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The *Land Registration Bill [HL]*

Bill 48 of 2001/02

The *Land Registration Bill* was presented in the House of Lords on 21st June 2001 and had its First Reading in the Commons on 8 November 2001.

The stated purpose of the Bill is to create the necessary framework in which registered conveyancing can be conducted electronically. The Bill also contains profound changes to the substantive law that governs registered land.

Full background to the Bill and detailed explanations on the purpose and content of its clauses can be found in the joint Law Commission and HM Land Registry report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No. 271). The Explanatory Notes to the Bill provide further information on each of the clauses. The Bill extends only to England and Wales.

This paper focuses on issues raised during the Bill's passage through the House of Lords.

Wendy Wilson

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Summary of main points

Land registration is presently conducted under the *Land Registration Act 1925* and more than 300 rules made under it. HM Land Registry and the Law Commission have been working together since 1994 to reform the law on land registration. The recommendations of their first report, *Transfer of Land: Land Registration* (Law Com No 235) were implemented by the *Land Registration Act 1997.* In September 1998 a consultative document, *Land Registration for the Twenty-First Century* (Law Com No 254) was published. This document offered a blueprint for the development of conveyancing, and in particular, electronic conveyancing and land registration in England and Wales.

Three main reasons have been identified for the need to reform the land registration system:

1. The first is the need to create a legal environment in which it will be possible to conduct conveyancing in electronic form and which will reflect the possibilities that electronic conveyancing might offer.

2. The second is the unsatisfactory nature of the existing legislation governing land registration. The *Land Registration Act 1925* is acknowledged to be badly drafted, lacking in clarity and unnecessarily complicated.

3. The third is the need to create principles that reflect the fact that registered land is different from unregistered land and rests on different principles.

The responses to the consultative document showed "wide support," both within the property industry and from many legal practitioners, for the introduction of a system dealing with land in electronic form.

It is hoped that the Bill will:

- make changes to the law that are needed so that the process of dealing with unregistered land can move from a paper based system to an all-electronic system within a few years;
- reform the law that governs land registration in the light of this fundamental change, streamlining, clarifying and simplifying it and replacing completely the existing legislation;
- lead to a register that gives buyers more certainty because it is more accurate, gives fuller information about the rights which the owner has over other land and the restrictions to which the land is subject;
- improve the security of property rights in and over registered land by providing better means of protecting them;
- provide better protection for the owners of registered land against the claims of squatters;
- reduce the number and scope of overriding interests (which are not currently apparent from the register) significantly and abolish some categories after 10 years;

- abolish charge certificates; and
- allow for the registration of certain types of Crown land which at present is not registrable, including much of the foreshore around England and Wales.

The Law Commission believes that the potential benefits to the public of these changes is enormous given the 1 million residential sales and 2 million other property transactions that take place annually:

> The conveyancing process will be transformed. It should in time be possible to investigate title almost entirely online, something that cannot be done at present. This will speed up the process considerably and should make it cheaper. It will also be possible to manage chains of sales, under the system of electronic conveyancing that the Bill will create. Chain sales are a major difficulty for most people when they buy or sell a home. While the new system will take some time to introduce, it should lead to quicker, less stressful ways of buying and selling land as well as providing greater security of title.

Full background to the Bill and detailed explanations on the purpose and content of its clauses can be found in the joint Law Commission and HM Land Registry report, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No. 271) which was published on 10 July 2001.

This report can be found on the Law Commission's website at http://www.lawcom.gov.uk/library/lc271/lc271.pdf. The 1998 consultation document, *Land Registration for the Twenty-First Century*, is also on the website at http://www.lawcom.gov.uk/library/lc254/lc254.pdf. The Explanatory Notes to the Bill provide further information on each of the clauses. Because of the wealth of background and explanatory material contained in *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, this paper does not attempt to duplicate that work but focuses instead on the main points raised during the Bill's passage through the House of Lords.

The Bill extends only to England and Wales.

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I Background

The beginnings of the current Bill can be found in a 1998 consultation document produced by a joint working group of representatives of the Law Commission and HM Land Registry.[1] *Land registration for the 21st Century*[2] invited views on a range of proposals to make dealings in land much simpler, quicker and cheaper.

The working group outlined the following three main reasons behind the need to reform the land registration system:

1. The first was the need to create a legal environment in which it would be possible to conduct conveyancing in electronic form and which would reflect the possibilities that electronic conveyancing could offer.

2. The second was the unsatisfactory nature of the existing legislation governing land registration. The *Land Registration Act 1925* is acknowledged as being badly drafted, lacking in clarity and unnecessarily complicated.

3. The third was the need to create principles that reflected the fact that registered land was different from unregistered land and rested on different principles.[3]

Some progress to assist the introduction of electronic conveyancing has already been made:

- England and Wales has been subject to compulsory registration since 1990 and most conveyances of unregistered land are required to be completed by registration.
- The register is now computerised and almost all titles have been entered on the computer.
- A system of direct access to the register introduced in 1995 enables instant inspection; HM Land Registry has introduced a system of electronic requests for discharges of mortgages.
- On 18 March 2001 the Lord Chancellor issued a consultation paper on electronic conveyancing together with a draft order with a view to issuing an order under the *Electronic Communications Act 2000.*[4]

The 1998 consultation document set out the current law in detail and made proposals for reform with regard to the three matters listed above. The great majority of the working

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1 The recommendations of the Joint Working Group's first report on land registration, (1995) Law Com No 235, were implemented by the *Land Registration Act 1997.*

2 *Land Registration for the Twenty-first Century*, Law Com No 254, Cm 4027

3 Law Com 254, para 1.6

4 Law Commission Press Notice, "A Conveyancing Revolution", 7 July 2001

group's recommendations were accepted on consultation.[5] The significant area where the group diverged from the views of respondents concerned the length of registrable leases.[6] A further two matters on which views were sought in the consultation document were supported by respondents but are not taken forward by the current Bill; the following explanation has been given for these omissions:

> First, the proposals contained in Part X of the Consultative Document on prescription have been abandoned for three reasons:
> (1) there was not a compelling case for the reform of the law of prescription in the context of registered land alone as there was in relation to the law of adverse possession;
> (2) the Law Commission is now undertaking a comprehensive review of easements and land obligations which will include prescription and it seems better to view prescription as a totality; and
> (3) some of the conveyancing concerns that informed our proposals have been addressed in more direct ways in the Bill.
>
> Secondly, we have not made any specific recommendations in relation to a problem thrown up by the decision of the Court of Appeal in *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Lt*d. The particular problem there was as follows. A tenant had assigned a registered lease. The assignee did not register the assignment. The assignor then exercised a break clause and successfully determined the lease. This case caused considerable concern and we explored a number of ways in which it might be resolved in the Consultative Document. However, we have decided that no reform is needed because the law already provides an adequate remedy. Where a seller of land has executed a transfer of a registered title, he or she holds that land on a bare trust for the buyer until the buyer is registered as proprietor. If the seller purports to dispose of the land after it has been transferred but before registration, he or she commits a breach of trust for which the usual remedies exist. The problem thrown up by the *Brown & Root* case will disappear when electronic conveyancing is introduced, because the making of dispositions and their registration will occur simultaneously.[7]

The Law Commission's revised recommendations, amended in the light of responses to the consultation document, were published on 10 July 2001.[8] Although the *Land Registration Bill* was introduced in the House of Lords on 21st June 2001, the Explanatory Notes to the Bill state that it implements the recommendations contained in *Land Registration for the Twenty-First Century: A Conveyancing Revolution.*[9]

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5 *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, Law Com 271, HC 114 July 2001, para 1.17

6 See page 12 below

7 Law Com 271, paras 1.19 & 1.20

8 *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, Law Com 271, HC 114 2001

9 HL Bill 2 - EN para 3

This joint report contains a very detailed discussion of policy behind the recommendations and full explanatory notes on each clause of the draft Bill. During the debate on Second Reading of the *Land Registration Bill* Peers questioned why the Bill had been introduced prior to the publication of the joint working group's revised recommendations.[10] Baroness Scotland of Asthal (the Parliamentary Secretary, Lord Chancellor's Department) replied that the report would not materially affect the clauses of the Bill under consideration but would "outline matters in great depth".[11]

Because of the wealth of background and explanatory material contained in *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, and also in the Explanatory Notes to the Bill,[12] this paper does not attempt to duplicate that work but focuses instead on debate on the Bill during its passage through the House of Lords.

II The Bill's objectives

The joint working group described the fundamental objective of the Bill as follows:

> …under the system of electronic dealing with land that it [*the Bill*] seeks to create, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional enquiries and inspections.[13]

The working group concluded that certain specific measures would be necessary to make it possible for the Bill to achieve its fundamental objective, namely:

(1) all express dispositions of registered land will have to be appropriately protected on the register unless there are very good reasons for not doing so;
(2) the categories of overriding interests will have to be very significantly reduced in scope; and
(3) dispositions of registered land will have to be registered simultaneously, so that it becomes impossible to make most dispositions of registered land except by registering them. This aim will be possible only if conveyancing practitioners are authorised to initiate the process of registration when dispositions of registered land are made by their clients. This is a very significant departure from present practice.[14]

It is believed that a change in attitude will be required in regard to the need for people to register their rights over land. The fact of registration, and registration alone, will confer

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10 HL Deb 3 July 2001 c 787
11 HL Deb 3 July 2001 c 799
12 HL Bill 48-EN
13 Law Com No 271, para 1.5
14 ibid para 1.8

title in accordance with the fundamental principle of a conclusive register which underpins the Bill.[15]

III The Bill's key features: an outline

A. Electronic conveyancing

Land Registration for the Twenty-First Century: A Conveyancing Revolution advises that:

> The Bill will create a framework in which it will be possible to transfer and create interests in registered land by electronic means. It is envisaged that, within a comparatively short time, it will be the only method of conducting registered conveyancing. As we have indicated above, an essential feature of the electronic system when it is fully operational is that it will be impossible to create or transfer many rights in or over registered land expressly except by registering them. Investigation of title will be almost entirely online. It is intended that the secure electronic communications network on which the system will be based, will be used to provide information about properties for intending buyers. It will also provide a means of managing a chain of transactions by monitoring them electronically. This will enable the cause of delays in any chain to be identified and remedial action encouraged. It is anticipated that far fewer chains will break in consequence and that transactions will be considerably expedited. Faster conveyancing is also likely to provide the most effective way of curbing gazumping. The process of registration under the electronic system will be initiated by solicitors and licensed conveyancers, though the Land Registry will exercise control over the changes that can be made to the register. Electronic conveyancing will not come into being as soon as the Bill is brought into force. It will be introduced over a number of years, and there will be a time when both the paper and electronic systems co-exist.[16]

The same document describes present conveyancing practice in relation to unregistered land and how it is anticipated that electronic conveyancing will work.[17] The bare bones of the electronic system seem to be:

- The numerous legal rules requiring land transfer documents to be (a) in writing and (b) signed, will be abolished, so far as is necessary to facilitate use of an electronic system.
- Documents will be capable of being created and signed electronically, subject to certain conditions.
- The e-conveyancing system will be operated through a secure electronic communications network, controlled by the land registry, which will be used to conduct all stages of an e-conveyancing transaction in electronic form.

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15 ibid para 1.10
16 ibid para 1.12
17 ibid paras 2.43-2.58

- Certain persons, probably solicitors, will be authorised to use the secure network and will 'sign' electronic documents on their clients' behalf by means of 'dual key cryptography'.
- When a transaction is completed, the register will immediately show the name of the new owner in place of the old; this replaces the so-called 'registration gap' when months can elapse between completion of a deal and registration of the new owner by the land registry.[18]

B. Adverse possession

Adverse possession is the process by which a squatter can acquire title to land after having 'adversely possessed' it for 12 years. The Bill will create new rules in relation to registered land that will confer greater protection against the acquisition of title by persons in adverse possession. This is consistent with the Bill's objective that registration alone should confer title:

> The essence of the new scheme is that a squatter will be able to apply to be registered as proprietor after 10 years' adverse possession. However, the registered proprietor will be notified of that application and will, in most cases, be able to object to it. If he or she does, the application will be rejected. However, the proprietor will then have to take steps to evict the squatter or otherwise regularise his or her position within two years. If the squatter is still in adverse possession after two years, he or she will be entitled to be registered as proprietor. We consider that this new scheme strikes a fairer balance between landowner and squatter than does the present law. It also reflects the fact that the basis of title to registered land is the fact of registration, not (as is the case with unregistered land) possession.[19]

C. Other changes

A summary of the other main changes that the Bill will make is listed in *Land Registration for the Twenty-First Century: A Conveyancing Revolution;* this list is reproduced below:

> - the requirement of compulsory registration of title is to be extended to leases granted for more than 7 years, with power to reduce the length of registrable leases still further;
> - in favour of those dealing with them, owners of registered land will be presumed to have unrestricted powers of disposition in the absence of any entry on the register;
> - the rules as to the competing priority of interests in registered land will be clarified and simplified;

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[18] Lovells Property Newsletter, September 2001

[19] ibid para 1.13

- the protection of rights in or over registered land will be simplified and improved by the extension of notices and restrictions and the prospective abolition of cautions and inhibitions;
- the range of overriding interests will be significantly restricted in their scope: the ambit of particular categories of overriding interests will be narrowed, some categories will be abolished altogether and others will be phased out after 10 years;
- it will become possible to access the history of a registered title (to the extent that the Registry has it) if there is a reason to see it;
- charge certificates will be abolished and land certificates will have a much less important role;
- Crown land, including much of the foreshore around England and Wales, that is not presently registrable will become so; and
- a new system of independent adjudication of disputes arising out of disputed applications to the registrar will be set up.[20]

IV Debate in the Lords

This section focuses on the main aspects of the Bill that have been debated during the Bill's passage through the House of Lords.

