

Scottish Law Commission

(Scot Law Com No 165)

Report on Leasehold Casualties

Report on a reference under section 3(1)(e) of the
Law Commissions Act 1965

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

The Honourable Lord Gill, *Chairman*

Dr E M Clive

Mr P S Hodge, QC

Professor K G C Reid

Mr N R Whitty.

The Secretary of the Commission is Mr J G S Maclean. Its offices are at 140 Causewayside, Edinburgh EH9 1PR.

Scottish Law Commission

Report on Leasehold Casualties

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

To: The Right Honourable Donald Dewar, MP
Her Majesty's Secretary of State for Scotland

We have the honour to submit our Report on Leasehold Casualties.

(Signed) BRIAN GILL, *Chairman*
E M CLIVE
PATRICK S HODGE
KENNETH G C REID
N R WHITTY

J G S MACLEAN, *Secretary*
12 March 1998

Contents

	<i>Paragraph</i>	<i>Page</i>
PART 1 - INTRODUCTION		
Terms of reference	1.1	1
What are leasehold casualties?	1.2	1
Leasehold casualties and the feudal system	1.5	1
Survival of leasehold casualties	1.6	2
Revival of claims to leasehold casualties	1.7	2
Discussion paper and consultation	1.8	2
Advisory group	1.9	3
Further reform of leasehold tenure	1.10	3
Acknowledgements	1.11	4
PART 2 - LEGAL AND FACTUAL BACKGROUND		
Use of ground leases	2.1	5
Reasons for use of ground leases	2.4	6
A feudal substitute	2.5	6
Feudal casualties	2.6	6
Transplantation of feudal casualties into leases	2.8	7
Types and incidence of leasehold casualties	2.9	7
Partial assignments and sub-leases	2.13	9
The demise of feudal casualties	2.16	10
Effect on leasehold casualties	2.17	10
Legislation on leasehold casualties	2.18	11
Judicial attitude to leasehold casualties	2.19	11
Practice of landlords	2.20	12
Enforceability	2.29	14
PART 3 - THE NEED FOR REFORM		
Introduction	3.1	16
The first problem	3.2	16
The second problem	3.8	17
The landlords' case	3.12	18
Can reform be left to the courts?	3.20	19
The Results of consultation	3.23	20
PART 4 - ABOLITION WITHOUT COMPENSATION		
Introduction	4.1	22
Human rights	4.2	22
Public policy in relation to land tenure reform	4.10	24
Nature of leasehold casualties	4.11	24

Freedom of contract	4.13	25
Position of landlords	4.14	25
Earlier legislative interventions	4.15	26
Legal doubts and difficulties	4.16	26
Difficulties and disadvantages of compensation schemes	4.18	27
Are the same considerations applicable to all casualties?	4.28	28
Advantages and disadvantages	4.31	29

PART 5 - ABOLITION OR REDEMPTION WITH COMPENSATION

Introduction	5.1	30
Impracticability of case by case assessments of compensation	5.3	30
Abolition of casualties not based on rental value	5.4	31
Casualties of fixed amount payable at regular intervals	5.5	31
Casualties payable on the entry of an heir	5.9	36
Casualties payable on death of last person to pay a casualty	5.10	36
Casualties payable on entry of assignee	5.11	37
Other types of non-rental-value casualties	5.17	39
Payment of compensation	5.18	39
Casualties due by intermediate landlords	5.19	39
Abolition of other casualties unless landlord opts for preservation	5.22	40
Redemption scheme for surviving rental value casualties	5.26	41
Outline of scheme	5.26	41
Multipliers	5.27	41
The Basic figure to which multiplier should be applied	5.40	45
Procedure	5.59	52
Summary of scheme	5.60	52
Advantages and disadvantages	5.61	55

PART 6 - ABOLITION WITH COMPENSATION IN MOST CASES

Introduction	6.1	57
Abolition of rental value casualties without compensation	6.2	57
Abolition of other casualties with compensation	6.7	58
Advantages and disadvantages	6.10	59

PART 7 - MAIN RECOMMENDATIONS

Assessment	7.1	60
Main recommendations	7.2	60
Comment	7.3	61

PART 8 - OTHER RECOMMENDATIONS

Introduction	8.1	63
Definition of relevant casualties	8.2	63

Irritancies	8.4	63
Liability for former tenants' casualties	8.9	66
Proposals not followed up	8.13	67
PART 9 - SUMMARY OF RECOMMENDATIONS		69
APPENDIX A		72
Draft Leasehold Casualties (Scotland) Bill		
APPENDIX B		86
Research paper on leasehold casualties		
APPENDIX C		99
List of those who submitted written comments on Discussion Paper No 102		

Part 1 Introduction

Terms of reference

1.1 On 26 February 1997 we were asked by the Secretary of State for Scotland

"to consider the law on leasehold casualties and advise on possible reforms".

What are leasehold casualties?

1.2 A leasehold casualty is an extra amount, over and above the rent, which must be paid by the tenant to the landlord from time to time if the lease so requires.¹ A true casualty is payable on the occurrence of an event. The word "casualty" comes from the Latin *casus*, meaning in this context an event or occurrence. For example, an amount equal to the annual rental value of the property may be payable when a purchaser takes over the lease. Or the lease may provide for a "duplicand" - an extra payment of ground rent or tack duty - to be due if the lease is taken over by the tenant's heir.

1.3 Since 1914 the term "casualty" has been used in legislation, perhaps improperly, to cover not only true casualties but also some types of payments made at regular intervals, such as duplicands payable every 19 years.² In this report we will deal with both types of payment.

1.4 In practice leasehold casualties are payable under very long leases - usually for 999 years. Such leases are common only in certain parts of Scotland.

Leasehold casualties and the feudal system

1.5 Tenants under the very long leases in which leasehold casualties are found do not hold their property on feudal tenure. They are tenants, not vassals. Strictly speaking, therefore, leasehold casualties have nothing to do with the feudal system of land tenure. The complete abolition of the feudal system of land tenure would have no effect on leasehold casualties. However, there is a historical link between leasehold casualties and feudal tenure. The very long leases in which casualties are found were an attempt by some landowners and their advisers to set up a form of land tenure which was almost as durable from the tenants' point of view as feudal tenure but which avoided some of the restrictions and technical complications of that form of tenure. Leasehold casualties were copied from similar casualties which were at one time common in feudal tenure. These feudal casualties were abolished by the Feudal Casualties (Scotland) Act 1914.³

¹ The Long Leases (Scotland) Act 1954, section 25 describes a casualty as "any grassum, duplicand or other periodical or casual payment stipulated in a lease or a sub-lease to be payable in addition to the annual rent".

² See the Feudal Casualties Act 1914 and the Long Leases (Scotland) Act 1954.

³ An earlier attempt to eliminate feudal casualties was made by the Conveyancing (Scotland) Act 1874 but it was largely unsuccessful because the redemption terms were too generous to the feudal superiors.

Survival of leasehold casualties

1.6 Leasehold casualties might well have been abolished at the same time as the feudal casualties from which they were copied. The 1914 Act did not confine itself to feudal tenure. It also abolished casualties in contracts of ground annual which often performed a function very similar to that of the ultra-long leases in which leasehold casualties are found. Contracts of ground annual too were a way round technical restrictions on the granting of feu writs. However, for some unknown reason, perhaps simple ignorance that they existed in parts of Scotland, leasehold casualties were not included in the relevant legislation. The Feudal Casualties (Scotland) Act 1914 gave the Court of Session power to apply the Act's redemption scheme to other types of casualties. Section 23 provided that

"If it shall appear to the Court of Session that there exist any rights of the nature substantially of casualties which are not comprised within the scope of this Act, it shall be competent for the court by act of sederunt to provide for the redemption and extinction of such rights on terms seeming to the court to be just and equitable on the analogy of the provisions of this Act, and such act of sederunt shall have the same force and effect as if it were embodied in this Act."

This power was never exercised.⁴ So leasehold casualties survive, subject to any common law objections which might be made to them. However, they were treated in practice as if they had been abolished. It appears that landlords did not claim them. They survived in a dormant form.

Revival of claims to leasehold casualties

1.7 Some landlords in areas where leasehold casualties were dormant have now begun to demand substantial sums by way of casualties from tenants who often had no idea that they were liable to pay them.⁵ In at least some cases it appears that the landlords in question are so-called "title raiders" who have bought up landlords' interests in the hope of being able to turn forgotten rights to their financial advantage.⁶ The distress caused to people suddenly faced with demands for thousands of pounds has revived the question of leasehold casualties and led to calls for reform of the law.⁷

Discussion paper and consultation

1.8 In May 1997 we published a discussion paper on leasehold casualties in which we explained the nature and origin of these casualties and the problems to which they gave rise.⁸ We invited views on various proposals for reform. The discussion paper was widely distributed and comments were invited from those representing the interests of tenants in the affected areas, from landlords and those representing landlords' interests, from legal

⁴ The view of the Lord President of the Court of Session is that it would at this stage be inappropriate to alter the substantive law on leasehold casualties by Act of Sederunt.

⁵ Claims for indemnity have also been made against the Keeper of the Registers of Scotland in cases where leasehold casualties have been omitted from the relevant title sheets. See the Annual Reports of the Keeper of the Registers of Scotland for 1992-93 and 1993-94 at pp. 15 and 17 respectively. We understand that another claim is currently being disputed.

⁶ See the Adjournment Debates in the House of Commons on 6 November 1996 and 13 November 1996.

⁷ See the above Debates and articles in the *Sunday Mail* and *News of the World* on 1 September 1996 and in the *Herald* and *Daily Express* on 2 September 1996. See also Sinclair "Casualties: Suitable Cases for Treatment", 1 *Scottish Law and Practice Quarterly* (1996) 125.

⁸ Discussion Paper No 102.

bodies and lawyers with an interest in the subject and from others. We thank all those who responded.⁹ Some of the submissions¹⁰ provided us with a great deal of background information which we could not otherwise have obtained.

Advisory group

1.9 In our work on this subject we have been greatly assisted by the group of advisers whose names are given below.¹¹ The advisory group helped us with background information and technical advice. The responsibility for the provisional proposals made in the discussion paper and for the recommendations made in this report is ours alone.

Further reform of leasehold tenure

1.10 Our reference is limited to the specific problem of leasehold casualties. There is a broader problem as to the future of ultra-long leasehold tenure. The long-term relationship of landlord and tenant under a lease for 999 years or more is similar to, and open to some of the same objections as, the long-term relationship of superior and vassal under the feudal system. Indeed long leasehold tenure of this type can be regarded as a sort of shadow feudal tenure. There is a powerful argument that the interest of the tenant under a lease for several hundred years should be converted into outright ownership on payment of compensation to the landlord. Several respondents to our discussion paper advocated this solution to the problem.¹² The abolition of ultra-long leasehold tenure is a matter which we hope to address as part of our current programme of work on the rationalisation of Scottish land tenure. It is beyond the scope of this project. However, just as the abolition of feudal casualties many years ago makes it easier now to sweep away the remnants of the feudal system of land tenure, so the abolition of leasehold casualties will make it easier to abolish the remnants of the similar system which arises under ultra-long leases.

⁹ A list of those who submitted written comments is in Appendix C.

¹⁰ Including those from Mr B G Hamilton BLE, Mr James Campbell WS and the Boghead Feudal Scotland Action Group.

¹¹ Mr Michael D Barclay, FRICS, Glasgow; Miss Louise J Miller, Solicitor, Edinburgh; Mr Alistair G Rennie, Deputy Keeper of the Registers of Scotland; and Professor Robert Rennie, School of Law, University of Glasgow.

¹² Some consultees called for the problem to be solved by the complete abolition of the feudal system but in the present context they were probably thinking of the complete abolition of the landlord-tenant relationship under 999 year leases.

Acknowledgements

1.11 We are grateful to the Keeper of the Registers of Scotland for making facilities available to our researchers. We are also grateful to many other people who provided us with valuable information for the purposes of this report.¹³

¹³ We would mention, in particular, Mr R M Walker of The Letting Company, Glasgow; Mr L W J Hutchison of the Donald Storrie Estate Agency, Hamilton; Mr John Leighton ARICS, IRRV of Messrs Whyte and Barrie, Chartered Surveyors, Hamilton; the North Lanarkshire Council, Motherwell; the Lanarkshire Valuation Joint Board; Mr W MacDougall, Senior Rent Officer, the Rent Registration Service, Glasgow; the Government Actuary's Department; the Scottish Record Office; and Telesis Scotland, the business intelligence agency of Scottish Homes.

Part 2 Legal and factual background

Use of ground leases

2.1 A ground lease or tack is a type of long lease whereby vacant land is let to a tenant for the erection of buildings on it.¹ In the areas most affected by leasehold casualties such leases were generally granted for 999 years.² The Guthrie Committee which was set up in 1951 to examine the law on leases gave examples of even longer leases which came to light in the course of their investigations - eg 9,995 years from Whitsunday 1815.³ Our own research also discovered examples of leases for periods in excess of 999 years.⁴

2.2 Long leases of this type normally date from the eighteenth or nineteenth centuries. They are not entered into for residential purposes nowadays, because section 8 of the Land Tenure Reform (Scotland) Act 1974 severely curtails the permissibility of residential lets of more than twenty years. Leases containing casualties based on the rental value of the property were almost all granted in the hundred years prior to 1874. Leases providing for payment of duplicands at regular intervals of 19 years or more were granted at various periods but in Lanarkshire, where they appear to have replaced rental value casualties, were granted almost entirely in the period after 1874.⁵

2.3 The common use of the period of 19 years for duplicands requires a brief explanation. The use of a 19 year period in relation to leases has been a feature of Scottish land law for centuries.⁶ At one time any tack in excess of 19 years was regarded as legally suspect because it was too much like an alienation of the land.⁷ It was only in 1762 that the validity of ultra-long tacks was finally upheld by the House of Lords, although many such tacks had in fact been granted.⁸ In 1806 the Court of Session decided that a power to sublet could be implied in a lease for longer than 19 years if nothing to the contrary was said in the lease, thus further reinforcing the significance of the 19 year period.⁹ Long leases were often granted for successive periods of 19 years or for multiples of 19 years.¹⁰ Against this

¹ See the *Report of the Scottish Leases Committee* ("the Guthrie Committee") (1952) Cmd 8656 para 28.

² See Appendix B. Over 90% of a sample of tacks in Lanarkshire, Renfrewshire, Ayrshire and Clackmannanshire were of the 999 year type. Some 18th century tacks in Saltcoats, Ayrshire, were for 361 years - 19 times 19 years. Some leases in Holytown, Lanarkshire, were for 500 years. A few leases in the sample were for 99 years but these leases either contained no casualty clause or provided only for payment of a small duplicand.

³ Para 39.

⁴ Some leases in Larkhall, Lanarkshire, were for 1037 years. A few Renfrewshire leases were even longer - two for 1900 years, one for 3000 years and one for 1,000,000 years. See Appendix B.

⁵ See Appendix B.

⁶ There is a reference to a 19 year tack in Sinclair's *Practicks*, dating from the 1540's.

⁷ See Craig, *Jus Feudale* (Lord Clyde's transl., 1934) 2.10.5. Craig wrote at the end of the 16th century. Ross, in his *Lectures on Conveyancing*, delivered in 1783-84, explained that originally no tack beyond 19 years was valid. It was regarded as too much like a liferent which required sasine. "The reason why nineteen is such a common period in leases is because that space was early considered as equivalent to a life." Ross's *Lectures on Conveyancing* (2nd edn 1822), p 489.

⁸ *Frazer v H M Advocate* (1762) 2 Pat. App. 66. This case upheld the validity of a tack for 1140 years (60 times 19 years). See also *Irvine v Knox* 27 June 1760 FC where the Court of Session sustained a tack for 1260 years and, generally, Ross's *Lectures on Conveyancing* (2nd edn 1822) pp 492-93.

⁹ *Earl of Cassillis v Macadam* (1806) Mor. s.v. Tack, App. 24.

¹⁰ There are frequent references in old cases to tacks for two, three or more times 19 years. See Morison's *Dictionary* 15282 - 15307.

background it is not surprising that an interval of 19 years should have been considered natural and appropriate for duplicands.

Reasons for use of ground leases

2.4 The Guthrie Committee concluded that ultra-long ground leases were often used because of restrictions on the right to feu which affected, for example, proprietors who held under entails or who held on burgage tenure.¹¹ It seems probable too that landlords sometimes preferred tacks to feudal writs because they were simpler, cheaper and more flexible.¹² They avoided the technicalities and complications involved in feudal conveyancing.¹³

A feudal substitute

2.5 It is clear that leasehold tenure under a very long tack, typically for 999 years, was regarded as a substitute for feudal tenure. The land concerned was regularly viewed as being to all intents and purposes the property of the tenant.¹⁴ Long leases were often referred to as "feu-tacks".¹⁵ In these circumstances, it is hardly surprising that the terms of the lease frequently mirrored those which would have attached themselves to a contemporaneous feu. To understand leasehold casualties it is necessary to know something about feudal casualties.

Feudal casualties

2.6 Until 1874 feudal casualties arose, in the absence of provision to the contrary, on both the succession of an heir and transfer to a purchaser or other singular successor.¹⁶ The sum due on the succession of an heir was called "relief" and amounted to an extra year's feuduty. The sum due on sale of the property was called "composition" and amounted to a year's rent or rental value.¹⁷ Relief was of old common law origin and operated in a complicated way.¹⁸ Composition had its roots in statute law.¹⁹ It was a sort of fine payable to the superior in recognition of the fact that he had lost his old common law rights to refuse to accept singular successors to the vassal.²⁰ It was quite a separate matter from the normal financial return, in the form of feuduties, which the superior expected from the property. Feu writs also sometimes provided for payment of a duplicand or doubled feuduty at intervals of, say, 19 or 21 years.

¹¹ Paras 18 - 20 and 42 - 44.

¹² Mr James Campbell, W.S., Saltcoats, provided us with invaluable information about the history of tacks in North Ayrshire.

¹³ See the report of the Guthrie Committee, para 45.

¹⁴ However, a person who had bound himself as "proprietor" to grant "a valid conveyance" of land could not implement the obligation by tendering an assignation of a 999 year lease. *McConnell v Chassels* (1903) 10 SLT 790.

¹⁵ See eg *Buchanan's Trs v Pagan*, (1868) 7 M 1.

¹⁶ See Burns, *Extinction of Casualties* (2nd edn 1916) (hereafter "Burns") p 39 and the anonymous article on "The Casualties Bill" 29 SLR (1913) 257 at 258. The Conveyancing (Scotland) Act 1874, s 23 prevented feudal casualties from arising by operation of law in subsequent feu grants. At one time there were feudal casualties of wardship and marriage but these were abolished by the Tenures Abolition Act 1746. See the Discussion Paper, para 2.5.

¹⁷ Bell's *Principles*, para 716.

¹⁸ It was not necessarily payable on the death of the owner in possession but might be payable on the death of an earlier owner who had long since sold the property. See the Discussion Paper, para 2.5.

¹⁹ The Act of 1469 c.36 and the Tenures Abolition Act 1746.

²⁰ *Encyclopaedia of the Laws of Scotland sv Casualties of Superiority*, para 246.

2.7 Where composition was payable, the amount due was specified in the Act of 1469 c.36 as "a year's maill, as the land is set for the time". Maill meant rent, but it was extended by the courts to cover a subfeuduty in those cases where the vassal had subfeued the lands. The Act did not cover the case where the vassal himself occupied the land but the courts held that in such a case the composition should be the rental value - that is, the amount of rent which the lands would produce if let.²¹ The year's rent or rental value was subject to deductions for public burdens, repairs and stipend.²² The rateable value was sometimes used as a guide²³ but it was not conclusive and had to yield to proof of actual rent or rental value.²⁴ The underlying principle was that of placing the superior in the vassal's position as regards the vassal's income from the property for the year.²⁵ Where an actual rent was payable to the vassal for the year in question it was held to be wrong to use a notional rent based on a supposed return on capital.²⁶

Transplantation of feudal casualties into leases

2.8 Clauses reflecting the feudal liability for relief and composition were regularly incorporated into eighteenth and nineteenth century ground leases.²⁷ Duplicands of the tack duty payable at fixed intervals also appear. Indeed these duplicands became almost the only type of casualty inserted in leases after 1874. Often a lease would provide for a combination of different types of casualties or for variations on the feudal theme. For example, only a double ground rent, and not the full rental value, might be payable on an assignation; or payment of a casualty by an assignee might be postponed until the death of the last person to pay a casualty under the lease; or payment of a small lump sum (e.g. one penny or £12) might be due on an assignation. We came across one lease which provided that "in lieu and place of the casualties of superiority which would have fallen to [the landlord] had [the tenant] feued the subjects from him" a casualty equal to the real rent of the land and buildings was to be payable every 25 years during the currency of the lease.

Types and incidence of leasehold casualties

2.9 For the purposes of this report, leasehold casualties can be divided into those based on annual rental value,²⁸ those based on the ground rent or tack duty and those expressed in terms of a fixed sum. Casualties based on rental value are the only type which give rise to difficulty in practice. As the rental value is based on the land and the buildings erected on

²¹ *Aitchison v Hopkirk* (1775) Mor 15,060; *Lord Blantyre v Dunn* (1858) 20 D 1188; *Earl of Home v Lord Belhaven* (1903) 5F (HL) 13.

²² *M'Laren v Burns* (1886) 13 R 580.

²³ See *M'Laren v Burns* (1886) 13 R 580 by Lords Craighill and Rutherford Clark.

²⁴ *Duke of Argyll v Bullough* (1904) 6 F 949. *Crawford v Campbell*, 1937 SC 596.

²⁵ *Crawford v Campbell*, 1937 SC 596 at 602.

²⁶ *Earl of Home v Lord Belhaven* (1903) 5 F (HL) 13.

²⁷ The information in this and the succeeding paragraph is based on the research carried out for us in 1997. See Appendix B for further details. The research showed that rental value casualties were hardly ever inserted in leases granted after 1874. The attempt by the Conveyancing (Scotland) Act of that year to phase out feudal casualties seems to have had an influence on practice relating to leasehold casualties.

²⁸ We use the term "rental value" in this report as a shorthand way of describing those casualties which are based on the rent or rental value of the property, including the buildings, held under the lease. The "rent" in this context is not the tack duty or ground rent due *by* the tenant but the rent, if any, due *to* the tenant under a sub-lease. The "rental value" is the rental value of the subjects, including the buildings, to the tenant. The actual terms of "rental value" casualty provisions vary. Some refer to "one full year's rent or value". Some refer to "one full year's real yearly worth". Some refer to "one full year's rent of the Lands with the whole houses built at the time thereon". Some refer to "a sum equal to what the premises would then let for at rack rent". See Appendix B. The distinguishing feature is that the rental value of the buildings is reflected in the amount of the casualty.

it, these casualties can be of a substantial amount. This type of casualty is found in only a minority of long leases. The casualty is normally payable only on assignment of the lease. It is a levy by the landlord on value added or paid for by tenants' expenditures because the buildings were erected and improved, or purchased, with the tenants' capital.

2.10 The Guthrie Committee²⁹ referred to what had happened in the two Lanarkshire villages of Stonehouse and Larkhall.

"Most of the houses built on leased land in these villages were erected originally by building societies formed for the purpose by small groups of miners or weavers. Wages were small then and the houses, often consisting of a house room and a loom shop, had clay floors and no ceilings, just rafters, but as the members of the societies cleared their dues on the houses they occupied, they began the series of improvements, such as lathing and plastering, and the installation of water and drainage and gas services, which, in most of these 'owner'-occupied homes, has been effected through the generations. Houses built in Stonehouse in 1860 cost about £100 to construct: now the improvements of successive lessees and the vast change in property values since then have combined to give them a value never dreamt of by the first occupants. It is understandable that, once a family had paid off what was due to the building society and had improved the house considerably, they looked on it as their own, without regard to the eventual rights of the landowner."

2.11 Casualties based on the ground rent or tack duty may take the form of duplicands payable at regular intervals or sums payable at irregular intervals when the lease is taken over by an heir or assignee. Such casualties are of little or no economic importance. Ground rents payable under long tacks are generally low. The research which we carried out in 1997 showed that the average ground rent in a Lanarkshire casualty lease was under £4 a year.³⁰ More than a third of the leases examined had a rent of £1 a year or less. Rents of this amount, payable half-yearly, are not worth collecting and are not in fact collected. Casualties consisting of a fixed sum (not related directly to the tack duty) are comparatively rare. The fixed sum may be payable at regular intervals or on the entry of an assignee. The sums involved are small or derisory.³¹

2.12 Our research into a 20% sample of registered Lanarkshire leases revealed 290 leases with casualty provisions out of a sample of 875 leases.³² Only 95 of the leases contained onerous casualty provisions of the rental value type.³³ A smaller sample of 105 Renfrewshire leases contained 28 with casualty provisions of which only one was a rental value casualty.³⁴ None of the small sample of 76 Clackmannanshire leases examined contained a rental value casualty, although 67 provided for payment of a small duplicand based on the ground rent.³⁵ The small sample of 20 Ayrshire leases included 11 which provided for casualties, only four of which were rental value casualties.³⁶

²⁹ At para 58 of their report.

³⁰ 290 leases containing casualty provisions were examined. The average rent was £3.82 a year. The maximum rent in the sample was £44.48 but this was exceptional. See Appendix B.

³¹ Eg a penny if asked only. See Appendix B.

³² See Appendix B. There was also a lease where the casualty provision had been expressly discharged.

³³ Many of these may be unenforceable because of partial assignments. See paras 2.13-2.14 below.

³⁴ This particular casualty was payable every 25 years. See Appendix B.

³⁵ See Appendix B.

³⁶ See Appendix B.

Partial assignments and sub-leases

2.13 Long tacks were generally granted for building purposes. Sometimes the lease would be of a single house site. A landowner might be attempting to develop industry or commerce on his lands and might be anxious to attract skilled tradesmen. A long tack of a single building plot might be granted.³⁷ Building plots in the eighteenth and nineteenth centuries were often bigger than they are now and many of these plots have been subdivided. Partial assignments, limited to part of the original subjects, have often been granted. Sometimes the original lease would be of a large plot of land suitable for the building of several houses or other buildings. The lessee would build houses or shops and sell the separate lots thus created. The disposal might be done by a partial assignment of the lease.

2.14 In the absence of any attempt by the cedent to impose new conditions in the assignment itself,³⁸ the effect of a partial assignment would depend on the terms of the casualty clause in the original lease. The original casualty clause might be applicable only to an assignment of the lease as a whole in which case no casualty would be payable on any assignment relating only to part of the subjects leased.³⁹ This is a potentially important point. Our research indicates that many tacks have been subject to partial assignments. Indeed, of the 95 rental value casualties in the Lanarkshire sample our researcher estimated that as many as 74 were affected by partial assignments.⁴⁰

2.15 Often the lessee would grant sub-leases instead of partial assignments.⁴¹ Although the original long tack would sometimes contain provisions for the payment of a casualty for the first year's possession of any sub-tenant whose lease exceeded 19 years⁴² such provisions were of doubtful legal effect. First, they might not apply to a sub-lease of only part of the subjects.⁴³ Secondly, although possibly binding on the tenant,⁴⁴ they would not be legally binding on the sub-tenant. The sub-tenant had no legal relationship with the original landlord. His only relationship was with the intermediate landlord who had granted the sub-lease. He was not a singular successor to the original tenant but was the first holder of a separate and subordinate right. The sub-lease might itself oblige the sub-tenant to pay casualties to the intermediate landlord but in practice intermediate landlords, having sold off all their sub-plots for capital sums and having lost interest in ground rents of trifling value, may have become uninterested and untraceable.⁴⁵

³⁷ Mr James Campbell, WS gave examples of this practice in the Saltcoats and Ardrossan areas.

