JUSTICE 1 COMMITTEE

Tuesday 24 September 2002
(*Afternoon*)

Session 1

£5.00

Produced and published in Scotland on behalf of the Scottish Parliamentary Corporate Body by The Stationery Office Ltd.

Her Majesty's Stationery Office is independent of and separate from the company now trading as The Stationery Office Ltd, which is responsible for printing and publishing Scottish Parliamentary Corporate Body publications.

CONTENTS

Tuesday 24 September 2002

JUSTICE 1 COMMITTEE

† 31st Meeting 2002, Session 1

CONVENER

*Christine Grahame (South of Scotland) (SNP)

DEPUTY CONVENER

*Maureen Macmillan (Highlands and Islands) (Lab)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)
*Lord James Douglas-Hamilton (Lothians) (Con)
Donald Gorrie (Central Scotland) (LD)
*Paul Martin (Glasgow Springburn) (Lab)
*Michael Matheson (Central Scotland) (SNP)

COMMITTEE SUBSTITUTES

Bill Aitken (Glasgow) (Con)
Mrs Margaret Smith (Edinburgh West) (LD)
Kay Ullrich (West of Scotland) (SNP)

*attended

WITNESSES

Eddie Bain (City of Edinburgh Council)
Robert Balfour (Scottish Landowners Federation)
Ian Davis (Registers of Scotland)
Andrew Fraser (Convention of Scottish Local Authorities/Society of Local Authority Lawyers and Administrators in Scotland)
Councillor Sheila Gilmore (City of Edinburgh Council)
Eric Leggat (Convention of Scottish Local Authorities/Society of Local Authority Lawyers and Administrators in Scotland)
Malcolm MacAskill (Society of Local Authority Lawyers and Administrators in Scotland/Association of Chief Estates Surveyors and Property Managers in Local Government)
Lorna McGregor (Convention of Scottish Local Authorities)
Alistair MacLeary (Lands Tribunal for Scotland)
Bruce Merchant (South Forrest Solicitors)
Malcolm Strang Steel (Scottish Landowners Federation)
Neil Tainsh (Lands Tribunal for Scotland)
John Wright QC (Lands Tribunal for Scotland)

ACTING CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 1

† 30th Meeting 2002, Session 1—joint meeting with Justice 2 Committee.

Scottish Parliament

Justice 1 Committee

Tuesday 24 September 2002

(*Afternoon*)

[THE CONVENER *opened the meeting in private at 13:46*]

13:58

Meeting continued in public.

The Convener (Christine Grahame): Welcome to the 31st meeting this year of the Justice 1 Committee. I remind members and anyone in the public area to turn off their mobile phones and pagers. Apologies have been received from Donald Gorrie, who is attending the Liberal Democrat conference. I welcome Scott Wortley, who is invaluable to us as our adviser on the Title Conditions (Scotland) Bill.

Items in Private

The Convener: I propose that item 5, which is consideration of a draft stage 1 report on the Public Appointments and Public Bodies etc (Scotland) Bill, be considered in private. Members will know that that has been our practice, to enable us to consider our detailed approach to reports. The report will be made public in its final form. Does the committee agree to take that item in private?

Members *indicated agreement.*

The Convener: Under item 6, members will be asked to consider two draft motions on the prison estates review. The motions are not contentious, and there is little difference between them, but as they are draft motions, does the committee agree to take the item in private and to announce the decision in public?

Members *indicated agreement.*

Convener's Report

The Convener: I draw members' attention to the letter from Safeguarding Communities Reducing Offending, which invites the committee to visit SACRO in relation to our alternatives to custody inquiry. We have a busy schedule, so it might be best if members accept the offer in an individual capacity, as their diaries permit. Is that agreed?

Members *indicated agreement.*

14:00

The Convener: I should inform members that the Justice 1 Committee has been nominated as a secondary committee for the Protection of Children (Scotland) Bill, which was introduced on 6 September. The bill provides for a list of persons unsuitable to work with children to be established and maintained by the Scottish Executive and for those on the list to be banned from working with children.

We will look specifically at the appeal process and the creation of offences. It is proposed that we take oral evidence at only one session, as we are just the secondary committee, and that we seek comments in writing. The clerks will e-mail members regarding potential witnesses. Members should note that this impacts on the time scale for other committee work, including the alternatives to custody inquiry. We will discuss our forward work programme and items relating to that inquiry next week. I am aware that Michael Matheson wants to raise issues about the inquiry. Are members happy with those suggestions?

Members *indicated agreement.*

The Convener: The European Commission office in Edinburgh has invited a member of the committee to lead a workshop on the European convention on human rights at the Scottish European resources network—SERN—annual meeting on 26 November. Various other members of other committees have agreed to lead workshops relevant to their committees. The member nominated by this committee would be required to conduct a short talk on the work of the Justice 1 Committee and then open a discussion on the ways in which the work of the Scottish Parliament, the Scottish Executive and other information providers can enhance the public's understanding of the ECHR and its European dimension. Do we have any volunteers?

Michael Matheson (Central Scotland) (SNP): Do you want to do it, convener?

The Convener: I am happy to do it, if members want me to.

Lord James Douglas-Hamilton (Lothians) (Con): I think that the opportunity should be offered to the convener in the first instance.

The Convener: Thank you.

Title Conditions (Scotland) Bill: Stage 1

The Convener: The next item of business is the Title Conditions (Scotland) Bill. We will take evidence from a panel comprising Lorna McGregor, a legal adviser for the Convention of Scottish Local Authorities; Andrew Fraser, the principal solicitor of North Ayrshire Council; Eric Leggat, a solicitor of North Lanarkshire Council; Malcolm MacAskill, the principal estates surveyor of South Ayrshire Council, who is representing the Society of Local Authority Lawyers and Administrators in Scotland and the Association of Chief Estates Surveyors and Property Managers in Local Government; Councillor Sheila Gilmore from the City of Edinburgh Council; and Eddie Bain, a solicitor of the City of Edinburgh Council.

If any witness wishes to answer a specific question, they should indicate that they want to do so. I know that people sometimes feel that they have not had a chance to speak and I will do my best to ensure that everyone gets a chance, but I might overlook somebody in error.

I refer members to the joint submission from COSLA, SOLAR and ACES and to the submission from the City of Edinburgh Council.

In written evidence, local authorities and social landlords have expressed concern that the abolition of the feudal system will cause particular problems. Could you outline briefly why you use the feudal system and what problems feudal abolition will cause for you?

Eric Leggat (Convention of Scottish Local Authorities/Society of Local Authority Lawyers and Administrators in Scotland): The main use that North Lanarkshire Council has for the feudal system is in relation to sales under the right-to-buy scheme. When selling off a house, we grant a feu disposition to purchasing tenants.

The feu disposition contains several burdens or conditions that regulate what the tenant can do or—what is more usual—cannot do with the property after it has been purchased from the council. For example, we insert conditions to the effect that no business that could be annoying to neighbours is to be run from a house. The feu disposition also contains miscellaneous conditions, such as regulating the number of pets that somebody can keep in a house. The aim of inserting the conditions is to protect the amenity of the estate, not just for tenants, but for owner-occupiers.

The Convener: Is that because you have mixed estates that you are trying to keep much of a muchness?

Eric Leggat: Yes. We are trying to knit the estates together.

Lorna McGregor (Convention of Scottish Local Authorities): If we are looking generally at the importance of the feudal system, I would like to say that the system is extensively used by local authorities for matters beyond housing. The feudal system is important for how local authorities effect their business in a variety of functions, not just in economic development, but when granting land to community groups for their use. The existing system has many useful facilities that we would like preserved, particularly in relation to clawback and development-value burdens, which we can currently use and impose.

The Convener: Can you give an example of a useful facility?

Lorna McGregor: An example for community groups might be when a council grants land to a canoe club for a canoe hut. The land would be granted only for specified recreational purposes and for a nominal figure—for example, £100—that would be less than the open market value of the land.

Such a facility allows a council to encourage the use of land by community groups. They benefit from the use of land and it is a win-win situation. If that provision were removed and councils could not use clawback or restrictions on use, a local authority, to achieve best value, would have to justify more fully the granting of land for less than its open market value. The public purse would have to be protected, which would mean that in future local authorities could not grant land on the same terms and conditions as they do now.

The Convener: I see.

Eddie Bain (City of Edinburgh Council): Another example of a development-value burden, where the land is conveyed for less than the best price that is reasonably obtainable, would be where the local authority wants to restrict the use of the land to preserve its amenity. Therefore, it conveys the land for less than the best consideration that is reasonably obtainable with a view to that land continuing to be used only for recreational purposes.

In that particular type of development-value burden, giving the local authority a right to compensation would not protect the interest for which the burden was created. The bill's policy memorandum states that there are difficulties in identifying development-value burdens. There is a deal of truth in that, but so far as local authorities are concerned it is possible to identify land that has been conveyed for the best consideration that is reasonably obtainable because local authorities must not only apply to ministers for consent, but give a reason for ministers to grant that consent.

The Convener: The adviser has just been explaining to me something that I believe is going to be picked up by Wendy Alexander later on, so I do not want to go into great detail just now.

I return to the question of mixed ownership, with property partly sold off and partly rented. The Executive proposes that, prior to the appointed day, a local authority can register a deed of conditions over the part still in council ownership. As I understand it, the estate will then qualify as a community and will be subject to the community burdens scheme. The council will get a vote for every house in the community that is in its ownership. Why is it desirable that local authorities retain that level of control over houses after they enter private ownership? The witnesses have perhaps already explained that, but perhaps they could give examples of difficulties that have arisen with mixed ownership that could be prevented by such provisions.

I see that Sheila Gilmore is prepared to answer this question. I keep meeting people from my past life, and Sheila and I met in the courts when we were both practising solicitors.

Councillor Sheila Gilmore (City of Edinburgh Council): From our perspective, it is not so much a question of control as of being able to create the kind of community responsibility that we would like. We do not see it as a means of the council keeping a control on what happens, so much as the entire community of owners, of which the council is one, being able to play that role collectively. It is important to be within that community. Under the previous set-up, we could have been in a situation where the council would be cut out of that—unless we lodged hundreds of notices all over the place. In my view, the council is not there as some special type of owner, but simply as one, or several, among many, representing the interests of the tenants in those houses. It is important to create communities that have a fair balance, but it should not be seen as the council trying to hold on to control over what is happening. Rather, councils would be sharing in a genuine partnership.

The Convener: On a technical point, the Executive proposes that a deed of conditions be registered prior to the appointed day. What is your view on that? Are you aware of any practical difficulties with implementing that scheme that you want to put on the record?

Eric Leggat: The council's view is that there would be significant resource implications for us, purely in terms of manpower and the pressure of work, if that proposal got on to the statute book. We may have to take the view that, beneficial as it would be to record deeds of conditions, we simply could not do it.

The Convener: What problems would that cause?

Eric Leggat: All the burdens that we have mentioned would lapse and we would no longer have our present input in mixed-tenure schemes.

The Convener: Have you made the Executive aware of that?

Eric Leggat: Yes. My council certainly referred to that in our submission, not to the Executive but to the Justice 1 Committee. The proposal simply appeared in the bill.

