JUSTICE AND HOME AFFAIRS COMMITTEE

Wednesday 15 March 2000
(*Morning*)

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JUSTICE AND HOME AFFAIRS COMMITTEE
11th Meeting 2000, Session 1

CONVENER

*Roseanna Cunningham (Perth) (SNP)

DEPUTY CONVENER

*Gordon Jackson (Glasgow Govan) (Lab)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
Phil Gallie (South of Scotland) (Con)
*Christine Grahame (South of Scotland) (SNP)
*Mrs Lyndsay McIntosh (Central Scotland) (Con)
*Kate MacLean (Dundee West) (Lab)
*Maureen Macmillan (Highlands and Islands) (Lab)
*Pauline McNeill (Glasgow Kelvin) (Lab)
*Michael Matheson (Central Scotland) (SNP)
*Euan Robson (Roxburgh and Berwickshire) (LD)

*attended

THE FOLLOWING MEMBERS ALSO ATTENDED:

Robin Harper (Lothians) (Green)
Angus MacKay (Deputy Minister for Justice)
Mr Brian Monteith (Mid Scotland and Fife) (Con)

CLERK TEAM LEADER

Andrew Mylne

SENIOR ASSISTANT CLERK

Shelagh McKinlay

ASSISTANT CLERK

Fiona Groves

LOCATION

The Chamber

Scottish Parliament

Justice and Home Affairs Committee

Wednesday 15 March 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:34*]

The Convener (Roseanna Cunningham): We all seem to be here. I extend a welcome to Robin Harper and Brian Monteith, who are joining us this morning for the excitements of stage 2 of the Abolition of Feudal Tenure etc (Scotland) Bill. No doubt they will find the way in which we do things in this committee very exciting, even with bills such as this one. I also welcome the Deputy Minister for Justice, Angus MacKay, who is having his regular weekly outing to the Justice and Home Affairs Committee.

Before we begin this morning's business, I have one or two things to say. Other committees' agendas have an item variously called "Convener's correspondence", "Convener's business", "Convener's report" and so on. In the main, committee members receive copies of pretty much everything that I receive. From time to time, however, I have other bits and pieces of information that you might find useful. For example, I have been invited as convener to the launch of the retail crime strategy in London on the morning of Wednesday 5 April. I will not be able to attend, but the organisers have very kindly said that they will welcome any other member of the Justice and Home Affairs Committee in my place. Any member who is interested should speak to the clerk separately.

Secondly, on Thursday morning, I am meeting the Minister for Justice to discuss the Regulation of Investigatory Powers Bill; I hope that, next week, that matter will be clearer.

Thirdly, I should say that, although Michael Matheson and I visited the Dáil in Dublin a few weeks ago wearing our party hats, we took the opportunity to attend a meeting of the Committee on Justice, Equality and Women's Rights and to meet its convener and members. That committee deals not only with justice, home affairs and women's issues but with defence, so, however hard done by we might feel on occasion, at least we should be thankful that defence is not part of our remit. I have invited members of that committee to visit us if they wish.

Maureen Macmillan (Highlands and Islands) (Lab): When you meet the minister tomorrow, will you remind him that I am waiting to meet him about domestic violence legislation?

The Convener: I will be sure to do that and I will ensure that he understands that the rest of the committee is anxious about that matter.

Abolition of Feudal Tenure etc (Scotland) Bill: Stage 2

The Convener: We move on to the first item on the agenda, which concerns amendments to the Abolition of Feudal Tenure etc (Scotland) Bill. Although most members of the committee are pretty familiar with stage 2 procedures, I will say a few words for the benefit for Robin Harper and Brian Monteith, who perhaps do not have the same experience of the process as the members of this committee.

All members should have a copy of the marshalled list of amendments, which was published this morning, and the suggested groupings for amendments. Those documents form the bible for today's proceedings.

Amendments have been grouped together to make debate easier. I saw the minister's eyebrows rising when I said that; perhaps he disagrees with me. Although amendments might pertain to different sections of the bill, they will be grouped together if they relate to one specific debate. The order in which amendments are called and moved is dictated by the marshalled list.

All amendments will be called, one after the other, on the basis of the marshalled list, and will be disposed of in that order. We cannot move backwards on the marshalled list; once we have gone past something, we cannot move back to it. However, we shall frequently come to amendments on the marshalled list that have already been debated because they were grouped with earlier amendments. When we come to vote on them, we will not debate them again; we will simply dispose of them. That will happen fairly soon after the proceedings begin, and members will recognise what is happening. Most of us are fairly familiar with the system, so we will keep our colleagues right.

There will be one debate on each group of amendments, and I shall call the proposer of the first amendment in the group. The person who has the lead amendment in the group will speak first, and should speak to and move that amendment. I shall then call other speakers, including the proposers of all the amendments in the group, but they should not move their amendments at that stage—only the lead amendment will be moved at that stage. Other members should indicate that they want to speak in the usual way. In this committee, members do that by signalling to me or to the clerk. We take a note of people's names and I promise you that we reach everybody, so there is no need to become anxious about whether you will be called to speak.

The minister will be called to speak on every group; he is an automatic contributor to the debate. Following the debate, I shall clarify whether the member who moved the amendment still wants to press it. At that stage, a member may choose not to go ahead with an amendment. If they do not, they must seek the agreement of the committee to withdraw it. If the amendment is not withdrawn, the question will be put on the first amendment. If any member disagrees to the question, there will be a division on a show of hands. Members should keep their hands raised until the clerk has fully recorded the vote. Only members of the Justice and Home Affairs Committee may vote, despite the fact that other members may be proposing amendments. If any member does not wish to move their amendment, they should simply say, "Not moved", when it is called.

When we come to whole sections or schedules of the bill, I shall again put the question on the section or schedule. It is possible to have a short general debate on the section or on the schedule, if members so desire. It will help the clerk if members indicate in good time whether they want to talk in general terms about a section or schedule. Members should be aware that the only way in which it is permitted to oppose agreement to a section is by lodging an amendment to leave out the section. One cannot suddenly launch oneself into an impassioned speech in direct opposition to the whole section unless one has lodged an amendment to delete that section. No such amendments have been lodged, so that should not happen today. If any member wants to oppose the question that a section or schedule be agreed to, they can submit a handwritten amendment. Whether that amendment is accepted is my decision.

I should explain something about the groupings. Amendment 140, which is second on the marshalled list, refers to section 56 of the bill, and would therefore normally have been grouped with the two amendments to that section. However, that would have brought forward to this morning the whole debate on public interest. Most people, inside and outside Parliament, would not have anticipated that that debate was going to take place so soon at this stage of the proceedings. I have therefore decided that we should consider amendment 140 today on its own and leave the main debate on public interest until later in the proceedings. That debate may be next week, but it is more likely to be in a fortnight's time.

One or two requests have been made by outside bodies to give evidence at stage 2, as happened during stage 2 of the Adults with Incapacity (Scotland) Bill. Taking further evidence at this stage is not ruled out, but I do not propose to do so, as it is difficult to accommodate evidence sessions along with all the other business on our

timetable.

Gordon Jackson (Glasgow Govan) (Lab): I heard what you said about taking amendment 140 on its own and postponing the public interest debate. However, amendment 140 is totally connected to that issue and I assume that that is why Pauline McNeill lodged it.

09:45

The Convener: It does not matter whether it stands or falls on its own. Whether amendment 140 is accepted does not make any difference to the later amendments on the public interest issue. The decision has now been taken not to group those amendments together. This morning's debate will be truncated to allow the full debate to take place when we reach the sections of the bill on which people would have expected it to happen.

There will be a brief adjournment at an appropriate time in the proceedings, and tea and coffee will be available—we like to be civilised on this committee.

Section 1—Abolition on appointed day

The Convener: There are no amendments to section 1 so, before I call the first amendment on the marshalled list, I have to ask whether the committee agrees that section 1 be part of the bill. If anybody wishes to debate the section, they should now indicate that they would like to speak. If not, we shall proceed.

Section 1 agreed to.

Section 2—Consequences of abolition

The Convener: I call Robin Harper to speak to and move amendment 139.

Robin Harper (Lothians) (Green): The amendment is to

"leave out <ownership> and insert <tenure>

in section 2, page 1, line 17. I draw the committee's attention to the evidence from the Scottish Land Reform Convention and to the contribution that I made to the stage 1 debate.

The Abolition of Feudal Tenure etc (Scotland) Bill seeks to introduce a new term into the Scots land law lexicon. That word is "ownership"—the ownership of the land of Scotland. At first glance, the word itself and the presumptions and ideas behind it might seem natural and uncontentious. Some argue that it is a straightforward case of modernisation and simplification of the language of the law. However, there is no tradition in Scots law of the ownership of land. In spite of the presumptuous title of the Scottish Landowners Federation, the term "landowner" is a disingenuously false one. It has no real legal meaning in Scotland—at least, not yet.

Land is different from all other forms of property. That is recognised by systems of law the world over. One of the aims of modern environmental philosophy is to clarify even further the extent and nature of that distinction. The land and the earth's natural resources, in social, economic and legal terms, have a role and status that are altogether different from those of all other forms of property. That is recognised in old Scots land law. Land is not a bicycle, as the convener of the Scottish Land Reform Convention recently remarked. The ownership of a bicycle is a legal concept that has sturdy philosophical and legal foundations. The ownership of land per se does not enjoy such a basis.

Until now, the ownership of Scottish land has never been anything other than a public constitutional matter. Scotland can properly be said to be owned only by the people of Scotland as a whole or, if you like, by God leasing it to us. The landowners have never owned the land of Scotland; they have been permitted to exercise rights and to enjoy social privileges over the lands to which they have title. As a response to that state of affairs, the chosen wording of the bill would have the effect of reinforcing the hand of those landowners, delimiting and increasing their title to their land and crowning them the owners of Scotland.

We can speak of ownership in relation to land in only one way. Post-feudalism, we can speak about private ownership of rights over land, rather than rights to land. That distinction is critical. We can speak about the ownership of right in relation to the title to occupy land, to mine it for minerals or to range over it for game. The term "ownership" can apply only when we are speaking of such rights. It cannot be used for the land itself. It is quite improper both philosophically and in terms of Scots law to refer to the private ownership of land. As drafted, the bill would erroneously and needlessly introduce that concept.

Conferring ownership to private individuals who are currently privileged to hold title to the land of Scotland would constitute a massive transfer of rights over Scotland's land and natural resources—presently held in disparate ways—into private ownership. The effect would be contrary to all international understanding of the purpose of land reform—the recovery of fallen public rights and a fair rebalancing of private rights. Ownership is not a concept that can be applied to the stuff of the natural world. Scots law, in its legislation, precedents, institutional authorities and customs, has until now been wise enough to recognise that. Man does not own the land and no collection of landowners own Scotland.

The bill offers evidence to support my argument. The number of minor and consequential amendments and repeals to past land law listed in schedules 10 and 11 that are needed to introduce the idea of land ownership into the bill is itself a strong measure of the incompatibility of the concept of land ownership with Scots law. The bill requires changes to Scots laws dating back more than 400 years simply to introduce the word "owner".

That is the wrong word. Unfortunately, its adoption would not be neutral; it would mean the erosion of public rights. A straightforward substitution of the term "tenure" for "ownership" and "titleholder" for "owner" would be proper in legal philosophy, desirable in its political consequences and uncomplicated to draft.

I move amendment 139.

The Deputy Minister for Justice (Angus MacKay): Good morning. My brief response to the amendment is that I do not believe that it is appropriate, as it is implicit in the term "tenure" that a person holds land in a conditional relationship with another. The purpose of the bill—the abolition of the feudal system—is to introduce a system of outright ownership of land. The introduction of the word "tenure" would imply that ownership was not outright. I therefore ask the member to withdraw his amendment.

Gordon Jackson: I am puzzled about what to do. This morning, we have had a ruling that we should not deal with public ownership of land in detail, but these amendments make that ruling impossible to keep to. Robin Harper made a detailed, impassioned and philosophical plea on the whole subject of public ownership and talked about the philosophical, ethical and legal idea of owning land absolutely.

