LAND REGISTRATION (SCOTLAND) ACT 1979

The long title of the Act is

> "An Act to provide a system of registration of interests in land in Scotland in place of the recording of deeds in the Register of Sasines; and for indemnification in respect of registered interests in land; to simplify certain deeds relating to land and to provide as to the effect of certain other such deeds; to enable tenants-at -will to acquire their landlords' interests in the tenancies; to provide for the fixing of fees payable to the Keeper of the Registers of Scotland; and for connected purposes".

This is a concise and accurate statement of what the Act does. The main purpose of the Act is the one stated first in the long title -

> to provide a new system of registration to replace the recording of deeds in the Register of Sasines.

The other provisions are almost entirely consequential on, or paving provisions to assist the implementation of, the main purpose of the Act.

> The overall effect of the Act is however more far-reaching than a mere change in the system of registration. Prior to the Act, title to heritable property flowed from a grant by a predecessor in title and the quality of the title obtained depended on the quality of title which could be deduced by the granter. Recording a deed in the Register of Sasines is only a step, albeit an essential one, with regard to most transactions, in the completion of a single transaction and gives no guarantee of the validity of the deed recorded or of the title as a whole. After commencement of the Act, title flows from the register and the quality of the title depends on the quality of indemnity given by the Keeper in respect of it, regardless of the quality of the title prior to registration. This follows from the rectification provisions which prohibit rectification of the register to the prejudice of a proprietor in possession except in very limited circumstances, mainly connected with fraud on the part of that proprietor. Thus, whatever defects there may have been in a title prior to registration, if the Keeper registers it without qualification of indemnity that title becomes virtually unassailable.

The Act consists of four parts and four schedules.

Part I deals with registration and contains provisions setting up the Land Register, specifying what is registrable and regulating the effect of and procedure for registration.

Part II provides for indemnity in respect of registered interests in land.

Part III makes provision for the simplification of certain deeds and specifies the effect of those simplified deeds and of certain other deeds.

Part IV contains miscellaneous and general provisions relating to inter alia tenancies-at-will, registration fees, subordinate legislation, definitions and commencement.

The Schedule contain forms, amendments and repeals of existing legislation etc.

PART I
REGISTRATION OF INTERESTS IN LAND

Section 1 **THE LAND REGISTER OF SCOTLAND**

Subsection (1) provides that there shall be a public register of interests in land in Scotland to be known as the "Land Register of Scotland".

The new register, like the Register of Sasines, is public and may be inspected by any of the lieges on payment of a fee. This is in direct contrast to the Land Register in England which was a private register until December 1990.

Publication has always been an essential element in obtaining a real right to heritage in Scotland. Originally there was a public ceremony on the land - the giving of seisin, which consisted of a ceremonial handing over of earth and stone. The Register of Sasines was set up by an Act of the Scots Parliament in 1617 to counter a situation wherein the lack of effectiveness in respect of publication achieved by the giving of seisin caused

> "gryit hurt sustened by his maiesties liegis by the fraudulent dealing of pairties who have annaliet their landis and ressavit gryit soumes of money thairfore Yit be thair uniust concealing of sum privat right formarlie made by thame rendereth subsequent alienation done for gryit soumes of money altogidder unproffitable which can not be avoyded unless the saidis privat rightis be made publict and patent to his hienes liegis"

The Act retains the essential element of publication by making the Land Register public.

The register is a register of interests in land. Under feudal theory no one has an absolute right to land. The ultimate superiority lies in the crown and the right of any person is burdened by the rights of a superior or vassal or both. What is registered is therefore the interest of any party in a piece of land.

Subsection (2) places the register under the control of the Keeper of the Registers of Scotland and provides that the register shall have a seal. The only documents which the act requires to be authenticated by the seal are Land and Charge certificates (Section 5(2) and (3)). The method of authentication of other documents is left to the discretion of the Keeper.

Subsection (3) defines "registered" and cognate expressions as referring to registration in accordance with the Act i.e. in the Land Register of Scotland. It follows therefore that "unregistered" that means "not registered in the Land Register".

Throughout the Act "recording" is used to refer to the registration or recording of writs in the Register of Sasines. While the conveyancing statutes generally use the term "record" when referring to the process of registering or recording in the Register of Sasines they do not do so exclusively, for example "register is used more frequently than "record" in the Land Registers (Scotland) Act 1868.

In order to avoid confusion, it will be advisable in future to exercise care in the use of the expressions "register" and "record" and to follow, where possible, the convention in the Act.

Section 2 **REGISTRATION**

Since the Land Register replaces the Register of Sasines, everything which is capable of being recorded in the Register of Sasines is registrable in the Land Register. This general statement must be qualified to some extent in respect of overriding interests as will be seen when those interests are discussed later.

In addition, in respect of certain interests - under a long lease, udal tenure of kindly tenancy - in which a real right could be obtained without recording a deed in the Register of Sasines, registration becomes essential to obtain a real right once the interest has come within the scope of the Act.

Both the Reid and Henry committees recommended that in order to avoid unnecessary expense, first registration of an interest should take place only when the title to the interest were being examined in connection with a transfer of the interest and, since first registration would be the most expensive registration under the Act, only where the transfer was for valuable consideration. After first registration, any transaction or event affecting an interest is registrable.

There have always been interests in land which could be enforced without a deed revealing their existence having been recorded in the Register of Sasines, for example, public rights of way, and, over the years, the list of interests in that category has been added to, by statute, for example powers of compulsory acquisition, planning regulations etc. It has always been necessary to look outwith the register to discover the existence of those interests. Ideally the Land Register should disclose any interest affecting a registered interest, but it would be impractical to require registration of interests of the kind mentioned above. These have been grouped under the definition of overriding interest in section 28. Although these interests have been identified and given a new name they are not a new concept. As will be shown later registered interests in land are subject to overriding interests even although the overriding interests are not revealed on the register.

Subsection (1) sets out the circumstances in which unregistered interests (other than overriding interests) are registrable.

Paragraph (a) sets out the circumstances in which registration is "compulsory" in that failure to register will mean failure to obtain a real right.

i) on a grant of the interest in feu, long lease or security by way of contract of ground annual but only to the extent that the interest has become that of the feuar, lessee or debtor in the ground annual.

The effect of this provision is that where a feu or a long lease is granted the interest of the feuar or lessee is registrable but there is no requirement to register the interest of the superior or the landlord. The definition of feu in Section 28 is such that the provision is not restricted to grants in feu farm, but applies to any feudal grant.

In a Contract of Ground Annual no new fee is created. The existing interest is conveyed to the debtor who conveys it back to the granter in security of the obligation created by the contract. The existing interest which has passed to the debtor is registered and since the creation of a security over a registered interest is registrable the interest of both parties to the contract is registered.

The creation of new feuduties, ground annuals and other periodical money payments out of land was prohibited by the Land Tenure Reform (Scotland) Act 1974, but that act also provided that any deed purporting to impose such a payment would continue to have effect but only to the extent it would have had effect prior to that act if it had not imposed such payment. It is unlikely therefore that any new Contracts of Ground Annual will be made, but since it is still theoretically possible to do so the provision in Section 2(1)(a)(i) with respect to Contracts of Ground Annual is necessary.
Sub-paragraph (i) makes no reference to valuable consideration but this follows a recommendation of the Henry Committee that any grant of the kind mentioned in the sub-paragraph should be compulsorily registrable regardless of consideration.

ii) on a transfer of the interest for valuable consideration. This follows the recommendation of both learned committees previously mentioned.

iii) on a transfer of the interest in consideration of marriage. The purpose of this provision is to make registrable a transfer in implement of a Marriage Contract. Transfers of property in Marriage Contracts are considered to be onerous transfers and the value of the property transferred is usually high.

iv) On a transfer of the interest whereby it is absorbed into a registered interest in land.

In a consolidation of property and superiority or the renunciation of a lease, the interest of the feuar or the tenant disappears and the interest of the superior or the landlord is enhanced to the extent that a restriction on the enjoyment of his interest by the superior or landlord is removed. If the interest which is thus enhanced is registered it is essential that the transaction which brings about the enhancement should be registered.

v) on any transfer of the interest where it is held under a long lease, udal tenure or kindly tenancy.

Because of terms of Section 3(3) - that registration shall be the only means of obtaining a real right in these interests - this provision is necessary to ensure that, on a gratuitous transfer of one of these interests, registration is available as a means of obtaining a real right. Gratuitous transfers of this kind are not covered by the other sub-paragraphs of Section 2(1)(a), and without this provision, a gratuitous transferee of one of those interests would have to depend on the Keeper exercising his discretion to accept a voluntary registration under Section 2(1)(b) in order to obtain a real right.

The initial words in paragraph (a) are "in any of the following circumstances occurring after the commencement of this Act".

It follows therefore that the paragraph only applies where the grant or transfer takes place after commencement. There may be room for argument as to the date at which the grant or transfer takes place. For most purposes the operative date of a conveyance is the date of delivery. This, however, is not a date which would be readily apparent to the Keeper, and there would be practical problems if that were the date, occurring before or after commencement, which governed whether or not an interest was registrable. The Keeper could, for practical purposes, assume the last date of execution to be the date of delivery. There is no possibility of the date of delivery being before the last date of execution, so if the latter date fell after commencement there would be no doubt that the interest is registrable.

Paragraph (b) provides for voluntary registration of an unregistered interest which is not registrable under paragraph (a), but only where the Keeper considers it expedient to accept such a registration.

Section 25 deals with appeals against decisions of the Keeper but provides that there shall be no appeal against a decision on whether or not to accept a voluntary registration. The Keeper therefore has absolute discretion on the acceptance of voluntary registrations.

Normally, voluntary registration in a operational area, or in an area which is about to become an operational one and for which the necessary maps are held will be welcomed. However experience in England has been that unrestricted voluntary registration caused such dislocation in the Land Registry that legislation (Section 1(2) of the Land Registration Act 1966) was enacted to give the Chief Land Registrar sole discretion as to the acceptability of a voluntary registration.

If the volume of voluntary registrations were to rise to the extent that the Keeper's resources are unduly strained he has the power to refuse acceptance so that he can deal more expeditiously with "compulsory" registrations.

Subsection (2) excepts from the provisions of subsection (1) unregistered interests which are heritable securities, liferents or incorporeal heritable rights. These interests are in effect subsidiary interests which can be created over registrable interests, they are not interests which would have become subjects of search in the Register of Sasines and similarly a separate title sheet would not be opened for them in the Land Register. They are however disclosed in a Sasine search over the primary interest and similarly in the title sheet of the primary interest. It would cause disruption in both registration and searching if those subsidiary interests were registered while the primary interest over which they were created remained unregistered. If the primary interest is registered, the creation of any of those subsidiary interests is registrable (Section 3(3)) and any existing ones are disclosed in the title sheet of the primary interest (Section 6(1)(b)).

It should be noted that in Section 28 salmon fishings are excluded from the definition of incorporeal heritable right. Salmon fishings, unlike other fishing rights, have always been separable from lands and are capable of being held as an interest in their own right. They can be a separate subject of search in the Register of Sasines and a separate title sheet is opened for them in the Land Register. Their exclusion from the definition of incorporeal heritable right enables the provisions of subsection (1) to apply to them.