A. When title must be registered

The Bill will increase the scope of compulsory and voluntary registration. This will lead to more interests in land being protected by registration and should assist the process of making the register as complete and accurate a reflection of the state of the title of a piece of land at any given time as is reasonably practical.

Clause 4 [*when title must be registered*] sets out the events that will trigger the compulsory first registration of title. During the debate on Second Reading Earl Caithness described clause 4 as perhaps one of the most controversial clauses in the Bill.[21] Under current provisions only a lease with more than 21 years to run may be registered voluntarily.[22] The Bill provides that the transfer of a legal lease with more than seven years to run will trigger compulsory registration. This is regarded as a significant change to the present law. Responses to the joint consultative document revealed "no clear consensus from the answers of those who responded to the point, though there was support for having a power to reduce the length of registrable leases at a later date if, after consultation, there was support for such a change."[23] Debate in the Lords on this aspect of clause 4 similarly revealed "no clear consensus".

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20 ibid para 1.14
21 HL Deb 3 July 2001 c 781
22 *Land Registration Act 1925*, section 8(1)
23 Law Com No 271, para 3.14

In Grand Committee Baroness Buscombe moved amendments that were designed to reduce the length of lease that must be registered from 21 years to 14 years (instead of seven). She argued that such a reduction would impose a smaller initial burden on the property industry, the conveyancing profession and the Land Registry:

> The proposal to make all seven-year and longer leases compulsorily registrable is a major change in the law. It will cause equally major changes in practice, all of which are best introduced by stages thereby enabling the industry and the professions to become familiar with the new system without undue pressure, and also enabling any problems that may emerge to be tacked before they become widespread. Any leaseholders who wish to apply for voluntary registration of seven-year leases will be able to do so under clause 3(3), if they believe that the benefits of registration are worth having.[24]

The Baroness quoted from a briefing provided by the Country Landowner's Association in support of her amendment:

> By making such leases compulsorily registrable landlords and tenants will be put to greater expense. The current consultation paper on business tenancies, rightly, seeks to remove some of the more cumbersome procedures regarding obtaining exclusions from the security of tenure provisions of the Landlord and Tenant Act 1954 Part II. Yet by reducing the qualifying term to 7 years, in the CLA's opinion, an unnecessarily bureaucratic burden is going to be placed on both landlords and tenants and their advisers.
>
> The introduction of such leases into the realms of compulsory registration would also impact upon many farm business tenancies which at present do not need to be concerned with registration since their term is rarely more than 21 years. Many of the CLA's members are parties to such tenancies and consequently, given the current state of the rural economy should not be subjected to any increase in the bureaucratic burden that will be brought to bear by this enactment.

The Baroness returned to the matter on Report[25] and Third Reading where she once again moved amendments to reduce the length of lease that must be registered from 21 to 14 years (rather than 7). Her amendment was negatived on a division during the debate on Third Reading.[26]

On Second Reading Lord Harrison expressed support for reducing the length of leases to be compulsorily registered down to three years.[27]

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[24] HL Deb 17 July 2001 c 1385
[25] HL Deb 30 October 2001 cc 1305-6
[26] HL Deb 8 November 2001 cc 307-11
[27] HL Deb 3 July 2001 c 785

Baroness Scotland explained the reasoning behind the choice of seven years in Grand Committee:

> We believe that the Bill is more likely to achieve the intended aim without the amendment. Increasing the length of leases that will be subject to compulsory registration would, we think, limit the improvements in the market that the Bill will bring and impede progress towards the realisation of the Bill's overall objectives.
>
> Using the registered system saves money for both domestic and commercial lease transactions. As was helpfully mentioned on Second Reading by the noble Earl, Lord Caithness, who I see is now in his place, agricultural leases will also benefit. As many have pointed out, there is, indeed, a cost to registration. People taking out a new lease would be put to the additional expense of preparing and making an application to the Land Registry. Those costs are not insignificant. We estimate that they may amount to a little over £100 an average transaction.
>
> However, unregistered conveyancing transactions are significantly more complicated than those drawn up under the simpler, more certain law applying to registered transactions. The name and title of any existing or intermediate leaseholders, and the quality of their title, is easier to establish, as is the identity and quality of title of the freeholder. Even if the conveyancing transaction remains a paper one, it should be very much quicker. Therefore, although we understand the concern that has been expressed, when one looks at the market there appears to be overwhelming support for the reduction that we propose. Conservatively, we estimate that some two and a half hours could be saved on each transaction. It is a matter that we believe will inure to the benefit of the market and of all those who wish to take advantage of the new scheme outlined in the Bill.[28]

The Baroness reiterated these arguments on Report where she also noted that making all leases registrable would add 5% to the annual workload of the Land Registry:

> Issues of feasibility have, therefore, been considered carefully during the preparation of the Bill. The registry is confident that its modernised system could absorb the extra work that would result from leases over seven years being registrable immediately the Bill is implemented.[29]

In *Land Registration for the Twenty-First Century: A Conveyancing Revolution* the Law Commission and Land Registry summarised their reasons for recommending the registration of all leases with 7 or more years to run:

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[28] HL Deb 17 July 2001 c1385
[29] HL Deb 30 July 2001 c 1308

> It is absurd to continue to maintain two distinct and already very different systems of conveyancing, the registered and the unregistered. These two systems will diverge still further not only as a result of the introduction of electronic conveyancing, but also because of the other reforms that this Bill will bring about. In principle, as we have recommended in Part II, we should move to a system of total registration as soon as is reasonably practicable.
>
> The business lease is, in commercial terms, one of the most significant dealings with land. However, it is currently excluded from the benefits of registration, because such leases are almost invariably granted for periods of 21 years or less. This is an indefensible omission. First, it is a considerable barrier to our eventual goal of total registration. Secondly, it means that it will not be possible to grant and make dispositions of such leases electronically. Thirdly, the register of title is a public document and an increasingly important source of public information about land. There is no obvious justification for excluding a significant body of leasehold property from this source of information.
>
> As we mentioned above, there was support on consultation for the recommendation in the Consultative Document, that the Bill should confer a power, exercisable by statutory instrument, to reduce the length of lease that was capable of being registered voluntarily. The Bill implements that proposal, and confers power on the Lord Chancellor to reduce the term by order after prior consultation. It is likely that, when electronic conveyancing is fully operative, the period will be reduced to include all leases that have to be made by deed — in other words, those granted for more than three years. The move to electronic conveyancing should make it possible to register such short leases and ensure that they are removed when they have terminated. This will virtually eliminate the need to have recourse to unregistered conveyancing for the future.[30]

Baroness Scotland expressed "great sympathy" with an amendment moved by Lord Goodhart during Grand Committee that would have required, whenever a registrable lease or a protected charge was granted out of an unregistered estate, the registration of the estate itself.[31] She explained that the option had been discussed in detail but had been rejected because "it could not be made to work":

> The requirement to register the superior estate when specific leases are carved out of it would catch the superior title to a short lease. In some cases that lease could relate only to a very small area of the total landholding. That would be a disproportionate effect of a deal of that nature and the disproportion could only be increased by the shorter length of leases that give rise to first registration under the Bill. There would also no doubt be processing difficulties for large organisations which have portfolios of short leases that may come up for renewal all at the same time.[32]

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30 Paras 3.15-3.17
31 HL Deb 17 July 2001 cc 1389-1390
32 HL Deb 17 July 2001 c1390

The Baroness emphasised the Law Commission and Land Registry's enthusiasm for the general extension of compulsory registration but noted that compulsion should be avoided unless it is clearly required for the common good. Making the registration of all land compulsory at this time has been rejected. It is felt that the changes introduced by the *1997 Land Registration Act* should be given time to "bed down." A further barrier to the extension of compulsory registration is the difficulty in devising a system other than one that operates on the disposition of the land in question; there is a need for any system of compulsion to comply with the European Convention on Human Rights.[33] The final reason given for not extending compulsory registration is the desire not to over-stretch the resources of the conveyancing and land registration professions.[34] The Law Commission and Land Registry have recommended that the need for further action in this area should not be considered until five years after the current Bill has been brought into force.

The power that the Bill would give the Lord Chancellor to introduce compulsory registration for leases of under 7 years (clause 5)[35] was also discussed in Grand Committee. Baroness Buscombe moved an amendment to prevent this power being used to introduce compulsory registration for leases of 5 years or less:

> Five year leases are very common. They are usually occupational business, residential or farming leases and are not assigned as frequently as longer interests. Therefore we believe that there is no pressing practical need to register them, either to ensure that a purchaser of the superior interest finds out about them or to make it easier to buy and sell them.[36]

She also argued that any amendments should be introduced by primary legislation.[37] Baroness Scotland agreed that there was a length of lease below which it would be sensible not to require compulsory registration but did not agree with the amendment:

> Under contract law, leases granted for a period of three years or less do not have to be in written form as a deed. The logical break-off point is three years. The five year leases have to have a deed. Requiring registration of leases of less than three years would therefore be likely to introduce new inflexibilities into the current arrangements, and wholly new costs. It is very difficult indeed to envisage a Lord Chancellor contemplating the exercise of his powers to reduce the qualifying term of the leases to bring unwritten leases within the scope of registered conveyancing. Leases of more than three years are therefore likely to be the practical limit of the power.
>
> However, there would be significant problems in tying a future Lord Chancellor's hands by preventing him or her from reducing the qualifying period below five

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33 HL Deb 17 July 2001 c 1391
34 ibid
35 Power to extend section 4
36 HL Deb 17 July 2001 c 1392
37 ibid

> years and one month. First, it would slow down the extension of the benefits of registered conveyancing throughout the leasehold market. It would therefore leave unregistered conveyancing with a significant role for the foreseeable future, leaving in place the difficulties that follow from attempting to run two essentially separate systems of land law alongside each other.[38]

Clause 116 [*power to reduce qualifying term*] will give the Lord Chancellor the power to reduce the length of registrable leases after consultation with "such persons as he thinks appropriate". In Grand Committee and on Report Baroness Buscombe moved amendments to require the Lord Chancellor to consult with the Rules Committee[39] before reducing the qualifying term.[40] Lord Goodhart also remarked that orders made under clause 116 should be subject to the affirmative, rather than the negative, resolution procedure.[41] Baroness Scotland explained in Grand Committee that the approach throughout the Bill is to give the Lord Chancellor a duty to consult without listing the different bodies and stakeholders that might have an interest; she said that it was not the Rules Committee's function to represent the public interest generally. She agreed to give "further consideration" to the affirmative resolution issue.[42]

On Report Baroness Scotland said that she saw "little additional benefit" in incurring the delay involved in the use of the affirmative resolution procedure under clause 5. She explained at some length how the consultation and parliamentary scrutiny of delegated legislation under the Bill would be provided for.[43] This is discussed below in section **K**.[44]

In Grand Committee[45] and on Report[46] Baroness Buscombe moved amendments to exclude leases of a particular kind from compulsory registration where the landlord's title is unregistered, ie reversionary leases where there is a renewal to an existing tenant. She gave the following reasons for the amendments:

> We made the reason for making such a "reversionary" lease very clear in Committee. That reason is given in paragraph 3.32 of the report. It is that if that is not registered, a buyer of a landlord's interest may not be able to find out about it before the term actually begins because the tenant would not be in possession. As we said in Committee, that objection does not apply when the reversionary lease is a renewal to an existing tenant. In that situation there is no practical need for such a lease to be registered merely because it does not take effect immediately.

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38 HL Deb 17 July 2001 c 1394

39 The Rules Committee is a body of experts, chaired by a High Court Judge, that scrutinises all rules made under the *Land Registration Act 1925* before they are laid before Parliament.

