



# Title Conditions (Scotland) Act 2003

## 2003 asp 9

### PART 1

#### REAL BURDENS: GENERAL

##### *Meaning and creation*

#### **1 The expression “real burden”**

- (1) A real burden is an encumbrance on land constituted in favour of the owner of other land in that person’s capacity as owner of that other land.
- (2) In relation to a real burden—
  - (a) the encumbered land is known as the “burdened property”; and
  - (b) the other land is known as the “benefited property”.
- (3) Notwithstanding subsections (1) and (2) above, the expression “real burden” includes a personal real burden; that is to say a conservation burden, a rural housing burden, a maritime burden, an economic development burden, a health care burden, a manager burden, a personal pre-emption burden and a personal redemption burden (being burdens constituted in favour of a person other than by reference to the person’s capacity as owner of any land).

#### **2 Affirmative, negative and ancillary burdens**

- (1) Subject to subsection (3) below, a real burden may be created only as—
  - (a) an obligation to do something (including an obligation to defray, or contribute towards, some cost); or
  - (b) an obligation to refrain from doing something.
- (2) An obligation created as is described in—
  - (a) paragraph (a) of subsection (1) above is known as an “affirmative burden”; and
  - (b) paragraph (b) of that subsection is known as a “negative burden”.
- (3) A real burden may be created which—

- (a) consists of a right to enter, or otherwise make use of, property; or
  - (b) makes provision for management or administration,
- but only for a purpose ancillary to those of an affirmative burden or a negative burden.

- (4) A real burden created as is described in subsection (3) above is known as an “ancillary burden”.
- (5) In determining whether a real burden is created as is described in subsection (1) or (3) above, regard shall be had to the effect of a provision rather than to the way in which the provision is expressed.

### **3 Other characteristics**

- (1) A real burden must relate in some way to the burdened property.
- (2) The relationship may be direct or indirect but shall not merely be that the obligated person is the owner of the burdened property.
- (3) In a case in which there is a benefited property, a real burden must, unless it is a community burden, be for the benefit of that property.
- (4) A community burden may be for the benefit of the community to which it relates or of some part of that community.
- (5) A real burden may consist of a right of pre-emption; but a real burden created on or after the appointed day must not consist of—
- (a) a right of redemption or reversion; or
  - (b) any other type of option to acquire the burdened property.
- (6) A real burden must not be contrary to public policy as for example an unreasonable restraint of trade and must not be repugnant with ownership (nor must it be illegal).
- (7) Except in so far as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint—
- (a) the manager of property; or
  - (b) the supplier of any services in relation to property).
- (8) It shall not be competent—
- (a) to make in the constitutive deed provision; or
  - (b) to import under section 6(1) of this Act terms which include provision, to the effect that a person other than the holder of the burden may waive compliance with, or mitigate or otherwise vary, a condition of the burden.
- (9) Subsection (8) above is without prejudice to section 33(1)(a) of this Act.

### **4 Creation**

- (1) A real burden is created by duly registering the constitutive deed except that, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), the constitutive deed may provide for the postponement of the effectiveness of the real burden to—
- (a) a date specified in that deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or

- (b) the date of registration of some other deed so specified.
- (2) The reference in subsection (1) above to the constitutive deed is to a deed which—
- (a) sets out (employing, unless subsection (3) below is invoked, the expression “real burden”) the terms of the prospective real burden;
  - (b) is granted by or on behalf of the owner of the land which is to be the burdened property; and
  - (c) except in the case mentioned in subsection (4) below, nominates and identifies—
    - (i) that land;
    - (ii) the land (if any) which is to be the benefited property; and
    - (iii) any person in whose favour the real burden is to be constituted (if it is to be constituted other than by reference to the person’s capacity as owner of any land).
- (3) Where the constitutive deed relates, or purports to relate, to the creation of a nameable type of real burden (such as, for example, a community burden), that deed may, instead of employing the expression “real burden”, employ the expression appropriate to that type.
- (4) Where the constitutive deed relates to the creation of a community burden, that deed shall nominate and identify the community.
- (5) For the purposes of this section, a constitutive deed is duly registered in relation to a real burden only when registered against the land which is to be the burdened property and (except where there will be no benefited property or the land in question is outwith Scotland) the land which is to be the benefited property.
- (6) A right of ownership held pro indiviso shall not in itself constitute a property against which a constitutive deed can be duly registered.
- (7) This section is subject to sections 73(2) and 90(8) of this Act and is without prejudice to section 6 of this Act.

## **5 Further provision as respects constitutive deed**

- (1) It shall not be an objection to the validity of a real burden (whenever created) that—
- (a) an amount payable in respect of an obligation to defray some cost is not specified in the constitutive deed; or
  - (b) a proportion or share payable in respect of an obligation to contribute towards some cost is not so specified provided that the way in which that proportion or share can be arrived at is so specified.
- (2) Without prejudice to the generality of subsection (1) above, such specification may be by making reference to another document the terms of which are not reproduced in the deed; but for reference to be so made the other document must be a public document (that is to say, an enactment or a public register or some record or roll to which the public readily has access).

## **6 Further provision as respects creation**

- (1) A real burden is created by registering against the land which is to be the burdened property a deed which—

- (a) is granted by or on behalf of the owner of that land; and
  - (b) imports the terms of the prospective burden.
- (2) “Imports” in subsection (1)(b) above means imports into itself from a deed of conditions; and importation in, or as near as may be in, the form set out in schedule 1 to this Act shall suffice in that regard.
- (3) A right of ownership held pro indiviso shall not in itself constitute a property against which a deed such as is mentioned in subsection (1) above can be duly registered.
- (4) This section is without prejudice to section 4 of this Act.

*Duration, enforceability and liability*

**7 Duration**

Subject to any enactment (including this Act) or to any rule of law, the duration of a real burden is perpetual unless the constitutive deed provides for a duration of a specific period.

**8 Right to enforce**

- (1) A real burden is enforceable by any person who has both title and interest to enforce it.
- (2) A person has such title if an owner of the benefited property; but the following persons also have such title—
- (a) a person who has a real right of lease or proper liferent in the benefited property (or has a pro indiviso share in such right);
  - (b) a person who—
    - (i) is the non-entitled spouse of an owner of the benefited property or of a person mentioned in paragraph (a) above; and
    - (ii) has occupancy rights in that property; and
  - (c) if the real burden was created as mentioned in subsection (3)(b) below, a person who was, at the time the cost in question was incurred—
    - (i) an owner of the benefited property; or
    - (ii) a person having such title by virtue of paragraph (a) or (b) above.
- (3) A person has such interest if—
- (a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property; or
  - (b) the real burden being an affirmative burden created as an obligation to defray, or contribute towards, some cost, that person seeks (and has grounds to seek) payment of, or as respects, that cost.
- (4) A person has title to enforce a real burden consisting of—
- (a) a right of pre-emption, redemption or reversion; or
  - (b) any other type of option to acquire the burdened property, only if the owner of the benefited property.

- (5) In subsection (2)(b) above, “non-entitled spouse” and “occupancy rights” shall be construed in accordance with section 1 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (c. 59) (right of spouse without title to occupy matrimonial home).
- (6) Subsections (2) to (5) above do not apply in relation to a personal real burden.

## **9 Persons against whom burdens are enforceable**

- (1) An affirmative burden is enforceable against the owner of the burdened property.
- (2) A negative burden or an ancillary burden is enforceable against—
- (a) the owner, or tenant, of the burdened property; or
  - (b) any other person having the use of that property.

## **10 Affirmative burdens: continuing liability of former owner**

- (1) An owner of burdened property shall not, by virtue only of ceasing to be such an owner, cease to be liable for the performance of any relevant obligation.
- (2) A person who becomes an owner of burdened property (any such person being referred to in this section as a “new owner”) shall be severally liable with any former owner of the property for any relevant obligation for which the former owner is liable.
- (3) A new owner who incurs expenditure in the performance of any relevant obligation for which a former owner of the property is liable may recover an amount equal to such expenditure from that former owner.
- (4) For the purposes of subsections (1) to (3) above, “relevant obligation” means any obligation under an affirmative burden which is due for performance; and such an obligation becomes due—
- (a) in a case where—
    - (i) the burden is a community burden; and
    - (ii) a binding decision to incur expenditure is made, on the date on which that decision is made; or
  - (b) in any other case, on—
    - (i) such date; or
    - (ii) the occurrence of such event,as may be stipulated for its performance (whether in the constitutive deed or otherwise).

## **11 Affirmative burdens: shared liability**

- (1) If a burdened property as respects which an affirmative burden is created is divided (whether before or after the appointed day) into two or more parts then, subject to subsections (2) and (4) below, the owners of the parts—
- (a) are severally liable in respect of the burden; and
  - (b) as between (or among) themselves, are liable in the proportions which the areas of their respective parts bear to the area of the burdened property.
- (2) “Part” in subsection (1) above does not include a part to which the affirmative burden cannot relate.

- (3) In the application of subsection (1) above to parts which are flats in a tenement, the reference in paragraph (b) of that subsection to the areas of the respective parts shall be construed as a reference to the floor areas of the respective flats.
- (4) Paragraph (a) of subsection (1) above shall not apply if, in the constitutive deed, it is provided that liability as between (or among) the owners of the parts shall be otherwise than is provided for in that paragraph; and paragraph (b) of that subsection shall not apply if, in the constitutive deed or in the conveyance effecting the division, it is provided that liability as between (or among) them shall be otherwise than is provided for in that paragraph.
- (5) If two or more persons own in common a burdened property as respects which an affirmative burden is created then, unless the constitutive deed otherwise provides—
  - (a) they are severally liable in respect of the burden; and
  - (b) as between (or among) themselves, they are liable in the proportions in which they own the property.

*Division of benefited or burdened property*

## 12 Division of a benefited property

- (1) Where part of a benefited property is conveyed, then on registration of the conveyance the part conveyed shall cease to be a benefited property unless in the conveyance some other provision is made, as for example—
  - (a) that the part retained and the part conveyed are separately to constitute benefited properties; or
  - (b) that it is the part retained which is to cease to be a benefited property.
- (2) Different provision may, under subsection (1) above, be made in respect of different real burdens.
- (3) For the purposes of subsection (1) above, any such provision as is referred to in that subsection shall—
  - (a) identify the constitutive deed, say where it is registered and give the date of registration;
  - (b) identify the real burdens; and
  - (c) be of no effect in so far as it relates to—
    - (i) a right of pre-emption, redemption or reversion; or
    - (ii) any other type of option to acquire the burdened property,
 if it is other than such provision as is mentioned in paragraph (b) of that subsection.
- (4) Subsection (1) above does not apply where—
  - (a) the property, part of which is conveyed, is a benefited property only by virtue of any of sections 52 to 56 of this Act;
  - (b) the real burdens are community burdens; or
  - (c) the real burdens are set out in a common deed of conditions, that is to say in a deed which sets out the terms of the burdens imposed on the part conveyed, that part being one of two or more properties on which they are or will be imposed under a common scheme.

### **13 Division of a burdened property**

Where part of a burdened property is conveyed (whether before or after the appointed day), then on registration of the conveyance the part retained and the part conveyed shall separately constitute burdened properties unless the real burden cannot relate to one of the parts, in which case that part shall, on that registration, cease to be a burdened property.

#### *Construction*

### **14 Construction**

Real burdens shall be construed in the same manner as other provisions of deeds which relate to land and are intended for registration.

#### *Extinction*

### **15 Discharge**

- (1) A real burden is discharged as respects a benefited property by registering against the burdened property a deed of discharge granted by or on behalf of the owner of the benefited property.
- (2) In subsection (1) above, “discharged” means discharged—
  - (a) wholly; or
  - (b) to such extent as may be specified in the deed of discharge.

### **16 Acquiescence**

- (1) Where—
    - (a) a real burden is breached in such a way that material expenditure is incurred;
    - (b) any benefit arising from such expenditure would be substantially lost were the burden to be enforced; and
    - (c) in the case of—
      - (i) a burden other than a conservation burden, economic development burden or health care burden, the owner of the benefited property (if any) has an interest to enforce the burden in respect of the breach and consents to the carrying on of the activity which results in that breach, or every person by whom the burden is enforceable and who has such an interest, either so consents or, being aware of the carrying on of that activity (or, because of its nature, being in a position where that person ought to be aware of it), has not, by the expiry of such period as is in all the circumstances reasonable (being in any event a period which does not exceed that of twelve weeks beginning with the day by which that activity has been substantially completed), objected to its being carried on; or
      - (ii) a conservation burden, economic development burden or health care burden, the person by whom the burden is enforceable consents to the carrying on of that activity,
- the burden shall, to the extent of the breach, be extinguished.

- (2) Where the period of twelve weeks following the substantial completion of an activity has expired as mentioned in sub-paragraph (i) of subsection (1)(c) above, it shall be presumed, unless the contrary is shown, that the person by whom the real burden was, at the time in question, enforceable (or where a burden is enforceable by more than one person, each of those persons) was, or ought to have been, aware of the carrying on of the activity and did not object as mentioned in that sub-paragraph.

## 17 Further provision as regards extinction where no interest to enforce

Where at any time a real burden is breached but at that time no person has an interest to enforce it in respect of the breach, the burden shall, to the extent of the breach, be extinguished.

## 18 Negative prescription

- (1) Subject to subsection (5) below, if—
- (a) a real burden is breached to any extent; and
  - (b) during the period of five years beginning with the breach neither—
    - (i) a relevant claim; nor
    - (ii) a relevant acknowledgement,
 is made,
- then, subject to subsection (2) below, the burden shall, to the extent of the breach, be extinguished on the expiry of that period.
- (2) Subject to subsections (5) and (6) below, where, in relation to a real burden which consists of—
- (a) a right of pre-emption, redemption or reversion; or
  - (b) any other type of option to acquire the burdened property,
- the owner of the burdened property fails to comply with an obligation to convey (or, as the case may be, to offer to convey) the property (or part of the property) and paragraph (b) of subsection (1) above is satisfied, the burden shall be extinguished in relation to the property (or part) on the expiry of the period mentioned in the said paragraph (b).
- (3) Sections 9 and 10 of the Prescription and Limitation (Scotland) Act 1973 (c. 52) (which define the expressions “relevant claim” and “relevant acknowledgement” for the purposes of sections 6, 7 and 8A of that Act) shall apply for the purposes of subsections (1) and (2) above as those sections apply for the purposes of sections 6, 7 and 8A of that Act but subject to the following modifications—
- (a) in each of sections 9 and 10 of that Act—
    - (i) subsection (2) shall not apply;
    - (ii) for any reference to an obligation there shall be substituted a reference to a real burden; and
    - (iii) for any reference to a creditor there shall be substituted a reference to any person by whom a real burden is enforceable;
  - (b) in section 9 of that Act, for the reference to a creditor in an obligation there shall be substituted a reference to any person by whom a real burden is enforceable; and
  - (c) in section 10 of that Act, for any reference to a debtor there shall be substituted a reference to any person against whom the real burden is enforceable.



- (4) Section 14 of the said Act of 1973 (which makes provision as respects the computation of prescriptive periods) shall apply for the purposes of subsections (1) and (2) above as that section applies for the purposes of Part I of that Act except that paragraph (a) of subsection (1) of that section shall for the purposes of those subsections be disregarded.
- (5) In relation to a breach occurring before the appointed day, subsections (1) and (2) above apply with the substitution in paragraph (b) of subsection (1), for the words “period of five years beginning with the breach”, of the words “appropriate period”.
- (6) In the case of a right of pre-emption constituted as a rural housing burden, subsection (2) above shall apply with the modification that for the words “the burden shall be extinguished in relation to the property (or part) on” there shall be substituted “it shall not be competent to commence any action in respect of that failure after”.
- (7) The reference, in subsection (5) above, to the “appropriate period” is to whichever first expires of—
  - (a) the period of five years beginning with the appointed day; and
  - (b) the period of twenty years beginning with the breach.

## **19 Confusio not to extinguish real burden**

A real burden is not extinguished by reason only that—

- (a) the same person is the owner of the benefited property and the burdened property; or
- (b) in a case in which there is no benefited property, the person in whose favour the real burden is constituted is the owner of the burdened property.

### *Termination*

## **20 Notice of termination**

- (1) Subject to section 23 of this Act, if at least one hundred years have elapsed since the date of registration of the constitutive deed (whether or not the real burden has been varied or renewed since that date), an owner of the burdened property, or any other person against whom the burden is enforceable, may, after intimation under section 21(1) of this Act, execute and register, in (or as nearly as may be in) the form contained in schedule 2 to this Act, a notice of termination as respects the real burden.
- (2) It shall be no objection to the validity of a notice of termination that it is executed or registered by a successor in title of the person who has given such intimation; and any reference in this Act to the “terminator” shall be construed as a reference to—
  - (a) except where paragraph (b) below applies, the person who has given such intimation; or
  - (b) where that person no longer has the right or obligation by virtue of which intimation was given, the person who has most recently acquired that right or obligation.
- (3) Subsections (1) and (2) above do not apply in relation to—
  - (a) a conservation burden;
  - (b) a maritime burden;

- (c) a facility burden;
  - (d) a service burden; or
  - (e) a real burden which is a title condition of a kind specified in schedule 11 to this Act.
- (4) The notice of termination shall—
- (a) identify the land which is the burdened property;
  - (b) describe the terminator’s connection with the property (as for example by identifying the terminator as an owner or as a tenant);
  - (c) set out the terms of the real burden and (if it is not wholly to be terminated) specify the extent of the termination;
  - (d) specify a date on or before which any application under paragraph (b) of section 90(1) of this Act will require to be made if the real burden is to be renewed or varied under that paragraph (that date being referred to in this Act as the “renewal date”);
  - (e) specify the date on which, and the means by which, intimation was given under subsection (1) of section 21 of this Act; and
  - (f) set out the name (in so far as known) and the address of each person to whom intimation is sent under subsection (2)(a) of that section.
- (5) Any date may be specified under paragraph (d) of subsection (4) above provided that it is a date not less than eight weeks after intimation is last given under subsection (1) of the said section 21 (intimation by affixing being taken, for the purposes of this subsection, to be given when first the notice is affixed).
- (6) Where a property is subject to two or more real burdens, it shall be competent to execute and register a single notice of termination in respect of both (or all) the real burdens.