Sub-section (2) also excludes from the operation of subsection (1) a transfer whereby the interest is absorbed into another unregistered interest. The effect, for example, of a Disposition ad perpetuam remanentiam is that the dominium utile ceases to exist and is absorbed into the superiority. If the superiority is unregistered there is nothing left in respect of which a title sheet could be opened in the Land Register.
It would not be reasonable to make such a transfer induce registration of the superiority title, especially if, as the case, the interest resigned was only part of the superiority title. If however the superior wished to make such a transfer the occasion of registration of his title, there is nothing to prevent his applying for voluntary registration.

Subsection (3) provides that where the primary interest is registered the creation of any of the subsidiary interests mentioned in subsection (2) is registrable and makes it clear that on registration, the subsidiary interest itself becomes a registered interest so that the provisions of subsection (4) apply to it.

Subsection (4) makes provision for the registration of subsequent transfers and other transactions or dealings which affect a registered interest. Its purpose is to ensure that once an interest is registered, the title sheet is kept up to date by registration of anything which affects the interest. The subsection makes registrable, not only deeds which were capable of being recorded in the Register of Sasines, but any occurrence which is capable of affecting the title of a registered interest whether or not a deed is granted. For example the death of one of the parties in a survivorship destination may be brought to the attention of the Keeper by submission of a death certificate along with evidence that the certificate relates to the party in question, and the register will be amended accordingly. There is no need to expede a Notice of Title or other such deed.

Transactions or events creating or affecting overriding interests are excluded from the operation of subsection (4). Because of the exclusion of overriding interests in subsections (1) and (4) these interest will never be registrable. This may seem anomalous, since deeds relating to certain overriding interests, for example a Deed of Servitude, were capable of being recorded. By Section 6(4) however the Keeper is in some cases required, and in other cases empowered, to note the existence of an overriding interest in a title sheet. The net effect of these provisions is therefore the same, as regards servitudes and other overriding interests which could be recorded, as that obtaining in the Register of Sasines. The result of recording in the Register of Sasines was twofold, first, the completion of a real right and second, publication. Only the second of these was achieved, in relation to servitudes etc., by recording. The first was not effected and was indeed unnecessary because the right was already real without recording and was not in any way enhanced by recording. Publication is achieved equally well by noting on the title sheet in the Land Register. The provisions also permit publication in the Land Register of interests which could not be published in the Sasine Register.

In Section 28 the definition of overriding interest contains the words *"in relation to any interest in land, the right or interest over it of"*. The interests contained in the list which follows those words are therefore overriding interests only in relation to the interests in land which is burdened by them. In relation to the parties in right of them, they are, if they fall within the definition of interest in land, registrable interests. For example, a servitude is an overriding interest in relation to the servient tenement, but in relation to the dominant tenement it falls within the definition of "interest in land" and is therefore a registrable interest. On the other hand a short lease (i.e. a lease which does not fall within the definition of long lease) is an overriding interest in relation to the landlord's interest, but it is excluded from the definition of interest in land, so it is not a registrable interest as regards the tenant's interest.

Subsection (5) permits the Secretary of State, by order made by statutory instrument, to require registration of interests remaining unregistered at the date of the order.

Since the provisions of subsection (1) apply mainly on a transfer for value it is inevitable that, after the bulk of first registrations have taken place in any operational area, there will remain unregistered, a number of interests which have not been transferred for value and may not be so transferred for a long time. The Register of Sasines would therefore have to be kept open for the recording of deeds, affecting those interests; but of a kind which would not induce registration under subsection (1). The making of an order under subsection (5) will permit the Keeper to close the division or divisions of the General Register of Sasines for the area affected by the order and transfer the interests remaining unregistered to the Land Register. It is probable that separate orders will be made for different operational areas. They are likely to require any transaction to induce registration and permit the Keeper to initiate registration of those interests in respect of which no transaction takes place, as and when he finds it expedient. The provision refers to interests of a kind or kinds specified in the order. This will allow omission from the effect of the order of interests which it would be impractical to register, such as the interest of the National Coal Board in unworked coal etc.

The subsection also permits inclusion in the order of provision as to the expenses of registration. This will allow the expense of registration to be undertaken by the Keeper in cases where it is considered inequitable that the whole expense should fall on the proprietor.

Subsection (6) provides that in section 2 *"enactment"* includes sections 17, 18 and 19 of this Act.
This is to ensure that the deeds and less formal agreements referred to in those sections are made registrable under Section 2(4) by being included in the reference in that subsection to "any other transaction or event ..... capable under any enactment ..... of affecting the title .....".

Section 3 **EFFECT OF REGISTRATION**

This section gives to registration in the Land Register a similar effect to that of recording a deed in the Register of Sasines, as a means of completing a real right. It goes further however by providing that registration will give a real right in the interest subject only to any adverse matter entered in the title sheet, and to overriding interests. It also provides that registration shall be essential to obtain a real right in certain interests in respect of which, prior to commencement, recording a deed in the Register of Sasines was not essential for that purpose. The effect is that the register is conclusive as to any burdens or conditions, other than overriding interests, which may affect a registered interest.

Subsection (1) provides that the effect of registration shall be

a) *"vesting in the person registered as entitled to the registered interest in land a real right in and to the interest and in and to any right, pertinent or servitude, express or implied, forming part of the interest".*

This part gives to registration a similar effect to that of recording a deed in the Register of Sasines.

"subject only to any matter entered in the title sheet of that interest under Section 6 of this Act so far as adverse to the interest or that person's entitlement to it and to any overriding interest whether noted under that Section or not".

This is where the Act breaks new ground. The effect of this part of the provision is that the register may be relied on absolutely to disclose any burden, restriction, condition or security affecting the interest and any burden etc. not entered in the title sheet shall be of no effect in relation to the interest, excepting always overriding interests.

The provision refers to the noting of overriding interests under Section 6. There are circumstances in which overriding interests may be noted on a title sheet, but this will be dealt with more fully under Section 6.

b) *"making any registered right or obligation relating to the registered interest in land a real right or obligation;"*

This paragraph refers to the registration of the creation of any new right or obligation over a registered interest. An existing right or obligation contained in a recorded deed or in a title sheet is already real and does not need registration. In terms of paragraph (a) a registered interest will not be subject to an existing right or obligation not entered on the title sheet. An existing obligation which had not been recorded before the recording of a subsequent title could, prior to commencement, be recorded in the Register of Sasines "for what it is worth" which was little or nothing, but, since in terms of paragraph (a) the registered interest will not be subject to it, it will not be acceptable for registration.

c) *"affecting any registered real right or obligation relating to the registered interest in land"*
This part deals with the transfer or variation of any real right or obligation affecting a registered interest
"insofar as the right or obligation is capable, under any enactment or rule of law, of being vested as a real right, of being made real or, as the case may be, of being affected as a real right".
This is a saving provision to avoid any inadvertent change in the existing law by subsection (1).

In subsection (1) "enactment" is stated to include Sections 17, 18 and 19 of this Act. This is an avoidance of doubt provision to ensure that any changes brought about by these sections are brought within the scope of subsection 3(1).

Subsection (2) provides that registration shall supersede the recording of a deed in the Register of Sasines but, subject to subsection (3), shall be without prejudice to any other means of creating or affecting real rights or obligations. The first part of the subsection is in line with the general tenor of the Act and is self explanatory. The effect of the proviso is that, except in relation to certain interests referred to in subsection (3), in cases where, prior to commencement, a real right could be obtained without recording a deed in the Register of Sasines, a real right will continue to be obtained without registration (c.f. overriding interests).

Subsection (3) follows recommendations by the Henry Committee, in Paragraph 33 and 34 of their Report; that after the introduction of Registration of Title, registration shall be necessary to obtain a real right in a registrable lease and lands held under udal tenure and kindly tenancy.

Originally a real right in a lease was obtained by possession of the subjects let, but in order to permit tenants to grant heritable securities over their subjects to obtain loans, registration (recording) was introduced as an alternative to possession in respect of certain long leases by the Registration of Leases (Scotland) Act 1857. The detailed provisions of the 1857 Act have been amended by subsequent legislation and the position now is that any probative lease for a term of more than 20 years or capable, under its original provisions, of being renewed so that its total duration will extend for more than 20 years is recordable or registrable as the case may be.

Written titles are not required for lands held under kindly tenancy or udal tenure. Changes in the tenant under a kindly tenancy are recorded in the landlord's rentroll and udal land can pass without any writing at all.The researches of the Henry Committee revealed that, over the years, many written titles had been granted and recorded in respect of both kindly tenancies and udal land, and it was thought that the position should be regularised by bringing those forms of tenure into line with other forms of tenure and making registration essential for the purpose of obtaining a real right.

It should be noted that subsection (3) provides that the lessee, the proprietor under udal tenure, and the kindly tenant, shall obtain a real right only by registration, and that registration shall be the only means of making a right or obligation relating to a registered interest of the kind mentioned in subsection (3) real.

The effect is that prior to registration of the lease etc., subsidiary rights over it may be made real without registration, for example a standard security over a recorded lease may be recorded in the Register of Sasines, or an obligation over udal land held under an unwritten title may still be created without writing. Any transfer of the interest, whether for value or not, will induce registration and, after first registration, any transaction of the kind mentioned in Sections 2 (3) and (4) will be registrable.

Subsection (4) provides that the date at which a real right or obligation is created or affected, and the date of entry of a feuar with his superior, shall be the date of registration.

This applies to the Land Register provisions similar to those applied to the Register of Sasines by Section 3 of the Infeftment Act 1845 and Section 4 of the Conveyancing (Scotland) Act 1874.

The date of registration is defined in Section 4(3).

Subsection (5) provides that when an interest in land has been registered, any obligation to assign title deeds etc. (i.e. an obligation contained in a clause of assignation of writs, whether it is the one statutorily implied under Section 16 a conventional one) shall be of no effect in relation to that interest or to any other registered interest.

Once an interest has been registered in the Land Register, title to it is by registration and does not come from a progress of title deeds, and all rights and burdens are set out in the title sheet. The effect of the subsection is that it will no longer be necessary for a proprietor to preserve and pass on bundles of titles, as he had to do with titles recorded in the Register of Sasines. It should be noted, however, that the subsection only applies in relation to registered interests. If any of the interests to which common titles relate remain unregistered, those titles will still be required.

There is a proviso at the end containing two exceptions to the application of the subsection,

(a) Land or Charge Certificates.These must still be passed on for submission to the Keeper with an application for registration,

and (b) where the Keeper has excluded indemnity.

Until a title with full indemnity is obtained deeds may still be required to support the matter in respect of which indemnity has been excluded.

Subsection (6) provides that it shall not be necessary for an uninfeft proprietor of an interest in land which has been registered to expede a notice of title to complete his title provided that sufficient midcouples or links are produced to the Keeper.

This follows a recommendation of the Henry Committee in Rule 29 of their report. The recommendation refers also to deductions of title in conveyances by uninfeft proprietors. The latter is dealt with in Section 15(2), under part III of the Act which deals with the simplification and effect of deeds.

