JUSTICE 1 COMMITTEE

Tuesday 10 December 2002
(*Afternoon*)

Session 1

£5.00

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

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CONTENTS

Tuesday 10 December 2002

JUSTICE 1 COMMITTEE
42nd 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)
Kate Maclean (Dundee West) (Lab)
Mrs Margaret Smith (Edinburgh West) (LD)
Kay Ullrich (West of Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Mr Jim Wallace (Deputy First Minister and Minister for Justice)

CLERK TO THE COMMITTEE

Alison Taylor

SENIOR ASSISTANT CLERK

Claire Menzies Smith

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

Scottish Parliament

Justice 1 Committee

Tuesday 10 December 2002

(*Afternoon*)

[THE CONVENER *opened the meeting at 13:31*]

The Convener (Christine Grahame): We are now in public and the microphones are on, so members should be wary. I ask members and anyone else in the vicinity to turn off mobile phones and pagers. I have received apologies from Donald Gorrie, who has an extra Procedures Committee meeting this afternoon—my goodness, how he must love procedures. I welcome Scott Wortley, our adviser, who at present is communing with Michael Matheson.

Lord James Douglas-Hamilton (Lothians) (Con): To keep us right, convener, should we formally declare our interests?

The Convener: We will consider the report on the Council of the Law Society of Scotland Bill later. We can declare interests then—or now, if you like.

Lord James Douglas-Hamilton: With regard to the Council of the Law Society of Scotland Bill and the Title Conditions (Scotland) Bill, my interests are as declared in the register of members' interests. I am a non-practising Queen's counsel, an unpaid trustee and director of a family company and an unpaid executor for my father.

The Convener: To put the matter out of the way, I, too, will declare my interests now. I am a registered member of the Law Society of Scotland and I was a practising solicitor until I became a member of the Scottish Parliament.

Maureen Macmillan (Highlands and Islands) (Lab): My husband is a solicitor and a former member of the council of the Law Society.

The Convener: That has cleared away the preliminaries.

Items in Private

The Convener: I ask members to agree to consider item 4 on the agenda, which is consideration of the draft stage 1 report on the Council of the Law Society of Scotland Bill, in private. As usual, that will enable us to consider our detailed approach to the report, which will be available publicly in its finalised version. Do members agree to take item 4 in private?

Members *indicated agreement*.

The Convener: I also propose that we consider the second draft report and other drafts in private at future meetings. Do members agree to do so?

Members *indicated agreement*.

Convener's Report

The Convener: Members will be pleased to discover that I have nothing to report under item 2, which is the convener's report.

Title Conditions (Scotland) Bill: Stage 2

The Convener: I will rattle on, because we have an awful lot to get through. Item 3 on the agenda is consideration of the Title Conditions (Scotland) Bill. I welcome the Minister for Justice, Jim Wallace, and his team. I draw the committee's attention to paper J1/02/42/1, which is the minister's response to the committee's stage 1 report on the bill. I also refer members to the useful informal paper, "Note of Purpose and Effect", which relates to the amendments that the Executive has lodged. I want to check that members have everything that they require: a copy of the bill, the marshalled list of amendments and the list of groupings. Members should have a copy of the revised marshalled list. I will give members a moment to get their paperwork sorted out.

Section 1—The expression "real burden"

The Convener: Amendment 87 is grouped with amendments 106, 107, 108, 233, 235, 208, 64, 67, 69, 70, 71, 72, 238, 239 and 75.

The Deputy First Minister and Minister for Justice (Mr Jim Wallace): Amendment 87 will introduce into the bill economic development burdens as one of the exceptions to the general rule that burdens must benefit other land.

Amendment 106 is the main amendment in the group. It introduces section 42A, which provides for a new category of personal burdens on land. Those burdens will require no benefited property. Local authorities will be able to create economic development burdens in circumstances in which they wish to sell land with a view to encouraging economic development within their area. They might wish to impose a burden that includes a clawback condition if there is likely to be a windfall increase in the value of land as a result of a change in use. Authorities will be able to use the new burdens for that purpose. Subsection (3) of the proposed new section provides specifically for the burden to comprise or include an obligation to pay money.

The new burdens will be subject to the law of real burdens as reformed and codified by the bill; they will also be subject to the jurisdiction of the Lands Tribunal for Scotland. It is intended that economic development burdens will also be available to Scottish ministers, as occasions might well arise on which they wish to sell land for the purposes of economic development. Although it will be possible for bodies other than local authorities or Scottish ministers to create an economic development burden, it will be necessary for them first to obtain the consent of the authority or the ministers whom they intend should have the right to enforce the burden.

In evidence to the committee, the Convention of Scottish Local Authorities argued that there is a strong public interest in the protection of public funds. In the stage 1 debate, I indicated that the Executive agrees that there is a compelling argument that, when the public sector sells or gives land for economic development, there should be a means of protecting the purpose of the transfer of the land and the public funds that are involved.

Amendment 107 ensures that the holder of an economic development burden will have a presumed interest to enforce. Amendment 108 is one of a number of amendments that are required to ensure that economic development burdens will get the same treatment in law as other kinds of personal burdens. Amendment 108 will ensure that economic development burdens will be discharged by registering a deed of discharge against the burdened property. The discharge will have to be made by the holder of the burden.

Amendment 208 builds on amendment 106 by allowing a normal burden of this type that was imposed in the past to be converted into an economic development burden. Amendments 233, 235, 64, 67, 69, 70, 71, 72 and 75 are all consequential to amendments 106 and 208.

Amendment 239 is consequential to the insertion by section 102 of the bill of the various new sections in the Abolition of Feudal Tenure etc (Scotland) Act 2000. Amendment 208, on the conversion of feudal burdens into economic development burdens, will insert section 18B in the 2000 act. Amendment 238 is consequential.

