JUSTICE AND HOME AFFAIRS COMMITTEE

Tuesday 21 March 2000
(*Morning*)

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CONTENTS

Tuesday 21 March 2000

JUSTICE AND HOME AFFAIRS COMMITTEE
12th 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:

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

Tuesday 21 March 2000

(*Morning*)

[THE CONVENER *opened the meeting at 09:33*]

The Convener (Roseanna Cunningham): We had better get cracking, as we have quite a lot to do today.

I have received no formal apologies for absence, but I understand that Phil Gallie's apologies will have to be taken, because of his wife's illness. In his absence, we must assume that his apologies will go into the minutes weekly. There are no other apologies, so I expect that members of the committee will be here.

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

The Convener: I welcome Brian Monteith, who has amendments to the Abolition of Feudal Tenure etc (Scotland) Bill this morning.

Brian asked me to consider a manuscript amendment, which he did not manage to lodge by 5.30 pm on Friday—I understand that one or two matters caught his attention towards the end of last week and he took his eye off the ball. I indicated to Brian that I have no objection in principle to considering a manuscript amendment, but I will wait to see how far we get this morning before I decide whether to allow the amendment to be considered. If we are making enough progress to justify taking the time to deal with that amendment, I will allow it. If that happens, members will need a chance to examine the amendment and that will require a brief adjournment. The clerk has copies of the amendment, and I will ensure that everyone gets a copy now.

Brian understands the position and, if we cannot deal with his amendment this morning, he will have the opportunity to lodge it again at stage 3.

As I indicated last week, as convener I will take one or two minutes at the beginning of each meeting to raise with members items of relevant business, should there be any.

Last week, I said that I would have a meeting with the Minister for Justice, Jim Wallace, on Thursday morning. The meeting, at which the clerk was present, lasted nearly one and a half hours. I will not go into a great deal of detail, but the upshot of the meeting was that the Executive wishes to introduce yet another bill before the summer recess. We were told that that bill would be introduced in mid-May, with the expectation that we would complete the bill by the summer recess.

I explained to the minister that, according to standing orders, the proposed timetable for dealing with that bill is impossible. Standing orders would have to be suspended on three separate occasions, which would have to be agreed by Parliament. There would also be considerable cost to other work that the committee is required to undertake, as well as to work that we might wish to tackle.

Therefore, although I am not entirely sure of the position, I warn members that our three-hour meeting after the Easter recess, at which we were to discuss potential future business, now may be little more than a fond hope. We will still try to make time at least to discuss future business, but if that bill is introduced, frankly there will be no time to do anything else.

The bill that the Executive proposes to introduce will mirror the Regulation of Investigatory Powers Bill that is going through the House of Commons. The Scottish Parliament is required to mirror part of the Westminster bill and the desire is that both bills should come into force at about the same time. Also, it is intended to take the opportunity to add extra parts to the Scottish bill that will address compliance with the European convention on human rights, although it is not clear how far that would go. In that sense, it would be a bill in two halves.

The difficulty is that the Executive wishes to turn the bill round completely and pass it through the final stage, stage 3, before the summer recess. Given that the bill has yet to be introduced, that poses timetabling difficulties. How those difficulties will be resolved has yet to be discussed and whether pushing a bill through, by having to suspend standing orders so many times, will be agreed also requires discussion.

If members wish to ready themselves for such a bill, the Home Office has a good website on the Westminster bill. I will ensure that members receive the website address, as a great deal of work has been done on that bill.

We now proceed with today's work. We want to reach the end of section 55 of the Abolition of Feudal Tenure etc (Scotland) Bill today, which means that we must make considerable progress. If we do not reach section 55 by 12.30, we may continue for a little while or we may come back this afternoon. I do not want to be in the position of not knowing how much time we need next week.

Our meeting is scheduled for next Wednesday morning and it would start to become awkward if we had to use the extra slot on Tuesday morning, so we will try to reach the end of section 55 today. That would mean that only a few sections would need to be dealt with at next week's meeting and that there would be clear space for the public interest debate, which, in a sense, is the most philosophical or ideological debate as far as the bill is concerned. I therefore expect members to work quite hard to get through the work this morning.

We now resume, from last week, consideration of section 19.

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

The Convener: I call amendment 130, which is in the name of Brian Monteith.

Mr Brian Monteith (Mid Scotland and Fife) (Con): The purpose of amendment 130 is to challenge the idea that there should be no appeal beyond the Lands Tribunal of Scotland and to suggest that there should be an appeal to the Court of Session. I would be surprised if an appeal were not required under ECHR in any case, but perhaps the Deputy Minister for Justice will address that.

At the very least, there should be some right of appeal somewhere in the bill. My amendment seeks to address that point.

The Deputy Minister for Justice (Angus MacKay): I understand the argument that there should be a right of appeal from the Lands Tribunal and I accept that it is unusual for a court decision not to carry a right of appeal.

The Executive did not introduce section 19(10) without a great deal of thought, and a considerable section of the policy memorandum was also devoted to this subject. I do not propose to repeat the closely argued point that is made in the memorandum, but, briefly, allowing a right of appeal would cause difficulties in the conveyancing process.

If a superior were to lose their case at the Lands Tribunal, their burden would be extinguished. If the former vassal then sold the property, the price would reflect the property value without the burden. However, if the superior were to appeal a decision of the Lands Tribunal and were to win that appeal, the burden would be reinstated, the value of the property would be affected and the reinstatement of the burden might cut across the purchaser's use of the property. Clearly, it is unacceptable that the value of a property should fluctuate in that way. Alternatively, the burden might have to survive, even although the superior was unsuccessful at the Lands Tribunal, until all rights of appeal were exhausted. There might be further court cases with consequent cost and distress for those involved.

It is worth stressing that the application to the Lands Tribunal under section 19 is a second stage—the first stage is for the superior, under section 18, to attempt to reach agreement with the vassal on the preservation of the burden. I think that we discussed those provisions last week. An appeal against the decision of the Lands Tribunal, would cause delay and, in my view, unnecessary uncertainty.

As I said, the Executive thought carefully about the provision and concluded that, in the interests of stability and certainty in the property market, there should be no right of appeal in such cases and therefore that the decision of the Lands Tribunal would be final. The committee did not differ from that conclusion when it considered the general principles of the bill and I hope that it will agree with it again. I invite Mr Monteith to withdraw his amendment.

Christine Grahame (South of Scotland) (SNP): I am open to either the minister's view or that of Mr Monteith, as I see both arguments. Obviously, there must be finality but the fact that there is absolutely no right of appeal causes me some unease. I am sure that the minister has considered this point, but were grounds for appeal considered where special cause was shown, or in the circumstances of the Lands Tribunal misdirecting itself? Rather than everyone having a right of appeal, a preliminary sifting of lodged appeals could take place within a certain time scale in order to consider whether an appeal had any merit, as happens with employment tribunals or in criminal cases.

The Convener: Minister, we were passing papers backwards and forwards and may have missed your comments. Did you comment on the potential ECHR implications of there being no right of appeal? You may have done so—

Angus MacKay: No, I did not. In responding to that point, I make it clear that the advice from the Presiding Officer's legal advisers is that the provision is competent under ECHR—that is, it complies with ECHR.

The Convener: Even if it does not allow a right of appeal?

Angus MacKay: That is my understanding of the position.

The Convener: Do you want to deal with Christine's point?

Christine Grahame: I just want to know if there might be an opportunity for a fast-track, preliminary sifting of appeal cases. I appreciate the minister's comments about stability, but has a

preliminary sifting procedure been considered?

Angus MacKay: Perhaps I should add further points that might help.

