



Scottish Law Commission
promoting law reform

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204)

Report on Conversion of Long Leases

report



Scottish Law Commission
promoting law reform

Report on Conversion of Long Leases

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

SCOTTISH LAW COMMISSION

Item No 1 of our Seventh Programme of Law Reform

Report on Conversion of Long Leases

To: Ms Cathy Jamieson MSP, Minister for Justice

We have the honour to submit to the Scottish Ministers our Report on Conversion of Long Leases.

(Signed)

RONALD D MACKAY, *Chairman*

GEORGE L GRETTON

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Michael Lugton, *Chief Executive*
6 November 2006

Contents

	<i>Paragraph</i>	<i>Page</i>
Part 1 Introduction		
Background	1.1	1
Empirical work	1.4	2
What is a long lease?	1.5	2
Earlier conversion schemes	1.8	4
Our recommendations in summary	1.10	5
Which Parliament?	1.12	5
Part 2 Qualifying leases		
The case for conversion	2.1	7
Qualifying duration	2.13	10
Initial term	2.13	10
Unexpired duration	2.16	11
Computation of duration	2.22	12
Renewals	2.23	12
Breaks	2.27	13
Leases for life	2.29	14
Recommendation	2.30	14
Lease as a registered real right	2.31	15
Exempt leases	2.32	15
Type of property	2.33	15
Minerals	2.34	16
Inalienable property	2.36	16
Nature of landlord	2.39	17
Date of lease	2.40	17
Rent	2.41	18
Existing conversion schemes	2.43	18
Recommendation	2.44	19
Leases and subleases	2.45	19
Part 3 Conversion		
Voluntary or compulsory?	3.1	21
Compulsion	3.1	21
Exemption	3.4	21
One day or many?	3.9	23
From lease to ownership	3.14	25
Introduction	3.14	25
Transfer from landlord to tenant	3.15	25
Conferral of ownership on tenant	3.19	27

Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Conversion of lease to ownership	3.20	27
Evaluation	3.22	27
Extinction of landlord's interest and of intermediate leases	3.23	28
Real rights and conditions of the lease	3.25	28
Real rights	3.25	28
Conditions of the lease	3.27	29
Recommendation	3.30	30
Reservations and pertinents	3.31	31
Servitudes	3.34	32
Leases without tenants	3.42	34
Part 4	From leasehold conditions to real burdens	
Introduction	4.1	35
Qualifying conditions	4.3	35
Introduction	4.3	35
Enforceable against successors	4.4	36
Of the nature of a real burden	4.5	36
Some exclusions	4.6	36
Pre-emptions	4.12	37
Implied terms	4.13	38
Inversion of possession	4.14	38
Recommendation	4.17	39
Constitutive deeds	4.18	39
Qualifying lease	4.19	39
Superior leases	4.20	39
Variations	4.25	41
Assignations and deeds of condition	4.26	41
Recommendation	4.27	41
Conversion in outline	4.28	41
Facility burdens	4.30	42
Further special cases	4.34	43
Service burdens	4.35	43
Manager burdens	4.36	44
Conservation burdens	4.37	44
Personal pre-emption burdens and personal redemption burdens	4.38	45
Economic development burdens	4.39	45
Health care burdens	4.40	45
Recommendation	4.41	45
Other conditions: the position of landlords	4.42	47
Conversion by nomination of benefited property	4.42	47
Conversion by agreement	4.48	50

Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Other conditions: the position of third parties	4.49	50
Introduction	4.49	50
Express rights	4.50	51
Implied rights: common schemes	4.52	51
Implied rights: partial assignments	4.53	52
Recommendation	4.55	53
Conditions reserving development value	4.56	53
Prior variation or extinction of conditions	4.57	54
One choice	4.58	54
Notices	4.60	55
Service	4.60	55
Separate notices and combined notices	4.62	56
Recommendation	4.63	56
Registration	4.64	56
Invalidity	4.66	57
Introduction	4.66	57
Applications to the Lands Tribunal	4.67	57
Application for rectification	4.69	57
Challenge to the burden itself	4.70	58
Conditions affecting the landlord or third party	4.71	58
Conditions enforceable contractually	4.74	59
Part 5 Minerals and sporting rights		
Introduction	5.1	61
Reservations of minerals	5.3	61
Sporting rights	5.7	62
Reservations of sporting rights	5.10	63
Preservation: in principle	5.13	64
Preservation: a scheme in outline	5.15	64
Content of preserved right	5.18	65
Freshwater fish	5.19	65
Game	5.20	65
Exclusivity	5.22	66
Recommendation	5.23	67
Part 6 Compensation		
Introduction	6.1	68
Compensatory payment	6.3	68
Basis of calculation	6.3	68
Non-monetary rents and royalty rents	6.9	71

Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
<i>Cumulo</i> rent	6.11	71
Partially continuing leases	6.15	72
Recommendation	6.16	73
Compensation due only where claimed	6.17	74
Renewal premiums	6.22	75
Allocation of premiums	6.26	76
Additional payment: grounds	6.28	77
Introduction	6.28	77
Non-monetary rents	6.29	77
Rent review	6.30	77
Rent increase	6.31	78
Renewal premiums exceeding £100	6.32	78
Residual value of reversionary interest	6.33	78
Early termination	6.34	78
Right to development value	6.36	79
Recommendation	6.38	80
Additional payment: amount	6.39	80
Procedure	6.39	80
Matters to be taken into account	6.40	81
Valuation of reversionary interest	6.43	81
Capping of claim for development value	6.45	82
Date of valuation	6.46	83
Recommendation	6.47	83
Claims in excess of £500	6.48	84
Intermediate leases	6.52	85
Crystallisation of liability	6.56	86
Time scale	6.63	88
Enforcement	6.64	89
Payment by instalments	6.65	89
Service	6.70	91
Negative prescription	6.74	93
Unpaid rent	6.75	93
Leasehold casualties	6.76	93
Part 7 Notices of exemption		
Introduction	7.1	95
Exemption	7.2	95
Publicity	7.2	95
Tenant under the qualifying lease	7.3	95
Notice	7.4	95
Service	7.5	95

Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Registration	7.6	96
Effect	7.7	96
Sublease of an exempt lease	7.8	96
Recommendation	7.9	96
Recall	7.10	97
Introduction	7.10	97
Notice of recall	7.11	97
Unexpired duration exceeding 100 years	7.12	97
Effect	7.13	98
Recommendation	7.15	98
Part 8	Miscellaneous topics	
Updating the Land Register	8.1	100
Notices: evaluation for registration	8.9	102
Unregistered leases	8.14	105
Stamp Duty Land Tax	8.19	106
Recommendation	8.25	108
Translation	8.27	108
Part 9	Residential ground leases	
Introduction	9.1	110
Protection of tenants	9.6	112
The case for protection	9.8	112
Loss of a home	9.8	112
Absence of alternative accommodation	9.10	113
Comparison with other leases	9.11	113
No compensation for improvements	9.12	113
The case against protection	9.13	114
Justified expectations	9.14	114
Previous opportunity	9.16	114
Cost to the tenant	9.17	115
Escalation of compensation for voluntary conversions	9.20	115
Results of consultation	9.21	116
Evaluation	9.25	117
Part 10	List of recommendations	118
Appendix A		
Draft Long Leases (Scotland) Bill		135

Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Appendix B		
List of those who submitted written comments on Discussion Paper No 112		250
Appendix C		
Survey of Long Leases		251
Appendix D		
Clauses extracted from a 999 year lease of land in Wishaw granted in 1901		267

Abbreviations

1954 Act

Long Leases (Scotland) Act 1954

1967 Act

Leasehold Reform Act 1967

2000 Act

Abolition of Feudal Tenure etc. (Scotland) Act 2000

Gordon, *Scottish Land Law*

W M Gordon, *Scottish Land Law* (2nd edn) (Edinburgh, 1999)

Guthrie Report

Scottish Home Department, *Report of the Scottish Leases Committee* (chaired by Lord Guthrie) (1952, Cmd 8656)

Hunter, *Landlord and Tenant*

Robert Hunter, *A Treatise on the Law of Landlord and Tenant* (3rd edn, 1860)

Paton & Cameron, *Landlord and Tenant*

G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (Edinburgh, 1967)

Rankine, *Leases*

J Rankine, *The Law of Leases in Scotland* (3rd edn) (Edinburgh, 1916)

Reid, *Property*

Kenneth G C Reid *et al*, *The Law of Property in Scotland* (Edinburgh, 1996)

Scot Law Com DP No 112

Scottish Law Commission, *Discussion Paper on Conversion of Long Leases* (Scot Law Com DP No 112) (2001)

Scot Law Com No 165

Scottish Law Commission, *Report on Leasehold Casualties* (Scot Law Com No 165) (1998)

Scot Law Com No 168

Scottish Law Commission, *Report on Abolition of the Feudal System* (Scot Law Com No 168) (1999)

Scot Law Com No 181

Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181) (2000)

Stair Memorial Encyclopaedia

Stair Memorial Encyclopaedia: The Laws of Scotland (25 vols, Edinburgh 1986-95)

Part 1 Introduction

Background

1.1 In recent years we have been engaged in a major review of the structure of land law in Scotland. Our *Report on Abolition of the Feudal System* (1999)¹ was implemented by the Abolition of Feudal Tenure etc. (Scotland) Act 2000, and our *Report on Real Burdens* (2000)² by the Title Conditions (Scotland) Act 2003. A slightly earlier report, on the *Law of the Tenement* (1998),³ was implemented by the Tenements (Scotland) Act 2004. Although important work remains to be done in other areas of property law,⁴ the present report marks the final stage of this structural review.⁵ In essence it seeks to apply to certain types of long lease the principle of conversion already applied to feus by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. Under that Act all feus were converted into ownership, on a day known as the "appointed day". On that day feudal vassals became outright owners.⁶ The present report seeks to extend that scheme to tenants holding under certain categories of long lease.⁷

1.2 Other work has been carried out on the law of leases. Our *Report on Leasehold Casualties* (1998)⁸ was implemented by the Leasehold Casualties (Scotland) Act 2001. The Act abolished the casualties – payments due on assignation and on certain other occasions – payable under some long leases. It also abolished the remedy of irritancy for most leases of 175 years or more.⁹ Our *Report on Irritancy in Leases of Land* (2003)¹⁰ recommended the introduction of a comprehensive statutory scheme regulating irritancy as it applies to all leases of land, including commercial agricultural and residential leases. However, we have no plans to consider the law of landlord and tenant more generally.

¹ Scottish Law Commission, *Report on Abolition of the Feudal System* (Scot Law Com No 168, 1999).

² Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 181, 2000).

³ Scottish Law Commission, *Report on the Law of the Tenement* (Scot Law Com No 162, 1998).

⁴ As part of our *Seventh Programme of Law Reform* (Scot Law Com No 198, 2005) we are reviewing the system of registration of title as set out in the Land Registration (Scotland) Act 1979. See our three discussion papers on land registration; *Land Registration: Void and Voidable Titles* (Scot Law Com DP No 125, 2004), *Land Registration: Registration, Rectification and Indemnity* (Scot Law Com DP No 128, 2005) and on *Land Registration: Miscellaneous Issues* (Scot Law Com DP No 130, 2005). In addition, we have received a reference in relation to the problems arising out of *Sharp v Thomson* 1997 SC(HL) 66. See our *Discussion Paper on Sharp v Thomson* (Scot Law Com DP No 114, 2001).

⁵ We have also reported on a reference received on the law of the foreshore and seabed. See our *Report on Law of the Foreshore and Seabed* (Scot Law Com No 190, 2003).

⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 1 and 2. The day appointed for feudal abolition under s 71 of the 2000 Act was 28 November 2004, (Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Commencement No 2) (Appointed Day) Order 2003, SSI 2003/456).

⁷ The subject of conversion of long leases was included within Item No 4: Property of our *Sixth Programme of Law Reform* (Scot Law Com No 176, 2000) paras 2.11 and 2.12 and was carried forward to our *Seventh Programme of Law Reform* (Scot Law Com No 198, 2005) paras 2.3–2.6.

⁸ Scottish Law Commission, *Report on Leasehold Casualties* (Scot Law Com No 165, 1998).

⁹ By s 5 the conditions are (i) that the lease was granted before 10 August 1914 and (ii) that the annual rent does not exceed £150.

¹⁰ Scottish Law Commission, *Report on Irritancy in Leases of Land*, (Scot Law Com No 191, 2003).

1.3 Our ideas on the conversion of long leases were first set out in a discussion paper published in 2001.¹¹ We have benefited from comments received on this paper,¹² as well as from the views, at two separate meetings, of our advisory group on leasehold conversion.¹³ A number of other people helped us in various ways.¹⁴ To all we are grateful.

Empirical work

1.4 A study of the incidence of long leases was carried out in 1951 for the Scottish Leases Committee chaired by Lord Guthrie. This involved an examination of all search sheets in the Register of Sasines for the period 1905–1951. The results, which disclosed 13,151 current leases, were tabulated both by length of initial grant and by unexpired duration. Almost 9,000 leases were found to have more than 100 years still to run.¹⁵ For the purposes of preparing this paper we have carried out a major study of our own, based on entries in the Land Register for the counties of Ayr, Clackmannan, Lanark, and Renfrew. In all we considered around 2,500 leases. As well as noting initial length and unexpired duration we also investigated the year of grant, the amount of rent payable, the type of property, whether there had been subletting or a partial assignation following division, and whether the minerals had been excepted. The full results are given in appendix C. We are indebted to the Registers of Scotland for making the source material available and for putting the expertise of their staff at our disposal. Taken together, these two studies make it possible to draw a reasonably full picture of the incidence and use of long leases in Scotland today, and this has made our task of law reform much simpler than would otherwise have been the case. Our understanding was further increased by the knowledge and experience of those solicitors who wrote to us on this subject in response to an advertisement in the legal press.

What is a long lease?

1.5 By "long lease" is usually meant a lease that is sufficiently long to be registrable in the property registers, that is to say, in the Land Register or the Register of Sasines.¹⁶ Registration of long leases – or "tacks" to use the traditional name – first became possible in 1857.¹⁷ It is now compulsory in the sense that a real right cannot be obtained otherwise than

¹¹ Scottish Law Commission, *Discussion Paper on Conversion of Long Leases* (Scot Law Com DP No 112, 2001).

¹² A list of those who submitted written responses is in appendix B.

¹³ The members of our advisory group were Professor Stewart Brymer, University of Dundee and Thorntons WS; Mr Angus McAllister, University of Paisley; Mr Somerled Notley, Brodies WS; and Professor Robert Rennie, University of Glasgow and Harper Macleod.

¹⁴ We should particularly mention: Mr A M Bowman, Bonar Mackenzie WS; Mr J C N Craxton, Craxton & Grant; Mr Ian Davis, Registers of Scotland; Mr Fergus Ewing MSP; Fife Council; Mr A D D Forgan: Mr Andrew Fraser, North Ayrshire Council; Mr J D Grandison, Pomphreys; Mr Neil D Lambe, Office of Law Reform, Northern Ireland; McJerrrow & Stevenson; Mr Ian T Mackay, North Ayrshire Council; Mr Malcolm McRae, Highland Council; Ms Lynne Raeside, The Royal Institution of Chartered Surveyors in Scotland; Professor Peter Robson; Mr Peter Sharp, Murray & Tait; Mr Neil Tainsh, Clerk to the Lands Tribunal for Scotland; Mr S R Waters, Waters Rule & Co; Mr Robert Williamson; and Mr John Wright QC, Member of the Lands Tribunal for Scotland.

¹⁵ *Report of the Scottish Leases Committee* (Cmd 8656) (hereafter the "Guthrie Report") paras 37 and 38 and appendix II.

¹⁶ At present there are two property registers, the Register of Sasines and the Land Register, dating, respectively from 1617 and 1981. The Register of Sasines has now been phased out for new transactions although the two registers are likely to operate side by side for many years to come.

¹⁷ Registration of Leases (Scotland) Act 1857 s 1.

by registration.¹⁸ Originally a lease could only be registered if it had been granted for more than 31 years,¹⁹ but the figure was reduced to 20 years in 1974.²⁰ A long lease, therefore, is any lease with an initial duration of more than 20 years. Until modern times there was no upward limit and leases could be, and sometimes were, of prodigious length. Our survey disclosed 11 leases granted for a million years, all for property in Paisley. Since 1974 new residential leases have been restricted to 20 years and so cannot be long leases;²¹ and since 2000 it has no longer been possible to grant any type of lease for more than 175 years.²² Both restrictions were designed to prevent the creation of a second feudal system by means of long leases.

1.6 Our survey makes clear that there are really two types of long lease. First, there are leases of moderate duration – leases of anything from 20 to 125 years, but with a concentration in the lower part of the range. And then there are leases which may be characterised as "ultra-long" – leases for 700 years or more, but typically for 999 years. Almost one half of all leases in our sample were granted for 999 years.²³ The former are genuine leases. The land is let with the intention that it be returned in due course; and the residual ownership of the landlord is of value. The latter are quasi-feus, and the tenants quasi-owners; and, apart from a right to receive rent, the whole economic value in the land lies with the tenant.

1.7 Many of the ultra-long leases date from the period before 1900. Often they were used as alternatives to feus in cases where feuing was not permitted. Land held on burgage tenure could not be feued,²⁴ while in the case of other tenures feuing was sometimes forbidden in the original charter.²⁵ But the main obstacle was the entail. It is estimated that in 1825 half of the territorial property of Scotland was entailed, and the percentage continued to rise during the next 50 years.²⁶ Entailed land could not be feued at all until 1848,²⁷ and not freely until 1914.²⁸ Many long leases, therefore, were substitutes for feus. Of course this is not the whole story. Our survey shows that ultra-long leases continued to be granted after 1914, when the restrictions on entails fell away;²⁹ and doubtless leases were sometimes granted before that date for reasons which had nothing to do with entails, for example because they were simpler and therefore cheaper, or because of local estate practice. But long leases were never popular in Scotland in the manner of south of the border, where the alternative of feuing was not available.³⁰ In Scotland feus were usually preferred to leases; and where leases were used it tended to be because feuing was not possible. It must be stressed, however, that from a functional point of view there was – and is – little to choose

¹⁸ Land Registration (Scotland) Act 1979 s 3(3).

¹⁹ Hence the survey carried out for the Guthrie Committee was restricted to leases of over 31 years.

²⁰ Land Tenure Reform (Scotland) Act 1974 sched 6 para 1.

²¹ Land Tenure Reform (Scotland) Act 1974 ss 8–10.

²² Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67. There are transitional exceptions, including for subleases.

²³ Appendix C paras 11 and 12.

²⁴ This obstacle disappeared in 1874 when burgage tenure was assimilated to feu farm tenure by s 25 of the Conveyancing (Scotland) Act 1874.

²⁵ Such provisions were rendered ineffective by s 8 of the Conveyancing Amendment (Scotland) Act 1938.

²⁶ Guthrie Report para 44.

²⁷ Entail Amendment Act 1848 ss 4 and 24.

²⁸ Entail (Scotland) Act 1914 s 4.

²⁹ Appendix C para 16 and charts 9 and 10.

³⁰ In England subinfeudation was abolished in 1290 by the statute *Quia Emptores*.

between the two.³¹ Both provide an income stream for the grantor, and both allow the imposition of use restrictions and other obligations on the grantee. A feu was sometimes analysed as a lease of perpetual duration,³² and many ultra-long leases too approached perpetuity in duration.

Earlier conversion schemes

1.8 The role of the 2000 Act in converting feus to ownership has already been mentioned. A scheme for the conversion of long leases was introduced by the Long Leases (Scotland) Act 1954 and was in operation between 1954 and 1959. This implemented the recommendations of the Guthrie Committee, mentioned earlier. A lease was eligible for conversion if it was of residential property and had been granted before 10 August 1914 for a period of at least 50 years.³³ The cut-off date of 1914 was an acknowledgement of the restrictions on the feuing of entailed property which were in operation until then. Conversion was at the election of the tenant. The landlord granted a conveyance against payment of compensation. If the lease had more than 100 years to run, the rent and casualties were converted into feuduty. In other cases payment was also due in respect of the landlord's residual ownership.³⁴ The scheme appears to have been successful to some degree, although detailed figures are not available.³⁵ Certainly our survey suggests a decline in the number of long leases. The Guthrie Report disclosed that in 1951 a little under 3% of properties were held on long lease.³⁶ Today the figure is probably around 2%.³⁷ No doubt there were other factors at work as well. Some leases will simply have come to an end. In other cases, if rent had ceased to be paid, the tenant may have acquired ownership by recording an *a non domino* conveyance.³⁸ But conversion, whether under the 1954 Act or, after 1959, on an equivalent but voluntary basis, seems to have played an important role.

1.9 Other conversion schemes were, and remain, available on a more restricted basis.³⁹ A special scheme for tenancies-at-will was introduced in 1979.⁴⁰ There has been a right to buy houses leased from local authorities or other social landlords since 1980.⁴¹ And the Crofters (Scotland) Act 1993 contains a conversion scheme for crofts. Conversion schemes also operate in the other jurisdictions of the United Kingdom. In England and Wales it has been possible to convert ultra-long leases since 1881.⁴² The Leasehold Reform Act 1967 allows the conversion of leases of houses for more than 21 years on payment of

³¹ For this reason ultra-long leases were sometimes referred to as "feu-tacks": see *Buchanan's Trs v Pagan* (1868) 7 M 1.

³² For a discussion of the relationship between feus and leases, see Martin Hogg, "Leases: Four Historical Portraits" in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, pp 369–71.

³³ Long Leases (Scotland) Act 1954 s 1.

³⁴ Long Leases (Scotland) Act 1954 ss 7 and 8.

³⁵ See, however, para 9.3.

³⁶ Guthrie Report para 37. This figure is derived by disregarding the 3,224 leases which had expired.

³⁷ Appendix C para 9. The ratio of ultra-long to "ordinary" leases appears to be roughly 2:1.

³⁸ Guthrie Report paras 43–4. For a recent (and unsuccessful) example see *B G Hamilton Ltd v Ready Mixed Concrete (Scotland) Ltd* 1999 SLT 524.

³⁹ For a summary account of the schemes mentioned in this paragraph, see Scot Law Com DP No 112 pp 95–8.

⁴⁰ Land Registration (Scotland) Act 1979 ss 20–22. For tenancies-at-will, see paras 70–81 of the Guthrie Report. There are very few such tenancies.

⁴¹ The current legislation is the Housing (Scotland) Act 1987, as amended by the Housing (Scotland) Act 2001.

⁴² See now s 153 of the Law of Property Act 1925.

compensation, a right extended to flats in 1993.⁴³ Northern Ireland has comparable legislation.⁴⁴

Our recommendations in summary

1.10 We recommend that a conversion scheme be introduced for ultra-long leases. The scheme would follow closely the scheme for conversion of feus introduced by the 2000 Act. The scheme would be compulsory and automatic, but with the possibility of an opt-out by the tenant. A lease would qualify if it had been granted for more than 175 years and had more than 100 years left to run.⁴⁵ In practice, most qualifying leases will have been granted for much longer periods such as 999 years. On a specified day, to be known as the "appointed day", all ultra-long leases would be converted into ownership, and the residual ownership of the landlord would be extinguished.⁴⁶ Certain leasehold conditions could remain in force as real burdens. Conditions concerned with facilities and services would always survive, as would conditions imposed under a common scheme on a group of related properties. Other conditions could be preserved if the (former) landlord owned suitable land in the neighbourhood to which enforcement rights could be attached or if they were capable of being personal real burdens.⁴⁷ Special provision is made for servitudes.⁴⁸ Sporting rights could also be preserved.⁴⁹ The landlord would be entitled to compensation, calculated as a multiplier of the rent,⁵⁰ and in some cases additional compensation would also be due.⁵¹ Conversion would be prevented if the tenant registered a notice of exemption before the appointed day, but the exemption could be recalled at any time provided the lease had more than 100 years to run.⁵²

1.11 For reasons set out in part 9 we have concluded that we should make no recommendation in relation to a possible second scheme for the small number of residential ground leases which are too short to qualify under the main scheme.

Which Parliament?

1.12 Legislation to give effect to our proposals would be within the legislative competence of the Scottish Parliament⁵³ (save for the proposal relating to the application of Stamp Duty Land Tax).⁵⁴ The law of landlord and tenant is not a reserved matter. Further, the legislation would not, in our view, be in breach of the European Convention on Human Rights. Indeed

⁴³ Leasehold Reform, Housing and Urban Development Act 1993.

⁴⁴ Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971; Ground Rents Act (Northern Ireland) 2001.

⁴⁵ Part 2.

⁴⁶ Part 3.

⁴⁷ Part 4.

⁴⁸ Paras 3.34–3.41.

⁴⁹ Part 5.

⁵⁰ As with the 2000 Act, the multiplier is derived by reference to the price of two and a half per cent Consolidated Stock. See paras 6.3–6.8.

⁵¹ Compensation is discussed in part 6.

⁵² Part 7.

⁵³ Scotland Act 1998 s 29.

⁵⁴ See paras 8.19–8.26. Taxes are a reserved matter, Scotland Act 1998, s 29, s 30, sched 5, part II, reservation A1. Other reserved matters are listed in sched 5.

to a large extent our recommendations are modelled on existing legislation of the Scottish Parliament.⁵⁵

⁵⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000.

Part 2 Qualifying leases

The case for conversion

2.1 Before the details, first the principle. What problems are encountered with ultra-long leases? And is conversion into ownership an appropriate solution for these problems?

2.2 Most ultra-long leases were granted for periods such as 999 years and have still many hundreds of years to run. This means that they are barely distinguishable from feus, and indeed were often granted as an alternative to feus, in circumstances where feuing was not possible.¹ A theoretical difference is that, while feus are perpetual, even an ultra-long lease will, eventually, come to an end by expiry of its term. But the prospect is so remote that the possibility can hardly enter into the consciousness of either landlord or tenant, and the landlord's ownership has rarely an economic value beyond the right to receive rent and, and also the benefit of any other terms that there may be. Almost always the reversionary interest itself is of minimal value.

2.3 An ultra-long lease suffers from many of the disadvantages already familiar from feus.² The hierarchical structure of leases and subleases is needlessly complex in circumstances where the only right of value is that held by the ultimate tenant. Yet a lease may be vulnerable to irritancy (ie unilateral termination by the landlord, without compensation) in the event of non-payment of rent or a failure to observe one of the conditions of the lease.³ The conditions themselves may verge on the unacceptable. They allow an inappropriate degree of control by a person who, unless a close neighbour, has little or no interest in the land; or if actual control is eschewed they provide an opportunity to charge money for waivers. This can make the landlord's interest attractive to title raiders. It is true that conditions in leases can be discharged by the Lands Tribunal on cause shown⁴ as was the case with feudal real burdens. But a condition in a lease has a nuisance value even if it would in all probability be discharged by the Tribunal. In practice the tenant may prefer to pay for a waiver than to risk the uncertainty, and delay, involved in a judicial process. Sometimes the landlord is untraceable, as occurred also with feudal superiors.

2.4 In the case of feus, these disadvantages were considered sufficient grounds for conversion into proper ownership. That conversion was effected by the 2000 Act on 28 November 2004,⁵ following on a report by this Commission.⁶ The reform of land tenure would be incomplete, it may be argued, without the conversion of ultra-long leases. A pseudo-feu should be treated in the same way as the real thing.

¹ Para 1.7.

² For which see Scot Law Com No 168 paras 1.16–1.19.

³ Irritancy is abolished by the Leasehold Casualties (Scotland) Act 2001 ss 5 and 6 in respect of leases granted before 10 August 1914 for not less than 175 years and at a rent not exceeding £150.

⁴ Title Conditions (Scotland) Act 2003 s 90(1)(a).

⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 1 and 71 and Abolition of Feudal Tenure etc. (Scotland) Act 2000 (Commencement No 2) (Appointed Day) Order 2003, SSI 2003/456.

⁶ Scot Law Com No 168.

2.5 In fact the difficulties with leases extend beyond those with feus. Because ultra-long leases are relatively rare, and are concentrated within small geographical areas, they are unfamiliar to many legal practitioners. The result is often an increase in transaction costs when the property comes to be sold. Several firms of solicitors complained to us of this difficulty. An agent for the purchaser who is unfamiliar with the type of holding is likely to ask inappropriate questions and to seek assurances on matters on which assurance is either not required or could not reasonably be obtained. Worse than this, a contract to buy a house or land expressed in standard terms does not cover the possibility that the title might be held on long lease. This means that, unless the terms have been appropriately adjusted, a purchaser can refuse to proceed with the transaction on the basis that the title offered is merely one of lease. Such cases occur, and have been litigated.⁷

2.6 A tenant under a long lease may also encounter difficulties in relation to secured financing. A small number of lenders will not advance money on the security of a lease.⁸ Others are wary of potential problems, such as premature termination as a result of irritancy or of confusion.⁹ Renewable leases are particularly troublesome. Although a 99-year perpetually renewable lease with 10 years to run may seem to the tenant like a perpetual lease, it may seem like a 10-year lease to the lender. This is because the lender will have to depend on the tenant renewing the lease on time and, following renewal, re-granting the security over the new lease. Meanwhile the lender is exposed to dangers such as the bankruptcy of the tenant, an inhibition preventing the re-grant, or a supervening security with a preferential ranking.

2.7 There are special difficulties with flatted properties. The common law of the tenement presupposes ownership rather than ultra-long lease. Yet tenements exist in which each flat is held under such a lease. In that case there is no clear applicable law, although in practice the law of the tenement is probably applied by analogy. In our *Report on the Law of the Tenement* we noted that we had "considered whether we should formalise the position by extending our proposals to flats which are held on exceptionally long leases but concluded that the issue is best approached as part of our long-term project on leasehold tenure".¹⁰ Accordingly, neither the draft Tenements (Scotland) Bill included in the *Report* or the Tenements (Scotland) Act 2004 makes provision for ultra long leases. The problem is solved if, as envisaged in the *Report*, such leases are converted into ownership.

2.8 A number of other factors may be mentioned. Not to convert leases now would be to store up problems in the long term when such leases come to an end and the tenant loses the property without compensation, including compensation for improvements.

2.9 The 2000 Act¹¹ makes a distinction between "proper" leases and leases which are so long as to amount to quasi-ownership. The line is drawn at 175 years. Since 9 June 2000, when the relevant provision came into force, it has ceased to be possible to grant leases

⁷ *McConnell v Chassels* (1903) 10 SLT 790; *Fleming v Boswell* (Outer House, Nov 1948, unreported but noted at para 48 of the Guthrie Report).

⁸ The Council of Mortgage Lenders' *Handbook for Scotland* (2004) suggests that eleven lenders might come into this category, others required that specific reference be made to them.

⁹ "Confusion" in this technical sense occurs where the same person is both landlord and tenant.

¹⁰ Scot Law Com No 162 para 4.7.

¹¹ ie the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

with a duration in excess of 175 years.¹² It would be consistent with the rule for new leases if existing leases which amount to quasi-ownership were now to be converted into proper ownership. Further, the 175-year limit will bring to a premature end those leases which are ultra-long only because they make provision for renewals. Two further renewals are permitted under the Act, but thereafter the lease cannot be renewed in such a way that it lasts for more than 175 years.¹³

2.10 A practical point is that a scheme already exists. If ultra-long leases are truly pseudo-feus, then it would be logical to apply to such leases the scheme which applies for the conversion of feus, with appropriate adaptation.

2.11 Finally, the case *against* conversion is weak. Although conversion involves an interference with contractual relations, it should be borne in mind that in almost all cases the current landlord and tenant are not the original contracting parties. Nor could it be said that conversion will confer a windfall benefit on one party at the expense of the other. So far as the tenant is concerned, the conversion operates only at a technical level. It brings the law into line with reality. But the economic value of his asset is likely to remain unchanged. Landlords who suffer loss – in practice usually loss of the income stream from payment of rent – will be compensated.¹⁴

2.12 These arguments, we suggested in the discussion paper, amount to a strong case for conversion of ultra-long leases.¹⁵ Almost all consultees agreed. Only the Royal Institution of Chartered Surveyors in Scotland opposed the principle of conversion, arguing that consistency with the 175-year limit on new leases contained in the 2000 Act was better achieved by reducing the length of all existing leases to 175 years. There would also be practical advantages:

"Such a proposal will obviate the need for the complex notice procedures, exemption clauses, etc and, importantly, converting ultra-long leases to 175 years would, in our view, not require compensation, as the difference in value between 175 years and 999 years would be negligible."

Nonetheless we doubt whether a tenant who holds on a 999-year lease with an unexpired duration of 893 years would regard it as acceptable for the duration to be reduced to 175 years, with or without compensation. A quasi owner will not wish to be downgraded to a mere tenant. We do not consider this proposal further, but instead recommend that

- 1. The right of a tenant under an ultra-long lease should be converted into a right of ownership, and the right of the landlord should correspondingly be extinguished.**

(Draft Bill s 3)

¹² 2000 Act s 67. There are some exceptions.

¹³ 2000 Act s 67(4)(a), (b).

¹⁴ See part 6.

¹⁵ Scot Law Com DP No 112 paras 2.2–2.12.

Qualifying duration

2.13 **Initial term.** A lease should qualify for conversion only if its duration is so long as to amount virtually to ownership. Leases shorter than this have a valuable role to play in the property market and are not touched by our proposed reform. Thus nothing in our proposals will affect the 25-year commercial lease or the 60-year PFI/PPP lease¹⁶ or the 99-year ground lease.

2.14 Our survey of leases suggests a clear dividing line between ordinary long leases on the one hand and leases which amount to virtual ownership on the other. If our figures can be relied on, most leases have been granted either for around 999 years or for 125 years or less. There is little in between.¹⁷ As many as half of the leases (1269) revealed by our search of the Land Register were granted for exactly 999 years. Most of the others had a duration of 125 years or less. Of the ordinary leases, the typical lengths were 25, 60, 99 or 125 years, with the first being by far the most common. Our survey discloses only 2 leases in the range 126-175 years, and a further 21 in the range 175-299 years. The next cluster of leases does not occur until between 700 and 800 years.¹⁸ On the basis of these figures, the dividing line between the two types of leases would seem to be 125 years. Indeed that was the durational limit originally included, on our recommendation, in the bill to abolish the feudal system. In the course of the bill's parliamentary passage, however, the limit was raised from 125 to 175 years, and as the law now stands it is competent to lease land for up to, but not beyond, 175 years.¹⁹ This argues for 175 years as a convenient point of division. Certainly the qualifying period could not be lower than 175 years, for it would be illogical for a lease to be permitted by a recent act of parliament only to be converted into ownership by virtue of a later act. Our survey suggests that there would be little difference in practice between a limit of 125 years and one of 175 years. A threshold of 175 years would still admit two familiar types of residential long lease, namely leases for 99 years renewable once (making a total of 198 years) and leases for 19 years renewable 9 times (making a total of 190 years).

2.15 In the discussion paper we asked whether there should be a higher limit – 300 years for example – in the case of leases by local authorities or other public bodies.²⁰ We understand that local authority leases have occasionally been granted for periods of around 200 years. Unsurprisingly, this suggestion was welcomed by the local authorities among our consultees. Most other consultees, however, were sceptical or hostile. The Faculty of Advocates thought that the public interest was served by receipt of the price rather than by the expectation of a reversion more than 175 years later. Others doubted whether public bodies should be treated differently from private developers. It was also pointed out that the landlord's interest might pass into the private sector. We share these doubts and do not recommend a special rule for leases by public bodies.

¹⁶ For which see Anne Ferguson and Liz Scobbie, "Property Aspects of PFI transactions" (2000) 44 Greens Property Law Bulletin 1.

¹⁷ Appendix C paras 11 and 12.

¹⁸ Appendix C chart 3.

¹⁹ 2000 Act s 67.

²⁰ Scot Law Com DP No 112 para 2.23.

2.16 **Unexpired duration.** There is also a second factor to be taken into account. As a lease begins to approach its close the line is crossed between quasi-ownership and mere lease. At that point conversion should cease to be possible, or at least not without payment of compensation for the landlord's reversionary interest. In the case of most of the leases with which we are concerned, this will not occur for many hundreds of years into the future. If an initial grant of more than 175 years is taken as the mark of an ultra-long lease, then there were 1781 such leases in our survey. Of those, 1531 (86%) had more than 700 years still to run, while a mere 43 (2%) were due to expire within the next 175 years (and none within the next 50).²¹

2.17 Nonetheless a minimum figure for unexpired duration seems required. Under the equivalent scheme in England and Wales, conversion is allowed of certain leases, without payment of compensation, provided that the unexpired term is not less than 200 years.²² In Scotland an unexpired term of 100 years was the point at which conversion under the Long Leases (Scotland) Act 1954 could proceed without compensation.²³ The scheme currently operational in Northern Ireland requires only 50 years.²⁴ No doubt the differences are partly attributable to the difficulty of putting a value on the landlord's interest. In order to assist our understanding of this question, we asked the Royal Institution of Chartered Surveyors in Scotland for their view on the point at which the value of a landlord's interest in a long lease can be treated as negligible. In the course of a full and helpful response, it was suggested that the appropriate figure in most cases was an unexpired duration of 100 years.

2.18 Against this background, there seem to be two different ways of setting the criteria for conversion of long leases. One is simply to focus on unexpired duration, as in Northern Ireland. Given the terms of section 67 of the 2000 Act, the period could not be less than 175 years. The rule might therefore be that conversion is available in every case where, on a day to be fixed by statute, the unexpired portion of the lease is more than 175 years. In the discussion paper this was referred to as option A.²⁵

2.19 The other way of approaching the issue would be to use a combination of initial term and unexpired duration. Initial term would be a means of separating quasi-ownership from genuine lease; and unexpired duration would be a means of ensuring that a tenant could not convert once the landlord's interest had acquired a significant value. A feature of this approach is that it allows a shorter period of unexpired duration. This is because the requirement of an initial term has already filtered out cases of genuine lease – and in particular the standard commercial ground lease. In the discussion paper we suggested for consideration that the initial term might be any period over 175 years coupled with an unexpired duration of more than 100 years. This second option was referred to as option B.²⁶

²¹ Appendix C para 14. The total excludes the small number of leases for which the unexpired duration is not known.

²² The current provision is s 153 of the Law of Property Act 1925 although based on an earlier provision of 1881. For a discussion, see Megarry & Wade, *The Law of Real Property* (6th edn by Charles Harpum, 2000) paras 14-178–14-181.

²³ Long Leases (Scotland) Act 1954 ss 7 and 8.

²⁴ Ground Rents Act (Northern Ireland) 2001 s 3(3), (4).

²⁵ Scot Law Com DP No 112 para 2.17.

²⁶ Scot Law Com DP No 112 para 2.18.

2.20 These options operate to different effect only at the very margins. Almost all ultra-long leases would comfortably satisfy the criteria in either option and so would qualify for conversion. In order to bring out such differences as there are, we tested the options against our database of long leases. If option A were used, 1653 leases would qualify for conversion. Option B would bring in an additional 2.4% of leases – some 40 in all. Mainly these are residential leases. The reason that they fall within option B but not option A is that they have an unexpired duration of between 100 and 175 years. In the discussion paper we suggested that, if the effect of option B is to admit more residential leases but without at the same time drawing in ordinary commercial ground leases,²⁷ then it is probably to be preferred. Most consultees who expressed a view agreed with this conclusion.

2.21 We recommend that

2. A lease should qualify for conversion in respect of duration if it –

- (i) was granted for more than 175 years, and**
- (ii) has an unexpired duration of more than 100 years.**

(Draft Bill s 1(2)(b),(c))

Computation of duration

2.22 If the duration of a lease determines whether it qualifies for conversion, it is necessary to consider how that duration is calculated. Usually computation is a straightforward matter on which nothing more need be said, but from time to time one or more of the following issues may arise.

2.23 **Renewals.** Our survey disclosed examples of leases for an initial term of less than 175 years but with an obligation on the landlord to renew. Case law also gives examples.²⁸ Usually the landlord need renew only once, or on a stipulated number of occasions, but sometimes there is an obligation of perpetual renewal. An example of the latter is the so-called "Blairgowrie lease", which is a lease for 99 years perpetually renewable.²⁹ A grassum (premium) may be payable. The 2000 Act has now placed a cap on renewals. For leases executed on or after 9 June 2000 the total duration of a lease, including renewals, is restricted to 175 years.³⁰ For leases executed before that date two further renewals are permitted but thereafter a lease cannot be renewed in such a way that it lasts for more than 175 years.³¹

²⁷ The policy of the law is to allow ordinary commercial ground leases, ie leases of up to 175 years. See 2000 Act s 67.

²⁸ *Wight v Earl of Hopetoun* (1763) Mor 10,461; *Scott v Straiton* (1771) Mor 15,200; *Campbell v McLean* (1870) 8 M(HL) 40.

²⁹ Special provision for such leases was made by s 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, introducing a retrospective amendment to the Land Tenure Reform (Scotland) Act 1974 s 8(4)(ii).

³⁰ 2000 Act s 67(1), (2). There is an exception where the lease implemented an obligation entered into before 9 June 2000: s 67(4)(a).

³¹ 2000 Act s 67(4)(a),(b).

2.24 A renewal requires action on the part of the tenant. It is an option and not an automatic event. If the tenant fails to seek renewal, the lease either comes to an end or continues from year to year by tacit relocation. In either case the option to renew lapses.³² Despite, or perhaps because of, these dangers, it seems likely that renewals are usually both requested and granted. If the landlord is unknown, or uncooperative, an application may be made to the sheriff for the renewal to be executed by the sheriff clerk.³³

2.25 It seems clear that renewals – both actual and potential – should be included in the calculation of the duration of leases. To do otherwise would be to understate the probable length of the lease. Renewals were included in the computation of duration for the 1954 conversion scheme and, much more recently, in both the 2000 Act and in the Leasehold Casualties (Scotland) Act 2001.³⁴ The latter provides, succinctly, that "where a lease includes provision (however expressed) requiring the landlord to renew the lease, the duration of any such renewed lease shall be added to the duration of the original lease". Consultees were in unanimous agreement with this approach.

2.26 A variant, occasionally found, is the consecutive lease. Here, a few years into an existing lease, the landlord grants a second lease which is to begin immediately on the termination of the first. Again it seems that the leases should be aggregated for the purposes of the calculation of duration.

2.27 **Breaks.** Break options are sometimes found in ultra-long leases. Invariably they are in the landlord's favour.³⁵ Quite often they cannot be exercised without payment to the tenant, generally of compensation for the value of buildings and other improvements.³⁶ A break exercisable only on payment is barely distinguishable from a right of redemption (or resumption), and the discussion in this section should be regarded as extending to such rights.³⁷

2.28 If it is to be assumed that a tenant will always exercise a right to renew,³⁸ then it is hard to resist the parallel assumption that a landlord will always exercise a right to break the lease. That, certainly, was the approach taken by the 1954 Act.³⁹ Break points which had already passed were ignored, but the lease was treated as coming to an end at the first break point occurring after the legislation. Since break points occur at relatively short intervals, the effect of this approach would be to remove from our conversion scheme many leases with breaks.⁴⁰ On further consideration, this approach seems unduly penal. As one consultee pointed out,⁴¹ landlords are not as active as tenants. In ultra-long leases a

³² *Commercial Union Assurance Co Ltd* 1964 SLT 62; *Sea Breeze Properties Ltd v Bio-Medical Systems Ltd* 1998 SLT 319 (tacit relocation).

³³ Land Registration (Scotland) Act 1979 s 22A.

³⁴ Long Leases (Scotland) Act 1954 s 18(1)(a); Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67(2); Leasehold Casualties (Scotland) Act 2001 s 10(2)(b).

³⁵ If the break option were conceived in favour of the tenant, then, for the purposes of computation of duration, it should be assumed that it would not be exercised.

³⁶ For a standard style see *Encyclopaedia of Scottish Legal Styles* vol 6 (1937) pp 211–4.

³⁷ The main difference is that, whereas a break occurs at a stipulated time, a redemption can often be exercised at will.

³⁸ See para 2.24.

³⁹ Long Leases (Scotland) Act 1954 s 18(1)(c).

⁴⁰ This is because the scheme requires an unexpired duration of more than 100 years: see para 2.17.

⁴¹ Mr Angus McAllister (a member of our advisory group on leasehold conversion).

landlord may be moribund or even untraceable. It would be wrong to exclude a lease if the break option would not in practice be exercised. The problem is avoided if breaks are taken account of only in relation to compensation. In the computation of duration, breaks would be disregarded; but the existence of a break provision would be a specific ground on which compensation could be sought.⁴² Only active landlords would then take benefit.

2.29 Leases for life. Four of the leases in our survey were for the life of the first tenant plus a further period of years, the further period being either 361 years or, in one case, 741 years. No doubt such leases are extremely rare. Further, if our sample is typical, the leases so obviously qualify for conversion that it would not be necessary to make a precise calculation of the lifetime of the tenant. Nonetheless, a cautious view would be that it is necessary to make provision for how such a calculation might be attempted. The 1954 Act contains such a provision.⁴³ Except where there is information to the contrary, a lease for the lifetime of a person is treated as a lease for 35 years. This assumes, not a life expectancy of 35 years, but that a person might be expected to have been tenant for that period.⁴⁴ If, however, the tenant is currently in life, a calculation is made of life expectancy on the basis of a table set out in a schedule to the Act. We suggest that this approach be adopted, but with the substitution of a current table of life expectancy.⁴⁵

2.30 Recommendation. Our recommendation is that

3. For the purposes of determining the duration of a lease -

(a) there should be included

- (i) any renewal period which the landlord is bound to grant, and**
- (ii) the duration of any other lease which is to run consecutively with the current lease;**

(b) any provision enabling the lease to be terminated early should be disregarded; and

(c) any reference to the lifetime of a tenant should be calculated as –

- (i) the years during which the person survived after first becoming tenant, if known, or**

⁴² Paras 6.34 and 6.35.

⁴³ Long Leases (Scotland) Act 1954 s 18(1)(b).

⁴⁴ There seems no reason to change the 35 year period. The target is the same, namely leases of an older vintage where information is not available. If there are more recent examples of such leases it will be easier to find the relevant information.

⁴⁵ Draft bill s 60 (1)(c) sched 20. We are grateful to the Government Actuary's Department for their advice and assistance in the preparation of this table. It is based on the format of the table set out in the 1954 Act. It shows, for 5-year age groups, the expectations of life for the youngest age in the age group based on mortality rates taken from the Interim Life Table for Scotland 2002 - 2004 prepared by the Government Actuary's Department for the Registrar General for Scotland. The Interim Life Tables are updated annually formerly by the Government's Actuary's Department but now by the Office of National Statistics.

- (ii) if the tenant is alive, the years for which the person is likely to be tenant, having regard to a statutory table of life expectancy, or
- (iii) in any other case, 35 years.

(Draft Bill s 60(1)(a)–(d))

Lease as a registered real right

2.31 It goes almost without saying that the lease must have been constituted as a real right. The idea of conversion is to transform one real right (lease) into another real right (ownership). There can be no question of upgrading a right which is merely contractual in nature. Further, in order to allow automatic conversion, it is necessary that the real right be created by registration and not merely by possession.⁴⁶ Only registered leases, therefore, are to qualify for initial conversion, although separate provision is made later for unregistered leases.⁴⁷ The requirement of a registration applies only to the lease as originally granted, and it would be no bar to conversion that its current holder has not completed title.⁴⁸ We recommend that

- 4. A lease should qualify for conversion only if it is constituted as a registered real right.

(Draft Bill s 1(2)(a))

Exempt leases

2.32 Thus far, the only measures used to identify leases which would qualify for conversion are duration and constitution as a real right. In this section we consider whether there is a need for supplementary criteria or – to express the same thought negatively – whether certain classes of lease should be exempt from conversion.

2.33 **Type of property.** The 1954 Act scheme was directed at leases of houses rather than at leases which were ultra-long, although many of the leases converted would also have fallen into the ultra-long category. Non-residential leases were excluded from the 1954 Act.⁴⁹ By contrast, the English scheme for ultra-long leases makes no distinction by type of property. We do not propose such a distinction. In particular we do not suggest that leases of commercial property be excluded. If, for example, a tenement is built on land held on an ultra-long lease, it does not seem reasonable, or indeed practicable, that the shops on the ground floor should be treated in a different way from the flats above. Or again there seems no reason for excluding a 999-year lease of a factory or pub granted in 1891⁵⁰ if a lease of a

⁴⁶ Para 3.12.

⁴⁷ Paras 8.14–8.18.

⁴⁸ This is the same rule as applies to the conversion of the right of *dominium utile* under s 2(1) of the 2000 Act.

⁴⁹ Long Leases (Scotland) Act 1954 s 1(1).

⁵⁰ As in the lease litigated in *B G Hamilton Ltd v Ready Mixed Concrete (Scotland) Ltd* 1999 SLT 524.

house for the same period would be converted.⁵¹ The basic principle should be universal convertibility. Two possible exceptions are canvassed below.

2.34 Minerals. Usually leases have the effect of separating entitlement to the surface of land from entitlement to the minerals beneath it. For on the one hand minerals are impliedly reserved from leases of land; and on the other, leases of minerals alone are quite common. The first of these is discussed elsewhere in this report,⁵² and our concern here is only with the second.

2.35 Most mineral leases are too short to qualify for conversion, although we understand that ultra-long leases have sometimes been granted by the Coal Authority. In a mineral lease the tenant is entitled, indeed is expected, to use up the subjects of let; and when he does so, by extraction, the minerals become his property instead of the property of the landlord. Thus the lease operates much as a sale of the minerals. This makes mineral leases unlike leases of other types of property. It also argues for their exemption from conversion.⁵³ For if the agreement is that a tenant is to become owner by extraction, it is difficult to see any advantage in conferring ownership at an earlier date. Indeed there may be disadvantage because the tenant would have to pay compensation now for minerals which he might choose not to extract, or which might turn out to be incapable of economic extraction. There is also the practical difficulty of calculating compensation. In part 6 we recommend that compensation be calculated, in the usual case, as a multiplier of the annual rent.⁵⁴ But in a mineral lease the rent is typically a royalty based on the tonnage extracted and so is both unpredictable and subject to fluctuation from year to year.⁵⁵ It is difficult to see how a satisfactory average figure could be arrived at. Exemption of minerals would be consistent with the preservation in the 2000 Act of royalty arrangements for mines of gold and silver.⁵⁶

2.36 Inalienable property. Some property which can be leased is not capable of being transferred outright. This is either because of the nature of the property itself or because of some limitation of power affecting the landlord. Possibly the only examples of the first category are shootings and freshwater fishings.⁵⁷ Both can be leased⁵⁸ but neither is a separate tenement capable of being owned separately from the land (or river). By contrast, the right to fish for salmon is a separate tenement and may be alienated as well as leased.⁵⁹ Leases of property inalienable in this sense are necessarily excluded from conversion.⁶⁰

2.37 The position is different if inalienability is attributable merely to a lack of power in the owner/landlord. Here the property is capable of alienation, but not by its current owner. A further distinction requires to be made between a restriction of power which rests on

⁵¹ Such a lease is far from being an "ordinary" commercial ground lease (for which see note 27).

⁵² Paras 5.3–5.6.

⁵³ In the discussion paper, however, our preliminary view was that mineral leases should not be exempted: see Scot Law Com DP No 112 para 2.35.

⁵⁴ Paras 6.3–6.8.

⁵⁵ Robert Rennie, *Minerals and the Law in Scotland* (2001) pp 110–1 and 122–6.

⁵⁶ 2000 Act s 61, discussed in Scot Law Com No 168 para 3.56.

⁵⁷ See generally, Rankine, *Leases* pp 501–07; Paton & Cameron, *Landlord and Tenant* pp 78–84.

⁵⁸ Salmon and Freshwater Fisheries (Consolidation)(Scotland) Act 2003 s 66; *Palmer's Trs v Brown* 1989 SLT 128.

⁵⁹ For separate tenements, see Reid, *Property* paras 207–13.

⁶⁰ In part 5, however, a different rule is suggested in respect of reservations.

obligation and one which is attributable to a lack of capacity.⁶¹ The former has no effect even on voluntary transfer. So property is not inalienable merely because its owner has agreed with a third party that it should not be sold. A sale would be legally effective, although the seller would be liable for breach of contract.⁶² Similarly, trustees are always able to sell trust property even where this would be in breach of trust. If obligational restrictions have no effect on voluntary sale, there is no reason why they should prevent conversion under our scheme. This is true even of rights of pre-emption. While, however, conversion would not be prevented by a pre-emption,⁶³ the pre-emption (if constituted as a real burden) would continue to affect the property in the hands of the tenant-acquirer and would take effect at the first post-conversion sale.

2.38 A restriction of power attributable to lack of capacity is a different matter. Without capacity there can be no transfer, and a purported transfer would be void – subject to the special rule that validates all entries made on the Land Register.⁶⁴ Here, however, the scheme need not be as exacting as the law on voluntary transfer. At least as a general rule, lack of capacity on the part of the landlord should not have the effect of preventing conversion of a lease into ownership. Thus conversion should not be defeated merely because, on the relevant day, the landlord happened to be *incapax* or happened to be a body corporate without capacity to alienate land. And on a practical level, the Keeper could hardly be expected to make inquiries, in respect of all qualifying leases on the Land Register, as to the legal capacity of the landlord on that day. In the discussion paper⁶⁵ we suggested that a special rule might be required for the National Trust for Scotland, which, while given general powers of alienation, is unable to alienate a building which is held for the express purpose of preservation.⁶⁶ However, we understand that the National Trust has not granted any lease for the qualifying duration. No other examples requiring exemption were brought to our attention.

2.39 **Nature of landlord.** We are not aware of any grounds for exempting leases simply on the basis of the type of landlord involved. In particular, it does not seem necessary to exempt leases granted by the Crown (acting through the Crown Estate Commissioners), or by Scottish Ministers or other governmental bodies. Doubtless most such leases would not qualify in any event, as not being granted for the requisite period.

