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Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 18 January 2011

Session 3

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JUSTICE COMMITTEE
2nd Meeting 2011, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

Claire Baker (Mid Scotland and Fife) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

John Dods (Scottish Law Commission)
Professor George Gretton (Scottish Law Commission)
Andy Wightman

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 4

Scottish Parliament

Justice Committee

Tuesday 18 January 2011

[The Convener *opened the meeting in private at 10:03*]

10:34

Meeting continued in public.

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I start the public part of the meeting by reminding everyone to switch off their mobile phones. There is a full turnout of committee members, thus there are no apologies.

I ask members to make a decision on taking business in private. I invite members to agree that items 5 and 6 should be taken in private today, and that any discussion of the main themes arising from written and oral evidence received on the Long Leases (Scotland) Bill at stage 1 should be taken in private at future meetings. Is that agreed?

Members *indicated agreement.*

Long Leases (Scotland) Bill: Stage 1

10:35

The Convener: We turn to the principal business of the morning, which is the first evidence-taking session on the Long Leases (Scotland) Bill.

I welcome the first panel of witnesses, who are from the Scottish Law Commission: Professor George Gretton, who is a commissioner; and John Dods, who is a project manager.

I invite Professor Gretton to make a short opening statement, as he requested.

Professor George Gretton (Scottish Law Commission): Good morning. I am a professor of law at the University of Edinburgh and was appointed as a commissioner of the Scottish Law Commission in 2006. One of the projects for which I assumed responsibility on my appointment was the long leases project, which, at that stage, was already nearing completion.

My colleague John Dods is the project manager for the property law projects at the commission, and he worked extensively on the long leases project.

I plan to make a few brief opening remarks—that is difficult for a professor, because soundbites normally last exactly 50 minutes. After I have done so, I will be happy to take questions.

The Scottish Law Commission long leases project was a follow-up to the project on the abolition of feudal tenure, the legislation on which the Parliament passed in 2000.

If you have a house on a 999-year lease, that is a feudal relationship in all but name, with the landlord being, in functional terms, a superior and you being, in functional terms, a vassal. Therefore, the reasons for getting rid of the system of feudal tenure are equally applicable to such ultra-long leases.

Ultra-long leases are quasi-feudalism and a sort of toxic waste that is left to future generations. As with feudalism, there is often a complex hierarchy of long lease and sub-long lease—for instance, a 999-year lease and then, under that, a 500-year lease—which gives us something similar to the complex feudal hierarchy. One extra problem with ultra-long leases is that, unlike a feudal right, they eventually come to an end, which causes problems with people who think of themselves as owners eventually being turned out.

The Abolition of Feudal Tenure etc (Scotland) Act 2000 was about feudalism but did one thing in

relation to long leases: it prohibited new leases with a duration of more than 175 years. That was to prevent quasi-feudalism coming in by the back door even more than it already had done through long leases. However, the 2000 act did not tackle the problem of existing ultra-long leases. That is what the bill seeks to address.

The bill that has been introduced to the Parliament follows the commission's draft bill closely. There are three principal changes, which are outlined in the policy memorandum. They concern leases for pipes and cables; leases for which the rent is more than £100; and a particular issue to do with so-called Blairgowrie leases.

John Dods and I are happy to answer questions on any of those three differences between the bill as introduced and the commission's draft bill, on common good or on anything else.

The Convener: Thank you, Professor Gretton. That was useful. We now proceed to questions.

The SLC survey that was carried out in 2000 led the Scottish Government to estimate that there are around 9,000 ultra-long leases eligible for conversion under the bill. Given that 10 years have passed and that everything in life changes, was the Government right not to undertake any further empirical work on that before introducing the bill?

Professor Gretton: I do not have a strong view on that. There will have been some changes over the past 10 years. Some ultra-long leases will simply have been terminated and some will have been converted to ownership by agreement. Other ultra-long leases will have been created. None can have been created since November 2004, when the Abolition of Feudal Tenure etc (Scotland) Act 2000 prohibited the creation of new ultra-long leases, but some new ones were certainly created between 2000 and 2004. The numbers will have changed both up and down, but I do not expect that there will have been a huge change since 2000, so I am not sure that further empirical research was needed. However, I do not have a strong view on that.

I do not know whether John Dods has a different view.

John Dods (Scottish Law Commission): No, I think that that is a fair comment. The starting point for the 9,000 figure was probably the Guthrie committee report in the 1950s. That committee identified by examining every single search sheet that there were probably about 13,000 long leases at that time. Sufficient work has probably been done, both for the Guthrie committee report and by us, so further empirical work might not have been necessary.

The Convener: Is it the case that, if there has been a significant difference in the number of leases, it will have been a net, albeit fairly marginal, reduction?

Professor Gretton: I do not know the answer to that question. As I said, some leases will have disappeared for one reason or another but others will have been created in that four-year period. Some of those new leases were created precisely because the writing was on the wall for feudalism, so people started doing it—for good reasons or bad—in that other way. I do not know the numbers, so I cannot comment on whether there will have been a net reduction, but I would think that the overall figures are unlikely to have changed massively.

The Convener: That is fine. I turn to the issue of common good, which has been the subject of some concerns. I ask Robert Brown to pursue various points under that heading.

Robert Brown (Glasgow) (LD): Good morning, Professor Gretton. The common good issue, which has been raised by a number of people, has focused on Waverley market. First, are there distinct issues in defining common good because of the uncertainty of the registers that are held by various councils and the potential width of the relevant law, which is pretty ancient?

Professor Gretton: You are absolutely right. It can be difficult to know whether a particular property is a common good property of a local authority. As you say, the quality of records varies to some extent from council to council.

Robert Brown: Did the Scottish Law Commission look at that issue during its consideration of long leases?

Professor Gretton: Before I arrived at the commission, I think that the issue was considered, but it is not reflected in the report that we published. I do not think that the term "common good" appears in the report. We did not take it up as a particular issue, but I think that it crossed our collective desks.

Robert Brown: Part of the difficulty is the one that I began with, which is that, without a clear view of what common good might consist of and whether there are significant issues with the use of long leases for what might be common good property, it is difficult to get a view of the significance of the problem, if indeed any exists.

Professor Gretton: Yes. I do not think that anyone knows for sure. However, I think it is unlikely that there are many common good properties that are subject to ultra-long leases. Waverley market might be one. I know that there is disagreement between the City of Edinburgh Council on the one hand and Andy Wightman on

the other as to whether that is common good property. I do not know, so I cannot offer a view. That is one possible candidate, but I am not aware of any others. There could be others, but if there are, we must be talking about a very low number. It is possible that there is none, if the City of Edinburgh Council is right about Waverley market. I should call it by its modern name, but I am going to call it Waverley market. There could be none; there could be one, which is Waverley market; or there could be a tiny handful—the maximum is a handful.

Robert Brown: Do you have any basis for saying that there should be only a small number? That might be the case—I am not disputing the point—but given that we do not have clear evidence of what the common good register is, what is on it, and what the position is throughout Scotland, do we have a basis for saying that the number involved is small? It might be a more significant number for all we know, might it not?

10:45

Professor Gretton: It is a question of probabilities. The number might be more significant, but the probability of that is low; the probability of there being perhaps one or two such properties is considerably higher. I say that because one has not heard of such assertions. Apart from the claim regarding Waverley market, there have been no claims of common good properties that are subject to ultra-long leases, and I would have thought that the publicity surrounding Waverley market would have flushed such things out. It is a question of reasonable probability. There is a vanishingly small possibility that there is a substantial number, so I cannot rule that out, but I think that the number must be pretty small.

Robert Brown: I accept that the number might be small, but in view of the uncertainty on the edge, would it be reasonable to exclude from the scope of the bill ground that is held as common good? It is clear that there are inalienable characteristics in that regard, which we must bear in mind. Is the suggestion practical? Can you envisage difficulties with excluding common good land from the bill altogether?