The Convener: That is interesting. Another general point that has been raised in written evidence is that, for part of the estate in private ownership to remain subject to the burdens originally imposed, there must be an indication in the title deeds of an intention to create a common scheme. However, not all deeds have been drafted that way, and some mention only the superior's right. How big a problem do you think that will be for local authorities in practice?

Andrew Fraser (Convention of Scottish Local Authorities/Society of Local Authority Lawyers and Administrators in Scotland): Unfortunately, we do not have categorical evidence on what the position would be among all local authorities, but it will be a problem for some local authorities. If a means could be found in the fine print of the bill to give flexibility to the definition of "common scheme" to reflect a scheme covering an area where householders had a similar interest, that would certainly be welcome.

The Convener: Will an amendment be winging its way from COSLA at some point?

Andrew Fraser: We could certainly consider producing an amendment for stage 2.

Paul Martin (Glasgow Springburn) (Lab): On common maintenance and repair, section 28 provides a default rule that in the absence of express stipulation in the title deeds, the majority of proprietors can instruct common maintenance work.

In the oral evidence that we heard from the Royal Institution of Chartered Surveyors in Scotland and the Law Society of Scotland, those organisations said that they were concerned that section 28 was far too bureaucratic. What are the panel's views on that matter?

14:15

Andrew Fraser: As I understand it, the Law Society's criticism was that the requirements of the notice were far too complex. Our view is that it is important that the notice has a sufficient level of detail in it so that people who receive it are able to deal with the issue there and then without going to look at their title deeds.

We wonder whether sections 28(4)(d) and (e) are strictly necessary. However, broadly we have no great dispute with those provisions.

Eddie Bain: That view is reflected in the City of Edinburgh Council's evidence. As the questioner has said, my understanding is that the provisions are default provisions. The City of Edinburgh Council welcomes the majority rule, but is concerned that the majority rule applies only in a default situation. If the title deeds make provision for decision making on maintenance, those provisions might be contrary to the majority rule.

Paul Martin: Are you of the same view as the other organisations that believe that the system is far too bureaucratic? Are you satisfied that the current system is sufficient? I know you touched on that, but the issue of bureaucracy was specifically raised.

Andrew Fraser: Our position on the notice is that we acknowledge that the notice has to contain sufficient detail so that those who get one are able to tell what it is they are signing. In broad terms, we are happy with the detail that has to go into the notice. However, I take on board the issues that have been raised by Mr Bain for the City of Edinburgh Council and I would not disagree with any of those either.

Maureen Macmillan (Highlands and Islands) (Lab): Are you happy that this is addressing problems such as those that occur when the roof of a tenement needs to be repaired and the majority of the people living there want the work done, but cannot get the other residents to chip in?

Councillor Gilmore: As the bill is drafted, we feel that it has missed an opportunity. As everyone is aware, there is a huge problem about repairs, maintenance and getting agreement.

The City of Edinburgh Council was attracted by the original formulation of the development management scheme in the draft bill, although we thought that it did not go far enough because it was intended to cover new properties. Most new properties or flatted developments—maybe not all—tend to have arrangements in place. That has helped those developments. People sign up to a scheme when they become owners; it is part and parcel of the obligations of being an owner. People know that there will be a call on them to make regular payments. What is often lacking is something that tells people what their obligations are and a mechanism for getting people together—it does not have to be a physical meeting, but it can be—and operate that community of interest to get things done. We were disappointed that that original formulation was dropped altogether. Because it was dropped, the opportunity to suggest that it be extended to apply to existing properties and not just new properties

has also disappeared.

I know that there are jurisdictional issues about the role of the Scottish Parliament and the role of the Westminster Parliament, but we would not have thought that those were insuperable if there were a will. It is not just a question of saying what a majority can, in certain circumstances, decide, but of regularising a mechanism for managing multi-occupied property, because that is difficult. If the mechanism were there, owners would be able to do a lot more for themselves, whether owner-occupiers, or, for example, the council. Fundamentally, it is the job of owners to look after their property. We do not believe that the legal system makes it sufficiently easy for them to do so. As a result, either things do not get done, which is pretty disastrous, or there is, particularly in Edinburgh, a reliance on the council to step in through the statutory notice process.

Ms Wendy Alexander (Paisley North) (Lab): I want to ask about the model development management scheme. There are two issues here. First, what are your views on the scheme that the Scottish Law Commission has proposed? Is it adequate or could it be improved and if so, how could be it be improved? To what extent should it be advisory and to what extent should core functions be compulsory?

Secondly, I presume that you would support the inclusion in the bill of the model development management scheme if a solution could be found to the problem that the issues are partially reserved to Westminster. Do you want to make any observations on the question of the issues' being reserved?

The Convener: I think that the witnesses have, in part, already answered that, but do they want to add anything?

Councillor Gilmore: We would certainly welcome a resolution to what seems to be a technical issue. I am not saying that it is not important, but such difficulties can be overcome and I am not convinced that the reservation of the power to Westminster was intended to have the sort of effect that it does on what is a small-scale business organisation.

The advantage of owners having the power to form an organisation, rather than operating just on an ad hoc basis when a problem arises, is that it places responsibility on the owners to do things for themselves, rather than expect external forces to come in and do them.

The advantage of being an organisation is that there is a legal, binding quality to it and owners can recover money from people. It also allows a major cultural change in the way in which owners relate to each other. Without that sort of mechanism, even with majority decision making, action will be ad hoc and reactive to problems. We have to get to the point at which owners say, "Well, we live in the building so we have to think about its future," rather than have them wait until the roof falls in.

Ms Alexander: This is emerging as a significant area in which the bill would be undermined if the scheme did not go ahead. I do not know whether in the next meeting of the committee we might write to the minister seeking early clarification of the legal issues. Were we to discover that the matter was reserved, we could make representations.

The Convener: Scott Wortley is assisting me here. The issue is about incorporation. I cannot see why we cannot have a trust or an association that is not incorporated. Has that been addressed in submissions?

Eddie Bain: I cannot say that I have considered that in detail. I thought that the point that was being made was that even an association that is not incorporated is a business association, but I do not claim to be clear on that.

Ms Alexander: I might be wrong about this, but as I understand it, most of the submissions were made prior to the issue of the reservation becoming clear. That puts the committee under an obligation to seek early clarification of the reservation. If the matter is devolved, we will want to make representations about ways in which the provision should be strengthened. If it turns out to be reserved, the issue of the competence of the Scottish Parliament is one that we might also want to take up, before we get to stage 1 and stage 2.

The Convener: The minister is here next week. I have no doubt—

Ms Alexander: It would be helpful to give the minister advance warning that we want to press for a resolution of the issue, given how fundamental it is to the bill.

The Convener: I am sure that the minister's staff will read the *Official Report*. We would give your suggestion a thumbs-up but, unfortunately, it would not go on the record.

Lord James Douglas-Hamilton: I will ask some probing questions. First, why is it necessary for local authorities, when selling off properties under the right-to-buy scheme, to be able to impose manager burdens lasting for 30 years, as opposed to the standard 10 years that is permitted for private developers?

Eric Leggat: That is due to the practicalities of the situation. Private developers sell properties fairly quickly, whereas councils have been selling properties for more than 20 years, and many more are still to be sold. That is why the 30-year rule on manager burdens will apply to councils.

Lord James Douglas-Hamilton: So from a practical point of view, 30 years is the ideal time scale.

Eric Leggat: It is as good a time scale as any other, as far as I am concerned.

Lord James Douglas-Hamilton: Given that the effect of sections 58(5) and 58(7) is that the manager burden runs from the time when the burden was first imposed, as opposed to from the date the act comes into force, is the 30-year period long enough?

Eric Leggat: It could be argued that in reality it is a 10-year period. If the first deed was registered 20 years ago, we are already 20 years down the line, so we have only 10 years left of the 30-year period. However, I appreciate that a figure had to be chosen. The councils would prefer the period to be longer, but others may take a different view.

Lord James Douglas-Hamilton: So your preference would be for a period of not less than 30 years.

Eric Leggat: Yes.

Michael Matheson: I have a question on sections 77 to 79, which relate to the School Sites Act 1841—an act with which I am sure everyone is familiar. I understand that some local authorities have encountered difficulties with that legislation. Could you take us through the problems that local authorities have encountered? Are sections 77 to 79 adequate to deal with the problems?

Andrew Fraser: As the committee will probably be aware, the School Sites Act 1841 provided a mechanism whereby estates in entail could transfer ground for schools. If that act had not done so, such estates would have been unable to transfer ground because of the entail. If the school ceased to be used as a school, there was a right of reversion. In many local authorities, most of the old school sites are affected by such restrictions. The schools of that age are precisely those that—

The Convener: I must stop you there. I hope that I am not going to insult committee members, but I will insult myself. Could you explain the right of entail and reversion rights? It would help if that were on the record.

Andrew Fraser: My understanding of an entail is that, in the 19th century, an owner could transfer either superiority or the dominium utile of a property to someone else, subject to a direction that it would pass on down a number of heirs. Restrictions provided that that entailed property could not be sold inalienably.

The Convener: I love all this. I am asking for a simple explanation, but bigger words are appearing.

Michael Matheson: Let us go back to basics. Can you give us an example, and preferably a real-life one?

Andrew Fraser: For example, an old school site may need to be redeveloped or it may be surplus to requirements. If its original title deeds were granted under the School Sites Act 1841, there is reversion. In other words, when the property ceases to be used as a school, it transfers back to the original owner. Local authorities have experienced a number of problems in that respect. First, the Keeper of the Registers of Scotland has not been willing to grant a full indemnity of title for the sale of any old school, even if the school deeds do not include a reference to the School Sites Act 1841.

As drafted, the bill will deal with that problem by transferring the right of reversion into a right of compensation. If there is no right of reversion, the keeper will no longer be interested. We welcome the fact that the bill deals with that problem.

14:30

The Convener: Please explain the process in which a local authority sells an old school.

Andrew Fraser: At present, if we want to sell an old school, the keeper—

The Convener: I understand the bit about indemnities and the keeper. Please explain the bit about compensation. We are talking about a local authority selling a school that is surplus to requirements. Is that correct?

Andrew Fraser: Yes.

The Convener: What is meant by the reversionary interest?

Andrew Fraser: It means that the old owner who sold the school site in the 1800s or his successors are entitled to get the site back. What usually happens in practice is that the successors try to get compensation from the local authority. The keeper will not grant a full indemnity because he is concerned that in theory the superior can always return and claim a reversion on the property.

The Convener: Is the superior the original family who sold the property for a school?

Andrew Fraser: Yes. The bill addresses that issue, but there is a lack of certainty at present over which schools are affected. First, as I mentioned, local authorities are concerned that the present position is so uncertain that the keeper will not grant a full indemnity for any old school site regardless of whether the original title refers to the School Sites Act 1841.

Secondly, difficulties can arise in tracing who is entitled to the reversion. The original discussion paper from the Scottish Law Commission referred

to some of those difficulties. The situation is not as easy as that of finding the successor to the superior. Thirdly, the School Sites Act 1841 has attracted the attentions of what are known as title raiders—people who buy up superiorities with a view to getting a quick return from councils that have either sold or are in the process of selling such properties. Fourthly, problems can arise in situations in which a local authority retains the property as a school. If a major redevelopment or reinvestment in the school were to take place, for example involving a private finance initiative or a public-private partnership, the lenders might not be happy that a reversion is sitting in the titles. That can affect councils' abilities to promote such PFI or PPP projects.