Amendment 75 sets out the notice that is to be given by local authorities that convert a real burden into an economic development burden. It is consequential to amendment 208, which will convert feudal burdens into economic development burdens.

I move amendment 87.

Lord James Douglas-Hamilton: Does amendment 106 provide for clawback for the public sector? I assume that in certain circumstances economic burdens might relate to clawback.

Mr Wallace: I confirm that the amendment provides for clawback.

Lord James Douglas-Hamilton: I declare an interest as an unpaid trustee.

Does the minister believe that there are no circumstances in which the provision should apply to the private sector?

Mr Wallace: Yes. In the stage 1 debate, we discussed whether the provision should be available to private bodies and individuals, rather than restricted to local authorities and Scottish ministers. Unlike private landowners, local authorities have a duty to promote economic development. They can often achieve that by making land available for new enterprises. If the value of the land increases subsequently, it is only right that the local authority should be able to share in that increase, so that the benefit of the investment that it has made returns to the public purse.

Private landowners do not operate under such a duty. However, there are other mechanisms available to private landowners who want to make land available for public-spirited purposes. Those include standard securities, which can be used to secure a contract for clawback, long leases and trust arrangements. All those mechanisms would give the landowner an element of control over subsequent development of land, without the use of real burdens.

Lord James Douglas-Hamilton: Is the minister's view that the public interest should be paramount in circumstances of the kind that we are discussing?

Mr Wallace: That is the motivation for amendment 106. The amendment accords with the evidence that COSLA gave to the committee at stage 1.

Amendment 87 agreed to.

The Convener: Amendment 222 is grouped with amendments 223 to 226.

Maureen Macmillan: Amendment 223 is the main amendment in the group. The bill proposes a special status for conservation bodies. In the same way, we believe that there should be a social housing burden.

I lodged the amendments because the Highlands Small Communities Housing Trust approached me about potential problems that it foresaw under the bill. The trust is a charity and a company limited by guarantee. It was set up by all the main housing agencies and land-for-housing interest groups in the Highlands. It is a partnership vehicle for improving the delivery of publicly funded housing solutions. The trust has a land bank and purchases land. Those purchases provide it with sites for the provision in due course of two main types of housing: rented housing and privately built housing. Privately built housing is often provided with the assistance of rural home ownership grants.

The trust wants to ensure that the housing and land that it provides do not pass out of the hands of communities. It wants to be assured that it can impose a burden on properties. I realise that amendment 223 might prevent all local authority tenants from having the right to buy their council houses—I do not intend that. I am seeking a way of protecting very small rural housing developments from being sold to people outwith communities.

The other amendments in the group are consequential to amendment 223.

I move amendment 222.

Lord James Douglas-Hamilton: Does the minister accept that Maureen Macmillan has a valid point? In certain parts of the Highlands, local people have difficulty in obtaining low-cost homes either for rent or to buy. The amendments that Maureen Macmillan has lodged would be of assistance in that regard.

13:45

Mr Wallace: As Maureen Macmillan indicated, amendment 223 seeks to ensure that, where bodies sell land at affordable prices for local social community housing purposes, they can ensure that it will continue to be used for those purposes. I recognise the motivation behind the amendment and Lord James's concern about the importance of social housing either to rent or to buy in rural areas.

Amendment 223 appears to allow a body to be nominated by Scottish ministers as an appropriate body to enforce any conditions that restrict the use of the land to social housing. However, it does not make clear what the nature of the proposed restrictions might be. Although neighbouring properties might still be able to enforce any such condition in the title of land sold, it is likely to be the case that the sort of body that Maureen Macmillan is concerned about would lose its enforcement rights if it did not have any property nearby.

I readily appreciate the concern that underlies amendment 223. However, it is difficult to come up with a definition of social housing that would be sufficiently tight to provide the certainty that we believe is necessary in property law. A restriction on the sale of land to a particular group is unlikely to be a valid real burden. However, I am not unsympathetic on the matter and I am willing to consider it if a real need can be identified and defined precisely. I am not sure whether Maureen Macmillan has the letter that I sent her yesterday, but when she gets it she will see that I have indicated that it would be helpful to have further information on the type of condition that is giving rise to the concern.

Although I cannot promise anything, I want to consider the matter further, because I recognise

that a genuine issue has been raised. I ask Maureen Macmillan not to press amendments 222 to 226. We will have further dialogue on the basis of the letter that I have sent to her.

Maureen Macmillan: I am pleased to hear the minister say that he realises that the issue is important in rural areas. I would be happy to withdraw amendment 222, on the basis that we can have some dialogue about the issue and see what can be done.

Amendment 222, by agreement, withdrawn.

Section 1, as amended, agreed to.

Section 2 agreed to.

Section 3—Other characteristics

The Convener: Amendment 88 is grouped with amendment 73.

Mr Wallace: Amendment 88, together with amendment 73, will resolve a technical problem that might have allowed people who do not have any right to enforce a condition to exploit a title condition that required their consent before the terms of a burden could be broken. Those people would not have had benefited land, but could consent to work being carried out, regardless of the wishes of those who were actually able to enforce the conditions. Amendment 88 will prevent the creation of that sort of right. Amendment 73 will ensure that former feudal superiors who lose their ability to enforce burdens on the appointed day will also lose their ability to give that kind of consent.

I move amendment 88.

Amendment 88 agreed to.

Section 3, as amended, agreed to.

Section 4—Creation

The Convener: Amendment 89 is grouped with amendments 169, 170 and 182.

Mr Wallace: Section 4 is about the creation of real burdens after the appointed day. As the committee will see, paragraph (c) of subsection (2) is about the identification of burdened and benefited properties and, in the case of a personal burden, the identification of the holder of the personal burden. In the bill as introduced, subparagraphs (i) and (ii) are mutually exclusive. In other words, the way in which the bill is written means that either the owner of the benefited property or the holder of the personal burden should be identified. However, there could be circumstances in which there would be both a benefited property and a personal burden holder. For example, a community burden might be both a community burden and a conservation burden. The amendment will ensure that both the benefited property and the person in whose favour the real burden is constituted should be nominated and identified where both exist.