³⁸ On this situation see the Registration of Leases (Scotland) Act 1857, s 3(2) and (3) as inserted by s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

³⁹ *Kaye v Archibald* 27 June 1996 (Sheriff Court at Hamilton, unreported).

⁴⁰ See Appendix B, para 10.

⁴¹ Sub-leases were often preferred because, until the enactment of s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 it was doubtful whether effective conditions, different from those in the original lease, could be imposed in a partial assignment in such a way as to be binding on singular successors of the assignee.

⁴² See Appendix B, para 32, Type B.

⁴³ The considerations here are the same as for partial assignments. Everything would depend on the terms of the relevant casualty clause but often it would relate only to a sub-lease of the whole subjects.

⁴⁴ The tenant might, of course, contract with the sub-tenant for reimbursement.

⁴⁵ The Long Leases (Scotland) Act 1954 contained special provisions to deal with the problem of the untraceable intermediate landlord.

The demise of feudal casualties

2.16 There was a recommendation from the Law Commissioners in 1838 for the abolition of feudal casualties on due compensation.⁴⁶ Eventually the Conveyancing (Scotland) Act 1874 provided a scheme whereby the proprietor could insist on their redemption according to statutory terms.⁴⁷ Section 23 of the 1874 Act prevented casualties from arising by operation of law in new feus and outlawed future stipulations for relief and composition, whilst stating that casualties (such as duplicands) of certain amount and payable at fixed intervals, rather than on events the time of whose occurrence was uncertain, remained lawful where contracted for.⁴⁸ The redemption terms in the 1874 Act were too favourable to the superiors and proved unpopular with vassals, with the result that the Act was of limited value.⁴⁹ The Royal Commission on Registration of Title presided over by Lord Dunedin recommended in 1910 that there should be compulsory redemption of feudal casualties if a proper basis of compensation could be fixed.⁵⁰ A scheme was worked out by a committee under Sir George Paul and the Feudal Casualties (Scotland) Act 1914 introduced a redemption scheme which could be activated at the option of either superior or proprietor with a set timescale at the end of which outstanding casualties and corresponding rights to compensation on discharge were automatically extinguished. The redemption scheme in the 1914 Act was difficult and complicated but it achieved its purpose and feudal casualties are now a thing of the distant past.

Effect on leasehold casualties

2.17 The 1874 Act had no direct effect on leasehold casualties but it appears to have had a powerful indirect effect on such casualties in Lanarkshire leases. Before 1874 duplicands payable at regular intervals of 19 years or more were very rare in Lanarkshire. Casualties were normally payable on the entry of each heir or assignee. A common provision was for a duplicand on the entry of each heir or assignee. Another common type of provision was for a duplicand on the entry of each heir and a full year's rent or rental value on the entry of each assignee. After 1874 rental value casualties disappear. We do not know why this was so. It may be that the general assumption that long tacks were the equivalent of feudal titles was applied. It may be that there were doubts about the propriety or enforceability of rental value casualties. At any rate there appears to have been a decisive change in attitude towards them. After the Feudal Casualties (Scotland) Act 1914 there appears to have been even more doubt on the part of landlords and their factors and agents as to whether casualties were still exigible from leasehold subjects. There appears to have been a "feeling that such exactions were, since the 1914 Act, no longer in keeping with public policy".⁵¹

Legislation on leasehold casualties

2.18 Leasehold casualties escaped the reforms which led to the abolition of feudal casualties, perhaps because of their localised nature and comparative rarity, but have not

⁴⁶ See the Third Report of Her Majesty's Law Commissioners (Scotland) 1838, pp xiv - xv and xli - xlii.

⁴⁷ ss 15 to 19.

⁴⁸ The relevant words of s 23 were that "In feus granted after the commencement of this Act... it shall not be lawful to condition or stipulate for any casualty to be paid on the succession of an heir or the acquisition of a singular successor, or in any way except at fixed intervals..." Only casualties of fixed and certain amounts payable at fixed intervals were allowed.

⁴⁹ See Burns, p 22.

⁵⁰ Report of the Royal Commission on Registration of Title in Scotland (Cd 5316, 1910) paras 30 and 60.

⁵¹ Submission by Mr James Campbell, WS, Saltcoats, in response to our Discussion Paper.

been totally exempt from legislative attention. By the Long Leases (Scotland) Act 1954, a right was given to tenants under leases of at least 50 years duration granted prior to 10 August, 1914 to purchase as feus any parts of the subjects occupied by such lessees as their usual residences. This power to buy out the landlord's interest expired, in terms of the statute, on 1 September, 1959.⁵² The 1954 Act included provisions for calculating the appropriate redemption amounts for any casualties payable under the lease.⁵³ Finally, section 16 of the Land Tenure Reform (Scotland) Act 1974 banned the inclusion of stipulations for the payment of casualties in future leases.⁵⁴ However, the right to stipulate for a periodical variation of rent was preserved. A duplicand could be regarded as a doubling of the rent. So periodical duplicands may not be prohibited by the section. This Act also prohibited the use of long leases for residential purposes,⁵⁵ thus cutting off for many tenants the possibility of granting a sub-lease for the remaining duration of the head lease instead of an assignation.

Judicial attitude to leasehold casualties

2.19 Where a casualty clause is clear it will be given effect by the courts according to its terms.⁵⁶ It is no concern of the courts if casualty provisions in old leases were expressed in a way which makes them ineffective in certain common circumstances or easy to avoid by simple devices. Burdens cannot be imposed or increased by implication on a tenant. In one case a lease provided for payment of a casualty on the entry of an heir of "one real year's rent of the subjects, in the same way as is used in feu holdings". The court held that the clause gave the landlord a right only to a duplicand of the tack duty, because that would have been the technique used in feu holdings on the entry of an heir.⁵⁷ Where the meaning of a casualty clause is obscure or doubtful two principles of construction may come into operation.⁵⁸ First, a doubtful expression will be construed against the interests of the person who put it forward (normally the landlord).⁵⁹ Secondly, there is a preference for a construction which favours freedom from a burden or restriction.⁶⁰

Practice of landlords

2.20 The practice of traditional Scottish landlords in relation to long ground leases was to regard them as feudal titles in all but name. The Guthrie Committee received few

⁵² See ss 1 and 31(2).

⁵³ ss 7 - 9; Sch 2.

⁵⁴ s 16 provided that

"No casualties in future leases. In leases executed after the commencement of this Act, it shall not be lawful to stipulate for the payment of any casualty, but this provision shall be without prejudice to the right to stipulate for review of rent or for a permanent or periodical variation of rent in accordance with any condition of or relating to the lease."

For the background, see the Green Paper on *Land Tenure Reform in Scotland* (HMSO) 1972, para 76.

⁵⁵ ss 8 and 9.

⁵⁶ *Crawford v Livingstone's Trs* 1938 SC 609 at p 618 ("equity seems to me to have little to do with casual payments such as this").

⁵⁷ *Buchanan's Trs v Pagan*, (1868) 7 M 1. See also *Kaye v Archibald* 27 June 1996 (Sheriff Court at Hamilton, unreported) where a casualty clause was read strictly according to its terms.

⁵⁸ See our Discussion Paper on *Interpretation in Private Law* (Discussion Paper No 101, 1996) paras 6.13 and 6.21 and our report on *Interpretation in Private Law* (Scot Law Com No 160, 1997) Appendix B.

⁵⁹ This is the so-called *contra proferentem* rule. See *Buchanan's Trs v Pagan* (1868) 7 M 1 at 3 and Rankine, *The Law of Leases in Scotland* (3rd edn, 1916) 98.

⁶⁰ There are many cases in which this rule is referred to. See eg *Governors of Heriot's Hospital v Ferguson* (1774) 3 Pat App 674; *Tailors of Aberdeen v Coutts* (1837) 2 Sh & Macl 609 at 667; *Dykehead and Shotts Co-operative Society v The Public Trustee* 1926 SC 157 at 162 and 167; *Kemp v Magistrates of Largs* 1939 SC (HL) 6 at 12; *Carswell v Goldie* 1967 SLT 339 at 341.

complaints about the practices of landlords. Many landlords would readily grant conversions to feu tenure on generous terms. They recognised that their ancestors would probably have granted feus but for technical restrictions. They would often not claim any capital sum for the conversion but only a feu duty in place of the tack duty.⁶¹

2.21 According to the information we have received, both before and in response to our discussion paper, there was for many years a prevalent practice of not collecting leasehold casualties. Following the legislation limiting and then abolishing feudal casualties there appear to have been serious doubts about the enforceability or propriety of rental value casualties. Duplicands were not collected for another reason. They were simply not worth collecting.

2.22 Recently in some areas landlords who did not claim casualties have been replaced by landlords who saw financial possibilities in them. As one firm of solicitors put it:

"their view is that the failure on the part of their predecessors to enforce the provisions of the lease has led to a complacency on the part of the present tenants of the Estates and also on the part of local solicitors. [They] wish to take a business attitude to the whole issue".

Some of our consultees were less charitable in their assessment and simply regarded the new enforcing landlords as speculators, buying up mixed estates consisting of superiors' and landlords' interests on the chance that they would be able to make a profit out of forgotten rights or conveyancing blunders. The prices paid by landlords for their interests are usually a matter of public record. The Coltness and Wishaw estates, which contain many leases with casualty clauses, were bought in 1984 for £42,500. They included the superior's or landlord's interests in about 1176 properties of which approximately half were leasehold.

2.23 We received information from both tenants and the landlord about the recent practices of one enforcing landlord. Although the standpoints were different there was agreement on the main facts. The new landlord had discovered that some of his leases contained rental value casualty clauses. He proceeded to claim outstanding casualties of this type, taking legal proceedings where necessary, in the expectation that tenants who had not been informed of the existence of the casualty would have a claim against their solicitors, who would in turn be covered by insurance. The amounts claimed were substantial. The tenants gave us details of the distress caused to them by these claims and of the difficulties some of them had had in obtaining any satisfaction from their solicitors. The landlord recognised the "mental hardship" which the tenants had suffered but placed the blame entirely on solicitors who refused to accept their responsibilities.

2.24 It is clear from the comments we received from landlords that casualties based on ground rents are not insisted upon in practice, partly because the cost of collection is greater than the financial obligation. Only casualties based on rental value are likely to be collected. One landlord said that, because of the incidence of partial assignments and the decision in

⁶¹ See the report of the Guthrie Committee at paras 57 - 61.

Kaye v Archibald,⁶² it was unlikely that such casualties were collectable "except only in a small number of cases".

2.25 Two landlords referred to the fact that landlords often did not know when a casualty had fallen due. There was no obligation on the tenant to inform the landlord of an assignation. In practice, intimation of an assignation was rarely made. On one estate there had apparently been only one intimation of an assignation out of a total of thirty four assignations in the previous twenty years. One respondent referred to the problem which arose when in terms of the lease the casualty was not payable until the end of the first year of the new tenant's possession. In such cases the solicitor might advise the tenant of the casualty obligation but also tell the tenant that payment did not have to be made until the end of the first year. The tenant might not volunteer any payment until the landlord discovered the situation.

2.26 We were told of cases where sales of houses had almost fallen through, or had actually fallen through, because the purchaser had insisted on the casualty being bought out but the vendor, having a large loan secured on the house, did not have enough money to do this.

2.27 Comments from tenants and landlords also provided some information about the terms on which rental value casualties could be bought out in practice. A tenant and a landlord both referred to a case where the landlord had offered the tenant the chance to buy out the casualty for 1.5 times the annual rental value.⁶³ We were also told, however, that a routine arrangement with the professional indemnity insurer for solicitors was for the future obligation to pay a rental value casualty to be bought out at a rate of two and a half times the annual rental value. And we were told of cases where landlords had based their claim for a redemption sum for a rental value casualty on a multiplier of three, apparently on the view that the property would have been likely to change hands three times in the next twenty or thirty years.⁶⁴ Landlords, we were told, would deal "realistically" with requests to buy out casualties. They appreciated that to make demands at too high a level could result in their receiving nothing, partly because some tenants had little equity in their houses and could simply not afford to pay very much. However, it seems that they always require their legal expenses to be paid. Some of the comments we received on this issue left us with the impression that the fixing of redemption sums for rental value casualties was often more a matter of assessing what the payer could or would pay than of scientific calculation.

2.28 We also received some information about the ways of calculating the notional rental value. At one time rateable values had been used, and would still be argued for by tenants in commercial property cases. In relation to dwelling houses, various techniques were used, including known rents for comparable property and rough and ready estimates of what a property could have been rented for. We were told that in the Lanarkshire area it was becoming more common for solicitors to agree a settlement based on Council Tax bandings,

⁶² 27 June 1996 (Sheriff Court at Hamilton, unreported). As noted above, it was held in this case that a casualty exigible on a transfer of the whole subjects of the original lease was not exigible on a transfer of only part of the subjects.

⁶³ The tenant regarded this as extortion. The landlord cited it as an example of a generous offer which had been completely misrepresented in the press.

⁶⁴ This seems to ignore the elements of uncertainty and risk inherent in such casualties and also seems to ignore the fact that the present value of a pound receivable in, say, twenty years time has to be heavily discounted. We discuss appropriate multipliers in more detail in Part 5.

the rule of thumb figures for each band being based on known rental values for similar properties.

Enforceability

2.29 There is normally⁶⁵ no doubt as to the enforceability of duplicands payable at regular intervals. The obligation to make such payments is an obligation on the original tenant in the same way as the obligation to pay rent. It is a qualification of the right to occupy the subjects and, as such, passes on assignation to the new tenant. The amounts of such duplicands are fixed and never excessive. They do not depend on value added to the land by tenants. Such casualties do not depend on events or levels of rent which are within the control of the tenants. They cannot easily be avoided and would not be worth avoiding even if they could be. They do not in practice give rise to legal disputes.

2.30 The position is not so clear in relation to casualties payable by assignees. Although the enforceability of such casualties was accepted in several court cases this century, and was assumed in the Long Leases (Scotland) Act 1954, they are constantly being subjected to legal challenge. One landlord complained about this. There may turn out, in the course of time, to be some legal defect in them or in some versions of them. There are theoretical weaknesses worth probing. It is not easy to achieve by contract what was achieved for the feudal system by statute. It is not easy to ensure that a provision which can, of its very nature, never be binding on the original tenant and which is not an ordinary and natural term of a lease transmits by assignation against singular successors.⁶⁶

2.31 Developments in the general law on penal or oppressive clauses in contracts could have an indirect effect on leasehold casualties. In short, even if such casualties have escaped the effect of common law doctrines so far, there is no guarantee that they will do so for ever.

2.32 Whatever may be the present or future position in relation to rental value casualties generally, it is already clear that many rental value casualties have been rendered valueless or unenforceable as a result of sub-leases and partial assignations. In some cases the landlord may have expressly or impliedly waived rights to casualties.⁶⁷ A particular casualty provision may be void from uncertainty.⁶⁸ A provision which appears to impose a rental value casualty may be interpreted as imposing only a casualty based on the tack duty.⁶⁹

2.33 It also seems clear that the impact of many surviving rental value casualties, even if they are assumed to have been validly created, could be avoided or greatly reduced by the use of lawful avoidance devices. From the landlord's point of view there are two basic weaknesses. First, the casualty often depends on there being an assignation of the lease. In certain cases,⁷⁰ the use of a sub-lease instead of an assignation avoids the casualty.⁷¹ Even

⁶⁵ However, particular provisions may be ineptly drafted. We came across one lease which provided for payment of a duplicand at unspecified intervals.

⁶⁶ The difficulties are not resolved by section 3 of the Registration of Leases (Scotland) Act 1857 because it presupposes that the conditions and stipulations which are to be binding on the assignee of a recorded lease are valid. It does not validate any conditions and stipulations which are invalid.

⁶⁷ We discussed the law on waiver at paras 6.21 to 6.25 of the Discussion Paper.

⁶⁸ Eg the provision, mentioned above, for payment of a duplicand at unspecified intervals.

⁶⁹ See eg *Buchanan's Trs v Pagan* (1868) 7 M 1. Some casualty provisions in leases are far from clear on this point.

⁷⁰ But not normally, since 1974, in relation to residential property because of the effect of s 8 of the Land Tenure Reform (Scotland) Act 1974.

⁷¹ Of course, everything depends on the terms of the actual lease but many casualty clauses are not carefully framed to prevent avoidance.

where this possibility is not available there are ways of ensuring that there is at most only one assignation. In relation to feudal casualties there were special statutory provisions to deal with the situations where the property was held by a company or by trustees.⁷² There are no such provisions in relation to leasehold casualties. Where property is owned by a company or by trustees the transfer of shares in the company or of the beneficiary's rights under the trust can take the place of a transfer of the property. Landlords use companies to hold their titles. There is no reason why tenants should not do the same. Collective action by or on behalf of tenants could create a low-cost title-holding system. Secondly, the amount of the casualty often depends on the actual rent if the property is let for the full year in question.⁷³ There may be ways of ensuring that this amount is not excessive. For example, an assignation to a title-holding company or to the trustees of a title-holding trust followed by a short sublet to the householders at a rent just sufficient to cover permissible outlays might, depending on the terms of the casualty clause, frustrate a claim for a large rental value casualty. We do not want to over-emphasise this point because we have no evidence that deliberate avoidance devices have been widely used so far.⁷⁴ There are practical objections to them in many cases. Individual purchasers might prefer to opt out of a transaction and buy elsewhere than to become involved in potential complications. Nonetheless there is undoubtedly scope for avoidance and for sharing the resulting savings between seller and purchaser. Much depends on the amount at stake. The greater the casualty the greater the temptation to find a way of avoiding it. A right to very large sums of money, which depends on actions within the control of the debtor, has no secure future value.

⁷² Conveyancing (Scotland) Act 1874, s 5.

⁷³ *Cf Earl of Home v Lord Bellhaven* (1903) 5 F (HL) 13. A common form of casualty provision refers to a full year's "rent or value" of the subjects (see Type A in Appendix B). If this is not void from uncertainty it presumably falls to be interpreted as providing for the measure of the casualty to be a year's rent if the subjects are actually sublet and to a year's value if they are not. This corresponds to the rules developed in relation to feudal casualties.

⁷⁴ The effects of sub-leases and partial assignations on casualties in the past have probably been fortuitous rather than deliberate.

Part 3 The need for reform

Introduction

3.1 Two problems are currently giving rise to concern in relation to leasehold casualties but only the second is amenable to solution by law reform.

The first problem

3.2 The first problem, and the one that has given rise to most concern in the press and Parliament, is the level of distress suffered by tenants who have suddenly and unexpectedly been faced by demands for large sums of money by landlords claiming payment of outstanding rental value casualties. The press and Members of Parliament have placed the blame for this situation on new landlords who have departed from the settled practice of traditional landlords and have exploited what they saw as a lawful opportunity to extract money from others without doing anything in return. In their submissions to us, representatives of two of these new landlords suggested that the blame lay entirely on solicitors who had failed to advise their clients of the existence of a potential liability to pay casualties.

3.3 Tenants who were not properly advised that their lease contains a casualty clause are placed in an unenviable position when faced with an unexpected demand for payment. They usually have no way of knowing whether the clause is valid or invalid. They have to rely on legal advice. Their solicitor may say that the clause is unenforceable or may say that the tenant was duly informed of the clause. The landlords may press vigorously for payment and threaten legal action, saying that the tenants have a claim against their solicitors. This may or may not be correct in any particular case. What is clear is that to be caught between an insistent landlord and a solicitor who denies, or who is reluctant to admit, professional negligence can be a source of prolonged worry, trouble and expense. The comments which we received on our discussion paper left us in no doubt on this point.

3.4 The responsibility of solicitors for some of the problems which have arisen in relation to leasehold casualties was recognised by legal commentators on our discussion paper. The Law Society of Scotland said that

"Solicitors ought to have been aware of their continued existence and have taken the necessary steps to ensure that the leases were checked."

A member of the Society of Writers to H. M. Signet¹ said that

"The current situation ... whilst clearly distressing to those involved, shows a need for education and perhaps the loading of indemnity premiums rather than a reason for a change to the law. Surely the fact that the public suffer as a result of the errors of the legal profession is a cause for concern as to the quality and standards of the profession rather than a reason to change the law ..."

¹ Mr J M Robertson, WS.

3.5 It must, we think, be recognised that not all of the casualty provisions which have been founded on by landlords are valid and enforceable. It must also be recognised that not all solicitors in areas affected by casualties have been negligent or irresponsible. Some will have advised their clients fully and at the proper time of the risks and liabilities involved. Others, on discovering that they have overlooked a valid and enforceable casualty, will have immediately assumed the responsibility of clearing it from the title at their own expense. It is also necessary to take into account that long practice in an area where casualties were never in fact demanded may have caused some solicitors to underestimate the risk which a change of landlord or a change of practice would pose to their clients. That is not an excuse but it is probably an explanation.

3.6 One of the justifications for conveyancing fees has always been that the client is buying security of title and peace of mind. Where a failure to inform a client of an enforceable burden which is obvious on the face of the title has led to loss and distress it is clearly incumbent on the solicitor to accept responsibility in such a way as to minimise further distress for the client. But landlords who have caused distress by enforcing rental value casualties cannot entirely escape responsibility by laying the blame on the legal profession. It is they who have chosen to re-activate archaic and dormant rights for their own advantage, regardless of the stress and unhappiness this may cause.

3.7 We mention this first problem because it was emphasised by several consultees and is part of the background to this report. However, law reform measures cannot undo what has already happened and cannot reasonably do anything to relieve people of liabilities already incurred.

The second problem

3.8 The second problem is that leasehold casualties are an archaic, anachronistic and undesirable feature of Scottish property law.

3.9 Rental value casualties are particularly objectionable. They are an example of burdens attached to land one or two hundred years ago² which have come to seem unreasonably onerous and unjustifiable in current conditions. Because they are based on an annual rental value for the buildings as well as the land, and because the annual value of a notional short let for a year depends almost entirely on the buildings, and because in the case of ground leases the buildings were invariably erected and developed or purchased by the tenant, rental value casualties amount, morally if not legally, to a levy by the landlord on the value of tenants' expenditures. They have proved to be a dangerous trap for all those who relied on the continuance of an established practice of non-enforcement. They complicate house transfers and operate as a sort of private transfer tax. They give rise to legal and practical difficulties and extra costs - including in some cases the difficulty and cost of finding out who is the current landlord. They originated as an imitation of a feudal institution which never had any place in leasehold tenure and their acceptability has not improved with the passing years. They are perceived as oppressive exactions - a way in which landlords get something for nothing and tenants can be forced to pay a sort of private fine.

² Our research shows that almost all onerous leasehold casualties date from the period between 1750 and 1875. See Appendix B.

3.10 Other casualties, based on the ground rent or on small fixed sums, do not amount to a levy on tenants' expenditures and do not give rise to the same problems in practice. Nonetheless their existence, even in dormant form, makes it more difficult to introduce measures to convert ultra-long leasehold tenure into absolute ownership.

3.11 Even if no hardship or distress had been caused to existing tenants there would still be a strong case for eliminating leasehold casualties from the law as soon as possible.

The landlords' case

3.12 The enforcing landlords who submitted comments to us argued that there was no problem requiring a legislative solution. In their view there could be only one of two situations. Either the tenant had been negligently advised, in which case there was a remedy against the solicitor, or the tenant was fully informed of the existence of the casualty obligation at the time of acquiring the property, in which case the price would have been reduced accordingly. In either event there would be no problem. It is not quite so simple.

3.13 First, a tenant might not have been negligently advised but might still have paid a full price. A solicitor who informed the client fully of the casualty provision in the lease but who said, accurately, that such provisions had not in practice been enforced within the last eighty years and who added that there was always a risk that practice could change or that a new landlord might try to enforce the provision, would not have been giving negligent advice and yet the tenant may have paid a full price. Even a tenant who was strongly advised that a casualty liability existed might have paid a full price. Supply and demand, shortage of suitable accommodation or competition for a house may be the most important factors in determining price in a particular case. All that can safely be said is that a tenant who knew about the casualty will not be taken by surprise. It cannot safely be assumed that such a tenant suffers no loss because of the casualty.

3.14 Secondly, a tenant who had been negligently advised would not necessarily have a claim against the solicitor. The tenant may have found out about the casualty shortly after entry but may have taken no action within the prescriptive period of five years applicable to claims for reparation.³ If it is the case, as these landlords strongly contended, that the obligation to pay a rental value casualty prescribes only after twenty years⁴ then there is a long period of time when the tenant is liable without any possibility of relief against the solicitor. In some cases too the existence of the casualty may come to light only when the tenant comes to sell the house. By that time the solicitor's obligation may have been extinguished by the long negative prescription of twenty years.⁵ There may be other types of case, such as those where a house is inherited, where the liability for casualty payments falls clearly on the tenant and not on solicitors or their insurers.

³ Prescription and Limitation (Scotland) Act 1973, ss 6 and 11. Prescription runs from the date when the obligation to make reparation becomes enforceable. That is normally when the loss occurs. The tenant suffers loss when he or she pays too much for the house subject to the undisclosed burden which reduces its value. Section 11(3) allows for an extension of time where the person concerned is not aware and could not reasonably be aware that the loss had occurred. That is why we have assumed in the text that the tenant has learned of the burden of the casualty.

⁴ See para 8.14 below and the discussion of this question in our discussion paper at paras 6.2 - 6.10. A rental value casualty will prescribe in five years if it is a "periodical payment under a lease". Otherwise it will prescribe in twenty years. The prescriptive period depends on whether the term "periodical" in this particular statutory context necessarily implies regular intervals.

⁵ Prescription and Limitation (Scotland) Act 1973 s 7.

3.15 We are not persuaded by the argument that there is no cause for complaint if the casualty is known about at the time of acquisition. This argument ignores the peculiar nature of rental value casualties. Such casualties appear as unjustifiable exactions. Tenants under 999 year leases, who are in effect buying the property and who regard themselves as owner-occupiers, see no reason why they should pay them. They do have cause for complaint. Their complaint is that they are house purchasers, just like any other house purchasers, and yet they are faced with demands for large capital sums simply because the original landlord for his own reasons, often connected with a desire to avoid restrictions applying to him, granted a title in one form rather than another. The current landlord, who has no active role in relation to the property, is claiming a return on tenants' capital because of a conveyancing device used by a distant predecessor.

3.16 The landlords' argument also seems to ignore the realities of house purchase. Most people buying houses in Scotland are operating at the limit of their financial resources. To go through the process of house hunting, to find a suitable house at last, and then to find after an offer has been made that there will be a liability to pay a further sum of a thousand or more pounds, the exact amount of which may be a matter of prolonged dispute, is an experience likely to provoke resentment rather than the calm acceptance which the landlords' argument seems to presuppose. In many such cases the purchasers' solicitors would require the seller to redeem the casualty but that can give rise to problems and could cause the sale to fall through.