In COSLA's view, the provisions of the bill are a curate's egg. As I said earlier, it is good that the bill translates the right of reversion on a property into compensation. However, the bill does not address issues to do with the lack of certainty. In the light of the history of the School Sites Act 1841, public policy objectives to secure better education and the potential windfall to title raiders, it is surprising that the compensation that will be payable will be the full, open-market value less improvements.

COSLA suggests that it would be possible to address those issues by requiring those who are entitled to a reversion under the School Sites Act 1841 to record a notice that compensation should be paid thereafter. One model that would be eminently suitable is the model that is applied at present to development-value burdens. In that model, a notice is recorded prior to the appointed day and compensation is payable for any change of use that follows within the next 20 years. A cap is put on the compensation, which, in the case of a school, would be a calculation of the difference in value at the time that the school was sold.

The Convener: I have been told that the provisions to which you referred are in the Abolition of Feudal Tenure etc (Scotland) Act 2000. I understand that similar provisions could be imported into the bill. Is that what you are saying?

Andrew Fraser: That would certainly meet many of the problems that we experience.

Michael Matheson: How widespread is the problem of title raiders?

Andrew Fraser: There are two issues to take into account. First, some areas do not have many titles under the School Sites Act 1841, but in other areas, such as North Ayrshire, most schools are burdened by such title restrictions. The matter depends on how many estates were subject to entail in the 1800s. Secondly, it is simply pot luck whether there is a title raider or someone who has bought up the titles. North Ayrshire has had problems with four schools in the past two years. One of those cases went to the Court of Session and in another a title raider attempted to get a reversion over what had become a sheltered housing complex. In our area, title raiders are common, but other authorities do not have a problem.

Michael Matheson: Could the compensation mechanism in the bill make buying up titles more attractive to title raiders?

Andrew Fraser: It could make that more attractive; it would certainly do nothing to stop it. The 1841 act permitted a local authority to transfer the value of a school to another educational establishment. In 1945, when the 1841 act was abolished, that provision disappeared also, which unwittingly created a windfall for people who held such restrictions. People already have more of a windfall than they had in 1841.

Malcolm MacAskill (Society of Local Authority Lawyers and Administrators in Scotland/Association of Chief Estates Surveyors and Property Managers in Local Government): Compensation is always a thorny issue with valuers and there are always areas of disagreement. Particularly with schools, there is a difficulty with an individual's view of the value of a property, especially when that person looks at the asset valuations in a council's annual report. A primary school might have an asset value of £3 million or £4 million. However, the site might not be very large, it might be in a rural location where there is little demand for commercial or industrial use and the alternative usage might be residential. That means that the site will not be worth a lot of money—perhaps only £50,000 or £60,000.

Glasgow City Council's submission mentions that if the reversion holder is to take a site back, he could be burdened with the cost of demolishing the buildings on the site in order to develop it for residential use, which means that the site might have negative value. The value is up to an individual's view. Title raiders will go on the basis that a site is in a council's asset register as being worth £3 million or £4 million. That is our view of the value, but we have to value the properties on the basis of how much it will cost the council to replace the site. That relates to Andrew Fraser's view that, if section 14 of the 1841 act were reintroduced, no compensation should be payable where the council, after disposal of a site that was affected by the 1841 act, was entitled to reinvest the money in an education project.

The Convener: Is it not the case that, if someone is not content with a valuation, they can go to the Lands Tribunal for Scotland?

Malcolm MacAskill: Yes, indeed.

The Convener: Does that not mean that, when

somebody is doing an evaluation in the first place, they will take into account all the other factors that you and others such as Glasgow City Council mentioned?

Malcolm MacAskill: That forces them to take those factors into account. It also extends the period that is involved in trying to dispose of a property. Such matters take a long time to resolve, especially if they have to go through the Lands Tribunal system.

Maureen Macmillan: I hear what you say about schools but, in my experience, title raiders have often preyed on schoolhouses in rural areas. Someone has bought the schoolhouse in good faith from the local authority and an individual has come along and said, "Excuse me, this is actually my house." How would you sort that out?

Malcolm MacAskill: That is not uncommon. I wonder whether you refer to a situation in which the property was not disponed, but held on a long lease. Those are two different situations.

Maureen Macmillan: That is possible. I know that many of the schools in the area that I represent were held on long leases.

Malcolm MacAskill: That relates to the prescriptive period. At the moment, if a property such as a former schoolhouse has been purchased and the prescriptive period has passed, the reversion holder cannot come along and claim compensation, but the proposals in the bill seem to suggest that a further prescriptive period of five years would be added, despite the fact that the prescriptive period may have passed.

The Convener: I will have to go back and find out what the Leasehold Casualties (Scotland) Act 2001 does.

Maureen Macmillan: We have done that one.

The Convener: We have, but it obviously does not cover long leases of schools, which could be covered by the School Sites Act 1841. Is that correct?

Malcolm MacAskill: I do not think that that would be the situation. I would be very surprised if any properties are covered by the School Sites Act 1841 and a long lease.

Maureen Macmillan: The schoolhouse and the school are often one and the same building. They are often conjoined.

Malcolm MacAskill: That tends to happen in rural areas in which the school was small and the teacher lived on the premises. It is not so common now.

The Convener: We will move on. Although the topic is interesting, I suspect that not many cases are involved.

Ms Alexander: Do you agree with the Executive's general approach to development-value burdens and clawback? We are interested in the decision not to preserve existing feudal burdens of that type, the way in which compensation has been dealt with and whether the amendments to the standard securities legislation are adequate.

Andrew Fraser: We share the concerns that are evident in the Law Society's evidence on why the state is interfering in the area. If a property has been sold at less than market value by agreement, is it not only fair and reasonable that the seller gets a share of the uplift? Although we would like the development-value burden solution to be applied to school sites, we do not like it applied to development-value burdens.

A distinction must be drawn between development-value burdens, clawback securities and the local authority use of burdens to restrict use. Local authorities sometimes use burdens, such as development-value burdens, as opposed to clawbacks, to restrict use. For example, public money may have been spent on regenerating a site for a particular use, and the local authority concerned would want to ensure that that site was maintained for that use. If a local authority is trying to encourage inward investment, in the same way as a local enterprise company would, it may sell ground for that use for less than its market value, or grant-awarding bodies may require a specific use to be continued for a 10-year period. The use of burdens does not arise only in economic development matters—Heritage Lottery funding is one of a number of areas in which burdens are used, as are sports complexes. COSLA urges members to ensure that the bill includes a provision to give local authorities a power that is similar to the power that allows local enterprise companies to impose title restrictions. We hope that such a power could be linked to the new power of well-being under the Local Government in Scotland Bill.

14:45

The Convener: Are you talking about the extension of borrowing powers?

Lorna McGregor: We are referring to the power in the Local Government in Scotland Bill that will afford local authorities new freedoms and flexibilities. That is a power of first resort—as opposed to the previous power, which was a power of last resort—which will allow local authorities to fulfil their functions in new and innovative ways.

The power that is to be afforded to enterprise companies under the Title Conditions (Scotland) Bill should be extended to local authorities. It

should not be limited to economic development matters but extended to match both the direction in which policy is heading—of affording local authorities greater freedoms and flexibilities—and the power to promote well-being in an area.

Powers granted under section 171 of the Local Government (Scotland) Act 1973 allowed local authorities to do basically anything to promote local economic development. The thinking has moved since then. The Local Government in Scotland Bill renews the powers that were restricted under section 171 of the 1973 act to economic development and extends them to a wide range of functions. We seek a similar power in the Title Conditions (Scotland) Bill.

Ms Alexander: A separate issue about the circumstances in which local authorities act has come up in evidence from other witnesses. Members of the committee have noted that the Executive is committed to talking to COSLA about whether the bill can be amended in the interests of local authorities to cover the clawback arrangements. In evidence to the committee, Homes for Scotland suggested that it was more common for local authorities to use development-value burdens and clawback in purely commercial transactions, as opposed to "benevolent or socially aware" transactions. The evidence implies that, if that is the case, there is no reason why local authorities should receive special treatment.

Lorna McGregor: Local authorities use those powers in the full range of their functions. They are particularly useful in the promotion of commercial and industrial interests, but their use is not limited to that. We accept that the power may be restricted in certain areas, and we concede that there is a restriction in the use of burdens for residential purposes. However, as I indicated, we are moving towards a different culture and working more closely with community planning partners and other public and voluntary sector providers. If we do not have a facility to promote not only economic development but the full range of local authority functions, that would stand in the way of local authorities' work with those partners. That would also jar with the policy intent behind the Local Government in Scotland Bill.

Councillor Gilmore: We are anxious that the issue is not viewed in a wholly financial context, because our concern is about preserving the use of land as much as it is about getting some money back for it. It is not entirely the point to translate the issue into a consideration of whether one receives compensation and to decide that, if one receives compensation, that is all right. In such a crowded piece of land as Edinburgh, there is a community interest in preserving the recreational or green-space use of land. That is precisely why we might well dispose of land for a useful function. However, we do not want to lose that use of the land in the future. In our view, getting money back is not sufficient compensation to the wider community.

The Convener: Would the purchaser have to come to you for planning consent? Would the local authority be able to do anything to stop the purchaser?

Councillor Gilmore: There would be planning consent, but the burden has always been a stronger constraint than planning consent.

Eddie Bain: I have an adjunct to the same point that Councillor Gilmore made. I do not disagree with the welcome to clawback proposals, which would ensure that local authorities got uplift. However, there is a fundamental distinction between the development-value burden, where the rationale is the preservation of amenity, and clawback arrangements, which are essentially financial and commercial. Other witnesses might ask why local authorities should seek preferential treatment. In a scenario involving development-value burdens, local authorities can take the high moral ground by saying that they are looking for different treatment for reasons of protection of amenity or protection of the environment, rather than to secure commercial gain.

The Convener: I understand the distinction.

Lord James Douglas-Hamilton: We usually have a declaration of interests at the beginning of a meeting.

The Convener: I apologise for not doing that.

Lord James Douglas-Hamilton: My interests are given in the register of interests—they are the same as for all the other committee meetings that I attend.

The Convener: Are there any further questions? I thank the panel very much. It is difficult to sit as a panel. I hope that all members of the panel have had the opportunity to put a point.

While our witnesses are changing over, I invite members to look at the submission from the Lands Tribunal for Scotland. I also advise the committee—on the advice of our adviser—that the responses of the Highland Council and North Lanarkshire Council are probably the most useful among our large volume of responses in dealing with common scheme and mixed estates. They will provide useful bedtime reading on the bill.

I welcome John Wright QC and Alistair MacLeary, who are members of the Lands Tribunal for Scotland, and Neil Tainsh, who is clerk to the Lands Tribunal, of which we are hearing so much.

The witnesses may appoint who will speak first. What are your statutory responsibilities on title conditions and other matters?