The Act, however, goes further than the Henry recommendation which permitted the Keeper to require a notice of title or deduction of title if he thought fit. Indeed by providing that the sections of the Conveyancing (Scotland) Act 1924 and the Conveyancing and Feudal Reform (Scotland) Act 1974 relating to notices of title and deduction of title shall not apply in respect of registered interests, the Act makes these incompetent after first registration.

It was thought extremely unlikely that circumstances would arise in which the Keeper, when presented with midcouples and links in title, and empowered, as he is by Section 4(1) to call for such evidence as he may require, would ever call for a deduction or notice of title.

There is a proviso that subsection (6) does not apply to completion of title under Section 74 or 76 of the Lands Clauses Consolidation (Scotland) Act 1845. A notice of title registered or recorded under compulsory purchase powers has a special effect which would not be achieved if the registration of such a notice of title were made incompetent. Because of the uncertainty, expressed in numerous judicial decisions, as to the exact nature of that special effect, it was considered inadvisable to tamper with such notices of title in this Act.

Subsection (7) provides that nothing in Section 3 affects any question as to the validity or effect of an overriding interest.

This is a saving provision to ensure that no overriding interest is prejudiced by provisions as to the effect of registration.

Section 4 **APPLICATIONS FOR REGISTRATION**

The section sets out the circumstances in which the Keeper may accept or refuse to accept an application for registration, distinguishes between receipt and acceptance of an application, and makes provisions as to the respective effects of receipt and acceptance.

Subsection (1) provides that, subject to subsection (2), an application for registration shall be accepted by the Keeper if it is accompanied by such documents and other evidence as he may require.

The effect is that, once an interest has become registrable under section 2, the Keeper has no power to refuse an application for registration of any matter relating to it set out in that section, except in circumstances.
Section 4 however does modify, quite extensively, this strict obligation on the Keeper. Apart from subsection (2) which, just as strictly, forbids him to accept an application in certain circumstances, the words *"if it is accompanied by such documents and other evidence as he may require"* give the Keeper very wide and extensive powers to require the production of evidence which he may require to satisfy him as to the validity of the title and rights and obligations connected with it. Failure, or even delay, in the provision of such evidence will enable him to reject the application.

Subsection (2) forbids the Keeper to accept an application
(a) if it is not sufficiently described to enable him to identify it by reference to the Ordnance Map.

One of the most important features of the Land Register is that it is map based, and it would seriously impair the value of this feature if the Keeper were forced to register an interest which he could not positively identify in relation to the Ordnance Map. The Henry Committee recommended in paragraph 37 of their report that the Keeper should be able to guarantee a written description where he could not identify the subjects sufficiently on the Ordnance Map. This recommendation has not been accepted. The index map is the key to the register and the registration of an interest which could not be identified on it would impair the value of that map, as an index, to an unacceptable degree.

The words *"by reference to"*, rather than "on", are used in paragraph (a) because, with regard to flatted property, it is considered impractical to attempt to plot each flat on the map. The solum of the flat is plotted and a verbal description is used to identify the particular flat on that.

The word *"described"* does not necessarily refer to a description in a deed,. Although descriptions in some deeds are exceptionally vague, most proprietors know, to within a reasonable degree of accuracy, what they possess. It will be sufficient therefore if enough evidence is supplied along with the application to enable the Keeper to identify the subjects on the map.

There will no doubt be cases where doubts will arise as to the compatibility of information supplied in this way, with the description in the deed. The Keeper need not refuse the application in such cases. He may instead qualify the indemnity in respect of part of the subjects. It is a matter of degree.

b) if it relates to land which is a souvenir plot.

Souvenir plot is defined, but the definition is somewhat loose. It would probably be impractical and even undesirable to attempt a tighter definition.
Titles to plots extending to one square foot have been granted in the past. These plots would come within the definition of "interest in land" and , if granted after commencement, it would have been registrable interests. Their registration would clearly have been an abuse of the register and section 4(2)(b) will enable the Keeper to refuse to accept applications to register similar plots in the future. On the other hand, plots on the island of Lewis which were expressed to have been sold as souvenir plots, were of a size, and on land of a type, which could have made them useful for other purposes.
Considerable discretion is left to the Keeper as to what he will deem to be a souvenir plot. There is however an appeal, under section 25, against a decision of the Keeper in this respect.

c) if it is frivolous or vexatious

There is no definition of frivolous or vexatious, so considerable discretion is left to the Keeper. Clearly an attempt by an individual to register a non domino title to Holyrood Palace could be regarded as frivolous or vexatious, but there will no doubt be cases where the applicability of this section is by no means clear. Again, an appeal will lie under section 25.

d) if a deed accompanying an application, relating to a registered interest, and executed after registration of the interest, does not bear a reference to the title number of the interest.

In view of the provisions of section 15 anent the simplification of deeds relating to registered interests, failure to refer to the number of the title sheet in such a deed could have undesirable consequences. The matter will be dealt with at greater length when section 15 is considered, but, briefly, the effect of referring to the title number in a deed is to convey the interest with all the rights referred to in the title sheet, and subject to all the burdens and conditions in the title sheet. Failure to refer to the title number might raise doubts as to whether or not that effect was achieved. The provision enables the Keeper to insist on the insertion of the title number.

The word *"bear"* is used to cover the situation where the title number might have to be added, after execution, to a deed, such as a will, which had been drawn and executed without registration in the Land Register in mind. In such a case the title number could not be inserted in the text of the deed.

Subsection (3) deals with receipt and acceptance of applications and makes provision as to the effective date of registration.

It provides first of all that on receipt of an application the Keeper shall forthwith note the date of such receipt.

This is the equivalent of entry in the presentment book in the Register of Sasines, but in order not to preclude the Keeper from making use of computer technology and any future developments therein, no specific method of noting receipt is specified.

The subsection goes on to provide that, on acceptance of the application by the Keeper, after examination, the date of receipt shall be deemed to be the date of registration. This again is equivalent to the date of entry in the presentment book being the date of recording in the Register of Sasines, but only after entry in the Minute Book.

The subsection then introduces a concept which is foreign to the Register of Sasines.

The date of receipt shall be deemed to be the date of registration, where an application is not accepted by the Keeper on the grounds that it does not comply with subsections (1) or (2), but, without being rejected or withdrawn is subsequently accepted by him on his being satisfied that it does so comply or has been made so to comply.

In the Register of Sasines, a writ may not be altered in the Keeper's hands. If any alteration or correction is required the writ must be withdrawn, and its being re-presented it takes the date of re-presentment as the date of recording.In the Land Register, an application may consist of an application form and a series of writs and other documents. Unless the error or deficiency is such as to render the entire application void ab initio, any of the documents of which the application consists may be returned to the applicant for correction while the application retains its place on the application record.

This is possible because, in the Land Register, applications are processed individually, unlike the Register of Sasines in which, because of the nature of the register, recordings have to be processed on a conveyor belt system and delay in one recording holds up the whole register.

Section 5 **COMPLETION OF REGISTRATION**

The section makes provisions as to how the Keeper will complete registration in respect of a registrable interest and provides for the issue of Land and Charge Certificates. It also states the evidential status of such certificates.

Subsection (1) provides that the Keeper shall complete registration

a) in respect of an interest in land which is not a heritable security, liferent or incorporeal heritable right.

   An interest which is not any of those things equates fairly closely to what the Henry Report defined in paragraph 1 as a "separate tenement of land"

   i) if the interest has not previously been registered, by making up a title sheet for it.
      i.e. on a first registration or on the creation of a new interest as a result of a transfer of part a new title sheet is opened.

   ii) if the interest has previously been registered, by making such amendment as is necessary to the title sheet.
      i.e. on registration of a dealing with the whole interest, the existing title sheet is amended as appropriate.

b) in respect of an interest in land which is a heritable security, liferent or incorporeal heritable right or in respect of the matters registrable under Section 2(4) of this Act by making such amendment as is necessary to the title sheet of the interest to which the heritable security etc. relates.

   A separate title sheet is not opened for an interest which is not a *"separate tenement of lands"*. On registration of such an interest the appropriate amendment is made to the title sheet of the "separate tenement of lands" to which it relates.

   "and in each case by making such consequential amendments in the register as are necessary".
   For example a Minute of Waiver is entered on the superior's title sheet as well as the vassal's and on a transfer of part, as well as opening a new title sheet for the part transferred, it is necessary to amend the title sheet of the major area.

Subsection (2) provides for the issue of a Land Certificate on completion of a registration under Section 1(a), that is, of an interest which has a title sheet of its own. It further provides that the Land Certificate shall be a copy of the title sheet, authenticated by the seal of the register.

Subsection (3) provides for the issue of a Charge Certificate on completion of registration in respect of a heritable security. A Charge Certificate is also required to be authenticated by the seal, but the form of certificate is not specified. This is left to subordinate legislation.

Subsection (4) specifies the evidential status of both Land and Charge Certificates.

It provides that a Land Certificate shall be accepted for all purposes as sufficient evidence of the contents of the title sheet of which it is a copy. It goes without saying that it will be evidence only of the contents of the title sheet at the date on which the Land Certificate was issued, and normally, before a Land Certificate is founded on, it should be brought up to date by one of the methods provided by the Land Registration Rules made under Section 27.

The provision relating to a Charge Certificate is that such a Certificate shall be accepted for all purposes as sufficient evidence of the facts stated in it. Since subsection (3) does not specify the form of a Charge Certificate subsection (4) can provide no more than that.

Subsection (5) provides that every Land and Charge Certificate shall contain a statement as to indemnity under part II of the Act. This refers not only to a general statement as to the indemnity provisions in the Act, but also to any specific qualification of indemnity in respect of the particular interest to which the certificate relates.

Section 6 **THE TITLE SHEET**

This section sets out, in considerable detail, the contents of a title sheet and makes provision for the issue of office copies (extracts) from the register.

Subsection (1) lists the information which a title sheet will contain.

a) a description of the land which shall consist of or include a description of it based on the Ordnance Map, and, where the interest is that of the proprietor of the dominium utile or the lessee under a long lease and the land appears to the Keeper to extend to 2 hectares or more, its area as calculated by the Keeper.

   Normally a title sheet will include an extract from the Ordnance Map upon which the subjects in respect of which the title sheet has been opened are delineated in such a way that they are instantly indentifiable, usually by edging them with a red line. The description in the title sheet will consist of a reference to the map, the postal address, if known, or some other short identifying description, and such other verbal description as is necessary to supplement the plan. For example, if the subjects consist of flatted property the solum will be delineated on the title plan and a verbal description will identify the particular flat within the building on the solum. It is not proposed to use floor plans except in exceptional circumstances.

The words *"consist of or include a description of it based on the Ordnance Map"* permit the delineation on the map to be supplemented by a verbal description. These words also permit the use of extracts from the Ordnance Map which omit certain details not required for the purpose of land registration, and of a size more convenient for handling by the Keeper's staff, instead of the Ordnance sheets themselves.