Professor Gretton: I would have no objection to the exclusion of common good property from the bill. The approach might cause marginal difficulties, because sometimes it is unclear whether a property is common good. Let us suppose that a section in the bill said, “This act does not apply to common good property”. In the case of Waverley market there is a disagreement, so after the bill had received royal assent one would not know who was the legal owner of it. That would be the down side.

However, where there is legislation there are sometimes marginal cases. If agreement cannot be reached, perhaps ultimately the court has to decide. That happens in property law occasionally. If it is uncertain who owns something and there is no agreement between the competing parties, the court will ultimately have to decide. That would apply to Waverley market. Given that we are probably talking about tiny numbers of cases—and possibly not even one case, depending on the position—I do not see that the exclusion of common good property would cause especially big problems. Such a provision would be acceptable.

Robert Brown: I am thinking about who might be parties to such a dispute. There are issues of title and interest to sue in such matters, are there not? Would that restrict the number of people who might have an interest? For example, would an ordinary member of the public be able to aver a common good issue in some court dispute, or would that be struck out by title and interest considerations?

Professor Gretton: In the case of Waverley market, the primary parties would be the City of Edinburgh Council, which is the current owner—perhaps by virtue of common good, which is a funny sort of ownership—and the company that has the long lease, the name of which I cannot remember. Those would be the primary contestants.

Could a member of the public be a party? There is some authority on the question. I think that the Court of Session has held that—I am sorry; I will have to go and check the authorities.

Robert Brown: That would be helpful, because the issue is not unimportant if there is the possibility of an enormous number of people having involvement in such instances.

Professor Gretton: You asked a very good question. I should have anticipated it.

The Convener: In the recesses of my mind there is a recollection of a Lands Tribunal decision not all that long ago, which might be relevant. Is that what you had in mind?

Professor Gretton: I think that the case was about a property on the Clyde. Inverclyde Council comes to mind. That is the first case that I will go and look at for authority on the point.

The Convener: May we impose on you for some unpaid research under that heading?

Professor Gretton: Indeed. Wilson v Inverclyde Council comes to mind as the name of the case, but I will need to check that. To whom should I reply?

The Convener: The clerk.

Robert Brown: There are provisions in the bill for not just ordinary compensation but compensation in exceptional situations that are not otherwise covered. It has been argued that the provisions offer a way round the matter and give people confidence that there is no particular issue. However, am I right in saying that the approach does not entirely tackle the concept of common good, in which there is an inalienability aspect to the public interest that is involved?

Professor Gretton: That is quite a strong argument. The counterargument is that if the local authority receives the ordinary compensatory payment and any additional compensatory payment that might be claimed, the money is equally available for public purposes, just as the land itself would have been. In fact the money is available now, whereas the reversion will not happen until my grandchildren are grown—well, I might have to work that one out, but it will not happen until long into the future. Therefore one could argue that there is no loss to the community. It depends on how one looks at it, because some people will say, "Land is land; it is not the same as money." I agree that there is an argument in relation to what you said, but it is one on which people will differ.

Nigel Don (North East Scotland) (SNP): I will pursue this from a position of ignorance, as we are just getting to the matter, and some things have been coming to me at short notice.

My understanding is that there may be places where common good funds have found their way into what might be defined as a coffer or trust fund. That is understandable. The fund might have leased the land that it owns either to the local authority or possibly to the health board or its predecessor organisation in such a way that there may be long leases—I say "may be", as I have not yet been able to explore the matter. In other words, the trust fund could have set up long leases in favour of a local authority or health board—or possibly other organisations, but let us work with those two for the moment.

Did you consider that possibility as a matter of policy? I suspect that the answer will be no. Does it sound right that such a trust fund should be expropriated by a local authority or a health board, on the basis of the proposed legislation?

Professor Gretton: Okay—we are talking about trusts that have owned or own land and which have granted ultra-long leases to a local authority or to another public sector body.

Nigel Don: Yes. I am treating the common good, in some places, as being a trust fund, so that I am able to describe it.

Professor Gretton: I am not an expert in common good law, which is a specialism in itself and which probably needs to be reviewed, but my understanding is that trust fund-owned land will not be common good property. If, 200 years ago, some benefactor set up a trust and put land into trust for the benefit of the community, that will not be classified as common good property.

Nigel Don: Forgive me—I am trying to find some words to describe the situation. It is being suggested to me that local authorities may hold a pot of money, a tranche of land or a group of tranches of land that they might regard as being for the common good—land was given to the common good in various burghs. I am describing that as a trust just to have a way of describing it—not because there is necessarily a trust deed. The land is held by the local authority in trust, effectively, and it might then lease it to itself, as the local authority—or to the regional health board, perhaps.

Professor Gretton: You will think that I am being difficult here, but if ownership is vested in the local authority, it will not be able to lease it to itself.

Nigel Don: Okay—point taken. Let us take the circumstance that the land is leased to the local health authority. I can think of a situation where that might be the case.

Professor Gretton: So, the land could have been vested in the local authority, which has leased it to a separate entity, whatever it is. Let us say that that is an ultra-long lease.

Nigel Don: It could well be.

Professor Gretton: If it is not an ultra-long lease, the bill will not apply to it. If it is an ultra-long lease, the effect would be to transfer ownership from the local authority to the health board.

Your question is whether I think that that is appropriate. We take it that the land is not technically common good property. If a common good exception provision were added to the bill, that would not apply to your case. That is my understanding.

Nigel Don: I think that it probably would, actually—that is the point. I am trying to work this out: if we do not have a common good exception, are we doing the right thing?

Professor Gretton: If common good property is leased to a health board, any common good exception would apply.

I am happy to have a common good exception, although I do not have a strong view as to whether it is appropriate and I would not press for it. It is clear that a lot of people would like there to be such an exception, and I have no objection to that—my position on the matter is rather neutral. In terms of policy, I have the same answer as

regards your example. If it is common good property, I am happy for the exception to apply to it, although I would not specially press for that.

The Convener: Let us proceed with the Blairgowrie issue.

Nigel Don: Yes, let us move on to that. As I understand it, section 69 was introduced late on, to cover what we are beginning to describe as Blairgowrie leases. Can we put on the record what it is really all about?

Forgive me if I start with what might turn out to be my ignorance, but I thought that, under Scots law, if a lease was not specifically renewed or terminated, it just rolled on—and was renewed.

Professor Gretton: Like Ol' Man River—yes.

Nigel Don: In that case, what is special about a 99-year lease with a perpetual right to renew? Is that not just an ordinary long lease that just happens to be 99 years instead of 100?

Professor Gretton: That is a good question, but there is an answer, which is that, if a lease rolls on, it does not roll on for its original period; instead, it rolls on for a year, and then another year, and that can carry on to the crack of doom. Each slice, or deemed renewal or tacit relocation—which comes from the Latin expression relocatio tacita, meaning an unspoken re-leasing—is for only an extra year.

Nigel Don: That comes back to the point that a Blairgowrie lease could be for 99 or 56 years and, in Scottish land common law, it continues to roll on for a year at a time. Why is it any different from any other long lease? Why do I need to say anything about it at all? Can we not presume that it has been renewed, because that is what the law would do?

Professor Gretton: Yes, but it is renewed for only one year, in which case, on one argument, it ceases to be an ultra-long lease and is just a one-year lease. That is the argument, and that is why the commission did not include Blairgowrie leases in our original draft bill. If the tenant in a Blairgowrie lease has not exercised a renewal option, the argument is that the renewal option has gone and they are just on a rolling year-to-year lease and are no longer in the field of ultra-long leases. The argument is that the landlord could, when each year-end approaches, which is normally in May or November, serve a notice to quit and that would be that. Accordingly, we felt that those leases are not really ultra-long leases if the tenant has not exercised the renewal option. In that situation, they cease to be ultra-long leases.