2.40 **Date of lease.** The 1954 Act scheme applied only to leases granted before 10 August 1914.⁶⁷ This was apparently on the basis that 1914 marked the removal of the final restrictions on subinfeudation. From that point on, or so it was argued, the use of a lease must be seen as a matter of choice and not merely as a substitute for the feu which was not

⁶¹ Reid, *Property* para 599.

⁶² In addition, if the purchaser was in bad faith, the transfer would be reducible by the creditor in the obligation on basis of the "offside goals" rule. See eg *Rodger (Builders) Ltd v Fawdry* 1950 SC 483.

⁶³ This is the solution reached in the conversion scheme for tenancies-at-will: see Land Registration (Scotland) Act 1979 s 21(9). And see also *Ross & Cromarty District Council v Patience* 1997 SC(HL) 46. In any event, a conversion of the kind proposed could not be characterised as a sale and so would not trigger the pre-emption. Note that the pre-emption here affects the title of the landlord and not that of the tenant.

⁶⁴ Land Registration (Scotland) Act 1979 s 3(1).

⁶⁵ Scot Law Com DP No 112 para 2.33.

⁶⁶ National Trust for Scotland Order Confirmation Act 1947 (c xxxviii) s 4(1).

⁶⁷ Long Leases (Scotland) Act 1954 s 1(1).

available.⁶⁸ We see no reason for perpetuating this restriction. Even before 1914 there must have been many leases which were granted by preference and not merely by default; and our survey shows that ultra-long leases continued to be granted on a regular basis even after 1914. Further, it should not be assumed that the preference for leases was always shared by the tenant. A person acquiring land may have to take it in the form that it is offered, or not take it at all. There may possibly be an argument that very recent leases ought not to be converted into ownership, at least where the original parties are still in place, but we do not support a restriction even in a case such as this. If a date restriction were to be introduced it would be necessary to decide whether it applied only to the original head lease or to later subleases also. The 1954 Act restriction is confined to head leases, and a restriction which encompassed subleases would be likely to produce random results.

2.41 Rent. The equivalent scheme in England and Wales is confined to ultra-long leases "without any rent, or merely with a peppercorn rent or other rent having no money value".⁶⁹ This may be one reason why the scheme – in existence now for over 120 years – has been little used. Our survey suggests that, for leases likely to be covered by our own proposed scheme, the rent is usually very small.⁷⁰ Of 1705 leases in our sample with a known rent and with a duration of more than 175 years, a mere 19 (1.1%) had an annual rent of more than £100, and only a further 7 (0.4%) had a rent of more than £50. More than two thirds (1160) had a rent of less than £5. As a broad generalisation, more recent leases tended to have higher rents. The highest rent of all, £5,000, was for a 999-year lease granted in 1978. But small rents were often found in modern leases also, such as the rent of £1 for a 999-year lease granted in 1996.

2.42 We do not think that a high rent should be a bar to conversion. So long as the landlord is fairly compensated for the loss of income, it should not matter whether the rent is high or low. Indeed with high rents the difficulty is more one for the tenant than for the landlord. A tenant may be unwilling, or unable, to pay the capitalised value of an annual rent of several thousand pounds. Later we suggest that a tenant who does not wish to pay should be able to opt out of the conversion scheme and continue with his lease.⁷¹

2.43 Existing conversion schemes. A number of other conversion schemes are already on the statute book.⁷² Tenants of council and other public sector housing have a right to buy their house on payment of a discounted sum.⁷³ Crofters can buy their crofts.⁷⁴ And a person holding under a tenancy-at-will can become owner on payment of limited compensation.⁷⁵ There seems no reason why two schemes should not run in parallel, with the result that a person who qualifies under both would have a choice of schemes. We do not suggest, therefore, that qualification under an existing scheme should be a bar from qualification

⁶⁸ Guthrie Report para 68(2)(i).

⁶⁹ See now s 153(1) of the Law of Property Act 1925. By s 153(4), however, rent not exceeding £1 is extinguished if it has not been paid for 20 years. The lease then becomes convertible.

⁷⁰ Appendix C para 17.

⁷¹ Part 7.

⁷² For a summary account of the schemes mentioned in this paragraph, see Scot Law Com DP No 112 pp 95–8.

⁷³ Housing (Scotland) Act 1987 part III as amended by the Housing (Scotland) Act 2001 ss 42–52, s 112, sched 10.

⁷⁴ Crofters (Scotland) Act 1993 ss 12–19. To this the Land Reform (Scotland) Act 2003, part 3 adds a community right to buy croft land.

⁷⁵ Land Registration (Scotland) Act 1979 ss 20–22.

under the new scheme. As it happens, however, the existing schemes do not usually apply to ultra-long leases of the kind which will be covered by the new scheme. A crofting lease was traditionally a lease from year to year,⁷⁶ while a tenancy of public sector housing may be of even shorter duration. The term "tenancies-at-will" covers a range of customary holdings which almost defy satisfactory definition,⁷⁷ and whether a particular tenancy satisfies the requirements of the new scheme would need to be determined on a case-by-case basis.

2.44 Recommendation. We now draw the discussion together in the form of a recommendation that

- 5. A lease should not qualify for conversion if it is –**
- (a) a lease of minerals; or**
 - (b) a lease –**
 - (i) of land or a right in land which, by its nature, cannot be owned separately from other land, and**
 - (ii) the lease does not include that other land.**

(Draft Bill s 1(2), s 68(1))

Leases and subleases

2.45 If land has been sublet, the sublease too might fulfil the criteria for conversion, that is, it might also be a lease for more than 175 years with an unexpired duration of more than 100 years. Indeed there might have been further subleases, resulting in a leasehold chain in which each constituent lease is of the requisite duration. Only one tenant, however, can become owner, and hence only one lease out of a chain can qualify for conversion. The choice is not difficult to make. All leases, other than the last, are reversions which must await the expiry of the lowest lease in the chain.⁷⁸ By definition, that expiry could not occur for 100 years and in most cases would not occur for a much longer period. The reversionary interest of an intermediate landlord, in other words, is barely distinguishable from that of the head landlord and owner, and no more valuable. On consultation, there was no dissent from the view that, where more than one lease fulfils the criteria as to duration, the qualifying lease should be the lowest in the chain.⁷⁹ We recommend therefore that

- 6. Where, in the case of any land, more than one lease satisfies the criteria set out in recommendations 2–5, the qualifying lease should be whichever is the sublease of the other or others.**

⁷⁶ Hence the original definition of "crofter" in s 34 of the Crofters Holdings (Scotland) Act 1886.

⁷⁷ *Maclean v Kershaw* 1993 SLCR 145. The definition for the purposes of the statutory conversion scheme is contained in s 20(8) of the 1979 Act. The fullest treatment of tenancies-at-will is that contained in the Guthrie Report at paras 70–81.

⁷⁸ There may be further subleases in the chain which do not qualify for conversion. These will remain unaffected.

⁷⁹ Similarly, in feudal conversion it is only the *dominium utile* that is converted into full ownership. See 2000 Act s 2.

2.46 If the sublease affected part only of the land originally leased, the rule just described would be confined to that part, and the principal lease would be the qualifying lease for the remaining part. So if A, the owner of land, leases 10 hectares to B for 999 years and B in turn subleases 4 of those hectares to C for 920 years, C is the qualifying tenant in relation to the 4 hectares and B in relation to the remaining 6. If B had assigned rather than sublet, B and C would both hold as direct tenants of A under the same lease and there would be no hierarchy of leases. But the end result would be much the same, with C the qualifying tenant for 4 hectares and B for 6. Indeed, for the purposes of conversion, a lease which is divided by partial assignation is treated as two independent leases.⁸⁰

⁸⁰ Draft bill s 1(3).

Part 3 Conversion

Voluntary or compulsory?

3.1 **Compulsion.** An initial question is whether the proposed scheme should be voluntary or compulsory. Naturally, any conversion scheme must be compulsory as respects the landlord; but it need not be compulsory for the tenant. Here there seem three choices. The scheme could be compulsory, or it could be voluntary, or it could be compulsory but subject to the possibility of an opt-out. The 1954 Act scheme was voluntary, as are the various schemes in force in England and Wales. The scheme for ultra-long leases which operates in Northern Ireland is essentially compulsory in character.¹

3.2 In the case of ultra-long leases, we do not think that a conversion scheme should be wholly voluntary. If ultra-long leases are undesirable, then proper provision ought to be made for their removal. A voluntary scheme would do only half the job. As under the 1954 Act scheme, a significant number of tenants would fail to take the steps necessary to achieve conversion.² At best the conversion process would be slow and sporadic. At worst many leases would remain unconverted. Consultees accepted the principle that conversion should be compulsory.

3.3 An advantage of a compulsory scheme is that it solves the problem of subleases. Suppose, for example, that A leases to B for 999 years, that B subleases to C for the same period, and that C subleases to D also for 999 years. In respect of the same piece of land there are then three leases, all classified as ultra-long and all, in principle, capable of conversion under the scheme. As with the scheme for abolition of the feudal system, the ultimate right to become owner rests with the tenant holding under the lowest qualifying lease (D in the example).³ If conversion is compulsory, therefore, the rule can simply be that, on the trigger event, the lowest qualifying lease is converted into ownership. All intermediate leases then fall. If, however, conversion is voluntary, the position is unavoidably more complex. The tenant with the ultimate right (D) might fail to take the necessary steps to achieve conversion; and rather than allow the complex chain of leases to remain in existence, it would seem preferable to give intermediate qualifying tenants the right to become owner. Thus B, for example, would be able to convert his lease into ownership. If this was done, B would replace A as owner and the chain would be one link shorter. But B's title would then be lost if either C or D sought to convert. B might therefore be owner for 30 years, or for 30 days. In practice he might conclude that the rewards from conversion were not worth the effort.

3.4 **Exemption.** It may be assumed that, in the normal case at least, a qualifying tenant will not be opposed to conversion. It is true that conversion may involve the payment of

¹ Ground Rents Act (Northern Ireland) 2001 s 2.

² Para 9.3.

³ Paras 2.45 and 2.46.

compensation,⁴ based on a multiplier of the rent. But usually the rent is so small that the amount due is an acceptable price for becoming owner. In other cases the facility to spread payment over a number of years will make the position manageable. Occasionally, however, the arithmetic will seem less attractive. Sometimes the rent is high, or even very high. The highest rent disclosed by our survey was £5,000. Further, the amount due as compensation is increased if, for example, there is value in the landlord's reversionary interest or the lease contains conditions designed to reserve development value.⁵ A person may prefer to stay as tenant than to make a substantial one-off payment, especially if the lease has hundreds of years to run. This points, as we suggested in our discussion paper,⁶ to a scheme which is normally compulsory but from which it is possible to opt out. The result would then be a compromise. The principle of compulsion would produce a uniform and complete pattern of conversion, while the principle of opting-out would prevent a tenant having to accept a benefit for which he did not wish to pay. Opting out would involve the registration in the Land Register or Register of Sasines of a notice of exemption. It would be fully revocable, so that a lease, withdrawn from the scheme for the moment, could experience conversion at some point in the future.

3.5 Consultees were divided as to the merits of opting out. While a clear majority were content with the principle, others were uneasy that ultra-long leases would survive, even in small numbers, and wondered whether the position was not better handled by a more yielding instalment scheme. We have found this a difficult issue to determine, but finally our view has come to be that opting out is needed. The fact that compensation payments will be high only in exceptional cases seems more an argument in favour of opting out than an argument against it. For if high payments are exceptional, opting out will be exceptional also. The principle of universal conversion will therefore be substantially intact, and yet in cases where it is needed opting out will be available.

3.6 An instalment scheme could not, we think, provide an adequate alternative. The 2000 Act scheme permits a maximum of 20 instalments spread over a 10-year period. This applies where the compensatory payment exceeds £1500.⁷ Given that, in the conversion of leases, compensation is based on a multiplier of rent, and given that the likely multiplier is around 24,⁸ even a former tenant who is able to take advantage of the full 10-year period will be making payments of nearly two and a half times the original rent. If, as quite often, the rent was not previously collected, the increase will be all the greater. In theory it would be possible to introduce a more benign scheme. For example it might be provided that compensation exceeding £1500 should be payable over 20 years and not over 10. But if a former landlord is to wait 20 years for payment – if, in effect, he is to act as a lender to the tenant on a long-term basis – some provision would be needed for security. Otherwise the risk of non-payment seems unacceptable. It would, of course, be possible so to provide. For example, if a former tenant opted to pay by instalments over 20 years, the former landlord might be permitted to register a notice which would have the effect of a standard security. But there are obvious difficulties. In many cases the land will already be burdened

⁴ See part 6.

⁵ Paras 6.28 ff.

⁶ Scot Law Com DP No 112 para 2.43.

⁷ 2000 Act s 10. This is the scheme which we recommend for leasehold conversion also: see paras 6.65–6.69.

⁸ Para 6.4.

by one or more securities. If so, there might be little or no 'equity', or even negative 'equity'. Some of the land which is subject to ultra-long leases is of low, or declining, value. A decision must then be taken as to the ranking of the new security. If it ranks last the landlord may receive nothing; but if it ranks ahead of the existing securities, the other creditors may be prejudiced. Then there is the question of remedies. A standard security is usually enforced by calling up followed by sale of the security subjects.⁹ It would be ironic, and unwelcome, if the end result of conversion was for the former tenant to lose his house. Finally, it seems likely that a security for the landlord would, at a technical level, be at least as complex as opting out for the tenant. In that case opting out seems preferable.

3.7 There is also a libertarian argument. A person may be content to remain a tenant for reasons which are unconnected with money. If the lease is recent, the relationship of landlord and tenant may have been willingly entered into and may suit both parties. Occasionally a lease has provisions which are of value to the tenant but which could not readily be translated into real burdens. In a commercial development, for example, the landlord may have a managerial role which is in the interests of all the tenants and which would be lost by conversion into ownership. Or again the tenant may have personal reasons for continuing with the *status quo*. If exceptions had been allowed to feudal abolition it would have been necessary to keep the entire system in place for the sake of a small number of properties. That difficulty does not apply in the present exercise. Conversion affects only a limited category of lease. Other leases are undisturbed and will continue in existence. If, therefore, a person wishes to remain as tenant, there seems no reason for not respecting that wish. A person should not be forced to take a benefit that is unwanted.

3.8 We recommend that

7. Except where a tenant opts out of conversion by registration of a notice of exemption, conversion of a qualifying lease should be mandatory.

(Draft Bill s 3)

The mechanics of opting out are the subject of part 7.

One day or many?

3.9 If conversion is to be compulsory, it must also occur automatically, without either landlord or tenant being required to do anything. For otherwise there is the risk that the relevant action would not, or could not, be taken. A requirement that the landlord do something, such as grant a disposition, would face the difficulty that in a significant number of cases the landlord is untraceable. More rarely it may be the tenant who cannot be traced.¹⁰

3.10 Automatic conversion can be achieved in broadly two ways. One is to say that on a particular day (which we may refer to as the "appointed day"),¹¹ all ultra-long leases are converted into ownership. The other is to provide for conversion on the occurrence of a

⁹ Subject, now, to the Mortgage Rights (Scotland) Act 2001.

¹⁰ See further para 3.42.

¹¹ This was the technique used in the 2000 Act (s 1).

particular event, such as the first time the lease is assigned after the legislation comes into force. The choice, in other words, is between conversion on a single day and conversion on different days running some years into the future.

3.11 One consultee¹² argued strongly for conversion on different days:

"There is no immediate necessity for every lease to be converted. Most of the perceived evils of leasehold tenure have been removed by the [Leasehold] Casualties Act and the opportunity to convert at short notice will be an answer to any problems that may arise for a tenant ... [I]t is not possible to irritate a lease, demand a casualty or, because of the powers of the Lands Tribunal, enforce unreasonable conditions. Had the 1954 Act not had a time limit on it we would by now have hardly any long leases. I would therefore adopt the same approach to conversion as was adopted to the redemption of feu duties.¹³ Every tenant should have the right to convert and every tenant should be compelled to convert on the sale, gift or inheritance of the tenant's interest in the lease. At this point the Register can be altered to reflect the tenure and the Keeper is not burdened with more work than he is capable of."

That such a scheme would be both workable and, to a certain extent, advantageous can hardly be doubted. Nonetheless, in common with the other consultees, we consider that the balance of advantage favours conversion on a single day. A once and for all conversion would be simpler, and also much quicker. It would provide a fixed date which would be known to both landlord and tenant and which could be used as a baseline for the registration of notices (for the preservation of conditions, for example, or for opting out) and for the collection of compensation for the extinction of rent. In the case of tenements and other properties with shared facilities, conversion on a single day would ensure uniformity of holding and would avoid a situation where, for many years to come, some occupiers are owners and others hold on ultra-long leases. Finally, conversion on a single day would allow the use, with adaptations, of the scheme already enacted for the abolition of the feudal system. Not only does that save time and effort, but it also means that the scheme for leases would be recognisable and familiar to solicitors and other advisers.

3.12 There is one case in which automatic conversion would not be possible. A real right of lease can be acquired without registration in the property registers.¹⁴ A real right of ownership cannot. This difference precludes automatic conversion in a case where the lease is unregistered, for it would be contrary to principle, as well as unworkable in practice, for a person to be owner without a registered title. Nor would it be acceptable, following conversion, for the person with a registered title (the former landlord) not to be owner. For these reasons a lease does not qualify for conversion unless it has been registered.¹⁵ It should be emphasised that our concern is with unregistered leases and not with an unregistered title to a lease which has itself been registered. It sometimes happens, for example, that, while the lease has been registered, the current holder has not completed his title by registration – in the same way as a person entitled to ownership may not have completed title. Failure to complete title is not a disqualification for conversion, for the

¹² Mr B G Hamilton.

¹³ ie under part I of the Land Tenure Reform (Scotland) Act 1974.

¹⁴ The real right is completed by possession, under the Leases Act 1449.

¹⁵ Para 2.31.

conversion affects, not the title, but the lease itself. On the appointed day all qualifying leases will be converted into ownership. The effect, for the unregistered holder, will be to convert a right to become tenant into a right to become owner.¹⁶ If, however, the lease itself remains unregistered on the appointed day, there can be no question of automatic conversion. Later we suggest that a lease registered for the first time after the appointed day should be capable of conversion by service and registration of a notice of recall.¹⁷ Until that time the lease will remain in force.

3.13 We recommend that

8. On a day to be appointed (the "appointed day") there should be automatic conversion of all qualifying leases.

(Draft Bill s 3)

From lease to ownership

3.14 **Introduction.** The next question to consider is the legal technique by which conversion into ownership might be achieved. Three main options seem available. Either the ownership of the landlord could be transferred to the tenant and the lease extinguished; or there might be no transfer as such but the tenant declared to be the owner with the lease once again extinguished; or there could be direct conversion of the real right of lease into the real right of ownership. These options are considered more fully below. Common to all three is a requirement that the lease be still in existence immediately before the appointed day; for if a lease has already been extinguished – as a result of material breach, for example, or by renunciation – there is nothing left to convert.

3.15 **Transfer from landlord to tenant.** An obvious way of characterising conversion is as a transfer from landlord to tenant. Before the appointed day the owner was the landlord. On or after the appointed day ownership is with the tenant. And the means by which this result is achieved is a transfer, on the appointed day, from landlord to tenant. This approach was not available to the 2000 Act because in feudal law ownership (*dominium*) is divided and a form of ownership (*dominium utile*) is already held by the vassal. While, however, this approach has certain attractions it also suffers from the disadvantages described below.

3.16 In the first place, to characterise conversion as involving a transfer is to invoke the rules of the general law applying to transfers.¹⁸ In particular, it is to invoke the rule that the transferee receives no better title than was held by the transferor. The risk here is not a title that is radically bad. If a person's title is void, he is not the landlord. Someone else is. Rather the risk is from a title which is subsistent but imperfect.¹⁹ It is easy to imagine how such a title might arise. The landlord might be the donee under a gratuitous alienation.²⁰ His

¹⁶ Feudal abolition works in precisely the same way. What is converted into ownership, by s 2(1) of the 2000 Act, is the "estate of *dominium utile*". The question of entitlement to that estate is then resolved by the usual rules of property law.

¹⁷ Para 8.15. We also suggest that a lease registered for the first time in the year before the appointed day should be treated in the same way (para 8.16).

¹⁸ Reid, *Property* paras 669–700.

¹⁹ Reid, *Property* para 601.

²⁰ Bankruptcy (Scotland) Act 1985 s 34.

acquisition of the property might have been in breach of trust, or of a prior contract. The person from whom the property was acquired might himself have held on a voidable title. The landlord's title, if unregistered, might be defeated by the registration after the appointed day of a rival disposition of which the former tenant has no knowledge. In short, the concept of transfer carries a title risk for the tenant. Indeed it carries the *wrong* title risk. That the former tenant should be affected by an inadequacy in his own title (ie in the title to the tenant's interest) is just as it should be, but nonetheless would be prevented by the model under consideration.²¹ That he should be affected by an inadequacy in the title to the landlord's interest is unjustifiable.

3.17 In the second place, there is the problem of too many landlords and tenants. The difficulty is both definitional and one of substance. Since at any given time there may be no one with a registered title to the interest of landlord or tenant, the draft bill defines "landlord" and "tenant" to include a person who has right to the interest in question but without a completed title.²² This can easily lead to a multiplication of parties. Take the following example. A, who has the tenant's interest under a 999-year lease, dies. B (A's executor) confirms to A's estate. B executes a docket transfer to C (A's widow).²³ C sells the lease to D and grants an assignation. C is then sequestered and a trustee in sequestration, E, is appointed. Who is the "tenant" within the statutory definition? Unless one of the parties has managed to register before the appointed day, the answer is that all are "tenants" apart from A (who is deceased). Of course, multiplication of parties on this scale would be highly unusual in practice, but to have two, or even three, unregistered parties is an everyday occurrence. And what is true of the tenant's interest is true also of the landlord's. This poses a difficulty for a rule based on the transfer of rights, for if ownership is to pass from landlord to tenant, it will be necessary to identify which landlord and which tenant. The obvious solution is to say that, where there is more than one "landlord" or "tenant", the qualifying party is the last to acquire the right in question – E in the example. But while even this solution as it applies to the tenant's interest²⁴ is imperfect – it is not clear, for example, why E should be preferred over D – the real difficulty lies with the parties who are not so nominated. On conversion E receives the property, but what of the others? Before the appointed day they hold rights in respect of property which may be of considerable value. After the appointed day they hold nothing. That also is unjustifiable.

3.18 In the third place there is the converse problem of no landlord or no tenant. A transfer rule presupposes the existence of both, and yet there may be a landlord and no tenant, or a tenant and no landlord, or indeed neither a landlord nor a tenant. This may come about in a number of different ways. The landlord or tenant may have died without, by the appointed day, confirmation of an executor having been obtained. There may be a lapsed trust, that is to say, a trust in which the last trustee has died. A juristic person might have been dissolved.²⁵ Or the landlord or tenant may simply have disappeared. This last

²¹ This is unfair to those holding competing titles. In the example set out in the next paragraph, it would defeat the claims of D.

²² Draft bill s 68(1).

²³ Under s 15(2) of the Succession (Scotland) Act 1964.

²⁴ The difficulty is far less acute in relation to the modest claims for compensation in respect of the landlord's interest. See para 6.57.

²⁵ In the most common cases, however, legislation will provide a substitute tenant, even if it is only the Crown. See eg Companies Act 1985 s 654.

situation is familiar enough with landlords, because the cost of conveyancing may exceed the value of the reversionary interest; but, as our advisory group emphasised to us, it also occurs in the case of tenants.²⁶

3.19 Conferral of ownership on tenant. A different approach would be to confer ownership on the tenant without reference to the previous ownership of the landlord. The tenant then receives a new statutory title and the landlord's title is, simultaneously, extinguished. In the language of property law, this is original and not derivative acquisition. As such it avoids one of the worst features of the previous model, namely that the tenant must take the landlord's title, imperfections and all. But for the most part the other difficulties remain. Thus the rule does not cater for the possibility that there are multiple tenants, or none. And, by conferring an original title, it exonerates the former tenant from the imperfections attaching to his own former title – to the prejudice of those with a potentially better claim.

3.20 Conversion of lease to ownership. The final model involves the conversion of the lease into ownership. At the tenant's end, existing relationships are undisturbed. In the example given earlier, B, C, D and E would hold precisely the same rights in relation to each other after the appointed day as before, and precisely the same rights to the land, minus the landlord's right. This model solves the difficulties which affect the other two. A mechanism which focuses on the right (the lease and ownership) rather than on the person (the landlord and tenant) avoids the problem of too many persons or of none. Equally, there is no loss of rights among those with a claim to the (former) tenant's interest; and any imperfections of title remain with the former tenant. Broadly this was the mechanism for conversion used in the 2000 Act, and for much the same reasons.²⁷

3.21 The argument may indeed be expressed more positively. As an account of the change which is taking place, the final model is more apt than either of the other two. The first model supposes a transfer of the landlord's interest coupled with an extinction of the tenant's, the third model an enlargement – an upgrading – of the tenant's interest. Reality is on the side of upgrading. The encumbrances – and the infirmities of title – which remain after conversion are, for the most part, those that formerly affected the interest of the tenant. From the tenant's point of view there is a change in form but not in content or, on the whole, in value. The lease has become ownership. Otherwise nothing has changed.

3.22 Evaluation. Some of the difficulties with the first two models could be solved by making special provision. Others seem inherently insoluble. And with a model which does not properly represent the change taking place there is always a risk of further problems which are not anticipated and hence not provided for. Our proposal, in the discussion paper,²⁸ that the third model be adopted was accepted by consultees without dissent. We adhere to it now and recommend that

9. For the purposes of the scheme a lease is converted by becoming the ownership of the land.

²⁶ See para 3.42 below.

²⁷ Thus *dominium utile* was upgraded to simple *dominium*, 2000 Act s 2(1).

²⁸ Scot Law Com DP No 112 para 3.2.

Extinction of landlord's interest and of intermediate leases

3.23 Conversion of the qualifying lease would, necessarily, be accompanied by the extinction of the landlord's right of ownership and of any intermediate leases. An "intermediate" or "superior" lease is one that is higher in the hierarchy of leases than the lease which is being converted (ie than the "qualifying lease").²⁹ It is "intermediate" in the sense that is placed between the qualifying lease and the landlord's interest. As already seen, the qualifying lease is the lowest lease in the hierarchy which fulfils the criteria for conversion.³⁰ Any lease which is beneath the qualifying lease – a sublease of that lease, in other words – would be unaffected by the conversion. So if A, the owner of land, leases to B for 999 years, who subleases to C for 900 years, who subleases to D for 899 years, who subleases to E for 15 years, the person holding the lowest ultra-long lease is D. On the appointed day D becomes owner, but subject to the (unconverted) 15-year lease held by E.³¹ A's right of ownership is extinguished, as are the intermediate rights of lease held by B and C.

3.24 We recommend that

10. There should be extinguished on the appointed day –

- (i) the landlord's ownership, and**
- (ii) any lease intermediate between that ownership and the qualifying lease.**

(Draft Bill s 3(1)(b), (c), (2))

Real rights and conditions of the lease

3.25 **Real rights.** Conversion is a purely technical change. Insofar as the right was encumbered before the appointed day, it should continue to be encumbered thereafter. Existing subordinate real rights, in other words, should remain in place.³² At this point, however, it is necessary to distinguish (i) encumbrances affecting the lease from (ii) encumbrances affecting the land itself.³³ If the tenant grants a standard security, that is an encumbrance affecting the lease. But if the landlord grants a security, that is an encumbrance affecting the land. The security subjects, in other words, are different in the two cases.³⁴ The two classes of encumbrance need not be treated in the same way. It

²⁹ The draft Bill (s 3) uses the term "superior lease".

³⁰ Paras 2.45 and 2.46.

³¹ A variant is that the land may have been divided and only a part sublet to D. In that case D becomes owner of the part, and C owner of the rest. The lease from A to B and the lease from B to C so far as relating to the land sublet to D are superior leases (see s 3(2)). A's right of ownership in that land is extinguished as are the intermediate rights of lease held by B and C in that land.

³² A subordinate real right is a real right other than ownership. See Reid, *Property* paras 5 and 6. The main subordinate real rights are security, proper liferent, lease, servitude and real burden.

³³ That is, over the right of ownership of the land.

³⁴ Thus s 9(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 provides that a standard security may be granted over "any land or real right in land". A lease is a real right in land. The distinction is not,

seems self-evident that encumbrances affecting the *lease* before conversion should affect the land after conversion. Ownership is merely enlargement of the lease. So a standard security over the lease becomes a standard security over the land. But it is less clear that existing encumbrances affecting the *land* should survive the extinction of the landlord's interest. Here it may be necessary to distinguish between what may be termed "occupational" and "non-occupational" encumbrances. If an encumbrance affects the manner in which the land is occupied and used, then, arguably, it should survive conversion. Otherwise there is both a windfall gain and an unjustified loss. Servitudes, real burdens and public rights of way are the main examples falling into this category: although granted by the owner, all bind the tenant and affect his use. Conversely, an encumbrance which has no impact on occupation and use should fall with the extinction of the landlord's interest. Here the only examples seem to be security and proper liferent.³⁵ A security over land encumbered by an ultra-long lease is of no more value than a security over a feudal superiority and, like the latter, should be extinguished on the appointed day. Naturally, extinction would have no effect on the personal obligation of the debtor; and the security itself would survive insofar as it affected other subjects, as usually it would. Proper liferents, in this context at least, are more or less unknown.

3.26 It need hardly be added that encumbrances affecting an intermediate lease would fall with the lease itself. Intermediate leases are relatively uncommon in the present context, and encumbrances on such leases (such as standard securities) less common still.

3.27 **Conditions of the lease.** Subordinate real rights, as encumbrances external to the lease,³⁶ should normally survive conversion. Actual conditions of the lease should not. Following conversion, therefore, the former tenant should no longer be liable for rent or for any of the other obligations under the lease, and the remedy of irritancy should cease to be available.³⁷ The landlord, similarly, should be relieved of his obligations under the lease. Later, however, we propose a scheme whereby certain of the tenant's obligations can be converted into real burdens.³⁸

3.28 There is a need for transitional arrangements.³⁹ Once the obligations in the lease are extinguished it should cease to be possible to sue for past breaches and any current proceedings should be deemed abandoned. This is an application of the standard rule that an obligation, once extinguished, is extinguished for all purposes. Furthermore, any decree or interlocutor already pronounced should be deemed recalled on the appointed day. In this way interdicts enforcing use restrictions would cease to apply. An exception is necessary for rights and obligations which survive the appointed day in one form or another.⁴⁰ A further exception is necessary for debts already due by the appointed day, whether in the form of an ordinary money debt (such as rent) or of a claim for damages.

however, always so clear with other real rights. For example, if the tenant grants a sublease, it seems a matter of analytical preference whether this is classified as a real right in the land or as a real right in the lease.

³⁵ A third example, but one already accounted for, is leases higher up in the chain.

³⁶ See Reid, *Property* para 349 for the distinction between intrinsic and extrinsic encumbrances.

³⁷ Insofar as not already abolished by the Leasehold Casualties (Scotland) Act 2001 ss 6 and 7.

³⁸ See part 4.

³⁹ The recommendations that follow are modelled on ss 17(2) and (3) of the 2000 Act.

⁴⁰ See ss 5 and 6 and Part 2 of the bill.

3.29 Finally, with a view to mirroring the protection from irritancy given to feus by the 2000 Act,⁴¹ we propose that it should not be possible to terminate a lease by irritancy after the date that the bill receives Royal Assent.⁴²

3.30 **Recommendation.** We recommend that

- 11. (a) Following conversion, ownership of the land should be subject to –**
- (i) the subordinate real rights that formerly affected the qualifying lease, and**
 - (ii) the subordinate real rights, other than any right in security or proper liferent, that formerly affected the land itself.**
- (b) There should be extinguished on the appointed day all rights and obligations arising under the qualifying lease or any intermediate lease; and on or after that day –**
- (i) it should not be possible to bring new proceedings for enforcement;**
 - (ii) any current proceedings should be deemed abandoned; and**
 - (iii) any decree or interlocutor already pronounced should be deemed reduced.**
- (c) Paragraph (b)(i)–(iii) should not affect –**
- (i) a right to the payment of money or the recovery of damages; or**
 - (ii) any right or obligation which continues after the appointed day.**
- (d) No qualifying or intermediate lease may be terminated by irritancy after the date that the legislation implementing this recommendation receives Royal Assent.**

(Draft Bill s 4(1), (3)–(5), s 5(1)–(4), s 61)

⁴¹ Section 53(1).

⁴² Section 61 of the bill. In fact most long leases which fall within the scope of the conversion scheme are already protected from irritancy as a result of ss 5 and 6 of the Leasehold Casualties (Scotland) Act 2001. It should be noted that s 61 also applies to an unregistered lease and a lease which subsequently becomes exempt on service of a notice under s 54.

Reservations and pertinents

3.31 The position of the former tenant should, as far as possible, be the same after conversion as before, except for the mutation of the right from lease into ownership. Thus any reservations from the property formerly let should be reflected in the property now owned; and any pertinents of the lease – additional rights exercised in association with the property but beyond its boundaries⁴³ – should become pertinents of ownership. This principle is, however, subject to the rules of pertinents and separate tenements as they apply to ownership. Occasionally a lease may contain reservations or pertinents which would not be recognised in the context of ownership. For example, only certain rights can be reserved, as separate tenements, from the ownership of the surface of the land itself.⁴⁴ The standard example is minerals.⁴⁵ A reservation which fell outside this limited category would be inept and would need to be disregarded on conversion into ownership.⁴⁶ Later, however, we suggest a special rule for sporting rights.⁴⁷

3.32 Pertinents may be either corporeal or incorporeal. The principal incorporeal pertinents (servitudes and real burdens) are considered more fully below.⁴⁸ Corporeal pertinents are usually shared with other properties and so are held *pro indiviso*. The standard example occurs in tenements. Where whole tenements are held on leasehold tenure, the lease of each flat includes, expressly or, probably, by implication, a shared right to certain common parts, such as the common passage and stair. On conversion of the lease, the shared right would become a right of ownership in common.

3.33 We recommend that

- 12. (a) Following conversion, ownership of the land should –**
 - (i) include any pertinents (express or implied) of the lease but**
 - (ii) exclude any rights reserved (expressly or by implication) from the lease.**
- (b) Paragraph (a) does not apply to a right which –**
 - (i) can be a pertinent of a lease but not of the land;**
 - (ii) can be reserved from a lease but not from ownership of the land.**

⁴³ Reid, *Property* paras 199–206. A right may either be a pertinent of the land that is leased, or a pertinent of the lease itself. Take the case of the common parts in a tenement. If the flat leased is the only flat in that tenement owned by the landlord, the common parts are pertinents of the flat. If, however, the landlord owns all of the flats, they are pertinents of the lease (for there is no common *ownership* as such). Our recommendations are intended to apply to pertinents of both types.

⁴⁴ Reid, *Property* paras 207–212.

⁴⁵ For minerals see further paras 5.3–5.6.

⁴⁶ An example is woods, which are reserved by implication from agricultural leases: see Rankine, *Leases* p 210. Woods are not separate tenements: *Paul v Cuthbertson* (1840) 2 D 1286.

⁴⁷ Paras 5.7 ff.

⁴⁸ Respectively at paras 3.34–3.41 and in part 4.

(c) **This recommendation is subject to recommendation 27.**

(Draft Bill s 5(5))

Servitudes

3.34 A servitude requires two properties in separate ownership, for there must be both a burdened property and a benefited property.⁴⁹ Almost always, this requirement prevents servitudes from being created in leases. So if A leases to B reserving a right of access over the land leased in favour of other land not leased, the fact that A owns both areas of land prevents the right from qualifying as a servitude. The same is true if right and obligation are reversed, and the access right is conferred on B. At most the parties have a leasehold right which operates as a kind of quasi-servitude.⁵⁰ In theory, of course, a lease might reserve or create a right which affected land owned by some third party, thus allowing a proper servitude to come into existence, but this is almost unknown in practice.

3.35 Conversion will not end the need for the access and other rights created or reserved in a lease. If A required a right of access over land at a time when it was still his but tenanted, he will need the right all the more once the land comes to belong to B. The solution readily presents itself. Any right granted or reserved in a lease which, if the lease had been a conveyance (leading to separation of ownership), would have been classified as a positive servitude should take effect as a servitude on the appointed day. A's quasi-servitude, in other words, would become a proper servitude.

3.36 This proposal may not go far enough. It is not uncommon for tenants (or landlords) to exercise "rights" over the others' property which are not expressly provided for in the lease. Thus the pipes and other services to the landlord's property may pass through the property which is tenanted; or the only reasonable access to the back garden of the tenanted property may be by way of a lane forming part of the landlord's property. Often the other property belonging to the landlord will itself be leased to someone else, perhaps on another ultra-long lease; but the principle is the same whether it is leased or not. If the two properties were already in separate ownership, a right exercised in the manner just described would usually be classified as a servitude. Sometimes this would be because a servitude was implied into the original conveyance which separated the properties, but in any event a servitude would usually have been acquired by exercise of the right for the twenty years of positive prescription.⁵¹

3.37 A reasonable solution would be to give the former tenant (or landlord), on conversion, the benefit of any period of quasi-prescription. Thus the rule might be that, on the appointed day, the property should have the benefit of, but also be subject to, all servitudes which, if the properties had been separately owned since the date of the lease, would have been constituted by positive prescription or otherwise. This gives weight to past use. Without

⁴⁹ The discussion here is limited to servitudes which are positive in character. Negative servitudes have been assimilated with real burdens: Title Conditions (Scotland) Act 2003 ss 79 and 80. Any provision in a lease which is capable of forming a negative servitude will be governed by the rules, discussed in part 4, for real burdens.

⁵⁰ Rankine, *Leases* pp 206–07; D J Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 1.18–1.21.

⁵¹ Prescription and Limitation (Scotland) Act 1973 s 3(2).

such a rule the former tenant (or landlord) might be deprived of a right which was reasonably required for the proper enjoyment of his property. A possible objection is the absence of the opportunity to interrupt prescription. If, at the time when the "right" was being exercised, the landlord (or tenant) had known that statute would later allow such exercise to qualify for the purposes of prescription, then he might have been less forbearing. He should not be penalised for his neighbourliness. There is some force in this objection. But it should be set in the context of the fact that the running of prescription is rarely interrupted and that the proposed rule will operate even-handedly as between landlord and tenant. Further, it is possible that weight is already given by the current law to possession of quasi-servitudes by a tenant.⁵² All consultees who expressed a view were in favour of the suggested rule. The only reasonable alternative would be to treat conversion itself as a deemed conveyance by landlord to tenant, thus invoking the existing law of implied servitudes. This would produce much the same result, although giving rise to greater uncertainty.

3.38 In theory implied servitudes might equally be part of the rule now proposed, for if the properties were deemed to have been separately owned since the date of the lease, servitudes might have been implied at the time of the deemed separation. But that would be of significance only in the rare case of a qualifying lease granted within the last twenty years. For leases older than that, the "right" will either have been exercised, in which case it would be established by positive prescription on the principle already mentioned, or it will not have been exercised, in which case it will have been extinguished by negative prescription.⁵³

3.39 Much the same issue arises if the land originally leased is divided into two or more units, whether by partial assignation or by partial sublease; and once again the solution seems to lie in treating the units as if they had been in separate ownership, in this case from the date of division.

3.40 No special rule would be needed in relation to property not owned by the landlord.⁵⁴ For the purposes of prescription, possession by a tenant is as good as possession by the landlord.⁵⁵ Hence if a tenant exercises a right in the nature of a servitude over property belonging to a third party, at the end of twenty years a servitude will have been created by prescription in the usual way. The right attaches to the tenanted property as a pertinent, and will continue to do so when, as a result of conversion, the property ceases to be tenanted.

3.41 We recommend that

- 13. Following conversion, ownership of the land should be subject to or, as the case may be, include as a pertinent such servitudes as would have existed if –**

⁵² *Little v Irving* (2000), reported and commented on in R R M Paisley and D J Cusine (eds), *Unreported Property Cases from the Sheriff Courts* (2000) pp 120–37.

⁵³ Prescription and Limitation (Scotland) Act 1973 s 8. Of course what is being extinguished here is a deemed, and not an actual, servitude. The effect of the proposed rule is to put the former landlord and tenant in precisely the same position as if the original lease had been a conveyance. Thus the deemed conveyance and deemed servitudes are accompanied by deemed negative prescription.

⁵⁴ Sometimes, of course, property not owned by the landlord today would have been so owned at the time of the granting of the lease and so would be subject to the rule described above.

⁵⁵ Prescription and Limitation (Scotland) Act 1973 s 15(1) (definition of "possession").

- (i) the qualifying lease and any superior lease, and
- (ii) any partial assignation of such leases,

had been dispositions to the effect of conveying ownership but otherwise expressed in the same terms.

(Draft Bill s 6)

Leases without tenants

3.42 Sometimes a lease has no traceable landlord, and much less frequently it is the tenant who cannot be traced. As conversion occurs automatically, by force of law, it is not dependent on the presence of either a landlord or tenant.⁵⁶ But if, exceptionally, there was a landlord but no tenant, conversion will create uncertainty as to ownership. In some cases the issue is self-resolving. A lease in which the tenant has long since disappeared is probably to be regarded as renounced by implication.⁵⁷ In that case there is no extant lease which is capable of conversion, and the (former) landlord remains owner after the appointed day as before. If the tenant's absence is less prolonged, the landlord may be able to rescind for material breach – for example of the obligation, express or implied, to sustain possession.⁵⁸ To prevent conversion, however, rescission would have to occur before the appointed day. For certain ultra-long leases irritancy would be available as an easier alternative.⁵⁹ Whatever the basis of the landlord's claim it would not in practice be accepted by the Keeper without a declarator in appropriate terms. A lease which had not fallen by the appointed day would be converted into ownership in the usual way, but the right might lie unclaimed. The position is then the same as for any land in respect of which ownership is uncertain.

⁵⁶ Para 3.9.

⁵⁷ Hume, *Lectures* IV, 115-6; *Taylor v Maxwell* (1728) Mor 15310.

⁵⁸ *Blair Trust Co v Gilbert* 1940 SLT 322. If the property is classed as non-residential, the landlord will have to show that his conduct is fair and reasonable within s 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

⁵⁹ The abolition of irritancy by s 5 of the Leasehold Casualties (Scotland) Act 2001 is restricted to leases granted before 10 August 1914 for an annual rent not exceeding £150. Where irritancy is still available the lease will require to have terminated by the date of Royal Assent (s 61 of the bill discussed at para 3.29 above).

Part 4 From leasehold conditions to real burdens

Introduction

4.1 Many ultra-long leases contain conditions which, in a conveyance, would be classified as real burdens. Indeed the connection is made overt in the style books, which tend to import for leases the model clauses already given in the context of feus and other conveyances;¹ and it is plain that in drafting conditions of title the Victorian conveyancer made little or no distinction between feus and ultra-long leases. Ground leases from this period tend to conform to a standard pattern. There is an obligation to build and maintain a house. The land is to be fenced and the fences duly maintained. And there are certain restrictions on use, most notably a prohibition of enumerated nuisances. Often there is an irritancy clause, and sometimes a right of pre-emption. Occasionally there is a clause of redemption.² Sometimes the special nature of the property requires additional terms. In the case of tenement flats, for example, provisions are often added about common maintenance. Doubtless particular provisions were sometimes inserted in order to negative an obligation which would otherwise have fallen on the landlord, most notably the obligation of repair.³ A typical Victorian lease is reproduced in appendix D.

4.2 Conditions of this kind could survive the conversion of the lease into ownership only if they in turn were converted into real burdens. A scheme for such conversion is considered below.⁴ But first it is necessary to identify more precisely the conditions which should qualify for conversion.

Qualifying conditions

4.3 **Introduction.** Not all conditions resemble real burdens. Some – for example the obligation to pay rent, or a prohibition on assignation and subleasing – presuppose the relationship of landlord and tenant and have no place once that relation is at end. Others are more akin to servitudes than real burdens and have already been provided for in part 3. Others still are personal obligations affecting the original parties as a matter of contract but not enforceable in a question with successors of either the landlord or the tenant. In this section we consider the criteria which might be used to distinguish conditions suitable for conversion from other types of condition. The concern, it should be emphasised at the outset, is with *eligibility* for conversion. The fact that a condition is eligible does not mean that it will in fact be converted. Actual conversion depends on the scheme described later;

¹ R Bell, *A System of the Forms of Deeds used in Scotland* (1800) vol III p 115–6; *Scots Style Book* (1904) vol 5 p 325–7.

² In leases, however, it may sometimes be difficult to distinguish a clause of redemption from an ordinary break provision in favour of the landlord.

³ On which see generally Paton & Cameron, *Landlord and Tenant* pp 131–5.

⁴ Paras 4.28–4.70.

and, with some exceptions, a requirement of that scheme is that the landlord owns neighbouring land which is capable of acting as a benefited property.

4.4 Enforceable against successors. Clearly a condition should not be eligible for conversion unless it already binds successors. A condition is enforceable by successive landlords against successive tenants only if it is *inter naturalia* of the lease, that is to say, if it belongs naturally in a lease of the type in question.⁵ This test is, necessarily, rather imprecise; but few conditions in practice fail to make the grade.⁶

4.5 Of the nature of a real burden. The condition must also be a kind which is capable of being constituted as a real burden. The relevant rules are conveniently re-stated in the opening provisions of the 2003 Act. There must be both a benefited property and a burdened property.⁷ There are certain requirements as to content – for example, that the condition is either an obligation to do something or to refrain from doing something, and that it is not contrary to public policy.⁸ And, subject to some minor exceptions, the full terms of the condition must be set out in the lease or other constitutive deed.⁹ The first of these rules (benefited and burdened property) is incorporated into the conversion scheme itself and can be put on one side for the moment. The others may be accepted as formal requirements of a qualifying condition.

4.6 Some exclusions. It is also helpful to define by exclusion. Three are suggested.¹⁰

4.7 In older leases non-compliance with conditions is sometimes subject to a penalty. The following is typical:¹¹

"... and both parties bind and oblige themselves and their foresaids to perform implement and fulfil their respective parts of the premises to each other under the penalty of Twenty pounds Stg to be paid by the party failing to perform to the party performing or willing to perform over and above performance ..."

4.8 There may be a question as to whether a penalty can be a real burden at all, but in any event it seems undesirable to give new life to obligations to pay small sums of money. Penalty clauses should, we think, be excluded. A person seeking to enforce a real burden has other, and more effective, remedies.

4.9 Another remedy often contracted for is irritancy. In the case of leases granted before 10 August 1914 and for a rent of not more than £150, any irritancy clause was made void by

⁵ See eg Rankine, *Leases* pp 475–8; W M Gordon, *Scottish Land Law* (2nd edn, 1999) para 23–22.

⁶ A purchase option in favour of the lessee seems to be an example: see *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 and *Advice Centre for Mortgages Ltd v McNicoll*, 2006 CSOH 58.

⁷ Title Conditions (Scotland) Act 2003 s 1.

⁸ *Ibid* ss 2 and 3. It is necessary, however, to exclude s 3(5) (which is intended to disallow *new* rights of redemption). See draft bill s 10. An existing leasehold condition having the effect of a redemption or resumption should be eligible for conversion.

⁹ *Ibid* s 4(2)(a). The exceptions are given in s 5. Section 5 makes it permissible to omit actual figures in allocating liability for a cost provided that in the case of an obligation to pay a proportion or share of such cost, the way in which that proportion or share can be calculated is specified. For this purpose it is possible to incorporate without repeating the terms of a public document (typically a deed in a public register or a statute).

¹⁰ Two others are included in s 9(6) of the draft bill for the avoidance of any possible doubt. These are obligations to pay rent, and restrictions on assignation and subletting.

¹¹ From a 999-year lease granted in 1896 of land in Ayrshire.

the Leasehold Casualties (Scotland) Act 2001.¹² Similarly, the 2003 Act invalidates existing irritancies in respect of real burdens and disallows the creation of new irritancies.¹³ We have also proposed that it should not be competent for a qualifying or intermediate lease to be terminated by irritancy on or after the date of Royal Assent.¹⁴ In those circumstances it is clear that an irritancy clause should not be eligible for conversion.

4.10 The final exclusion is for conditions inmixed with irritancy clauses. For example:¹⁵

"... And it is hereby expressly conditioned and declared that in case the said [*name of tenant*] or his foresaids ... shall suffer the houses or other buildings erected or to be erected on the said piece of ground to become ruinous or untenanted or shall sell or allow to be sold any ale or spirituous liquors or keep or allow to be kept an Inn or Public House of any description upon the said piece of ground hereby let ... then and in these or any of these cases this Lease shall in the option of the proprietor become extinct void and null and at an end ..."

4.11 Provisions of this kind are quite common in leases from the Victorian period. The effect is to create two categories of condition. There are in the first place ordinary conditions which are enforceable by ordinary remedies. And then there are lower-order conditions of the kind just quoted which are enforceable only by irritancy. The difficulty with the latter is that irritancy has either already been abolished or, as just suggested, is not to survive the conversion of leases; and if the remedy falls so must the condition to which the remedy is attached. It would, of course, be possible to make an exception in this case; but a condition which is marked out as unenforceable by normal methods does not seem sufficiently important to save.

4.12 **Pre-emptions.** Pre-emptions are capable of being constituted as real burdens and so will be eligible for conversion on the principles outlined above. A pre-emption may strike at both assignments and subleases or alternatively at assignments only.¹⁶ In either case the clause should be converted as it stands. Thus a pre-emption affecting assignment will translate as a restriction on sale (by disposition), while a pre-emption which extends to subleases will apply to any leases to be granted by the former tenant.¹⁷ A pre-emption which is confined to assignments is, as one of our consultees pointed out,¹⁸ easily evaded by the grant of a sublease. That will remain true after conversion as before, save only that any lease will be limited to 175 years.¹⁹

¹² Leasehold Casualties (Scotland) Act 2001 s 5. This provision applies to leases granted for 175 years or more (s 1(1)), and hence to all pre-1914 leases that qualify under our scheme.

¹³ Title Conditions (Scotland) Act 2003 s 67.

¹⁴ See para 3.29 above and s 61 of the bill.

¹⁵ From a 999-year lease granted in 1877 of land in Wishaw.

¹⁶ The clause in the lease extracted in appendix D is an example of the latter.

¹⁷ A pre-emption should be distinguished from a direct prohibition on subleasing. The latter prevents or restricts subletting and is too repugnant with ownership to be constituted as a real burden. This is put beyond doubt by s 9(6)(d) of the draft bill. By contrast, the former allows subletting but gives the holder first refusal of the subtenancy.

¹⁸ Mr R T B Jack.

¹⁹ Compare here clauses of pre-emption in feus and dispositions, which may be worded so as to exclude long leases. See J M Halliday, *Conveyancing Law and Practice* (2nd edn, ed Iain J S Talman) vol II (1997) para 32–75.

4.13 Implied terms. So far only express conditions have been mentioned, and indeed the terms of a real burden must be set out expressly and in full in the constitutive deed. But, unlike real burdens, leasehold conditions may also arise by implication.²⁰ We doubt whether a condition which is merely implied should be eligible for conversion. A term is implied only because it is intimately concerned with the relationship of landlord and tenant. Once that relationship is at an end, the term too should cease. Indeed its very content would usually serve to prevent conversion on the basis of rules already described. A characteristic example of an implied term is considered in the next paragraph.

4.14 Inversion of possession. Just as a lease is limited in time so it is also limited in purpose. The permitted purpose may be expressed in the deed itself, but with older leases in particular this is more usually a matter of inference whether from the deed or from surrounding circumstances. To depart from this purpose is to "invert the possession" and so to breach an implied term of the contract.²¹ So for example if land is leased for residential use it would be inversion of possession to use the land (and house) for a factory or a shop. The justification for this rule seems never to have been properly articulated. Presumably one reason is to protect the reversionary interest of the landlord by preventing alterations which might change the character of the property. Another may be to ensure that rent levels match the tenant's use, leaving open the possibility of a higher rent for a different use.²² Today these matters are invariably regulated by express terms and the doctrine of inversion of possession is largely moribund. But even in its heyday, in the nineteenth century, it seems only to have been invoked for relatively short leases, thus emphasising its role as a protection for the landlord's reversionary interest. Not all reported cases on this topic disclose the length of the lease under consideration, but a typical length would be 19 years, and the longest lease was granted for 58 years and had, at the time of the litigation, an unexpired duration of 26 years.²³ There may even be a question as to whether the doctrine of inversion of possession applies to ultra-long leases at all.²⁴ At any rate its function in that context is of diminished importance.

4.15 Earlier we suggested that implied conditions be disregarded on the basis that they arose from the relationship of landlord and tenant and had no role once that relationship was at an end.²⁵ There seems no reason for making an exception for the implied term against inversion of possession. No exception is made in the 1954 Act scheme.²⁶ Admittedly there may be cases where the implied term protects the amenity of a landlord who happens also to be a close neighbour. But such neighbourhood protection is then adventitious.²⁷ A landlord who wished to protect neighbouring property could have inserted a provision to that effect. After conversion it should not be possible to rely on a provision which was implied for the benefit of landlords rather than neighbours.

²⁰ See eg Paton & Cameron, *Landlord and Tenant* chap IX.

²¹ Hume, *Lectures* II, 76–7; Hunter, *Landlord and Tenant* vol II pp 443–4; Rankine, *Leases* pp 236–9; Paton & Cameron, *Landlord and Tenant* pp 137–8

²² This aspect is built into our compensation scheme, set out in part 6, for while compensation is normally based on current rent levels, an additional sum may be claimed where the standard formula does not sufficiently compensate for the loss of the landlord's reversionary interest.