John Wright (Lands Tribunal for Scotland): The Lands Tribunal has a variety of separate jurisdictions that broadly cover valuation and rights to land. The main jurisdiction over rights to land that relates to the bill is that to vary or discharge land conditions, which was introduced by the Conveyancing and Feudal Reform (Scotland) Act 1970. That is the existing system for the variation and discharge of land obligations.

The Lands Tribunal's other two jurisdictions over rights to land arise from disputes about the right to buy council or public authority houses and from appeals from the Keeper of the Registers of Scotland, which is a more recent jurisdiction. Some disputes that arise under the registration of title system may be taken to the Lands Tribunal or to court.

The two main valuation matters are compensation for compulsory purchase and rating valuation disputes—disputes about the valuation of subjects that are liable to commercial rating.

A wide variety of situations involve the variation and discharge of conditions. That may involve someone who wants to add an extension or have a house built in his garden, or substantial commercial matters, as our paper says.

The Convener: You deal with small matters, such as a title that does not allow someone to build a conservatory, and large developments. It would be interesting to hear a little about the size and structure of the Lands Tribunal. Our evidence is that extra work may be coming in your direction. How do staff arrive at the tribunal? How did you obtain your position?

John Wright: I will divide my answer between the members, whose function is deciding cases, and the administration. Our members include Lord McGhie, who is also the president of the Scottish Land Court, so his time is divided between that court and the Lands Tribunal, and Mr MacLeary, who is a full-time surveyor member. I am a part-time legal member and there is one part-time surveyor member. At present, our members add up to a complement of two and a half—one full-time member and three half-time members.

The Convener: That does not sound like a lot.

John Wright: It is not. There used to be more members. The tribunal has been deliberately scaled back in the past few years, because the work load has been relatively light, as most of the jurisdictions have not produced a substantial amount of cases. Surges occur, especially when the law changes. That is why a question arises from the bill. In the past few years, the number of tribunal members has been scaled back but, as a result of the bill and other acts—particularly the Abolition of Feudal Tenure etc (Scotland) Act 2000—an increase may be expected. In our paper, we have attempted to address the effect of that.

15:00

The Convener: I was about to ask you how long it takes to process an application for variation or discharge of a title condition. However, that obviously depends on the circumstances. Will you give us examples of time scales from the lower end of the spectrum—for example, for an individual who just wants to build something in their garden that they could not build before—and for commercial applications?

John Wright: Neil Tainsh has suggested four to six months in a normal case, by which I mean a relatively straightforward situation that does not involve any great difficulties with intimation and is not opposed.

The Convener: Did you say "not opposed"?

Neil Tainsh (Lands Tribunal for Scotland): I should point out that the four to six months time scale relates to an application that is opposed and that ends up in a formal hearing, with a further period for tribunal members to reach a decision. At the moment, an unopposed case involves a period of intimation of the application on benefited proprietors and affected persons. If no objection is forthcoming, the tribunal can produce an order discharging the condition in, say, two months.

The Convener: That gives us some idea of the time scale.

At our meeting on 3 September, Professor Paisley and Kenneth Swinton of the Scottish Law Agents Society suggested that you must find it difficult to cope with your current work load. You can now tell all. If you need more funding, you should make your pitch now.

John Wright: We have made it clear that we are not under excessive demands at the moment. Although we have experienced surges over the years—for example, in relation to rating revaluation—the work load has not been particularly heavy over the past two or three years, which is why things have been scaled down. We noted the evidence to which you refer, but it does not really describe the present situation.

The Convener: How is funding allocated to the Lands Tribunal for Scotland?

John Wright: All I can say is that it is a matter for the Scottish Executive justice department.

The Convener: Does someone submit a bid?

Neil Tainsh: Because the tribunal occupies the same premises as the Scottish Land Court—as someone pointed out, Lord McGhie is head of both—the justice department hands down a joint

budget for the court and tribunal, which funds membership of the tribunal, staff salaries and so on.

The Convener: The policy memorandum will obviously say something about the financial implications of the legislation.

John Wright: You asked about personnel. I have already described the members of the tribunal; perhaps I should also describe the administrative side of things. The clerk, Mr Tainsh, has a deputy clerk and an administrative assistant, which makes three people. As with the membership of the tribunal, that is a bare minimum and, given the new circumstances, it might well need to be increased.

The Convener: So you are trying to put some flexibility in your budget. You will understand that I am only teasing a little. You should never close doors to extra money.

John Wright: I have simply described the present situation with a view to addressing the effects of the bill and other reforms.

Maureen Macmillan: I think that we were all expecting you to tell us that you were terribly overworked and that you would really be struggling with your future work load. In fact, you seem to be quite sanguine about your future prospects.

John Wright: I should stress, as far as the future work load is concerned, that we cannot know the numbers of applications that will be received. We have endeavoured to form a view and to weigh up the effects of the various changes on the adjudication side and on the administration side. The application of the sunset rule and perhaps variation of community burdens will give rise to an increase—perhaps substantial—in work loads. A new certification procedure will be involved, which means that there will be more work on the administration side, and applications to renew or preserve will also be involved; however, it is difficult for us to tell how many applications there will be. If we take the bill on its own, our best guess is that we could perhaps cope with a small increase in work on the administrative side and with a small increase in the commitment of members, but if that is added to other commitments, that might not necessarily be the position.

Maureen Macmillan: Paul Martin mentioned resources. Could things be managed by lengthening decision times? Would that be politic?

John Wright: That is difficult to answer—it would depend on the number of cases. If there was a substantial increase in cases, substantial increases in the length of time for decisions might be required, which would probably be unacceptable.

Maureen Macmillan: So the problem is that we do not know what the future holds. Will your work load be eased by the bill's provision in section 88 that unopposed applications should be granted automatically? I presume that you would welcome that.

John Wright: I make it clear that we should not comment on matters of policy. However, that provision will lead to a slight reduction in work load. Quite a lot of the current administrative work load is dealing with unopposed applications and I am not sure that that would change much. On the adjudication side, most unopposed applications are currently decided by members without a hearing. In fact, it is rare for an unopposed application to require a hearing. It is therefore unlikely that there will be much reduction in work load. However, we considered the matter while we were attempting to weigh up the bill's effects.

Paul Martin: We should change our questions, because we expected you to call for additional resources. Professor Paisley made it clear that he thought that you would require additional staff. Do you disagree with him?

John Wright: There may be a view that there will be a massive increase of work that will require a massive increase in staff, but we do not know that because we cannot know the numbers that are involved. If the bill is considered by itself, we are not sure that that will be the position.

Paul Martin: Has any resource assessment been carried out to clarify whether there will be a personnel requirement?

John Wright: With respect, when new jurisdictions are introduced, we cannot know how many applications there will be. We make our best guess, but there is total uncertainty. However, we and the Executive have considered the matter.

Paul Martin: The Executive's view is that about £55,000 a year will be required. Would you be satisfied with that amount? That question is perhaps similar to my previous one.

John Wright: It is not for me or for individual members to be satisfied about the amount. I think that it is envisaged that that money will be used for at least one more member of staff on the administrative side. We also envisage some increase in the commitment of part-time members.

The Convener: We have pretty well exhausted that topic. Michael Matheson has another question.

Michael Matheson: How many cases does the Lands Tribunal deal with at present? How does your work break down into the different categories of cases?

John Wright: Over the past few years, the

number of applications dealing with discharge and variation of conditions has run at about 50 a year.

Michael Matheson: Have the past few years been a lean period?

Neil Tainsh: The number of applications has for the past 10 years or so generally been steady at between 50 and 60 applications. As regards the other jurisdictions, tenants' rights applications have gradually diminished since the 1980s and are down to about 12 to 20 a year. Valuation appeals tend to go in cycles; the number of such appeals is currently not very high. There are roughly 10 or 12 disputed compensation applications a year. Those are the numbers on the books, but not all applications necessarily lead to a formal hearing in the same year that they are lodged. Those are the kinds of numbers that we are talking about just now.

Michael Matheson: I wanted simply to put the figures in context.

The Convener: Absolutely.

Lord James Douglas-Hamilton: At the beginning of his written evidence, Professor Paisley suggests that the Lands Tribunal should have jurisdiction over the variation and discharge of statutory agreements, such as the agreements that may be entered into between a private owner and a planning authority under section 75 of the Town and Country Planning (Scotland) Act 1997. In his oral evidence on 3 September, Professor Paisley said that, as some members of the Lands Tribunal are surveyors, the tribunal might be equipped to consider matters of public policy that might arise as a result of the proposed new jurisdiction. Is that a fair analysis of the situation?

The Convener: Mr MacLeary is a surveyor and has not spoken so far. Perhaps he will answer that.

Alistair MacLeary (Lands Tribunal for Scotland): I have been keeping very quiet here.

Planning agreements were part of the jurisdiction of the Lands Tribunal in England, but for reasons of which I am unaware, that responsibility was shifted 10 years ago, when a right of appeal to the Secretary of State for the Environment was introduced.

Professor Paisley has pointed to an area of expertise that applies in all areas of our jurisdiction because of our function. Valuation, compensation and taxation have been mentioned, but most cases—including, commonly, land obligation cases—require consideration of planning matters. Obviously, we are careful not to make planning decisions of any kind—as we are invited to do from time to time—but we have the expertise to deal with that. If it were decided that a judicial body should deal with such matters, the tribunal would be a suitable judicial body.

The Convener: Does John Wright wish to add anything?

John Wright: No. It should be stressed that there may be questions of policy relating to whether such matters should come to a judicial body. However, that is not for us to comment on. I entirely agree with Mr MacLeary's assessment.

Lord James Douglas-Hamilton: To the best of my knowledge, the situation south of the border worked quite well. Is that the case?

Alistair MacLeary: Yes. The jurisdiction of the Lands Tribunal in England arose from the Law of Property Act 1925 and has run for a long time—since after the war. This is purely anecdotal, but I have never heard any criticism of the way in which the English Lands Tribunal has acquitted its jurisdiction.

The Convener: We may want to follow that up. Perhaps we could have a briefing note on the English Lands Tribunal.

As there no further questions, I thank the witnesses for coming.

15:15

We will now take evidence from Ian Davis, who is the director of legal services at the Registers of Scotland, and Sarah Duncan, who is assistant adviser. I have another confession to make: I am meeting somebody else from my past. Mr Davis and I were at university together many years ago, doing our law degrees.

Ian Davis (Registers of Scotland): Indeed we were.

The Convener: It is nice to see you again. Scotland is a village. I keep bumping into people.

Will the witnesses explain, in general terms, the role of the Registers of Scotland? In the context of the bill, we are especially interested in the operation of the Land Register of Scotland and the Register of Sasines, rather than in the Register of Inhibitions and Adjudications and so on.

Ian Davis: The two property registers that are kept under the control of the Keeper of the Registers of Scotland—the Register of Sasines and the Land Register of Scotland—will be affected by the Title Conditions (Scotland) Bill. For the new legislation to work in practice, the registers need accurately to reflect the legislative provisions. That will have important resource implications for us. We need to consider those implications in the context of the new registration events—I am talking about the various notices, such as notices of preservation, notices of converted servitude, notices of termination, and discharges of burdens. We must also consider the new rules' resource implications for existing

registration events, such as dual registration for constitutive deeds. In other words, we will have to identify both the burdened and the benefited property. The same will go for positive servitudes, for which we will have to introduce new rules for putting them on the properties of the dominant and servient proprietors.