I stress that the approach of the bill, as it stands, gives the superior a further opportunity, beyond the first attempt to reach agreement, to take the case to the Lands Tribunal, which is a significant concession. A superior is not likely to take that step without a reasonable prospect of success. That underpins the point about the lack of a requirement for additional legal recourse. I appreciate that that does not address directly Christine Grahame's point, but it is worth stressing.

09:45

I will put the issue in a broader context. Under the Law Commission's original proposals, superiors would have been able to save burdens only if the burdens fell into rigid categories. The Executive recognised that that might create anomalies, so we decided to give superiors further opportunities to save burdens. As I pointed out, that was a considerable move in the direction of the superior.

Superiors will have three ways in which they can save their burdens. First, they will be able to save their burden if it fits into one of the categories that is set out in section 17. Secondly, the burden could be saved if the vassal agrees; on many occasions, the vassal might be happy to accede to a request of that kind. If the vassal does not agree, superiors will have a further avenue open to them—they will be able to apply to the Lands Tribunal to hear the case for the saving of the burden. That is a considerable move in the direction of the superior.

I recognise that it is unusual for there to be no right of appeal to the Court of Session, and it will be evident to anyone who reads the policy memorandum that much thought was given to that point. I will outline the difficulties that emerged. If a superior lost the case at the Lands Tribunal and appealed, two possible scenarios could result. The first would be that as the superior had lost the burden, it would be extinguished but would reappear if the superior won the case at a higher court. The second would be that, even if the superior lost, the burden would be preserved until the legal processes were complete. The first scenario has clear drawbacks; the burden would disappear and reappear, which would affect the value of the burden property. There would also be complications for the Keeper of the Registers. Questions would arise about what would happen if the property were to be put on the market during that period. Any prospective purchaser would have to be aware of the terms of the burden and the fact that it might be revived. That would cause confusion and difficulty in the property market.

That raises the question whether it would be better for a contested burden to remain in place for the whole period of legal proceedings. It would be possible to say that as soon as a superior had applied to the Lands Tribunal to save a burden, the burden would be protected until all possible legal proceedings had been completed. That would mean that superiors could save burdens for many years. The amendment does not mention appeal beyond the Court of Session, but the logical conclusion would be that if there were an appeal procedure, there could be an appeal to the House of Lords. Many superiors would not appeal to a higher court, but the possibility would exist that they might do so. It would be difficult for a seller to demonstrate that the decision of a court was the last word. There would be no quick, clean end to the feudal system—it would drag on indefinitely.

Against that background, the Executive decided that the best course was for there to be no appeal from the Lands Tribunal. That will enable the future of burdens to be decided in a quick, clear and certain way. That is the thinking behind our position.

Pauline McNeill (Glasgow Kelvin) (Lab): I follow the logic of what the minister is saying. I am not entirely sympathetic to superiors saving burdens, but I have a concern about the Lands Tribunal, as it is the last place to which a person can go. I want a reassurance that the decision-making process of the Lands Tribunal will not be obscured. When the tribunal makes a decision, it will know that no further appeal can take place. Will safeguards be added for the Lands Tribunal's decision-making process? I am not too familiar with how it operates—are its decisions published, or can you look up the decisions that it makes?

Gordon Jackson (Glasgow Govan) (Lab): Without getting technical, I cannot see the point of an appeal to the Court of Session. Brian Monteith's amendment does not say whether the appeal would be on a point of law, or general. If the appeal were on a point of law, it is difficult to see where the legal problem would lie, because all that the Lands Tribunal is deciding, under section 19(7)(a) is that

"there would be substantial loss or disadvantage to the applicant".

That is an easily determinable matter of fact. It is difficult to see the point of an appeal on a point of law as, in a sense, the issue does not have any law in it.

If the appeal were general, that would mean that the Court of Session was deciding, as a matter of fact, whether the requirements of the section had

been met. There is no reason why the Court of Session would be better placed to decide that than the Lands Tribunal. Such an appeal would give a second fact-finding body a go at this for no real purpose, which would make the process extremely long. Once matters get into the Court of Session, they can—and frequently do—disappear into the mists of antiquity.

Christine Grahame: Gordon's chance of a judicial appointment has just gone.

Gordon Jackson: I never wanted to be a judge anyway.

I do not see the point of creating a long process when the Lands Tribunal can make a factual decision. I was interested in Brian Monteith's point about ECHR, but if the Executive has taken advice, I accept that. It is interesting that there will be one bite and no appeals procedure on an important decision, but if Angus MacKay says it is okay, no doubt it will be.

The Convener: That counts as a grovel.

Gordon Jackson: It counts as irony.

Angus MacKay: In relation to Pauline McNeill's point, the Lands Tribunal is a public court, so it will be open and its workings will be visible. The rules and regulations by which it functions are prescribed by Scottish ministers. We will develop new rules for the hearing of cases such as those we are discussing today, so there will be an opportunity to address the concerns that Pauline raised in relation to the members of that tribunal hearing these cases if the bill is passed in the form that there is no subsequent right of appeal.

Christine Grahame asked about sifting, but I feel that you either have a right of appeal or you do not; it would be difficult to construct a middle way. The clearer cut—and, on balance, more appropriate—approach is to say that in effect the Lands Tribunal is the appeal and that going beyond that would drag out the process unduly.

Christine Grahame: Procedures exist for industrial tribunals, whereby applications go through a sifting process before a decision is taken whether they are placed in a tribunal. I was not a criminal practitioner, but I know that there are sifting procedures for criminal appeals. I am not saying that those procedures are the same, but sifting procedures are in existence. Perhaps a decision could be referred in the first instance to an appointed Court of Session judge, whose decision on the right of appeal would be final.

Angus MacKay: I understand your point, but the Executive's view is that such a process would not be appropriate in this instance. When balanced with the requirement for certainty—especially in relation to the potential impact on the property market—our view is that it is not appropriate to go through that process.

Mr Monteith: Having heard Angus MacKay's response and members' comments, I am willing to withdraw the amendment. I will consider the point about sifting and might come back to it—a time-bar might be appropriate to resolve the problem. It is important that we have a commitment on ECHR on the record on this matter.

In response to Angus MacKay's point that it might take a little while for feudalism to depart, I do not believe that that is a great problem. It will take time—we should not be in too much of a rush. It has taken several hundred years; the important point is to get it right.

I ask leave to withdraw the amendment.

Amendment 130, by agreement, withdrawn.

The Convener: I call amendment 150, in the name of Christine Grahame, which is grouped with her amendment 151.

Christine Grahame: The amendments are the same. They make the term "legal representative of" more specific by adding

"solicitor or attorney for, or other".

When dealing with affidavits and so on, one must have clarity about the status of the party who is acting for you. I think that the term "legal representative" is rather wide and general.

I move amendment 150.

Angus MacKay: The Executive does not believe that either amendment is necessary, since the term "legal representative", which the amendment leaves in, would include a solicitor or a person acting under a continuing power of attorney, but is wider in its meaning. I therefore ask Christine Grahame to withdraw the amendments.

Christine Grahame: I will stick with the amendment—it is similar to my amendment that replaced "for" with "in respect of". It makes the status of the parties clearer. A legal representative can be somebody who is just nominated by someone to speak for them, as happens in other forms of tribunals. The "or other" would leave it open to other appointed parties, but stresses that it would generally be solicitors or attorneys, who can take affidavits.

The Convener: The question is, that amendment 150 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)

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)
Michael Matheson (Central Scotland) (SNP)
Euan Robson (Roxburgh and Berwickshire) (LD)

ABSTENTIONS

Roseanna Cunningham (Perth) (SNP)

The Convener: The result of the division is: For 2, Against 7, Abstentions 1.

Amendment 150 disagreed to.

Section 19, as amended, agreed to.

Schedule 6 agreed to.

Section 20—Manner of dealing with application under section 19

The Convener: We move on to section 20. I call amendment 46, in the name of the minister.