I think that the approach behind this and other amendments is misguided in terms of what the feudal system does and what the bill is for. Robin has said that if we introduce the concept of ownership of land, we erode public rights. I think that it was Professor Jack who gave evidence on that. I do not know in what sense the feudal superiority of the Crown preserved public rights in any meaningful sense. Public rights are preserved by democratically elected public bodies such as the planning authorities, the conservation authorities and those that are responsible for compulsory purchase. The feudal system does not protect public rights but sets up a structure of burdens on and uses of land that, as most of us wish, the bill will do away with.

I understand Robin's argument but I cannot think of a single right that would be affected by not using the word "ownership". When he talks about the erosion of public rights, we must ask what actual public rights he has in mind. The whole point of getting rid of the feudal system is to ensure that we do not have a layered structure and that people have not just the dominium utile to land, but ownership of land. Some people may not find that philosophically comfortable, but it is the result of getting rid of the feudal system. It would be legal gobbledegook to get rid of that system and to keep it at the same time. It does not make sense.

The amendments are important and should be considered in the broad context of public ownership. If we changed the wording here, we would be introducing the public ownership argument by the back door before we had actually discussed it.

The Convener: If there are no further comments, I will put the question. The question is, that amendment 139 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Roseanna Cunningham (Perth) (SNP)
Christine Grahame (South of Scotland) (SNP)
Michael Matheson (Central Scotland) (SNP)

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Gordon Jackson (Glasgow Govan) (Lab)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 139 disagreed to.

The Convener: I invite Pauline McNeill to speak to amendment 140.

Pauline McNeill (Glasgow Kelvin) (Lab): Convener, I understand from what you said this morning that we will not have a full debate on public interest in land until the next meeting, so please stop me if I go beyond what you see as appropriate.

The amendment refers to section 56. At stage 1 the committee debated the issue of public interest in land. Like others in the committee, I reject the idea that public interest can be retained through retaining the interest of the Crown as paramount superior. However, at the moment the extent of the Crown's ultimate rights as owner of all land for the benefit of the community is unclear. I do not think there is even agreement on the source of those rights or whether they derive from the paramount superiority or from sovereignty.

I will be interested to hear the minister's

comments on that as my reading of section 56 is that it refers to prerogative powers—it is difficult not to refer to the section. I accept what Gordon Jackson said on public interest and land; it is not created by this bill but elsewhere. However, for the avoidance of any doubt, if there are any rights belonging to the Crown as paramount superior, I want to be absolutely sure we are not clearing them away in this bill.

I move amendment 140.

Angus MacKay: Both the committee and the Executive have received a large number of representations on Crown rights and the public interest. It is right that the concerns that have been expressed should be given full consideration by the committee today and later. I welcome the decision to postpone debate on the substantive part of the issue until we reach section 56.

It seems appropriate, however, to avoid doubt or anything being lost inadvertently, for an amendment to be brought forward by the Executive at stage 3 to address these issues. The clearance needed for such an amendment means that we cannot bring it forward in time for stage 2, but the Parliament will have the opportunity to discuss it at the next stage.

In view of the undertaking of the Executive to bring forward its own amendment on Crown rights at stage 3, I hope that Pauline McNeill will feel able to withdraw the amendment.

Euan Robson (Roxburgh and Berwickshire) (LD): It is not appropriate to abolish the feudal system and retain Crown superiority, although I understand what Pauline is saying in the second part of the amendment. I am not sure that the phraseology of the amendment is correct. It may be possible to come back to it at a later date. I would be interested to see that happen, particularly if there are any things that should be retained and any omissions that should be rectified. The overall principle of retaining some Crown superiority means defeating the object of the bill; therefore I flag up the fact that while there may be some merit in retaining the concept of the public interest, the Crown is not the appropriate body to do that.

10:00

Pauline McNeill: As part of the discussion at stage 1 I rejected the idea that this can be done by retaining the Crown as paramount superior. I am clear about that. This amendment is about the avoidance of doubt. Constitutional writers cannot agree on some of the ancient rights that we have. I agree that the issue is one of making sure that we have not swept anything away.

Minister, if you are saying that you will look at the issue and come back at stage 3, I am happy to withdraw the amendment.

The Convener: Attempts to amend this bill by introducing the concept of the public interest without referring to the existing, or potentially remaining, Crown rights are being ruled inadmissible as they are outwith the purposes of the bill. In a sense, the bill is introducing a new concept, so the only way that we can have the public interest argument is in reference to the retention of whatever remaining powers the Crown may have, notwithstanding the rest of the bill. I wish to make that clear, because people are becoming puzzled.

Christine Grahame (South of Scotland) (SNP): I wish to raise a point of order, or perhaps it is a point of information. Who rules on the admissibility of amendments? Is it the convener? I do not have the standing orders in front of me.

The Convener: Ultimately I do, but I have to be guided by advice. The difficulty is that if we started to rule in amendments that were outwith the ambit of bills, it would not just be the amendments that I favoured that would be included—there would be a great many. It is better at this stage if we keep ourselves within the stricter ambit of bills when we lodge amendments.

This particular issue is causing us difficulty because there is a debate over whether there is a residual power relating to the Crown. The only way for us to have this debate is to talk about a potential residual power of the Crown. People should understand why this is difficult, and deal with the point that Euan Robson made.

Pauline, what do you want to do with your amendment?

Pauline McNeill: I have agreed to withdraw it.

Amendment 140, by agreement, withdrawn.

Section 2 agreed to.

Section 3—Amendment of Land Registration (Scotland) Act 1979

The Convener: I call amendment 2, which is grouped with amendments 3, 4 and 6, in the name of the minister.

Angus MacKay: Amendments 2, 3, 4 and 6 relate to the practical effects of abolition of the feudal system on the Land Register of Scotland. These amendments are highly technical and are designed to ensure that obsolete material, and particularly obsolete feudal burdens and conditions, are safely removed from the register over time.

The appearance on the register of superiority interests in land or of feudal burdens which are

extinguished by the bill will constitute inaccuracies in the register until they are removed. The established process for correcting inaccuracies in the register is known as rectification. Our general policy is that the Keeper of the Registers should be able to rectify the register to take account of the effect of feudal abolition. The keeper cannot, except in limited circumstances, rectify the register if to do so would disadvantage a proprietor currently in possession of a property. Subject to certain exceptions, the keeper is obliged to indemnify anyone who suffers loss due to a rectification of the register.

It is not considered that rectification of the register following on from feudal abolition would be likely to prejudice a proprietor in possession of a property, or give rise to loss, but nevertheless, for the sake of certainty, section 3 of the bill provides that the keeper may rectify the register to take account of abolition of the feudal system without having to concern himself or herself as to whether to do so would disadvantage a proprietor in possession, or might give rise to a claim against the keeper's indemnity. Section 3 is intended to facilitate rectification of the register.

It is not, however, intended that the keeper should be able to correct an inaccuracy in the register by the inclusion or reinstatement of a burden or condition in the register to the prejudice of a proprietor in possession. Amendments 2 and 6 together provide that, where to do so would prejudice a proprietor in possession, the keeper will not be able to enter or reinstate a burden in the register that he or she has omitted to include, or which he or she has removed because it was erroneously considered to have been extinguished on feudal abolition. So a proprietor in possession does not need to worry that a burden that is not disclosed on the register might reappear in the register at some point in the future. The underlying principle is that the public should be able to rely with certainty on the information contained in the Land Register.

Amendment 3 provides that the provisions of the bill that facilitate rectification of the register to take account of feudal abolition will apply not only where a rectification is required, for example, due to a court order, but where the keeper exercises discretion to rectify the register, subject to the constraints placed by amendments 2 and 6.

Amendment 4 also relates to rectification of the register. Certain feudal burdens will be saved by the registration of notices. It is possible that certain notices, which will be registered and will appear to save a burden, will in fact be invalid. If the relevant burden continued to be shown on the Land Register, having apparently been saved, it would be an inaccuracy on the register. Amendment 4 makes it clear that the keeper can rectify an inaccuracy that arises as a result of an invalid notice in the same manner as he or she is able to rectify other inaccuracies resulting from the abolition of the feudal system.

Amendments 3 and 4 provide important safeguards for the keeper, who has to deal with many thousands of applications for registration each year, but they do not cut across two vital strands of our policy. The first is that the registers should contain accurate information on which people can rely. The second is that if the keeper makes an error that is his or her fault, and which causes a property owner to suffer, that owner should remain able to claim on the keeper's indemnity in respect of the loss suffered. Neither of those basic principles is compromised by the proposals in this bill or in these amendments, but it is important to ensure that the keeper is adequately protected in respect of inaccuracies arising from errors that others may make in the administrative work that follows the abolition of the feudal system, or which arise from matters that he is unable to check.

I move amendment 2.

The Convener: Are there any comments?

Christine Grahame: The amendment clashes with my amendment with regard to the rectification of the Land Registration (Scotland) Act 1979 and the indemnification of the keeper. We may wish to address that. I may be wrong on that.

The Convener: Your amendment is not grouped with this one, Christine, so it is not relevant. The issue may be raised when your amendment is debated.

Amendment 2 agreed to.

Amendments 3 and 4 moved—[Angus MacKay]—and agreed to.

The Convener: I now call amendment 5, in the name of the minister, which is grouped with amendment 141, in the name of Christine Grahame, and amendments 7 and 8, also in the name of the minister.

Angus MacKay: As I have explained in relation to the other amendments in section 3, the Keeper of the Registers will be able to amend the Land Register, to remove inaccuracies arising due to the operation of the bill or anything done under, or by virtue of, the bill.

The underlying approach of the bill is that a superior will not suffer loss as a result of the abolition of the feudal system. Where a feudal burden has value to a superior, he or she will be entitled to save it, or in the case of a development value burden, reserve a claim for compensation. There is a scheme for compensation for the extension of the obligation to pay feuduty and a

bare superiority is not considered to have value. The bill therefore does not make provision for compensation for the extinguishment of non-saveable burdens or of feudal superiorities.

Under the Land Registration (Scotland) Act 1979 persons who suffer loss as a result of the rectification of the register have, except in certain limited cases, a right to claim indemnity from the keeper for that loss. As the bill does not provide a general scheme of compensation, it is desirable to avoid claims for compensation being made by superiors by the back-door route of a claim on the keeper's indemnity.

Section 12(3) of the Land Registration (Scotland) Act 1979 sets out various circumstances in which the keeper has no liability for an indemnity claim. Section 3 of the bill adds to those circumstances the case where a loss arises as a result of a rectification of, or an omission to rectify, an inaccuracy caused by abolition of the feudal system.

The provision will assist the keeper in rectifying the register. Without it he or she may be reluctant to remove entries on the register and may have to face claims on his or her indemnity from unscrupulous parties seeking compensation for the loss of feudal rights through the keeper's indemnity, even though the bill does not provide such compensation. Amendment 141 could lead to that result. In those circumstances, I ask Christine Grahame to withdraw the amendment.

Amendments 5, 7 and 8 are technical. They provide that indemnity is excluded not only where there is a proprietor in possession, but also where there is no proprietor in possession. Amendment 8 is stylistic and is to avoid the unnecessary repetition of the words "proprietor in possession".

I move amendment 5.

Christine Grahame: I hear what the minister is saying. It is my understanding of section 12(3) of the Land Registration (Scotland) Act 1979 that the noted reason for not providing indemnity under that subsection relates to what you have referred to in passing previously, which is the volume of work to be carried out by the keeper. There will be a lot of changes going through the Land Register as a result of the abolition of feudal tenure, which will no doubt lead to increased mistakes by the keeper's staff. However, do you think that is sufficient reason to disentitle members of the public who may have losses as a result of such mistakes to compensation?

You should re-examine section 3(c) of the bill in those circumstances. You said that this is a back-door route, but there might be mistakes for other reasons because of the volume of the work.