The other amendments in the group deal with cases where there is both a benefited property and a personal burden holder. They make provisions as to how the Lands Tribunal should deal with such cases.

I move amendment 89.

Amendment 89 agreed to.

Section 4, as amended, agreed to.

Sections 5 and 6 agreed to.

Schedule 1

FORM IMPORTING TERMS OF TITLE CONDITIONS

The Convener: Amendment 18 is in a group on its own.

Mr Wallace: Amendment 18 is the technical amendment of technical amendments. The Land Register of Scotland is a register of interests in land, rather than deeds. The Keeper of the Registers extracts information from deeds submitted to him in support of applications for registration. That contrasts with the old Register of Sasines, which is a register of deeds—the convener has been familiar with it over the years.

The Convener: Happy days.

Mr Wallace: Happy deeds, indeed.

The deeds are said to be "recorded". The distinction is recognised by the definition of "registering" in section 110, which applies the term to both registers. The amendment, therefore, replaces the word "recorded" in schedule 1 with the appropriate term "registered", as that covers both registers in the definition in section 110.

I move amendment 18.

Amendment 18 agreed to.

Schedule 1, as amended, agreed to.

Section 7 agreed to.

Section 8—Right to enforce

The Convener: Amendment 1 is grouped with amendments 13, 14, 15, 2 and 3. I point out that, if amendment 1 is agreed to, I cannot call amendments 13, 14 and 15, which will be pre-empted.

Maureen Macmillan: I lodged amendments 1, 2 and 3 as a result of conversations with Bruce Merchant, a solicitor in Inverness. He is concerned that, if a property were conveyed under the terms of the bill, it would be difficult for the selling

solicitor to find out who the tenants or non-entitled spouses were. It is easy enough to find out who owners are, because they are registered. However, if everybody in a housing community had to be canvassed to find out whether they agreed to a burden being waived—if that is the right word—the selling solicitor would not necessarily know who the tenants or non-entitled spouses were. Although my amendments could remove from the bill the right of tenants and non-entitled spouses to enforce, which the committee agreed was a good thing, I lodge the amendment to find out whether there is some way in which the conveyancing problems mentioned by Mr Merchant can be modified.

I move amendment 1.

Lord James Douglas-Hamilton: I lodged amendments 13, 14 and 15 after lengthy discussions with the Law Society of Scotland. The relevant committee of the Law Society is opposed to the extension of the right to enforce real burdens to non-entitled spouses and tenants because it believes that it will be impossible to identify those categories of persons from the Land Register of Scotland or the Register of Sasines.

The committee of the Law Society of Scotland had no objection to the right being extended to life renters, whose right will always be recorded in the Register of Sasines or registered in the Land Register of Scotland. However, those life renters with a pro indiviso right—a shared right—should be excluded, because including them would simply complicate matters a great deal, unnecessarily so in the view of the Law Society committee.

The committee took the view that, if a non-entitled spouse is to have the right to enforce, the right should arise only if he or she can establish that the entitled spouse—the owner—has not been resident in the matrimonial home for at least three years. It is the experience of members of the Law Society that the vast majority of tenants of residential properties are tenants under short assured tenancies, which can exist for a maximum of five years. It is therefore inappropriate that short-term occupiers of houses should be able to enforce burdens that run with the land and therefore affect only the interests of the owner and his or her successors.

The Law Society committee would support amendments to exclude from the right to enforce real burdens in the first instance non-entitled spouses, unless the entitled spouse had been continually absent from the matrimonial home for a period of not less than three years, and tenants of residential property under leases of five years or less. Those are quite complex provisions. It would be a great help if the minister would, at the very least, consider the matters, even if he is not in a position to say anything substantive today.

The Convener: Do you want to come down into the body of the kirk, Donald, or are you happy sitting up there? You might want to catch my eye in order to speak. You have made it back from the Procedures Committee and I know that you were desperate to join us for this exciting meeting.

Donald Gorrie (Central Scotland) (LD): This is my third committee meeting of the day, so I have not been slacking.

The Convener: That is too much.

Mr Wallace: The purpose of section 8 is to extend the range of people who will be able to enforce real burdens protecting a particular property. Section 8(1) states:

"A real burden is enforceable by any person who has both the title and the interest to enforce it."

There would be little if any benefit from amendment 1, which would prevent the people on the list to which it refers from enforcing burdens. It is fair to say that the provisions in section 8 received overwhelming support in the Executive's consultation exercise. I remember discussing the provisions with the committee when I gave evidence during the stage 1 deliberations. There was concern about absentee spouses or tenants, but it is difficult to see how someone who was absent could have the interest as well as the title. It is also difficult to see how having another person exercise enforcement rights could prejudice the owner. If anything, that would mean that the owner's property interests were protected even though they might be inactive. It is important to stress that the burden is not being enforced against the owner. The person who is given rights by section 8 is enforcing a burden benefiting the owner's property but affecting other land.

As I indicated to the committee, a tenant might be the person who is most affected by a breach; they might be affected more than the owner is. I used the example of a tenant with young children who is living next door to someone who decided to keep an animal, despite the fact that the keeping of pets was prohibited under the title conditions. If that animal were a Rottweiler, for example, it would scare the living daylights out of the children living next door. Section 8 will allow a tenant to respond immediately to such a breach of a burden.

Under existing law, a concerned occupier would have to contact the owner and persuade the owner to take enforcement action. We are providing for a tenant to take action in circumstances that an absentee landlord might readily ignore. A tenant is more likely to have an immediate concern as to whether a breach of a condition is likely to be harmful. That is true regardless of the period of tenure. A tenant on a short lease might be unlikely to enforce the

condition, but there seems no harm in allowing them the option in the event of unusual circumstances materialising.