The second requirement of the paragraph, the disclosure of the area of land extending to 2 Hectares or more, is in response to a demand from certain sections of the public that it should be possible to ascertain from the register, the extent of any substantial land holding. In order to avoid imposing on an applicant for registration, the expense of a special survey to determine the area of the land being registered, the responsibility for measuring the area is placed on the Keeper. The only practical way for the Keeper to measure area is from the map, and, since all land is not completely flat, complete accuracy in such measurement is not possible. The degree of accuracy is, however, sufficient to fulfil the object of the provision.

Since the object of the provision is to disclose the area of substantial land holdings a lower limit of 2 Hectares was placed on the area which must be disclosed. This removes from the effect of the provision the normal dwellinghouse and small business premises, which account for more than 90% of all registration. The cost to the Keeper of implementing the provision will not therefore be great.

Since the provision aims at providing information about the person who has the actual use of the land, rather than persons who have a lesser right, its operation is restricted to the interest of the proprietor of the dominium utile and that of the lessee under a long lease (i.e. a registrable lease).

b) the name and designation of the person entitled to the interest in the land and the nature of that interest.

An obviously essential requirement of a land register is that it identifies any person having a right in the land, and what the nature of that right is, for example proprietor, superior, lessee etc.

c) any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest.

Any restriction on the power of a proprietor to dispose of or otherwise deal with his interest in land is of vital concern to any prospective purchaser, or lender on the security of the land. It is right therefore that the restrictive effect of the type of deed which is recorded in the Register of Inhibitions and Adjudications should be disclosed in the Land Register.

In theory as soon as any deed is recorded in the Register of Inhibitions and Adjudications, the Keeper should seek out any title sheet affected by that deed and enter particulars of the deed on the title sheet. Because of the nature of the deeds recorded in that Register that would be an almost impossible task. It is much easier to look at a title sheet and search the Register of Inhibitions and Adjudications to determine whether any entry in that register affects that particular title sheet. The practice therefore is that, before a Land or Charge Certificate or a search or report is issued, or any information from a title sheet is disclosed, a search of the Register of Inhibitions is made and any entry affecting the title sheet in question is entered on that title sheet.

Paragraph (c) refers to any subsisting entry, therefore, if during the period of search, there was recorded, for example, an Inhibition followed by a discharge of that inhibition, no entry is made on the title sheet.

d) any heritable security over the interest.

This provision requires little comment. It is obvious that any heritable security affecting an interest in land must be disclosed in a Land Register. *"Heritable security"* is defined in section 28 of the Act.

e) Any enforceable real right pertaining to the interest or subsisting real burden or condition affecting the interest.

This provision implements recommendations of the Henry Committee which have the following effect:

i) a title sheet should disclose all rights and all burdens affecting the interest to which the title sheet relates;

ii) If, however, the Keeper considers that any right or burden is no longer subsisting or enforceable he may omit such right or burden from the title sheet;

iii) any right entered in a title sheet shall be "guaranteed" unless the Keeper expressly excepts that right from the guarantee;

iv) There shall be no "guarantee" in respect of any burden entered in a title sheet, beyond the validity of its constitution;

It may appear at first glance that paragraph (e) places a heavier responsibility on the Keeper than that imposed by the Henry recommendations, but if the paragraph is read in conjunction with the indemnity provisions in Section 12(3)(g) it will be seen that the provisions of the Act have exactly the same effect as the Henry recommendations.

f) any exclusion of indemnity under section 12(2) of this Act in respect of the interest.

This provision ensures that the position regarding indemnity will be immediately apparent to anyone examining the title sheet. Read in conjunction with section 9(3) it also ensures that after a registration has taken place the Keeper will not be able to make any subsequent qualification of indemnity unless the qualification relates to a subsequent registration.

g) such other information as the Keeper thinks fit to enter in the register.

This is a useful provision which permits the Keeper to enter any information, not covered by the other paragraphs of subsection (1), which he considers may be relevant to the interest. The provision gives him a very wide discretion.

The subsection makes no reference to the form of the title sheet This is covered by the Land Registration Rules which provide that the title sheet shall consist of four sections and a plan, and allocate the information set out in subsection (1) to the appropriate section of the title sheet.

Subsection (2) provides that the Keeper shall enter a real right or real burden or condition in the title sheet by entering its terms or a summary of its terms therein and goes on to provide further that such a summary shall, unless it contains a reference to a further entry in the title sheet wherein the terms of the real right, burden or condition are set out in full, be presumed to be a correct statement of the terms of the right, burden or condition.

The effect of the first part of the subsection is that the Keeper is given discretion to quote in the title sheet the full terms of a right or burden as set out in the deed creating it, or to cut out unnecessary verbiage by producing a summary. This is a very useful discretion which can result in considerable savings, in typing and storage, and make the title sheet a less formidable document to read.

There is however a sting in the second part of the subsection, the effect of which is that any such summary is conclusive as to the terms of the real right, burden or condition. Read in conjunction with the rectification provisions in section 9(3) it means that once a summary has been entered in a title sheet the register cannot be rectified to the prejudice of the proprietor in possession. This puts a very heavy responsibility on the Keeper and his staff quite apart from considerations of indemnity, because if, in making such a summary, they omit any important element of the right or burden, that element will be lost forever.

Subsection (3) provides that the Keeper's duty under subsection (1) of section 6 shall not extend to entering in the title sheet any over-feuduty or over-rent exigible in respect of the interest in land, but he may so enter any such over-feuduty or over-rent.
This provision produces a minor exception to the requirement in section 6(1)(e) that any subsisting real burden or condition shall be entered in the title sheet. It was considered that the trouble and expense to which the Keeper would be put in seeking out details of all over-feuduties and over-rents would not be justified by the benefit obtained from entering them in the title sheet, but that if any come to the Keeper's notice he should enter them. Section 12(4) provides that omission by the Keeper of any over-feuduty or over-rent shall not by itself prevent a claim for indemnity. Even although he is not bound to enter over-feuduty or over-rent, he is still bound to indemnity any loss resulting from his failure to do so.

Subsection (4) deals with the noting on a title sheet of overriding interests. Subsection 2(1) and 2(4)(c) prevent the registration of overriding interests and transactions or events creating them. As has already been mentioned, recording a deed in the Register of Sasines was not necessary, and in some cases not competent, to make the interests which are defined in the Act as overriding interests effective against land over which they were created. The same is true of registration in the Land Register. It was considered impractical to require registration of such interests, but it will be useful, however, if a title sheet gives as much information as is practical about overriding interests which do exist. Subsection (4) makes provision for this.
Paragraph (a) provides that an overriding interest shall be noted if it is disclosed in any document accompanying an application for registration of the interest which it effects.

Paragraph (b) provides that an overriding interest may be noted

i) if application is made to the Keeper to do so;

ii) if the overriding interest is disclosed in an application for registration;

iii) if the overriding interest otherwise comes to the notice of the Keeper;

The object of the provision is that although it is intended that a title sheet should be as informative as possible, it should not contain information, the validity of which has not been checked.
If the Keeper is presented with documentary evidence of the existence of an overriding interest as in paragraph (a) he is required to note it. In the circumstances referred to in paragraph (b) he has discretion as to whether or not he notes the overriding interest and will only do so if he is satisfied with the evidence produced. Since no indemnity attaches to any note of an overriding interest (section 12(3)(h)) the standard of evidence required will not be so stringent as that required in relation to a matter which must be entered under subsection 6(1).

There is a proviso at the end of subsection (4) that in that subsection *"overriding interest"* does not include the interest of a lessee under a lease which is not a long lease.
The effect of this proviso is that the register will never contain any information about any lease which has a duration of less than 20 years.

Subsection (5) makes provision for the issue of office copies (extracts) from the register. Although it is a short provision it contains a number of important points.

It provides first of all that the Keeper shall issue an office copy to any person applying. This is in keeping with the provision in section 1 that the Land Register shall be a public register. Any member of the public is entitled to apply for and receive an office copy of any of the documents referred to in the subsection, on payment of the appropriate fee.
The subsection then goes on to provide that an office copy may be authenticated as the Keeper thinks fit. There is thus no statutory requirement for a signed extracting docquet, as there is in respect of extracts from other registers under the control of the Keeper. This makes possible substantial savings in time and cost in the production of office copies compared with extracts from the other registers.

The subsection then lists the documents, office copies of which may be issued, - *"of any title sheet, part thereof, or of any document referred to in a title sheet"*.

It is thus possible to obtain an office copy of an entire title sheet, including the plan, but if one or two sections of the title sheet will suffice, it is not necessary to incur the expense of an office copy of the whole title sheet. On many occasions on which an office copy is required, the purpose for which it is required will be met by the proprietorship section only or by the proprietorship and charges sections.
It is also possible to obtain an office copy of any document, referred to in a title sheet. For example, in a title sheet relating to a superiority the Keeper need not enter the conditions created by feu writs granted out of that title (section 12(3)(m)) but does enter the feuduty and particulars of the writ by which it is constituted. Any person wanting to find out the feuing conditions may apply for an office copy of the feu writ.

It follows from this that the Keeper must retain copies of all writs and other documents referred to in a title sheet, for the purpose of supplying office copies, at least as long as the writ &c. continues to be referred to in the title sheet. It is the intention at present to continue to keep those copies even after the title sheet has ceased to refer to the writ, but the day may come in the future when it will be necessary to dispose of the copies no longer required. Once a title sheet ceases to refer to a writ there is no longer a statutory obligation on the Keeper to supply an office copy of the writ.

Subsection (5) goes on to provide that an office copy shall be accepted for all purposes as sufficient evidence of the contents of the original. As far as the contents of a title sheet is concerned, an office copy therefore has the same evidential status as a Land Certificate. That is not to say however that an office copy is for all purposes the equivalent of a Land Certificate. In terms of subsection (5) any person may obtain an office copy of a title sheet but in terms of section 5(2) a Land Certificate may be issued only to the applicant for registration, possession of the Land Certificate is therefore prima facie evidence of entitlement to deal with the interest. The Land Registration Rules provide a number of circumstances in which the Land Certificate must be submitted to the Keeper and in these circumstances submission of an office copy is not sufficient.

Section 7 **RANKING**

The section regulates ranking in the Land Register and, in conjunction with Schedules 2 and 4, makes changes to existing legislation relating to ranking of deeds in the Register of Sasines to bring the provisions relating to the two registers into line with each other.

The section refers throughout to ranking of titles to interests in land. It may aid comprehension of the full import of the provisions to think of them as regulating priority of registration and the consequences which flow from that rather than ranking in the strictest sense of the word.

Subsection (1) states clearly at the outset that the remaining provisions of the section will not prejudice any express provision as to ranking in any deed or any other provision as to ranking in or having effect by virtue of, any enactment or rule of law. (An example of the latter is s.8(3) of the Crofting Reform (Scotland) Act 1976, which provides that heritable securities under s.8 in favour of the Secretary of State will rank prior to those in favour of the Highlands and Islands Development Board and that securities under that section in favour of the Secretary of State and those in favour of the Board will have priority over any other securities). The provisions of section 7 therefore only operate to regulate priority insofar as it is not regulated by any other provision, conventional or statutory.