Angus MacKay: The principle of the bill is that a superior should not suffer a loss as a result of the abolition of the feudal system. For that reason, the bill does not make provision for compensation for the extinguishment of non-saveable burdens or feudal superiorities. The principle at stake is that if the bill does not provide a general scheme of compensation, it is in general terms desirable to avoid claims for compensation being made by superiors by that back-door route of a claim on the keeper's indemnity, notwithstanding the point that Christine Grahame is making.

Christine Grahame: If mistakes are made as a consequence of the volume of work that the keeper has and errors are made, is there no right of compensation for someone who has a loss?

Angus MacKay: I am being advised that if the keeper makes a mistake, he or she is liable to indemnify the individual who suffers as a consequence of that mistake.

Christine Grahame: Is that true of his staff as well, because he is liable for the activities of his staff?

Angus MacKay: Yes, because he presumably acts jointly on behalf of his staff.

Euan Robson: Is the minister saying that this is a method to ensure that superiors do not take advantage of the system to obtain undue compensation, but mistakes of another nature continue to be indemnified so those amendments have no effect on genuine errors that are made that bring forward a loss in circumstances other than what may be described as a loss of superiority claim?

Angus MacKay: Yes.

Amendment 5 agreed to.

Amendment 6 moved—[Angus MacKay]—and agreed to.

10:15

The Convener: Does Christine want to move amendment 141?

Christine Grahame: Given the minister's assurance, I will not move it.

Amendment 141 not moved.

Amendments 7 and 8 moved—[Angus MacKay]—and agreed to.

Section 3, as amended, agreed to.

Sections 4 and 5 agreed to.

Section 6—Deduction of title for unregistered land etc

10:15

The Convener: I call amendment 142, in the name of Christine Grahame.

Christine Grahame: This is more of a stylistic amendment, to substitute "in respect of" for "for". That would improve the way that the bill reads.

I move amendment 142.

Angus MacKay: The Executive does not believe that it is necessary to make this drafting amendment, because its effect is to use three words where one would suffice, so we ask Christine Grahame to withdraw her amendment.

The Convener: Christine is a lawyer.

Christine Grahame: I am still moving it.

Gordon Jackson: This is too big a decision for me.

Mrs Lyndsay McIntosh (Central Scotland) (Con): The minister is changing the habit of a lifetime, using only one word when he could use three.

The Convener: I would not put the minister on oath about that.

Amendment 142 agreed to.

The Convener: The minister cannot vote.

Angus MacKay: Am I entitled to voice opposition to the amendment when you ask if everyone is agreed?

The Convener: No.

Section 6, as amended, agreed to.

Section 7 agreed to.

Section 8—Requiring compensatory payment

The Convener: I call amendment 143, in the name of Christine Grahame, which is grouped with amendment 144, also in the name of Christine Grahame.

Christine Grahame: I may not get agreement to this amendment. Amendment 142 might be the only one that I get. The purpose of amendment 143 is self-evident—it is to ensure that superiors who have not claimed feuduties for a long time do not suddenly come out of the woodwork. It ensures that they must show that they have been taking the income for the past three years and that the loss of feuduties will cause financial hardship. That is to strike a balance between the feu superior and inferiors—sorry, I mean vassals. It is the beginning of the morning and my head is mince. [*Laughter.*]

The Convener: Please settle down, or we will never get through this. That is now on record, Christine.

Christine Grahame: I do not care. I have said it before.

The point of the amendment is to prevent the commercialised and oppressive use of the collection of feuduties. It is also to prevent feu raiders from coming on the scene, and the impact that they would have on ordinary people and those who are not well off. It is a fair amendment. If a superior has been collecting feuduties for some time, he will not be disfranchised. As we have already heard, some superiors do not know what feus they have and this will mean that they will not have to search for them.

I move amendment 143.

Angus MacKay: Amendments 143 and 144 raise several interesting issues.

First, amendment 143 implies that the right to compensation for loss of property under the law should depend on the means of the person who has been expropriated. That is not how our law works. We are obliged to apply the law without discrimination. The amendment would lead to one law for the rich and another for the poor. If a change in the law results in a person losing rights to property, in this case feuduty, the right to compensation cannot depend on the accident of whether the loss of the feuduty would cause him hardship. Compensation should be payable on the expropriation of the feuduty, which is a form of property. If a person's house or land were to be acquired to build a road or pipeline, we would not suggest that their right to compensation should depend on whether the loss causes them hardship. The market value of the property would be determined objectively and compensation would be payable accordingly, irrespective of the claimant's means. The same principle applies in the case of feuduties.

Secondly, the question is raised of whether the feuduty has formed part of the superior's income in the past three years. There are a range of reasons why that might not be the case. The superior may have only recently purchased the superiority or received legal advice on his or her rights. A superior's right to arrears of feuduty falls where arrears have not been pursued within five years. However, that does not mean that the superior is not entitled to compensation for the loss of the right in future.

Thirdly, amendment 143 raises the issue of what the vassal is to do with the evidence supplied by the superior. How should the vassal verify or dispute it? The amendment could lead to lengthy proceedings between superiors and vassals who doubt their claims that the loss of feuduties would

cause financial hardship. In the Executive's view, it would be unworkable.

We cannot accept amendment 143. Compensation is appropriate on the expropriation of a property right, in this case the extinction of the right to feuduty. The amendment would also lead to a discriminatory application of the law, and would inappropriately force vassals into making judgments about the claims of superiors. I therefore urge Christine Grahame not to press that amendment to a vote.

In lodging amendment 144, Christine is clearly concerned to protect former vassals who may be exposed to requirements for compensatory payments under section 8 of the bill. The amendment seeks to protect them by placing additional obligations on former superiors, who are to be required to deposit information about their property holdings with the Keeper of the Registers, who would make the information publicly available.

Such information is already publicly available in the Register of Sasines or the Land Register and can be brought together with comparatively little research. However, the amendment effectively suggests a new and additional register. It is not clear how that would be paid for. As members are aware, the Keeper of the Registers is entitled to raise the costs of carrying out his functions through charges and this would be no exception. The former superior would have to pay for registering the property holdings and the public would have to pay to consult the new register. It is not clear what purpose the new register would serve, other than to bring together information that is already available to the public. It would not provide any redress for former vassals against compensatory payments.

There could be many reasons why a former superior had issued notices to more than three vassals. The feuduties due from a tenement of flats might not have been allocated and might remain unredeemed. There might be several reasons why a former superior had required compensatory payments of more than £1,000. The properties concerned might be high-value commercial properties. Such cases are likely to be rare, however, and in the event of large payments, the arrangements for payment by instalments will provide a safeguard for former vassals. Under amendment 15, the threshold for payment by instalments will be reduced to £50.

I hope that, having heard my comments, Christine Grahame will be persuaded not to press amendment 144.

Christine Grahame: I have not yet addressed amendment 144. I understand what the minister says about information being available in the public registers, but I would dispute that it is as easy as he suggests to link in the information about the superiorities and I would point out that it is also expensive.

He said that another public register would be required, but I can see no reason why there should not be one. Tenure of land in Scotland is public knowledge, but only to those who know where to ferret away to get the information. The registration of superiors and the extent of their interest in land is part of openness in Scotland. The information could be available to the public via computers. The proposal is perfectly reasonable.

Pauline McNeill: I would like the minister to clarify the issue of compensatory payment. Minister, you described a situation where a superior might have recently acquired the rights. However, what would happen if the rights have been held for, say, 20 years and no feuduty has been collected? You seem to be saying that, under this act, the superior should be able to claim that feuduty as long as the claim is made within two years. Would prescription laws apply if the superior had not claimed after five years?

The Convener: I will bring Gordon Jackson in before you answer that, minister.

Gordon Jackson: I understand Christine Grahame's intention, but I have a problem with it. I appreciate that there is no contractual right to payment, but people will have bought property knowing that there is an obligation to pay feuduty to a superior. I think that it would be wrong in principle for the superior's right to receive payment to be affected by the fact that they have not needed the money before. I dread to say the words but, bearing in mind the European convention on human rights, I would have reservations about that situation.

Christine Grahame is thinking about the vassal, understandably, but the superior is entitled to receive payment. To tell someone that they cannot enforce their right because they are quite well off is an infringement of that person's rights.

The Convener: Minister, do you want to come back on anything that has been said?

Angus MacKay: I would like to address a couple of points. I hear what Christine Grahame is saying about the registers and accept that they are by no means straightforwardly accessible. On the other hand, there are already registers that collate information and, through one route or another, that information can be made available publicly, albeit at a cost. It is clear that if an additional register were established under these amendments, its cost would have to be borne. I am not sure that it would be any cheaper than the current system. That is a critical point that should be borne in mind when considering the objective of amendment 144.

10:30

On the point that Pauline McNeill raised, it is correct to say that if there had been no attempt to raise money in the previous five years it would fall outwith the capacity of the superior to start to claim feuduty. That would also apply to a superior who had recently acquired the superiority. If the preceding superior had not claimed within five years, it would not be open to the new superior to start claiming. I hope that that addresses that point.

Christine Grahame: Will you consider the point, which is raised in amendment 144, about information on the superiorities that are owned by various parties being more accessible? You have conceded that, as things stand, that information is not readily accessible to anyone. It might be accessible to someone who is seeking to use it as part of a commercial exercise to gather feus on behalf of people.

I have already referred to raiders of lost feus, who might have the time and opportunity to seek out such information. That ties in with amendment 143, part of the aim of which is to prevent possible negative consequences of this bill. Will you consider introducing a requirement that information stating the full extent of a former superior's land holdings and interests should be registered with the Keeper of the Registers of Scotland? The next stage might be to collate that into another register. The amendment seems to me to be about openness to the public about land.

Angus MacKay: It is important to recognise that although the current system is imperfect, it is open and frequently used by individual members of the public. To that extent, information on land ownership is accessible and can be acquired. I am not prepared to consider Christine Grahame's proposal in this context, where it is not appropriate, but as part of the debates that are taking place around the land reform bill and the community right to buy we are examining ways in which we can improve the system of information on land ownership. We have had discussions with a number of bodies about the kind of new structure that might be put in place.

The Convener: We would welcome that. As, in a past life, I have had to establish ownership of various pieces of land, I must tell the minister that in practice that can be almost impossible, even for people with a professional understanding of what they are supposed to be doing—much less for laypeople.

Pauline McNeill: I am interested in compensation and want to be clear about how it would affect different parties. I take on board the minister's point about superiors not losing rights for all kinds of legal reasons, but we must ensure that the interests of superiors and vassals are balanced out. The minister will know that since 1974 there has been an obligation on people to buy out the feuduty when property changes ownership. However, there have been cases when that has not happened. If a property had passed to a new owner after 1974 without the feuduty being bought out, would compensation be due, and to whom?

Angus MacKay: Compensation would be available, but there are conditions attached. Rather than debating those here, it might be better—members willing—for me to write in detail about what those conditions are.

Pauline McNeill: Yes. I know that it is complex. Before we move away from this section, however, I want to be clear about how different parties will be affected by compensation.

Angus MacKay: The answer to your question, conditionally, is yes.

The Convener: The minister can assume that there is concern about the compensation element of the bill, which may need to be considered further, particularly in the light of Pauline McNeill's remarks.

As nobody else wants to speak to the amendments, I will put the question.

The question is, that amendment 143 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

Those in favour of the amendment should raise their hands. If members do not have a clue, they can always keep their hands down and abstain.

Gordon Jackson: Do not even think about doing that.

The Convener: Is that an admission that there is whipping on the committee? [*Laughter.*]

FOR

Roseanna Cunningham (Perth) (SNP)
Christine Grahame (South of Scotland) (SNP)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Michael Matheson (Central Scotland) (SNP)

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Gordon Jackson (Glasgow Govan) (Lab)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 4, Against 6, Abstentions 0.

Amendment 143 disagreed to.

The Convener: Amendment 144 has already

been debated with amendment 143.

Amendment 144 moved—[Christine Grahame].

The Convener: The question is, that amendment 144 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Roseanna Cunningham (Perth) (SNP)
Christine Grahame (South of Scotland) (SNP)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Michael Matheson (Central Scotland) (SNP)

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Gordon Jackson (Glasgow Govan) (Lab)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Euan Robson (Roxburgh and Berwickshire) (LD)

The Convener: The result of the division is: For 4, Against 6, Abstentions 0.