Angus MacKay: Amendment 46 is a substantial amendment, which deletes section 20 from the bill and substitutes a new one.

Section 20 specifies how the Lands Tribunal will deal with cases that are referred to it under section 19, which gives a superior the opportunity, as we have discussed, to try to save a burden by applying to the Lands Tribunal.

When the Subordinate Legislation Committee examined the bill, it was not entirely happy with the way in which section 20 had been drafted. The Executive has reconsidered the section and agreed that it should be reframed. Our general approach for cases that go to the Lands Tribunal under those provisions is that they should be treated in broadly the same way as cases under section 1 of the Conveyancing and Feudal Reform (Scotland) Act 1970. Members may not be entirely familiar with that act—I was not—but they will be relieved to know that amendment 46 removes the need for them to look it up quickly.

10:00

The original section 20 included a cross-reference to the 1970 act. The new section has been redrafted as a stand-alone provision. The policy remains that cases should be dealt with in broadly the same way as those heard under the 1970 act. The new section sets out who should receive notification of an application from the tribunal and who has the right to be heard by the tribunal. It also provides that Scottish Ministers may make specific rules, as I mentioned in the previous debate, in relation to section 19 cases, in the same way as they can for other Lands Tribunal business.

I move amendment 46.

Amendment 46 agreed to.

Section 20, as amended, agreed to.

Section 21 agreed to.

Section 22—Reallotment of real burden affecting facility of benefit to other land etc

The Convener: I call the minister to speak to and move amendment 47, in the name of Mr Jim Wallace, which is grouped with amendment 48, also in the name of Mr Jim Wallace.

Angus MacKay: Amendment 47 corrects a typing error in the bill as introduced.

The section of the bill in which—

The Convener: Stop there. You said that it corrects a typing error?

Angus MacKay: Amendment 47 does.

Gordon Jackson: We will agree it.

Angus MacKay: That was the equivalent of coming out with one's hands up there.

The Convener: What about amendment 48?

Angus MacKay: The section of the bill in which amendment 48 appears is the section that deals with common facilities burdens. The amendment makes it clear that boundary walls may constitute a common facility. The amendment attempts to respond to a point that was raised with us during consultation on the bill.

I move amendment 47.

Amendment 47 agreed to.

Amendment 48 moved—[Angus MacKay]—and agreed to.

Section 22, as amended, agreed to.

Sections 23 and 24 agreed to.

Section 25—Conservation bodies

The Convener: I call amendment 131, in the name of Mr Brian Monteith, which is grouped with amendment 49, in the name of Mr Jim Wallace, and amendment 132, also in the name of Mr Brian Monteith.

Mr Monteith: The purpose of amendment 131 is to explore the possibility of creating conservation bodies to represent former vassals, to enable them to enforce burdens which were previously enforceable by the superior and in which they have an interest, to defend what they see as their rights.

To give an example, there may be a group of tenements in Morningside that share the same burdens, which limit what can be done and which

preserve the amenity of the back gardens. The amendment would allow the former vassals, who have the same burdens—that is the important point—to come together to form a conservation body to protect the common amenity. That is what amendments 131 and 132 seek to achieve.

That would mean that there would be a flourishing of conservation bodies, led by people who want to protect their right to preserve the amenity, the design and charm, of a particular group of properties, which is no bad thing. Given the time limit on the debate, I will leave it at that.

I move amendment 131.

Angus MacKay: The three amendments to section 25 all deal with conservation bodies and conservation burdens. Scottish ministers will be able to prescribe bodies as conservation bodies, which will be able to preserve burdens that protect or preserve the architectural, historical or other special features of land.

Amendment 49 widens the definition of those bodies that may be prescribed as conservation bodies. It is important that that definition be wide enough to include all bodies that we would want to include for that purpose. The definition in the bill as it stands is limited to bodies whose object is to preserve or protect architectural, historical or other special characteristics of land. However, not all bodies can properly be described as having objects. Some are more correctly described as having functions. Amendment 49 widens the definition to include bodies that have similar functions. That means, for example, that local authorities will be able to be conservation bodies.

The purpose of amendments 131 and 132, in the name of Mr Brian Monteith, appears, as Mr Monteith has said, to be to allow a body of local owners to form themselves into a body that could be prescribed by Scottish ministers as a conservation body. Brian Monteith has made it clear what he has in mind. He gave the example of a local residents' association, specifically one in my constituency, or an amenity group.

I can see the attraction in the idea. Although conservation burdens can be preserved only in the public interest, it may be the case that people who live close to them have the greatest interest in ensuring that they are adhered to and would certainly be best placed to keep an eye out for any breach of the burden—what might best be described as a conservation watch. However, I am not sure that there is anything in the bill as it stands that would prevent that from happening.

The only note of caution that it is worth sounding is that a conservation body can preserve a burden only if it holds the superiority. So if a group of local owners owns or can acquire the superiority of an area, there is nothing to stop them trying to constitute themselves in such a way as to become a body that could be prescribed by Scottish ministers as a conservation body. In the light of that, I hope that Brian Monteith will be willing to withdraw his amendment.

Christine Grahame: Is there something in the forthcoming land reform legislation to do with the enforcement of neighbourhood rights which might be compatible with what Brian Monteith is getting at? I am trying to recall where I read that.

Angus MacKay: I am advised that there will be something in the forthcoming title conditions bill.

Christine Grahame: So there is something that will deal with that.

Angus MacKay: Yes.

Mr Monteith: I am willing to withdraw the amendment. I have made my point and will explore the matter further. I will write to the minister. It seems to me that the fact that it is up to Scottish ministers to determine which bodies can become conservation bodies provides some protection against what the minister was suggesting might be a problem.

Amendment 131, by agreement, withdrawn.

Amendment 49 moved—[Angus MacKay]—and agreed to.

Amendment 132 not moved.

The Convener: The question is, that section 25 be agreed to. Are we all agreed?

Angus MacKay: Convener, may I take this opportunity to put something on record in relation to section 25?

The Convener: Of course.

Angus MacKay: We are considering making a small change to section 25 at stage 3. It is to be expected that some superiors who at present can enforce burdens that could be classified as conservation burdens will not be likely to become conservation bodies. For example, the laird of a feudal village will not become a conservation body, but may well hold burdens over the village which protect its architectural unity. The superior could pass the superiority on to a body such as the National Trust for Scotland. However, he or she may not want to do so, because they want to keep the superiority for the moment, perhaps to enable them to collect compensatory payment for the abolition of feuduty.

We are therefore considering whether there would be advantage in allowing such superiors to pass on the right to enforce a burden to a body that will become a conservation body. We have not yet reached a firm view on the matter, but have written to a number of potential conservation

bodies to ask whether they would find that helpful. Depending on their response, we may want to return to the matter at stage 3.

Section 25, as amended, agreed to.

Section 26—Notice preserving right to enforce conservation burden

Amendment 50 moved—[Angus MacKay]—and agreed to.

The Convener: Amendment 51, in the name of Mr Jim Wallace, is grouped with amendments 52, 53, 54, 55 and 56, also in the name of Mr Jim Wallace.

Angus MacKay: Amendments 51 and 52 remove the qualification that to qualify as a conservation burden, a burden must have been created in the public interest, while ensuring that a burden that is preserved for the future as a conservation burden is in the public interest.

The purpose of allowing burdens to be saved as conservation burdens is to preserve architectural, historical or other special characteristics of land which might otherwise be lost. That is a new and imaginative way of preserving valuable aspects of our heritage. However, the important thing is the purpose of a conservation burden for the future, not its past history.

The bill as drafted requires that a burden must have been created for the benefit of the public at the time of its creation, which could be difficult to prove. It would merely put an obstacle in the way of the current public interest of having the burden saved. Amendment 52 removes the qualification that for it to be saved as a conservation burden, a burden must have been created in the public interest. The removal of that test will make it easier to save a conservation burden. Amendment 51 makes it clear, however, that for the future, conservation burdens are to be enforced in the public interest.