Subsection (2) provides that titles to registered interests in land are to rank according to the date of registration of those interests. The definition of *"interest in land"* in section 28 is such that the registered interest referred to in the subsection might be the interest of the proprietor, that of the creditor in a heritable security, or that of the creditor in any other registrable right or condition affecting heritage. In a case of conflict between any of those interests, the interests will be preferred according to their date of registration.

Deeds presented for registration in the Register of Sasines originally ranked according to the order of their entry in the presentment book. That rule was modified by section 6 of the Land Registers (Scotland) Act 1868 which introduced presentment by post and provided that all deeds received by the Keeper by the same post would rank pari passu, despite the order or their entry in the presentment book. By the time the 1979 Act was being drafted, almost all of the deeds recorded in the Register of Sasines were received by post and the fluctuation of the time between posting and receipt had become such that it was felt that the existing provisions relating to ranking gave to the solicitors practising in close proximity to Meadowbank House an unfair advantage over their bretheren practising in other parts of the country. It was decided therefore that all applications for registration in the Land Register received by the Keeper, irrespective of the method of their transmission to him, would rank according to the date of receipt, not the time or the order of their entry on the register.

As is mentioned in a previous paragraph there may be a conflict between the interest of a proprietor and that of having some other interest in heritable property. It is possible therefore for there to be a conflict between a registered interest and an interest created by a deed recorded in the Register of Sasines. For example, a Disposition, for value, of an area of ground would induce a first registration in the Land Register. A standard security over the whole area might be recorded in the Register of Sasines. The resolution of the conflict of interest between the proprietor of the part and the creditor in the standard security over the whole area might depend on priority of registration.

Subsection (3) therefore provides that a title to a registered interest and a title governed by a deed recorded in the Register of Sasines will be preferred according to the respective dates of registration and recording. This provision is supplemented by the amendment and repeal of enactments in Schedules 2 and 4, the effect of which is that all deeds presented for recording in the Register of Sasines on the same day whether presented personally or by post will be deemed to have been presented contemporaneously.

Subsection (4), for the avoidance of doubt, provides that where the date of registration or recording of the titles to two or more interests in land is the same, the titles to those interests will rank equally.

The effect of the practical application of the provisions of section 7 to the case postulated above, where a title to a part is registered and a standard security over the whole area is recorded, is as follows:-

a) if the standard security is recorded first the registered title is burdened by it and the standard security is entered in the charges section.

b) if the standard security is recorded after the registration the recording will be ineffective in relation to the registered interest.

c) if both are received by the Keeper on the same day neither will be preferred to the other and the conflict of interest cannot be resolved by priority of registration.

Section 8 **CONTINUING EFFECTIVENESS OF RECORDING IN THE REGISTER OF SASINES**

The section provides for the continuation, after the commencement of the Act, of recording in the Register of Sasines in certain specified circumstances.

The effect of subsections (1), (2) and (3) is that recording is permitted, and, except where a real right could formerly be obtained without recording, remains essential for the purpose of obtaining a real right, in the following circumstances:-

a) re-recording in terms of s.143 of the Titles to Land Consolidation (Scotland) Act 1868 if the original recording took place before commencement of the Act.

   It was considered unfair that first registration should be induced by re-recording of a writ which had originally been recorded prior to the commencement of the Act even if it affected a transaction which would otherwise have induced a first registration.

b) the absorption of a registered interest into an unregistered interest otherwise than by operation of prescription.

   This provision covers consolidation of a registered dominium utile with an unregistered superiority, either by Minute of Consolidation or Disposition ad perpetuam remanentiam, and renunciation of a registered lease where the landlord's title is unregistered. Absorption by prescription is excepted because in that case there is no deed to record.

   Absorption of a registered interest into an unregistered interest is the only occasion on which subjects which have been registered in the Land Register can return to the Register of Sasines. In theory the registered interest disappears and the unregistered interest is enhanced by the removal of a burden on it. While it is undesirable that subjects which have been registered in the Land Register should return to the Register of Sasines the only alternative in the case of absorption would be to make the absorption induce registration of the higher interest. That alternative was rejected for practical reasons. It would, for example, be quite impractical to make a disposition ad perpetuam remanentiam of a cottage force the registration of the whole of Buccleuch Estates. Even the compulsory registration of the superiority of the cottage would be impractical as that would involve the examination of the estate title and would result in fragmentation of the estate title if, as is probable, there were a number of such transactions.

c) Any transaction etc. which is not registrable under subsections (1) to (4) of section 2, and in respect of which, before the commencement of the Act, a real right could be created or affected by recording a deed in the Register of Sasines.

In effect any deed which was acceptable for recording, which is not compulsorily registrable under section 2, and which is not registered voluntarily may still be accepted for recording in the Register of Sasines.

In practical terms this means that any disposition, which is not for value (unless it deals with udal subjects or a kindly tenancy), and any other type of deed except a feu or a lease, dealing with an interest which is not already registered, may be accepted for recording in the Register of Sasines.

Subsection (4) provides that except in the circumstances detailed in subsections (1) to (3) the Keeper must reject any deed presented for recording in the Register of Sasines.

The number of deeds recordable under section 8 will reduce steadily from the first commencement order until, as a result of the last order under section 2(5), all interests are registered and no deeds will be able to fall within the categories in subsections (1) to (3).

Section 9 **RECTIFICATION OF THE REGISTER**

Only a very exceptional person, or a fool, would claim that he never made a mistake. Since the majority of the staff of the Registers of Scotland do not fall into either of these categories it has been recognised that the possibility of an error or inaccuracy in the register cannot be ruled out. Provisions has therefore been made in section 9 for rectification of the register by the Keeper, on his own initiative, at the request of an interested party, or on an order by the court or the Lands Tribunal for Scotland.

Since, however, one of the primary objects of the system of registration introduced by the Act is that any person should be able to rely on the register without the need to look beyond it, the power of the Keeper to rectify, and of the court or the Lands Tribunal to order him to do so, is severely circumscribed where the result of the rectification would prejudice a proprietor in possession.

Subsection (1) empowers the Keeper, and compels him on being ordered to do so by the court or the Lands Tribunal, to rectify the register by "inserting, amending or cancelling anything therein".

Subsection (2) empowers the court and the Lands Tribunal to make orders directing the Keeper to rectify the register.

Subsection (3) then restricts the wide powers given in subsections (1) and (2) to the following circumstances unless the rectification would not prejudice a proprietor in possession.

i) where the purpose of the rectification is to note an overriding interest or to correct information relating to an overriding interest.
In fact, such a rectification would not prejudice a proprietor in possession because his interest is burdened by the overriding interest whether or not the overriding interest is noted on the register and whether or not the overriding interest is correctly noted

ii) where all persons whose interests are likely to be affected by the rectification have consented in writing.
If all interested parties have consented to a rectification there is no reason why it should not be made.

There is no question of a court order in these circumstances and paragraph (b) acknowledges this.

iii) where the inaccuracy in the register has been caused wholly or substantially by the fraud or carelessness of the proprietor in possession.

It would be unjust if a proprietor who had gained an advantage through fraud or carelessness were able to retain that advantage because rectification of the register against him was prohibited. The provision only applies to the person who has committed the fraud or has been careless. A bona fide transfer is still protected from rectification.

iv) where the rectification relates to a matter in respect of which indemnity has been excluded.
Where a title is registered with full indemnity and the restriction on rectification imposed by section 9(3) applies, the title is good against the world from the date of registration. It would be unfortunate if the restriction on rectification gave the same quality of title where the Keeper has excluded indemnity because of some deficiency in the evidence produced to him. Rectification against a proprietor in possession is therefore permitted where the rectification relates to a matter in respect of which indemnity is excluded.

Section 9 is one of the most important sections of the Act, and, in conjunction with s.3, is responsible for what is probably the most significant change in existing law made by the Act. Its effect is that, except in very limited circumstances, what is entered in the register becomes the true legal position, whether or not the register reflects what, but for section 9, would have been the true legal position.

Section 3(1) provides that registration will have the effect of vesting a real right subject only to any matter entered in the title sheet and to overriding interests. If, therefore, what was a good and valid right over an interest prior to registration is omitted from the title sheet of that interest on registration, and rectification of the register to permit its subsequent entry is prohibited by section 9(3), the interest is no longer burdened by that right. As will be seen later when section 12 is discussed the person who had the benefit of the right may be entitled to be indemnified by the Keeper for his loss, but he no longer has his right over the burdened interest.

Subsection (4) is an avoidance of doubt provision.
It provides that in section 9
a) "the court" means any court having jurisdiction in questions of heritable right or title
and b)"overriding interest" does not include the interest of a lessee under a lease which is not a long lease.

Paragraph (b) is intended to ensure that no information relating to non-registrable leases is noted on the register.

Section 10 **POSITIVE PRESCRIPTION IN RESPECT OF REGISTERED INTERESTS IN LAND**

It might be thought that under a system of registered titles backed by a state indemnity there is no room for positive prescription to operate.
There is a statement in Gloag and Henderson (7th edition, page 160) "Good titles stand in no need of prescription". It can be deduced from the comments on section 9 that where rectification of the register is not permitted, a title registered by the Keeper, whatever objections there may have been to it before registration, is "good" from the date of registration and therefore stands in no need of prescription.Account must however be taken of the circumstances in which rectification is permitted.

Where rectification concerns an overriding interest or where all interested parties consent to rectification, positive prescription, as far as the Land Register is concerned, is not relevant. A registered title which discloses no overriding interests will never free the interest to which it relates of overriding interests and establishment of, for example, a servitude by positive prescription does not require registration. Where all interested parties consent to a rectification, prescription does not enter into the matter.

Where, however, a registered title is subject to exclusion of indemnity it will be useful for prescription to be able to fortify the title and thus permit removal of the exclusion. Section 10, amendment of section 1 of the Prescription and Limitation (Scotland) Act 1973 provides accordingly.

Prescription has never operated when possession was founded on and followed a forged deed. The amendment of section 1 of the 1973 Act follows this premise, but with one important difference. Where the registered proprietor was in good faith at the time of registration of his interest, prescription may still run although the registration proceeded on a forged deed.

The effect of section 10 is that positive prescription can operate in relation to a registered title, but only where the Keeper has excluded indemnity and only to fortify the title in relation to the matter in respect of which indemnity was excluded. If the registration was induced by a forged deed and the person registered as entitled to the interest was aware of the forgery at the time of registration, prescription does not operate, but if the person registered as entitled was not aware of the forgery at the time of registration prescription can operate.

In practical terms, once prescription has run, the person holding the qualified Land Certificate, or a qualified Charge Certificate, may apply to the Keeper to have the exclusion of indemnity removed. His application will, of course, have to be accompanied by satisfactory evidence of possession, normally a statutory declaration or a sworn statement certified by a notary public. The Keeper will then remove the exclusion of indemnity and issue a new Certificate of Title.

If the result of the operation of prescription is to make the qualified title prevail over a competing title, as well as removing the exclusion of indemnity from the title sheet the Keeper will also have to delete the entry relating to the competing title. The register may be rectified in this way even if the competing title had been registered with full indemnity. Rectification is not prohibited by section 9(3) because if prescription has run against the competing proprietor he cannot have been in possession.

