership of Z and confers ownership on B. Z has a claim for the loss of the land.
- an acquirer is evicted and makes a claim under the Keeper's warranty of title.⁴ For example: A forges Z's signature on a disposition ostensibly from Z to B. B registers. Z discovers about the forgery and "evicts" B by asserting his title to the land. Since the Keeper warrants that B became owner on registration, B has a claim for the loss of the land.

9.3 If the whole of a property is lost, the value of the loss is the value of the property. But where part only of the property is affected – where, for example, an acquirer has good title to the house but not to a section of garden – the loss could be expressed either as the cost of putting things right (ie acquiring the ground in question) or as the resultant diminution in the value of the whole.⁵ The same is true where, in breach of the Keeper's warranty as to encumbrances, the property is encumbered by a right not disclosed on the Register.⁶ Normally diminution in value will be the appropriate expression of loss. Indeed this is made explicit in the draft legislation prepared for the provinces and territories of Canada:⁷

¹ *Registration of Title Practice Book* para 7.11.

² For the 6 heads of claim under our proposals, see para 8.1.

³ Para 7.53.

⁴ Para 7.29.

⁵ *Palmer v Beck* 1993 SLT 485, 491I–J *per* Lord Kirkwood (warrandice claim).

⁶ *Welsh v Russell* (1894) 21 R 769, 773 *per* Lord McLaren (warrandice claim). Sometimes, eg with standard securities, this may be the same as the cost of procuring the removal of the encumbrance.

⁷ Joint Land Titles Committee, *Renovating the Foundation* p 124 (s 7.2). The Committee's recommendations were made on behalf of Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan, and Yukon.

"The compensation shall be,

(a) if a person is deprived of an interest, the value of the interest, or

(b) if the priority of an interest of a person is subordinated, the reduction in value of the interest ..."

Date of valuation

9.4 It is necessary to decide the date at which the property is to be valued. In *Kaur v Singh (No 2)* the pursuer initially identified five possible dates before settling on the date on which the loss actually occurred.⁸ A subsequent decision ties valuation to the date of rectification, or its refusal.⁹ Our proposals, however, sever the link between indemnity and rectification, so that the effective choice is between the date on which the loss occurred and the date on which the claim for indemnity is made. In the examples given above¹⁰ the loss occurred when B was registered as owner (first example) and when B was evicted by Z (second example).¹¹

Interest

9.5 The 1979 Act makes no provision for interest although we understand that interest is sometimes paid in practice. The position in England and Wales was the same until 2002, but legislation now provides for interest on indemnity claims.¹² In our recent discussion paper on *Interest on Debt and Damages*¹³ we proposed that interest should usually run on pecuniary claims – a principle which, if accepted, would extend to claims for indemnity. The rate would be a specified percentage above a base rate such as that of the Bank of England.¹⁴ Our discussion paper proposed that interest on damages should run from the date of the loss while interest on insurance or indemnity contracts should run from the date of the claim (or shortly thereafter).¹⁵ It will be seen that these are the two dates already identified for the purposes of valuation, and it seems desirable, and perhaps even necessary, that the dates for valuation and for interest should coincide.

Two models

9.6 From the discussion so far there seem to be two main models for the payment of indemnity. On one ("model A") the property would be valued, and interest would run, from the date of the loss. On the other ("model B") valuation and interest would be tied to the date of the claim. The legislation in England and Wales adopts model A. The legislation proposed for the provinces and territories of Canada adopts model B.¹⁶

⁸ Ie the date on which the inaccurate entry was made on the Register, resulting in the pursuer's loss of ownership. See 2000 SLT 1323, 1325D–E *per* Lord Macfadyen.

⁹ *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271. Some of the difficulties of this approach are explored at paras 7.14 ff.

¹⁰ Para 9.2.

¹¹ Para 7.49.

¹² Land Registration Act 2002 sch 8 para 9; Land Registration Rules 2003 (SI 2003/1417) r 195.

¹³ Scot Law Com DP No 127, 2005.

¹⁴ Scot Law Com DP No 127 para 7.21. In part 8 of the paper we consider whether compound interest should be payable.

¹⁵ Paras 4.29 and 5.7. For indemnity contracts our precise proposal was to give the debtor 30 days of grace to investigate the claim before interest began to run.

¹⁶ See in particular s 7.2 of the proposed legislation. See further Joint Land Titles Committee, *Renovating the Foundation* pp 31 and 124.

9.7 Each model has points in its favour. There is an obvious attraction in valuing a loss at the time when it occurs; for to choose a later date is to expose the valuation process to the chance of subsequent events – to the rise and fall of land values, to the release of development value by the grant of planning permission, to the erection of buildings and other improvements, and to the imposition of or release from encumbrances such as leases or securities. We return to the issue of improvements below. Once the valuation is fixed under model A, interest provides a straightforward means of accounting for the period between time of loss and time of payment.

9.8 If, however, property prices are rising rapidly, even the payment of interest may not be sufficient to raise the compensation amount to the value of the property at the time of the claim.¹⁷ For cases like this model B may seem fairer. The claimant is then paid the cost in current money of replacing that which has been lost.

9.9 Neither model could be used without qualification. In the version of model A adopted in England and Wales, interest is not payable for any period during which the claim was not pursued with due diligence.¹⁸ Nor should interest be due for as long as the claimant remained in possession, for enjoyment of the fruits of the land must exclude payment of the fruits of its surrogatum.

9.10 Model B, while allowing for capital appreciation, makes insufficient allowance for lost income. The claimant is paid interest from the date of the claim until the date of payment, but receives nothing for the period before the claim is made. If model B were applied to the facts of *M R S Hamilton Ltd v Keeper of the Registers of Scotland*¹⁹ it would give the claimant the capitalised value of future claims of leasehold casualties but not the income from any casualties due between the date of the loss and the date of the claim. That case, rather unusually, concerned a claim for loss of an income stream, but claims for lost income can arise equally in respect of capital assets. So if ownership is lost in 2008 and a claim for indemnity is made only in 2011 a question may arise as to the income from the land during the three intervening years. There is no difficulty, of course, if the claimant has remained in possession: then he has had the fruits of the land and is due nothing more. The position is the same if the possession was civil rather than natural – if the land was leased, in other words – so that the claimant received the rent. But what if the claimant was not in possession – or if, having been in possession, the fruits of that possession are now claimed by the new owner on the basis of unjustified enrichment?²⁰ In the second case, at least, it is difficult to see why the loss – direct and pecuniary as it is – should not be recoverable in full. But if loss is recoverable in the second case it seems that it must be recoverable in the first case as well. This raises issues of consequential loss which are considered more fully below.²¹

¹⁷ The adoption of model A in England and Wales has been criticised on this basis. See eg E Cooke, *The New Law of Land Registration* (2003) p 131.

¹⁸ Land Registration Rules 2003 (SI 2003/1417) r 195(2).

¹⁹ 2000 SC 271. For a discussion see paras 7.14 ff.

²⁰ Reid, *Property* para 168. For as long as the claimant was in good faith, however, nothing would be due: see para 171.

²¹ Paras 9.21 ff.

9.11 Of the two models, model A is the simpler and the more predictable in its outcome. It has our provisional support. The choice is perhaps unimportant in relation to the second of the examples given above (eviction of acquirer),²² for a claim will usually follow on shortly from eviction (the date of the loss). In cases falling within the first example (loss by true owner), however, the potential claimant may not become aware of the loss for months or even years after it has occurred with the result that the gap between loss and claim may often be substantial.

Improvements

9.12 In valuing land for the purposes of indemnity it would seem necessary to discount improvements carried out by others.²³ So if – in the first of the examples given above²⁴ – the new owner (B) builds a shopping centre on land which was formerly in agricultural use, the person from whom ownership was taken (Z) should receive compensation based only on its unimproved state. The position would, however, be different if the improvements had been carried out by Z or on his instructions, or by a tenant or other person deriving title from Z. The later the date fixed for valuation the more likely the issue of improvements is to arise. That means that improvements would occur more frequently under model B than under model A. But it is easy to imagine how they might arise under model A also. Thus in the example just given the improvements might have been carried out by the first acquirer to register (A) and not by his successor (B). In that case they would pre-date Z's loss (and the resulting valuation) for, under our proposals, it is only the second disposition, to B, which divests Z of ownership.

9.13 Drawing together the discussion in the previous paragraphs we propose that:

37. In the calculation of indemnity –

- (a) any property the loss of which is to be indemnified should be valued as at the date of the loss;**
- (b) in valuing such property no account should be taken of improvements other than improvements carried out by or on behalf of –**
 - (i) the claimant, or**
 - (ii) a person deriving title from the claimant;**
- (c) in all cases of indemnity, interest should be paid from the date of the loss.**

²² Para 9.2.

²³ For a recent statutory example of the technique, see Title Conditions (Scotland) Act 2003 s 86 (valuations for the purposes of the School Sites Act 1841). The problems of allowing improvements are discussed by Professor A J McDonald in "Rectification and Indemnity in the Land Register" (2002) 56 *Greens Property Law Bulletin* 1, 2 ff.

²⁴ Para 9.2.

Incidental benefit

9.14 In 2000²⁵ the legislation on land registration in New South Wales was amended to exclude payment of compensation to any person –

"to the extent to which the loss or damage has been offset by some other benefit to that person that has arisen from substantially the same circumstances as those from which the loss or damage has arisen."²⁶

Apparently the target is incidental benefit; for if a benefit were to arise directly out of the event in respect of which the claim is being made it would already have the effect of reducing the loss and no special provision would be needed.²⁷ In Scotland the issue of incidental benefit was raised sharply by the decision in *Kaur v Singh (No 2)*.²⁸

9.15 The facts in brief were these. Mr and Mrs Kaur owned a flat in common. The purchase was financed by a loan from the Woolwich Building Society secured by a standard security. Without his wife's consent Mr Kaur sold the flat to a Mr Singh. In the disposition, which was registered on 8 March 1996, Mrs Kaur's signature was forged. Immediately before, on 7 March, Mr Kaur repaid the loan from the Woolwich and obtained a discharge of the standard security. Following these events the Register was, of course, inaccurate in showing Mr Singh as the owner of Mrs Kaur's one half share; but Mr Singh was a proprietor in possession in good faith so that the Register could not be rectified against him. Mrs Kaur claimed indemnity under section 12(1)(b) (refusal to rectify). The question was how much she should be paid. The flat was worth £51,000 and the outstanding loan repaid by Mr Kaur amounted to approximately £41,000. Mrs Kaur claimed £25,500, being one half of the value of the flat. The Keeper argued that the loan must first be deducted with the result that only £5,000 was due. His reasoning was simple. Before her husband's transaction Mrs Kaur had held an asset of £25,500 subject to a heritable debt of £20,500. If the facts were looked at as a whole, therefore, her loss was £5,000 and not £25,500. To pay more would be to repay her loan at the public expense. This argument failed, as it was almost bound to do so given the terms of the legislation. Section 12(1)(b) indemnifies the Keeper's refusal to rectify, and had the Keeper rectified on 8 March Mrs Kaur would have received a share in the flat unencumbered by debt and worth £25,500. Hence that was the amount of her loss.

9.16 This case raises difficult issues. For example, it should not be assumed that Mrs Kaur finished up £20,500 the richer. It is true that the loan was repaid as part of the transaction; but, having paid the whole of a loan for which both spouses were liable, Mr Kaur would have a right of relief against his wife for her share. So Mrs Kaur continued to owe £20,500. It was merely the creditor that had changed. Admittedly the new creditor was likely to be benign: the fraudulent Mr Kaur was unlikely to pursue repayment with the vigour which might have been expected of the Woolwich. In a practical sense there might well be a windfall benefit. But in law Mrs Kaur still had an asset (now in pecuniary form) of £25,500 and a liability of £20,500.