3.17 The landlords' argument also seems to ignore the undesirable effect of rental value casualties on property values and the cost of house transfers. Some houses stay in the same hands for thirty or forty years. In such cases the effect of a rental value casualty, although objectionable, may not be serious in the long run. However, some houses change hands several times in a few years. In such cases, the effect of a rental value casualty, if it were to be regularly exacted, could be devastating. Each householder, although paying a price for the house in the same way as an owner would do, would end up paying a large rent as well. Our research revealed several houses subject to rental value casualties which had changed hands four times in ten years. These were not expensive houses. They were of the type which might be bought by young people buying their first house.

3.18 Our research disclosed another problem. Houses are often transferred otherwise than on sale. One common situation is a transfer from one spouse to another as a result of marriage breakdown. A rental value casualty becomes payable even if there is no price paid on an assignation. The existence of such casualties is a disincentive to all transfers but is a particularly strong disincentive to transfers for reasons other than sale.

3.19 In short, we are not persuaded by the landlords' argument that there is no problem requiring a legislative solution. We believe that there is a problem. It is numerically and geographically limited but where it exists it is serious enough to require a solution.

Can reform be left to the courts?

3.20 When there is an area of the law which requires reform it is often the case that the courts can do what is necessary. A forgotten case may be discovered.⁶ A doctrine or judicial

⁶ As in *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SLT 299.

dictum can be applied in a new way or developed to meet a new situation.⁷ The logic of a fundamental legal principle can be pursued to an appropriate conclusion.⁸ We do not underestimate the responsiveness of the common law.

3.21 There would be advantages in a judicial solution. If, say, rental value casualties payable only by assignees were held to be fundamentally inept, or contrary to public policy as an unreasonable restraint on trade in property (akin to a private capital transfer tax),⁹ or amenable to some old undeveloped "equitable jurisdiction of the court" to protect tenants from "an oppressive use of the powers conferred on the landlord by the contract",¹⁰ or amenable to some newly developed common law power to strike down oppressive provisions in contracts, then the result would be not only that such casualties could not be collected in the future but also that arrears could not be collected either. Judicial reform of the law is retrospective. The traditional non-enforcing landlords would be vindicated. The long-standing practice of non-enforcement would be shown to have been in accordance with the law. On the other hand the new enforcing landlords would obtain some reward for ploughing this forgotten field. They would be able to keep any payments made in error of law outwith the five year prescriptive period applying to claims based on unjustified enrichment,¹¹ and they would be able to keep any payments made to them in settlement of disputed claims.

3.22 Attractive though this prospect is, we do not consider that reform of this area of the law can appropriately or safely be left to the courts. It is not right that the expense of legal reform should fall on private litigants. There would be no guarantee that the courts would be able to arrive at a solution which would meet the requirements of public policy in this area. Much might depend on the facts and circumstances of the individual case. Reform, if it happened at all, would be delayed, expensive and unpredictable.

The results of consultation

3.23 Almost all of those who commented on the proposals in our discussion paper favoured reform of the law on leasehold casualties. Several consultees favoured outright abolition without compensation. We consider that option more fully in Part 4 of this report.

3.24 Other consultees considered that there should be some provision for a sum to be payable on abolition or redemption. The representatives of one landlord, who owns a considerable number of properties subject to casualties, complained about the attitudes of many solicitors but then said that

"the system of casualties is probably an anachronism in the present day and age".

⁷ In *CIN Properties Ltd v Dollar Land* 1992 SC (HL) 104 Lord Keith of Kinkel suggested an enterprising development based on a dictum in the case of *Hannan v Henderson* (1879) 7 R 380 at 383.

⁸ See eg *Mathieson Gee (Ayrshire) Ltd v Quigley* 1952 SC (HL) 38.

⁹ The courts are reluctant to use public policy to strike down contractual terms. However, a situation where landlords themselves had voluntarily given up enforcing certain provisions on the ground that they appeared to be contrary to public policy might be a particularly appropriate one for the use of the doctrine.

¹⁰ *McDouall's Trs v MacLeod* 1949 SC 593 at 599. Cf *Mackintosh v Macdonell* (1798) Mor App sv Tack 8. The law on this subject has been developed mainly in the context of irritancy clauses, and has become rather fossilised, but it is arguable that there is a wider underlying principle. It must be recognised, however, that it would be a big step to hold an enforcement of a legal right to be oppression by itself.

¹¹ See the Prescription and Limitation (Scotland) Act 1973 s 6 and Sch 1 para 1(b). The landlords would normally have to repay payments made in error of law within the five year prescriptive period. See *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SLT 299.

This respondent favoured generous compensation out of public funds. Another landlord considered that the problem was a relatively small one, made the assumption that there could be no abolition without compensation and proceeded to consider the best way of arriving at a fair redemption sum. This landlord thought that it was "unthinkable that any compensation that landlords receive comes from state funds". This would give a windfall benefit to any tenant who had bought in full knowledge of the casualty and, in other cases, would "be a subsidy from the state to the legal profession and their insurers".

3.25 We consider in Part 5 a possible scheme which would provide for the abolition of some casualties subject to full compensation; the abolition of others without compensation unless the landlord opted to preserve them (a technique designed to eliminate dead or abandoned casualties); and the voluntary redemption of any remaining casualties on payment of a statutory redemption sum designed to provide full compensation.

3.26 Some consultees stressed the important differences between rental value casualties and other casualties such as duplicands payable at fixed intervals. There are indeed important practical and theoretical differences between these two types of casualty. There may be good reasons for treating them differently. We discuss in Part 6 a scheme built on this distinction.

3.27 In Part 7 we set out our main recommendations on the question of abolition of leasehold casualties and consider some of the implications.

3.28 In the discussion paper we put forward various provisional proposals designed to limit the scope of the problem of leasehold casualties. We suggested some special provisions on the law on prescription and some provisions of a minor, clarifying nature. The results of consultation and further research have persuaded us that some of these minor reforms would be unnecessary. Some, however, would still be useful and other possible reforms of a minor or consequential nature were brought to our attention by consultees. We discuss these in Part 8 of this report.

3.29 Our consultation has left us in no doubt that leasehold casualties should be phased out. The only question is how that can best be done.

Part 4 Abolition without compensation

Introduction

4.1 Several consultees advocated the abolition of all leasehold casualties without compensation. This is a possible solution, which has several clear advantages over other possible solutions, but which might also be open to criticism on the ground that it is unfair to landlords and infringes their human rights. Whether or not it should be adopted depends to a large extent on considerations which, in our view, only the government can properly assess. We set out below some considerations which appear to us to be relevant. There may be other relevant considerations of which we are unaware. It is known, for example, that some of the areas in which leasehold casualties are found have in recent times suffered from a loss of heavy industry and of the employment which it provided. A type of provision in house titles which, if regularly enforced, would have the effect of a private tax on house transfers may be regarded as impinging on wider policy concerns relating to such areas. We are not in a position to judge these wider matters.

Human rights

4.2 Article 1 of the First Protocol to the European Convention on Human Rights provides as follows.

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

4.3 In our discussion paper we reviewed the case law of the European Court of Human Rights on this provision.¹ We need not repeat a full review here. It is sufficient to note the importance of the second paragraph of Article 1 in the present context and to observe that each Contracting State enjoys a large measure of discretion in assessing what is necessary in the general interest.

4.4 It is clear that the European Convention on Human Rights does not prevent modernisation of a country's system of land tenure or the control of oppressive feudal or quasi-feudal exactions.² It is also clear that the payment of full compensation for every right which is restricted or removed in the course of such modernisation or control is not

¹ Part IX.

² If the Convention had been drawn up a century earlier one of its main concerns might well have been to protect citizens from excessive feudal exactions.

necessarily required.³ Indeed in the context of landlord and tenant, a landlord can in appropriate circumstances be deprived of rights affecting his income from the property (such as a right to a grossly excessive rent) without any compensation being required.⁴ The absence of legitimate expectations can also be taken into account: a person who acquires an asset in the knowledge that it is likely to be short-lived is not in a strong position to claim compensation for its loss within the expected time.⁵

4.5 A State must use the discretion conferred by Article 1 in a responsible, appropriate and proportionate way, having regard to all the legitimate interests involved, including the interests of the persons whose use of their property is being controlled. A proper balance must be struck between the demands of the community's general interest and the requirements of protecting the fundamental rights of the individual.⁶ Only in exceptional cases will it be legitimate for there to be a deprivation of rights without compensation.

4.6 One feature of rental value casualties which is important from the human rights point of view is that the tenant is being taxed by the landlord on an annual value which is based almost entirely on tenants' expenditures. The leases with which this report is concerned are ground leases where land was let for building purposes. In all such cases the buildings will have been erected and improved, or paid for, by the expenditure of tenants' capital.

4.7 Two cases of the European Court of Human Rights are particularly relevant in the present context.

4.8 The Duke of Westminster's case⁷ was concerned with a provision in the (English) Leasehold Reform Act 1967 which enabled tenants to buy out the landlord's interest for a sum based, in some cases, on the value of the property less the value of the house. The effect was that tenants could buy out the landlord's interest and then sell at a large profit. The Duke of Westminster's trustees, who had owned valuable properties in London of which they were deprived under the 1967 Act, contended that the Act infringed the First Protocol to the European Convention on Human Rights. They were unsuccessful. The court found that it was within the Convention to take into account the lessee's "moral entitlement" to the house. The court also recognised that Contracting States had a wide margin of appreciation in the field of economic and social policy and that there could be a public interest in ensuring the fairness of private legal relations. The 1967 Act was a much more extreme measure than the abolition of future rights to leasehold casualties would be because it deprived the landlord of his whole interest in the property and not just of his right to use it to extract money from the tenant from time to time. The amounts involved were also much greater than the amounts which would be involved in the abolition of leasehold casualties.

4.9 In *Mellacher and Others*⁸ severe rent control measures in Austria, which deprived landlords of part of the income from their property, were held to be justified under the second paragraph of Article 1 of the First Protocol. The enforced rent reductions were

³ See *James v United Kingdom*, ECHR, 21 February 1986, Series A No 98. On the adequacy of compensation, see also *Lithgow and Others*, ECHR, 8 July 1986, Series A No 102 esp at para 121.

⁴ See *Mellacher and Others*, ECHR, 19 December 1989, Series A No 169.

⁵ See *Fredin*, ECHR, 18 February 1991, Series A No 182.

⁶ See the above cases and *Erkner and Hofauer v Austria*, ECHR, 23 April 1987, Series A No 117.

⁷ *James v United Kingdom*, ECHR, 21 February 1986, Series A No 98.

⁸ ECHR, 19 December 1989, Series A No 169.

sometimes "striking in their amount". The European Court of Human Rights concluded that the measures were not so inappropriate or disproportionate as to take them outside the State's margin of appreciation. It also noted that

"The fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice."⁹

Again this was a much more extreme measure than the abolition of leasehold casualties would be. Under the Austrian law the landlords were deprived of substantial annual sums. The abolition of leasehold casualties would remove only the chance of future payments at long or irregular intervals. The value of the rights removed would be minimal, in the case of casualties based on the ground rent, or so affected by factual and legal uncertainties as to be insecure, in the case of many other casualties.

Public policy in relation to land tenure reform

4.10 One factor to be taken into account is the strength of the government's commitment to land tenure reform. If this is regarded as an important public policy objective at the present time then there can be little doubt that reform of leasehold casualties can be regarded as a legitimate part of it. Any reform of ultra-long leasehold tenure, of the type which constitutes an imitation feudal tenure, would require the elimination of leasehold casualties. If that reform is to be achieved in the short term rather than the long term there is a strong case for immediate abolition of leasehold casualties by operation of law. Immediate abolition would not, in our view, be acceptable if a consequence was that tenants who might never have had to pay a casualty in their lifetime were forced to pay a substantial sum to their landlords. So a strong public policy in favour of urgent reform of the system of land tenure in Scotland supports the solution of immediate abolition of leasehold casualties without any liability on tenants to pay substantial compensation.

Nature of leasehold casualties

4.11 Another relevant factor is the archaic and anomalous nature of leasehold casualties. This was accepted by virtually all of those who commented on our discussion paper. A State must, we believe, enjoy a considerable discretion as to the elimination of archaisms and anomalies from its system of property law and as to whether compensation should necessarily be payable in all cases. The anomalous nature of leasehold casualties in the current law is one of the features which distinguishes them from feudal casualties at the beginning of this century. Feudal casualties were widely regarded as archaic, troublesome and objectionable. But they were a normal and well-known part of the property law system. Leasehold casualties are not. They were a largely forgotten relic, which most people regarded as obsolete in practice, until recently reactivated by a few landlords.

4.12 A great deal depends on the view taken as to the nature of the mischief to be remedied. If the problem is perceived as one in which an unobjectionable feature of property law has to be removed in order to modernise the system of land tenure, then there is a strong argument for compensation. If, however, the problem is seen to be the

⁹ Para 46.

oppressive exaction of large sums of money on the basis of an imitation feudal doctrine which has no justification at the present time, which taxes tenants on value added or acquired by tenants' expenditures and which is clearly contrary to public policy then it is not clear that an appropriate response is to require tenants to compensate landlords.

Freedom of contract

4.13 One of our consultees¹⁰ founded strongly on ideas of freedom of contract. He treated leasehold casualty provisions as if they were freely negotiated provisions in a modern commercial lease. He said

"leasehold casualties are terms of a contract, constituted between a willing landlord and a willing tenant..."

This way of looking at the position may not take full account of the historical realities. Almost all leasehold casualty provisions are in tacks granted over a hundred years ago. Many were granted in the eighteenth century. In many cases the original parties would be, on the one side, a major local landowner and, on the other, a weaver or miner. In other cases the original tenant would be a builder acquiring land for building purposes. We do not know how much freedom to negotiate the tenants had in different types of case. It is dangerous to generalise and to speculate. We do know from our research that the terms of all long tacks granted by particular landlords are usually identical. We also know that rental value casualties were an imitation of the feudal casualty of composition. Landowners and their factors were granting titles which were for all practical purposes the same as feudal titles but which for technical legal reasons took the form of tacks. They appear simply to have borrowed the provisions on casualties payable on the entry of assignees from the equivalent provisions in feudal law. The feudal casualty of composition was not itself a freely negotiated contractual provision. It was the creation of statute. It was, as we have seen, a sort of statutory fine in lieu of the superior's former right to object to the entry of a particular vassal. It is more accurate, in our view, to regard leasehold casualty provisions of this type as historical anomalies which have inappropriately survived than as freely negotiated contractual provisions of the type which might be found in a modern commercial lease.

Position of landlords

4.14 In assessing the case for abolition of leasehold casualties without compensation an important consideration will be the view taken of the position of the landlords under the relevant leases. To what extent can those who have not exercised their rights to exact casualties for many years be regarded as having tacitly abandoned their rights, in fact if not in law? To what extent can those landlords who have recently been exacting casualties be regarded as speculators, gambling that they will be able to make large gains before this obvious anomaly is countered by legitimate avoidance devices or removed by law? To what extent have recent purchasers of landlords' interests been gambling on receiving secure and officially approved gains in the form of compensation? These questions are not easily answered. Information is inadequate. The comments we received from landlords were almost entirely from enforcing landlords or their representatives. They blamed lawyers for

¹⁰ Mr J M Robertson, WS, Edinburgh.

the distress caused to tenants, accepted no responsibility themselves and advocated compensation on generous terms.

Earlier legislative interventions

4.15 The history of legislative interventions in the area of feudal and leasehold casualties is relevant in two ways. First, it has been clear since 1874, and abundantly clear since 1914, that casualties were suspect from the public policy point of view. One of our most knowledgeable consultees¹¹ suggested that this fact was appreciated by landlords and was one of the reasons why leasehold casualties became dormant. Secondly, an unintended result of the restrictions on the granting of long leases for residential purposes¹² was to cut off a way in which some tenants of dwelling houses could quite legitimately bring to an end, for all practical purposes, any future obligations to pay leasehold casualties.¹³ It is no longer possible for such tenants to grant a sub-lease instead of an assignation for the remaining duration of the head lease. It would be open to the legislature to cancel this inadvertent effect by modifying the restrictions on residential sub-leases. However, it seems clear that direct abolition of leasehold casualties without compensation would be preferable to indirect measures which would eventually have the same effect.

Legal doubts and difficulties

4.16 Rental value casualties payable on assignations are often legally suspect. Many apparently valid casualties are already unenforceable because of the effect of sub-leases or partial assignations. Others may be in the future. There may be other possibilities for legal challenge which have not yet been fully explored.¹⁴ Changes in the general background law might well increase the possibilities for legal challenge. For example, a reform of the law on penal or oppressive clauses in contracts could have significant effects on the enforceability of leasehold casualties.¹⁵ We do not know what proposals might be made in this country or at a European level in the future. The point is simply that it cannot be assumed that oppressive contractual terms which have escaped judicial control so far will necessarily continue to do so for ever.

4.17 We have also mentioned already the possibilities for legal avoidance of rental value casualties. Any casualty payable on an event which is within the control of the tenant is inherently open to avoidance measures. Landlords who found on legal technicalities in order to make large demands cannot complain if tenants found on legal technicalities to resist them. This is potentially an important factor in the case of the largest casualties. It

¹¹ Mr James Campbell, WS, Saltcoats.

¹² Land Tenure Reform (Scotland) Act 1974, s 8. This provision effectively prevents the granting of a residential let for more than twenty years.

¹³ This method was not necessarily available in the same way in all leases. Where the lease provided for a casualty to be payable on the grant of a sub-lease exceeding 19 years (Type B in Appendix B) the tenant granting a sub-lease in excess of this length might be liable. However, there would have been no need for any further liability after the first payment. The provision in many such leases would also not appear to have caught a sub-lease for 19 years or less renewable at the tenant's option, an obvious device which is covered by s 8(4)(a)(ii) of the 1974 Act.

¹⁴ In an unreported case decided by Temporary Sheriff John A Baird at Lanark on 1 September, 1995 a bold but unsuccessful attempt was made to argue that leasehold casualties had been unintentionally abolished by s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

¹⁵ We have recently published a discussion paper on penalty clauses (Discussion Paper No 103, 1997) containing some modest proposals for reform. These proposals would not affect leasehold casualties but we do not know what the response of consultees will be.

seems to us that many rental value casualties could be avoided for the future by legal means. When very large impositions are perceived by skilled advisers as being both unjust and avoidable it is generally only a matter of time before avoidance becomes the norm. We do not see this as a desirable development because it would lead to still more conveyancing artificialities. But it is a factor which is relevant to an assessment of whether rental value casualties have any secure future value.

Difficulties and disadvantages of compensation schemes

4.18 Any workable and acceptable compensation scheme would involve difficulties and disadvantages.

4.19 One of the main difficulties is fixing acceptable levels of compensation. In the case of duplicands payable at regular intervals, a compensation scheme can be established on a sound scientific basis but can be criticised on the ground that it is not worth the effort. It would only be rarely that a landlord would trouble to claim compensation. A complicated legislative scheme may not be justified. The same criticism could be levelled at a full compensation scheme in so far as it applied to casualties payable on the entry of an heir. Such casualties probably have little or no value.

4.20 In the case of rental value casualties the difficulty is in finding an appropriate level of compensation. The difficulty is inherent in the nature of rental value casualties, which are almost always payable on the occurrence of unpredictable events. There is inevitably a large element of subjectivity in the assessment of risks and uncertainties. It is particularly difficult to factor in any allowance for future legal uncertainty because this uncertainty may attain a level which renders the casualty nugatory. It seems clear that no multipliers for rental value casualties could claim to be based entirely on objective scientific criteria. Any multipliers are likely to be met with objections from both sides.

4.21 Another area of difficulty is the fixing of the base figure to which the multipliers for rental value casualties will be applied. Ascertaining rental value is a notoriously difficult exercise. It becomes particularly difficult and artificial when the exercise proceeds on the fiction that properties which might never have been considered for letting are placed on the market. In our view a redemption scheme would not work if rental value had to be ascertained on a case by case basis by professional valuers, with a system of appeals in cases of dispute. Such a system would be too complicated and expensive to contemplate. The alternative is to use one of the available classifications of property, such as the valuation roll or the classification into bands for council tax purposes, as the starting point. It must be admitted, however, that there are difficulties here too and that the base figures are likely to be considered objectionable by landlords or tenants or both. There is no satisfactory way round these difficulties.

4.22 There are other significant disadvantages of a compensation scheme. It could cut off possibilities for legal challenge. The courts can feel inhibited from developing the common law in a radical way if Parliament has recently intervened in an area in a limited way.¹⁶

¹⁶ See eg *CIN Properties Ltd v Dollar Land* 1992 SC (HL) 104.

4.23 A compensation scheme might appear to confer legislative approval on the exaction of leasehold casualties. Non-enforcing landlords would be made to appear unduly punctilious. Enforcing landlords would be cloaked with respectability.

4.24 An unintended consequence of a scheme for abolition with compensation may be, as one landlord pointed out, to send even non-enforcing landlords to their legal advisers to comb the records for dormant casualties. Solicitors, who have been made aware of the dangers of professional negligence in relation to casualties, may feel obliged to advise all landlords to take active steps to preserve their rights. There could be nothing improper or contrary to public policy in taking advantage of a compensation scheme approved of by Parliament. A compensation scheme could therefore make the existing situation worse rather than better. We regard this as a real danger and it causes us concern.

4.25 Another serious objection to a compensation scheme based in part on voluntary redemptions at the option of tenants is that it would take many years, or even decades, for leasehold casualties to be eliminated from the system. This would in turn delay the ultimate conversion of ultra-long leasehold tenure into outright ownership which would be an essential part of a fully rational system of land tenure.

4.26 A less important disadvantage of a full compensation scheme would be that it might, depending on the form adopted, involve a good deal of work for many people for very little result. Landlords would have to check their records. The Keeper of the Registers would be involved in work in processing notices. Tenants would have to consult their solicitors. There would be doubts and probably disputes as to the enforceability of particular casualties. Public, as well as private, expense would have to be incurred in resolving these disputes. And all of this would be required in order to resolve a problem which all agree is a small one in numerical terms. Outright abolition without compensation would have clear advantages from the point of view of efficiency and use of resources.

4.27 A full compensation scheme, which takes account of the different types of casualty provision known to exist, would be complicated. It is not clear that the complications would be justified.

Are the same considerations applicable to all casualties?

4.28 The arguments in favour of immediate abolition without compensation are strongest in relation to rental value casualties. It is these casualties - the equivalent of the old feudal casualty of composition - which can reasonably be regarded as archaic and oppressive exactions, which tax tenants on value created or acquired by tenants' capital expenditures, which have an adverse effect on house transfers, which are dependent on difficult valuation decisions, and which are most affected by legal doubts and uncertainties and by the possible use of avoidance devices.

4.29 Casualties payable on the entry of an heir, although archaic and anomalous, are open to fewer objections in theory and give rise to no problems in practice because the amounts are trifling.

4.30 Duplicands and similar fixed casualties payable at regular intervals are comparatively unobjectionable. In their case the main argument for abolition is that this would help to pave the way for abolition of ultra-long leasehold tenure and the main

argument against compensation is simply that the amounts involved would be so small that a scheme would not be justified.

Advantages and disadvantages

4.31 Some of the advantages of immediate abolition of all leasehold casualties without compensation are that the reform would be simple, readily understandable and efficient. It would stop oppressive exactions for the future, but would not require tenants to pay for the removal of the oppression. It would have immediate effect and would clear the way for an immediate reform of ultra-long leasehold tenure itself.

4.32 A disadvantage is that landlords would be deprived of future rights (although not accrued rights) without compensation. This may be justifiable in the case of those casualties which are considered to be manifestly oppressive and contrary to public policy. However, it is not clear that all rights to casualties are equally objectionable.

4.33 One landlord argued that abolition without compensation would be objectionable because it would give windfall gains to negligent lawyers and their insurers. We are not impressed by this argument. Liabilities already incurred in relation to casualties which had already fallen due would not be affected by abolition of rights to recover casualties in the future. There is no human right to have lawyers and insurance companies penalised to the maximum possible extent. The same landlord argued that abolition without compensation would give windfall benefits to tenants who had paid a smaller price for their house because it was burdened by the casualty. We are not impressed by this argument either. We do not think it corresponds to the reality of what has happened in casualty areas. We would emphasise again that we are concerned only with future rights to casualties, not with liabilities already incurred. A person who had bought for a price which took fully into account not only his or her immediate liability to one casualty, but also all future liabilities of all future tenants to casualties, would admittedly gain something from the immediate abolition of future rights to casualties without compensation. We do not regard the possibility of there being such cases as a serious objection to this reform.

Part 5 Abolition or redemption with compensation

Introduction

5.1 We consider in this Part a possible scheme for abolition of some leasehold casualties with full compensation, abolition of others without compensation unless the landlord opts to preserve them, and voluntary redemption on statutory terms of any which remain. In outline the four essential features are as follows.

1. Casualties not based on rental value¹ would be abolished immediately, with a right to compensation if asked only.
2. Casualties based on rental value and payable by intermediate landlords who have granted long sub-leases would be abolished immediately, with a right to compensation if asked only.
3. Other casualties based on rental value would be abolished after a year without compensation if the landlord had not opted for preservation within that period.
4. All surviving rental value casualties would be redeemable at the tenant's option on payment of a redemption sum determined by statute.

5.2 Key assumptions underlying this scheme are that no rights to casualties are sufficiently objectionable on public policy grounds to be abolished immediately without compensation; that the possibility of future measures to avoid or counteract leasehold casualties can properly be ignored; that all casualties other than those abolished with the acquiescence of the landlord under sub-paragraph 3 above have a future value which justifies compensation; that it would be acceptable to have a system which would enable certain leasehold casualties to remain in existence for many years; and that it is possible to have a scheme for compensation which, in relation to all types of casualties, would not exacerbate existing problems. We consider later whether these assumptions are justified.

Impracticability of case by case assessments of compensation

5.3 An initial choice has to be made between two approaches to compensation. One would be based on case by case assessments, the other on standard rules. The choice has to be made in relation to all casualties other than fixed casualties payable at regular intervals.² We have no doubt that the only practicable approach would be one which used standard

¹ As noted above, we use the expression "rental value casualties" as a shorthand for those casualties based on the rent or rental value of the property (including the buildings) held under the lease. The rent referred to here is not the tack duty or ground rent due by the tenant but the rent which might be due to the tenant under a sub-lease of the property. The rental value is the notional rental value to the tenant in any case where the property is not in fact sub-let by the tenant.