We do not really have much idea of the level of business that we will attract, but we do not expect the notices that I mentioned to be labour intensive. They will not be like first registrations, which take a long time to process. We therefore do not think that the notices will adversely affect our business, irrespective of volume.

The Convener: Before my colleagues ask you about resource implications, will you tell us how you are funded?

Ian Davis: The Registers of Scotland is a self-financing trading fund. We fund our operations from the fee income that we receive for our registration services.

The Convener: So when solicitors pay fees for registration, that is how you pay for the whole shebang.

Ian Davis: Those fees pay for all the expenses of the department.

The Convener: Yes—"shebang" is not quite as technical an expression as "expenses of the department". I am also hearing quiet complaints from my colleagues that the money comes first from the clients who pay the solicitors. However, having practised, I add that that money is an outlay for solicitors.

The Registers of Scotland is self-financing, which is why we see nothing on the financial memorandum about the Registers of Scotland.

Ian Davis: Yes. We are self-financing; we do not receive money from central Government.

Maureen Macmillan: You say that there will be resource implications for the Registers of Scotland, but that you are not sure of the level of those resource implications because you do not know how much business you will get. You also say that your work will not be labour intensive. Have you considered in detail what the increase in your work load is likely to be?

Ian Davis: We have considered in some detail the type of notices that the bill would introduce. Our job of checking such notices would be fairly straightforward. I would equate them to notices of payment of improvement grants, which we can process relatively quickly and cheaply.

Although we do not have too much of an issue with those notices, there will be quite serious resource implications for the Registers of Scotland in connection with the extinguishment of implied enforcement rights and the notices of preservation that may apply from the appointed day over the following 10 years until the end of the transitional period.

Maureen Macmillan: How long is the period to which you refer?

Ian Davis: I refer to a 10-year period.

Maureen Macmillan: I presume that you will be looking for an increase in staffing levels.

Ian Davis: No, we will not. We believe that we can tackle the implications of the bill within our existing resources. I will explain, if I may, how we will do that. At the outset of land registration—when the first county went live in 1981—we created what is known as a research area team. That consisted of a number of staff who examined common burdens deeds in advance of the registration county going live. We edited the deeds in cases where they affected 10 or more properties and used that as a template, which we could import into the rest of the development in question. For example, instead of carrying out examinations for each of 200 houses, we would do a one-off examination of the common burdens deeds and, whenever the first registration for application came in, we would transfer the standard text into that first application's title sheet.

The land register extension programme will be complete in April 2003, when the northern counties go on to land registration. About 20 people currently work in the research areas. We intend to redeploy those people to do the cleansing of the register that will be required from 2005 because, on the appointed day, many title sheets will become inaccurate as a consequence of the Abolition of Feudal Tenure etc (Scotland) Act 2000 and the eventual title conditions legislation. With the expiry of the transitional period in 2015—if that is indeed the year that is set—we will have to look at all the title sheets that we had created by 2005. They will number 900,000. We anticipate that we need 300 man-years of resource over the 10-year period, which equates to 30 full-time equivalent registration staff working every year. At this point, we think that we will have about 20 full-time staff. We are looking for efficiency savings in order to try to meet the shortfall.

Maureen Macmillan: We have heard that the Lands Tribunal does not expect too much of an increase in its work load, although its representatives were not absolutely certain about that—the tribunal will have to wait and see. There has been a suggestion that some of your staff might have to be seconded to the Lands Tribunal to help it to cope. I presume that that would affect the calculations that you have just mentioned.

Ian Davis: We are minded to help the Lands

Tribunal, with which we have a long association. Indeed, the clerk to the tribunal is a secondee from Registers of Scotland. We provided all the tribunal's clerks from the start.

Maureen Macmillan: Would you be able help without additional resources?

Ian Davis: Yes.

Lord James Douglas-Hamilton: Registration of a notice is one of the key ways under the bill by which an individual can alter his or her rights and obligations in relation to his or her property. It therefore seems to me that it is important that the registration of a notice is affordable. Can you estimate how much it would cost an individual to register one of the various notices under the bill and how that compares with the cost of registering other documents such as deeds of conditions or dispositions?

Ian Davis: It might help if I explain that the Keeper of the Registers of Scotland is required by statute to charge for registration in the registers for which he is responsible. The authority for that is the Land Registers (Scotland) Act 1868, which, essentially, provides that the amount of fees to be fixed will be no more than is reasonably sufficient to defray the expenses that are incurred, which include the expenses of improving the system of registration. In other words, we must cover the costs of registration from fee income. The fees are set out in the Fees in the Registers of Scotland Order 1995, as amended.

We are looking to charge the minimum fee for the new events that are provided for under the bill, which are registration of notices and discharges. That charge stands at £25. Processing of applications for registration is not expected to be labour intensive, so we think it wholly appropriate to levy that minimum fee. We might need to consider an amendment to the 1995 order specifically to provide for the new deeds, and we might consider a small loading for the dual registration deeds under the bill but, essentially, we will keep the costs to a minimum.

Lord James Douglas-Hamilton: You mentioned that the registration of title for Scotland should be complete by about April 2003. What will be the effect of completion? Will it mean that you can give people a greater service? Could any consumer look up who had owned a piece of ground and the burdens that were attached to it if that consumer owned or had an interest in that ground, or had an interest in purchasing or selling it?

Ian Davis: Completion will mean that the final registration counties—Orkney, Zetland and others—are subject to land registration arrangements in terms of the Land Registration (Scotland) Act 1979. It does not mean that every property in Scotland will be registered in the land register. There are trigger events for registration, the most normal of which is a disposition for consideration of value.

Lord James Douglas-Hamilton: Will it be possible to establish who was the last known owner?

Ian Davis: Yes—it always is.

The Convener: That is possible only if a property has been registered. Registration is not required unless you are under a security. If land were bought with cash, it would not have to be registered.

Ian Davis: That is right. People who borrow from building societies or banks have no choice, because such organisations insist on registration.

The Convener: However, the information about some land in Scotland might not be recorded and nobody will know who owned it.

Ian Davis: That might be the case, but most properties are on the Register of Sasines or the Land Register of Scotland.

Lord James Douglas-Hamilton: From what the convener said, I presume that you have a record for most land, even if that record is from some time back. If a house burned down or an owner went to Australia and did not register their land, you would know who the previous owner was.

Ian Davis: Yes. We have that information in the Registers of Scotland.

The Convener: Will the information be available for electronic searching?

Ian Davis: The information is already available electronically through the Keeper of the Registers of Scotland's registers direct service, which provides information from the registers. We plan to develop electronic registration. We are talking not about paper applications stuffed into envelopes, but about electronic or digital transfer of information. If we have the legislation for that in the next two to three years, we will make significant savings. That would help us with the task of updating the registers in the 10-year transitional period.

Lord James Douglas-Hamilton: Would not that be a great service to the public?

Ian Davis: Our objective is always to improve our services. We have a good continuing relationship with all our customers. We ask them frequently about the standard of the service that they receive from the keeper and we monitor that.

The Convener: That is enough of the love-in with the Registers of Scotland. I thank the witnesses.

The committee will have a short break, after which we will take evidence from Bruce Merchant.

15:27

Meeting suspended.

15:38

On resuming—

The Convener: Excuse us for taking a short break, Mr Merchant, but these lengthy sessions are quite tough for us and we are in need of caffeine.

I welcome Bruce Merchant, from South Forrest Solicitors. He has provided us with a written submission, which members have before them.

Mr Merchant, as a practising conveyancer, when do you encounter problems in relation to real burdens?

Bruce Merchant (South Forrest Solicitors): I encounter burdens on behalf of house owners and the superiors for whom I act. The difficulties almost always arise when someone is selling their house. A typical example would involve someone who has extended their house by, for example, erecting a kitchen extension, a sun porch or whatever, for which they had obtained planning consent or a building warrant, where necessary. When they come to sell their house, the seller's solicitor or the purchaser's solicitor will check to see whether the consent of the superior or anyone else who has a right to restrict what might be added to the house should have been obtained. Typically, title deeds contain a condition for a superior to be consulted and to give written consent before any alterations are made. Frequently, house owners do not seek that consent—because they forget to or do not know that they have to—and think that their planning consent or building warrant is sufficient.

The point at which difficulties usually arise is when the house is sold. That is reflected in the experience of superiors, who will receive a letter from a seller's solicitor saying, "My client is selling a house. Could I please have a letter consenting to the extension that has been erected? By the way, settlement is due tomorrow and we would be pleased if you could fax the letter to us."

The Convener: Few of us check our title deeds. We think only of applying for planning consent and building warrants.

Maureen Macmillan: When people apply for planning consent, they put up a notice and the neighbours have the opportunity to object to the proposal. Would the 4m rule be covered by the planning process?

Bruce Merchant: That is one of the reasons why I am strongly of the view that the 4m rule should apply equally where there are implied rights with neighbours to consent. Almost invariably, neighbours will have been notified as part of the planning procedure and will have had their say at that point. Almost always, that will take care of the situation.

There are exceptions, however. Three years ago, a well-publicised situation in Edinburgh resulted in a case in the Court of Session. Someone had obtained planning permission to turn their house into a children's nursery. It was discovered after three years that, because of a condition in the title, the neighbours had the right to object to the change of use. Despite the fact that planning permission had been secured, an application had to be made to the Lands Tribunal for consent for the condition to be changed. When the Lands Tribunal refused the consent, there was an appeal to the inner house of the Court of Session, which again refused consent. I assume that the nursery had to close.

The Convener: Was there no opposition to the application to the Lands Tribunal?

Bruce Merchant: The application to the Lands Tribunal would have been fiercely opposed by the neighbours who were objecting.

The Convener: The neighbours had had notice of the planning application but had not taken the opportunity to object at that point. I am surprised that they were not barred.

Bruce Merchant: Presumably, the planning application was granted after opposition.

The Convener: I see, so after having opposed unsuccessfully, they got another bite at it.

Bruce Merchant: Only when they finally realised that they could do, which was much later.

So there are examples where getting planning consent is not the full story. However, it would be extremely useful for people to receive notification of the change that is intended by a planning application.

Section 16 of the bill, which deals with acquiescence, is particularly useful and would help in the situation that I have just described. In effect, it says that where work is done—this would deal particularly with extensions—and where the person does not take appropriate steps under their title within eight weeks of the work's being done, they cannot later object.

The Convener: You are referring to the section on acquiescence.

Bruce Merchant: Yes, I am talking about section 16.

15:45

The Convener: Is the eight-week period reasonable? We heard evidence that there might be reasons why a party might not know about work.

Bruce Merchant: I read evidence that proposed a period of 12 weeks. I do not feel terribly strongly about that. Section 16 is one of the best sections of the bill. It is absolutely excellent on dealing with neighbours who have not objected. However, it is unfortunate that it is undermined by the suggestion that, where there are deeds of conditions, everyone within the development should be able to object. We would have difficulty in applying the acquiescence provisions to anyone other than reasonably close neighbours, because the person who is taken to have acquiesced or not objected must know that something is going on. If someone is putting up a rear extension, their neighbours will know, but the other 100 people in the development might not know. That is why I feel strongly that the 4m rule should apply. Its removal from the draft bill promulgated by the Scottish Law Commission is a retrograde step from the point of view of house owners.