²⁵ Real Property Act 1900 s 129(2)(d), inserted by the Real Property Amendment (Compensation) Act 2000 s 3, sch 1 para 12.

²⁶ In similar vein s 7.2(2) of the legislation proposed for Alberta provides that in determining the value of property "the Court may take into account any benefit received" by the claimant. See Alberta Law Reform Institute, *Land Recording and Registration Act* vol 1 p 155.

²⁷ For a discussion in the context of delict, see W J Stewart, *Delict* (4th edn, 2004) para 26-5.

²⁸ 2000 SLT 1323.

9.17 The main issue, however, is one of legal policy. In calculating loss for the purposes of indemnity should account be taken of incidental benefit? Should, in other words, the new legislation in Scotland have a provision along the lines of the legislation in New South Wales? The argument in favour of such a provision is that an indemnity fund, and especially a public one, should pay no more than is actually lost, and that in calculating loss a broad or "commonsense" approach should be adopted.

9.18 There are arguments which may point the other way. Suppose that Mr Singh had been out of possession (as indeed at one stage he was)²⁹ with the result that Mrs Kaur had succeeded in her application for rectification.³⁰ She would then have had the half share in the house untrammelled by the heritable debt. This is because the security was properly discharged – because, in other words, the Register was inaccurate only in respect of the half share attributed to Mr Singh. It is not clear that indemnity for non-rectification should produce a different economic result.³¹ In a broad sense the discharge and the disposition may be part of the same transaction; but in legal analysis they are a long way apart. A valid discharge does not invoke any special rules of land registration. It is not a matter for indemnity, or, one might argue, for its restriction. It is a normal registration event, quite remote from a case involving forgery. The point is of course a wider one. If a benefit is incidental it is also likely to be remote from the event giving rise to the claim for indemnity. That is an argument for discounting it.

9.19 This first argument leads on to a second. Remote *losses*, it may be argued, should be treated in the same way as remote gains.³² Either both should be counted or neither. The trouble with the New South Wales provision is that it counts the gains but not the losses. Again the facts of *Kaur v Singh* are of assistance. Suppose that Mr Kaur had forged the discharge as well as the disposition. Shorn of their security, the Woolwich would presumably have sought to recover the full amount of the loan from Mrs Kaur.³³ And in paying her husband's share as well as her own she would have suffered an incidental loss of £20,500 – the mirror image of the incidental gain that actually occurred.³⁴ It seems plain that such a loss is not – and should not be – recoverable from the Keeper. It is simply irrelevant. It is arguable that the same should be true of the incidental gain.

9.20 At this stage we make no choice between these competing arguments and merely ask:

38. In the calculation of indemnity should the amount payable in respect of loss be offset by the amount of any incidental gain?

²⁹ See the case at an earlier stage: 1999 SC 180.

³⁰ That would be the result under our proposals regardless of the state of possession, for the forgery is only a transactional error and ownership would have remained all along with Mrs Kaur.

³¹ That, indeed, was the reasoning adopted by the court. For example Lord Macfadyen 2000 SLT 1323, 1327J: "I have reached the conclusion that the loss which the pursuer suffered as a result of the Keeper's refusal to rectify the inaccuracy in the register falls to be measured by reference to the difference between what she now has and what she would have had if rectification had been granted".

³² For remoteness in the context of losses, see para 9.31.

³³ If Mrs Kaur did not or could not pay, the Woolwich would receive indemnity from the Keeper under s 12(1)(b) (ie refusal to restore the standard security). The Keeper would then be subrogated to the Woolwich's claim against Mrs Kaur.

³⁴ And of course, as with the actual facts, there would in theory be a right of relief, so that Mrs Kaur could recover her loss from her fraudulent husband.

CONSEQUENTIAL LOSS

Introduction

9.21 An initial distinction may be made between (i) indemnity for loss of property³⁵ and (ii) other cases of indemnity such as for the omission of an inhibition or standard security in a report.³⁶ In the first case, but not usually in the second, there is a clear separation between the initial loss (of the property) and further losses which are consequential on that initial loss. It is with such consequential loss that this section is primarily concerned.

Should consequential loss be recoverable at all?

9.22 The model legislation produced for Canada excludes consequential loss: the claimant is entitled to the value of the property lost and to nothing more.³⁷ The rule was the same in England and Wales until the new legislation of 2002,³⁸ but consequential loss is now recoverable.³⁹ In Scotland consequential loss has always been recoverable.⁴⁰ As the Henry Report explains, this was a matter of deliberate choice:⁴¹

"We do not favour limitation on the amount of indemnity imposed by section 83(6) of the 1925 Act [ie the restriction in England and Wales]. If a person has suffered loss he should be indemnified against whatever that loss may be, apart from the cost of legal proceedings taken without the consent of the Keeper in so far as such proceedings were not necessary to vindicate his claim. Our reasons are (a) that under the existing law the true owner of lands is entitled to recover his lands, apart from a prescriptive title operating against him whereas under registration of title the Register may or may not be rectified and the true owner may or may not recover his lands, (b) where the Register is not rectified in England the amount of the loss appears to be unfairly limited ... Our proposals are wider and will include all consequential loss, as may be determined in the last analysis by the Court."

Today it seems less self-evident that the state should make good the losses of its citizens. But in any event the extent of compensation promised may seem incautious or even profligate. For if the case law on compensation for compulsory purchase is any guide, consequential loss may be far-reaching both in scope and in amount.⁴² On this view, an acquirer wanting protection against, say, interruption of business, could obtain private insurance. The state need do no more than pay the value of the property lost.

9.23 For a number of reasons, however, we favour the *status quo*. In the first place, to offer the citizen less protection in the future than exists at present seems unattractive and is likely to be unwelcome. And it would seem odd for protection to be withdrawn in Scotland at much the same time as it has been introduced in England. Secondly, we agree with the

³⁵ Including, in the case of the Keeper's warranty as to title, eviction due to the absence of property rights.

³⁶ Of the six heads of claim identified in para 8.1, only heads (i)-(iii) are likely to involve the loss of property.

³⁷ Joint Land Titles Committee, *Renovating the Foundation* pp 31 and 124 (s 7.2).

³⁸ Compare Land Registration Act 2002 sch 8 para 6 with the Land Registration Act 1925 s 83(6) (as originally enacted) and the identical s 83(8) (as substituted by the Land Registration Act 1997 s 2).

³⁹ Law Com No 271 paras 10.41 and 10.43(1).

⁴⁰ Not expressly under the 1979 Act but because, unlike in some other jurisdictions, it is not excluded.

⁴¹ Henry Report part I para 48 n 3.

⁴² See J Rowan-Robinson, *Compulsory Purchase and Compensation: The Law in Scotland* (2nd edn, 2003) ch 10. In compulsory purchase consequential loss has traditionally been known as compensation for disturbance. The Law Commission has recently proposed the use of the term consequential loss: see Report on *Towards a Compulsory Purchase Code: (1) Compensation* (Law Com No 286, 2003) paras 4.4 and 4.5.

Henry Committee that the true owner, at least, must be properly compensated for his loss. For such a person registration of title operates as a kind of private compulsory purchase. He should not be less favourably treated than if his property had been taken for a road or some other public purpose. Thirdly, we understand that experience in operating a system of consequential loss has not, on the whole, given rise to difficulties.⁴³ Finally, to offer less than full compensation is to put the curtain principle at risk. As the *Registration of Title Practice Book* points out,⁴⁴ the public at present "can rely on the register in the knowledge that, if loss is suffered as a result of that reliance, the loss will attract indemnity". If indemnity is to be restricted it will not always be possible to take the Register at face value.⁴⁵

9.24 A possible compromise position would be to allow consequential loss to the true owner (ie to a person claiming under head (iii))⁴⁶ but not to anyone else. But our preliminary view is against any limitation of this kind. Other, important, limitations are considered in the next section.⁴⁷ We propose, therefore, that:

39. Subject to proposal 40, indemnity should continue to be available in respect of consequential loss.

Scope

9.25 Consequential loss is infinitely varied in character. In describing its scope it is only possible to give examples.

9.26 **Cost of establishing that loss has occurred.** Claims for indemnity are not like claims under a policy of fire insurance. If a house burns down it is clear that the event insured against has occurred. But whether property has been lost under registration of title may be uncertain without investigation and the expenditure of money. Take the following example. Z discovers – typically long after the event – that B is now registered as owner of part of his land. Who, then, is the owner, Z or B? If Z is owner he can have his name restored to the Register by rectification, and B has a claim for indemnity for breach of the Keeper's warranty as to title.⁴⁸ If B is owner, Z has a claim for indemnity for loss of his property. Under our scheme B would be owner if, and only if (i) there was an intermediate "proprietor" (A) between Z and B, (ii) A possessed the land for the prescribed period and (iii) B acquired without knowledge of Z's rights. Any or all of those conditions may be disputed. Often, of course, the position will be perfectly clear, but in the event of disagreement litigation may be unavoidable.

9.27 The lack of finality intrinsic to the 1979 Act makes rectification potentially available for many years to come, notwithstanding a series of subsequent transfers; and that in turn can encourage "fishing" investigations in an attempt to demonstrate that the "real" position is not as disclosed by the Register. Under our scheme the Register will not be wrong for long because a *bona fide* acquirer takes free from Register error. Further investigation by Z would thus be fruitless and the expense irrecoverable as unnecessary.

⁴³ But see paras 9.43 ff for difficulties affecting expenses.

⁴⁴ *Registration of Title Practice Book* para 7.10.

⁴⁵ Of course in the acquisition from the person registered as owner, an acquirer will usually be protected by the integrity principle.

⁴⁶ See para 8.1 for the heads of claim.

⁴⁷ Paras 9.30 ff.

⁴⁸ Under our proposals Z will also have a claim for incidental costs including legal advice: see para 7.59.

9.28 **Loss of sale or purchase.** In practice the loss may often come to light only where the property is being sold. In that case not only might the sale itself be lost but also, in some cases, an advantageous purchase. For example, in *Watson v Swift & Co's Judicial Factor*,⁴⁹ a warrandice case, the claimant sought to recover the difference in price between a lost purchase and the, much more expensive, purchase which in due course she had to make.

9.29 **Relocation costs.** A person who is deprived of property is likely to incur relocation costs such as legal or other fees for the purchase of a replacement property. Some expenses, however, may be too remote, a subject to which we return below.⁵⁰

LIMITATIONS

Introduction

9.30 Certain limitations are necessary if the indemnity fund is not to be unreasonably exposed. Some would arise anyway as a matter of the general law and need be included in the legislation, if at all, only as a matter of convenience. Others raise issues which are peculiar to registration of title.

Loss too remote

9.31 A loss cannot be recovered if it is too remote. Arguably this is implicit in section 12. Ruoff and Roper⁵¹ comment on the parallel provision in England and Wales that:

"The Act does not specifically provide any rules of remoteness which govern the outer limits of the registrar's responsibility for the losses resulting from the initial mistake or failure. It would seem appropriate, however, that the registrar should only be liable to indemnify the claimant for those kinds of loss which were reasonably foreseeable as following from the initial mistake or failure. This should be the case even though the ground of indemnity need not depend on proof that the registrar has been negligent."

The effect of the Scottish provision is, we think, the same. As Ruoff and Roper imply, the obvious parallel is with remoteness of damage in the law of delict,⁵² remoteness being determined by a test of reasonable foreseeability.⁵³ If that is a correct analysis of the current provision, we would not propose any change; but there may be value in giving expression to the rule in the legislation.

⁴⁹ 1986 SC 55.

⁵⁰ Para 9.31.

⁵¹ Ruoff and Roper, *Registered Conveyancing* para 47.018.

⁵² In the case of contractual damages remoteness also operates by reference to foreseeability, but as the foreseeability is on the part of the parties to the contract ("reasonable contemplation") the parallel is inexact.