² In the case of such casualties the two approaches come to the same thing.

rules. Rental value casualties payable on assignments can be considered as an example of the problems which would arise on a case by case approach. To assess the actual value of such a casualty it would be necessary first to estimate the likely date of the next assignment. This might require an investigation of the age, health, family situation, employment prospects and intentions of the tenant and, in some cases, of the tenant's spouse or partner. As a tenant who stated an intention to live in the house for life might not necessarily be telling the truth, some cross checking would be desirable. All of this would just provide information in relation to the likely date of the first assignment. It would be impossible to provide accurate information as to the number and timing of future assignments. Arriving at a current rental value would be more straightforward. This has to be done for various purposes and there is expertise available. Nonetheless there would be opportunities for disputes, particularly as there are no statutory assumptions to provide a basis for valuation. A method would have to be made available for resolving disputes. There would be inevitable uncertainty about future rental values. The whole process would be expensive. It would be a deterrent to voluntary redemptions. We do not think that a compensation scheme would achieve its objectives if compensation, in all or most cases, were to be based on a case by case attempt to arrive at actual values.³

Abolition of casualties not based on rental value

5.4 The first feature of the possible scheme outlined above is that all leasehold casualties not based on rental value would be abolished immediately and automatically. In practice this would cover casualties based on the amount of the ground rent or tack duty, or a fraction or a multiple of it, or expressed in terms of a fixed sum. The landlord would have the right to compensation from the tenant. Compensation would be due only if, and when, the landlord requested it by written notice to the tenant. Such written notice would have to be given not later than one year after the date of abolition and would have to state the amount claimed by the landlord. As ground rents under the long leases with which we are concerned are normally very small,⁴ it is unlikely that landlords would trouble to ask for compensation in many cases. Fixed sum casualties which are not expressed as a multiple of the tack duty are also usually small. The maximum such fixed sum casualty in our samples was £12. However, there are some duplicands based on ground rents at the upper level of the scale.⁵ For this reason, and because our research has not been exhaustive, the protection of the landlord's interest would not be a mere token gesture. This reform would cleanse the system of all duplicands and similar casualties based on the ground rent or tack duty, and also of all other fixed sum casualties, whether payable at regular intervals or on the entry of an heir or on assignments.⁶

5.5 *Casualties of fixed amount payable at regular intervals.* It is comparatively easy to work out the appropriate compensation in the case of casualties of fixed amount payable at regular intervals. The principle is that the compensation payable should be the total of such

³ There may however, as noted in para 5.47 below, be some residual cases where rental value has to be assessed on a case by case basis.

⁴ The average ground rent in the sample of leases which we examined was under £4 a year and the maximum was under £50 a year.

⁵ Our samples included sixteen duplicands payable at regular intervals which were in the range from £24 to £44.

⁶ Our research suggests that all casualties payable on the entry of an heir are expressed in terms of an extra ground rent or a small fixed sum. See Appendix B. So this type of casualty would be eliminated from the system under our first recommendation.

sums as, if invested at the date of abolition⁷ at an appropriate rate of interest per year, compounded annually, would produce the sums which would have been due in respect of the casualty on the dates when they would have fallen due. Given the small amounts involved, the long time-scale and the varying personal positions of landlords it would, we think, be appropriate to ignore tax.⁸ Another way of stating the principle is that the compensation should be the total of the present values at the date of abolition (at an appropriate assumed rate of interest, compounded annually) of the sums which would have been payable in respect of the casualty on the dates when the casualty would have fallen due. Again tax would be ignored. There are standard tables which give the present value of £1 receivable at various dates in the future assuming a certain rate of return on money.⁹ Suppose, for example, that the calculation relates to a duplicand payable every 19 years; that the next payment will fall due one year after the date of abolition; that all subsequent payments will be made as they fall due; that the lease has at least 77 years to run after the date of abolition¹⁰; that tax falls to be ignored and that the rate of return which could reasonably be expected on a fixed interest security would be 8% into the foreseeable future.¹¹ On these assumptions it becomes possible, using the standard tables, to calculate an appropriate multiplier. The tables tell us that the present value of £1 payable after a year, at the 8% assumed rate of return on an investment, is £0.926. The present value of the next £1 payable after a further 19 years (i.e. at the end of year 20) is £0.215. The present value of the next pound payable at the end of year 39 is £0.050. The present value of the next pound, payable at the end of year 58, is £0.012 and the present value of the next pound, payable at the end of year 77 is £0.003. At year 96 the value becomes so low that it does not affect calculations done to three decimal places. So, on these particular assumptions, the present value at the date of abolition of a duplicand of £1 payable every 19 years is £1.206, the total of the above values.

5.6 The most important single assumption relates to the date when the first payment is due. However, in the case of casualties of fixed amount payable at regular intervals it is possible to reduce the need for assumptions on this point and to produce a table giving different multipliers depending on the date when the next payment actually falls due. This date ought to be discoverable from the date of the lease and the length of the interval between casualties. If that major element of uncertainty is reduced¹² the only difficulty is the

⁷ The date of abolition rather than the date of giving notice is the appropriate notional investment date because that is the date when the right to compensation replaces the right to the casualty. There is no hardship to the landlord in using the date of abolition because the date of giving notice is within the landlord's control.

⁸ Investment expenses could also be ignored.

⁹ The formula for calculating the present value of £1 receivable in the future, where no allowance for tax is made, is

$$\frac{1}{(1+i)^n}$$

where n is the number of years after which the £1 is receivable and i is the assumed rate of interest. So to calculate the present value of £1 receivable after 7 years at an assumed rate of interest of 10% the formula would be $1/(1+10\%)^7$. That is the same as $1/1.1^7$, and the result of that computation, rounded to three decimal places, is 0.513.

¹⁰ The present value of the next £1 payable after the one due at the end of 77 years is so low that it ceases to affect the multiplier when it is expressed to three decimal places.

¹¹ It should be stressed that this rate is assumed to be appropriate for *long-term* purposes. It is, for example, the currently prescribed long-term rate of return on gilt-edged stock for the purpose of actuaries' calculations of company pension scheme liabilities in connection with the Minimum Funding Requirement introduced by the Pensions Act 1995. Letter from Mr George Russell of the Government Actuary's Department dated 9 February 1998. We do not know what the current rates might be at the date of abolition.

¹² It is only reduced, not completely eliminated, because the table cannot conveniently be based on monthly or weekly figures. The table assumes that payments are due at the beginning of the stated periods when they might

assumed rate of return. Payment of a duplicand of the ground rent might be covered by the landlord's hypothec¹³ and could therefore be regarded as a secured investment. However, the costs of collecting a stream of small payments would be greater than the costs of collecting a single compensation sum and would be likely to become relatively more heavy in the future because of inflation. Taking this factor into account, we think that it would be reasonable to apply an assumed rate of return of 10%.¹⁴ Our research shows that most duplicands are payable at intervals of 19 years but that there are some which are payable at intervals of 20, 21, 25 or 30 years. This too can be catered for in a table.

5.7 The multiplier would be applied to the amount of the casualty. This would normally simply be the amount of the ground rent, because a duplicand consists of one extra payment of ground rent for the year in question, but there are less usual cases where the casualty is four extra ground rents for the year in question or an extra half year's ground rent. There are also rare examples of casualties expressed as fixed sums, payable at regular intervals, which are not related to the ground rent. The table would cover such cases. There may be cases where the casualty is payable at intervals not mentioned above. There may also be cases where a lease covered by the scheme has a comparatively short time still to run so that only one or two future payments of the casualty could possibly be exigible. To cater for the risk that there might be casualties of fixed amount payable at intervals not specified in the table or payable under leases with less than 80 years to run after the date of abolition¹⁵ it would be useful to provide that in any such case the compensation would be calculated in accordance with the general principle mentioned above - that is, that it should be the total of the values of the date of abolition (at an assumed rate of interest of 10% compounded annually) of the sums which would have been due in the future in respect of the casualty if it had not been extinguished, tax being ignored. The standard tables giving the present value of £1 payable at future dates could still be used to make the calculations.¹⁶

5.8 On the above assumptions the following table gives the multiplier which should be used to find the compensation which would be payable by the tenant to the landlord in cases where the lease has at least 80 years to run after the date of abolition and where the casualty is a fixed amount¹⁷ payable at intervals of 19, 20, 21, 25 or 30 years. The period in

in fact have been due at any time during them. So when the table gives a multiplier for a casualty which would have fallen due in the period of 5 to 6 years after the date of abolition, the calculation is based on the assumption that the first payment of the casualty would have been due exactly 5 years after abolition. The differences due to this assumption favour the landlord. They can, it is thought, be ignored for practical purposes given the small sums with which we are here concerned. The convenience of a compact table outweighs the benefit of accuracy to monthly or weekly dates.

¹³ The hypothec secures only the payment of rent. See Rankine on *Leases* (3rd edn 1916) pp 367-68. However, a duplicand, unlike a rental value casualty, can be regarded as just a doubled rent for the year in question.

¹⁴ Again we would stress that this is based on a *long-term* assumption as to interest rates.

¹⁵ The present value of £1 payable after 80 years at an assumed rate of return of 10% is only .0004882 and therefore ceases to register for the purposes of our calculations.

¹⁶ Without standard tables the compensation (assuming a rate of interest of 10%) can be found by calculating in relation to each date when the casualty would have fallen due a value for the formula $1/1.1^n$ where n is the period, in years, between the date of abolition and the date of the payment in question. See footnote 9 above. The sum of the values so calculated is the multiplier which is then applied to the amount of the casualty (ie to the unvarying amount which is payable at regular intervals). If, for example, a duplicand of £40 is payable 5 years after the date of abolition and then every 15 years thereafter then the first calculation is $1/1.1^5$ which is 0.621. The next calculation is $1/1.1^{20}$ which is 0.149. The next calculation is $1/1.1^{35}$ which is 0.036. The next calculation is $1/1.1^{50}$ which is 0.009. The next calculation is $1/1.1^{65}$ which is 0.002. The next calculation is $1/1.1^{80}$ which produces a figure too low to register to three decimal places. From then on it is pointless to continue this stage of the calculations. The total of the values brought out by the calculations is 0.817, which is the multiplier. Applying the multiplier to the amount of the casualty (£40) brings out a sum of £32.68, which is the compensation payable.

¹⁷ This, of course, includes a casualty expressed as a multiple or fraction of a fixed ground rent.

column 1 is the period (reckoned, after year 1, in full years) between the date of abolition and the date when the next payment of the casualty after the date of abolition would have been due if the casualty had not been extinguished. As Acts take effect from the first moment of the day when they come into force a casualty falling due on the day of abolition would cease to be payable. The first row of the table must apply to this situation. This is why it includes a reference to the case where the relevant period is nil. A casualty which would have fallen due, say, exactly 19 years after the date of abolition would be the second casualty lost as a result of the Act. It is therefore not necessary to include in the first column of figures a figure for the case where the first casualty would have fallen due exactly 19 years after the date of abolition.

Table 1 Multipliers for casualties of fixed amount due at certain regular intervals by period within which first payment due, assuming lease has still 80 years or more to run after the date of abolition

<i>Period (in years) within which first payment would have been due</i>	<i>Interval between casualties in years</i>				
	19	20	21	25	30
Nil or less than half a year	1.196	1.174	1.155	1.102	1.060
½ to 1	1.140	1.119	1.102	1.050	1.011
1 to 2	1.087	1.067	1.051	1.002	.964
2 to 3	.988	.970	.955	.910	.876
3 to 4	.898	.882	.869	.827	.796
4 to 5	.816	.802	.789	.753	.724
5 to 6	.743	.729	.718	.683	.659
6 to 7	.673	.662	.651	.621	.598
7 to 8	.613	.602	.592	.564	.544
8 to 9	.557	.548	.540	.514	.496
9 to 10	.506	.497	.490	.467	.449
10 to 11	.461	.453	.446	.425	.409
11 to 12	.418	.411	.404	.385	.371
12 to 13	.381	.374	.369	.351	.338
13 to 14	.346	.340	.335	.319	.308
14 to 15	.314	.309	.305	.289	.279
15 to 16	.285	.281	.276	.263	.254
16 to 17	.261	.256	.252	.240	.231
17 to 18	.236	.233	.229	.218	.210
18 to 19	.215	.212	.207	.199	.191
19 to 20		.193	.189	.180	.174
20 to 21			.172	.164	.158
21 to 22				.148	.143
22 to 23				.135	.130
23 to 24				.123	.118
24 to 25				.112	.108
25 to 26					.097
26 to 27					.089
27 to 28					.080
28 to 29					.073
29 to 30					.067

The above technique cannot be applied with any reliability to casualties payable on the occurrence of unpredictable events. These casualties involve a high element of risk for the landlord. They also involve collection costs which in the case of most non-rental-value casualties would exceed the amounts recoverable and which, even at the highest levels of such casualties encountered in our research, would be likely to reduce the value of the

casualty to nothing. There are several types of such casualties and, as the considerations relevant to their valuation differ, they must be examined individually.

5.9 *Casualties payable on the entry of an heir.* Quite a common type of casualty is a duplicand payable on the entry of each heir. The highest such casualty in our samples was £27. There were two of £16 and a few more in the £5 to £11 range but the vast majority were under £5. In relation to most, if not all, of such casualties it seems likely that collection costs would exceed the amounts recoverable. There is no obligation on anyone to inform the landlord of the entry of an heir. In relation to any particular property there is also a high likelihood that no such casualty would ever fall due in the next 80 years (after which the discounted value of a pound at any rate of interest reasonably appropriate to this situation becomes negligible). Even if a tenant died within that period it is quite likely that the property would be disposed of by the executor without passing to an heir. Anyone holding, or investing in, a duplicand payable only on the entry of each heir would stand a high chance of receiving no return at all, even in the long term, and this is so even if no account is taken of the legal difficulties to which such casualties can give rise¹⁸ or of the fact that a lease may be held by a company or by trustees. We conclude that a casualty providing for the payment of a duplicand on the entry of an heir will at best have a trifling value. However, to preserve the principle of offering compensation, we have attempted to put a value on such casualties by adapting the "present value of £1" technique mentioned above. We have assumed that a casualty might be due on the entry of an heir every 40 years¹⁹ and that the first such casualty might be due after 20 years. We have used an assumed rate of return of 20% because it seems reasonable to include a heavy premium for risk and uncertainty and for the substantial costs of monitoring and collecting such casualties, costs which are likely to become more and more disproportionately heavy in the future because of the effects of inflation. Calculations based on these assumptions produce a multiplier of .026. It would be convenient, for ease of calculation, to round that up to .03.

5.10 *Casualties payable on death of last person to pay a casualty.* There is another type of casualty, modelled rather bizarrely on a feudal casualty, which consists of a duplicand of the ground rent payable on the entry of an heir or assignee but with payment postponed until the death of the last tenant, heir or assignee to pay a casualty. Our research revealed a few such casualties in leases granted by one landlord in 1860. The tack duty was under £1 per year in each case. There may, of course, be other such casualties but, given their peculiar terms and the serious practical difficulties involved in collecting them, we think that they can safely be regarded as having, at best, a trifling value in current conditions. To preserve the principle of offering some compensation the same multiplier (.03) could be assigned to such casualties as to those payable on the entry of an heir.

¹⁸ See eg *Crawford v Livingston's Trs* 1938 SC 609. The legal changes made by the Succession (Scotland) Act 1964 have increased the difficulties of applying these old casualty provisions in current conditions.

¹⁹ In relation to the redemption of feudal casualties, the Conveyancing (Scotland) Act 1874 assumed that a transfer on death would take place every 25 years. Life expectancy has increased considerably since 1874. In the period from 1871-80 the life expectancy for males in Scotland was 42.2 years at age 15. The equivalent life expectancy in 1996 was 57.7. For females the life expectancy in 1871-80 was 44.4 years at age 15. In 1996 the equivalent life expectancy was 63.3. See the Annual Report for the Registrar General for Scotland for 1996, table 5.4. The increased mobility of the population and changes in family patterns have also made it less likely that a house will stay in the same family for generation after generation.

5.11 *Casualties payable on entry of assignee.* Another type of casualty consists of a duplicand, or more rarely a small fixed sum, payable on the entry of each assignee.²⁰ The maximum casualty of this type in our sample was just over £8. Many were under £1. Again there are high collection costs relative to the amount of the casualty. As landlords themselves pointed out, in the context of an argument about the prescription of casualties, there is no obligation on a tenant to inform the landlord of an assignation and in practice it is rare for this to be done. The landlord can search the land registers or make enquiries on the ground but that is costly and, in this particular context, unreliable.²¹ There is also a high level of unpredictability as to the return on such casualties. A house may well remain in the same hands, without any assignation, for thirty years or more. The discounted value of £1 receivable in 30 years time, assuming a rate of return of 10%, is less than 6 pence. It has been said that houses in Scotland change hands on average about once in every seven years²² but the interval may be longer in casualty areas²³ and, in any event, it would be unrealistic to convert that statistic into an assumption that any particular property will change hands every seven years without making any allowance for the element of uncertainty.

5.12 It is difficult to arrive at an appropriate multiplier for casualties payable only on assignations. The main problems, as we have noted above, are the costs of monitoring and collection and the large element of uncertainty as to the return. The uncertainty is particularly great if the focus of attention is, as we think it must be, on the compensation due for the loss of a particular casualty.²⁴ There is no scientific way of quantifying these factors.

5.13 One possible approach would be to say that anyone making an investment involving high costs and a high element of uncertainty would be looking for a good return in the short term rather than in the long term. However, this does not help in quantifying a multiplier. It may suggest that an investment in a casualty payable on assignations would have a low value when compared with other investments and that a multiplier of a mere fraction of the next casualty would be appropriate, as only then would there be a reasonable chance of a profit in the short term, but it does not take us much further than that.

²⁰ Usually the lease provides for payment of the duplicand on the entry of each heir or assignee but the two types of casualty turn on different events and are best considered separately.

²¹ Except in cases covered by the Land Registration (Scotland) Act 1979 there is no need to register in order to obtain a real right. Possession suffices. A change in actual occupation may be the result of a sub-lease.

²² This is the figure which used to be given by Building Societies on the basis of their records. However, we have been informed by a spokesman for the Council of Mortgage Lenders that this information is no longer supplied because it is thought that it may be distorted by the inclusion of re-mortgages. The inclusion of re-mortgages would give the impression that houses changed hands more frequently than is in fact the case.

²³ Research carried out for us in the Land Register suggests that properties subject to rental value casualties may change hands on average once every 8 or 9 years. However, the register has only been in operation for Lanarkshire since 1983 and our sample for this purpose was confined to 33 properties first registered in 1984, 1985 or 1986. Estimated statistics for the whole owner-occupied sector within the Unitary Authorities of Glasgow, North Lanarkshire and South Lanarkshire, provided by Telesis Scotland (the business intelligence agency of Scottish Homes) and based on information published by the Scottish Office and the Registers of Scotland, suggest that the turnover rate is about 11.6% a year if an average is taken for the years 1994, 1995 and 1996. Figures calculated on the same basis for Wishaw, where there are many casualty leases, suggest a turnover rate of about 10.6% a year. Letter from Audrey Willis, Consultant, Telesis Scotland, 15 December 1997. It is clearly appropriate to treat houses held on 999 year leases as part of the owner-occupied sector for statistical purposes.

²⁴ If a landlord owns, say, a thousand properties subject to casualties due on assignation then it is probable that the frequency of assignations will be close to average levels. In relation to any one property there is no such flattening of the risk. The number of properties owned by the landlord ought not, in our view, to have any bearing on the compensation payable by a particular tenant.

5.14 A second approach would be to eliminate much of the risk element by using a conservative estimate of the frequency of disposals. For example, it could be argued that the risk element would be greatly reduced if it were to be assumed that there would be an assignation every 19 years, rather than, say, every seven years. This assumption would enable the table of multipliers for regular 19 year duplicands to be used, the only difficulty being as to the choice of a date for the first payment. If it were to be assumed that the first payment would be due after 10 years then the multiplier would be .461.²⁵

5.15 A third approach would be to use the "present value of £1" method which is appropriate for payments at predictable dates but with assumed assignations every seven years or so. One landlord favoured this approach in his submission to us. He assumed that the first payment would be due in year four and that thereafter payments would be received every seven years. It would, however, be essential to use a higher than normal assumed rate of return so as to take account of the increased work involved in monitoring and collecting this type of casualty and of the great element of uncertainty. It is realistic to suppose that someone prepared to put work and effort into the management of an investment would expect a return considerably in excess of that obtainable, without effort, from gilt-edged government securities. If the appropriate assumed rate of return for duplicands payable at regular intervals is 10%, then a further "work and effort" premium of, say, 3% might be reasonable to take account of the increased difficulties in managing casualties due on assignations. It is also realistic to suppose that anyone investing in an investment with a very uncertain and unpredictable return would expect a higher rate of return than would be obtainable, regularly and without any uncertainty, on a government security. To take full account of the uncertainty factor a further "risk" premium of, say, 5% might be justifiable. It may be that that is too low. There is room for disagreement about the figures but it seems clear that a reasonable hypothetical investor would not invest in a fixed sum leasehold casualty payable on assignations, with all its obvious disadvantages, rather than in a gilt-edged government security, unless the rate of return was significantly higher. If the suggested premiums for extra work and risk are added to the basic 10% used in Table 1 above then we arrive at a deemed rate of return of 18%. If allowance is made in this way for the elements of risk, uncertainty and extra costs of monitoring and collection, and it is assumed that the casualty would be payable regularly at seven year intervals²⁶ and that the first payment would be due in the fourth year, then the "present value of £1" technique brings out a multiplier of .75.²⁷

5.16 Although there is nothing scientific about the allocation of premiums for work and risk, a multiplier of .75 does not seem unfair to landlords when tested against common sense expectations. Indeed, on this criterion, it may well be thought generous. How many readers of this report would pay 75p now for the opportunity of extracting £1 from a succession of debtors at various unpredictable dates in the future, perhaps at intervals of many years, at the cost of a good deal of work and effort?

²⁵ See Table 1 above.

²⁶ As noted above, it may be that slightly longer intervals would be more realistic. However, there can be no precision here, particularly as the calculation has to be based on assumed trends in the future and it is known that turnover in houses varies considerably from time to time.

²⁷ In pounds, and assuming a rate of interest of 18%, the present value of 1 payable after 4 years is .516; after 11 years is .162; after 18 years is .051; after 25 years is .016; after 32 years is .005 and after 39 years is .002. After that the value becomes negligible. The total of these values is .752.

5.17 *Other types of non-rental-value casualties.* There may be other types of non-rental-value casualties, although we have not come across any. To cater for this possibility it would be wise to have a residual rule to the effect that in the case of any other type of non-rental-value casualty the compensation should be the total of the values at the date of abolition (assuming a rate of interest, compounded annually, which is appropriate having regard to the nature of the casualty) of the sums which would have been due in the future in respect of the casualty if it had not been extinguished, tax being ignored. This formula has to be general because it has to cater for any type of unforeseen case. An inevitable consequence is that there would be room for dispute as to when a particular casualty might have been payable and as to what would be an appropriate assumed rate of interest. The assumed rate of interest might, in an appropriate case, have to include premiums for exceptional levels of risk or difficulties of collection. The most appropriate body to determine any such disputes would be the Lands Tribunal for Scotland. The existing statutory provisions and rules governing the Tribunal would deal in a very suitable manner with such questions as the procedure for making and dealing with applications and the question of expenses.²⁸ We do not envisage that there would be many, if any, cases for the Tribunal by virtue of this proposal.

5.18 *Payment of compensation.* The compensation due by the tenant to the landlord, if asked, would be a simple personal obligation of the person who was the tenant at the date of abolition. It would be subject to the normal prescriptive period of five years, the starting point being the date when the notice requiring payment was given.

Casualties due by intermediate landlords

5.19 Land which was let to a builder on a 999 year lease, or similar ultra-long lease, for development purposes was sometimes sub-let in individual lots after it had been developed. The builder "sold" individual houses for capital sums. The title of each unit sold might take the form of a sub-lease granted for the remaining duration of the head lease. With the decline in the value of already small ground rents, the builder or his successor might cease to take any interest in the property and, in effect, disappear from the legal scene. Any non-rental-value casualties exigible under such head leases would be covered by the above scheme and would be abolished automatically subject to the landlord's right to claim compensation from the tenant. It is possible that under some such head leases casualties based on rental value might be payable on the assignation of the lease. We consider that, if the sub-leases are long enough, such rental value casualties due by intermediate landlords could with advantage be abolished automatically.

5.20 Where the sub-lease has been granted for the remaining duration of the head lease, such casualties payable by the intermediate landlord are likely to be of little or no value. There is unlikely to be an assignation of the intermediate landlord's rights under the head lease. In the event of an assignation, any casualty based on rental value would generally be calculated by reference to the amount for which the subjects had actually been rented out.²⁹ These casualties, although nominally rental value casualties, would be indirectly based on

²⁸ See the Lands Tribunal Act 1949, as amended, and the Lands Tribunal for Scotland Rules 1971 (SI 1971 No 218).

²⁹ *Earl of Home v Lord Belhaven* (1903) 5F (HL) 13. This was a case on feudal casualties but the principle that the actual rent received by the vassal was the basis of the casualty of composition where the subjects had been let by the vassal would seem to be equally applicable to leasehold casualties unless there were clear words in the lease requiring another result.

the typical ground rents payable under ultra-long leases or sub-leases. The high likelihood of a nil return on such casualties brings them into the same category as casualties payable on the entry of an heir. If any compensation at all were thought appropriate then the same multiplier of .03 could be used.

5.21 It is possible that the tenant under a 999 year lease, or similar ultra-long lease, may have sub-let for a period less than the remaining duration of the head lease. If the sub-lease is of short duration it can be ignored for the purpose of the casualty payable by the tenant under the head lease to the landlord under that lease. However, if it is of sufficient duration it will affect the likelihood of any casualty being payable on an assignation by the tenant under the head lease to such an extent as to justify treatment in the same way as a sub-lease for the remaining duration of the head lease. We think that any sub-lease which on the date of commencement of the new legislation still has 40 years or more to run could be treated in that way. Any rental value casualties due by intermediate landlords in such cases could be subject to immediate abolition in the same way as those due by tenants who have granted sub-leases for the remaining duration of the head lease.

Abolition of other casualties unless landlord opts for preservation

5.22 An important part of the scheme under consideration is that all other casualties would be abolished automatically without compensation after one year unless the landlord had opted within that time to preserve the casualty. The objective would be to eliminate dead or abandoned rental value casualties from the system. It would be particularly useful in relation to casualties due to intermediate landlords³⁰ who have long abandoned all interest in the subjects of the sub-lease and whose successors might well be impossible to trace.

5.23 So far as the procedure for preserving a casualty is concerned, the landlord would be required to send a notice to the tenant identifying the casualty and the subjects in respect of which it is payable and informing the tenant that the landlord is exercising his statutory right to preserve the casualty. The landlord would also be required to record a copy of the notice in the Register of Sasines or, where the property is on the Land Register, to send a copy of the notice to the Keeper for noting on the title sheet.

5.24 We put forward a proposal of this nature in the discussion paper. Some consultees did not support it on the ground that they wished to see all casualties abolished immediately. Of the rest, most supported the proposal. Two respondents representing landlords' interests disagreed with the proposal on the ground that it placed too much of a burden on the landlord rather than the tenant. A member of the Society of Writers to H. M. Signet took a similar view. We consider, however, that in the whole context of leasehold casualties, where a large part of the problem has been caused by the inconsistent attitudes of landlords over time, and where there is a strong public interest in ascertaining the true extent of live casualties, it would be reasonable to require landlords to make their position clear in this way. The maximum number of live rental value casualties is not large.³¹ Landlords who have a commercial attitude to leasehold casualties will be well aware of the casualties to which they are entitled. Intermediate landlords who have abandoned all interest in the property, and who may well have ceased to exist, would not register. It

³⁰ We have already considered the case of casualties due *by* intermediate landlords.