## 21 Intimation

- (1) A proposal to execute and register a notice of termination shall be intimated—
- (a) to the owner of each benefited property;
  - (b) in the case of a personal real burden, to the holder; and
  - (c) to the owner (or, if the terminator is an owner, to any other owner) of the burdened property.
- (2) Subject to subsection (3) below, such intimation may be given—
- (a) by sending a copy of the proposed notice of termination, completed as respects all the matters which must, in pursuance of paragraphs (a) to (d) and (f) of section 20(4) of this Act, be identified, described, set out or specified in the notice and with the explanatory note which immediately follows the form of notice of termination in schedule 2 to this Act;
  - (b) by affixing to the burdened property and to—
    - (i) in a case (not being one mentioned in paragraph (c)(ii) below) where there exists one, and only one, lamp post which is situated within one hundred metres of that property, that lamp post; or
    - (ii) in a case (not being one so mentioned) where there exists more than one lamp post so situated, each of at least two such lamp posts,
 a conspicuous notice in the form set out in schedule 3 to this Act; or
  - (c) in a case where—

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*Status: This is the original version (as it was originally enacted).*

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- (i) it is not possible to comply with paragraph (b) above; or
  - (ii) the burdened property is minerals or salmon fishings,by advertisement in a newspaper circulating in the area of the burdened property.
- (3) Such intimation shall, except where it is impossible to do so, be given by the means described in subsection (2)(a) above if it is given—
  - (a) under subsection (1)(b) or (c) above; or
  - (b) under subsection (1)(a) above in relation to a benefited property which is at some point within four metres of the burdened property.
- (4) An advertisement giving intimation under subsection (2)(c) above shall—
  - (a) identify the land which is the burdened property;
  - (b) set out the terms of the real burden either in full or by reference to the constitutive deed;
  - (c) specify the name and address of a person from whom a copy of the proposed notice of termination may be obtained; and
  - (d) state that any owner of a benefited property, or as the case may be any holder of a personal real burden, may apply to the Lands Tribunal for Scotland for the real burden to be renewed or varied but that if no such application is received by a specified date (being the renewal date) the consequence may be that the real burden is extinguished.
- (5) The terminator shall provide a person with a copy of the proposed notice of termination (completed as is mentioned in subsection (2)(a) above and with the explanatory note referred to in that subsection) if so requested by that person.
- (6) A person—
  - (a) is entitled to affix a notice to a lamp post in compliance with subsection (2)(b) above regardless of who owns the lamp post but must—
    - (i) take all reasonable care not to damage the lamp post in doing so; and
    - (ii) remove the notice no later than one week after the date specified in it as the renewal date; and
  - (b) must, until the day immediately following the date so specified, take all reasonable steps to ensure that the notice continues to be displayed and remains conspicuous and readily legible.
- (7) Section 184 of the Town and Country Planning (Scotland) Act 1997 (c. 8) (planning permission not needed for advertisements complying with regulations) applies in relation to a notice affixed in compliance with subsection (2)(b) above as that section applies in relation to an advertisement displayed in accordance with regulations made under section 182 of that Act (regulations controlling display of advertisements).

## **22 Oath or affirmation before notary public**

- (1) Before submitting a notice of termination for registration, the terminator shall swear or affirm before a notary public that, to the best of the terminator's knowledge and belief, all the information contained in the notice is true and that section 21 of this Act has been complied with.
- (2) For the purposes of subsection (1) above, if the terminator is—

- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the terminator may swear or affirm;
- (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;

and any reference in that subsection to a terminator shall be construed accordingly.

### **23 Prerequisite certificate for registration of notice of termination**

- (1) A notice of termination shall not be registrable unless, after the renewal date, there is endorsed on the notice (or on an annexation to it referred to in an endorsement on it and identified, on the face of the annexation, as being the annexation so referred to) a certificate executed by a member of the Lands Tribunal, or by their clerk, to the effect that no application in relation to the proposal to execute and register the notice has been received under section 90(1)(b) (and (4)) of this Act or that any such application which has been received—

- (a) has been withdrawn; or
- (b) relates (either or both)—
  - (i) to one or more but not to all of the real burdens the terms of which are set out in the notice (any real burden to which it relates being described in the certificate);
  - (ii) to one or more but not to all (or probably or possibly not to all) of the benefited properties (any benefited property to which it relates being described in the certificate),

and where more than one such application has been received the certificate shall relate to both (or as the case may be all) applications.

- (2) At any time before endorsement under subsection (1) above, a notice of termination, whether or not it has been submitted for such endorsement, may be withdrawn, by intimation in writing to the Lands Tribunal, by the terminator; and it shall not be competent to endorse under that subsection a notice in respect of which such intimation is given.

### **24 Effect of registration of notice of termination**

- (1) Subject to subsection (2) below, a notice of termination, when registered against the burdened property, extinguishes the real burden in question wholly or as the case may be to such extent as may be described in that notice.

- (2) A notice of termination registrable by virtue of a certificate under paragraph (b) of section 23(1) of this Act shall not, on being registered, extinguish a real burden which is the subject of an application disclosed by the certificate in so far as that burden—

- (a) is constituted in favour of the property of which the applicant is owner; or
- (b) is a personal real burden of which the applicant is holder,

but if under that section a further certificate is endorsed on the notice (or on an annexation to the notice) the notice may be registered again, the effect of the later registration being determined by reference to the further certificate rather than to the certificate by virtue of which the notice was previously registered.

## PART 2

### COMMUNITY BURDENS

#### *Meaning, creation etc.*

#### **25 The expression “community burdens”**

- (1) Subject to subsection (2) below, where—
  - (a) real burdens are imposed under a common scheme on four or more units; and
  - (b) each of those units is, in relation to some or all of those burdens, both a benefited property and a burdened property,the burdens shall, in relation to the units, be known as “community burdens”.
- (2) Any real burdens such as are mentioned in section 54(1) of this Act are community burdens.

#### **26 Creation of community burdens: supplementary provision**

- (1) Without prejudice to section 2 of this Act, community burdens may make provision as respects any of the following—
  - (a) the appointment by the owners of a manager;
  - (b) the dismissal by the owners of a manager;
  - (c) the powers and duties of a manager;
  - (d) the nomination of a person to be the first manager;
  - (e) the procedures to be followed by the owners in making decisions about matters affecting the community;
  - (f) the matters on which such decisions may be made; and
  - (g) the resolution of disputes relating to community burdens.
- (2) In this Act “community” means—
  - (a) the units subject to community burdens; and
  - (b) any unit in a sheltered or retirement housing development which is used in some special way as mentioned in section 54(1) of this Act.

#### **27 Effect on units of statement that burdens are community burdens**

Where, in relation to any real burdens, the constitutive deed states that the burdens are to be community burdens, each unit shall, in relation to those burdens, be both a benefited property and a burdened property.

#### *Management of community*

#### **28 Power of majority to appoint manager etc.**

- (1) Subject to sections 54(5)(a) and 63(8)(a) of this Act and to any provision made by community burdens, the owners of a majority of the units in a community may—
  - (a) appoint a person to be the manager of the community on such terms as they may specify;

- (b) confer on any such manager the right to exercise such of their powers as they may specify;
  - (c) revoke, or vary, the right to exercise such of the powers conferred under paragraph (b) above as they may specify; and
  - (d) dismiss any such manager.
- (2) Without prejudice to the generality of subsection (1)(b) above, the powers mentioned there include—
- (a) power to carry out maintenance;
  - (b) power to enforce community burdens; and
  - (c) power to vary or discharge such burdens.
- (3) If a unit is owned by two or more persons in common, then, for the purposes of voting on any proposal to exercise a power conferred by subsection (1) above, the vote allocated as respects the unit shall only be counted for or against the proposal if it is the agreed vote of those of them who together own more than a half share of the unit.
- (4) The powers conferred by paragraphs (b) to (d) of subsection (1) above may be exercised whether or not the manager was appointed by virtue of paragraph (a) of that subsection.

## **29 Power of majority to instruct common maintenance**

- (1) This section applies where—
- (a) community burdens impose an obligation on the owners of all or some of the units to maintain, or contribute towards the cost of maintaining, particular property; and
  - (b) the obligation so imposed accounts for the entire liability for the maintenance of such property.
- (2) Subject to any provision made by community burdens, the owners of a majority of the units subject to the obligation may—
- (a) decide that maintenance should be carried out;
  - (b) by written notice to each owner, require that owner to deposit—
    - (i) by such date as they may specify (being a date not less than twenty-eight days after the requirement is made of that owner); and
    - (ii) into such account (the “maintenance account”) as they may nominate for the purpose,
 

a sum of money (being a sum not exceeding that owner’s apportioned share, in accordance with the terms of the community burdens, of a reasonable estimate of the cost of maintenance);
  - (c) give any such authorisation as is mentioned in subsection (4)(h) below;
  - (d) instruct or carry out such maintenance; and
  - (e) modify or revoke anything done by them by virtue of paragraphs (a) to (d) above.
- (3) If a unit is owned by two or more persons in common, then, for the purposes of voting on any proposal to exercise a power conferred by subsection (2) above, the vote allocated as respects the unit shall only be counted for or against the proposal if it is the agreed vote of those of them who together own more than a half share of the unit.

- (4) Any notice given under subsection (2)(b) above shall contain, or to it shall be attached, a note comprising a summary of the nature and extent of the maintenance to be carried out together with the following information—
- (a) the estimated cost of carrying out that maintenance;
  - (b) why the estimate is considered a reasonable estimate;
  - (c) how—
    - (i) the sum required from the owner in question; and
    - (ii) the apportionment among the owners, have been arrived at;
  - (d) what the apportioned shares of the other owners are;
  - (e) the date on which the decision to carry out the maintenance was taken and the names of those by whom it was taken;
  - (f) a timetable for the carrying out of the maintenance, including the dates by which it is proposed the maintenance will be—
    - (i) commenced; and
    - (ii) completed;
  - (g) the location and number of the maintenance account; and
  - (h) the names and addresses of the persons who will be authorised to operate that account on behalf of the community.
- (5) The maintenance account shall be a bank or building society account which is interest bearing; and the authority of at least two persons, or of a manager on whom has been conferred the right to give authority, shall be required for any payment from it.
- (6) If modification or revocation under paragraph (e) of subsection (2) above affects the information contained in a notice or note under subsection (4) above, that information shall forthwith be sent again, modified accordingly, to the owners.
- (7) An owner shall be entitled—
- (a) to inspect, at any reasonable time, any tender received in connection with the maintenance to be carried out;
  - (b) if—
    - (i) that maintenance is not commenced by the fourteenth day after the date specified by virtue of subsection (4)(f)(i) above; and
    - (ii) the owner demands, by written notice, from the persons authorised under subsection (4)(h) above repayment (with accrued interest) of such sum as has been deposited by that owner in compliance with the requirement under subsection (2)(b) above, to be repaid accordingly; except that no requirement to make repayment in compliance with a notice under paragraph (b)(ii) above shall arise if the persons so authorised do not receive that notice before the maintenance is commenced.
- (8) Such sums as are held in the maintenance account by virtue of subsection (2)(b) above are held in trust for all the depositors, for the purpose of being used by the persons authorised to make payments from the account as payment for the maintenance.
- (9) Any sums held in the maintenance account after all sums payable in respect of the maintenance carried out have been paid shall be shared among the owners—

- (a) by repaying each depositor, with any accrued interest and after deduction of that person's apportioned share of the actual cost of the maintenance, the sum which the person deposited; or
- (b) in such other way as the depositors agree in writing.

### **30 Owners' decision binding**

Anything done (including any decision made) by—

- (a) the owners in accordance with such provision as is made in community burdens; or
  - (b) a majority of them, in accordance with section 28 or 29 of this Act,
- is binding on all the owners and their successors as owners.

### **31 Remuneration of manager**

Subject to any provision made by community burdens, liability for any remuneration due to a manager of the community (however appointed) shall be shared equally among the units in a community and each owner shall be liable accordingly; but if two or more persons have common ownership of a unit then—

- (a) they are severally liable for any share payable in respect of that unit; and
- (b) as between (or among) themselves, they are liable in the proportions in which they own the unit.

*Variation, discharge etc.*

### **32 The expressions “affected unit” and “adjacent unit”**

In this Part of this Act a unit in respect of which a community burden is to be varied (“varied” including imposed), or discharged, is referred to as an “affected unit”; and “adjacent unit” means, in relation to an affected unit, any unit which is at some point within four metres of the unit.

### **33 Majority etc. variation and discharge of community burdens**

- (1) A community burden may be varied (“varied” including imposed), or discharged, by registering against each affected unit a deed of variation, or discharge, granted—
  - (a) where provision is made in the constitutive deed for it to be granted by the owners of such units in the community as may be specified, by or on behalf of the owners of those units; or
  - (b) where no such provision is made, in accordance with subsection (2) below.
- (2) A deed is granted in accordance with this subsection if granted—
  - (a) by or on behalf of the owners of a majority of the units in the community (except that, where one person owns a majority of those units, the deed must also be granted by at least one other owner); or
  - (b) where the manager of the community is authorised to do so (whether in the constitutive deed or otherwise), by that manager.
- (3) An affected unit may, for the purposes of subsection (1)(a) or (2)(a) above, be included in any calculation of the number of units.



- (4) For the purposes of this section, where a unit is owned by two or more persons in common a deed is granted by or on behalf of the owners of the unit if—
- (a) granted in accordance with such provision as is made in that regard in the constitutive deed; or
  - (b) where no such provision is made, granted by or on behalf of those of them who together own more than a half share of the unit.
- (5) This section is subject to section 54(5)(b) and (c) of this Act.

### **34 Variation or discharge under section 33: intimation**

- (1) Where a deed of variation or discharge is granted under section 33(2) of this Act, a proposal to register that deed shall be intimated to such other owners of the units in the community as have not granted the deed.
- (2) Such intimation shall be given by sending a copy of the deed, together with—
- (a) a notice in, or as near as may be in, the form set out in schedule 4 to this Act; and
  - (b) the explanatory note which immediately follows that form in that schedule.
- (3) Where a deed has been granted as mentioned in subsection (1) above, any person to whom intimation is given under subsection (2) above may, during the period of eight weeks beginning with the latest date on which intimation of the proposal to register the deed is so given, apply to the Lands Tribunal for preservation, unvaried, of the community burden in so far as constituted in favour of, or against, any unit not all of whose owners have granted the deed.
- (4) Subsections (2) to (4) of section 37 of this Act apply to a deed granted as mentioned in subsection (1) above as they apply in relation to a deed granted as mentioned in section 35 of this Act but with the modifications specified in subsection (5) below.
- (5) The modifications are that—
- (a) references in the said subsections (2) and (4) to subsection (1) of that section are to be construed as references to subsection (3) above;
  - (b) the reference in the former of those said subsections to no application having been received under section 37 is to be construed as a reference to none having been received under this section; and
  - (c) the reference in the latter of those said subsections to section 36 of this Act is to be construed as a reference to subsections (1) and (2) above.
- (6) For the purposes of subsection (4) of section 37 of this Act as so applied, if the person proposing to submit for registration a deed granted as mentioned in subsection (1) above is—
- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in the said subsection (4), then a legal representative of that person may swear or affirm;
  - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm,
- and any reference in the said subsection (4) to the person so proposing shall be construed accordingly.

**35 Variation and discharge of community burdens by owners of adjacent units**

- (1) A community burden may be varied or discharged by registering against each affected unit a deed of variation, or discharge, granted, in a case where no such provision as is mentioned in section 33(1)(a) of this Act is made, by or on behalf of the owners of the affected units and by or on behalf of the owners of all units (if any) which in relation to any of the affected units are adjacent units, except that this subsection—
  - (a) shall not apply where the burden is a facility burden or a service burden or where the units constitute a sheltered or retirement housing development;
  - (b) may expressly be disappplied by the constitutive deed; and
  - (c) is subject to sections 36 and 37 of this Act and to any determination of the Lands Tribunal.
- (2) Subsection (4) of section 33 of this Act applies for the purposes of this section as it applies for the purposes of that section.

**36 Variation and discharge under section 35: intimation**

- (1) A proposal to register under section 35 of this Act a deed of variation or discharge shall be intimated to such owners of the units in the community as have not granted the deed.
- (2) Such intimation may be given—
  - (a) by sending a copy of the deed together with—
    - (i) a notice in, or as near as may be in, the form set out in schedule 5 to this Act; and
    - (ii) the explanatory note which immediately follows that form in that schedule;
  - (b) by affixing to each affected unit and to—
    - (i) in a case where there exists one, and only one, lamp post which is situated within one hundred metres of that unit, that lamp post; or
    - (ii) in a case where there exists more than one lamp post so situated, each of at least two such lamp posts,a conspicuous notice in the form set out in schedule 6 to this Act; or
  - (c) in a case where it is not possible to comply with paragraph (b) above, by advertisement in a newspaper circulating in the area of the affected unit.
- (3) An advertisement giving intimation under subsection (2)(c) above shall—
  - (a) identify the land which is the affected unit;
  - (b) set out the terms of the community burden either in full or by reference to the constitutive deed;
  - (c) specify the name and address of the person who proposes to register the deed and state that from that person (or from some other person whose name and address are specified in the advertisement) a copy of that deed may be obtained;
  - (d) state that any owner of a unit who has not granted the deed may apply to the Lands Tribunal for Scotland for the community burden to be preserved but that if no such application is received by a specified date (being the date on which the period mentioned in section 37(1) of this Act expires) the consequence may be that the community burden is varied or discharged in relation to the affected unit.

- (4) The person proposing to register the deed shall provide any other person with a copy of that deed if so requested by that other person.
- (5) Subsections (6) and (7) of section 21 of this Act apply in relation to affixing, and to a notice affixed, under subsection (2)(b) above as they apply in relation to affixing, and to a notice affixed, under subsection (2)(b) of that section (the reference in paragraph (a)(ii) of the said subsection (6) to the date specified in the notice as the renewal date being construed as a reference to the date so specified by virtue of subsection (2)(b) above).