Amendments 53, 54, 55 and 56 are highly technical and simply tidy up the drafting of the bill in schedule 7 to clarify that where Scottish ministers or conservation bodies serve notices to save conservation burdens, Scottish ministers or the conservation bodies must sign the relevant documents, not their agents.

I move amendment 51.

Amendment 51 agreed to.

Amendment 52 moved—[Angus MacKay]—and agreed to.

Section 26, as amended, agreed to.

Amendments 53 to 56 moved—[Angus MacKay]—and agreed to.

Schedule 7, as amended, agreed to.

Section 27—Enforcement of conservation burden

Amendment 57 moved—[Angus MacKay]—and agreed to.

Section 27, as amended, agreed to.

Sections 28 to 31 agreed to.

After section 31

The Convener: I call amendment 133, in the name of Mr Brian Monteith. I confess to being fascinated by this amendment. I look forward to hearing Mr Monteith talk about moral burdens.

Mr Monteith: The purpose of this amendment is to explore whether the minister would consider maintaining existing burdens, notably those used by superiors such as the Church of Scotland, to ensure that churches, church buildings, manses and so on are not used for purposes after their sale to which the Church might have objected.

It is quite common to find that burdens expressly make gambling, the consumption of alcohol and prostitution impossible for the subsequent purchaser. As the bill seeks to preserve a number of other burdens such as conservation burdens, it strikes me that it might be advisable, to protect the amenity of such superiors, to preserve what, for the sake of argument, have been called moral burdens. That could be done either through this amendment, or by amending conservation burdens at a later stage to include a similar classification. The amendment seeks to explore whether the minister will expand the retention of some burdens to include what might be called moral burdens.

I move amendment 133.

The Convener: Minister, what do you have to say on morality? [*Laughter.*]

Angus MacKay: The general policy of the bill is that a former superior should have the right to preserve a feudal burden only in circumstances where the burden affects land neighbouring, or in the close vicinity of, that of the superior. The burden is intended to protect the amenity of the superior's property. The thrust of the amendment is to give the superior the right to enforce a burden that prohibits the use of a building or premises for gambling, prostitution or the sale of alcohol irrespective of where the affected property lies in relation to the superior's own property. I understand the point that Brian Monteith is making, particularly in relation to the Church of Scotland and similar organisations. However, I fear that to concede the amendment would be to go against the general policy of the bill and might

also have implications for its legislative competence.

10:15

In any event, I do not believe that it is necessary to regulate the activities to which the amendment refers by saving feudal burdens as non-feudal burdens. All those activities are heavily regulated already, and one is illegal. I am sure that members will be able to draw their own conclusions about that. Although I appreciate the desire to control the activities mentioned, which might have a serious detrimental effect on the amenity of a particular property or neighbourhood, I am not willing to concede that former feudal superiors should continue to have the right to enforce burdens in, perhaps, an indiscriminate way, when there is no connection with their property. I invite the member to withdraw his amendment.

Gordon Jackson: Prostitution is a separate matter, because it is illegal. However, there must at the moment be buildings on which there is a prohibition because they were owned by the Kirk 100 years ago. I do not know the answer to this question, but my suspicion is that people get such prohibitions lifted by going to the Lands Tribunal and that the burdens are largely unenforceable. I am asking for information on that.

Angus MacKay: You may have stumped us.

Gordon Jackson: I was wondering whether burdens are no longer effective if the superior has long since left the area that they are supposed to protect. I do not have the technical knowledge to answer that question.

Angus MacKay: If Gordon keeps speaking, advice will arrive.

The Convener: I am aware of former churches that have been turned into clubs or licensed premises; clearly, it happens. Scott Barrie and Christine Grahame were having a vigorous conversation behind the microphone. They may want to share their comments with the rest of us while the minister is conferring with his advisers.

Scott Barrie (Dunfermline West) (Lab): It is all to do with Christine Grahame's pigs. However, is it not the case that when former church premises have been turned into licensed premises, that has happened because waivers have been granted?

The Convener: I have never been involved in the process of changing the restrictions on premises of that kind, so I do not know. This is quite a technical matter. However, Brian Monteith may have further information.

Mr Monteith: Examples close by are Preservation Hall and The Hub, which is just across the road. Those two buildings were quite important churches in their time, but the burdens have since been lifted. Clearly, that can be done. However, when a church or manse has been sold only recently, there may be a wish to preserve a burden for a while. Obviously, when a church has been vacant for a long time, as so many churches have been, people will seek to overturn the burdens because they see no point in maintaining them.

Christine Grahame: I have a serious point, which has nothing to do with my burdens in pigs. Under the circumstances that have been described, people need to apply for a change of use. I had to apply for a change of use for my parliamentary office, which was formerly a shop. In the case of sensitive buildings, that process is quite rigorous. I understand that Brian Monteith's concerns are covered by existing legislation and statutory regulations.

Angus MacKay: If the premises were to be used for gambling or the sale of alcohol, there would have to be an application for change of use, which would be considered by the appropriate council committees. Relevant institutions would have an opportunity to raise concerns at that stage, although they would not have the right to impose a burden. The advice that I have received is that currently the Church of Scotland, like other institutions, would have to demonstrate some interest in the property in question by virtue of proximity to its own property.

Maureen Macmillan (Highlands and Islands) (Lab): I live in a former manse. We were not forbidden to run a gambling house and so on, but we were forbidden to call the house a manse. However, that made no difference, as everyone in the area calls it the old manse anyway.

Gordon Jackson: What about prostitution?

Maureen Macmillan: Absolutely not.

Mr Monteith: I ask leave to withdraw the amendment.

Amendment 133, by agreement, withdrawn.

Before section 32

The Convener: We have now reached the point at which I said I would consider the manuscript amendment that has been lodged by Brian Monteith. I think that we have made sufficient progress to allow us to take that. I will adjourn the meeting to allow members to examine the amendment and discuss it with one another. We will reconvene in five minutes.

10:20

Meeting adjourned.

10:25

On resuming—

The Convener: I call the meeting to order and ask Brian Monteith to move manuscript amendment 161.

Mr Monteith: It is my understanding that under the European convention on human rights the state has to ensure that compensation is paid when assets are taken away from individuals. In bringing forward this amendment I am seeking, first, to find out what the minister feels about compensation, and secondly, to show how compensation might be achieved for those whose superiority could be described as an asset.

The process is set out in the amendment. Subsection (3) states:

"Where a notice under subsection (1) has been registered, a superior may, after the appointed day, apply to the Lands Tribunal for compensation for the loss of those feudal rights."

Those rights must relate to the interest in land, and their exercise must have been

"capable of producing a substantial financial or other real benefit to the superior".

The superior must "set out the title",

"describe, sufficiently to enable identification by reference to the Ordnance Map, the land"

in question and set out the nature of the rights and whether the benefit from those was financial or otherwise. They must also provide a best estimate of the amount that was capable of being obtained.

The Lands Tribunal would weigh up such a compensation claim and decide whether to pay compensation from a compensation fund that the Scottish Executive would have to finance. The amendment suggests that the Lands Tribunal should be able to refuse vexatious or trivial claims. To be consistent with my previous arguments, I have stipulated a right of appeal to the Court of Session. The minister may want to comment on that separately.

The main purpose of the amendment is to explore a methodology that might allow compensation for the loss of assets of value resulting from the abolition of feudal tenure to those superiors who can show that, prior to the appointed day, they obtained a real benefit from their rights.