³¹ See paras 2.12-1.14 above and Appendix B.

would be reasonable to expect other landlords who may be entitled to casualties to make their position known.

5.25 Some casualty provisions are badly drafted. Some are legally incapable of achieving the results which the landlords may have wanted them to achieve. An election by the landlord for preservation would not cure any defects or invalidities. It should simply preserve the landlord's right to found on the casualty provision as it is, with whatever defects it may have.

Redemption scheme for surviving rental value casualties

5.26 *Outline of scheme.* The fourth element in this possible scheme for abolition of leasehold casualties with compensation is that any surviving rental value casualty would be redeemable at the tenant's option on payment by the tenant to the landlord of a redemption sum. Arrears would not be affected. They would remain due. The redemption sum would be a multiple of a basic figure which would be the rent, less certain deductions, if the subjects were sublet, or a notional net rental value if they were not. In practice rental value casualties are almost always payable by reference to the entry of an assignee. However, our research disclosed one rental value casualty payable at fixed intervals of 25 years. Our research also disclosed a group of rental value casualties payable by assignees, but with payment postponed until the death of the last person to have paid a duplicand or rental value casualty in respect of the subjects.

5.27 *Multipliers.* Different multipliers are necessary for different types of casualty. We have already discussed the appropriate multiplier for a duplicand or fixed sum casualty due on assignments. We have noted that the element of uncertainty and risk inherent in such casualties makes the application of the standard discounted cash flow technique peculiarly difficult if not totally suspect. Taking into account the work and effort involved in monitoring and collecting casualties due on assignments, and the large element of uncertainty involved, we have concluded that a multiplier of .75 would be appropriate for a non-rental-value casualty payable on assignments if it were to be considered that any compensation should be due. The question for consideration now is whether it makes any difference that the redemption scheme is optional rather than compulsory and that the casualty is based on rental value rather than on the ground rent or a fixed sum.

5.28 It might be suggested that, as redemption would be activated by the tenant and as the tenant might be expected to opt for redemption shortly before the next casualty was due, the assumption in any discounted cash flow calculation should be that the next casualty would be due in year 1. We think, however, that there are good reasons for not making any such assumption. An important policy objective is that any redemption scheme should be an effective way of eliminating remaining casualties from Scottish property law in the short or medium term. It would not be wise to build in an assumption which would discourage tenants from exercising their option until just before an assignment. We therefore suggest that the same assumption should be made as in the case of fixed sum casualties payable on assignments - namely, that the first assignment will take place after 4 years.

5.29 The fact that the casualty is based on rental value rather than a fixed sum does make an important difference in several ways.

5.30 First, there is a new element of uncertainty because it is difficult to predict future rental values. It might be supposed, on past evidence, that rental values were likely to increase in monetary terms but it is probable that any increase will be largely due to inflation. It would be wrong to compensate a landlord in today's pounds for the loss of an equivalent number of devalued future pounds.³² So growth in rental values can be regarded at this stage of the calculation as being offset by inflation. Indeed it may be unreasonable to assume even a maintenance of rental values in real terms. The properties subject to rental value casualties are old properties, often situated in the oldest parts of towns. It is quite likely that the rental value of some such properties would in the future diminish in real terms.

5.31 Secondly, there are different considerations to be taken into account in relation to the burden of collection of the casualty. There can be prolonged disputes about the rental values of property even in cases where the tenant is perfectly willing to pay the casualty. That will tend to increase the costs and difficulties of collection. The comparatively large sums exigible in the case of rental value casualties also tend to increase the difficulty of collection and the risk of non-recovery. Indeed, as one landlord pointed out in his submission, there may be cases where tenants are simply unable to pay the amounts demanded. Rental value casualties are unsecured.³³ On the other hand, even when these extra difficulties are taken into account, the costs of monitoring and collection will be a lower proportion of the amount recoverable.

5.32 The fact that a rental value casualty is, in effect, inflation-protected affects the assumption which must be made as to the expected rate of return on the supposed capital sum received on redemption. The starting point might be a notional long-term return on capital of, say, 4% instead of 8%. However, even when the higher value of rental value casualties, and the fact that they have some protection against inflation, are taken into account, it still seems reasonable to suppose that anyone investing in a similarly troublesome, difficult, unreliable and unsecured investment would expect a higher than normal return. There still ought, in our view, to be a heavy premium for work, effort, uncertainty and risk. An assumed rate of return of 14% seems to us to be reasonable. The justification for the increased assumed rate of return is simply that someone who is losing an investment of this nature should not be able to claim compensation on the footing that it is as secure and trouble-free as an inflation-protected gilt-edged security.

5.33 On the assumption that the first assignation will take place after four years and that thereafter there will be regular assignations every seven years, and that a deemed rate of return of 14% is justifiable, given the peculiar nature of rental value leasehold casualties as an investment, the appropriate multiplier would be .986.³⁴ It would be sensible, we think, to round that up to one.

³² However, the effect of inflation has to be taken into account later in deciding on the return which would be expected on a similar (ie an inflation-protected) investment.

³³ The landlord's hypothec would not in our view be available for a rental value casualty. There is no way in which such a casualty could be regarded as rent.

³⁴ The present value of £1 after 4 years on the above assumptions is .592; after 11 years .237; after 18 years .095; after 25 years .038; after 32 years .015; after 39 years .006; after 46 years .002; after 53 years .001; and after 60 years .0004. Beyond that point the values are so small that they can be ignored for practical purposes. The total of the sums mentioned is .986.

5.34 The nature of rental value casualties casts doubt on the value of the above method of arriving at a redemption sum. The truth is that the "present value of £1" method is not reliable in the case of high risk investments with an uncertain and, at best, irregular return.

5.35 A more direct way of arriving at a redemption sum might be to ask what a landlord could obtain for the right to exact the casualty if it were sold on the open market. The difficulty here is that there is, so far as we are aware, no ready market in the right to exact casualties in relation to a particular property. We were told by a firm of solicitors acting for superiors and landlords of long leases that there are people interested in buying mixed estates consisting of superiors' and landlords' interests.

"Whilst it is true that a client may consider purchasing only Leasehold Casualties, most well advised clients would wish to purchase as much as possible of a mixed Superiority and Long Lease Estate in order to gain the maximum benefit. The only reason such Estates are considered high risk investments is that there is no guaranteed return, other than Feu Duty and rental income. It is however known that these are not the only returns available from such Estates."

An investment in a mixed estate of superiorities and landlords' interests, which might contain baronies, forgotten strips or areas of unfeued and unleased plots, leases about to expire and other valuable adjuncts, is however different from an investment in the future right to a single rental value casualty on its own. Any attempt to arrive at the multiplier which a purchaser might use on offering a sum for the right to exact a rental value casualty in relation to a particular property must be speculative. Some things, however, are clear. First, the purchaser would be parting with capital immediately in exchange for the right to receive future sums at intervals largely within the control of the tenant. If the tenant remained in the house for forty years and then passed the house on to his or her grandchild, the investment would be a disastrous one even if the multiplier were one. Secondly, the purchaser would be parting with capital immediately in exchange for an investment which, on past experience, was likely to be troublesome and difficult, with unwelcome side effects. The marketability of the investment would be unlikely to improve over time. Unless a reasonably quick return could be achieved, and this could not be guaranteed, the money might well be wasted. It seems inherently unlikely that a multiplier in excess of one would be considered by any reasonably prudent potential purchaser of a particular rental value casualty. Indeed a multiplier of one might be considered imprudent even in favourable cases. In many cases, even if the lease were assigned immediately after the purchase of the right to the casualty, it would be a year before payment was due.³⁵ It is necessary to take into account too that some rental value casualties probably have no market value because of the nature of the existing tenant. It would be wrong to base the calculation of a redemption figure only on the supposed value of the most marketable casualties. One landlord gave the following example in the course of a submission about the prescription of casualties.

"Let us take the hypothetical situation where I am the landlord of St. Giles Church, Edinburgh, and my tenants the Church of Scotland have a 999 year Lease with a casualty clause entitling me to one year's rental value on assignation to a singular successor. When is my next casualty due?"

³⁵ This is because of the terms of some typical casualty clauses which provide for payment at the end of the first year's possession by the assignee. See Appendix B.

This is an unusual and dramatic example but there are much more common examples of the same situation. Many older houses in Scottish towns are owned by companies or housing associations which manage them and let them out. It is reasonable to suppose that in at least some cases the title will consist of an ultra-long lease and that assignments of such leases would be less frequent than assignments of leases where the tenant was the occupier of the property.

5.36 In selecting a suitable multiplier it is relevant to take account of earlier redemption schemes,³⁶ of which the most recent was that set out in the Long Leases (Scotland) Act 1954. The standard redemption sum due under this Act for a casualty due on death or transfer was one and two thirds the amount of the highest casualty, but in many cases this was reduced to the amount of the casualty because of an abatement which operated in all cases where the next casualty could have been one due on the entry of an heir.³⁷ Landlords who have acquired their interests since 1954 had available to them the knowledge of the redemption terms thought appropriate by Parliament at that time.

5.37 In our discussion paper we relied mainly on the historical argument in proposing a multiplier of one for casualties other than those payable at fixed and regularly recurring intervals. Only two consultees favoured a higher multiplier. One was a landlord who proposed a multiplier of four, arrived at by using the discounted cash flow technique and assuming (a) a rate of return on capital of 8%, with no premium for work, risk or other special factors (b) a steady growth in rental values (not offset by inflation) into the indefinite future, and (c) regular assignments every seven years with the first one after 4 years. These assumptions are, in our view, unrealistic. The other consultee favouring a higher multiplier than one was a firm of solicitors representing landlords. They suggested a multiplier of between 3 and 5, without saying how this was arrived at. Nothing in the results of our consultation, or our consideration of the issue, leads us to suppose that a multiplier of one is too low. Our main concern is that it might be too high, even on the assumptions made in paragraph 5.2 above.

5.38 What would be an appropriate multiplier for rental value casualties due on assignments, with payment postponed until the death of the last person to pay a casualty? A landlord cannot readily discover the date of death of a former tenant and, even if he could, might not receive any return on his investment for 60 years or more. Valuing such casualties seems unrealistic. If some compensation is thought necessary then the same multiplier as has been proposed above for casualties due on the entry of an heir, namely .03, would be as appropriate as any.

5.39 What would be an appropriate multiplier for other rental value casualties? Other types of rental value casualties are unusual. Our research did disclose however one rental value casualty payable at fixed intervals of 25 years. There may possibly be other unusual cases. To cater for all possibilities it might be suggested that in the case of all rental value casualties other than the two types mentioned above the multiplier could be ascertained using the "present value of £1" technique and assuming a rate of return which takes full account of the costs of collection and any element of risk and uncertainty inherent in the particular type of casualty.

³⁶ We described these in Part IV of our Discussion Paper.

³⁷ See our Discussion Paper paras 4.12 to 4.16 and 7.27 to 7.29.

5.40 *The basic figure to which the multiplier should be applied.* In the case of rental value casualties, with which alone we are here concerned, the sum to which the multiplier will be applied will be a figure representing the annual rental value of the subjects of the lease.³⁸ It would cause expense and inconvenience to leave this figure to be determined by professional valuations in every case. If a voluntary redemption scheme is to work, it must be as simple as possible. We think therefore that a compensation scheme would be practicable only if a table were to be prepared giving a notional rental value for properties by reference, where possible, to existing classifications. As a voluntary redemption scheme might have to operate for a number of years before leasehold casualties were eliminated, it would be important to ensure that the figures in the table could be altered by statutory instrument.

5.41 Where property is currently entered in the valuation roll, as is the case for commercial properties, the current net annual value could be taken as the notional annual value for the purpose of ascertaining a redemption sum. The net annual value is assessed on the footing that the notional tenant (in the current context, the notional sub-tenant) is to pay all burdens. This is the right assumption to make for the purpose of determining rental value for casualty purposes.³⁹ The figures would not be low. Rateable values for properties subject to rental value casualties can be £15,000 or more.

5.42 The valuation roll no longer contains entries for dwelling houses.⁴⁰ It is not always easy to obtain access to the old rolls, particularly for people who are outwith the area in question. However, it would be possible to work out average rateable values for houses in each Council Tax band, to uprate the values to take account of inflation since the last valuation was carried out,⁴¹ and to produce a list giving a notional rental value for each Council Tax band. We have carried out a small pilot exercise along these lines, based on properties known from our research in the Land Register to be subject to a rental value casualty. This produces the following table. We did not have in our sample any properties in Council Tax bands G and H which were subject to rental value casualties and so the table contains no figures for these bands. It might in any event be considered appropriate to have a ceiling on the amount of the redemption sums. Column 4 gives the notional rental values calculated in this way.

³⁸ This is on the assumption that the property is not actually sublet by the tenant for the year in question. If it is then the rent payable to the tenant, less certain deductions, should be the measure. See para 5.58 below.

³⁹ See *Duke of Argyll v Bullough* (1904) 6F 949; *Crawford v Campbell* 1937 SC 596 at 602.

⁴⁰ Dwelling houses have not been entered or included in the valuation roll since 1 April 1989. Abolition of Domestic Rates Etc. (Scotland) Act 1987, s 2; Local Government Finance Act 1992, s 73.

⁴¹ This was in 1983 in the relevant areas.

Table 2 Adjusted average rateable values by Council Tax bands for a sample of properties subject to rental value casualties

<i>Council Tax Band</i>	<i>No. of properties subject to rental value casualties for which figures available</i>	<i>Average rateable value based on last available valuation roll</i>	<i>Average rateable value adjusted for inflation from 1983 to 1997</i>
A	22	£370	£683
B	18	£459	£848
C	10	£589	£1088
D	3	£720	£1329
E	7	£1074	£1983
F	2	£1405	£2594
G	0	----	----
H	0	----	----

5.43 Another possible approach for properties not currently entered in the valuation roll would be to use a notional return on capital taking the bands of capital values prescribed in section 74 of the Local Government (Scotland) Act 1992 for the purposes of the council tax. These bands are set out in Table 3 below.

5.44 Information is available about the average yields from rented properties in different areas of the United Kingdom. In Scotland as a whole the average yield (based on the gross annual rent received as a percentage of the capital value of the property) appears to be about 9%.⁴² However, this figure is slanted towards quality property, selected and prepared for letting.⁴³ The standards expected by tenants of such property are explained as follows in the report from which the average yields are taken.

"The key to letting any property quickly is to make sure that it is tastefully decorated throughout with colours which appeal to most tastes, that it is in first class condition and in a good location. Modern bathrooms with power showers, modern kitchens fitted with white goods such as washing machines, cookers, fridges, freezers and microwaves are also expected as standard by most tenants, as well as phone lines, carpets, and curtains."⁴⁴

⁴² *Residential Lettings Report*, September 1997, produced by the residential lettings division of the Black Horse Agencies group, p 5. The average yield varies with the type of property. For flats with 1-2 bedrooms it is 10.7%, but for detached 3-4 bedroom houses it is 7.9%.

⁴³ Letter from Mr R M Walker of The Letting Company, Glasgow dated 10 November 1997.

⁴⁴ *Residential Lettings Report*, September 1997, produced by the residential lettings division of the Black Horse Agencies group, p 2.

It cannot be assumed that all property subject to rental value leasehold casualties would be of this nature. An informed estimate is that the mean yield on unselected properties in the rental casualty areas would be around 6-7%.⁴⁵

5.45 Deductions would have to be made from any gross annual value calculated on the above basis. The principle of assessing rental value for casualty purposes is that the landlord is to be put in the same position as the tenant for the year in question.⁴⁶ There is no reason to suppose that the tenant would work unpaid for the landlord in managing the property. Reasonable management expenses should therefore be deductible. Management fees might be 25% of the first month's rent, to cover the heavier work in the initial stages of a letting.⁴⁷ There might then be a normal management fee of 15% of each month's rent thereafter. There would also have to be a deduction for the landlord's repair obligations. That might be 10% of the gross rent, bearing in mind that we are dealing exclusively with old or very old properties. There would also have to be a deduction for insurance - say, 10% of the gross rent.⁴⁸ Value Added Tax would need to be taken into account. We estimate that these deductions taken together would reduce the gross return on capital by about 42%. In theory a deduction should also be made for the tack duty payable under the main lease but we have not included any element for this because tack duties are normally so small that they are not in fact collected.

5.46 If the mid-points of the Council Tax bands are taken as reference points it is possible to use the average net yield technique to produce a list of notional rental values. In the case of the lowest band, however, it is artificial to take a mid-point between £1 and £27,000 as no houses in the band will be at the lower end of the scale and almost all will be clustered towards the top end. We have therefore taken £23,000 as the notional capital value for houses in band A. At the other end of the scale we have assumed that most houses in the top band (above £212,000) will be clustered towards the bottom end of that scale and have taken £216,000 as the notional capital value. The following table gives the results of this method of arriving at notional rental values for properties in the different council tax bands.

⁴⁵ Letter from Mr R M Walker of The Letting Company, Glasgow dated 10 November 1997.

⁴⁶ If this principle is applied strictly then it might be arguable that a deduction should be made for the time of 6 to 8 weeks which would be necessary before a sub-tenant could be found. We have not, however, included any deduction for "finding time" in the following calculations.

⁴⁷ We are grateful to Mr R M Walker for information about customary management fees. We have not included the additional fee which is usually charged for the preparation of an inventory because we are assuming that an inventory would not be required for unfurnished property.

⁴⁸ The deduction of 20% in total for landlords' repairs and insurance is broadly in line with the deductions for repairs, insurance and maintenance expenses formerly made from the gross annual value to arrive at the net annual value for dwelling-houses under the Valuation and Rating (Scotland) Act 1956. See s 6(2) and Sch 1 as substituted by the Valuation (Deductions from Gross Annual Value) (Scotland) Order 1984 (SI 1984 No 1112). The deductions varied with the gross annual value, being heavier in the lower ranges, but in the middle range were in the region of 20%.

Table 3 Notional rental values by Council Tax bands calculated on the basis of an assumed return on capital

<i>Range of values</i>	<i>Band</i>	<i>Selected capital value (usually mid-point)</i>	<i>Return on selected capital value at 6%</i>	<i>Net return after deductions for landlords' expenses</i>
To £27,000	A	£23,000	£1380	£800
£27,000 to £35,000	B	£31,000	£1860	£1079
£35,000 to £45,000	C	£40,000	£2400	£1392
£45,000 to £58,000	D	£51,500	£3090	£1792
£58,000 to £80,000	E	£69,000	£4140	£2401
£80,000 to £106,000	F	£93,000	£5580	£3236
£106,000 to £212,000	G	£159,000	£9540	£5533
Above £212,000	H	£216,000	£12960	£7517

5.47 A combination of figures from the current valuation roll for properties still entered in it and figures from a table using council tax bands as the basis of classification would cover most properties in respect of which rental value casualties are exigible. In other cases, such as derelict ground, notional rental value would have to be assessed on a case by case basis.

5.48 An objection to the above approach is that neither out-of-date rateable values, even if adjusted for inflation, nor the valuations of capital values made for Council Tax purposes are good starting points for non-commercial property. This objection could be met by collecting information about actual rents, relating this to Council Tax bands and producing a table similar to that shown above. We have conducted a small pilot exercise on these lines.⁴⁹

5.49 There is a good deal of information available about rents for dwelling houses. It is not all equally relevant to the present inquiry. House rents are affected by social policies. Certain sectors of the rental market are affected by subsidies, for example in the form of low rents for some local authority housing or through the provision of housing benefit. Other sectors are not subject to the full play of market forces.⁵⁰

5.50 We were told by local authority officers that rents for local authority houses in some of the casualty areas were about £67 a fortnight for a two bedroom house; £75 a fortnight for a three bedroom house; and £79 a fortnight for a four bedroom house. In annual terms that is £1742, £1950 and £2054.

⁴⁹ We are grateful to Mr L W J Hutchison of the Donald Storrie Estate Agency, Hamilton and to Mr John Leighton of Messrs Whyte and Barrie, Chartered Surveyors, Hamilton for information about actual rents for houses in the casualty areas within certain Council Tax Bands.

⁵⁰ For example in the case of protected tenancies under the Rent (Scotland) Act 1984 the determination of a fair rent ignores any scarcity of similar houses there may be in a particular area. See s 48 (2) of the 1984 Act and Robson, *Residential Tenancies* (1994) pp 120- 121. The "scarcity deduction" might be in the region of 20% to 30% in the areas with which we are concerned.

5.51 We also received information from the Rent Registration Service about the level of rents for properties on their records within the main casualty areas.⁵¹ The information was in the form of the following parameters for annual rents in the normal range.⁵²

<i>Amalgamated areas</i>	<i>Lower</i>	<i>Higher</i>
Motherwell, Newmains and Wishaw	£1530 to £1900	£2250 to £3500
Bellshill and Shotts	£1200 to £1350	£3200 to £3500
Larkhall, Chapelton, Strathaven, Blackwood, Boghead and Lanark	£1150 to £1700	£3300 to £3800

The properties in question were diverse and ranged from small one room flats above commercial premises to new build houses, generally of two bedrooms. They covered properties let by private landlords or by housing associations. The better properties tended to be those of housing associations. The rents were based on the standard assumption that the landlord would be liable for landlords' repairs and insurance. The figures are drawn from information held for the purposes of the Service's work on protected tenancy cases and on housing benefit cases, with the protected tenancy cases tending to be towards the lower end. In housing benefit cases there is no "scarcity deduction" as there is in the assessment of fair rents in protected tenancies and the criterion is the rent which the landlord might reasonably be expected to obtain having regard to the level of rent under similar tenancies of similar dwellings in the locality, but on the assumption that no-one who would have been entitled to housing benefit has sought or is seeking the tenancy.⁵³ Accordingly, information collected for the housing benefit cases provides a better guide for present purposes than the fair rents determined for protected tenancy cases. The Rent Registration Service stressed the difficulties involved in drawing conclusions from these figures, partly because of the wide variations between and within different geographical areas. The information held by the Service does not include information about Council Tax bands and so it was not possible, in the limited time available for the response to our inquiry, for the rents to be classified on this basis. Clearly, however, the information held by the Rent Registration Service would be a valuable resource should the government wish to proceed with a solution based on notional rental values for properties within the different Council Tax Bands.

5.52 If it is assumed in favour of landlords that the lowest figures in the preceding paragraph reflect protected tenancy cases and so ought to be increased by, say, 25% to eliminate the effect of the "scarcity deduction" used in assessing fair rents then we obtain a range of rents from about £1438 to £3800. The figures in Table 3, based on an assumed

⁵¹ We are grateful to Mr W MacDougall, Senior Rent Officer, Rent Registration Service, Glasgow for the information which follows. The work of the Rent Officers includes fixing fair rents for protected tenants under the Rent (Scotland) Act 1984 and determinations of rents in connection with housing benefit cases. See the Rent Officers (Housing Benefit Functions) (Scotland) Order 1997 (SI 1997 No 1995).

⁵² In compiling the table a few abnormally low or abnormally high rents were omitted as being outside the most "populated" groupings.

⁵³ See the Rent Officers (Housing Benefit Functions) (Scotland) Order 1997 (SI 1997 No 1995) Sch 1, para 1. In general the protected tenancy rents plus, say, 20% to 30% should be the same as the market value rents in housing benefit cases.

return on capital by Council Tax bands, suggest that the rises in rental value between bands should not be uniform.⁵⁴ If the splits between £1438 and £3800 are made for Council Tax bands A to F⁵⁵ in a similar way to the splits in Table 3⁵⁶ we obtain notional gross rents of £1438 for band A; £1721 for band B; £2028 for band C; £2406 for band D; £2997 for band E and £3800 for band F. These figures would be subject to deductions for landlords' expenses on management, repairs and insurance - say, 42% in all.⁵⁷ That leaves notional net rental values of £834 for band A; £998 for band B; £1176 for band C; £1395 for band D; £1738 for band E and £2204 for band F.

5.53 Published information for the whole of Scotland, produced by a consortium of letting agencies and slanted towards quality private properties, suggests that the average annual rental value for a 1-2 bedroom flat of this type is £6420; for a terraced 2-3 bedroom house is £6900; for a semi-detached 3 bedroom house is £5856; and for a detached 3-4 bedroom house is £8220.⁵⁸ We doubt whether these figures give an accurate picture of rental values for houses in the areas with which we are concerned.

5.54 On the basis of information provided by two firms of estate agents it appears that the average gross annual rent for a privately rented house handled by an estate agent in a casualty area might be about £3750 for band A; £4142 for band B; £4650 for band C; £5205 for band D; £6762 for band E and £7550 for band F.⁵⁹ However there is no real correspondence between actual rents and Council Tax bands. Some properties in band A command a higher rent than some properties in band B and so on. The above figures for private rents in casualty areas are for furnished property. We are informed that the difference between the rent from furnished and unfurnished accommodation would be about 10 to 15%. In the typical lease from which the figures are derived, the tenant is bound to pay the Council Tax and the landlord is bound to pay for structural and exterior repairs. The landlord is also bound to pay for repairs to installations relating to water, gas, electricity, sanitation and central heating.⁶⁰

5.55 If the figures mentioned in the preceding paragraph are taken, purely for the purposes of illustration, as a basis for gross rental value and if deductions are made for the difference between furnished and unfurnished accommodation (say, 10%), for management fees, for landlords' repairs and for insurance (say, 42% of the unfurnished rent in all) then the notional net rental values for Council Tax bands A to F would be £1958 for band A; £2162 for band B; £2427 for band C; £2717 for band D; £3530 for band E and £3941 for band F.

⁵⁴ The rise between bands A and B is 12% of the difference between the notional rental value for band A and that for band F. The rise between bands B and C is 13%; between bands C and D is 16%; between bands D and E is 25% and between bands E and F is 34%. The pattern in Table 2, based on rateable values, is even more uneven: 66% of the difference between the lowest and highest figures is accounted for by the last two jumps and only 21% by the first two jumps.

⁵⁵ Very few properties in bands G and H are let on a long term basis and no such properties appeared in our sample of properties subject to rental value casualties. See Table 2 above.

⁵⁶ *Ie as described in footnote 54.*

⁵⁷ See para 5.45 above for an explanation of how this figure is arrived at.

⁵⁸ *Residential Lettings*, a report by Black Horse Agencies (September 1997) p 3. We are indebted to Mr R M Walker of The Letting Company, Glasgow for further information about the way in which this report was compiled and about the difference in rental value between furnished and unfurnished properties.

⁵⁹ These figures are averages based on information supplied by Mr L W J Hutchison and Mr John Leighton.

⁶⁰ See the Housing (Scotland) Act 1987 s 113 and Sch 10.

5.56 The rental value figures calculated on the various bases set out above are compared in the following table. We would emphasise that these are rough figures produced on the basis of the limited information available to us. The columns are not necessarily precisely comparable. The raw materials used and the assumptions made may not, for example, relate to precisely the same time periods.