I said when I gave evidence to the committee that I do not accept the argument about the perceived mischief that might arise from the measure. I repeat that the burden cannot be enforced against the owner. In the unlikely event that an owner would be prejudiced by the enforcement of a condition from which he is meant to benefit, the owner could discharge the enforcement rights. The committee noted in its stage 1 report that the person who seeks to use the burden must have an interest to enforce, the test of which is whether there is material detriment to the benefited property.

14:00

Maureen Macmillan asked the pertinent question whether section 8 would mean that a substantial number of people would have to sign discharges in the event of a sale. Although in addition to the owner of the benefited property various parties can enforce a burden—which is the point that we have been discussing—the bill provides that only the owner of the benefited property needs to sign a discharge. That is true of individual discharges under section 15, majority discharges under section 32 and discharges by near neighbours under section 34. Maureen Macmillan's concern is addressed in other sections of the bill. To obtain a discharge, it is not necessary to obtain the signature of tenants or non-entitled spouses. There is no prescribed form that discharges must take, so they need not be long or complex documents.

I have covered the point about tenants, who might well have a clear and pressing need to secure the enforcement of a condition because their enjoyment of a property is affected immediately. Lord James said that non-entitled spouses should have rights of enforcement only when the entitled spouse has been absent for three years, but what if there is a material change to the character of the neighbourhood during that time? For example, the next-door neighbour might, contrary to the title conditions, begin parking a heavy-goods vehicle in the drive. In such circumstances, it would be, to put it mildly, unfortunate if the non-entitled spouse had to wait for three years while suffering the loss of amenity of having a big lorry parked outside their house. Without that three-year qualification period, the non-entitled spouse could enforce the condition right away.

As non-entitled spouses have a clear interest from day one in preserving the character of their neighbourhood and in being free from any kind of nuisance, they should not have to rely on an absent spouse to enforce such rights for them. Those people should not have to wait for the qualification period, during which the character of the neighbourhood might change altogether, before they could enforce a real burden. It might also be argued that a delay would extinguish the burden by acquiescence.

Given those circumstances, there is a compelling case—which, as I said, was supported in the consultation—for maintaining the list of people who can enforce burdens. The provisions in the bill that deal with owners discharging a burden address Maureen Macmillan's concern.

Maureen Macmillan: I am glad to have the assurance that only owners of a benefited property will be required to sign the discharge. It was a worry among solicitors that they would have to chase tenants without having a register of tenants. I therefore seek permission to withdraw amendment 1.

Amendment 1, by agreement, withdrawn.

The Convener: Does James Douglas-Hamilton want to move amendment 13?

Lord James Douglas-Hamilton: I would like to study, in co-operation with the Law Society of Scotland, what the minister has said. I reserve the right to return to the issue at stage 3, but I am grateful to the minister for the substantial comments that he has made.

Amendments 13, 14, 15, 2 and 3 not moved.

Section 8 agreed to.

Sections 9 to 15 agreed to.

Section 16—Acquiescence

The Convener: Amendment 90 is grouped with amendment 91.

Mr Wallace: Amendment 90 responds to the committee's concerns that the acquiescence provision as drafted will disadvantage individuals who may be away from their homes for longer than eight weeks. The period has been extended to 12 weeks, as suggested.

However, the time limit is very much a backstop. Acquiescence will normally occur very quickly, particularly if neighbours have given verbal agreement to an activity that breaches a burden or do not complain quickly about very obvious building works. In such cases, it would be difficult to rebut a presumed acquiescence.

Amendment 90 will be of assistance to those who have been on holiday or in hospital for an extended period. I hope that the committee feels that the amendment meets the concern that it expressed in its report. Amendment 91 is consequential to amendment 90.

I move amendment 90.

Amendment 90 agreed to.

Amendment 91 moved—[Mr Jim Wallace] and agreed to.

Section 16, as amended, agreed to.

Sections 17 to 19 agreed to.

Schedule 2 agreed to.

Section 20—Intimation

The Convener: Amendment 92 is in a group on its own.

Mr Wallace: The committee will be aware that section 19 of the bill contains a sunset rule, which provides a method for owners to discharge burdens that are more than 100 years old and which affect their land. In such cases, the owner of the benefited land, who has the right to enforce the burden, will receive notification under section 20 of a proposal to execute and register a notice of termination.

The relevant burden may be one of those that do not require benefited property. In such cases, the person in whose favour the burden is constituted should receive notification, rather than the owner of the benefited property. It is the holder of the personal burden who should be able to apply for renewal of the burden at the Lands Tribunal, under section 81.

Conservation burdens cannot be extinguished by the notice of termination procedure. Amendment 92 ensures that the holders of personal pre-emption and redemption burdens, and of economic development burdens, will receive notification of any notice of termination.

I move amendment 92.

Amendment 92 agreed to.

Section 20, as amended, agreed to.

Schedule 3 agreed to.

Sections 21 to 27 agreed to.

The Convener: I was tempted to ask Maureen Macmillan to comment on the sunset rule.

Section 28—Power of majority to instruct common maintenance

The Convener: Amendment 93 is grouped with amendment 94.

Mr Wallace: Amendment 93 ensures that where the title deeds apportion shares of maintenance costs between each unit, those shares will prevail when section 28 is used to allow a majority of units to instruct common maintenance. It would be unfair for the majority to be able to apportion costs in any way that it thought fit.

Amendment 94 allows a manager who is authorised by a majority in a community to make payments from the maintenance account. As drafted, section 28 requires the authority of two people before payments can be made so the manager would have to get one of the owners to authorise a withdrawal each time that expenditure was required. The reasoning behind amendment 94 is that, in some situations, owners might prefer to place authority and responsibility for payments in the hands of a manager rather than deal with those payments themselves.

I move amendment 93.

Amendment 93 agreed to.