²³ *Young & Co v Ramsay* (1824) 2 S 793.

²⁴ *Swan's Trs v Muirkirk Iron Co* (1850) 12 D 622.

²⁵ Para 4.13.

²⁶ Long Leases (Scotland) Act 1954 s 11(a).

²⁷ Other close neighbours unconnected with the lease are also protected.

4.16 Principle is reinforced by practicalities. Under the scheme described below, a leasehold condition will normally be converted by registration of a notice in the Land Register or Register of Sasines. The notice transcribes the words of the condition.²⁸ But an implied term must be articulated before it can be transcribed. That requires the exercise of discretion by the landlord, and an evaluation of that discretion both by the tenant and by the Keeper. It requires a consideration, not only of the terms of the lease, but of the circumstances surrounding its grant and the nature of the possession thereafter. The potential for dispute is obvious. Even if desirable, a conversion mechanism for the implied term would not, we think, be workable.

4.17 **Recommendation.** We recommend that

- 14. (a) A condition affecting a qualifying lease should qualify for conversion into a real burden (as a "qualifying condition") if –**
- (i) its terms are set out in full in the constitutive deed;**
 - (ii) it binds successive tenants; and**
 - (iii) it conforms to real burdens in respect of content.**
- (b) But a condition should not qualify if –**
- (i) it imposes a monetary penalty on the failure to comply with other conditions;**
 - (ii) it imposes an irritancy for such failure to comply; or**
 - (iii) it is stated to be enforceable only by irritancy.**

(Draft Bill ss 9(1), (3)–(6), 10)

Constitutive deeds

4.18 As has been seen, a leasehold condition qualifies for conversion only if it is set out in full in a constitutive deed. The next task is to consider which deeds can be considered as "constitutive" for the purposes of this rule.

4.19 **Qualifying lease.** The deed most immediately affecting the tenant (and future owner) is the qualifying lease itself, ie the lease under which that person is the current tenant.²⁹ It seems hardly necessary to say that the terms of that lease should (subject to the criteria mentioned earlier) be qualifying conditions.

4.20 **Superior leases.** If the qualifying lease is itself a sublease, there will also be intermediate leases – "superior leases" in the terminology of this Report – to be taken into account. The present law is not entirely settled as to whether conditions of a superior lease

²⁸ Para 4.43.

²⁹ For the meaning of qualifying lease, see part 2.

are binding on a subtenant (ie, for present purposes, the tenant under the qualifying lease). Hume's view was that a subtenant is liable for such conditions of a superior lease as impose restrictions on use. This was because obligations of this kind

"can only be performed by the person who is in natural possession of the lands – obligations which the principal tenant by ceding the possession has disabled himself from performing, and which the subtenant by taking possession virtually undertakes, else he would contradict the lease."³⁰

4.21 Affirmative obligations, however, remain the responsibility of the principal tenant alone, there being no contractual nexus between head landlord and subtenant. Hume's distinction between negative and affirmative obligations was repeated, apparently with approval, in Hunter's work on *Landlord and Tenant*,³¹ and Rankine also supported the idea of direct enforcement of negative obligations against the subtenant.³² The matter, however, seems not to have been judicially determined. In England the rule is the same although the reasoning is different.³³

4.22 An alternative basis of liability arises if the sublease repeats, or incorporates, the terms of the superior lease. These terms are then part of the sublease and so binding on the subtenant. For that reason they will remain binding even after the appointed day and the extinction of the superior lease. No distinction is made between affirmative and negative provisions.

4.23 While the position is not free from doubt, therefore, it seems that a subtenant is usually liable in respect of the conditions contained in superior leases. Accordingly such conditions should be eligible for conversion, or in other words superior leases should be treated as constitutive deeds. If Hume is correct, an exception exists where a condition is both affirmative in character and is neither incorporated nor repeated in the sublease. In that case the subtenant would not be liable for the condition. On balance we think that this exception (if indeed it is an exception) should be disregarded for the purposes of conversion into real burdens. Conditions like this will be comparatively rare. If, as often, they are of the nature of facility burdens, it is plainly desirable that they should survive, for otherwise the facility may deteriorate and become unusable.³⁴ And in other cases the imposition of a new affirmative obligation will usually seem an acceptable price for the acquisition of ownership. If it does not, the subtenant can opt out of conversion by registering a notice of exemption.³⁵ Finally, a rule which makes all conditions in superior leases potentially eligible for conversion is an exact match for the corresponding rule in the 2000 Act.³⁶

³⁰ Hume, *Lectures* II, 96. The same view is expressed in the commentary on *Purves v Gentle* (1797) Hume 794.

³¹ Hunter, *Landlord and Tenant* II, 168–9.

³² Rankine, *Leases* p 199. An obvious parallel is the enforceability of negative (but not affirmative) real burdens against tenants: see Reid, *Property* para 413.

³³ eg *Halsbury's Laws of England* (4th edn) vol 27(1) (1994) para 85.

³⁴ For facility burdens, see para 4.30–4.33.

³⁵ See part 7.

³⁶ In feudal law real burdens created in a feudal grant higher up the feudal chain are directly enforceable against subvassals, and no distinction is made between negative and affirmative obligations. See Reid, *Property* para 414.

4.24 One qualification is needed. An interposed lease,³⁷ it is thought, affects only its grantee and not the tenants lower down the leasehold chain.³⁸ For otherwise a tenant would be vulnerable to the imposition of new, and potentially onerous, obligations if the landlord chose to interpose a lease. If, therefore, superior leases are to be constitutive deeds, interposed leases should be excluded.

4.25 **Variations.** A lease may be varied by means of a registered deed of variation.³⁹ Where this has been done in relation to a qualifying or a superior lease, the deed of variation should likewise have the status of a constitutive deed and its terms be eligible for conversion to real burdens.

4.26 **Assignations and deeds of condition.** Assignations of leases, deeds of conditions and other deeds granted in association with assignations, may also contain conditions binding on successors and so should be included in the list of constitutive deeds.⁴⁰

4.27 **Recommendation.** We recommend that

15. The following deeds should be constitutive deeds for the purposes of recommendation 14 –

- (i) the qualifying lease;**
- (ii) any superior lease;**
- (iii) any deed varying such a lease; and**
- (iv) an assignation of such a lease or a deed of conditions or other deed granted in association with such an assignation.**

(Draft Bill s 9(2))

Conversion in outline

4.28 Self-evidently, any scheme for the conversion of leasehold conditions into real burdens should follow closely the equivalent scheme introduced by part 4 of the 2000 Act in respect of feudal burdens.⁴¹ A version of the 2000 Act scheme, with necessary modifications, was set out in summary form in our discussion paper and was generally approved by consultees.⁴² In the next section of the report we provide further details of how such a scheme might work in the context of ultra-long leases.

4.29 It may be helpful to begin with a summary. Qualifying leasehold conditions concerned with the management and maintenance of (generally common) facilities are to

³⁷ For which see Land Tenure Reform (Scotland) Act 1974 s 17.

³⁸ *Kildrummy (Jersey) Ltd v Calder (No 2)* 1997 SLT 186.

³⁹ Land Registration (Scotland) Act 1979 s 3(3); Requirements of Writing (Scotland) Act 1995 s 1(2)(b).

⁴⁰ Registration of Leases (Scotland) Act 1857 s 3.

⁴¹ As altered and supplemented by the Title Conditions (Scotland) Act 2003.

⁴² Scot Law Com DP No 112 paras 3.42–3.52.

survive the appointed day without the need for special action on the part of anyone. Such conditions will become facility burdens, enforceable by the owners of those properties to which the facility in question is of benefit.⁴³ There will also be special treatment for a number of other conditions – namely service burdens, manager burdens, conservation burdens, personal pre-emption and personal redemption burdens, economic development burdens, and health care burdens.⁴⁴ Conditions not falling into any of these special categories will survive the appointed day only if a notice of conversion is registered by the landlord (or a neighbour, if such a person has enforcement rights) before the appointed day; and a notice can be registered only if the landlord (or other enforcer) owns land which is sufficiently close to act as a benefited property in the condition.⁴⁵ Special rules are proposed for common schemes, and for the small number of cases in which express enforcement rights are conferred on neighbours.⁴⁶

Facility burdens

4.30 It is proposed that on the appointed day all conditions involving facilities should become facility burdens. The justification for preserving such conditions automatically is familiar from earlier reform exercises.⁴⁷ Facility burdens are essential if the facility in question – the roof of a tenement, for example, or a shared recreational area – is to be properly maintained and regulated in the future.

4.31 A facility burden is a type of real burden. It is both possible and desirable, to replicate the provisions of the Title Conditions (Scotland) Act 2003 on this topic.⁴⁸ Thus a leasehold condition qualifies for conversion to a facility burden if it regulates the maintenance, management, reinstatement or use of a facility. Almost always the facility will be common to two or more properties. Familiar examples include the roof and other shared parts of a tenement, and a private road or sewerage system. This means that the obligation to maintain a boundary fence, found almost standardly in Victorian ground leases, would be eligible for conversion under this rule. There is one exclusion, for obligations (typically in relation to roads and sewerage) which have since been taken over by a local or other public authority. Obligations of this kind are spent and should not be carried forward into the new system.

4.32 One effect of conversion will be to clarify the position as to enforcement. The burdened property will of course be the land which, immediately before the appointed day, was subject to the qualifying lease; and all properties to which the facility is (and is intended to be) of benefit will be the benefited properties. In practice both the burden and the benefit may often be shared.⁴⁹ A typical example would be a tenement in which the flats are leased on 999-year leases, with each lease containing identical obligations to maintain the common

⁴³ Paras 4.30–4.33.

⁴⁴ Paras 4.34–4.41.

⁴⁵ Paras 4.42–4.48.

⁴⁶ Paras 4.49–4.52.

⁴⁷ Scot Law Com No 168 paras 4.78–4.85; Scot Law Com No 181 paras 11.34–11.42.

⁴⁸ Title Conditions (Scotland) Act 2003 s 56(1) and s 122. These provisions re-enact s 23 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 and extend its scope to all real burdens. For a discussion, see Scot Law Com No 168 paras 4.78–4.85 and Scot Law Com No 181 paras 11.34–11.42.

⁴⁹ With the result that the facility burden would be a community burden within part 2 of the Title Conditions Act 2003.

parts. On conversion the maintenance obligations would become facility burdens in respect of which each flat would be both a benefited and a burdened property. Usually the facility itself will be part of a benefited property,⁵⁰ but in cases where this is not so the facility too should be a benefited property in order that the owner can procure its maintenance.

4.33 We recommend that

- 16. (a) A qualifying condition which regulates the maintenance, management, reinstatement or use of a facility should become a facility burden on the appointed day.**
- (b) The burdened property should be the land the lease of which was subject to the condition.**
- (c) The benefited property should be –**
- (i) any land to which the facility is (and is intended to be) of benefit; and**
 - (ii) insofar as not covered by (i), the facility itself.**
- (d) A condition should not become a facility burden if it constitutes an obligation to maintain or reinstate which has been assumed by a local or other public authority.**

(Draft Bill s 23(1), (3), s 27)

Further special cases

4.34 For consistency with the 2000 Act and the 2003 Act special provision is needed for seven other types of condition.⁵¹ None is at all common in practice save possibly for rights of pre-emption.

4.35 **Service burdens.** A service burden is a real burden which binds the owner of one piece of land to provide services from that land to some other land.⁵² An example would be an obligation to supply water or electricity. Occasionally a qualifying leasehold condition might be to the same effect. If so, it should become a service burden on the appointed day.⁵³ The benefited property would be the land to which the service is provided and the burdened property the land which was subject to the qualifying lease.

⁵⁰ In the tenement example the facility would typically be a *pro indiviso* pertinent of each flat.

⁵¹ A further type of condition found in the 2000 Act (s 60) is maritime burdens, ie burdens enforceable by the Crown in respect of the sea bed or foreshore. They are not required as part of this exercise. The Crown Estate Commissioners may not grant leases of more than 150 years: see Crown Estate Act 1961 s 3(2) (as amended by the Miscellaneous Financial Provisions Act 1983 s 5). And it is understood that such leases were not in practice granted before the 1961 Act.

⁵² Title Conditions (Scotland) Act 2003 s 122(1).

⁵³ See s 56(1)(b) of the Title Conditions (Scotland) Act 2003 which replaced s 23(2) of the 2000 Act. For a discussion, see Scot Law Com No 181 para 11.40.

4.36 Manager burdens. A manager burden is a real burden which confers a power of management over a group of related properties.⁵⁴ A typical example would be a power reserved to a developer to act as (or appoint the) manager during the early years of a development. There is no benefited property as such, the burden being held by the person with management powers. Manager burdens have a short life. They expire five years after registration of the constitutive deed, and cease to be enforceable earlier if the holder has parted with all of the units in question. It is thought that few qualifying conditions in a lease could be characterised as potential manager burdens and that fewer still will be less than five years old and so within the period for validity. Nonetheless any leasehold conditions which fulfil these criteria should become manager burdens on the appointed day. They will expire five years after registration of the qualifying lease or other constitutive deed.⁵⁵

4.37 Conservation burdens. Special provision was made in the 2000 Act for burdens concerned with conservation and which were enforceable by a conservation body or by Scottish Ministers.⁵⁶ Burdens falling into this category survived feudal abolition if a notice in the prescribed form was registered by the conservation body (or Scottish Ministers).⁵⁷ On the day of feudal abolition the burdens became conservation burdens, a new category of real burden. Like manager burdens there is no benefited property, so that a conservation burden is held directly by the conservation body or by Scottish Ministers.⁵⁸ Further provisions about conservation burdens, including rules as to transmission and extinction, are contained in the 2003 Act.⁵⁹ The 2000 Act scheme can readily be adapted for long leases. If a qualifying condition which promotes conservation is enforceable by a conservation body or Scottish Ministers, it should be converted into a conservation burden on the appointed day provided that a notice in the prescribed form is duly registered in the Land Register or Register of Sasines.⁶⁰ A person, other than a conservation body (or Scottish Ministers), who is entitled to enforce such a qualifying condition should be able to nominate a conservation body or Scottish Ministers to hold the burden in their place by registering a notice. Definitions and other points of detail can be taken from the 2000 Act. Since leasehold conditions are generally enforceable by landlords alone,⁶¹ the principal mechanism is likely to be available mainly or exclusively for leases in which the landlord is a conservation body or Scottish Ministers.

⁵⁴ Title Conditions (Scotland) Act 2003 s 63. See Scot Law Com No 181 paras 2.29–2.39.

⁵⁵ There may be some cases where on the sale of a landlord's interest as lessee under the right to buy provisions of the Housing (Scotland) Act 1987 the equivalent of a manager burden was imposed. That condition will become a manager burden on the appointed day but, as with a manager burden imposed under that legislation on an outright sale, it will be subject to a thirty year life rather than a five year life. An appropriate amendment has been made to s 63 of the Title Conditions (Scotland) Act 2003; see draft bill sched 21 para 3(3).

⁵⁶ 2000 Act ss 26–28. See Scot Law Com No 168 paras 4.52–4.56. Section 26 was replaced by s 38(4)–(7) of the Title Conditions (Scotland) Act 2003. Conservation bodies are prescribed as such by Scottish Ministers under s 38(4) of the 2003 Act: see Title Conditions (Scotland) Act 2003 (Conservation Bodies) Order 2003 (SSI 2003/453).

⁵⁷ 263 notices were registered under s 27 of the 2000 Act according to figures provided by the Registers of Scotland; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

⁵⁸ The 2000 Act (at ss 27A and 28A) also allowed a superior who was not qualified to hold a conservation burden to nominate a conservation body or Scottish Ministers to hold the burden in their place. According to the Registers of Scotland, 5 notices were registered under these provisions; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

⁵⁹ Title Conditions (Scotland) Act 2003 ss 38–42, ss 47–48. See Scot Law Com No 181 paras 9.10–9.25.

⁶⁰ See para 4.64 for the meaning of registration in this context. It will be necessary to make further provision for notices: see paras 4.60–4.63 below.

⁶¹ But see paras 4.49–4.55.

4.38 Personal pre-emption burdens and personal redemption burdens. Following the scheme of the 2000 Act,⁶² it should be possible to convert a qualifying condition which confers a right of pre-emption or redemption into a personal pre-emption burden or a personal redemption burden. There is no benefited property as such; instead, the burden is held directly by the person entitled to enforce it. Conversion should occur on the appointed day provided that a notice in the prescribed form is duly registered in the Land Register or Register of Sasines.

4.39 Economic development burdens. An economic development burden is a type of personal real burden which has the purpose of promoting economic development. It may be held only by Scottish Ministers or by a local authority.⁶³ Again, following the 2000 Act,⁶⁴ it should be possible to convert a qualifying condition which meets the criteria into an economic development burden. Conversion should occur on the appointed day provided that a notice in the prescribed form is duly registered. Once more there is no benefited property so the burden is held directly by the local authority or Scottish Ministers.

4.40 Health care burdens. A health care burden is a personal real burden which is held by Scottish Ministers and has the purpose of promoting the provision of facilities for health care.⁶⁵ Again, following the 2000 Act,⁶⁶ it should be possible to convert a qualifying condition which meets the criteria into a health care burden by registering a notice. The burden is then held directly by Scottish Ministers.

4.41 Recommendation. We recommend that

- 17. (a) A qualifying condition which relates to the provision of services to other land should become a service burden on the appointed day.**
- (b) A qualifying condition which confers on a person power to act as, or to appoint, the manager of related properties should become a manager burden on the appointed day.**
- (c) A qualifying condition which –**
 - (i) has the purpose of preserving or protecting the architectural, historical or other special characteristics of land, and**
 - (ii) is enforceable by a conservation body or by Scottish Ministers**

⁶² 2000 Act s 18A. According to the Registers of Scotland 642 notices were registered under this section; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

⁶³ Title Conditions (Scotland) Act 2003 s 45.

⁶⁴ 2000 Act s 18B. According to the Registers of Scotland, 31 notices were registered under this section; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

⁶⁵ Title Conditions (Scotland) Act 2003 s 46. Section 46 (like s 18C of the 2000 Act) also refers to National Health Service Trusts but these are dissolved by the National Health Service Reform (Scotland) Act 2004.

⁶⁶ 2000 Act s 18C. According to the Registers of Scotland 2 notices were registered under this section; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

should become a conservation burden on the appointed day, but only if there has been registered before that day a notice identifying the condition and the body entitled to enforce it.

- (d) A qualifying condition which –
 - (i) has the purpose of preserving or protecting the architectural, historical or other special characteristics of land, and
 - (ii) is enforceable by a person other than a conservation body or Scottish Ministers

should become a conservation burden on the appointed day, but only if there has been registered before that day a notice identifying the condition and nominating (with the prior consent of the nominee) a conservation body or Scottish Ministers to have title to enforce the conservation burden.

- (e) A qualifying condition which comprises a right of pre-emption or a right of redemption should become a personal pre-emption burden or, as the case may be, a personal redemption burden on the appointed day but only if there has been registered before that day a notice identifying the condition.

- (f) A qualifying condition which –
 - (i) has the effect of promoting economic development, and
 - (ii) is enforceable by Scottish Ministers or by a local authority

should become an economic development burden on the appointed day, but only if there has been registered before that day a notice identifying the condition

- (g) A qualifying condition which –
 - (i) has the purpose of promoting the provision of facilities for health care, and
 - (ii) is enforceable by Scottish Ministers

should become a health care burden on the appointed day, but only if there has been registered before that day a notice identifying the condition.

- (h) In each case the burdened property should be the land the lease of which was subject to the condition.

- (i) In the case of a service burden the benefited property should be any land to which the services are provided.

- (j) A manager burden should be held by the person on whom power is conferred.
- (k) A conservation burden should be held by the conservation body or, as the case may be, Scottish Ministers.
- (l) A personal pre-emption burden or a personal redemption burden should be held by the person previously entitled to enforce the qualifying condition.
- (m) An economic development burden should be held by the local authority, or as the case may be, Scottish Ministers.
- (n) A health care burden should be held by Scottish Ministers.

(Draft Bill ss 18, 19, 20, 21, 22, 23(2), 24)

Other conditions: the position of landlords

4.42 **Conversion by nomination of benefited property.** With the dissolution of the relationship of landlord and tenant there is a corresponding dissolution of the network of rights and obligations by which the parties were formerly connected. On the appointed day, therefore, the (former) landlord will lose the right to enforce the conditions of the lease.⁶⁷ Nonetheless there is room for an exception. A landlord who owns other land in the vicinity should be able to reallocate the conditions to that other land, at least in certain circumstances. The conditions would then become real burdens in which the burdened property was the land formerly subject to the lease and the benefited property the land owned, and nominated, by the landlord. The facility would be available not merely to the immediate landlord under the qualifying lease but to any landlord under a superior lease who had a right to enforce the condition in question.⁶⁸ And it could be used for any qualifying condition,⁶⁹ including one of the special conditions mentioned above; for a landlord will not necessarily benefit from the conversion process previously described.⁷⁰ The requirement that the neighbouring land be "owned" would not be met if that ownership was itself subject to a qualifying lease⁷¹ and so liable to be extinguished on the appointed day.⁷² As with the 2000 Act scheme *pro indiviso* ownership would not be sufficient.⁷³ A completed title is not required.⁷⁴

⁶⁷ Para 3.27.

⁶⁸ Paras 4.20–4.24 above. It would also be available to any third party with a right to enforce: see paras 4.49–4.55. There is no requirement that the landlord or other party has a completed title: draft bill s 12(2).

⁶⁹ For the meaning of qualifying conditions, see paras 4.3–4.17 above.

⁷⁰ For example, a former landlord would be able to enforce a facility burden after the appointed day only if he owned property which the facility was intended to benefit.

⁷¹ Or an exempt lease. Exempt leases are dealt with in part 7.

⁷² For the same reason, mere *dominium directum* of neighbouring land was not sufficient for the purposes of s 18(1) of the 2000 Act.

⁷³ However in a minor departure from the 2000 Act scheme *pro indiviso* ownership is sufficient in the case of third parties (paras 4.49–4.55 below). In a case where enforcement rights already attach, by implication, to some neighbouring land, it allows the procedure to be used by any *pro indiviso* owner of that land.

⁷⁴ Draft bill s 68(1) (definition of "owner").

4.43 The equivalent procedure in the 2000 Act suggests a model on the following lines.⁷⁵ The landlord draws up a notice in a prescribed form.⁷⁶ This narrates the landlord's title, identifies the potential benefited and burdened properties, and sets out the terms of the condition. The notice is served on the tenant, sworn or affirmed before a notary public, and registered in the Land Register or Register of Sasines before the appointed day. On that day the condition becomes a real burden.

4.44 There are certain restraints, both practical and formal. To draw up and register a notice involves a degree of trouble and expense. It is unlikely to be undertaken unless the landlord is confident both as to the value of the conditions and as to the likelihood of a sufficient interest to enforce.⁷⁷ Interest to enforce depends in turn on the nature of the conditions, on the type of breach that might be anticipated, and on the character and location of the land which is to be nominated as benefited property.⁷⁸ The landlord will also be mindful of the new rule introduced by the 2003 Act by which burdens imposed more than 100 years ago may (with some exceptions) be discharged by a simple notice served and registered by the burdened owner.⁷⁹ There may seem little point in converting a condition if it is subsequently extinguished on account of age.

4.45 To these practical considerations the 2000 Act added a formal restraint. Normally land was ineligible for nomination as the benefited property unless it contained a permanent building which was in use as a place of human habitation or resort and lay within 100 metres of the burdened property.⁸⁰ The distance measured interest to enforce. It admitted those cases where protection was most essential while excluding those other cases where the real interest of the landlord was likely to be income from minutes of waiver. Inevitably the line was not always correctly drawn. A fixed distance could take no account of locality, topography or type of condition. For that reason the Lands Tribunal was empowered to waive the 100 metres rule if satisfied that there would otherwise be material detriment to the applicant as owner of the (potentially) benefited property.⁸¹ The 2000 Act took for granted that applications might not be disposed of before the appointed day. Hence the superior must register a notice before that day, and the burden survived feudal abolition for as long as the Lands Tribunal takes to consider the application.⁸² These rather elaborate provisions are not needed in the present case. The relatively small number of leases eligible for conversion means that applications to the Lands Tribunal should occur in small and manageable numbers. If, as we recommend, applications require to be made within a fixed

⁷⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 18. For a discussion see Scot Law Com No 168 paras 4.26–4.47. According to the Registers of Scotland, 1960 notices were registered in the Register of Sasines and 719 in the Land Register under s 18, although as s 18 requires registration against both the benefited and the burdened property some double counting is involved; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

⁷⁶ For further particulars, see paras 4.60–4.63.

⁷⁷ Interest is required for the enforcement of a real burden and is not presumed. See Title Conditions (Scotland) Act 2003 s 8(1), (3).

⁷⁸ Scot Law Com No 181 paras 4.16–4.24.

⁷⁹ Title Conditions (Scotland) Act 2003 ss 20–25. For a discussion see Scot Law Com No 181 paras 5.18–5.57. The discharge can be opposed by the benefited owner before the Lands Tribunal.

⁸⁰ 2000 Act s 18(1)(b), (7)(a).

⁸¹ 2000 Act ss 20–22. These provisions were added by the Scottish Executive. Our own recommendation was that, on balance, a power of waiver was not required. See Scot Law Com No 168 paras 4.40–4.45.

⁸² In fact, according to the Registers of Scotland, only 1 such notice was registered; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

period – say a year – of royal assent, it will be possible to monitor their progress before the appointed day is set.⁸³ That will ensure that no applications are still outstanding on the appointed day. It may be noted that the decision of the Tribunal is final and that there is no question of further proceedings in a superior court.

4.46 In two cases the 100-metres rule is so obviously inappropriate that it is disappplied even without an application to the Lands Tribunal.⁸⁴ One is for rights of pre-emption and redemption. The other is where the prospective benefited property is one of the separate tenements, typically minerals or salmon fishings. In the second case the difficulty is less the distance of 100 metres than the requirement of a building. Minerals are reserved from leases by implication and hence will often be available to the landlord as a benefited property. In order to prevent evasion of the 100-metres rule it is necessary to add a requirement that the condition in question was imposed for the benefit of the minerals (or other separate tenement). A typical example might be a restriction on building designed to prevent subsidence. Conditions of this kind should be distinguished from conditions which are integral to the mineral reservation itself and which will survive the appointed day on other grounds.⁸⁵

4.47 We recommend that

18. (a) **A qualifying condition should become a real burden on the appointed day if, before that day, the landlord registers a notice in which other land belonging to him is nominated as the benefited property.**
- (b) **The burdened property should be the land the lease of which was subject to the condition, and the benefited property the land so nominated.**
- (c) **Normally land should not be eligible for nomination as the benefited property unless it contains a permanent building used as a place of human habitation and resort and lying within 100 metres of the burdened property.**
- (d) **But land not complying with paragraph (c) above should be eligible for nomination if –**
 - (i) **the condition is a right of pre-emption or redemption;**
 - (ii) **the land is a separate tenement (such as minerals or salmon fishings) and the condition was conceived for the benefit of that land; or**

⁸³ The 2000 Act s 20(1) also restricts the time within which an application must be made.

⁸⁴ The 2000 Act s 18(7)(b)(i) also has a third disapplication, for rights to enter or make use of the servient tenement. This is omitted because, following the enactment of the 2003 Act, such rights are capable of constitution only as servitudes or reservations and not as real burdens. See s 2 of that Act. Sporting rights, the most important example in practice, are separately provided for in paras 5.7–5.23.

⁸⁵ Para 5.5.

(iii) paragraph (c) is waived by the Lands Tribunal on an application by the landlord.

(e) An application to the Lands Tribunal should be made not later than one year after the relevant provision comes into force; and the Tribunal should grant the application only if satisfied that, in the event of the condition being extinguished, there would be material detriment to the applicant as owner of the nominated land.

(Draft Bill ss 13,15, 16 and 17)

4.48 Conversion by agreement. An alternative to a Lands Tribunal application is a voluntary agreement with the tenant. Indeed an attempt to reach such an agreement should be a prerequisite for such an application, as under the 2000 Act.⁸⁶ Normally the agreement would be for certain conditions of the lease to survive and be enforceable as real burdens by the (former) landlord in his capacity as owner of neighbouring property. This could not be put in place, as the law currently stands, until after the appointed day, for a tenant cannot burden property which is not yet his.⁸⁷ Some statutory assistance therefore is required. Following the 2000 Act⁸⁸ we recommend that

19. (a) A landlord should be able to serve on the tenant a notice inviting the tenant to enter into an agreement for the conversion of conditions into real burdens.

(b) If an agreement is duly entered into and registered before the appointed day, on that day the conditions should become real burdens in respect of which –

(i) the burdened property is the land the lease of which was subject to the conditions, and

(ii) the benefited property is the land nominated in the agreement, being land which at the time of the agreement was owned by the landlord.

(Draft Bill s 14)

Other conditions: the position of third parties

4.49 Introduction. Usually leasehold conditions are a matter for the landlord alone. More precisely, the rule is that the qualifying lease is enforceable by the immediate landlord⁸⁹ while more remote landlords can enforce such terms of superior leases as are prestable against

⁸⁶ 2000 Act s 20(1), (2).

⁸⁷ The deed creating a real burden must be granted by the owner of the burdened property: see Title Conditions (Scotland) Act 2003 s 4(2)(b).

⁸⁸ According to the Registers of Scotland 10 agreements were registered under s 19, although again some double counting may be involved; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

⁸⁹ Including such terms of any superior lease as are incorporated into the qualifying lease.

subtenants.⁹⁰ Only rarely do enforcement rights attach to third parties, such as neighbours holding under other ultra-long leases. In this section we review the existing position of third parties and consider how such enforcement rights as currently exist might survive the appointed day.

4.50 Express rights. An initial distinction is between rights expressly conferred by the lease or other deed and rights which arise by implication. The former are rare. Almost the only example commonly encountered is a condition such as the following:⁹¹

"and it is further agreed and declared that the said [*name of tenant*] and his foresaids shall not be entitled to erect on said piece of ground or to convert the house erected or to be erected thereon into candlemakers or crackling houses tan works foundries powder houses breweries distilleries steam mill or slaughter houses or any building whatever that may be deemed a nuisance and hurtful to the neighbouring feuars and tenants nor to carry on in said subjects any nauseous chemical preparations noxious or noisy manufactures and it shall be competent to any of the neighbouring feuars and tenants as well as to the proprietor of the subjects hereby let for the time to maintain action for preventing and removing nuisances of every kind ... "

4.51 There is no reason why rights of this kind should fall with the lease. Neighbours will continue to exist after the appointed day, and their interests will remain in need of protection. Enforcement rights which are expressly conferred should, in our view, survive conversion of the lease and become real burdens in which the benefited property is the neighbouring land nominated in the deed. This could happen automatically, without registration of a notice. If the land is identified only by some general expression – "neighbouring" in the example quoted above – it will be for the courts to determine identity, as at the moment.

4.52 Implied rights: common schemes. In feus it was common for enforcement rights to arise by implication. In a series of cases, of which *Hislop v MacRitchie's Trs*⁹² was the most important, it was held that where neighbouring owners hold land subject to broadly the same conditions and imposed by the same superior, the conditions may, in certain circumstances, amount to a "common scheme" which is mutually enforceable among the owners. In the absence of authority it is unclear whether comparable rules apply in the case of leasehold conditions and the matter cannot be regarded as completely closed.⁹³ Whatever the current position, it seems necessary to follow the regime provided by section 53 of the 2003 Act as to do otherwise would be anomalous and potentially confusing. We suggest therefore that where qualifying conditions are imposed under a common scheme on a group of related properties, such conditions should become real burdens on the appointed day in which each property would be both a burdened and benefited property.⁹⁴ A typical

⁹⁰ Paras 4.20–4.24 above.

⁹¹ From a 500-year lease of land in Girvan granted in 1872.

⁹² (1881) 8 R(HL) 95. For a discussion see Reid, *Property* paras 399–402.

⁹³ Writing in 1967, Paton & Cameron (*Landlord and Tenant* p 98) express the view that: "The question has not arisen whether one lessee may enforce against a neighbouring co-lessee restrictions contained in the latter's lease (for example, building conditions contained in a long lease) on the ground of similarity of condition and mutuality of interest, but there seems no reason why this should not be possible, if there is a reference to a common plan or a stipulation in each long lease that the same restrictions are to be imposed in all the others". But this idea has not been taken up by the case law.

⁹⁴ If one of the group of related properties was subject to an exempt lease which is later converted the effect of s 24 of the draft bill is to make that property a benefited and a burdened property on the deferred appointed day.

example of a group of related properties would be flats in the same tenement. The real burdens created would be classified as community burdens.⁹⁵

4.53 Implied rights: partial assignments. There is another situation where, in the law of real burdens, enforcement rights may arise by implication. This is where land is disposed (as opposed to feued) and burdens are imposed in the disposition. If other land was retained by the granter, the retained land is usually, by implication, the benefited property in the burden.⁹⁶ The directly equivalent situation, for leasehold property, is the partial assignment. Doubts as to whether real conditions could be imposed in assignments were removed, with retrospective effect, by legislation in 1985 but enforcement remains problematic.⁹⁷ An example explains why.⁹⁸ Suppose that A holds 3 hectares on a 999-year lease. He assigns the lease to B in respect of 2 of those hectares. The assignment contains a number of conditions designed to protect the amenity of the remaining hectare retained by A. Who can enforce the conditions? The relevant legislative provision⁹⁹ says merely that, on registration, the conditions

"shall be as effectual against any singular successor of the assignee in the subjects assigned as if such assignee had been a grantee of the lease and it had been duly recorded or, as the case may be, the grantee's interest had been so registered."

4.54 The meaning of this provision is difficult to grasp. A possible reading is that conditions in an assignment are deemed to be conditions of the lease itself, and hence enforceable by the landlord against the assignee, now his tenant. But it seems improbable that it was intended to give enforcement rights to the *landlord* in relation to conditions generally imposed for the benefit of the *cedent* (or perhaps of co-assignees). A more natural reading of the provision, therefore, is that it does no more than ensure that the assignee, and successors, are to be bound. This, however, leaves open the question of title to enforce. One view would be that, on analogy with the rule for dispositions mentioned earlier, a condition imposed in a partial assignment is by implication enforceable by the cedent as tenant of the retained land. Another view would be that enforcement rights arise only if expressly created in the assignment; otherwise the condition is merely contractual in effect. This second view seems so contrary to the evident intention behind the 1985 Act that it should probably be discarded.¹⁰⁰ But if the first view is to prevail it seems necessary to make express legislative provision on the subject. The rule suggests itself. If qualifying conditions are imposed in, or in association with,¹⁰¹ a partial assignment, they should be treated as enforceable by the cedent and his successors as tenants of the land which is retained. This

⁹⁵ Title Conditions (Scotland) Act 2003 s 25.

⁹⁶ *J A Mactaggart & Co v Harrower* (1906) 8 F 1101. And see Reid, *Property* paras 403 and 404.

⁹⁷ Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 3, amending s 3 of the Registration of Leases (Scotland) Act 1857.

⁹⁸ Reid, *Property* para 352. The difficulties do not depend on the particular example given. Another standard case where conditions might be used in assignments is where a tenement is built on land held on an ultra-long lease, and (partial) assignments are granted of the individual flats.

⁹⁹ Registration of Leases (Scotland) Act 1857 s 3(2).

¹⁰⁰ One of our consultees (and a member of our advisory group), Mr Angus McAllister, argued that, since both the assigned part of the lease and the retained part would be upgraded to ownership, there was much to be said for the view that those who are to become owners should enjoy the same enforcement rights as those who were owners all along.

¹⁰¹ Conditions may also be included in a deed of conditions or other deed: see Registration of Leases (Scotland) Act 1857 s 3(5) (now repealed) and s 3(2A).

means that the procedure for conversion by notice, described earlier, would be available.¹⁰² For the tenant of the retained land would, by statute, have title to enforce the conditions, and his tenancy under an ultra-long lease would qualify as "ownership" for the purposes of nominating other land as a benefited property.¹⁰³ If a notice were duly registered, the conditions would, on the appointed day, become real burdens in which the burdened property was the land subject to the partial assignation and the benefited property the land retained by the cedent.¹⁰⁴

4.55 **Recommendation.** Our various proposals in relation to third party rights may be drawn together in the form of a recommendation that

20. (a) A qualifying condition expressed as being enforceable by the owner or tenant of other land should, on the appointed day, become a real burden in respect of which –

(i) the burdened property is the land the lease of which was subject to the condition, and

(ii) the benefited property is the other land.

(b) Qualifying conditions imposed under a common scheme on a group of related properties should, on the appointed day, become real burdens in respect of which each property is both a benefited and a burdened property.

(c) Where, before the appointed day –

(i) a lease was assigned in part, and

(ii) a qualifying condition was imposed in, or in association with, the assignation

the cedent and his successors as tenants of the retained land should have title to enforce the condition and accordingly should be able to convert the condition into a real burden by a notice in accordance with recommendations 17 and 18 or by an agreement under recommendation 19.

(Draft Bill ss 12(3), 25, 26)

Conditions reserving development value

4.56 One other aspect of the 2000 Act scheme may be mentioned. Section 33 provided that where land was feued subject to a real burden enforceable by a superior which reserved

¹⁰² Para 4.29.

¹⁰³ Draft bill s 13(3).

¹⁰⁴ Similarly, the tenant of the retained land could enter into an agreement under s 14 of the draft bill or, where appropriate, register a notice under ss 18–22 of the draft bill.

for the superior the benefit of any development value of the land, and either there was no consideration, or the consideration was significantly lower than it would have been had there been no such burden, then the superior could reserve the right, under certain circumstances, to claim compensation following feudal abolition.. In our discussion paper we questioned whether ultra-long leases were ever used to reserve development value in this way, and expressed reluctance to reproduce the, rather complex, provisions of the 2000 Act on this subject unless they were clearly necessary. Only four consultees offered views on this subject. A working party of the Law Society of Scotland observed that, in its experience, development value burdens have not been a common feature of ultra-long leases entered into in the last 20 years or so but that the subject of compensation merited further consideration. Two consultees thought that compensation ought to be provided. One consultee considered that the former landlord should have the right to oppose future development but, if it proceeded, the development value should be shared equally. We accept the view that compensation should be payable; but the probable scale of the problem argues for a less ornate solution than that provided under the 2000 Act. The details are considered later, in part 6.¹⁰⁵

Prior variation or extinction of conditions

4.57 A condition will be converted only in the form in which it exists on the appointed day. If it has been varied – whether by judicial process, by voluntary deed, or by acquiescence – the terms of the real burden will reflect that variation. And if the condition has been extinguished, there is nothing that can be the subject of conversion. It will be borne in mind that variation or even extinction may occur as a result of events furth of the register.¹⁰⁶

One choice

4.58 A condition may be converted under more than one head. A maintenance obligation in a tenement, for example, would qualify for conversion both as a facility burden and under the special rules for common schemes.¹⁰⁷ Or a condition which was subject to express enforcement rights in favour of a third party might also be converted by the landlord by registration of a notice nominating neighbouring property.¹⁰⁸ Double conversion of this kind is unobjectionable. Its effect is merely to enlarge the class of those entitled to enforce the burden. What is less acceptable, however, is that the same person should be able to acquire enforcement rights under separate heads of conversion. A landlord should not be able to convert the same condition into both a neighbour burden, by nomination of neighbouring property, and into a conservation burden. That is to strengthen his position beyond its present level. Nor should he be able to register an agreement reached with the tenant on enforceability and at the same time register a notice which further extends his enforcement rights. Instead a choice must be made. The landlord is free to register an ordinary notice of conversion, or a special notice for conservation burdens, or an agreement reached with the tenant. But he can only register one such document.¹⁰⁹ The choice,

¹⁰⁵ Paras 6.36 and 6.37.

¹⁰⁶ A notice registered in respect of a condition that had been extinguished would not revive the condition but rather would be ineffective. See para 4.66 below.

¹⁰⁷ Respectively paras 4.30 and 4.52.

¹⁰⁸ Respectively paras 4.50 and 4.42

¹⁰⁹ The rule is the same in the 2000 Act: see s 42(1).

however, would not necessarily be final. A different option could be pursued later provided that the notice or agreement first registered is formally discharged. But this must be done before the appointed day. After that day it is too late to register notices or agreements.

4.59 We recommend that

- 21. Where a notice or agreement has been registered under recommendations 17, 18 or 19 it should not be possible to register another notice or agreement in relation to the same condition unless the earlier notice or agreement has been discharged and the discharge registered.**

(Draft Bill s 30(1) and (2))

Notices

4.60 **Service.** A notice for conversion of conditions into real burdens is of less immediate importance, from the tenant's point of view, than a claim for compensation.¹¹⁰ A notice does not require the tenant to do anything. It preserves existing rights. The tenant is no worse off than before. A notice could be challenged but in general a challenge later is as good as a challenge now.¹¹¹ The existence of the notice appears from a public register and will come to light, at latest, when the proprietor sells. Nonetheless we think that, wherever possible, the tenant should be informed of the notice. Accordingly, we propose a general duty on the landlord (or third party enforcer) to send a copy of the notice. The notice should be accompanied by an explanatory note in a prescribed form.¹¹² This explains the background to the notice and its implications for the recipient. The notice should be sent by post. In the normal case we imagine that it will be sent to the tenanted property. If the name of the tenant is unknown it will be sufficient to address the envelope to the "tenant". Occasionally service may turn out to be impracticable, generally because the tenant has abandoned the property and disappeared. In that case service is excused but the circumstances must be explained in the notice.¹¹³

4.61 Slightly different considerations apply in respect of the notice which precedes an agreement with the tenant.¹¹⁴ By itself such a notice achieves nothing. It is merely a preliminary stage on the path to an agreement. The notice is not registered, only the agreement. This suggests that, following the 2000 Act,¹¹⁵ the rules of service might be less formal and extend to delivery as well as posting. If service fails it will be because the tenant is nowhere in evidence. There will then be no question of an agreement and, the landlord having done his best, the proper course of action will be an application to the Lands Tribunal to waive the 100 metres rule.¹¹⁶

¹¹⁰ For service of compensation claims see paras 6.70–6.73.

¹¹¹ Subject to the rules of negative prescription.

¹¹² The notices and explanatory notes are contained in scheds 2 and 4–8 of the draft bill.

¹¹³ These rules reproduce s 41(3), (4) of the 2000 Act.

¹¹⁴ See para 4.48 above.

¹¹⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 19(1)(a), sched 6 note for completion 5.

¹¹⁶ Para 4.45.

4.62 **Separate notices and combined notices.** Following the 2000 Act,¹¹⁷ a separate notice is needed for each property. So if the same person is landlord of six different properties each held under an ultra-long lease a separate notice must be prepared for each property. The rule is the same if the properties, or some of them, were originally part of a single lease which came to be divided by partial assignation or sublease.¹¹⁸ There is no objection, however, to using the same notice for different conditions which affect the same property.¹¹⁹

4.63 **Recommendation.** We recommend that

22. (a) **Except where it is not reasonably practicable to do so, a copy of the notice (and explanatory note) should be sent by post to the tenant before registration.**
- (b) **A separate notice should be used for each property.**

(Draft Bill ss 30(3), (4) and 62)

Registration

4.64 As usual with the creation of real burdens, the notice or agreement should be registered against both the burdened property and the benefited property.¹²⁰ The former is the property affected by the qualifying lease and the latter the property nominated by the landlord or third party enforcer. With conservation burdens and the other personal burdens there is no benefited property and therefore no requirement of dual registration. So far as the burdened property is concerned, only the title sheet (or search sheet) for the tenant's interest will list the conditions and so registration should in the ordinary course of events be against that interest. But registration against the landlord's interest ought to be available as an alternative. Since the Keeper will have to examine both interests in making up a title sheet,¹²¹ it is thought that registration against the landlord's interest would not cause difficulties in practice. Sometimes the benefited property too will be subject to a (different) qualifying lease,¹²² in which case there should likewise be an option of registration against either interest.¹²³

4.65 We recommend that

23. (a) **A notice or agreement should be registered against both the burdened property and (except where there is no such property) the benefited property.**

¹¹⁷ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 42(3), (4).

¹¹⁸ See draft bill s 1(3).

¹¹⁹ See draft bill s 30(4).

¹²⁰ See Title Conditions (Scotland) Act 2003 s 4(5).

¹²¹ This is because the former lease – now ownership – is subject to a number of real rights which may have affected the former ownership. See paras 3.25 and 3.26.

¹²² Or an exempt lease. Exempt leases are dealt with in part 7.

¹²³ In that case the person registering the notice will be the holder of the tenant's interest: see para 4.54.

(b) If property is subject to a qualifying lease, registration may be against either the interest of the tenant or the interest of the owner.

(Draft Bill ss 13(6),(7), 14(7),(8), 18(4), 19(3), 20(3), 21(4), and 22(4))

Invalidity

4.66 Introduction. Most notices will be valid. But a notice might be invalid for a number of different reasons. The landlord's building might be 101 metres from the tenant's property. The landlord's title might be radically defective, whether to the property which is leased or to the neighbouring property nominated in the notice. The landlord might be *incapax*, or might fail to sign properly. Doubtless there are other possibilities. Naturally mistakes in a notice will sometimes be uncovered during the registration process. But the Keeper cannot be expected to check everything, and later we list a number of matters that he should not be required to consider.¹²⁴ If an invalid notice is accepted for registration, the mere fact of registration does not cure the invalidity.¹²⁵ It is true that a notice will not take effect on the appointed day unless it has been registered; but registration is only one of the conditions that must be satisfied. If a notice is registered but invalid, the question then arises as to how it may be challenged.

4.67 Applications to the Lands Tribunal. Notices sent under the 2000 Act can be challenged before the Lands Tribunal.¹²⁶ The same should be true of notices sent under the proposed new legislation.¹²⁷ We recommend, therefore, that

24. (a) The Lands Tribunal should be empowered to make an order discharging or restricting a notice on cause shown.

(b) An extract of the order should be capable of registration, and on registration should take effect as respects third parties.

(Draft Bill s 64)

4.68 Under this recommendation an order would enter the Land Register by registration rather than by rectification, thus avoiding the protection against rectification given to proprietors in possession.¹²⁸

4.69 Application for rectification. An obvious defect does not require to be declared by judicial process. Instead, in Land Register cases, a direct application can be made to the

¹²⁴ Para 8.11.

¹²⁵ This seems true even of the Land Register. Usually the effect of registration is to create real rights, and hence to overcome defects in the deed. See s 3(1)(a) of the Land Registration (Scotland) Act 1979. But in the present case registration will precede the appointed day, and the notice will be effective, not by virtue of the 1979 Act, but by virtue of the legislation converting leasehold conditions into real burdens.

¹²⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 44.

¹²⁷ This would apply not merely to notices converting conditions into real burdens but also to notices preserving reservations (paras 5.15–5.23) and notices of exemption (para 7.4).

¹²⁸ Land Registration (Scotland) Act 1979 s 9(3). And see *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

Keeper for rectification of the Register. The protection for proprietors in possession would not apply, under recommendations made later, and no indemnity would be due.¹²⁹ Thus the Keeper would be free to correct the error by making the appropriate amendment to the Register.

4.70 Challenge to the burden itself. Notices have short lives. On the appointed day the notices operate to convert leasehold conditions into real burdens. Thereafter their task is done. Thus after conversion another way of attacking a notice is to attack the burden itself, whether in the ordinary courts or in the Lands Tribunal. The 2003 Act confers jurisdiction on the Lands Tribunal to determine the validity of burdens.¹³⁰ An application under this jurisdiction could challenge the burden on any ground and not merely on the ground that the notice was invalid. Alternatively, an application could be made to the Tribunal under its jurisdiction for the variation and discharge of burdens.¹³¹

Conditions affecting the landlord or third party

4.71 Leasehold conditions may affect a landlord as well as a tenant. In fact express obligations on the landlord are uncommon in ultra-long leases, but obligations may be implied – for example, a warranty of title, or that the subjects are reasonably fit for the purposes of the lease.¹³² Not all obligations bind successors of the original landlord: in order to do so, the obligation must be classified as *inter naturalia* of the lease.¹³³ Once a lease has been converted, it seems clear that the obligations on the former landlord should fall. Almost always, they are closely connected with the obligant's status as landlord and, once that status is lost, cease to be appropriate. But even if that were not so, there would be the technical difficulty of identifying a property to which the obligations could attach. In the case of feudal abolition the 2000 Act made clear that superiors' obligations were extinguished on the appointed day.¹³⁴ An equivalent rule for landlords was recommended earlier, in part 3.¹³⁵ Nonetheless two qualifications seem necessary.

4.72 It occasionally happens that an obligation on the landlord is the direct counterpart of an obligation on the tenant. For example, the tenant may be bound to pay for maintenance which is then to be carried out by the landlord. And indeed counter-obligations are not confined to landlords but may also affect third party enforcers. In a case where the tenant's obligation is converted into a real burden, under the rules suggested earlier, then any counter-obligation should survive also and be binding on the former landlord or third party or (in the case of facility or service burdens or burdens affecting a group of related properties) on any replacement enforcer. Consultees were in agreement with this proposal. The notice – in those cases where a notice is required for conversion – would give details of the counter-obligation. The counter-obligation could not be independently enforced, but

¹²⁹ Paras 8.1–8.6.

¹³⁰ Title Conditions (Scotland) Act 2003 s 90(1)(a)(ii).

¹³¹ Title Conditions (Scotland) Act 2003, part 9.

¹³² Paton & Cameron, *Landlord and Tenant* pp 127–35.

¹³³ Thus an obligation to convey the subjects to the tenant on request has been held to fail the *inter naturalia* test. See *Bisset v Magistrates of Aberdeen* (1898) 1 F 87 and *Advice Centre for Mortgages Ltd v McNicoll*, 2006 CSOH 58.

¹³⁴ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 54. For the background, see Scot Law Com No 168 paras 4.92 to 4.96.

¹³⁵ Para 3.27.

enforcement of the real burden would be prevented for as long as the counter-obligation remained outstanding. An equivalent rule is provided for in the 2000 Act.¹³⁶ A counter-obligation is extinguished on the extinction of the real burden to which it relates.¹³⁷ Our formal recommendation is that

25. The enforcement of a qualifying condition (now a real burden) after the appointed day should be subject to compliance with any obligation which, before that day, was the direct counterpart of the condition.

(Draft Bill s 28)

4.73 A second exception was mentioned earlier.¹³⁸ Any obligation in the nature of a servitude affecting other land belonging to the landlord would, on the appointed day, be converted into a servitude proper. It would therefore survive the extinction of the lease. This principle has no direct equivalent in the 2000 Act scheme.¹³⁹

Conditions enforceable contractually

4.74 The 2000 Act makes an express saving for conditions of the feu insofar as they are enforceable contractually.¹⁴⁰ Conditions are enforceable contractually only in a question between the original parties (or their assignees). This means that for as long as the original superior and vassal are in place, the conditions of the (former) feu will continue to be enforceable. In practice this affects mainly former real burdens and so works for the benefit of the former superior rather than the former vassal. Almost all consultees agreed that this principle should not be extended to leasehold conversion.¹⁴¹ All or most conditions of a lease presuppose the continued existence of the relationship of landlord and tenant. In the absence of such a relationship the conditions would be inappropriate where they were not actually oppressive. That is as true of conditions affecting the landlord as of conditions affecting the tenant. For example, it is difficult to see why a former landlord should continue to be bound to ensure that the subjects are reasonably fit for the purposes of the lease. If there is no lease, there can be no purposes; and the former landlord has no further connection with the subjects. The argument seems even stronger in relation to landlords – and tenants – of leases superior to the qualifying lease.

4.75 A technical consideration reinforces the argument. Suppose that, on the appointed day, the original parties to the lease were still in place. A rule which preserved contractual liability would treat the two parties differently. The (former) tenant¹⁴² would be relieved of liability as soon as he sold the property (of which he is now the owner); and no such liability would be acquired by the purchaser. But the (former) landlord would not be in this fortunate

¹³⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 25.

¹³⁷ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 47.

¹³⁸ Paras 3.34–3.41.

¹³⁹ The reason is that such rights are already servitudes proper, because the benefited and burdened properties are already in separate ownership.

¹⁴⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 75. See Scot Law Com No 168 para 4.88.

¹⁴¹ Only the Scottish Law Agents Society argued that there may be some contractual obligations which should survive. In fact our recommendation will allow for the survival of obligations which are purely contractual in nature.

¹⁴² But not tenants under superior leases.

position. His leasehold interest having been extinguished on the appointed day, there is nothing left to sell. A rule which provided for continuing contractual liability would impose on the landlord an obligation from which there was no escape.¹⁴³

4.76 It remains to consider the details of the proposed rule. The essential distinction is between conditions which of their nature bind successors of either the landlord or tenant and conditions which do not. Qualifying conditions are a characteristic, but non-exhaustive, example of the first category.¹⁴⁴ Other examples would include an implied obligation of maintenance binding on successive landlords, or the obligation of a tenant to pay rent. While such conditions will usually be terms of the lease itself (whether express or implied) they may also be found in assignments and in deeds of conditions or other deeds granted in association with such assignments.¹⁴⁵ Except for obligations of warrandice, conditions of the second type – contractual obligations pure and simple – are uncommon in ultra-long leases. They do not bind successors because, as a general rule, they are not *inter naturalia* of the lease.¹⁴⁶

4.77 In our view conditions which are purely contractual in nature should be left undisturbed by the legislation. Conditions of this kind are personal to the parties and not intrinsic to the relationship of landlord and tenant. There is no reason why they should not survive the dissolution of that relationship. Conversely, conditions which bind successors should be swept away unless they can be saved under the provisions recommended in this and other parts of the report. They should not have a second life as contractual obligations. A parallel distinction is drawn in the 2003 Act.¹⁴⁷ Our recommendation therefore is that

26. Notwithstanding recommendation 11, there should not be extinguished any rights or obligations that are binding only on the original parties.