40 HL Deb 19 July 2001 cc 1635-6 & HL Deb 30 October 2001 cc 1313-14

41 ibid

42 ibid

43 HL Deb 30 October 2001 cc 1315-18

44 Pages 52-54

45 HL Deb 17 July 2001 cc 1386-7

46 HL Deb 30 October 2001 cc 1309-10

> As the Bill stands, a renewal for a year--or for an even shorter period--that was granted during the midsummer in relation to a lease that will expire at Michaelmas would be registrable and, as we said, a trap.
>
> We have taken notice of what the Government said in Committee in response to our proposals about the need to reduce inquiries relating to matters that are not on the register. The amendments are therefore restricted to a reversionary lease to a tenant whose existing lease is not subject to registration. We accept that a tenant who is within the registration system can fairly be required to register a renewal. When the tenant is not already within the system, we think that the balance of advantage is emphatically on the side of the amendments. A buyer of the landlord's interest will have to check what the tenant's rights are. It is no real burden for such a buyer to have to ask not only, "Is this the lease?" but also, "Is there any other relevant document?".
>
> A tenant renewing a comparatively short lease may well do so without specialist advice. The Bill as it stands would create a very significant trap. If the renewed lease is registrable but unregistered, it will always be overridden by a disposition of the landlord's interest not only before it falls into possession but at any time thereafter during the renewed term.
>
> Paragraph 1(a) of Schedule 3 will stop a registrable reversionary lease from ever being an overriding interest in the common situation in which the landlord's interest is registered. I beg to move.[47]

Baroness Scotland did not accept that there was merit in the proposed amendments:

> Our view of such amendments, despite the noble Baroness's eloquence, has not, I am afraid, changed since our debate in Committee. Noble Lords may recall that in Committee I mentioned that existing provisions in the Bill will give effect to a recommendation in the Law Commission and the Land Registry joint consultative document that was unanimously supported by all those who responded to it.
>
> The amendments would place an unreasonable burden on the intending buyers. They would have no way of knowing from the register that the reversionary lease existed and would have to inquire of an existing tenant in circumstances where they might not expect to have to incur that additional step; for example, where they have had produced to them by the seller the tenant's existing lease which makes no option of, say, an option for a further grant.
>
> If, as can happen with estates of some size, the intending buyer is purchasing a portfolio of properties, the problem could be magnified. With the advent of electronic conveyancing, the number of inquiries should be kept to a minimum, so that a buyer can rely as much as possible on the entries in the register. Where such a reversionary lease is not on the register, an intending buyer of, say, the

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[47] HL Deb 30 October 2001 cc 1309-10

> freehold reversion will not know from the register of the existence of the lease. Furthermore, the fact that a new lease taking effect more than three months in the future has to be registered enables the buyer to protect his or her position by registering an estate contract or by making a priority search under Clause 72.
> The Bill seeks as far as possible and practicable to make the register as comprehensive as possible, particularly with the advent of e-conveyancing. The proposed amendments would hinder that objective and make the law more complicated, by excluding from the category of reversionary leases in Clause 4 or Clause 27 certain leases by reference to the status of the tenant under the lease.
>
> Another if perhaps less-serious problem is the possibility that the first lease dealt with under the subsection could, in theory, also be a reversionary lease of some sort. If that were the case, the tenant would not be in occupation under either lease. That would only multiple the problems facing the prospective buyer.
>
> I readily accept that in certain circumstances the reversionary lease that will be required to be registered may be short. But it is a matter of balancing that against the benefits to buyers and others of a more comprehensive register. Although the noble Baroness points to short leases being caught, the amendments would catch also relevant leases not exceeding seven years. The discovery of such a reversion by a buyer after completion of the purchase would cause him or her financial and emotional distress. In light of that explanation, I invite the noble Baroness to withdraw the amendment.[48]

In Grand Committee and on Report amendments were moved to probe the question of the payment of Stamp Duty on replacement leases.[49] Lord Bassam, speaking for the Government, provided clarification on Report:

> The amendment was tabled in Committee and we agreed carefully to consider it. If the responsible estate owner fails to apply for first registration of title within the period of registration stipulated in Clause 6, the transfer, grant or creation of the legal estate becomes void as a result of the application of Clause 7(1). It is therefore necessary for the legal estate to be re-transferred, re-granted or recreated by a new and additional document.
>
> Stamp duty should not have to be paid on both the original document that dealt with the transaction and the subsequent, replacement document. I am therefore delighted to be able to confirm that the Stamp Duties Management Act 1891 already addresses that issue. Section 9 of that Act states that, subject to the production of evidence as to the facts, and to compliance with stamp duty regulations, allowance is to be made by the Commissioners for stamps spoiled in certain situations. Section 9(7)(d) then explains how such an allowance is to be made, by providing that,

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48 HL Deb 30 October 2001 cc 1310-11

49 HL Deb 17 July 2001 c1397 & HL Deb 30 October 2001 c 1322

> "Allowance is to be made when an instrument executed by any party thereto becomes void for want of registration within the time required by law".
>
> I can therefore reassure your Lordships that no amendment needs to be made to the Bill, as the necessary provision is already made by existing legislation. I trust that, with that warm reassurance and careful recollection of Victorian legislation, the noble Baronness will feel able to withdraw her amendment.[50]

B. Cautions against first registration

Cautions against first registration provide a means by which a person, having some estate or interest in the land affected, may be notified of an application for first registration. The principal changes to the present law that the Bill will make are as follows:

- First, it will place the register of such cautions on a statutory footing and make provision for its alteration by analogy with the provisions applicable to the register of title.

- Second, it will make it impossible for a person to lodge a caution against first registration in relation to his or her own estate, where that estate is registrable. The entry of a caution against first registration is not intended to be a substitute for the registration of an estate where such registration is possible.

In Grand Committee Baroness Buscombe moved an amendment to clause 15 [*right to lodge*] of the Bill to retain the ability of the holder of a registrable interest to enter a caution against first registration. She referred to strong support from the Charities' Property Association for this amendment:

> It is possible that the Law Commission will recommend compulsory registration of all land. Currently there is only encouragement of voluntary registration of land which means that there will continue to be unregistered land for the foreseeable future.
>
> For many endowed charities, such as members of the Charities' Property Association, this could have a negative impact, particularly because cautions against first registration are to be abolished. In effect, the Bill will not provide them with the same level of protection against squatters for their unregistered land in contrast to the extra protection for registered land being conferred by Part 9 of the Bill.
>
> In some cases the land that endowed charities own is unregistered because it has been owned for hundreds of years and full legal documentation does not exist. It would therefore, we suggest, be extremely expensive and very complicated for endowed charities to register it.

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[50] HL Deb 30 October 2001 c 1322

> Currently, endowed charities with unregistered land can register a caution against first registration, as can others, by lodging a plan with the Land Registry and a statutory declaration for a fee of £40. The cautioner would then be notified of any application by a third party--such as, for example, a squatter--to register the land. Clause 15 and Schedule 12 remove that right.
>
> This is a very important and fundamental point with regard to the Bill. On that basis, I beg to move.[51]

Lord Goodhart gave his support to the Baroness's amendment. Baroness Scotland reassured Baroness Buscombe that the new prohibition would not apply immediately but would take effect two years after the rest of clause 15 comes into effect.[52] She did not, however, accept the need for the amendment:

> I hear what the noble Baroness says about it not being fair to require registration, particularly in relation to charities. But requiring registration in order to get the benefits is not being heavy handed, given the considerable benefits that we genuinely believe will accrue to those who register their interests. All owners have the opportunity to benefit from this system, which will make the dealings in their property quicker, surer and cheaper. Registration is not expensive and cautions have been useable for this purpose only since 1998.
>
> Although we understand the concern, we genuinely believe that the reality will not be either as onerous or as burdensome as many fear. For the reasons I have already given, cautions against first registration under Clause 15 must not be used as an alternative to substantive legislation. To allow otherwise would be fatally to compromise our ambition of a complete register.[53]

Baroness Buscombe's amendment was negatived on a division in Grand Committee.

Clause 18 [*cancellation*] provides a procedure for the cancellation of cautions. Viscount Bridgeman moved an amendment in Grand Committee to specify a minimum period in the rule making powers to allow the recipient of a notification to respond and protect his or her rights.[54] Baroness Scotland said that the rules stipulating the period of notice will be subject to the scrutiny of the Land Registry Rules Committee which will be 'well placed to balance the various interests and take a rounded view on what the appropriate period should be.'[55] The Viscount said that the Minister's response addressed his concerns on that point. The Viscount returned to clause 18 on Report where he moved an amendment to give a landowner the right to apply for a caution to protect a time limited interest[56] to be cancelled once the time period has expired.[57] Baroness Scotland agreed

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51 HL Deb 17 July 2001 cc 1412-3
52 Under the transitional arrangements in schedule 12 paragraph 13.
53 HL Deb 17 July 2001 c 1414
54 HL Deb 17 July 2001 c 1418
55 HL Deb 17 July 2001 c 1419
56 eg an easement granted for a specified term

that the detailed arrangements for giving effect to the Bill would have to take account of the circumstances envisaged in the amendment but did not accept that it was necessary to amend the Bill to achieve this end.[58]

On Report Lord Bassam moved a Government amendment to clause 22 [*supplementary*] to provide for rules to specify who may be regarded as the cautioner for the purpose of objecting to the removal of a caution, or for seeking a withdrawal of a caution. The purpose of the clause has therefore been widened to cover a larger group of persons who might legitimately be entitled to the benefit of the caution.[59]

C. Dispositions of registered land

The Bill will give statutory effect to the presumption that a registered proprietor is taken to have all the powers of disposition that an absolute owner of a registered estate or charge would have under general law unless there is an entry in the register that limits those powers.

Clause 23 [*owner's powers*] states the unlimited[60] powers of an owner to deal with his/her estate. The clause will remove the possibility of creating a legal mortgage by demise or sub-demise over registered land.[61]

In Grand Committee Lord Goodhart picked up on a point raised in paragraph 7.6 of the joint Law Commission and H M Land Registry report:

> The Law Commission proposed in its consultative document that a deed should not be necessary in order to create a registered charge giving a chargee powers under Section 101 of the Law of Property Act. According to a subsequent report, that proposal was accepted by most respondents. However, the Law Commission changed its mind simply on the ground that this particular provision would not be necessary when electronic conveyancing was introduced, and the commission expected that only a relatively short time would elapse before its introduction.
>
> I am slightly more pessimistic about this matter than the Law Commission. It seems to me that there is a possibility that e-conveyancing could be, not a matter of months, but several years off. Therefore, I cannot see any objection to removing as an interim stage the requirement that a charge should be by deed. The provision does not seem to serve any useful purpose. The Law Commission appears to be happy in principle that that obligation should be removed, so why not allow its removal? The aim of this amendment, and of Amendment No 28 which is grouped with it, is that this should be possible. I beg to move.

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57 HL Deb 30 October 2001 c 1337

58 HL Deb 30 October 2001 c 1338

59 HL Deb 30 October 2001 c 1341

60 They will have the power to do anything that is permitted under the general law.

61 See section 27(1) of the *1925 Land Registration Act.* These are so seldom employed that they have been deemed to be obsolete.

Amendment 28 would have introduced two further ways of charging a property.

Baroness Scotland disagreed with the proposition that charges were a long way from being dealt with electronically. She explained why the changes proposed in Lord Goodhart's amendment had not been taken forward:

> The Bill is setting the framework for electronic documentation and conveyancing. As I said earlier, the first of those electronic documents is likely to be an electronic charge. This is likely to be taken forward in the near future. Again, I tempt the noble Lord as regards the possible date. The precise form of written instrument used to create a charge will therefore cease to be relevant very quickly.
>
> As I said, the current methods are simple to use. No-one will be prejudiced by the failure to introduce this change in the run-up to electronic charges. There is little point in permitting this additional method for a short space of time, when there are so many other longer-term adjustments that will need to be made.[62]

In regard to amendment 28, she noted that responses the consultation document had revealed that the proposed methods of making a charge (contained in the amendment) were not now used.[63]

On Report the Government and the Opposition moved amendments to clause 23 to deal with the question of how a legal charge could be defined when what it is said to be equivalent to can no longer be created. This problem arises because the Bill will take away the power to create a mortgage by demise. Baroness Scotland explained the Government's amendment:

> Clause 23(1)(a) states that an owner's powers to deal with a registered estate do not extend to the creation of a mortgage by demise or sub-demise. As your Lordships will recall from Committee, that is a simplification of the existing law, introduced because those methods of creating mortgages are not used any more. I very much appreciate the welcome that the noble Baroness gave to that change.
>
> Noble Lords opposite helpfully spotted that Section 87 of the Law of Property Act 1925 provides that a mortgagee of a charge expressed to be by way of mortgage has the same protection, powers and remedies as a mortgagee by demise or sub-demise. The amendment should make the intended effect abundantly clear.
>
> However, we respectfully suggest that it is necessary to retain the reference to the creation of mortgages by demise or sub-demise, as that will still be possible in

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62 HL Deb 17 July 2001 cc 1422-3
63 HL Deb 17 July 2001 c 1423

> relation to unregistered land. It is beyond the scope of the Bill to legislate in respect of such land.
>
> We prefer our amendment to Amendment No. 26, as it inserts a new subsection directly into Section 87 of the Law of Property Act 1925. It would be more helpful to insert the new subsection directly into the section whose interpretation it is designed to assist.[64]

Baroness Buscombe and the Earl of Caithness declared that they preferred their own amendment to that of the Government and asked the Government to reconsider the matter.[65]

Clause 24 [*right to exercise owner's powers*] provides that an owner's powers can be exercised by the registered proprietor or someone entitled to be registered. Baroness Buscombe sought to amend the Bill in Grand Committee to limit the rule making powers under the clause (24(2)). She sought to ensure that these powers could not impose substantive restrictions on the powers that could be exercised, who can exercise them, or what provisions parties to dispositions can agree.[66] Baroness Scotland agreed that the issue merited further consideration and at Report Stage she moved an amendment to delete the rule-making power from the clause.[67] At Report Stage an amendment to clause 25 [*mode of exercise*] was moved by Baroness Buscombe which was aimed at limiting the rule making power as to the form of a registrable disposition.[68] In response, Baroness Scotland stated that there was no intention to curb owners' powers to deal with their registered estates beyond what was required to make the system work in an effective manner, and that there was no intention to prescribe anything other than the heads of content to be contained in a disposition.[69]

The effect of clause 26 [*protection of disponees*] is that a disponee will be entitled to proceed, in the absence of an entry in the register, on the basis that there are no limitations on the owner's powers and the disponee's title. This clause reflects one of the major principles in the Bill.