Amendment 94 moved—[Mr Jim Wallace]—and agreed to.

Section 28, as amended, agreed to.

Sections 29 to 31 agreed to.

Section 32—Majority etc variation and discharge of community burdens

The Convener: Amendment 95 is in a group on its own.

Mr Wallace: Section 32 makes provision for the variation and discharge of community burdens by a majority of owners within a community. Section 32(4) states:

"where a unit is owned by two or more persons in common a deed is granted by or on behalf of the owners of the unit if granted by or on behalf of those of them who together own more than a half share of the unit."

The provisions of amendment 95 mean that that rule will not operate where other provision is made or is intended to be made in a constitutive deed that imposes burdens on the relevant properties. In those circumstances, such provision in the constitutive deed will be given priority since it will have been put in place deliberately by the developer and/or the owners. Such local arrangements should continue to have effect over what is otherwise a statutory presumption.

I move amendment 95.

Amendment 95 agreed to.

Section 32, as amended, agreed to.

Section 33—Variation or discharge under section 32: intimation

The Convener: Amendment 97 is in a group on its own.

Mr Wallace: Amendment 97 is a consequential amendment to ensure that some of the provisions in section 36 that concern the Lands Tribunal for Scotland can be reused in section 33. The amendment ensures that where section 33 adopts

some section 36 provisions, a reference to "this section" in the phrase that is taken from section 36 will mean section 33.

I move amendment 97.

The Convener: No member wishes to speak, so does the minister waive the right to wind up?

Mr Wallace: I am glad that no one asked me for further clarification of amendment 97. I waive the right.

The Convener: Now we are tempted to ask a supplementary. That disclosure has made you a hostage to fortune.

Amendment 97 agreed to.

Section 33, as amended, agreed to.

Schedule 4 agreed to.

Section 34—Variation and discharge of community burdens by owners of adjacent units

The Convener: Amendment 98 is grouped with amendments 99, 19 and 20.

Mr Wallace: The purpose of section 34 is to allow a community burden to be varied or discharged by a deed that is granted by all the owners of adjacent units. Amendment 98 ensures that the owners of the adjacent units will not be able to make a variation or discharge without the consent of the owner of the property in question. Amendment 99 allows the discharge procedure to be used where there are no adjacent owners.

Amendment 19 makes a small change to the form in schedule 5. It seems unnecessary for the person who wants to register a deed to vary or discharge a burden to specify in the schedule 5 form their interest and connection if they are the owner of the property in question. The amendment removes the relevant words from the form. Amendment 20 is a consequential amendment.

I move amendment 98.

Amendment 98 agreed to.

Amendment 99 moved—[Mr Jim Wallace]—and agreed to.

Section 34, as amended, agreed to.

Section 35—Variation and discharge under section 34: intimation

The Convener: Amendment 100 is in a group on its own.

Mr Wallace: The bill makes a number of provisions for notifying benefited proprietors of proposed changes to burdens. There are precise rules about how notification should be made, which include, in some cases, the display of notices on lamp posts. It is desirable that notices should not stay on lamp posts longer than necessary—

The Convener: Heaven forfend.

Mr Wallace: Amendment 100 simply specifies the date at which one particular form of lamp post notification should be removed. In this case, the burdens in question are community burdens where the owners of units within 4m have agreed to the variation and discharge of the burdens.

Owners of benefited properties outwith the 4m boundary are to be notified so that they will have the opportunity to have the matter considered by the Lands Tribunal. They will have a period of eight weeks to object.

Amendment 100 simply seeks to provide that a lamp post notice used to notify neighbours in such circumstances should be removed from the lamp post no later than one week after the final day of the eight-week period for objections to the Lands Tribunal.

I move amendment 100.

14:15

The Convener: I am awfully tempted to ask what would happen to someone if their notice was not removed within that period of time. Are there penalties?

Mr Wallace: I suppose that someone else might be able to take the notice down.

The Convener: Does anyone wish to speak to the lamp post amendment?

Members: No.

The Convener: I am trying to brighten things up.

Amendment 100 agreed to.

Section 35, as amended, agreed to.

Schedule 5

FURTHER FORM OF NOTICE OF PROPOSAL TO REGISTER DEED OF VARIATION OR DISCHARGE OF COMMUNITY BURDEN: SENT VERSION

Amendments 19 and 20 moved—[Mr Jim Wallace]—and agreed to.

Schedule 5, as amended, agreed to.

Schedule 6 agreed to.

Section 36 agreed to.

Section 37—Conservation burdens

The Convener: Amendment 101 is grouped with amendments 65, 209 and 210.

Mr Wallace: Section 37 relates to the creation of conservation burdens. Amendment 101 would

ensure that a standard security could not be created over a conservation burden in the period before the appointed day. The amendment is consequential to repeals in schedules 13 and 14. There is no change in policy.

Amendment 65 inserts new section 28A on conservation burdens into the Abolition of Feudal Tenure etc (Scotland) Act 2000. It excludes the new section from the general abolition of superiors' rights to enforce real burdens. That will facilitate the nomination of a conservation body as the new benefited proprietor for a conservation burden. Therefore, amendment 65 is technical.

Amendments 209 and 210 seek to make stylistic changes to the bill.

I move amendment 101.

The Convener: I have just been told by our adviser that one of the amendments is close to his heart, so we can make him very happy.

Amendment 101 agreed to.

The Convener: Amendment 102 is grouped with amendments 103, 104 and 105.

Mr Wallace: This group of amendments seeks to give effect to the recommendations of the Subordinate Legislation Committee that the prescription of conservation bodies should be done by order rather than by regulations.

I move amendment 102.

Amendment 102 agreed to.

Amendments 103 and 104 moved—[Mr Jim Wallace]—and agreed to.

Section 37, as amended, agreed to.

Sections 38 to 40 agreed to.