It is extremely unlikely that the combination of circumstances required to bring into operation the new provision relating to prescription founded on a registration proceeding on a forged deed will ever occur. If the Keeper discovers the forgery at the time of registration he will reject the application. He will not register with excluded indemnity. If the Keeper does not discover the forgery at the time of registration, an exclusion of indemnity would only be made in respect of a matter not connected with the forgery. If, in the latter case, the forgery is subsequently discovered, but the applicant was unaware of the forgery at the time of registration, prescription can still operate.

A further effect of the provisions of section 10 is that once both interests are registered, consolidation by prescription can no longer take place since the title to each interest will be specifically to that interest. A superior will be able to prescribe a title to the dominium utile if he registers an a non domino title to it, but that will not effect consolidation. That can only be achieved by registration of a Minute of Consolidation or a Disposition ad perpetuam remanentiam.

If, however, the superiority title remains in the Register of Sasines and is ex facie to the lands, consolidation by prescription is still possible even although the title to the dominium utile is registered.

Section 11 **TRANSITIONAL PROVISIONS FOR PART I**

The provisions of section 11 regulate the way in which certain situations, which may arise before "compulsory" registration has been extended to the whole of Scotland, may be dealt with.

Subsection (1) provides that where an application for registration relates to land outwith an "operational area" (defined in subsection (3) as an area in respect of which the provisions of the Act relating to registration have come into effect by an order under section 30(2) - i.e. an area where registration is "compulsory") the Keeper may accept the application as if it related to land within an operational area and if such an application is accepted, the provisions of the Act relating to registration then in force shall apply in relation to that application.

The effect of the provision is that the Keeper may accept a voluntary registration of subjects outwith a compulsory area, and if he does so the effect of that registration will be the same as if it had been a compulsory one. Any transaction or event relating to the subjects, of the kind referred to in sections 2(3) and (4), is registrable and any deed relating to the subjects presented for recording in the Register of Sasines must be rejected.

Subsection (2) provides that an application which relates to land which is partly in an operational area shall be treated as if it related to land wholly in that area.

This provision is intended to deal with the "railroad runs through the middle of the house" situation.

Where subjects straddle the boundary of an operational area the whole subjects are registrable. It does not matter whether the major part is in the operational area or outwith it. There is no question of the kitchen and bathroom being registered while the living room and bedroom remain in the Register of Sasines or even two fields of a farm in one register while the remainder is in the other.

Part II

INDEMNITY IN RESPECT OF REGISTERED INTERESTS IN LAND

Section 12 INDEMNITY IN RESPECT OF LOSS

This section is one of the most important in the Act and together with section 9 is responsible for what is probably the major impact of the Act on the public, namely the general effect that, in any dispute, the registered proprietor retains the property and the person who, prior to the Act, would have been the true proprietor, is indemnified for the loss of his right. The above statement is of course a generalisation and like all generalisations is subject to certain exceptions which have already been mentioned in connection with section 9. A further effect of section 12 is that the public are able to rely on the register in the knowledge that if they suffer loss as a result of such reliance, even where no dispute is involved, that loss will be indemnified.

The effect of the provisions of subsection (1) is that any person must be indemnified against loss suffered as a result of the register being rectified, the register not being rectified, the loss or destruction of any document while it is in the Keeper's custody and any error or omission in any information from the register given formally by the Keeper.

The subsection places an unreasonably onerous responsibility on the Keeper and the remaining subsections of section 12 qualify the Keeper's responsibility in circumstances in which absolute liability on the Keeper was considered unreasonable. Subsection (2) permits the Keeper to exclude indemnity in respect of anything appearing in or omitted from a title sheet. The Keeper will, of course, only exclude indemnity where he is not satisfied with the evidence produced in support of an application for registration.

The subsection also provides that such exclusion of indemnity may be made at the time of registration. The purpose of that provision is to prevent the Keeper from subsequently excluding indemnity in respect of a title which he has originally registered with full indemnity. That does not prevent him from excluding indemnity on a subsequent registration, but that exclusion must arise out of something that has taken place since the previous registration. It cannot relate to a matter which existed at the time of the previous registration but in respect of which no exclusion had been made. For example if the Keeper has not excluded indemnity on registration of a defective title he cannot on a subsequent registration exclude indemnity in respect of that defect.

Subsection (3) sets out circumstances in which there will be no entitlement to indemnity:
a) where the loss arises from the fortification by prescription of a competing title prejudicial to the interest of the claimant.
Section 10 provides for the continuance of the operation of positive prescription in relation to registered titles. It would be quite inequitable if the Keeper were bound to indemnify a registered proprietor, who had permitted prescription to operate against him, especially since the Keeper has no power, except in relation to foreshore, to bring to the notice of a registered proprietor the fact that prescription is operating against his title.

b) where the loss arises in respect of a title which has been reduced as a gratuitous alienation or fraudulent preference, or has been reduced or varied by an order under section 6(2) of the Divorce (Scotland) Act 1976 (such an order is made if the courts consider a conveyance has been made for the purpose of prejudicing the rights of a spouse).

The Keeper, when registering a title, has no way of knowing that the deed inducing registration is in implementation of a gratuitous alienation or fraudulent preference, or that an order under section 6(2) of the Divorce (Scotland) Act is likely to be made. He should not therefore be liable for indemnity in respect of any of these matters.

c) where the loss arises in consequence of the making of a further order under section 5(2) of the Presumption of Death (Scotland) Act 1977. An order under that section is made when a person who is presumed dead reappears.

The same considerations as those mentioned in connection with paragraph (b) apply to the making of an order under section 5(2) of the 1977 Act.

d) where the loss arises as a result of any inaccuracy in the delineation of any boundaries shown in a title sheet, being an inaccuracy which could not have been rectified by reference to the Ordnance Map, unless the Keeper has expressly assumed responsibility for the accuracy of that delineation.

The Henry Committee, in considering the degree of accuracy in the delineation of boundaries for which the Keeper should be responsible in relation to indemnity, observed that measurements in deeds are normally qualified by the words "or thereby" and concluded that application of those words to the delineation on the plan would give the Keeper a sufficient practical margin of error.

However in the case of Griffin v Watson 1962 S.L.T. (Sheriff Court Reports) p.75 the Sheriff considered that a variation of 2 1/2 inches was not covered by the qualification "or thereby". It was obvious therefore that in light of the decision in Griffin "or thereby" would not have the effect envisaged by the Henry Committee.

The Henry Committee had been strongly opposed to the adoption of the English general boundaries rule, although in fact their provisions were a close approximation to it. Even after it became apparent that the application of "or thereby" would not have the effect envisaged by the Henry Committee, the Law Society continued to oppose the adoption of a general boundaries rule. Eventually a compromise was reached whereby the Keeper, in the accuracy of delineation of boundaries, obtains the benefit of the thickness of the line on the published Ordnance Map. The distance that the thickness of the line covers varies according to the scale of the map, but even on the largest scale (1/1250) it amounts to about 1 foot.

It is extremely unlikely that the Keeper would ever assume responsibility for an accuracy of delineation beyond that in respect of which he is bound to indemnity loss. The physical difficulty and the cost of a special survey for that purpose would almost inevitably preclude such an undertaking.

e) where the loss arises, in the case of land extending to 2 hectares or more the area of which falls to be entered in the title sheet of an interest in that land under s.6(1)(a), as a result of the Keeper's failure to enter such area in the title sheet, or, where he has so entered such area, as a result of any inaccuracy in the specification of that area in the title sheet.

The purpose of the requirement in s.6(1)(a) to enter the area of certain land in the title sheet is to enable owners of large tracts of land and the extent of their holdings to be ascertained readily by the public. Calculation of area from a map, which is the only practical method of calculation available to the Keeper, is by its nature an inaccurate method since a map is flat and land seldom is. There was never any intention that the result of the provision would be to supply to the proprietor a guaranteed accurate hectarage figure of his holding. No indemnity therefore attaches to the statement of hectarage. The extent of the holding is "guaranteed" by the accuracy of the delineation of the boundaries.

f) the loss arises in respect of an interest in mines and minerals and the title sheet of the surface does not expressly include the mines and minerals.

Minerals normally pass with the land unless they are expressly excluded, but exclusions of minerals are not invariably repeated in subsequent transmissions. The effect of the provision therefore is that the Keeper is not liable for indemnity in respect of minerals if the title sheet is silent about minerals. He is only liable if minerals are expressly included. Cases do arise where there is an express inclusion of minerals in a conveyance but the granter has no title to the minerals. In such a case the minerals would be expressly included in the title sheet but there would also be an exclusion of indemnity in respect of them.

g) where the loss arises from inability to enforce a real burden or condition entered in the register, unless the Keeper expressly assumes responsibility for the enforceability of that burden or condition.

The Keeper is required in terms of s.6(1)(e) to enter in the title sheet "any subsisting real burden or condition". He may therefore omit any real burden or condition which he is satisfied is no longer subsisting. Burdens and conditions may however be lost by prescription or become obsolete by changes in circumstances. In most cases the Keeper would have no way of knowing that that had happened. He would be at risk in omitting any burden in respect of which he did not have positive proof that it no longer subsisted. It would be quite impractical for him to demand positive proof of the continued subsistence of a burden before entering it in the title sheet, moreover such proof would only be valid at the date it was given. The Keeper is therefore relieved of liability in respect of the continued subsistence of burdens or conditions entered in a title sheet.

h) where the loss arises in respect of an error or omission in the noting of an overriding interest.

Overriding interests do not require registration to make them effective and it would not normally be expected that any information relating to them would be found on the register. In order to make the register as informative as possible provision is made in s.6(4) for the Keeper to note on a title sheet, overriding interests which come to his notice. No indemnity is, however, payable in respect of any information relating to overriding interests appearing on a title sheet or in respect of the absence from a title sheet of information relating to overriding interests.

i) where the loss is suffered by

i) a beneficiary under a trust in respect of any transaction entered into by its trustees or in respect of any title granted by them the validity of which is unchallengeable by virtue of section 2 of the Trusts (Scotland) Act 1961 (validity of certain transactions by trustees), or as the case may be, section 17 of the Succession (Scotland) Act 1964 (protection of persons acquiring title), or

ii) a person in respect of any interest transferred to him by trustees in purported implement of trust purposes;

Part (i) extends to the Keeper the protection afforded to third parties by the two provisions mentioned.

Part (ii) protects the Keeper from claims by grantees in transactions by trustees in purported implement of a trust.

The net result of both parts is that there is no onus on the Keeper to enquire into a transaction involving trustees to ensure that it is competent in terms of the trust.

k) where the loss arises as a result of an error or omission in an office copy as to the effect of any subsisting adverse entry in the Register of Inhibitions and Adjudications affecting any person in respect of any registered interest in land, and that person's entitlement to that interest is neither disclosed in the Register nor otherwise known to the Keeper.