In Grand Committee Baroness Buscombe moved amendments to clause 26:

> They would ensure that where local authorities or other statutory corporations are so constituted that they can only perform acts which the relevant statute authorises, and purported actions not so authorised are absolutely void, such ultra vires acts are not validated or partly validated because, or in so far as, they happen to affect registered land. It is also important to ensure that anyone dealing

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64 HL Deb 30 October 2001 cc 1343-4
65 HL Deb 30 October 2001 cc 1344-5
66 HL Deb 17 July 2001 c 1424
67 HL Deb 30 October 2001 c 1345
68 HL Deb 30 October 2001 c 1346
69 HL Deb 30 October 2001 c 1347

> with such an entity is not caught out by statutory limitations on its powers. I beg to move.[70]

Baroness Scotland responded with the advice that a registered proprietor who is subject to statutory restrictions on his powers should enter a restriction. She did not see why the risk of a proprietor breaching a statutory restriction should be placed on a buyer.[71] She also rejected the amendment to impose a duty on the Lord Chancellor to make rules to ensure that when the powers of a body corporate to deal with its land are limited, for whatever reason, that that fact is recorded on the register by the entry of a restriction. She accepted that the aim of the amendment was to prevent a void transfer operating to pass legal title in such cases under clause 26 and agreed that it was desirable to prevent such situations arising. However, she reassured the Grand Committee that the registration of compulsory interests in these circumstances was already frequently undertaken by the registry and that there was no intention to change that approach.[72] Baroness Buscombe moved the same amendment on Report and Baroness Scotland re-stated the Government's objections.[73]

Clause 27 [*dispositions required to be registered*] sets out those dispositions of registered land that must be completed by registration if they are to operate at law. Baroness Buscombe moved amendments in Grand Committee to 'ensure that easements and rights of entry for short terms of years do not have to be registered or noted on the title of servient land.'[74] Lord Bassam of Brighton rejected the amendments on the grounds that it was against the purpose of the Bill to expand the categories of interest that do not have to be registered. It was conceded that a short non-registrable lease may contain easements over, for example, common parts of a block of flats, and that these should not have to be registered. Baroness Scotland undertook to consider the matter further but was not persuaded by similar amendments moved at Report Stage.[75]

D. Notices and restrictions

The Bill seeks to make title to registered land more secure and also attempts to enhance the protection given to the interests of third parties over registered land. The Bill does this by simplifying the methods of protecting such interests in the register and, at the same time, extending the protection that an entry in the register gives.

Clause 34 [*entry on application*] provides that a person claiming to have the benefit of an interest capable of being the subject of a notice may, subject to rules, apply to the registrar for entry of an agreed or a unilateral notice in respect of the interest. The clause

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70 HL Deb 17 July 2001 c 1426
71 HL Deb 17 July 2001 c 1426
72 HL Deb 17 July 2001 cc 1426-7
73 HL Deb 30 October 2001 cc 1348-9
74 HL Deb 17 July 2001 c 1428
75 HL Deb 30 October 2001 cc 1350-2

sets out the circumstances in which the registrar may approve an application for an agreed notice.

In Grand Committee Baroness Buscombe moved amendments to clause 34 to ensure that an agreed notice could be entered only if the registered proprietor, or someone entitled to be registered, made or consented to the application.[76] To explain the reasoning behind the amendment she referred to the joint Law Commission and Land Registry Report:

> Paragraph 6.22 to 6.31 of the Land Registration for the Twenty-First Century report describes the system in the Bill and indicates that it is intended not only to allow the entry of so-called agreed notices, which are not in fact consensual, to which reference is made in paragraph 6.24, but to go further and prescribe by rules that certain interests can be protected only by agreed notices without any procedure for cancellation on the proprietor's application. That is paragraph 6.25. It gives matrimonial home rights as an example.
>
> It seems wrong in principle to allow entries to be made without the proprietor's consent and, possibly, even without his knowledge and without allowing him to use the procedure in Clauses 35 and 36 to resolve the applicant's claim where it is disputed.[77]

Baroness Scotland responded thus:

> I hope that I shall be able to reassure the noble Baroness that the purpose of the provision is to give the Lord Chancellor power, for example, to prescribe that certain types of application will always be registrable as agreed notices. That is very similar to certain situations which arise under the present law, and the noble Baroness touched on that; for example, whereby notice can be entered of a wife's matrimonial home rights notwithstanding that the proprietor objects. If that power is to be exercised, the right to apply to the registry must be made expressly subject to rules as originally drafted. That need for such a wide rule-making power does not exist under the current law because the methods of protecting third party interests are rather different. As the law stands now, there is only a consensual form of notice, and unilateral action is taken by lodging a caution against dealings.
>
> Even with those different methods, the position is not straightforward. For example, rights under the Family Law Act 1996 are registered as notices even though they are not in fact consensual in the normal sense. Under the new arrangements, the registry can set out in rules a comprehensive statement of the interests which can be protected by a consensual notice and which can be protected by a unilateral notice. The difference between the two is significant. The registered proprietor may challenge the unilateral notice and seek its removal.

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[76] HL Deb 17 July 2001 c 1437
[77] HL Deb 17 July 2001 c 1437

> The advantage of setting out the detail in rules is that it will remain flexible and can be more readily updated in the future. I have already mentioned the Family Law Act 1996. It is apparent from that that the treatment of these different applications by the registry can depend on legislation outside of the sphere of land registration. There must be an ability to respond to those. That makes it more important that these details are left to rules because we cannot prescribe what future legislation may need to provide in relation to its operation and how that may impact upon the Land Registry's discharge of its duties.
>
> Having heard the reasons that I have given for the width of the rule-making power under this clause, I invite the noble Baroness to withdraw the amendment. I remind her of the role that will be played by the rule committee in that regard, which should give greater assurance. [78]

Baroness Scotland went on to clarify the circumstances in which it is envisaged that the registrar would approve an application for an agreed notice where the registered proprietor does not consent to the entry of the notice:

> The subsection [34(3)] states that the registrar is able to enter an agreed notice where he is satisfied as to the validity of the applicant's claim. An example would be where the applicant could establish to the registrar's satisfaction that the registered proprietor had granted him an easement.
>
> A more detailed example of how the amendment would work in practice might assist. When dealing with these issues, it is always difficult to think how they may apply in concrete terms. Perhaps I may pose one example. What if the registered proprietor granted an option in writing to X? X applied to have it protected by an agreed notice. The registered proprietor refuses to agree to that. X would be forced to enter a unilateral notice even though the registrar had seen the grant of the option and was quite satisfied that it was valid. At present the registrar is entitled and does enter a notice if an interest has been validly created even if the proprietor objects. It is a power which he exercises regularly and it should not be taken away from him because of its practical use. From what I have said, I hope that I have demonstrated why that third basis of approval of an application for registration of an agreed notice is necessary. It enables the practical way in which that matter has operated in the past to be carried forward and provides an appropriate level of flexibility and transparency. Therefore, I invite the noble Baroness to withdraw the amendment.[79]

Lord Goodhart was not satisfied with this explanation:

> We have here a claim which the registered proprietor is not entitled to dispute. The registrar may think that the validity of the claim has been proved to his

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78 HL Deb 17 July 2001 c 1438
79 HL Deb 17 July 2001 c 1439

> satisfaction. However, surely that is not a decision which should be taken without the possibility of a hearing.
>
> The situation is now entirely new. There is a possibility for unilateral notices as well as agreed notices. A unilateral notice is as good as an agreed notice subject only to the possibility that it might be cancelled as a result of the proprietor making a case against it. If it is as clear as that, the proprietor will not make a case. It is only where there is a dispute that the proprietor is likely to challenge a unilateral notice.[80]

Under clause 35 [*unilateral notices*], when the registrar enters a unilateral notice in the register he must give notice to the affected proprietor and to such other persons as may be prescribed. Baroness Buscombe moved an amendment in Grand Committee to ensure that the proprietor would know that an application had been made and also what its consequences might be in order that he or she might be able to make an informed decision as to what, if anything, to do about it.[81] Baroness Scotland preferred that such detail should be included in notices rather than on the face of the Bill.[82] On Report the Government moved an amendment to clauses 35 and 36 to allow rules to be made that will specify in detail who may apply for the removal of a notice or object to the removal of a caution.[83]

Clause 37 [*unregistered interests*] will give the registrar power to enter a notice in respect of an interest that is an interest of a kind mentioned in schedule 1, provided that it is not excluded by clause 33. This clause is part of the strategy of the Bill to eliminate, where practicable, overriding interests and ensure that they are entered in the register. The Government moved an amendment to clause 37 at Report Stage to provide that, when making an entry in the register, the registrar will be obliged to serve notice of that fact on persons specified in the rules.[84]

Clause 46 [*power of court to order entry*] gives the court the power to direct that a restriction ordered by it has "overriding effect" so that the restriction will override the priority protection given to an official search or the entry of a notice in respect of an estate contract. In Grand Committee Viscount Bridgeman moved an amendment to clarify the extent of the "overriding priority" that a court will be able to give to a restriction ordered by it under clause 46(1). Baroness Scotland gave the following explanation:

> It may help if I explain what "overriding priority" in Clause 46(3) refers to. Members of the Committee know that that can be found on page 18 at line 35. "Overriding priority" is not a free-standing statement about priority. That is

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80 HL Deb 17 July 2001 c 1439
81 HL Deb 17 July 2001 c 1440
82 HL Deb 17 July 2001 c 1441
83 HL Deb 30 October 2001 c 1342
84 HL Deb 30 October 2001 c 1353

because Clause 46(3) has to be read with Clause 72(4), which can be found on page 25 at line 35. Both provisions are new.

Subject to rules being made as to detail, Clause 72 will (as under the current Act) enable a buyer of registered land to apply for priority protection. That will give the buyer a priority period. If he or she lodges a transfer application within that period, any entry made in the register during the same time will take second place to the entry made in respect of the transfer. The clause also provides for priority protection in other circumstances.

Clause 72(4) sets out an exception to priority protection. If the earlier entry is one to which a direction under Clause 46(3) applies, the entry will not have priority over the earlier restriction entry.

To make that a little easier to comprehend it might be of assistance if I give an example of the way in which that arrangement may work. A claimant seeking substantial damages in a court case is anxious that the defendant does not dispose of assets, including a house which has a registered title, so that if the claimant wins, the defendant will have the means to pay the damages. The claimant believes that the defendant intends to sell the house and to place the sale money in a bank account overseas. He or she is aware that an intending buyer has priority protection under an official search. So the claimant applies to the court for a freezing order to prevent the defendant disposing of the house.

If the court makes the order, it might, as ancillary to it, order that a restriction be entered that prevents the registration of any dealing with the registered estate of the house. The court might go on to direct, under Clause 46(3), that the restriction overrides the priority protection enjoyed by the intending buyer.

Once the restriction was registered together with an entry as to its overriding priority, the direction would prevent the registration of any subsequent transfer to the intending buyer. That would be the practical effect that would be brought into play as a result of Clause 72(4).

So, to the extent that the amendment seeks to empower the court in relation to restrictions and priority periods, we genuinely believe that no amendment is required in view of the interaction between Clauses 46(3) and 72(4).

If, by referring in the amendment to ranking in priority ahead of estates and interests, the noble Viscount has in mind priority ahead of existing entries, we consider that that would amount to a form of rectification, and any order for rectification should be in accordance with Clause 65 and Schedule 4.