(Draft Bill s 4(2))

¹⁴³ In practice this problem does not arise with s 75 of the 2000 Act because contractual obligations tend not to affect superiors.

¹⁴⁴ For qualifying conditions see paras 4.3–4.17 above.

¹⁴⁵ The general rule is that rights and obligations contained in all such deeds are to be extinguished on the appointed day. See para 3.27. The proposal made below is by way of an exception to that rule.

¹⁴⁶ Para 4.4.

¹⁴⁷ Title Conditions (Scotland) Act 2003 s 61.

Part 5 Minerals and sporting rights

Introduction

5.1 At one level minerals and sporting rights have little in common. Whereas the ownership of minerals can be separated from ownership of the surface of the land, sporting rights (with the single exception of salmon fishing) cannot be so separated. In the technical language of the law, minerals are (conventional) separate tenements while sporting rights (other than salmon fishings) are not.¹ Another difference is that minerals are corporeal and sporting rights incorporeal. Ownership of minerals means ownership of a stratum of earth whereas sporting rights confer no entitlement to a particular piece of corporeal property.² Important as these differences are, however, for present purposes the resemblances are more important. Both minerals and sporting rights are reserved by implication from leases – are indeed the only significant examples of such implied reservation.³ Both may themselves be the sole subject of a lease. And both require to accommodate the fact that control of the surface of the land is often in other hands.

5.2 Earlier we recommended that leases of minerals and of sporting rights should both (but for different reasons) be exempt from conversion.⁴ Only reservation, therefore, need be considered further.

Reservations of minerals

5.3 An ordinary lease confers only the right to use the surface, and minerals are impliedly reserved. The landlord (or those authorised by him) has a right to work the minerals but is liable for surface damage.⁵ This implied reservation is frequently re-expressed, and glossed, in the lease itself. Express reservations were almost universal in Victorian ground leases, in much the same way as they were universal in feus of the same period. Indeed the wording is much the same as found in feus, so that the bare reservation of minerals is accompanied by ancillary rights to work (sometimes from the surface), and by provisions about compensation. Conversion cannot improve on the lease. If, as almost always, the minerals were excluded from the lease then they are excluded from the property now acquired by the (former) tenant.⁶ Sometimes the minerals will already be separate tenements, because they were reserved by the landlord's superior at the time when the land was feued or because

¹ Reid, *Property* paras 207–212.

² *Graham v Duke of Hamilton* (1871) 9 M(HL) 98.

³ Erskine II.6.22; Hume, *Lectures* II, 89; Bell, *Principles* § 1226; Robert Bell, *A Treatise on Leases* (2nd edn 1805) pp 271–83 and 333–41; Hunter, *Landlord and Tenant* II, 195–201; Rankine, *Leases* pp 208–11 and 489–501. At one time the landlord's rights extended to timber and kelp, at least in leases of ordinary duration. The general principle, according to Erskine, was to deny the tenant rights "the use of which consumes the subject".

⁴ Paras 2.34–2.36.

⁵ Rankine, *Leases* p 209. The common law rule is re-stated by s 12(c) of the 1954 Act.

⁶ Para 3.31.

they have been sold since. Otherwise they will become separate tenements on the appointed day, when ownership of the surface passes to the former tenant.⁷

5.4 If the minerals were already separated at the time the lease was granted, they were not the property of the landlord and could not have formed part of the subjects let, even without a reservation. The purpose of a clause of reservation, in such a case, is not therefore to retain the minerals for the landlord but to make clear that they do not pass to the tenant. In this way a warrandice claim is avoided. If, conversely, the minerals were not already separated, the effect of a reservation is to achieve separation for the purposes of the lease – and hence, on the appointed day, for the purposes of ownership as well.

5.5 An express clause in a lease will usually provide for rights to work and payment of compensation. If the minerals were already separated, this will merely repeat the terms of the earlier separation, and indeed any innovation on those terms could have no effect on the owner of the minerals. It may be added that such terms are not real burdens (an extrinsic limitation on ownership) but rather part of the very content of the separate tenement of minerals.⁸ If, however, the minerals remained in the ownership of the landlord, the clause serves to regulate the relations of landlord and tenant for the purposes of the lease – and will continue to do so when, on the appointed day, the minerals are elevated into a separate tenement.⁹

5.6 If the lease is silent as to rights of working or compensation, the position will be governed by the default rules provided by the general law.¹⁰

Sporting rights

5.7 "Sporting rights", in the sense used here, mean the right to fish and the right to take game. An initial distinction is between the right to fish for salmon and other sporting rights.

5.8 Salmon fishings are separate tenements, that is, are capable of being owned separately from the land or river in which they subsist.¹¹ More than that, salmon fishings (unlike minerals) are *always* separate tenements and so do not require to be separated from the land by reservation or conveyance. Instead they are treated as "land" in their own right. So a disposition or lease of a river does not carry the salmon fishings in that river by implication, any more than it would carry an adjacent field. If the fishings are not mentioned they are excluded. This assimilation of salmon fishings to land removes the need for special treatment. Either salmon fishings are included in a qualifying lease or they are not. If included, there is a change in ownership on the appointed day, in the usual way. If not

⁷ As this is an automatic consequence of separation of ownership, no provision is made in the draft Bill. The position is different in respect of sporting rights which are not separate tenements in the absence of legislative assistance. See para 5.14.

⁸ Reid, *Property* para 266.

⁹ If there are subleases, the reservation will appear in the head lease and its terms repeated or referred to in the subleases, including the qualifying lease. Theoretically it might happen that the clause in the qualifying lease was in different terms from that in the head lease; and in that event the latter would prevail as the clause which, being the first in time, effected the actual reservation and so determined the rights and obligations of the holder of the minerals.

¹⁰ For which see Robert Rennie, *Minerals and the Law in Scotland* (2001) chap 4.

¹¹ Reid, *Property* paras 209, 320 ff.

included they are wholly unaffected by the conversion of the lease into ownership. Salmon fishings are not considered further in this Report.

5.9 The position of other sporting rights is different. The remaining rights of fishing affecting private rivers and lochs – "freshwater fishings" as they may be called – are not recognised as separate tenements. Nor is the right to game. Rights of this kind can be leased,¹² or reserved from a lease. In either case the right is then separated from the land as a matter of lease. But such rights cannot be separated as a matter of ownership. As the law currently stands it is impossible for one person to own the land and another person the game or fishing rights in that land.¹³ The difficulty for our scheme is obvious. Arrangements made by way of lease cannot be replicated once that lease is converted into ownership. This affects both reservations of sporting rights to the landlord, and also leases of sporting rights. Earlier we recommended that leases of sporting rights should be exempt from conversion.¹⁴ The topic of reservation requires further examination.

Reservations of sporting rights

5.10 A case of 1804 (*Ronaldson v Ballantine*)¹⁵ decided that, in an agricultural lease, the right to kill and take game is impliedly reserved to the landlord.¹⁶ Previously the position had been in doubt and the subject of controversy.¹⁷ An important reason for the decision was the Act of 1621 c 31 which restricted hunting and hawking to those owning a ploughgate of land (around 50 acres), a rule which both fortified the link between game rights and ownership while at the same time disqualifying those tenants who did not happen to own other land.¹⁸ *Ronaldson* concerned game rights but subsequently the doctrine was extended to fishing for trout and therefore, by implication, to other freshwater fish apart from salmon.¹⁹ Most agricultural leases were granted for terms such as 19 or 21 years, but in *Welwood v Husband*²⁰ it was held that game rights were impliedly reserved even in a lease for 999 years. It may be taken that the rule is the same in relation to fishing rights. The reserved right is exclusive in nature, and the tenant has no right to fish or to take game.

5.11 Some limitations may be mentioned. The reservation is implied only in the case of agricultural leases. Further, the right is confined to that part of the land under cultivation and does not apply to garden and recreational ground. In some leases the implied right is supplemented by an express reservation.

¹² Salmon and Freshwater Fisheries (Consolidation)(Scotland) Act 2003 s 66 (freshwater fishings); *Palmer's Trs v Brown* 1989 SLT 128 (game).

¹³ Scot Law Com No 168 paras 6.27 and 6.28.

¹⁴ Para 2.36.

¹⁵ (1804) Mor 15270.

¹⁶ See generally: Rankine, *Leases* pp 489–501; Lord Gill, *The Law of Agricultural Holdings in Scotland* (3rd edn, 1997) ch 11; Gordon, *Scottish Land Law* paras 9-14–9-20.

¹⁷ In the first text on leases, Robert Bell's *A Treatise on Leases*, it was argued strongly that sporting rights passed to the tenant. See pp 333–41 of the 2nd edition of 1805 (the last for which Bell was responsible).

¹⁸ However, it came to be accepted that the right could be communicated by the owner to others who were not qualified under the 1621 Act. The Act was eventually repealed by the Statute Law Revision (Scotland) Act 1964.

¹⁹ *Copland v Maxwell* (1868) 7 M 142, (1871) 9 M (HL) 1. The right to fish for salmon is a separate tenement and is treated as if it were land. See para 5.8 above.

²⁰ (1874) 1 R 507.

5.12 The topic is of limited importance for present purposes. So far as we are aware, ultra-long leases do not usually involve either agricultural subjects, or rivers and lochs; and if that is correct, few leases eligible for conversion are affected by sporting rights. This may be contrasted with the position of minerals where the reservation is virtually universal.

Preservation: in principle

5.13 In part 3 we concluded that reservations of a right which could not be constituted as a separate tenement would necessarily fall to be disregarded for the purposes of conversion of a lease. On the appointed day, therefore, the right would cease to be reserved and would pass from landlord to tenant.²¹ Nonetheless a number of factors argue for a different solution in the case of sporting rights. Such rights are the only reservation of this kind likely to be encountered in practice. Although not common in the context of ultra-long leases, the rights where they exist may be of considerable value. If they were not preserved it would be necessary to provide separately for compensation. Further, consistency with the 2000 Act also argues for preservation of sporting rights.²²

5.14 If sporting rights are to be preserved, the next question to consider is in what form. The obvious solution is to follow the 2000 Act and accept that sporting rights can be constituted as a separate tenement.²³ The recognition of sporting rights as separate tenements would, however, be limited to the conversion of long leases. This is not the place to reconsider the general issue of which rights can and cannot be held separately from the land.²⁴

Preservation: a scheme in outline

5.15 Preservation could not be automatic, as in the case of minerals. The Keeper knows that minerals are always reserved from leases and on conversion can mark the title sheet accordingly. But with sporting rights his knowledge is far less sure, for reservation depends on the character of the land and hence on information which may be unavailable or, if available, disputed. In many cases the Keeper would be unable to make a confident entry on the Register. A different point is that, even where they exist in theory, sporting rights may quite often be moribund in practice. Conversion should not have the effect of reviving rights long since abandoned. If sporting rights are exercised or of value, the landlord will no doubt take the necessary steps to preserve them. Otherwise they will be extinguished on the appointed day.²⁵

5.16 Section 65A of the 2000 Act suggests a model on the following lines. The landlord draws up a notice in statutory form for preservation of a reserved right to game or, as the

²¹ Paras 3.31–3.33.

²² Section 65A of the 2000 Act allows sporting rights to be preserved as a separate tenement. According to the Registers of Scotland 65 notices were registered under s 65A; K G C Reid and G L Gretton, *Conveyancing 2004*, (Edinburgh, 2005), pp 95–96.

²³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 65A.

²⁴ Accordingly, following the appointed day there will be 2 categories of sporting rights held as separate tenements: those converted under s 65A of the 2000 Act and those converted under s 7 of the draft bill.

²⁵ Under the general rule referred to above and set out in para 3.31.

case may be, to freshwater fishing.²⁶ After service on the tenant,²⁷ the notice is sworn or affirmed before a notary public and registered in the Land Register or Register of Sasines. This must be done before the appointed day. Registration may be against the interest either of the landlord or of the tenant.²⁸ On the appointed day the reserved right will then be preserved, and transformed into a (statutory) separate tenement. The landlord thus loses the land but retains the sporting rights. Thereafter the rights can continue to be held separately from the land. As separate tenements they would command their own title sheet on the Land Register,²⁹ and be transferred by disposition rather than by assignation.³⁰ Only the head landlord could register a notice because, sporting rights being incapable of severance, only the owner of the land can be their owner.

5.17 Sometimes the reserved right may itself have been leased out, generally on a much shorter lease.³¹ In common with other real rights, such a lease would be unaffected by the conversion of the qualifying lease;³² but except where a notice had been registered there would be a change of landlord. This is because the reservation would be extinguished on the appointed day, and the ownership of the former tenant would extend to the sporting rights. As already mentioned, a lease of sporting rights could not of itself qualify for conversion no matter how long its duration.³³

Content of preserved right

5.18 The preserved right should mirror the reservation. Sometimes an express reservation is explicit as to scope and, if so, the terms of the lease will control the terms of the preserved right. Otherwise the scope must remain a matter for the general law, discussed below.

5.19 **Freshwater fish.** "Freshwater fish", in the sense intended here, means any fish other than salmon. The statutory definition is well-established,³⁴ and, practice varying as to which species are caught for sport, further refinement would seem unhelpful.

5.20 **Game.** The meaning of game is less certain. In popular speech "game" refers to those animals that are killed for sport and thereafter for the table. In legislation, however, "game" has been defined both frequently and inconsistently, and the term carries no agreed meaning.³⁵ For present purposes a starting point is provided by Rankine's statement that "it has never been decided whether or to what extent the reservation [ie from a lease] goes

²⁶ A separate notice is required for each qualifying lease affected by the same sporting right but, where different sporting rights affect the same qualifying lease, one notice can be used. See s 8 of the draft bill and also para 4.62.

²⁷ For service see para 4.60.

²⁸ Para 4.64.

²⁹ As with salmon fishings. See Land Registration (Scotland) Act 1979 ss 5(1)(a) and 28(1) (definition of "incorporeal heritable right"). The draft bill makes an appropriate amendment to the 1979 Act.

³⁰ For this and other characteristics see Reid, *Property* para 208.

³¹ The same result occurs if A grants B an ultra-long lease in which the sporting rights are expressly granted, and B then grants C an ultra-long sublease from which the sporting rights are withheld. C then has a lease of the land and B of the reserved sporting rights.

³² Para 3.25.

³³ Para 2.36.

³⁴ Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 s 69(1). This definition was carried forward from s 24(1) of the Salmon and Freshwater Fisheries (Protection) (Scotland) Act 1951.

³⁵ See eg *Stair Memorial Encyclopaedia* vol 11 para 802; Gordon, *Scottish Land Law* paras 9-02 and 9-03.

beyond the animals enumerated in the Night Poaching Act [1828]³⁶. The animals there are hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.³⁷ Apart from hares, which are ground game, the list consists exclusively of game birds. Indeed it is close to the definition of "game bird" in the Wildlife and Countryside Act 1981, which is "any pheasant, partridge, grouse (or moor game), black (or heath) game or ptarmigan".³⁸ The 1981 Act is of importance for present purposes, for it is an offence under the Act to kill any wild bird other than a game bird.³⁹ This means that a bird which is not a game bird within the 1981 Act cannot usually⁴⁰ be shot for sport – and therefore could not sensibly be treated as reserved for sport under a lease. If the definitions in the Acts of 1828 and 1981 are combined, the result is a core list comprising pheasant, partridge, grouse and black game,⁴¹ and to this may be added ptarmigan which appears only in the 1981 Act.⁴² Bustard, which appears in the 1828 Act but not in the 1981 Act or in other statutory definitions, should presumably be excluded on the basis that it cannot now lawfully be killed. The 1981 Act contains a further list of birds which, while not "game birds", can nonetheless be killed outwith the close season.⁴³ Originally this included capercaillie, and capercaillie (which do not appear in the 1828 Act) have been held in the sheriff court to be "game" within the Game (Scotland) Act 1832.⁴⁴ But the 1981 Act has since been amended to the effect of making capercaillie protected,⁴⁵ and they should presumably be excluded from our list.

5.21 For particular statutory purposes the rules that apply to game in the narrow sense are sometimes extended to certain other animals killed for sport. For example the Game (Scotland) Act 1832⁴⁶ makes it an offence to trespass on land during daytime

"in search or pursuit of game, or of deer, roe, woodcocks, snipes, quails, landrails, wild ducks, or conies ..."

Similarly, the Crofters (Scotland) Act 1993 reserves to the landlord under crofting tenure a right to take, not only game in the narrow sense, but also deer, rabbits, woodcock, snipe, wild duck, widgeon and teal.⁴⁷ But it seems improbable that the right reserved to a landlord under an ultra-long lease is so extensive, and certainly there is no authority to that effect.

5.22 **Exclusivity.** Normally the landlord's rights are exclusive. If the landlord can fish or shoot, the tenant cannot. But the Ground Game Act 1880 extends to any "occupier" the right to take or kill hares and other ground game.⁴⁸ The right is then shared between landlord and tenant. The statutory right was withheld from tenants holding under leases which were already in existence on 7 September 1880 and in terms of which the right to hares was

³⁶ Rankine, *Leases* p 490 n 74.

³⁷ Night Poaching Act 1828 s 13.

³⁸ Wildlife and Countryside Act 1981 s 27(1).

³⁹ Wildlife and Countryside Act 1981 s 1.

⁴⁰ But see the discussion below in the context of capercaillie.

⁴¹ As the 1981 Act definition makes clear, heath game and moor game, both included by name in the 1828 Act, are synonyms of, respectively, black game and grouse. Another word for black game is black grouse.

⁴² The core list of pheasant, partridge, grouse, black game and ptarmigan is also found in the Crofters (Scotland) Act 1993 sched 2 paras 11(h) and 13 in the context of the rights reserved to the landlord under crofting tenure.

⁴³ Wildlife and Countryside Act 1981 s 2(1) and sched 2 part I.

⁴⁴ *Colquhoun's Trs v Lee* 1957 SLT (Sh Ct) 50.

⁴⁵ The Wildlife and Countryside Act 1981 (Amendment) (Scotland) Regulations 2001 (SSI 2001/337).

⁴⁶ Game (Scotland) Act 1832 (also known as the Day Trespass Act) s 1.

⁴⁷ Crofters (Scotland) Act 1993 s 5(1) and sched 2 paras 11(h) and 13.

⁴⁸ Ground Game Act 1880 s 1. By s 8 "ground game" is defined to mean hares and rabbits.

reserved to the landlord.⁴⁹ More than 100 years later it seems undesirable to perpetuate what was obviously only a transitional arrangement. We suggest, therefore, that in the case of hares the landlord's reserved right should be subject to the rights of an occupier under the Ground Game Act. In all other cases the right to game and fishings would be exclusive.

5.23 **Recommendation.** We recommend that

27. (a) Where –

- (i) a right to take game or fish for freshwater fish is reserved from a qualifying lease or a superior lease (whether expressly or by implication), and**
- (ii) before the appointed day the head landlord registers a notice preserving such right,**

on that day the right should become a separate tenement in land.

(b) A right converted into a separate tenement should comprise a right of the same description, and be subject to the same terms and conditions as to its exercise and liability for damage, as specified in the lease from which it was reserved; and if or to the extent that there is no such specification, the right should comprise an exclusive right (subject to the Ground Game Act 1880) to take –

- (i) hares, pheasants, partridges, grouse, black game and ptarmigan, or, as the case may be**
- (ii) freshwater fish as defined in s 69(1) of the Salmon and Freshwater Fisheries (Consolidation)(Scotland) Act 2003**

(Draft Bill s 7 and s 68(1))

⁴⁹ Ground Game Act 1880 s 5.

Part 6 Compensation

Introduction

6.1 Conversion presupposes compensation. If the tenant is to become owner, the landlord is due a payment to reflect the rights that have been lost. The main value of a landlord's interest lies in the right to receive rent. Almost always, in the case of an ultra-long lease, there is no other value. This suggests that compensation should be measured by the capitalised value of rent. In both this report and the draft bill, compensation calculated in this way is referred to as a "compensatory payment".¹ Very occasionally a compensatory payment might not be enough. In unusual cases the landlord's reversionary interest may turn out to have a value over and above the entitlement to rent. Or additional payments may be provided for under the lease, such as premiums for granting a renewal, or increased rent following a rent review. Or again the lease may contain conditions designed to reserve development value. For such exceptional cases a further payment – an "additional payment" in the words of the report and bill – is needed.²

6.2 For consistency, and ease of use, the mechanics of payment should follow the rules set out in the 2000 Act in the context of feuduty.³ This means that both the compensatory payment and any additional payment would be collected by a notice served by the (former) landlord on the (former) tenant during the first two years after the appointed day.⁴ If the amount claimed was £50 or more the former tenant would have the option of paying by instalments, but the balance would fall due immediately in the event that the property was sold.⁵ In a departure from the 2000 Act, a landlord whose claim exceeded £500 would require to serve a preliminary notice, before the appointed day, alerting the tenant to the amount claimed.⁶ A tenant who considered the price too high could then have the lease exempted from conversion by registration of a notice of exemption.⁷ Claims of this amount are likely to be rare, and notices of exemption rarer still.

Compensatory payment

6.3 **Basis of calculation.** As already mentioned, the compensatory payment would be calculated by reference to the annual rent. In practice most rents are likely to be small – according to our survey, less than £5 in around two thirds of all qualifying leases.⁸ The obvious model for compensation is the treatment of feuduty under the 2000 Act and earlier

¹ Paras 6.3 ff.

² Paras 6.28 ff.

³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 part 3. For a detailed discussion, see Scot Law Com No 168 part 3.

⁴ The "appointed day" is the day on which all ultra-long leases are converted to ownership. It is the first Whitsunday or Martinmas which occurs two years after section 58 of the draft bill comes into force.

⁵ Paras 6.65–6.69.

⁶ Paras 6.48–6.51.

⁷ For notices of exemption see part 7.

⁸ Appendix C para 17.

legislation.⁹ Where feuduty was "redeemed" (ie extinguished by being bought out), the superior was entitled to be paid such sum as, if invested in two and a half per cent Consolidated Stock, would produce an annual sum equal to the feuduty. The idea was that the superior could exchange one investment for the other without disturbance to the income stream. If the case for conversion is that qualifying leases are quasi-feus, then there is obvious merit in applying to rent the rules which applied to feuduty.

6.4 As we pointed out in the discussion paper, it is possible to characterise the feuduty rules as unduly generous.¹⁰ When the rules were first introduced, in 1974, the price of two and a half per cent Consolidated Stock resulted in a feuduty "factor" (ie the figure by which the annual feuduty required to be multiplied in order to arrive at the redemption sum) of 6.3. Since 1974 there has been a steady rise in the price of Consolidated Stock with the result that the feuduty factor for the purposes of the 2000 Act was 21.40. In 1974 a feuduty of £5 could be redeemed for £31.50. Under the 2000 Act the compensatory payment for the extinction of the same feuduty was £107. Applying the feuduty model to a rent the factor would today be around 24 and the compensatory payment around £120. This suggests that the price of Consolidated Stock may no longer be a reliable measure of compensation. Admittedly it was re-used as recently as the 2000 Act, albeit in a context where consistency was required with the 1974 Act provisions. Further, the redemption formula has the merit of representing the cost of an asset which generates income at the same rate as the income which is being lost. The rise in the cost is simply a reflection of the fall in interest rates. Nonetheless it seems plain that a multiplier of 24 or so is considerably greater than the (pre-feudal abolition) value of a bare superiority – or, it may be assumed, of a bare reversionary interest under a 999-year lease – in the market place. One reason for this is that the multiplier assumes a trouble-free investment, and so takes no account of the cost and difficulty of collecting small sums of money on a regular basis. In ultra-long leases rents may not be collected at all.

6.5 In the case of leasehold conversion there is no earlier model which need be treated as binding.¹¹ The scheme for conversion of leases which operates in Northern Ireland uses a fixed multiplier of 12.¹² That is close to the multiplier of 8–10 suggested for feuduty by the Royal Institution of Chartered Surveyors in Scotland in written evidence to the Justice and Home Affairs Committee of the Scottish Parliament at stage 1 of the Abolition of Feudal Tenure etc. (Scotland) Bill and repeated in response to our discussion paper.¹³ Other consultees were more cautious, however, with a narrow majority supporting the adoption of two and a half per cent Consolidated Stock.

6.6 It would, of course, be possible to take a different approach altogether. In its response RICS argued that:

⁹ Land Tenure Reform (Scotland) Act 1974 ss 4–6; Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 9.

¹⁰ Scot Law Com DP No 112 para 3.10.

¹¹ However, it may be noted that under the 1954 Act scheme the multiplier for profit rent, in a case where the unexpired duration was 96 years or more, was 19.85. See Long Leases (Scotland) Act 1954 s 9 and sched 3.

¹² Ground Rents Act (Northern Ireland) 2001 s 5(1) and sched 1; Ground Rents (Multiplier) Order (Northern Ireland) 2002 (Statutory Rules No 228).

¹³ The evidence, which is dated 2 November 1999, is reproduced as part of the Stage 1 Report issued by the Justice and Home Affairs Committee on 9 December 1999.

"[C]ircumstances will vary between leases to such an extent that a fixed multiplier would be wholly inappropriate. Leases by their nature are varied and may or may not incorporate rent reviews and other rights which have financial implications. For example, where there is provision for rent review, a much higher multiplier might be justified as ... the income will not be eroded by inflation. Other issues which should be taken into account include the effect on adjoining land in the same ownership, giving rise to severance claims or compensation for loss of value of access rights."

6.7 The inexorable conclusion is that separate valuation is needed in respect of each and every lease. We are not persuaded by this line of argument. Whatever the position may be with leases generally, those leases which were granted for 999 years or similar periods tend to be short and in standard terms. We have not encountered a lease with provision for rent review – no doubt in part because most ultra-long leases were granted long before rent review clauses became common.¹⁴ And the duration of most of the leases under consideration means that few landlords can have been counting on the prospect of reversion. In a small number cases, of course, the position may be different, and a more nuanced approach desirable. We return to this subject later in the context of the additional payment.¹⁵ But for the overwhelming majority of leases a fixed formula seems sufficient. And such a formula, it is hardly necessary to add, would be much simpler, quicker and cheaper to operate than a system which required that the landlord's interest be individually valued.

6.8 The question remains as to whether the formula should be based on two and a half per cent Consolidated Stock or on a fixed multiplier. With some hesitation, we have come to support the former. This is partly for consistency with the rules for feuduty, and in deference to the views of consultees. Partly too it is acknowledgement of the fact that in the, admittedly rare, cases where conversion takes place on a later date – either because the lease was not registered until shortly before or after the appointed day or because a notice of exemption was registered but subsequently recalled – a fixed multiplier would not be appropriate. But it is also because a more generous figure strikes a better balance between the interests of landlord and tenant. To give more than is strictly necessary is an acknowledgement that the landlord may have lost more than the right to rent. The compensatory payment should thus be seen as covering loss of the landlord's interest as a whole.¹⁶ At the same time, however, the tenant is not unreasonably disadvantaged. On conversion the tenant's gain will exceed the landlord's loss, because the value of the landlord's interest to the tenant is greater than its value on the open market. That some of this "marriage value" should be shared with the landlord seems unexceptionable.¹⁷ It should also be borne in mind that, almost always, the amount payable by the tenant will be small whatever formula is used. A rent of £5 or less – the typical figure – would generate a liability in the region of £120, even on the basis of two and a half per cent Consolidated Stock. In the rare case where substantial sums were claimed – more than £500 – our scheme would

¹⁴ Nonetheless provision is made for the possibility of rent review at para 6.30 below.

¹⁵ Paras 6.43 and 6.44.

¹⁶ Compare s 31(1) of the draft bill with s 8(1) of the 2000 Act.

¹⁷ For "marriage" or "merger" value, see Scot Law Com DP No 112 para 4.28.

require prior notice by the landlord, giving the tenant the choice between paying the compensation or continuing with the tenancy.¹⁸

6.9 Non-monetary rents and royalty rents. The scheme presupposes a money rent. In around 1% of leases in our survey the rent, or part of the rent, was expressed in non-monetary form. This raises a valuation question which is best dealt with in the context of a claim for an additional payment. No compensatory payment will therefore be due if, or to the extent that, the rent is expressed in non-monetary form. Instead the landlord must claim an additional payment under rules considered later.¹⁹

6.10 In leases of minerals the rent is typically a royalty based on the tonnage extracted and so is both unpredictable and subject to fluctuation from year to year.²⁰ To find an average rent for the purposes of a compensation formula would be a challenging task which would risk random results. The difficulty is avoided by the proposal made earlier that mineral leases be excluded from conversion.²¹

6.11 *Cumulo* rent. Sometimes the original subjects of let have been divided, by assignation of a part. Our survey suggests that this may have occurred in more than half of all leases.²² So far as the rent is concerned, there are then four broad possibilities. Either

- (i) the rent has been apportioned among the leases by the landlord or with his express consent;
- (ii) the rent has been apportioned by the tenants (whether in the assignation or subsequently)²³ and the apportionment tacitly accepted by the landlord;
- (iii) the rent has been apportioned by the tenants without the consent of the landlord; or
- (iv) there has been no apportionment of rent.

6.12 In the first case the amounts apportioned form the rent due in respect of each part of the subjects. This is the equivalent, for rent, of formal allocation in the context of feuduty. The second case appears to produce much the same result. The original initiative of the tenants is accepted, with greater or lesser reluctance, by the landlord. Almost always this is by acceptance of rent in accordance with the apportionments. Thereafter the landlord is personally barred from disputing the manner of division.²⁴ In the case of feuduty this would have been informal apportionment and not formal allocation, but the distinction is unknown

¹⁸ Paras 6.48–6.51.

¹⁹ Para 6.28.

²⁰ Robert Rennie, *Minerals and the Law in Scotland* (2001) pp 110–1 and 122–6.

²¹ Paras 2.34 and 2.35. One criterion for such a lease is that the rent is wholly or partly calculated by reference to a royalty payment.

²² Of the 2608 leases in respect of which we have information on this point, division had occurred in 1503 cases (57.63%).

²³ Of the 1476 divided leases where our survey provided information on this point, there was informal apportionment in the assignations of 586 (39.7%).

²⁴ We owe this analysis to Mr Angus McAllister. For personal bar in the analogous case of consent to assignation, see Paton & Cameron, *Landlord and Tenant* pp 155–6.

for rent.²⁵ In the last two cases there is no accepted apportionment so that, by analogy with feuduty, a single rent remains due from the original subjects of let. There is, in other words, a *cumulo* rent, and the landlord is free to recover the full amount from any tenant of a part.

6.13 A *cumulo* rent needs to be allocated before the compensatory payment can be calculated.²⁶ Once again, the rules of the 2000 Act can be used.²⁷ Allocation is a matter for the landlord, and may be carried out in any reasonable manner. If the parts are of roughly the same size, equality would seem the obvious principle. Otherwise the landlord would need to have regard to relative area. Sometimes there will already have been an informal apportionment but which has not been accepted by the landlord.²⁸ The typical – and possibly the only – case is where the apportioned amounts are collected by a property manager or other third party and paid to the landlord as a single sum. The single payment disguises the apportionment and prevents the tacit approval of the landlord. Apportionments of this kind may be taken to be reasonable and should normally be followed by the landlord. Thus a landlord who discovers that payment of a single sum is not matched by the existence of a single tenant should make enquiries of the person making payment; and that person will be under a statutory duty to disclose all relevant information.²⁹

6.14 The statutory form of notice³⁰ to be served by the landlord shows, not merely the amount claimed, but also the amount of rent allocated by him on the other parts of the same subjects of let. It would be a defence to an action of payment that the allocation is unreasonable. A landlord who allocates too little on some former tenants and too much on others runs the risk of a successful challenge, and a corresponding loss of compensation, for the tenants who were allocated too little would have no liability to make up the shortfall.³¹

6.15 **Partially continuing leases.** In most cases there will be no difficulty in ascertaining the annual rent by reference to which the compensatory payment is calculated. The lease in question will have been extinguished and the annual rent will be the sum due under the lease or, where the rent is a *cumulo*, the sum allocated by the landlord. In some cases however a lease may not be wholly extinguished on the appointed day.³² Such a lease is

²⁵ For the distinction in the context of feuduty, see Scot Law Com No 168 paras 3.3–3.5.

²⁶ Allocation rather than apportionment is the term used in the bill.

²⁷ A small difference is that, whereas under the 2000 Act s 9(3) the former superior apportions the compensatory payment (ie the *cumulo* feuduty after application of the redemption multiplier), in the present scheme what is allocated is the rent itself. See draft bill s 36(1),(2). This is to take account of the fact that one of the leases might be exempt from conversion and will require a definite, and allocated, rent for the future. See s 36(5) of the draft bill.

²⁸ ie the third situation described earlier.

²⁹ Draft bill s 48.

³⁰ See sched 9 of the draft bill.

³¹ Where, however, one of the leases subject to the *cumulo* rent is an exempt lease the tenant of that lease can challenge the allocation made by the landlord by applying to the Lands Tribunal for an order fixing the rent for that lease for the future. See s 37 of the draft bill. That provision also allows the tenant of such a lease to seek a similar order where no steps have been taken by the landlord to fix the future rent.

³² Take the case where lease A is followed by sublease B of part of the subjects of lease A. Lease A is a qualifying lease in relation to the remaining subjects and a superior lease in relation to the subjects of sublease B. Sublease B is exempt (see part 7 of the report). On the appointed day lease A will continue in force in relation to the subjects of sublease B but will be extinguished in relation to the other subjects. Alternatively, the retained part of lease A may be exempt. This part would continue after the appointed day. On the appointed day lease B would be converted into ownership and lease A would be extinguished to the extent that it is a superior lease. See ss 1–3 and part 4 of the draft bill.

termed a "partially continuing lease" in the draft bill.³³ Here the annual rent due under the lease should be allocated between the extinguished part of the lease, for the purpose of calculating the compensatory payment, and the continuing part, for the purpose of calculating the rent payable in the future.³⁴ As with a *cumulo* rent, allocation is a matter for the landlord and may be carried out in any reasonable manner. Where the rent due under the lease was also part of a *cumulo* rent two allocations are required. The first is of the *cumulo* rent and the second is of the sum allocated to the lease as part of the *cumulo*. The statutory form of notice³⁵ shows the amount claimed together with details of the allocation including any allocation of the *cumulo*.

6.16 **Recommendation.** We recommend that

28. (a) **The compensatory payment for the extinction of the rights of a landlord under a lease should be such sum as, if invested in two and a half per cent Consolidated Stock on the day before the appointed day, would produce an annual sum equal to the annual rent due under the lease.**

(b) **If the rent payable under the lease is a *cumulo* amount extending to another lease or leases, the landlord should first allocate the rent among the leases in such proportions as are reasonable in the circumstances; and an allocation should be deemed reasonable if it follows an existing informal apportionment.**

(c) **Where the lease is a partially continuing lease the landlord should first allocate the rent, taking into account any allocation made under (b) above, between that part of the lease that is extinguished and that part of the lease that continues in such proportions as are reasonable in all the circumstances. The sum allocated to the part of the lease that is extinguished shall be the annual rent for the purposes of calculating the compensatory payment. The sum allocated to the part of the lease that continues shall be the rent due for that lease as from the appointed day.**

(d) **This recommendation does not apply if, or to the extent that, the rent under the lease is expressed other than in monetary terms.**

(Draft Bill ss 32, 35, and 36)

³³ See s 35 of the draft bill.

³⁴ Again, under s 37 of the draft bill, the tenant may apply to the Lands Tribunal for an order fixing the rent for the continuing part of the lease. An application may be made where the landlord has not taken steps to fix the rent or in response to an allocation.

³⁵ See sched 10 of the draft bill.

Compensation due only where claimed

6.17 Under the 2000 Act the superior must ask for compensation. Otherwise none was due, and the feuduty was extinguished without payment.³⁶ The claim was made in the form of a prescribed notice, served on the vassal,³⁷ and specifying the amount due. This was accompanied by a prescribed note explaining the reason for the claim and the rules for payment. Consultees were generally content that this procedure be adapted for present purposes. Only two³⁸ argued that the debt should be due without notice and that it should be for the tenant to seek out the landlord. It may be added that the scheme proposed is fully consistent with the compensation rules in respect of leasehold casualties.³⁹

6.18 If, as sometimes, the rent has already been informally "redeemed", typically by using the 1974 Act scheme for feuduty, no claim could be made by the landlord. For this and for other reasons the take-up of compensation claims is likely to be patchy. Often rent is so small as to be barely worth collecting. It may not in fact have been collected for many years. Sometimes also there is no identifiable landlord. In cases such as this it may be assumed that compensation will not normally be claimed. But where the rent is substantial, or at any rate has been regularly collected, landlords will presumably enforce their rights.

6.19 In the discussion paper we suggested that the landlord's notice should be served before the appointed day and not after, as in the 2000 Act.⁴⁰ This was to facilitate exemption. As will be seen, a tenant disappplies the scheme by registering a notice of exemption, and naturally this must be done before the appointed day.⁴¹ But in practice a tenant is unlikely to seek exemption unless significant compensation is being claimed. Requiring service before the appointed day was a means of allowing an informed choice; for if no notice was served, no compensation was being claimed and there was no need to seek exemption. The proposal had a number of disadvantages. It required that rent be redeemed before the appointed day, at a time when the lease was still in place. The person paying compensation might be different from the person who ultimately benefited from conversion. And if the lease was subsequently exempted from conversion, it would be necessary for the rent to be reinstated and arrears paid, and for the compensatory payment to be refunded. This affected not only the qualifying lease but superior leases as well.

6.20 We now propose to tackle the issue in a different way. A tenant is unlikely to seek exemption unless substantial sums are claimed. But in most cases the compensatory payment will be small or very small. If only small sums are being claimed, there is no reason to require service before the appointed day. Exceptional cases should not dictate the general rule. That rule should therefore be service after the appointed day, and with a cut-off point of two years, as in the 2000 Act. But if more than £500 is being claimed, the landlord must serve an additional notice before the appointed day. The details are considered later.⁴² Only a small number of claims is likely to be affected by this requirement.

³⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 8.

³⁷ The rules of service are discussed at paras 6.70–6.73 below.

³⁸ The Scottish Landowners' Federation and Mr B G Hamilton.

³⁹ Leasehold Casualties (Scotland) Act 2001 ss 2 and 3.

⁴⁰ Scot Law Com DP No 112 paras 3.12 and 3.13.

⁴¹ See part 7.

⁴² Paras 6.48–6.51.

The rules just described should apply, not only to compensatory payment, but to any additional payment as well.⁴³

6.21 We recommend that

29. A compensatory payment or additional payment is due if and only if the former landlord serves on the former tenant, within two years of the appointed day –

- (i) a notice in the prescribed form setting out the amount due and how it has been calculated and, in the case of *cumulo* rent or a partially continuing lease, information as to how the rent has been allocated; and**
- (ii) an explanatory note in the prescribed form.**

(Draft Bill ss 31(1)–(4) and 39(1), (2), (4))

Renewal premiums

6.22 Earlier we recommended that a renewal which the landlord is bound to grant should be counted for the purposes of determining the duration of a lease, and hence the eligibility for conversion.⁴⁴ Sometimes, however, renewal is granted only against payment of money. For example, in the so-called Blairgowrie leases (leases for 99 years, perpetually renewable) it is provided that the landlord

"binds and obliges herself and her foresaids at the expiry of the foresaid period of ninety-nine years to renew this Subtack for the like period of ninety-nine years upon the tenants paying one year's rent in addition to the rent then due ..."

6.23 Where, as usually, the renewal premium (*grassum*) is tied to the ground rent, it is likely to be very small – less than £1 in the example quoted above. Occasionally the amount due is larger. We found one example in which payment was a full year's rental value "whatever that may happen to be".⁴⁵ With renewable leases the tenant will usually need to count at least one renewal in order to bring the unexpired duration to the qualifying level for the purposes of conversion, and occasionally more than one will be required. This suggests both that compensation should be given for the loss of such renewal premiums as are required to reach the qualifying level, but also – in view of the very small number of cases, and the derisory sums often involved – that the method of calculation need not be very sophisticated.

6.24 In the discussion paper we offered two alternative approaches.⁴⁶ One was to treat renewal premiums as an additional rent, spread evenly over the period of the lease. So a premium of £10 payable for renewal every 99 years would be treated as an additional rent of

⁴³ For additional payment see paras 6.28 ff.

⁴⁴ See paras 2.23–2.26.

⁴⁵ This is the same measure as used in rental value leasehold casualties, for which see Scot Law Com No 165 paras 2.9–2.12 and n 28.

⁴⁶ Scot Law Com DP No 112 para 3.22.

£0.10 a year. This figure could then be added to the rent for the purposes of calculating compensation in the manner already described. The other was to calculate, on a case-by-case basis, the current value of the right to receive the premium on the date on which it is due. The first method has the merit of simplicity, while achieving a certain amount of rough justice. It favours the tenant if the next renewal is expected shortly and the landlord if it is still a long way off. The second is more accurate but more cumbersome. In many cases the expense of agreeing the calculation would exceed the compensation due.

6.25 Consultees were divided as to the merits of these approaches. A majority favoured the simple expedient of adding to the rent, but others were uneasy at possible unfairness, particularly in cases where the premiums were substantial. On further consideration we are inclined to accept the charge of unfairness in relation to large premiums, while remaining reluctant to impose a costly valuation exercise where the amounts involved are small. The solution seems to be to provide two different rules, depending on the size of the premium. Where the premium is small – say £100 or less – it would seem acceptable to add the averaged annual amount to the rent. But where the premium is larger, or uncertain (typically because tied to future rental value), a proper valuation will be required. This can most conveniently be incorporated into the scheme for additional payments described in the next section.

6.26 **Allocation of premiums.** In cases where there is a *cumulo* rent any premium is likely to be a “*cumulo* premium”, that is a single premium payable under two or more leases. Such a premium should be allocated between the leases before compensation may be claimed. An allocation should be made by the landlord using the scheme, with the necessary modifications, for the allocation of a *cumulo* rent.⁴⁷ Similarly, a premium payable under a partially continuing lease should be allocated between the extinguished part and the continuing part of that lease.⁴⁸ If the amount of the premium allocated to a lease or part of a lease is £100 or less, the averaged annual amount should be added to the annual rent for the purposes of calculating the compensatory payment. If the amount allocated exceeds £100, compensation may only be claimed under the additional payment scheme set out below.⁴⁹

6.27 We recommend that

30. (a) Where –

- (i) a lease contains an obligation on the landlord to renew the same from time to time at fixed periods and on payment of a premium not exceeding £100; and**
- (ii) the lease complies as to duration (including unexpired duration) with recommendation 2 only if it is renewed on one or more occasions;**

⁴⁷ See paras 6.11–6.14 above and s 36 of the draft bill.

⁴⁸ Para 6.15 and s 35 of the draft bill.

⁴⁹ Paras 6.28–6.47 .

the rent for the purposes of recommendation 28 should be deemed to be augmented by the amount of the premium divided by the number of years occurring between each renewal.

(b) For the purposes of calculating the amount of the premium under (a)(i) above or recommendation 31(d), where the premium is a *cumulo* premium or a premium payable under a partially continuing lease, the scheme for allocation of rent set out in recommendation 28(b) and (c) should apply with the necessary modifications.

(Draft Bill ss 33 and 38)

Additional payment: grounds

6.28 Introduction. Occasionally the compensatory payment will not be a sufficient measure of the landlord's loss. Such cases are likely to be rare; but except where the difference is too slight to be worthy of separate compensation, the landlord should be able to seek an additional payment from the tenant. In this section we isolate the particular grounds on which a further payment might be needed. These grounds are intended to be exhaustive, for an open category would invite speculative claims, create uncertainty, and lead to disputes. In the notice making claim to an additional payment it will be for the landlord to nominate, and to justify, the particular ground of claim.

6.29 Non-monetary rents. A non-monetary rent could not be subject to the mechanical formula used for compensatory payment.⁵⁰ Instead separate valuation is required. Non-monetary rents were found in around 1% of the leases in our survey. For example, in one lease six fat hens formed part of the rent. Another supplemented a low monetary rent with four bolls of good and sufficient oat farm meal. In two leases the rent included providing the services of a labourer for three days to work on the roads in a particular town. In cases such as these the claim of the landlord should be for an additional payment, proceeding on a valuation of the right. If a monetary equivalent of the rent can be agreed,⁵¹ the payment due would normally be derived by applying the formula for monetary rents based on the price of two and a half per cent Consolidated Stock.

6.30 Rent review. In ultra-long leases provision for rent review is rare but probably not unknown.⁵² At any rate the possibility ought to be acknowledged. Hence if the level of rent is to be reviewed at regular intervals, the likely consequences of that review must be built into any calculation of compensation. Its value will depend on market conditions, on the frequency of the review, and on whether the rent has recently been reviewed.⁵³

⁵⁰ Para 6.9.

⁵¹ As to which see the Long Leases (Scotland) Act 1954 s 19(a) (grain and other fungibles) (now repealed by 2000 Act sched 13), and the Local Government (Scotland) Act 1973 s 228 (fiars prices).

⁵² The Royal Institution of Chartered Surveyors in Scotland were of the view that rent review was sometimes provided for.

⁵³ For a statutory formula designed to accommodate rent review, see the Ground Rents Act (Northern Ireland) 2001 sched 1 para 5.

6.31 **Rent increase.** A rent might increase according to a fixed formula rather than by virtue of rent review. If so, the possibility of such increase should likewise found a claim for an additional payment.

6.32 **Renewal premiums exceeding £100.** A renewal premium of £100 or less is to be averaged on an annual basis and treated as additional rent for the purposes of the compensatory payment.⁵⁴ Premiums in excess of this figure require more sophisticated treatment, and the same is true of premiums involving uncertain sums (such as premiums tied to rental value on a particular date). Only those renewals needed to raise the lease to the qualifying duration are relevant. Hence if a lease granted for 99 years but renewable for further periods of 99 years on payment of £1000 has, on the appointed day, 30 years still to run, a single renewal would be sufficient to achieve the qualifying level of a lease of 175 years with an unexpired duration of 100 years. The additional payment to the landlord would therefore be the value on the appointed day of a right to receive £1000 in 30 years time. Once an assumption is made as to rates of interest, this is a straightforward calculation.⁵⁵

6.33 **Residual value of reversionary interest.** Occasionally the landlord's reversionary interest has a value over and above the income stream from rent. Whether this is so depends mainly on unexpired duration – on how long, in other words, the landlord must wait before repossessing the property. In a report prepared for our benefit, and for which we are grateful, the Royal Institution of Chartered Surveyors in Scotland suggested that 100 years was the crucial figure. In leases with a shorter unexpired duration the interest of the landlord might begin to acquire independent value, while for leases with more than 100 years to run no value could usually be attributed to the reversionary interest. The same threshold of 100 years was used in the 1954 Act for the purposes of assessing the need for compensation.⁵⁶ In the equivalent scheme for Northern Ireland the cut-off point is 50 years.⁵⁷ Under our proposals conversion will be available for any lease granted for more than 175 years and with an unexpired duration of more than 100 years.⁵⁸ Where a lease has an unexpired duration of around 100 years, the landlord's reversion may occasionally have a value in its own right. If so, an additional payment should be available for the landlord. A cut-off point seems necessary, however, if speculative claims are to be prevented. We suggest a figure of 200 years as sufficient to bring in any lease in which residual value might conceivably lie.⁵⁹ The numbers involved are small. Our survey found only 50 leases granted for more than 175 years and with an unexpired duration of less than 200 years – less than 3% of the total of ultra-long leases.⁶⁰ And of these small numbers there will be many instances in which the residual interest is valueless.

6.34 **Early termination.** Sometimes there is a right to bring the lease to an end before its normal expiry. This may be a break clause exercisable at regular intervals, or perhaps a right of redemption or resumption exercisable at the landlord's discretion. Under our scheme

⁵⁴ Para 6.22–6.27.

⁵⁵ For a discussion, see Scot Law Com No 165 paras 5.4 ff (and especially para 5.5).

⁵⁶ Long Leases (Scotland) Act 1954 ss 7 and 8.

⁵⁷ Ground Rents Act (Northern Ireland) 2001 s 3(4).

⁵⁸ Paras 2.13–2.21.

⁵⁹ This is the cut-off point in England and Wales for conversion without any possibility of compensation. See s 153 of the Law of Property Act 1925.

⁶⁰ Appendix C para 14.

rights of this kind are disregarded in the calculation of duration. A lease for 200 years with breaks at 20-year intervals is treated as having a duration of 200 years and not 20.⁶¹ But the right to terminate may itself be of value, at least if it can be exercised at will or within a reasonable period after the appointed day. In principle it should be capable of founding a claim for an additional payment. Its value may, however, turn out to be negligible if, as often, the right can be exercised only against payment.

6.35 An additional payment should be available only for rights within the full control of the landlord. A right to terminate on breach – irritancy or the equivalent – should not be included. Nor should a right of pre-emption. Pre-emptions are eligible for conversion into real burdens,⁶² and the need to match a purchaser's price will usually deprive them of independent value.

6.36 **Right to development value.** It is possible that leases, like feus, were occasionally granted cheaply on the basis that the property was used for some limited purpose only, such as the building of a church or a community hall. If so, the restriction served to guard the donation. The tenant took the land cheap but subject to a right of limited use. The undervalue might affect either the rent or the grassum, although the generally very low level of rents may make the former difficult to detect at least at this distance in time. Depending on the circumstances it may be possible to convert a restriction of this kind into a real burden, under rules already considered.⁶³ Otherwise it will be extinguished with the lease on the appointed day. The issue then becomes one of compensation.

6.37 The nature of the loss is readily understood. For as long as the lease remained in place, the development potential of the land could not be released without a discharge of the restriction. A discharge might be obtained either by agreement or by order of the Lands Tribunal. In either case money would be expected to change hands.⁶⁴ In losing the right to enforce the restriction the landlord is losing the contingent chance of payment in the event that the tenant wishes to develop the land. The solution for feus, in the 2000 Act, was to allow compensation for any development occurring in the first twenty years after the appointed day, provided that the superior had registered an appropriate notice before that day.⁶⁵ The complex provisions giving effect to this idea are, however, over-elaborate for present purposes, and it seems sufficient to allow loss of development value as a head of claim for an additional payment.⁶⁶ Definitions may be borrowed from the 2000 Act, and later we suggest that the claim should be subject to a ceiling, as under that Act.⁶⁷

⁶¹ Paras 2.27 and 2.28.

⁶² Para 4.12.

⁶³ Paras 4.42–47.

⁶⁴ The Lands Tribunal has power to award "a sum to make up for any effect which the title condition produced, at the time when it was created, in reducing the consideration then paid or made payable for the burdened property": see Title Conditions (Scotland) Act 2003 s 90(7)(b) which replaced an equivalent provision in Conveyancing and Feudal Reform (Scotland) Act 1970 (s 1(4)(ii)).

⁶⁵ 2000 Act ss 33–40. See further Scot Law Com No 168 paras 5.14–5.57.

⁶⁶ Para 4.56.

⁶⁷ Para 6.45.

6.38 **Recommendation.** We recommend that

31. A landlord should be entitled to an additional payment for any loss arising from the extinction on the appointed day of one or more of the following rights –

- (a) the right to a rent expressed in non-monetary terms;**
- (b) the right to a review of the rent;**
- (c) the right to an increase in the rent;**
- (d) the right to payment of a premium for renewal of the lease other than a premium mentioned in recommendation 30(a)(i), provided that the lease complies as to duration (including unexpired duration) with recommendation 2 only if it is renewed on one or more occasions;**
- (e) the right to the reversion of the lease at ish;**
- (f) the right to terminate the lease prior to the ish other than**
 - (i) a right of pre-emption, and**
 - (ii) a right of irritancy or other equivalent right; and**
- (g) the right to development value in circumstances where**
 - (i) the lease was granted subject to a condition which reserved the development value of the lease, and**
 - (ii) the rent or grassum for the lease was nominal in amount, or was significantly lower than if the lease had not been subject to the condition.**

(Draft Bill s 40)

Additional payment: amount

6.39 **Procedure.** As already mentioned, a claim for payment is initiated by service of a notice on the tenant, and this must be done within two years of the appointed day.⁶⁸ The notice sets out the ground of claim, the amount claimed, and an explanation of how that amount has been calculated.⁶⁹ If more than £500 is sought, a preliminary notice must also have been sent before the appointed day.⁷⁰ A tenant who accepts the claim can pay either in a lump sum or by instalments.⁷¹ Following the 2000 Act, a lump sum payment is due

⁶⁸ See para 6.2.

⁶⁹ See sched 12 of the draft bill.

⁷⁰ Paras 6.48–6.51.

⁷¹ Instalment payment is not, however, available for sums under £50.

within eight weeks of service.⁷² If, however, the tenant disputes the amount due – as may be common for claims based on a valuation – a period of negotiation will follow. If the original figure is rejected by the tenant, the landlord must send a second notice once a new figure is agreed.⁷³ A second notice is necessary to provide a starting point both for the instalment scheme, described later,⁷⁴ and for payment in a lump sum. If no election is made for instalments, the tenant would have to pay the full amount within four weeks of the second notice.⁷⁵ The matter can, if necessary, be referred to the Lands Tribunal, as under the 2000 Act⁷⁶ for an order fixing the additional payment.⁷⁷ In making an order the Lands Tribunal must, where appropriate, provide the former tenant with the option of paying by instalments in accordance with the instalment scheme set out in the bill.⁷⁸

6.40 Matters to be taken into account. The rights in respect of which a claim can be made are numerous and diverse. Nonetheless claims for additional payment are unlikely to be common in practice. Both factors argue against the provision of complex and sophisticated rules for the valuation of individual rights. Valuation is in any event an art and not a science. In most cases the amounts will be small, and the figure settled by negotiation. It may be helpful, however, to set out two general matters which should be taken into account in arriving at the appropriate figure.