⁵³ In compensation for compulsory purchase the accepted formulation is that of Romer LJ in *Harvey v Crawley DC* [1957] 1 QB 485, 494: "... any loss ... may properly be regarded as the subject of compensation ... provided, first, that it is not too remote, and, secondly, that it is the natural and reasonable consequence of the dispossession of the owner". For a discussion, see J Rowan-Robinson, *Compulsory Purchase and Compensation: The Law in Scotland* (2nd edn, 2003) paras 10-16 ff. In England and Wales the Law Commission has recommended that this test be enshrined in statute: see Report on *Towards a Compulsory Purchase Code: (1) Compensation* (LC No 286, 2003) para 4.21.

Consequential loss which pre-dates principal loss

9.32 To the extent that loss is consequential,⁵⁴ it must come after, and not before, the principal loss to which it relates (ie the loss of the property). For the purposes of head of claim (iii),⁵⁵ the true owner loses his property when a second acquirer (B in the example given earlier)⁵⁶ registers his title. For head of claim (i) the acquirer's loss is triggered by eviction. Expenses prior to these points are irrecoverable by way of indemnity.

Mitigation of loss

9.33 The New South Wales legislation provides that:⁵⁷

"Compensation is not payable in relation to any loss or damage suffered by any person ... to the extent to which that person has failed to mitigate the loss or damage."

This expresses in statutory language a principle familiar from the law of damages: that there can be no recovery for avoidable loss;⁵⁸ and while there is no reason to suppose that this principle does not apply to claims against the Keeper there may be value in putting the matter beyond doubt in the legislation.

Disputes with third parties

9.34 As already mentioned,⁵⁹ a potential claimant may be uncertain as to whether his right survives or has been lost, and a proper determination of the position may involve investigation, negotiation, and, in a small number of cases, litigation. If the outcome is success, the right is re-asserted and no indemnity is due; but if the outcome is failure the cost of the proceedings will form one of the heads of a claim for indemnity. In England and Wales the 1925 Act disallowed the expenses of any litigation not expressly approved by the registrar,⁶⁰ and in 1997, following the recommendations of the Law Commission,⁶¹ this was extended to the expenses of negotiation.⁶² There is no such provision in the legislation for Scotland. Is such a provision needed? Certainly it would be a useful check on expenditure which might, on occasion, threaten to spiral out of control. But at the same time it might operate unfairly on a person who defends his title, innocent of the possibility that the next step might be a claim for indemnity.

9.35 We do not think that the Keeper's consent should be needed for investigation or negotiation. Normal and reasonable steps⁶³ to prevent or to confirm a loss should be fully

⁵⁴ For consequential loss, see paras 9.21–9.29.

⁵⁵ For the heads of claim see para 8.1.

⁵⁶ Para 9.26.

⁵⁷ Real Property Compensation Act 1900 s 129(2)(c), inserted by the Real Property Amendment (Compensation) Act 2000 s 3, sch 1 para 12.

⁵⁸ See eg McGregor on *Damages* (17th edn, 2003) ch 7.

⁵⁹ Para 9.26.

⁶⁰ Land Registration Act 1925 s 83(5)(c).

⁶¹ Law Commission and H M Land Registry, Report on *Transfer of Land: Land Registration* (Law Com No 235, 1995) para 4.12. In the Law Commission's view, "This accords with the principle that an insurer should not be expected to settle a claim for costs incurred without his prior consent".

⁶² Land Registration Act 1925 s 83(5)(c), as inserted by the Land Registration Act 1997 s 2. The current provision is Land Registration Act 2002 sch 8 para 3. There is an exception for expenses incurred as a matter of urgency.

⁶³ This raises the same issue, and seems to require the same treatment, as the reasonableness criterion in respect of expenses incurred in claiming indemnity. See para 9.53.

indemnifiable. But we are sympathetic to a requirement of consent to take or defend legal proceedings. For if a case is promising it will be in the Keeper's financial interests to allow it to go ahead. Conversely a hopeless case should not be fought at public expense. Earlier we suggested that a refusal of consent should amount to eviction and so trigger an immediate claim in indemnity.⁶⁴

Non-pecuniary loss

9.36 The Keeper's practice is to refuse claims for solatium, although occasionally an *ex gratia* payment is made. Whether this is a correct interpretation of the law is unclear. Some guidance may perhaps be obtained from *Palmer v Beck*,⁶⁵ a case on warrandice. There the buyer's claim in respect of a defective title included, not only pecuniary losses, but also £10,000 of solatium. As a result of the defect the buyer had moved out of the house and was said to have suffered considerable anxiety and stress over a long period of time and to have required medical treatment. Her claim was rejected. According to the Lord Ordinary (Kirkwood):⁶⁶

"[A]s the pursuer's claim would be for indemnification, she is not entitled to an award of damages for solatium for the anxiety and distress which she allegedly suffered as a result of the breach of warrandice. While Lord Morison appeared to express the view in *Watson*⁶⁷ that a claim for damages for breach of warrandice could include a claim for solatium, I was not referred to any case in which an award of solatium had been made to a pursuer in an action for breach of warrandice. In my opinion, a breach of warrandice only entitles the pursuer to be indemnified in respect of the financial loss which has been sustained in consequence of the breach."

Taking that to be the rule for warrandice, we incline to the view that it should apply equally to indemnity under the system of registration of title. Indemnity, like warrandice, does not depend on fault, and in the absence of fault it seems reasonable to restrict the Keeper's liability to losses of a pecuniary nature.

Prescription

9.37 A claim for indemnity is extinguished by prescription after 20 years.⁶⁸ By the standards of other countries that is relatively generous. In England and Wales the limitation period is six years after the claimant knew or ought to have known of the claim.⁶⁹ The model legislation proposed for Canada allows only two years.⁷⁰ The limitation period in other Torrens systems tends to begin with the date of the loss and not with the, often much later, date of its discovery. In New South Wales, for example, the right to claim compensation is extinguished six years after the loss.⁷¹ On the whole, however, we are content with the rule currently operating in Scotland. It was a matter of deliberate choice by the Henry Committee.⁷² It is the same as the rule for warrandice. It gives a reasonable, but not

⁶⁴ Para 7.50.

⁶⁵ 1993 SLT 485.

⁶⁶ 1993 SLT 485, 492D.

⁶⁷ *Watson v Swift & Co's Judicial Factor* 1986 SC 55.

⁶⁸ Prescription and Limitation (Scotland) Act 1973 s 7. The 5-year prescription is excluded because the Keeper's obligation to pay appears to be an obligation relating to land: see sch 1 para 2(e).

⁶⁹ Land Registration Act 2002 sch 8 para 8; Ruoff and Roper, *Registered Conveyancing* para 47.025.

⁷⁰ Joint Land Titles Committee, *Renovating the Foundation* pp 33–4 and 125 (s 7.3).

⁷¹ Real Property Act 1900 s 131(2), inserted by the Real Property Amendment (Compensation) Act 2000 s 3, sch 1 para 12.

⁷² Henry Report part I para 48 n 4.

excessive, opportunity to make a claim, particularly when it is borne in mind that the 20 years runs from the date of the loss and not from the date of its discovery. A period of five years – the only alternative offered by the Prescription Act – would be too short unless special provision were made postponing its start to the date when the loss was, or ought to have been, discovered.⁷³

Proposal

9.38 We summarise the discussion in the form of a proposal:

- 40. (1) Indemnity should not be payable in respect of –**
 - (a) a loss not reasonably foreseeable;**
 - (b) a non-pecuniary loss such as solatium; or**
 - (c) the expense of taking or defending legal proceedings against a third party other than with the consent of the Keeper.**
- (2) Nor should indemnity be payable to the extent that the claimant has failed to mitigate his loss.**
- (3) A claim for indemnity should continue to be subject to the 20-year negative prescription.**

A cap on liability?

9.39 There is no indemnity fund as such. In the event of a claim being made which could not be met out of normal fee income, further money would be made available by Parliament.⁷⁴ Presumably registration fees would then rise as a result.⁷⁵ So far, very large claims have been unknown in Scotland, but it is easy to see they could arise. The land in question might be of great value; or its value, modest at the time of registration, might undergo a substantial increase due to building or re-zoning. If the property were then lost – if, for example, an acquirer was the victim of forgery or some other transactional error – the Keeper would be liable for its value.⁷⁶ No limit is set by the 1979 Act: the Keeper must pay whether the loss is £1 million, £10 million or £100 million.

9.40 Although unusual, limits on liability are not unknown in other systems of registration of title. For example, in the legislation proposed by the Joint Land Titles Committee for Canada, there is power to set a "maximum amount or amounts payable for compensation".⁷⁷ The attractions are obvious. By setting a limit the Keeper – and the public who must ultimately fund the indemnity system – would be protected against the risk of an excessive

⁷³ Such a provision can already be found in the 1973 Act but only in respect of obligations to make reparation for loss caused by an act, neglect or default: see s 11(1),(3). It is thought that an obligation to pay indemnity would not normally fall within this definition. For a discussion, see D Johnston, *Prescription and Limitation* (1999) paras 4.17–4.22.

⁷⁴ 1979 Act s 24.

⁷⁵ See Land Registers (Scotland) Act 1868 s 25.

⁷⁶ However, in a case where the value was raised by building, the acquirer (and hence the Keeper, by subrogation) would normally have a claim in unjustified enrichment against the person recovering the land.

⁷⁷ Joint Land Titles Committee, *Renovating the Foundation* p 58 (s 2.3(f)).

claim; and yet, as the Joint Land Titles Committee explained, "[t]he imposition of a limit on individual claims would not be destructive of a compensation system so long as the limit is high enough to cover the great bulk of land transactions."⁷⁸ At present in Scotland the fee for registration (including consequential indemnity cover) is capped at £7,500, which is payable for a transaction with a consideration exceeding £5 million.⁷⁹ As a result, a company which buys land for £60 million pays the same fee as a company which buys for £6 million; but the indemnity cover is ten times greater. If the notional indemnity premium is capped in this way, that is an argument for capping indemnity itself. A person with a high-value transaction can buy additional insurance from the private sector.

9.41 But there are arguments the other way. If indemnity is capped or otherwise restricted, there may be pressure even on ordinary acquirers to buy private title insurance. The experience of Canada in this respect is not encouraging.⁸⁰ If the result is then a loss of confidence in the registration system as a whole, this may seem too high a price for excluding what experience shows to be a negligible number of high claims. Further, even if an indemnity cap were thought appropriate for acquirers, there could be no justification for restricting indemnity for those who lose ownership passively, as a result of the integrity principle.⁸¹ Finally, no cap is applied in England and Wales, where the indemnity system is similar to that which operates in Scotland.

9.42 At this stage we draw no firm conclusions but merely ask:

41. Should indemnity payments be capped?

EXPENSES OF THE CLAIM

Section 13(1): legislative history

9.43 Some expense is likely to attach to the claim itself. A solicitor will usually be needed to marshal the arguments and conduct negotiations. Often property will have to be valued. There may in the end be litigation, resulting in considerable further expense. Recovery of expenses of the claim is dealt with by section 13(1) of the 1979 Act.

9.44 In the Bill as introduced to Parliament, section 13(1) was in the following terms (our lettering):

"[A] The Keeper shall reimburse any expenditure reasonably and properly incurred by a person in pursuing a *prima facie* well-founded claim under section 12 of this Act, whether successful or not, [B] other than a claim disposed of by the Lands Tribunal for Scotland under section 25 of this Act or by any court."

In this version the provision is reasonably straightforward. A distinction is made between judicial and extra-judicial claims. The expenses of the latter are to be met by the Keeper if

⁷⁸ Joint Land Titles Committee, *Renovating the Foundation* p 32.