Section 41—Extinction of burden on body ceasing to be conservation body

Amendment 105 moved—[Mr Jim Wallace]—and agreed to.

Section 41, as amended, agreed to.

After section 41

Amendments 223 and 224 not moved.

Section 42 agreed to.

After section 42

Amendment 106 moved—[Mr Jim Wallace]—and agreed to.

Section 43—Interest to enforce

Amendment 107 moved—[Mr Jim Wallace]—and agreed to.

Amendment 225 not moved.

Section 43, as amended, agreed to.

Section 44—Discharge

Amendment 108 moved—[Mr Jim Wallace]—and agreed to.

Amendment 226 not moved.

Section 44, as amended, agreed to.

Sections 45 and 46 agreed to.

Schedule 7 agreed to.

Section 47 agreed to.

Section 48—Common schemes: general

The Convener: Amendment 109 is grouped with amendments 16, 5, 6, 17, 110, 111, 112, 119 and 11. I point out that agreeing amendment 109 would pre-empt amendment 16.

Mr Wallace: Given the complicated way in which the group's amendments interact, I will, with the committee's forbearance, depart from a strict running order and discuss the amendments that are most closely related. I will deal first with amendments 5, 16, and 17, which deal with the concerns that Maureen Macmillan and Lord James Douglas-Hamilton aired during the stage 1 debate, I think, about imposing a 4m rule.

The effect of amendments 5, 16 and 17 would be to restrict the re-creation of enforcement rights to immediately adjacent neighbours. Neighbours that are more distant would lose their right of enforcement. It is not difficult to think of circumstances in which such neighbours would have a real interest in enforcing burdens that might have a seriously detrimental effect on the value and enjoyment of their property if they were breached. It is not only adjacent neighbours who have an interest in the amenity of property in the near vicinity. For example, even if neighbours live at the other end of an estate from a property at the entrance of the estate, they would clearly have an interest to protect if any activity that was being carried out on the property at the entrance had an adverse effect on the amenity of the whole estate. Several witnesses who gave evidence at stage 1 made that point.

Moreover, our legal advice is that the bill would not be compliant with the European convention on human rights if it were to have the effect of removing property rights—without compensation and without the opportunity to preserve the rights—from owners who have such rights at present but who live more than 4m away from the burdened property. If amendments 5, 16 and 17 were passed, they would have their rights removed. Therefore, amendments 5 and 16, read

together with amendment 17, would, in our view, be outwith the legislative competency of the Parliament. For that reason, I ask the relevant members not to move amendments 5, 16 and 17.

The wording of amendment 6 might be described as overlapping with the wording of Executive amendment 109. The main Executive amendments in the group are amendments 109 and 111. The purpose of amendment 109 is to restate the common law on who has implied rights to enforce. Setting that out in statute will ensure that no one who has implied enforcement rights at present will lose them. Amendment 111 and the existing section 50 will build on that platform to extend enforcement rights in certain targeted areas, namely: related properties, including housing estates, tenements and sheltered housing developments.

In contrast, amendment 6—taken with amendment 5, which might have been the original intention—would extinguish some property rights. For the reasons that I have given, I invite Maureen Macmillan not to move amendment 6. If I have misunderstood the intention behind amendment 6 and its purpose is merely to restate the common law, amendment 109 would more accurately achieve that aim.

I fully appreciate the intention behind amendment 110, which is to ensure that common schemes of mutually enforceable burdens on mixed tenure estates will exist into the future. However, the amendment would not allow local authorities to continue to enforce burdens in such estates. The amendment would affect only properties that have been sold off. Executive amendment 111 will have a more widespread effect. It will allow local authorities to complete a common scheme by including units that they have yet to sell in a right-to-buy housing estate.

Amendment 111 also responds to concerns that were expressed at stage 1 about a difficulty in relation to the need for notice of a common scheme in the deeds that impose burdens that were intended to be mutually enforceable. It also answers the concern that too many new enforcement rights would be created under section 48.

Amendment 111 applies not only to right-to-buy estates. The purpose of new section 48A is to ensure that amenity burdens in all housing estates or tenements should be mutually enforceable by the owners of houses in the estate or of flats in a tenement. They would become community burdens and would be subject to the rules in part 2. A large majority of respondents to the consultation on the bill were in favour of such amenity burdens being treated in the same way, irrespective of whether rights had been granted expressly to owners in the original deeds or whether they had arisen by implication under existing law.

The amendment will also deal with the concern that local authorities expressed at stage 1 that they might be unable to complete the registration of deeds of conditions for all estates before the appointed day. New section 48A will confer enforcement rights in existing estates where a local authority registers a deed of conditions after the appointed day.

We needed to ensure that section 48 would not confer enforcement rights as between scattered properties in rural areas. Amendment 111 does not require notice of a common scheme, but it retains the need for a common scheme of burdens and introduces a requirement for the properties to be related to one another. For example, houses on a typical housing estate would be related properties. The relationship would be inferred from all the circumstances, but the amendment gives examples of when such inference might arise.

Amendment 111 applies only to burdens that have been imposed under the common scheme, when at least one of the related properties became subject to the common scheme in deeds before the appointed day. For burdens that are intended to operate as a common scheme in the future, the deeds will have to be registered under sections 4 and 6 and the common scheme or community will then be obvious.

The Executive believes that amendment 111 and connected amendments will deliver the policy of treating amenity burdens in housing estates similarly, irrespective of how they came into being. In contrast to amendment 111, Maureen Macmillan's amendment 110 relates only to right-to-buy properties, which should not be singled out. Amenity burdens will be important on all housing estates—not only on those where the right to buy has been used. Right-to-buy estates raise one issue and, much more than any other estate, they will consist of houses that remain unsold and unburdened on the appointed day. I ask Maureen Macmillan not to move amendment 110.