6.41 The first is whether the landlord has any other entitlement to recover in respect of the loss. Primarily this refers to the compensatory payment itself, which may often be sufficient to cover the loss, not only of rent, but of other rights as well.⁷⁹ But it also refers to any right to recover an additional payment on a different ground. If the loss is already provided for in some other way, no additional payment will be due.

6.42 The second is the extinction of the obligations of the landlord. From the landlord's point of view, leasehold conversion extinguishes obligations as well as rights. There are gains as well as losses.⁸⁰ To assess net loss it is necessary to set off any gains.

6.43 Valuation of reversionary interest. More may be said as to the valuation of the reversionary interest. Here the basic principle seems clear enough. The landlord's loss is represented by the value which the interest would have on the open market as between a seller and a buyer both of whom are willing, knowledgeable and prudent,⁸¹ and on the basis that the lease will continue to its end.⁸² Following the *RICS Appraisal and Valuation Standards* (the "Red Book"), special sellers and special purchasers are both disregarded.⁸³

⁷² See 2000 Act s 8(5).

⁷³ This notice must be served within 5 years of the appointed day.

⁷⁴ Paras 6.65–6.69.

⁷⁵ The rules as to timing of payment are set out in ss 41(2) and 42(5) of the draft bill.

⁷⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 44(2).

⁷⁷ The application must be made within 5 years of the appointed day.

⁷⁸ See paras 6.65–6.69 and draft bill s 43.

⁷⁹ Para 6.8.

⁸⁰ Paras 4.71–4.72.

⁸¹ For a recent formulation to this effect, see Land Reform (Scotland) Act 2003 s 59(6). The words "knowledgeable and prudent" were removed from the section in question at stage 2 of the bill on the basis that removing the words would make no difference to the process of assessing market value of land (Minutes of the Justice 2 Committee of the Scottish Parliament, Meeting No 39, 5 November 2002).

⁸² This is broadly the test used for the conversion of leases in England and Wales, although the position there is complicated by the fact that the price is discounted. See Leasehold Reform Act 1967 s 9(1).

⁸³ *RICS Appraisal and Valuation Standards* (5th ed, 2003) practice statement 3.2.

A special purchaser is one who will pay more for the property on account of its special value to him. In the present context such a purchaser would usually be the tenant under the lease,⁸⁴ for the value of the combined interests of landlord and tenant exceeds the sum of the values of each interest when held separately.⁸⁵ A special seller is one who also owns adjacent land the value of which may be affected by the severance and loss of the principal land.⁸⁶ In fact a decline in value is not to be expected in the present case.⁸⁷ If a lease has at least 100 years to run, the landlord is unlikely to have been counting on the use of the land. Moreover, our scheme allows the preservation, as servitudes or real burdens, of any rights over the leased land which are for the benefit of neighbouring land which the landlord happens to own.⁸⁸

6.44 In most cases a substantial part of the value placed on the reversionary interest will be attributable to the rent, which is separately compensated through the (principal) compensatory payment.⁸⁹ To arrive at the additional payment, therefore, it will first be necessary to deduct the compensatory payment.⁹⁰

6.45 **Capping of claim for development value.** If, under the present law, a leasehold condition preserving development value were discharged by the Lands Tribunal, any compensation would be limited to "a sum to make up for any effect which the title condition produced, at the time when it was created, in reducing the consideration then paid or payable for the burdened property".⁹¹ The same limitation, it seems clear, should apply to the proposed additional payment for development value, as indeed it applies to the equivalent provisions in the 2000 Act.⁹² On the basis of current Lands Tribunal practice, the limitation would disregard inflation.⁹³ This is justifiable on policy grounds, as a means of taking the age of the conditions into account.⁹⁴ For the older a condition, the more benefit the landlord has already received and hence the less need for compensation. Further the older the condition the more likely that the landlord's interest has changed hands since the lease was first granted. It would be unusual for the price paid for that interest – then or now – to be materially affected by the existence of the condition. In other words the value of the burden to the landlord will not have caused an increase in the value paid for the landlord's interest that will justify taking inflation into account. Also, if inflation is taken into account, the

⁸⁴ See Leasehold Reform Act 1967 s 9(1) as amended by the Housing Act 1969 s 82. In the English scheme the special interest of the tenant is likewise disregarded.

⁸⁵ The difference between the two amounts – sometimes known as the "marriage value" or "merger value" – may nonetheless be taken into account to some extent in the calculation of market value, for a potential purchaser will be mindful of the possibility of a future higher bid from a sitting tenant.

⁸⁶ Strictly the position of the special seller is of relevance, not for the valuation of the leased property itself, but for the question of whether the landlord has suffered *additional* loss due to the effect on other land which he also owns. For the distinction see eg Land Clauses Consolidation (Scotland) Act 1845 s 61.

⁸⁷ Severance is also disregarded under the Land Reform (Scotland) Act 2003 s 59(7)(b)(iii).

⁸⁸ Paras 3.34 and part 4.

⁸⁹ Paras 6.3 ff.

⁹⁰ As just mentioned: see para 6.41.

⁹¹ Title Conditions (Scotland) Act 2003 s 90(7)(b) which replaced an equivalent provision in Conveyancing and Feudal Reform (Scotland) Act 1970 (s 1(4)(ii)).

⁹² Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 37(2).

⁹³ See *Manz v Butter's Trs and Others* 1973 SLT (Lands Tr) 2. For an analysis of current practice, see Scot Law Com No 168 paras 5.49–5.53.

⁹⁴ Scot Law Com No 168 para 5.46.

landlord will receive more than he would have been entitled to if there had been no discount.⁹⁵

6.46 **Date of valuation.** The date of valuation should be the date of the loss, or in other words the appointed day. The same principle rules in respect of the compensatory payment.⁹⁶

6.47 **Recommendation.** We recommend that

32. (a) The additional payment in respect of the extinction of a right mentioned in recommendation 31 should be the amount agreed between the parties following service of the notice as provided in recommendation 29 or, failing agreement, the amount fixed by order of the Lands Tribunal.

(b) In assessing the additional payment account should be taken of –

(i) the extinction, under recommendation 11, of the obligations of the landlord; and

(ii) the compensatory payment and any other entitlement of the landlord to recover in respect of the loss.

(c) Subject to (b), the additional payment in respect of a claim under recommendation 31(e) should be the value which the reversion would have on the open market as between a seller and buyer both of whom are willing, knowledgeable and prudent, on the assumption that the lease will continue to its term, but disregarding –

(i) possible bids by the tenant or other purchasers with a special interest; and

(ii) any depreciation in the value of other land owned by the landlord.

(d) The additional payment in respect of a claim under recommendation 31(g) should not exceed such sum as would make up for any effect which the condition produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the lease.

⁹⁵ Kenneth G C Reid, *The Abolition of Feudal Tenure in Scotland* (2003), para 9.17 and the example given there in the context of the reservation of development value to a superior.

⁹⁶ The price of two and a half per cent Consolidated Stock is calculated at the middle market price at the close of business last preceding the appointed day. See draft bill s 32.

(e) The rights lost should be valued as at the appointed day.

(Draft Bill ss 41–44)

Claims in excess of £500

6.48 Conversion is mandatory only for the landlord. A tenant who concludes that costs exceed benefits can opt out of conversion by registration of a notice of exemption not later than two months before the appointed day.⁹⁷ But exemption supposes foreknowledge. To make an informed choice the tenant must have some idea as to the amount of compensation that is likely to be required; and this information must be available before the appointed day. The only reasonable way in which information can be provided is by requiring the landlord to serve, before the appointed day, a preliminary notice giving an estimate of the compensation due.⁹⁸ This is in addition to the normal notice, served after the appointed day, which establishes the debt and results in payment.⁹⁹ In order to give the tenant a reasonable opportunity to take advice and, if necessary, to register a notice of exemption, the preliminary notice would require to be served well before the appointed day, and we suggest a period of six months.

6.49 In fact a preliminary notice would not be usually be necessary. It would not be necessary, for example, where compensation was being claimed from an intermediate tenant, because only the tenant under the qualifying lease is able to register a notice of exemption.¹⁰⁰ Nor would it be necessary where, as typically, the amount claimed was small, since it may be assumed that a small sum would always be an acceptable price for the acquisition of ownership. It is a difficult, and to some extent an arbitrary, decision as to when a sum ceases to be "small" for this purpose. A sum which is small to one person may seem large to another. The policy objective is to give fair notice to a tenant without at the same time imposing an unnecessary burden on the landlord. If the figure is set too low, the landlord will have the trouble and expense of serving a notice which is of little interest to the tenant. But if it is set too high the tenant might be faced with forced acquisition of the land at a price which he cannot afford. Balancing these considerations as best we can, we think that a threshold of £500 would be about right. The threshold would apply separately to compensatory payments and to additional payments. Hence a landlord could claim £450 in compensatory payment and a further £450 in an additional payment without having to serve a preliminary notice. But if an additional payment were claimed under more than one head, the heads would be aggregated. Except where a preliminary notice had been served a (former) landlord would be limited to £500 in any claim for compensatory payment or additional payment. In most cases, of course, the amounts involved would be much smaller.

6.50 As usual, the form of notice would be prescribed.¹⁰¹ The notice must state the sum that is claimed or the best available estimate of that sum. Since the amount payable would depend on valuation as at the appointed day¹⁰² – a day not yet arrived – the figure given is in

⁹⁷ See part 7.

⁹⁸ For our previous approach, and for the reasons for departing from it, see paras 6.19 and 6.20.

⁹⁹ Paras 6.17–6.21 (compensatory payment) and 6.39 (additional payment).

¹⁰⁰ Para 7.3.

¹⁰¹ See draft bill scheds 14 and 15.

¹⁰² Para 6.45.

practice likely to be an estimate. The landlord is not bound by this figure. After the appointed day he could claim either more or less. But if the estimate was unreasonable – if, for example, it was set unjustifiably high in the hope of persuading the tenant to opt out – the notice would be invalid and the landlord restricted to a claim of £500. Service¹⁰³ of the notice would be accompanied by an explanatory note, again in prescribed form, which would explain its status and the availability of exemption.

6.51 We recommend that

33. Any claim against the former tenant under a qualifying lease in respect of –

(i) a compensatory payment, or

(ii) an additional payment

should be restricted, in each case, to a maximum of £500 unless, not later than six months before the appointed day, the person making the claim served on the tenant a notice giving warning of the prospective claim.

(Draft Bill s 45)

Intermediate leases

6.52 In most of the properties affected by the scheme there is only a single landlord and a single tenant.¹⁰⁴ Where intermediate leases exist, however, the position becomes more complicated. Take the case where A, the owner of land, leases to B for 999 years, who subleases to C for 900 years, who subleases to D for 899 years. Each tenant pays rent to his landlord. How is the compensation scheme to operate in such a case?

6.53 So far as the compensatory payment¹⁰⁵ is concerned, two possibilities seem available. One would be for each landlord to claim from D (the future owner) compensation calculated in respect of the "profit" rent only, ie of that part of the rent due to him which exceeds the rent due to his own landlord. So if B paid £10 to A but collected £15 from C, B's profit rent would be £5. The other possibility would be for each landlord to claim the full amount from his own immediate tenant, leaving it for that tenant to claim further down the line. Thus A would claim from B on the basis of a rent of £10, B from C on the basis of a rent of £15, and so on. A number of considerations suggest that this second solution is preferable. One is that it takes proper account of the fact that some of the intermediate rents may no longer be claimed. If B does not in practice pay to A, then B's real profit rent – and hence his real loss on redemption – is £15 and not £5. If he can only claim for £5, then – on the basis that A will not in fact make a claim – the subtenants will have got off too lightly. Another factor is the possible difficulty of identifying the qualifying subtenant. Occasionally, too, there may not be a profit rent at all. B may have sublet for less than he pays to A. In

¹⁰³ For service, see paras 6.70–6.73.

¹⁰⁴ Our figures suggest that there are intermediate leases in only around one fifth of cases.

¹⁰⁵ For compensatory payment, see paras 6.3 ff.

such a case the first solution would not be workable. Finally, there is the question of consistency with the 2000 Act, which allows intermediate superiors to claim in full from their immediate vassals.¹⁰⁶ Most consultees agreed that landlords should claim only from their immediate tenants.¹⁰⁷

6.54 Sometimes the gain which corresponds to the landlord's loss is received, not by the immediate tenant, but by the tenant under the qualifying lease (D in the example). The essential distinction is between loss of rent and loss of other rights. The former is of benefit to the immediate tenant, in the sense that that tenant no longer has liability for rent. Hence any claim which is based on loss of rent may appropriately be made against the immediate tenant – a principle which covers not only compensatory payment, as already seen, but also those elements of a claim for additional payment which are concerned with rent.¹⁰⁸ The immediate tenant may then have a corresponding claim against the subtenant. The position is different in relation to the other rights for which an additional payment may be due.¹⁰⁹ If, for example, a landlord¹¹⁰ claims for loss of the reversionary interest, the corresponding gain – ownership of the land – accrues only to the tenant under the qualifying lease. Hence it is against that person that the claim for additional payment should be directed.¹¹¹

6.55 We recommend that

34. A claim for compensatory payment or additional payment should be made –

- (i) in the case of a claim under recommendation 31(e)–(g), against the former tenant under the qualifying lease, and**
- (ii) in any other case, against the immediate former tenant of the person making the claim.**

(Draft Bill ss 31(2) and 39(2), (3))

Crystallisation of liability

6.56 Compensation is payable by the person who was tenant immediately before the appointed day to the person who was landlord immediately before that day; for only those parties are affected by the gains and losses consequent on conversion.

¹⁰⁶ Scot Law Com No 168 para 3.43.

¹⁰⁷ The same rule would apply in respect of renewal premiums of £100 or less (for which see paras 6.24–6.25). So if A leases to B and B subleases to C, and both head lease and sublease are renewable every 99 years on payment of a premium of £100 or less, the rent of each lease is increased by the premium averaged over 99 years. This means that, while B must pay A for a renewal that he no longer needs, he has an equivalent claim against C.

¹⁰⁸ ie paras (a)–(d) of recommendation 31 (para 6.38).

¹⁰⁹ ie paras (e)–(g) of recommendation 31 (para 6.38).

¹¹⁰ Normally only the head landlord would have a claim, but occasionally the real loss – and hence the claim – would lie with an intermediate landlord (as where A leases to B for 999 years and B subleases to C for 200 years).

¹¹¹ The same principle applies in the 2000 Act (s 35(1)) in respect of compensation in respect of development value burdens.

6.57 A difficulty, particularly in relation to the tenant, is that the interest may be in the course of changing hands. The tenant's interest under a lease is transferred by a written assignation, signed and delivered by the outgoing tenant, and registered in the Land Register by the acquirer.¹¹² Until registration the seller remains tenant, as a matter of strict law. But in practice the acquirer may already be in possession and paying rent. Completion of title, it should be emphasised, is beyond the control of the seller. If the acquirer delays registration, there is nothing that the seller can do; and an acquirer who wished to avoid paying compensation might delay registration until after the appointed day. This difficulty can be met – as it was met under the 2000 Act¹¹³ – by defining "former tenant" as including a person who has right to the tenant's interest but has not completed title. The concept of "having right" to land is familiar from the legislation on deduction of title,¹¹⁴ from the 2000 Act, and from the 2003 Act.¹¹⁵ It signifies a person holding on an unregistered conveyance. An acquirer with a delivered assignation would be a "former tenant" under this definition despite the fact that the assignation had not been registered. If more than one person comes within the definition – as for example in cases with a sequence of unregistered assignees – the latest such person would be treated as the former tenant.¹¹⁶ If the tenant died before the appointed day, liability would attach to his estate as a matter of general law.¹¹⁷

6.58 A uniform approach requires that the same extended definition be used for "former landlord", as under the 2000 Act.

6.59 In some cases our proposals may cause difficulties for landlords. A former landlord who relies on the property registers will, occasionally, be misinformed as to where liability lies. But it may be assumed that a person on whom a notice is wrongly served will not be slow to dispute liability, and a landlord who has not left everything to the last minute should have ample opportunity to re-serve on the right person. In order to assist landlords, a person on whom a notice was mistakenly served should be under a statutory duty to disclose the name and address of the proper tenant or, failing that, such other information as might enable the proper tenant to be traced.¹¹⁸

6.60 Liability might not be disputed if the notice is only a preliminary document warning of a possible claim in excess of £500.¹¹⁹ This is because such a notice is not in itself a demand for payment. It is true that the explanatory notes accompanying the notice state that "if you have sold or transferred the property and are no longer the tenant, please give this notice to the new tenant".¹²⁰ But not everyone will comply, and there is a risk that service on the wrong person will not come to the landlord's attention. In that case the notice would be ineffective. Here the landlord seems in greater need of protection than the tenant. In relation to a preliminary notice (only), therefore, a landlord should be able to rely on the

¹¹² Reid, *Property* para 657.

¹¹³ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 16(1).

¹¹⁴ Conveyancing (Scotland) Act 1924 ss 3–5.

¹¹⁵ Title Conditions (Scotland) Act 2003 s 123.

¹¹⁶ This refers to sequential plurality. If two or more people acquired the tenant's interest *pro indiviso*, they would together count as the "former tenant". See para 6.61 for the distribution of liability.

¹¹⁷ If by the appointed day an executor had already been confirmed, he would "have right" to the tenant's interest by virtue of s 14(1) of the Succession (Scotland) Act 1964 and so would be a "tenant" within our definition.

¹¹⁸ Section 49 of the draft bill. An equivalent duty is imposed by s 15 of the 2000 Act.

¹¹⁹ For which see paras 6.48–6.51.

¹²⁰ Draft bill scheds 14 and 15.

register. If he serves on the person who is registered as tenant, then he has done enough. A notice that is "wrongly" served will usually be passed on to the current tenant. Where this is not done, the current tenant is in effect being penalised for his failure to register.

6.61 Sometimes there are joint tenants, such as a husband and wife. In that case all co-tenants will be the "former tenant" under the definition, and all will be liable for payment of compensation. We suggest that, in a question with the former landlord, liability ought to be joint and several, but with an underlying liability based on the size of the *pro indiviso* share. Any co-owner could be called upon to pay the former landlord, but would then have a right of relief against fellow co-tenants.¹²¹

6.62 We recommend that

35. (a) For the purposes of compensation, "former landlord" and "former tenant" should mean the person who, immediately before the appointed day, has right to the interest of the landlord or, as the case may be, of the tenant (and where more than one person comes within this description, the person who has most recently acquired such right).

(b) Where a person on whom a notice is served under recommendation 29 is not the former tenant that person shall be under a duty to disclose to the former landlord the identity and address of the former tenant or failing that, such other information as might enable the former tenant to be traced.

(c) A preliminary notice under recommendation 33 should be validly served if it is served on the person who is the registered tenant under the qualifying lease.

(d) Where the interest of a tenant is held by two or more persons as common property –

(i) any liability to pay compensation should be their joint and several responsibility; but

(ii) as among themselves they should be liable in the proportions in which the interest is held.

(Draft Bill ss 45(2), 49, 52, and 68(1))

Time scale

6.63 There will be a gap, perhaps of two years, between the passing of the legislation and the appointed day. This will give the landlord time to investigate the rent, including any *cumulo* rent, and to make the necessary administrative arrangements for serving notices. The obligation on any third party collector¹²² will be in force from this time. If more than £500

¹²¹ The rule is the same under the 2000 Act: see s 16(4).

¹²² See para 6.13.

is being claimed, the landlord must serve a preliminary notice at least six months before the appointed day.¹²³ Rent is abolished on the appointed day itself, along with the other rights and obligations arising under the lease, and claims for compensation can then be made at once. Well-prepared landlords are likely to serve a notice as soon as possible after the appointed day, for late service means late payment, and there is no provision for interest. But in all events all notices claiming payment must be served within two years of the appointed day.¹²⁴ Service constitutes the debt. Except where an instalment scheme is in force, the former tenant must pay within eight weeks,¹²⁵ or within four weeks where a second notice has been served in respect of additional compensation.¹²⁶

Enforcement

6.64 As well as being a personal debt of the tenant, rent is (through the landlord's hypothec) secured on moveables brought on to the land.¹²⁷ Further, until recently non-payment could lead to irritancy of the lease, but irritancy was abolished for most ultra-long leases by the Leasehold Casualties (Scotland) Act 2001.¹²⁸ After the appointed day there will be no lease to irritate, and the landlord's hypothec will similarly be disapplied. Thus the compensation due by the former tenant will be an ordinary, unsecured debt.¹²⁹ This has the effect of taking the payment out of the system of land tenure and conveyancing, and making a clean break with the leasehold antecedents of the new title.

Payment by instalments

6.65 For some tenants, at least, the obligation to pay compensation will be unwelcome and unexpected, and may cause financial hardship. An instalment scheme provides an obvious means of relief.

6.66 The scheme set out in the 2000 Act can readily be adapted.¹³⁰ It would work as follows. Any compensation of £50 or more will qualify for payment by instalments. For this purpose compensatory payment and additional payment are viewed separately, so that if a former landlord served notices claiming £40 by way of compensatory payment and a further £150 as additional payment, only the latter could be paid by instalments. The instalment scheme is tiered. Where compensation is between £50 and £500 there would be 5 instalments payable on the next 5 term days of Whitsunday (28 May) and Martinmas (28 November) (ie over a period of 2½ years); where it is between £501 and £1000 there would be 10 instalments payable on the succeeding 10 term days (5 years); where it is between £1001 and £1500 there would be 15 instalments payable on the succeeding 15 term days (7½ years); and where it is more than £1500 there would be 20 instalments

¹²³ Paras 6.48–6.51.

¹²⁴ Draft bill ss 31(2) and 39(2).

¹²⁵ Draft bill ss 34 and 42.

¹²⁶ Draft bill s 43(5). A second notice is needed where the tenant disputes the sum originally claimed, and the amount due is then settled by agreement. See para 6.39.

¹²⁷ See generally Paton & Cameron, *Landlord and Tenant* pp 144–5. See also the changes made to the landlord's hypothec by s 194 of the Bankruptcy and Diligence (Scotland) Bill currently going through the Scottish Parliament.

¹²⁸ Leasehold Casualties (Scotland) Act 2001 ss 5 and 6.

¹²⁹ The rule is the same for compensation due under the 2000 Act. See Scot Law Com No 168 para 3.21.

¹³⁰ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 10 and sched 3.

payable on the succeeding 20 term days (10 years). The instalments would be equal instalments or as equal as can be. To provide for interest would be to turn a simple scheme into a complex one; but in recognition of the administrative and other costs for the former landlord we propose a surcharge amounting to 10% of the total compensation. This would be payable at the time when the former tenant elects to pay by instalments, and could not be recovered if the scheme were later abandoned.

6.67 Where the payment requested – whether as compensatory payment or additional payment – is £50 or more a former landlord must serve with the notice an instalment document.¹³¹ If, in the case of additional payment, a second notice is served, following a definitive decision on the amount due,¹³² an instalment document must accompany that notice as well. Failure to comply with this rule will invalidate the notice in question and (unless the correct documents are re-served) excuse payment by the former tenant. Prior to service the former landlord must complete the document with details of the compensation, the number of instalments, the dates of payment, and the amount of the surcharge. Explanatory notes (in a statutory form) should be attached to the document. On receipt, the former tenant must sign, date and return the instalment document, along with the 10% surcharge. If this is not done within the period allowed for payments – 8 weeks in the normal case but 4 where a second notice is served in respect of an additional payment¹³³ – there is no entitlement to pay by instalments.

6.68 Once an instalment scheme is in place, the former tenant must make the stipulated payments on each succeeding term day. If an instalment is late by more than 6 weeks, the scheme is deemed abandoned and payment is due in full. There is of course nothing to stop the former tenant from paying in full at any time. Further, if the property is sold, payment in full is due not later than a week after the former tenant ceases to be owner.¹³⁴

6.69 We recommend that

- 36. (a) Where the compensation due as**
- (i) compensatory payment, or**
 - (ii) additional payment**

is £50 or over, the former landlord should serve an instalment document with the notice in which payment is claimed. If this is not done, the notice should have no effect.

- (b) The document should specify –**
- (i) the compensation due**

¹³¹ For which see draft bill sched 16.

¹³² Para 6.39.

¹³³ Para 6.63.

¹³⁴ This reproduces the rule which was formerly in s 5 of the Land Tenure Reform (Scotland) Act 1974 by which redemption of feuduty occurred if the feu was sold.

- (ii) the number of instalments
- (iii) the amount of each instalment
- (iv) the date of the first and subsequent payments
- (v) the amount of the surcharge, and
- (vi) have explanatory notes attached.

(c) A former tenant who wishes to pay by instalments should sign, date and return the instalment document, along with the surcharge, within the period allowed for payment.

(d) The instalments should be determined in accordance with the following table –

<i>Compensation due</i>	<i>Number of instalments</i>
between £50 and £500	5
between £501 and £1000	10
between £1001 and £1500	15
more than £1500	20

(e) The instalments should be equal instalments payable half yearly at Whitsunday and Martinmas beginning at the next term day.

(f) The unpaid balance should become immediately due and payable if –

- (i) an instalment is unpaid for 6 weeks, or
- (ii) following sale, the former tenant ceases to be owner of the property.

(Draft Bill ss 31(5), 39(5), 43(4), and 46)

Service

6.70 Liability depends on service of a notice; and once a notice is served, the date of service is the starting point both for the period allowed for payment or return of the instalment document (4 weeks or 8 weeks), and for the quinquennial prescription.¹³⁵ Following the 2000 Act,¹³⁶ we suggest that service should be effected by delivery or by registered post or recorded delivery. Delivery involves handing the documents personally to

¹³⁵ For prescription see para 6.74.

¹³⁶ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 11 and sched 4.

the former tenant. If the lease was held *pro indiviso*, separate service is needed for each co-tenant.¹³⁷ The date of service would be the date of delivery or of posting.

6.71 If post is used, the notice should be sent to the former tenant's home, place of business or ordinary postal address (or to the most recent known such address). Documents which are returned marked undelivered could be formally re-served on the Extractor of the Court of Session. A postal receipt coupled with a short prescribed certificate signed by the sender would be sufficient evidence of service. Alternatively, a prescribed acknowledgement could be signed by the former tenant.¹³⁸

6.72 Where a notice is delivered or posted to the wrong person or to the wrong address it will have to be served again. There is no reason why a notice cannot be re-served on a number of different occasions provided the time limit for service has not expired.

6.73 We recommend that

37. (a) Notices under recommendations 29, 33 and 36 should be served on the former tenant –

- (i) by delivery, or**
- (ii) by registered post or recorded delivery to the former tenant's place of residence, place of business or ordinary postal address (or to the most recently known such address).**

(b) If a notice sent by post is returned marked as undelivered, it should be competent for it to be re-served on the Extractor of the Court of Session.

(c) The following should be sufficient evidence of service –

- (i) a certificate signed by the sender or his agent and accompanied by a postal receipt, or**
- (ii) an acknowledgement signed by the former tenant, or**
- (iii) an acknowledgement of receipt by the Extractor.**

(d) The date of service should be the date of delivery or, as the case may be, of posting.

(e) In paragraph (a) notice includes an instalment document and former tenant includes tenant.

(Draft Bill s 47)

¹³⁷ Draft bill s 52(2).

¹³⁸ Draft bill s 47(3) and sched 17.

Negative prescription

6.74 Rent prescribes after five years.¹³⁹ The same rule should apply to the obligation to make a compensatory payment or additional payment.¹⁴⁰ It will be necessary to amend the Prescription and Limitation (Scotland) Act 1973 to make this clear.¹⁴¹ Our recommendation therefore is that

38. The obligation to make a compensatory payment or additional payment should prescribe after five years.

(Draft Bill s 50)

Unpaid rent

6.75 Unpaid arrears of rent are unaffected by our proposals. A person who was liable for arrears before the appointed day will continue to be liable after that day. The prescribed notices include a space for claiming arrears.¹⁴² In the absence of a landlord, the landlord's hypothec would cease to be available. Any rent which has accrued but is not yet due should be deemed to become due on the appointed day itself.¹⁴³ Thereafter there would be no further liability for rent.

Leasehold casualties

6.76 Until recently tenants under some ultra-long leases were subject to casualties. Casualties were obligations to pay money (other than rent) at certain intervals, regular or irregular – for example, every 19 years, or on the assignation of the lease. However, leasehold casualties were abolished on 10 May 2000 by the Leasehold Casualties

¹³⁹ Prescription and Limitation (Scotland) Act 1973 s 6 and sched 1 para 1(a)(v).

¹⁴⁰ But where the amount of the additional payment is fixed by the Lands Tribunal, the order will set up the obligation to pay. The order will be subject to the rules of prescription that apply to other orders of the Tribunal. See Prescription and Limitation (Scotland) Act 1973 s 7.

¹⁴¹ Draft bill s 50.

¹⁴² Draft bill scheds 9–11.

¹⁴³ Draft bill s 4(3).

(Scotland) Act 2001.¹⁴⁴ The Act made provision for compensation and no separate provision is needed here.¹⁴⁵ The legislation applied to all leases granted for a period of not less than 175 years and so will cover all the leases which qualify for our scheme.¹⁴⁶

¹⁴⁴ Leasehold Casualties (Scotland) Act 2001 ss 1(1) and 10(1). The Act implemented our *Report on Leasehold Casualties* (Scot Law Com No 165, 1998).

¹⁴⁵ Leasehold Casualties (Scotland) Act 2001 ss 2 and 3 and scheds 1 and 2.

¹⁴⁶ Leasehold Casualties (Scotland) Act 2001 s 1(1). The further limitation, that the lease must have been granted before 1 September 1974, was due to the fact that leasehold casualties could not be imposed after that date. See Land Tenure Reform (Scotland) Act 1974 s 16.

Part 7 Notices of exemption

Introduction

7.1 Earlier we discussed, and accepted, the principle that a tenant can opt out of conversion.¹ In this short part we consider how an exemption scheme might work.

Exemption

7.2 **Publicity.** The working assumption is that, on the appointed day, every lease which qualifies will be converted into ownership by statute, and the Land Register amended accordingly. If, therefore, a particular lease is to be exempted from conversion, the exemption process must be sufficiently public to alert the Keeper, the landlord under the lease, and any third party who comes to deal with the property. As elsewhere in our proposals, this seems best achieved by a notice, served on the landlord, and registered in the Land Register or Register of Sasines.

7.3 **Tenant under the qualifying lease.** Only a tenant can opt out. Conversion is mandatory for the landlord.² Further, if, due to subletting, there is more than one lease and hence more than one tenant, only the tenant under the qualifying lease can procure exemption. A person holding under an intermediate lease, after all, has little either to lose or gain from conversion. He is most unlikely to be exposed to a substantial compensation claim, which is the main justification for opting out. And a person with such a modest stake in the property should not be able to deny the qualifying tenant the opportunity to become owner.

7.4 **Notice.** Opting out requires a notice in the prescribed statutory form.³ This will describe the property and identify the lease and the current landlord and tenant. If there are intermediate leases, the landlords of those leases should also be identified.

7.5 **Service.** Exemption affects the landlord as well as the tenant. It means that the status of landlord is retained and that rent continues to be due; and, immediately and practically, it removes the need for notices for the conversion of leasehold conditions into real burdens or for claims for compensation. It is important, therefore, that the landlord has early warning that exemption is being sought. The tenant should be required to send a copy of the notice. If there are intermediate leases, the landlords under those leases should likewise be notified. The rules of service may be modelled on those already recommended for conversion of leasehold conditions.⁴ Service would be by post, and before registration. The notice would be accompanied by an explanatory note in a prescribed form, explaining

¹ Paras 3.4–3.8.

² Para 3.1.

³ Draft bill sched 18.

⁴ Para 4.60. This in turn is modelled on the rules in ss 41(3), (4) of the 2000 Act. Since money is not being claimed, it is not necessary to require the greater formality which applies in the case of compensatory and additional payments (paras 6.70–6.73).

the background to the notice and its implications for the recipient. Normally the tenant will know his immediate landlord but is likely to be less certain about landlords further up the chain. An inquiry of the immediate landlord may produce the necessary information. Alternatively, the tenant should be entitled to rely on the Land Register or Register of Sasines, thus ensuring that any disadvantage falls on the landlord who chose not to register and not on the tenant who instructed a search.⁵ Service is excused in the rare case where it is not reasonably practicable – typically because the landlord has disappeared and is untraceable. The notice will give details of service and will be signed only after those details are completed. If service was not practicable, the reasons must be explained.

7.6 Registration. Exemption is completed by registration in the Land Register or Register of Sasines. Since the lease is to continue, registration should be against the interest of the tenant and not of the landlord.⁶ In this way the exemption will be obvious to any third party coming to deal with the lease. Registration must take place before the day on which conversion would otherwise occur, that is to say, before the appointed day. Further, to protect the landlord from incurring the trouble and expense of registering notices of various kinds only to discover, at the last minute, that the lease has been exempted, the final permitted day for registration of a notice of exemption should be two months before the appointed day.⁷ Thereafter it would be too late for exemption, and a landlord could make the necessary preparations secure in the knowledge that conversion will go ahead.

7.7 Effect. For as long as a notice of exemption has been registered and not recalled, conversion is suspended. Hence if, on the appointed day, a notice of exemption is in force in respect of a lease, no conversion will occur and the relationship of landlord and tenant will remain in place. A qualifying lease which is exempt from conversion is termed an exempt lease in the draft bill.⁸

7.8 Sublease of an exempt lease. If an exempt lease is assigned it remains exempt. A sublease which fulfils the criteria for conversion should be treated in the same way and become an exempt lease on conversion.

7.9 Recommendation. We recommend that

- 39. (a) A qualifying lease should be exempt from conversion for as long as a notice of exemption is registered and has not been recalled.**
- (b) A notice should be registrable only –**
- (i) by the tenant under the qualifying lease, and**
 - (ii) not later than two months before the appointed day.**
- (c) A notice should be registered against the interest of the tenant under the qualifying lease.**

⁵ A similar rule applies to the preliminary notice for compensation claims in excess of £500. See draft bill s 45.

⁶ Compare here the rule for notices of conversion of leasehold conditions, discussed in para 4.64.

⁷ However, for cases where the application for registration is refused by the Keeper, see para 8.12.

⁸ Section 53(1)(a).

(d) Except where it is not reasonably practicable to do so, a copy of the notice (and explanatory note) should, before registration, be sent by post to –

(i) the landlord under the qualifying lease, and

(ii) the landlord under any superior lease.

(e) It should be sufficient compliance with (d) if the notice is sent to the person who is registered as landlord.

(f) A sublease of an exempt lease should on registration also be exempt from conversion.

(Draft Bill ss 53, 54, 56 and 58)

Recall

7.10 Introduction. The importance of recall was stressed by a number of consultees. A decision to opt out, it was said, should not be a decision for ever. A future tenant might see matters differently, or be more willing (or able) to make the compensatory payment. In that event it should be possible to recall the exemption and proceed to conversion. Indeed, if exemption was irrevocable it would be almost never used. We accept those views. In principle, an exemption should be capable of being recalled.

7.11 Notice of recall. As with the original exemption, recall seems best achieved by service and registration of a notice in appropriate terms. Broadly the same rules would apply. Thus the notice of recall would follow a prescribed form.⁹ It would be served (together with an explanatory note) on the immediate landlord and on the landlord under any superior lease. For this purpose the tenant could rely on the information contained on the register. Following service, the notice would be signed, and registered against the tenant's interest.

7.12 Unexpired duration exceeding 100 years. In general there seems no reason to restrict the period within which an exemption might be recalled. Thus, if, on the appointed day, a lease has still 800 years to run, it would be competent to register a notice of recall for many years into the future. And subject to what is said below,¹⁰ recall would be permitted before the appointed day as well as after. One restriction, however, seems necessary. Ordinarily, a lease is eligible for conversion only if its unexpired duration exceeds 100 years. This is because 100 years marks the point at which the landlord's reversionary interest may begin to acquire value, and hence the boundary between quasi-ownership and lease proper. Since recall leads to conversion, it would follow that recall should not be available where this durational requirement is no longer satisfied. Thus if a notice of exemption is registered in respect of a lease which, on the appointed day, has 150 years left to run, recall would be restricted to a period of 50 years.

⁹ Draft bill sched 19.

¹⁰ Para 7.14.

7.13 **Effect.** On registration of a notice of recall, the lease would once more become eligible for conversion. Conversion could not, however, happen at once. The landlord would need time to prepare and to take advice; and if he wished to convert any conditions of the lease into real burdens, the relevant notice would have to be registered, or an application made to the Land Tribunal, while the lease was still in existence.¹¹ We think that a period of six months would be sufficient for this purpose.¹² This means that conversion would take place on the first Whitsunday or Martinmas falling at least six months after the registration of the notice of recall. For the purposes of other provisions of the legislation, this day would be treated as the "appointed day" in respect of the lease in question.

7.14 If six months is the minimum period needed for the notices and applications to the Lands Tribunal, it follows that recall should not be available during the six months immediately before the appointed day. Otherwise a tenant who wished to avoid the conversion of leasehold conditions might register a recall on the day before the appointed day. It would then be far too late for the landlord to prepare the necessary notice. Rather than prohibit registration of a recall during this period – which would be administratively cumbersome – it seems better to allow registration but to provide that for any recall registered during the six months before the appointed day conversion should be deferred under the rule discussed above. Conversion of the lease would be postponed until the first Whitsunday or Martinmas occurring at least six months after the registration of the notice.

7.15 **Recommendation.** We recommend that

40. (a) **The tenant under a qualifying lease should be able to recall an exemption by service and registration of a notice of recall.**
- (b) **A notice should not be registrable if the unexpired duration of the lease is 100 years or less but otherwise should be registrable at any time.**
- (c) **Where a notice of recall is registered the lease should be converted to ownership on the first Whitsunday or Martinmas occurring six months thereafter: and for the purposes of applying the legislation to that lease, that day should be treated as the appointed day.**

¹¹ There would, however, be no need to register the other preliminary notice, claiming compensatory or additional payments in excess of £500. See draft bill s 45. This is because the only purpose of such a notice is to invite consideration of opting out – a possibility which, following recall, would no longer be available.

¹² This is the same period as was viewed as the minimum necessary for the tenant to consider the merits of opting out: see para 6.48.

(d) The reference to a notice of recall in paragraph (c) includes a notice of recall which is registered during the six months immediately before the appointed day.

(e) The rules for service and registration should be the same as for notices of exemption.

(Draft Bill ss 57 and 58)

Part 8 Miscellaneous topics

Updating the Land Register

8.1 Automatic conversion has obvious implications for the Land Register. Until the appointed day the landlord is owner of the land. On or after that day, the tenant is owner, and the lease itself is extinguished. The change occurs by force of statute, without registration; and until the Register catches up it will be inaccurate. On consultation it was accepted that some legislative assistance to the Keeper is required, as it was required under the 2000 Act.¹

8.2 In the first place, it needs to be made clear that the Keeper has the power to make the necessary changes to the Register. These changes are likely to involve (i) altering the status of the title sheet from leasehold to ownership; (ii) deleting from the burdens section the conditions of the lease other than those converted into real burdens by registered notice or by statute;² (iii) adding to the burdens section any real burdens or servitudes which are registered (or recorded) under the title of the landlord and affect the land;³ (iv) deleting the title sheet (if there is one) of the current owner (ie the head landlord); and (v) deleting the title sheets of any intermediate tenants. Normally rectification is prevented where it is to the prejudice of a proprietor in possession;⁴ and while it is arguable that any prejudice to such a proprietor would be caused by the conversion legislation rather than by the consequential rectification, it seems as well to put the position beyond doubt by giving the Keeper express power to rectify.

8.3 In the second place, it is necessary to allow for the possibility of error. A mistake made by the Keeper in the course of the changes described above should be capable of being corrected; and again the necessary rectification should be allowed without regard to the position of a proprietor in possession. However, that proprietor should have the protection of the rule from the 2000 Act which prevents rectification to the effect of reinstating encumbrances which have been deleted in error.⁵ So if the Keeper retains a leasehold condition which ought to have been removed, he is free to remove it by a further process of rectification; but if he removes a condition in error, it cannot thereafter be reinstated, and the remedy of the (former) holder of the right is to claim indemnity from the Keeper.⁶

8.4 Next there is the issue of indemnity. Usually a person who suffers loss as result of rectification is entitled to indemnity.⁷ But there would be little point in giving power to rectify if

¹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 3 and 46. For the background, see Scot Law Com No 168 paras 2.46 to 2.50.

² See generally part 4.

³ Para 3.25.

⁴ Land Registration (Scotland) Act 1979 s 9(3).

⁵ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 3(b) (adding a new subs (3C) to s 9 of the 1979 Act).

⁶ Under s 12(1)(b) of the Land Registration (Scotland) Act 1979.

⁷ Land Registration (Scotland) Act 1979 s 12(1)(b).

the Keeper was then made liable for payment of indemnity.⁸ Hence indemnity requires to be excluded. It should be emphasised that this withdrawal of indemnity is confined to certain transitional changes arising out of leasehold conversion and does not affect other matters involving the title.

8.5 Finally, there is the question of timescale. Although the number of ultra-long leases is small, and the number registered in the Land Register smaller still, it will be impracticable for the Keeper to make the necessary alterations to the Register on the appointed day itself. Thus for a limited period the Register will not accurately reflect the post-conversion position. No one need be misled by this. The existence of the legislation will be well-known to any professional adviser; and if the landlord's title sheet is still on the Register, it will also be disclosed that the title is subject to an ultra-long lease and hence that it has been extinguished.

8.6 We recommend that

41. (a) It should be made clear –

(i) that any rectification of the Land Register which is required to take account of the legislation on leasehold conversion, or of anything done under or by virtue of that legislation, is not to be regarded as prejudicing any proprietor in possession, and

(ii) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification.

(b) But paragraph (a) should not apply insofar as the rectification involves the reinstatement of an encumbrance which was previously deleted.

(Draft Bill s 67, sched 21, para 2(4))

8.7 Thus far our recommendations follow closely the scheme laid down by the 2000 Act. But we propose one departure. Under the 2000 Act the alterations to the Register are, in effect, to occur in two distinct phases. First, *dominium utile* is upgraded to ownership and superiority title sheets are deleted; and secondly, those real burdens which do not survive abolition are deleted. Section 46 delays the second phase for some years after the appointed day, partly in recognition of the difficulty of the task to be performed.⁹ In leasehold conversion, there are no real burdens to be evaluated and deleted.¹⁰ Rather there are leasehold conditions which, necessarily, fall with the lease itself. They could not sensibly be left on the Register until some later exercise. It is true that a small number of those conditions may be converted into real burdens under proposals set out in part 4, but by

⁸ The same solution is reached by s 3(c) of the 2000 Act.

⁹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 46(1), (2). See Scot Law Com No 168 paras 4.21–4.25.

¹⁰ There might, of course, be real burdens affecting the land, but these would be unaffected by leasehold conversion and would simply fall to be added to the title sheet of the (former) qualifying lease. See para 3.25.

comparison with feudal abolition these should be easy to identify. This suggests that an equivalent of section 46 is neither desirable nor necessary. Instead we suggest that all changes to the Register be made at the same time, and as soon as is reasonably practicable after the appointed day. No special legislative provision is needed.

8.8 Finally, it may be mentioned that no action need be taken in relation to the Register of Sasines. The Sasine Register is a register of deeds and not of rights, whereas the proposed legislation will affect, not the original deeds themselves, but the rights to which the deeds give rise.

Notices: evaluation for registration

8.9 Our proposals involve the registration of a number of different notices. Usually these have the purpose of turning leasehold conditions into real burdens,¹¹ but notices are also required for opting out of conversion altogether (and for opting back in),¹² as well as for preserving sporting rights.¹³ In addition, section 14 of the draft bill provides for the registration of an agreement between landlord and tenant converting conditions into real burdens.

8.10 It cannot be assumed that the Keeper will accept all notices (or agreements) presented for registration. There is a power to reject documents, both in the Land Register¹⁴ and, to a more limited extent, in the Register of Sasines.¹⁵ In relation to the latter, the Keeper's concern is confined to whether the deed presented for recording is of a type appropriate to the register and whether it is formally valid. It follows that a notice is likely to be accepted for recording without further inquiry provided that it is signed and all the relevant parts appear to be completed. Land Register practice is different. In the interests of maintaining the accuracy of the Register, all deeds are carefully examined. If necessary the Keeper calls for further information or evidence. A notice would be rejected if the Keeper was not satisfied as to its validity.¹⁶

8.11 A difficulty is that notices (or agreements) contain or refer to certain matters which the Keeper could not reasonably be expected to check. These are:

- whether a copy of the notice has been duly served;¹⁷
- whether, in the case of a notice or agreement converting leasehold conditions into real burdens, the conditions were enforceable by the landlord (or other sender);
- whether, in the case of such a notice or agreement, the conditions were still enforceable immediately before the appointed day;

¹¹ Paras 4.42 ff.

¹² Part 7.

¹³ Paras 5.15–5.23.

¹⁴ Land Registration (Scotland) Act 1979 s 4(1).

¹⁵ *Macdonald v Keeper of the General Register of Sasines* 1914 SC 854.

¹⁶ Land Registration (Scotland) Rules 1980 r 12. From 22 January 2007, the Land Registration (Scotland) Rules 2006 will be in force. The equivalent provision in the new rules will be r 13.

¹⁷ Paras 4.60 and 7.5.

- whether, in the case of a notice nominating a benefited property, the requirement of a building within 100 metres of the burdened property has been met;¹⁸
- whether, in a case where the 100 metres requirement has been dispensed with by the Lands Tribunal, the order of the Tribunal was preceded by an attempt by the parties to reach agreement;¹⁹
- whether, in the case of an agreement converting leasehold conditions into real burdens, a preliminary notice has been served;²⁰
- whether, in the case of a notice converting a leasehold condition into an economic development burden or health care burden, the requirement that the condition was imposed for the purpose of promoting economic development or the provision of facilities for health care was met;²¹
- whether, in the case of a notice converting a sporting right into a separate tenement, the sporting right was still enforceable immediately before the appointed day.²²

Following the 2000 Act,²³ it should be made clear that the Keeper has no duty in relation to these matters. Other checks exist. The landlord or other person signing the notice is on oath to tell the truth.²⁴ The person on whom the notice is served may be expected to read it over and will be in a much better position than the Keeper to check the information which it contains. A defective notice may be challenged.²⁵

8.12 In the event that registration is refused, the applicant may choose to litigate the refusal, either in the Lands Tribunal²⁶ or the ordinary courts.²⁷ Since a notice or agreement must normally be registered before the appointed day,²⁸ special provision is needed for late registration in the event that the litigation is successful but does not finish until after that day. Following the 2000 Act,²⁹ we suggest that late registration should be permissible provided that it takes place within two months of judicial determination. In the interests of longer-term certainty, Scottish Ministers would be able to prescribe a final date after which registration would cease to be possible.³⁰ The registration would be backdated to the appointed day.

8.13 We recommend that

42. (a) The Keeper should not be required to verify –

¹⁸ Para 4.45.

¹⁹ Paras 4.45 and 4.48.

²⁰ Para 4.48.

²¹ Paras 4.39–4.40.

²² Paras 5.15–5.23.

²³ 2000 Act s 43.

²⁴ Para 4.43.

²⁵ Paras 4.66–4.70.

²⁶ Land Registration (Scotland) Act 1979 s 25.

²⁷ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14.

²⁸ But notices of exemption must be registered not later than two months before the appointed day, while there is no time limit for the registration of notices of recall. See paras 7.6 and 7.11.

²⁹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 45.

³⁰ The power given to Scottish Ministers by s 65(2) of the bill to prescribe a period rather than a particular date allows a different period to be set for exempt leases which subsequently convert.

- (i) that a copy of the notice has been duly served;**
- (ii) that, in the case of a notice under recommendations 17(c) to (g), or 18, or an agreement under recommendation 19, the conditions to be converted were enforceable by the landlord (or other person sending the notice);**
- (iii) that, in the case of such a notice or agreement, the conditions were still enforceable immediately before the appointed day;**
- (iv) that, in the case of a notice under recommendation 18, the benefited property contains a permanent building used as a place of human habitation and resort and lying within 100 metres of the burdened property;**
- (v) that, in a case where the 100 metres requirement was dispensed with by the Lands Tribunal under recommendation 18(d)(iii), the order of the Tribunal was preceded by an attempt to reach agreement under recommendation 19;**
- (vi) that, in the case of an agreement under recommendation 19, a preliminary notice was served in accordance with recommendation 19(a);**
- (vii) that, in the case of a notice under recommendation 17(f) and 17(g) the conditions to be converted were imposed respectively for the purpose of promoting economic development or the provision of facilities for health care; and**
- (viii) that, in the case of a notice under recommendation 27 that the sporting right was still enforceable immediately before the appointed day.**

(b) Where a notice or agreement submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal to be registrable, it should be possible to register the notice or agreement late, but not later than –

- (i) two months after the determination, or**
- (ii) such date as Scottish Ministers may prescribe**

whichever occurs first.

(Draft Bill ss 63, 65)

Unregistered leases

8.14 The statutory facility to register leases dates only from 1857;³¹ and while most leases granted before that year have found their way on to the register there may be some cases in which an ultra-long lease remains unregistered. If so, the numbers are likely to be very small. In practice an unregistered lease could not be used as security for a loan,³² so that a person who wishes to use the property as a security for a loan cannot avoid registration. Further, now that the whole country is operational for the purposes of the Land Register,³³ all future assignments require to be registered if they are to confer a real right.³⁴ This means that, within a fairly short time, most remaining unregistered leases will find their way on to the register. If, however, a lease remained unregistered on the appointed day it would be excluded from conversion, for it is a fundamental, and sound, principle of Scots law that ownership of land cannot be acquired without registration. Instead conversion should not occur unless or until the lease is first registered.³⁵

8.15 In the discussion paper we suggested that registration should of itself be the trigger for conversion. The day on which the lease was first registered would be the appointed day for that lease, and hence the day on which conversion took place.³⁶ On further reflection, and following consultation, we accept the need for a mechanism for informing the landlord. A landlord should not lose ownership without being told of the fact, or being given an opportunity to serve and register the notices needed for conversion of conditions into real burdens and for preservation of sporting rights. In view of the very small numbers involved, the simplest approach would be to make use of the rules already recommended for the recall of exemptions.³⁷ The mechanism would work as follows. If a lease was registered for the first time only after the appointed day, it would be treated as a qualifying lease which had been exempted from conversion. That exemption could then be recalled by registration by the tenant of a notice of recall, in the usual way. Registration would be preceded by service of the notice on the immediate landlord and on the landlord under any superior lease. The appointed day for the purposes of conversion would then be the first Whitsunday or Martinmas occurring at least six months after the day of registration. Until the appointed day (as so defined) the landlord would be able to register the usual notices, and after that day he would have a further two years in which to claim compensation.³⁸

8.16 The rule will be the same for a lease registered in the year before the (standard) appointed day.³⁹ Such a lease will be treated as a lease which has been exempted from

³¹ Registration of Leases (Scotland) Act 1857. By s 18 – repealed by the Land Tenure Reform (Scotland) Act 1974 sched 6 para 5 – the area let could not exceed 50 acres.

³² In theory there could be an assignation in security, but the creditor's right could be completed only by taking possession. It was the difficulty of creating securities over unregistered leases which was the main impetus behind the introduction of a registration scheme in 1857.

³³ The last counties to become operational were the counties of Banff, Caithness, Moray, Orkney and Zetland, Ross and Cromarty, and Sutherland. They became operational on 1 April 2003 (Land Registration (Scotland) Act 1979 (Commencement No 16) Order, SSI 2002/432).

³⁴ Land Registration (Scotland) Act 1979 s 3(3).

³⁵ A lease which is unregistered is not a qualifying lease for the purposes of the scheme: see para 2.31.

³⁶ Scot Law Com DP No 112 para 2.46.

³⁷ Paras 7.10–7.15.

³⁸ Paras 6.17–6.21. In view of the fact that conversion is voluntary and not compulsory, there would be no need to serve an additional notice before the appointed day in respect of claims exceeding £500.

³⁹ The period chosen has to be longer than six months in order to allow a landlord the opportunity to serve a preliminary notice. A period of six months is regarded as the minimum period needed for the service and

conversion. This will give the landlord the opportunity to serve and register notices should a notice of recall be registered.

8.17 It may occasionally happen that an unregistered lease is a sublease and that the head lease itself is registered. Where the sublease was not registered on the (standard) appointed day the head lease would be converted into ownership on that day, as the lowest lease then qualifying,⁴⁰ but that ownership would be potentially defeasible on registration of the sublease. Where the sublease was registered in the year before the appointed day the normal rules will apply and the headlease will not be converted on that day.

8.18 We recommend that

43. Where –

(i) on the day falling one year before the appointed day a lease would qualify for conversion but for the fact that it has not been registered; and

(ii) registration subsequently takes place

the lease should be treated as a qualifying lease which has been exempted from conversion and accordingly the exemption should be capable of recall under recommendation 40.

(Draft Bill s 55)

Stamp Duty Land Tax

8.19 Stamp Duty Land Tax is a tax on “land transactions”.⁴¹ A land transaction means any “acquisition” of a “chargeable interest”, no matter how the acquisition is effected.⁴² Acquisition involves the creation, surrender, release or variation of a chargeable interest.⁴³ A chargeable interest includes an “estate, interest, right or power in or over land” other than an “exempt interest”.⁴⁴ A land transaction is exempt from charge if there is no “chargeable consideration” for the transaction.⁴⁵ A person acquiring a “major interest” in land⁴⁶ has a duty to notify the transaction to HM Revenue & Customs within 30 days of the effective date of the transaction⁴⁷ unless the transaction is exempt from charge⁴⁸ or in the case of residential property the chargeable consideration is less than £1,000.⁴⁹ The percentage due

registration of notices for the conversion of conditions into real burdens and for preservation of sporting rights. See paras 7.13–7.14 above.