⁷⁹ Fees in the Registers of Scotland Order 1995 (SI 1995/1945) sch, part IV table A.

⁸⁰ B Ziff, "Title Insurance: the big print giveth but does the small print taketh away?" in D Grinlinton (ed), *Torrens in the Twenty-first Century* (2003) p 371. See also Manitoba Law Reform Commission and Law Reform Commission of Saskatchewan, Consultation Paper on *Private Title Insurance* (2005).

⁸¹ Paras 7.52–7.58.

the claim is successful or, even if not successful, if at any rate it was plausible. But no provision is made for judicial claims. By implication judicial expenses are to be dealt with by the court in the normal way. That means that in the event of failure the claimant will have to meet, not only his own expenses, but usually the expenses of the Keeper as well.

9.45 The provision was amended in the First Scottish Standing Committee on 27 March 1979. Part [A] was left as it was but new words (which we may call part [C]) replaced part [B] and were placed before part [A]. As so amended, and ultimately enacted, section 13(1) read:

"[C] Subject to any order by the Lands Tribunal for Scotland or the court for payment of expenses in connection with any claim disposed of by the Lands Tribunal under section 25 of this Act or the court, [A] the Keeper shall reimburse any expenditure reasonably and properly incurred by a person in pursuing a *prima facie* well-founded claim under section 12 of this Act, whether successful or not."

Apparently the purpose of the amendment was not to change the policy. Rather it was to clear up what was seen as a drafting error. In the original version of section 13(1), part [B] could be read as suggesting that the Keeper would not meet the expenses of a judicial claim even where expenses were awarded against him by the court. The drafting solution was to invert the order of the two component parts. As the Lord Advocate⁸² explained,⁸³ part [B] had suggested:

"that the keeper shall not reimburse any expenditure incurred by a person pursuing a claim disposed of by the lands tribunal or by any court. In fact, both these bodies – that is the lands tribunal and the court – have discretion to award expenses, or to find that no expenses are due to or by any of the parties concerned. The ... amendment makes clear that this discretion is retained and that the keeper must conform to any order issued by them as to expenses."

9.46 In fact the amendment made things worse rather than better, for a minor uncertainty was replaced by one altogether more serious. In the original version it was clear that section 13(1) did not apply to claims which were pursued judicially. In its revised version the matter seemed open. What does it mean to say that part [A] is "subject to" an order for expenses? Did such an order exclude section 13(1) entirely? Or could further sums be claimed under section 13(1) provided only that they were not inconsistent with the court's order? The answer, it has now been decided, is the latter. The court must award expenses in the usual way. But the claimant can then seek further sums from the Keeper under section 13(1). According to Lord Hamilton:⁸⁴

"If in the course of pursuing a *prima facie* well founded claim, he reasonably and properly incurs expenditure which is not recoverable under an award of expenses made in his favour by the court or the tribunal, he may, in my view, still obtain reimbursement of it from the Keeper provided that such recovery is not inconsistent with or already covered by an order for the payment of expenses made by the court or the tribunal."

⁸² Ronald King Murray QC, MP.

⁸³ *Hansard*, First Scottish Standing Committee, 27 March 1979, col 43.

⁸⁴ *M R S Hamilton Ltd v Keeper of the Registers of Scotland (No 2)* 1999 SLT 840, 841E–F. See also *Keeper of the Registers of Scotland v M R S Hamilton Ltd* 1999 SLT 855; *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 19 September 2001, Lands Tribunal.

Almost certainly this was not what was intended.⁸⁵ On the contrary, section 13(1) was meant to apply only to extra-judicial claims.⁸⁶

Section 13(1): scope

9.47 By admitting judicial claims the current interpretation of section 13(1) extends its intended scope in three, or possibly four, respects; for it seems to allow:

- (i) a claimant who succeeds on the merits to claim pre-litigation expenses;
- (ii) a claimant who succeeds on the merits to claim litigation expenses at an enhanced rate;
- (iii) a claimant who fails on the merits to claim pre-litigation expenses (provided there was a *prima facie* case); and, on one view
- (iv) a claimant who fails on the merits to claim litigation expenses (provided there was a *prima facie* case).

9.48 (i) and (iii) are straightforward, if not what Parliament seems to have intended.

9.49 (ii) is more tenuous and cannot be said to be properly established. Where a person succeeds in a claim for indemnity the practice of the court is to award expenses on the ordinary judicial scale (ie party and party expenses). But it has been suggested by the Lands Tribunal that expenses under section 13(1) are due on a rough equivalent of the higher, agent and client third party paying, scale.⁸⁷ If that is so, section 13(1) may entitle the claimant to more than he was awarded by the court in the ordinary way.

9.50 (iv) is controversial. A claim may fail on the merits yet still have been *prima facie* well-founded. Usually, failure on the merits will lead to an award of expenses against the claimant: in other words, the claimant must pay not only his own expenses but those of the Keeper as well. On one view, section 13(1) would then allow this award to be reversed.

Some difficulties

9.51 This extended meaning has caused difficulties for the Keeper. If a claimant litigates, his expenses will be met by the state, win or lose. As a result there may be an unnatural enthusiasm for litigation and a corresponding reluctance to settle claims by negotiation. In a submission to us the Keeper expressed the matter in this way:

"In this interpretation, section 13(1) ... has lent itself to being used by claimants as a tool for bargaining against the Keeper. The Keeper may offer a settlement which is based on impartial valuation advice ... The claimant's response to this may be that, in

⁸⁵ It does not seem that the legislative history of s 13(1) was before the court in any of the cases in which it has been interpreted.

⁸⁶ As indeed the Keeper argued in *M R S Hamilton Ltd v Keeper of the Registers of Scotland (No 2)* 1999 SLT 840.

⁸⁷ *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 19 September 2001, Lands Tribunal, p 22 of the transcript. In *Hood v Gordon* (1896) 23 R 675, 676 Lord McLaren described agency and client, third party paying as "the expenses which a prudent man of business, without special instructions from his client, would incur in the knowledge that his account would be taxed". Often this may be little different from party and party expenses: see *Dingley v Chief Constable of Strathclyde Police* 2003 SCLR 160, para 27 *per* Lord Eassie.

terms of section 13(1), he has nothing to lose by taking the matter to the court or Lands Tribunal. The Keeper must then weigh the consequences on the public purse of standing by his offer and facing possible court action, or settling the section 12 claim at more than its realistic value. In short, there are claimants who argue that section 13(1) puts the Keeper and the public funds under his stewardship over a barrel."

9.52 It seems evident that section 13(1) cannot remain as it is. It should not apply to litigation expenses at all; and it is at least open to question whether it should cover other expenses in the event that the claim is ultimately unsuccessful. In considering a revised provision, however, we begin with successful claims.

Successful claims

9.53 It seems uncontroversial that the Keeper should continue to meet the costs of a claim for indemnity which is successfully concluded by negotiation.⁸⁸ Earlier we made the same proposal in respect of applications for rectification.⁸⁹ Of course the costs must be reasonable and not excessive. In this connection it would be possible, but not perhaps practical, to require that they are approved in advance by the Keeper.⁹⁰ Instead a general formula seems more attractive. Section 13(1) refers to "expenditure reasonably and properly incurred", and commenting on this requirement the Lands Tribunal has said that:⁹¹

"It must be recognised that any assessment of reasonableness requires some criteria explicit or implicit ... [W]e are satisfied that in considering the question of reasonableness, the need or otherwise for a particular step will be a factor to take into account. Similarly, we are satisfied that in normal speech the question of whether a particular piece of expenditure was 'reasonable' can only be determined by having some regard to economy. To make either of these factors determinative would be to supersede the test of reasonableness but that does not mean that they must be ignored".

It is difficult, and probably unhelpful, to be more specific.

9.54 If a claim is successful only after litigation, the normal rules for judicial expenses should apply; for it seems both unnecessary and, probably, unprincipled to make special provision for litigation which happens to relate to land registration.⁹² The question of pre-litigation expenses is more difficult. They are not covered by an award of (judicial) expenses. Nor, probably, can they be claimed as an independent head of loss, at least in the absence of express statutory provision.⁹³ Section 13(1), as interpreted, is such a provision. Its removal

⁸⁸ The rule is the same in respect of compensation for compulsory purchase: see J Rowan-Robinson, *Compulsory Purchase and Compensation: The Law in Scotland* (2nd edn, 2003) para 10-08.

⁸⁹ Para 7.59.

⁹⁰ This solution is, however, adopted in England and Wales: see Land Registration Act 2002 sch 8 para 3. See also paras 9.34 and 9.35.

⁹¹ *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 19 September 2001, Lands Tribunal, pp 25–6 of the transcript.

⁹² In England and Wales, however, it has recently been held that, where indemnity is successfully claimed against the registrar, judicial expenses should be awarded on an indemnity basis and not, as usual, on a standard basis. See *Prestige Properties Ltd v Scottish Provident Institution* [2003] Ch 1, paras 70–4 per Lightman J. Where costs are awarded on a standard basis, the court will only allow costs which are proportionate to the matters in issue, and will resolve doubts in favour of the paying party. Where costs are awarded on an indemnity basis, the court will resolve doubts in favour of the receiving party. See Civil Procedure Rules 1998 (SI 1998/3132) r 44.4(2), (3).

⁹³ *Shanks v Gray* 1977 SLT (Notes) 26.

would mean that expenditure which was recoverable in a negotiated claim would cease to be recoverable in a judicial claim. Sometimes this would act as a spur to litigate in order to keep pre-litigation costs to a minimum. But there would also be advantage in its removal. Section 13(1) innovates on the standard rule which excludes recovery for pre-litigation expenses. It therefore puts proceedings for indemnity in a different position from proceedings of other kinds. In particular it treats proceedings for indemnity differently from other proceedings against the Keeper – for example proceedings in respect of refusal to register or to rectify. It is not clear that the difference can be justified. At this stage we have formed no definite view on this issue and simply invite the views of consultees.

Failed claims

9.55 Section 13(1) makes recoverable the expenses even of a failed claim provided only that, *prima facie*, the claim was well-founded. For reasons already discussed,⁹⁴ this rule should cease to extend to judicial expenses. The position of extra-judicial expenses, however, is more difficult. By "extra-judicial expenses" we mean to include both pre-litigation costs, and also the expenses of a claim conducted without litigation. On one view, no expenses at all should be recoverable in respect of a bad claim. On another, the potential complexities of land registration justify a special rule at least to the extent that a claim had initial merit. This justification is at its strongest in relation to a person who fears – but, as it transpires, and after expensive investigation, unjustifiably – that his title has been lost to an acquirer; but an acquirer claiming under the Keeper's warranty might seem entitled to less sympathy.⁹⁵ In England and Wales the registrar has a discretion, but not an obligation, to meet some or all of the expenses of a failed claim.⁹⁶ Once again, we offer no definite view on this whole issue and would welcome the views of consultees.

9.56 We summarise the discussion on expenses in the form of two proposals and two questions:

- 42. (1) Where indemnity is awarded without litigation, the Keeper should be liable for such expenses of the claim as were reasonably and properly incurred.**
- (2) No special provision should be made as to the expenses of litigation (whether successful or unsuccessful).**
- (3) Where indemnity is awarded after litigation, should the Keeper be liable for expenses reasonably and properly incurred during the pre-litigation period?**

⁹⁴ Para 9.51.

⁹⁵ These are, respectively, grounds (iii) and (i) of indemnity set out in para 8.1.

⁹⁶ Land Registration Act 2002 sch 8 para 4. This is a new power. For a brief discussion, see C Harpum and J Bignell, *Registered Land: Law and Practice under the Land Registration Act 2002* (2004) para 23.15.

(4) Where indemnity is refused but the claim seemed initially well-founded, should the Keeper be liable for such extra-judicial expenses as were reasonably and properly incurred?