Amendment 144 disagreed to.

Section 8 agreed to.

Schedule 1

FORM OF NOTICE REQUIRING COMPENSATORY PAYMENT ETC.: *CUMULO* FEUDUTY

The Convener: We now come to amendment 9, in the name of Mr Jim Wallace, which is grouped with amendments 12, 15, and 16, also in the name of Mr Jim Wallace, and amendment 147, in the name of Christine Grahame.

Angus MacKay: The main Executive amendment in this group is amendment 15, which reduces the threshold at which former vassals may opt to pay the compensatory payment for feuduty by instalments. Amendments 9, 12 and 16 are purely consequential.

Amendment 15 is a response to the concerns expressed by the committee and others that former vassals might be faced with large bills when feuduty is finally extinguished. In the report on which the bill is based, the Scottish Law Commission recognised that former vassals might be caused hardship if they had to pay what might turn out to be substantial sums of money and proposed that the introduction of an instalment scheme would alleviate that. It canvassed views on the threshold at which vassals should be able to opt to pay by instalments and received a variety of views. It concluded that a threshold of £100 was appropriate. We have listened to the arguments on this issue and concluded that a bill of £99—the figure before which the threshold option would kick in—would be too high. For many people, that would be a difficult sum to find. We have therefore decided that a threshold of £50 is more appropriate. I invite members to agree with that conclusion and to accept the amendment.

The Executive cannot agree that it would be sensible to adopt amendment 147. A superior may approach a vassal to get compensation for the loss of feuduty. The vassal may agree to pay, but could opt to pay by instalments. Because the vassal is paying by instalments, a 10 per cent administrative charge would have to be paid in advance. The advance payment of 10 per cent would have to be reassessed and the outstanding balance recalculated. We cannot agree that that would be sensible or proper. It would simply involve a lot of work for all parties.

It could be argued that the amendment simply reflects the current position on sale of a property, but compulsory redemption of feuduty does not apply on the sale of all properties; it applies only when the feuduty is allocated or when the feu has not been subdivided.

It is likely that many feuduties that remain are unallocated, as they would otherwise have been redeemed on the sale of the property at some time since 1974. The amendment assumes that it would be a quick, clean and painless method of collecting the money, as the seller would have money to hand at the point of sale, but the time of sale or purchase of a property can be when people are most stretched financially and would not welcome being forced to pay a lump sum. I therefore hope that amendment 147 will not be pressed.

I move amendment 9.

Christine Grahame: I thought that amendment 147 was quite sensible. It is usual to clear the slate on the transfer of title and sale of a property. I can see the minister's point about the technical matter, but that is nothing. There have always been calculations about what the feuduty payment would be when selling a property. I am proposing that it could be left to either the seller or the purchaser but that, one way or another, the feuduty payment would be completed at the sale of the property. I think it only appropriate that it should be closed down. Would it pass to the purchaser otherwise?

The Convener: Before the minister answers that question, I shall allow Euan Robson to contribute.

Euan Robson: Forgive me if I have missed something, but is there a definition of instalment? It may be necessary to clarify what is meant by that word, as some people's instalment plans might not be acceptable to others. Having dealt with instalment plans in a previous life, I know that what people can afford to pay in instalments may not match what is demanded of them.

Angus MacKay: I shall deal with that last point first. At present, instalment simply indicates that payments should be made every six months. We would be willing to consider that when drafting the guidance.

Euan Robson: I am thinking of people on small fixed incomes. There should be some definition of what instalment means, but we can come back to that point.

Gordon Jackson: I am hesitant, because I could be completely losing the plot, but I am not sure that I can see what is wrong with Christine's amendment. As I understand it, people can make their payments in instalments over a number of years, but if they sell the property, the ability to keep paying those instalments ends and the feuduty must be paid off at the point of sale. Does not that sound sensible?

Angus MacKay: If an individual is allowed to set out an instalment plan for repayment of a debt, why should there be any curtailment of the right to continue that instalment plan over an agreed specified period, simply because the property has been sold?

Gordon Jackson: Because he would have his money.

Angus MacKay: The property might be sold due to hardship, or there might be negative equity on the property when it is sold. There are a number of issues that would bear further examination.

Gordon Jackson: We seem to be in an amazing role reversal here, if I may say so. We have suddenly stood ourselves on our heads and the minister is now asking the questions that other members were expressing an interest in.

At present, people who sell property have to redeem the feuduty. No one would be any worse off under the system that Christine Grahame is suggesting. Even now, feuduty must be redeemed, even if there is hardship, so why not bring feuduty payments to an end at the point at which property is sold rather than allowing them to linger on?

Kate MacLean (Dundee West) (Lab): I would like the minister to answer Christine's question about the outstanding balance. Does that fall to the buyer or the seller?

Maureen Macmillan: Is Christine Grahame proposing a sort of compulsion to redeem it all when the house is sold? Will there not be a choice? Can people not choose either to redeem it in a lump sum when the house is sold or to continue with payments?

The Convener: The point is that they cannot choose just now.

Maureen Macmillan: What about the new proposals?

The Convener: That question is directed at Christine Grahame. I shall ask her to answer, and we will then put it to the minister.

Christine Grahame: Amendment 147 proposes that the outstanding balance

"shall be payable on the date on which the proceeds of sale are received".

Payment would be mandatory. The outstanding balance "shall be payable". That seems to be less of a clutter than having instalment payments continue either to the previous owner or to the purchaser if they make a contract to pay them off. I do not see the problem. Calculating the paying-off of feuduties is a complex business, involving fractions and goodness knows what. I do not understand why it is not technically possible here.

10:45

Angus MacKay: I am trying to remember several different points. I am advised that, under the bill as it is proposed, the seller has a choice of actions at the point of sale. Euan Robson raised several points about instalments and the capacity and liability to pay. Liability to pay the instalments stays with the vassal at the appointed day and becomes a personal debt. I do not know whether that is of assistance, but I am happy to pass that information on. [*Interruption.*]

The Convener: Some muttering is going on, but no one has indicated that they want to ask a question. Would members like to mutter more loudly at the minister?

Christine Grahame: With respect, I think that Maureen Macmillan's solution is messier, and would involve keeping track of somebody who has left the property on which they continue to pay instalments for the discharge of the feu. The proposed method is clearer: if there are proceeds, the debt will transfer to either the seller or the purchaser—it could be part of the contract that the purchaser takes it on. That is neater than having someone trailing on and following a person who is no longer in the property.

Gordon Jackson: That is right. That person may have four instalments or £20 to pay, but they might disappear and go to Australia. With a mandatory payment method, the solicitor collects the money on the property. The seller will have a thousand bills to pay, one of which will clear off the feuduty. That is what happens at the moment.

I take Maureen Macmillan's point, but it would not put people in a worse position. It is saying, "We are extinguishing feuduty. If the property is not sold you can carry on, but when you sell it the remaining balance must be extinguished there and

then." That is a tidy and neat way of dealing with it, which does not put people off because the people who stay on in the property must clear the feuduty anyway. It is not the end of the world if we do not accept that idea, but I cannot see anything wrong with it.

Angus MacKay: Equally, it is not an issue that is worth dying in a ditch over. [*Laughter.*] I am quite happy for us to reconsider the issue and return with another suggestion later.

The Convener: That has exhausted the debate on an unlikely subject.

Amendment 9 agreed to.

The Convener: Amendment 10 is grouped with many other amendments, which may take some time.

Christine Grahame: I have not moved amendment 147.

The Convener: We are not dealing with amendment 147 yet, so please hold your horses. We will have a brief adjournment before we deal with amendment 10. I ask members to return by 11:00 sharp.

10:49

Meeting adjourned.

11:06

On resuming—

The Convener: There are enough of us here to begin again. We will move on to amendment 10, which is grouped with amendments 11, 13, 14, 21, 69 and 70, all in the name of Mr Jim Wallace.

Angus MacKay: Later, when we come to amendments 17, 18, 65 and 66, we will have an opportunity to deal with arrangements for the formal service of documents which demand compensation from a former vassal in connection with the abolition of feuduty or the loss of a development value burden. The amendments under consideration are linked to that particular process in two respects. The first is where a property has been sold or transferred prior to the appointed day for feudal abolition but the sale did not require the compulsory redemption of feuduty under the Land Tenure Reform (Scotland) Act 1974. In that case, the feuduty will be extinguished on the appointed day and the former superior will be able to claim compensation. The second instance is where there has been a sale or transfer of property before the event, giving rise to a claim for compensation in relation to a development value burden.

This group of amendments deals with the situation where a superior seeking compensation might be unable to trace the appropriate former vassal or owner obliged to pay the compensation. The former superior may try to trace that person through the property registers; however, if the property has changed hands, the property registers might not disclose the new owner either because the new owner has not yet presented title, or because the Register of Sasines has not yet been updated to show the new owner's title. The register would still show the initial owner as the owner of the house but, having sold or transferred the property, that person is not liable to pay the compensation. If liability rested with the person shown as owner in the property registers, the new owner could avoid liability by delaying to register title. The intention of this group of amendments is to place a duty on a previous vassal or owner who receives the papers to tell the former superior anything that they know to help the superior find the correct person, so that the papers can be served on that person.

This is not a particularly controversial area of the bill, and I hope that the committee will be able to accept these amendments.

I move amendment 10.

Amendment 10 agreed to.

Amendment 11 moved—[Angus MacKay]—and agreed to.

Schedule 1, as amended, agreed to.

Schedule 2

FORM OF NOTICE REQUIRING COMPENSATORY PAYMENT ETC: ORDINARY CASE

Amendments 12 to 14 moved—[Angus MacKay]—and agreed to.

Schedule 2, as amended, agreed to.

Section 9—Calculation of amount of compensatory payment

The Convener: Amendment 145, in the name of Christine Grahame, is grouped with amendment 146, also in the name of Christine Grahame.

Christine Grahame: I will speak to both amendments together. They simply reflect the position regarding the two different kinds of feuduty. The aim of the amendments is clear: to set a cap of £500 on the compensatory payment. From the evidence that we have heard, the total amount of compensation, taken from minutes of waiver and so on, is usually of the order of a few hundred pounds anyway. The amendments are to prevent oppressive use of the legislation. The figure that will be used will be whichever is the lower—that speaks for itself—but the cap on compensation paid to the superior will be £500.

I move amendment 145.

Angus MacKay: I understand the intention of trying to put a cap of £500 on the amount of the compensatory payment that can be required by the former superior. We do not know exactly what compensatory payments the formula in section 8(1) will produce. In the absence of certainty about that, it is understandable that Christine Grahame is anxious to build in safeguards. However, a consultation exercise that was carried out by the Scottish Law Commission in December 1996, involving major superiors and legal firms, suggested that probably under 10 per cent of properties remained subject to feuduty, and that what was left was mainly small sums of money due in respect of a small number of properties.

The safeguard for the vassal lies in the ability to pay by instalments. Amendment 15 provides for the threshold for payment by instalments to be reduced from £100 to £50. Payment by instalments would be available for a compensatory payment of £500. In our view, that is probably a better and fairer approach than a cap.

A cap could also create anomalies. For example, it is not necessarily the case that the superior who calculated a feuduty of more than £500 would be wealthy and the vassal would be poor; it could be the other way round. Such a large feuduty is unlikely to apply in the case of a private residence; it is more likely to affect a commercial property. The legislation of this Parliament requires to be compatible with the convention rights. The jurisprudence of the European Court of Human Rights requires that compensation should be payable on the expropriation of property other than in exceptional circumstances. The compensation should be reasonably related to the value of the property being taken. In our view, a cap on compensation payable that does not give regard to the value of the property right that has been expropriated would not be compatible with that.

I hope that Christine will accept that explanation and will not press her amendment.

Christine Grahame: I appreciate what the minister is saying. In a sense, the figure was put in as a test. Will the minister be able at any time to provide us with data as to the numbers who may be affected and the kind of figures that we are talking about?