**37 Preservation of community burden in respect of which deed of variation or discharge has been granted as mentioned in section 35(1)**

- (1) Where a deed of variation or, as the case may be, of discharge has been granted as mentioned in section 35(1) of this Act, any owner of a unit in the community who has not granted the deed may, during the period of eight weeks beginning with the latest date on which intimation of the proposal to register that deed is given under section 36(2) of this Act, apply to the Lands Tribunal for preservation, unvaried, of the community burden in so far as constituted in favour of, or against, any unit not all of whose owners have granted the deed.
- (2) A deed of variation or discharge granted as so mentioned shall not, on registration, vary or discharge a community burden in so far as constituted in favour of, or against, any unit not all of whose owners have granted the deed unless, after the expiry of the period mentioned in subsection (1) above, there is endorsed on it (or on an annexation to it referred to in an endorsement on it and identified, on the face of the annexation, as being the annexation so referred to) a certificate executed by a member of the Lands Tribunal, or by their clerk, to the effect that no application in relation to the proposal to register the deed has been received under this section or that any such application which has been received—
  - (a) has been withdrawn; or
  - (b) relates to one or more but not to all of the community burdens the terms of which are set out in the deed (any community burden to which it relates being described in the certificate),and where more than one such application has been received the certificate shall relate to both (or as the case may be all) applications.
- (3) A deed of variation or discharge granted as so mentioned does not vary or discharge, in so far as constituted in favour of, or against, any unit not all of whose owners have granted the deed, a burden described by virtue of subsection (2)(b) above.
- (4) A person who proposes to submit a deed of variation or discharge granted as so mentioned for registration shall, before doing so, swear or affirm before a notary public (the deed being endorsed accordingly)—
  - (a) that section 36 of this Act has been complied with; and
  - (b) as to the date on which the period mentioned in subsection (1) above expires, but if more than one person so proposes only one of them need so swear or affirm.
- (5) Subsection (2) of section 22 of this Act applies in relation to such a person and for the purposes of subsection (4) above as it applies in relation to a terminator and for the purposes of subsection (1) of that section.

- (6) For the purposes of subsection (1) above, intimation by affixing shall be taken to be given when first the notice is affixed.

### PART 3

#### CONSERVATION AND OTHER PERSONAL REAL BURDENS

##### *Conservation burdens*

### 38 Conservation burdens

- (1) On and after the day on which this section comes into force it shall, subject to subsection (2) below, be competent to create a real burden in favour of a conservation body, or of the Scottish Ministers, for the purpose of preserving, or protecting, for the benefit of the public—
- (a) the architectural or historical characteristics of any land; or
  - (b) any other special characteristics of any land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land);
- and any such burden shall be known as a “conservation burden”.
- (2) If under subsection (1) above the conservation burden is to be created other than by the conservation body or the Scottish Ministers, the consent of—
- (a) that body to the creation of the burden in its favour; or
  - (b) those Ministers to the creation of the burden in their favour,
- must be obtained before the constitutive deed is registered.
- (3) It shall not be competent to grant a standard security over a conservation burden.
- (4) The Scottish Ministers may, subject to subsection (5) below, by order, prescribe such body as they think fit to be a conservation body.
- (5) The power conferred by subsection (4) above may be exercised in relation to a body only if the object, or function, of the body (or, as the case may be, one of its objects or functions) is to preserve, or protect, for the benefit of the public such characteristics of any land as are mentioned in paragraph (a) or (b) of subsection (1) above.
- (6) Where the power conferred by subsection (4) above is exercised in relation to a trust, the conservation body shall be the trustees of the trust.
- (7) The Scottish Ministers may, by order, determine that such conservation body as may be specified in the order shall cease to be a conservation body.

### 39 Assignment

The right to a conservation burden may be assigned or otherwise transferred to any conservation body or to the Scottish Ministers; and any such assignment or transfer takes effect on registration.

#### **40 Enforcement where no completed title**

A conservation burden is enforceable by the holder of the burden irrespective of whether the holder has completed title to the burden.

#### **41 Completion of title**

Where the holder of a conservation burden does not have a completed title—

- (a) title may be completed by the holder registering a notice of title; or
- (b) without completing title, the holder may grant—
  - (i) under section 39 of this Act, a deed assigning the right to the burden; or
  - (ii) under section 48 of this Act, a deed discharging, in whole or in part, the burden,

but unless the deed is one to which section 15(3) of the 1979 Act (circumstances where unnecessary to deduce title) applies, it shall be necessary, in the deed, to deduce title to the burden through the midcouples linking the holder to the person who had the last completed title.

#### **42 Extinction of burden on body ceasing to be conservation body**

Where—

- (a) the holder of a conservation burden is a conservation body or, as the case may be, two or more such bodies; and
- (b) that body ceases to be such a body, or those bodies cease to be such bodies (whether because an order under section 38(7) of this Act so provides or because the body in question has ceased to exist),

the conservation burden shall, on the body or bodies so ceasing, forthwith be extinguished.

#### *Rural housing burdens*

#### **43 Rural housing burdens**

- (1) On and after the day on which this section comes into force it shall, subject to subsections (2) and (3) below, be competent to create a real burden which comprises a right of pre-emption in favour of a rural housing body other than by reference to the body's capacity as owner of any land; and any such burden shall be known as a "rural housing burden".
- (2) If under subsection (1) above the rural housing burden is to be created other than by the rural housing body, the consent of that body to the creation of the burden in its favour must be obtained before the constitutive deed is registered.
- (3) It shall not be competent to create a rural housing burden on the sale of a property by virtue of section 61 of the Housing (Scotland) Act 1987 (c. 26) (secure tenant's right to purchase).
- (4) It shall not be competent to grant a standard security over a rural housing burden.
- (5) The Scottish Ministers may, subject to subsection (6) below, by order, prescribe such body as they think fit to be a rural housing body.

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*Status: This is the original version (as it was originally enacted).*

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- (6) The power conferred by subsection (5) above may be exercised in relation to a body only if the object, or function, of the body (or, as the case may be one of its principal objects or functions) is to provide housing on rural land or to provide rural land for housing.
- (7) Where the power conferred by subsection (5) above is exercised in relation to a trust, the rural housing body shall be the trustees of the trust.
- (8) The Scottish Ministers may, by order, determine that such rural housing body as may be specified in the order shall cease to be a rural housing body.
- (9) In this section, “rural land” means land other than excluded land (“excluded land” having the same meaning as in Part 2 of the Land Reform (Scotland) Act 2003 (asp 2)).
- (10) Sections 39 to 42 of this Act apply in relation to a rural housing burden and a rural housing body as they apply in relation to a conservation burden and a conservation body but with the modifications that in section 39 the words “or to the Scottish Ministers” shall be disregarded and in section 42(b) the reference to an order under section 38(7) of this Act shall be construed as a reference to an order under subsection (8) above.

#### *Maritime burdens*

#### **44 Maritime burdens**

- (1) On and after the day on which this section comes into force, it shall be competent to create a real burden over the sea bed or foreshore in favour of the Crown for the benefit of the public; and any such burden shall be known as a “maritime burden”.
- (2) The right of the Crown to a maritime burden may not be assigned or otherwise transferred.
- (3) For the purposes of this section—
  - (a) “sea bed” means the bed of the territorial sea adjacent to Scotland; and
  - (b) “territorial sea” includes any tidal waters.

#### *Economic development burdens*

#### **45 Economic development burdens**

- (1) On and after the day on which this section comes into force it shall, subject to subsection (2) below, be competent to create a real burden in favour of a local authority, or of the Scottish Ministers, for the purpose of promoting economic development; and any such burden shall be known as an “economic development burden”.
- (2) If under subsection (1) above the economic development burden is to be created other than by the local authority or the Scottish Ministers, the consent of that body or those Ministers to the creation of the burden in their favour must be obtained before the constitutive deed is registered.
- (3) An economic development burden may comprise an obligation to pay a sum of money (the sum or the method of determining it being specified in the constitutive deed) to the local authority or the Scottish Ministers as the case may be.

- (4) It shall not be competent—
  - (a) to grant a standard security over; or
  - (b) to assign the right to,  
an economic development burden.
- (5) Sections 40 and 41(a) and (b)(ii) of this Act apply in relation to an economic development burden as they apply in relation to a conservation burden.
- (6) In subsections (1) to (3) above, “local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c. 39).

#### *Health care burdens*

### **46 Health care burdens**

- (1) On and after the day on which this section comes into force it shall, subject to subsection (2) below, be competent to create a real burden in favour of a National Health Service trust, or of the Scottish Ministers, for the purpose of promoting the provision of facilities for health care; and any such burden shall be known as a “health care burden”.
- (2) If under subsection (1) above the health care burden is to be created other than by the trust or the Scottish Ministers, the consent of the trust or those Ministers to the creation of the burden in its or their favour must be obtained before the constitutive deed is registered.
- (3) A health care burden may comprise an obligation to pay a sum of money (the sum or the method of determining it being specified in the constitutive deed) to the trust or the Scottish Ministers as the case may be.
- (4) It shall not be competent—
  - (a) to grant a standard security over; or
  - (b) to assign the right to,  
a health care burden.
- (5) Sections 40 and 41(a) and (b)(ii) of this Act apply in relation to a health care burden as they apply in relation to a conservation burden.
- (6) In subsection (1) above, “facilities for health care” includes facilities ancillary to health care; as for example (but without prejudice to that generality) accommodation for staff employed to provide health care.

#### *General*

### **47 Interest to enforce**

The holder of a personal real burden is presumed to have an interest to enforce the burden.

## **48 Discharge**

- (1) A personal real burden is discharged by registering against the burdened property a deed of discharge granted by or on behalf of the holder of the burden.
- (2) In subsection (1) above, “discharged” means discharged—
  - (a) wholly; or
  - (b) to such extent as may be specified in the deed of discharge.

## **PART 4**

### TRANSITIONAL: IMPLIED RIGHTS OF ENFORCEMENT

#### *Extinction of implied rights of enforcement*

## **49 Extinction**

- (1) Any rule of law whereby land may be the benefited property, in relation to a real burden, by implication (that is to say, without being nominated in the constitutive deed as the benefited property and without being so nominated in any deed into which the constitutive deed is incorporated) shall cease to have effect on the appointed day and a real burden shall not, on and after that day, be enforceable by virtue of such rule; but this subsection is subject to subsection (2) below.
- (2) In relation to a benefited property as respects which, on the appointed day, it is competent (taking such rule of law as is mentioned in subsection (1) above still to be in effect) to register a notice of preservation or of converted servitude, subsection (1) above shall apply with the substitution, for the reference to the appointed day, of a reference to the day immediately following the expiry of the period of ten years beginning with the appointed day.

## **50 Preservation**

- (1) Subject to subsection (6) below, an owner of land which is a benefited property by virtue of such rule of law as is mentioned in section 49(1) of this Act may, during the period of ten years beginning with the appointed day, execute and duly register, in (or as nearly as may be in) the form contained in schedule 7 to this Act, a notice of preservation as respects the land; and if the owner does so then the land shall continue to be a benefited property after the expiry of that period (in so far as the burdened property, the benefited property and the real burden are the burdened property, the benefited property, and the real burden identified in the notice of preservation).
- (2) The notice of preservation shall—
  - (a) identify the land which is the burdened property (or any part of that land);
  - (b) identify the land which is the benefited property (or any part of that land);
  - (c) where the person registering the notice does not have a completed title to the benefited property, set out the midcouples linking that person to the person who last had such completed title;
  - (d) set out the terms of the real burden; and
  - (e) set out the grounds, both factual and legal, for describing as a benefited property the land identified in pursuance of paragraph (b) above.



- (3) For the purposes of subsection (1) above, a notice is, subject to section 116 of this Act, duly registered only when registered against both properties identified in pursuance of subsection (2)(a) and (b) above.
- (4) A person submitting any notice for registration under this section shall, before doing so, swear or affirm before a notary public that to the best of the knowledge and belief of the person all the information contained in the notice is true.
- (5) For the purposes of subsection (4) above, if the person is—
  - (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the person may swear or affirm;
  - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;and any reference in that subsection to a person shall be construed accordingly.
- (6) Subsection (1) above does not apply as respects a real burden which has been imposed under a common scheme affecting both the burdened and the benefited property.
- (7) This section is subject to section 115 of this Act.

## **51 Duties of Keeper: amendments relating to unenforceable real burdens**

- (1) Unless one of the circumstances mentioned in subsection (2) below arises, the Keeper of the Registers of Scotland shall not be required to remove from the Land Register of Scotland a real burden which section 49 of this Act makes unenforceable.
- (2) The circumstances are that the Keeper—
  - (a) is requested, in an application for registration or rectification, to remove the real burden; or
  - (b) is, under section 9(1) of the 1979 Act (rectification of the register), ordered to do so by the court or the Lands Tribunal,and no such request or order shall be competent during that period of ten years which commences with the appointed day.
- (3) During the period mentioned in subsection (2) above a real burden, notwithstanding that it has been so made unenforceable, may at the discretion of the Keeper, for the purposes of section 6(1)(e) of the 1979 Act (entering subsisting real right in title sheet), be taken to subsist; but this subsection is without prejudice to subsection (4) below.
- (4) The Keeper shall not, before the date mentioned in subsection (5) below, remove from the Land Register of Scotland a real burden which is the subject of a notice in respect of which application has been made for a determination by—
  - (a) a court; or
  - (b) the Lands Tribunal,under section 115(6)(b) of this Act.
- (5) The date is whichever is the earlier of—
  - (a) that two months after the final decision on the application; and
  - (b) that prescribed under section 115(6)(ii) of this Act.

*New implied rights of enforcement***52 Common schemes: general**

- (1) Where real burdens are imposed under a common scheme and the deed by which they are imposed on any unit, being a deed registered before the appointed day, expressly refers to the common scheme or is so worded that the existence of the common scheme is to be implied (or a constitutive deed incorporated into that deed so refers or is so worded) then, subject to subsection (2) below, any unit subject to the common scheme by virtue of—
  - (a) that deed; or
  - (b) any other deed so registered,shall be a benefited property in relation to the real burdens.
- (2) Subsection (1) above applies only in so far as no provision to the contrary is impliedly (as for example by reservation of a right to vary or waive the real burdens) or expressly made in the deed mentioned in paragraph (a) of that subsection (or in any such constitutive deed as is mentioned in that subsection).
- (3) This section confers no right of pre-emption, redemption or reversion.
- (4) This section is subject to sections 57(1) and 122(2)(ii) of this Act.

**53 Common schemes: related properties**

- (1) Where real burdens are imposed under a common scheme, the deed by which they are imposed on any unit comprised within a group of related properties being a deed registered before the appointed day, then all units comprised within that group and subject to the common scheme (whether or not by virtue of a deed registered before the appointed day) shall be benefited properties in relation to the real burdens.
- (2) Whether properties are related properties for the purposes of subsection (1) above is to be inferred from all the circumstances; and without prejudice to the generality of this subsection, circumstances giving rise to such an inference might include—
  - (a) the convenience of managing the properties together because they share—
    - (i) some common feature; or
    - (ii) an obligation for common maintenance of some facility;
  - (b) there being shared ownership of common property;
  - (c) their being subject to the common scheme by virtue of the same deed of conditions; or
  - (d) the properties each being a flat in the same tenement.
- (3) This section confers no right of pre-emption, redemption or reversion.
- (4) This section is subject to sections 57 and 122(2)(ii) of this Act.

**54 Sheltered housing**

- (1) Where by a deed (or deeds) registered before the appointed day real burdens are imposed under a common scheme on all the units in a sheltered or retirement housing development or on all such units except a unit which is used in some special way, each unit shall be a benefited property in relation to the real burdens.

- (2) Subsection (1) above is subject to section 122(2)(ii) of this Act.
- (3) In this section, “sheltered or retirement housing development” means a group of dwelling-houses which, having regard to their design, size and other features, are particularly suitable for occupation by elderly people (or by people who are disabled or infirm or in some other way vulnerable) and which, for the purposes of such occupation, are provided with facilities substantially different from those of ordinary dwelling-houses.
- (4) Any real burden which regulates the use, maintenance, reinstatement or management—
- (a) of—
    - (i) a facility; or
    - (ii) a service,  
which is one of those which make a sheltered or retirement housing development particularly suitable for such occupation as is mentioned in subsection (3) above; or
  - (b) of any other facility if it is a facility such as is mentioned in that subsection, is in this section referred to as a “core burden”.
- (5) In relation to a sheltered or retirement housing development—
- (a) section 28 of this Act applies with the following modifications—
    - (i) in subsection (1), the reference to the owners of a majority of the units in a community shall, for the purposes of paragraphs (b) and (c) of that subsection, be construed as a reference to the owners of at least two thirds of the units in the development; and
    - (ii) in paragraph (c) of subsection (2), the reference to varying or discharging shall be construed as a reference only to varying and that to community burdens as a reference only to real burdens which are not core burdens (the words “Without prejudice to the generality of subsection (1)(b) above,” which begin the subsection being, for the purposes of that modification, disregarded except in so far as they give meaning to the words “the powers mentioned there” which immediately follow them);
  - (b) section 33 of this Act, in relation to core burdens, applies with the following modifications—
    - (i) in subsection (1), the reference to varying or discharging shall, in relation to a deed granted in accordance with subsection (2) of the section, be construed as a reference only to varying; and
    - (ii) in subsection (2)(a) the reference to the owners of a majority of the units shall be construed as a reference to the owners of at least two thirds of the units of the development; and
  - (c) no real burden relating to a restriction as to any person’s age may be varied or discharged by virtue of section 33(2) of this Act.
- (6) This section confers no right of pre-emption, redemption or reversion and is subject to section 57 of this Act.

**55 Grant of deed of variation or discharge of community burdens relating to sheltered or retirement housing: community consultation notice**

- (1) Where in relation to a sheltered or retirement housing development it is proposed to grant, under section 33(1)(a) or (2) of this Act, a deed of variation or discharge, the proposal shall be intimated to all the owners of the units of the community.
- (2) Such intimation shall be given by sending a notice (a “community consultation notice”) in, or as near as may be in, the form set out in schedule 8 to this Act together with the explanatory note which immediately follows that form in that schedule.
- (3) The deed of variation or discharge shall not be granted before the date specified in the community consultation notice as that by which any comments are to be made, being a date no earlier than that on which expires the period of three weeks beginning with the latest date on which such intimation is given.
- (4) Subsection (4) of section 37 of this Act shall apply in relation to a deed of variation or discharge granted as mentioned in subsection (1) above and to the person giving intimation as it applies in relation to such a deed granted as mentioned in section 35(1) of this Act and to the person proposing to submit the deed but with the modifications that the reference—
  - (a) in paragraph (a) of the said subsection (4), to section 36 of this Act is to be construed as a reference to this section; and
  - (b) in paragraph (b) of that subsection, to subsection (1) of section 37 of this Act is to be construed as a reference to subsection (3) above.
- (5) For the purposes of subsection (4) of section 37 as so applied, if the person giving intimation is—
  - (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in the said subsection (4), then a legal representative of that person may swear or affirm;
  - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm,and any reference in the said subsection (4) (as so applied) to the person giving intimation shall be construed accordingly.