Part 10 Summary of Provisional Proposals

1. Any new legislation should make clear –
 - (a) that the Land Register comprises the totality of the title sheets (but not including any deeds referred to in the title sheets); and
 - (b) that the Register may be maintained in electronic form or in such other form as the Keeper may direct.

(Para 2.7)
2.
 - (1) The existing division of the Register into "principal" title sheets and "lease" title sheets should continue.
 - (2) There should be no change as to the amount of information given on the principal title sheet in respect of standard securities, real burdens, and other subordinate real rights.
 - (3) The "charges section" of the title sheet should be re-named the "securities section".

(Para 2.14)
3. Should a system be introduced to exempt from public inspection certain documents or parts of documents? If so what criteria for exemption should be adopted?

(Para 2.20)
4. Should the index of proprietors –
 - (a) cease to be available to the public (subject to exceptions);
 - (b) remain available to the public but with a facility for "hiding" a name (subject to exceptions) where its disclosure would create a serious risk that the person concerned, or a person living with that person, would be subjected to violence or intimidation; or
 - (c) remain available to the public on the present, unqualified, basis?

(Para 2.36)
5.
 - (1) The Keeper should make available, on request, a copy of any deed or document held by him in respect of an application to the Register.
 - (2) An entry on the Register which transcribes words from a deed should, in a case of doubt, be interpreted in the context of the whole deed.

(3) The Keeper should continue to be able to make information about land available on payment of a fee.

(4) Where the name of a person entered as proprietor is deleted from the Register, the information contained in that entry should be stored in a readily retrievable form and should be made available on request.

(5) Should the same rule apply to other entries (for example entries in relation to standard securities) which are deleted from the Register?

(6) The Keeper should make available, on request, information as to the ownership of any property during the period between first registration and the coming into force of the proposed legislation; but the Keeper should not be bound to compile this information except in response to such request.

(Para 2.49)

6. (1) Subject to (2), registration should be competent only if authorised by some other enactment.

(2) Where a subordinate real right in land is constituted by registration, there should be registrable any –

- (a) transfer;
- (b) variation; or
- (c) extinction;

of that right which is effected by deed or other juridical act.

(Para 3.25)

7. First registration should be triggered by –

- (a) the transfer of ownership of land (whether or not for valuable consideration);
- (b) the grant or transfer of a long lease; and
- (c) such other transactions as may from time to time be nominated by statutory instrument.

(Para 3.34)

8. (a) It should continue to be possible for an owner of land or a lessee under a long lease to apply at any time for first registration.

(b) The Keeper should cease to have a discretion to refuse such an application merely on the basis that it is voluntary.

(Para 3.38)

9. Ministers should continue to have power to provide by statutory instrument for the registration of unregistered land in such circumstances and on such terms as they may determine.

(Para 3.45)

10. The date of registration should continue to be the date on which the application is received.

(Para 4.3)

11. An application for registration should continue to be made in a manner to be prescribed and the Keeper should continue to have power to requisition such further evidence as is available and as he may reasonably require.

(Para 4.18)

12. (1) The Keeper should be bound to accept an application for registration if it appears to him that –

- (a) the deed or document on which the application is based is valid; and
- (b) the application is in order.

(2) For the purposes of (1)(a) a deed or document is valid if (but not only if) the result of registration would be to confer (or, as the case may be, vary or extinguish) the right in question.

(Para 4.24)

13. (1) The Keeper should be bound to reject an application for registration if –

- (a) it relates to land which is not sufficiently described to enable him to identify it by reference to the Ordnance Map (or any map replacing that map);
- (b) payment of the registration fee has not been made; or
- (c) the deed on which the application is based is not self-proving.

(2) At present it is permissive, but not mandatory, for registered land to be described in a deed by reference to the title number. Should a description by title number be mandatory?

(3) Having regard to the fact that the title numbers affected by an application must already be listed on the application form, should it continue to be a requirement that the title number is given somewhere in the deed?

(4) If the answer to (3) is yes, the rule should be that the Keeper is bound to reject an application if the deed in respect of which it is made fails to mention (whether within the text of the deed or otherwise) the number of the title sheet of the primary right to which the deed most directly relates.

(5) The Keeper should no longer reject applications only on the ground that they –

- (a) relate to souvenir plots, or
- (b) are frivolous or vexatious.

(6) Should applications for first registration require to include the postcode of the property?

(Para 4.42)

14. The Keeper's power to exclude indemnity should not apply in respect of an application covered by proposal 12.

(Para 4.43)

15. (1) The Keeper should be bound to reject an application for registration in respect of a deed where or to the extent that –

- (a) the person granting the deed did not have title to do so; and
- (b) a person who would have had such title can be identified.

(2) But there should be no duty to reject if it appears to the Keeper that the person with title has ceased to assert that title.

(Para 4.57)

16. In the residual cases not covered by proposals 12, 13 and 15, the Keeper should have a discretion either to accept an application or to reject it.

(Para 4.58)

17. (1) Land certificates and charge certificates should cease to be issued.

(2) In their place, should an office copy of the title sheet be issued, following the completion of registration (and whether in paper or electronic form) –

- (a) automatically or
- (b) only at the option of the applicant?

(Para 4.66)

18. (1) A person shown on the Register as owner of land should, in a question with an acquirer of that land, be taken to have become owner of that land on the date stated on the Register.

(2) But (1) should not apply where at the time of registration of his title the acquirer knew that the entry in the Register was inaccurate.

- (3) Nor should (1) apply to the extent that –
- (a) the person shown on the Register as owner did not possess the land for a specified period (and for this purpose any possession by the acquirer may be aggregated with the possession of that person); or
 - (b) indemnity was excluded with respect to that person's ownership.
- (4) "Land" in (1) does not include minerals unless minerals are expressly included in the title sheet.

(Para 5.30)

19. A person named on the Register as the owner of land should be presumed to be the owner of that land.

(Para 5.32)

20. (1) On becoming owner on registration an acquirer should take the land free of all subordinate real rights other than –
- (a) such rights as appeared on the title sheet on the day of registration (or, having the same or a prior date of registration to that of the acquirer, were omitted from the title sheet only because the registration process was incomplete);
 - (b) any rights which, although omitted from the title sheet, were known to the acquirer; and
 - (c) overriding interests.
- (2) Accordingly, any subordinate real right which –
- (a) affected the land before the day of registration but
 - (b) did not fall within (1)
- would be extinguished on that day.
- (3) The reference in (1)(a) to "rights" includes rights as varied.
- (4) This proposal does not apply to first registrations.

(Para 5.37)

21. There should be no general rule as to the effect of registration.

(Para 5.50)

22. The principle that, in a competition, real rights are preferred by order of creation, should be left to the general law. Accordingly there should be repealed without replacement –

- (i) the Real Rights Act 1693; and
- (ii) section 7 of the Land Registration (Scotland) Act 1979.

(Para 5.58)

23. (1) Registration should be deemed to occur at the beginning of the day on which the application is received (all applications received on the same day thus being deemed to be registered at the same time).
- (2) But Scottish Ministers should be able to provide by statutory instrument that the time of registration is, instead, the time at which the application is received.
- (3) Where –
- (a) two or more applications are received on the same day, and
 - (b) having regard to the nature of the rights in question, one could not be given effect without excluding the other

the Keeper should be bound to reject both applications, and any future application in respect of the same deeds.

- (4) Where, on the same day, applications are received in respect of –
- (a) the transfer of property, and
 - (b) a deed by the person in whose favour the transfer is being made

and the applications are accepted by the Keeper, the transfer should be deemed to be registered immediately before the registration in respect of the deed.

(Para 5.69)

24. (1) Where the Register is inaccurate, rectification should be available without restriction.
- (2) The Register is inaccurate where, in respect of an entry or omission, it fails to state the actual legal position. But the Register is not inaccurate where it omits an overriding interest.
- (3) The Keeper should continue to rectify an inaccuracy where –
- (a) at his discretion he so decides
 - (b) he is ordered to do so by the court or the Lands Tribunal.
- (4) The Keeper should be bound to rectify an inaccuracy where he is requested to do so by application.
- (5) Only the following should be able to apply for rectification –

(a) the person who holds the right in respect of which the application is being made; and

(b) any person who holds a real right in the same land or who has a right to acquire such a real right.

(6) An application for rectification should be accompanied by a fee which should be retained in the event that the application is unsuccessful.

(7) The Keeper should be entitled to requisition from the applicant such further evidence as is available and he may reasonably require, and, in the event that it is not forthcoming within a reasonable period (being a period of at least 60 days), to reject the application.

(Para 6.32)

25. (1) On registration of the acquisition, variation or discharge of a real right the Keeper should warrant to the applicant that the real right is duly acquired, varied or discharged to the extent shown on the Register.

(2) In warranting the acquisition of a real right the Keeper should be taken as further warranting that –

(a) the right exists;

(b) it is of the type specified;

(c) it is held by the person who is named as holder; and

(d) it is a right over the land described (including the pertinents of that land).

(3) The warranty should not apply insofar as the Register shows an acquisition, variation or discharge more extensive than was sought by the applicant.

(4) Nor should it apply to the extent that, at the time of registration, the applicant knew (or ought to have known) that the right was not acquired, varied or discharged; but for this purpose an applicant can take the Register as having previously been accurate unless he knew that it was not accurate.

(5) Nor should it apply to the extent that indemnity is excluded by the Keeper.

(6) Nor should it apply to the acquisition of a real right in minerals except where a right to minerals is expressly included in the title sheet.

(Para 7.29)

26. On registration of the acquisition of a real right the Keeper should further warrant that the right is unaffected by subordinate real rights other than –

- (a) such rights as appear on the title sheet (or, having a date of registration prior to that of the acquirer, were omitted from the title sheet only because the registration process was incomplete);
- (b) any rights which, though omitted from the title sheet, were known (or ought to have been known) to the applicant; and
- (c) overriding interests.

(Para 7.47)

27. (1) No claim should lie under the Keeper's warranties unless the claimant is first evicted by a person founding on the title defect to which the warranty relates.

(2) A claimant is evicted if, in respect of the title defect –

- (a) its existence is judicially determined;
- (b) the claimant concedes a court action to which there was no reasonable defence;
- (c) the claimant applies to the Keeper for consent to defend a court action, in terms of proposal 40(1)(c), and consent is refused; or
- (d) the Register is rectified against the claimant.

(Para 7.51)

28. A person who loses a right as a result of the operation, in favour of another person, of the integrity principle (ie proposals 18 and 20) should be indemnified by the Keeper for his loss.

(Para 7.53)

29. Indemnity payable under proposal 28 should be reduced if and to the extent that the loss was attributable to fault on the part of the claimant.

(Para 7.58)

30. Where an inaccuracy in respect of a real right is rectified, the person in whose favour the rectification is made should be indemnified by the Keeper for –

- (a) the reasonable costs of the application for rectification; and
- (b) any other loss caused by the inaccuracy.

(Para 7.59)

31. The Keeper should not warrant the accuracy of the Register to the public at large.

(Para 7.61)

32. Loss caused by errors in reports and other information supplied by the Keeper should continue to be indemnified by the Keeper.

(Para 7.62)

33. Loss caused by the loss or destruction of any document while lodged with the Keeper should continue to be indemnified by the Keeper.

(Para 7.63)

34. Indemnity should be paid in accordance with proposals 25 - 33 except –

(a) in the circumstances mentioned in proposals 25(4), 26(b) and 29 (claimant in bad faith or fraudulent or careless);

(b) in the circumstances mentioned in proposal 25(6) (claim in respect of minerals); and

(c) in respect of an error in the delineation of boundaries which could not have been corrected by reference to the Ordnance Map.

(Para 8.20)

35. There should continue to be no requirement that a person exhausts other remedies before making a claim to the Keeper for indemnity.