Nigel Don: So the bill proposes to write back into the Blairgowrie leases—the 99-year, renewable leases—that they are actually ultra-long leases, despite the fact that they have become annually renewable leases.

Professor Gretton: Yes, that is what section 69 says.

In our report, we said straightforwardly that, if such a lease has not been renewed, the tenant has had it and should just go on to year-to-year renewal. Some people think that that might not be right. Section 69 is Government policy and I am happy to leave the matter to Government policy. The Government has considered the aspects relating to article 1, protocol 1 of the European convention on human rights. If the Government is satisfied on that point, that is fine by me. We have not researched the possible ECHR article 1, protocol 1 issues behind the matter, because the proposal was not in our original draft bill.

Nigel Don: I understand that. I am beginning to see that there might be a complication. If I own one of those pieces of land and I have my paperwork up to date and know that the renewal date is next week, is it not open to me to tell my tenant that they will get a one-year renewal next year, and thereby take myself out of the scope of the bill, because I saw it coming?

Professor Gretton: I am not sure that I exactly follow that example. You are not giving a notice to quit.

Nigel Don: No, but I am acknowledging on paper that the tenant now has a one-year rolling lease.

Professor Gretton: Is the tenant acknowledging that as well, in your example?

Nigel Don: Well, I guess that—

Professor Gretton: Something unilateral from the landlord will not change anything one way or the other.

Nigel Don: Okay, so the tenant needs to know and be well enough advised to recognise that they are not on a one-year rolling lease, which they might have imagined they were on anyway. They might be none the wiser. Sorry—I am in the realms of speculation.

Professor Gretton: It might be that all that they are on is a one-year rolling lease.

Nigel Don: In which case, the bill is about to tell them that, because the lease was originally created as a 99-year one, suddenly they have a long lease that they did not know that they had and which the landlord did not know that they had.

Professor Gretton: You could interpret the situation as being that the tenant had been on a 99-year indefinitely renewable lease and, because they failed to exercise the renewal option, they went back to a pure year-to-year rolling lease, but

section 69 will re-upgrade them. That is one interpretation of the bill.

Nigel Don: Yes, that is my interpretation. Is that what we want to do in policy?

11:00

Professor Gretton: I want to be a bit neutral about this because you could say that it is not fair to landlords. A landlord who has a tenant with a year-to-year lease is entitled to get rid of the tenant every year when the termination date comes up. They are entitled to sell the property for full value and so on, just like any other landlord of a year-to-year tenant. Effectively, they will lose the property as a result of section 69. One could argue that that is unfair to them and contrary to their human rights.

The Scottish Government has taken a different view. I will be a bit hard to get on this one.

Nigel Don: But you acknowledge that there is a policy question.

Professor Gretton: There is a difficult policy question. I shall describe what I understand is happening in the Blairgowrie area at the moment. It was easy to forget that a tenant's 99-year lease was coming to an end and suddenly they had missed the opportunity. If they missed it, traditionally the landlord would nevertheless happily renew the lease for another 99 years. They would not try to argue that the lease had gone and that the tenant would have to go on to a year-to-year lease.

More recently, some landlords in the Blairgowrie area have started to say, "Perhaps that's not right. Perhaps we can say that it's just a year-to-year lease and nothing more." Accordingly, they are holding out for substantial payment from a tenant to get either renewal or conveyance of ownership. I stress that my knowledge of the issue is a bit anecdotal, and that research would have to be done to confirm this, but my understanding is that a tenant of a property that was worth for example £200,000 or £300,000 would pay a significant amount—a tenth of the property's value, say—to get an ownership title. That represents a sort of compromise: the price paid is by no means just a nominal figure but it is way below the full value that a landlord could expect to ask from a tenant who has only a year-to-year lease. It seems that what is happening on the ground at the moment is a sort of compromise.

Dave Thompson (Highlands and Islands) (SNP): Good morning. I want to move on to the definition of the ultra-long lease. Given that the SLC survey in 2000 found that most long leases were for less than 125 years or more than 999 years, with very little in between, are you satisfied that 175 years is the right figure? I know that it ties in with the Abolition of Feudal Tenure etc (Scotland) Act 2000, but that does not necessarily make it right. What is your view?

Professor Gretton: What you say is right: most long leases are either below 125 years or 150 years or are up there at the very high level, and there are very few in between. One thing that the bill has flushed out is that a number of leases—not many—are around the 200-year mark. There are 30, 40 or 50 leases of between 175 and 300 years, which is not a huge number. It might have caused less kerfuffle if we had said 225 rather than 175 years.

On the other hand, it could be argued that wherever you draw the line, there will be people who are just on the other side of the line who will kick up a fuss. If I could go back in time, I might have gone for slightly more— 225, perhaps—more for the peaceful life argument than anything else. Ultra-long leases are a public nuisance and there is a strong case for getting rid of them, even over the 175-year limit. I might have gone to a cut-off point of 225 years, merely for the quieter life argument.

Dave Thompson: Would it cause any problem if the cut-off point was 225 years, given that no new long leases can be created that are for more than 175 years?

Professor Gretton: The main downside to shifting the time up to 225 years would be that in a few non-commercial situations—for example a small-house lease in Ayrshire that would be converted under the current 175-year rule—the property would not be converted. It would be a tiny number, though. To move the hurdle up to 225 years would be a perfectly reasonable option to go for; it would be a perfectly defensible policy change.

The Convener: We turn to commercial leases.

James Kelly (Glasgow Rutherglen) (Lab): A number of written submissions have highlighted commercial leases and have provoked a bit of discussion about what leases should properly be captured by the bill. The position that you took in your report at the outset was that there should be universal convertibility—basically, that all ultra-long leases should be converted. That has not quite been followed through in the bill, because leases for which the rent is greater than £100 have been excluded. What is your view on the position that is taken in the bill?

Professor Gretton: Do you mean specifically on the £100 limit?

James Kelly: Yes.

Professor Gretton: As you know, the bill as it was originally drafted did not include any such

monetary limit. I understand why the Scottish Government has gone for that, but I would have stuck to the original policy. When the Parliament dealt with feudal conversion, there was no exception for feu duties that were more than £100 or whatever. I do not see a strong case for any such exception in the bill.

The bill is supposed to catch commercial leases, but £100 is not a commercial amount. In some big transactions there will be an initial payment—which lawyers call a grassum—of perhaps £1 million or £2 million, and then a peppercorn rent of perhaps £1 a year. Those commercial transactions will not be caught by the exemption because of the peppercorn rent of just £1 a year. I am, therefore, not sure what the SG is targeting and, whatever its target is, I am not sure that it is hitting it.

If the view is that long leases are a bad thing, I see no reason to have the exception. If some people are unhappy, that is tough. When feudal abolition was being discussed, some feudal-superior side representatives said, "You can't do this." Exactly the same is happening now, with some landlords and their representatives saying, "You can't do this." My attitude is that that is tough. That said, one could argue that the number of long leases that would be exempted from conversion under the £100 rule would be pretty limited, so it is perhaps not a huge issue.

James Kelly: That is an interesting answer. You cite the example of someone paying a premium lump sum and then paying a peppercorn rent. That circumstance was drawn to the committee's attention by the City of Edinburgh Council. Should the bill be amended to take account of that?

Professor Gretton: In the case of Waverley market, if a common good exemption went into the bill, that would take Waverley market out—assuming that the site is a common good, which is in dispute. In its written submission, the City of Edinburgh Council says that the grassum—the premium—should be taken into account and sort of smeared out into a notional rent across the period. In the case of Waverley market, that would take the notional rent far over £100 a year.