Table 4 Notional rental values for dwelling houses by Council Tax bands calculated in different ways

<i>Council Tax Band</i>	<i>Average former rateable values adjusted for inflation⁶¹</i>	<i>Assumed net return on capital⁶²</i>	<i>Assumed net rents based on information supplied by the Rent Registration Service⁶³</i>	<i>Assumed net rents based on information supplied by two firms of estate agents⁶⁴</i>
A	£683	£800	£834	£1958
B	£848	£1079	£998	£2162
C	£1088	£1392	£1176	£2427
D	£1329	£1792	£1395	£2717
E	£1983	£2401	£1738	£3530
F	£2594	£3236	£2204	£3941
G	-	£5533	-	-
H	-	£7517	-	-

5.57 We have set out the above figures only for purposes of illustration. Many of them are based on small samples and incomplete information. The deductions for landlords' repairs and insurance made in arriving at net rental values are based on estimates of what might be reasonable rather than on empirical information about the actual average levels for different types of property over a long period of years.⁶⁵ Various rough and ready assumptions have had to be made at various points, particularly in relation to the third column of figures in the table. Given the obvious difficulties we do not think we could recommend any one of the above approaches rather than another, even if it were to be decided to adopt the full compensation model for rental value casualties. Our concern has been to show the types of figures which might be involved if a full compensation scheme were to be adopted. If a table were to be prepared for a legislative scheme a great deal more factual information would be required and some difficult policy decisions would have to be taken.

⁶¹ See Table 2, para 5.42 above.

⁶² See Table 3, para 5.46 above.

⁶³ See para 5.52 above.

⁶⁴ See para 5.55 above.

⁶⁵ It would be essential to use a spread over a long period of years. An expensive roof repair could easily swallow up the whole rent for a single year.

5.58 It may happen that a property is actually sublet at the time when the option to redeem is exercised. In that case the actual rent, less appropriate deductions for landlords' expenses, should be used as the base figure instead of any notional rental value. This was the principle applied in the case of feudal casualties⁶⁶ and it should, we consider, apply for leasehold casualties too. For example, a Housing Association or commercial letting company might hold a whole tenement block on a 999 year lease which contains a rental value casualty provision. The flats might all be sublet on short tenancies of various types. If the Association or company wished to redeem the casualty, the basic figure to which the multiplier should be applied should be the amount of the actual rents less deductions for landlords' expenses.

Procedure

5.59 In the discussion paper we suggested that the procedure for voluntary redemptions should follow that used under the Long Leases (Scotland) Act 1954. This was generally approved on consultation. To redeem a rental value casualty, the tenant would send a notice to the landlord, by recorded delivery, requiring the landlord to grant a discharge in statutory form in exchange for the statutory redemption sum. There would be provision for applications to the sheriff to deal with any disputes and with any case where the landlord refused to co-operate or was unknown.

Summary of scheme

5.60 The following is a summary of the above compensation scheme.

Abolition of casualties not based on rental value

1. **(a) Leasehold casualties not based on rental value would be abolished immediately by legislation.**
(b) Compensation would be payable by the tenant to the landlord in respect of the abolition of any such casualty. Compensation would be due only if, and when, the landlord gave written notice requiring payment. Any such notice would have to be given not later than one year after the date of abolition. It would have to state the amount claimed by the landlord.
(c) In the case of any casualty of fixed amount which is payable at regular intervals of 19, 20, 21, 25 or 30 years under a lease which has at least 80 years to run after the date of abolition the compensation would be assessed by applying to the amount of the casualty the appropriate multiplier derived from Table 1.
(d) In the case of any casualty of fixed amount which is payable at regular intervals other than those mentioned above or under a lease which has less than 80 years to run after the date of abolition the compensation would be the total of the discounted values at the date of abolition (at an assumed rate of interest of 10% compounded annually) of the sums which would

⁶⁶ *Earl of Home v Lord Belhaven* (1903) 5F (HL) 13.

have been due in the future in respect of the casualty if it had not been extinguished, tax being ignored.

(e) In the case of any casualty not based on rental value which is payable on, or by reference to, the entry of an assignee (but where the lease does not provide for payment to be postponed to the death of the last person to pay a casualty) the compensation would be assessed by applying to the amount of the casualty a multiplier of .75.

(f) In the case of any casualty not based on rental value payable on, or by reference to, the entry of an heir or the death of the last person to pay a casualty, the compensation would be assessed by applying to the amount of the casualty a multiplier of .03.

(g) In the case of any other type of non-rental-value casualty the compensation should be the total of the discounted values at the date of abolition (assuming a rate of interest, compounded annually, which is appropriate having regard among other things to the nature of the casualty) of the sums which would have been due in respect of the casualty if it had not been extinguished, tax being ignored. Any dispute as to the compensation due under this paragraph should be determined, on the application of either party, by the Lands Tribunal for Scotland.

(h) The obligation to pay compensation would be a simple personal obligation of the person who was tenant at the date of abolition. It would be subject to the five year prescription provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973, the starting point being the date when the obligation becomes enforceable (that is, the date when the landlord gives a valid notice requiring payment).

Abolition of certain casualties due by intermediate landlords

2. (a) Casualties based on rental value and due by intermediate landlords would be abolished immediately, with a right to compensation if requested by written notice not later than a year after the date of abolition, if the subjects in respect of which the casualties are due have been sub-let for the remaining duration of the head lease, or for a period which at the date of commencement of the new legislation still has forty years or more to run.

(b) In the case of any casualty abolished under this rule the compensation would be assessed by applying a multiplier of .03 to the rent actually payable to the intermediate landlord for the subjects for the year following the date of abolition.

(c) The obligation to pay compensation would be a simple personal obligation and would be subject to the five year prescription provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973, in the same way as described above.

Abolition of other casualties unless landlord opts for preservation

3. (a) Any leasehold casualty not covered by the above rules would be abolished as from a date one year after the commencement of the new legislation unless the landlord had, within that period, sent a notice to the tenant, with a copy to the Keeper of the Registers, electing to preserve it.

(b) An election by the landlord to preserve a casualty would not have the effect of curing any invalidity or defect in the provision imposing the casualty.

Voluntary redemption of remaining rental value casualties

4. Any surviving rental value casualty would be redeemable at the tenant's option on payment by the tenant to the landlord of a redemption sum.

Calculation of redemption sum

5. (1) The redemption sum payable by the tenant to the landlord on voluntary redemption of a rental value casualty would be a multiple of the net rent (if any) receivable by the tenant for the year following the date of redemption or (if there is no such rent) of a notional rental value.

(2) (a) In the case of a rental value casualty payable on assignments, but not coming under sub-paragraph (b) below, the multiplier would be 1.

(b) In the case of a rental value casualty payable on assignments, with payment postponed until the death of the last person to pay a casualty, the multiplier would be .03.

(c) In the case of all other rental value casualties the multiplier would be calculated on the "discounted present value of £1" technique using an assumed rate of return which takes into account the costs of collection and the element of risk and uncertainty.

(3) (a) For properties currently entered in the valuation roll, the notional rental value would be the net annual value as stated in that roll.

(b) For properties subject to Council Tax a table would be prepared giving a notional net rental value for each Council Tax band. The table would be subject to amendment from time to time by statutory instrument.

(c) For all other properties the notional rental value would be assessed on a case by case basis.

Procedure for redemption

6. (a) To redeem a rental value casualty, the tenant would send a notice to the landlord, by recorded delivery, requiring the landlord to grant a discharge in statutory form in exchange for the statutory redemption sum.

(b) There would be a procedure for an application to the sheriff to deal with any dispute or any case where the landlord is unco-operative. The sheriff would have power to ordain the landlord to sign the necessary form. If the landlord still refused to sign, the sheriff would have power to direct the sheriff clerk to sign on behalf of the landlord.

(c) There would be provision to enable the sheriff to dispense with the signature of a landlord who is unknown or cannot be found.

(d) For the purposes of calculating the redemption sum due the date of redemption would be deemed to be the date of posting of the notice of redemption.

Advantages and disadvantages

5.61 The advantages of the above scheme are that it would enable leasehold casualties to be phased out of Scottish property law. Many casualties would be abolished immediately. Dead or abandoned casualties would be eliminated immediately by the operation of the opt-in provisions. Remaining casualties would be redeemable on a voluntary basis in exchange for an easily determined redemption sum. Landlords' rights would be fully respected. The principle, established in the schemes for the redemption of feudal casualties, of providing compensation for redeemed casualties using appropriate multipliers would be maintained. These are important advantages. However, there are also serious disadvantages.

5.62 One disadvantage is that the scheme would require tenants to pay potentially large sums to redeem rental value casualties. In so far as these casualties are regarded as unreasonable and oppressive exactions, contrary to public policy in themselves, this may be considered an inappropriate response. Rental value casualties tax the tenant on the value of tenants' expenditures. Whatever theoretical arguments may be put forward to the effect that the landlord's predecessors provided the land, the contemporary reality is that a rental value casualty gives the landlord a return on the tenant's capital.

5.63 A second disadvantage is that the scheme does not take account of the legal uncertainty attaching to future rights to casualties, particularly those payable on assignations. We have not included any premium for this uncertainty in working out appropriate multipliers because it seems to us that this point is too important to be included merely as one risk factor among many. If it is accepted that avoidance measures or legal changes (even legal changes falling short of express abolition) or a combination of the two could legitimately render certain leasehold casualties valueless in the future then grave doubts are raised as to the appropriateness of any scheme for compensation for the loss of future rights to those casualties.

5.64 A third disadvantage is that the scheme would not enable all rental value casualties to be phased out immediately. Voluntary redemptions might not take place for many years. This is a serious disadvantage at a time when there is a strong policy in favour of a complete modernisation of the Scottish law on land tenure. There would be a danger of repeating the mistake made in 1914 when the feudal law on casualties was reformed but the imitation feudal law in long tacks was left unreformed.

5.65 A fourth disadvantage is that the nature of rental value casualties means that it is not possible to produce a totally satisfactory redemption scheme, even if legal uncertainties are ignored and such a scheme was thought to be desirable.

5.66 A final, and serious, disadvantage of a scheme on the above lines is that it might have the unintended effect of reviving abandoned casualties. It could make the existing situation worse. It could make it more likely rather than less likely that people would be disturbed in the peaceful enjoyment of their possessions. The opt-in system would favour precisely those landlords who would be most likely to take an assertive approach to forgotten claims. Landlords who were reluctant to enforce casualties themselves might be tempted to sell their interests to those with no such reluctance.

Part 6 Abolition with compensation in most cases

Introduction

6.1 We now consider a possible reform which would combine features from the two schemes considered in Parts 4 and 5. It would abolish immediately and without compensation all leasehold casualties which enable the landlord to impose a levy on value added or purchased by tenants' expenditures - that is, all rental value casualties. It would abolish all other casualties immediately but subject to the payment of compensation if asked.

Abolition of rental value casualties without compensation

6.2 The justifications for abolishing all rental value casualties without compensation have been considered already. These casualties are archaic and oppressive exactions, which survive only because of a historical anomaly, which are contrary to social policy because of their inhibiting effects on property transactions, which enable landlords to impose a levy on tenants based on value added or paid for by tenants', and which in many cases have no secure future value because of the risks and uncertainties attaching to them, including the future risks of legal challenge or legal avoidance. To provide for full compensation would exacerbate the social harm sought to be avoided.

6.3 We have considered whether it would be possible and reasonable to provide for compensation on a basis which distinguished between the value of the buildings and the value of the ground. The objections to rental value casualties all flow from the fact that they are a levy by the landlord on value added or paid for by tenants' capital. It is that which makes them excessive and oppressive and which gives an incentive to challenge and avoid.

6.4 If we were concerned with capital values it would be possible to assign separate values to the ground and buildings in a realistic way. However, we are not concerned with capital values. We are concerned with a notional rent under a short let for a period of one year with no possibility of renewal. The properties in question consist of urban building plots which would be subject to strict planning controls. In our view any attempt to assign a portion of the rent to the ground would be unrealistic. People pay a rent under a short lease of a house or shop because they want a house or shop. An urban plot with a derelict or unusable house or shop on it has no short term rental value except in the most exceptional cases. Often it would have a negative income value because it would have to be secured against vandalism which might endanger neighbouring properties. The artificiality of the whole exercise is most clearly seen when tenement property is considered.

6.5 A possible approach would be to take the ground rent under the main lease as the measure of the net annual value of the ground. Let us take the case of a ground rent at the upper end of the levels encountered in practice - say, £40 a year. A person subletting for a

year would be aware of that outlay and would seek to recover it from the subtenant.¹ It therefore represents an element of the rent which is paid for the use of the ground and which is identifiable as such. No other part of the rent is identifiable as being for the ground, for the reasons given above. If the landlord were to receive a casualty based on the rental value of the ground ascertained in this way in addition to the normal ground rent he would receive a double ground rent. In effect therefore the rental value casualty would be treated as if it were a duplicand. There is some sense in that from the historical point of view because historically rental value casualties and duplicands seem to have been regarded as alternative techniques. This approach would be worthy of consideration if it were thought that as a matter of principle some compensation, however minimal, ought to be payable for the loss of rental value casualties but our provisional view is that it is artificial. Rental value casualties are not duplicands and, in our view, it is more straightforward to let them stand or fall according to what they are, not according to what they might have been.²

6.6 In our view rental value casualties are of such an exceptional nature that a decision not to provide compensation could be taken without infringing landlords' human rights. Abolition would affect only the right to exact casualties in the future. It would not affect vested rights to casualty payments which had already fallen due. For the reasons given above we consider that compensation should not be payable for the loss of future rights to rental value casualties. To require tenants to pay compensation would frustrate the whole purpose of the reform sought to be achieved and would exacerbate the social problem sought to be remedied.

Abolition of other casualties with compensation

6.7 The exceptional considerations justifying the abolition of rental value casualties without compensation do not apply to other types of leasehold casualty. In particular such other casualties do not enable landlords to impose a levy on value added or paid for by tenants' capital and do not in practice constitute an oppressive exaction or a clog on house sales. They are archaic and anomalous and they must be abolished as a preliminary to the abolition of ultra-long leasehold tenure but there is no reason why provision should not be made for the payment of full compensation.

6.8 The compensation, particularly for casualties payable on the entry of an heir, would often be minimal but that is not a reason, as one landlord was at pains to point out, for not making it available. Duplicands and similar casualties are similar to feoduty or ground rent in this respect. In relation to reform of the feudal system we envisage that full compensation would be provided for the loss of feoduties even although many of them are small in amount. Similarly, if we were to recommend the abolition of ultra-long leasehold tenure we would envisage that full compensation would be payable for the loss of the right to tack duties or ground rents. It is consistent with principle, and consistent with the approach which we would wish to recommend in analogous cases, to provide full compensation for the loss of casualties other than rental value casualties.

¹ It would be deductible from the gross rent in order to arrive at net rental value but that does not matter for present purposes.

² The issue here is similar to an issue which we discuss in our discussion paper on *Penalty Clauses* - whether an excessive penalty clause should be struck down altogether or modified to what would be reasonable. See Discussion Paper No 103 (1997) paras 5.41-5.47.

6.9 We have already worked out a compensation scheme for non-rental-value casualties in Part 5. The only question which has caused us some concern is whether any adjustment should be made to non-rental-value casualties payable on assignments to take account of the possibilities of legal avoidance. We have not already included an allowance for this factor. It seems to us that the small value of non-rental-value casualties makes the possibility of legal avoidance unrealistic. Such casualties are literally not worth avoiding. We have not therefore made any further adjustment to the multiplier of .75 worked out earlier.

Advantages and disadvantages

6.10 The advantage of this scheme is that it achieves all of the policy objectives while still respecting the landlords' right to compensation in those cases where there is no compelling reason for not providing compensation.

6.11 One possible objection is that it is not worth while to set up a compensation scheme for the loss of casualties which are usually of small value. We have answered that objection above so far as principle is concerned. From the practical point of view the compensation scheme would be simple and easy to apply. Compensation would be payable if asked only. In most cases it would not be worth seeking. There may, however, be cases where the tack duty is higher than usual and where a duplicand is about to fall due. In such cases compensation would be worth claiming.

6.12 The other possible objection is that abolition of rental value casualties without compensation would infringe the human rights of landlords under Article 1 of the First Protocol to the European Convention on Human Rights. We have already discussed this question³ but because of its importance we return to it in the next part of the report.

³ See paras. 4.2-4.9 and paras 6.2-6.6 above.

Part 7 Main recommendations

Assessment

7.1 We consider that only the third option mentioned above - that is, abolition of most casualties with compensation and abolition of rental value casualties without compensation - would enable all the policy objectives to be achieved while still being compatible with human rights requirements.

Main recommendations

7.2 Our main recommendations are as follows.

1. **All leasehold casualties should be abolished by legislation as from the date of commencement of the implementing Act.**

(Draft Bill, clause 1)

2. (a) **Compensation should be payable by the tenant to the landlord in respect of the abolition of all casualties other than rental value casualties.**

(b) **Compensation should be payable only if the landlord so requests by a written notice given not later than one year after the abolition date. The notice would have to state the amount claimed by the landlord.**

(c) **For this purpose "rental value casualties" are those based on the rent or rental value (however expressed) of the property (including the buildings) held under the lease. "Rent" in this context does not include the ground rent or tack duty payable by the tenant under the lease.**

(Draft Bill, clause 2)

3. (a) **In relation to casualties other than rental value casualties, compensation should be assessed as follows.**

(b) **Where the casualty is a fixed amount (such as a duplicand of a fixed ground rent or tack duty) payable at regular intervals of 19, 20, 21, 25 or 30 years under a lease which has 80 years or more to run after the date of abolition the compensation should be the amount of the casualty times the multiplier found by applying Table 1 (set out in paragraph 5.8).**

(c) **Where the casualty is a fixed amount payable at regular intervals other than those mentioned above or under a lease which has less than 80 years to run after the date of abolition the compensation should be the total of the discounted values at the date of abolition (assuming a rate of interest of 10% per year, compounded annually) of the sums which would have been**

due in respect of the casualty if it had not been extinguished, tax being ignored.

(d) Where the casualty is payable on, or by reference to, the entry of an assignee, but the lease does not provide for payment to be postponed to the death of the last person to pay a casualty, the compensation should be the amount of the casualty times a multiplier of .75.

(e) Where the casualty is payable on, or by reference to, the entry of an heir or the death of the last person to pay a casualty, the compensation should be the amount of the casualty times a multiplier of .03.

(f) Where the casualty is any other type of non-rental-value casualty the compensation should be the total of the discounted values at the date of abolition (assuming a rate of interest, compounded annually, which is appropriate having regard to the nature of the casualty) of the sums which would have been due in respect of the casualty if it had not been extinguished, tax being ignored. Any dispute as to the compensation due under this paragraph should be determined, on the application of either party, by the Lands Tribunal for Scotland.

(Draft Bill, clause 3 and Schedules)

4. (a) The obligation to pay compensation should be a personal obligation of the person who was tenant at the date of abolition.

(b) It should be subject to the five year prescription provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973, the starting point being the date when the obligation became enforceable (that is, the date when a valid notice requiring payment was given).

(Draft Bill, clause 4)

Comment

7.3 These recommendations are made in the knowledge that the decision on this matter will depend on considerations which only the government can properly assess. They represent the best advice we can give after careful consideration of the issues, including in particular the human rights issues.

7.4 Under legislation currently before Parliament a Minister of the Crown in charge of a Bill in either House of Parliament will have to make a statement that in his view the provisions of the Bill are compatible with the European Convention on Human Rights or that, although he is unable to say that, the government nevertheless wishes to proceed with the Bill.¹ Under the Scotland Bill the Scottish Parliament would have no competence to enact a Bill which was incompatible with any human rights protected by the European Convention on Human Rights.² A member of the Scottish Executive in charge of a Bill

¹ Human Rights Bill, clause 19(1) (HL Bill 51, as amended in Committee, 27 November 1997).

² Clause 28(2)(d) (Bill of 17 December 1997).

would have to make a statement that in his view an Act of the Scottish Parliament containing the same provisions as those in the Bill would be within the legislative competence of the Parliament.³

7.5 We think that rental value casualties fall within one exceptional type of case where deprivation of rights without compensation is within the Convention. It would, we believe, clearly be within the Convention for a State to require a landlord, on exercising certain rights under a long lease, whether the rights were of an income or capital nature, to compensate a tenant for value added or acquired by tenants' capital expenditures. Where the right in question is a right to income which derives its whole value from tenants' capital expenditures there is no point in saying that the landlord can enforce the right if he pays all the money back. It is better to achieve the same result by abolishing for the future the right to enforce the payment.

7.6 The point can be made more strongly. The enforcement of rental value casualties is, because of their nature, financially oppressive. A State is entitled under the Convention to control the use of archaic property rights in an oppressive way. The Convention does not oblige a State to require the oppressed to pay the oppressor to stop the oppression. If it did it would seriously impair the right of a State to enact such laws as it deems necessary to control the use of property in the general interest.

7.7 In our view the recommendations made in this report would, if implemented, be compatible with the European Convention on Human Rights. If, contrary to our recommendation, it were thought essential to provide some compensation for the abolition of rental value casualties then we consider that an attempt should be made, in fixing the amount of compensation, to recognise the tenant's moral entitlement to the buildings on the land and to the rent which can be derived from them. We also consider that in fixing the amount of any compensation account should be taken of the fact that most rental value casualties are either already avoidable by legal means or would be so avoidable if other minor reforms, justifiable in themselves, were to be introduced.

³ Clause 30(1).

Part 8 Other recommendations

Introduction

8.1 In this part we make some minor and consequential recommendations for reform of the law relating to the type of long leases in which leasehold casualties are found. We also explain why we are not making recommendations on some of the options for minor reforms which we put forward for consideration in our discussion paper.

Definition of relevant casualties

8.2 It would be necessary in any abolition statute to define the casualties abolished. There is a danger of going too far and affecting provisions in modern commercial leases which are unobjectionable. We think that the starting point would be to define a casualty as any duplicand or other periodical or casual payment stipulated in a relevant lease or sub-lease to be payable in addition to the annual rent. This is derived from the definition in the Long Leases (Scotland) Act 1954. To ensure that provisions in modern commercial leases are not inadvertently covered, a relevant lease or sub-lease might be defined as one granted before 1 September 1974¹ for a period of 300 years or more. This would, so far as our research discloses, catch virtually all the leases in which casualty provisions are found² and all of those in which rental value casualty provisions are found.

8.3 We recommend that:

5. (a) **For the purposes of an abolition statute a casualty should be defined as any duplicand or other periodical or casual payment stipulated in a relevant lease or sub-lease to be payable by the tenant in addition to the annual rent.**

(b) **A relevant lease or sub-lease would be one granted before 1 September 1974 for a period of 300 years or more.**

(Draft Bill, clauses 1 and 8)

Irritancies

8.4 Some leases contain provisions for irritancy of the lease in the event of the tenant's obligations not being met. If the landlord invokes an irritancy provision the lease is terminated. The landlord owns the property free from restrictions and acquires the benefit of any buildings erected on the land by the tenant or the tenant's predecessors. Typically an irritancy clause may provide for the lease to come to an end for non-payment of rent but some provide for irritancy in the event of any failure by the tenant to meet the obligations

¹ The date when the Land Tenure Reform (Scotland) Act 1974 came into force. It prohibited the inclusion of casualty clauses in future leases and prohibited the use of long leases for residential purposes.

² We came across one lease for 99 years granted in 1926 which provided for payment of a small duplicand. See Appendix B.

under the lease. Most casualty clauses in leases are not reinforced by an irritancy clause. However, rare examples are encountered. In the discussion paper we proposed that there should be a statutory provision making the sanction of irritancy unavailable in relation to leasehold casualties.³ Two thirds of the consultees agreed with this proposition.

8.5 The courts have power at common law to prevent the oppressive use of irritancies but this power will be used only if there has been something in the landlord's conduct which could be characterised as oppressive or as an abuse of power.⁴ The mere facts that the result of the irritancy would be very harsh or that the landlord sought to irritate for late payment of rent although he had accepted late payment of rent on prior occasions without complaint would not give rise to a case of oppression.⁵ Some statutory control of irritancy clauses in leases was introduced by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985⁶ but it does not apply to any lease of land "used wholly or mainly for residential purposes".⁷ In our recent discussion paper on Penalty Clauses⁸ we have invited views on whether certain irritancy clauses should be brought within the new system of control of grossly excessive penalties which we suggest in that paper. The effect would be that any grossly penal provision could be struck down or, possibly, modified by the court. However, we noted in that paper that any general reform of that nature would be without prejudice to the possibility of dealing specifically with any particular types of irritancy clause which appeared to merit more direct treatment. It would be difficult to imagine a more grossly excessive penalty than the forfeiture of a 999 year lease, with all the buildings erected on the land by tenants, for non-payment of a duplicand of trifling amount.

8.6 We think that our proposal on irritancies in relation to casualties should be put into effect. However, as some consultees pointed out, a more serious problem relates to irritancy clauses in relation to non-payment of rent under ultra-long leases. There are often arrears of rent under these long leases, if only because landlords have for many decades not sought to claim rents which are of such small amount as not to be worth collecting. Similar problems could arise in relation to non-fulfilment of any other obligation under such a lease. Although this goes beyond our reference on leasehold casualties the point arose on consultation and we think it should be dealt with.⁹ It may well be that if a landlord sought to irritate an ultra-long lease, of the type with which we are concerned in this report, on the grounds of non-payment of a small ground rent which had not been claimed for many years the tenant could successfully invoke the court's common law power to prevent or control¹⁰ the oppressive use of irritancy clauses. There would be an element of abuse or misuse of power in such a case. The landlord, given the history of non-collection of rent, could be said to be acting unfairly, taking the tenant by surprise and catching him out by founding on the

³ Para 6.34.

⁴ The law on this subject was reviewed in *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104. There was held to be no oppressive conduct by the landlords in that case but the existence of a power to intervene in an appropriate case was affirmed.

⁵ See *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104; *Dorchester Studios (Glasgow) Ltd v Stone* 1975 SC (HL) 56.

⁶ ss 4-7.

⁷ s 7(1)(a).

⁸ Discussion Paper No 103 (1997).

⁹ We have power to offer advice on matters going beyond specific terms of reference (Law Commissions Act 1965, s 3(1)(e)). We would always exercise that power with great restraint, but we think that this is a suitable occasion on which to exercise it.

¹⁰ Eg by allowing the overdue rent to be paid.

irritancy clause.¹¹ However, we think this matter should be placed beyond the scope of argument as to the suitability of particular cases for the exercise of the common law power.¹² In our view conventional powers of irritancy in ground leases of such a length and nature that they are the functional equivalent of a feudal title are inappropriate. Landlords in practice have no interest in such leases which could justify protection by such a draconian power. We recommend the removal of the power to irritate. It would clearly be important to confine removal of the power to irritate to the old ultra-long leases with which this report is concerned. We think that it would be safest to confine the definition for this purpose to leases for 300 years or more granted before 10 August 1914. This was the date chosen by the Guthrie Committee for its recommendations on the redemption of certain long leases and incorporated in the Long Leases (Scotland) Act 1954.¹³ The reason for choosing that date was that after 1914 there was no technical reason for choosing long leasehold tenure rather than feudal tenure. As an added protection against inadvertent effects on leases with which we are not concerned it would be useful to confine the irritancy provision to those leases under which the ground rent or tack duty is not more than £100 a year. All the casualty leases which we came across were well within this limit.