The Convener: Does the current law present any major problem that the bill does not address?

Bruce Merchant: The bill addresses all the major problems. I have doubts only about the conclusions that have been reached in certain respects. One of the areas on which a great deal of time has been spent is the question of implied conditions in title deeds. We are talking about something that is very rare—it is an esoteric subject that few people other than lawyers have thought about until now and even lawyers have hardly considered it. However, it is now in the forefront of everyone's consideration, because superiors are being done away with and people want to see whether implied rights can be transferred to neighbours. From the point of view of house sellers, that could be disastrous.

I give the example of someone who has put up a rear extension. At the moment, they can go to the superior to get a consent. Most superiors will give consents without much difficulty, because they know that, if they do not, the case can go to the Lands Tribunal. That is probably why the Lands Tribunal deals with so few applications now—the threat of the Lands Tribunal is worth much more than the reality. Some superiors will extract a payment of £200 or £300. That is worth while, because of the time that is saved and because of the avoidance of the cost of going to the Lands Tribunal.

Generally speaking, I believe that the system works pretty well at the moment, because a house owner can get a consent from a superior's solicitor. However, if the system were extended to include all house owners, tenants, spouses of house owners and life renters within a development, there would be a real difficulty. First, how would one know who the house owners were? There can be a problem even when there are only six or seven neighbours to deal with, but if there were 100 it would be impossible to know who the owners were. There is no neat list of tenants to consult. People can see a list of owners, for a price—it might cost hundreds of pounds to see who all the owners in a development are. I am not aware of any way of finding out who all the tenants in a housing development are.

Maureen Macmillan: I want to look through the other end of the telescope. Highland Council has told us that its concern is with small housing schemes. It does not think that the bill will work in that respect. The right to buy might have been exercised in relation to a couple of houses, but two or three might remain in council ownership.

Bruce Merchant: Let us take an example of a situation in which one requires to obtain consent from four or five people. That might be practical—I have occasionally obtained consent in such circumstances. Some developers, such as Wimpey, have a provision that says—roughly—that, if one wants to add an extension to one's house, one must obtain the consent of the neighbouring proprietors and that, if the neighbouring proprietors will not give consent, one should approach the developer, who will consider overriding that requirement. In such a situation, I have obtained a letter of consent from four or five people.

However, the bill suggests that, if there are implied rights among all the people in a development, one should obtain consent from all those people. If one cannot get consent from them all, one may obtain a discharge from the neighbours only. The problem with that provision is that it is not simply a requirement to get the consent of the neighbours, it is a requirement to obtain a discharge from them. I calculate that the cost of getting a discharge from each neighbour could be in the order of £200 to £300, which means that the requirement is not practical.

Why should that requirement cost so much? First, one goes to one's neighbours, most of whom will have loans from banks or building societies, which will hold the titles. One has to get the titles from the bank or building society. The neighbours' solicitors will do that. The customary charge for releasing the titles is £50 to £75. The neighbours' solicitors must examine the titles, for which they will make a charge. A formal document has to be prepared, which must incorporate the discharge, rather than a simple letter of consent. Therefore, in

my view, the extension of the rights to object to everyone in a development creates a real problem.

The Convener: I will put to you two questions that the adviser has passed to me. As I understand it, tenants do not have the right to discharge—they have the right to enforce.

Bruce Merchant: That is correct.

The Convener: So the problems relating to a list of tenants would not arise in such circumstances.

Bruce Merchant: Let us return to the example that I suggested. If one could obtain consent from everyone who was in a position to object, one would have to get the consent of the tenants as well as of the owners. If one could not get the consent of the tenants, one could, as the adviser suggests, obtain a discharge from the owners. However, as I have just said, each discharge could cost £200 to £300. Therefore, I do not regard the provision on discharges as being an adequate substitute.

The Convener: On a different point, section 34 provides that only the owners who are within 4m need to provide a discharge. A limited number of owners are involved.

Bruce Merchant: The point is the same. One still has to obtain a formal discharge from owners within 4m. A much simpler form of consent could be used. I obtained such a form of consent, which was written in three lines. It said: "We, the proprietors of the following houses, hereby agree to the three extensions that Mr and Mrs X put up on their house." They went round the houses and got the relevant signatures.

The Convener: You are saying that there is a cheaper way of doing it.

Bruce Merchant: That is the cheap way of doing it, but if the situation involves 100 people, one cannot get them all to sign such a simple bit of paper; one must obtain a formal discharge, with all the cost that that implies.

The Convener: I understand that.

Lord James Douglas-Hamilton: You have made it clear that you are in favour of the 4m rule. Our understanding is that the effect of section 48, in combination with section 52, is to create new implied rights to enforce in certain circumstances, where no such implied rights existed previously. Is that a good idea?

Bruce Merchant: From the attitude that I have adopted so far, the committee will not be surprised to discover that I do not think that that proposal is a good idea. I can explain why, if you wish.

Lord James Douglas-Hamilton: Perhaps you could give us a clear view on section 52. My understanding is that opinion in the legal fraternity is split down the middle on that issue. As a practitioner who has dealt with countless cases involving such matters, could you give us your expert evidence on where you think the weight and balance of advantage lie?

Bruce Merchant: Section 52 deals with technical provisions regarding deeds of conditions. Stop me if I become too obscure.

The Convener: Our heads will hit the desks if we lose track.

Bruce Merchant: Customarily, it is the developer who puts conditions in title deeds. As he develops the development, he puts in conditions, some of which no one would argue with and which would be maintained under the bill. I am talking about matters such as people having pipes running through each other's gardens. Until the 1960s, the general practice was that each person got their individual title deed, which set out 10 or 12 pages of detailed conditions. From the 1960s onwards, it became common practice—although it had been competent for a long time before that—to record the 12 pages of conditions in a single document before any houses were sold. Each title deed was then two pages long and would say that all the conditions in the 12-page document applied.

In the deed of conditions—the thing that was on the register first—one could say that, as well as the fact that the developer, as superior, can enforce the conditions, every house owner can enforce them against every other house owner. According to the statistics that the Law Commission produced, that has been done in about 40 per cent of cases. In more than 50 per cent of the other 60 per cent of cases, the document has been prepared in such a way that there is no right to enforce those conditions. In other cases, it has been done in such a way that, by accident, there is a right to enforce those conditions. In approximately 53 per cent of cases, the document is phrased in such a way that there is no right to enforce the conditions. In about 6 per cent of cases, it says nothing, which means that there is an implied right to enforce.

The bill says that, in the 53 per cent of cases where there is no right for neighbours to enforce, they should now be given that right. From the standpoint that I have taken—that such problems normally arise when one is selling one's house—that produces a fairly nightmarish scenario. Even if, on the day when I bought my house, I knew that I had to go only to the superior, if I carry out alterations after the bill has come into force, I will now have to get permission from everyone in the development. I know that one of the witnesses referred to a development of 580 houses. That is a lot bigger than the development that I have in

mind, but even 100 houses or 50 houses could make the process very difficult.

Lord James Douglas-Hamilton: Is your view that section 52 is unfair?

Bruce Merchant: Yes, I believe that it is unfair.

The Convener: Before we go on, I must apologise to members and witnesses. I have to excuse myself to go to another meeting, which always clashes with this one. The chair will be taken by the deputy convener, Maureen Macmillan.

Lord James Douglas-Hamilton: Mr Merchant, do you think that the majority of practising conveyancers who have to deal with title conditions problems would support your view?

Bruce Merchant: It is difficult to answer that question, because the provision to which you are referring has been introduced into the bill by the Executive. The profession has heard a considerable amount about the bill as drafted by the Law Commission, but has not had the opportunity to consider that specific provision. Accordingly, I can speak only from personal experience. When I talk to fellow practitioners about the provisions of the bill as it stands, they react by saying, "They wouldn't do that, would they?"

16:00

Lord James Douglas-Hamilton: In his evidence to the committee, John McNeil of the Law Society referred to the vacuum that could be created by the abolition of feudal burdens. He pointed out that, unless new rights to enforce are created, a community that currently has a superior could be left unregulated after abolition. What is your response to that?

Bruce Merchant: I understand what John McNeil is saying, but experience across Scotland is variable. There are some excellent superiors who exercise their powers in a reasonable—not to say altruistic—manner for the benefit of other house owners. However, some superiors exercise their powers in a manner that is at best whimsical and at worst designed to extract money for consents. Such practices have given rise to the whole business of reform of the feudal system. Only in a few cases would a vacuum be created. If I remove a stone from my shoe, I notice the difference, but that is not the same as creating a vacuum.

Lord James Douglas-Hamilton: You have given us a pretty clear indication of your thinking, but I would like to wrap up this issue with a further question about section 52. When giving evidence to the committee on 3 September, the Scottish Law Agents Society said that the effect of section 52 could be unfair if people buy into developments with specific ideas about what they want to do with their property and are reassured by the fact that there are no third-party rights to enforce. You have argued along the same lines. However, people could later find that third-party rights have been created under section 52 and that their plans for their property have been thwarted. Do you think that section 52(2), which ensures that the creation of new rights occurs only after the appointed day, addresses the Law Agents Society's concerns to any significant extent?

Bruce Merchant: It is a partial answer to that question. Section 52(2) states that, if someone has extended their house before the appointed day and required only their superior's consent to do so, that is all that is necessary. They will not be required retrospectively to seek the consent of their neighbours. However, if after the appointed day someone decides to extend their house, they are required to get their neighbours' permission to do so. The Law Agents Society is right to identify that as a problem for the future.

The Deputy Convener (Maureen Macmillan): Are you saying that ordinary solicitors are not aware of the provision, because the Executive has inserted it into the bill? Have conveyancers not woken up to the fact that the provision exists?

Bruce Merchant: The point is a very obscure one. To appreciate its practical implications, one must have a particular interest in the bill. I happen to have taken such an interest from an early stage. I would not underrate solicitors' interest in law reform—they have taken great interest in the bill. However, I am not aware that the major changes that the Executive has introduced—in relation to the 4m rule and the extension of implied rights to those who do not have them already—are widely known about in the profession. The profession will find out about them when the bill becomes law. People will tour the country to tell us about the problems that we will face.

The Deputy Convener: It will then be too late.

Paul Martin: I refer you to the sections of the bill that concern community burdens and the discharge by adjacent proprietors. How well will the discharge by adjacent proprietors for community burdens work in practice?

Bruce Merchant: I have probably largely covered that issue already. I apologise if I have been jumping from one subject to another, but they are all interrelated. The difficulty that I foresee with discharge by adjacent proprietors is the cost.

Paul Martin: Is that the main issue of concern to you?

Bruce Merchant: First, of course, the neighbours must agree to the discharge, but the

cost and delay involved could be significant. Each discharge could cost between £200 and £300. It might be slightly less if someone happened to have their titles and did not have a loan on the house, but in many developments the substantial majority have loans on their houses.