It comes down to the fact that expensive properties are outwith the scope of the bill. If you worked out a deemed rent for Waverley market—forgetting the grassum and putting the whole value into an annual rent—would it be more than £100 a year? Of course—it would be vastly above that figure.

It boils down to saying that anything except extremely cheap properties is outwith the scope of the bill. That is how I read the implications of what the City of Edinburgh Council is saying—although I may have misunderstood it—and I would not support that position.

James Kelly: Would I be right to summarise your position as being that all properties should be captured by the bill and that no financial limit should be set?

Professor Gretton: That is my view and the route that I would prefer to take. If any policy change is to be made, I would favour a move to a 225-year period, instead of to a £100 limit.

James Kelly: Okay.

Another example was drawn to our attention by Brodies LLP. A number of recent commercial leases involve variable rents that would not be captured by the £100 provision and would qualify as ultra-long leases for conversion. Brodies argues that conversion should not be applicable to leases of that nature. Do you reject the notion of amending the bill at stage 2 to take account of that scenario?

Professor Gretton: Brodies' submission is very interesting. My first point is that the landlord can always apply for the additional payment. As Brodies says, in such cases, the additional payment could sometimes be rather high. Two things follow from that. The first is that there would be compensation for the landlord. Under the bill, compensation for landlords is reasonably satisfactory, which is not always the case with legislation. In other words, landlords are protected.

Secondly, if the tenant does not feel like getting out their cheque book and writing a large cheque, they have an opt-out, because the bill's provisions are opt-out rather than opt-in: conversion will happen unless the tenant opts out. The tenant could always opt out, if they felt that the cheque would be a bit too big.

An alternative approach might be to revisit how the compensatory payment is calculated in order to take account of the variable-rent issue. I am not sure that the bill is entirely satisfactory in that regard. May I ask John Dods to deal with that, convener?

The Convener: Yes.

John Dods: I think that the provision is probably okay, but there might be more doubts about its use as the threshold for rent.

Professor Gretton: The issue is whether a variable rent of the type that Brodies is talking about is sufficiently taken account of in the £100-threshold rule. There may be a drafting issue that could be revisited, which might address Brodies' worries. I am not fully prepared on that point, but when I took a quick look at the bill, I thought that there might be room for a drafting change that

would satisfy Brodies. Even without such a change, the bill provides reasonable solutions.

James Kelly: Could you reflect on that point and, if you have any further thoughts on it, feed them back to the committee?

Professor Gretton: I will do that.

Brodies also mentioned the use of ultra-long leases for tax-planning purposes. I do not feel that that issue represented a strong policy driver for the bill. I will say no more than that.

James Kelly: Thank you for your answers.

The Convener: We turn to questions on potential difficulties under the Title Conditions (Scotland) Act 2003.

Robert Brown: There is an issue with real burdens, particularly in terms of ius quaesitum tertio, or third-party rights. As I understand it, when the Title Conditions (Scotland) Bill was being considered, it was the subject of academic criticism on various policy grounds, the principal one of which was that it might prove to be difficult in practice to identify who had and who had not the rights in question, because they were implied by law and were not in the title deeds, per se. In effect, the bill replicates the scheme of the 2003 act in that regard. Were the academic criticisms of section 53 of the 2003 act correct? If so, will passing that through into the bill present difficulties?

11:15

Professor Gretton: Thank you. That is an excellent question. When the 2003 act was still a bill, opinion was divided as to the desirability of section 53. One can say that, on the whole, conveyancers did not like what became section 53; they thought that it would be a nuisance for conveyancing practice. The Scottish Government carefully considered the issues and came down on the opposite side.

The debate continues today. There are those who would like the 2003 act to be amended, essentially to cut out section 53. They have not given up the battle.

We felt that we had to replicate the legislation; the whole structure of the bill follows the feudal abolition legislation very closely. We thought that the policy would stand or fall together with section 53 and that continues to be the case. If section 53 stands, this bill should be the same.

Robert Brown: The policy ground really goes back to common building lines and all that sort of stuff, which is really quite important in parts of the major cities in particular, is it not?

Professor Gretton: It is. The arguments in favour of the section 53 type of approach are quite strong, but the arguments against it are also quite strong. I am afraid that I am going to play hard to get on this one, too. However, I will say that whatever the policy is, you should stick to it consistently. At the moment, section 53 exists, so the bill should follow it.

Robert Brown: There is another nuance, in that it is suggested to us in our briefing material that it has never been clear that implied third-party enforcement rights can be created in favour of parties other than the landlord in respect of leasehold conditions that are imposed under a common scheme. Is that right? Will section 31 of the bill therefore land us with new enforcement rights in favour of neighbouring property owners, where none existed previously?

Professor Gretton: Yes, to both questions. There is uncertainty under the common law as to implied rights in connection with leases, so the situation is different from the common law for ordinary properties. Accordingly, what is currently section 52 of the feudal abolition act is not replicated in the bill. I think that that was the right policy decision.

John Dods: It is section 52 of the Title Conditions (Scotland) Act 2003.

Professor Gretton: I am sorry—you are quite right.

The bill would create new enforcement rights where none exists at the moment. That is what section 53 of the Title Conditions (Scotland) Act 2003 did, too.

Robert Brown: So, really, one should follow the other. That seems to have a degree of logic to it.

Professor Gretton: Yes.

Robert Brown: As I understand it, not all leasehold conditions will be converted to real burdens under part 2 of the bill and there is no provision in the bill for compensation for the loss of the former landlord's right to enforce a leasehold condition, even if the right has a value. Do any issues arise from that? Why did you not recommend that there be some sort of compensation provision? Is that a relevant consideration?

Professor Gretton: Leasehold conditions will generally be convertible into real burdens. Some will convert automatically without any further procedure, such as for maintenance of common parts. Others will be convertible by a notice that is registered by the landlord. However, as you said, some will fail. John, can you remember the compensation rules for the ones that are non-convertible? That was the second part of the question.

The Convener: It would be useful if matters could be directed through the chair, for the purposes of the *Official Report*. I am not being precious; it just makes it easier to record.

John Dods: That is quite right. From memory—again—to a certain extent, we are following the path of the feudal tenure legislation, whereby if superiors lost the right to enforce, they would not receive compensation as such, except in the case of development value burdens. We are mirroring that pattern.

We also take the view that the compensation provisions, which are for loss of rent and are linked to the provisions in the Abolition of Feudal Tenure etc (Scotland) Act 2000, may in some minds be slightly more generous than should be the case. So, we take the view that the compensation provisions are compensation not just for the loss of the right to rent, but for the loss of other landlord rights, such as leasehold conditions, that might not otherwise be convertible. However, as Professor Gretton said, the bill contains quite an extensive conversion scheme that mirrors almost exactly the conversion scheme in the 2000 act.

Robert Brown: So, your understanding is that the additional enhanced compensation rights would cover any issues that arise.

John Dods: We hope that together they would provide suitable compensation. The additional payment regime will arise only in the specified circumstances. I think that we say in our report that we regard the linking of the payment of compensation to the 2.5 per cent consolidated regime as being possibly more than compensation just for the loss of rent; it must be viewed as compensation for the loss of the package of rights that a landlord might have. However, on top of that we recognise that particular circumstances deserve extra provisions for compensation.

Robert Brown: Just to dot the i's, am I right to presume that that would mean that no European convention on human rights issues could arise for uncompensated aspects of the real burdens issue?

John Dods: When we prepared our report we were satisfied that the overall package would be ECHR compliant. Certainly, the SG has probably gone through the same procedure and satisfied itself as to ECHR compliance.