We know that the two clauses are new, but they work together. Although we understand the concerns expressed, we respectfully suggest that they are met by those two clauses working together.[85]

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[85] HL Deb 19 July 2001 cc 1600-1

E. Charges

The joint Law Commission and HM Land Registry report notes that, of the mainly "technical" changes that the Bill makes in relation to charges, only two are significant.[86] First, the law that governs the priority of further advances made by chargees will be recast so that it will coincide with current practice; a new method of making further advances is also offered.[87] Second, the Bill will impose a new duty on the registrar to inform existing chargees whose charges are protected in the register, of any overriding statutory charge when it is registered. [88]

In Grand Committee Baroness Buscombe moved an amendment to clause 50 [*overriding statutory charges: duty of notification*] to require the registrar to give notice to the persons affected by a claim that a statutory charge had priority over existing entries where priority was unclear or disputed. Baroness Scotland advised that clause 50 as drafted covered the situation envisaged in her amendment.[89]

Lord Bassam moved a Government amendment to clause 54 [*proceeds of sale: chargee's duty*] on Report and in so doing enlarged upon the purpose of the clause:

> Clause 54 is an important new provision. It affects the exercise of a mortgagee's duty when applying proceeds of sale of registered land; that is, when he has sold the property to repay the moneys due to him and there is a surplus left over. This clause states that a person shall be taken to have notice of anything in the register.
>
> This provision is needed because of a legal technicality, otherwise entries on the register would not count as notice for this purpose. Under the present law, a chargee should pay any surplus to the chargor unless he has been notified of the existence of a subsequent charge. Clause 54 changes the law and, as a result of the provision, the chargee will have to consult the register to determine who is entitled to the surplus. This will impose no significant burden as it is an easy search to do.
>
> However, the clause as originally drafted does not specify when such an inspection must be undertaken. When the property is sold by the chargee, the buyer will apply for registration of his title. In registering the buyer's title, the Land Registry will remove the entry relating to the charge of the chargee who sold, and also entries relating to any subsequent charges on the register. This means that if the chargee searches at the time when he is ready to release surplus funds, some time after the sale has occurred, the entries disclosing the existence of the other charges may already have been removed. The advent of electronic

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86 Law Com No 271 para 2.23
87 Clause 49
88 Clause 50
89 HL Deb 19 July 2001 cc 1603-4

> conveyancing could heighten the need for the inspection of the register to have occurred before the sale goes through.
>
> In order to make it clear when the inspection of the register must have occurred, Amendment No. 60 specifies that it is the moment immediately before the disposition on sale. I beg to move.[90]

F. Overriding interests

Overriding interests are interests that are not protected in the register but are still binding on any person who acquires an interest in registered land. The range of overriding interests is wide and includes many easements,[91] the rights of persons in actual occupation[92] and leases granted for less than 21 years.[93] The joint Law Commission and HM Land Registry report noted:

> Overriding interests present a significant impediment to one of the main objectives of the Bill, namely that the register should be as complete a record of the title as it can be, with the result that it should be possible for title to land to be investigated almost entirely on-line.[94]

The Bill seeks to restrict overriding interests as far as is possible. The guiding principle on which it proceeds is that interests should be overriding only where it is unreasonable to expect them to be protected in the register. The joint report describes the strategies that the Bill uses to try to achieve this objective:

> (1) defining the categories of overriding interests more narrowly;
> (2) excluding some expressly created interests from overriding status;
> (3) phasing out the overriding status of the more obscure interests after 10 years and allowing for them to be entered on the appropriate register without charge in the interim; and
> (4) strengthening mechanisms for ensuring that overriding interests are protected in the register if they are capable of being so protected.[95]

During Grand Committee Lord Goodhart moved an amendment to schedule 1 [*unregistered interests which override first registration*] of the Bill. He noted that, under the Bill, the only interests that would be overriding would be those of persons in actual occupation.[96] He argued that occupation under any form of contractual relationship should

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90 HL Deb 30 October 2001 c 1355
91 *Land Registration Act 1925*, section 70(1)(a)
92 ibid section 70(1)(g)
93 ibid section 70(1)(k)
94 Law Com No 271, para 2.24
95 ibid para 2.25
96 A person will be regarded as in actual occupation of land if he or she, or his or her agent or employee is physically present there.

be treated as giving an overriding interest to the actual occupier and to the other party to the contract.[97] Baroness Scotland replied stating that this would add a further overriding interest to those that already exist:

> It would require a buyer to make inquiries not only of the person in actual occupation, but also of any person from whom he or she holds the land by way of lease or licence. That is a significant extra burden for anyone and it would significantly undermine the objective of being able to do so on line.
> That is why the Law Commission consulted on this issue with a provisional recommendation that the rights of those entitled to rents or profits should cease to have an overriding interest. Its recommendation was strongly supported by those who responded.[98]

In Grand Committee and on Report Baroness Buscombe moved amendments to schedule 1 paragraph 2(1) and schedule 3[99] paragraph 2(1)(a) to "seek clarity and consistency in relation to beneficiaries as they are defined in the Bill":

> When we moved the amendments in Committee, we saw no justification for the discriminatory treatment of the beneficiary under the strict settlement, and we see none now. We accept that under existing legislation, interests under strict settlement do not constitute overriding interests. But, as the Law Commission pointed out at paragraph 2.69 of its third report on land registration in 1987, the distinction in the treatment of beneficiaries under strict settlements and beneficiaries under trusts of sale--now trusts of land--was probably unintended and was in principle unjustifiable. In the recent consultative document, at paragraph 563, the Law Commission and the Land Registry both readily accept that rights under strict settlement should be capable of existing as overriding interests. We agree wholeheartedly with that view.
>
> There is a further important consideration to which the Law Commission refers in its 1987 report. The strict settlement was the classical type of landed settlement, designed to preserve family estates from generation to generation. In that context, the need to protect the beneficial interests of persons in actual occupation will seldom, if ever, arise. However, one unintended consequence of the Settled Land Act 1925 has been the unintentional and informal creation of strict settlements in circumstances in which the machinery of the Act is inappropriate and often not properly implemented.
>
> In that context, the exclusion of beneficiaries under strict settlement who are in actual occupation of land is capable of operating unjustly. For example, a widow entitled to a life interest in the former matrimonial home under the will of her husband will be entitled to protection if in actual occupation only if the property were subject to a trust of sale. In the absence of that magic formula, which may

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97 HL Deb 17 July 2001 cc 1405-6
98 HL Deb 17 July 2001 c 1406
99 [unregistered interests which override registered dispositions]

> well have been omitted in a handmade or informal will, the widow will be entitled to no protection. When she is evicted, it will be cold comfort to her to know that she is one of comparatively few people who will be affected by the abandonment of the Law Commission's recommendation to extend the protection to persons in her position.[100]

Lord Bassam restated the Government's belief that the Bill's position was correct. He referred to responses to the 1998 consultation paper that had produced no evidence to show that the current provision was causing hardship.[101] On Third Reading Baroness Buscombe expressed a desire to 'test the opinion of the House' on this issue; her amendment was negatived on a division.[102]

In Grand Committee Baroness Buscombe sought to elucidate the meaning of 'actual occupation' in schedule 1 paragraph 2(2) and schedule 3 paragraph 2(2) of the Bill which include references to people being 'physically present'. She wanted to ensure that an occupier's protection would not be lost by a 'temporary and fortuitous' absence.[103] On Report Lord Bassam advised that, after consideration, the Government had concluded that the partial definition of 'actual occupation' should be removed from paragraphs 2(2) in schedules 1 and 3 of the Bill. Actual occupation is a term used in section 70(1)(g) of the *1925 Land Registration Act*; there is no statutory definition of the term but key elements of it have been explained in case law. Lord Bassam noted that the Government did not wish to change any of those key elements and conceded that the glossing words, 'physically present' could have given scope for further argument. [104]

In Grand Committee and also on Report Viscount Bridgeman and Baroness Buscombe moved amendments to schedule 3 to:

> …close off the unmeritorious argument that, although someone's occupation or, under paragraph 3 of schedule 3 an easement, would have come to light on a reasonably careful inspection, it would not have been obvious and therefore not binding because the person undertaking the inspection would have had to think about what he saw in order to realise what the position was.[105]

In Grand Committee the amendments sought to replace the word "obvious" with "apparent" and on Report with "disclosed by". The aim of schedule 3 is to reduce interests that override registration as far as practicable and to ensure that they are restricted to interests that it would be impracticable or impossible to register.[106] Lord Bassam preferred

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[100] HL Deb 30 October 2001 c 1324
[101] HL Deb 30 October 2001 c 1328
[102] HL Deb 8 November 2001 cc 314-9
[103] HL Deb 17 July 2001 c 1407
[104] HL Deb 30 October 2001 c 1326
[105] HL Deb 30 October 2001 c 1325
[106] HL Deb 30 October 2001 c 1327

the *Oxford English Dictionary* definition of "obvious"[107] in this context but hoped that debates around the issue had done much to clarify the intention of Parliament.[108]

Further amendments were tabled on Report by Baroness Buscombe in regard to paragraph 3(1)(b) of schedule 3:

> The point we want to deal with is that an inspection of land may show a used pathway across it or a window overlooking it. However, it will not be possible to say merely from looking at the land whether whoever uses the path or receives light to the window is entitled to do so as of right under an easement, or merely has the landowner's temporary or revocable permission to do so. We suggest that in such circumstances, a reasonably careful inspection should include asking whatever questions arise naturally from the facts observed.
>
> The Government's reference in Committee to the case of Yandle v. Sutton and to patent defects in title appears to indicate that in their view as the Bill stands not only the relevant activity but also the fact that it is "as of right" and not merely permissive has to appear from mere visual inspection or be a "necessary" consequence of what is found by such inspection. If so, the saving for easements which would be revealed by inspection will never apply to anything, because merely looking at a path does not reveal whether anyone has an easement to use it.
>
> The effect will be that paragraph 3(1)(b) appears to promise but does not deliver and even a clear but undocumented right of way over a well defined route will be lost on a sale of the land affected unless the person having the right can prove that it was used at some time in the previous year. I beg to move.[109]

Lord Bassam rejected the amendment with the following response:

> As to Amendment No. 45, in debating Amendments Nos. 41 and 44 I said that if buyers knew of a legal easement or profit because it was patent they would be bound by it. Such easements will be discovered from a reasonably careful inspection of the property, and the seller will not be under a duty to disclose them. The amendment seeks to spell out that if it is obvious that there has been activity on the land, or advantage enjoyed over it, the buyer will take it subject to the easement or profit, whether or not that is disclosed. The test of what is "obvious" on a reasonably careful inspection is to be interpreted as the case law relating to the question of a patent defect in title, namely one that does not have to be disclosed to a buyer of land prior to contract. In the leading case the learned judge said:

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[107] "Plain and open to the eye or mind, clearly perceptible, perfectly evident or manifest; palpable."
[108] ibid
[109] HL Deb 30 October 2001 c 1325

> "I think [the purchaser] is only liable to take property subject to those defects which are patent to the eye, including those defects which are a necessary consequence of something which is patent to the eye".
>
> Therefore, if it was patent to the eye that, say, a private right of way existed the disponee would be bound even if he did not know the particular right under which the way was used or who all the users were. A legal easement will override a registered disposition if it is one that a seller of the land burdened by it would not have to disclose before contracting to sell the land. If the amendment was accepted there would be a danger that that simple test, which is perfectly familiar to conveyancers, might be obscured.[110]

In Grand Committee and on Report Baroness Buscombe and Lord Lestor of Herne Hill raised the position of people who, having acquired title by adverse possession, may in some circumstances be divested of that title as a result of the Bill's provisions:

> But what of the situation where the existing 12-year period for acquiring title by adverse possession has already been completed when the Bill comes into force? The adverse possessor will have acquired an indefeasible title; that is, a right to the enjoyment of the property.
>
> Under Clause 11(4)(c), adverse possession binds the estate on first registration only if the freehold proprietor--the person with the paper title or the person acquiring the title--has notice. That requirement for notice is new. In the absence of notice, the indefeasible property right of an adverse possessor will be overridden by operation of the Bill. Perhaps the Minister can confirm that that is the position.
>
> Paragraph 7 of Schedule 12 to the Bill, read with Clause 131(2), deals with this issue. It gives three years' grace for someone who claims to have acquired a title which extinguishes that of the first registered proprietor to protect his rights by registration.
>
> Under existing law, Section 15 of the Limitation Act contains a 12-year limitation period for actions to recover land, including rights acquired by adverse possession. Therefore, under present law someone who believes that he or she has acquired title by 12 years of adverse possession is given 12 years to vindicate that property right.
>
> In response to the noble Baroness, Lady Buscombe, the Minister explained that:
>
> "Under the Bill a squatter's rights will override first registration only if the squatter is in actual occupation. Squatters who are no longer in actual occupation will therefore no longer fall within the protected category when the new law comes into force. That could involve some unfairness. Paragraph 7 therefore provides for the existing regime to continue for three years. That will allow sufficient time for squatters who have

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[110] HL Deb 30 October 2001 cc 1327-8

> extinguished the title of the paper owner but who are no longer in actual occupation to make application for registration of title".--[Official Report, 17/07/01; col. 1400.]
>
> In answer to my noble friend Lord Goodhart, the Minister explained that a three-year grace period for someone who claims to have acquired a title by adverse possession is,
>
> "not a particularly onerous price to pay".--[Official Report, 17/07/01; col. 1401.]
>
> The problem is that the three-year grace period is rigid and inflexible. It cannot be extended to allow for special cases of hardship, such as mistake or disability. Perhaps the Minister can confirm that there is no flexibility.
>
> The heading before paragraph 7 of Schedule 12 refers to what are described as "Former overriding interests". The Bill seeks to convert existing indefeasible property rights into precarious rights. The rights are dependent on an uncertain application to the registrar within a fixed time limit of only three years. Perhaps the Minister can also confirm that that is correct.[111]

Baroness Scotland gave a full explanation of the Bill's provisions on this area and defended the Government's position:

> The difference in our respective positions can be shortly put. The noble Lord, Lord Goodhart, is anxious to give greater protection to squatters who have acquired rights under the existing law to apply to be registered as proprietors of land. The noble Lord thinks that possibly failure to do so might be at some risk of challenge under the Human Rights Act.
>
> We, however, think that the greater protection which the Bill gives to registered owners is wholly appropriate in the context of a system of registered land where the title to land depends on registration rather than occupation. We also think that the changes we propose to the existing law are entirely proportionate to the issues involved, and therefore consistent with the convention rights, and, in accordance with that, we have been able to sign the certificate pursuant to Section 19.[112]

G. Registration

The Bill contains extensive provisions relating to registration, the register and searches of the register. Many of the provisions are similar to existing provisions; the joint Law Commission and Land Registry report outlines those that are new:

> First, there is a power to record in the register the fact that a right to determine a registered estate has become exercisable. The main case that this is intended to over is where the owner of a freehold subject to a rentcharge has failed to pay the

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[111] HL Deb 30 October 2001 cc 1330-1
[112] HL Deb 30 October 2001 cc 1332-5

> rentcharge and the owner of that rentcharge has a power to re-enter in consequence. This accords with our policy of trying so far as possible to make the register conclusive as to title, so that inquiries outside of the register are kept to a minimum.
>
> Secondly, in response to representations that were made to us on consultation, the Bill gives the registrar power to disclose information about the history of a title. The register is a record of the title as it stands at any given moment. It does not explain the history of the title, nor is that history relevant in most cases. However, there are occasions when it is necessary to discover how title devolved and the Bill will enable those who have reason to discover this to be able to do so to the extent that the registrar has the information.
>
> Thirdly, at present, land and charge certificates have to be produced on various occasions in relation to particular transactions or entries in the register. The Bill abolishes (by making no provision for) charge certificates. The role of land certificates is considerably reduced.