(Para 8.25)

36. For the purposes of a claim for indemnity, should the knowledge and conduct of the claimant's solicitor cease to be treated as the knowledge and conduct of the claimant?

(Para 8.28)

37. In the calculation of indemnity –

(a) any property the loss of which is to be indemnified should be valued as at the date of the loss;

(b) in valuing such property no account should be taken of improvements other than improvements carried out by or on behalf of –

(i) the claimant, or

(ii) a person deriving title from the claimant;

(c) in all cases of indemnity, interest should be paid from the date of the loss.

(Para 9.13)

38. In the calculation of indemnity should the amount payable in respect of loss be offset by the amount of any incidental gain?

(Para 9.20)

39. Subject to proposal 40, indemnity should continue to be available in respect of consequential loss.

(Para 9.24)

40. (1) Indemnity should not be payable in respect of –

(a) a loss not reasonably foreseeable;

(b) a non-pecuniary loss such as solatium; or

(c) the expense of taking or defending legal proceedings against a third party other than with the consent of the Keeper.

(2) Nor should indemnity be payable to the extent that the claimant has failed to mitigate his loss.

(3) A claim for indemnity should continue to be subject to the 20-year negative prescription.

(Para 9.38)

41. Should indemnity payments be capped?

(Para 9.42)

42. (1) Where indemnity is awarded without litigation, the Keeper should be liable for such expenses of the claim as were reasonably and properly incurred.

(2) No special provision should be made as to the expenses of litigation (whether successful or unsuccessful).

(3) Where indemnity is awarded after litigation, should the Keeper be liable for expenses reasonably and properly incurred during the pre-litigation period?

(4) Where indemnity is refused but the claim seemed initially well-founded, should the Keeper be liable for such extra-judicial expenses as were reasonably and properly incurred?

(Para 9.56)

Appendix A

Extracts from the Land Registration (Scotland) Act 1979

PART I

REGISTRATION OF INTERESTS IN LAND

1. The Land Register of Scotland

(1) There shall be a public register of interests in land in Scotland to be known as the 'Land Register of Scotland' (in this Act referred to as 'the register').

(2) The register shall be under the management and control of the Keeper of the Registers of Scotland (in this Act referred to as 'the Keeper') and shall have a seal.

(3) In this Act 'registered' means registered in the register in accordance with this Act and 'registrable', 'registration' and other cognate expressions shall be construed accordingly.

2. Registration

(1) Subject to subsection (2) below, an unregistered interest in land other than an overriding interest shall be registrable—

(a) in any of the following circumstances occurring after the commencement of this Act—

(i) on a grant of the interest in land in long lease but only to the extent that the interest has become that of the lessee;

(ii) on a transfer of the interest for valuable consideration;

(iii) on a transfer of the interest in consideration of marriage;

(iv) on a transfer of the interest whereby it is absorbed into a registered interest in land;

(v) on any transfer of the interest where it is held under a long lease or udal tenure;

(b) in any other circumstances in which an application is made for registration of the interest by the person or persons having that interest and the Keeper considers it expedient that the interest should be registered.

(2) Subsection (1) above does not apply to an unregistered interest which is a heritable security, liferent or incorporeal heritable right; and subsection (1)(a)(ii) above does not apply where the interest on transference is absorbed into another unregistered interest.

(3) The creation over a registered interest in land of any of the following interests in land—

- (i) a heritable security;
- (ii) a liferent;
- (iii) an incorporeal heritable right,

shall be registrable; and on registration of its creation such an interest shall become a registered interest in land.

(4) There shall also be registrable—

- (a) any transfer of a registered interest in land including any transfer whereby it is absorbed into another registered interest in land;
- (b) any absorption by a registered interest in land of another registered interest in land;
- (c) any other transaction or event which (whether by itself or in conjunction with registration) is capable under any enactment or rule of law of affecting the title to a registered interest in land but which is not a transaction or event creating or affecting an overriding interest.

(5) The Secretary of State may, by order made by statutory instrument, provide that interests in land of a kind or kinds specified in the order, being interests in land which are unregistered at the date of the making of the order other than overriding interests, shall be registered; and the provisions of this Act shall apply for the purposes of such registration with such modifications, which may include provision as to the expenses of such registration, as may be specified in the order.

(6) In this section, 'enactment' includes section 19 of this Act.

3. Effect of registration

(1) Registration shall have the effect of—

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

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

In this subsection, 'enactment' includes section 19 of this Act.

(2) Registration shall supersede the recording of a deed in the Register of Sasines but, subject to subsection (3) below, shall be without prejudice to any other means of creating or affecting real rights or obligations under any enactment or rule of law.

(3) A—

- (a) lessee under a long lease;
- (b) proprietor under udal tenure;

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

(4) The date at which a real right or obligation is created or as from which it is affected under this section shall be the date of registration.

(5) Where an interest in land has been registered, any obligation to assign title deeds and searches relating to that interest in land or to deliver them or make them forthcoming or any related obligation shall be of no effect in relation to that interest or to any other registered interest in land.

This subsection does not apply—

- (a) to a land or charge certificate issued under section 5 of this Act;
- (b) where the Keeper has, under section 12(2) of this Act, excluded indemnity under Part II of this Act.

(6) It shall not be necessary for an unregistered holder of an interest in land which has been registered to expedite a notice of title in order to complete his title to that interest if evidence of sufficient midcouples or links between him and the person last registered as entitled to the interest are produced to the Keeper on any registration in respect of that interest and accordingly—

- (a) section 4 of the Conveyancing (Scotland) Act 1924 (c 27);
- (b) section 18A(8)(a) of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5); and
- (c) section 41(a) of the Title Conditions (Scotland) Act 2003 (asp 9),

(each of which relates to completion of title) shall be of no effect in relation to such an interest in land.

This subsection does not apply to the completion of title under section 74 or 76 of the Lands Clauses Consolidation (Scotland) Act 1845 (procedure on compulsory purchase of lands).

(7) Nothing in this section affects any question as to the validity or effect of an overriding interest.

4. Applications for registration

(1) Subject to subsection (2) below, an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require.

(2) An application for registration shall not be accepted by the Keeper if—

(a) it relates to land which is not sufficiently described to enable him to identify it by reference to the Ordnance Map;

(aa) it relates in whole or in part to an interest in land which by, under or by virtue of any provision of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5) is an interest which has ceased to exist;

(b) it relates to land which is a souvenir plot, that is a piece of land which, being of inconsiderable size or no practical utility, is unlikely to be wanted in isolation except for the sake of mere ownership or for sentimental reasons or commemorative purposes; or

(c) it is frivolous or vexatious;

(d) a deed which—

(i) accompanies the application;

(ii) relates to a registered interest in land; and

(iii) is executed after that interest has been registered,

does not bear a reference to the number of the title sheet of that interest;

(e) payment of the fee payable in respect of such registration under section 25 of the Land Registers (Scotland) Act 1868 has not been tendered.

(3) On receipt of an application for registration, the Keeper shall forthwith note the date of such receipt, and that date shall be deemed for the purposes of this Act to be the date of registration either—

(a) where the application, after examination by the Keeper, is accepted by him, or

(b) where the application is not accepted by him on the grounds that it does not comply with subsection (1) or (2)(a) or (d) above but, without being rejected by the Keeper or withdrawn by the applicant, is subsequently accepted by the Keeper on his being satisfied that it does so comply, or has been made so to comply.

(4) Where an application is not accepted by the Keeper on the ground that he has not been provided with sufficient evidence to confirm that it does not relate to a transfer which is prohibited by section 40(1) of the Land Reform (Scotland) Act 2003 (asp 2), or by virtue of section 37(5)(e) of that Act, the Keeper shall, subject to subsection (5) below, provide the Scottish Ministers with a copy of the application and notify them of the reason for which the application has been rejected.

(5) Subsection (4) above does not apply where the application has been rejected by reason only of the application not being accompanied by a declaration required under section 43(2) of that Act of 2003.

5. Completion of registration

(1) The Keeper shall complete registration—

(a) in respect of an interest in land which is not a heritable security, liferent or incorporeal heritable right—

(i) if the interest has not previously been registered, by making up a title sheet for it in the register in accordance with section 6 of this Act, or

(ii) if the interest has previously been registered, by making such amendment as is necessary to the title sheet of the interest;

(b) in respect of an interest in land which is a heritable security, liferent or incorporeal heritable right or in respect of the matters registrable under section 2(4) of this Act by making such amendment as is necessary to the title sheet of the interest in land to which the heritable security, liferent, incorporeal heritable right or matter, as the case may be, relates,

and in each case by making such consequential amendments in the register as are necessary.

(2) Where the Keeper has completed registration under subsection (1)(a) above, he shall issue to the applicant a copy of the title sheet, authenticated by the seal of the register; and such copy shall be known as a land certificate.

(3) Where the Keeper has completed registration in respect of a heritable security, he shall issue to the applicant a certificate authenticated by the seal of the register; and such certificate shall be known as a charge certificate.

(4) A land certificate shall be accepted for all purposes as sufficient evidence of the contents of the title sheet of which the land certificate is a copy; and a charge certificate shall be accepted for all purposes as sufficient evidence of the facts stated in it.

(5) Every land certificate and charge certificate shall contain a statement as to indemnity by the Keeper under Part II of this Act.

6. The title sheet

(1) Subject to subsection (3) below, the Keeper shall make up and maintain a title sheet of an interest in land in the register by entering therein—

(a) a description of the land which shall consist of or include a description of it based on the Ordnance Map, and, where the interest is that of the proprietor of the land or the lessee under a long lease and the land appears to the Keeper to extend to 2 hectares or more, its area as calculated by the Keeper;

- (b) the name and designation of the person entitled to the interest in the land and the nature of that interest;
- (c) any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest;
- (d) any heritable security over the interest;
- (e) any subsisting real right pertaining to the interest or subsisting real burden or condition affecting the interest and, where the interest is so affected by virtue of section 18, 18A, 18B, 18C, 19, 20, 27 or 27A of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5) or section 4(5), 50, 75 or 80 of the Title Conditions (Scotland) Act 2003 (asp 9), the Keeper shall in the entry identify the benefited property, or as the case may be the dominant tenement, (if any) and any person in whose favour the real burden is constituted;
- (ee) any subsisting right to a title condition pertaining to the interest by virtue of section 18, 19 or 20 of that Act of 2000 or 4(5), 50, 75 or 80 of that Act of 2003, the Keeper identifying in the entry the burdened property;
- (f) any exclusion of indemnity under section 12(2) of this Act in respect of the interest;
- (g) such other information as the Keeper thinks fit to enter in the register.

(2) The Keeper shall enter a real right or real burden or condition in the title sheet by entering its terms or a summary of its terms therein; and such a summary shall, unless it contains a reference to a further entry in the title sheet wherein the terms of the real right, burden or condition are set out in full be presumed to be a correct statement of the terms of the right, burden or condition.

(3) The Keeper's duty under subsection (1) above shall not extend to entering in the title sheet any over-rent exigible in respect of the interest in land, but he may so enter any such over-rent.

(4) Any overriding interest which appears to the Keeper to affect an interest in land—

- (a) shall be noted by him in the title sheet of that interest if it has been disclosed in any document accompanying an application for registration in respect of that interest;
- (b) may be so noted if—
 - (i) application is made to him to do so;
 - (ii) the overriding interest is disclosed in any application for registration; or
 - (iii) the overriding interest otherwise comes to his notice.

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

- (i) a lessee under a lease which is not a long lease and
- (ii) a non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981.

(5) The Keeper shall issue, to any person applying, a copy, authenticated as the Keeper thinks fit, of any title sheet, part thereof, or of any document referred to in a title sheet; and such copy, which shall be known as an office copy, shall be accepted for all purposes as sufficient evidence of the contents of the original.