⁴⁰ Para 2.45.

⁴¹ Finance Act 2003, ss 42(1).

⁴² Finance Act 2003, s 43(1)(2).

⁴³ Finance Act 2003, s 43(3).

⁴⁴ Finance Act 2003, s 48(1).

⁴⁵ Finance Act 2003, s 49, sched 3, para 1. “Chargeable consideration” is defined in sched 4.

⁴⁶ Major interest in land includes the interest of an owner of land; Finance Act 2003 s 117(1)(3).

⁴⁷ Finance Act 2003, s 76(1).

⁴⁸ Finance Act 2003, s 77(3).

⁴⁹ Finance Act 2003, s 77(3)(b) inserted by s 298(2)(b) of the Finance Act 2004.

falls to zero where the consideration is £125,000 or less in the case of residential property and £150,000 in the case of other properties.⁵⁰

8.20 The question arises whether conversion of a qualifying lease into ownership would give rise to an obligation on the former tenant of a qualifying lease to notify the conversion to HM Revenue & Customs for the purposes of Stamp Duty Land Tax and hence potentially to a charge to tax. In practice the vast majority of, and in fact almost certainly all, conversions would involve a consideration so low that they would fall in the zero rate band. However, even zero rate transactions have to be notified.

8.21 Ownership of land is a "chargeable interest". But whether it would be deemed to have been *acquired* at the point of conversion is more open to question. On conversion the right of lease of the land is simply replaced by a virtually identical right to ownership of the land. In substance what is happening is not so much an acquisition of a new right as the mutation of an existing one.⁵¹ As against this it can be noted that in English law a chargeable interest is acquired where an enlargement of the residue of a long lease into a fee simple takes place in terms of section 153(7) of the Law of Property Act 1925.⁵² Enlargement under the 1925 Act is not dissimilar to conversion to ownership under our scheme and it makes no difference that enlargement is voluntary while conversion is compulsory.⁵³ Given also that the policy intention of the legislation is to tax transactions relating to land it is reasonable to conclude that conversion of a qualifying lease to ownership probably amounts to an acquisition, so that in turn conversion is a land transaction.

8.22 In our view conversion also involves a chargeable consideration. A chargeable consideration is defined as any consideration in money or money's worth given for the subject-matter of the transaction, directly or indirectly.⁵⁴ Under the conversion scheme a landlord is entitled to claim compensation, calculated as a multiplier of the rent, for the loss of the landlord's interest. Where the compensatory payment is not a sufficient measure of the landlord's loss the landlord may in certain circumstances claim an additional payment by way of compensation.⁵⁵ As already noted, in practice most or all cases would fall into the zero rate band, so that nothing will be due, but that would not obviate the notification requirement.

8.23 As a matter of policy, however, we consider that conversion should be treated as a land transaction that is exempt from charge, and so not notifiable. Under the present legislation a lessee of residential property could normally rely on the exemption where the consideration is less than £1000.⁵⁶ But this exemption, which was designed to resolve difficulties that had arisen in England, applies only to residential property. The conversion

⁵⁰ Finance Act 2003, s 55 as amended by Finance Act 2006 s 162.

⁵¹ See para 3.20.

⁵² Finance Act 2003, s 43(3). Leases are subject to enlargement under the 1925 Act where (i) they were granted for an initial term of 300 years and have more than 200 years left to run; and (ii) either no rent of any monetary value is payable, or a rent of no more than £1 per year has not been collected or paid for a period of 20 years or more.

⁵³ The acquisition may be effected "by act of the parties, by order of a court or other authority, by or under any statutory provision or by operation of law" (Finance Act 2003, s 43(2)).

⁵⁴ Finance Act 2003, s 50, sched 4, para 1.

⁵⁵ See generally part 6.

⁵⁶ Finance Act 2003, s 77(3)(b) inserted by s 298(2)(b) of the Finance Act 2004.

scheme requires a solution for Scotland which extends to all leases converted under the scheme. The effect of the proposed exemption would be to take leases which will be converted to ownership out of the scheme for Stamp Duty Land Tax. There would thus be no requirement to notify and no possible liability for Stamp Duty Land Tax.

8.24 Why should conversion of a qualifying lease to ownership be exempt? For reasons of public policy that are explained earlier in the report we have recommended that the system of ultra-long leasehold tenure be dismantled, and that certain long leases should automatically be converted into ownership on a single day.⁵⁷ It would simply be inequitable if, in addition to facing a claim for compensation, a tenant was obliged to notify the conversion and (in possibly some cases) face a charge to tax, given that the State has determined that his or her lease should in the public interest be converted to ownership. In certain circumstances conversion might begin to feel more of a burden than a benefit. There is also the cost-benefit argument. To require notification of conversion where either all or virtually all cases would fall within the zero rate band for Stamp Duty Land Tax⁵⁸ would cost more to administer than the amount (if any) that would be collected in tax.

8.25 **Recommendation.** We recommend that

44. A transaction which results from the conversion of a qualifying lease into a right of ownership shall be treated as a land transaction which is exempt from charge to Stamp Duty Land Tax.

8.26 The draft bill annexed to the Report does not contain a provision implementing this recommendation. This is because the subject of taxes is a reserved matter and is outside the legislative competence of the Scottish Parliament.⁵⁹ The recommendation could however be implemented by subordinate legislation as the Treasury has power by regulations to exempt further categories of land transaction from charge.⁶⁰

Translation

8.27 We have considered whether it is necessary to have a translation provision for leasehold terminology along the lines of the provision in the 2000 Act for feudal terminology.⁶¹ In contrast to the 2000 Act, which abolished the entire feudal system of land

⁵⁷ See paras 2.1 to 2.12, 3.1 to 3.3 and 3.9 to 3.11.

⁵⁸ Which currently stands at £125000 for residential property and £150000 for other properties (Finance Act 2003 s 55, as amended by Finance Act 2006 s 162).

⁵⁹ Scotland Act 1998 s 29, s 30, sched 5, part II, reservation A1.

⁶⁰ Finance Act 2003 s 49, sched 3, para 5.

⁶¹ Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 73.

tenure, the bill if enacted will not abolish leasehold tenure. Only certain ultra-long leases will be affected. A general translation provision of the type used in the 2000 Act would therefore be inappropriate. In those cases where leasehold is converted into ownership, any necessary translations will be implied by the circumstances of the case. For example, if qualifying conditions are converted into real burdens, their terminology must of necessity be thereafter construed as dealing with rights of ownership, and not as dealing with landlord and tenant relationships. For these reasons we do not think that a translation provision is required.

Part 9 Residential ground leases

Introduction

9.1 "Ground lease" is a convenient term, although not a technical one. As its name suggests, a ground lease is a lease of bare ground – of land not yet built on. In a ground lease the landlord supplies the land and the tenant the buildings; and the rent is attributable to the former but not to the latter.¹ Ground leases are invariably long, and sometimes ultra-long, in duration. For all of the nineteenth century and for some at least of the twentieth, they were used for the building of dwellinghouses. However, the Land Tenure Reform (Scotland) Act 1974 prevented the creation of new residential long leases,² so that where ground leases are granted today they are invariably of a commercial character. In this part of the paper, however, we are concerned exclusively with residential ground leases.

9.2 In 1954 there was introduced a statutory right to convert residential ground leases into ownership, on payment of compensation to the landlord. The Long Leases (Scotland) Act 1954 applied to all residential leases granted before 10 August 1914 for a duration of at least 50 years.³ The date marked the passing of the Entail (Scotland) Act 1914, which removed the final obstacles to the granting of feus. Thereafter any ground lease would have been entered into as a matter of choice rather than necessity.⁴ The Act substantially followed the recommendations of the Guthrie Committee.⁵ The scheme introduced by the 1954 Act was a form of compulsory purchase, at the option of the tenant. A tenant who wanted to buy served a notice in the statutory form.⁶ This had to be done within five years of the commencement of the Act.⁷ Thereafter the landlord was bound to grant a feu contract, on payment of compensation calculated according to a statutory formula.⁸ After 1959 the right to buy ceased to be available, although the legislation remained on the statute book until repealed by the 2000 Act.⁹

9.3 The take-up of the 1954 Act scheme seems to have been patchy, and such figures as are available point to regional variations. In Moray, for example, 141 of the 361 surviving leases were converted between 1954 and 1959, whereas in Dumfries the corresponding

¹ Guthrie Report paras 28 and 29. The position may be much the same where the landlord supplies the buildings but the tenant pays for them by means of initial grassum (premium). There too the rent may be attributable to the land alone.

² Land Tenure Reform (Scotland) Act 1974 ss 8–10. This inserts an implied term into all leases of more than 20 years to the effect that no part of the property is to be used as a private dwelling-house.

³ Long Leases (Scotland) Act 1954 s 1(1). The Act did not distinguish between ground leases and other leases, but in practice almost all leases which satisfied the stated criteria would have been ground leases. Compare here the definition of "tenant-at-will" in s 20(8) of the Land Registration (Scotland) Act 1979.

⁴ Guthrie Report para 68(2)(i). And see also para 1.7.

⁵ See paras 1.4 and 1.8.

⁶ 1954 Act s 1(1) and 6.

⁷ 1954 Act s 1(2).

⁸ 1954 Act ss 7 to 14.

⁹ 2000 Act, sched 13.

figure was a mere 2 out of 793 leases.¹⁰ No doubt one reason for the difference was the far larger number of leases in Moray which were close to expiry.¹¹ Leases came to an end for other reasons as well. Many were converted by agreement, either before 1954 or after 1959.¹² Those which were not converted will often have expired. The political impetus behind the 1954 Act was the fact that many leases granted in the second half of the nineteenth century were on the point of coming to an end.¹³ They were kept alive artificially, by temporary legislation passed in 1951,¹⁴ pending the report of the Guthrie Committee. Thereafter they were either converted under the 1954 Act or have now expired.¹⁵ New residential ground leases, uncommon in the postwar period,¹⁶ ceased to be competent altogether in 1974. It seems doubtful that there are many of the shorter ground leases left. Most ground leases which survive today are likely to have been granted for 999 years or other periods amounting to quasi-alienation,¹⁷ and as such will fall to be converted automatically under the scheme for ultra-long leases set out in the earlier parts of this report. With the enactment of that scheme the history of residential ground leases in Scotland would be substantially at an end.

9.4 Nonetheless some leases would remain. We have tried to make an assessment of the number of residential ground leases still in existence today but which would not qualify for conversion under the scheme for ultra-long leases. That scheme is intended to apply to all leases granted for more than 175 years, provided that there is an unexpired duration of 100 years.¹⁸ Our survey of some 2,500 leases disclosed only 46 granted for more than 50 but less than 175 years and which might plausibly be regarded as residential.¹⁹ To those must be added the small number of leases originally granted for longer than 175 years but which would be excluded from the conversion scheme because of a relatively short unexpired duration. Overall this suggests that fewer than 2% of all registered leases fall into this category, and that the absolute number of such leases is probably a matter of hundreds rather than thousands.

9.5 Our survey is of course incomplete in a number of important respects. It is confined to four out of the 33 registration counties in Scotland, although two of those (Ayr and Lanark) are thought to have the highest incidence of registered leases.²⁰ It covers only such period as the counties have been operational for the purposes of the Land Register – a period which ranges from nineteen years (Renfrew) to only three (Ayr).²¹ And it omits both those

¹⁰ These figures were made available to us in 1977 by Registers of Scotland. They include a small number of voluntary conversions from the same period. An article published in 1959 commented that "There is no evidence that the Act has so far been taken advantage of on any very extensive scale": see J G Mitchell, "Some Notes on Long Leases" (1959) 2 Conv Rev 186, 188.

¹¹ Unexpired duration is given in column 6 of the table in appendix II to the Guthrie Report.

¹² Guthrie Report paras 38 and 57–67.

¹³ Guthrie Report para 7.

¹⁴ Long Leases (Temporary Provisions) (Scotland) Act 1951.

¹⁵ Some, however, may have been kept in existence by tacit relocation.

¹⁶ Guthrie Report para 41.

¹⁷ As mentioned at para 1.4 the survey of all search sheets in the Register of Sasines for the period 1905-51 which was carried out for the Guthrie Committee disclosed 13,151 surviving long leases of which around two thirds were thought to be of ultra-long duration. See Guthrie Report paras 38 and 40. Our own survey produced similar results: see appendix C para 11.

¹⁸ Paras 2.13–2.21.

¹⁹ Appendix C paras 21 and 22.

²⁰ Guthrie Report appendix II.

²¹ The survey was carried out in 2000.

leases which have never been registered and also those which, although registered, saw no activity during the period under scrutiny.²² As we stated in our discussion paper, any conclusions based on such a survey are speculative and subject to challenge, and we asked for further information and help.²³ No new information, however, was brought forward by consultees and our figures were not challenged.

Protection of tenants

9.6 From time to time it has been suggested that the 1954 Act ought to be revived to allow the conversion of remaining residential ground leases or that a new conversion scheme should be introduced.²⁴ A possible model for such a scheme was set out in the discussion paper.²⁵ An alternative method of protection would be to confer security of tenure. For example, residential ground leases could become assured tenancies under the Housing (Scotland) Act 1988. On expiry of the contractual lease the tenant would then continue undisturbed for as long as he chose to remain in the property.²⁶ Alternatively the duration of the lease could be extended for a fixed period (such as 50 years).

9.7 In this part of the report we consider whether protection is required in respect of the small number of such leases which will not be covered by our scheme for ultra-long leases.

The case for protection

9.8 **Loss of a home.** In the discussion paper we set out a number of arguments which seemed to support the introduction of a conversion scheme or some other form of protection.²⁷ By far the strongest is the consideration that, at the end of a ground lease, the tenant loses his home while the landlord merely realises an investment. An investment can be compensated with money. A home cannot. A scheme for conversion or security of tenure, against payment of money, would be a means of giving the home to the tenant while continuing to realise an investment for the landlord. Arguably that is the right way round. It is the length of the lease which turns a house into a home, just as it is the presence of the home which marks residential ground leases out from ground leases taken for commercial purposes. In leases of short duration the landlord might intend to re-occupy the property himself or through a member of his family. In that case the house is as much the home of the landlord as of the tenant. But once a lease passes the 50 years required by the 1954 Act, the landlord's interest is likely to assume a monetary form.

9.9 To some extent this argument is self-defeating. If a landlord is content with money rather than the eventual return of his property, he will be willing to enter into a voluntary arrangement with the tenant. In that case a statutory scheme is unnecessary. But in

²² In the absence of activity, such leases would remain in the Register of Sasines.

²³ Scot Law Com DP No 112 para 4.4.

²⁴ For example, this suggestion was made in some of the responses to our *Discussion Paper on Leasehold Casualties* (Scot Law Com DP No 102, 1997).

²⁵ Scot Law Com DP No 112 paras 4.23 ff.

²⁶ A successor would not generally be protected, however. See Housing (Scotland) Act 1988 s 18 and sched 5 part I (ground 7). Other grounds for repossession, both mandatory (part I) and discretionary (part II), are set out in sched 5.

²⁷ Scot Law Com DP No 112 paras 4.6–4.12.

practice not all landlords are content to give up their property, particularly if the property forms part of a larger estate the integrity of which they wish to protect.

9.10 Absence of alternative accommodation. Ground leases tend to be concentrated in particular areas, often reflecting the practice of a particular estate in the disposal of property. If a lease comes to an end and the tenant loses his home, there may be no alternative accommodation in the immediate vicinity. This may be especially the case in certain rural areas where accommodation is scarce. If so, the tenant will have to leave, not merely his home, but also the neighbourhood, with obvious implications for employment and for domestic life. Whether this problem is at all common in practice is unclear. Although views were invited in our discussion paper,²⁸ no information was received.

9.11 Comparison with other leases. An ultra-long lease would be converted into ownership, under the scheme proposed earlier. A short lease of a dwellinghouse might attract security of tenure, whether as a protected tenancy under the Rent (Scotland) Act 1984, a secure tenancy under the Housing (Scotland) Act 1987 or as an assured tenancy under the Housing (Scotland) Act 1988. The leases with which we are concerned here, however, are unprotected. They are too short to qualify for conversion into ownership, but have too low a rent, usually, to qualify for security of tenure.²⁹ The rent is low because, in a ground lease, it is attributable to the land and not to the buildings. The result is that the tenant has no right to stay on at the end of the lease, whether as owner under a conversion scheme or as tenant under a statutory tenancy.

9.12 No compensation for improvements. Once a lease expires, not only must the tenant leave the property but usually there is no entitlement to compensation for improvements. Most improvements – and certainly buildings – accede to the land and so become the property of the landlord. At the end of the lease they must be left behind, unless they qualify as trade³⁰ or agricultural³¹ fixtures. Nor is there a claim in unjustified enrichment, for a tenant is deemed to have carried out the improvements for his own benefit during the period of his tenancy.³² It is true that the position can be altered by agreement in the lease, so that a lease which contains no provision on the subject must be taken as having accepted the position as laid down by the general law.³³ And it is also true that the general law applies to all leases and not merely to ground leases. But in ground leases the improvements include a house, often of considerable value, and the loss to the tenant is correspondingly greater.

²⁸ Scot Law Com DP No 112 para 4.8.

²⁹ In practice the statute which is most likely to be applicable is the Rent (Scotland) Act 1984. But by s 2 of that Act the rent must be at least two thirds of the rateable value of the property on 23 March 1965. See eg *Fennel v Cameron* 1968 SLT (Sh Ct) 30.

³⁰ *Brand's Trs v Brand's Trs* (1876) 3 R(HL) 16.

³¹ Agricultural Holdings (Scotland) Act 1991 s 18. In fact this provision suspends the operation of accession.

³² *Wallace v Braid* (1900) 2 F 754; *Dollar Land (Cumbernauld) Ltd v CIN Properties* 1998 SC (HL) 90.

³³ Our survey suggests that such provisions are rare in ground leases, although we encountered some 999-year leases in which the landlord must pay for the value of the buildings in the event of exercising a break option.

The case against protection

9.13 The discussion paper listed a number of other factors which argue against the introduction of special protection for tenants holding under a residential ground lease.³⁴

9.14 **Justified expectations.** If the original parties are still in place, then the lease is a consensual contract, freely entered into; and if, as almost always, the parties are successors, they are subject to rights and obligations which they have chosen to assume. In acquiring a lease a tenant buys with his eyes open. In most cases he will have had the benefit of legal advice. The price will have reflected the terms of the lease. A lease which has only twenty years to run and allows no compensation for improvements is worth much less in the market place than a lease with an unexpired duration of 900 years. The house, which will soon return to the landlord, was not built by the tenant but by some, usually remote, predecessor. In short, the tenant has received what he paid for, no more and no less. The same is true of the landlord. The property was bought subject to the lease, and the price paid will have been determined largely by the length of the unexpired term. In summary, each party to the lease has certain expectations, based on its terms. The law should hesitate before it interferes with such expectations, and with the established rights of parties.

9.15 This argument may seem to have less force in a case where the lease has passed down a family without ever being exposed on the open market. At the least there may have been genuine misunderstandings. For if a house has been in the family for 100 years it may be natural to assume, without inquiry, that the present arrangements are permanent in nature. And that belief may have been reinforced by the words and actions of the current landlord. The distinction between lease and ownership, so apparent to the lawyer, is not always so clear to a person living, virtually rent-free, in a house. It is noteworthy that the 1954 Act scheme, while not generally available to those acquiring the lease after 10 May 1951, made an exception for acquisition by inheritance.³⁵ No doubt, however, social and economic change means that cases of houses passing down families are increasingly rare. And in any event there are difficulties in saying that a person who acquires by inheritance and without payment is more deserving than a person who pays for what he receives.

9.16 **Previous opportunity.** A right to convert ground leases into ownership was conferred by the 1954 Act. There was thus a previous opportunity during the period from 1954 to 1959. On one view, the opportunity should not be renewed.³⁶ The force of this argument, however, is weakened by the fact that a significant number of the leases now surviving were granted after 1914 and hence would not have qualified under the 1954 Act scheme.

³⁴ Scot Law Com DP No 112 paras 4.13–4.20.

³⁵ Long Leases (Scotland) Act 1954 s 3.

³⁶ Thus, in rejecting the idea that compensation should be available as an alternative to conversion, the Guthrie Report argued (para 69) that "where a lessee under an old ground lease of residential property fails to take advantage of the opportunity to obtain a feu title in accordance with our recommendations, we can see no reason why he should be given an alternative right to compensation".

9.17 **Cost to the tenant.** A conversion scheme could not be free.³⁷ The landlord would be deprived of his property, including property in the house. Compensation would need to be paid in return. The discussion paper examined various ways in which such compensation might be calculated.³⁸ Necessarily, the level of compensation increases as a lease approaches its end, so that in its final years the amount payable is likely to be substantial.

9.18 The introduction of security of tenure would, equally, raise issues of compensation, whether in the form of increased rent or a one-off payment. In England and Wales the 50-year extension allowed for leases under the Leasehold Reform Act 1967 is accompanied by an increase in rent to the level of a modern ground rent.³⁹ The equivalent extension for leases of flats involves payment of a premium.⁴⁰ In Scotland the conversion of ground leases into assured tenancies would result in a sharp increase in rent.⁴¹

9.19 For many tenants payment of a lump sum or an increased rent might be either unattractive or impossible; but in that case a scheme for conversion or security of tenure would confer no benefit. Our survey gives some indication of the unexpired duration of leases of the kind under consideration, and hence of the likely levels of payment required. One third of the leases had either expired and were continuing, if at all, by tacit relocation, or had less than 10 years to run. A further one fifth had less than 40 years to run.⁴² Although the sample is too small to be reliable, the figures are instructive nonetheless.

9.20 **Escalation of compensation for voluntary conversions.** Conversion already occurs on a voluntary basis, although we have no information as to its frequency. A worry expressed by the Guthrie Committee was that the introduction of a statutory scheme might drive up the levels of compensation typically asked for in voluntary conversions.⁴³ In a voluntary conversion, the landlord might be disposed to be generous. He may know the tenant well. Sometimes the tenant is his employee. The tenant's family may have occupied the house for many years. They may have carried out, and paid for, major improvements. And so on. The Guthrie Committee found that conversion often took place on generous terms. A statutory scheme, however, could take no account of factors such as those just mentioned. Instead the transaction would have to be viewed purely on a commercial basis. If this increased the going rate for compensation, the tenant would be in a worse position than before.

³⁷ Compare here the scheme for ultra-long leases, where, usually, no compensation is needed in respect of the vestigial interest of the landlord.

³⁸ Scot Law Com DP No 112 paras 4.23–4.33.

³⁹ Leasehold Reform Act 1967 s 15(2). It is estimated that a modern ground rent is around one third of market rent: see *Commonhold and Leasehold Reform* (Cm 4843, 2000) p 158.

⁴⁰ Leasehold Reform, Housing and Urban Development Act 1993 ss 39(1), 56 and sched 13.

⁴¹ Housing (Scotland) Act 1988 ss 24 and 25.

⁴² Appendix C chart 16.

⁴³ Guthrie Report para 66: "[W]e are satisfied that the usual practice of Scottish landowners, so far from showing an insistence on their legal rights, has been generous. There have, of course, been instances in which a lessee has been faced with a demand for a price which took into account almost the whole of the landowner's legal rights at the enhanced current value, but it seems clear that these cases have been exceptional, and at the end of our inquiry we find ourselves somewhat anxious lest the publicity which this matter is receiving should result in the abandonment by Scottish landowners of the reasonable spirit which has usually characterised their negotiations with lessees until now."

Results of consultation

9.21 Consultation on these arguments produced a mixed message. A bare majority of those who responded were in favour of some form of protection for tenants of residential ground leases. Some consultees were strongly opposed. Others were doubtful. The bodies representing the two branches of the legal profession declined to express any view on a matter which they saw as "one of policy rather than law".⁴⁴ The Law Society of Scotland regarded this as "a matter for decision by Parliament following upon detailed consideration as to whether cases are occurring where landlords are abusing their position".

9.22 The main arguments in favour of protection were thought to be the tenant's loss of a home and of the value of improvements. The argument most often mentioned against protection was that the tenant acquired with his eyes open and should not be given a windfall benefit. That was the view, for example, of the Centre for Research into Law Reform of the University of Glasgow:

"The centre are of the view that legislative provision would not be justified unless there were a significant number of leases of this type. The centre have no empirical evidence as to the number of leases which may exist but it may be doubted whether there will be any ground leases where it is the original tenant who is still in occupation having expended the money on construction. There seems little justification for extending the [conversion] provisions to shorter leases in cases where an assignee has taken the tenant's interest in the full knowledge that the lease has a relatively short time to run. In cases where an assignee has acquired a dwelling house without knowledge as to the duration of the lease there will be a claim against the solicitor who acted."

One consultee queried the justification for favouring residential leases over commercial leases. Another emphasised that, with the introduction of short tenancies in 1980 and short assured tenancies in 1988,⁴⁵ there was often no security of tenure in the private rental sector. It was wrong, therefore, to regard tenants of ground leases as uniquely unprotected. On the contrary, many tenants were unprotected as a matter of deliberate government policy.

9.23 Among those who favoured protection there was no agreement as to which scheme should be adopted. Security of tenure, supported by a majority, was criticised by others as merely deferring the problem. A conversion scheme, though a complete solution and attracting some support, was criticised as unduly cumbersome.

9.24 A notable omission from the responses was any indication of the scale of the problem, or even an indication that there was a problem at all. Only one consultee cited a particular case, while others referred to the need for further research.

⁴⁴ The phrase is from the response by the Faculty of Advocates.

⁴⁵ Tenants' Rights Etc. (Scotland) Act 1980 ss 34–6; Housing (Scotland) Act 1988 ss 32–5.

Evaluation

9.25 In the light of the response on consultation we have concluded that we should not pursue the subject of residential ground leases further, at least as part of the present exercise. Two factors have influenced us in particular.

9.26 One is the lack of information.⁴⁶ Before a problem can be solved it must first be identified. It may be that there is a problem in relation to shorter ground leases; but if so it has not been sufficiently uncovered for a solution to be devised. Our best guess, on the basis of our own empirical work,⁴⁷ is that the number of residential ground leases still in existence is less than 1000, that a significant number of these have either expired and are continuing by tacit relocation or are within a few years of expiry, that the current tenant is a successor (and often a remote successor) of the original tenant and did not build the house currently standing on the land, and that in most cases the tenant acquired by purchase and not by succession. If these suppositions are accurate, a legislative solution would not seem an appropriate or a proportionate response. By way of contrast the Leasehold Reform Act 1967 was estimated to affect 1.25 million leases in England and Wales.⁴⁸

9.27 The other factor was mentioned by some of our consultees and is mentioned again in an article by Professor Robert Rennie. Any recommendations on residential ground leases would, in Professor Rennie's words, "go well beyond general law reform and into the field of social policy".⁴⁹ We share the misgivings which this comment implies. The position would be different if consultation had revealed clear agreement both on the problem and on its solution. But in the absence of such agreement it is not for us to commit scarce resources on proposals of our own devising which may turn out to be unattractive to the Scottish Executive and to Parliament.

9.28 In reaching this conclusion we do not rule out a legislative scheme altogether. It may yet turn out that, for reasons of hardship or otherwise, tenants under residential ground leases are more worthy of protection than tenants under other types of lease. If so the conversion scheme sketched in our discussion paper might serve as a possible model. But the case for special treatment has still to be made.

⁴⁶ Little further information has emerged since the end of the consultation period.

⁴⁷ Paras 9.4, 9.5 and 9.19.

⁴⁸ *James v United Kingdom* (1985) ECHR Series A no 98 para 19.

⁴⁹ Robert Rennie, "Leasehold Casualties" 2001 SLT (News) 235, 239.

Part 10 List of recommendations

Part 2 Qualifying Leases

1. The right of a tenant under an ultra-long lease should be converted into a right of ownership, and the right of the landlord should correspondingly be extinguished.

(Para 2.12; Draft Bill s 3)

2. A lease should qualify for conversion in respect of duration if it –

- (i) was granted for more than 175 years, and
- (ii) has an unexpired duration of more than 100 years.

(Para 2.21; Draft Bill s 1(2)(b), (c))

3. For the purposes of determining the duration of a lease -

- (a) there should be included

- (i) any renewal period which the landlord is bound to grant, and
- (ii) the duration of any other lease which is to run consecutively with the current lease;

- (b) any provision enabling the lease to be terminated early should be disregarded; and

- (c) any reference to the lifetime of a tenant should be calculated as –

- (i) the years during which the person survived after first becoming tenant, if known, or
- (ii) if the tenant is alive, the years for which the person is likely to be tenant, having regard to a statutory table of life expectancy, or
- (iii) in any other case, 35 years.

(Para 2.30; Draft Bill s 60(1)(a)–(d))

4. A lease should qualify for conversion only if it is constituted as a registered real right.

(Para 2.31; Draft Bill s 1(2)(a))

5. A lease should not qualify for conversion if it is –
- (a) a lease of minerals; or
 - (b) a lease –
 - (i) of land or a right in land which, by its nature, cannot be owned separately from other land, and
 - (ii) the lease does not include that other land.

(Para 2.44; Draft Bill ss 1(2) and 68(1))

6. Where, in the case of any land, more than one lease satisfies the criteria set out in recommendations 2 – 5, the qualifying lease should be whichever is the sublease of the other or others.

(Para 2.45; Draft Bill s 2)

Part 3 Conversion

7. Except where a tenant opts out of conversion by registration of a notice of exemption, conversion of a qualifying lease should be mandatory.

(Para 3.8; Draft Bill s 3)

8. On a day to be appointed (the "appointed day") there should be automatic conversion of all qualifying leases.

(Para 3.13; Draft Bill s 3)

9. For the purposes of the scheme a lease is converted by becoming the ownership of the land.

(Para 3.22; Draft Bill s 3(1)(a))

10. There should be extinguished on the appointed day –

- (i) the landlord's ownership, and
- (ii) any lease intermediate between that ownership and the qualifying lease.

(Para 3.24; Draft Bill s 3(1)(b),(c), (2))

11. (a) Following conversion, ownership of the land should be subject to –

- (i) the subordinate real rights that formerly affected the qualifying lease, and

- (ii) the subordinate real rights, other than any right in security or proper liferent, that formerly affected the land itself.
- (b) There should be extinguished on the appointed day all rights and obligations arising under the qualifying lease or any intermediate lease; and on or after that day –
 - (i) it should not be possible to bring new proceedings for enforcement;
 - (ii) any current proceedings should be deemed abandoned; and
 - (iii) any decree or interlocutor already pronounced should be deemed reduced.
- (c) Paragraph (b)(i)–(iii) should not affect –
 - (i) a right to the payment of money or the recovery of damages; or
 - (ii) any right or obligation which continues after the appointed day.
- (d) No qualifying or intermediate lease may be terminated by irritancy after the date that the legislation implementing this recommendation receives Royal Assent.

(Para 3.30; Draft Bill s 4(1), (3)–(5), s 5(1)–(4), s 61)

- 12. (a) Following conversion, ownership of the land should –
 - (i) include any pertinents (express or implied) of the lease but
 - (ii) exclude any rights reserved (expressly or by implication) from the lease.
- (b) Paragraph (a) does not apply to a right which –
 - (i) can be a pertinent of a lease but not of the land;
 - (ii) can be reserved from a lease but not from ownership of the land.
- (c) This recommendation is subject to recommendation 27.

(Para 3.33; Draft Bill s 5(5))

- 13. Following conversion, ownership of the land should be subject to or, as the case may be, include as a pertinent such servitudes as would have existed if –
 - (i) the qualifying lease and any superior lease, and
 - (ii) any partial assignation of such leases,

had been dispositions to the effect of conveying ownership but otherwise expressed in the same terms.

(Para 3.41; Draft Bill s 6)

Part 4 From Leasehold Conditions to Real Burdens

14. (a) A condition affecting a qualifying lease should qualify for conversion into a real burden (as a "qualifying condition") if –
- (i) its terms are set out in full in the constitutive deed;
 - (ii) it binds successive tenants; and
 - (iii) it conforms to real burdens in respect of content.
- (b) But a condition should not qualify if –
- (i) it imposes a monetary penalty on the failure to comply with other conditions;
 - (ii) it imposes an irritancy for such failure to comply; or
 - (iii) it is stated to be enforceable only by irritancy.

(Para 4.17; Draft Bill ss 9(1), (3)–(6) and 10)

15. The following deeds should be constitutive deeds for the purposes of recommendation 14 –
- (i) the qualifying lease;
 - (ii) any superior lease;
 - (iii) any deed varying such a lease; and
 - (iv) an assignation of such a lease or a deed of conditions or other deed granted in association with such an assignation.

(Para 4.27; Draft Bill s 9(2))

16. (a) A qualifying condition which regulates the maintenance, management, reinstatement or use of a facility should become a facility burden on the appointed day.
- (b) The burdened property should be the land the lease of which was subject to the condition.
- (c) The benefited property should be –

- (i) any land to which the facility is (and is intended to be) of benefit; and
- (ii) insofar as not covered by (i), the facility itself.

(d) A condition should not become a facility burden if it constitutes an obligation to maintain or reinstate which has been assumed by a local or other public authority.

(Para 4.33; Draft Bill ss 23(1), (3), and 27)

17. (a) A qualifying condition which relates to the provision of services to other land should become a service burden on the appointed day.

(b) A qualifying condition which confers on a person power to act as, or to appoint, the manager of related properties should become a manager burden on the appointed day.

(c) A qualifying condition which –

- (i) has the purpose of preserving or protecting the architectural, historical or other special characteristics of land, and
- (ii) is enforceable by a conservation body or by Scottish Ministers

should become a conservation burden on the appointed day, but only if there has been registered before that day a notice identifying the condition and the body entitled to enforce it.

(d) A qualifying condition which –

- (i) has the purpose of preserving or protecting the architectural, historical or other special characteristics of land, and
- (ii) is enforceable by a person other than a conservation body or Scottish Ministers

should become a conservation burden on the appointed day, but only if there has been registered before that day a notice identifying the condition and nominating (with the prior consent of the nominee) a conservation body or Scottish Ministers to have title to enforce the conservation burden.

(e) A qualifying condition which comprises a right of pre-emption or a right of redemption should become a personal pre-emption burden or, as the case may be, a personal redemption burden on the appointed day but only if there has been registered before that day a notice identifying the condition.

(f) A qualifying condition which –

- (i) has the effect of promoting economic development, and
- (ii) is enforceable by Scottish Ministers or by a local authority

should become an economic development burden on the appointed day, but only if there has been registered before that day a notice identifying the condition.

- (g) A qualifying condition which –
 - (i) has the purpose of promoting the provision of facilities for health care, and
 - (ii) is enforceable by Scottish Ministers

should become a health care burden on the appointed day, but only if there has been registered before that day a notice identifying the condition.

(h) In each case the burdened property should be the land the lease of which was subject to the condition.

(i) In the case of a service burden the benefited property should be any land to which the services are provided.

(j) A manager burden should be held by the person on whom power is conferred.

(k) A conservation burden should be held by the conservation body or, as the case may be, Scottish Ministers.

(l) A personal pre-emption burden or a personal redemption burden should be held by the person previously entitled to enforce the qualifying condition.

(m) An economic development burden should be held by the local authority, or as the case may be, Scottish Ministers.

(n) A health care burden should be held by Scottish Ministers.

(Para 4.41: Draft Bill ss 18, 19, 20, 21, 22, 23(2) and 24)

18. (a) A qualifying condition should become a real burden on the appointed day if, before that day, the landlord registers a notice in which other land belonging to him is nominated as the benefited property.
- (b) The burdened property should be the land the lease of which was subject to the condition, and the benefited property the land so nominated.
- (c) Normally land should not be eligible for nomination as the benefited property unless it contains a permanent building used as a place of human habitation and resort and lying within 100 metres of the burdened property.
- (d) But land not complying with paragraph (c) above should be eligible for nomination if –
- (i) the condition is a right of pre-emption or redemption;

- (ii) the land is a separate tenement (such as minerals or salmon fishings) and the condition was conceived for the benefit of that land; or
- (iii) paragraph (c) is waived by the Lands Tribunal on an application by the landlord.

(e) An application to the Lands Tribunal should be made not later than one year after the relevant provision comes into force; and the Tribunal should grant the application only if satisfied that, in the event of the condition being extinguished, there would be material detriment to the applicant as owner of the nominated land.

(Para 4.47; Draft Bill ss 13,15, 16 and 17)

19. (a) A landlord should be able to serve on the tenant a notice inviting the tenant to enter into an agreement for the conversion of conditions into real burdens.
- (b) If an agreement is duly entered into and registered before the appointed day, on that day the conditions should become real burdens in respect of which –
- (i) the burdened property is the land the lease of which was subject to the conditions, and
 - (ii) the benefited property is the land nominated in the agreement, being land which at the time of the agreement was owned by the landlord.

(Para 4.48; Draft Bill s 14)

20. (a) A qualifying condition expressed as being enforceable by the owner or tenant of other land should, on the appointed day, become a real burden in respect of which -
- (i) the burdened property is the land the lease of which was subject to the condition, and
 - (ii) the benefited property is the other land.
- (b) Qualifying conditions imposed under a common scheme on a group of related properties should, on the appointed day, become real burdens in respect of which each property is both a benefited and a burdened property.
- (c) Where, before the appointed day –
- (i) a lease was assigned in part, and
 - (ii) a qualifying condition was imposed in, or in association with, the assignation

the cedent and his successors as tenants of the retained land should have title to enforce the condition and accordingly should be able to convert the condition into a real burden by a notice in accordance with recommendations 17 and 18 or by an agreement under recommendation 19.

(Para 4.55; Draft Bill ss 12(3), 25 and 26)

21. Where a notice or agreement has been registered under recommendations 17, 18 or 19 it should not be possible to register another notice or agreement in relation to the same condition unless the earlier notice or agreement has been discharged and the discharge registered.

(Para 4.59; Draft Bill s 30(1) and (2))

22. (a) Except where it is not reasonably practicable to do so, a copy of the notice (and explanatory note) should be sent by post to the tenant before registration.
- (b) A separate notice should be used for each property.

(Para 4.63; Draft Bill ss 30(3), (4) and 62)

23. (a) A notice or agreement should be registered against both the burdened property and (except where there is no such property) the benefited property.
- (b) If property is subject to a qualifying lease, registration may be against either the interest of the tenant or the interest of the owner.

(Para 4.65; Draft Bill ss 13(6), (7), 14(7), (8), 18(4), 19(3), 20(3), 21(4) and 22(4))

24. (a) The Lands Tribunal should be empowered to make an order discharging or restricting a notice on cause shown.
- (b) An extract of the order should be capable of registration, and on registration should take effect as respects third parties.

(Para 4.67; Draft Bill s 64)

25. The enforcement of a qualifying condition (now a real burden) after the appointed day should be subject to compliance with any obligation which, before that day, was the direct counterpart of the condition.

(Para 4.72; Draft Bill s 28)

26. Notwithstanding recommendation 11, there should not be extinguished any rights or obligations that are binding only on the original parties.

(Para 4.77; Draft Bill s 4(2))

Part 5 Minerals and Sporting Rights

27. (a) Where –
- (i) a right to take game or fish for freshwater fish is reserved from a qualifying lease or a superior lease (whether expressly or by implication), and
 - (ii) before the appointed day the head landlord registers a notice preserving such right,

on that day the right should become a separate tenement in land.

(b) A right converted into a separate tenement should comprise a right of the same description, and be subject to the same terms and conditions as to its exercise and liability for damage, as specified in the lease from which it was reserved; and, if or to the extent that there is no such specification, the right should comprise an exclusive right (subject to the Ground Game Act 1880) to take –

- (i) hares, pheasants, partridges, grouse, black game and ptarmigan, or, as the case may be
- (ii) freshwater fish as defined in s 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

(Para 5.23; Draft Bill ss 7 and 68(1))

Part 6 Compensation

28. (a) The compensatory payment for the extinction of the rights of a landlord under a lease should be such sum as, if invested in two and a half per cent Consolidated Stock on the day before the appointed day, would produce an annual sum equal to the annual rent due under the lease.

(b) If the rent payable under the lease is a *cumulo* amount extending to another lease or leases, the landlord should first allocate the rent among the leases in such proportions as are reasonable in the circumstances; and an allocation should be deemed reasonable if it follows an existing informal apportionment.

(c) Where the lease is a partially continuing lease the landlord should first allocate the rent, taking into account any allocation made under (b) above, between that part of the lease that is extinguished and that part of the lease that continues in such proportions as are reasonable in all the circumstances. The sum allocated to the part of the lease that is extinguished shall be the annual rent for the purposes of calculating the compensatory payment. The sum allocated to the part of the lease that continues shall be the rent due for that lease as from the appointed day.

(d) This recommendation does not apply if, or the extent that, the rent under the lease is expressed other than in monetary terms.

(Para 6.16; Draft Bill ss 32, 35 and 36)

29. A compensatory payment or additional payment is due if and only if the former landlord serves on the former tenant, within two years of the appointed day –

- (i) a notice in the prescribed form setting out the amount due and how it has been calculated and, in the case of *cumulo* rent or a partially continuing lease, information as to how the rent has been allocated; and
- (ii) an explanatory note in the prescribed form.

(Para 6.21; Draft Bill ss 31(1)–(4) and 39(1), (2), (4))

30. (a) Where –

- (i) a lease contains an obligation on the landlord to renew the same from time to time at fixed periods and on payment of a premium not exceeding £100; and
- (ii) the lease complies as to duration (including unexpired duration) with recommendation 2 only if it is renewed on one or more occasions;

the rent for the purposes of recommendation 28 should be deemed to be augmented by the amount of the premium divided by the number of years occurring between each renewal.

(b) For the purposes of calculating the amount of the premium under (a)(i) above or recommendation 31(d), where the premium is a *cumulo* premium or a premium payable under a partially continuing lease, the scheme for allocation of rent set out in recommendation 28(b) and (c) should apply with the necessary modifications.

(Para 6.27; Draft Bill ss 33 and 38)

31. A landlord should be entitled to an additional payment for any loss arising from the extinction on the appointed day of one or more of the following rights –

- (a) the right to a rent expressed in non-monetary terms;
- (b) the right to a review of the rent;
- (c) the right to an increase in the rent;
- (d) the right to payment of a premium for renewal of the lease other than a premium mentioned in recommendation 30(a)(i), provided that the lease complies as to duration (including unexpired duration) with recommendation 2 only if it is renewed on one or more occasions;
- (e) the right to the reversion of the lease at ish;

- (f) the right to terminate the lease prior to the ish other than
 - (i) a right of pre-emption, and
 - (ii) a right of irritancy or other equivalent right; and
- (g) the right to development value in circumstances where
 - (i) the lease was granted subject to a condition which reserved the development value of the lease, and
 - (ii) the rent or grassum for the lease was nominal in amount, or was significantly lower than if the lease had not been subject to the condition.

(Para 6.38; Draft Bill s 40)

32. (a) The additional payment in respect of the extinction of a right mentioned in recommendation 31 should be the amount agreed between the parties following service of the notice as provided in recommendation 29 or, failing agreement, the amount fixed by order of the Lands Tribunal.
- (b) In assessing the additional payment account should be taken of –
- (i) the extinction, under recommendation 11, of the obligations of the landlord; and
 - (ii) the compensatory payment and any other entitlement of the landlord to recover in respect of the loss.
- (c) Subject to (b), the additional payment in respect of a claim under recommendation 31(e) should be the value which the reversion would have on the open market as between a seller and buyer both of whom are willing, knowledgeable and prudent, on the assumption that the lease will continue to its ish, but disregarding –
- (i) possible bids by the tenant or other purchasers with a special interest; and
 - (ii) any depreciation in the value of other land owned by the landlord.
- (d) The additional payment in respect of a claim under recommendation 31(g) should not exceed such sum as would make up for any effect which the condition produced, at the time when it was imposed, in reducing the consideration then paid or made payable for the lease.
- (e) The rights lost should be valued as at the appointed day.

(Para 6.47; Draft Bill ss 41–44)

33. Any claim against the former tenant under a qualifying lease in respect of –

- (i) a compensatory payment, or
- (ii) an additional payment

should be restricted, in each case, to a maximum of £500 unless, not later than six months before the appointed day, the person making the claim served on the tenant a notice giving warning of the prospective claim.

(Para 6.51; Draft Bill s 45)

34. A claim for compensatory payment or additional payment should be made –

- (i) in the case of a claim under recommendation 31 (e)–(g), against the former tenant under the qualifying lease, and
- (ii) in any other case, against the immediate former tenant of the person making the claim.

(Para 6.55; Draft Bill ss 31(2) and 39(2), (3))

35. (a) For the purposes of compensation, "former landlord" and "former tenant" should mean the person who, immediately before the appointed day, has right to the interest of the landlord or, as the case may be, of the tenant (and where more than one person comes within this description, the person who has most recently acquired such right).

(b) Where a person on whom a notice is served under recommendation 29 is not the former tenant that person shall be under a duty to disclose to the former landlord the identity and address of the former tenant or failing that, such other information as might enable the former tenant to be traced.

(c) A preliminary notice under recommendation 33 should be validly served if it is served on the person who is the registered tenant under the qualifying lease.

(d) Where the interest of a tenant is held by two or more persons as common property –

- (i) any liability to pay compensation should be their joint and several responsibility; but
- (ii) as among themselves they should be liable in the proportions in which the interest is held.

(Para 6.62; Draft Bill ss 45(2), 49, 52 and 68(1))

36. (a) Where the compensation due as

- (i) compensatory payment, or
- (ii) additional payment

is £50 or over, the former landlord should serve an instalment document with the notice in which payment is claimed. If this is not done, the notice should have no effect.

- (b) The document should specify –
- (i) the compensation due
 - (ii) the number of instalments
 - (iii) the amount of each instalment
 - (iv) the date of the first and subsequent payments
 - (v) the amount of the surcharge, and
 - (vi) have explanatory notes attached.

(c) A former tenant who wishes to pay by instalments should sign, date and return the instalment document, along with the surcharge, within the period allowed for payment.

(d) The instalments should be determined in accordance with the following table –

<i>Compensation due</i>	<i>Number of instalments</i>
between £50 and £500	5
between £501 and £1000	10
between £1001 and £1500	15
more than £1500	20

(e) The instalments should be equal instalments payable half yearly at Whitsunday and Martinmas beginning at the next term day.

- (f) The unpaid balance should become immediately due and payable if –
- (i) an instalment is unpaid for 6 weeks, or
 - (ii) following sale, the former tenant ceases to be owner of the property.

(Para 6.69; Draft Bill ss 31(5), 39(5), 43(4) and 46)

37. (a) Notices under recommendations 29, 33 and 36 should be served on the former tenant –
- (i) by delivery, or

- (ii) by registered post or recorded delivery to the former tenant's place of residence, place of business or ordinary postal address (or to the most recently known such address).
- (b) If a notice sent by post is returned marked as undelivered, it should be competent for it to be re-served on the Extractor of the Court of Session.
- (c) The following should be sufficient evidence of service –
 - (i) a certificate signed by the sender or his agent and accompanied by a postal receipt, or
 - (ii) an acknowledgement signed by the former tenant, or
 - (iii) an acknowledgement of receipt by the Extractor.
- (d) The date of service should be the date of delivery or, as the case may be, of posting.
- (e) In paragraph (a) notice includes an instalment document and former tenant includes tenant.

(Para 6.73; Draft Bill s 47)

38. The obligation to make a compensatory payment or additional payment should prescribe after five years.

(Para 6.74; Draft Bill s 50)

Part 7 Notices of Exemption

39. (a) A qualifying lease should be exempt from conversion for as long as a notice of exemption is registered and has not been recalled.
- (b) A notice should be registrable only –
 - (i) by the tenant under the qualifying lease, and
 - (ii) not later than two months before the appointed day.
 - (c) A notice should be registered against the interest of the tenant under the qualifying lease.
 - (d) Except where it is not reasonably practicable to do so, a copy of the notice (and explanatory note) should, before registration, be sent by post to –
 - (i) the landlord under the qualifying lease, and
 - (ii) the landlord under any superior lease.

(e) It should be sufficient compliance with (d) if the notice is sent to the person who is registered as landlord.

(f) A sublease of an exempt lease should on registration also be exempt from conversion.

(Para 7.9; Draft Bill ss 53, 54, 56 and 58)

40. (a) The tenant under a qualifying lease should be able to recall an exemption by service and registration of a notice of recall.

(b) A notice should not be registrable if the unexpired duration of the lease is 100 years or less but otherwise should be registrable at any time.

(c) Where a notice of recall is registered the lease should be converted to ownership on the first Whitsunday or Martinmas occurring six months thereafter: and for the purposes of applying the legislation to that lease, that day should be treated as the appointed day.

(d) The reference to a notice of recall in paragraph (c) includes a notice of recall which is registered during the six months immediately before the appointed day.

(e) The rules for service and registration should be the same as for notices of exemption.

(Para 7.15; Draft Bill ss 57 and 58)

Part 8 Miscellaneous Topics

41. (a) It should be made clear –

(i) that any rectification of the Land Register which is required to take account of the legislation on leasehold conversion, or of anything done under or by virtue of that legislation, is not to be regarded as prejudicing any proprietor in possession, and

(ii) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification.

(b) But paragraph (a) should not apply insofar as the rectification involves the reinstatement of an encumbrance which was previously deleted.

(Para 8.6; Draft Bill s 67, sched 21, para 2(4))

42. (a) The Keeper should not be required to verify –

(i) that a copy of the notice has been duly served;

(ii) that, in the case of a notice under recommendations 17(c) to (g), or 18, or an agreement under recommendation 19, the conditions to be

converted were enforceable by the landlord (or other person sending the notice);

- (iii) that, in the case of such a notice or agreement, the conditions were still enforceable immediately before the appointed day;
- (iv) that, in the case of a notice under recommendation 18, the benefited property contains a permanent building used as a place of human habitation and resort and lying within 100 metres of the burdened property;
- (v) that, in a case where the 100 metres requirement was dispensed with by the Lands Tribunal under recommendation 18(d)(iii), the order of the Tribunal was preceded by an attempt to reach agreement under recommendation 19;
- (vi) that, in the case of an agreement under recommendation 19, a preliminary notice was served in accordance with recommendation 19(a);
- (vii) that, in the case of a notice under recommendation 17(f) and 17(g) the conditions to be converted were imposed respectively for the purpose of promoting economic development or the provision of facilities for health care; and
- (viii) that, in the case of a notice under recommendation 27 that the sporting right was still enforceable immediately before the appointed day.

(b) Where a notice or agreement submitted for registration is rejected by the Keeper but is subsequently determined by the court or the Lands Tribunal to be registrable, it should be possible to register the notice or agreement late, but not later than –

- (i) two months after the determination, or
- (ii) such date as Scottish Ministers may prescribe

whichever occurs first.

(Para 8.13; Draft Bill ss 63 and 65)

43. Where –

- (i) on the day falling one year before the appointed day a lease would qualify for conversion but for the fact that it has not been registered; and
- (ii) registration subsequently takes place

the lease should be treated as a qualifying lease which has been exempted from conversion and accordingly the exemption should be capable of recall under recommendation 40.

(Para 8.18; Draft Bill s 55)

44. A transaction which results from the conversion of a qualifying lease into a right of ownership shall be treated as a land transaction which is exempt from charge to Stamp Duty Land Tax.