The Convener: Bill Butler will move on to sporting rights.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, gentlemen. It is my information that sporting rights to freshwater fishing and to game are sometimes reserved to a landlord in an ultra-long lease, so the tenant's exercising of his or her rights to occupancy is subject to the sporting rights that are held by the landlord. Section 7 of the bill follows the scheme that is provided for in the 2000 act in relation to feudal reform by providing the opportunity for a former landlord to preserve the sporting rights on registration of a notice. You may be aware that there has been some academic criticism of the preservation of sporting rights in the form of a "separate tenement". Why did you recommend that model for the preservation of sporting rights? It may be argued that such a model may permanently deprive, without compensation, the former tenant of his or her right to develop the land.

Professor Gretton: As a preliminary point, I think that landlords' reserved sporting rights are going to be very unusual; the sort of leases to which the bill will apply will seldom have reserved sporting rights. However, it is possible, which is why there are provisions in the bill for it. Such situations will, however, be different from what happens in feudal conversion and will be very exceptional. So, whatever the issue is, I think that in practice it will be extremely minor.

Bill Butler: What about the cases in which it does arise?

Professor Gretton: The position of the tenant is not going to be worse, because if they are already subject to the landlord's sporting rights, then those rights will continue in the future in a so-called separate tenement. That will, indeed, take away from the tenant some of the benefits of ownership of the land, but it will not make the tenant's position worse. If there is a development prospect for the land, it will be the same as with any other situation, in that there will be negotiation by the third party with the party who has the sporting rights to buy them out.

Bill Butler: There is no practicable way around that, in that case.

Professor Gretton: There is no way around that, but that is not an uncommon situation in the development of properties. When there is development value in an area, it is sometimes just the owner who has any rights, which is straightforward and they can sell to Tesco, or whoever. However, it is quite common for other parties to have rights in particular land, so it is then a matter of bargaining. There is nothing particularly unusual about that, in a broad sense. However, I stress the point that I made at first, which is that reserved sporting rights are not going to be common for this type of lease.

Bill Butler: Are you content that this aspect of the bill is compliant with the European convention on human rights?

Professor Gretton: Yes.

Bill Butler: That is clear, thank you.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): In its response to the Scottish Government's consultation, the Law Society of Scotland explained that it had received representations to the effect that a landlord's interest under a residential ground lease might be a target for the title raiders—I believe that that term was used in the Scottish Law Commission's original report. Do you still think that it was correct not to include a separate conversion scheme, or some other form of protection, for tenants under residential ground leases?

Professor Gretton: I am not 100 per cent certain that I know what the Law Society was getting at in that bit of its submission, but reading it together with its original response to the Scottish Government consultation in summer 2010, I think that it is talking about cases in which there is a long lease on residential property, but which is not an ultra-long lease within the meaning of this bill. The worry is that a title raider might buy up the landlord's interest and cause trouble to the tenant, and there is a question about whether the tenant should have protection in such a circumstance.

When we produced the discussion paper that preceded our report by a few years, we offered consultees a basic skeletal possibility of converting some of the residential ground leases, even though they are not ultra-long leases within the meaning of the bill. There is a possibility there that could be developed. In the end, however, there did not seem to be a lot of support for that. In those cases, the compensation that would be payable to the landlord would be much larger than it would be in the types of cases that we are talking about at the moment.

If the committee is concerned about residential ground leases that are not eligible for conversion under the bill, there are other ways of approaching that problem. I am not sure how big a danger arises in this regard. What can a title raider do? They can wait until the lease terminates and put the tenant out, but that was going to happen anyway.

Perhaps my colleague has something to add.

John Dods: I have nothing to add.

Stewart Maxwell (West of Scotland) (SNP): Earlier, you mentioned pipes and cables briefly. Section 1(4)(b) says that a lease is not a qualifying lease if

"it is one operating for the sole purpose of allowing access (including work) to pipes or cables".

In its written submission, the Scottish Rural Property and Business Association has said that that does not go far enough and that commercial leases would be affected. It has suggested an amendment to the section that would add the words,

"or is a lease of an area of land for the installation and use of a pipe or cable".

Do you agree with the SRPBA that that amendment is necessary, or do you believe that the words "allowing access (including work)" cover installation and use?

11:30

Professor Gretton: Your question relates to something that came into the bill after it left our hands. I am not entirely happy with the provision as it stands. In my view, the law of Scotland does not allow a lease just for access. A lease is defined as a right of exclusive possession.

If a farmer gives a telecommunications company the right to lay a cable through his land and to have access to it, but that is all that the lease consists of, and the farmer continues to plough and reap and graze his beasts on the land, that is not in my view a lease according to the law of Scotland, because it is not exclusive possession. Although it can be a valid contract between the farmer and the telecommunications company, it does not constitute a lease, with all the legal consequences such as registrability, validity against successors and ownership of the farm and so on.

What bothers me is that the bill states that there is an exception for a type of lease that the law of Scotland does not recognise. One could say that it does not matter, because if those leases do not exist they are not convertible, so there is no harm in saying that they are not convertible. However, some might well argue that the Scottish Parliament is recognising the existence of a new type of lease, which should be done only on the basis of a considered policy on what sort of lease the law will recognise.

The Scottish Landowners Federation—or the Scottish Rural Property and Business Association, as it is now called—is coming from a slightly different direction, as it is not concerned about the legalistic point that I have just mentioned. Its formula would perhaps help, but that would depend on how the documents are drafted.

If the farmer has signed a document that says, "I give you the right to lay a cable and to access it for repair, and that is a lease for the next 200 years", the SRPBA's amendment will not cover it, and it cannot in my view be a valid lease according to the law of Scotland. However, if the document says, "You have the lease of a strip of land that is half a metre wide and is right across the farm", and the telecommunications company has exclusive possession of that strip of land, that could be a valid lease according to the law of

Scotland. The fact that the farmer ploughs and reaps and grazes beasts over it might contravene the lease, but it is still a valid lease. If leases of that sort are being used in practice—I do not know that they are; I have never seen one—the SRPBA amendment would cover them. The amendment probably does make sense.

This is all a bit complicated; I have covered the ground, but I have done so rather quickly.

Stewart Maxwell: That is very helpful. If I can summarise, you are in effect saying that if section 1(4)(b) is dealing with a lease that is recognised as such under Scots law, it would be caught and the Scottish Rural Property and Business Association may have a point about extending the definition. However, if it is not really a lease but an ultra-long contract—if there is such a thing—the mere mention of it in the bill may create unintended consequences.

Professor Gretton: That is my worry.

Stewart Maxwell: That is something that we have to look at, then.

The Convener: It is a point that we anticipated in our earlier discussions.

I see that there are no other questions for Professor Gretton or Mr Dods. Thank you very much for your attendance; it has been exceptionally useful.

11:33

Meeting suspended.

11:36

On resuming—

The Convener: Our next witness, Andy Wightman, is classified as an independent researcher. Given the various reports that we have heard about your views on this matter, Mr Wightman, we have been particularly keen to take evidence from you, and you are exceptionally welcome. James Kelly will open the questioning.

James Kelly: Good morning, Mr Wightman. In your submission, you contend that, in certain circumstances, common good land has been leased instead of disposed of to subvert the requirement under section 75 of the Local Government (Scotland) Act 1973 for any such disposals to have court consent. Can you explain your views in that regard?

Andy Wightman: Quite a lot of case law on this exists from well before 1975. Earlier statutes such as the Town Councils (Scotland) Act 1900 prohibited the alienation of any common good asset for more than three years without it being put to roup and, over the centuries, town councils have not been allowed to alienate common good assets for more than three years. Indeed, that had been central to the nepotism and corruption in Scotland's burghs in the years leading up to the burgh reform legislation of 1832. As a result, there have for a long time now been question marks over town councils' authority to alienate these assets. I use the term "alienate" because it also covers long leases and so on; basically, it means to pass them over to a third party out of the town's use.