**56 Facility burdens and service burdens**

- (1) Where by a deed registered before the appointed day—
  - (a) a facility burden is imposed on land, then—
    - (i) any land to which the facility is (and is intended to be) of benefit; and
    - (ii) the heritable property which constitutes the facility,shall be benefited properties in relation to the facility burden;
  - (b) a service burden is imposed on land, then any land to which the services are provided shall be a benefited property in relation to the service burden.
- (2) Subsection (1) above is subject to section 57 of this Act; and in paragraph (a) of that subsection “facility burden” does not include a manager burden.

**57 Further provisions as respects rights of enforcement**

- (1) Nothing in sections 52 to 56 revives a right of enforcement waived or otherwise lost as at the day immediately preceding the appointed day.

- (2) Where there is a common scheme, and a deed, had it nominated and identified a benefited property, would have imposed under that scheme the real burdens whose terms the deed sets out, the deed shall, for the purposes of sections 25 and 53 to 56 of this Act, be deemed so to have imposed them.
- (3) Sections 53 to 56 do not confer a right of enforcement in respect of anything done, or omitted to be done, in contravention of the terms of a real burden before the appointed day.

## **58 Duty of Keeper to enter on title sheet statement concerning enforcement rights**

The Keeper of the Registers of Scotland—

- (a) during that period of ten years which commences with the appointed day, may; and
- (b) after the expiry of that period, shall,

where satisfied that a real burden subsists by virtue of any of sections 52 to 56 of this Act or section 60 of the 2000 Act (preserved right of Crown to maritime burdens), enter on the title sheet of the burdened property—

- (i) a statement that the real burden subsists by virtue of the section in question; and
- (ii) where there is sufficient information to enable the Keeper to describe the benefited property, a description of that property,

and where there is that sufficient information the Keeper shall enter that statement on the title sheet of the benefited property also, together with a description of the burdened property.

## **PART 5**

### **REAL BURDENS: MISCELLANEOUS**

## **59 Effect of extinction etc. on court proceedings**

Where by virtue of this Act, a real burden is to any extent discharged, extinguished or made unenforceable, then on and after the day on which that happens (but only to the extent in question)—

- (a) no proceedings for enforcement shall be commenced;
- (b) any such proceedings already commenced shall, in so far as they do not relate to the payment of money, be deemed to have been abandoned on that day and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly; and
- (c) any decree or interlocutor already pronounced in proceedings for such enforcement shall, in so far as it does not relate to the payment of money, be deemed to have been reduced, or as the case may be recalled, on that day.

## **60 Grant of deed where title not completed: requirements**

- (1) Subject to subsection (2) below, where an owner who does not have a completed title to land is to grant, as respects a real burden—
  - (a) a constitutive deed;
  - (b) a deed of discharge; or

(c) a deed of variation,

then unless the deed is one to which section 15(3) of the 1979 Act (circumstances where unnecessary to deduce title) applies, it shall be necessary in the deed to deduce title to the land through the midcouples linking the owner to the person who had the last completed title to the land.

- (2) Where, under section 33 of this Act, a manager is to grant a deed of variation or discharge, it shall not be necessary to comply with subsection (1) above or with section 15(3) of the 1979 Act.

#### **61 Contractual liability incidental to creation of real burden**

Incidental contractual liability which a constitutive deed (or a deed into which a constitutive deed is incorporated) gives rise to as respects a prospective real burden, ends when the deed has been duly registered and the real burden has become effective.

#### **62 Real burdens of combined type**

- (1) Where an obligation is constituted both as a nameable type of real burden (such as, for example, a community burden) and as a real burden which is not of that nameable type, then in so far as a provision of this Act relates specifically to real burdens of the nameable type the obligation shall be taken, for the purpose of determining the effect of that provision, to be constituted as two distinct real burdens.
- (2) The owner of a benefited property which is a unit of a community shall not be entitled to enforce that obligation against the community constituted other than as a community burden or as a burden mentioned in section 1(3) of this Act.

#### **63 Manager burdens**

- (1) A real burden (whenever created) may make provision conferring on such person as may be specified in the burden power to—
- (a) act as the manager of related properties;
  - (b) appoint some other person to be such manager; and
  - (c) dismiss any person appointed by virtue of paragraph (b) above,
- a real burden making any such provision being referred to in this Act as a “manager burden”.
- (2) A power conferred by a manager burden is exercisable only if the person on whom the power is conferred is the owner of one of the related properties.
- (3) The right to a manager burden may be assigned or otherwise transferred; and any such assignation or transfer shall take effect on the sending of written intimation to the owners of the related properties.
- (4) A manager burden shall be extinguished on the earliest of the following dates—
- (a) the date on which such period as may be specified in the burden expires;
  - (b) the relevant date;
  - (c) the ninetieth day of any continuous period throughout which, by virtue of subsection (2) above, the burden is not exercisable; and
  - (d) if a manager is dismissed under section 64 of this Act (in the case mentioned in subsection (6) below), the date of dismissal.

- (5) In this section, the “relevant date”—
- (a) in the case so mentioned means the date thirty years after the day specified in subsection (7) below;
  - (b) in a case where the manager burden is imposed under a common scheme on any unit of a sheltered or retirement housing development, means the date three years after the day so specified; and
  - (c) in any other case, means the date five years after the day so specified.
- (6) The case is where the manager burden is imposed on the sale, by virtue of section 61 of the Housing (Scotland) Act 1987 (c. 26) (secure tenant’s right to purchase), of a property by—
- (a) a person such as is mentioned in any of the sub-paragraphs of subsection (2) (a) of that section; or
  - (b) a predecessor of any such person,  
to a tenant of such a person.
- (7) The day is that on which the constitutive deed setting out the terms of the burden is registered (and if there is more than one day on which such a constitutive deed is registered in respect of the related properties, then the first such day).
- (8) Where a power conferred by a manager burden is exercisable, any person who is, by virtue of that burden, a manager may not be dismissed—
- (a) under section 28(1)(d) of this Act; or
  - (b) in a case other than that mentioned in subsection (6) above, under section 64 of this Act.
- (9) Section 17(1) of the 2000 Act (extinction on appointed day of certain rights of superior) shall not apply to manager burdens.

#### **64      Overriding power to dismiss and appoint manager**

- (1) Where a person is the manager of related properties, the owners of two thirds of those properties may—
- (a) dismiss that person; and
  - (b) where they do so, appoint some other person to be such manager,
- and such actings shall be effective notwithstanding the terms of any real burden affecting those properties; but this section is subject to section 63(8)(b) of this Act.
- (2) If a property is owned by two or more persons in common, then, for the purposes of voting on any proposal to exercise a power conferred by subsection (1) above, the vote allocated as respects the property shall only be counted for or against the proposal if it is the agreed vote of those of them who together own more than a half share of the property.

#### **65      Manager: transitory provisions**

Where, immediately before the appointed day, any person is, by virtue of any real burden or purported real burden, ostensibly the manager of related properties that person shall be deemed to have been validly appointed as such.

**66 The expression “related properties”**

- (1) Whether properties are related properties for the purposes of sections 63 to 65 of this Act is, subject to subsection (2) below, to be inferred from all the circumstances; and without prejudice to the generality of this section circumstances giving rise to such an inference might include—
  - (a) the convenience of managing the properties together because they share—
    - (i) some common feature; or
    - (ii) an obligation for common maintenance of some facility;
  - (b) it being evident that the properties constitute a group of properties on which real burdens are imposed under a common scheme; or
  - (c) there being shared ownership of common property.
- (2) For the purposes of section 63(2) of this Act, the following are not related properties—
  - (a) any property which, being a unit in a sheltered or retirement housing development, is used in some special way (that is to say, is the unit mentioned as an exception in section 54(1) of this Act);
  - (b) any property to which a development management scheme applies; or
  - (c) any facility which benefits two or more properties (examples of such a facility being, without prejudice to the generality of this paragraph, a private road and a common area for recreation).

**67 Discharge of rights of irritancy**

- (1) All rights of irritancy in respect of a breach of a real burden are, on the day on which this section comes into force, discharged; and on and after that day—
  - (a) it shall not be competent to create any such right; and
  - (b) any proceedings already commenced to enforce any such right shall be deemed abandoned and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly.
- (2) Subsection (1)(b) above shall not affect any cause in which final decree (that is to say, any decree or interlocutor which disposes of the cause and is not subject to appeal or review) is granted before the coming into force of this section.

**68 Requirement for repetition etc. of terms of real burden in future deed**

In any deed (whenever executed) a requirement to the effect that the terms of a real burden shall be repeated or referred to in any subsequent deed shall be of no effect.

**69 Further provision as respects deeds of variation and of discharge**

- (1) Where a deed of variation or deed of discharge is granted under this Act, it is not requisite that there be a grantee.
- (2) Any such deed so granted may be registered by an owner of the burdened property or by any other person against whom the real burden is enforceable.
- (3) Without prejudice to subsection (2) above, a deed of variation or deed of discharge granted under section 33 or 35 of this Act may be registered by a granter.



## **70 Duty to disclose identity of owner**

A person who has title to enforce a real burden (the “entitled person”) may require any person who, at any time, was an owner of the burdened property (the “second person”) to disclose to the entitled person—

- (a) the name and address of the owner, for the time being, of such property; or
- (b) (if the second person cannot do that) such other information as the second person has which might enable the entitled person to discover that name and address.

## **PART 6**

### **DEVELOPMENT MANAGEMENT SCHEME**

## **71 Development management scheme**

- (1) The development management scheme may be applied to any land by registering against the land (in this Part of this Act referred to as “the development”) a deed of application granted by, or on behalf of, the owner of the land or, if and in so far as the terms of the order mentioned in subsection (3) below so admit, may be thus applied with such variations as may be specified in the deed; and the scheme shall take effect in relation to the development on the date of registration or, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.)—
  - (a) on such later date as may be so specified (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event); or
  - (b) on the date of registration of such other deed as may be so specified, and different provision for the taking effect of the scheme may be made for different parts of the development.
- (2) The deed of application shall include specification or description of the matters which the scheme requires shall be specified or described and shall in any event include—
  - (a) the meaning, in the scheme, of such expressions as “the development”, “scheme property” and “unit”;
  - (b) the name by which any owners' association established by the scheme is to be known, being a name which either ends with the words “Owners Association” or begins with those words preceded by the definite article;
  - (c) the name and address of the first manager of any association so established.
- (3) In this Act, “the development management scheme” means such scheme of rules for the management of land as is set out in an order made, in consequence of this section, under section 104 of the Scotland Act 1998 (c. 46) (power to make provision consequential on legislation of, or scrutinised by, the Scottish Parliament) or, in relation to a particular development, that scheme as applied to the development.

## **72 Application of other provisions of this Act to rules of scheme**

In so far as the terms of the order mentioned in section 71(3) of this Act so admit, sections 2, 3, 5, 10 (except subsection (4)(a)), 11, 13, 14, 16, 18, 59 to 61, 67 to 70, 98, 100, 104 and 105 of this Act apply in relation to the rules of the development

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management scheme as those sections apply in relation to community burdens; except that, for the purposes of that application, in those sections any reference—

- (a) to an owner of a benefited property shall be construed as to the manager of any owners' association established by the scheme;
- (b) to a benefited property shall be construed as to a unit of the development in so far as advantaged by those rules;
- (c) to a burdened property shall be construed as to a unit of the development in so far as constrained by those rules;
- (d) to a community shall be construed as to the development; and
- (e) to a constitutive deed shall be construed as to the deed of application.

### **73 Disapplication**

- (1) The development management scheme may be disappplied to the development, or to any part of the development, by an owners' association established by the scheme registering against the development or as the case may be the part, a deed of disapplication granted by that association in accordance with the scheme; and subject to subsection (3) below the disapplication shall take effect—

- (a) on the date of registration; or
- (b) notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), on such later date as may be specified in the deed (the specification being of a fixed date and not, for example, of a date determinable by reference to the occurrence of an event).

- (2) The deed of disapplication may by means of real burdens provide for the future management and regulation—

- (a) in the case of disapplication to the development, of the development or of any part of the development; or
- (b) in the case of disapplication to a part of the development, of that part or of any part of that part,

and section 4 of this Act shall apply accordingly except that paragraph (b) of subsection (2) of that section shall, for the purposes of this subsection, apply with the substitution, for the reference to the owner of the land which is to be the burdened property, of a reference to the owners' association.

- (3) The deed of disapplication shall not, on registration, disapply the development management scheme or impose a real burden unless, after the expiry of the period mentioned in subsection (3) of section 74 of this Act, there is endorsed on the deed (or on an annexation to it referred to in an endorsement on it and identified, on the face of the annexation, as being the annexation so referred to) a certificate executed by a member of the Lands Tribunal, or by their clerk, to the effect that no application for preservation of the scheme has been received under that subsection or that any such application which has been received has been withdrawn; and where more than one such application has been received the certificate shall relate to both (or as the case may be all) applications.

- (4) An owners' association proposing to submit a deed of disapplication granted as mentioned in subsection (1) above for registration shall, before doing so, swear or affirm before a notary public (the deed being endorsed accordingly)—

- (a) that section 74 of this Act has been complied with; and
- (b) as to the date on which the period mentioned in subsection (3) of that section expires.

- (5) Subsection (2)(b) of section 22 of this Act applies in relation to the owners' association and for the purposes of subsection (4) above as it applies in relation to a terminator and for the purposes of subsection (1) of that section.

#### **74 Intimation of proposal to register deed of disapplication**

- (1) Where a deed of disapplication is granted as mentioned in section 73(1) of this Act, any proposal to register that deed shall be intimated by the owners' association to every person who is the owner of a unit of the development.
- (2) Such intimation to an owner shall be given by sending a copy of the deed, together with a notice stating—
- (a) what the effect of registering the deed would be; and
  - (b) that an owner who has not agreed to the granting of the deed and who wishes to apply to the Lands Tribunal for preservation of the development management scheme must do so by a date specified in the notice (being the date on which the period mentioned in subsection (3) below expires).
- (3) A person to whom intimation is given under subsection (2) and who has not so agreed may, during the period of eight weeks beginning with the date by which subsection (1) above has been complied with fully, apply to the Lands Tribunal for preservation of the scheme.

### **PART 7**

#### **SERVITUDES**

##### *Positive servitudes*

#### **75 Creation of positive servitude by writing: deed to be registered**

- (1) A deed is not effective to create a positive servitude by express provision unless it is registered against both the benefited property and the burdened property.
- (2) It shall be no objection to the validity of a positive servitude that, at the time when the deed was registered as mentioned in subsection (1) above, the same person owned the benefited property and the burdened property; but, notwithstanding section 3(4) of the 1979 Act (creation of real right or obligation on date of registration etc.), the servitude shall not be created while that person remains owner of both those properties.
- (3) Subsection (1) above—
- (a) is subject to section 3(1) of the Prescription and Limitation (Scotland) Act 1973 (c. 52) (creation of positive servitude by 20 years' possession following execution of deed); and
  - (b) does not apply to servitudes such as are mentioned in section 77(1) of this Act.

**76 Disapplication of requirement that positive servitude created in writing be of a known type**

- (1) Any rule of law that requires that a positive servitude be of a type known to the law shall not apply in relation to any servitude created in accordance with section 75(1) of this Act.
- (2) Nothing in subsection (1) above permits the creation of a servitude that is repugnant with ownership.

**77 Positive servitude of leading pipes etc. over or under land**

- (1) A right to lead a pipe, cable, wire or other such enclosed unit over or under land for any purpose may be constituted as a positive servitude.
- (2) It shall be deemed always to have been competent to constitute a right such as is mentioned in subsection (1) above as a servitude.

**78 Discharge of positive servitude**

A positive servitude—

- (a) which has been registered against the burdened property; or
- (b) which has been noted in, or otherwise appears in, the title sheet of that property,

is discharged by deed only on registration of the deed against the burdened property.

*Negative servitudes***79 Prohibition on creation of negative servitude**

On the appointed day it shall cease to be competent to create a negative servitude.

*Transitional***80 Negative servitudes to become real burdens**

- (1) A negative servitude shall, on the appointed day, cease to exist as such but shall forthwith become a real burden (such a real burden being, for the purposes of this section, referred to as a “converted servitude”).
- (2) Subject to subsections (3) and (4) below, a converted servitude shall be extinguished on the expiry of the period of ten years beginning with the appointed day.
- (3) If, before the appointed day, a negative servitude was registered against the burdened property or was noted in, or otherwise appeared in, the title sheet of that property the converted servitude shall not be extinguished as mentioned in subsection (2) above.
- (4) If, during the period mentioned in subsection (2) above, an owner of the benefited property executes and duly registers, in (or as nearly as may be in) the form contained in schedule 9 to this Act, a notice of converted servitude, the converted servitude shall not be extinguished as mentioned in subsection (2) above (in so far as the burdened property, the benefited property and the converted servitude are, respectively, the

burdened property, the benefited property, and the converted servitude identified in the notice of converted servitude).

- (5) The notice of converted servitude shall—
- (a) identify the land which is the burdened property (or any part of that land);
  - (b) identify the land which is the benefited property (or any part of that land);
  - (c) where the person registering the notice does not have a completed title to the benefited property, set out the midcouples linking that person to the person who last had such completed title;
  - (d) set out the terms of the converted servitude;
  - (e) include as an annexation the constitutive deed, if any (or a copy of such deed); and
  - (f) if the land identified for the purposes of paragraph (b) above is not nominated in the constitutive deed, set out the grounds, both factual and legal, for describing that land as a benefited property.
- (6) For the purposes of subsection (4) above, a notice is, subject to section 116 of this Act, duly registered only when registered against both properties identified in pursuance of subsection (5)(a) and (b) above.
- (7) Subsections (4) and (5) of section 50 of this Act shall apply in respect of a notice of converted servitude as they apply in respect of a notice of preservation.
- (8) This section is subject to section 115 of this Act.