8.7 We have considered whether the removal of the power to irritate should be retrospective. We do not believe that the danger of abuse is sufficient to justify a retrospective provision. Landlords have not in fact sought to use powers of irritancy in relation to these old ultra-long ground leases. It is hard to envisage circumstances in which a fair-minded landlord would seek to do so. Any case of abuse or oppression which did arise could be dealt with under the existing common law. However, we see no reason why the removal of the power to irritate should not come into force immediately, affecting any action which has not reached the stage of final decree, as soon as the relevant legislation comes into force.

8.8 We recommend that:

6. **(a) It should be provided by statute that any irritancy clause in a lease granted before 10 August 1914 for a period of 300 years or more, and providing for a ground rent or tack duty of not more than £100 a year, is void and of no effect.**

- (b) The new rule should affect any action which has not reached the stage of final decree by the time the legislation comes into force.**

(Draft Bill, clauses 5 and 7)

¹¹ Such matters as taking the tenant by surprise, unfair resort to an irritancy, or "undue harshness or catching" have been regarded as relevant to the use of the power to prevent oppressive uses of irritancy provisions. See *Stewart v Watson* (1864) 2 M 1414 at p 1422 and the cases cited above. The power to interfere in cases of abuse or oppression is not confined to the Court of Session but can be exercised by the sheriff. See eg *Lucas's Exrs v Demarco* 1968 SLT 89.

¹² We would not wish it to be thought that, in making limited recommendations on this subject, we were of the view that the courts' common law powers should be in any way restricted in their application or development in cases not covered by our recommendation.

¹³ s 1(1).

Liability for former tenants' casualties

8.9 In the discussion paper¹⁴ we suggested that, as a matter of policy, there was no reason why a landlord should be able to hold a current tenant liable for arrears of casualties for which former tenants were liable, even if the current tenant did have a right of relief against the former tenants. We suggested that it should be provided for the future that an assignee of a lease was not liable for any arrears of casualties which fell due under previous tenancies.

8.10 A majority of those who responded to this proposal agreed with it. It would not affect the subsistence of the obligation to pay the casualty. It would affect only the parties who could be sued by the landlord. Instead of the landlord being able to claim against a person who had not personally incurred the liability, leaving that person to recover from those primarily liable, the landlord would be compelled to proceed against the persons primarily liable.

8.11 In practice purchasers ought to insist that any arrears have been cleared. It may be therefore that the problem of liability for previous tenants' arrears is not currently an important one. Nonetheless we consider that our proposal should be put into effect in order to deal with cases which arose before solicitors became alerted to the dangers of leasehold casualties. It should apply not only to assignees on sale but also to those succeeding to tenancies in other ways.

8.12 The new provision should clearly not apply where a landlord has already received payment from, or concluded a settlement with, or obtained final decree against, the existing tenant. On the other hand, if it is to have any useful effect, it must apply to casualties which have already fallen due. As in the case of the irritancy provision, we see no reason why the new provision should not apply to actions pending at the date when the new legislation comes into force, provided they have not reached the stage of final decree. We recommend that:

7. **(a) It should be provided that an assignee of a lease, or a person succeeding to the lease in any other way, is not liable for any arrears of casualties which fell due under previous tenancies.**

(b) This rule should apply to assignments or transmissions which took place before the date when the legislation comes into force and it should apply to any actions pending at that date which have not reached the stage of final decree. However, it should not apply to any case where the landlord has, in relation to the former tenant's arrears, obtained payment from, or concluded a settlement with, or obtained a final decree against, the current tenant before the date when the new legislation comes into force.

(Draft Bill, clauses 6 and 7)

¹⁴ Para 6.30. Some casualty clauses describe the casualty payments as additional rents. However, the descriptions given to them in the leases would not, in our view, be conclusive.

Proposals not followed up

8.13 In the discussion paper we made other proposals for minor reforms which we do not now think it necessary to follow up.

8.14 In the discussion paper we considered the prescriptive period applicable to casualty payments.¹⁵ Casualties, such as duplicands, payable periodically at fixed regular intervals will prescribe in five years.¹⁶ As we have noted already,¹⁷ the word "casualty" is a misnomer in relation to these payments and this is nowhere more obvious than in the context of prescription. True casualties payable at irregular intervals on the occurrence of an event such as an assignation or the entry of an heir will prescribe in twenty years unless it can be successfully argued that they are "periodical" payments.¹⁸ The question is whether the word "periodical" can, in this particular statutory context, be applied to payments made at irregular intervals.¹⁹ There is a difference of opinion on this question within this Commission.²⁰ If the present prescriptive period is twenty years then any provision specifying a prescriptive period of five years in relation to casualties payable at irregular intervals on the occurrence of an event would be a change in the law. To make such a change retrospectively would be to cut off rights which had already accrued. Our general approach in this report is to leave accrued rights unaffected. We do not therefore make any recommendations on the prescriptive period applying to casualties.

8.15 In the discussion paper we also proposed that the right to future casualties of a particular type should be extinguished by prescription if a casualty of that type had, on the last two occasions when it fell due, been neither paid nor demanded within five years after the date on which it fell due.²¹ This was an attempt to deal with the problem of dead or abandoned casualties. The recommendations in this report would deal with that problem for the future in a more direct way. To apply the proposal to events which had already occurred would be to extinguish rights which a person taking legal advice would have been justified in thinking still subsisted. We do not favour that approach. There would also be difficulties relating to the burden of proof.²² Although a majority of consultees supported this approach we do not now recommend it. In particular cases it might be arguable that a

¹⁵ Paras 6.2-6.10.

¹⁶ Prescription and Limitation (Scotland) Act 1973, s 6 and Sch 1 para 1(a)(v) - applicable to any "rent or other periodical payment under a lease".

¹⁷ Paras 1.2-1.3 above.

¹⁸ There is normally no difficulty with the requirement under the opening words of para 1(a) of Sch 1 to the 1973 Act that the sum be due in respect of a particular period because casualties payable on the entry of an heir or assignee are normally expressed to be due in respect of the first year's possession of the heir or assignee.

¹⁹ See the Discussion Paper para 6.4. This question did not have to be decided by the Court of Session in *M.R.S. Hamilton Ltd v Arlott* 24 May 1995 (reported incompletely at 1995 GWD 25-1355) because of a concession by the defenders' counsel. The sheriff had decided that the obligation to pay the particular sum due had prescribed after five years.

²⁰ Some consultees doubted whether a true casualty could be regarded as a periodical payment. One (Mr B G Hamilton) argued strongly that it could not, pointing out that a casualty due on the entry of an heir or assignee might never be payable if the tenant were, say, the Church of Scotland. However, the fact that in certain cases no casualty might ever be payable does not necessarily mean that casualties of that type are not as a class periodical payments. Magazines which appear more or less regularly are, as a class, periodicals even if in particular cases only one issue might ever appear.

²¹ Para 6.29.

²² See para 6.28 of the Discussion Paper. The results of consultation did not help to resolve these difficulties as varying views were expressed.

landlord had waived his rights to casualties but that would depend on the circumstances of the case and on the existing common law.²³

8.16 We also made a provisional proposal that for the avoidance of doubt it should be made clear that a sub-tenant was not liable for any casualties other than those falling due under the sub-lease to the intermediate landlord.²⁴ All consultees, including those landlords who commented on the point, agreed that this was the existing law. We conclude that no recommendation is necessary on this point.

8.17 In the discussion paper we suggested that there should be a statutory provision to the effect that any reference in a lease to a duplicand should be treated as a reference to one extra rent for the period in question and similarly for analogous terms.²⁵ Although this was supported by a majority of consultees, we do not now think that it would be necessary to have such a statutory provision. The leases we have examined are generally clearly to the effect that the casualty is an additional rent and not an additional two rents. The problem is hardly ever going to arise and if it did we would expect that a doubtful clause would be interpreted in favour of the tenant.

²³ The leading case on waiver is *Armia Ltd v Daejan Developments Ltd* 1979 SC (HL) 56. We discussed the application of the doctrine of waiver to casualty payments at paras 6.21-6.25 of the Discussion Paper.

²⁴ Discussion Paper, paras 6.31-6.33.

²⁵ Paras 6.35-6.36. Uncertainty as to the meaning of a duplicand caused problems in relation to the redemption of feuduties and resulted in the Duplicands of Feuduties (Scotland) Act 1920.

Part 9 Summary of recommendations

1. All leasehold casualties should be abolished by legislation as from the date of commencement of the implementing Act.

Para 7.2.
Draft Bill, clause 1.

2. (a) Compensation should be payable by the tenant to the landlord in respect of the abolition of all casualties other than rental value casualties.

(b) Compensation should be payable only if the landlord so requests by a written notice given not later than one year after the abolition date. The notice would have to state the amount claimed by the landlord.

(c) For this purpose "rental value casualties" are those based on the rent or rental value (however expressed) of the property (including the buildings) held under the lease. "Rent" in this context does not include the ground rent or tack duty payable by the tenant under the lease.

Para 7.2.
Draft Bill, clause 2.

3. (a) In relation to casualties other than rental value casualties, compensation should be assessed as follows.

(b) Where the casualty is a fixed amount (such as a duplicand of a fixed ground rent or tack duty) payable at regular intervals of 19, 20, 21, 25 or 30 years under a lease which has 80 years or more to run after the date of abolition the compensation should be the amount of the casualty times the multiplier found by applying Table 1 (set out in paragraph 5.8).

(c) Where the casualty is a fixed amount payable at regular intervals other than those mentioned above, or under a lease which has less than 80 years to run after the date of abolition, the compensation should be the total of the discounted values at the date of abolition (assuming a rate of interest of 10% per year, compounded annually) of the sums which would have been due in respect of the casualty if it had not been extinguished, tax being ignored.

(d) Where the casualty is payable on, or by reference to, the entry of an assignee, but the lease does not provide for payment to be postponed to the death of the last person to pay a casualty, the compensation should be the amount of the casualty times a multiplier of .75.

(e) Where the casualty is payable on, or by reference to, the entry of an heir or the death of the last person to pay a casualty, the compensation should be the amount of the casualty times a multiplier of .03.

(f) Where the casualty is any other type of non-rental-value casualty the compensation should be the total of the discounted values at the date of abolition (assuming a rate of interest, compounded annually, which is appropriate having regard to the nature of the casualty) of the sums which would have been due in respect of the casualty if it had not been extinguished, tax being ignored. Any dispute as to the compensation due under this paragraph should be determined, on the application of either party, by the Lands Tribunal for Scotland.

Para 7.2.

Draft Bill, clause 3 and Schedules.

4. (a) The obligation to pay compensation should be a personal obligation of the person who was tenant at the date of abolition.

(b) It should be subject to the five year prescription provided for by section 6 of the Prescription and Limitation (Scotland) Act 1973, the starting point being the date when the obligation became enforceable (that is, the date when a valid notice requiring payment was given).

Para 7.2.

Draft Bill, clause 4.

5. (a) For the purposes of an abolition statute a casualty should be defined as any duplicand or other periodical or casual payment stipulated in a relevant lease or sub-lease to be payable by the tenant in addition to the annual rent.

(b) A relevant lease or sub-lease would be one granted before 1 September 1974 for a period of 300 years or more.

Para 8.3.

Draft Bill, clauses 1 and 8.

6 (a) It should be provided by statute that any irritancy clause in a lease granted before 10 August 1914 for a period of 300 years or more, and providing for a ground rent or tack duty of not more than £100 a year, is void and of no effect.

(b) The new rule should affect any action which has not reached the stage of final decree by the time the legislation comes into force.

Para 8.8.

Draft Bill, clauses 5 and 7.

7. (a) It should be provided that an assignee of a lease, or a person succeeding to the lease in any other way, is not liable for any arrears of casualties which fell due under previous tenancies.

(b) This rule should apply to assignments or transmissions which took place before the date when the legislation comes into force and it should apply to any actions pending at that date which have not reached the stage of final decree.

However, it should not apply to any case where the landlord has, in relation to the former tenant's arrears, obtained payment from, or concluded a settlement with, or obtained a final decree against, the current tenant before the date when the new legislation comes into force.

Para 8.12.
Draft Bill, clauses 6 and 7.

Appendix A

Leasehold Casualties (Scotland) Bill

ARRANGEMENT OF CLAUSES

Clause

1. Extinction of leasehold casualties.
2. Landlord's right to require compensation in respect of extinction of certain casualties.
3. Calculation of compensation.
4. Prescriptive period for payment of compensation on extinction of certain casualties.
5. Irritancy provisions in certain leases to be void.
6. Liability for casualty due by former tenant not to transmit on assignation or other transfer of lease.
7. Transitional application of sections 5 and 6.
8. Interpretation.
9. Short title, Crown application and extent.

SCHEDULES:

Schedule 1 - Table of Multipliers.

Schedule 2 - Method for calculating multiplier.

DRAFT

OF A

BILL

TO

Provide for the extinction of leasehold casualties in Scotland; for the payment of compensation on the extinction of certain such casualties; for irritancy provisions in certain leases of land in Scotland to be void; and for connected purposes. A.D. 1998.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Leasehold Casualties (Scotland)

1.—(1) In a relevant lease (that is to say, in a lease of land granted before 1st. September 1974 for a period of not less than three hundred years), any provision which stipulates for payment of a casualty shall be void; and, accordingly, any such payment which would, but for this subsection, have fallen due on or after the relevant date shall not be exigible.

Extinction of Leasehold casualties.

(2) In subsection (1) above, any reference to a payment falling due shall be construed, in a case where the provision in the relevant lease stipulates for payment to be deferred until the death of the last person to pay a casualty, as a reference to its falling due on the date of death of that person.

2.—(1) Where—

(a) a casualty extinguished by virtue of section 1 of this Act was not based on the rent, or rental value, (in either case, however expressed) of the land held under the relevant lease; and

Landlord's right to require Compensation in respect of Extinction of certain casualties.

(b) the landlord, not later than one year after the relevant date, gives written notice to the tenant—

(i) that he requires the tenant to pay to him, in respect of the extinction of the casualty, compensation calculated in accordance with section 3 of this Act; and

(ii) specifying the amount of compensation required as calculated by him,

the tenant shall be liable to pay such compensation.

(2) Any error in a calculation under paragraph (b)(ii) of subsection (1) above shall not affect the validity of the notice under that subsection.

(3) For the purposes of this section—

"rent" does not include any ground rent, or tack duty, payable by the tenant under the relevant lease; and

"tenant" means the person who, on the relevant date, has the interest of tenant in the relevant lease.

EXPLANATORY NOTES

Clause 1

Clause 1 abolishes leasehold casualties automatically as soon as the Act is passed. See the definition of "relevant date" in clause 8. "Casualty" is defined in clause 8. The abolition of leasehold casualties is prospective only. It does not affect arrears which have fallen due before the Act comes into force.

Subsection (1). The casualties must arise under a "relevant lease". This is defined as a lease granted before 1st September 1974 for a period of not less than 300 years. The reason for referring to 1st September 1974 is that it has not been possible to insert a valid casualty provision in a lease since then. The reason for mentioning 300 years is to prevent the clause from inadvertently affecting provisions in modern commercial leases. In practice it is only in leases for a period in excess of 300 years (generally for 999 years) that onerous casualty provisions are found. "Lease" includes a sub-lease. See clause 8. The last part of the subsection makes it clear that arrears of casualties are not affected. A casualty payment which fell due before the relevant date would continue to be payable.

Subsection (2). This subsection is designed to clarify a doubt which could have arisen as to the date when a certain type of casualty payment fell due. A casualty of the type which is payable on an assignation of the lease unless the person who last paid a casualty is still alive, in which case it is payable on the death of that person, is regarded as falling due only on that death and not on the earlier assignation.

Clause 2

Clause 2 provides for compensation to be payable in respect of all casualties other than rental value casualties - that is, those based on the rent or rental value (however expressed) of the land (which, because of the Interpretation Act 1978, includes the buildings) held under the lease. Compensation is due only if requested by the landlord by written notice not later than a year after the date of abolition. It is due by the person who is the tenant on that date. The notice must state the amount required as calculated by the landlord. See subsection (1)(b)(ii). The "rent" here referred to is not the ground rent or tack duty payable by the tenant but the rent which might be payable to the tenant under any sub-lease granted by him. See subsection (3). The reasons for not providing compensation for rental value casualties are explained in paragraphs 4.2 - 4.28, 6.2 - 6.6 and 7.5 - 7.6 of the Report.

Leasehold Casualties (Scotland)

3. Where by virtue of section 2(1) of this Act a tenant is liable to pay compensation, the amount payable shall be— Calculation of Compensation.

(a) in a case where—

(i) a period of eighty or more years of the relevant lease is unexpired on the relevant date; and

(ii) the lease stipulated for payment of a casualty of an unvarying amount at fixed and regularly recurring intervals of nineteen, twenty, twenty-one, twenty-five or, as the case may be, thirty years,

the product of the amount of the casualty and the multiplier obtained from the Table of Multipliers in Schedule 1 to this Act (the reference in the first column of that table to the relevant period being a reference to the period (if any) between the relevant date and the date on which the casualty would, but for this Act, next be payable);

(b) in a case where—

(i) sub-paragraph (ii), but not sub-paragraph (i), of paragraph (a) above is satisfied; or

(ii) the relevant lease stipulated for payment of a casualty of an unvarying amount at fixed and regularly recurring intervals other than any interval mentioned in sub-paragraph (ii) of that paragraph, the product of the amount of the casualty and the multiplier obtained in accordance with Schedule 2 to this Act;

(c) in a case where the relevant lease stipulated for—

(i) payment of a casualty on, or by reference to, the entry of an assignee; and

(ii) the payment to be made at any time other than on the death of the person who last paid a casualty, the product of the amount of the casualty and 0.75;

(d) in a case where the relevant lease stipulated for payment of a casualty on, or by reference to—

(i) the entry of an heir; or

(ii) the death of any person,

the product of the amount of the casualty and 0.03; and

(e) in any other case, the sum of the discounted values as at the relevant date of the amounts which would, but for this Act, have been payable in respect of the casualty; and any dispute as to the amount payable under this paragraph shall be referred to and determined by the Lands Tribunal for Scotland.

4. In Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (obligations affected by prescriptive periods of five years to which section 6 of that Act applies)— Prescriptive period for payment of compensation on extinction of certain casualties. 1973 c.52.

(a) after paragraph 1(a) there shall be inserted—

"(aa) to any obligation to pay compensation by virtue of section 2 of the Leasehold Casualties (Scotland) Act 1998;" and

(b) in paragraph 2(e), after the words "paragraph 1(a)" there shall be inserted "or (aa)".

Explanatory Notes

Clause 3

Clause 3 sets out the rules for calculating the compensation payable in respect of the abolition of non-rental-value casualties. The underlying principle is that the compensation represents the discounted value as at the date of abolition, assuming an appropriate rate of interest, of the future payments which have been lost.

Paragraphs (a) and (b). In the case of casualties of fixed amount payable at fixed and regular intervals the Table in Schedule 1 provides a convenient way of arriving at the compensation payable in most cases which are likely to arise in practice. The formula in Schedule 2 provides a method for determining the compensation in other cases.

Paragraph (c). In the case of non-rental-value casualties payable on, or by reference to, the entry of an assignee the compensation is determined by applying a multiplier of .75 to the amount of the casualty. The words "or by reference to" are included to cover the case where payment is due, say, at the end of the first year of possession by the assignee. The reasons for choosing a multiplier of .75 are explained in paragraphs 5.11 to 5.16 of the Report. Casualties payable by reference to an assignation but with payment deferred until the death of the last person to pay a casualty are dealt with in paragraph (d).

Paragraph (d). In the case of non-rental-value casualties payable on the entry of an heir or on the death of any person the compensation is the amount of the casualty times a multiplier of .03. This is a small multiplier because these casualties have a negligible value, if any. The reasons for choosing a multiplier of .03 are set out in paragraphs 5.9 to 5.10 of the Report.

Paragraph (e). This is a residual category for all non-rental-value casualties other than those dealt with by the preceding rules. The compensation payable is the total of the discounted values of the various payments lost. Paragraph (e) is inserted as a safety net. In practice the preceding rules ought to cover all normal types of non-rental-value casualty. The formula in paragraph (e) has to be general if it is to cover all possible types of case. That means that it leaves room for argument as to, for example, the dates when a casualty might have fallen due or the appropriate rate of interest to apply, taking into account such factors as exceptional levels of risk or difficulties of collection. Any disputes are to be determined by the Lands Tribunal for Scotland.

Clause 4

This clause makes it clear that the obligation to pay compensation prescribes after 5 years. Under section 6(3) of the Prescription and Limitation (Scotland) Act 1973 the starting point of the prescriptive period is the date when the obligation became enforceable, which in this case would be the date when the notice is given by the landlord.

Leasehold Casualties (Scotland)

- 5.—(1) This section applies to any relevant lease—
- (a) granted before 10th. August 1914; and
 - (b) stipulating for payment of a ground rent, or tack duty, of not more than £100 in respect of each year.
- (2) Any provision in a relevant lease to which this section applies shall, in so far as it—
- (a) purports to terminate the lease, or to entitle the landlord to terminate it, in the event of a failure of the tenant to comply with any provision in the lease; or
 - (b) deems such a failure to be a material breach of contract,
- be void.

Irritancy provisions in certain leases to be void.

- 6.—(1) Where—
- (a) before, on or after the relevant date a relevant lease is assigned, or otherwise transferred, to a new tenant; and
 - (b) any casualty payable under the lease by a former tenant is, on such assignation or other transfer, due but unpaid,

Liability for casualty due by former tenant not to transmit on assignation or other transfer of lease.

the new tenant shall not be liable to pay it.

- (2) Nothing in subsection (1) above shall—
- (a) entitle a new tenant to recover any amount which he has paid to the landlord;
 - (b) affect any agreement concluded before the relevant date between a new tenant and the landlord; or
 - (c) prevent a landlord enforcing any decree obtained before the relevant date against a new tenant.
- (3) Any reference in this section to a relevant lease being assigned, or otherwise transferred, includes a reference to the lease being partially assigned or, as the case may be, partially transferred.

7. —(1) Without prejudice to the generality of section 5 of this Act, that section shall apply for the purposes of any action commenced before the relevant date which concerns a provision such as is mentioned in subsection (2) of that section and in which final decree is not granted before that date.

Transitional application of sections 5 and 6.

(2) Without prejudice to the generality of section 6 of this Act, that section shall apply for the purposes of any action against a new tenant commenced before the relevant date for payment of a casualty such as is mentioned in subsection (1)(b) of that section and in which final decree is not granted before that date.

(3) For the purposes of this section "final decree" means any decree or interlocutor disposing of an action which is not subject to appeal or review.

Explanatory Notes

Clause 5

This clause implements recommendation 6 of the Report. It abolishes the power of the landlord to terminate the lease by virtue of an irritancy clause or a clause having similar effect. The exercise of such a power for, say, non-payment of a small tack duty or casualty would have the result that the property would revert to the landlord along with the buildings erected or paid for by the tenants. This would be a grossly excessive penalty in the type of lease covered by the clause. The clause is confined to leases granted before 10 August 1914 for a period of 300 years or more with a ground rent or tack duty of not more than £100. These restrictions are designed to limit the provision to the old ultra-long ground leases of the type in which casualty provisions may be found and to prevent inadvertent application to modern commercial leases. The clause would not affect any decree already obtained before the Act comes into force but clause 7(1) makes it clear that it would apply to any actions still pending at that date.

Clause 6

This clause implements recommendation 7 of the Report.

Subsection (1). The effect of this subsection is that a tenant is liable only for his own arrears of casualty payments, not for any liabilities incurred by previous tenants. The landlord retains his rights to proceed against previous tenants for any arrears incurred by them and not yet extinguished by prescription.

Subsection (2). This subsection is designed to make it clear that subsection (1) does not affect any case where, in relation to arrears due under earlier tenancies, the landlord has before the date when the Act comes into force received payment from the current tenant or concluded a settlement with him or obtained a final decree against him. It does, however, apply to any action still pending when the Act comes into force. See clause 7(2).

Subsection (3). For the avoidance of any doubt it is provided that any reference in the clause to an assignation or transfer includes a partial assignation or transfer.

Clause 7

This clause makes it clear that clauses 5 and 6 apply to pending actions which have not yet reached the stage of final decree. Without this provision there would be a danger that landlords would seek to preserve their irritancy rights and rights to recover previous tenants' arrears from the current tenant by commencing actions before the Act came into force. The two subsections are in similar terms. They do not set out the *only* circumstances in which clauses 5 and 6 apply: they are without prejudice to the generality of those clauses.

Leasehold Casualties (Scotland)

8. In this Act, unless the context otherwise requires— Interpretation.

"casualty" means any duplicand or other periodical or casual payment stipulated in a relevant lease to be payable by the tenant to the landlord in addition to the rent;

"lease" include sublease;

"relevant date" means the date on which this Act is passed; and

"relevant lease" shall be construed in accordance with section 1(1) of this Act.

9.—(1) This Act may be cited as the Leasehold Casualties (Scotland) Act 1998. Short title,
Crown
application and
Extent.

(2) This Act binds the Crown.

(3) This Act extends to Scotland only.

Explanatory Notes

Clause 8

The definition of "casualty" is similar to that in section 25 of the Long Leases (Scotland) Act 1954.

"Lease" includes a sublease.

The Act comes into force on the date when it is passed and that date is the "relevant date" for the purposes of the preceding provisions. Any delay in bringing the Act into force would be undesirable because some property transactions may be frozen pending abolition of leasehold casualties. It is also desirable to give immediate effect to clause 5 on the effect of irritancy clauses in certain old leases and to clause 6 on a tenant's liability for a former tenant's arrears of casualty payments.

Clause 9

Subsection (1). The short title requires no explanation.

Subsection (2). There is no reason why the Act should not apply to any case where the Crown is a party, whether as landlord or tenant, to one of the old leases covered by the Act.

Subsection (3). The Act would extend to Scotland only.

Leasehold Casualties (Scotland)

SCHEDULES

SCHEDULE 1

Section 3(a).