In Grand Committee Lord Goodhart moved an amendment to clause 60 [*boundaries*] in order to obtain clarification of the jurisdiction of the adjudicator in relation to boundary disputes. He said:

> …Clause 60 simply requires rules to be made enabling boundaries to be determined. It is true that Clause 60(3)(c) refers to procedure in relation to applications for determination but it does not refer to applications being made to the registrar.
>
> It is my understanding that it is the Government's intention that the determination of fixed boundaries, as opposed to general boundaries, should be made by the adjudicator, and that is certainly an objective with which I entirely agree. But I suggest that as drafted Clause 60 is not adequately clear about that.[113]

Baroness Scotland confirmed that the intention was for the registrar and the adjudicator to have jurisdiction over boundary disputes and agreed to look at the wording of clause 60 to ensure that this was achieved.[114] Government amendments to clause 60 were subsequently moved and agreed at Report Stage.[115]

Clause 61 [*accretion and diluvion*] states that the fixing of the position of a boundary shown on land registry plans would not prevent the adding of land by accretion or the removal of land by diluvion.[116] In Grand Committee Lord Goodhart moved an amendment

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[113] HL Deb 19 July 2001 c 1606
[114] HL Deb 19 July 2001 c 1607
[115] HL Deb 30 October 2001 c 1358
[116] This happens when the natural boundary between the land and water changes gradually over time, in particular where land is formed by deposits from the sea (accreditation) or washed away by waves (diluvion).

to provide that accreditation and diluvion would not alter the boundary of a registered estate, except where agreement had been reached to the contrary. Baroness Scotland resisted the amendment:

> Clause 61, as the noble Lord rightly says, deals with accretion and diluvion. The words of the noble and learned Lord, Lord Wilberforce, who is not in his place, but who is with us in spirit, are important. I am sure that the noble Lord, Lord Goodhart, will remember what he said in the Privy Council case of Southern Centre of Theosophy Inc v. State of South Australia:
>
> "The doctrine of accretion recognises that where land is bounded by water, the forces of nature are likely to cause changes in the boundary. Where these changes are gradual and imperceptible, the law considers the title to the land, as applicable to the land as it is changed from time to time. Except where a substantial and recognisable change has suddenly taken place, it is both convenient and fair to regard the boundary between land and water as being where it is from day to day or year to year. If part of an owner's land is taken from him by erosion, or diluvion (that is by the advance of the water), the landowner is treated as losing a portion of his land. So, if an addition is made to the land from what was previously water, it is only fair that the landowner's title should extend to it. The doctrine of accretion, in other words, is one which arises from the nature of land ownership from, in fact, the long-term ownership of property inherently subject to the gradual processes of change".
>
> The Bill gives effect to those well and long-established principles. Subsection (1) provides that the registry's plan showing a particular boundary, whether a fixed or a general boundary, does not affect the operation of the common law principles of accretion or diluvion.
>
> I respectfully say that the effect of the amended clause would not, however, be totally clear. It raises questions as to the ownership of coastal land that has emerged by accretion, as I have already indicated, and it suggests that areas of foreshore could fall into private hands--I have already referred to this--rather than to the Crown Estate.
>
> That uncertainty would be likely to cause real problems for a significant number of people.[117]

In Grand Committee Baroness Buscombe moved an amendment to clause 64 [*use of the register to record defects in title*] the purpose of which was to make clear that where a defect in title arises, it can be recorded on the register only if, at the time that it is proposed to make the entry, the defect still exists.[118] The Government accepted the need for such an amendment and fulfilled its undertaking to amend the Bill on Report. Baroness Scotland provided a detailed explanation of the purpose of clause 64:

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[117] HL Deb 19 July 2001 cc 1608-9
[118] HL Deb 19 July 2001 c 1610

This clause deals with a situation not currently catered for under the land registration system where something happens in the course of the ownership of the property that itself makes the title bad. This occurs in only a limited number of situations and in most of those situations there are already simple and well-developed practices for protecting buyers of the land affected. In such cases there is no need to record the defect in title in the register.

Perhaps I may explain how the clause will work using two examples. One example is on the assignment of a lease. There is a risk that the assignor is in breach of covenant and that the landlord will, therefore, be able to exercise his or her right to re-enter and determine the lease. However, where a landlord accepts rent from a tenant whom he or she knows to be in breach of covenant, he or she will be taken to have waived the breach of covenant. Conveyancers take advantage of this principle and require the assignor of a lease to produce the last receipt for rent prior to the assignment. This creates a rebuttable presumption that all the covenants and provisions of the lease have been fully performed. Because there is already a procedure for dealing with this situation, we respectfully suggest that there is little point in empowering the registrar to enter on the register the fact that the lease might be determined.

Rules are likely to confine the exercise of the power to those cases where there is presently no established procedure for dealing with the problem and in particular to cases concerning rent charges. My first example may suffice. I could give noble Lords a second example but I think that the first probably clarifies the position.

This clause is also needed to help achieve one of the principal objectives of the Bill: to create a conveyancing system in which title can, so far as possible, be investigated online by computer. It follows from this principle that every effort should be made to make the register as conclusive as to title as is practically possible. That includes recording the fact that the right to determine the estate has become and is still exercisable.

An obvious objection to this new duty is that it will not be easy to enforce. A solicitor or licensed conveyancer will be very reluctant to inform the registry of a defect in his or her client's title, particularly where it is one that could lead to the determination of that client's estate. However, the move to electronic conveyancing will provide a means of enforcing such obligations via network access agreements. Under the system of electronic conveyancing that is to be created under the Bill it will be solicitors or licensed conveyancers acting for buyers who will actually carry out the process of registration. They will do so in accordance with the terms of a network access agreement with the registry that may require them to disclose specified information. They are likely to know far more about the conveyancing transaction than the registry does at present when documents are submitted for registration. They may, therefore, know the facts that make a title bad even though these will not necessarily appear from the conveyancing documents that, under present arrangements, would be sent to the registry for registration.

> I hope that that explanation will have convinced the House that the clause fulfils an important purpose. It introduces a useful and flexible procedure which can be initiated by application or as a response to events which have come to the attention of the registry or the court. I beg to move.[119]

On Report Viscount Bridgeman moved an amendment to clause 66 [*inspection of the registers* etc] to restrict the availability of information that individuals might consider private or that companies might consider commercially confidential. Baroness Scotland confirmed that leases and charges, which are currently excluded from the list of documents that are available to the public as of right, would be included under the Bill and that this was in line with the *Freedom of Information Act 2000* and data protection principles. However, she went on to confirm that commercially sensitive and private information would be excluded and that these safeguards would be sufficient to protect parties to leases and charges with commercially sensitive terms from being released to third parties.[120]

H. Special cases

On Report the Government moved amendments to clause 86 [*bankruptcy*]. This clause addresses the situation in which a sole registered proprietor of land or a charge becomes the subject of a bankruptcy petition or order. As originally drafted the clause would have required the registrar to note the effect of section 284 of the *Insolvency Act 1986* which prevents a sale by the registered proprietor during the period between the issue of a bankruptcy petition and the making of a bankruptcy order, unless sanctioned by the court.

The amendments will place the registrar under a wider obligation to reflect the effect of the 1986 Act more generally:

> This means that the registrar must also record the fact that the registered proprietor is unable to deal with the property at all following the vesting of the title to the property and the trustee in bankruptcy. Although this action by the registrar was permitted by other provisions in the Bill and the intention of the registrar from the outset, this fact is now apparent on the face of the Bill.[121]

I. Electronic conveyancing

The Bill will create a framework for electronic conveyancing the detail of which will be filled in by rules to be promulgated at a later date. On Second Reading Baroness Scotland confirmed that implementation of electronic conveyancing would be 'staged' in order that its benefits could be assured and also that a pilot scheme for electronic conveyancing

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[119] HL Deb 30 October 2001 cc 1360-1
[120] HL Deb 30 October 2001 cc 1361-3
[121] HL Deb 30 October 2001 c 1366

would be established.[122] Part 8 of the Bill (clauses 91 to 94) deals with the introduction of electronic conveyancing.

Despite very wide support in the property industry for the potential benefits offered by electronic conveyancing there are some issues that have given rise to concern. Chief amongst these is the question of security. In response to *Electronic Conveyancing: a Draft order under section 8 of the Electronic Communications Act 2000*[123] the Law Society claimed that the Government's proposed security arrangements would not work and that there was a danger of hackers affixing a solicitor's digital signature to an electronic deed. The Law Society called on the Government to "prescribe achievable security measures and to accept liability itself if those measures proved inadequate". Outstanding security issues, and particularly the use of "electronic signatures," will, in the Law Society's opinion, inhibit the development of electronic conveyancing:

> The Law Society has fundamental concerns about the way in which electronic signatures are proposed to be used in electronic conveyancing. For the reasons explained more fully below, certification of signatures as proposed, if it is practicable at all, will be cumbersome and expensive without adding to the security of the process; and the procedures envisaged will cause Conveyancers to incur new risks which they will not be equipped to manage. These drawbacks are likely to result in slow and limited adoption of the method of electronic conveyancing now proposed.[124]

Respondents to the Bill have also questioned what will happen if a computer system crashes at a crucial moment resulting in losses to clients for which they then seek compensation.

In Grand Committee Lord Goodhart moved an amendment to remove subsection (6) from clause 91 [*electronic dispositions: formalities*] on the basis of concerns raised by the Law Society. The Society has argued that clause 91(6) is unacceptable because it would not be possible to raise any question as to whether an agent had written authority to authenticate a particular document.[125] Baroness Scotland, in response, set out at some length what clause 91 is intended to achieve and why, in the Government's view, subsection (6) is necessary:

> Clause 91 is part of the preparation for electronic conveyancing. Under that clause electronic documents will be introduced into the conveyancing process gradually. At first, there may be only a few electronic documents. Perhaps the first will be charges which are signed only by one party and do not give rise to

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[122] HL Deb 3 July 2001 c 797

[123] Lord Chancellor's Department consultation paper, March 2001 (available online at http://www.lcd.gov.uk/consult/general/e-conv.htm)

[124] Law Society's response to *Electronic Conveyancing: a Draft order under section 8 of the Electronic Communications Act 2000*

[125] see paragraph 148 of the Explanatory Notes to the Bill.

stamp duty. The idea is to learn through that limited experience as we move further into the electronic world.

Eventually, we may all have our own electronic signatures. That appears to be the way that it will develop in future, but we are not there yet. That is, however, too far into the future for that contingency to be built into the first electronic conveyancing process. We may, therefore, have to rely in the early stages on the authentication of electronic documents by the person who has been instructed to carry out the conveyancing process on an individual's behalf, typically a solicitor or licensed conveyancer.

The prospect of professionals having their own electronic signature is not quite so far into the future. We believe that that will happen relatively soon. The professionals will have access to a secure network established by the Land Registry. Access will be permitted by means of a network access agreement between the professional and the Land Registry. The terms of that agreement will regulate the conduct of electronic transactions. The standards of conduct required will be high, whether the party to the transaction electronically signs in person or through his or her agent.

We appreciate the concern that to permit agents to sign electronic documents on behalf of their clients where those clients would themselves sign the equivalent paper document will increase the opportunity for fraud. However, perhaps I may assure the Committee that proper procedures to ensure that the terms of the agency are clearly understood will be necessary. The terms of network access agreements will provide an opportunity for control, and rules of professional conduct may well need to be developed. The detailed terms will be worked out in consultation with professionals and the industry.