As for amendment 112, subsection (2) of new section 48A gives several examples of circumstances that might give rise to an inference that properties are related properties for the purpose of being treated as a common scheme. One example is of properties that are flats in the same tenement, so section 49 will no longer be needed, as it will have no independent effect.

At stage 1, much interest was expressed in section 52, but its effect has been misunderstood. I assume that amendment 11 seeks to remove section 52 because it was thought that the section would extend enforcement rights and transfer them from feudal superiors to neighbours. Section

52 does not do that. Any transfer under the bill of enforcement rights from superiors would arise because of sections 48A, 50 and 51.

I understand why confusion might have arisen, because section 52 refers to the

"reservation of a right to vary or waive the real burden".

Many reading the section have taken that to be a reference to our intention to transfer the superior's rights to neighbours in a situation where he or she has reserved the right to vary or waive burdens. In fact, section 52 applies to non-feudal burdens and is concerned with another area of law.

It would perhaps be helpful if I were to explain that further. When developers are selling off flats in a tenement, it is relatively common for them to use ordinary dispositions, rather than execute feudal dispositions. Their standard practice is to exclude the operation of section 17 of the Land Registration (Scotland) Act 1979 and to reserve a power to vary the burdens until all the flats are sold and the deeds are registered. The effect of the law is uncertain, but it seems that, if the developer did that, there would be a risk that the burdens would fall on the appointed day because there would be no one to enforce them.

14:30

Sections 48A to 51 confer enforcement rights on neighbours only where the burden already exists. If an obligation is not enforceable, it cannot be a real burden. The problem can only arise with non-feudal burdens, because feudal burdens are enforceable by the appointed day by the feudal superior. It is easy to see how that could have a disastrous effect on the tenement if, indeed, no real burdens remain.

Let us take as an example a burden imposed under a common scheme on the flats of a tenement that requires all the owners to contribute a share of the cost of maintaining the roof. On the appointed day, the burden may not be enforceable. We doubt that a court would reach that conclusion, but the provision seeks to put the matter beyond all doubt.

The removal of section 52 does not truly address the issue raised by the member and merely removes the safeguards that were included in the bill to ensure that non-feudal common schemes, whether imposed on tenements, housing estates or comprising amenity or facility burdens, are enforceable. Therefore, I ask Maureen Macmillan not to move amendment 11.

Amendment 119 is a consequential drafting amendment made necessary by amendment 109, especially by the inclusion of subsection (1A) in section 48. It will ensure that the two provisions do not become contradictory.

I move amendment 109.

The Convener: Thank you for that complex approach, minister.

Lord James Douglas-Hamilton: I recently discussed amendments 16 and 17 with the Law Society. It supports Maureen Macmillan's proposed amendments, which are designed to restrict the number of properties benefited by a real burden to those situated within 4m of the burdened property. That would avoid the need to obtain consent, or retrospective consent, for matters such as alterations, which formerly required the consent of the superior or the discharge or variation of the burden by all proprietors in a common scheme.

I understand that the minister is worried about the bill's being ECHR compliant, and that there is a feeling that the amendment would abolish property rights for those outside the 4m boundary without providing compensation. However, there must be a clear definition of "neighbour". Otherwise a situation could arise whereby all 600 tenants in a Wimpey, Barratt or Miller housing scheme could claim to be neighbours. I cannot imagine that each of the 600 households would call in aid the ECHR and I therefore respectfully suggest that the Administration should be prepared to argue for Scottish interests and not roll over when the words "human rights" are used.

It was an American President who said that

"the whole world is one neighborhood",

and there is much to be said for that argument. However, in conveyancing there is a need for finality and boundaries to avoid excessive cost, bureaucracy and confusion. There is merit in amendments 16 and 17. Incidentally, the difference between Maureen Macmillan's amendments 5 and 6 and my amendments 16 and 17 involves fine-tuning, rather than detail or principle.

Section 52(1) is covered by amendment 11. As drafted, section 52(1) would confer new implied rights to the enforcement of real burdens where none exist under the common law. The Law Society believes that the deletion of that section, along with the proposed amendments to section 48, would ensure that no new implied enforcement rights would arise where none had existed previously and that the number of owners whose consent or agreement to variable discharge is required would be reduced to manageable proportions.

There is a need for clear limits that are readily workable. I hope that, at the end of the debate, the minister will indicate that he is willing to consider the issues again because the lawyers believe that what has been proposed could lead to unnecessary confusion.

Maureen Macmillan: Amendment 5, as Lord James said, relates to the unwieldiness of some common schemes, which, in terms of conveyancing, many solicitors feel would be impossible to manage. They believe therefore that a common scheme should be restricted to near neighbours, which is to say, people within 4m of a property.

Amendment 6 is about creating new rights where none existed. It is contrary to natural justice for a person who comes to sell his or her house to find that other people, who did not have a right before, now have the right to enforce burdens over his or her property. Again, that complicates conveyancing.

Amendment 110 is a technical amendment, which the minister has taken further with amendment 111. The committee felt that the amendment would clarify the position of right-to-buy estates, but I acknowledge what the minister said when he spoke to amendment 111.

Mr Wallace: With regard to the point that Lord James made about the ECHR, I would say that, given that section 8(1) states that

"A real burden is enforceable by any person who has both title and interest to enforce it",

it might not be possible to prove that every owner on an estate comprising 600 houses, for example, had an interest to enforce.

The question is one of standing up not for Scotland's rights, but for the rights of individuals who could well have an interest and a right to enforce, even though they are not within the 4m area stipulated by Lord James in his amendment 17. The example that I gave was of someone living well inside an estate, who would have an interest in maintaining the appearance of the entrance to the estate. If the entrance to the estate became run down in breach of a condition, it could have a material impact on the value of the house. I believe that the owner who lives well inside the estate would have an interest and that, therefore, the matter of ECHR compliance that Lord James mentioned is not some notional matter, but one that could be meaningful for people.