TABLE OF MULTIPLIERS

<i>Relevant period (in years)</i>	<i>Multipliers for casualties payable at intervals of:</i>				
	<i>19 years</i>	<i>20 years</i>	<i>21 years</i>	<i>25 years</i>	<i>30 years</i>
Nil or less than ½	1.196	1.174	1.155	1.102	1.060
½ but less than 1	1.140	1.119	1.102	1.050	1.011
1 but less than 2	1.087	1.067	1.051	1.002	0.964
2 but less than 3	0.988	0.970	0.955	0.910	0.876
3 but less than 4	0.898	0.882	0.869	0.827	0.796
4 but less than 5	0.816	0.802	0.789	0.753	0.724
5 but less than 6	0.743	0.729	0.718	0.683	0.659
6 but less than 7	0.673	0.662	0.651	0.621	0.598
7 but less than 8	0.613	0.602	0.592	0.564	0.544
8 but less than 9	0.557	0.548	0.540	0.514	0.496
9 but less than 10	0.506	0.497	0.490	0.467	0.449
10 but less than 11	0.461	0.453	0.446	0.425	0.409
11 but less than 12	0.418	0.411	0.404	0.385	0.371
12 but less than 13	0.381	0.374	0.369	0.351	0.338
13 but less than 14	0.346	0.340	0.335	0.319	0.308
14 but less than 15	0.314	0.309	0.305	0.289	0.279
15 but less than 16	0.285	0.281	0.276	0.263	0.254
16 but less than 17	0.261	0.256	0.252	0.240	0.231
17 but less than 18	0.236	0.233	0.229	0.218	0.210
18 but less than 19	0.215	0.212	0.207	0.199	0.191
19 but less than 20	-	0.193	0.189	0.180	0.174
20 but less than 21	-	-	0.172	0.164	0.158
21 but less than 22	-	-	-	0.148	0.143
22 but less than 23	-	-	-	0.135	0.130
23 but less than 24	-	-	-	0.123	0.118
24 but less than 25	-	-	-	0.112	0.108
25 but less than 26	-	-	-	-	0.097
26 but less than 27	-	-	-	-	0.089
27 but less than 28	-	-	-	-	0.080
28 but less than 29	-	-	-	-	0.073
29 but less than 30	-	-	-	-	0.067

Schedule 1

The table in this Schedule is designed to make it easy for users of the Act to find the appropriate multiplier for determining the compensation payable for the loss of duplicands and other casualties of fixed amount payable at regular intervals of 19, 20, 21, 25 or 30 years, which are the intervals normally encountered in leases containing casualty provisions. It applies only where the lease has 80 years or more still to run at the date of abolition. The figures in the table represent the total of the discounted present values, expressed as figures rounded to three decimal places, of £1 payable on each date when the casualty would have fallen due. In order to make the table manageable the first column is organised in yearly breaks, except for the first year, where there is a half-yearly break.

The first casualties to be lost as a result of the Act will be those due on the relevant date itself. See clause 1(1). The first row of the table provides the multiplier for this situation. It is the maximum multiplier because the landlord is losing one full casualty plus the discounted values of all subsequent casualties. A casualty due on, say, the nineteenth anniversary of the relevant date would be the second casualty lost. This is why there is no figure in the first column of the table for the case where a casualty is payable exactly 19 years after the relevant date. The same point applies to the last figures in the columns for casualties payable at intervals of 20, 21, 25 or 30 years.

To use the table it must first be discovered when the next payment of the casualty after the date of abolition would have fallen due. Suppose that this would have been more than four but less than five years after abolition. If the casualty is a duplicand of £17 payable every 19 years then the multiplier is 0.816 and the compensation payable, if claimed by the landlord, is £17 times 0.816, which is £13.87.

METHOD FOR CALCULATING MULTIPLIER

1. As respects each date on which, but for this Act, a payment of the casualty would have fallen due, a value shall, subject to paragraphs 2 and 3 below, be calculated, rounded to three decimal places, in accordance with the formula—

$$\frac{1}{1.1^n}$$

where n is the period, in years, between the relevant date and the date of the payment; and the sum of all the values so calculated shall be the multiplier for the purposes of section 3(b) of this Act.

2. For the purposes of paragraph 1 above, for any case where the period is—

- (a) less than ½ year (or is nil), the value shall be 1;
- (b) ½ but less than 1 year, the value shall be 0.953.

3. For the purposes of reckoning n in paragraph 1 above, where the period is more than one year, n shall be the whole number of years in question (with any time in excess of that number being ignored).

Explanatory Notes

Schedule 2

This schedule contains the method of finding the multiplier for casualties of fixed amount payable at fixed intervals other than those covered in the table in Schedule 1 or payable under a lease which has less than 80 years still to run after the date of abolition. Paragraph 2 covers the situation covered by the first two rows of the table in Schedule 1. It provides for casualties which would have been payable on the relevant date or within one year thereafter. Paragraph 3 ensures that after the first year the calculations proceed with yearly breaks. There are two reasons for this. First, it introduces coherence between the method in Schedule 2 and the method used in compiling the figures in the table in Schedule 1. Secondly, it facilitates the use of standard tables giving the present value of £1 payable at various dates in the future.

An example may be useful to illustrate the use of the formula in Schedule 2. Suppose that the casualty in question is a duplicand of £40 payable 5 years and 7 months after the date of abolition and then every 15 years thereafter, under a lease which has 830 years to run. The table in Schedule 1 does not have a column for 15 year intervals. So Schedule 2 has to be used. The first calculation is $1/1.1^5$ which is 0.621. The next calculation is $1/1.1^{20}$ which is 0.149. The next calculation is $1/1.1^{35}$ which is 0.036. The next calculation is $1/1.1^{50}$ which is 0.009. The next calculation is $1/1.1^{65}$ which is 0.002. The next calculation is $1/1.1^{80}$ which produces a figure too low to register to three decimal places. From then on it is pointless to continue this stage of the calculations. The total of the values brought out by the calculations is 0.817, which is the multiplier. Applying the multiplier to the amount of the casualty (£40) brings out a sum of £32.68, which is the compensation payable. Standard tables giving the present value of £1 at various dates in the future could also be used to find the values which have to be added together, the assumed rate of interest for present purposes being 10%.

Appendix B

RESEARCH PAPER ON LEASEHOLD CASUALTIES

1. The following information is the result of a survey of long leases registered in the Land Register and the Register of Sasines carried out by Nicola Speirs, a law graduate employed temporarily at the Scottish Law Commission in the summer of 1997. The largest sample of leases was taken from Lanarkshire where leasehold casualties have given rise to most trouble. Smaller samples were taken from Renfrewshire, Clackmannanshire and Ayrshire. The purpose of the survey was to examine the incidence and types of leasehold casualties.

LANARKSHIRE LEASEHOLD CASUALTIES

Number of casualties

2. The number of titles examined was 786. This represented 20%, selected at random, of the 3929 leasehold titles in the Lanark Title Sheet record. The survey took no account of transactions recorded in the Register of Sasines. It does not, therefore, provide a complete picture. The sample covered only leases granted prior to 1974.¹ The Land Tenure Reform (Scotland) Act of that year prohibited the inclusion of stipulations for the payment of casualties in future leases. The examined titles contained 875 leases. 291 of these provided for casualties and in one of them the casualty liability had been discharged by recorded deed. So the number of remaining casualties in the sample was 290.

Types of casualty clause

3. *Casualties including payments based on rental value.* 95 leases provided for payment of one year's full rental value for the first years' possession or entry of each assignee or singular successor. All of these leases also provided for payment of a duplicand on the entry of each heir. 35 of these "onerous casualty" leases contained simple clauses of this type (Type A).² 46 provided that only where an assignee or sub-tenant's lease was for any longer period than 19 years was there an obligation to pay a sum equal to the annual rental value (Type B). 13 of the "onerous casualty" leases had clauses postponing the payment of the full rental value for the lifetime of the previous payer of a casualty (Type C). 1 "onerous casualty" lease provided that assignees were required to pay either a duplicand or, at the proprietor's option, a sum equal to the full rental value of the property (Type D). In no case, in the sample of leases examined, was an heir required to pay the more onerous casualty based on full rental value. Sometimes actual payment of a rental value casualty was due only at the end of the first year of possession by the new tenant.

¹ The most recent example in the survey of a casualty being imposed was in a sub-let dated 1971. The casualty was a duplicand of a ground rent of 2p.

² Examples of the different types of casualty clause are given later in this paper.

4. *Casualties based on ground rent.* 177 leases provided for payment of casualties based on an extra year's ground rent (or occasionally an extra half year's ground rent).

100 of these ground rent casualty leases contained clauses providing only for payment of a duplicand at a fixed period of years. 92 of these specified that payment should be every 19 years (Type E), 3 every 20 years (Type F) and 5 every 21 years (Type G).

77 of these ground rent casualty leases provided for payment of a duplicand of the ground rent on the entry of each heir or assignee. Of these, 64 were for payment of a duplicand of the rent in the year of entry (Type H); 2 were for payment of an extra half year's rent in the year of entry (Type J); and 11 provided for payment of a duplicand on the entry of an heir or assignee unless a casualty had been paid by a person still alive, in which case payment was only due on the previous payer's death (Type K).

5. *Fixed sum casualties.* 17 leases provided for a payment of one penny at the entry of each heir or singular successor if asked (Type L). 1 lease specified that on the death of a tenant a duplicand was payable and on the entry of an assignee £12 was to be paid (Type M).

6. *Summary.*

Casualties including payments based on rental value	95
Casualties based on ground rent	177
Fixed sum casualties	18
Total casualties in 875 leases	290

Level of ground rents

7. The average ground rent in the 290 leases containing casualty clauses was £3.82. The maximum was £44.48 (only one lease). 101 leases provided for a rent of £1 or less per year.

Duration of leases

8. 239 out of the 290 Lanarkshire casualty leases examined were for 999 years. 22 were for periods between 900 and 998 years. 5 were for periods between 800 and 899 years. 17 were for 500 years. One was for 498 years. One (granted in 1926 and providing only for a small duplicand) was for 99 years. 5 were for 1037 years.

Comment

9. Various patterns can be seen in the incidence of leasehold casualties. Particular landlords used certain standard forms of casualty. Some landlords did not impose casualties at all. What is also striking is the relationship between the starting date of a lease and the type of casualty that it contains. Particularly noticeable is the fact that in leases created after 1875 there are only two casualties referring to full rental value, both in leases from the 1890s. These onerous casualties appear to have been almost universally replaced in

the 1870s with clauses providing for payment of a duplicand of the ground rent at periodic intervals.

10. Several factors seem to have no bearing on the incidence of leasehold casualties. The actual value of the property and the amount payable in ground rent as well as the nature of the subjects (whether domestic or commercial) do not appear to relate to the type of casualty, if any, which has been imposed. Irritancy clauses are also apparently unconnected to leasehold casualties. In a sub-sample of 100 Lanarkshire leases, only one contained a clause which would lead to irritancy of the lease if a leasehold casualty was unpaid. This clause was not specific, but allowed irritancy if any provisions of the lease were not complied with. It appeared that 74 of the 95 leases containing an onerous casualty clause (involving rental value) had been subject to a partial assignation.

Table 1 Incidence of leasehold casualties in Lanarkshire sample in relation to the starting date of the leases in which they appear

	<i>1750 to 1775</i>	<i>1776 to 1800</i>	<i>1801 to 1825</i>	<i>1826 to 1850</i>	<i>1851 to 1875</i>	<i>1876 to 1900</i>	<i>1901 to 1925</i>	<i>1926 to 1950</i>	<i>1951 to 1974</i>
Total leases	10	111	91	124	160	158	89	19	113
Total casualties	0	60	35	43	59	65	16	6	6
A		6	2	6	20	1			
B		19	17	6	4				
C			1	7	4	1			
D					1				
E		2		2	3	59	16	5	5
F		1				2			
G		3		2					
H		13	13	20	16			1	1
J		1	1						
K					11				
L		15	1			1			
M						1			

KEY

Casualties providing for payment of full rental value (and a duplicand of ground rent)

A Duplicand on entry of every heir and one year's full rental value on entry of each assignee

B Duplicand on entry of every heir and one year's full rental value on entry of assignees or subtenants whose lease is for more than 19 years

C Duplicand on entry of every heir and one year's full rental value payable by assignees on the death of the last tenant, heir or assignee to pay a casualty

D Duplicand on entry of every heir and duplicand or, at the proprietor's option, full rental value on the entry of each assignee

Casualties providing for payment based on ground rent

E Duplicand payable every 19 years

F Duplicand payable every 20 years

G Duplicand payable every 21 years

H Duplicand payable on entry of each heir or assignee

J Extra half year's rent payable in year of entry of each heir or assignee

K Duplicand payable on entry of each heir or assignee on the death of the last tenant, heir or assignee to pay a casualty

Casualties providing for payment of a fixed sum

L One penny payable on entry of each heir or assignee

M Duplicand payable on death of tenant, £12 payable on assignation

RENFREWSHIRE LEASEHOLD CASUALTIES

Number of casualties

11. The sample consisted of 10% of the registered long leases in the County of Renfrew. The number of titles examined was 105. The number of leases containing casualties was 28.

Types of casualties

12. *Casualties including payments based on rental value.* Only one lease provided for payment of a casualty based on rental value. Unusually, it provided for payment every 25 years (Type N). This lease was granted in 1814. Interestingly, the clause expressly states that the payment for which it provides is the leasehold equivalent of a feudal casualty.

13. *Casualties based on ground rent.* 24 leases stipulated for payment of an equivalent of ground rent after varying periods of years; 4 payable every 20 years (Type F), 8 payable every 21 years (Type G), 7 payable every 25 years (Type P), 3 payable every 30 years (Type Q) and 2 (almost certainly void for uncertainty on this point) payable after an unspecified period of time (Type R). One lease included a requirement to pay a duplicand on the entry of heirs and assignees (Type H).

14. *Fixed sum casualties.* One lease provided for payment of a fixed sum of £25 every 19th year (Type S) and one provided for payment of a fixed sum of "Twenty seven pounds nine shillings and four pence half penny" on the entry of new assignees (Type T).

15. *Summary.*

Casualties including payments based on rental value	1
Casualties based on ground rent	25
Fixed sum casualties	2
Total casualties in 105 leases	28

Level of ground rents

16. Ground rents were higher in the Renfrewshire casualty leases than in the corresponding Lanarkshire leases. In the sample the average annual rent was £12 and the highest rent was £26.52.

Duration of leases

17. 22 out of the 28 Renfrewshire casualty leases were for 999 years; one was for 996 years; one was for 1000 years; 2 were for 1900 years; one was for 3000 years; and one was for a million years.

Table 2 Incidence of leasehold casualties in Renfrewshire sample in relation to the starting date of the leases in which they appear

	<i>Prior to 1775</i>	<i>1776 to 1800</i>	<i>1801 to 1825</i>	<i>1826 to 1850</i>	<i>1851 to 1875</i>	<i>1876 to 1900</i>	<i>1901 to 1925</i>	<i>1926 to 1950</i>	<i>1951 to 1974</i>
Total leases	25	15	9	3	8	38	2	0	5
Total casualties	3	3	2	1	1	18	0	0	0
F						4			
G	3					5			
H		1							
N				1					
P					1	6			
Q		2	1						
R						2			
S						1			
T			1						

KEY

Casualties providing for payment of full rental value

N One year's full rental value every 25 years

Casualties based on ground rent

F Duplicand payable every 20 years

G Duplicand payable every 21 years

H Duplicand payable on entry of each heir or assignee

P Duplicand payable every 25 years

Q Duplicand payable every 30 years

R Duplicand payable after an unspecified period of time

Fixed sum casualties

S Payment of a fixed sum every 19 years

T Payment of a fixed sum on entry of assignees

CLACKMANNANSHIRE LEASEHOLD CASUALTIES

Number of casualties

18. The number of titles examined was 76. The number of leasehold casualties was 67.

Types of casualties

19. *Casualties including payment of rental value.* The research into long leases in the County of Clackmannan failed to find any leasehold casualties based on actual rental value.

20. *Casualties based on ground rent.* 66 of the 76 registered long leases in Clackmannanshire included a requirement to pay a duplicand of ground rent every 30 years (Type Q). One lease provided for payment of a duplicand every 20 years (Type F).

21. *Fixed sum casualties.* No fixed sum casualties were found in the Clackmannanshire leases examined.

22. *Summary.*

Casualties including payments based on rental value	0
Casualties based on ground rent	67
Fixed sum casualties	0
Total casualties in 76 leases	67

Level of ground rents

23. The average ground rent in the Clackmannanshire casualty leases examined was £2.61. The highest rent was £5.26.

Duration of leases

24. All the Clackmannanshire leases containing casualties were for 999 years.

AYRSHIRE LEASEHOLD CASUALTIES

Number of casualties

25. A very small sample of 20 leases recorded in the Register of Sasines for Ayrshire was examined. 11 of these leases provided for casualties.

Types of casualties

26. *Casualties including payments based on rental value.* Four leases containing Type A casualty clauses (payment of a full year's rental value by assignees and of a duplicand by heirs) were found. These were in leases dated 1765, 1780 and two from 1833. As before, it is clear that certain landlords tend to use certain forms of casualty.

27. *Casualties based on ground rent.* 6 leases provided for payment of 5 times the tack duty (rather than a duplicand) every 19 years. These clauses were in leases entered into between 1806 and 1847.

28. *Fixed sum casualties.* One lease, granted in 1820, provided for payment of a fixed sum of £5 every 19 years.

29. *Summary.*

Casualties including payments based on rental value	4
Casualties based on ground rent	6
Fixed sum casualties	1
Total casualties in 20 leases	11

Level of ground rents

30. The average ground rent in the 4 leases which provided for a rental value casualty on assignation and a duplicand on entry of an heir was £4.76. The average ground rent in the 6 leases in the sample which provided for a casualty of 5 times the tack duty every 19 years was £1.08. The one fixed sum casualty had an unusually high ground rent of £50.

Duration of leases

31. The four leases which provided for a rental value casualty on assignation and a duplicand on entry of an heir were all for 361 years (19 times 19 years). All the other casualty leases were for 999 years.

EXAMPLES OF LEASEHOLD CASUALTY CLAUSES

32. The following are examples of typical casualty clauses in the leases examined.

Type A

One year's full rental value on entry of each assignee and duplicand payable on entry of each heir.

"As also to pay to the said George Auldjo Jamieson as Trustee foresaid and his successors proprietors of the said subjects or his or their assignees the sum of Ten shillings of additional rent for the first years possession at the entry or succession of every heir, to the said subjects and one full years rent or value of the said subjects including all buildings erected or to be erected thereon according to the actual value thereof at the time for the first years possession or entry of every assignee or singular successor and that within year and day from the date of such heir assignee or singular successor succeeding or acquiring right or possession or of the right or possession opening to or devolving upon him her or them all over and above and besides payment of the yearly rent before specified with a fifth part more of penalty in case of failure and interest at the rate of five pounds per centum per annum of the respective sum or sums foresaid from the time or times when the same shall become due till payment thereof."

Type B

Duplicand payable on entry of every heir and one year's full rental value payable by assignees, tenants and sub-tenants where the subjects are let for 19 years or more.

"As also to make payment to the said Sir James Steuart Denham Baronet and his foresaids of the sum of Ten shillings Sterling of additional rent for the first years possession of every legal Heir to the said subjects; And one full years real yearly worth of the said subject, according to the then value thereof of additional Rent for the first years possession of every assignee, or of every Tenant or sub-tenant, whose lease shall be for any longer space or period than Nineteen years; And these additional Rents to be over and besides the current Rents before mentioned."

Type C

Duplicand payable on entry of every heir and one year's full rental value payable by assignees and sub-tenants on the death of the last tenant, heir or assignee to pay a casualty.

"And the heir of the said Tacksman and of his successors paying always to the proprietor of the said Land let a double of said rent of eleven pounds fourteen shillings Sterling (after the expiry of the first thirty eight years hereof) in the year the succession shall open to him her or them so often as that shall happen and each purchaser, assignee or singular successor whether by Disposition, Assignment, Translation Lease or Sub Lease or other deed paying the said John Burns and his foresaids one full years rent of the Lands with the whole houses built at the time thereon and that whenever he, she or they shall acquire such right unless he, she or they can show that a person alive hath paid double of the said feu rent or a years rent of the said premises in which event said purchaser, assignee or singular successor

shall not be bound to pay said years rent during such persons life but immediately on the death of such person said purchaser, assignee or singular successor or his heirs or the person then having right to said subjects and this Lease thereof shall be bound to pay to the said John Burns and his foresaids said years rent."

Type D

Duplicand payable on entry of every heir. Duplicand or, at the proprietor's option, full rental value on the entry of each assignee.

"And the heir of the tenant paying a Double of said years rent at the first term of Whitsunday or Martinmas after the succession opens to him and assignees or singular successors by whatever title paying either a double of the said rent or in the proprietors option a sum equal to what the premises would then let for at rack rent and that at the first term after his entry or the entry mentioned in the writing in his favour with interest as aforesaid."

Type E

Duplicand payable every 19 years.

"As also to pay to the said Lord Belhaven and Stenton and his foresaids proprietors for the time of the said subjects the sum of One pound sixteen shillings and five pence sterling of additional rent at the term of Whitsunday Nineteen hundred and eleven and a like sum of One pound sixteen shillings and five pence of additional rent at the expiration of every succeeding period of nineteen years thereafter during the currency of this Lease all over and above and besides payment of the yearly rent or tack duty before specified with a fifth part more of each term's payment of the said rent and of the said additional payments of liquidate penalty in case of failure in the punctual payment thereof and interest at the rate of five per centum per annum of the said respective sums from the time or times when the same shall become due till payment thereof."

Type F

Duplicand payable every 20 years.

"And paying a fine or Grassum of one years Tack Duty at the Expiration of Each Twentieth year."

Type G

Duplicand payable every 21 years.

"And paying a double of said Tack duty the twenty first year of this Tack and every twenty first year thereafter payable the said duplication in each twenty first year at the terms and in the proportions and with interest and penalty as stipulated in the case of the principal Tack duty."

Type H

Duplicand payable on entry of each heir or assignee

"And doubling the said yearly tack duty the first year of entry of each heir or Assignee to the said Subjects."

Type J

Extra half year's rent payable in year of entry of each heir or assignee.

"And the said John Langmuir further binds and obliges himself and his foresaids to pay to the said Alexander Gibson and his foresaids the sum of Two pounds and five pence four twelfths and a half of a penny Sterling in name of entry for each heir purchaser or singular successor in said subjects along with the first term's rent that shall become due after the entry of each heir or singular successor."

Type K

Duplicand payable on entry of each heir or assignee unless a casualty has been paid by a person still alive, in which case payment postponed until their death.

"And further, in terms of Agreement between the said John Marshall and the Larkhall Building Society, Number Three, the heirs and successors of the said James Frame and his foresaids are by acceptance hereof taken bound, and hereby bind and oblige themselves, himself, or herself to pay to the proprietor of the said piece of ground for the time being a double of the said rent of Fifteen shillings and one penny halfpenny in the year the succession shall open to them, him or her by succession purchase or otherwise so often as that shall happen whether by Disposition, Assingation, Translation, Lease, or Sub-Lease or any other deed unless they can shew that a person alive hath paid a double of said tack rent of said premises, in which event such successors, purchaser, assignee, or sub-tenant shall not be bound to pay the double of said tack rent during such person's life."

Type L

One penny payable on entry of each heir or assignee.

"And also the sum of one penny Sterling at the entry of each heir or singular successor to be paid when required."

Type M

Duplicand payable on death of tenant, £12 payable on assignation.

"And further upon the death of every person vested with the tenants right of the said Tack to make payment to the said John Miller Wilson Jackson and his foresaids of the sum of Two pounds two shillings and four pence half penny for the entry of each heir and of the sum of Twelve pounds for the entry of singular successors or assignees and these payments to be made over and above said yearly tack duty."

Type N

One year's full rental value payable every 25 years.

"And further the said Archibald Black binds and obliges himself and his foresaids at the term of Whitsunday one thousand eight hundred and fifty three years and so forth at each term of Whitsunday that shall occur at the distance of every 25 years thereafter during the currency of this lease to pay to the said Charles James Fox Orr, and his foresaids along with the feu duty for that year and over and above the same a sum equal to the then real rent of the ground hereby let and of any buildings which may be erected thereon and that in lieu and place of the casualties of superiority which would have fallen to the said Charles James Fox Orr had the said Archibald Black feued the said subjects from him in place of entering into these presents which real rent so to be paid shall be ascertained by two neutral men to be mutually chosen by the proprietor and tenant or by the oaths of the tenants in possession of the subjects at the time"

Type P

Duplicand payable every 25 years.

"Secondly, on the expiry of every period of 25 years...to make payment to the said Robert Orr and his foresaids of a duplicand of the said tack-duty of £6 sterling for the whole ground hereby let with interest."

Type Q

Duplicand payable every 30 years.

"And doubling the said rent or Tack duty of £2 18s 9d in lieu of interest or compensation at the expiry of every 30 years with interest thereof from the time the same becomes due till paid."

Type R

Duplicand payable after an unspecified period of time.

"On the expiry of every period...to make payment...of a duplicand of the said tack duty."

Type S

Fixed sum payable every 19th year.

"And further paying at the term of Martinmas in every nineteenth year from the said term of entry the sum of twenty-five pounds sterling and that over and above the Rent or Tack Duty of the year in which the same shall be exigible in lieu of composition for the entry of heirs and singular successor to which the same is hereby taxed and restricted."

Type T

Fixed sum payable on entry of each assignee.

"And the assignees or singular successors of the said Margaret Morrison shall be obliged to pay the sum of Twenty seven pounds nine shillings and four pence half penny of composition, besides the yearly rent at the first term of Martinmas after their entry to the said pieces of ground."

CONCLUSION

33. The research confirms that leasehold casualties are archaic and anachronistic. After 1874 almost no casualties based on rental value were introduced. This seems to correspond to the passing of the 1874 Conveyancing (Scotland) Act. After 1914, and the introduction of the Feudal Casualties (Scotland) Act, leasehold casualties disappeared almost altogether. These trends suggest that the legislation of those years relating to feudal casualties was interpreted as referring to leasehold casualties as well. Only a minority of casualties are based on rental value. It is not known how many apparently live casualties of this type are in fact still exigible³ or likely to be claimed in practice.⁴ Casualties tied only to ground rent or tack duty involve very small amounts of money. Fixed sum casualties are comparatively rare. Those in the sample also involved only very small amounts of money.

³ Clauses providing for a casualty to be payable on the assignation of the whole subjects comprised in the lease may not be exigible after a partial assignation. See *Kaye and Others v Archibald*, 27 June 1996, Sheriff Court at Hamilton, unreported.

⁴ In some cases the landlord may have disappeared or become untraceable.

Appendix C

List of those who submitted written comments on Discussion Paper No 102

Mrs Maureen Allan

Boghead Feudal Scotland Action Group

Mr Robin F Callander

Mr James Campbell, WS, Messrs Jas Campbell & Co WS, Saltcoats

Council of Mortgage Lenders

Messrs Craxton and Mercer, Solicitors, Paisley

Faculty of Advocates

Mr Cameron S Fyfe, Messrs Ross Harper & Murphy, Solicitors, Glasgow

Professor William M Gordon, University of Glasgow

Professor George L Gretton, University of Edinburgh

Mr Brian G Hamilton

Mr Jimmy Hood MP

Mr Walter B Kilgour, Head of Legal Services, North Lanarkshire Council

Law Society of Scotland

Members of Property Law Honours class, University of Glasgow (responses collated by Professor Robert Rennie)

Monocastle Ltd

Mr L D Most, Messrs Alexander Stone & Co, Solicitors, Glasgow

Mrs Gretta Pritchard

Professor Colin T Reid, University of Dundee

The Rt Hon the Lord Rodger of Earlsferry, Lord President

Royal Faculty of Procurators in Glasgow (responses collated by Mr Campbell White, Dean)

Royal Institution of Chartered Surveyors in Scotland

Scottish Consumer Council

Scottish Courts Administration

Mrs Esther Serrels, Councillor, South Lanarkshire Council

Professor John H Sinclair, University of Strathclyde

Mr Michael J R Smith, Messrs Grant & Co, Solicitors, Glasgow

Society of Writers to HM Signet (forwarding response prepared by Mr J M Robertson, WS)

Mr I N D Walker, Messrs McGrigor Donald, Solicitors, Glasgow