Paul Martin: You may also have touched on my next question, but I ask you to go into it in more detail. The bill provides a further method of discharge for community burdens—discharge by a majority of affected units. What are your views on that additional method? Is it workable?

Bruce Merchant: It would not be workable in the context of a house sale, where one is required to get the consent of more than half the people, serve notice on those who have not given it and then wait eight weeks to find out whether they will go to the Lands Tribunal. The purchaser would have gone by that stage.

Paul Martin: That is helpful. Professor Paisley raised the issue that a person seeking a variation or discharge of a burden can apply to the Lands Tribunal. He expressed concern about the increased work load that that might cause. What are your views on that?

Bruce Merchant: Granted that the Lands Tribunal does not know what the increase in its work load is likely to be, it is difficult for me to double-guess it. As I said, the threat of going to the Lands Tribunal has changed the atmosphere when dealing with superiors. In more than 30 years of practice, I have never had to make an application to the Lands Tribunal, although I deal with conveyancing day in, day out for superiors and house owners. One or two colleagues in my firm have had to make such an application, but it is a relatively rare, slow and—from our point of view—expensive procedure.

The bill introduces so many new parties into the system that I would have thought that, granted that all the methods of obtaining discharges are extremely difficult to operate, we may be left with the Lands Tribunal as the final option. The first question that I will ask anyone who comes to me—once I find that they have some extensions for which consent should have been obtained—is, "Please—were they put up more than five years ago?" to find out whether the prescription provisions will cut in. If the answer is no, I suspect that the possibilities will be for that person to wait five years before they sell their house or for them to apply to the Lands Tribunal. It is difficult to know how the bill will work in practice, but I would not rule out a significant increase in the number of applications.

Michael Matheson: Section 102 deals with amendment of the Abolition of Feudal Tenure etc (Scotland) Act 2000. Do you foresee any difficulties in rural communities with the amendment of that act to enable a feudal pre-emption to be preserved as a personal real burden—in effect, a burden without a benefited property?

Bruce Merchant: That is a highly technical amendment to the 2000 act. A right of pre-emption arises when somebody sells a property but reserves the right to purchase it if it comes on the market again. In other words, if somebody agrees to buy the property, the person who sold it previously may step in and acquire it instead. This has been a matter of concern to the legislature for a long time. The rights of superiors to exercise the right have been reduced since 1938, and there were further amendments in 1974. I can understand the concern that, if feudal pre-emptions ceased to be enforceable as burdens at all, the interest of those who impose such conditions could be prejudiced. I see the amendment as an attempt to remedy the problem.

The problem does not arise terribly frequently in practice. It is not like the three issues that I addressed in my written submission, which arise almost daily. However, granted that this amendment is simply a way of securing a right that would otherwise be contractual, I cannot see any real difficulty with it.

The Deputy Convener: I will finish by asking you three further quick questions. Should the 100m rule be retained? Does the rule present particular difficulties in the rural context? Do you agree with the Scottish Landowners Federation, which suggests that feudal superiors will not go to the time, trouble and expense of saving any but the most worthwhile feudal burdens, and will save only those where the legal advice is that there would be interest to enforce? The SLF says that, as a result, the protection that is supposedly afforded by the 100m rule is unnecessary.

Bruce Merchant: This is clearly a difficult area. Any rule that is based on distance is, in essence, arbitrary. Nonetheless, an attempt is being made to identify, reasonably clearly, what the interest is to continue to enforce the burden. For what it is worth, I think that, if one were to abolish the 100m rule, that could result in the perpetuation of many feudal conditions that the Abolition of Feudal Tenure etc (Scotland) Act 2000 is trying to abolish. One already sees attempts to get round the provisions of that act, by imposing conditions that will be secured by standard securities. One should not underestimate the likelihood that some people—not necessarily the enlightened members of the Scottish Landowners Federation—might take advantage of the situation if the 100m rule, or something similar, were not in place. Although I acknowledge that the rule is arbitrary, it is probably the best in the circumstances. I support its retention.

The Deputy Convener: As members have no more questions, I thank Bruce Merchant very much indeed for his most informative evidence.

I now welcome, last but not least, representatives of the Scottish Landowners Federation—Malcolm Strang Steel, Robert Balfour and Michael Smith.

Ms Alexander: I will start as we have started with previous witnesses by asking you to tell us, in general terms, a little about your organisation and the interests that you represent.

Robert Balfour (Scottish Landowners Federation): The Scottish Landowners Federation primarily represents owners of rural land throughout Scotland. It does not matter whether they are community owners, trusts or quangos, for example. We have more than 3,000 members and we represent a majority of landowners in Scotland.

Ms Alexander: In general, do your members support the Title Conditions (Scotland) Bill?

16:15

Robert Balfour: In general, they do, although there are a number of areas about which we have concerns.

Ms Alexander: I hope that we will cover all those areas, or at least most of them.

I want to turn to rule changes in respect of the enforcement of real burdens, which we discussed with Bruce Merchant. Does the SLF agree with the proposal in the bill to extend rights to enforce to people in occupation of the benefited property other than owners, such as tenants under a lease? What do you think of that provision?

Robert Balfour: I will hand over to our legal expert.

Malcolm Strang Steel (Scottish Landowners Federation): I do not think that the SLF feels terribly strongly about the matter. However, I am a solicitor in private practice and must associate myself with much of what Bruce Merchant said about the issue. I have always regarded title burdens as for the owner and not for long or short-term tenants. No lower limit on tenancies is given, although short assured tenancies—which is a standard way of letting private residential property—now have a minimum period of six months. If I may say so, in respect of the so-called sunset rule at the other end, I notice that not just the owner can apply to put in a notice that the sunset rule should apply, but other unspecified people can do so, which is particularly inappropriate. I do not think that tenants or non-entitled spouses and probably proper life renters—although they are in a form of quasi-ownership—should be included.

Ms Alexander: Can we take it that, were the proposals with respect to tenants to go ahead, you would want the right to enforce to be restricted to tenants under longer leases? That follows from what you say.

Malcolm Strang Steel: The right to enforce is an adjunct of ownership. The current law is that the right to enforce is attached to land and that is stated in the bill. If anybody should have a right to enforce on behalf of the land—if I can put it in that way—the owner should, whoever that may be, rather than somebody in a more transitory situation.

While we are on the subject, one group of people is not mentioned in the bill. There is much about community burdens and owners in different houses in a housing estate being able to enforce burdens against one another, but there is nothing about joint owners of the same property being able to enforce burdens against each other—in fact, they specifically cannot. That is the common law, but it might be worth considering the matter, as it is increasingly common for unconnected people to own the same property—I am thinking of timeshare schemes, for example. It would be convenient in respect of conveyancing if they could enforce against each other certain types of burden regulating the use of their property. That is not in the bill and the committee may like to think about it.

Ms Alexander: I am grateful for your comments.

The Deputy Convener: Should people be able to create burdens over their individual share?

Malcolm Strang Steel: Do you mean pro indiviso proprietors?

The Deputy Convener: Yes—in timeshares, for example.

Malcolm Strang Steel: There might be a question of enforcing upkeep of the property against each other. I have the situation in mind in which one person occupies the property one week and somebody else occupies it the next week. Currently, the Keeper of the Registers thinks that many burdens that are supposedly imposed are probably not enforceable as real burdens. He is probably right, but there is an opportunity to change that. Shared ownership schemes will be increasingly common. They are a phenomenon of the past 20 years—certainly, that is the case in the rural context.

The Deputy Convener: Is the matter not dealt with adequately in the bill?

Malcolm Strang Steel: The matter is not dealt with at all. I cannot point to it offhand, but the bill specifically sets out that co-owners may not enforce burdens against each other. From a conceptual point of view, we are concerned about

the fundamental principle that co-owners should be in a position to split up a property or, if it cannot be split up, to have it put on the open market and for the proceeds to be divided between them.

In a number of Court of Session cases, it has been said that co-owners should not be able to contract out of that principle. I am not suggesting that the bill should go so far as to enable co-owners to do that. The principle is a good one and, without it, people could become locked in to a property.

Lord James Douglas-Hamilton: Are you in favour of the sunset rule as a method of discharging burdens? I am referring to sections 19 to 23.

Malcolm Strang Steel: I do not think that the Scottish Landowners Federation has a problem in principle with the sunset rule, although, as I mentioned, the question arises who should be entitled to operate it.

Robert Balfour: As Malcolm Strang Steel indicated, our question on the subject is whether tenants should be able to terminate the burden.

Lord James Douglas-Hamilton: Would you have a problem with that method?

Malcolm Strang Steel: Not in principle with the sunset rule. There has been some discussion as to whether 100 years is the right cut-off.

Lord James Douglas-Hamilton: I was about to ask that question.

Malcolm Strang Steel: I would have said that it was right. Somebody suggested 50 years, but that is too short, particularly given the rural context, in which things change slightly more slowly than they do in the middle of the city.

Lord James Douglas-Hamilton: Section 16 deals with acquiescence, imposing a maximum limit on what constitutes a reasonable period in which to object to the breach of the burden. Do you agree with that approach? Do you think that eight weeks is the right period to set as the maximum limit?

Robert Balfour: It is not a major concern for us, but we feel that 90 days would be more appropriate than 60 days, which is the period that is set out in the bill.

Malcolm Strang Steel: The provision is quite restricted. The draftsmen had in mind a particular type of breach of a particular type of burden. They were thinking of buildings, in which a substantial amount of expenditure can be involved. If the burden were to be enforceable, the bill sets out that

"any benefit arising from such expenditure would be substantially lost".

Lord James Douglas-Hamilton: Why do you recommend 90 days?

Robert Balfour: There was a feeling that eight weeks was too short a period. Some people, although that certainly does not include farmers and landowners, are able to take long periods away. Ninety days would therefore be a more appropriate period.

Lord James Douglas-Hamilton: I will move on to section 17. Do you approve of the reduction in the relevant period for the purposes of negative prescription?

Malcolm Strang Steel: We are quite content with that provision. If someone has not made an objection to the sort of thing that we are talking about in five years from when it came to their attention, they have had long enough to do so.

Michael Matheson: Let us turn to sections 73 to 80, which deal with pre-emption. I understand that the Scottish Law Commission considered the issue and that a minority of the consultees suggested that pre-emption should be preserved only as a matter of contract. You would prefer it to be preserved as a matter of real burden. Why should it be dealt with in that way?

Malcolm Strang Steel: Rights of pre-emption that, in effect, fall off after there has been one opportunity to pre-empt are, in most cases, a matter of contract. However, if the pre-emption is ignored, there is a benefit in retaining it as a real burden, as it can then be enforced against the subsequent owner. In most cases it is a long stop, but it is a valuable one. I have never been in that situation. If the purchaser's solicitor sees a right of pre-emption, he will want to ensure that it has been discharged in one way or another. Nonetheless, it could slip by, which is why there is a benefit in retaining it as a real burden.

Michael Matheson: Does not the provision of pre-emption have the potential to create a difficulty? Someone may be interested in a property and their solicitor may not realise that someone else is interested in the property because of the pre-emption. Has not the person who pursues the property wasted a lot of money if they find out later that there was always a preferred bidder?