We are not yet in a position to cross every "t" and dot every "i". Therefore, I am not able to explain precisely how it will work. However, I am happy to outline the area with which we are dealing. At the moment a significant and thorough development process is being undertaken. Constant vigilance will be required to ensure that standards are maintained.

If a transaction involves the authentication of an electronic document by an agent to prevent difficulties for the agent and the system as a whole, it is important, subject to proper safeguards, to minimise the occasions on which the action taken by the agent can be questioned. For example, electronic transactions will be made more cumbersome if an agent must supply hard copy evidence that his or her authority was given in writing. Whether or not the agent is acting within his or her authority will, as now, be a matter for the general law of agency. In this context Clause 91(6) is intended to facilitate electronic conveyancing in a very specific way. It makes clear that where statute requires an agent's authority to be in writing objections cannot be raised as to whether a solicitor or licensed conveyancer who had signed an electronic document had written, as opposed to merely oral, authority to do so. The agent will need authority from his client before proceeding with authentication, and he can be held to account to his client if he fails to acquire it. However, this subsection prevents the need for other

> parties to investigate if the associated formalities that should be observed have been complied with.
>
> I hope that my comments have clarified why there is a need for this assumption to be built into the provisions relating to electronic documents. I also hope that I have dealt with the concerns raised by the Law Society and enabled the noble Lord to withdraw this amendment.[126]

She went on to state her belief that the security and safeguards that would be inherent in the electronic system would be greater than those available with a paper system. She also confirmed that the law of agency would not be affected by 91(6) and that the clause would 'merely stop a buyer challenging the seller's authorisation'.[127]

The mechanics of the electronic system and the security of transactions was raised again on Report. Baroness Buscombe moved a series of amendments to clauses 91 and 92 [*land registry network*] to which Baroness Scotland provided a detailed response.[128] On Third Reading Baroness Buscombe sought the Government's assurance that, in the event of a mistake on the register resulting out of the misuse of an electronic signature, the Land Registry would indemnify the solicitor or licensed conveyancer against any losses incurred, and that the right to recourse would not be pursued by the Land Registry against the solicitor or licensed conveyancer unless they were at fault. She also asked whether the onus of proof would be on the Land Registry to show fault.[129]

Baroness Scotland gave the following response:

> My Lords, I understand and sympathise with the concerns expressed about the possible consequences of unauthorised misuse of electronic signatures, which is the issue that lies behind the amendment.
>
> Two aspects need to be considered. First, if a transaction were completed and registered on the basis of an unauthorised electronic document, there could be grounds for rectification of the register and for indemnity from the Land Registry for the victim. Secondly, a conveyancer who has acted in accordance with the arrangements for access to the network, and who has taken the sensible steps needed to preserve the system's security, should not bear the liability for harm caused by careless, malicious or criminal action taken by others. I am very happy to give the reassurance that the noble Baroness seeks.
>
> These practices are no more than the application to electronic transactions of established principles that already apply to transactions in paper form. Under the present law and under this Bill, where indemnity is paid, the Land Registry has

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126 HL Deb 19 July 2001 cc 1612-3
127 HL Deb 19 July 2001 c 1614
128 HL Deb 30 October 2001 cc 1369-75
129 HL Deb 8 November 2001 cc312-3

> rights of recourse analogous to rights of subrogation against the wrongdoer. When the then Land Registration Bill was passing through the House in November 1996, the noble Baroness, Lady Trumpington--who, regrettably, is no longer in her place--said on behalf of the then government that, "it is neither the practice nor the intention of HM Land Registry to resort to its rights of recourse against those who are neither fraudulent nor negligent. It"-- that is the power of recourse-- "is a power that will continue to be used only in bad cases".--[Official Report, 18/11/96; col. 1166.] This practice will continue.
>
> That Bill became the Land Registration Act 1997. I am happy to confirm that the principles which have guided the Land Registry in relation to the paper system will continue to operate in the new world of electronic conveyancing.
>
> In particular, the Land Registry also accepts that the burden lies with it to satisfy itself that there has indeed been a "bad case" of fraud or negligence before seeking recourse against a conveyancer. The proper security precautions that will be needed when electronic conveyancing is introduced will have to be discussed with conveyancers and their professional bodies when drafting the network access agreements, which will also have to be approved by Parliament.
>
> I have repeatedly made it clear that the Government are determined to work with stakeholders to develop robust and secure electronic conveyancing systems. But having said that, I do not believe that the amendment is either timely or necessary. It is untimely because the details of electronic conveyancing and electronic signatures have not yet been worked out. Only the most generic conditions should be included in Clause 91(3). It is unnecessary because, if such a condition were to prove necessary--which I doubt--it could be added under the rule-making power in Clause 91(3)(d). I hope that in the light of my reassurance and the comments that I have made the noble Baroness will feel able to withdraw the amendment.[130]

Baroness Buscombe agreed to withdraw her amendment on the basis of the Minister's 'full and reassuring response'.[131]

On Second Reading and also in Grand Committee Earl Caithness raised the issue of electronic online auctions of land. He noted that the Bill did not provide for this and referred to particular concerns over this omission held by the Royal Institute of Chartered Surveyors:

> Currently, English law allows online auctioneering until the stage of exchange of contracts. That action must still be done in the traditional area of the auction room. The RICS and others are keen to develop electronic auctioneering to its fullest potential and has established guidance for its members on the best practice in undertaking such transactions. Amendment No. 81 refers to the rules

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[130] HL Deb 8 November 2001 cc 313-4
[131] ibid

> concerning this measure and states that no rules should be brought in without the RICS and, indeed, the Law Society being consulted by the Lord Chancellor in order to develop the best practice.[132]

Earl Caithness also requested that the Government give urgent consideration to implementing the licensing of estate agents given the added responsibilities that agents will have when online conveyancing becomes the norm.[133] Baroness Scotland expressed her belief that the legal framework created by the Bill would be sufficiently flexible to accommodate the specific needs of electronic auctions.[134] She noted the Earl's concerns over the licensing of estate agents but felt it was outside the scope of the current Bill. She stressed that network access agreements would be entered into and completed only by those that satisfy the Land Registry and others that they have the necessary skills to operate that facility.[135]

J. Adverse possession

As the law stands, if a squatter is in adverse possession of land, he or she will usually extinguish the owner's title to that land after 12 years.[136] The doctrine of adverse possession is said to be "an embodiment of the policy that defendants should be protected from stale claims and that claimants should not sleep on their rights".[137] The changes that the Bill makes to adverse possession are described by the joint Law Commission and Land Registry report as "scarcely less striking than those it makes to the conveyancing process."[138] The two reasons given for making changes to the doctrine of adverse possession are that it is perceived to be too easy for squatter to acquire title and also, because it is difficult to justify the continuation of the principle in relation to registered land. The Law Commission report of 1998 said that "where title is registered, the basis for title is primarily the fact of registration rather than possession."[139]

The joint report contains an outline of the new scheme that the Bill will introduce:

> The essence of the new scheme in the Bill is that it gives a registered proprietor one chance, but only one chance, to terminate a squatter's adverse possession. In summary, a squatter will be able to apply to be registered as proprietor after 10 years' adverse possession. The registered proprietor and certain other persons (such as a chargee) who are interested in the property will be notified of the application. If any of them object, the squatter's application will be rejected,

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132 HL Deb 19 July 2001 c 1616
133 HL Deb 19 July 2001 c 1616
134 HL Deb 19 July 2001 c 1617
135 HL Deb 19 July 2001 c 1618
136 Sections 15 & 17 of the *1980 Limitation Act*
137 Law Com No 271, para 2.71. Paragraphs 2.71-2.73 of this report consider why the doctrine of adverse possession exists in some detail.
138 ibid para 2.70
139 Law Com No 254, para 10.11

> unless he or she can establish one of the very limited exceptional grounds which will entitle him or her to be registered anyway. Of these exceptional grounds, the only significant one is where a neighbour can prove that he or she was in adverse possession of the land in question for ten years and believed on reasonable grounds for that period that he or she owned it. This exception is intended to meet the case where the physical and legal boundaries do not coincide. Even if the squatter's application is rejected, that is not necessarily the end of the matter. If the squatter remains in adverse possession for a further two years, he or she will be entitled to apply once more to be registered, and this time the registered proprietor will not be able to object. If the proprietor has been notified of the squatter's adverse possession and has been given the opportunity to terminate it within two years, we consider that the squatter should obtain the land. It should be noted that our scheme places the onus on the squatter to take the initiative. If he or she wants to acquire the land, he or she must apply to be registered. This is because the registered proprietor's title will never be barred by mere lapse of time. One point should be stressed about the provisions of the Bill on adverse possession. They are very carefully constructed to ensure that there is consistency between the way in which applications for registration are treated and what happens when the registered proprietor takes proceedings for possession against the squatter. The scheme stands or falls as an entity.[140]

Clauses 95-97 and schedule 6 of the Bill (Part 9) contain the proposed changes to the law of adverse possession. Some respondents believe that the changes will dramatically reduce squatters' rights because the burden on the squatter to prove his or her right to ownership of land will become more onerous and costly. Commentators have said that the statutory exceptions for proprietary estoppel and purchasers under a contract will make little difference in practice:

> Those who have rights of this nature have always been able to claim ownership or (where applicable) a share of ownership, and neither the old law nor the new proposals would require them to have been in occupation for 10 or 12 years or any other period.[141]

The third exception, reasonable mistake as to the squatter's ownership of adjacent land, is felt to provide some element of hope for adverse possessors, especially when combined with the reduction in the required period of adverse possession from 12 years to 10.[142]

On Second Reading Lord Harrison referred to criticism of the Bill on the grounds that it favours big landowners and discriminates against squatters, "especially those who purportedly perform the worthy job of utilising assets which are often neglected by absent

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[140] Law Com No 271, para 2.74
[141] Lovells Property Newsletter, September 2001
[142] ibid

landlords."[143] Lord Kingsland questioned why the Bill created differences between adverse possession of registered and unregistered land:

> These new provisions will apply only to registered land. They will not apply to unregistered land, where Section 15 of the Limitation Act 1980 still prevails. We can see no good reason why the substantive law of adverse possession should be different in the case of unregistered land. If the new provisions in the Bill are better than the old law, then those provisions should apply also to unregistered land. If the new law is not suitable for unregistered land, we cannot see why the new law should be suitable for registered land. In our submission, the correct approach is to amend the substantive law first, if appropriate, and then allow the Bill to deal with pure issues of land registration.[144]

He went on to argue for tougher measures against squatters:

> In a way, I suppose, it can be said that the Bill seeks to weaken squatters' rights. At present, after a squatter has been in adverse possession of land for 12 years, he or she can apply to be the new proprietor of the estate. The Bill allows a squatter to apply for ownership after 10 years, but ensures that the owners are informed. Of course, if the owners do not object, the squatter will be registered as proprietor of the land.
>
> We would argue that the proposed measures against squatters should be tougher. The Library in another place cites research based on the 1986 London Housing Survey suggesting that 74 per cent of squatted properties were in the social rented sector. Indeed, there have been high profile cases in the past few years of squatters obtaining ownership of council housing due to the continued negligence of councils to manage their housing stock.
>
> We should like see a situation in which squatters have no automatic right to ownership of property owned by social landlords or by the public sector. This property was intended for a collective social benefit and should not be seized by private individuals without appropriate compensation.[145]

Baroness Scotland responded on the issue of unregistered and registered land:

> Finally, the noble Lord referred to "adverse possession" and the issue of it applying only to registered land. I have already touched a little on this, but I can tell the noble Lord that a registered title is the basis of the new proposal. We cannot have the protection that it confers without registration, so the systems are fundamentally different.[146]

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[143] HL Deb 3 July 2001 c 786
[144] HL Deb 3 July 2001 c 795-6
[145] ibid
[146] HL Deb 3 July 2001 c 800

On Report Baroness Buscombe moved an amendment to delete clause 95 [*disapplication of periods of limitation*] from the Bill. She argued that the law of adverse possession should be based on social and economic factors and not on whether the land concerned is registered or not.[147] Baroness Scotland's response noted that clause 95 was fundamental to the new system and would contribute to the diminishing importance of unregistered land.[148]

In Grand Committee Lord Goodhart moved an amendment to remove paragraph 5(4) from schedule 6 [*registration of adverse possessor*]. This sub-paragraph confers a right to registration on the basis of adverse possession where a boundary on the ground does not coincide with a boundary on the register. Lord Goodhart argued that the boundary shown on the register should be paramount in order to reduce the chances of boundary disputes.[149]

Baroness Scotland disagreed with Lord Goodhart's amendment:

> Perhaps I may start by explaining the problem with which the paragraph deals. The Land Registry has found that it is very common indeed for there to be small differences between the legal boundaries of an estate and those laid out on the ground. Much more rarely, as we have heard, the differences are significant. Problems are often particularly marked, in number and in kind, in relation to new estates, where, I am advised, it is rare indeed for properties to be exactly in the spot marked on the original plan. It is quite usual for a developer to have built a whole estate some three or four inches or three or four feet in the wrong place. That causes the quite significant difficulties that we are talking about changing.
>
> The most obvious example is a series of fences put up in the wrong place. Those who move into a new house tend - perfectly naturally - to take their new fence as the boundary of their territory. Few will go to the trouble of comparing their new property in detail with its entry on the register. One can see how that occurs. If one has a 50 feet garden, and one measures it and it is 50 feet, one tends to think that it is the 50 foot garden one purchases, as opposed to thinking it is three inches the wrong side of a particular fence. Certainly such persons do not go to what can still be a matter of considerable inconvenience and expense of getting the general boundary of their property fixed by the land registry.
>
> Such new owners, having made assumptions about the location of their boundaries, proceed to treat all the land within the fences as theirs. They will often plan their gardens accordingly; they may build garden sheds and greenhouses against that boundary. A position can then arise where, for whatever reason, one party examines the actual boundaries, and the legal position turns out to be something very different from what it had up to that point been thought to

147 HL Deb 30 October 2001 c 1376
148 HL Deb 30 October 2001 cc 1376-9
149 HL Deb 19 July 2001 c 1621

> be. In the circumstances I have described, it is simply unreasonable that someone who has enjoyed territory through a mistake which was no fault of his or her own, should not be able to apply to have the position regularised.
>
> Without the simple procedures of the kind laid out in the schedule, the only recourse would be expensive litigation, with all the uncertainty and stress that that would bring. One envisages, for example, an estate with 20 houses, where all 20 houses are one foot in the wrong position. Although all 20 houses have got the direct proportions the owners thought that they were buying, the man or woman on the end could say "You have got a bit of my land". To get his or her bit of land back, everyone would have to perform a very interesting dance.[150]

Baroness Buscombe moved amendments in Grand Committee concerning the extent to which an adverse possessor may be registered as proprietor "free of a charge". Amendment 90 was designed "to ensure that where an adverse possessor is registered as proprietor, the extent to which he takes free of a charge is not affected by whether that charge is substantively registered or merely an equitable charge protected by notice." She argued that the way in which a particular security happened to have been protected was irrelevant to the substantive issue of whether the adverse possessor should take subject to it or free from it.[151]

Lord Bassam of Brighton responded to this amendment:

> The effect of paragraph 9(3) of Schedule 6 is to make the registration of an adverse possessor as proprietor of a legal estate free of any registered charges which affect that estate immediately before the registration, subject to one qualification. I shall explain the reason why this exception has been made.
>
> When an adverse possession application is lodged, notice of the application will be served on both the registered proprietor and the registered chargee. As that chargee has the right to possession, his position has been improved under the Bill, since he will have two years in which to take action to evict the unlawful occupier (the squatter). If he does not do so, however, he loses his charge.
>
> The position of a chargee whose interest is noted on the register is, however, significantly different. Even if notice of the adverse possession claim is served upon that chargee, he is unlikely to be able to take any action against the squatter. It is unfair that he should be singled out to lose his charge when he can do nothing to stop the squatter obtaining title. I hope that in view of that explanation the noble Baroness will feel able to withdraw the amendment.[152]

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[150] HL Deb 19 July 2001 c 1623
[151] HL Deb 19 July 2001 c 1624
[152] HL Deb 19 July 2001 c 1624-5

Amendments 91 and 92, also moved by Baroness Buscombe in Grand Committee, were intended to ensure that when an adverse possessor is registered as proprietor because he or she establishes one of the conditions in paragraph 5 of Schedule 6, he will take free of registered and noted charges which on general principles would not bind him, because they were created by the proprietor at a time when the adverse possessor's claim had already acquired priority. Lord Bassam responded thus:

> In discussing this amendment we are concerned with only one specific instance of an adverse possessor being registered as owner of the land. That is when the adverse possessor is registered after only 10 years, having successfully established that one of the three conditions set out in paragraph 5 of Schedule 6 applies.
>
> The combined effect of sub-paragraphs (3) and (4) of paragraph 9 of the same schedule is that the adverse possessor, in this instance only, does not automatically take the estate free of any registered charges which affect that estate immediately before his registration.
>
> I understand the concern that has been raised. Taking paragraph 9 in isolation, it seems that an adverse possessor can be registered as proprietor after 10 years, but only by paying the penalty of being subject to existing charges over the estate. I can reassure the noble Baroness that that does not reflect the complete picture.
>
> At first sight, every adverse possessor, whether registered as owner after 10 years or after a further two-year period has expired, should take free of all registered charges and, as we discussed in relation to the previous amendment whether he or she should take free of any noted charges as well.
>
> However, if the adverse possessor does not take free of the charges under paragraph 9, it does not mean that the story ends there. If the basis of registration is one of the first two conditions set out in paragraph 5 there exists an independent right or other reason justifying the squatter's registration as owner. That independent right or justification will, under wider property law principles, either have priority over the charge or it will not. The fact that the claim to registration has been made by way of the adverse possession procedure should not affect that priority. In such cases the apparent unfairness that the amendment seeks to address does not arise. The scheme does not make an arbitrary decision as to whether the charge still bites, but leaves the general law to determine the answer to the question. I suggest that this is probably the fairest solution to apply.
>
> This leaves the third condition in paragraph 5 to be considered; namely, where there is a boundary dispute. In such cases, the claim relates to only part of the property. The adverse possessor may have successfully claimed a very small part of a very large estate; and that estate could have a substantial mortgage on it. The provision in paragraph 10 deals with the practical problem that this may cause: it enables the proprietor of the land to seek an apportionment of the charge between the land acquired and the remaining land. This is an important point. I say that because, in most normal circumstances, lenders would seek repayment of the entire loan before releasing any part of the property from their charge. In some

> cases, the apportionment exercise will result in a charge being secured entirely on the remaining land.
>
> In the light of that slightly complex explanation, I hope that the noble Baroness will feel that the unfairness that the amendment, understandably, seeks to address has already been considered and that it is, indeed, covered by the Bill's provisions. In those circumstances, I invite the noble Baroness to withdraw her amendment.[153]

Lord Goodhart moved an amendment in Grand Committee to remove paragraph 12 from schedule 6. He questioned why the interests of beneficiaries were relevant to the issue of whether or not land is in adverse possession. His position was that the land would be registered in the name of the trustee and that the trustee would have a fiduciary duty to protect the interests of the beneficiary. He could see "no good reason" why land held in trust should be any harder to acquire by adverse possession than land which is in absolute ownership.[154] Lord Thomas of Gresford moved this amendment again on Report.[155]

Baroness Scotland defended the Bill's provisions:

> One of the Bill's aims is to make sure that land that is being neglected remains in economic use. It is a sensible derogation from the general principle that registration determines ownership that an owner who is so little concerned with the land as to fail persistently to take the simple steps required to secure possession should yield to a squatter who will.
>
> Matters are inevitably more complicated when land is held in trust and where the ultimate beneficiary of the trust has not yet taken possession. To put it briefly, the difference between us is that the noble Lord believes that the general law of trusteeship provides adequate protection for the interests of the ultimate beneficiary if the trustees and the current beneficiary do not take adequate action to retain the registered interest if there is a claim for adverse possession. We, however, think that more is needed. Certainly we do not dispute that the general law would give the ultimate beneficiary recourse against a trustee who had been negligent, but establishing that right would almost certainly require litigation. If the claim was unsuccessful as the title to the land had now passed to the squatter, the ultimate beneficiary would be exceedingly unlikely to be able to recover the land. Money rather than land would generally be a second best and it may be a poor second best. In view of what I have said I invite the noble Lord to withdraw the amendment.[156]

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153 HL Deb 19 July 2001 cc 1625-6
154 HL Deb 19 July 2001 c 1627
155 HL Deb 30 October 2001 cc 1380-1
156 HL Deb 30 October 2001 cc 1381-2

Lord Goodhart returned to this question on Third Reading where he expressed his belief that the Government 'had got this issue wrong.' Baroness Scotland remained unmoved by his arguments and ultimately Lord Goodhart's amendment was withdrawn.[157]

K. Miscellaneous and general

On Report the insertion of a new clause (now clause 120) was agreed. This clause will repeal the *Land Registry Act 1862*. Baroness Scotland advised that the repeal would have little or no practical effect for conveyancers and landowners but would tidy up the statute book by removing an otiose provision.[158]

In Grand Committee Lord Goodhart moved an amendment to clause 124 (now clause 125[159]) to include persons nominated by the Royal Institute of Chartered Surveyors (RICS) and the National Consumer Council on the Rules Committee.[160] Lord Brighton expressed sympathy with the amendment and undertook to table a Government amendment on Report.[161] This was subsequently done.[162]

Lord Goodhart also moved amendments to clause 125 (now clause 126[163]) which he said would give effect to the recommendations of the Select Committee on Delegated Powers and Regulatory Reform.[164] The Committee's recommendations in respect of the Bill are reproduced below:

> 24. The House may wish to consider whether the bill should be amended to apply negative procedure to the powers in clauses 66, 87, 88 and 89, which are all "land registration rules".
>
> 25. The general power to make rules regulating land regulation procedures dates back to 1925 and has always been subject only to the requirement of laying before Parliament after being made. However this is the first opportunity that this Committee - which was first established in 1992 - has had to consider whether this procedure is appropriate. All rules of court are subject to negative procedure. In the view of the Committee, it would be better for all registration rules to be subject to negative procedure rather than to select four as requiring negative procedure and by so doing to endorse the antiquated procedure which would continue to apply to the remainder.

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157 HL Deb 8 November 2001 cc 319-21
158 HL Deb 30 October 2001 cc 1385-6
159 [exercise of powers]
160 HL Deb 19 July 2001 c 1637
161 HL Deb 19 July 2001 c 1638
162 Government amendment 106, HL Deb 30 October 2001 c 1388
163 [rules, regulations and orders]
164 1st Report, Session 2001-02, HL Paper 6

> 26. If the House agrees with our view that all land registration rules should be subject to negative procedure, it would follow that the rules made under clauses 107, 108, and 119, regulations under Schedule 9 and orders under clause 99 should also be subject to that procedure - the only justification for applying in this bill the unusual requirement that an instrument has to be laid before Parliament after it has been made is that that procedure has always applied to procedural rules about land registration.
>
> 27. The Committee has also noted that clauses 5, 101 and 106 expressly require the Lord Chancellor to consult before making orders under those clauses while clauses 62, 80, 99(3) and 111 do not. It has suggested that the House may wish to seek an explanation for this distinction and if the explanation is not satisfactory, to make appropriate amendments.

Baroness Scotland advised that the Government would bring forward amendments to subject all land registration rules to the negative procedure on Report. She also advised that these amendments would "include provision for the affirmative resolution in relation to rules dealt with under the current amendments."[165]

The Select Committee's response to the Government's amendments on rule making powers is reproduced below:

> 11. The amendments to clauses 22, 35, 36, 37, 60 and 73 extend the rule-making powers conferred by the bill. The new clause to follow clause 119 repeals an Act of 1862 and provides for the preservation of records kept under that Act. Subsection (5) allows land registration rules to regulate the procedure on applications for a copy of such a record.
>
> 12. The amendments to clause 125 alter the Parliamentary control over instruments made under the bill. If these amendments are made, the only instruments which will be laid before Parliament after being laid (clause 125(3)) will be regulations under clause 99(2) (carrying out of functions of registrar during a vacancy in that office) and orders under clauses 99(3) (designation of proper officer for receipt of applications), 101 (fee orders) and 111 (fees). The list of instruments subject to negative procedure (clause 125(4)) would be amended to include land registration rules and the other rules and regulations listed in the amendment. Finally the amendments to clause 125 apply affirmative procedure to rules under clause 93 (power to require simultaneous registration) and paragraphs 1, 2 and 3 of Schedule 5 (rules regulating access to the Land Registry Network). These amendments were commended to the Committee by Baroness Scotland of Asthal, Parliamentary Secretary at the Lord Chancellor's Department, (see letter printed at Annex 3) and they are substantially those which the Committee had recommended in its first report.

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[165] ie Amendments 100,101, 103 and 103A, HL Deb 19 July 2001 cc 1641-3

> RECOMMENDATION
> 13. The Committee has no comments on the amendments which extend the rule-making powers in the bill. The Committee welcomes the amendments which apply affirmative procedure to certain rules and extend the range of instruments which are subject to negative procedure.[166]

As promised, on Report Baroness Scotland spoke to Government amendments to deal with the consultation that will be required in the preparation of delegated legislation under the Bill and the parliamentary scrutiny that such legislation will be subject to.[167] Briefly, the Lord Chancellor will be required to consult the Rules Committee before adding new events to trigger compulsory registration. The Government has made provision for a member nominated by RICS and the National Consumer Council to be added to the Rules Committee but consultation with the Rules Committee will not be specified on the face of the Bill. Wide consultation will take place over the rules on electronic conveyancing but she thought that it was "unnecessary and inappropriate" to consider them formerly as land registration rules.

On the affirmative resolution procedure she advised that the rules under clause 93 [*the power to make electronic conveyancing compulsory*] and the rules under paragraphs 1,2, and 3 of schedule 5 in relation to network access agreements, will be subject to the affirmative resolution procedure.

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[166] 3rd Report, Session 2001-02, HL Paper 28
[167] HL Deb 30 October 2001 cc 1315-18