I move manuscript amendment 161, to insert before section 32,

Compensation for loss of feudal rights

(1) Where, before the appointed day—

(a) a superior had feudal rights in relation to a *dominium utile* interest in land; and

(b) the exercise of those rights was capable of producing financial or other real benefit to that superior,

the superior may, before that day, reserve the right to claim compensation by executing and registering with the Lands Tribunal a notice in such form as may be prescribed by Scottish Ministers in regulations.

(2) A notice under subsection (1) shall—

(a) set out the title of the superior;

(b) describe, sufficiently to enable identification by reference to the Ordnance Map, the land the *dominium utile* of which in relation to which the superior has rights;

(c) set out the nature of those rights and whether the benefit capable of being obtained by the exercise of those rights is a financial or other benefit;

(d) set out, if the benefit is financial, the superior's best estimate of the amount capable of being obtained and, if not, a description of the nature of the benefit capable of being obtained and, where possible, an estimate of the equivalent financial value of the benefit; and

(e) state that the superior reserves the right to claim compensation in accordance with this section.

(3) Where a notice under subsection (1) has been registered, a superior may, after the appointed day, apply to the Lands Tribunal for compensation for the loss of those feudal rights.

(4) As soon as possible after the appointed day, the Lands Tribunal shall, on being satisfied that—

(a) the superior had feudal rights before the appointed day;

(b) the feudal rights ceased to exist on the appointed day; and

(c) the feudal rights were capable of producing a substantial financial or other real benefit to the superior;

pay such amount of compensation to the superior as it thinks appropriate in all the circumstances.

(5) The Lands Tribunal may refuse a claim for compensation under this section if it considers that the claim is trivial or vexatious.

(6) The Lands Tribunal shall establish a compensation fund from which payments under this section shall be made; and Scottish Ministers shall from time to time make such payments as are necessary into that fund.

(7) A decision of the Lands Tribunal under this section may be appealed to the Court of Session.

Angus MacKay: The direct effect of the amendment, if accepted, would be that feudal superiors would be compensated for the loss of feudal rights directly from the public purse. I hope that committee members will agree that that would be wholly unacceptable and unnecessary.

As mentioned in the discussion on amendments relating to section 3, the bill does not provide a general scheme of compensation. However, it provides for the payment to the superior by the vassal of full compensation for the loss of the right to collect feuduty, which is the most obvious financial loss to superiors resulting from the abolition of the feudal system of land tenure.

Sections 17, 18 and 19 of the bill also provide a scheme under which a superior has the opportunity to preserve certain types of real burdens as non-feudal burdens, where he or she has a genuine interest in preserving the amenity of neighbouring property. Superiors will also have the right to claim compensation in cases where a feudal burden that reserved development value is extinguished on abolition.

10:30

The bill does not provide compensation for the loss of the right to demand payment from vassals for waivers of feuing conditions in which the superior's only interest is as a means of deriving wholly unearned income. The bill also does not provide compensation for the loss of the bare superiority interest, because it has no value once it is stripped of feuduty and the right to enforce feudal burdens. Although the bill breaks the link between baronies and particular plots of land, the value of a barony is in the title and, consequently, no compensation is required in those circumstances.

The reform of the feudal system of land tenure is clearly in the public interest. I firmly believe that the bill provides a proper framework for compensation, where that is justifiable, or allows a feudal superior to preserve rights when he or she has a genuine interest in doing so. The principle of the argument for public compensation for the loss of feudal rights is not sustainable. Those are private rights, the loss of which should not be paid for by the public purse. I ask the member to withdraw his amendment.

Pauline McNeill: I oppose the amendment for several reasons. One of the things that the public sees as a positive aspect of the bill—we can lose sight of this as we plough through it line by line—is that it addresses the potential of the superior to hold back reasonable development. There have been several cases where the superior has charged huge amounts of money for an extension to a property, for example. It is not always the case that the superior has a direct financial interest, because if it can be shown that the superior has not enforced the burden on other properties in the area, the superior may lose the right to enforce the burden and would not be compensated financially. Furthermore, compensation need not be paid if that is shown to be in the public interest.

Gordon Jackson: It is worth asking where the value in feudal rights lies. Brian Monteith has not specified that. Leaving aside development costs, which is a separate issue, there are only two aspects of value. One is the payment of feuduty, which is being compensated for, and the other is the granting of waivers. The only thing for which Brian's amendment could get money is the loss of the revenue from granting waivers. I can see no moral argument in favour of that.

The burdens were not imposed as a source of revenue; they were imposed as a matter of principle. People did not want their ground used as a pub, for bleaching linen, for keeping pigs or whatever. People wished to stop certain things at a certain time in history. Now the superiors are saying that they do not care about the principle, they just want money for giving it up. If the superiors cared about the principle, they would seek to keep the burden in place—they can do that.

There is no good argument for a superior to be paid out of the public purse in return for giving up a burden that was established as a matter of principle, but about which they no longer care. That is not appropriate and, therefore, I too oppose the amendment. The bill is right not to compensate for the loss of the right to grant waivers. There is no financial value other than the feuduties that have already been dealt with.

Christine Grahame: I endorse Gordon Jackson's and Pauline McNeill's comments. The amendment is retrogressive and goes against the spirit and principles of the bill. It will result in a cost to the public, not just because compensation would have to come out of the public purse, but because of the applications to the Lands Tribunal. There is already sufficient protection for feudal superiors against real losses. I do not support the amendment.

Mr Monteith: Gordon Jackson is right to raise the issue of what is being compensated, which is the granting of the waiver. However, it is not inconsistent for someone to sell their waiver, even though they do not want to give up the principle. They might want to adhere to the principle, but feel that they deserve compensation for putting up with allowing the change to go ahead. The potential compensation for giving up the principle is what is being lost.

I understand the arguments of the minister and of committee members, but I want to be clear that the bill is watertight in terms of the European convention on human rights, even though it does not provide a general compensation scheme. The minister did not cover that. If the minister is advised that the bill is ECHR compatible, I am willing to withdraw the amendment.

Angus MacKay: We assessed the bill for compatibility with the European convention on human rights and we think that it is compatible. Superiors can save certain rights and claim compensation, or can preserve a claim to compensation for other rights. At the introduction of the bill, both the Deputy First Minister and the

Presiding Officer certified that, in their view, the bill was within the legislative competence.

Amendment 161, by agreement, withdrawn.

Section 32—Notice reserving right to claim compensation where land subject to development value burden

Amendment 58 moved—[Angus MacKay]—and agreed to.

The Convener: I call amendment 59, which is grouped with amendments 60, 61 and 62.

Angus MacKay: When we were considering conservation burdens, we discussed the difficulties of establishing why something was done in the past. A similar point arises in relation to amendments 59 and 61.

The section to which the amendments relate deals with development value burdens. Those are burdens where the superior has gifted or sold property to a vassal at a reduced price, but placed a restriction on the use of the property. The superior may have said that the vassal could have the land, but that it could be used only as a playing field or for the construction of a village hall. The bill will mean that some burdens of that type will fall and therefore allows the superior to be compensated if he or she has taken the necessary administrative steps.

As the bill stands, if a superior, or his predecessor, had given the land away, he would have to prove that that was because he had imposed the burden. In other words, the superior would have to prove a link between the lack of payment and the burden. That might be very difficult, as the transaction may have taken place many years ago. The amendment simply removes that link.

I hope that the committee will agree that that is a sensible change and that it will accept the amendments.

The other two amendments in the group are technical. When we introduced the bill, we omitted from it a provision about property that was secured by heritable security that was included in the Scottish Law Commission's draft bill. Our concern was that the existence of a standard security might not enable a former superior to recover any compensation, as the security relied on the terms of an extinguished burden. The change at introduction was intended to remove any uncertainties that would otherwise have arisen. At that time, we should have omitted the two provisions that the amendments propose to delete, because they were consequential on that change. The current position is that the amendments are technical changes designed to reflect the bill as it stands.

I move amendment 59.