(6) In subsections (1)(e) and (2) above, 'condition' includes a servitude created by a deed registered in accordance with section 75(1) of the Title Conditions (Scotland) Act 2003 (asp 9) and a rule of a development management scheme ('development management scheme' being construed in accordance with section 71 of that Act).

7. Ranking

(1) Without prejudice to any express provision as to ranking in any deed or any other provision as to ranking in, or having effect by virtue of, any enactment or rule of law, the following provisions of this section shall have effect to determine the ranking of titles to interests in land.

(2) Titles to registered interests in land shall rank according to the date of registration of those interests.

(3) A title to a registered interest and a title governed by a deed recorded in the Register of Sasines shall rank according to the respective dates of registration and recording.

(4) Where the date of registration or recording of the titles to two or more interests in land is the same, the titles to those interests shall rank equally.

8. Continuing effectiveness of recording in Register of Sasines

(1) Subject to subsection (3) below, the only means of creating or affecting a real right or a real obligation relating to anything to which subsection (2) below applies shall be by recording a deed in the Register of Sasines.

(2) This subsection applies to—

- (a) an interest in land which is to be transferred or otherwise affected by—
 - (i) an instrument which, having been recorded before the commencement of this Act in the Register of Sasines with an error or defect; or
 - (ii) a deed which, having been recorded before the commencement of this Act in the Register of Sasines with an error or defect in the recording,

has not, before such commencement, been re-presented, corrected as necessary, for the purposes of recording of new under section 143 of the Titles to Land Consolidation (Scotland) Act 1868;

In this paragraph, 'instrument' has the same meaning as in section 3 of the said Act of 1868.

(b) a registered interest in land which has been absorbed, otherwise than by operation of prescription, into another interest in land the title to which is governed by a deed recorded in the Register of Sasines;

(c) anything which is not registrable under subsections (1) to (4) of section 2 of this Act and in respect of which, immediately before the commencement of this Act, a real right or obligation could be created or affected by recording a deed in the Register of Sasines.

(3) Nothing in subsection (1) above shall prejudice any other means, other than by registration, of creating or affecting real rights or obligations under any enactment or rule of law.

(4) Except as provided in this section, the Keeper shall reject any deed submitted for recording in the Register of Sasines.

9. Rectification of the Register

(1) Subject to subsection (3) below, the Keeper may, whether on being so requested or not, and shall, on being so ordered by the court or the Lands Tribunal for Scotland, rectify any inaccuracy in the register by inserting, amending or cancelling anything therein.

(2) Subject to subsection (3)(b) below, the powers of the court and of the Lands Tribunal for Scotland to deal with questions of heritable right or title shall include power to make orders for the purposes of subsection (1) above.

(3) Subject to subsection (3B) below, if rectification under subsection (1) above would prejudice a proprietor in possession—

(a) the Keeper may exercise his power to rectify only where—

(i) the purpose of the rectification is to note an overriding interest or to correct any information in the register relating to an overriding interest;

(ii) all persons whose interests in land are likely to be affected by the rectification have been informed by the Keeper of his intention to rectify and have consented in writing;

(iii) the inaccuracy has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession; or

(iv) the rectification relates to a matter in respect of which indemnity has been excluded under section 12(2) of this Act;

(b) the court or the Lands Tribunal for Scotland may order the Keeper to rectify only where sub-paragraph (i), (iii) or (iv) of paragraph (a) above applies

or the rectification is consequential on the making of an order under section 8 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985.

(3A) Where a rectification of an entry in the register is consequential on the making of an order under section 8 of the said Act of 1985, the entry shall have effect as rectified as from the date when the entry was made:

Provided that the court, for the purpose of protecting the interests of a person to whom section 9 of that Act applies, may order that the rectification shall have effect as from such later date as it may specify.

(3B) Subject to subsection (3C) below, rectification (whether requisite or in exercise of the Keeper's discretion) to take account of, or of anything done (or purportedly done) under or by virtue of—

(a) any provision of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5), other than section 4 or 65; or

(b) section 49, 50, 58 or 80 of the Title Conditions (Scotland) Act 2003 (asp 9),

shall, for the purposes of subsection (3) above (and of section 12(3)(cc) of this Act), be deemed not to prejudice a proprietor in possession.

(3C) For the purposes of subsection (3B) above, rectification does not include entering or reinstating in a title sheet a real burden or a condition affecting an interest in land.

(4) In this section—

(a) 'the court' means any court having jurisdiction in questions of heritable right or title;

(b) 'overriding interest' does not include the interest of—

(i) a lessee under a lease which is not a long lease, and

(ii) a non-entitled spouse within the meaning of section 6 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981.

11. Transitional provisions for Part I

(1) If an application for registration relates to land no part of which is in an operational area, the Keeper may nevertheless accept that application as if it related to land wholly within an operational area, and if the Keeper has so accepted such an application, the provisions of this Act relating to registration then in force shall apply in relation to that application.

(2) An application for registration which relates to land which is partly in an operational area shall be treated as if it related to land wholly in that area, and the provisions of this Act relating to registration in force shall apply in relation to that application.

(3) In this section an 'operational area' means an area in respect of which the provisions of this Act relating to registration have come into operation.

PART II

INDEMNITY IN RESPECT OF REGISTERED INTERESTS IN LAND

12. Indemnity in respect of loss

(1) Subject to the provisions of this section, a person who suffers loss as a result of—

- (a) a rectification of the register made under section 9 of this Act;
- (b) the refusal or omission of the Keeper to make such a rectification;
- (c) the loss or destruction of any document, while lodged with the Keeper;
- (d) an error or omission in any land or charge certificate or in any information given by the Keeper in writing or in such other manner as may be prescribed by rules made under section 27 of this Act,

shall be entitled to be indemnified by the Keeper in respect of that loss.

(2) Subject to section 14 of this Act, the Keeper may on registration in respect of an interest in land exclude, in whole or in part, any right to indemnity under this section in respect of anything appearing in, or omitted from, the title sheet of that interest.

(3) There shall be no entitlement to indemnity under this section in respect of loss where—

- (a) the loss arises as a result of a title prevailing over that of the claimant in a case where—
 - (i) the prevailing title is one in respect of which the right to indemnity has been partially excluded under subsection (2) above, and
 - (ii) such exclusion has been cancelled but only on the prevailing title having been fortified by prescription;
- (b) the loss arises in respect of a title which has been reduced, whether or not under subsection (4) of section 34, or subsection (5) of section 36, of the Bankruptcy (Scotland) Act 1985 (or either of those subsections as applied by sections 615A(4) and 615B of the Companies Act 1985, respectively), as a gratuitous alienation or fraudulent preference, or has been reduced or varied by an order under section 6(2) of the Divorce (Scotland) Act 1976 or by an order made by virtue of section 29 of the Matrimonial and Family Proceedings Act 1984 (orders relating to settlements and other dealings) or has been set aside or varied by an order under section 18(2) (orders relating to avoidance transactions) of the Family Law (Scotland) Act 1985;
- (c) the loss arises in consequence of the making of a further order under section 5(2) of the Presumption of Death (Scotland) Act 1977 (effect on property rights of recall or variation of decree of declarator of presumed death);

- (cc) the loss arises in consequence of—
 - (i) a rectification which; or
 - (ii) there being, in the register, an inaccuracy the rectification of which,

were there a proprietor in possession, would be deemed, by subsection (3B) of section 9 of this Act, not to prejudice that proprietor;

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

(e) the loss arises, in the case of land extending to 2 hectares or more the area of which falls to be entered in the title sheet of an interest in that land under section 6(1)(a) of this Act, as a result of the Keeper's failure to enter such area in the title sheet or, where he has so entered such area, as a result of any inaccuracy in the specification of that area in the title sheet;

(f) the loss arises in respect of an interest in mines and minerals and the title sheet of any interest in land which is or includes the surface land does not expressly disclose that the interest in mines and minerals is included in that interest in land;

(g) the loss arises from inability to enforce a real burden or condition entered in the register, unless the Keeper expressly assumes responsibility for the enforceability of that burden or condition;

(gg) the loss arises from inability to enforce sporting rights converted into a tenement in land by virtue of section 65A of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5), unless the Keeper expressly assumes responsibility for the enforceability of those rights;

(h) the loss arises in respect of an error or omission in the noting of an overriding interest;

(j) the loss is suffered by—

(i) a beneficiary under a trust in respect of any transaction entered into by its trustees or in respect of any title granted by them the validity of which is unchallengeable by virtue of section 2 of the Trusts (Scotland) Act 1961 (validity of certain transactions by trustees), or as the case may be, section 17 of the Succession (Scotland) Act 1964 (protection of persons acquiring title), or

(ii) a person in respect of any interest transferred to him by trustees in purported implement of trust purposes;

(k) the loss arises as a result of an error or omission in an office copy as to the effect of any subsisting adverse entry in the Register of Inhibitions and Adjudications affecting any person in respect of any registered interest in land, and that person's entitlement to that interest is neither disclosed in the register nor otherwise known to the Keeper;

(kk) the loss is suffered by an adult within the meaning of the Adults with Incapacity (Scotland) Act 2000 (asp 4) because of the operation of sections 24, 53, 67, 77 or 79 of that Act, or by any person who acquires any right, title or interest from that adult;

(l) the claimant is the proprietor of the dominant tenement in a servitude, except insofar as the claim may relate to the validity of the constitution of that servitude;

(m) the claimant is a landlord under a long lease and the claim relates to any information—

(i) contained in the lease and

(ii) omitted from the title sheet of the interest of the landlord,

(except insofar as the claim may relate to the constitution or amount of the rent and adequate information has been made available to the Keeper to enable him to make an entry in the register in respect of such constitution or amount or to the description of the land in respect of which the rent is payable);

(n) the claimant has by his fraudulent or careless act or omission caused the loss;

(o) the claim relates to the amount due under a heritable security;

(p) the loss arises from a rectification of the register consequential on the making of an order under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

(q) the loss arises in consequence of an inaccuracy in any information contained in a notice of potential liability for costs registered in pursuance of—

(i) section 10(2A)(a) or 10A(3) of the Title Conditions (Scotland) Act 2003 (asp 9); or

(ii) section 12(3)(a) or 13(3) of the Tenements (Scotland) Act 2004 (asp 11).

(4) A refusal or omission by the Keeper to enter in a title sheet—

(a) any over-rent exigible in respect of a registrable interest;

(b) any right alleged to be a real right on the ground that by virtue of section 6 of this Act he has no duty to do so since it is unenforceable,

shall not by itself prevent a claim to indemnity under this section.

(5) In subsection (3)(g) above, 'condition' includes a rule of a development management scheme ('development management scheme' being construed in accordance with section 71 of the Title Conditions (Scotland) Act 2003 (asp 9)).

13. Provisions supplementary to section 12

(1) Subject to any order by the Lands Tribunal for Scotland or the court for the payment of expenses in connection with any claim disposed of by the Lands Tribunal under section 25 of this Act or the court, the Keeper shall reimburse any expenditure reasonably and properly incurred by a person in pursuing a *prima facie* well-founded claim under section 12 of this Act, whether successful or not.

(2) On settlement of any claim to indemnity under the said section 12, the Keeper shall be subrogated to all rights which would have been available to the claimant to recover the loss indemnified.

(3) The Keeper may require a claimant, as a condition of payment of his claim, to grant, at the Keeper's expense, a formal assignation to the Keeper of the rights mentioned in subsection (2) above.

(4) If a claimant to indemnity has by his fraudulent or careless act or omission contributed to the loss in respect of which he claims indemnity, the amount of the indemnity to which he would have been entitled had he not so contributed to his loss shall be reduced proportionately to the extent to which he has so contributed.