It is our view that the right to enforce a real burden is a possession under article 1 of the ECHR, which guarantees the right to property. The loss of a right to enforce a real burden would be an interference in the rights of property and falls to be considered as a control on the use of property under article 1 of the ECHR. To comply with article 1, such a control on use must be lawful, in the general interest and proportionate. Obviously, balances must be struck, but we believe that to withdraw that right without the availability of compensation could involve a material loss that would be incompatible with the ECHR.

A point was made on enforcement. Concerns have been expressed on a number of occasions about the great numbers of people to whom things would need to be intimated. The specific concern that was raised in evidence to the committee related to a situation in which the proprietor has breached a burden in the past, by building a garage, for example, and seeks to remedy the position in the context of the sale of property.

It is important to look at other provisions of the bill and to see two significant changes that materially alter the situation and, I believe, improve it. The first is the reduction in the period of negative prescription from 20 years to five years in section 17, which we have just approved. That means that if the garage was built more than five years ago, there would only rarely be a difficulty, and the purchaser's solicitor could be expected to accept the position without any difficulty at all.

The second is the clarification that section 16 provides on the extinction of real burdens by acquiescence. If the garage had been built within the past five years, but not within the past few months, it is thought that the burdened proprietor should, in almost all cases, be able to rely on section 16 to extinguish the restriction, at least in so far as the restriction prevented the building of the garage.

The building of a garage is an overt act. It is clearly reasonable to suppose that a benefited proprietor living nearby would know, or should know, that a garage had been built. The benefited proprietor does not also have to know that the building of the garage breached the terms of the real burden, or that he had been entitled to enforce the burden. The presumption set out in section 16(2) is that benefited proprietors are to be taken as being in a position of knowledge, and that they did not object.

Those matters have a material bearing on some of the concerns that have been expressed. With regard to my amendment 111 and Maureen Macmillan's amendment 110, I have tried to explain that amendment 110 only relates to a limited number of properties—in contrast to amendment 111—and that there is no policy reason why that provision should be restricted just to right-to-buy estates.

On amendment 11 and the provisions relating to section 52, I have sought to indicate that what is being addressed is not some provision that extends enforcement rights, but rather one that gives protection to certain rights, which could well be lost if section 52 is not in place. I give the example of a tenement where, if the conditions had been established by a non-feudal charter, there could be no one to enforce the burden, which means that there would be no burden, and therefore something simple like an agreement to

maintain a common roof would have no one to enforce the burden and it would disappear. I do not believe that that is what the committee wants to happen. I hope that I have explained that that is the purpose of section 52, and that it is not a section that tries to extend the range of people who can compel enforcement, as has been suggested.

Lord James Douglas-Hamilton: Convener—

The Convener: I would rather not revisit the matter, James; the minister gave a pre-emptive explanation. Is there something that you particularly want to place on the record?

Lord James Douglas-Hamilton: Yes, there is. I am reluctant to press amendments 16 and 17 to a division, but they address probably the most controversial aspect of the bill. I will seek to revisit the matter later. In the meantime, I would be grateful if the minister could give an assurance that he is prepared to meet the Law Society to discuss these matters. If the minister goes headlong down this path of limiting rights to those who are neighbours, there is a danger that it could inflict a great deal of extra work and cost on consumers, which would not be welcome. I would be grateful if the minister could agree to a meeting, with the aim of achieving a meeting of minds on the matter, because such a meeting of minds does not exist at present.

Mr Wallace: If the Law Society wishes to meet to discuss the matter, the answer is yes, I will have a meeting. I indicated to Lord James at stage 1 that we would be prepared to consider representations from the Law Society. My understanding is that the Law Society sent a letter that indicated support for the amendments that Lord James has lodged, but that it did not give any detailed reasoning for its apparent change in position, so it was difficult to assess the merit of the case that it put. I acknowledge what has been said about these provisions being some of the most controversial. I do not believe that the problems are as considerable as has been suggested, but if a meeting with the Law Society would help to dispel some of the concerns, that might be only to the good.

The Convener: I am sure that the Law Society will have heard that, minister, and will take it on board. I hope that if it has a preliminary explanation, such a meeting will take place shortly. Is that fine, James?

Lord James Douglas-Hamilton: I am grateful to the minister, and in those circumstances I will not push amendments 16 and 17 to a division at this stage.

The Convener: We have not reached that point, James. You have made a pre-emptive strike again. It is all right; I am getting to them.

Amendment 109 agreed to.

Maureen Macmillan: In light of the fact that the minister is willing to meet the Law Society to discuss the impact on the practicalities on conveyancing, I will not move amendment 5.

Amendments 5, 6, 17 and 110 not moved.

Section 48, as amended, agreed to.

After section 48

Amendment 111 moved—[Mr Jim Wallace]—and agreed to.

Section 49—Tenements

Amendment 112 moved—[Mr Jim Wallace]—and agreed to.

The Convener: Minister, I will give my committee and you a 10-minute break before we move on to the rather lengthy section 50, then we will conclude for the day. We hope that a particular member who wishes to move an amendment will make it here in that time.

14:46

Meeting suspended.

15:01

On resuming—

The Convener: I reconvene the meeting. I ask the committee to agree—I am grateful to the minister for agreeing to this—to stop our consideration of stage 2 of the bill just now and to agree to start with section 50 at our meeting next week. That is because Ken Macintosh, Dr Sylvia Jackson and Brian Adam, who are not members of the committee, all have amendments that they wish to speak to. It is unfortunate that we have rattled on so much and that they have not made it to speak to their amendments this week. It would be fair for us to hear what they have to say on their amendments. Is that agreed?

Members *indicated agreement*.

The Convener: We agreed to take item 4 in private. I will have to wait for the public galleries to clear.

15:02

Meeting continued in private until 15:20.

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Printed in Scotland by The Stationery Office Limited

ISBN 0 338 000003 ISSN 1467-0178