Euan Robson (Roxburgh and Berwickshire) (LD): I would like the minister to clarify amendment 60. Would that amendment remove paragraph (f), leaving the word "and"?

Angus MacKay: Yes.

Amendment 59 agreed to.

Amendment 60 moved—[Angus MacKay]—and agreed to.

The Convener: Amendment 151 in the name of Christine Grahame was already debated with amendment 150.

Christine Grahame: Where are we?

The Convener: That is the amendment on which you were well gubbed.

Christine Grahame: As I will probably get gubbed again, I will not move the amendment.

Amendment 151 not moved.

Section 32, as amended, agreed to.

Schedule 8

FORM OF NOTICE RESERVING RIGHT TO COMPENSATION IN RESPECT OF EXTINCTION OF DEVELOPMENT VALUE BURDEN

Amendments 61 and 62 moved—[Angus MacKay]—and agreed to.

Schedule 8, as amended, agreed to.

Section 33—Limited transmissibility of right to claim compensation

The Convener: I call amendment 134, in the name of Brian Monteith.

Mr Monteith: This is a simple amendment. It reverses the last line to say that the right to claim compensation may be assigned rather than may not be assigned. I wanted to explore the ability of someone who has the right to claim compensation to assign those rights. If it is something of value, surely the person who has the right to compensation should be able to assign the right in the same way that they can assign the rights to many other items of value such as property, a car or a house.

I move amendment 134.

Angus MacKay: It is an interesting amendment. In submitting its report on the abolition of the feudal system, the Scottish Law Commission made a specific recommendation on the question. It was anxious that a trade should not develop in reserved rights to claim compensation. The Law Commission was conscious of the way in which speculators have, in the past, exploited the ways in which property rights are held; it wanted to

avoid a future Raider of the Lost Titles from taking advantage of the provisions under the bill.

The background to this is a situation where, in days past, a benevolent feudal superior gave or sold for little money a piece of the land to the community for a useful purpose. The superior might have sold the land for a playing field or for building a village hall, as I suggested in an earlier example. The superior would have sold the land at a low price—or given it away—because the community could not have afforded it at its true value. However, knowing that the value of the land for general purposes would be much higher, the superior placed a burden on the land that it should only be used for a specific purpose.

On the abolition of the feudal system, the superior would no longer be able to enforce the burden. The community would be able to knock down the hall and sell off the land to a building developer at a high price. The bill recognises that that would not be fair. There is a scheme to allow the former superior to get compensation. However, the superior will not get that compensation unless there is a breach of the formerly enforceable restriction on use. The bill provides that the superior may reserve a right to claim compensation by registering a notice in the property registers.

The scenario that the Scottish Law Commission foresaw was that a speculator could search the notices registered and offer to buy the reserved rights to compensation. The former superior might regard that as attractive—it would be cash in hand. At that point, it might not be possible to say whether the superior would ever receive compensation, because the terms of the former burden might never be breached. However, if they were to be breached, the speculator might enjoy a profit.

The Scottish Law Commission did not regard that as a desirable outcome of the abolition of the feudal system and, on balance, I agree with that point of view. However, the convener may remember that we raised this matter in our policy memorandum because we recognised that there was room for a different view. The committee did not respond on that particular point. However, I am interested to hear the arguments that are put forward today.

Christine Grahame: I am intrigued by amendment 134. When a debt or a burden is assigned, one is put in the shoes of the cedent—I think that is what the original party is called—and is therefore in no better a position than the superior would have been. I hear what you are saying about a trade in reserved rights, but that would not be triggered until the circumstances that you have described arose. So really they are in exactly the same position as the original party. I am attracted to the question, why not? Why is there not the right to assign this potential debt, as there is with other debts?

10:45

Gordon Jackson: I share the fascination with this matter.

The Convener: Anorak.

Gordon Jackson: This matter is one which I confess to not having given much thought. My instinct is to also ask Christine's question, why not? I have heard the argument why not, but if people want to trade in this, who is damaged by it? That is my initial response to everything. If people want to trade in things, we restrain them if people are hurt by that trade, but who is damaged by this trading?

At the end of the day, you trade your possible right to compensation. You get your money and you walk away. The guy who buys the right to compensation has speculated. Twenty years may pass and he has wasted his money, or in 10 years something else may happen and he has made a few quid. Who gets hurt by that? It is just normal trading. It is like trading in futures, in a funny sort of way. Why is it a bad thing? Why should we restrain people from doing what they want with their rights?

I accept that when compensation comes from the public purse and development is prevented, there are good reasons for stopping people entering private bargains, but I cannot see why we should prevent this trade if people want to do it. I am not entirely sure about this. It is a funny one. Like Christine, I am intrigued by this issue. I wish that I had thought about it before.

Angus MacKay: I will close my contribution by saying that I would be interested to hear the views of the committee, because at this point I do not have a firm view against this amendment. I appreciate the point that a reserved claim to compensation is a form of property like any other, and therefore the suggestion that it should be able to be bought and sold freely is one that has some strength.

Our concern was that we did not want to dismiss the prospect that was raised by the Scottish Law Commission that these claims might become subject to speculation in a way which might be thought to be unreasonable or improper, particularly given the many abuses of land titles by speculators in the past. We would not want to open the door to more of those abuses in future, but as Gordon Jackson and Christine Grahame said, it is difficult to see how such a circumstance might arise.

I am minded to ask Brian Monteith to withdraw

his amendment, with a view to the Executive considering the matter further and looking at the possibility of bringing something forward at stage 3. We could discuss some of the issues that have been raised in the intervening period to try to refine the points that members have made.

Gordon Jackson: I support that proposal. If we change the approach, we would not do it with this amendment. The whole structure of the section would be changed. A right to claim compensation will only be transmissible by 33(a), (b) or (c) because you are going to put in "may be assigned". If you were going to allow it to be assigned, you would just say that it was transmissible, or something like that. If it were agreed in principle that Brian Monteith was right, as he might be, the change would not be made with this amendment; the whole section would be changed.

Mr Monteith: Having heard the arguments, and picked myself up off the floor—perhaps for once I have some sympathy with the minister—I am happy to withdraw my amendment. I share the minister's concern with regard to the problems that there have been with traders of lost titles, but as Gordon Jackson pointed out, it is the speculator who is taking the risk. As Christine Grahame said, the difficulty with the compensation would remain with whoever has the claim on the compensation, assigned or not.

I ask the committee to let me withdraw my amendment.

Amendment 134, by agreement, withdrawn.

Section 33 agreed to.

Section 34—Claiming compensation

Amendments 63 and 64 moved—[Angus MacKay]—and agreed to.

Section 34, as amended, agreed to.

Section 35—Service under section 34(3)

Amendments 65, 66 and 67 moved—[Angus MacKay]—and agreed to.

Section 35, as amended, agreed to.

After schedule 8

Amendment 68 moved—[Angus MacKay]—and agreed to.

Section 36—Amount of compensation

The Convener: I call amendment 152, in the name of Christine Grahame, which is grouped with amendment 153.

Christine Grahame: The purpose of amendment 152 is to clarify that in assessing the amount of compensation, account should be taken of any formula in the deed covering the development value burden for calculating the mark-up in the original sale price in the event of the additional payment being triggered, which we have just discussed. That is all that the amendment is taking account of. If that burden is in the deed, it should be part of the considerations. It is only fair and equitable that such burdens should continue to be enforceable, in accordance with their terms, having been entered into by the parties to the original transaction.

Amendment 153, which I will press more, seeks to leave out

"whether or not he has completed title"

in section 37(1). As the minister is aware, it is difficult to know who has title to property, because that information is not always registered. As I understand it, title might be completed at the settlement of the disposition, but that might not be recorded. In fact, some people never record their dispositions if they want to keep their property secret.