In terms of s.6(1)(c) the Keeper is required to enter in the title sheet any subsisting entry in the Register of Inhibitions and Adjudications adverse to the interest. In theory therefore, as soon as an entry in the Register of Inhibitions and Adjudications is made, the Keeper should seek out all title sheets adversely affected by that entry and make the appropriate entries on those title sheets. In practice this is impossible because a diligence of the kind registered in the Register of Inhibitions and Adjudications affects the power of the person against whom it is taken to deal with a heritable interest whether or not he is infeft in it. If the person is not infeft the Keeper will, at the time of recording of the diligence, have no way of connecting the title sheet with the diligence.

How the Keeper complies with s.6(1)(c) in practice is that before issuing any Certificate of Title, Search, Report, or office Copy, he searches the Register of Inhibitions and Adjudications and makes any necessary entry on the title sheet. On the occasion of a registration or when a search or report is applied for the Keeper requires the applicant to supply the necessary information to enable him to make a satisfactory search of the Register of Inhibitions and Adjudications. A person applying for an office copy may not, however, have any more information than the Keeper as to persons, not shown on the title sheet, but having an interest which could be adversely affected by an entry in the personal register.

The Keeper is therefore absolved from liability for failure, but only when issuing an office copy, to disclose entries from the Register of Inhibitions and Adjudications against a person not disclosed from the title sheet, nor otherwise known to the Keeper to have an interest in the subjects to which the title sheet relates.

l) where the claimant is the proprietor of the dominant tenement in a servitude, except insofar as the claim may relate to the validity of the constitution of that servitude.

The Keeper is not required, before entering a servitude as a pertinent on the title sheet of the dominant tenement, to establish that the servitude still subsists, provided that he establishes that it was validly constituted at the outset.

where the claimant is a superior, a creditor in a ground annual or a landlord under a long lease and the claim relates to any information:-

i) contained in the feu writ, the contract of ground annual or the lease, as the case may be, and

ii) omitted from the title sheet of the interest of the superior, creditor or landlord,

(except insofar as the claim may relate to the constitution or amount of the feuduty, ground annual or rent and adequate information has been made available to the Keeper to enable him to make an entry in the register in respect of such constitution or amount or to the description of the land in respect of which the feuduty, ground annual or rent is payable).

The Henry Committee considered that on registration of a superiority title, to guarantee anything beyond the matters mentioned in paragraph (m) would place too formidable a burden of investigation on the Keeper and that there would be little point in the Keeper producing in a Land Certificate what would be, in effect a duplicate of an estate chartulary.

In practical terms the Keeper discloses in the property section of the title sheet for the superiority, the amount of the feuduty, where appropriate, the part of the superiority subjects in respect of which that amount is exigible and short particulars of the feu writ by which the feuduty was constituted. Where there are a number of feus incorporated in a superiority title the above information may be set out in a schedule.

Since similar considerations apply to titles to landlords' interests in leases and creditors' interests in ground annuals paragraph (m) is applied also to these interests.

n) where the claimant has by his fraudulent or careless act or omission caused the loss.

If a party has by supplying false or erroneous information to the Keeper, whether by fraud or by lack of proper care, induced the Keeper to make an error in the register, the Keeper is not liable to indemnify that party for loss resulting from that error. The Keeper' however, remains liable to any third party for loss he may have suffered as a result of such error.

o) where the claim relates to the amount due under a heritable security.

In many cases a standard security makes no definite statement of the sum secured by it, and even where it does, the Keeper is in no position to establish that the amount stated to be secured remains outstanding at any particular time. All that the Keeper "guarantees" in relation to a heritable security is that a valid security has been created over the registered interest. He has no liability for indemnity in respect of the amount of the debt secured.

Subsection (4) provides that refusal or omission by the Keeper to enter in a title sheet:

a) any over-feuduty or over-rent exigible in respect of a registrable interest;

any right alleged to be a real right on the ground that by virtue of section 6 he has no duty to do so since it is unenforceable.

shall not by itself prevent a claim to indemnity under this section.

In terms of section 6 there is no obligation on the Keeper to enter in a title sheet any over-feuduty or over-rent, (although he is not prohibited from doing so), or any right which he considers not to be enforceable. If however, any person suffers loss as a result of the omission from a title sheet of any of these matters he will have a claim for indemnity against the Keeper.

Section 13 **PROVISIONS SUPPLEMENTARY TO SECTION 12**

Subsection (1) provides that subject to any order by the Lands Tribunal for Scotland or the court for the payment of expenses in connection with any claim disposed of by the Lands Tribunal under section 25 or the court, the Keeper shall reimburse any expenditure reasonably and properly incurred by a person in pursuing a prima facie well founded claim under section 12, whether successful or not.

Section 48(1)(g) of the Henry Report made the following recommendation "whether or not indemnity shall be payable, a claimant shall be entitled to recover costs and expenses properly incurred in connection with any prima facie valid claim made by him". This recommendation was seen as an unacceptable restriction on the discretion of the court and the Lands Tribunal to award expenses. The recommendation was therefore enacted but with a discretion to the court and the Lands Tribunal to award expenses as they choose. The net effect is that the Keeper must pay the expenses of the claimant in any claim for indemnity settled by himself, but if the claim goes to the Lands Tribunal or the court, expenses will be awarded in the normal way.

Subsection (2) provides that on settlement of any claim to indemnity under section 12 the Keeper shall be subrogated to all rights which would have been available to the claimant to recover the loss indemnified.

Subsection (3) provides that the Keeper may require a claimant, as a condition of payment of his claim, to grant, at the Keeper's expense, a formal assignation to the Keeper of the rights mentioned in subsection (2) above.

Whether or not a party entitled to claim indemnity under section 12 also has a right of action against a third party is immaterial in relation to his right against the Keeper. In most cases a claim against the Keeper will be cheaper, easier and more certain than an action against a third party. In many cases the claim will be met by the Keeper without resistance and, if the Keeper does resist the claim, on appeal to the Lands Tribunal will be simpler and less costly than a court action.

A claim against the Keeper will be met out of money provided by parliament and payment will be certain, whereas a third party against whom decree is pronounced may not have sufficient assets to cover the sum awarded by the court.

If however the Keeper settles a claim for indemnity, it is equitable that the Keeper should have the opportunity to recover the whole or part of the amount he has paid from any third party against whom the claimant had a right of recovery, such rights are, by subsection (2), automatically assigned to the Keeper on payment of indemnity. Whether or not the Keeper will proceed against the third party will be a matter of policy in each particular case. The Keeper's decision will usually be influenced by the chance of success, the amount likely to be recovered and the probable expense of the proceedings.

It is unlikely that the Keeper will very often invoke subsection (3) to obtain a formal assignation of the claimant's rights against third parties.

Subsection (4) in effect applies the existing law of contributory negligence to claims for indemnity under section 12.

Section 14 **THE FORESHORE**

If -

a) it appears to the Keeper that -
   i) an interest in land which is registered or in respect of which an application for registration has been made consists, in whole or part, of foreshore or a right in foreshore, or might so consist, and
   ii) discounting any other deficiencies in his title in respect of that foreshore or right in foreshore, the person registered or, as the case may be, applying to be registered as entitled to the interest will not have an unchallengeable title in respect of the foreshore or the right in foreshore until prescription against the Crown has fortified his title in that respect, and

a) the Keeper wholly excludes or purposes wholly to exclude rights to indemnity in respect of that person's entitlement to that foreshore or that right in foreshore, and is requested by that person not to do so,

the Keeper shall notify the Crown Estate Commissioners that he has been so requested.

If the Crown Estate Commissioners have -

a) within one month of receipt of the notification referred to in subsection (1) above, given to the Keeper written notice of their interest, and
b) within three months of that receipt informed the Keeper in writing that they are taking steps to challenge that title,

the Keeper shall -

i) during the prescriptive period, or

ii) until such time as it appears to the Keeper that the Commissioners are no longer taking steps to challenge that title or that their challenge has been unsuccessful,

whichever is the shorter, continue wholly to exclude or, as the case may be, wholly exclude right to indemnity in respect of that person's entitlement to that foreshore or that right in foreshore.

3) This section, or anything done under it, shall be without prejudice to any other right or remedy available to any person in respect of foreshore or any right in foreshore.

The Henry Committee at paragraph 30 of their report recommended that on any application for registration of an interest comprising or including foreshore or rights in foreshore, the Keeper should not issue a fully guaranteed Certificate without service of notice on the Crown Estate Commissioners, thus giving them an opportunity to challenge the applicants claim to foreshore. It was considered, however, that where a right to foreshore had already been successfully established, that right should not be subjected to a further challenge by the Crown.

It was decided, therefore, that the Keeper should only be obliged to exclude indemnity in respect of foreshore if he is not satisfied that an unchallengeable title to it has already been established either by a direct grant from the Crown or by prescription or otherwise. If the Keeper does exclude indemnity in respect of foreshore on those grounds and the registered proprietor requests removal of the exclusion of indemnity, the Keeper must notify the Crown Estate Commissioners of the request. If the Crown Estate Commissioners wish the exclusion of indemnity to remain, they must within one month of the date of receipt of that notice, notify the Keeper of their interest and within three months of that date inform the Keeper in writing that they are taking steps to challenge the title. The Crown Estate Commissioners are not permitted merely to notify their interest and by doing nothing further continue to prevent the removal of the exclusion from indemnity. They must proceed to actively challenge the title. If the challenge is unsuccessful or it appears to the Keeper that the challenge has been abandoned, the removal of the exclusion of indemnity is permitted. The running of prescription will also permit the removal of an exclusion of indemnity. Proceedings in court to challenge the title would of course interrupt the running of prescription.

In relation to foreshore, because of its nature and the interest of the Crown, the Keeper will impose more stringent requirements of proof of possession and of the absence of counter acts of possession than he does in relation to other subjects.

Compliance with the requirements of section 14 is the only occasion on which the Keeper is permitted to take active steps to draw to the attention of a party, against whom prescription may be running, of the existence of a competing title.

PART III

SIMPLIFICATION AND EFFECT OF DEEDS

All three of the learned committees which reported on Registration and Land Tenure Reform in the sixties made recommendations about the shortening and simplification of deeds relating to heritable property. Some of these recommendations have already been implemented by the Acts of 1970 and 1974. Part III make a further significant contribution to the implementation of the recommendations of the committees. Section 15 applies only to deeds relating to registered interests in Land. The remaining sections of Part III apply to deeds executed after the commencement of the Act whether they relate to registered or unregistered interests.

Section 15 SIMPLIFICATION OF DEEDS FOR REGISTERED SUBJECTS

When an interest in land is registered all the rights which attach to it and all the burdens and conditions which affect it are set out in the title sheet. The registered interest is in fact the land together with the rights and subject to the burdens and conditions set out in the title sheet. It would be unfortunate if it were necessary to refer to all the rights, burdens and conditions in a title sheet in a deed relating to a registered interest. It would indeed be undesirable because any error or omission in such references would lead to an uncertain situation.

Subsection (1)accordingly provides that land in respect of which an interest has been registered shall be sufficiently described in any deed if it is described by reference to the number of the title sheet.

Subsection (2)provides that it shall not be necessary in any deed relating to a registered interest to insert or refer to any real burden, condition etc. if the real burden etc. is entered in the title sheet.