14. The foreshore

(1) If—

(a) it appears to the Keeper that—

(i) an interest in land which is registered or in respect of which an application for registration has been made consists, in whole or in part, of foreshore or a right in foreshore, or might so consist, and

(ii) discounting any other deficiencies in his title in respect of that foreshore or right in foreshore, the person registered or, as the case may be, applying to be registered as entitled to the interest will not have an unchallengeable title in respect of the foreshore or the right in foreshore until prescription against the Crown has fortified his title in that respect, and

(b) the Keeper wholly excludes or proposes wholly to exclude rights to indemnity in respect of that person's entitlement to that foreshore or that right in foreshore, and is requested by that person not to do so,

the Keeper shall notify the Crown Estate Commissioners that he has been so requested.

(2) If the Crown Estate Commissioners have—

(a) within one month of receipt of the notification referred to in subsection (1) above, given to the Keeper written notice of their interest, and

(b) within three months of that receipt informed the Keeper in writing that they are taking steps to challenge that title,

the Keeper shall

- (i) during the prescriptive period, or
- (ii) until such time as it appears to the Keeper that the Commissioners are no longer taking steps to challenge that title or that their challenge has been unsuccessful,

whichever is the shorter, continue wholly to exclude or, as the case may be, wholly exclude right to indemnity in respect of that person's entitlement to that foreshore or that right in foreshore.

(3) This section, or anything done under it, shall be without prejudice to any other right or remedy available to any person in respect of foreshore or any right in foreshore.

PART IV

MISCELLANEOUS AND GENERAL

24. Financial Provisions

There shall be defrayed out of money provided by Parliament all expenses incurred by the Keeper in consequence of the provisions of this Act.

25. Appeals

(1) Subject to subsections (3) and (4) below, an appeal shall lie, on any question of fact or law arising from anything done or omitted to be done by the Keeper under this Act, to the Lands Tribunal for Scotland.

(2) Subject to subsections (3) and (4) below, subsection (1) above is without prejudice to any right of recourse under any enactment other than this Act or under any rule of law.

(3) Nothing in subsection (1) above shall enable the taking of an appeal if it is, under the law relating to *res judicata*, excluded as a result of the exercise of any right of recourse by virtue of subsection (2) above; and nothing in subsection (2) above shall enable the exercise of any right of recourse if it is so excluded as a result of the taking of an appeal under subsection (1) above.

(4) No appeal shall lie under this section, nor shall there be any right of recourse by virtue of this section in respect of a decision of the Keeper under section 2(1)(b) or 11(1) of this Act.

26. Application to Crown

This Act shall apply to land owned by the Crown or by the Prince and Steward of Scotland, and to land in which there is any other interest belonging to Her Majesty in right of the Crown or to a Government department, or held on behalf of Her Majesty for the purposes of a Government department, in like manner as it applies to other land.

27. Rules

(1) The Secretary of State may, after consultation with the Lord President of the Court of Session, make rules—

- (a) regulating the making up and keeping of the register;
- (b) prescribing the form of any search, report or other document to be issued or used under or in connection with this Act and regulating the issue of any such document;
- (c) regulating the procedure on application for any registration;
- (d) prescribing the form of deeds relating to registered interests in land;
- (e) concerning such other matters as seem to the Secretary of State to be necessary or proper in order to give full effect to the purposes of this Act.

(2) The power to make rules under this section shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

28. Interpretation, etc

(1) In this Act, except where the context otherwise requires—

'deed' has the meaning assigned to it by section 3 of the Titles to Land Consolidation (Scotland) Act 1868, section 3 of the Conveyancing (Scotland) Act 1874 and section 2 of the Conveyancing (Scotland) Act 1924;

'heritable security' has the same meaning as in section 9(8) of the Conveyancing and Feudal Reform (Scotland) Act 1970;

'incorporeal heritable right' does not include a right of ownership of land, the right of a lessee under a long lease of land, a right to mines or minerals or

- (a) a right to salmon fishings; or
- (b) sporting rights (as defined by section 65A(9) of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (asp 5));

'interest in land'—

- (a) means any right in or over land, including any heritable security or servitude but excluding any lease which is not a long lease; and
- (b) where the context admits, includes the land;

'the Keeper' has the meaning assigned by section 1(2) of this Act;

'land' includes buildings and other structures and land covered with water;

'long lease' means a probative lease—

- (a) exceeding 20 years; or

(b) which is subject to any provision whereby any person holding the interest of the grantor is under a future obligation, if so requested by the grantee, to renew the lease so that the total duration could (in terms of the lease, as renewed, and without any subsequent agreement, express or implied, between the persons holding the interests of the grantor and the grantee) extend for more than 20 years;

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

(a) the lessee under a lease which is not a long lease;

(b) the lessee under a long lease who, prior to the commencement of this Act, has acquired a real right to the subjects of the lease by virtue of possession of them;

(c) a crofter or cottar within the meaning of section 3 or 28(4) respectively of the Crofters (Scotland) Act 1955, or a landholder or statutory small tenant within the meaning of section 2(2) or 32(1) respectively of the Small Landholders (Scotland) Act 1911;

(d) the proprietor of the dominant tenement in any servitude which was not created by registration in accordance with section 75(1) of the Title Conditions (Scotland) Act 2003 (asp 9);

(e) the Crown or any Government or other public department, or any public or local authority, under any enactment or rule of law, other than an enactment or rule of law authorising or requiring the recording of a deed in the Register of Sasines or registration in order to complete the right or interest;

(ee) the operator having a right conferred in accordance with paragraph 2, 3 or 5 of Schedule 2 to the Telecommunications Act 1984 (agreements for execution of works, obstruction of access, etc);

(ef) a licence holder within the meaning of Part I of the Electricity Act 1989 having such a wayleave as is mentioned in paragraph 6 of Schedule 4 to that Act (wayleaves for electric lines), whether granted under that paragraph or by agreement between parties;

(eg) a licence holder within the meaning of Part I of the Electricity Act 1989 who is authorised by virtue of paragraph 1 of Schedule 5 to that Act to abstract, divert and use water for a generating station wholly or mainly driven by water;

(eh) insofar as it is an interest vesting by virtue of section 7(3) of the Coal Industry Act 1994, the Coal Authority;

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

(g) a member of the public in respect of any public right of way or in respect of any right held inalienably by the Crown in trust for the public or in respect of the exercise of access rights within the meaning

of the Land Reform (Scotland) Act 2003 (asp 2) by way of a path delineated in a path order made under section 22 of that Act;

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

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

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

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

'the register' and 'registered' have the meanings assigned to them respectively by subsections (1) and (3) of section 1 of this Act;

'Register of Sasines' has the same meaning as in section 2 of the Conveyancing (Scotland) Act 1924;

'transfer' includes transfer by operation of law.

29. Amendment and repeal of enactments

(1) ...

(2) Subject to subsection (3) below, any reference, however expressed, in any enactment passed before, or during the same Session as, this Act or in any instrument made before the passing of this Act under any enactment to the Register of Sasines or to the recording of a deed therein shall be construed as a reference to the register or, as the case may be, to registration.

(3) Subsection (2) above does not apply—

(a) to the enactments specified in Schedule 3 to this Act;

(b) for the purposes of the recording of a deed in the Register of Sasines under section 8 of this Act.

(4) ...

Section 29(3)

SCHEDULE 3

ENACTMENTS REFERRING TO THE REGISTER OF SASINES OR TO THE RECORDING OF A DEED IN THE REGISTER OF SASINES NOT AFFECTED BY SECTION 29(2)

1. *The Real Rights Act 1693*
The whole Act.
2. *The Register of Sasines Act 1693*
The whole Act.
3. *The Register of Sasines Act 1829*
Section 1.
4. *The Infertment Act 1845*
Sections 1 to 4 and Schedule B insofar as relating to section 1.
5. *The Registration of Leases (Scotland) Act 1857*
 - (a) In section 6, from the beginning of the section to "to the extent assigned" and Schedule D.
 - (b) Section 12.
 - (c) Section 15.
 - (d) Section 16.
6. *The Land Registers (Scotland) Act 1868*
 - (a) Sections 2 and 3.
 - (b) Sections 5 to 7.
 - (c) Section 9.
 - (d) Sections 12 to 14.
 - (e) In section 19, the proviso.
 - (f) Section 23.

7. *The Titles to Land Consolidation (Scotland) Act 1868*
 - (a) Sections 9 and 10 and Schedules C and D.
 - (b) Sections 12 and 13 and Schedules F and G insofar as relating to sections 12 and 13 respectively.
 - (c) Section 17.
 - (d) Section 19 and Schedule L.
 - (e) Section 120.
 - (f) Section 141.
 - (g) Section 142.
 - (h) Section 143.
 - (i) Section 146.
 - (j) Schedule D.
 - (k) Schedule G.
8. *The Conveyancing (Scotland) Act 1874*
 - (a) Section 8.
 - (b) In section 32, from the beginning to "shall be sufficient" and Schedule H.
 - (c) Section 61.
 - (d) Schedule M.
9. *The Writs Execution (Scotland) Act 1877*

Sections 5 and 6.
10. *The Registration of Certain Writs (Scotland) Act 1891*

Section 1(2).
11. *The Conveyancing (Scotland) Act 1924*
 - (a) Section 3, form 1 of Schedule A and Note 2 to Schedule K.
 - (b) Section 4 and, in Schedule B, forms 1 to 6 and Note 7, but not insofar as relating to the completion of title under section 74 or 76 of the Lands Clauses Consolidation (Scotland) Act 1845.
 - (c) Section 8 and Schedule D.
 - (d) Section 9(3) and (4).
 - (e) Section 10(1) to (5) and Schedule F.

- (f) In section 24(3) from "and such lease, before" to "Schedule B to this Act".
 - (g) Section 24(2) and (5) and Schedule J.
 - (h) Section 47.
 - (i) Sections 48 and 49(2).
12. *The Burgh Registers (Scotland) Act 1926*
- (a) Section 1(1) (except the words from "and any writ" to "appropriate burgh register of sasines") and Schedule 1 insofar as relating to section 1(1) with that exception.
 - (b) Section 1(2).
 - (c) Section 2 and Schedule 1 insofar as relating to section 2.
 - (d) Section 5 and Schedule 1 insofar as relating to section 5.
13. *The Conveyancing Amendment (Scotland) Act 1938*
- Section 6(1) and (2).
14. *The Public Registers and Records (Scotland) Act 1948*
- (a) Section 2.
 - (b) Section 4.
15. *The Public Registers and Records (Scotland) Act 1950*
- Section 1(1).
16. *The Conveyancing and Feudal Reform (Scotland) Act 1970*
- (a) Section 12(1) and (2) and Notes 1, 2 and 3 to Schedule 2 insofar as relating to section 12(2).
 - (b) Section 28(3).
17. *The Prescription and Limitation (Scotland) Act 1973*
- Section 1.

Appendix B

Index of Proprietors

Sample page



REGISTERS DIRECT



LAND REGISTER

RESULTS OF NAME SEARCH

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County: ROSS AND CROMARTY
Search Criteria: DONALD MACLEOD

This copy does not have any evidential status.

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Search No: 2004-0639849

Time: 15:30:04
User Reference:

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ROS428	17 SWORDALE POINT ISLE OF LEWIS HS2 0BP	DONALD MACLEOD	17B SWORDALE ISLE OF LEWIS HS2 0BP
ROS856	42 NEWMARKET STORNOWAY	DONALD BEATON MACLEOD	23A NEWMARKET ISLE OF LEWIS HS2 0DZ
ROS1608	1 CARRON PLACE ARDGAY SUTHERLAND	DONELLA MACLEOD	1 CARRON PLACE ARDGAY IV24 3BQ
ROS340	48 SPRINGFIELD ROAD STORNOWAY HS1 2PP	JOHN DANIEL MACLEOD	48 SPRINGFIELD ROAD STORNOWAY HS1 2PP

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