Malcolm Strang Steel: The situation is no different from the normal situation in which more than one person is interested in a property. Only one person can buy the property. Because of the way in which the system operates on this side of the border, anyone who shows an interest in the property is at risk of having spent money on his survey but not being the preferred bidder.

Michael Matheson: Okay. You were present when I asked this question before. Section 102

amends the Abolition of Feudal Tenure etc (Scotland) Act 2000 and provides for a right of pre-emption that is created in a feu to be preserved as a personal real burden. What is your view on that?

Malcolm Strang Steel: That is a new concept, which deals with a situation in which there is a pre-emption in favour of a superior who does not have ground to which the pre-emption can be attached. The 2000 act makes provision for a right of pre-emption to be attached to land without any qualifications about the 100m rule, houses or anything else. The situation will be a slightly rare bird. A superior might, for one reason or another, reserve a right of pre-emption on a property in the middle of a town without retaining any land round about it. Such a provision is beneficial to the extent that there is a hanging pre-emption, where the superiority—which is the superior's only interest—has disappeared. I suspect that, if there were no such provision, there would be a risk of a claim for compensation because the superior had been deprived of a right of property that has some value.

The Deputy Convener: Let me finish by asking you about the 100m rule. In your evidence, you say that you have concerns about the rule and its operation in the rural context. Perhaps you can remind the committee of the problems that you envisage arising and give us some examples.

Malcolm Strang Steel: The problem is not about the 100m; it is about having a building on the ground within 100m. If the 2000 act contained no reference to the building but contained a reference to the land being within 100m, or even, as we say in our submission, contiguous, we would not have a problem.

If a minimum area of land were suggested, for example a hectare, we would not have a problem with that either. I notice that, during the previous evidence session, someone suggested that there might be difficulties in towns if what I would call a ransom strip had been preserved in the ownership of the former superior, to which conditions could be attached. That can be cut out using a de minimis provision, such as I have suggested.

16:30

I think that the question of having a building—specifically a house—on the ground that is to receive the benefit of a burden goes back to a remark made in the Scottish Law Commission paper that was behind the proposed legislation. The commission remarked that it could not see that bare land needed protection. With all due respect to the Scottish Law Commission, I think that it got that wrong. The deputy convener gave an example of a dog worrying livestock, and I note that the RICS gave other examples.

I will give a personal example. Some time ago, my family bought a property in Angus with a sawmill in the middle of it. Sawmills are not very attractive things to look at—they are pretty untidy, messy places. This one happened to straddle the main access to the property, which, apart from being a working farm, had some amenity value. I do not doubt that the price that we paid and the price at which we eventually sold were devalued as a result of the sawmill's being in a rather prominent position. There was no question of any building being situated within 100m; I should think that the nearest building was about 400m or 500m away. That is an example of how bare land can be affected by something happening on the land of an adjoining proprietor or on a piece of ground that has been sold off.

Furthermore, bare land does not always remain bare land. Farmers, in particular, are being encouraged to diversify, and the leisure-related industries are an obvious route. What happens over the border or over the march can have quite an effect on the attractiveness or otherwise of a leisure industry. I think that it was the RICS witnesses who wondered what it would be like to be next to the Raychem plant. I can remember—as the deputy convener probably can—some rather unattractive aluminium smelters in Invergordon.

We are dealing with a question of title. Section 3 restates the existing law. In effect, it says that both title and interest are needed to enforce a real burden. We are abolishing the title of a superiority, which would automatically have given the superior a title to enforce, although not necessarily an interest. The suggestion is that someone should have title if they have adjoining land within 100m—or whatever distance is arrived at—of the burdened property. The question whether there is a building on that land might have a bearing on the question whether there is a real interest to enforce, but that should not have an influence on the question of title.

In a way, the problem is exacerbated by the safety valve that the Executive introduced in passing the 2000 act, which says that everything is all right if the two parties involved agree. I do not think that that is realistic: people are unlikely to get agreement from somebody whose property is burdened to continue that burden. One can go to the Lands Tribunal, which must consider whether there is severe loss or disadvantage. That goes to the question of interest and is, if I may say so, a much higher test than the bill's test for having an interest.

The third aspect of having an interest is that under the current law—and I think under what the bill proposes—interest only arises when there is a threat to breach a burden. At that stage, the

interest and all the circumstances surrounding it are examined, such as the situation of the benefited and the burdened properties. Introducing the issue of a house—I say a house, but I should say a building of human resort—into what should be purely a question of title leads to conceptual confusion.

As it stands, the law is discriminatory. The example was given of a farmer who sold a cottage in the middle of his farm. If he had come to me for advice 20 years ago, or even five years ago, and said, "I want to impose some conditions on what is done in the house," I would have advised him that there were two ways of doing that. He could either sell the cottage on a straightforward disposition—reserving the burdens—or he could have me write the magic word "feu" into the title deed. That would give him a slight advantage in that he would be presumed to have an interest to enforce, and the owner of the cottage would have to disprove that he had that interest, rather than the other way round. If the owner had been sold the cottage on a straightforward disposition, the onus to provide proof of his interest would have been on him.

Two neighbouring farmers could do exactly the same thing, but if one wrote the word "feu" into the title deed and the other did not, they would be left in different situations. The one with the straight disposition would be able to enforce his burdens. The one who had the word "feu" in the title deed, and who did not have a building within 100m of the cottage or whatever it was he sold, would have to fight his way through the Lands Tribunal. He would have considerable difficulty in providing proof, because proving serious loss or disadvantage is a high standard, and there would be every chance that he would not win. There is now a discriminatory aspect.

The policy memorandum justifies the Executive's decision not to amend the Abolition of Feudal Tenure etc (Scotland) Act 2000 by stating that doing so would clog up the register with unwanted and perhaps defunct conditions. If one thinks that something is worth doing, I do not think that clogging up the register—which is essentially an administrative process—is a good reason for not doing it. I hope that the committee will consider doing what the Executive has not proposed to do, and will amend the 2000 act by deleting the reference to the requirement to have

"a place of human habitation or of human resort"

within 100m.

The Deputy Convener: Thank you for that detailed exposition.

Malcolm Strang Steel: Are there any questions?

The Deputy Convener: I do not think so. You covered many points in great detail. We will consider your evidence.

Presumably, the Executive believes that if a building were not part of the package, it would result in absentee landlords—who own land in one part of the country, but live in another part—having a disproportionate influence on what goes on in the community.

Malcolm Strang Steel: I accept that they would have to have land that was within 100m or even contiguous. Perhaps there should be a de minimis rule about how much land they own so that they have a chance of proving interest if and when they have to do that. Mr Swinton's superior, for example, who lived in Berwickshire and had no land anywhere near Mr Swinton's house in Dundee, did not get to first base, even under the current law. The register will be cleared of a huge swathe of burdens for people in that position. Most of the properties in Edinburgh are feued. The middle of Edinburgh would disappear.

The Deputy Convener: You say that landowners would have to have a certain area of land. What figure were you thinking of?

Malcolm Strang Steel: I suggest a hectare in the light of earlier evidence about the possibility of somebody owning a strip of ground down the side of a private road in the middle of a city and being able to attach burdens to it. I appreciate that that is not desirable. That was the reason for stopping people trying to keep ransom strips.

Robert Balfour: If the property were adjacent or even 25m away—which is what the planning rules state—that would knock out a lot of people.

Ms Alexander: Robert Balfour will be aware that we have heard contradictory evidence on development-value burdens and clawback. In point 5 of his written evidence, he says that he would like the Executive to reconsider the issue. Will he expand on that?

Robert Balfour: I have specific examples of land that has been given or sold at a reduced price to the local community for open space, playing fields, community halls and so on. If all the burdens on such land are abolished so that it can be used for whatever people or, in many cases, local authorities want, we believe that the burdens should be turned into conservation burdens. That would protect the land for what it was originally intended—community halls or open spaces. Much of that land was purchased for philanthropic reasons and not to make money. Such bits of land must be protected for the community.

Perhaps Malcolm Strang Steel wants to speak about development burdens.

Malcolm Strang Steel: It is easy to confuse a development burden and the clawback provision

that is common in commercial negotiations when selling land. Ms Alexander's question was on development burdens. I have nothing more to add except that they should be preserved. Money was not the first object when they were set up.

The Deputy Convener: That brings us to the end of our questions. Thank you for attending and for giving us a full account of your reasons.

16:44

Meeting continued in private until 16:59.

Members who would like a printed copy of the *Official Report* to be forwarded to them should give notice at the Document Supply Centre.

No proofs of the *Official Report* can be supplied. Members who want to suggest corrections for the archive edition should mark them clearly in the daily edition, and send it to the Official Report, 375 High Street, Edinburgh EH99 1SP. Suggested corrections in any other form cannot be accepted.

The deadline for corrections to this edition is:

Wednesday 2 October 2002

Members who want reprints of their speeches (within one month of the date of publication) may obtain request forms and further details from the Central Distribution Office, the Document Supply Centre or the Official Report.

PRICES AND SUBSCRIPTION RATES

DAILY EDITIONS

Single copies: £5
Meetings of the Parliament annual subscriptions: £350.00

The archive edition of the *Official Report* of meetings of the Parliament, written answers and public meetings of committees will be published on CD-ROM.

WHAT'S HAPPENING IN THE SCOTTISH PARLIAMENT, compiled by the Scottish Parliament Information Centre, contains details of past and forthcoming business and of the work of committees and gives general information on legislation and other parliamentary activity.

Single copies: £3.75
Special issue price: £5
Annual subscriptions: £150.00

WRITTEN ANSWERS TO PARLIAMENTARY QUESTIONS weekly compilation

Single copies: £3.75
Annual subscriptions: £150.00

Standing orders will be accepted at the Document Supply Centre.

Published in Edinburgh by The Stationery Office Limited and available from:

The Stationery Office Bookshop
71 Lothian Road
Edinburgh EH3 9AZ
0131 228 4181 Fax 0131 622 7017

The Stationery Office Bookshops at:
123 Kingsway, London WC2B 6PQ
Tel 020 7242 6393 Fax 020 7242 6394
68-69 Bull Street, Birmingham B4 6AD
Tel 0121 236 9696 Fax 0121 236 9699
33 Wine Street, Bristol BS1 2BQ
Tel 01179 264306 Fax 01179 294515
9-21 Princess Street, Manchester M60 8AS
Tel 0161 834 7201 Fax 0161 833 0634
16 Arthur Street, Belfast BT1 4GD
Tel 028 9023 8451 Fax 028 9023 5401
The Stationery Office Oriel Bookshop,
18-19 High Street, Cardiff CF12BZ
Tel 029 2039 5548 Fax 029 2038 4347

The Stationery Office Scottish Parliament Documentation Helpline may be able to assist with additional information on publications of or about the Scottish Parliament, their availability and cost:

Telephone orders and inquiries
0870 606 5566

Fax orders
0870 606 5588

The Scottish Parliament Shop
George IV Bridge
EH99 1SP
Telephone orders 0131 348 5412

sp.info@scottish.parliament.uk

www.scottish.parliament.uk

Accredited Agents
(see Yellow Pages)

and through good booksellers

Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178