Angus MacKay: The short answer is no. There is virtually no way of getting comprehensive details of the figures. I could certainly try to make available whatever information exists from the Scottish Law Commission exercise that was carried out in December 1996, if the details might be of assistance to members. Beyond that, however, it is not clear that we could produce in any meaningful way the kind of information that Christine Grahame is asking for.

Christine Grahame: I certainly think that that information would be useful.

Pauline McNeill: There has been some consensus that, although it would be hard to pinpoint the number of properties that would be affected, the figure would be low and that, by and large, small amounts of money would be involved. None the less, in taking evidence, this committee has been keen to ensure that the proper safeguards are put in place. On a point of clarification, is there provision for a superior to hike up the value, or is the value a static figure?

Angus MacKay: It is my understanding that a superior cannot increase the value.

11:15

Gordon Jackson: It is worth wondering whom we are protecting. This is the same ECHR point that I made about section 8. The people who will be given a compensatory payment of £500 will not be the owners of bungalows but will have very substantial assets.

I am sympathetic to the idea of protecting someone in a small property who has a problem paying. However, I think that we would be taking away a property right from someone—an action that may break ECHR—to stop payments being made by very asset-rich people or commercial organisations. Unless I have got this wrong, the figure of £500 will not arise from a dwelling-house; if it does, it will be a serious dwelling-house. I cannot understand why we should introduce this cap when it would not affect the normal householder. People would have to have very large assets to receive a compensatory payment of £500. The minister may disagree, but I do not think that feuduty redemption will be anything like that figure unless the property is very unusual and substantial.

Christine Grahame: I acknowledge what has been said, in particular about ECHR. I would like to read the minister's information and return to this issue to consider what, realistically, is involved. The figure was suggested to indicate concerns about oppressive effects on vassals. With more information, I might be able to pitch my point more properly.

The Convener: The minister has said that he will provide the information that the Executive has, although he has said that it is not terribly detailed, and that he will forward updates from 1996. Christine, you will be able to address this matter again at stage 3. As you have moved amendment 145, you will need to seek leave to withdraw it, if you do not want to pursue it now.

Christine Grahame: I ask leave to withdraw the amendment.

Amendment 145, by agreement, withdrawn.

Amendment 146 not moved.

Section 9 agreed to.

Section 10—Making compensatory payment by instalments

Amendment 15 moved—[Angus MacKay]—and agreed to.

The Convener: Christine, do you want to move amendment 147, which was debated with amendment 9?

Christine Grahame: Against what the minister had to say—

The Convener: This is not a debate.

Amendment 147 not moved.

Section 10, as amended, agreed to.

Schedule 3

FORM OF INSTALMENT DOCUMENT

Amendment 16 moved—[Angus MacKay]—and agreed to.

Schedule 3, as amended, agreed to.

Section 11—Codes of practice

The Convener: I call the minister to speak to amendment 17, which is grouped with amendments 18, 19, 20, 65, 66, 67 and 68, in the name of the minister.

Angus MacKay: This group of amendments deals with the arrangements for proper service of legal documents. The bill provides for payment of compensation in two places. The first is the compensatory payment for loss of feuduty. The second is compensation for the loss of the development value of a feudal real burden. The sections on development value burdens come much later in the bill but the arguments about proper service of the documents are the same in each case.

The former superior will have to serve a notice on the former vassal if he or she wants to claim the compensation. Service of the notice is significant because that is a trigger for the obligation to pay. The service constitutes an obligation to pay a debt. We regard it as important that there should be no doubt that the notice has been properly served. It would be unfair if the vassal found himself with a debt of which he had no knowledge. Amendments 17 and 65 therefore make provision for the service of notices by registered mail or recorded delivery rather than by ordinary post. The notices can be delivered if the vassal signs an acknowledgement of receipt. That provides a degree of protection for the former vassal.

It is important that the vassal should accept delivery of the notice and should not frustrate the purpose of the scheme by refusing to accept the notice when it is served. Amendments 18 and 66 therefore make formal provision as to what should happen if a former vassal refuses to accept service of a notice. Amendment 18 also removes the provisions from section 11 that, where a property is owned in common and the former vassals have a common address, the claim for compensation on extinction of feuduty is required to be delivered to only one of them. That is to avoid a situation where a former vassal is liable for a debt of which they are unaware. The claims for compensation also require to be served within prescribed time periods. Accordingly, completion of the certificates will assist a superior in demonstrating that a notice was served timeously.

The remaining amendments in this group are purely consequential. The proposals are not controversial and I hope that the committee will have no difficulty in accepting them.

Amendment 17 moved—[Angus MacKay]—and agreed to.

Amendments 18 and 19 moved—[Angus MacKay]—and agreed to.

Section 11, as amended, agreed to.

Sections 12 to 14 agreed to.

After schedule 3

Amendments 20 and 21 moved—[Angus MacKay]—and agreed to.

Section 15—Interpretation of Part 3

The Convener: I call the minister to speak to amendment 22, which is grouped with amendment 71, in the name of the minister.

Angus MacKay: These two amendments are purely for drafting purposes. They do not change the intention behind the provisions. Where compensation is payable on the extinction of feuduty or in relation to a development value burden and the property in question is held as common property, for example, by a husband and wife, the former superior may recover all of the compensation from one of the co-owners. That co-owner would have the right to recover the appropriate share from the other co-owners, based on the size of their interest in the property.

Amendment 22 moved—[Angus MacKay]—and agreed to.

Section 15, as amended, agreed to.

Section 16—Extinction of superior's rights

The Convener: I call the minister to speak to amendment 23, which is grouped with amendments 24 and 25, in the name of the minister.

Angus MacKay: With your permission, convener, I would also like to make a statement about our intentions with respect to part 4 of the bill. Although we will not reach the relevant section until later in these proceedings, I want to reiterate the contents of a letter that the Deputy First Minister sent to the committee on 11 February.

During the stage 1 debate on the general principles of the Abolition of Feudal Tenure etc (Scotland) Bill on 15 December, Jim Wallace assured Parliament that the Executive would not commence any aspect of the bill until we were certain that the time was right to do so. He also promised to keep the Justice and Home Affairs Committee in touch with developments and discussions with the Scottish Law Commission, particularly those on the close relationship between the Abolition of Feudal Tenure etc (Scotland) Bill and the bill on title conditions that is to follow. He also indicated that commencement dates might need to be re-examined.

We have held further informal discussions with the Scottish Law Commission on the relationship between the two bills. Although the commission is not yet ready to publish its final report on title conditions, it has become evident that its recommendations will impact on the feudal bill. However, until we see the final recommendations, we will not know the full implications for the feudal bill.

Jim Wallace wrote to the committee to inform members that the Executive will lodge amendments at stage 2 of the feudal bill to set a separate and later commencement date for part 4, which deals with real burdens. Part 4 is likely to be the area that is most affected by the Scottish Law Commission's work on title conditions. Currently, most of part 4 of the bill would automatically commence on gaining royal assent and superiors might begin the work of identifying those burdens for which they want to register notices and agreements with a view to either preserving the burden or reserving the right to claim compensation for the loss of a development value burden. Superiors and their staff should not be asked to start that task if there is any possibility that the title conditions bill would amend the current provisions on real burdens. The most sensible and efficient course is to set a separate and later date to assure a smooth process for the abolition of feudal tenure.

I hope that the committee will support the Executive amendments to section 75, which will give effect to the amended proposals when we come to debate them later in the bill.

I move on to address the amendments in the group. They are technical amendments that tidy up the bill by making it clear that court decrees for the payment of money should be treated in the same way as actions for damages.

I move amendment 23.

The Convener: I want to put on record the committee's concern that we are dealing with a bill that will be affected by another bill that we have not yet seen, but know we will be dealing with in the future. That has already caused the committee some concern. It is not a satisfactory way for the committee to proceed.

Amendment 23 agreed to.

Amendments 24 and 25 moved—[Angus MacKay]—and agreed to.

Section 16, as amended, agreed to.

Section 17—Reallotment of real burden by nomination of new dominant tenement

The Convener: I call amendment 26, which is grouped with amendments 27 to 30, 34, 36, 39, 41 to 45, 50, 57, 58, 63 and 64.

Angus MacKay: The amendments in this group are technical. They are scattered throughout the bill, and the same form of words is not used for every amendment, but the effect of each amendment is the same. The amendments ensure that a superior need not have completed title to save a burden.

I will try to explain what that means. Completing title means carrying out the registration process, so that the name of the superior appears on either the Register of Sasines or the Land Register as the owner of the superiority. Superiority is an interest in land, and title to a superiority is registered in those registers. Like other land interests, superiorities may change hands. They may be sold or inherited. At the time of local government reorganisation, many superiorities that were in the hands of the old authorities passed to the new authorities. The new authorities have right to the superiorities, but for some time the registers continued to show the name of the old authorities as the holders of the superiorities, because the new authorities had not yet completed title.

Under the general law, however, a superior must have completed title before being able to enforce a burden. The policy of the bill is that a superior should not have to complete title to the superiority to save a burden. It is therefore possible that, if the bill were not to be amended, some burdens that should be saved could not be saved without

additional and unnecessary work and expense, simply because of the technicality that the superior had not yet completed title.

Amendments 27 and 30 embody the same principle. In those cases, however, the superior's title is not to his superiority, but to his land, which is the land that will benefit from the burden that he wishes to save.

I appreciate that the terms in which those amendments are couched are difficult, but I hope that I have explained their purpose in a way that the committee can accept.

Amendment 36 makes a minor drafting change, which simply makes the wording of sections 18 and 19 consistent.

I move amendment 26.

Amendment 26 agreed to.

Amendments 27 and 28 moved—[Angus MacKay]—and agreed to.

11:30

The Convener: Amendment 127, in the name of Brian Monteith, is grouped with amendments 128 and 129, also in his name, and with amendment 148, in the name of Christine Grahame.

Mr Brian Monteith (Mid Scotland and Fife) (Con): The purpose of amendment 127 is to draw a distinction between urban and rural land and the rights that a superior may have. Members of the committee will notice that the amendment outlines changes to distance. My proposed distance is entirely arbitrary, and I would not suggest otherwise for a minute. However, it is no less arbitrary than the existing proposal for a distance of 100 m. I would like to hear the minister's opinion on why the 100 m rule is ideal and on what give and take there might be in extending that limit.

We should try to differentiate between 100 m in the urban townscape and in the rural landscape. For that reason, I have suggested that a limit of a kilometre should be introduced for what we might call rural land. I am aware that there is an amendment dealing with agricultural land, but I am using the phrase "rural land", for the moment, as a way of defining what is in the amendment, simply because not all rural land is agricultural. When we come to the amendment on agricultural land, I may speak about that again.

Buildings on rural land are often more than 100 m away from the land that would be the servient tenement. It would therefore be helpful to Scotland's rural communities to make some allowance for that. That is what my amendment proposes to do. Written and oral evidence from the Royal Institution of Chartered Surveyors suggests that there is concern in the leisure industry about neighbouring land to which existing rights may be attached. I am aware that that must be considered.

I am trying to draw a distinction between rural and urban land, and I hope that the minister will be willing to accommodate that difference.

I move amendment 127.

Christine Grahame: Although amendment 148 substitutes 50 m for 100 m, it is probing in that it raises the same issues as Brian Monteith has raised. The same distance could not apply equally to rural and urban areas. We have had representations from people in tenements that show that a limit of 100 m would be useless, and representations from rural organisations showing that a limit of 100 m is unsuitable for quite different reasons. I would like the minister to consider redrafting the bill to build in the greater flexibility that is required, rather than having 100 m as the mandatory distance.

Angus MacKay: I understand and sympathise with the argument that lies behind amendments 127 to 129, which is that different distances should be the criteria for neighbour burdens in rural and urban areas. It is obvious that the circumstances are likely to be different, but the difficulty would lie in attempting to differentiate in section 17 between urban and rural properties. For example, how does one define urban and rural, or how does one decide whether an area is built up? Would that involve calculating the density of housing in the area? At face value, those matters seem bureaucratic and time consuming, but they would have to be addressed.