## **81 Certain real burdens to become positive servitudes**

- (1) A real burden consisting of a right to enter, or otherwise make use of, the burdened property shall, on the appointed day, cease to exist as such but shall forthwith become a positive servitude.
- (2) Subsection (1) above—
- (a) is subject to section 17(1) of the 2000 Act (extinction on appointed day of certain rights of superior);
  - (b) does not apply to real burdens such as are mentioned in section 2(3)(a) of this Act.

## **PART 8**

### **PRE-EMPTION AND REVERSION**

#### *Pre-emption*

## **82 Application and interpretation of sections 83 and 84**

Sections 83 and 84 of this Act apply to any subsisting right of pre-emption constituted as a title condition which—

- (a) was originally created in favour of a feudal superior; or
- (b) was created in a deed executed after 1st September 1974,

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and for the purposes of sections 83(1)(a) and 84(1)(b) of this Act the person last registered as having title to a personal pre-emption burden or rural housing burden shall be taken to be the holder for a right of pre-emption which that burden comprises.

### **83 Extinction following pre-sale undertaking**

- (1) Where, in relation to any burdened property (or, as the case may be, part of such property)—
  - (a) the holder of a right of pre-emption to which this section applies gives an undertaking (in the form, or as nearly as may be in the form, contained in schedule 10 to this Act) that, subject to such conditions (if any) as the holder may specify in the undertaking, the holder will not exercise that right during such period as may be so specified;
  - (b) a conveyance in implement of the sale of the burdened property (or part) is registered before the end of that period; and
  - (c) any conditions specified under paragraph (a) above have been satisfied,such right shall, on registration of such a conveyance, be extinguished unless the right is constituted as a rural housing burden in which case the title condition shall be taken to have been complied with as respects that sale only.
- (2) Any undertaking given under subsection (1) above—
  - (a) is binding on the holder of the right of pre-emption; and
  - (b) if registered is binding on any successor as holder provided that the undertaking was registered before the successor completed title.

### **84 Extinction following offer to sell**

- (1) If in relation to a right of pre-emption to which this section applies—
  - (a) an event specified in the constitutive deed as an event on the occurrence of which such right may be exercised occurs; and
  - (b) the owner of the burdened property makes, in accordance with subsections (2) to (6) below, an offer to sell that property (or, as the case may be, part of that property) to the holder of such right,then such right shall, in relation to that property (or part), be extinguished unless it is constituted as a rural housing burden in which case the title condition shall be taken to have been complied with as respects that event only.
- (2) An offer shall be in writing and shall comply with section 2 of the Requirements of Writing (Scotland) Act 1995 (c. 7) (requirements for formal validity of certain documents).
- (3) An offer shall be open for acceptance during whichever is the shorter of—
  - (a) the period of 21 days, or where the right is constituted as a rural housing burden 42 days, beginning with the day on which the offer is sent;
  - (b) such number of days beginning with that day as may be specified in the constitutive deed.
- (4) An offer shall be made on such terms as may be set out, or provided for, in the constitutive deed; but in so far as no such terms are set out, an offer shall be made on such terms (including any terms so provided for) as are reasonable in the circumstances.

- (5) Where—
- (a) an offer is sent in accordance with this section; and
  - (b) the holder of the right does not, within the time allowed by virtue of subsection (3) above for acceptance of the offer, inform (in writing, whether or not transmitted by electronic means) the owner of the burdened property that the holder considers, giving reasons for so considering, that the terms on which the offer is made are unreasonable,
- the terms of the offer shall, for the purposes of subsection (4) above, be deemed to be reasonable.
- (6) If the holder of a right cannot by reasonable inquiry be identified or found, an offer may be sent to the Extractor of the Court of Session; and for the purposes of this section an offer so sent shall be deemed to have been sent to the holder.

## **85 Ending of council’s right of pre-emption as respects certain churches**

In a scheme framed under subsection (1) of section 22 of the Church of Scotland (Property and Endowments) Act 1925 (c. 33) (schemes for the ownership, maintenance and administration of churches etc.), any provision made in accordance with subsection (2)(h) of that section (council’s right of pre-emption) shall cease to have effect.

### *Reversion*

## **86 Reversions under School Sites Act 1841**

- (1) In a case where—
- (a) land would, under the third proviso to section 2 of the [School Sites Act 1841 \(4 & 5 Vict. c.38\)](#) (the “1841 Act”) revert (but for this section) to any person or has so reverted; but
  - (b) the person has not, before the day on which this section comes into force, completed title to the land, subsections (2) to (9) below shall (to the extent that subsection (9) admits) apply in place of that proviso and be deemed always to have applied and nothing shall be void or challengeable by virtue of that proviso.
- (2) If the circumstances are that a contract of sale of the land has been concluded by, or on behalf of, the education authority, the authority shall pay to the person, where the cessation of use by virtue of which the land would (but for this section) revert, or has reverted, occurred—
- (a) before the day on which this section comes into force, an amount equal to the open market value of the land as at that day;
  - (b) on or after that day, an amount equal to the open market value of the land as at the date of cessation less any improvement value as at that date.
- (3) If the circumstances are other than is mentioned in subsection (2) above—
- (a) the person may specify an obligation mentioned in paragraph (a), or as the case may be (b), of subsection (4) below and require the authority to comply therewith, which subject to paragraph (b) below the authority shall do;
  - (b) the authority may, if the person requires under paragraph (a) above performance of the obligation mentioned in paragraph (a)(i), or as the case

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- may be (b)(i), of that subsection, instead elect to make payment to the person of such amount as is mentioned in paragraph (a)(ii), or as the case may be (b)(ii), of that subsection provided that such election is timeous.
- (4) The obligations are, where the cessation of use by virtue of which the ownership of the land would (but for this section) revert, or has reverted, occurred—
- (a) before the day on which this section comes into force—
    - (i) to convey the land to the person;
    - (ii) to make a payment to the person of an amount equal to the open market value of the land as at that day; or
  - (b) on or after that day—
    - (i) on payment by the person of any improvement value as at the date of cessation, to convey the land to the person;
    - (ii) to make a payment to the person of an amount equal to the open market value of the land as at the date of cessation less any improvement value as at that date.
- (5) Any dispute arising in relation to the assessment of the value for the purposes of this section of any land, buildings or structures may be referred to, and determined by, the Lands Tribunal.
- (6) For the purposes of this section—
- “education authority” has the meaning given by section 135(1) of the Education (Scotland) Act 1980 (c. 44) except that if title to the land has been transferred to any person by any enactment it means that person; and
- “improvement value” means such part of the value of the land as is attributable to any building (or other structure) on the land other than any such building (or other structure) erected by or at the expense of—
- (a) the person who made the gift, sale or exchange of the land under section 2 of the 1841 Act; or
  - (b) any predecessor, as owner of such land, of that person.
- (7) References in subsection (1) above to the third proviso to section 2 of the 1841 Act shall be construed as including references to that proviso as applied by virtue of any other enactment; and for the purposes of that construction, the reference in paragraph (a) of the definition of “improvement value” in subsection (6) above to the said section 2 shall be construed as a reference to the provision corresponding to that section in such other enactment.
- (8) The reference in subsection (3)(b) above to an election being timeous is to its being notified to the person within three months after the requirement in question is made.
- (9) Subsections (2) to (8) above do not apply where the person has, before the day on which this section comes into force, accepted an offer of compensation in respect of the land or concluded a contract for, or accepted, a conveyance of the land.
- (10) Subsections (1)(b) and (2) of section 67 of this Act shall apply in relation to any proceedings already commenced by virtue of the proviso mentioned in subsection (1)(a) above as they apply in relation to any proceedings already commenced as mentioned in the said subsection (1)(b).



## **87 Right to petition under section 7 of Entail Sites Act 1840**

- (1) In a case where—
- (a) it would be competent but for this section, section 50(1) of the 2000 Act (disentailment on appointed day) and the repeal of the Entail Sites Act 1840 by that Act for a person to apply by petition under section 7 of that Act of 1840 (petition praying to have feu charter or other right or lease declared to be forfeited etc.); but
  - (b) the person has not, before the day on which this section comes into force, accepted an offer of compensation in respect of the right so to apply,
- subsections (2) to (6) and (8) of section 86 of this Act shall, in place of the said section 7 but with the modifications specified in subsection (2) below, apply.
- (2) The modifications are that—
- (a) for any reference to the education authority there shall be substituted a reference to the parties in whose favour the feu charter or lease was granted, or the successors other than by purchase for value of those parties;
  - (b) in each of subsections (2) and (4), for the word “revert” there shall be substituted “be forfeit” and for the word “reverted” there shall be substituted “have been forfeit”; and
  - (c) in subsection (6), for paragraph (a) of the definition of “improvement value” there shall be substituted—
    - “(a) the person who granted the feu or lease under section 1 of the [Entail Sites Act 1840 \(3 & 4 Vict. c.48\)](#) (grants for sites of churches etc.);”.
- (3) After such obligations as arise by virtue of this section are met or prescribe, the purposes for which the land in question was feued or leased under the said Act of 1840 need no longer be given effect.
- (4) Subsections (1)(b) and (2) of section 67 of this Act shall apply in relation to any application already made by petition as mentioned in subsection (1)(a) above as they apply in relation to any proceedings already commenced as mentioned in the said subsection (1)(b).

## **88 Prescriptive period for obligations arising by virtue of 1841 Act or 1840 Act**

In Schedule 1 to the Prescription and Limitation (Scotland) Act [1973 \(c. 52\)](#) (obligations affected by prescriptive periods of five years to which section 6 of that Act applies)—

- (a) after sub-paragraph (aa) of paragraph 1 there shall be inserted—
  - “(ab) to any obligation arising by virtue of a right—
    - (i) of reversion under the third proviso to section 2 of the [School Sites Act 1841 \(4 & 5 Vict. c.38\)](#) (or of reversion under that proviso as applied by virtue of any other enactment);
    - (ii) to petition for a declaration of forfeiture under section 7 of the [Entail Sites Act 1840 \(3 & 4 Vict. c.48\)](#);”;
- (b) in paragraph 2—
  - (i) in sub-paragraph (e), for the words “or (aa)” there shall be substituted “, (aa) or (ab)”; and

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(ii) after that sub-paragraph there shall be inserted—

“(ee) so as to extinguish, before the expiry of the continuous period of five years which immediately follows the coming into force of section 88 of the Title Conditions (Scotland) Act 2003 (asp 9) (prescriptive period for obligations arising by virtue of 1841 Act or 1840 Act), an obligation mentioned in sub-paragraph (ab) of paragraph 1 of this Schedule;”.

## 89 Repeal of Reversion Act 1469

- (1) The Reversion Act 1469 (c. 3) shall cease to have effect.
- (2) Subsection (1) above shall not affect any right of reversion constituted, before the appointed day, as a real right.

## PART 9

### TITLE CONDITIONS: POWERS OF LANDS TRIBUNAL

## 90 Powers of Lands Tribunal as respects title conditions

- (1) Subject to sections 97, 98 and 104 of this Act and to subsections (3) to (5) below, the Lands Tribunal may by order, on the application of—
  - (a) an owner of a burdened property or any other person against whom a title condition (or purported title condition) is enforceable (or bears to be enforceable)—
    - (i) discharge it, or vary it, in relation to that property; or
    - (ii) if the title condition is a real burden or a rule of a development management scheme, determine any question as to its validity, applicability or enforceability or as to how it is to be construed;
  - (b) an owner of a benefited property, renew or vary, in relation to that property, a title condition which is—
    - (i) a real burden in respect of which intimation of a proposal to execute and register a notice of termination has been given under section 21 of this Act; or
    - (ii) a real burden or servitude affected by a proposal to register a conveyance, being a proposal of which notice has been given under section 107(4) of this Act; or
  - (c) an owner of a unit in a community, preserve as mentioned in section 34(3) or 37(1) of this Act, a community burden in respect of which intimation of a proposal to register a deed of variation or discharge has been given under section 34(1) or 36(1) of this Act;
  - (d) an owner of a unit of the development to which applies a development management scheme in respect of which intimation of a proposal to register a deed of disapplication has been given under subsection (1) of section 74 of this Act, preserve the scheme;
  - (e) the owners' association of a development to which applies a development management scheme in respect of which intimation of a proposal to register

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a conveyance, being a proposal of which notice has been given as mentioned in subsection (b)(ii) above, preserve the scheme;

but where the Lands Tribunal refuse an application under paragraph (b) or (c) above wholly, or an application under paragraph (b) partly, they shall in relation to the benefited property discharge the title condition, wholly or partly, accordingly or as the case may be shall in relation to the units not all of whose owners have granted the deed vary or discharge the community burden accordingly and where they refuse an application under paragraph (d) or (e) above, they shall disapply the development management scheme.

- (2) Paragraph (b) of subsection (1) above applies in relation to the application of a holder of a personal real burden as it applies to the application of an owner of a benefited property except that, for the purposes of any application made by virtue of this subsection, the words “in relation to that property” in paragraph (b) shall be disregarded as shall the words “in relation to the benefited property” in what follows paragraph (e) in that subsection.
- (3) It shall not be competent to make an application under subsection (1) above in relation to a title condition of a kind specified in schedule 11 to this Act.
- (4) It shall not be competent to make an application under subsection (1)(b), (c), (d) or (e) above—
  - (a) after the renewal date, or as the case may be the date specified by virtue of section 107(6)(d)(ii) of, or the expiry of the period mentioned in section 34(3), 37(1) or 74(3) of, this Act, except with the consent of the terminator or as the case may be of—
    - (i) the person proposing to register the conveyance or the deed of variation or discharge, or
    - (ii) the owners' association; or
  - (b) after there has been, in relation to the proposal, endorsement under section 23(1) or, as the case may be, execution of a relevant certificate applied for by virtue of section 107(1)(b), or endorsement under section 37(2) or 73(3), of this Act.
- (5) Variation which would impose a new obligation or would result in a property becoming a benefited property shall not be competent on an application—
  - (a) under subsection (1)(a)(i) above unless the owner of the burdened property consents; or
  - (b) under subsection (1)(b) above.
- (6) Subject to section 97(1) of this Act and to subsections (9) and (10) below, an order discharging, renewing or varying a title condition may—
  - (a) where made under paragraph (a)(i) of subsection (1) above, direct the applicant; or
  - (b) where made by virtue of the refusal of an application under paragraph (b) or (c) of that subsection, direct the terminator or, as the case may be, the person proposing to register the conveyance or deed of variation or discharge,  
to pay to any person who in relation to the title condition was an owner of the benefited property or, where there is no benefited property, to any holder of the title condition, such sum as the Lands Tribunal may think it just to award under one, but not both, of the heads mentioned in subsection (7) below.
- (7) The heads are—

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- (a) a sum to compensate for any substantial loss or disadvantage suffered by, as the case may be—
    - (i) the owner, as owner of the benefited property; or
    - (ii) the holder of the title condition,
 in consequence of the discharge;
  - (b) a sum to make up for any effect which the title condition produced, at the time when it was created, in reducing the consideration then paid or made payable for the burdened property.
- (8) Subject to section 97(1) of this Act and to subsection (11) below, an order discharging, renewing or varying a title condition may impose on the burdened property a new title condition or vary a title condition extant at the time the order is made.
- (9) A direction under subsection (6) above shall be made only if the person directed consents.
- (10) Where an application under subsection (1)(b)(ii) above is refused, wholly or partly, any direction under subsection (6) above for payment to that person may be made only if that application was made by virtue of subsection (2) above.
- (11) An imposition under subsection (8) above shall be made only if the owner of the burdened property consents.
- (12) The jurisdiction conferred by subsection (1) above includes power, in relation to an application under paragraph (a)(ii) only of that subsection, to decline (with reason stated) to proceed to determine the question.

## **91 Special provision as to variation or discharge of community burdens**

- (1) Without prejudice to section 90(1)(a)(i) of this Act, an application may be made to the Lands Tribunal under this section by owners of at least one quarter of the units in a community for the variation (“variation” including imposition) or discharge of a community burden as it affects, or as the case may be would affect, all or some of the units in the community.
- (2) In the case of an application made by owners of some only of the units in the community, the units affected need not be the units which they own.
- (3) Subsections (6), (7) and (9) of section 90 of this Act shall apply in relation to an order made by virtue of subsection (1) above varying or discharging a community burden as they apply to an order under subsection (1)(a)(i) of that section discharging a title condition.

## **92 Early application for discharge: restrictive provisions**

In the constitutive deed, provision may be made to the effect that there shall be no application under section 90(1)(a)(i) or 91(1) of this Act in respect of a title condition before such date as may be specified in the deed (being a date not more than five years after the creation of the title condition); and if such provision is so made it shall not be competent to make an application under the section in question before that date.

## **93 Notification of application**

- (1) The Lands Tribunal shall, on receipt of an application under—

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- (a) section 90(1)(a) or 91(1) of this Act, give notice of that application to any person who, not being the applicant, appears to them to fall within any of the following descriptions—
  - (i) an owner of the burdened property;
  - (ii) an owner of any benefited property;
  - (iii) a holder of the title condition;
- (b) section 90(1)(b) of this Act, give such notice to any person who appears to them to fall within any of the following descriptions—
  - (i) in the case mentioned in sub-paragraph (i) of that provision, the terminator;
  - (ii) an owner of the burdened property; or
  - (iii) in the case mentioned in sub-paragraph (ii) of that provision, the person proposing to register the conveyance;
- (c) section 90(1)(c) of this Act, give such notice to the person proposing to register the deed of variation or discharge;
- (d) section 90(1)(d) of this Act, give such notice to the owners' association; or
- (e) section 90(1)(e) of this Act, give notice to the person proposing to register the conveyance,

and subject to subsection (2) below shall do so by sending the notice.

- (2) Notice under subsection (1) above may be given by advertisement, or by such other method as the Lands Tribunal think fit, if—
  - (a) given to a person who cannot, by reasonable inquiry, be identified or found;
  - (b) the person to whom it is given, being a person given notice by virtue of paragraph (a)(ii) of that subsection, does not appear to them to have any interest to enforce the title condition; or
  - (c) so many people require to be given notice that, in the opinion of the Lands Tribunal, it is not reasonably practicable to send it.
- (3) The Lands Tribunal may also give notice of the application, by such means as they think fit, to any other person.