There is clear case law that certain categories of property, such as land used by the citizens of the burgh since time immemorial, are inalienable and that disposing of them will always require court approval. A lot of the leases in question were granted before 1975 and, in some cases, town councils decided that instead of disposing of the property through a straightforward sale or feudal disposition, they would grant a long lease to get round the prohibitions and difficulties involved in disposing of the ground. In certain cases in Dumbarton, for example, there have been arguments over whether 99-year leases constitute disposal for the purposes of having to go to court.

There is quite a bit of law around all that. In defence of my argument that common good land should be exempted from the provisions of the bill, my simple point is that there were good reasons why town councils decided to go down the route of having leases in general and ultra-long leases in particular. It was to get round what were and what remain valuable protections designed to protect the public good.

James Kelly: Do you accept that some of the case law backs up the point that leases count as disposals?

Andy Wightman: Yes.

James Kelly: Do you therefore accept the view that the number of ultra-long leases of common good property is limited?

Andy Wightman: Yes. I agree with Professor Gretton that in all probability the number is low. I brought to the committee's attention the case of Waverley market. Over the past few months I have attempted to determine whether there are other cases in Scotland, but I have not encountered any. However, one must bear it in mind that I am just a freelance researcher and there are tens of thousands of common good assets throughout Scotland that are not yet properly documented. Even if we get to the stage where they are all properly documented, there will be the further question whether any of them have been granted on a long lease. That would involve an investigation of the title in each circumstance. For example, press coverage and council reports talk about Waverley market as having been sold in

1982, but we know that it has never been sold because it is on a long lease. It has become popular currency that we sold it, when in fact it was not sold.

The number of such leases is probably quite low, but I simply do not know how low. It is perfectly possible for a town council in Bathgate or Irvine to have granted a long lease in 1920 for 200 years that we will not know about until we start digging in Irvine's burgh records.

My proposal follows the precautionary principle. If the committee agrees in principle that common good assets should not be captured by the bill's provisions, it would be a sensible precaution to put that in the bill.

The Convener: We will return to Waverley market presently. In the meantime, I invite Bill Butler to expand on compensation.

Bill Butler: As you know, under the bill, if an ultra-long lease of common good land or property were converted to a right of ownership, the council would receive compensation based on annual rent and, where appropriate, additional payments, which could be substantial in some cases. Provided that the compensation and additional payments are attributed by the council to its common good fund, why do you consider the bill's impact on common good assets unacceptable as a policy?

Andy Wightman: Because it is not simply about compensation. I note that we will come to the subject of Waverley market but, as an example, its rent is a penny a year, so the compensation is virtually nothing. I accept that compensation might be more substantial in other cases.

If town councils—or district councils, which stewarded the common good funds in the 1970s and 1980s—decided consciously to grant a long lease, they did so in recognition of the fact that the land was held in trust, albeit not in the legal sense, for the residents of the burgh. Therefore, to come along post hoc and say, "Well actually, that decision will now be a disposal, an alienation—it's going to be ownership", would be to go against their decision at the time. You could make the same argument in relation to private landlords. The distinction to draw is that common good property is in a particular category and is held in trust for the citizens of the burgh.

Bill Butler: Therefore, you stick to your view that common good land should be exempt from the bill's provisions.

Andy Wightman: It should be exempt. If you were to argue that the compensation was sufficient, that would have to be decided on a case-by-case basis. In some burghs, councils faced with that situation might say, "Yes, the compensation is sufficient. We will get a substantial income of capital to the common good fund, and that's fine." In other cases, councils might say, "No, because we rented it on a very low rent for different reasons."

11:45

Bill Butler: Do you think that that is fine in principle? You seemed to say clearly that common good land should be 100 per cent exempt.

Andy Wightman: I think that it should be 100 per cent exempt. I do not think that the possibility that there may be compensation and that it may be substantial, or even enough, takes away from my fundamental point that such land should be exempt. I do not think that we want to get into arguments about compensation. At the end of the day, if a council wants to dispose of common good land, it is free to do so, even if the land is on a long lease. At that stage, it will come to a view on what is appropriate compensation.

Bill Butler: I am obliged.

Nigel Don: A council might not want to get rid of a building because of where it is—for example, bang in the middle of the town opposite the square, however that is defined. The council might regard that as part of the town's space. Would that be one of the relevant considerations?

Andy Wightman: That would be a relevant consideration for the council, although I am not sure whether it would be a relevant consideration for the bill, as there will also be many private landowners who will not want to get rid of their leasehold interest. Your question relates to my previous point that the reason why a council would have granted a lease rather than disposed of the property would have been that it saw the property as an intrinsic part of the burgh's long-term property portfolio, which, in many cases, it will have been granted by its original charter in the 14th or 15th century.

The Convener: We turn to Waverley market.

Robert Brown: You have rightly identified that, so far, Waverley market has been the main example of common good land or property that might be affected by the bill, although I think that the research mentions a 1,000-year lease by Fife Council of land in St Andrews. That emerged from correspondence with the councils about the bill.

I understand that your position is that Waverley market was leased for a penny a year, that the lease was extended in 1989 to 206 years and that it would therefore fall under the long leases arrangements, and that, if the bill was passed, the leaseholders of that property would become the owners of a multimillion-pound asset that had cost them a penny a year in rent, apart from any

compensation issues. Can you place on the record why, against the council's position that it is no longer common good land, Waverley market remains part of the City of Edinburgh Council's common good fund?

Andy Wightman: Yes, I am happy to do so.

In 2005, we published a report that looked at common good assets in Scotland. At that time, the council told me that Waverley market was part of the common good fund and I had no reason to doubt that view. I began to look specifically at the site because there were questions in my mind about the probity of some of the dealings that had been undertaken. Indeed, I spoke about the matter to one of your predecessors, Donald Gorrie MSP, who was a councillor at the time when the lease was granted.

Following my investigation, the council came back with its view, which it is articulating now, that the land somehow lost its common good status in the late 1930s. I said to the council that I had looked at a lot of council correspondence from the early 1980s—correspondence from a director of administration and a director of finance, legal advice and so on—all of which said that Waverley market had common good status, and asked whether the council was saying that all those people were wrong. The council did not reply to me. It has not said on what grounds the land's common good status was lost in the late 1930s.

What happened in the 1930s was that the Edinburgh Corporation Order Confirmation Act 1933 removed from Waverley market any of its market burdens. A citizen of Edinburgh had a legal right, going back a long time, to go to market. The 1933 act relieved Waverley market of the market obligations and rights that entitled citizens to go to that place and sell their produce, but it did not get rid of the common good status.

The council now seems to be arguing that Waverley market had common good status by virtue of the fact that it was a market. I disagree. It has common good status by virtue of the fact that it was purchased by the common good fund in the 18th century as part of the land assembly for the new town. The common good fund was used to acquire the land of the new town. Indeed, the Edinburgh Corporation Order Confirmation Act 1950 makes reference in section 70 to the effect that

"the Corporation may as part of the common good erect and maintain new buildings"

over that area. That was precisely to allow the corporation to redevelop the Waverley market site.

Under section 145 of the Edinburgh Corporation Order Confirmation Act 1967

"markets and the slaughterhouses"

ceased

"to form part of the common good."

In other words, a 1967 statute was required to remove markets from the common good, whereas the council argues that that happened in the late 1930s. I have a difference of opinion with the council on the matter and a lot of evidence to back up my view. As far as I can make out, the council does not have a great deal of evidence to back up its view; it is a mere assertion.

In fact, there is extensive council evidence that Waverley market is a very viable common good site: there are committee records, letters—I quoted from a letter from the director of finance in 1983—and annual reports that say that. Looking at the council documentation in the round, the argument is this: Waverley market is common good.