(Para 8.25)

Appendix A

Long Leases (Scotland) Bill [DRAFT]

CONTENTS

Section

PART 1

CONVERSION OF LONG LEASE TO OWNERSHIP

Determination of “qualifying lease”

- 1 Meaning of “qualifying lease”
- 2 Only one lease of particular land to be qualifying lease

Conversion of right of lease to ownership

- 3 Conversion of right of lease to right of ownership

Consequences of conversion

- 4 Extinction of certain rights and obligations on appointed day
- 5 Subordinate real rights, reservations and pertinents
- 6 Creation of servitudes on conversion
- 7 Conversion of reserved sporting rights
- 8 Further provision in respect of notices under section 7

PART 2

CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

Determination of “qualifying conditions”

- 9 Qualifying conditions
- 10 Restriction on conversion of qualifying conditions

Meaning of “qualifying land”

- 11 Meaning of “qualifying land”

Entitlement to enforce qualifying conditions

- 12 Determination, for purposes of sections 13 to 22, of person entitled to enforce qualifying condition

Conversion of conditions to burdens

- 13 Conversion by nomination of benefited property
- 14 Conversion by agreement

Applications relating to section 13

- 15 Application to Lands Tribunal for order dispensing with requirement under section 13(1)
- 16 Manner of dealing with application under section 15
- 17 Consequential amendment of Tribunals and Inquiries Act 1992

Personal real burdens

- 18 Conversion to personal pre-emption or personal redemption burden
- 19 Conversion to economic development burden
- 20 Conversion to health care burden
- 21 Conversion to conservation burden
- 22 Conversion to conservation burden where conservation body or Scottish Ministers nominated to enforce

Other real burdens

- 23 Conversion to facility or service burden
- 24 Conversion to manager burden
- 25 Conversion where common scheme affects related properties
- 26 Conversion where expressly enforceable by certain third parties

Exclusions from conversion

- 27 Qualifying conditions excluded from conversion: obligations assumed by local or other public authorities

Effect of conversion on counter-obligations

- 28 Counter-obligations on conversion

Prescription

- 29 Prescriptive period for converted conditions

Notices and agreements under this Part

- 30 Further provision in respect of notices and agreements under this Part

PART 3

COMPENSATION FOR LOSS OF LANDLORD'S RIGHTS

Compensatory payment

- 31 Requiring compensatory payment
- 32 Calculation of compensatory payment
- 33 Annual amount in respect of loss of right to receive renewal premium
- 34 Making compensatory payment

Leases continuing after the appointed day

- 35 Partially continuing leases: allocation of rent
- 36 Allocation of "cumulo rent"
- 37 Allocation disputed or not made: right to refer matter to Lands Tribunal
- 38 Application of sections 35 to 37 to renewal premiums

Additional payment

- 39 Claiming additional payment
- 40 Extinguished rights in respect of which additional payment may be claimed
- 41 Basis of calculation of additional payment
- 42 Additional payment: former tenant agrees to payment claimed
- 43 Additional payment: amount agreed between former landlord and former tenant
- 44 Reference to Lands Tribunal in relation to claim for additional payment

Supplementary

- 45 Claims in excess of £500: preliminary notice
- 46 Making payment by instalments
- 47 Service of notices under this Part
- 48 Duty of collecting third party to disclose information
- 49 Duty to disclose identity etc. of former tenant
- 50 Extinction by prescription of requirement to make compensatory payment or additional payment
- 51 Cumulo rent and cumulo premium
- 52 Interpretation of Part 3

PART 4

EXEMPTION FROM CONVERSION AND CONTINUING LEASES

Exempt leases

- 53 Meaning of “exempt lease”
- 54 Exemption of qualifying lease by registration of exemption notice
- 55 Certain long leases registered close to or after the appointed day
- 56 Subleases of exempt leases

Recall of exemption

- 57 Recall of exemption

Supplementary

- 58 Exemption notice and recall notice: supplementary

PART 5

GENERAL AND MISCELLANEOUS

- 59 The appointed day
- 60 Determination of duration of lease
- 61 Extinction of right of irritancy in certain leases

Notices

- 62 Notices: pre-registration requirements
- 63 Notices and agreements: extent of Keeper’s duty
- 64 Referral to Lands Tribunal of notice dispute
- 65 Circumstances where certain notices may be registered where initial submission for registration rejected

Miscellaneous

- 66 Power to prescribe forms and amend table of life expectancy
- 67 Consequential and minor amendments

- 68 Interpretation
- 69 Orders
- 70 Short title and commencement

-
- Schedule 1—Form of notice for preservation of sporting rights
 - Schedule 2—Form of notice for conversion of qualifying condition by nomination of benefited property
 - Schedule 3—Form of notice seeking agreement to the conversion of qualifying condition
 - Schedule 4—Form of notice for conversion of qualifying condition into personal pre-emption burden or personal redemption burden
 - Schedule 5—Form of notice for conversion of qualifying condition into economic development burden
 - Schedule 6—Form of notice for conversion of qualifying condition into health care burden
 - Schedule 7—Form of notice for conversion of qualifying condition into conservation burden
 - Schedule 8—Form of notice for conversion of qualifying condition into conservation burden by nomination of conservation body or Scottish Ministers to have title to enforce real burden
 - Schedule 9—Form of notice requiring compensatory payment etc: cumulo rent
 - Schedule 10—Form of notice requiring compensatory payment etc: partially continuing lease
 - Schedule 11—Form of notice requiring compensatory payment etc. in ordinary case
 - Schedule 12—Form of notice requesting additional payment
 - Schedule 13—Form of further notice requiring additional payment following agreement
 - Schedule 14—Form of preliminary notice for compensatory payment exceeding £500
 - Schedule 15—Form of preliminary notice for additional payment exceeding £500
 - Schedule 16—Form of instalment document
 - Schedule 17—Acknowledgement of service and certificate of posting
 - Schedule 18—Form of notice of exemption
 - Schedule 19—Form of notice of recall
 - Schedule 20—Table of life expectancy
 - Schedule 21—Minor and consequential amendments

Long Leases (Scotland) Bill

[DRAFT]

An Act of the Scottish Parliament to convert the right of lease in relation to certain long leases into ownership; to create, on such conversion, separate tenements in relation to certain rights of game and fishing; to provide for the conversion into real burdens of certain rights and obligations under such leases; to provide for payment to former owners of land of compensation for loss of it on conversion; to provide for tenants of qualifying long leases to opt out of conversion; and for connected purposes.

PART 1

CONVERSION OF LONG LEASE TO OWNERSHIP

Determination of “qualifying lease”

1 Meaning of “qualifying lease”

- (1) Subject to section 2 of this Act, a lease is a “qualifying lease” if it complies with subsection (2) below.
- (2) A lease complies with this subsection if, immediately before the appointed day, it is a right of lease in land—
 - (a) which is registered;
 - (b) granted for a period of more than 175 years;
 - (c) in respect of which the unexpired portion of such period is more than 100 years; and
 - (d) which is not a lease—
 - (i) of minerals; or
 - (ii) which includes minerals and in respect of which a royalty, lordship or other payment of rent determined by reference to the exploitation of those minerals is or may be payable.
- (3) Where a lease is divided (whether as a result of partial assignation or otherwise), each part shall, for the purposes of this Act, be treated as a separate lease.

GENERAL NOTE

In the Notes to each section the Abolition of Feudal Tenure etc. (Scotland) Act 2000 is referred to as the “2000 Act” and the Title Conditions (Scotland) Act 2003 as the “2003 Act”.

NOTE

Part 1 of the bill sets out the basic scheme for the conversion of certain long leases into ownership on the appointed day. The conversion scheme does not of course apply to a lease which has terminated before the appointed day. The appointed day is defined in section 59. A lease will qualify for conversion if

immediately before the appointed day it satisfies certain requirements. The requirements are set out in subsection (2).

Firstly, the lease must be a lease of land. Land is defined in section 68(1) as including anything which is or which may be held as a separate tenement. Accordingly leases of sporting or other rights which cannot be owned separately from the land to which they attach are excluded from the conversion scheme. This implements recommendation 5(b). See paragraph 2.36 of the report.

Subsection 2(a) requires the lease to be registered. It implements recommendation 4. See paragraph 2.31 of the report. Section 55 makes provision for a lease which is constituted as a real right by possession rather than registration and which is first registered close to or after the appointed day.

Subsections 2(b) and (c) require the lease to be of a certain duration. Together the subsections implement recommendation 2. See paragraphs 2.13 to 2.21 of the report. 175 years is the maximum period for which a lease may now be granted: 2000 Act, section 67. The duration of a lease (including unexpired duration) is calculated in accordance with section 60 of the bill.

Subsection 2(d) excludes a lease of minerals or a lease which is primarily of minerals from the conversion scheme. Such a lease is an exception to the rule that a lease of a separate tenement is a qualifying lease. This subsection implements recommendation 5(a). See paragraphs 2.34 to 2.35 of the report.

Subsection (3) applies where a lease has been divided by assignation. The conversion scheme applies to such a lease as though the retained part and the assigned part were separate leases. See paragraph 2.46 of the report.

2 Only one lease of particular land to be qualifying lease

- (1) Where land is subject to two or more leases both or each of which complies with section 1(2) of this Act (such a lease being referred to in this Act as a “potential qualifying lease”), subsections (2) to (4) below shall apply for the purposes of determining—
 - (a) which of such leases shall be the qualifying lease; and
 - (b) of which land the lease is a qualifying lease.
- (2) If none of the land which forms the subjects of a potential qualifying lease forms the subjects of an inferior lease, such potential qualifying lease shall be the qualifying lease of such land.
- (3) If any of the land which forms the subjects of a potential qualifying lease forms the subjects of an inferior lease, such potential qualifying lease shall be the qualifying lease of such land which does not form the subjects of an inferior lease.
- (4) If all of the land which forms the subjects of a potential qualifying lease forms the subjects of an inferior lease, such potential qualifying lease shall not be a qualifying lease.
- (5) In this section—

“inferior lease”, in relation to a potential qualifying lease, means a sublease—

 - (a) of the whole or part of the subjects of the potential qualifying lease; and
 - (b) which is itself a potential qualifying lease.

NOTE

Where land is subject to two or more leases which satisfy the requirements in section 1, this section sets out rules to determine the qualifying lease and the subjects of that lease. It implements recommendation 6. See paragraphs 2.45 and 2.46 of the report and the examples referred to there.

Conversion of right of lease to ownership

3 Conversion of right of lease to right of ownership

- (1) Subject to section 53(2) of this Act, on the appointed day—
 - (a) a qualifying lease shall become the right of ownership of the land in relation to which it is the qualifying lease;
 - (b) any right of ownership of that land existing immediately before that day shall be extinguished; and
 - (c) any superior lease shall be extinguished.
- (2) In this Act, a “superior lease” means a lease of land in relation to which, and to the extent that, a qualifying lease is a sublease of that land.

NOTE

Subsection (1) converts the qualifying lease into ownership while at the same time extinguishing any right of ownership that existed immediately before the appointed day along with any superior leases. Conversion takes place automatically unless the tenant of the qualifying lease has opted out under part 4.

Subsection (2) defines the concept of superior lease. The purpose of this definition is to ensure that all higher leases are extinguished only in respect of the land that is subject to the qualifying lease.

The section implements recommendations 1 and 7 to 10. See paragraphs 2.1 to 2.12 and 3.1 to 3.24 of the report.

Consequences of conversion

4 Extinction of certain rights and obligations on appointed day

- (1) Subject to subsection (2) below and sections 5 and 6 and Part 2 of this Act, all rights and obligations arising (whether expressly or by implication) from—
 - (a) the qualifying lease; and
 - (b) any superior lease,shall, on the appointed day, be extinguished.
- (2) Subsection (1) above shall not affect any right or obligation arising from a lease mentioned in that subsection in so far as that right or obligation is, by its nature, enforceable only as a personal right or obligation, that is to say, the right or obligation could not be enforced by or against the successor of a party to the lease.
- (3) Notwithstanding subsection (1) above, rent shall continue to be payable for any period before the appointed day; and if (in so far as so payable) it has not fallen due before that day, it shall fall due on that day.
- (4) Subject to subsection (5) below—

- (a) on or after the appointed day, no proceedings for enforcement of any such rights or obligations as are mentioned in subsection (1) above shall be commenced;
 - (b) any proceedings already commenced for such enforcement shall be deemed to have been abandoned on that day and may, without further process and without any requirement that full judicial expenses shall have been paid by the pursuer, be dismissed accordingly; and
 - (c) any decree or interlocutor already pronounced in proceedings for such enforcement shall be deemed to have been reduced or, as the case may be, recalled on that day.
- (5) Subsection (4) above shall not affect any proceedings, decree or interlocutor in relation to—
- (a) a right or obligation which subsists by virtue of section 5 of this Act;
 - (b) a right or obligation which is converted under Part 2 of this Act;
 - (c) a right or obligation which is created under section 6 of this Act; or
 - (d) a right to recover damages or to the payment of money (including rent).

NOTE

Subsection (1) extinguishes all rights and obligations arising from the qualifying lease and any superior lease. The rights and obligations may be set out expressly in a deed or be implied by virtue of the landlord and tenant relationship. There is a saving for any rights or obligations that survive the appointed day in one form or another under sections 5 and 6 and part 2.

Subsection (2) provides an exception for personal rights and obligations.

Subsection (3) makes it clear that the obligation to pay rent for any period before the appointed day remains enforceable.

Subsection (4) prevents any proceedings being raised or continued after the appointed day for the enforcement of any rights and obligations extinguished by subsection (1). It does not matter that the breach occurred before the appointed day. Any decree or interlocutor already pronounced does not survive the appointed day. For instance, an interdict enforcing a use restriction would cease to apply.

Subsection (5) provides that subsection (4) does not apply to rights and obligations which survive the appointed day under section 5 and 6 and part 2 of the bill. It will also remain possible after the appointed day to enforce a right to recover damages or a right to the payment of money (such as rent).

Subsections (1) and (3) to (5) implement recommendation 11(b) and (c). See paragraphs 3.27 to 3.30 of the report. Subsection (2) implements recommendation 26. See paragraphs 4.74 to 4.77 of the report.

5 Subordinate real rights, reservations and pertinents

- (1) This section applies where a right of ownership in land is created by the conversion of a qualifying lease under section 3(1)(a) of this Act (such land being referred to in this section as “the converted land”).
- (2) The converted land shall be subject to any subordinate real rights to which the qualifying lease was, immediately before the appointed day, subject.
- (3) The converted land shall, subject to subsection (4) below, be subject to—

- (a) any subordinate real rights (other than any superior lease extinguished by virtue of section 3(1)(c) of this Act); and
 - (b) any other encumbrances,
- to which the converted land itself was, immediately before the appointed day, subject.
- (4) Any heritable security or proper liferent to which the converted land itself was subject immediately before the appointed day shall, on that day and to the extent that the security or liferent affected the land, be extinguished.
 - (5) The converted land shall—
 - (a) include any pertinent (whether express or implied) of the qualifying lease which, by its nature, may be a pertinent of land; and
 - (b) exclude anything capable of being held as a separate tenement in land (including any right so held by virtue of section 7 of this Act) which is reserved (whether expressly or by implication) from—
 - (i) the qualifying lease; or
 - (ii) any superior lease.

NOTE

This section sets out the subordinate real rights and encumbrances that burden the right of ownership of the converted land from the appointed day. It also makes provision in respect of pertinents and reservations. In this section “converted land” is the land in which a right of ownership is created through the conversion of a qualifying lease under s 3(1)(a).

Subsection (2) implements recommendation 11(a)(i). See paragraphs 3.25 and 3.30 of the report. On the appointed day subordinate real rights over the qualifying lease become subordinate real rights over the right of ownership created under section 3.

Subsections (3) and (4) implement recommendation 11(a)(ii). See paragraphs 3.25, 3.26 and 3.30 of the report. The right of ownership created under section 3 is subject to any encumbrances and subordinate real rights, other than heritable securities, proper liferents or any superior leases, which burdened the head landlord’s ownership immediately before the appointed day. Servitudes, real burdens, and public rights of way, for example, will all continue. Subsection (4) does not affect the personal obligation of the debtor under the heritable security.

Subsection (5) defines the extent of the converted land by reference to pertinents and reservations of the lease. This subsection implements recommendation 12. See paragraphs 3.31 to 3.33 of the report. On the appointed day a pertinent of the qualifying lease becomes a pertinent of the converted land provided that it is of a type that is recognised as a pertinent of land. Excluded from the converted land is anything that was reserved from the qualifying lease (or any superior lease), provided that it is capable of being held as a separate tenement. If the reservation is not capable of being held as a separate tenement, it is disregarded on conversion and will form part of the converted land.

The main example of a reservation is a minerals reservation. Where the minerals are not already separate tenements they will become separate tenements on the appointed day when ownership of the surface is separated from ownership of the minerals. The clause of reservation will continue to regulate the relationship between the owner of the minerals (the former landlord) and the owner of the surface (the former tenant). See paragraphs 5.1 to 5.6 of the report.

Subsection (5) interacts with section 7. Under section 7 a notice may be registered converting reserved sporting rights into a separate tenement. If a notice is registered, the sporting rights will not form part of the converted land. If a notice is not registered, the converted land will include the reserved sporting rights as such rights are not capable on their own of being held as a separate tenement. In that case if the rights

have been leased out separately the lease in question is not affected by conversion of the qualifying lease (see subsection (3)) but there would be a change of landlord. See paragraph 5.17 of the report.

6 Creation of servitudes on conversion

Where a right of ownership in land is created by the conversion of a qualifying lease under section 3(1)(a) of this Act, that land shall include or, as the case may be, be subject to any servitudes which would have been created (whether expressly, by implication or by positive prescription) had the original grant of—

- (a) the qualifying lease;
- (b) any superior lease; and
- (c) any partial assignation of a lease, where the subjects of that lease include the land which forms the subjects of the qualifying lease,

been a conveyance of land.

NOTE

The effect of this section is to create those servitudes which would have been created (whether expressly, impliedly or by positive prescription) had the deeds referred to been a conveyance of land leading to separation of ownership. The section implements recommendation 13. See paragraphs 3.34 to 3.41 of the report.

The deeds referred to are the qualifying lease, any lease higher in the hierarchy of leases (where there is such a hierarchy), or any partial assignation relating to the qualifying lease. The latter, for example, covers the case where a single lease is divided into two by assignation. The assignation may include rights and obligations which affect the part of the lease that is assigned and also the part that is retained.

7 Conversion of reserved sporting rights

- (1) This section applies where a right of—
 - (a) game; or
 - (b) fishing,is reserved (whether expressly or by implication) from a qualifying lease or superior lease (such a right being referred to in this Act as a “sporting right”).
- (2) A landlord may, before the appointed day, execute and register a notice in, or as nearly as may be in, the form contained in schedule 1 to this Act.
- (3) The notice shall—
 - (a) set out the title of the landlord;
 - (b) identify the land affected by the sporting right;
 - (c) set out the terms of such right; and
 - (d) set out the terms of any counter-obligation to the right.
- (4) For the purposes of subsection (2) above—
 - (a) a notice is registered only when registered against the land identified in pursuance of paragraph (b) of subsection (3) above; and

- (b) the notice may be registered against the title of the owner of the land or the tenant under the qualifying lease.
- (5) Before submitting any notice for registration under this section, the landlord shall swear or affirm before a notary public that to the best of the knowledge and belief of the landlord all the information contained in the notice is true.
- (6) For the purposes of subsection (5) above—
 - (a) if the landlord is—
 - (i) an individual unable, by reason of legal disability or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the landlord may swear or affirm; or
 - (ii) not an individual, then any person authorised to sign documents on its behalf may swear or affirm; and
 - (b) any reference in that subsection to the landlord shall be construed in accordance with paragraph (a) above.
- (7) If subsections (2) to (6) above are complied with and immediately before the appointed day the sporting right to which the notice relates is still enforceable, on the appointed day—
 - (a) that right shall become a separate tenement in land;
 - (b) in the case of a right of game, the separate tenement shall, subject to subsection (8) below, be comprised of—
 - (i) in a case where the right is expressly reserved, the rights and obligations specified in the lease and, in so far as is consistent with those express rights and obligations, an exclusive right to take hares, pheasants, partridges, grouse, black game and ptarmigan;
 - (ii) in a case where the right is reserved by implication, an exclusive right to take hares, pheasants, partridges, grouse, black game and ptarmigan; and
 - (c) in the case of a right of fishing, the separate tenement shall be comprised of—
 - (i) in a case where the right is expressly reserved, the rights and obligations specified in the lease and, in so far as is consistent with those express rights and obligations, an exclusive right to fish for freshwater fish;
 - (ii) in a case where the right is reserved by implication, an exclusive right to fish for freshwater fish.
- (8) Any exclusive right conferred by subsection (7)(b) above is subject to section 1 of the Ground Game Act 1880 (c. 47) (right of occupier to kill and take ground game).
- (9) Where a right becomes, under subsection (7) above, a separate tenement in land—
 - (a) that right shall be subject to any counter-obligation enforceable immediately before the appointed day; and
 - (b) without prejudice to any other way in which such a counter-obligation may be extinguished, any such counter-obligation is extinguished on the extinction of the right.
- (10) In this section and section 8 of this Act, any reference to a “landlord” is a reference—
 - (a) in a case where there is one superior lease, to the landlord under the superior lease;

- (b) in a case where there are two or more superior leases, to the landlord under whichever of those leases is not itself subject to a superior lease.

(11) This section is subject to sections 8 and 62 of this Act.

NOTE

This section provides for the conversion of a sporting right into a separate tenement by the owner of the land. It is modelled on section 65A of the 2000 Act. It implements recommendation 27. See paragraphs 5.7 to 5.23 of the report. The term "right of fishing" allows an express reservation in a lease of salmon fishings of a non-exclusive right to fish for salmon to be converted.

Subsection (2) provides for the execution and registration of a notice by the landlord. The notice must follow the statutory form given in schedule 1. Landlord in this context means the owner of the land. See subsection (10).

Subsection (3) sets out requirements as to the content of the notice. This includes the terms of any counter-obligation to the right.

Under subsection (4) registration can be either against the interest of the landlord (ie the owner of the land) or the tenant of the qualifying lease.

Subsections (5) and (6) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally by the landlord but some exceptions are set out in subsection (6). Subsection (6)(a)(ii) must be read with schedule 2 of the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

Subsection (7) converts the sporting right into a separate tenement on the appointed day provided that the requirements of the section have been complied with and the right is still enforceable. It also prescribes the content of the separate tenement. Where the right has been expressly reserved there is a double content. First it comprises the rights and obligations set out in the lease in question. Secondly insofar as consistent with those express rights etc it comprises, in the case of game, an exclusive right to take hares, pheasants, partridges, grouse, black game and ptarmigan, and, in the case of fishing, an exclusive right to fish for freshwater fish. Freshwater fish is defined in section 68. The definition is taken from section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003.

Subsection (8) qualifies subsection (7) by providing that any exclusive right to game is subject to the right of the occupier under the Ground Game Act 1880 to take or kill hares.

Subsection (9) provides that the separate tenement continues to be subject to any existing counter-obligation. It also provides that a counter-obligation is extinguished on the extinction of the tenement.

Subsection (10), as read with the definition of landlord in section 68(1), makes clear that only the owner of the land can serve a notice converting the right into a separate tenement. Where the right is held in common each co-owner must sign the notice.

The section is subject to section 8 which makes further provision about this type of notice and section 62 which deals with service.

8 Further provision in respect of notices under section 7

- (1) Where more than one qualifying lease is affected by the same sporting right, a landlord shall, if that landlord wishes to execute and register a notice under section 7(2) of this Act in relation to those qualifying leases in respect of that right, require to do so in relation to each separately.

- (2) Where a qualifying lease is affected by more than one sporting right, a landlord may, if that landlord wishes to execute and register a notice under section 7(2) of this Act, do so by a single notice.

NOTE

Subsection (1) provides that where a right affects more than one qualifying lease a landlord has to register a separate notice in respect of each lease. However where the same qualifying lease is affected by different rights subsection (2) allows one notice to be used.

PART 2

CONVERSION OF CERTAIN LEASEHOLD CONDITIONS TO REAL BURDENS

Determination of “qualifying conditions”

9 Qualifying conditions

- (1) Subject to subsection (6) below, a condition is a “qualifying condition” if—
 - (a) it is constituted in accordance with subsection (2) below;
 - (b) it is enforceable against the tenant (and the successors of the tenant) of—
 - (i) the qualifying lease; or
 - (ii) any superior lease; and
 - (c) it complies with the provisions of subsection (3) below.
- (2) A condition is constituted in accordance with this subsection if it is set out in—
 - (a) the qualifying lease;
 - (b) any superior lease which is not a lease granted by virtue of section 17(1) of the Land Tenure Reform (Scotland) Act 1974 (c.38);
 - (c) any deed varying a lease such as is mentioned in paragraph (a) or (b) above; or
 - (d) any assignation of or other deed relating to a lease such as is mentioned in paragraph (a) or (b) above where the assignation or other deed is registered under section 3 of the Registration of Leases (Scotland) Act 1857 (c.26).
- (3) A condition complies with this subsection if it consists of—
 - (a) an obligation to do something (including an obligation to defray, or contribute towards, some cost);
 - (b) an obligation to refrain from doing something; or
 - (c) subject to subsection (4) below—
 - (i) a right to enter, or otherwise make use of, property; or
 - (ii) a provision for management or administration.
- (4) A condition which consists of a right or provision mentioned in paragraph (c) of subsection (3) above shall comply with that subsection only if the right or provision is for a purpose ancillary to an obligation such as is mentioned in paragraph (a) or (b) of that subsection.
- (5) In determining whether a condition complies with subsection (3) above, regard shall be had to the effect of the condition rather than to the way in which the condition is expressed.

- (6) A condition is not a qualifying condition if—
- (a) it is an obligation to pay rent;
 - (b) it confers a right of irritancy;
 - (c) the provision constituting it states that it is enforceable only by irritancy;
 - (d) it imposes a restriction on—
 - (i) assignation; or
 - (ii) subletting,
 that is neither a right of pre-emption, a right of redemption or reversion nor any other type of option to acquire the lease; or
 - (e) it imposes a monetary penalty which is payable on the failure of the tenant to comply with any of the other conditions under the lease.

NOTE

Part 2 of the bill provides a scheme for the conversion of certain leasehold conditions into real burdens. Once the conditions have been converted they become subject to the law of real burdens. See generally part 4 of the report.

This section identifies the criteria that must be met in order for a leasehold condition to qualify for conversion. The section should be read along with section 10. The effect of the two sections is that the leasehold condition must be capable of being constituted as a real burden. The sections implement recommendations 14 and 15. See paragraphs 4.3 to 4.27 of the report.

Subsection (1)(a), along with subsection (2), requires the condition to be set out in certain deeds. An interposed lease is specifically excluded from the list of constitutive deeds.

Subsection (1)(b) requires the condition to be binding on successors.

Subsection (1)(c), along with subsections (3) and (4), sets out certain requirements as to the content of the condition. Subsection (5) is an aid to interpretation. Whether a leasehold condition complies with subsection (3) will be judged by the effect of the words and not merely by their form. These provisions are based on section 2 of the 2003 Act.

Subsection (6) sets out some exclusions. Obligations to pay rent and restrictions on assignation and subletting presuppose the relationship of landlord and tenant and therefore cannot be converted. However rights of pre-emption, redemption or reversion may be capable of conversion. Rights of irritancy and penalty clauses are also struck at.

10 Restriction on conversion of qualifying conditions

A qualifying condition shall not become a real burden by virtue of this Part of this Act unless the real burden that would be so created complies with the provisions of section 3 (omitting subsection (5)) of the Title Conditions (Scotland) Act 2003 (asp 9) (in this Act, referred to as the “2003 Act”).

NOTE

The effect of this section is that a condition which becomes a qualifying condition must also comply with section 3 of the 2003 Act for it to be validly converted into a real burden. Section 3 provides rules as to the content of a real burden. It must, for instance, relate directly or indirectly to the burdened property; it must be for the benefit of the benefited property and it must not be contrary to public policy. Section 3(5)

of the 2003 Act which prohibits the creation of new rights of redemption is excluded as it would otherwise prevent the conversion of a qualifying condition having the effect of a redemption or resumption.

Meaning of “qualifying land”

11 Meaning of “qualifying land”

In this Act, “qualifying land”, in relation to a qualifying condition, means the land which forms the subjects of the qualifying lease.

NOTE

This section defines the term "qualifying land".

Entitlement to enforce qualifying conditions

12 Determination, for purposes of sections 13 to 22, of person entitled to enforce qualifying condition

- (1) Subsections (2) and (3) below have effect for the purposes of determining in relation to sections 13 to 22 of this Act whether a person is entitled to enforce a qualifying condition.
- (2) A person having right to property to which the entitlement to enforce a qualifying condition attaches may enforce the qualifying condition whether or not the person has completed title to that right (and where more than one person comes within that description, only the person who most recently acquired that right may enforce the qualifying condition).
- (3) Where before the appointed day the tenant under a lease—
 - (a) assigns the lease in part; and
 - (b) includes in the assignation or, as the case may be, a deed registered under section 3 of the Registration of Leases (Scotland) Act 1857 (c.26), a qualifying condition, a person who is a tenant or subtenant of the part of the land that is not so assigned (or a successor as tenant or subtenant of such person) may enforce the qualifying condition.
- (4) In sections 13 to 15 of this Act, a person is an “entitled person” if that person is entitled to enforce a qualifying condition (whether as landlord or otherwise).
- (5) Where the entitlement to enforce a qualifying condition is held in pro indiviso shares—
 - (a) if the entitlement is held as landlord, any reference in sections 13 to 15 of this Act to an entitled person is a reference to all of the persons holding such a share; and
 - (b) if the entitlement is held otherwise than as landlord, any reference in those sections to an entitled person is a reference to any of the persons holding such a share.

NOTE

The notice procedure introduced by sections 13 to 22 for converting a qualifying condition into a real burden can only be used by a person who has the right to enforce the qualifying condition. Section 12 sets out some rules on title to enforce a qualifying condition for the purposes of these sections.

Subsection (2) provides that a person who has not completed title to the property to which the right to enforce a qualifying condition attaches has the right to enforce the condition. Where more than one person comes within that description then the person with the latest right to the property is to be preferred. See paragraph 4.42 of the report.

Subsection (3) provides that where a lease has been partially assigned, the tenant or subtenant of the retained part of the lease has title to enforce conditions imposed in the assignation or related deed. Such a person can then serve a notice under sections 13, 14, and 18 to 22 of the bill. The subsection implements recommendation 20 (c). See paragraphs 4.53 to 4.55 of the report. The reference to a deed registered under s 3 of the Registration of Leases (Scotland) Act 1857 includes a deed of conditions registered under the old s 3(5) of the 1857 Act which was repealed and replaced by the Title Conditions (Scotland) Act 2003 (s 128, sched 14 paragraph 1, and sched 15).

Subsection (4) defines "entitled person" for the purposes of section 13 to 15. The definition recognises that third parties may have a right to enforce a qualifying condition.

Subsection (5) sets out rules, for the purposes of sections 13 to 15, for the situation where a right to enforce is held by more than one person pro indiviso. If the right to enforce is held in the capacity of landlord all pro indiviso landlords have to act together. In a section 13 case, for example, they must all be parties to the notice and they must all own the land to be nominated as a benefited property. If the right to enforce is held by a third party a pro indiviso holder of the right can act alone but the effect is to convert the condition into a real burden for the benefit of all pro indiviso holders. See paragraph 4.42 of the report.

Conversion of conditions to burdens

13 Conversion by nomination of benefited property

- (1) Subject to section 15 of this Act, where at least one of the conditions set out in subsection (2) below is met, an entitled person may, before the appointed day, prospectively convert a qualifying condition into a real burden by nominating—
 - (a) the qualifying land, or any part of it, as burdened property in relation to such burden; and
 - (b) land such as is mentioned in subsection (3) below, or any part of that land, as a benefited property in relation to such burden,by executing and registering a notice such as is mentioned in subsection (5) below.
- (2) The conditions are—
 - (a) that the land which would by virtue of this section become a benefited property has on it a permanent building which is in use wholly or mainly as a place of human—
 - (i) habitation; or
 - (ii) resort,and that building is, at some point, within 100 metres (measuring along a horizontal plane) of the land which would by virtue of this section become the burdened property;
 - (b) that the qualifying condition comprises a right of pre-emption or of redemption; and
 - (c) that the land which would by virtue of this section become a benefited property comprises—
 - (i) minerals; or

- (ii) salmon fishings or some other incorporeal property,
and it is apparent from the terms of the qualifying condition that the condition was included in the lease for the benefit of such land.
- (3) The land referred to in subsection (1)(b) above is land, other than the qualifying land, which—
 - (a) if the land is not subject to a qualifying or exempt lease, the entitled person is owner of; or
 - (b) if the land is subject to such a lease, the entitled person is tenant of under that lease.
- (4) Where the entitled person holds the entitlement to enforce the qualifying condition otherwise than as landlord—
 - (a) the land referred to in subsection (3)(a) above shall be the land to which the entitlement to enforce the condition attaches; and
 - (b) the lease referred to in subsection (3)(b) above shall be the lease to which the entitlement to enforce the condition attaches.
- (5) The notice referred to in subsection (1) above shall—
 - (a) be in, or as nearly as may be in, the form contained in schedule 2 to this Act;
 - (b) set out the title of the entitled person to enforce the qualifying condition;
 - (c) identify the land nominated as the burdened property;
 - (d) identify the land nominated as a benefited property;
 - (e) in a case where, by virtue of an order under section 15 of this Act, none of the conditions set out in subsection (2) above requires to be met, state that such an order has been made;
 - (f) in any case other than that mentioned in paragraph (e) above, specify which of the conditions set out in that subsection is (or are) met;
 - (g) set out the terms of the qualifying condition; and
 - (h) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person.
- (6) For the purposes of subsection (1) above, a notice is registered only when registered against both the burdened property and the benefited property.
- (7) Registration under subsection (6) above shall—
 - (a) in the case of the burdened property, be against the title of—
 - (i) the owner of the property; or
 - (ii) the tenant under the qualifying lease of the property; and
 - (b) in the case of a benefited property, be against the title of—
 - (i) the owner of the property; or
 - (ii) if the property in question is subject to a qualifying lease or exempt lease, the tenant under such lease.
- (8) Before submitting any notice for registration under this section, the entitled person shall swear or affirm before a notary public that to the best of the knowledge and belief of the entitled person all the information contained in the notice is true.

- (9) For the purposes of subsection (8) above, if the entitled person is—
- (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of the entitled person may swear or affirm;
 - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm;
- and any reference in that subsection to an entitled person shall be construed accordingly.
- (10) If subsections (1) to (9) above are complied with and immediately before the appointed day the qualifying condition is still enforceable by the entitled person (or that person's successor), then, on that day, the qualifying condition shall become a real burden in relation to which—
- (a) the land identified in pursuance of paragraph (c) of subsection (5) above shall be the burdened property; and
 - (b) the land identified in pursuance of paragraph (d) of that subsection shall be a benefited property.
- (11) This section is subject to sections 30 and 62 of this Act.

NOTE

This section allows a person with a right to enforce a qualifying condition (the "entitled person") to convert the condition into a real burden in favour of neighbouring land. It is modelled on section 18 of the 2000 Act. "Entitled person" is defined in section 12. The entitled person will usually be the landlord (of the qualifying lease or a superior lease) but in some circumstances will be a neighbour. This section implements recommendation 18(a) to (d). See paragraphs 4.42 to 4.47 of the report.

Subsection (1) provides for the execution and registration of a notice nominating the land which is to be the burdened property and the land which is to be a benefited property in relation to the real burden. The burdened property is the subjects of the qualifying lease or part of those subjects. The land that may be nominated as a benefited property is governed by subsections (3) and (4).

Save where the Lands Tribunal for Scotland ("Lands Tribunal") grants an order under section 15 a notice is not validly registered unless one of the conditions set out in subsection (2) is met. The conditions are substantially the same as those in section 18(7) of the 2000 Act.

Subsections (3) and (4) determine what land may be nominated by an entitled person as a benefited property. In the majority of cases the entitled person will be the landlord. Here the land to be nominated as the benefited property is land (i) which the landlord owns and which is not subject to a qualifying or exempt lease or (ii) is land which the landlord is tenant of under a qualifying or exempt lease. In the case of third parties the land which may be nominated as a benefited property is that land to which the right to enforce attaches (whether to the ownership of that land or to the tenant's interest under a lease of that land). In the latter case the tenancy under an ultra long lease qualifies as ownership for the purposes of nominating the benefited property. The requirement that the land in question should not be subject to a qualifying or exempt lease mirrors the requirement in section 18(1) of the 2000 Act that the superior had to own the *dominium utile* of the nominated land. The same rules apply to determine what land may be nominated as a benefited property under section 14.

Subsection (5) sets out the content of the notice which must follow the statutory form given in schedule 2. Further provision as to counter-obligations (paragraph (h)) is made in section 28.

Subsections (6) and (7) provide for dual registration of the notice against both the burdened and the benefited property. There is a choice in both cases of registering against the title of the owner or (where

applicable) the title of the tenant. The subsections implement recommendation 23. See paragraphs 4.64 to 4.65 of the report.

Subsections (8) and (9) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (9). Subsection (9)(b) must be read with schedule 2 of the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

Subsection (10) converts the qualifying condition into a real burden on the appointed day provided that the requirements of the section have been complied with and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

The section is subject to section 30, which makes further provision in relation to notices, and section 62, which deals with service.

14 Conversion by agreement

- (1) An entitled person may, before the appointed day—
 - (a) serve notice such as is mentioned in subsection (4) below, on the tenant under the qualifying lease, that the entitled person seeks to enter into an agreement with the tenant under this section—
 - (i) prospectively converting a qualifying condition into a real burden;
 - (ii) prospectively nominating the qualifying land, or any part of it, as burdened property in relation to such burden; and
 - (iii) prospectively nominating land such as is mentioned in subsection (2) below, or any part of that land, as a benefited property in relation to such burden;
 - (b) subject to subsection (5) below, enter into such an agreement with the tenant; and
 - (c) register that agreement.
- (2) The land referred to in subsection (1)(a)(iii) above is land, other than the qualifying land, which—
 - (a) if the land is not subject to a qualifying or exempt lease, the entitled person is owner of; or
 - (b) if the land is subject to such a lease, the entitled person is tenant of under that lease.
- (3) Where the entitled person holds the entitlement to enforce the qualifying condition otherwise than as landlord—
 - (a) the land referred to in subsection (2)(a) above shall be the land to which the entitlement to enforce the condition attaches; and
 - (b) the lease referred to in subsection (2)(b) above shall be the lease to which the entitlement to enforce the condition attaches.
- (4) The notice referred to in subsection (1) above shall—
 - (a) be in, or as nearly as may be in, the form contained in schedule 3 to this Act;
 - (b) set out the title of the entitled person to enforce the qualifying condition;
 - (c) identify the land nominated as the burdened property;

- (d) identify the land nominated as a benefited property;
 - (e) set out the terms of the qualifying condition; and
 - (f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person.
- (5) If the entitled person and the tenant think fit they may, by the agreement, modify the qualifying condition or any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the entitled person (or both the qualifying condition and any such counter-obligation).
- (6) An agreement such as is mentioned in paragraph (b) of subsection (1) above shall be a written agreement—
- (a) which expressly states that it is made under this section; and
 - (b) which includes all the information, other than that relating to service, required to be set out in completing the notice the form of which is contained in schedule 3 to this Act.
- (7) For the purposes of subsection (1) above, an agreement is registered only when registered against both the burdened property and the benefited property.
- (8) Registration under subsection (7) above shall—
- (a) in the case of the burdened property, be against the title of—
 - (i) the owner of the property; or
 - (ii) the tenant under the qualifying lease of the property; and
 - (b) in the case of a benefited property, be against the title of—
 - (i) the owner of the property; or
 - (ii) if the property in question is subject to a qualifying lease or exempt lease, the tenant under such lease.
- (9) If subsections (1)(b) and (c) and (6) to (8) above are complied with and immediately before the appointed day the qualifying condition is still enforceable by the entitled person (or that person's successor), then, on that day, the qualifying condition shall become a real burden in relation to which—
- (a) the land identified in pursuance of paragraph (c) of subsection (4) above shall be the burdened property; and
 - (b) the land identified in pursuance of paragraph (d) of that subsection shall be a benefited property.
- (10) If—
- (a) the entitled person has not completed title to—
 - (i) the property by virtue of which such person is entitled to enforce a qualifying condition; or
 - (ii) the land nominated as a benefited property; or
 - (b) the tenant has not completed title to the qualifying lease,

then, in a case to which section 15(3) of the Land Registration (Scotland) Act 1979 (c.33) (circumstances where unnecessary to deduce title) does not apply, the entitled person or, as the case may be, the tenant may enter into an agreement under this section only if in the agreement the entitled person, or the tenant, deduces title from the person who appears in the Register of Sasines as having the last recorded title to the interest in question.

(11) This section is subject to section 30 of this Act.

NOTE

This section allows the "entitled person" (as defined in section 12) to enter into an agreement with the tenant of the qualifying lease for the purpose of converting a qualifying condition into a real burden in favour of neighbouring land. It is modelled on section 19 of the 2000 Act. The entitled person will usually be the landlord (of the qualifying lease or a superior lease) but in some circumstances will be a neighbour. The section implements recommendation 19. See paragraph 4.48 of the report. An attempt to reach agreement is a prerequisite to an application under section 15 for an order from the Lands Tribunal dispensing with the need for any of the conditions set out in section 13(2) to be satisfied.

Subsection (1) requires a notice to be served on the tenant under the qualifying lease as a preliminary to the agreement.

Subsections (2) and (3) determine what land may be nominated as a benefited property. The rules are the same as those that apply to determine what land may be nominated as a benefited property under section 13. See the Note to section 13(3) and (4).

Subsection (4) sets out the content of the notice which must follow the statutory form given in schedule 3. Further provision as to counter-obligations (paragraph (f)) is made in section 28.

Subsection (5) allows the parties to the agreement to modify the terms of the qualifying condition or any counter-obligation.

Subsection (6) regulates the form and content of the agreement.

Subsections (7) and (8) provide for dual registration of the agreement against both the burdened and the benefited property. There is a choice in both cases of registering against the title of the owner or (where applicable) the title of the tenant. The subsections implement recommendation 23. See paragraphs 4.64 to 4.65 of the report.

Subsection (9) converts the qualifying condition into a real burden on the appointed day if the requirements of the section have been met and immediately before the appointed day the qualifying condition is still enforceable by the entitled person or a successor of that person.

Subsection (10) provides for deduction of title in cases where under the general law deduction of title would be required.

The section is subject to section 30, which makes further provision in relation to an agreement under this section.

Applications relating to section 13

15 Application to Lands Tribunal for order dispensing with requirement under section 13(1)

- (1) Where an entitled person cannot proceed under subsection (1) of section 13 of this Act prospectively to nominate land because none of the conditions set out in subsection (2) of that section are met, that person may apply to the Lands Tribunal for an order under subsection (4) below.
- (2) An application may be made under subsection (1) above only if the entitled person has first, in pursuance of section 14 of this Act, attempted to reach agreement as respects the qualifying condition in question with the tenant under the qualifying lease.
- (3) An application under subsection (1) above—
 - (a) shall include a description by the entitled person of the requisite attempt to reach agreement; and
 - (b) shall be made not later than 1 year after the day on which this section comes into force.
- (4) If, on an application under subsection (1) above, the Lands Tribunal is satisfied that, were the qualifying condition to be extinguished, there would be material detriment to the value or enjoyment of the entitled person's ownership (taking such person to have ownership) of the land which is to be nominated, under section 13(1) of this Act, as the benefited property, the Tribunal may make an order dispensing with the need for any of the conditions set out in subsection (2) of that section to be met.
- (5) The decision of the Lands Tribunal on an application under subsection (1) above shall be final.
- (6) A person opposing an application made under subsection (1) above incurs no liability in respect of expenses incurred by the entitled person unless, in the opinion of the Lands Tribunal, the actings of the person opposing are vexatious or frivolous.

NOTE

This section allows the "entitled person" (as defined in section 12) to apply to the Lands Tribunal for an order dispensing with the need to satisfy any of the conditions set out in section 13(2). It is modelled on section 20 of the 2000 Act. The entitled person will usually be the landlord (of the qualifying lease or a superior lease) but in some circumstances will be a neighbour. The section implements recommendation 18(e). See paragraph 4.45 of the report.

Subsection (2) prevents an application being made unless there has first been an attempt to reach agreement under section 14.

Subsection (3) requires the application to be made within a year of the section coming into force. The intention is that the section should come into force on Royal Assent. This will enable any applications to be dealt with before the appointed day. The application has also to include a description of the attempt to reach agreement.

Subsection (4) provides that the Lands Tribunal can grant an order if it is satisfied that there would be material detriment to the value or enjoyment of the entitled person's ownership (taking such person to have ownership) of the prospective benefited property were the qualifying condition in question to be extinguished. If an order is granted, the entitled person can then proceed to register a notice under section 13 converting the qualifying condition into a real burden.

Subsection (5) provides that the decision of the Lands Tribunal is final.

Subsection (6) makes provision for expenses in the case of a person opposing an application.

16 Manner of dealing with application under section 15

- (1) On receiving an application under section 15 of this Act, the Lands Tribunal shall give such notice of that application, whether by way of advertisement or otherwise, as may be prescribed for the purposes of that section by the Scottish Ministers by rules under section 3 of the Lands Tribunal Act 1949 (c.42) (the “1949 Act”) to the tenant under the qualifying lease and, if the Lands Tribunal thinks fit, to any other person.
- (2) Any person (whether or not the person has received notice under subsection (1) above) who—
 - (a) is a tenant under the qualifying lease; or
 - (b) is affected by that qualifying condition or by its proposed constitution as a real burden,may, within such time as may be so prescribed, oppose or make representations in relation to the application.
- (3) The Lands Tribunal—
 - (a) shall allow any such person as is mentioned in subsection (2) above; and
 - (b) may allow any other person who appears to it to be affected by the qualifying condition to which the application relates or its proposed constitution as a real burden,to be heard in relation to the application.
- (4) Without prejudice to subsections (1) to (3) above, the Scottish Ministers may, in rules under section 3 of the 1949 Act, make special provision in relation to any matter pertaining to proceedings in applications under section 15 of this Act (or in any class of such applications).

NOTE

This section makes provision for the procedure in the Lands Tribunal in respect of applications under section 15. It is modelled on section 21 of the 2000 Act.

17 Consequential amendment of Tribunals and Inquiries Act 1992

In section 11(7) of the Tribunals and Inquiries Act 1992 (c.53) (which makes provision for Scotland in relation to appeals from certain tribunals), in paragraph (c)—

- (a) the words after “under” shall be sub-paragraph (i); and
- (b) after that sub-paragraph insert “or
 - (ii) section 15 of the Long Leases (Scotland) Act 2006 (asp 00) (applications in relation to the conversion of certain conditions in leases into real burdens);”.

NOTE

This section makes consequential amendments to the Tribunals and Inquiries Act 1992. It is ancillary to section 15(5) which provides that there is no appeal from the decision of the Lands Tribunal on an application under section 15.

Personal real burdens

18 Conversion to personal pre-emption or personal redemption burden

- (1) Without prejudice to section 13 of this Act, the person entitled to enforce a qualifying condition such as is mentioned in subsection (2) below (whether as landlord or otherwise) may, before the appointed day, prospectively convert that qualifying condition into a personal pre-emption burden or, as the case may be, into a personal redemption burden by executing and registering a notice such as is mentioned in subsection (3) below.
- (2) The qualifying condition referred to in subsection (1) above is a condition comprising—
 - (a) a right of pre-emption; or
 - (b) a right of redemption.
- (3) The notice referred to in subsection (1) above shall—
 - (a) be in, or as nearly as may be in, the form contained in schedule 4 to this Act;
 - (b) set out the title to enforce the qualifying condition of the person executing and registering the notice;
 - (c) identify the qualifying land (or any part of such land);
 - (d) set out the terms of the qualifying condition; and
 - (e) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice.
- (4) For the purposes of subsection (1) above, a notice is registered only when registered against the land identified in pursuance of paragraph (c) of subsection (3) above; and the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.
- (5) Before submitting any notice for registration under this section, the person entitled to enforce the qualifying condition shall swear or affirm before a notary public that to the best of the knowledge and belief of that person all the information contained in the notice is true.
- (6) For the purposes of subsection (5) above, if the person entitled to enforce the qualifying condition is—
 - (a) an individual unable by reason of legal disability, or incapacity, to swear or affirm as mentioned in that subsection, then a legal representative of that person may swear or affirm; or
 - (b) not an individual, then any person authorised to sign documents on its behalf may swear or affirm,

and any reference in that subsection to the person entitled to enforce the qualifying condition shall be construed accordingly.

- (7) If subsections (1) to (6) above are complied with and immediately before the appointed day the qualifying condition is still enforceable by the person who executed and registered the notice under subsection (1) above (or that person's successor), then, on that day—
- (a) the qualifying condition shall be converted into a real burden in favour of that person, to be known as a “personal pre-emption burden” or, as the case may be, as a “personal redemption burden”; and
 - (b) the land identified in pursuance of subsection (3)(c) above shall become the burdened property.
- (8) The right to a personal pre-emption burden or personal redemption burden may be assigned or otherwise transferred to any person; and any such assignation or transfer shall take effect on registration.
- (9) Where the holder of a personal pre-emption burden or personal redemption burden does not have a completed title—
- (a) title may be completed by the holder registering a notice of title; or
 - (b) without completing title, the holder may grant a deed—
 - (i) assigning the right to; or
 - (ii) discharging, in whole or in part,
 the burden; but unless the deed is one to which section 15(3) of the Land Registration (Scotland) Act 1979 (circumstances where unnecessary to deduce title) applies, the holder must, in the deed, deduce title from the person who appears in the Register of Sasines as having the last recorded title to the burden in question.
- (10) This section is subject to sections 30 and 62 of this Act.

NOTE

This section allows a person with the right to enforce a qualifying condition which confers a right of pre-emption or redemption to convert that condition into a real burden to be known as a personal pre-emption burden or a personal redemption burden. The entitled person will usually be the landlord (of the qualifying lease or a superior lease) but in some circumstances will be a neighbour. It is modelled on section 18A of the 2000 Act. This section implements recommendation 17(e)(h) and (l). See paragraph 4.38 of the report.

Subsection (1) provides for the execution and registration of a notice. This must be done by "the person" with the right to enforce the qualifying condition. All pro indiviso landlords, for example, have to be parties to the notice.

Subsection (2) identifies the type of qualifying condition which may be converted.

Subsection (3) sets out the content of the notice which must follow the statutory form given in schedule 4. Further provision as to counter-obligations (paragraph (e)) is made in section 28.

Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant. This subsection implements recommendation 23. See paragraphs 4.64 to 4.65 of the report.

Subsections (5) and (6) provide that the notice must be sworn or affirmed before a notary public. In the normal case this must be done personally but some exceptions are set out in subsection (6). Subsection (6)(b) must be read with schedule 2 of the Requirements of Writing (Scotland) Act 1995, which identifies who may sign on behalf of companies and other juristic persons.

Subsection (7) converts the qualifying condition on the appointed day into a personal pre-emption burden or a personal redemption burden in favour of the person with the right to enforce (or that person's successor) provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

Subsection (8) makes clear that the benefit of the burden in question can be assigned. The assignation is completed by registration.

Subsection (9) provides for deduction of title in cases where under the general law deduction of title would be required.

The section is subject to section 30, which makes further provision in relation to notices, and section 62, which deals with service.

19 Conversion to economic development burden

- (1) Where a local authority is, or the Scottish Ministers are, entitled to enforce a qualifying condition which is imposed for the purpose of promoting economic development it or they may, before the appointed day, prospectively convert that qualifying condition into an economic development burden by executing and registering a notice such as is mentioned in subsection (2) below.
- (2) The notice referred to in subsection (1) above shall—
 - (a) be in, or as nearly as may be in, the form contained in schedule 5 to this Act;
 - (b) set out the title to enforce the qualifying condition of the person executing and registering the notice;
 - (c) state that such person is a local authority or the Scottish Ministers;
 - (d) identify the qualifying land (or any part of such land);
 - (e) set out the terms of the qualifying condition;
 - (f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice; and
 - (g) state that the qualifying condition was imposed for the purpose of promoting economic development and provide information in support of that statement.
- (3) For the purposes of subsection (1) above, a notice is registered only when registered against the land identified in pursuance of paragraph (d) of subsection (2) above; and the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.
- (4) If subsections (1) to (3) above are complied with and immediately before the appointed day the qualifying condition is still enforceable by the local authority or the Scottish Ministers then, on that day, the qualifying condition shall become an economic development burden—
 - (a) in favour of the local authority or, as the case may be, the Scottish Ministers; and
 - (b) in relation to which the land identified in pursuance of paragraph (d) of subsection (2) above shall be the burdened property.
- (5) This section is subject to sections 30 and 62 of this Act.

NOTE

This section allows a local authority or Scottish Ministers with the right to enforce a qualifying condition which was imposed for the purpose of promoting economic development to convert that condition into an economic development burden in their favour. It is modelled on section 18B of the 2000 Act. This section implements recommendation 17(f)(h) and (m). See paragraph 4.39 of the report. Economic development burden is defined in section 45(1) and local authority is defined in section 122(1) of the 2003 Act.

Subsection (1) provides for the execution and registration of a notice.

Subsection (2) sets out the content of the notice which must follow the statutory form given in schedule 5. Further provision as to counter-obligations (paragraph (f)) is made in section 28.

Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant. The subsection implements recommendation 23. See paragraphs 4.64 to 4.65 of the report.

Subsection (4) converts the qualifying condition on the appointed day into an economic development burden in favour of the local authority or Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

The section is subject to section 30, which makes further provision in relation to notices, and section 62, which deals with service.

20 Conversion to health care burden

- (1) Where the Scottish Ministers are entitled to enforce a qualifying condition which is imposed for the purpose of promoting the provision of facilities for health care, they may, before the appointed day, prospectively convert that qualifying condition into a health care burden by executing and registering a notice such as is mentioned in subsection (2) below.
- (2) The notice referred to in subsection (1) above shall—
 - (a) be in, or as nearly as may be in, the form contained in schedule 6 to this Act;
 - (b) set out the title of the Scottish Ministers to enforce the qualifying condition;
 - (c) identify the qualifying land (or any part of such land);
 - (d) set out the terms of the qualifying condition;
 - (e) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the Scottish Ministers; and
 - (f) state that the qualifying condition was imposed for the purpose of promoting the provision of facilities for health care and provide information in support of that statement.
- (3) For the purposes of subsection (1) above, a notice is registered only when registered against the land identified in pursuance of paragraph (c) of subsection (2) above; and the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.
- (4) If subsections (1) to (3) above are complied with and immediately before the appointed day the qualifying condition is still enforceable by the Scottish Ministers then, on that day, the qualifying condition shall become a health care burden—

- (a) in favour of the Scottish Ministers; and
 - (b) in relation to which the land identified in pursuance of paragraph (c) of subsection (2) above shall be the burdened property.
- (5) This section is subject to sections 30 and 62 of this Act.

NOTE

This section allows Scottish Ministers with the right to enforce a qualifying condition which was imposed for the purpose of promoting the provision of facilities for health care to convert that condition into a health care burden in their favour. It is modelled on section 18C of the 2000 Act. This section implements recommendation 17(g)(h) and (n). See paragraph 4.40 of the report. Health care burden is defined in section 46(1) of the 2003 Act.

Subsection (1) provides for the execution and registration of a notice.

Subsection (2) sets out the content of the notice which must follow the statutory form given in schedule 6. Further provision as to counter-obligations (paragraph (e)) is made in section 28.