This amendment should enable the superior to deal with the last recorded owner of the property, whoever that may be, because there are difficulties for a superior in serving notice and so on if there has been a transaction that he is unaware of. Indeed, there may even have been delivery of a disposition, and it may not be recorded. For clarity,

"whether or not he has completed title"

should be removed. The section would then read

"development value burden; and if more than one person comes . . . the owner is the person who has most recently acquired such right."

That would make it clear that the owner is the last-named person in the property register.

I move amendment 152.

Angus MacKay: It is my understanding that if we were to accept amendment 152, it may become possible for a former superior to have a double claim in respect of the development value of land. The intention behind the subsection as introduced was to ensure that a superior should not be able to claim compensation by virtue of the reserved right if, for example, the reserved development value could be recovered by virtue of a contractual claim. It is not clear whether the amendment is aimed at allowing double counting or whether that would simply be an unfortunate side effect.

The intention behind amendment 152 seems to be to provide that, in assessing the amount of compensation, account should be taken of any formula in the deed creating the development

value burden. It seems clear that that is intended to lead to a larger compensatory payment becoming due to the former superior than the bill currently allows. The basic principle behind the current provisions for calculating the amount of compensation due to a former superior is that the compensation should be the lesser of the former superior's loss or the former vassal's gain.

A claim for development value compensation is designed to enable the former superior to recover a loss suffered in the past because he or she sold land at a low price or gave land away. They may not have done so but for the restrictions placed on the land by feudal burdens. If those burdens are extinguished, the former superior may justifiably consider that they lost out at the time of the transfer of the land.

Under the current law, a vassal may apply to the Lands Tribunal for the variation or discharge of a burden. If they succeed, the Lands Tribunal may award compensation to the superior. It is considered that it would be both fair and reasonable to continue to use the existing basis for the assessment of the superior's loss in the future. If the burden were to have been discharged prior to the appointed day under the current law, that is all that the superior would be entitled to receive.

The Lands Tribunal may award compensation under two heads. First, it may compensate the superior for any substantial loss or disadvantage that the superior suffers as the owner of the land. It is not considered that that would be an appropriate basis for the assessment of a claim for compensation for the breach of a development value burden, because if the superior could establish substantial loss or disadvantage to his land, he would be able to save the burden under section 19.

Secondly, the Lands Tribunal may award compensation to make up for any effect that the obligation produced, at the time when it was imposed, in reducing the price paid. This is the right approach, and section 36(2) of the bill currently caps the compensation at this level. If, however, the value to the former vassal of the removal of the burden would have been a lesser sum, the superior should only be entitled to this lesser sum.

It is not clear how the amendment is intended to relate to the cap on compensation that is currently set out in subsection 36(2). We assume that the purpose of the amendment is to enable former superiors to claim increased compensation, but as the amendment does not affect the ceiling in subsection (2), this would be of limited effect. If the principle behind the amendment were to be accepted, it would almost certainly be necessary to remove the cap on compensation.

If that were necessary, a further, and unfortunate, consequence of the amendment would be to place some vassals in a worse position than they were in before abolition of the feudal system. Before the burden is extinguished, the vassal would be entitled to apply to the Lands Tribunal for a discharge of the burden before acting in breach of its terms. He or she would only have to pay compensation assessed on the basis of the current law; in other words, one of the two tests already set out. They would therefore only have to pay compensation assessed on the terms set out in the burden itself if that brought about the same result.

If the compensation assessed in terms of the burden were to bring out a higher sum, the Lands Tribunal would not at present be able to take account of that in assessing the compensation that is due to a superior. Following feudal abolition, the burden will no longer exist. The former vassal will no longer be able to apply to the Lands Tribunal. If they wish to use the land in a way which would have breached the burden—which they would be free to do—they may have to pay a greater sum to the former superior than they would have had to pay before feudal abolition. That would not be acceptable, so I invite Christine Grahame to withdraw amendment 152.

Amendment 153 would also make life easier for the superior. The intention of the amendment appears to be to require the person who has a registered title to pay the compensation, regardless of whether or not that person carried out the act that gave rise to the payment becoming due. The phrase

"the person who has right to land"

is used to describe someone who has not yet completed title to that land. In other words, a seller who has completed a sale, received the price, delivered the conveyance and allowed the purchaser to take entry to the land, has ceased to be a person who has right to the land. They will, however, until the purchaser registers the conveyance, remain the person shown on the registers as having title to the land. If the purchaser, before registering title, then acts in a manner that would have breached the burden, the right to claim compensation arises. It appears that the intention of the amendment is to make the innocent seller liable for the actions of the purchaser.

It would be difficult to envisage how the seller could protect himself against the possibility that the future actions of the purchaser could result in his having to pay a significant sum of money to the former superior. They will have no control over the actions of the purchaser. Purchasers will not want to hand over their money to sellers and leave the registration of the title in their name. Certainly, the

purchaser's bank would not want that to happen. It should be kept in mind that even if it is thought that a purchaser may only rarely act in that manner, the potential risk to the seller will exist whenever a property that is the subject of a section 32 notice is sold. That is not appropriate. We do not think that the committee would wish to see that situation, so I invite Christine Grahame not to move that amendment.

Christine Grahame: My position is that I will not continue with these amendments, but I would like to read your detailed answers, consider them and come back to you.

I have a couple of comments to make. I felt that with the first amendment, the parties would know where they were contractually. As things stand, the superior will not know what kind of compensation he might be liable for. Similarly, the vassal might not know what they would have to pay over. I am not saying that the first amendment was binding; it was intended to provide some kind of guidelines, not to favour one or t'other.

11:00

My second comment on section 37 is that there are more problems with it. I hear what the minister is saying, but one can contract in the missives for obligations to transmit and remain contractual, notwithstanding delivery of the disposition. I am not a conveyancer, but I think that that is the case. I was considering the difficulties that can arise in knowing who owns the title, particularly if it is not recorded. I am not arguing on behalf of superiors, but if a title is not recorded, how is the superior or another party to know who is the party that is due, who ought to be notified? It could be difficult to know that.

I hear what the minister says about the seller being in difficulties if the purchaser becomes the owner but has not registered. However, that could be dealt with by clever solicitors, perhaps in missives and so on. Given the minister's detailed answer, I would not insist on these amendments, although I believe that there are still issues to be addressed in section 37.

The Convener: Do you want to withdraw amendment 152?

Christine Grahame: Yes.

The Convener: You will take up some of the issues behind those amendments separately with the minister?

Christine Grahame: Yes.

Amendment 152, by agreement, withdrawn.

Section 36 agreed to.

After section 36

Amendment 69 moved—[Angus MacKay]—and agreed to.

Section 37—The expression "owner" for purposes of sections 34 to 36

Amendment 70 moved—[Angus MacKay]—and agreed to.

Amendment 153 not moved.

Amendment 71 moved—[Angus MacKay]—and agreed to.

Section 37, as amended, agreed to.

Sections 38 to 40 agreed to.

The Convener: At this point we can have our official tea break.

11:02

Meeting adjourned.

11:24

On resuming—

The Convener: I bring the committee to order. That was the longest tea break that the committee will ever have. It was due to the fact that we are making such good progress.

Section 41—Notices and agreements under sections 17 to 19, 26 and 32: extent of Keeper's duty

The Convener: We come to amendment 72, which is in the name of Mr Jim Wallace. It is grouped with amendments 73, 74, 75, 76, 79, 82 and 83, which are also in the name of the minister.

Angus MacKay: This group of amendments relates to the duties imposed on the Keeper of the Registers under the bill and the degree of discretion allowed to the keeper. All deeds presented as part of an application for registration in the Land Register are examined for their legal effect before registration; if necessary, the keeper calls for further information or evidence. The general policy of the bill is that the keeper should not be required to make judgments on matters that cannot be verified from the documentation submitted in connection with an application for registration.