Robert Brown: In its submission, the council says that not minutes but acts of the council in 1937 and 1938 transferred the fruit and vegetable market from Waverley market to premises in East Market Street. Your argument may be that the move does not matter because that did not cease the common good status. However, if the council argument is correct, there seems to be a clear basis for removal in acts of the council at that time.

Andy Wightman: I return to the Edinburgh Corporation Order Confirmation Act 1933—I am not certain of the section that applies—which is the act that relieved and freed Waverley market of all its market obligations, should it cease to be a market. When the council talks of acts of the council, it means the acts of the council in 1937 and 1938 that physically stopped Waverley market from being a market.

Robert Brown: As opposed to legislation.

Andy Wightman: Yes, as opposed to legislation. The market was moved at that time.

Robert Brown: Okay. So, there is still an issue in that regard.

I want to move the argument forward slightly. The court is empowered to order that alternative land or property be allocated to the common good as a condition of authorising the sale of common good property. Is there a possibility that that is what happened to Waverley market at some point in time?

Andy Wightman: If that is what happened, it was not documented. All the documentation from the early 1980s, which includes detailed reports from directors of development and administration, set out that Waverley market is a very valuable common good site. Indeed, at one time, the council talks of income being half a million pounds a year. If there is any evidence of what you

suggest having happened, I do not know where it is. In fact, all the evidence is to the contrary.

Robert Brown: That is helpful. Your work on this general area is very valuable.

The briefing that the committee received indicates a concept of common good that is rather wider than I had previously thought. In his textbook on common good law, Andrew Ferguson suggests that land or property may lose its common good character when it has been out of public use for a long time—let us say 20 years. I think that the timescale relates to prescriptive periods and all of that. Could the use of Waverley market by private retailers for many years have affected its status as a common good property?

Andy Wightman: The matter is one of interpretation of case law. Andrew Ferguson is talking about negative prescription. If it can be shown that land that the public has used from time immemorial for bleaching, playing golf or whatever ceases to be used by the public, negative prescription can apply where another use has been implanted upon the land. Citizens can therefore no longer use the land as a bleaching green, recreation area or whatever because they have not used it for 20 years. That is what the point relates to. Waverley market does not fall into that category because the use to which it has been put has been governed in the main over the years by Edinburgh corporation acts. Waverley market first had its status as a market before permission was granted to alter and adapt it and so forth.

The history of Edinburgh—like the history of many cities—is defined by private acts of Parliament to allow the city to do this and forbid it to do that, precisely because it wants to regulate its affairs and ensure that they are clear and transparent.

As I understand it, there has never been any use of the Waverley market site of the type that Andrew Ferguson hints at, which is where the public have been using land for certain functions since time immemorial. That is principally because the Waverley market site did not become part of the town council's property until the late 1700s. Before that, it was owned by George Heriot's Trust.

Robert Brown: That is very useful. Thank you.

Dave Thompson: Good morning, Mr Wightman. Waverley market is an extremely interesting example of the difficulties that arise as soon as we get into the issue of the common good. It is useful for us to get the background to that when we are considering the Long Leases (Scotland) Bill and whether common good should be included in it or exempted, as you would wish. How can the dispute be resolved? I am not sure that the committee can resolve it. Who has the legal right to challenge the City of Edinburgh Council to try to resolve the position? Are there wider issues around common good in relation to how citizens can establish their rights against a council?

Andy Wightman: That is a good question. It was hinted at in an earlier question to Professor Gretton, in response to which he said that he would come back to you.

On the question of title and interest to sue, my recollection is that the matter was settled in the case of Cockenzie and Port Seton Community Council v East Lothian Council. I might be a little bit wrong on that but, in the 1970s or 1980s, there were a number of cases in which a question was raised as to whether the ordinary citizens of a place such as Port Seton had the title and interest to sue in the courts for recovery of common good property where the title was now held by the district council, as it was then. I am sure that Professor Gretton will give you proper legal advice on the issue but, as I recall, the courts recognised that the citizens do have recourse to the law because, after all, the property is held on their behalf.

One of the major 19th century cases was Murray v Magistrates of Forfar, which defined common good from the 19th century right up until 1944. That case was brought by Dr Murray, who was a resident of Forfar. It was admissible because he was a resident of Forfar and the common good fund—the heritable property and the moveable property—is held on behalf of the residents of the burgh, much as a legal trust is held by the trustees on behalf of the beneficiaries.

I am clear that the citizens of a burgh have the title and interest to sue the council. If the residents of Edinburgh wish to resolve whether Waverley market is a common good, they have recourse to the law. They could seek a declarator in the sheriff court that the site is a common good. The citizens of Edinburgh have not done so. It is fair to say that the citizens of burghs across Scotland have not been eager to jump into the courts on such matters, not only because it is expensive to do so but because awareness of the topic, until recently, has been fairly low.

I was brought up in a small burgh, Kinross, where we had a town clerk and a town council and people in the town were aware of what was going on because affairs were regulated literally a few hundred yards from where they lived. Since 1975, things have all been run by increasingly distant local authorities that have, for good or ill, lost records, and people in the burghs have therefore also lost their awareness of what is there. I am therefore not surprised that a case has not been

brought, but the citizens have the power to bring one.

Another point that arises is that, if you choose to recommend that common good be exempt, there will be questions about what is common good on the date when the act comes into force. I make a brief suggestion in my written evidence as to how that could be resolved. I suggest that a court order could be required. You would have to make it blanket, so that when any property that a local council held was being converted, it would have to have a court order to the effect that it was not a common good. There may be other ways round it, but there will have to be some device. We know that there is dispute and disagreement, which will persist until the day on which the act comes into effect.

12:00

Dave Thompson: It seems to be a trend in recent years that local authorities are becoming ever more distant from the public and getting bigger and bigger. I accept the point that you make. In the small burghs and so on, people knew what was going on, but that will become more of a problem. The expense to an individual or group of individuals of challenging a large corporation in court will put the vast majority of people off doing that unless they are very committed and have a lot of money. Perhaps including a common good exemption would go some way towards redressing the balance, as the councils would need to go to court and make their case. The onus would be on them to spend the money on going to court to convince a sheriff. Do you agree that that would redress the balance a wee bit?

Andy Wightman: I do not know about the precise procedure but, if you choose to include a common good exemption, there must be some procedure for resolving whether something is, in fact, a common good. If the onus is on the council to prove it, the citizens will probably not be aware that an action is being taken, because the notice will be stuck in the bottom left-hand corner of a page of *The Scotsman* on a Friday before Christmas. Attention needs to be paid to exactly how one does that, so that citizens are a little more alert to the possibility that the measures are being taken.

In contrast, the record keeping of local authorities is improving year by year. Some now employ full-time solicitors to sort out their common good registers because there has been so much publicity about the issue. Therefore, by the time the act comes into force—if the bill becomes an act—there will be better records and the citizens will be more aware of what is common good and what is not. However, they will perhaps not be aware of what common good is held on ultra-long leases. That will still be a little impenetrable, as it requires examination of title. I knew that Waverley market was on an ultra-long lease only because I found the title. All the reports that I received were that it had been sold, but I discovered that it had not been.

You talked earlier with Professor Gretton about extending the threshold from 175 years to 225 years. If you were to do that, Waverley market would be exempted by that provision because the current lease is 206 years.

Nigel Don: Thank you, Mr Wightman. You have drifted on to many of the things that I wanted to ask about, but that is fine—I am not going to repeat them for the sake of it.

I want to pick up on the improvement in local authorities' record keeping, which you have spoken about. Is there any timescale in which we can expect those records to be complete—if that word has any meaning in the context?