## **94 Content of notice**

The Lands Tribunal shall—

- (a) in any notice given by them under section 93 of this Act—
  - (i) summarise or reproduce the application;
  - (ii) set a date (being a date no earlier than twenty-one days after the notice is given) by which representations to them as respects the application may be made;
  - (iii) state the fee which must accompany any such representations; and
  - (iv) in the case of an application for the discharge, renewal or variation of a real burden, or for the preservation of a real burden or development management scheme, state that if the application is not opposed it may be granted without further inquiry; and
- (b) in any notice so given (other than by advertisement) in respect of an application under section 90(1)(a) or 91(1) of this Act, also set out the name and address of every person to whom the notice is being sent.

## **95 Persons entitled to make representations**

The persons entitled to make representations as respects an application under section 90(1) or 91(1) of this Act are—

- (a) any person who has title to enforce the title condition;
- (b) any person against whom the title condition is enforceable;
- (c) in the case mentioned in paragraph (b)(ii) or (e) of section 90(1), the person proposing to register the conveyance; and
- (d) in the case mentioned in paragraph (d) of that section, the owners' association and the owner of any unit of the development.

## **96 Representations**

- (1) Representations made by any person to the Lands Tribunal as respects an application under section 90(1) or 91(1) of this Act shall be in writing and shall comprise a statement of the facts and contentions upon which the person proposes to rely.
- (2) For the purposes of this Act, representations are made when they are received by the Lands Tribunal with the requisite fee; and a person sending such representations shall forthwith send a copy of them to the applicant.
- (3) Notwithstanding section 94(a)(ii) of this Act, the Lands Tribunal may if they think fit accept representations made after the date set under that section.

## **97 Granting unopposed application for discharge or renewal of real burden**

- (1) Subject to subsection (2) below, an unopposed application duly made for—
  - (a) the discharge or variation;
  - (b) the renewal or variation; or
  - (c) the preservation,
 of a real burden shall be granted as of right; and as respects an application under paragraph (a) above neither subsection (6)(a) nor subsection (8) of section 90 of this Act shall apply in relation to the order discharging or as the case may be varying the real burden.
- (2) Subsection (1) above does not apply as respects an application—
  - (a) for the discharge or variation of a facility burden;
  - (b) for the discharge or variation of a service burden; or
  - (c) under section 91(1) of this Act for the discharge or variation of a community burden imposed on any unit of a sheltered or retirement housing development.
- (3) An application is unopposed for the purposes of—
  - (a) subsection (1)(a) above if, as at the date on which the application falls to be determined, no representations opposing it have been made under section 96 of this Act either by an owner of any benefited property or by a holder of a personal real burden;
  - (b) subsection (1)(b) above if, as at that date, no representations opposing the application have been made under that section by the terminator or as the case may be the person proposing to register the conveyance; or
  - (c) subsection (1)(c) above if, as at that date, no representations opposing the application have been made under that section by the person proposing to register the deed of variation or discharge,

or all such representations which have been so made have been withdrawn.

- (4) In granting an application under subsection (1)(b) or (c) above, the Lands Tribunal may, as they think fit, order either—
- (a) the person who intimated the proposal to execute and register the notice of termination or as the case may be the deed of variation or discharge or the conveyance; or
  - (b) any other person who succeeded that person as terminator or proposer, to pay to the applicant a specific sum in respect of the expenses incurred by the applicant or such proportion of those expenses as the Tribunal think fit.

## **98 Granting other applications for variation, discharge, renewal or preservation of title condition**

An application for the variation, discharge, renewal or preservation, of a title condition shall, unless it falls to be granted as of right under section 97(1) of this Act, be granted by the Lands Tribunal only if they are satisfied, having regard to the factors set out in section 100 of this Act, that—

- (a) except in the case of an application under subsection (3) of section 34 or, in respect of a deed of variation or discharge granted by the owner of an adjacent unit, subsection (1) of section 37 of this Act, it is reasonable to grant the application; or
- (b) in such a case, the variation or discharge in question—
  - (i) is not in the best interests of the owners of all the units in the community; or
  - (ii) is unfairly prejudicial to one or more of those owners.

## **99 Granting applications as respects development management schemes**

- (1) An unopposed application for preservation of a development management scheme shall be granted as of right.
- (2) An application is unopposed for the purposes of subsection (1) above if, as at the date on which the application falls to be determined, no representations opposing it have been made under section 96 of this Act by the owners' association or, as the case may be, by the person proposing to register the conveyance.
- (3) In granting an application under subsection (1) above, the Lands Tribunal may order the owners' association to pay to the applicant a specific sum in respect of the expenses incurred by the applicant or such proportion of those expenses as the Tribunal think fit.
- (4) An application for the preservation of a development management scheme shall, unless it falls to be granted as of right under subsection (1) above, be granted by the Lands Tribunal only if they are satisfied, in the case of an application—
  - (a) under paragraph (d) of section 90(1) of this Act, that the disapplication of the development management scheme is not in the best interests of the owners of the units of the development or is unfairly prejudicial to one or more of those owners; or
  - (b) under paragraph (e) of that section, that having regard to the purpose for which the land is being acquired by the person proposing to register the conveyance it is reasonable to grant the application.

**100 Factors to which the Lands Tribunal are to have regard in determining applications etc.**

The factors mentioned in section 98 of this Act are—

- (a) any change in circumstances since the title condition was created (including, without prejudice to that generality, any change in the character of the benefited property, of the burdened property or of the neighbourhood of the properties);
- (b) the extent to which the condition—
  - (i) confers benefit on the benefited property; or
  - (ii) where there is no benefited property, confers benefit on the public;
- (c) the extent to which the condition impedes enjoyment of the burdened property;
- (d) if the condition is an obligation to do something, how—
  - (i) practicable; or
  - (ii) costly,
 it is to comply with the condition;
- (e) the length of time which has elapsed since the condition was created;
- (f) the purpose of the title condition;
- (g) whether in relation to the burdened property there is the consent, or deemed consent, of a planning authority, or the consent of some other regulatory authority, for a use which the condition prevents;
- (h) whether the owner of the burdened property is willing to pay compensation;
- (i) if the application is under section 90(1)(b)(ii) of this Act, the purpose for which the land is being acquired by the person proposing to register the conveyance; and
- (j) any other factor which the Lands Tribunal consider to be material.

**101 Regulation of applications to Lands Tribunal**

The Scottish Ministers may make rules regulating any application under this Act to the Lands Tribunal and may in particular make provision, in those rules, as to the evidence which may be required for such an application.

**102 Referral to Lands Tribunal of notice dispute**

- (1) Any dispute arising in relation to a notice registered under section 50 or 80 of this Act may be referred to the Lands Tribunal; and in determining the dispute the Tribunal may make such order as they think fit discharging or, to such extent as may be specified in the order, restricting the notice in question.
- (2) In any referral under subsection (1) above, the burden of proving any disputed question of fact shall be on the person relying on the notice.
- (3) An extract of any order made under subsection (1) above may be registered and the order shall take effect as respects third parties on such registration.

**103 Expenses**

- (1) The Lands Tribunal may, in determining an application made under this Part of this Act, make such order as to expenses as they think fit but shall have regard, in particular, to the extent to which the application, or any opposition to the application, is successful.



- (2) Subsection (1) above is without prejudice to sections 97(4) and 99(3) of this Act.

#### **104 Taking effect of orders of Lands Tribunal etc.**

- (1) The Scottish Ministers may, after consultation with the Scottish Committee of the Council on Tribunals, make rules as to when an order of the Lands Tribunal on an application under section 90(1) or 91(1) of this Act shall take effect.
- (2) An order under subsection (1)(a)(i), (b) or (c) of section 90, under subsection (1) of that section on the refusal (wholly or partly as the case may be) of an application under paragraph (b) or (c) of that subsection or under section 91(1) of this Act which has taken effect in accordance with rules made under subsection (1) above may be registered against the burdened property by any person who was a party to the application or who was, under section 95 of this Act, entitled to make representations as respects the application; and on the order being so registered the title condition to which it relates is discharged (wholly or partly), renewed (wholly or partly), imposed, preserved or varied according to the terms of the order.
- (3) An order—
- (a) which disapplies a development management scheme, being an order under subsection (1) of section 90 of this Act, or preserves it under paragraph (d) or (e) of that subsection; and
  - (b) which has taken effect in accordance with rules so made,
- may be registered against the units of the development by the owners' association or as the case may be by an owner of a unit of the development or the person proposing to register the conveyance; and on the order being so registered the scheme is disappplied or preserved as the case may be.
- (4) Any enforceability which the obligation in question has as a contractual obligation shall be unaffected by such an order.

### **PART 10**

#### MISCELLANEOUS

##### *Consequential alterations to Land Register*

#### **105 Alterations to Land Register consequential upon registering certain deeds**

- (1) Subject to subsection (2) below, in registering in the Register of Sasines a document mentioned in subsection (3) below the Keeper of the Registers of Scotland may make such consequential alterations to the Land Register of Scotland as the Keeper considers requisite.
- (2) In so registering such a document, or in registering it in the Land Register, by virtue of section 18, 19 or 20 of the 2000 Act or section 4(5), 50, 75 or 80 of this Act, the Keeper shall make such consequential alterations as are mentioned in subsection (1) above.
- (3) The documents are—
- (a) any decree, deed or other document which varies, discharges, renews, reallots, preserves or imposes a real burden or servitude; and

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- (b) any deed which comprises a conveyance of part of—
  - (i) the benefited property; or
  - (ii) the burdened property.

*Compulsory acquisition of land*

**106 Extinction of real burdens and servitudes etc. on compulsory acquisition of land**

- (1) If land is acquired compulsorily by virtue of a compulsory purchase order then, except in so far as the terms of—
  - (a) the order; or
  - (b) the conveyance in implement of such acquisition,
 provide otherwise, on registration of the conveyance, any real burden, or servitude, over the land shall be extinguished and any development management scheme applying as respects the land disappplied.
- (2) Without prejudice to the generality of the exception in subsection (1) above, such terms as are mentioned in that exception may provide—
  - (a) for the variation of any of the real burdens or servitudes;
  - (b) that there shall be such extinction only—
    - (i) of certain of the real burdens and servitudes;
    - (ii) in relation to certain parts of the burdened property; or
    - (iii) in respect of the enforcement rights of the owners of certain of the benefited properties.
- (3) If the compulsory purchase order provides for an exception such as is mentioned in subsection (1) above, the conveyance in implement of the acquisition shall not, unless the owners of the benefited properties consent, or as the case may be the owners' association or the holder of any personal real burden consents, be registrable if its terms do not conform in that regard.
- (4) Where a personal real burden is extinguished by virtue of subsection (1) above, such person as immediately before the extinction held the right to enforce the burden shall be entitled to receive compensation from the acquiring authority in question for any loss thereby occasioned that person.
- (5) In this section—
  - “compulsory purchase order” has the meaning given by section 1(1) of the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c. 42) (procedure for compulsory purchase of land by local authorities etc.) except that it includes a compulsory purchase order made under the Forestry Act 1967 (c. 10); and
  - “conveyance” means—
    - (a) a—
      - (i) disposition;
      - (ii) notice of title; or
      - (iii) notarial instrument,
 which includes a reference to the application of subsection (1) above;

- (b) a conveyance in the form set out in Schedule A to the Lands Clauses Consolidation (Scotland) Act 1845 (c. 19); or
- (c) a general vesting declaration (as defined in paragraph 1(1) of Schedule 15 to the Town and Country Planning (Scotland) Act 1997 (c. 8)).

## **107 Extinction of real burdens and servitudes etc. where land acquired by agreement**

- (1) If—
- (a) land acquired by a person by agreement could have been so acquired by that person compulsorily by virtue of any enactment; and
  - (b) the person, having complied with subsection (4) below, registers a conveyance in implement of such acquisition together with a relevant certificate,
- then, except in so far as the terms of the conveyance provide otherwise, on such registration any real burden, or servitude, over the land shall be extinguished and any development management scheme applying as respects the land disapplied.
- (2) Registration under subsection (1) above shall not vary or extinguish a title condition which is the subject of an application disclosed by the certificate in so far as that title condition—
- (a) is constituted in favour of the property of which the applicant is owner; or
  - (b) is a personal real burden of which the applicant is holder,
- or disapply a development management scheme, described in the certificate; but the conveyance may be registered again, together with a further such certificate, under that subsection, the effect of the later registration being determined by reference to the further certificate rather than to the earlier certificate.
- (3) Subsection (2) of section 106 of this Act shall apply in relation to the exception in subsection (1) above as it applies in relation to the exception in subsection (1) of that section.
- (4) The person proposing to register the conveyance shall, before doing so in accordance with subsection (1)(b) above—
- (a) if such registration would extinguish a title condition, give notice to the owner of the benefited property (or in the case of a personal real burden to the holder of that burden); and
  - (b) if it would disapply a development management scheme, give notice to the owners' association,
- of the matters mentioned in subsection (6) below.
- (5) Any person to whom notice is given under subsection (4) above may, on or before the date specified by virtue of subsection (6)(d)(ii) below, apply to the Lands Tribunal for renewal or variation of the title condition or as the case may be preservation of the development management scheme.
- (6) The matters are—
- (a) a description of the land;
  - (b) the name and address of the person proposing to register the conveyance;
  - (c) the fact that, by virtue of this section (and subject to the terms of the conveyance), real burdens and servitudes over the land may be extinguished and any development management scheme disapplied;

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- (d) that the person given notice—
  - (i) may obtain information from the person acquiring the land about any entitlement to compensation; and
  - (ii) will require to apply to the Lands Tribunal for Scotland, by a date specified in the notice, if the title condition is to be renewed or varied under paragraph (b) of section 90(1) of this Act or as the case may be the development management scheme preserved under paragraph (e) of that section.
- (7) The date so specified may be any date which is not fewer than twenty-one days after the notice is given (intimation by affixing being taken, for the purposes of this subsection, to be given when first the notice is affixed).
- (8) Notice under subsection (4)(a) above may be given—
  - (a) by sending;
  - (b) by advertisement;
  - (c) by affixing a conspicuous notice to the burdened property and to—
    - (i) in a case where there exists one, and only one, lamp post within one hundred metres of that property, that lamp post; or
    - (ii) in a case where there exists more than one lamp post so situated, each of at least two such lamp posts; or
  - (d) by such other method as the person acquiring the land thinks fit,
 and notice under subsection (4)(b) above may be given by sending or by such other means as that person thinks fit.
- (9) Subsections (6) and (7) of section 21 of this Act apply in relation to affixing, and to a notice affixed, under subsection (8)(c) above as they apply in relation to affixing, and to a notice affixed, under subsection (2)(b) of that section (the reference in paragraph (a)(ii) of the said subsection (6) to the date specified in the notice as the renewal date being construed as a reference to the date specified by virtue of subsection (6)(d)(ii) above).
- (10) In this section—
  - “conveyance” has the same meaning as in section 106(5) of this Act except that the reference, in paragraph (a) of the definition of that expression in that section, to subsection (1) of that section shall be read as a reference to that subsection of this section and paragraph (c) of that definition shall be disregarded; and
  - “relevant certificate” means a certificate executed, on or after the date specified by virtue of subsection (6)(d)(ii) above, by a member of the Lands Tribunal, or by their clerk, to the effect that no application in relation to the proposal to register the conveyance has been received under section 90(1)(b)(ii) or (e) of this Act or that any such application which has been received—
    - (a) has been withdrawn; or
    - (b) relates, in the case of an application under section 90(1)(b)(ii), (either or both)—
      - (i) to one or more but not to all of the title conditions over the land (any title condition to which it relates being described in the certificate);
      - (ii) to one or more but not to all (or probably or possibly not to all) of the benefited properties (any benefited property to which it relates being described in the certificate),

and where more than one such application has been received the certificate shall relate to both (or as the case may be to all) applications.

- (11) Any application for a relevant certificate shall be made in the form set out in schedule 12 to this Act.

### *Amendments*

#### **108 Amendment of Church of Scotland (Property and Endowments) (Amendment) Act 1933**

In section 9 of the Church of Scotland (Property and Endowments) (Amendment) Act 1933 (c. 44) (right of pre-emption of certain successors in title to persons who granted or disposed without valuable consideration for the erection of a church or manse), after subsection (3) there is added—

- “(4) Where part of the lands which adjoin as is mentioned in subsection (3) above are conveyed, then on registration of the conveyance that subsection shall cease to afford a right of pre-emption to any owner of the part conveyed unless in the conveyance it is provided that the subsection shall instead cease to afford such a right to any owner of the part retained (in which case the subsection shall apply accordingly).
- (5) The Scottish Ministers may by order made by statutory instrument make provision as to the procedures to be followed for the purposes of subsection (3) above.
- (6) Without prejudice to the generality of subsection (5) above, any such order may include provision—
- (a) as to how a price is to be fixed; and
  - (b) for any case where there is at any time, as regards the ground or part, more than one person to whom an opportunity to purchase must be afforded under subsection (3) above.”.

#### **109 Amendment of Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947**

- (1) The First Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 (c. 42) shall be amended in accordance with the following subsections.
- (2) In paragraph 3(b) (which requires a local authority to notify certain persons that a compulsory purchase order is about to be submitted by the authority for confirmation etc.), the existing words from “every owner” to “order”, where it first occurs, shall be head (i); and after that head there shall be inserted the following heads—
- “(ii) the holder of any personal real burden affecting that land if registration of the conveyance in implement of the order would vary or extinguish the title condition in question;
  - (iii) the owner of any land which is a benefited property (as defined by section 122(1) of the Title Conditions (Scotland) Act 2003 (asp 9)) in relation to any land comprised in the order if such registration would vary or extinguish the title condition in question; and

- (iv) the owners' association of the development in question if a development management scheme applies as respects any land comprised in the order and registration of the conveyance in implement of the order would disapply that scheme.”.

(3) After paragraph 3 there shall be inserted—

- “3A Service of notice under head (ii) or (iii) of paragraph 3(b) above shall be—
- (a) by sending (that expression being construed in accordance with section 124 of the said Act of 2003 and as if what was being done was being done under that Act);
  - (b) by advertisement;
  - (c) by affixing a conspicuous notice to the burdened property and to—
    - (i) in a case where there exists one, and only one, lamp post which is situated within one hundred metres of that property, that lamp post; or
    - (ii) in a case where there exists more than one lamp post so situated, each of at least two such lamp posts; or
  - (d) by such other means as the acquiring authority think fit,
- and service of notice under head (iv) of that paragraph shall be by sending (as so construed) or by such other means as the acquiring authority think fit.
- 3B Subsections (6) and (7) of section 21 of the said Act of 2003 apply in relation to affixing, and to a notice affixed, under paragraph 3A(c) above as they apply in relation to affixing, and to a notice affixed, under subsection (2)(b) of that section (the reference in paragraph (a)(ii) of the said subsection (6) to the date specified in the notice as the renewal date being construed as a reference to the last day of the period specified in the notice given under paragraph 3(b) above).”.