Amendments 73 and 76 relieve the keeper of any requirement to determine whether a burden was enforceable by a superior, either at the time when a notice is registered or immediately before the appointed day of abolition. This is in relation to notices or agreements submitted for registration under sections 17, 18, 19, 26 and 32. It would be virtually impossible for the keeper to make a

judgment on such a matter, since all he or she would have to go on would be the documentation submitted in connection with the application for registration of the notice.

Amendment 74 relates to the facility offered to a superior under section 19, whereby they may apply to the Lands Tribunal for an order that would have the effect of preserving a burden if he or she persuades the tribunal that the loss of the burden would cause substantial loss or disadvantage. After making such an application, the superior may execute and register a notice that will have the effect of preserving the burden until the decision of the tribunal. The amendment provides that the keeper does not have a duty to check whether the relevant notice was executed and registered within the 42-day period specified in section 19. That is again to ensure that the keeper should not be expected to verify information that could not be checked without difficulty and time-wasting effort.

Amendment 72 simply tidies up the drafting of the bill and deletes a reference to agreements drawn up under section 18. Although the keeper is not required under section 41 to determine whether the superior has complied with the pre-registration requirements of section 39, those requirements relate to the registration of notices, but not agreements.

Amendment 75 is simply a consequential amendment following the removal of paragraph (f) from section 32(2). That amendment in turn removed a reference to standard securities in relation to development value burdens.

Amendment 79 relates to the keeper's ability to remove a burden that may be the subject of a notice or agreement that was originally rejected for registration by the keeper but which the former superior is seeking to have registered late under section 43. The amendment ensures that the keeper is prevented from removing the burden while it remains possible that the notice or agreement saving the burden may yet be registered. That will be the case even if the keeper has been ordered by the court or the Lands Tribunal to remove a burden from the register.

Amendment 82 permits the keeper a degree of discretion during the temporary period following the appointed day to be prescribed by Scottish ministers. The keeper will be enabled, but not required, to enter extinguished feudal burdens into the register when processing an application for first registration and will be at liberty to remove extinguished feudal burdens. That is to allow the keeper to deal with applications for first registration of an interest in land during the transitional period without having to make a judgment as to whether a feudal burden had been extinguished or had been validly saved.

Following the temporary period to which I referred in relation to amendment 82, the keeper will be entitled to remove extinguished burdens from the register at his or her discretion, but will not be entitled to do so when the burden in question is the subject of a notice or agreement that is before a court or Lands Tribunal for a decision on its eligibility for registration. Amendment 83 therefore limits the general power of the keeper to remove extinguished feudal burdens at his or her discretion, by making it clear that he or she is prevented from removing a burden that is the subject of a notice or agreement that has been rejected for registration but which the former superior is seeking to have registered late under section 43.

I move amendment 72.

Amendment 72 agreed to.

Amendments 73 to 76 moved—[Angus MacKay]—and agreed to.

Section 41, as amended, agreed to.

Section 42 agreed to.

11:30

Section 43—Circumstances where certain notices may be registered after appointed day

The Convener: Amendment 77, in the name of Mr Jim Wallace, is grouped with amendments 78, 80 and 81, which are also in the name of Mr Jim Wallace.

Angus MacKay: These are technical amendments. Amendment 77 is the first of a series of amendments that relate to the time periods connected to sections 43 and 44. The purpose of the amendments is to make the periods operate in a consistent manner and to provide flexibility. As the bill stands, a notice that the keeper rejects before the appointed day, but which a court subsequently holds to be registrable, may be registered during a five-year period starting on the appointed day. That is a rather inflexible arrangement, and the Executive believes that it would be better for the period to be prescribed by an order that is made by Scottish ministers. Before prescribing the period, we intend to assess the position and progress that has been made in registering notices.

The order would be subject to negative resolution procedures and members would have an opportunity to express their views on the appropriateness of the day that was chosen. For similar reasons, we propose that the period during which the keeper is not obliged to delete extinguished burdens from the Land Register—a period that also stands at five years—should not be specified. Again, the order specifying the date

on which the cut-off should be made would be subject to negative resolution procedure.

The amendments make it clear that, when an appeal relating to a rejected notice is determined prior to the appointed day, the notice may be registered if the determination is more than two months prior to the appointed day. This group of amendments also ensures the consistency of section 43(2) with section 43(1) by adding a reference to the courts, which was omitted on the bill's introduction. The amendments are not controversial and I hope that the committee will be able to accept them.

I move amendment 77.

Amendment 77 agreed to.

Amendment 78 moved—[Angus MacKay]—and agreed to.

Section 43, as amended, agreed to.

Section 44—Duties of Keeper: amendments relating to the extinction of certain real burdens

Amendments 79 to 83 moved—[Angus MacKay]—and agreed to.

The Convener: I call the minister to move amendment 84.

Angus MacKay: I move amendment 84, which secures consistency between section 44(4) and section 43(1).

Amendment 84 agreed to.

Section 44, as amended, agreed to.

Sections 45 to 51 agreed to.

Section 52—Extinction of superior's rights and obligations *qua* superior

The Convener: Amendment 85, in the name of Mr Jim Wallace, is grouped with amendments 86 and 87.

Angus MacKay: These amendments are technical. They 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. They are equivalent to the changes that have been made to section 16. I move amendment 85.

Amendment 85 agreed to.

Amendments 86 and 87 moved—[Angus MacKay]—and agreed to.

Section 52, as amended, agreed to.

Sections 53 to 55 agreed to.

The Convener: We have reached the limit that we planned to reach today. There are only a few sections left for us to consider, although, as I indicated earlier, the most substantive debate might take place next week.

It has been suggested that we should start at 10.00 am rather than 9.30 am next Wednesday. I am not inclined to do that. This committee can do other things in a meeting, and it is clear that the meeting next Wednesday morning will not be concerned solely with stage 2 of the Abolition of Feudal Tenure etc (Scotland) Bill. I intend to move some relatively non-controversial items on to the agenda next week, so that we can get them out of the way and so that they do not clutter up later meetings, when we may need the time.

I am aware that the Parliament will deal with stage 3 of the Adults with Incapacity (Scotland) Bill next Wednesday afternoon. Therefore, it is not my intention to have a full three-hour meeting in the morning. We will try to organise things so that we can bring next week's meeting to a close at around 11.00 am. In those circumstances, we should hold with the 9.30 am start.

I remind everybody that next Wednesday morning's meeting will be held in the Edinburgh Festival Theatre. I hope that that is not a comment on the way in which the committee conducts its business. The theatre is a new building on Nicolson Street, and we are meeting there for reasons of space—not because there is a big public interest, but because someone else needs to use the chamber. Committees need a lot of space for stage 2 consideration—another committee needs the chamber, and we will not be able to meet in any of the other committee rooms.

Pauline McNeill: For the purposes of consistency, we agreed that we would meet here for the whole of our stage 2 consideration of the bill. No one else expressed an interest in using the chamber—we are the only committee that agreed to be here—and most committees do not like to meet here.

The Convener: I appreciate that, but one of the advantages—

Pauline McNeill: I would like to finish, if you do not mind.

The Convener: Pauline, there is no point in arguing about this. Next week we will meet in the Edinburgh Festival Theatre. We have agreed to do so because another committee needs the extra space. If we met here, we would meet for only a very short time; therefore, the suggestion does not seem unreasonable.

Pauline McNeill: I do not think that it is unreasonable, but the committee should have been asked whether we would agree to change the venue, instead of being told that we were moving after having agreed we would meet here.

The Convener: There are more pressing issues for the committee's attention, not least the work load that we are expected to take on. I shall invite the committee to make its views heard on that, but I did not perceive any difficulty in our moving to the Edinburgh Festival Theatre.

Meeting closed at 11:38.

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