The use of these two subsections is not mandatory but in order to provide a strong disincentive to avoiding their use the subsections disapply to a deed relating to a registered interest the existing legislative provisions relating to descriptions by reference and importation of burdens by reference. Any person not making use of these subsections will have to make use of the common law.

Subsection (3) Just as section 3(6) makes it unnecessary to expede a Notice of Title to a registered interest, subsection (3) makes it unnecessary to insert a deduction of title in a deed relating to a registered interest provided that sufficient links in title are produced to the Keeper along with the application. The Keeper would in any case want to examine these links before completing registration. In order to defeat an applicant who might try to avoid production of the links to the Keeper by inserting a deduction of title, the subsection disapplies the existing legislation on deductions of title to a deed relating to a registered interest. It is therefore no longer competent to insert a deduction of title in such a deed.

Subsection (4) Since a conveyance of a registered interest containing a reference to the title number carries every thing in the title sheet there is no need for a separate assignation of an obligation or right of relief. Also since, before he registers the interest with full indemnity the Keeper will have satisfied himself that the registered proprietor is entitled to the obligation or right of relief, there is no need to narrate the series of writs by which the registered proprietor became so entitled subsection (4) provides accordingly and disapplies section 50 and schedule M of the Conveyancing (Scotland) Act 1974 to a deed relating to a registered interest.

Section 16 **OMISSION OF CERTAIN CLAUSES IN DEEDS**

Section 16 provides that it shall not be necessary to insert a clause of assignation of writs or a clause of assignation of rents in any deed executed after commencement of the Act. It then goes on to provide a statutory assignation of writs and of rents which will be automatically imported into any such deed unless the deed is specially qualified. The statutory clauses are the normal ones which one would expect, but it is open to the parties to such deeds to depart from the statutory interpretation by inserting a clause adopting the statutory interpretation to meet the requirements of a particular case.

It would obviously be undesirable, however if a registered proprietor were statutorily bound to retain and pass on all the writs which have become spent on registration of the interest.

In terms of section 3(5), upon registration of an interest in land, any obligation regarding assignation, exhibition or delivery of writs ceases to have effect except as set out in section 3(5).

The obligations set out in section 16 continue to apply in relation to (1) a Land or Charge Certificate (2) writs relating to a matter in respect of which indemnity has been excluded and (3) writs relating also to an interest which remains unregistered.

Section 17 **DEEDS OF DECLARATION OF CONDITIONS**

The Halliday Committee in paragraph 83 of their report recognised the inconvenience which could be caused by the conditions in a Deed of Conditions having to be imported by reference in a conveyance before they become effective. Lengthy periods often occur before all the property affected by a Deed of Conditions is sold and conditions which involve reciprocal obligations may, during that time bind some of the properties affected by them, but not others. They therefore recommended that the conditions in a Deed of Conditions should take effect immediately on recording of the Deed of Conditions, if the deed contained a declaration to that effect. In the course of subsequent consultations Professor Halliday agreed that such a provision would be more effective if the condition were to take effect immediately unless the deed contained a declaration to the contrary.

Section 17 accordingly provides that an obligation in a Deed of Conditions shall become a real obligation immediately on recording or registration of such deed unless it is expressly stated in the deed that the provisions of section 17 are not to apply.

Section 18 **VARIATIONS AND DISCHARGES OF LAND OBLIGATIONS**

Section 18, in order to remove any doubt which existed before the passing of the Act, provides that any recorded or registered variation or discharge of a land obligation shall be binding on singular successors of both parties affected by the obligation. The provision is retrospective.

Section 19 **AGREEMENT AS TO COMMON BOUNDARY**

Section 19 makes provision for a relatively simple and inexpensive method of resolving boundary discrepancies. If the parties agree as to the boundary they may, instead of executing a Contract of Excambion or otherwise conveying pieces of land to one another, merely indicate their agreement to the Keeper.

If all of the relevant interests are registered a plan indicating the boundary as agreed, and bearing a docquet, signed by all the parties, indicating that they have agreed will be sufficient. If any of the subjects remains unregistered a more formal agreement, capable of being recorded in the Registers of Sasines is required.

Section 16 to 19, which apply to recorded as well as registered interests, came into operation on the passing of the Act.

PART IV

MISCELLANEOUS AND GENERAL

Sections 20, 21 and 22 **TENANTS-AT-WILL**

For a number of years tenants-at-will have been at some disadvantage by comparison with persons holding under other forms of tenure in that although they were in effect proprietors, they were unable to record a title in the Register of Sasines and consequently were unable to obtain grants for the improvement of their property or to use that property as security for a loan. As the demand for houses in the north-east of Scotland grew these disadvantages became more serious.

The problem was partially alleviated by the Housing (Financial Provisions) (Scotland) Act 1978 which enabled a tenant-at-will to obtain an improvement grant but it was still not possible to obtain a heritable security over a tenancy at will. Sections 20 to 22 give a tenant-at-will power to demand a feudal title from his landlord, fix procedure for obtaining a feudal title and formulae for compensating the landlord and any heritable creditor of the landlord, and nominate the Lands Tribunal for Scotland as the forum of first instance for settlement of disputes.

Section 23 **FEES**

The power to prepare tables of fees for the Register of Sasines was contained in section 25 of the Land Registers (Scotland) Act 1868. Tables of fees were promulgated by Act of Sederunt and the procedure was involved and time consuming, requiring as it did, approval by numerous officials, largely as a result of historical accident. Section 25 referred only to fees in the Register of Sasines. Authority to fix fees for the other registers under the control of the Keeper was rather ill defined.

Section 23, by amendment of section 25 of the 1868 Act simplifies and improves the whole procedure. It provides that the Secretary of State, with the consent of the Treasury may fix, by order made by statutory instrument, fees payable in respect of registration in any register under the control of the Keeper and in respect of searches and other services given by the Keeper in connection with these registers. The amended section goes on to provide that the amount of the fees so fixed shall be no greater than is sufficient for defraying the expenses of the Department including the expenses of improvement of the systems.

It should be noted that the fees are required to cover the expenses of running the Department and improving the system. Each register is not required to pay its way.

Section 24 **FINANCIAL PROVISIONS**

This is a standard clause which is inserted in all Acts which may involve government expenditure. It has a technical significance connected with parliamentary procedure and does not relieve the Keeper of his duty to recoup the expenses of his Department out of income from fees.

Section 25 **APPEALS**

Section 25 makes provision for an appeal to the Lands Tribunal for Scotland on any matter arising under the Act. It is thought that an appeal to the Tribunal will be simpler, quicker and cheaper than an appeal to the court.

Any right of recourse under any other enactment or rule of law is however preserved, subject to the law of res judicata, ie. if a person is dissatisfied with the result of an appeal in one forum he cannot go to another unless he has grounds for a further appeal.

There is a further proviso that there is no appeal against a decision by the Keeper with regard to acceptance of an application for voluntary registration.

Section 26 **APPLICATION TO THE CROWN**

The Act is applied to land belonging to the Crown and the Prince and Steward of Scotland and land held by a Government department on behalf of the Crown.

Section 27 **RULES**

Section 27 empowers the Secretary of State to make rules, after consultation with the Lord President of Court of Session, for giving effect to the purposes of the Act. The rules are to be made by statutory instrument subject to the negative resolution ie. they are laid on the table of both houses of Parliament and if no member objects to them within a specified period they become law.

The section sets out in some detail the matters about which rules may be made but finishes with a general provision that rules may be made "concerning such other matters as seem ..... to be necessary or proper in order to give full effect to the purposes of this Act".

Section 28 **INTERPRETATION**

Section 28 contains surprisingly few definitions for an Act of such technical complexity.

"deed" is given the same definition as in existing conveyancing legislation;

"feu" is defined widely to include any kind of feudal holding;

"heritable security" has the same definition as in the conveyancing and Feudal Reform (Scotland) Act 1970;

"incorporeal heritable right" is defined as not including a right to salmon fishings. The intention is that salmon fishings are to be treated as interests in land which are registrable in terms of section 2(1) and for which a title sheet is opened in terms of section 5(1)(a);

"interest in land" The definition specifically includes a heritable security, but excludes a lease which is not a long lease ie. a lease which in terms of existing legislation is not a registrable lease;

"the Keeper" is defined as in section 1(2) ie. the Keeper of the Registers of Scotland;

"land" is defined as including buildings and other structures and land covered with water;

"long lease" In effect the definition is the same as the definition of "registrable lease" in existing legislation;

"overriding interest" overriding interests are in effect all the interests in which, prior to commencement of the Act, a real right could be obtained without recording a deed in the Register of Sasines but excepting those in relation to which the Act requires registration to obtain a real right.

The effect of the words in the definition *"in relation to any interest in land, the right or interest over it of"* is that an overriding interest is such only in relation to an interest which is burdened by it. Some overriding interests are themselves interests in land which are capable of registration. The definition sets out a detailed list of the most common overriding interests and covers the remainder by a general provision;

"The Register" and *"registered"* are defined as in section 1 as meaning the Land Register of Scotland and registered in that register;

"Register of Sasines" is defined as in section 2 of the Conveyancing (Scotland) Act 1924;

"transfer" is defined as including transfers by operation of law. The effect of this definition is to bring certain transfers not made by deed (e.g. by statutory provision, or by prescription) within the scope of section 2(4).

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Section 29 **AMENDMENT AND REPEAL OF ENACTMENTS**

Although certain of the amendments and repeals to existing legislation made necessary by the provisions of the Act are appropriate at the date of commencement, most are not appropriate until registration is induced by section 2.

Those which are appropriate at commencement are set out in schedule 2 (amendments) and schedule 4 (repeals). The other repeals and amendments cannot be made while recording in the Register of Sasines remains competent but must apply where registration is required in terms of the Act. The draftsmen solved this problem by providing that references in existing legislation to the Register of Sasines or recording should be construed as references to the Land Register and registration except where section 29 provides otherwise.

Subsection (2) contains a general provision that references in enactments to the Register of Sasines or to recording are to be construed as references to the Land Register and registration. The subsection is however qualified by subsection (3), which provides that subsection (2) does not apply (a) to the enactments specified in schedule 3 and (b) for the purposes of the recording of a deed in the Register of Sasines under section 8. Certain enactments dealing with matters such as warrants of registration and minute books have no application to the Land Register and it would not be appropriate to construe a reference in them to the Register of Sasines as a reference to the Land Register. These enactments, set out in schedule 3, cannot however be repealed so long as recording in the Register of Sasines remains competent.

It is obvious that subsection (2) should not apply where recording in the Register of Sasines remains appropriate in terms of section 8. Subsection 3(b) provides accordingly.

Section 30 **SHORT TITLE EXTENT AND COMMENCEMENT**

Subsection (1) gives the short title of the Act namely the Land Registration (Scotland) Act 1979.

Subsection (2) sets out the sections which come into operation on the passing of the Act and empowers the Secretary of State to bring the remaining provisions into operation by order made by Statutory Instrument. Different days may be appointed for different areas and for different provisions of the Act.

Some provisions require to be brought into operation for the whole of Scotland on the same day as registration commences in the first area. The remainder will be brought in for each area when that area becomes operational.