Andy Wightman: Local authorities in Scotland were meant to have completed their asset registers by 31 March 2009. That was a recommendation of the Local Authority (Scotland) Accounts Advisory Committee. It was also an exhortation by the Scottish Government at that time in a letter to all local authorities. I undertook a survey of common good in May 2009, which I have yet to publish—I had better get on and publish it—which showed that there had been a significant increase in documented common good assets since 2005 but that 10, 12 or 13 councils had still not completed their investigations. A few had not even started and were still maintaining the position that they had none. I remind the committee that common good is now accepted as having been defined by a Court of Session case in 1944 as all property that is owned by a burgh that was not acquired using statutory powers and that is not held under a special trust. By that definition, all property of a burgh is common good unless those two tests can be shown to have been met. That definition was upheld by the Court of Session in the case that was mentioned earlier, Wilson v Inverclyde Council, and it was reflected in a parliamentary written answer from Tom McCabe when he was a minister a number of years ago.

Nigel Don: If we were to exclude common good, are there any European convention on human rights issues in that regard? You are perhaps saying that local authorities will be acquiring some kind of windfall, right or residual right that others are not getting.

Andy Wightman: No, there would be none. My argument here is a bit in the realms of fantasy, as we are talking about what will happen in 2188. The City of Edinburgh Council will not recover control over Waverley market for another 190 years, but it

will recover control. The bill has no human rights implications as far as the title owner is concerned where a property is exempted, such as in cases of common good. There are obviously ECHR implications where leaseholders get hold of the land because they have an ultra-long lease, but I understand that that point has been satisfied.

Nigel Don: The question that occurs to me is whether we are discriminating between leaseholders.

Andy Wightman: I see. For the sake of argument, we could take the commercial company with a 200-year lease that happens to be common good, and another commercial leaseholder.

Nigel Don: Yes.

Andy Wightman: I do not know the answer. ECHR article 1, protocol 1 is very vague. You will know that, in the famous Duke of Westminster case, leasehold enfranchisement, which is essentially what you are doing in a Scottish context, was deemed to be perfectly compatible with the ECHR. As for whether there are issues around discrimination between one leaseholder and another, I could not comment.

Cathie Craigie: If what you have said about Waverley market is right 190 years down the road—if you are successful in your challenges—a plaque might be put up there, and the good citizens of Edinburgh might be grateful for the actions that are taken and for the rammie that you are causing at the moment.

I am interested in the points that you have raised. The Scottish Government has told us that there are currently about 9,000 ultra-long leases in Scotland, but we do not know just how much local councils have in their common good pots. The committee would be interested in seeing the survey that you carried out, to establish whether councils have progressed in that regard.

Your suggestion, whereby councils could seek court approval that a property is not common good before any lease is converted, seems an expensive way to ask councils to proceed, especially at a time when public bodies are carefully watching how they use the public purse. You have said that some other device could be used. Have you any other thoughts in that regard? In response to an earlier question, you suggested the use of some other device, but you did not expand on that.

Andy Wightman: I do not have any thoughts as to alternative devices. Ultimately, on the question whether something is common good, if there is a disagreement between the beneficiaries of the common good—the citizens of a burgh—and the council that has the title, only a court can resolve the matter. I do not want to subject anyone to unnecessary legal expense—either councils or private citizens.

I have suggested that the issue relates to all council property, just in case it is common good. The court should be invited to make a ruling only where there is some dispute, but it is difficult to know how to frame that. How do we frame the question of when there is a dispute? We are now discovering land that councils did not realise was common good. That might continue to be the case for the next 10, 20 or 30 years. It could be discovered five or 10 years later that a long lease that was deemed not to be common good when it was converted was in fact common good, so there needs to be some mechanism in place at the time of conversion. However, I do not have an idea as to what alternative could be used. A simple declarator in the sheriff court is not particularly expensive; only where it is disputed would there be substantial costs in terms of hearings, evidence and all the rest. Disputes about what is and is not common good are quite common, but disputes about that where there is clearly an ultra-long lease will be vanishingly small; in that regard, there is Waverley market and maybe half a dozen other cases.

Cathie Craigie: If we accept the bill, after making amendments to it, it will become law. Give me examples of what you think could constitute a dispute and where a council might end up in court with someone.

Andy Wightman: Many burghs have churches, town halls and various other buildings of some antiquity. Let us say that a burgh entered into a long lease for a building in 1910 for 200 or 300 years and that the property is caught by the bill and is to be converted. If the citizens of that burgh are alerted to the fact that the leaseholder is about to take title through conversion, they might argue that the property is, in fact, common good. There will be a dispute, but not about the leaseholder's right to have their interest converted to full ownership—the bill will make that clear; the question will be whether the common good exemption should apply to the property. That question will have to be resolved or the exemption will have no meaning.

Robert Brown: I have a brief point. You mentioned that the 1944 decision of the Court of Session identified that common good referred broadly to all the property of the former burghs other than certain denoted exceptions. Does that carry over in any way to the property that is acquired by the successor councils? Do they take on the rights and duties of the former burghs in that context, or is that an open question?

Andy Wightman: I do not quite follow.

Robert Brown: We have defined common good as being the property of the former burghs in one form or another, with certain exceptions. The burghs were succeeded by the district councils and the regional councils, and then by the unitary councils. I am inquiring whether common good is still defined as it was in 1944—and perhaps in 1975—and cannot be added to, in effect, or whether acquisitions by the successor councils would be regarded, because of the 1944 decision, as being common good property, other than in certain exceptional situations?

Andy Wightman: To be quite clear, the 1944 court case defined what was and was not common good. To the extent that councils today still have stewardship of those assets, whether something is common good is determined by that decision and test. Since 1975, a council or unitary authority has been free to add to the common good fund, if it so wished, by using funds from the common good fund to acquire land. I do not know the exact dates, but Aberdeen City Council, for example, owns quite substantial interests in industrial estates. I think that some of them were bought after 1975 with funds from the common good fund. Where something is bought with those funds, you do not need the 1944 test, because it belongs to the common good fund. Likewise, I could gift land to the council and say that it should go into the common good fund, because such funds still exist as legal entities. The 1944 case was a test of whether something was common good. As you rightly pointed out, common good property interests were carried forward in the Local Government etc (Scotland) Act 1973 to district councils and then in the Local Government etc (Scotland) Act 1994 to the unitary authorities that we have today.

Robert Brown: But could property that was acquired in a general sense by the new councils and that has nothing to do with the common good fund be regarded, because of the 1944 judgment, as common good property?

Andy Wightman: No. My understanding is that common good was a property of the burghs. Burghs still exist—the burgh charters are still legal documents—but, because they have no administrative authority in the form of town councils, anything that a council acquires now belongs to the council and does not have any common good status, unless it is bought using funds from the common good fund. However, I understand that there is a debate in Ayr about the future of the Gaiety theatre, and it is suggested that the theatre should be put into the common good fund and that that would be a legitimate thing to do. However, you are correct in that anything that is acquired by councils now is not common good, unless it is made quite explicit that it is.

Robert Brown: Thank you. That is helpful.

The Convener: There being no further points, I thank you very much indeed for your attendance, Mr Wightman, which has been very helpful to us.

12:15

Meeting suspended.

12:15

On resuming—

European Union Legislative Proposals (Reporter)

The Convener: Item 4 is the appointment of a European Union reporter. As members will know, the Parliament recently agreed to the introduction of a Parliament-wide strategy for European engagement and scrutiny, including the introduction on a pilot basis of an early-warning system for EU legislative proposals. Paper 2 provides further details of the pilot and invites the committee to appoint an EU reporter for the duration of the pilot, which is from the end of January to the conclusion of the session. My task here will not be particularly onerous because I have had a word with the deputy convener, Bill Butler, who has agreed to undertake the role of EU reporter for the few weeks that are left of the session. Is anyone minded otherwise?

Members: No.

The Convener: Bill Butler is therefore appointed. We express our gratitude to him.

Members: Hear, hear.

Bill Butler: I thank the committee.

12:15

Meeting continued in private until 13:22.

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