In such a matter, the law has to be absolutely clear on whether the dominant tenement falls within the definition of rural or urban. That means that we need an objective definition, so that any owner knows whether their property falls within the rules for rural properties or those for urban properties, otherwise there would be fruitful territory for the courts in dispute resolution. It would be in the interests of some vassals somewhere to dispute whether the superior's land was in a built-up area, to prevent the superior from saving and enforcing burdens.

As it stands, the bill can accommodate the different circumstances of individual cases. Members may recall that we adjusted the Law Commission's draft bill in that area. The Law Commission proposed strict criteria for the saving of feudal burdens: if the burdens did not meet those criteria—one of which was the 100 m rule—they could not be saved. We have given superiors further opportunities to save their burdens: if the burdens do not meet the criteria, the superior may try to save them by securing the vassal's agreement. Even if that agreement is not

forthcoming, the superior may still try to save them by applying to the Lands Tribunal.

As well as proposing a distinction between rural and urban areas, the amendments propose new limits. The Executive has always indicated that it has been, and remains, willing to listen to arguments on the precise figures that should feature in the act. That is because we, and the Scottish Law Commission, recognise that—as Brian Monteith said—any rule that is based on distance is to some extent arbitrary. However, an increase from 100 m to 300 m appears huge. In an urban area, 300 m is a long way. A variation on 100 m may be argued for, but to multiply that distance by a factor of three would run against the whole principle of a neighbour burden. To multiply the distance by a factor of 10 in rural areas seems excessive.

Section 23 of the bill makes it clear that section 17 is without prejudice to the requirement that a former superior should have a real interest in enforcing a burden. There must be considerable doubt that the former superior would in all cases have an interest in enforcing a burden on property that is 300 m from his own in a built-up area where there would be intervening buildings.

The argument in relation to a distance of 1 km is even stronger, so amendments 128 and 129 would be likely to lead to many challenges to burdens before the courts on the grounds that the superior had no real interest to enforce. On that basis, I invite Brian Monteith to withdraw those amendments.

As I have conceded, any distance is arbitrary, but in relation to amendment 148, 50 m would appear to be too short a distance. A former superior would be placed in a disadvantageous position compared to a seller who had imposed a burden in an ordinary disposition, and who would be likely to be able to enforce that burden beyond 50 m. Therefore, I ask Christine Grahame to withdraw her amendment.

Mr Monteith: I understand what the minister is saying on the definition of urban and rural, but I seek clarification from him on my understanding that one of the bills that will, in a sense, accompany this bill will seek to address the problem of defining rural land. If that is the case, why could not rural land be defined similarly in this bill?

I have raised the distances to gauge the minister's reaction. I am happy to withdraw the amendments concerned at this stage if I can have clarification that doing so will not inhibit me from returning with proposed changes in future.

The Convener: At stage 3?

Mr Monteith: Yes.

The Convener: Withdrawing your amendments now will not inhibit you from proposing changes at stage 3. I think that you are referring to the map in the land reform white paper, which, as I recall, designates clearly what is rural land and what is not. I believe that that is done by postcode.

Mr Monteith: That is indeed what I am referring to.

The Convener: I am not sure that that is necessarily the right way to do it, but it indicates that the land reform bill is likely to contain a way of differentiating between rural and urban.

Gordon Jackson: I appreciate the fact that Brian Monteith will withdraw or not move his amendments, but I would like some help, as this is an important point.

Listening to Brian, I understand in principle why rural is different from urban. I am not a rural person at all—I am a total townie. What sort of situation does Brian envisage? I understand why 100 m is probably as good a figure as any for towns, and why the distance should perhaps be greater for rural areas, but what interest would be affected? I understand that the land adjoining a habitation might be 500 m away, but what interest would be prejudiced?

I am trying to get an example of a real situation in which Brian thinks the distance would matter.

Mr Monteith: The real situations that I envisage are those in which superiors have an interest in buildings that are beyond 100 m away. They may include outlying farm buildings that have a burden on them that affects the adjacent amenity, which could be about 1 km from the land used by the current landowner.

Part of that land may be used for rearing cattle, and there may be burdens that limit the use of buildings for something that creates noise. If the superior says that they can no longer exercise that burden because of the distance, the rights of that superior could be prejudiced—simply because the building is at a distance of more than 100 m.

Mrs McIntosh: I am sympathetic to Brian Monteith's view about the distances of 100 m and 300 m. The minister, in his preamble, mentioned the option of pursuing an interest by going to the Lands Tribunal. What would that involve? How much would someone have to spend to pursue their interest in a property? Vast sums of money could be involved.

Christine Grahame: I endorse everything that Brian Monteith said on this matter. I mentioned 50 m, but the converse would apply in cities, which are obviously much more compacted than rural areas. I cannot see how section 17 can be sustained as its stands. It would cause a lot of anomalies for both urban and rural dwellers.

Section 17(7) says

"The conditions are"—

so this condition applies prior even to showing an interest—

"(a) that the land which . . . would become the dominant tenement has on it a permanent building which is in use wholly or mainly as a place of human—

(i) habitation; or

(ii) resort,

and that building is, at some point, within"—

whatever figure we choose—

"metres . . . of the land which would the servient tenement".

That suggests that it would not be possible for someone to go to the Lands Tribunal if they did not comply with the provisions of the bill as introduced. Is that correct?

11:45

Angus MacKay: I will try to deal with as many of those points as possible in the round, and then deal head on with any that I have not addressed.

The Convener: Yes; we will let this one run a little, because there is an issue that must be addressed.

Angus MacKay: I want to re-emphasise that I have sympathy with the attempt to draw a distinction between urban and rural areas; the difficulty lies in the practicality of doing so. Brian Monteith raised the issue of the map that will be set out for the purposes of land reform legislation; the convener also mentioned it. I am not entirely convinced that there is a genuine read-across between the two. Because of the number of properties affected, a map for this bill would have to be very specific in order to serve a particular purpose at a particular time, whereas the land reform map is likely to be used for only a very limited number of bids for a community right to buy. The volume of work that would be associated with each of those two maps is entirely different. It also appears that there will be some degree of ministerial discretion on the geographical areas to be covered under the land reform legislation—although to say that is somewhat to pre-empt the debate that we will have on that bill.

A map could not sit comfortably in this bill, or in the act that it will become, because the focus would have to be pretty sharp. That is the nub of the problem; the resolution lies in the capacity of a superior to take an issue to the Lands Tribunal in all circumstances. That would allow the tribunal to give a fair hearing to all concerns that may be raised in relation to the limitations that are imposed by distance.

I do not know if that is a satisfactory answer, but it is an attempt to throw some light on the process.

Gordon Jackson: I do not want to be repetitive, but having thought about this, I have a difficulty. The purpose of this section is to say that there are certain situations where someone with a house that has a garden round about it will be entitled—as it were—to restate the burden as against the servient piece of land. If you live in an area of the country where—just because there is enough space—every single house is at least 100 m away from the next piece of land, you are totally disenfranchised by the section. Everybody in a town is covered by the legislation—unless they live in a very big house—whereas everyone in the country is disenfranchised. It does not seem fair not to acknowledge that distinction. I do not know what the answer is; I am just thinking out loud and expressing a view.

Christine Grahame: Section 17(1)(b) refers to where

"at least one of the conditions set out in subsection (7) below is met".

If section 17(1)(a) is all that you can found on, you could not, as I understand it, go to the Lands Tribunal, because you are either too close or too far away.

Angus MacKay: To try to answer Christine Grahame's point, I will run over some ground that I hope may be helpful. The arrangements under section 17 are, I think, the simplest, because they allow a superior to save a burden to benefit his other land by using a notice procedure. Christine has already touched on the fact that to be able to save the burden in question, one of the conditions in subsection 7 must be met. The first of those conditions is that the land concerned, which is termed a "dominant tenement", has on it

"a permanent building which is in use wholly or mainly as a place of human—

(i) habitation; or

(ii) resort,

and that building is . . . within one hundred metres"

of the land that is burdened, which is termed the servient tenement.

The second condition is where

"the real burden comprises—

(i) a right to enter, or otherwise make use of, the servient tenement; or

(ii) a right of pre-emption of redemption".

The third condition is where

"the dominant tenement comprises—

(i) minerals; or

(ii) salmon fishings or some other incorporeal property,

and it is apparent from the terms of the real burden that it

was created for the benefit of such land."

That section is only one of the methods of preserving neighbour burdens and it will suit only cases that fall within the criteria. The more elaborate procedures in sections 18 and 19 will allow a wider range of cases to be covered, which would, I think, address Christine's point.

Mr Monteith: Would the minister be willing to accept further classifications or more extensive conditions?

The Convener: If you want to expand section 17 in terms of the conditions that can be applied, that would have to be done at stage 3.

Mr Monteith: I was thinking of that as an alternative to the amendments that I have lodged.

Angus MacKay: We would be willing to consider that before stage 3 and if Brian wants to discuss it, in writing or in person, we will examine his suggestions.

Christine Grahame: I am not clear that sections 18 and 19 resolve the issue; I will have to read them again to be certain. Like Brian Monteith, I am content for the section to be reconsidered by the Executive, or for it to be dealt with at stage 3.

Angus MacKay: If Christine Grahame wants to put her concerns in writing, we would be happy to examine them and possibly we could meet to discuss them.

The Convener: How do you want to deal with amendment 127, Brian?

Mr Monteith: I am content to withdraw it, if the committee agrees.

Amendment 127, by agreement, withdrawn.

The Convener: It is clear that we will come back to that debate at stage 3.

Before I call amendment 128, I should point out that if amendment 128 is agreed to then amendment 148 cannot be called, because of pre-emption. Brian, what do you wish to do?

Mr Monteith: I will not move the amendment.

Amendments 128, 129 and 148 not moved.

The Convener: I call amendment 1 in the name of Maureen Macmillan.

Maureen Macmillan: This is a focussed amendment to deal with a specific problem. It proposes an additional condition in section 17. At present, when farmers feu off a piece of land the practice is to include a condition that protects their livestock. For example, it might be a condition that fences are kept in order so that livestock cannot escape through the garden of the new house. Feu conditions commonly prevent keeping more than one dog—one dog is a pet but two become a pack and pose problems for sheep farmers—or prohibit running businesses such as dog breeding or kennelling for the same reason. As discussed a moment ago, the farmhouse and steading are not likely to be within 100 m or 300 m, or even a mile, of the feu, so under the present proposals a farmer would be unable to include such burdens. There is the possibility of a bit of joined-up government here. The minister knows that land for housing is difficult to acquire in rural areas and that there is pressure on farmers to sell land for both private and social housing. If farmers lose the right to preserve burdens that protect livestock, they may not want to release land for building. I urge the minister to address the problem.

I move amendment 1.

Mr Monteith: Amendment 1 seems to be on the same line that I was pursuing. I seek clarification from the minister on how agricultural land can be defined. I used the term rural land, but if he can concede that agricultural land exists, that would be helpful at stage 3.

Angus MacKay: I am happy to concede that agricultural land exists, but my difficulty lies in defining agricultural and rural land. The intention of Maureen Macmillan's amendment is to preserve a burden that affects an area of farmland adjoining an area owned by the superior. The burden would be one that, when originally imposed, facilitated the better management and protected the continued use of the agricultural unit of which the two areas were originally part.

At this juncture, I cannot agree that the proposal would be a useful addition to the bill, as it would have wide-ranging effects on rural areas and would allow a great number of feudal burdens to be saved. One difficulty is that the areas of land that are mentioned in the amendment are not fully defined. The only qualification is that they should formerly have been part of the same agricultural unit, but some agricultural units are, or have been, very large. The amendment could allow burdens to be preserved over a huge area if the agricultural unit in question was, for instance, a highland estate.

A further difficulty is that the word "formerly" is rather wide and imprecise. It could be a considerable time since the areas in question were part of the same agricultural unit. It may also be difficult to apply the test in subparagraph (iii) of the amendment that the burden must have been imposed to protect the continued use of the unit or to facilitate its better management. It is notoriously difficult to establish the purpose of something that has happened in the past. Unless the reason for the burden had been written down at the time, it could be difficult to determine the motivation for imposing it. The Executive has been struggling with that difficulty in relation to conservation

burdens, and one of our later amendments addresses the point.