(4) In paragraph 4 (powers in relation to objectors)—

- (a) in sub-paragraph (2), at the beginning there shall be inserted “Subject to sub-paragraph (2A),”;
- (b) after sub-paragraph (2) there shall be inserted—
 

“(2A) If the person by whom an objection is made states that he objects as mentioned in sub-paragraph (4)(b) or (c) below, sub-paragraph (2) above shall not apply as respects that objection provided that the acquiring authority give the person a written undertaking that any conveyance in implement of the acquisition will provide that the title condition in question is not varied or extinguished in respect of the enforcement rights of that person or as the case may be that the development management scheme is not disapplied; and any such undertaking shall—

  - (a) identify the benefited property (if any) and burdened property or as the case may be the development to which the development management scheme applies;
  - (b) identify the order; and
  - (c) set out the manner in which the conveyance will fulfil the undertaking.

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(2B) The effect, under subsection (1) of section 106 of the Title Conditions (Scotland) Act 2003 (asp 9) (extinction of real burdens and servitudes etc. on compulsory acquisition of land), of registering the conveyance after an undertaking given under sub-paragraph (2A) above has been registered against the burdened property, or as the case may be against the units of the development, shall be subject to the terms of the undertaking irrespective of the terms of the conveyance.

(2C) In sub-paragraphs (2A) and (2B) above, “conveyance” has the same meaning as in subsection (5) of that section.”;

(c) in sub-paragraph (4), the existing words from “the grounds thereof” to the end shall be head (a) and after that head there shall be inserted the following heads—

“(b) whether he objects as a person with title to enforce a title condition and, if he does so object, then in that statement to—

(i) identify the benefited property (if any) and burdened property;

(ii) identify the title condition (either by setting it out in full or by identifying the constitutive deed, saying where it is registered and giving the date of registration); and

(iii) if there is a benefited property, describe his connection with it;

(c) whether he objects as owners' association of the development to which a development management scheme applies and, if he does so object, then in that statement to identify—

(i) the development; and

(ii) the development management scheme (by identifying the deed of application, saying where it is registered and giving the date of registration).”.

(5) After paragraph 6 there is inserted—

“6A In this Part, “title condition”, “development management scheme” and “personal real burden” have the same meanings as in the Title Conditions (Scotland) Act 2003 (asp 9).”.

## 110 Amendment of Forestry Act 1967

(1) Schedule 5 to the Forestry Act 1967 (c. 10) shall be amended in accordance with the following subsections.

(2) In paragraph 2 (which provides for notices as respects compulsory purchase orders), after sub-paragraph (1) there shall be inserted—

“(1A) Before making a compulsory purchase order the Scottish Ministers shall give notice of their intention in that regard to—

(a) the holder of any personal real burden affecting the land to which the order relates if registration of the conveyance in implement of the order would vary or extinguish the title condition in question;

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- (b) the owner of any land which is a benefited property (as defined by section 122(1) of the Title Conditions (Scotland) Act 2003 (asp 9)) in relation to any land comprised in the order if such registration would vary or extinguish the title condition in question; and
- (c) the owners' association of the development in question if a development management scheme applies as respects any land comprised in the order and registration of the conveyance in implement of the order would disapply that scheme.

(1B) Notice under sub-paragraph (1A)(a) or (b) above may be given—

- (a) by sending (that expression being construed in accordance with section 124 of the said Act of 2003 and as if what was being done was being done under that Act);
- (b) by advertisement;
- (c) by affixing a conspicuous notice to the burdened property and to—
  - (i) in a case where there exists one, and only one, lamp post which is situated within one hundred metres of that property, that lamp post; or
  - (ii) in a case where there exists more than one lamp post so situated, each of at least two such lamp posts; or
- (d) by such other means as the Scottish Ministers think fit,

and service of notice under sub-paragraph (1A)(c) above shall be by sending (as so construed) or by such other means as the Scottish Ministers think fit.

(1C) Subsections (6) and (7) of section 21 of the said Act of 2003 apply in relation to affixing, and to a notice affixed, under sub-paragraph (1B)(c) above as they apply in relation to affixing, and to a notice affixed, under subsection (2)(b) of that section (the reference in paragraph (a)(ii) of the said subsection (6) to the date specified in the notice as the renewal date being construed as a reference to the last day of the period specified in the notice given under paragraph 2(1)(b) above).”.

(3) In each of paragraphs 3(2) and 6, at the beginning, there shall be inserted the words “Subject to paragraph 6B below,”; and in paragraph 4, for the words “paragraph 5” there shall be substituted the words “paragraphs 5 and 6B”.

(4) After paragraph 6 there shall be inserted—

“6A The Scottish Ministers may require an objector to state in writing whether he objects—

- (a) as a person with title to enforce a title condition and if he does so object then in that statement to—
  - (i) identify the benefited property and burdened property;
  - (ii) identify the title condition (either by setting it out in full or by identifying the constitutive deed, saying where it is registered and giving the date of registration); and
  - (iii) describe his connection with the benefited property.
- (b) as owners' association and if he does so object then in that statement to identify—
  - (i) the development; and



- (ii) the development management scheme (by identifying the deed of application, saying where it is registered and giving the date of registration).
- 6B If in compliance with paragraph 6A above an objector states that he objects as mentioned in sub-paragraph (a) or (b) of that paragraph, paragraphs 3(2), 4 and 6 above shall not apply as respects that objection provided that the Scottish Ministers give him a written undertaking that any conveyance in implement of the acquisition will provide—
  - (a) where the objector is as mentioned in paragraph 6A(a) above, that the title condition in question is not varied or extinguished in respect of the enforcement rights of that person, any such undertaking—
    - (i) identifying the benefited property (if any) and burdened property;
    - (ii) identifying the order; and
    - (iii) setting out the manner in which the conveyance will fulfil the undertaking; or
  - (b) where the objector is as mentioned in paragraph 6A(b) above, that the development management scheme will not be disapplied, any such undertaking—
    - (i) identifying the development;
    - (ii) identifying the order; and
    - (iii) setting out the manner in which the conveyance will fulfil the undertaking.
- 6C The effect, under subsection (1) of section 106 of the Title Conditions (Scotland) Act 2003 (asp 9) (extinction of real burdens and servitudes etc. on compulsory acquisition of land), of registering the conveyance after an undertaking given under paragraph 6B above has been registered against the burdened property, or as the case may be against the units of the development, shall be subject to the terms of the undertaking irrespective of the terms of the conveyance.
- 6D In this Part, “title condition”, “development management scheme” and “personal real burden” have the same meanings as in that Act; and in paragraphs 6B and 6C above, “conveyance” has the same meaning as in section 106(5) of that Act.”

## **111 Amendment of Conveyancing and Feudal Reform (Scotland) Act 1970**

- (1) In section 13 of the Conveyancing and Feudal Reform (Scotland) Act 1970 (c. 35) (ranking of standard securities), in subsection (1), for the words from “his present advances” to “to which the security relates” there shall be substituted the following paragraphs—
  - “(a) the present debt incurred (whenever payable); and
  - (b) any future debt which, under the contract to which the security relates, he is required to allow the debtor in the security to incur.”
- (2) Subsection (1) above does not affect the preference in ranking of the standard security of a creditor if the notice mentioned in the said section 13 was received by that creditor before the day on which this section comes into force.

**112 Amendment of Land Registration (Scotland) Act 1979**

- (1) The 1979 Act shall be amended in accordance with the following subsections.
- (2) In section 6(1) (duty to make up and maintain title sheet), for paragraph (e) there shall be substituted—
- “(e) any subsisting real right pertaining to the interest or subsisting real burden or condition affecting the interest and, where the interest is so affected by virtue of section 18, 18A, 18B, 18C, 19, 20, 27 or 27A of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) or section 4(5), 50, 75 or 80 of the Title Conditions (Scotland) Act 2003 (asp 9), the Keeper shall in the entry identify the benefited property, or as the case may be the dominant tenement, (if any) and any person in whose favour the real burden is constituted;
  - (ee) any subsisting right to a title condition pertaining to the interest by virtue of section 18, 19 or 20 of that Act of 2000 or 4(5), 50, 75 or 80 of that Act of 2003, the Keeper identifying in the entry the burdened property;”.
- (3) In section 9 (rectification of Land Register of Scotland), in subsection (3B), the existing words “any provision of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) other than section 4 or 65” shall be paragraph (a); and after that paragraph there shall be inserted the word “; or” and the following paragraph—
- “(b) section 49, 50, 58 or 80 of the Title Conditions (Scotland) Act 2003 (asp 9).”.

**113 Amendment of Enterprise and New Towns (Scotland) Act 1990**

- (1) The Enterprise and New Towns (Scotland) Act 1990 (c. 35) shall be amended in accordance with the following subsections.
- (2) In section 8(6) (powers and duties of Scottish Enterprise or Highlands and Islands Enterprise exercisable on terms and conditions arranged by agreement with person having an interest in land), for the words “section 32(3)” there shall be substituted “section 32”.
- (3) In section 32 (registration of agreements), for subsection (1) there shall be substituted—
- “(1) Scottish Enterprise or Highlands and Islands Enterprise, in exercising the powers and duties conferred on it by this Act, may as respects land which does not belong to it enter into an agreement with any person who has an interest in the land (provided that it is an interest which enables the person to bind the land) for the purpose of restricting or regulating, either permanently or during such period as may be prescribed by the agreement, the development or use of the land; and the agreement may be registered either—
    - (a) in a case where the land affected by the agreement is registered in the Land Register of Scotland, in that register; or
    - (b) in any other case, in the appropriate Division of the General Register of Sasines.
  - (1A) An agreement under subsection (1) above may contain such incidental and consequential provisions (including financial ones) as appear to the body in question to be necessary or expedient for the purposes of the agreement.”.

## 114 Amendment of Abolition of Feudal Tenure etc. (Scotland) Act 2000

- (1) The 2000 Act shall be amended in accordance with subsections (2) to (5) below.
- (2) After section 18 there shall be inserted—

### “18A Personal pre-emption burdens and personal redemption burdens

- (1) Without prejudice to section 18 of this Act, where a feudal estate of *dominium utile* of land is subject to a real burden which comprises a right of pre-emption or redemption and is enforceable by a superior of the feu or would be so enforceable were the person in question to complete title to the *dominium directum* the superior may, before the appointed day, by duly executing and registering against the *dominium utile* a notice in, or as nearly as may be in, the form contained in schedule 5A to this Act, prospectively convert that burden into a personal pre-emption burden or as the case may be into a personal redemption burden.
- (2) The notice 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 is subject to the real burden (or any part of that land);
  - (c) set out the terms of the real burden; and
  - (d) set out the terms of any counter-obligation to the real burden if it is a counter-obligation enforceable against the superior.
- (3) Before submitting any notice for registration under this section, the superior shall swear or affirm as is mentioned in subsection (4) of section 18 of this Act.
- (4) Subsection (5) of that section applies for the purposes of subsection (3) above as it applies for the purposes of subsection (4) of that section.
- (5) If subsections (1) to (3) above are, with subsection (4) of that section, complied with and immediately before the appointed day the real burden is still enforceable by the superior (or his successor) or would be so enforceable, or still so enforceable, were the person in question to complete title to the *dominium directum* then, on that day—
  - (a) the real burden shall be converted into a real burden in favour of that person, to be known as a “personal pre-emption burden” or as the case may be as a “personal redemption burden”; and
  - (b) the land the *dominium utile* of which was subject to the real burden (or if part only of that land is described in pursuance of subsection (2) (b) above, that part) shall become the servient tenement.
- (6) Title to enforce the burden against the land to which the notice relates shall be subject to any such counter-obligation as was set out by virtue of subsection (2)(d) above.
- (7) The right to a personal pre-emption burden or personal redemption burden may be assigned or otherwise transferred to any person; and any such assignation or transfer shall take effect on registration.
- (8) Where the holder of a personal pre-emption burden or personal redemption burden does not have a completed title—

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- (a) title may be completed by the holder registering a notice of title; or
- (b) without completing title, the holder may grant a deed—
  - (i) assigning the right to; or
  - (ii) discharging, in whole or in part,
 the burden; but unless the deed is one to which section 15(3) of the Land Registration (Scotland) Act 1979 (c. 33) (circumstances where unnecessary to deduce title) applies, it shall be necessary, in the deed, to deduce title to the burden through the midcouples linking the holder to the person who had the last completed title.

(9) This section is subject to sections 41 and 42 of this Act.

### **18B Conversion into economic development burden**

- (1) Without prejudice to section 18 of this Act, where a feudal estate of *dominium utile* of land is subject to a real burden which is imposed for the purpose of promoting economic development and is enforceable by the Scottish Ministers or a local authority, being in either case the superior of the feu, or would be so enforceable were the Scottish Ministers or as the case may be the local authority to complete title to the *dominium directum*, the superior may, before the appointed day, by duly executing and registering against the *dominium utile* a notice in, or as nearly as may be in, the form contained in schedule 5B to this Act, prospectively convert that burden into an economic development burden.
- (2) The notice 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 is subject to the real burden (or any part of that land);
  - (c) set out the terms of the real burden;
  - (d) set out the terms of any counter-obligation to the real burden if it is a counter-obligation enforceable against the superior; and
  - (e) state that the burden was imposed for the purpose of promoting economic development and provide information in support of that statement.
- (3) If subsections (1) and (2) above are complied with and immediately before the appointed day the real burden is still enforceable by the superior or would be so enforceable were the Scottish Ministers or as the case may be the local authority to complete title to the *dominium directum* then on that day the real burden shall be converted into an economic development burden and on and after that day the Scottish Ministers or, as the case may be, the authority, shall—
  - (a) have title to enforce the burden against the land to which the notice relates; and
  - (b) be presumed to have an interest to enforce it.
- (4) Title to enforce the burden against the land to which the notice relates shall be subject to any such counter-obligation as was set out by virtue of subsection (2)(d) above.

(5) This section is subject to sections 41 and 42 of this Act.

### **18C Conversion into health care burden**

- (1) Without prejudice to section 18 of this Act, where a feudal estate of *dominium utile* of land is subject to a real burden which is imposed for the purpose of promoting the provision of facilities for health care and is enforceable by a National Health Service trust or the Scottish Ministers, being in either case the superior of the feu, or would be so enforceable were the trust or as the case may be the Scottish Ministers to complete title to the *dominium directum*, the superior may, before the appointed day, by duly executing and registering against the *dominium utile* a notice in, or as nearly as may be in, the form contained in schedule 5C to this Act, prospectively convert that burden into a health care burden.
  - (2) The notice 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 is subject to the real burden (or any part of that land);
    - (c) set out the terms of the real burden;
    - (d) set out the terms of any counter-obligation to the real burden if it is a counter-obligation enforceable against the superior; and
    - (e) state that the burden was imposed for the purpose of promoting the provision of facilities for health care and provide information in support of that statement.
  - (3) If subsections (1) and (2) are complied with and immediately before the appointed day the real burden is still enforceable by the superior or would be so enforceable were the trust or as the case may be the Scottish Ministers to complete title to the *dominium directum* then on that day the real burden shall be converted into a health care burden and on and after that day the trust or, as the case may be, the Scottish Ministers, shall—
    - (a) have title to enforce the burden against the land to which the notice in question relates; and
    - (b) be presumed to have an interest to enforce it.
  - (4) Title to enforce the burden against the land to which the notice relates shall be subject to any such counter-obligation as was set out by virtue of subsection (2)(d) above.
  - (5) In subsections (1) and (2) above, “facilities for health care” includes facilities ancillary to health care; as for example (but without prejudice to that generality) accommodation for staff employed to provide health care.
  - (6) This section is subject to sections 41 and 42 of this Act.”.
- (3) After section 27 there shall be inserted—

**“27A Nomination of conservation body or Scottish Ministers to have title to enforce conservation burden**

- (1) Where a person other than a conservation body or the Scottish Ministers has the right as superior to enforce a real burden of the class described in section 27(2) of this Act or would have that right were he to complete title to the *dominium directum*, he may, subject to subsection (2) below, before the appointed day nominate for the benefit of the public, by executing and registering against the *dominium utile* of the land subject to the burden a notice in, or as nearly as may be in, the form contained in schedule 8A to this Act, a conservation body or the Scottish Ministers to have title on or after that day to enforce the burden against that land; and, without prejudice to section 27(1) of this Act, any burden as respects which such title to enforce is by virtue of this subsection so obtained shall, on and after the appointed day, be known as a “conservation burden”.
- (2) Subsection (1) above applies only where the consent of the nominee to being so nominated is obtained—
- (a) in a case where sending a copy of the notice, in compliance with section 41(3) of this Act, is reasonably practicable, before that copy is so sent; and
  - (b) in any other case, before the notice is executed.
- (3) The notice shall—
- (a) state that the nominee is a conservation body (identifying it) or the Scottish Ministers, as the case may be; and
  - (b) do as mentioned in paragraphs (b) to (e) of section 27(3) of this Act.
- (4) This section is subject to sections 41 and 42 of this Act except that, in the application of subsection (1)(i) of section 42 for the purposes of this subsection, such discharge as is mentioned in that subsection shall be taken to require the consent of the nominated person.”.
- (4) After section 28 there shall be inserted—

**“28A Effect of section 27A nomination**

If a notice has been executed and registered in accordance with section 27A of this Act and, immediately before the appointed day, the burden to which the notice relates is still enforceable by the nominating person as superior (or by such person as is his successor) or would be so enforceable, or still so enforceable, were the person in question to complete title to the *dominium directum* then, on and after the appointed day, the conservation body or as the case may be the Scottish Ministers shall—

- (a) subject to any counter-obligation, have title to enforce the burden against the land to which the notice in question relates; and
- (b) be presumed to have an interest to enforce that burden.”.