Whatever the difficulties with Maureen Macmillan's amendment, I do not believe that it is necessary in any case. If a superior has a burden of that kind, it will be open to him or her to seek to save it under section 18, so long as he or she can secure the agreement of the vassal. Alternatively, if the vassal does not agree, the superior can apply to the Lands Tribunal to seek an order under section 19, which would also have the effect of preserving the burden. The superior would have to satisfy the Lands Tribunal that the property would suffer substantial loss or disadvantage if the burden was extinguished. On those grounds, I believe that the bill already offers adequate means for a superior to preserve a burden over an adjoining area of land. I therefore ask the member to withdraw her amendment.

Maureen Macmillan: In response to Brian Monteith's amendment, the minister said that he might look again at conditions that could be attached to section 17. In doing that, will he also give consideration to farm management and the protection of livestock to include the ideas that are contained in my amendment? Farmers might be reluctant to give up land for building if they felt that they would not have protection for their livestock. They may get that protection in future, but they may be prejudiced if they feel that they are losing it now.

Angus MacKay: If Maureen Macmillan writes to us with those specific concerns, we will be happy to address them formally.

Maureen Macmillan: In that case, I am happy to withdraw my amendment.

Amendment 1, by agreement, withdrawn.

Section 17, as amended, agreed to.

Schedule 4 agreed to.

Section 18—Reallotment of real burden by agreement

Amendments 29 and 30 moved—[Angus MacKay]—and agreed to.

The Convener: I call the minister to speak to and move amendment 31, which is grouped with Executive amendments 32, 33 and 35.

12:00

Angus MacKay: The amendments in this group are all to section 18, which provides for an agreement between a superior and a vassal to save a burden. As it stands, the bill provides that the superior must first serve a notice on the vassal. If the notice were not properly served, the agreement would be invalid. On reflection, we do not think that that is appropriate. The agreement is a consensual arrangement, into which the vassal enters of their own free will. If a failure to comply with any requirement regarding the service of the notice were to invalidate the agreement, that would frustrate the intentions of the superior and the vassal.

It is the agreement that will be registered, therefore it is the important document. Amendment 32 specifies the content of the agreement, and amendment 33 removes the requirement that the notice should be properly served for the agreement to be valid. Amendment 31 is a consequential and stylistic amendment. Amendment 35 is a technical amendment, which enables parties to enter into an agreement without first having to complete title. It is similar to amendments that we have already considered this morning about the completion of title. The circumstances are different, but the policy is the same.

I move amendment 31.

Amendment 31 agreed to.

Amendments 32 to 35 moved—[Angus MacKay]—and agreed to.

Section 18, as amended, agreed to.

Schedule 5 agreed to.

Section 19—Reallotment of real burden by order of Lands Tribunal

The Convener: We will not go past section 19 and schedule 6 today. I call amendment 149, but I should point out that if it is agreed to, amendment 36 cannot be called by virtue of pre-emption. Amendment 149, in the name of Christine Grahame, is grouped with amendments 37, 38 and 40, which are in the name of the minister.

Christine Grahame: Amendment 149 seeks to delete the mandatory requirement of the superior to attempt to reach an agreement. It seems to clash with section 18(1), which we have just looked at:

"Where a feudal estate of *dominium utile* of land is subject to a real burden enforceable by a superior of the feu the superior may"—

not shall—"before the appointed day" serve notice that he is seeking an agreement.

That is discretionary, yet in section 19 it is mandatory that the superior has attempted to reach an agreement. They should be alternatives: you may seek agreement or you may go to the Lands Tribunal for Scotland. I do not see a difficulty with that. I think that I am right in saying that if you just went flying off to the Lands Tribunal when you could have reached an agreement, you might be liable for expenses if you have taken that

heavy-handed route. It appears that the requirement on the superior is not necessary, and it does not sit with section 18.

I move amendment 149.

Angus MacKay: Amendments 37, 38, 39 and 149 are to the part of the bill that deals with a superior trying to save a burden by applying to the Lands Tribunal. After the superior has applied to the tribunal, he may register a notice with Registers of Scotland, the purpose of which is to give public notice that a burden is the subject of an application to the Lands Tribunal and, if the application is not determined before the appointed day, to preserve the burden until the tribunal has heard the case and reached a decision.

The notice simply holds the position, but the superior must register the notice within a limited period of time. The purpose of the limit is to avoid uncertainty. Since there is a time limit, it is necessary to specify when the clock starts to tick, and that is what amendment 37 does. The term in the bill as it stands is "making", that is, when the superior makes the application the clock starts. That is a vague term, and the amendment substitutes the more precise "sending or delivering".

The time limit in the bill is 21 days. On reflection, we feel that that is rather short, and amendment 38 lengthens the limit to 42 days, and also gives the Lands Tribunal the opportunity to lengthen it further if there is good cause.

Amendment 40 is technical and has two aspects, the first of which relates to the need for the superior to have completed title to the land that they wish to nominate as having the benefit of the burden in the future. That issue has been discussed in connection with earlier amendments. The second aspect of the amendment relates to the need for the original applicant to remain the owner of that land.

As the bill stands, the Lands Tribunal may only order that a feudal burden be saved under the provisions in section 19 if it is satisfied that there would be substantial loss or disadvantage to the applicant as owner if the burden were to be extinguished. The owner of land is the person who has completed title. The amendment makes it clear that the applicant will be treated as having completed title, even if they have not.

The burden is for the benefit of land. It is the owner of that land who will enjoy the benefit of the burden or suffer its loss if it is extinguished. The initial applicant may have sold the land in question before the Lands Tribunal can reach a determination of the issue. If the initial applicant has sold the land, they will not suffer loss if the burden is extinguished; the purchaser would suffer the loss instead. The amendment clarifies that, for the purposes of making a determination on loss, the Lands Tribunal may treat the initial applicant as if they remained the owner of the land in question.

With regard to amendment 149, the main reason for requiring a superior to attempt to reach an agreement with a vassal over the reallotment of a burden under section 18 is to try to reduce the number of applications to the Lands Tribunal under section 19. We believe that there will be instances where it will be mutually beneficial for both superior and vassal to preserve a burden. For example, counter-obligations which benefit the vassal might be incumbent on the superior. In circumstances where an amicable agreement might be reached, there seems no reason to involve the Lands Tribunal. As a matter of policy, and in pursuit of good neighbour relations, it seems reasonable to expect a superior to attempt to come to some arrangement with the vassal before pursuing the judicial option.

Christine Grahame also pointed out the uses of "may" and "shall" in different sections. Section 18 is an option for the superior, which is why the word used is "may", not "shall". The superior does not have to pursue the agreement unless he is going to apply to the Lands Tribunal.

I therefore ask Christine to withdraw her amendment.

Christine Grahame: Although I fully agree that people should try to reach agreement before they embark on the judicial process, why should a superior be obliged to do so? It would no doubt have an impact on finances for a superior to hurtle to the Lands Tribunal; however, as it might be difficult—indeed impractical—to trace a vassal, reaching an agreement should not be mandatory and alternative measures should be available. As a result, I will stick with my amendment. It will come out in the wash if no effort has been made to reach an agreement.

Gordon Jackson: I do not agree. If a superior wants to go through the legal process, expenses might not be an issue as they might be very wealthy. However, the superior will be using up the system, and court processes are very expensive. I do not see anything wrong with telling a superior to try to reach agreement before going to court. If that cannot be done, that is fine; but I do not see why they should high-handedly go to the Lands Tribunal without trying to reach an agreement.

Angus MacKay: I am not sure that I have much to add to the discussion.

Christine Grahame: I certainly have something to add to Gordon Jackson's comments. What does the phrase "attempted to reach agreement" mean in section 19(1)? We are getting into difficulties of

definition, and, in any event, the Lands Tribunal might have to debate these matters.

Angus MacKay: I have been advised that, in the bill, we spell out a format for conducting that process.

Christine Grahame: Where?

Angus MacKay: I am not sure which section of the bill contains that format.

The Convener: We are waiting for that information.

Angus MacKay: If you keep waiting, I will be able to tell you.

The Convener: If it is there, that would solve the difficulty.

Angus MacKay: That is laid out in schedule 5, on page 40 of the bill.

The Convener: That deals with the point about what comprises an attempt to seek agreement.

Christine Grahame: I cannot digest that immediately. It is an unusual thing in legislation. I cannot think of any other circumstances where there is a legislative compulsion on a contractual party to seek agreement first. I would prefer to keep my amendment.

The Convener: Unless the minister has something to add, we have probably exhausted that topic.

Angus MacKay: I appreciate Christine Grahame's point, but I stand by the Executive's position. It seems sensible to attempt to filter out some of the business before it reaches the Lands Tribunal, given the number of potential cases. If some cases could be resolved satisfactorily without going to law, that would be appropriate.

The Convener: The question is, that amendment 149 be agreed. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Christine Grahame (South of Scotland) (SNP)
Mrs Lyndsay McIntosh (Central Scotland) (Con)
Michael Matheson (Central Scotland) (SNP)

AGAINST

Scott Barrie (Dunfermline West) (Lab)
Gordon Jackson (Glasgow Govan) (Lab)
Kate MacLean (Dundee West) (Lab)
Maureen Macmillan (Highlands and Islands) (Lab)
Pauline McNeill (Glasgow Kelvin) (Lab)
Euan Robson (Roxburgh and Berwickshire) (LD)

ABSTENTIONS

Roseanna Cunningham (Perth) (SNP)

The Convener: The result of the division is: For 3, Against 6, Abstentions 1.

Amendment 149 disagreed to.

Amendments 36 to 45 moved—[Angus MacKay]—and agreed to.

The Convener: I had hoped to complete the amendments to section 19 today, but I will have to draw this item to a close. We will come back to amendment 130 next Tuesday. I apologise to Brian Monteith, but there are two other items on the committee's agenda and we are struggling to get anything else done.

Before everyone rushes off, I would like to make the point that the committee was considering a petition from Mr and Mrs MacAlister asking for changes to section 17 of the bill. No amendment was lodged in response to that petition. I would like to know whether the minister has considered the issues raised by the petitioners. I remind committee members that the specific amendment proposed by the petitioners can be taken up at stage 3.

Angus MacKay: With your permission, convener, I will make a short statement.

I am aware of the circumstances of the case in Corstorphine to which you refer, where Mr and Mrs MacAlister wish to subdivide their property for use as home and office but are unable to do so, despite receiving full planning permission. I understand that that is because one of their neighbours has purchased the superiority of the development where they live and is preventing the MacAlisters from altering the use of their home because of a burden contained in an old feudal deed.

12:15

There seems to be little doubt that section 17 would allow the superior to preserve the burden in the MacAlisters' case, since the superior is a neighbour and the properties appear to be very close. The Scottish Law Commission recommended that a former superior should be able to preserve a burden that affects land within 100 m of the superior's land, provided that the superior's land has on it a permanent building that is in use wholly or mainly as a place of human habitation or resort.

I should point out that this is not a distinctly feudal issue, as it is almost certain that if the relevant burden in question had been imposed in a non-feudal deed, the person with the right to enforce that burden would be able to continue to enforce it after feudal abolition.

However, that is not the end of the matter. Section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970 allows people in the MacAlisters' situation to petition the Lands Tribunal for Scotland to seek an order varying or

discharging a land obligation. The tribunal can discharge an obligation that is unduly burdensome in comparison with any benefit resulting, or that would result, from its performance, or that impedes some reasonable use of the property. I understand that the MacAlisters have made an application to the tribunal, although I am unaware of the outcome.

The MacAlisters have argued that no former superior should have a power to impede reasonable community development by neighbours. That is why proprietors have a right to apply to the Lands Tribunal to have unreasonable burdens lifted. I note that the MacAlisters think that the granting of planning permission creates a presumption that a proposed development will have no adverse effect on amenity and the natural and built environment.