- (5) After section 65 there shall be inserted—

### “65A Sporting rights

- (1) Where a feudal estate of *dominium utile* of land is subject to sporting rights which are enforceable by a superior of the feu or which would be so enforceable were the person in question to complete title to the *dominium directum* the superior may, before the appointed day, by duly executing and registering against the *dominium utile* a notice in, or as nearly as may be in, the form contained in schedule 11A to this Act, prospectively convert those rights into a tenement in land.
- (2) The notice 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 is subject to the sporting rights (or any part of that land);
  - (c) describe those rights; and
  - (d) set out the terms of any counter-obligation to those rights if it is a counter-obligation enforceable against the superior.
- (3) Before submitting any notice for registration under this section, the superior shall swear or affirm as is mentioned in subsection (4) of section 18 of this Act.
- (4) Subsection (5) of that section applies for the purposes of subsection (3) above as it applies for the purposes of subsection (4) of that section.
- (5) If subsections (1) to (3) above are, with subsection (4) of that section, complied with and immediately before the appointed day the sporting rights are still enforceable by the superior (or his successor) or would be so enforceable, or still so enforceable, were the person in question to complete title to the *dominium directum* then, on that day, the sporting rights shall be converted into a tenement in land.
- (6) No greater, or more exclusive, sporting rights shall be enforceable by virtue of such conversion than were (or would have been) enforceable as mentioned in subsection (5) above.
- (7) Where the *dominium utile* comprises parts each held by a separate vassal, each part shall be taken to be a separate feudal estate of *dominium utile*.
- (8) Where sporting rights become, under subsection (5) above, a tenement in land, the right to enforce those rights shall be subject to any counter-obligation enforceable against the superior immediately before the appointed day; and section 47 of this Act shall apply in relation to any counter-obligation to sporting rights as it applies in relation to any counter-obligation to a real burden.
- (9) In this section, “sporting rights” means a right of fishing or game.
- (10) This section is subject to section 41 of this Act.
- (11) Subsections (1) and (2)(a) of section 43 of this Act apply in relation to a notice submitted for registration under this section as they apply in relation to a notice so submitted under any of the provisions mentioned in those subsections; and paragraph (a) of subsection (3) of that section applies in relation to a

determination for the purposes of subsection (5) of this section as it applies in relation to a determination for the purposes of any of the provisions mentioned in that paragraph.

- (12) Subsections (1), (3) and (4) of section 46 of this Act apply in relation to sporting rights extinguished by virtue of section 54 of this Act as they apply in relation to a real burden extinguished by section 17(1)(a) of this Act.”.
- (6) Schedule 13 to this Act, which contains amendments of the 2000 Act consequential upon the provisions of this Act, shall have effect.

### *Miscellaneous*

#### **115 Further provision as respects notices of preservation or of converted servitude**

- (1) This section applies in relation to a notice of preservation or of converted servitude.
- (2) Except where it is not reasonably practicable to do so, the owner of the benefited property shall, before executing the notice, send to the owner of the burdened property a copy of—
- (a) the notice;
  - (b) the explanatory note set out in whichever schedule to this Act relates to the notice; and
  - (c) in the case of a notice of converted servitude, the constitutive deed (if any).
- (3) The owner of the benefited property shall, in the notice, state either—
- (a) that a copy of the notice has been sent in accordance with subsection (2) above; or
  - (b) that it was not reasonably practicable for such a notice to be so sent.
- (4) However many the benefited or burdened properties may be, if the terms of the real burdens or converted servitudes are set out in a single constitutive deed, execution and registration may be accomplished in a single notice.
- (5) The Keeper of the Registers of Scotland shall not be required to determine whether a person submitting a notice for registration has complied with subsection (2) above.
- (6) Where—
- (a) a notice submitted before the expiry of the period of ten years which commences immediately after the appointed day is rejected by the Keeper; but
  - (b) a court or the Lands Tribunal then determines that the notice is registrable,
- the notice may, if not registered before that expiry, be registered—
- (i) within two months after the determination is made; but
  - (ii) before such date after that expiry as the Scottish Ministers may by order prescribe;
- and any notice registered under this subsection shall be treated as if it had been registered before that expiry.
- (7) For the purposes of subsection (6) above, the application to the court, or to the Lands Tribunal, which has resulted in the determination shall require to have been made within such period as the Scottish Ministers may by order prescribe.
- (8) In subsection (6)(b) above, “court” means Court of Session or sheriff.



**116 Benefited property outwith Scotland**

As respects a real burden or servitude, the benefited property need not be in Scotland; but where it is not then nothing in this Act requires registration against that property.

**117 Pecuniary real burdens**

On and after the day on which this section comes into force, it shall not be competent to create a pecuniary real burden (that is to say, to constitute a heritable security by reservation in a conveyance).

**118 Common interest**

On and after the day on which this section comes into force—

- (a) it shall not be competent to create a right of common interest; and
- (b) no such right shall arise otherwise than by implication of law.

**PART 11**

SAVINGS, TRANSITIONAL AND GENERAL

*Savings and transitional provisions etc.*

**119 Savings and transitional provisions etc.**

- (1) Nothing in this Act shall be taken to impair the validity of creating, varying or discharging a real burden by the registering of a deed before the appointed day.
- (2) This Act is without prejudice to section 3(1) of the 1979 Act (effect of registration).
- (3) The repeal by this Act of section 32 of the Conveyancing (Scotland) Act 1874 (c. 94) does not affect the construction of the expression “deed of conditions” provided for in section 122(1) of this Act.
- (4) Sections 8 and 14 of this Act do not affect proceedings commenced before the appointed day.
- (5) Section 10 of this Act does not apply where a person ceases to be, or becomes, an owner before the appointed day.
- (6) Section 16 of this Act does not apply as respects a breach of a real burden which occurs before the appointed day.
- (7) Section 61 of this Act does not apply as respects a constitutive deed (or a deed into which the constitutive deed is incorporated) registered before the appointed day except in so far as a real burden the terms of which are set out in the constitutive deed is a community burden.
- (8) Sections 75 and 78 of this Act do not apply as respects a deed executed before the appointed day.
- (9) Sections 106 and 107 of this Act do not apply as respects a conveyance registered before the appointed day.

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- (10) Except where the contrary intention appears, this Act applies to all real burdens, whenever created.

### *General*

#### **120 Requirement for dual registration**

A deed which, to be duly registered for the purposes of any provision of this Act, requires to be registered against both a benefited property and a burdened property, shall not be registrable against one only of the properties; nor shall a document which includes but does not wholly consist of such a deed.

#### **121 Crown application**

This Act binds the Crown.

#### **122 Interpretation**

- (1) In this Act, unless the context otherwise requires—
- “the 1979 Act” means the Land Registration (Scotland) Act 1979 (c. 33);
  - “the 2000 Act” means the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5);
  - “affirmative burden” shall be construed in accordance with section 2(2)(a) of this Act;
  - “ancillary burden” shall be construed in accordance with section 2(4) of this Act;
  - “appointed day” means the day appointed under section 71 of the 2000 Act;
  - “benefited property”—
    - (a) in relation to a real burden, shall be construed in accordance with section 1(2)(b) of this Act; and
    - (b) in relation to a title condition other than a real burden, means the land, or real right in land, to which the right to enforce the title condition is attached;
  - “burdened property”—
    - (a) in relation to a real burden, shall be construed in accordance with section 1(2)(a) of this Act; and
    - (b) in relation to a title condition other than a real burden, means the land, or real right in land, which is subject to the title condition;
  - “community” has the meaning given by section 26(2) of this Act;
  - “community burdens” shall be construed in accordance with section 25 of this Act;
  - “conservation body” means any body prescribed by order under subsection (4) of section 38 of this Act;
  - “conservation burden” shall be construed in accordance with subsection (1) of that section and includes (other than in subsections (1) and (2) of that section) a reference to a real burden the right to enforce which was—
    - (a) preserved by virtue of section 27(1) of the 2000 Act (preservation of right to enforce conservation burden); or

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(b) obtained by virtue of section 27A(1) of that Act (nomination of conservation body or Scottish Ministers to have title to enforce conservation burden);

“constitutive deed” is the deed which sets out the terms of a title condition (or of a prospective title condition) but the expression includes any document in which the terms of the title condition in question are varied;

“deed of conditions” means a deed mentioned in section 32 of the Conveyancing (Scotland) Act 1874 (c. 94) (importation by reference) and registered before the appointed day having been executed in accordance with that section;

“the development management scheme” has the meaning given by section 71(3) of this Act;

“economic development burden” shall be construed in accordance with subsection (1) of section 45 of this Act and includes (other than in subsections (1) to (3) of that section) a reference to a real burden which was converted under section 18B of the 2000 Act (conversion into economic development burden);

“enactment” includes a local and personal or private Act;

“facility burden” means, subject to subsection (2) below, a real burden which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land (examples of property which might constitute such a facility being without prejudice to the generality of this definition, set out in subsection (3) below);

“flat” means a dwelling-house, or any business or other premises, in a tenement;

“health care burden” shall be construed in accordance with subsection (1) of section 46 of this Act and includes (other than in subsections (1) to (3) of that section) a reference to a real burden which was converted under section 18C of the 2000 Act (conversion into health care burden);

“holder”, in relation to a title condition, means the person who has right to the title condition;

“land” includes—

- (a) heritable property, whether corporeal or incorporeal, held as a separate tenement; and
- (b) land covered with water,

but does not include any estate of *dominium directum*;

“Lands Tribunal” means Lands Tribunal for Scotland;

“maintenance” includes (cognate expressions being construed accordingly)—

- (a) repair or replacement; and
- (b) such demolition, alteration or improvement as is reasonably incidental to maintenance;

“manager”, in relation to related properties, means any person (including an owner of one of those properties or a firm) who is authorised (whether by virtue of this Act or otherwise) to act generally, or for such purposes as may be applicable in relation to a particular authorisation, in respect of those properties;

“manager burden” shall be construed in accordance with section 63(1) of this Act;

“maritime burden” shall be construed in accordance with subsection (1) of section 44 of this Act and includes (other than in that subsection) a reference to any real burden in relation to which the Crown has title and interest under section 60(1) of the 2000 Act (preserved right of Crown to maritime burdens);

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“midcouple” means such midcouple or link in title as it is competent to specify, under section 5(1) of the [Conveyancing \(Scotland\) Act 1924 \(14 & 15 Geo. 5, c.27\)](#), in a deduction of title in terms of that Act;

“negative burden” shall be construed in accordance with section 2(2)(b) of this Act;

“notary public” includes, in a case where swearing or affirmation is to take place outwith Scotland, any person duly authorised by the law of the country or territory in question to administer oaths or receive affirmations in that country or territory;

“notice of converted servitude” shall be construed in accordance with section 80(4) and (5) of this Act;

“notice of preservation” shall be construed in accordance with section 50 of this Act;

“notice of termination” shall be construed in accordance with section 20 of this Act;

“owner” shall be construed in accordance with section 123 of this Act;

“personal pre-emption burden” and “personal redemption burden” shall be construed in accordance with section 18A(5) of the 2000 Act;

“personal real burden” shall be construed in accordance with section 1(3) of this Act;

“property” includes unit;

“real burden” has the meaning given by section 1 of this Act except that in construing that section for the purposes of this definition “land” shall be taken to include an estate of *dominium directum*;

“registering”, in relation to any document, means registering an interest in land or information relating to an interest in land (being an interest or information for which that document provides) in the Land Register of Scotland or, as the case may be, recording the document in the Register of Sasines (cognate expressions being construed accordingly);

“renewal date” has the meaning given by section 20(4)(d) of this Act;

“road” has the meaning given by section 151(1) of the Roads (Scotland) Act 1984 (c. 54) (interpretation);

“rural housing body” means any body prescribed by order under subsection (5) of section 43 of this Act;

“rural housing burden” shall be construed in accordance with subsection (1) of that section and includes a personal pre-emption burden the holder of which is a rural housing body;

“send” shall be construed in accordance with section 124 of this Act (cognate expressions being construed accordingly);

“service burden” means a real burden which relates to the provision of services to land other than the burdened property;

“sheltered or retirement housing development” has the meaning given by section 54(3) of this Act;

“tenement” means a building which comprises two or more flats, at least two of which—

(a) are, or are designed to be, in separate ownership; and

(b) are divided from each other horizontally;

“terminator” shall be construed in accordance with section 20(2) of this Act;

“title condition” means—

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- (a) a real burden;
  - (b) a servitude;
  - (c) an affirmative obligation imposed, in a servitude, on the person who is in right of the servitude;
  - (d) a condition in a registrable lease if it is a condition which relates to the land (but not a condition which imposes either an obligation to pay rent or an obligation of relief relating to the payment of rent);
  - (e) a condition or stipulation—
    - (i) imposed under subsection (2) of section 3 of the Registration of Leases (Scotland) Act 1857 (c. 26) (assignment of recorded leases) in an assignment which has been duly registered; or
    - (ii) contained in a deed registered under subsection (2A) or (5) of that section;
  - (f) a condition in an agreement entered into under section 7 of the [National Trust for Scotland Order Confirmation Act 1938 \(c.iv\)](#); or
  - (g) such other condition relating to land as the Scottish Ministers may, for the purposes of this paragraph, prescribe by order;
- “unit” means any land which is designed to be held in separate ownership (whether it is so held or not); and
- “variation”, in relation to a title condition, includes both—
- (a) imposition of a new obligation; and
  - (b) provision that a property becomes a benefited property, (cognate expressions being construed accordingly).
- (2) In so far as it constitutes an obligation to maintain or reinstate which has been assumed—
- (a) by a local or other public authority; or
  - (b) by virtue of any enactment, by a successor body to any such authority,
- a real burden is neither—
- (i) a facility burden; nor
  - (ii) for the purposes of sections 52 to 54(1) of this Act, to be regarded as imposed as mentioned in any of those sections.
- (3) The examples referred to in the definition of “facility burden” in subsection (1) above are—
- (a) a common part of a tenement;
  - (b) a common area for recreation;
  - (c) a private road;
  - (d) private sewerage; and
  - (e) a boundary wall.

### 123 The expression “owner”

- (1) Subject to subsections (2) and (3) below, in this Act “owner”, in relation to any property, means a person who has right to the property whether or not that person has completed title; but if, in relation to the property (or, if the property is held pro indiviso, any pro indiviso share in the property) more than one person comes within that description of owner, then “owner”—

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- (a) for the purposes of sections 4(2)(b), 6(1)(a), 15, 16, 19, 33(1) and (2) and 35 of this Act, means any person having such right; and
  - (b) for any other purposes means such person as has most recently acquired such right.
- (2) Where a heritable creditor is in lawful possession of security subjects which comprise the property, then “owner”—
- (a) for the purposes of the sections mentioned in paragraph (a) of subsection (1) above includes, in addition to any such person as is there mentioned, that heritable creditor; and
  - (b) for any other purposes (other than of construing section 1 of this Act) means the heritable creditor.
- (3) In section 60(1) of this Act, “owner” in relation to any property has the meaning given by subsection (1) above except that, for the purposes of this subsection, in that subsection—
- (a) the words “Subject to subsections (2) and (3) below, in this Act” shall be disregarded; and
  - (b) paragraph (a) shall be construed as if section 60(1) were one of the sections mentioned.

#### **124 Sending**

- (1) Where a provision of this Act requires that a thing be sent—
- (a) to a person it shall suffice, for the purposes of that provision, that the thing be sent to an agent of the person;
  - (b) to an owner of property but only the property is known and not the name of the owner, it shall suffice, for the purposes of that provision, that the thing be sent there addressed to “The Owner” (or using some other such expression, as for example “The Proprietor”).
- (2) Except in subsection (3) below, in this Act any reference to a thing being sent shall be construed as a reference to its being—
- (a) posted;
  - (b) delivered; or
  - (c) transmitted by electronic means.
- (3) For the purposes of any provision of this Act, a thing posted shall be taken to be sent on the day of posting; and a thing transmitted by electronic means, to be sent on the day of transmission.

#### **125 References to distance**

Where a provision of this Act refers to a property being within a certain distance of another property, the reference is to distance along a horizontal plane, there being disregarded—

- (a) the width of any intervening road if of less than twenty metres; and
- (b) any pertinent of either property.

## **126 Fees chargeable by Lands Tribunal in relation to functions under this Act**

The Scottish Ministers may, after consultation with the Scottish Committee of the Council on Tribunals, make rules as to the fees chargeable by the Lands Tribunal in respect of that tribunal's functions under this Act.

## **127 Orders, regulations and rules**

- (1) Any power of the Scottish Ministers under this Act to make orders, regulations or rules shall be exercisable by statutory instrument; and a statutory instrument containing any such orders, regulations or rules, other than an order under section 128(4) or 129(4), shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.
- (2) A statutory instrument containing an order under section 128(4) of this Act shall not be made unless a draft of the instrument has been—
  - (a) laid before; and
  - (b) approved by a resolution of, the Scottish Parliament.

## **128 Minor and consequential amendments, repeals and power to amend forms**

- (1) Schedule 14 to this Act, which contains minor amendments and amendments consequential upon the provisions of this Act, shall have effect.
- (2) The enactments mentioned in schedule 15 to this Act are repealed to the extent specified.
- (3) The Scottish Ministers may by order amend any of schedules—
  - (a) 2 to 10 and 12 to this Act; and
  - (b) 1 to 11A to the 2000 Act.
- (4) The Scottish Ministers may by order make such incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes, or in consequence, of this Act or of any order, regulations or rules made under this Act.
- (5) An order under subsection (4) above may amend or repeal any enactment (including any provision of this Act).

## **129 Short title and commencement**

- (1) This Act may be cited as the Title Conditions (Scotland) Act 2003.
- (2) Subject to subsections (3) to (5) below, this Act, except this section, shall come into force on the appointed day.
- (3) Sections 63, 66, 67, 86 and 88, except in so far as it inserts a sub-paragraph (ab)(ii) into paragraph 1 of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c. 52), Part 9 for the purposes of any application under section 107(5) of this Act, sections 111, 113, 114, 117, 118, 122 to 124, 126, 127, 128(3) to (5), schedules 12 and 13 and, in schedule 14, paragraph 7(1), (3) and (6) come into force on the day after Royal Assent.

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- (4) There shall come into force on such day as the Scottish Ministers may by order appoint, Parts 3 and 6 and sections 106 to 110; and different days may be so appointed for different provisions.
- (5) In so far as—
- (a) it relates to paragraph 7(1), (3) and (6) of schedule 14, section 128(1);
  - (b) it relates to the 2000 Act, section 128(2);
  - (c) it relates to the 2000 Act, schedule 15;
  - (d) is necessary for the purposes of Part 3 and section 63, Part 1,
- shall come into force on the day after Royal Assent.