With respect, planning legislation is, essentially, public law, but the law that relates to real burdens over property is a matter of private regulation. I am not aware of any country that does not permit some form of private regulation of land. It seems that, by making an application to the Lands Tribunal, the petitioners have been advised as to their best course of action.

The Convener: Thank you, minister.

That completes today's proceedings on the Abolition of Feudal Tenure etc (Scotland) Bill. I remind everyone that we will return to the bill next Tuesday at 9.30 am.

Petition (Legal Aid)

The Convener: We move on to item 2, which is petition PE71 by James and Anne Bollan. It has been circulated to members of the committee. Members will recall that, at the first meeting of the committee after the Easter recess, we will discuss in detail potential future items of business and decide where we will go with them. Legal aid has been flagged up on a number of occasions and it might be appropriate to note this petition today and to put it on to the agenda for that meeting.

However, the petition is drawn in specific terms and, in the intervening period, we could send the petition to the Scottish Legal Aid Board for comments on the general issues that it raises. The answer would inform our discussion at the first meeting after the Easter recess. Are members content with that approach?

Members *indicated agreement.*

Kate MacLean: I misread the petition initially. I would be interested to receive the Legal Aid Board's comments on legal aid for representation of victims' families at fatal accident inquiries. The board appears to think that the procurator fiscal always defends the family's interests, but the procurator fiscal is there for the public interest. Although those two interests may coincide, they do not always do so.

In a case in which I am involved—I will not mention any names or details as it is continuing—the sheriff commented that the victim's family should have been able to have representation at the fatal accident inquiry. In addition to asking about the specific petition, which takes the issue on a stage, I would be interested in getting a response for our deliberations about the fatal accident inquiry.

The Convener: That is fair enough. We can include that in the letter.

Christine Grahame: The Scottish Parliament information centre should provide us with a note on the proceedings that are exempted from legal aid. This is an exempted proceeding, like employment tribunals.

The Convener: Let us not burden SPICe if the Legal Aid Board is prepared to do the work.

Pauline McNeill: I am happy to support the issue that Kate MacLean suggested we put to the Legal Aid Board. I wish to discuss the petition after the Easter recess in the context of the complex issue of access to justice. This is not the only area in which there are problems relating to the qualifications for legal aid. We need to explore ways in which we can improve access to justice and prevent finance becoming a barrier to that.

Freedom of Information

The Convener: We have a draft letter to the Minister for Justice in response to the Scottish Executive's consultation paper "An Open Scotland". Because we received it fairly late, I did not get a chance to look at it until last night. I would like to propose some substantial changes to the structure of the paper, rather than the words. I expect that we will have a difficult time with this, because the structure of the letter results in a different emphasis from that which I would have preferred. I will have to go through the paper to enable members to understand what I am saying, as it is quite complicated. Do members want to make any specific points at this stage? I appreciate that members received the paper quite late and may not have had an opportunity to examine the draft in detail, but our current work load creates difficulties for the clerks.

Christine Grahame: Like you, I think that the emphasis is the wrong way round. It should be on the review that the committee has done—I would have placed that at the beginning. My bugbear is the last paragraph, which relates to my concern about the distinction between devolved and reserved matters and the difficulties that might arise there. Generally, I feel that the committee's response does not come over in this letter.

The Convener: Do members have any other specific comments before I launch in?

Kate MacLean: I did not get the paper.

The Convener: It was e-mailed and sent in an envelope separate from the main papers.

Kate MacLean: When would that have arrived?

The Convener: The paper is dated 13 March.

Michael Matheson (Central Scotland) (SNP): My point relates to the evidence Professor Alan Miller gave about the appointment of a commissioner who would be responsible for implementing a freedom of information act. The need for that person to be properly independent in exercising their responsibilities was mentioned. Something needs to be included in the paper to reflect that.

The Convener: I do not want to labour this, but will people hang in with me while I explain why I am not happy about the structure of the draft letter. Will members begin by numbering the paragraphs throughout the paper? That includes the one-line paragraph on the first page, which will be paragraph 3. That will help me, because this is more about moving paragraphs around than about changing the words—if that makes sense.

Christine Grahame: Is the paragraph beginning "We learned" number 4?

The Convener: That is number 5. There is a one-line paragraph before that, which starts, "The main points". Paragraph 6 begins, "According to Professor Miller", paragraph 7 begins, "On a related point", paragraph 8 begins, "Your officials", paragraph 9 begins, "One issue", paragraph 10 begins, "For Professor Miller", paragraph 11 begins, "The Committee", paragraph 12 begins, "We welcome the Executive's commitment", paragraph 13 begins, "We believe that some mechanism", paragraph 14 begins, "Although we realise", and paragraph 15 begins, "Finally, we have some concerns".

Has everybody got there? Right. I want to focus more on the committee's feelings and views. Paragraphs 1 and 2 are fine as an introduction to the letter. I would then add to it paragraph 11, which begins,

"The committee . . . generally welcomes the consultation paper".

I would add that we note with approval that the Executive's proposals are distinct from, and in some respects further reaching than, those in the UK bill. That is a preliminary paragraph. Paragraph 11 should become the new paragraph 3.

Paragraph 12 should become the new paragraph 4, and should be given a bold heading on the culture of openness. I am happy enough with what paragraph 12 says, but we should expand on it a bit. The only change to the wording that I would like is this: at the end, we should add "however, the committee has some concerns that this is an area where most difficulties may arise, and we would welcome clear commitments as to how the existing culture of secrecy could be turned around into a culture of openness. In other freedom of information regimes this has proven particularly problematic." We received some information on Canada and Ireland. That is the only change to the wording that I would suggest, and it expands on what is already in paragraph 12—which will be the new paragraph 4.

We should then have a new bold headline, following on from what paragraph 12 says about the culture of openness. The committee has talked about the Crown Office and its information. Paragraph 10 concerns monitoring implementation of the freedom of information regime and should be added on to the paragraph on the freedom of information. I am sorry—I have probably just confused you all. Paragraph 12 should become our new paragraph 4, under a heading on the culture of openness. The extra words that I have suggested should be added along with what is currently paragraph 10, on the implementation of the freedom of information regime. That looks much neater.

That is also the point at which the issue of a freedom of information commissioner should be raised. I shall ask Michael Matheson to draft a paragraph on his expectations, based on the evidence that we received during the two meetings, and to give it to Fiona Groves.

Michael Matheson: It will be broadly along the lines that the committee believes that the minister should produce proposals to appoint a commissioner who will be responsible for implementing the act and to ensure his independence in discharging his duties.

The Convener: We should ask the Executive for clarification of what it intends with respect to the appointment of the freedom of information commissioner, as we are considering that appointment at such an early stage. We will then insert that information after paragraph 10, in the new paragraph 4.

I now ask members to turn to the last page. We have moved on to a slightly different issue. The new headline would concern the interaction between the European convention on human rights and freedom of information. The wording of paragraph 14 is fine. I would add to it the comments that are in the current paragraph 6, to pull the ECHR stuff together, putting what the committee thinks in the first paragraph and adding the part about the evidence from paragraph 6.

I would then go to the current paragraph 9, which is mainly about the Lord Advocate and the Crown Office. I suggest that we put a phrase at the beginning of the paragraph saying, "Following on from the issues raised under the ECHR and FOI paragraphs". The words of paragraph 9 are fine, but I would add at the end what is currently paragraph 13. That would pull together all the issues about the Lord Advocate and the Crown Office.

12:30

Christine Grahame: You might want to re-jig it so that the evidence always follows the view of the committee, so that there is a clear structure to the points.

The Convener: Paragraph 9 begins with the view of the committee as well.

I apologise for reworking the letter in this way, but I had no time to look at it until last night.

We would go from there to the current paragraph 15, which comes on to the devolved and reserved issues. That paragraph says that there are some concerns. I would add to that the comments currently in paragraph 5 about the cross-border public bodies.

The current paragraphs 3 and 4 are irrelevant. They do not add anything to the letter as they restate some evidence and we will send the evidence as well.

The current paragraph 8 is about the term "public interest"—shades of the Abolition of Feudal Tenure etc (Scotland) Bill. I am not sure what the committee view was on public interest. If the committee did not express a view, we may need to look at that. At present, the paragraph does not really give a committee view. It is about guidance being given, understanding the Executive's intention to include a "purpose provision" and Mr Goldberg saying that we should give consideration to

"a means of giving a Freedom of Information Act some special status".

If the committee has no view on any of that I do not see the point in including it.

Christine Grahame: What about condensing paragraph 8 and tagging it into the paragraph about cultural openness and secrecy of public bodies? Giving guidance is part of changing the culture.

The Convener: I am not sure that takes it much further.

Christine Grahame: I think it supplements it in that you are not blaming public authorities—it is a new ball game for them.

The Convener: We might look at incorporating bits of the current paragraph 8 in the part about the culture of openness.

I am trying to make the letter more structured and to present the committee's views in a more coherent way.

Christine Grahame: I would still give Fiona seven out of 10 for effort.

The Convener: It is not about that. I was sitting last night working on this letter. I was not in any better a position than the clerks. We are all being pushed really hard.

Andrew Mylne is pointing out one thing that I may have missed. Paragraph 7 is meant to go into the bit about freedom of information and the ECHR. That follows on from what I said about the issues in paragraph 6 being added on to the bit about ECHR.

Effectively, the committee talked around three main areas: the culture of openness and how to turn the culture round; how the ECHR will impact on freedom of information; and the differential regimes for devolved and reserved matters.

The wording has not changed much, so instead of putting the matter on the agenda again for next week, we could perhaps circulate a revised version of the letter, which everyone can sign off in

the next few days. The words were fine; it was the order that got changed.

The stage 3 debate on the Adults with Incapacity (Scotland) Bill will take place on the afternoon of Wednesday 29 March. Apparently, there is no intention to cut off proceedings at 5 pm. Proceedings will start at 2.30 pm and will continue until stage 3 is finished—there will be no guillotine at 5 pm.

Gordon Jackson: How late will it go on? Any time?

The Convener: Yes. Any time.

The intention is to do the lot, so there will be an amendment stage followed by a brief debate, which will probably last no longer than an hour or an hour and a half. Amendments at stage 3 will have to be lodged by 5.30 pm on Monday 27 March.

Gordon Jackson: So there will be amendments?

The Convener: I think that we can guarantee that. Committee members need to be aware of the timing. You will have to clear your diaries.

Gordon Jackson: To clarify, at stage 3, amendments will be voted on one at a time, just as we do here?

The Convener: Yes. It is a committee of the whole Parliament, like we had for the Ruddle bill—the Mental Health (Public Safety and Appeals) (Scotland) Bill.

Scott Barrie (Dunfermline West) (Lab): Or the Public Finance and Accountability (Scotland) Bill.

Gordon Jackson: So we will take the amendments, like we do here, and then we will have a debate on the general principles?

Christine Grahame: Does that mean that there is no decision time?

The Convener: There will be decision time.

Christine Grahame: But we will vote on amendments as we go along?

The Convener: No. Think of it as two sections. There will be a section when we go through stage 3 amendments, which will be done in exactly the same way as we do things here. The procedure will be exactly the same. When that is finished, there will be a debate on the general bill, which will not be allocated a huge amount of time—it will not last three hours or anything; it will probably be allocated an hour or something like that. There will be a vote at the end of that debate on the bill as a whole. We do not know what the position will be at that point. I just wanted to flag up early doors the fact that we will need to provide the core of the workhorse.

Christine Grahame: To an empty chamber.

The Convener: It will not be empty, because there will be the amendment stage. All parties will have to have their members here and hereabouts because we will not know when there will be votes. There could be votes on amendments all afternoon.

Gordon Jackson: The amendment stage will be the contentious part. Once it gets to the stage 3 debate, there will not be much contention.

The Convener: No, unless somebody is so unhappy that an amendment has not been passed that they contest it.

Gordon Jackson: But that would be only a tiny majority.

The Convener: Yes.

I do not think that I need to add anything else. I will see you all next Tuesday. Please remember that the deadline for amendments for the next meeting is 5.30 pm on Friday.

Meeting closed at 12:39.

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