Subsection (3) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant. The subsection implements recommendation 23. See paragraphs 4.64 to 4.65 of the report.

Subsection (4) converts the qualifying condition on the appointed day into a health care burden in favour of Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

The section is subject to section 30, which makes further provision in relation to notices, and section 62, which deals with service.

21 Conversion to conservation burden

- (1) Where a conservation body is, or the Scottish Ministers are, entitled to enforce a qualifying condition of the class described in subsection (2) below, it or they may, before the appointed day, prospectively convert that qualifying condition into a conservation burden for the benefit of the public by executing and registering a notice such as is mentioned in subsection (3) below.
- (2) The class is those qualifying conditions which have the purpose of preserving, or protecting—
 - (a) the architectural or historical characteristics of the land; or
 - (b) any other special characteristics of land (including, without prejudice to the generality of this paragraph, a special characteristic derived from the flora, fauna or general appearance of the land).
- (3) The notice referred to in subsection (1) above shall—
 - (a) be in, or as nearly as may be in, the form contained in schedule 7 to this Act;
 - (b) set out the title to enforce the qualifying condition of the person executing and registering the notice;
 - (c) state that such person is a conservation body or the Scottish Ministers;
 - (d) identify the qualifying land (or any part of such land);
 - (e) set out the terms of the qualifying condition; and

- (f) set out the terms of any counter-obligation to the qualifying condition if it is a counter-obligation enforceable against the person executing and registering the notice.
- (4) For the purposes of subsection (1) above, a notice is registered only when registered against the land identified in pursuance of paragraph (d) of subsection (3) above; and the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.
- (5) If subsections (1) to (4) above are complied with and immediately before the appointed day the qualifying condition is still enforceable by the conservation body or the Scottish Ministers then, on that day, the qualifying condition shall become a conservation burden—
 - (a) in favour of the conservation body or, as the case may be, the Scottish Ministers; and
 - (b) in relation to which the land identified in pursuance of paragraph (d) of subsection (3) above shall be the burdened property.
- (6) The references in subsection (5) above to—
 - (a) the conservation body include references to—
 - (i) any conservation body which is; or
 - (ii) the Scottish Ministers where they are,
 its successor as the person entitled to enforce the qualifying condition; and
 - (b) the Scottish Ministers include references to a conservation body which is their successor as such person.
- (7) This section is subject to sections 30 and 62 of this Act.

NOTE

This section allows a conservation body or Scottish Ministers with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in their favour. It is modelled on sections 27 and 28 of the 2000 Act. This section implements recommendation 17(c)(h) and (k). See paragraph 4.37 of the report. Conservation burden is defined in section 38(1) while conservation body is defined in section 122(1) of the 2003 Act.

Subsection (1) provides for the execution and registration of a notice.

Subsection (2) identifies the type of qualifying condition which may be converted.

Subsection (3) sets out the content of the notice which must follow the statutory form given in schedule 7. Further provision as to counter-obligations (paragraph (f)) is made in section 28.

Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant. The subsection implements recommendation 23. See paragraphs 4.64 to 4.65 of the report.

Subsection (5) converts the qualifying condition on the appointed day into a conservation burden for the benefit of the public in favour of the conservation body or Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable.

Subsection (6) qualifies the reference in subsection (5) to a conservation body or Scottish Ministers so as to include successors provided that they are either a conservation body or Scottish Ministers. In any other case the notice falls and the condition is extinguished on the appointed day.

The section is subject to section 30, which makes further provision in relation to notices, and section 62, which deals with service.

22 Conversion to conservation burden where conservation body or Scottish Ministers nominated to enforce

- (1) The person (not being a conservation body or the Scottish Ministers) entitled to enforce a qualifying condition of the class described in section 21(2) of this Act (whether as landlord or otherwise) may, subject to subsection (2) below, before the appointed day—
 - (a) prospectively convert that condition into a conservation burden for the benefit of the public; and
 - (b) nominate a conservation body or the Scottish Ministers to have title to enforce that burden,by executing and registering a notice such as is mentioned in subsection (3) below.
- (2) Subsection (1) above applies only where the consent of the nominee to being so nominated is obtained—
 - (a) in a case where sending a copy of the notice, in compliance with section 62(2) of this Act, is reasonably practicable, before that copy is so sent; and
 - (b) in any other case, before the notice is executed.
- (3) The notice referred to in subsection (1) above shall—
 - (a) be in, or as nearly as may be in, the form contained in schedule 8 to this Act;
 - (b) set out the title to enforce the qualifying condition of the person executing and registering the notice;
 - (c) state that the nominee is a conservation body (identifying it) or the Scottish Ministers, as the case may be; and
 - (d) comply with paragraphs (d) to (f) of section 21(3) of this Act.
- (4) For the purposes of subsection (1) above, a notice is registered only when registered against the land identified in pursuance of paragraph (d) of subsection (3) above; and the notice may be registered against the title of the owner of the land or of the tenant under the qualifying lease.
- (5) If subsections (1) to (4) above are complied with and immediately before the appointed day the qualifying condition is still enforceable by the person who executed and registered the notice under subsection (1) above (or that person's successor) then, on that day, the qualifying condition shall become a conservation burden—
 - (a) in favour of the conservation body or, as the case may be, the Scottish Ministers; and
 - (b) in relation to which the land identified in pursuance of subsection (3)(d) above, shall be the burdened property.

- (6) This section is subject to sections 30 and 62 of this Act except that, in the application of subsection (2)(b) of section 30 for the purposes of this subsection, such discharge as is mentioned in that subsection shall be taken to require the consent of the nominated person.

NOTE

This section allows a person with the right to enforce a qualifying condition which promotes conservation to convert that condition into a conservation burden in favour of a conservation body or Scottish Ministers. The entitled person will usually be the landlord (of the qualifying lease or a superior lease) but in some circumstances will be a neighbour. The section is modelled on sections 27A and 28A of the 2000 Act. It implements recommendation 17(d)(h) and (k). See paragraph 4.37 of the report. Conservation burden is defined in section 38(1) while conservation body is defined in section 122(1) of the 2003 Act.

Subsection (1) provides for the execution and registration of a notice. This must be done by "the person" with the right to enforce the qualifying condition. All pro indiviso landlords, for example, have to be parties to the notice.

Subsection (2) requires the consent of the nominee to be obtained before a copy of the notice is sent to the tenant under the qualifying lease under section 62(2) or in other cases before the notice is executed. The nominee is required to sign the notice by way of indicating consent.

Subsection (3) sets out the content of the notice which must follow the statutory form given in schedule 8. Further provision as to counter-obligations is made in section 28.

Subsection (4) provides for registration of the notice against the burdened property. Registration can be against either the title of the owner or the title of the tenant. The subsection implements recommendation 23. See paragraphs 4.64 to 4.65 of the report.

Subsection (5) converts the qualifying condition on the appointed day into a conservation burden for the benefit of the public in favour of the nominated conservation body or Scottish Ministers provided that the requirements of the section have been complied with and that immediately before the appointed day the qualifying condition is still enforceable by the person with the right to enforce or that person's successor.

The section is subject to section 30, which makes further provision in relation to notices, and section 62, which deals with service. The adjustment to section 30(2)(b) makes clear that a discharge of a section 22 notice also requires the consent of the nominated person.

Other real burdens

23 Conversion to facility or service burden

- (1) Where a qualifying condition regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to land other than the qualifying land then on the appointed day such condition shall become a facility burden in relation to which—
- (a) the qualifying land shall be the burdened property; and
 - (b) the heritable property which constitutes the facility and any land to which the facility is (and is intended to be) of benefit shall be the benefited property.
- (2) Where a qualifying condition relates to the provision of services to land other than the qualifying land, then the qualifying condition shall, on the appointed day, become a service burden in relation to which—
- (a) the qualifying land shall be the burdened property; and

- (b) any land to which the services are provided shall be the benefited property.
- (3) Without prejudice to the generality of subsection (1) above, examples of property which might constitute a facility such as is mentioned in that subsection are—
 - (a) a common part of a tenement;
 - (b) a common area for recreation;
 - (c) a private road;
 - (d) private sewerage;
 - (e) a boundary wall.

NOTE

Subsection (1) provides for the automatic conversion of qualifying conditions concerned with the maintenance management reinstatement or use of facilities into facility burdens. Typical examples of facilities are given in subsection (3). Obligations to maintain or reinstate which have been taken over by a local or other public authority are excluded (see section 27). This subsection (as with subsection (2)) is modelled on section 56(1) of the 2003 Act which re-enacted section 23 of the 2000 Act and extended its scope to all real burdens. It implements recommendation 16(a)(b) and (c). See paragraphs 4.30 to 4.33 of the report. A facility burden is defined in section 122(1) of the 2003 Act.

Subsection (2) provides for the automatic conversion of qualifying conditions concerned with the provision of services to other land into service burdens. It implements recommendation 17(a)(h) and (i). See paragraph 4.35 of the report. A service burden is defined in section 122(1) of the 2003 Act.

24 Conversion to manager burden

- (1) Where a qualifying condition confers on such person as may be specified in the condition power to—
 - (a) act as the manager of related properties;
 - (b) appoint some other person to be such manager; or
 - (c) dismiss any person appointed by virtue of paragraph (b) above,
 then, on the appointed day, such condition shall become a real burden in favour of such person and in relation to such burden the qualifying land shall be the burdened property.
- (2) A real burden constituted by virtue of subsection (1) above is a manager burden.
- (3) For the purposes of subsection (1) above, whether properties are related properties is to be inferred from all the circumstances; and without prejudice to the generality of this section circumstances giving rise to such an inference might include—
 - (a) the convenience of managing the properties together because they share—
 - (i) some common feature; or
 - (ii) an obligation for common maintenance of some facility;
 - (b) it being evident that the properties constitute a group of properties on which qualifying conditions are imposed under a common scheme; or
 - (c) there being shared rights to common property.

NOTE

This section provides for the automatic conversion of a qualifying condition which confers a power of management over a group of related properties into a real burden known as a manager burden. A manager burden is defined in section 63(1) of the 2003 Act. Such burdens are time limited, usually to five years from creation (section 63(4) to (7)) which in the case of converted conditions is the date of registration of the qualifying lease or other constitutive deed. This means that very few conditions will persist as manager burdens. The section implements recommendation 17(b)(h) and (j). See paragraph 4.36 of the report.

Subsection (3) provides that whether properties are related depends on the circumstances of each case and gives a list of indicators. It is modelled on section 66(1) of the 2003 Act.

25 Conversion where common scheme affects related properties

- (1) Where qualifying conditions are imposed under a common scheme on a group of related properties, such conditions shall, on the appointed day, become real burdens in relation to which each property shall be a benefited and a burdened property.
- (2) For the purposes of subsection (1) above, whether properties are related properties is to be inferred from all the circumstances; and without prejudice to the generality of this subsection circumstances giving rise to such an inference might include—
 - (a) the convenience of managing the properties together because they share—
 - (i) some common feature; or
 - (ii) an obligation for common maintenance of some facility;
 - (b) there being shared rights to common property;
 - (c) the properties being subject to the common scheme by virtue of the same deed of conditions; or
 - (d) the properties each being a flat in the same tenement.
- (3) This section confers no right of pre-emption, redemption or reversion.

NOTE

This section applies to qualifying conditions the regime provided by section 53 of the 2003 Act for real burdens. It draws on the concepts of "common scheme" and "related properties", which are familiar from that Act. Essentially, qualifying conditions will be imposed under a common scheme insofar as they apply identical or equivalent conditions to each property. The section implements recommendation 20(b). See paragraph 4.52 of the report.

The effect of subsection (1) is to convert automatically qualifying conditions which meet the criteria into real burdens in respect of which each property covered by the scheme will be both a benefited and a burdened property. The burdens created will be community burdens in the taxonomy of the 2003 Act.

Subsection (2) provides that whether properties are related depends on the circumstances of each case and gives a list of indicators. A typical example would be flats in the same tenement.

Subsection (3) prevents rights of pre-emption, redemption or reversion being conferred by virtue of this section.

26 Conversion where expressly enforceable by certain third parties

Where a qualifying condition is expressed as being enforceable by—

- (a) the owner; or
- (b) the tenant,

of land other than the qualifying land, then, on the appointed day, such condition shall become a real burden in relation to which the qualifying land shall be the burdened property and that other land shall be a benefited property.

NOTE

Sometimes the lease makes clear that, in addition to the landlord, the conditions (or some of them) are to be enforceable by neighbours, ie by the owners or tenants of other land. Without express provision the rights would fall with the conditions themselves. This section therefore provides for the conversion of such conditions into real burdens. The section implements recommendation 20(a). See paragraphs 4.49 to 4.51 of the report.

Exclusions from conversion

27 Qualifying conditions excluded from conversion: obligations assumed by local or other public authorities

Sections 23(1) and 25(1) shall not apply to a qualifying condition in so far as such condition constitutes an obligation—

- (a) to maintain or reinstate; and
- (b) which has been assumed—
 - (i) by a local or other public authority; or
 - (ii) by virtue of any enactment, by a successor body to any such authority.

NOTE

This section provides that the automatic conversion of qualifying conditions involving roads, sewerage or other facilities into facility burdens (section 23) does not extend to obligations which have been taken over by a local or other public authority. Obligations of this kind are spent. The section implements recommendation 16(d): see paragraph 4.31 of the report. The provision also applies to obligations which are part of a common scheme (section 25).

Effect of conversion on counter-obligations

28 Counter-obligations on conversion

- (1) Where a qualifying condition becomes, by virtue of any of sections 13 to 26 of this Act, a real burden, the right to enforce the burden shall be subject to any counter-obligation such as is mentioned in subsection (2) below.
- (2) The counter-obligations are—
 - (a) in the case of a real burden constituted by virtue of—
 - (i) section 13 or 18 to 22 of this Act, those specified in the notice registered under the section in question;
 - (ii) section 14 of this Act, those specified in the agreement;
 - (iii) section 24 of this Act, those enforceable against the person on whom power is conferred;

- (iv) section 26 of this Act, those enforceable against the owner or, as the case may be, tenant of the other land; and
- (b) in any other case, those enforceable against any person who immediately before the appointed day was entitled to enforce the qualifying condition which was converted into the burden.

NOTE

This section makes clear that an obligation which is the counterpart of a qualifying condition converted into a real burden under the bill will also survive and be binding on the former landlord or third party enforcer or any replacement enforcer. An example might be where a tenant is under an obligation to pay for maintenance which is then to be carried out by the landlord. The section does not provide a free-standing right to enforce the counter-obligation but it makes the right to enforce the burden subject to performance of the counter-obligation. The section is modelled on section 25 of the 2000 Act. It implements recommendation 25. See paragraphs 4.71 and 4.72 of the report.

Subsections (2) and (3) set out the relevant counter-obligations.

Prescription

29 Prescriptive period for converted conditions

Where a qualifying condition becomes, by virtue of any of sections 13 to 26 of this Act, a real burden, section 18(5) of the 2003 Act (prescription where breach of burden occurs before the appointed day) shall apply to any breach of such a qualifying condition as it applies to a breach of a real burden.

NOTE

This is a transitional provision. The period of negative prescription for a leasehold condition is presently twenty years. After conversion to a real burden the period will be five years under section 18 of the 2003 Act. The effect of this section is to make the prescriptive period for a breach of a qualifying condition that occurs before the appointed day for leasehold conversion the same as the period for a breach of a real burden that occurred before the day appointed for feudal abolition. That is to say, the prescriptive period for such a breach will be the shorter of 5 years from the appointed day or 20 years from the breach.

Notices and agreements under this Part

30 Further provision in respect of notices and agreements under this Part

- (1) Where, in relation to a qualifying lease—
 - (a) an agreement relating to a qualifying condition has been registered under section 14 of this Act; or
 - (b) a notice relating to a qualifying condition has been registered under section 13 or 18 to 22 of this Act,

subject to subsection (2) below, it shall not be competent for the person who registered such agreement or notice (or that person's successor) to register under any of those sections in relation to that qualifying lease another such agreement or notice relating to the same qualifying condition.

- (2) Nothing in subsection (1) above shall prevent registration of an agreement or notice where—

- (a) the discharge of any earlier such agreement has been registered, jointly, by the parties to that agreement (or by their successors); or
 - (b) as the case may be, the discharge of any earlier such notice has been registered by the person who registered that notice (or by that person's successor).
- (3) Where more than one qualifying lease is affected by the same qualifying condition enforceable by the same person, that person shall, if that person wishes to execute and register a notice under this Part of this Act in relation to those qualifying leases in respect of that qualifying condition, require to do so in relation to each separately.
- (4) Where a qualifying lease is affected by more than one qualifying condition enforceable by the same person, that person may, if that person wishes to—
- (a) enter into and register an agreement under section 14 of this Act in relation to that qualifying lease in respect of those qualifying conditions, do so by a single agreement; or
 - (b) execute and register a notice under section 13 or 18 to 22 of this Act in relation to that qualifying lease in respect of those qualifying conditions, do so by a single notice.
- (5) Nothing in this Part requires registration against land prospectively nominated as a benefited property but outwith Scotland.

NOTE

Subsection (1) reflects the policy that the person with a right to enforce (whether landlord or third party) should not be able to preserve that right under separate heads of conversion. It should not, for example, be competent to convert a condition into a neighbour burden under section 13 and a conservation burden under section 21. A choice has to be made but the choice is not final as subsection (2) allows an earlier agreement or notice to be discharged. The subsections are modelled on section 42(1) of the 2000 Act. They implement recommendation 21. See paragraphs 4.58 and 4.59 of the report.

Subsections (3) and (4) regulate the number of notices that are required. Where the same qualifying condition enforceable by the same person affects more than one qualifying lease, a separate notice must be prepared for each lease but the same notice (or agreement) can be used for more than one condition. The subsections are modelled on section 42(3) and (4) of the 2000 Act. The provisions implement recommendation 22(b). See paragraph 4.62 of the report.

Subsection (5) makes clear that there is no requirement of registration where the prospective benefited property is outwith Scotland.

PART 3

COMPENSATION FOR LOSS OF LANDLORD'S RIGHTS

Compensatory payment

31 Requiring compensatory payment

- (1) This section applies where, on the appointed day, the rights of a landlord under a lease are extinguished by virtue of Part 1 of this Act.
- (2) The former landlord under such a lease may, before the expiry of the period of 2 years beginning with the appointed day, serve on the former tenant a notice such as is mentioned in subsection (3) below, requiring that a payment—

- (a) calculated in accordance with section 32 of this Act; and
 - (b) specified in the notice,
- be made to the former landlord by the former tenant (such payment being referred to in this Act as a “compensatory payment”).
- (3) The notice referred to in subsection (2) above is—
 - (a) in a case where the rent payable immediately before the appointed day was a *cumulo* rent (as defined in section 51 of this Act) and the lease is not a partially continuing lease, a notice in (or as nearly as may be in) the form contained in schedule 9 to this Act;
 - (b) in a case where the lease is a partially continuing lease (as defined in section 35(1) of this Act), a notice in (or as nearly as may be in) the form contained in schedule 10 to this Act;
 - (c) in any other case, a notice in (or as nearly as may be in) the form contained in schedule 11 to this Act.
 - (4) A notice served under subsection (2) above shall be accompanied by a copy of the explanatory note which immediately follows the form in schedule 9, 10 or, as the case may be, 11 to this Act.
 - (5) Where the compensatory payment required is equal to or greater than £50, the former landlord shall, together with the notice served under subsection (2) above, serve on the former tenant a document such as is mentioned in section 46(2) of this Act (referred to in this Act as an “instalment document”).
 - (6) This section is subject to section 45 of this Act.

NOTE

Part 3 sets out a scheme under which the landlord of a lease extinguished under part 1 may claim compensation. In the first place a landlord may claim a general payment for the loss of all the landlord’s rights. This is termed a compensatory payment and is based on the capitalised value of the rent (see sections 31 to 38). Exceptionally a compensatory payment may not be enough. In certain cases, therefore, a landlord may claim a further payment – termed an additional payment – for the loss of the right in question (see sections 39 to 44). Part 3 implements recommendations 28 to 38. See part 6 of the report.

Section 31 principally implements recommendation 29. See paragraphs 6.17 – 6.21 of the report. To claim compensation, the former landlord must serve on the former tenant a notice in the prescribed form within 2 years beginning with the appointed day. The sum due by the tenant is calculated in accordance with section 32 and is an ordinary unsecured debt. The claim is against the immediate former tenant of the person making the claim (see recommendation 34(ii) and paragraphs 6.52 and 6.53 of the report).

Subsection (3) prescribes the notice to be served in particular cases. In the normal case, a schedule 11 notice will be required. The notices in schedules 9 and 10 are applicable where the rent payable under the lease was a *cumulo* rent, as defined in section 51, or where the lease is a partially continuing lease (see section 35). The notice must be accompanied by a copy of the appropriate explanatory note (subsection (4)).

If the sum being claimed is £50 or more, an instalment document has to be served along with the notice (subsection (5)). This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 46. The threshold of £50 is the same as the threshold for the instalment scheme in section 10 of the 2000 Act. If an instalment document is not served the notice has no effect. This subsection implements 36(a). See paragraphs 6.65 to 6.67 of the report

Subsection (6) makes the section subject to section 45 the effect of which, in the case of a qualifying lease, is to restrict the amount of compensatory payment to £500 unless a preliminary notice has been served.

32 Calculation of compensatory payment

- (1) The compensatory payment specified in a notice served under section 31(2) of this Act shall be the sum of money which would, if invested as mentioned in subsection (2) below, produce an annual sum equal to the sum of—
 - (a) subject to subsection (3) below and sections 35(3) and 36(4) of this Act, the annual rent payable under the lease; and
 - (b) any amount determined under section 33 of this Act.
- (2) The investment referred to in subsection (1) above is an investment in 2½ per cent Consolidated Stock at the middle market price at the close of business last preceding the appointed day.
- (3) Any rent payable under the lease which is expressed wholly or partly in non-monetary terms shall, to the extent that it is so expressed, be left out of account.

NOTE

This section sets out the rules for calculating the sum due by the former tenant as compensation under section 31. This section implements recommendation 28(a) and (d). See paragraphs 6.3 to 6.9 of the report.

Subsections (1) and (2) adopt the formula used in section 9 of the 2000 Act to calculate compensation due for the extinction of a feuduty. The landlord is entitled to the amount that would if invested as set out in subsection (2) produce an annual income equal to the sum of the annual rent that was payable under the extinguished lease. The reference to annual rent includes (i) that part of a cumulo rent that has been apportioned to the lease prior to the appointed day in the circumstances set out in section 51(2), (ii) that part of the annual rent that has been allocated to the lease under section 35(3), and (iii) that part of a cumulo rent that has been allocated to the lease under section 36(4).

In cases where a premium of £100 or less was payable for renewals, the annual rent is increased in accordance with section 33.

Subsection (3) provides that rent shall be disregarded to the extent that it is expressed in non-monetary terms. However, compensation for the loss of such rent can be claimed under section 40(1)(a) as an additional payment under the scheme set out in sections 39 to 44.

33 Annual amount in respect of loss of right to receive renewal premium

- (1) This section applies where—
 - (a) the lease contains an obligation on the landlord to renew it after a fixed period and on payment by the tenant to the landlord of a premium less than or equal to £100; and
 - (b) the lease complies with section 1(2)(b) and (c) of this Act by virtue of section 60(1)(b) of this Act.
- (2) For the purposes of section 32(1)(b) of this Act, the sum determined under this section is the sum obtained by dividing the value of the premium referred to in paragraph (a) of subsection (1) above by the number of years between each obligation to renew.

NOTE

This section applies if a renewal premium of £100 or less was payable under the lease and it was necessary to include the renewal or more than one renewal in order to meet the durational requirements. It implements recommendation 30(a). See paragraphs 6.22 to 6.25 of the report.

Subsection (2) directs the former landlord to divide the amount of the premium by the number of years between each renewal. This gives a sum which represents the “annual amount” of the premium. The annual amount is added to the annual rent that was payable under the lease in order to calculate compensation under section 32.

The reference to a premium is to the premium after taking into account the definition of cumulo premium in section 51 and any allocations that may be necessary under sections 35 and 36 as applied to renewal premiums by section 38.

If a premium of more than £100 was payable the landlord can claim compensation under the additional payments regime set out in sections 39 to 44.

34 Making compensatory payment

If the former landlord has served notice in accordance with section 31 of this Act the former tenant shall, subject to section 46 of this Act, before the expiry of the period of 56 days beginning with the day on which the notice is served, make the compensatory payment to the former landlord.

NOTE

If the landlord has followed the notice procedure correctly, the former tenant must, unless entitled to pay by instalments (see sections 31(5) and 46), make the compensatory payment within fifty six days beginning with the day on which notice is served. See paragraph 6.63 of the report.

Leases continuing after the appointed day

35 Partially continuing leases: allocation of rent

- (1) In this Part of this Act, a “partially continuing lease” is a lease which, on the appointed day —
 - (a) is extinguished by virtue of Part 1 of this Act, in respect of part of the subjects of the lease (in this section, such subjects being referred to as the “converted subjects”); and
 - (b) whether by exemption under Part 4 of this Act or otherwise, continues in respect of any other subjects (in this section, such subjects being referred to as the “continuing subjects”).
- (2) The landlord shall, before the expiry of the period of 2 years beginning with the appointed day, allocate—
 - (a) the annual rent payable under the partially continuing lease immediately before the appointed day; or
 - (b) where a *cumulo* rent is allocated to the lease under section 36(2) of this Act, the annual rent so allocated,between the converted subjects and the continuing subjects in such proportions as are reasonable in all the circumstances.

- (3) The annual rent allocated to the converted subjects shall be the annual rent payable under the partially continuing lease for the purposes of calculating the compensatory payment under section 32 of this Act.
- (4) The annual rent allocated to the continuing subjects shall, subject to section 37(1) of this Act, be the annual rent payable under the partially continuing lease from the appointed day.
- (5) In this section and in section 36 of this Act, “landlord” includes former landlord.

NOTE

In some cases it is necessary to determine the annual rent for the purposes of calculating the compensatory payment under s 32. In some cases also it is necessary to determine the annual rent for those leases that continue wholly or partly on and after the appointed day. Sections 35 to 37 identify the cases in question and provide the rules for fixing the annual rent. The onus is on the landlord to fix the annual rent otherwise the landlord will not be able to recover the compensatory payment.

Section 35 is concerned with a lease that is partly extinguished and partly continues on and after the appointed day. A lease will be a partially continuing lease if, for example, there is a partial sublease further down the leasehold chain which is exempt from conversion under part 4 of the Bill. Instead of being extinguished in full, the higher lease will continue in force in relation to the subjects of the exempt lease. See the examples given in footnote 32 to paragraph 6.15 of the report. This section implements recommendation 28(c). See paragraph 6.15 of the report.

Subsection (2) directs the landlord of a partially continuing lease to allocate the annual rent payable under the lease between the continuing part and the extinguished part. If the rent payable under the lease was a cumulo rent, as defined in section 51, the landlord must allocate the cumulo rent (section 36) between the relevant leases before carrying out the allocation under this section.

Under subsection (3) the sum allocated to the extinguished part of the lease is the annual rent that is used to calculate the compensation due under section 32.

Under subsection (4) the sum allocated to the continuing part of the lease is the annual rent payable under the lease from the appointed day. This is subject to section 37(1) which gives the tenant of the continuing part of the lease the right to apply to the Lands Tribunal to challenge the allocation.

Subsection (5) defines landlord for the purposes of this section and section 36. Following the appointed day the landlord of the partially continuing lease is the former landlord of the part of the lease that is extinguished.

36 Allocation of “*cumulo* rent”

- (1) This section applies where—
 - (a) immediately before the appointed day, a *cumulo* rent was payable; and
 - (b) on that day, one or more of the leases in respect of which that rent was payable is extinguished, by virtue of Part 1 of this Act, in respect of any of the subjects of such a lease.
- (2) The landlord shall, before the expiry of the period of 2 years beginning with the appointed day, allocate that rent between or, as the case may be, among the leases in such proportions as are reasonable in all the circumstances.

- (3) Where, immediately before the appointed day, the *cumulo* rent was wholly or partly apportioned between or, as the case may be, among the leases, then for the purposes of subsection (2) above the proportions of the landlord's allocation shall be presumed reasonable in so far as they accord with that apportionment.
- (4) Where, on the appointed day, a lease in respect of which *cumulo* rent was payable is extinguished, the annual rent allocated to the lease under subsection (2) above shall be the annual rent payable under the lease for the purposes of calculating the compensatory payment under section 32 of this Act.
- (5) Where a lease in respect of which *cumulo* rent was payable is an exempt lease or is otherwise a lease which continues on and after the appointed day, the annual rent allocated to the lease under subsection (2) above shall, subject to section 37(1) of this Act, be the annual rent payable under the lease from the appointed day.
- (6) Where a lease in respect of which *cumulo* rent was payable is a partially continuing lease, section 35 of this Act applies.

NOTE

Where the annual rent payable under the lease is a *cumulo* rent, as defined in section 51, that rent requires to be allocated before the compensatory payment can be calculated under section 32. This section sets out the rules. It is modelled on section 9(3) and (4) of the 2000 Act. It implements recommendation 28(b). See paragraphs 6.11 to 6.14 of the report.

Subsection (2) directs the landlord to allocate the *cumulo* rent between the relevant leases.

Subsection (3) creates a presumption that the landlord's allocation is reasonable if it accords with an apportionment made before the appointed day. This presumption is relevant only in cases where an apportionment was made without the consent of the landlord, for example where the rent was collected by a property manager or other third party and remitted to the landlord in a single sum. To assist the landlord section 48 requires a third party collector to disclose to the landlord information about the tenants from whom the rent has been collected and the amount collected.

Under subsection (4) the sum allocated to a lease that is wholly extinguished is the annual rent used to calculate compensation under section 32.

Under subsection (5) the sum allocated to a lease that continues after the appointed day is the annual rent payable under that lease from the appointed day. This is subject to section 37(1) which gives the tenant of a continuing lease the right to apply to the Lands Tribunal to challenge the allocation.

In cases where part of the *cumulo* rent is allocated to a partially continuing lease, subsection (6) directs the landlord to make a further allocation between the extinguished part and the continuing part of the lease under section 35.

37 Allocation disputed or not made: right to refer matter to Lands Tribunal

- (1) Where a tenant under—
 - (a) a partially continuing lease disputes the allocation made under subsection (2) of section 35 of this Act (including any allocation as may be required by paragraph (b) of that subsection); or
 - (b) a lease referred to in subsection (5) of section 36 of this Act disputes the allocation made under subsection (2) of that section,

the tenant may, before the expiry of the period of 56 days beginning with the day on which the landlord gives notice to the tenant of the allocation, apply to the Lands Tribunal for an order fixing the annual rent payable under the lease from the appointed day.

- (2) Where a landlord under—
 - (a) a partially continuing lease; or
 - (b) a lease referred to in section 36(5) of this Act,

does not, within the period of 2 years beginning with the appointed day, give notice to a tenant of an allocation under section 35(2) or, as the case may be, 36(2) of this Act, the tenant may apply to the Lands Tribunal for an order fixing the annual rent payable under the lease from the appointed day.

NOTE

Under subsection (1) the tenant under a continuing lease or the continuing part of a lease can challenge an allocation made under section 35 or 36 by applying to the Lands Tribunal for an order fixing the annual rent. An application must be made within fifty six days, beginning with the day on which notice of the allocation was given to the tenant. In a section 35 case notification will be given by the notice to be served under section 31.

Subsection (2) gives such tenants the right to apply to the Lands Tribunal for an order fixing the annual rent in cases where the landlord has not given notice of an allocation within two years beginning with the appointed day. Two years is the period within which compensation must be claimed under section 31. An application can be made at any time after the expiry of the two year period.

This section does not give a right of application to the former tenant of a lease, or part of a lease, extinguished on the appointed day in respect of compensation claimed by the former landlord where an allocation has been made under section 35 or 36. However, it is a defence to a claim for compensation that the allocation was unreasonable.

38 Application of sections 35 to 37 to renewal premiums

- (1) This section applies where—
 - (a) the rent payable under a lease is capable of being allocated under section 35 or, as the case may be, section 36 of this Act; and
 - (b) the lease contains an obligation on the landlord to renew it after a fixed period on payment by the tenant of a premium and the lease complies with section 1(2)(b) and (c) of this Act by virtue of section 60(1)(b) of this Act.
- (2) Sections 35 to 37 of this Act shall apply—
 - (a) with the modifications set out in subsection (3) below; and
 - (b) subject to subsection (4) below,for the purposes of allocating or fixing any premium such as is mentioned in subsection (1)(b) above as they apply to rent.
- (3) The modifications are—
 - (a) references to “annual rent” shall be construed as references to a premium such as is mentioned in subsection (1)(b) above;

- (b) references to “*cumulo* rent” shall be construed as references to a *cumulo* premium; and
 - (c) in sections 35(3) and 36(4) of this Act, for the words “calculating the compensatory payment under section 32 of this Act” substitute “section 33(1)(a) or (where the premium so allocated is more than £100) section 40(1)(c) of this Act”.
- (4) Where the rent payable under a lease is allocated under section 35 or, as the case may be, section 36 of this Act, any allocation of a premium such as is mentioned in subsection (1)(b) above shall be presumed to be reasonable in so far as it accords with the allocation of rent.

NOTE

This section applies the provisions on allocation of rent (sections 35 and 36) and right to refer to the Lands Tribunal (section 37) to a renewal premium in certain circumstances. Where a *cumulo* premium (as defined in section 51) was payable under more than one lease or where a premium was payable under a partially continuing lease, a landlord, for the purposes of claiming a compensatory payment or an additional payment for the loss of the renewal premium, has first to allocate the premium in accordance with the scheme for allocation of rent. If the premium allocated is more than £100, compensation can only be claimed under s 40(1)(c) as an additional payment. This section implements recommendation 30(b). See paragraph 6.26 of the report.

Subsection (3) sets out the modifications that are required to make sections 35 to 37 apply to renewal premiums.

Subsection (4) creates a presumption that an allocation of a premium is reasonable if it follows an allocation of rent.

Additional payment

39 Claiming additional payment

- (1) This section applies where, on the appointed day, a right of a landlord under a lease, being a right mentioned in section 40(1) of this Act, is extinguished by virtue of Part 1 of this Act.
- (2) The former landlord under such a lease may, before the expiry of the period of 2 years beginning with the appointed day, serve, subject to subsection (3) below, on the former tenant a notice such as is mentioned in subsection (4) below claiming that a payment, calculated in accordance with section 41 of this Act, be made to the former landlord by the former tenant in respect of the extinction of such a right (such payment being referred to in this Act as an “additional payment”).
- (3) Where—
 - (a) the lease mentioned in subsection (1) above is a superior lease; and
 - (b) the extinguished right is a right referred to in paragraphs (d) to (f) of subsection (1) of section 40 of this Act,

service by the former landlord under subsection (2) above shall be on the former tenant under the qualifying lease and any reference to the “former tenant” in sections 41 to 44, 46, 47 and 49 of this Act shall be construed as a reference to the former tenant under the qualifying lease.

- (4) The notice referred to in subsection (2) above shall—

- (a) be in, or as nearly as may be in, the form contained in schedule 12 to this Act;
 - (b) be accompanied by a copy of the explanatory note which immediately follows the form in schedule 12 to this Act;
 - (c) set out the right which has been extinguished and in respect of which the claim is made;
 - (d) specify the amount of additional payment claimed and the basis on which the amount is calculated; and
 - (e) where the claim is in respect of a right to development value, set out the basis on which the development value is reserved under the lease.
- (5) Where the additional payment claimed is equal to or greater than £50, the former landlord shall, together with the notice served under subsection (2) above, serve an instalment document on the former tenant.
- (6) This section is subject to section 45 of this Act.

NOTE

Sections 39 to 44 set out a scheme by which a landlord can claim a further payment for the loss of certain rights in cases where the compensatory payment is not a sufficient measure of the landlord's loss.

Section 39 regulates the initial procedure. The section principally implements recommendation 29 (paragraphs 6.17 – 6.21 of the report).

In order to claim compensation for the loss of a right the former landlord must serve a notice in the prescribed form on the former tenant within two years of the appointed day (subsection (2)). The amount claimed is calculated in accordance with section 41. The claim is against the immediate former tenant of the person making the claim (see recommendation 34(ii) and paragraphs 6.52 and 6.53 of the report) save in the circumstances set out in subsection (3).

Subsection (3) implements recommendation 34(i). See paragraph 6.54 of the report. Where the right lost by the former landlord of a superior lease is one specified in section 40(d) to (f), the former landlord is directed to serve the notice claiming an additional payment on the former tenant of the qualifying lease rather than on the former tenant of the superior lease.

Subsection (4) sets out various requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note.

If the sum being claimed is £50 or more, an instalment document has to be served along with the notice (subsection (5)). This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 46. The threshold of £50 is the same as the threshold for the instalment scheme in section 10 of the 2000 Act. If an instalment document is not served the notice has no effect. This subsection implements recommendation 36(a). See paragraphs 6.65 – 6.67 of the report

Subsection (6) makes the section subject to section 45 the effect of which, in the case of a qualifying lease, is to restrict the maximum amount that can be claimed by way of additional payment to £500 unless a preliminary notice has been served.

40 Extinguished rights in respect of which additional payment may be claimed

- (1) The rights referred to in section 39(1) of this Act are—
- (a) any right to a rent to the extent that such right is expressed wholly or partly in non-monetary terms;

- (b) any right to have the amount payable as rent reviewed or increased from time to time;
- (c) any right to receive a premium (other than a premium mentioned in section 33(1) of this Act) in return for renewing the lease after a fixed period, where, by virtue of section 60(1)(b) of this Act such a renewal is required in order for the lease to comply with section 1(2)(b) and (c) of this Act;
- (d) any right to resume natural possession of the land subject to a lease upon expiry of the lease, provided that the lease would expire no later than the end of the period of 200 years beginning with the appointed day;
- (e) any right, other than a right of pre-emption, enabling a lease to be terminated earlier than the date on which the lease would otherwise expire, providing that such right—
 - (i) is exercisable no later than the end of the period of 200 years beginning with the appointed day;
 - (ii) is not a provision of the lease purporting to terminate the lease, or entitling the landlord to terminate it, in the event of a failure of the tenant to comply with any provision of the lease;
 - (iii) is not a provision of the lease deeming such a failure to be a material breach of contract; and
 - (iv) does not become a real burden by virtue of section 13, 14 or 18 of this Act; and
- (f) any right to development value, providing that such right does not become a real burden by virtue of section 13 or 14 of this Act.

(2) In this Part of this Act—

“development value” means any significant increase in the value of a lease arising as a result of the subjects of the lease becoming free to be used, or dealt with, in some way not permitted under the lease; and

any reference to a “right to development value” means a right to the benefit of any development value of a lease where—

- (a) the lease was granted subject to a condition, enforceable by the landlord, reserving to the landlord the benefit (whether wholly or in part) of any development value; and
- (b) the consideration (including rent) paid for, or payable under, the lease was—
 - (i) nominal; or
 - (ii) significantly lower than it would have been had the lease not been subject to the condition.

NOTE

This section identifies the rights the loss of which may found a claim for an additional payment. It implements recommendation 31. See paragraphs 6.28 to 6.38 of the report. In the notice making the claim it will be for the landlord to nominate, and to justify, the particular ground of claim.

Subsection (1)(a) refers to a right to a non-monetary rent. See paragraph 6.29 of the report.

Subsection (1)(b) refers to a right to have a rent review or rent increase. See paragraphs 6.30 and 6.31 of the report.

Subsection (1)(c) refers to a right to receive a renewal premium other than a renewal premium of £100 or less (which can be recovered under the compensatory payment regime (see section 33)). The premiums in question are for more than £100 or of an uncertain amount. Only such renewals as are necessary to raise the lease to the qualifying duration are relevant. See paragraphs 6.22 to 6.25 and 6.32 of the report. The reference to a premium is to the premium after taking into account the definition of cumulo premium in section 51 and any allocations that may be necessary under sections 35 and 36 as applied to renewal premiums by section 38.

Subsection (1)(d) refers to a landlord's right of reversion. This occasionally may have a value over and above the income stream from rent. See paragraph 6.33 of the report. Section 60 sets out rules for calculating the period of a lease. The right has to be valued in accordance with section 41(2) and (3).

Subsection (1)(e) refers to a right to bring a lease to an end before its normal expiry. The right has to be within the full control of the landlord. A break clause exercisable at regular intervals or a right of redemption or resumption exercisable at the landlord's discretion would be included but not a right to terminate on breach. A right (such as a right of redemption) which is converted into a real burden under sections 13, 14 or 18 is excluded. See paragraphs 6.34 and 6.35 of the report.

Subsection (1)(f) refers to a right to development value provided that the right has not been converted into a real burden under section 13 or 14. "Development value" is defined in subsection (2) as is the expression "right to development value". The definitions are borrowed from the 2000 Act (section 33(1) and (5)). See paragraphs 4.56 and 6.36 to 6.37 of the report.

41 Basis of calculation of additional payment

- (1) In calculating the amount of an additional payment—
 - (a) the extinguished right mentioned in section 40(1) of this Act shall be valued as at the appointed day;
 - (b) any obligations of the former landlord arising from the lease which are, on the appointed day, extinguished by virtue of Part 1 of this Act shall, subject to subsection (5) below, be taken into account; and
 - (c) any other entitlement (including under this Act) of the former landlord to recover any loss for which the additional payment is claimed shall be taken into account.
- (2) In the case of a claim for an additional payment arising from the extinction of the right mentioned in section 40(1)(d) of this Act, the additional payment shall represent, subject to subsection (3) below, the value which the right could reasonably be expected to obtain if sold on the open market by a willing seller to a willing buyer.
- (3) In assessing the value which the right referred to in subsection (2) above would have in the circumstances referred to in that subsection—
 - (a) it shall be presumed that the lease shall continue until the expiry of the period for which it was granted; and
 - (b) no account shall be taken of—
 - (i) any factor attributable to the known existence of a person (including the former tenant) who would be willing to buy the right at a price higher than other persons because of a characteristic of the right which relates peculiarly to that person's interest in buying it; and

- (ii) any depreciation in the value of any other land owned by the former landlord.
- (4) In the case of a claim for an additional payment arising from the extinction of a right to development value, the additional payment shall not exceed such sum as would make up for any effect which the right produced, at the time when the condition reserving the right was imposed, in reducing the consideration (including rent) paid for or payable under the lease.
- (5) No account shall be taken of any obligation referred to in subsection (1)(b) above insofar as it is preserved as a counter-obligation to a real burden.

NOTE

This section sets out some general and some specific rules for determining the amount of an additional payment. It implements recommendation 32(b) to (e).

Subsection (1) contains the general rules. The right is to be valued at the appointed day. Any obligations on the landlord which do not survive conversion have to be taken into account as has any other entitlement of the landlord to recover in respect of the loss. The latter refers primarily to the compensatory payment which in many cases will be sufficient to cover the loss of all rights. See paragraphs 6.40 to 6.42 of the report.

Subsections (2) and (3) contain specific rules relating to the valuation of a landlord's reversionary interest in a claim under section 40(1)(d). See paragraphs 6.43 to 6.44 of the report.

Subsection (4) caps a claim for the loss of the right to development value in the same way that a claim under the 2000 Act is capped (section 37(2)). See paragraph 6.45 of the report.

42 Additional payment: former tenant agrees to payment claimed

- (1) This section applies where—
 - (a) a former landlord has served on the former tenant a notice in accordance with section 39 of this Act; and
 - (b) the former tenant agrees to make the additional payment specified in the notice to the former landlord.
- (2) The former tenant shall, subject to section 46 of this Act, before the expiry of the period of 56 days beginning with the day on which the notice is served, make the additional payment to the former landlord.

NOTE

This section applies in cases where, following service of an additional payment notice in accordance with section 39, the former tenant agrees to make the payment specified in the notice. Unless the tenant is entitled to pay by instalments (see sections 39(5) and 46), payment must be made to the former landlord within 56 days beginning with the day on which the notice was served on the former tenant. This section implements in part recommendation 32(a). See paragraphs 6.39 and 6.63 of the report.

The former tenant need not agree to pay the amount specified in the notice. Instead, the former tenant and the former landlord may agree that a different amount should be paid or where agreement cannot be reached, the matter may be referred to the Lands Tribunal (see sections 43 and 44).

43 Additional payment: amount agreed between former landlord and former tenant

- (1) This section applies where—
 - (a) a former landlord has served on the former tenant a notice in accordance with section 39(2) of this Act; and
 - (b) the former tenant and the former landlord agree the amount of the additional payment, being an amount other than that specified in the notice.
- (2) The former landlord may, before the expiry of the period of 5 years beginning with the appointed day, serve on the former tenant a notice such as is mentioned in subsection (3) below, requiring that the agreed additional payment be made to the former landlord by the former tenant.
- (3) The notice referred to in subsection (2) above shall—
 - (a) specify the agreed additional payment;
 - (b) be in (or as nearly as may be in) the form contained in schedule 13 to this Act; and
 - (c) be accompanied by a copy of the explanatory note which immediately follows the form in schedule 13 to this Act.
- (4) Where the agreed additional payment is equal to or greater than £50 the former landlord shall, together with the notice served under subsection (2) above, serve an instalment document on the former tenant.
- (5) The former tenant shall, subject to section 46 of this Act, before the expiry of the period of 28 days beginning with the day on which the notice is served under subsection (2) above, make the additional payment to the former landlord.

NOTE

Following service of an additional payment notice in accordance with section 39, the former landlord and former tenant may agree that a different amount be paid. This section regulates the procedure to be followed. It implements in part recommendation 32(a). See paragraphs 6.39 and 6.63 of the report.

Subsection (2) requires the former landlord to serve a further notice in the prescribed form on the former tenant specifying the agreed amount and requesting payment. The notice must be served within 5 years of the appointed day to be valid. If a notice is not served the obligation to pay does not arise and the landlord loses the right to collect the payment.

Subsection (3) sets out requirements for the form and content of the notice. The notice must be accompanied by a copy of the explanatory note.

If the sum being claimed is £50 or more, subsection (4) requires that an instalment document is served along with the notice. This gives the tenant the option of paying by instalments in accordance with the scheme set out in section 46. If an instalment document is not served the notice has no effect. This subsection implements 36(a). See paragraphs 6.65 – 6.67 of the report

Unless entitled to pay by instalments, subsection (5) requires the former tenant to make payment to the former landlord within 28 days, beginning with the day on which the notice is served.

44 Reference to Lands Tribunal in relation to claim for additional payment

- (1) If no agreement has been reached under section 42 or 43 of this Act, the—
 - (a) former landlord; or

- (b) former tenant,
may refer any matter arising in relation to a claim for an additional payment under section 39 of this Act to the Lands Tribunal.
- (2) In determining any such matter, the Lands Tribunal may make such order as it thinks fit (including an order fixing the amount of additional payment).
- (3) Where the Lands Tribunal makes an order fixing an additional payment which is equal to or greater than £50 it must provide the former tenant with the option of making the payment in instalments in accordance with section 46 of this Act but—
- (a) no instalment document is required;
 - (b) in subsection (3)(b) of that section, for the words “when so returning such document” there shall be substituted “before the expiry of the period of 28 days beginning with the day on which the Lands Tribunal makes the order fixing the additional payment”; and
 - (c) the reference in subsection (4) of that section to the date on which the instalment document is served shall be construed as a reference to the date on which the Lands Tribunal makes the order.
- (4) A reference under subsection (1) above must be made before the expiry of the period of 5 years beginning with the appointed day.

NOTE

This section applies in cases where no agreement has been reached under section 42 or section 43. It implements in part recommendation 32(a). See paragraph 6.39 of the report

Subsection (1) gives both the former tenant and the former landlord the right to refer any matter relating to a claim for an additional payment to the Lands Tribunal.

Subsection (2) gives the Lands Tribunal a wide discretion to determine the claim and make such order as it thinks fit.

Subsection (3) requires the Lands Tribunal to provide the former tenant with the option of paying by instalments in accordance with the statutory instalment scheme if the additional payment is fixed at £50 or more. This subsection makes certain amendments to the instalment scheme to take account of the fact that no instalment document will be served on the former tenant.

Subsection (4) provides that all references must be made to the Lands Tribunal within 5 years of the appointed day. This is to give some certainty. If no such reference is made a tenant for instance will know that the matter is not to be pursued.

Supplementary

45 Claims in excess of £500: preliminary notice

- (1) This section applies where a landlord intends, after the appointed day, to require or, as the case may be, claim from the tenant under a qualifying lease —
- (a) a compensatory payment which is;
 - (b) an additional payment which is; or
 - (c) more than one additional payments which, taken together, are,
- likely to exceed £500.

- (2) The landlord shall, not later than 6 months before the appointed day, serve on the person registered as tenant a notice such as is mentioned in subsection (3) below (such notice being referred to in this Act as a “preliminary notice”) stating the landlord’s intention to require or, as the case may be, claim such a payment.
- (3) The preliminary notice shall be in (or as nearly as may be in) the form contained—
 - (a) in the case of a requirement for a compensatory payment, in schedule 14; or
 - (b) in the case of a claim for an additional payment, in schedule 15,
 to this Act.
- (4) The preliminary notice shall—
 - (a) state—
 - (i) the amount of compensatory payment to be required or, as the case may be, additional payment to be claimed; or
 - (ii) where such amount cannot be determined, the best estimate of such amount; and
 - (b) be accompanied by a copy of the explanatory note which immediately follows the form in schedule 14 or, as the case may be, schedule 15 to this Act.
- (5) Where a preliminary notice has not been served in accordance with this section, the amount of—
 - (a) compensatory payment required under section 31(2) of this Act; or
 - (b) additional payment claimed under section 39(2) of this Act; or
 - (c) where more than one additional payment is claimed, the total amount of such payments,
 shall not exceed £500.

NOTE

A landlord who wishes to claim more than the sum of £500 by way of compensatory or additional payment from the tenant of the qualifying lease has to serve a preliminary notice six months before the appointed day on the person who is registered at that time as the tenant. Separate notices have to be served in respect of each type of payment. Where an estimate is given which will usually be the case the landlord is not bound by the figure but it must be a reasonable estimate. If a notice is not served or the estimate given is not reasonable the amount of compensatory or additional payment that can be claimed is capped at £500.

This section implements recommendation 33. See paragraphs 6.48 to 6.51 of the report. In so far as the section provides for service on the person registered as tenant it implements recommendation 35(c). See paragraph 6.60 of the report.

46 Making payment by instalments

- (1) This section applies where an instalment document under section 31(5), 39(5) or 43(4) of this Act is served on a former tenant.
- (2) An instalment document shall be—
 - (a) a filled out document in, or as nearly as may be in, the form contained in schedule 16 to this Act; and

- (b) accompanied by a copy of the explanatory note which immediately follows that form in that schedule.
- (3) Subject to subsection (4) below, the former tenant shall obtain the option of making the compensatory or, as the case may be, additional payment by instalments if (and only if)—
 - (a) the former tenant signs, dates and returns the instalment document within the period which (but for this section) is allowed for making that payment—
 - (i) in the case of a compensatory payment, under section 34; or
 - (ii) in the case of an additional payment, under section 42(2) or, as the case may be, 43(5),
 of this Act; and
 - (b) when so returning such document, the former tenant pays to the former landlord an amount equivalent to one tenth of the payment (such amount being payable in addition to the payment and irrespective of how or when such payment is subsequently made).
- (4) If on or after the date on which an instalment document is served on the former tenant under a qualifying lease the former tenant ceases, by virtue of a sale or transfer for valuable consideration, to have right to the land in respect of which the claim for payment has been made or any part of that land then—
 - (a) where the former tenant has obtained the option mentioned in subsection (3) above, the former tenant shall lose that option and the outstanding balance of the entire payment shall fall due on the seventh day after the day on which the former tenant ceases to have that right; and
 - (b) where the former tenant has not obtained that option, the former tenant shall lose the right to obtain it and—
 - (i) in the case of a compensatory payment, section 34; or
 - (ii) in the case of an additional payment, section 42(2) or, as the case may be, 43(5),
 of this Act shall apply accordingly.
- (5) Subject to subsection (6) below, where the option of making the payment by instalments is obtained, those instalments shall be equal instalments payable where—
 - (a) the payment is £500 or less, on each of the 5;
 - (b) it is more than £500 but not more than £1,000, on each of the 10;
 - (c) it is more than £1,000 but not more than £1,500, on each of the 15; or
 - (d) it is more than £1,500, on each of the 20,
 term days of Whitsunday or Martinmas which then next follow the making of the payment under subsection (3)(b) above.
- (6) In—
 - (a) a case where any instalment payable by virtue of subsection (5) above remains unpaid for 42 days after falling due, the outstanding balance of the entire payment shall immediately fall due;
 - (b) any other case, the former tenant may pay that outstanding balance at any time.

NOTE

Where the compensatory payment or additional payment is £50 or more the former landlord requires to serve an instalment document along with the relevant notice. This section sets out the rules of the instalment scheme, which is modelled on the scheme in the 2000 Act. The section implements recommendation 36(b). See paragraphs 6.65 to 6.69 of the report.

Subsection (2) prescribes a form of instalment document and requires the former landlord to complete the blank parts of the form. A copy of the explanatory note has to be attached to the document when it is served.

In order to obtain the option to pay by instalments, subsection (3) requires the former tenant to sign, date and return the instalment document along with payment of the 10% surcharge within the period allowed for payment of the compensatory or additional payment, namely twenty eight or fifty six days.

Subsection (4) provides that the option of paying by instalments is lost by the former tenant of a qualifying lease in the event of a sale of the whole or part of the land now owned.

Subsection (5) sets out the details of the scheme.

Subsection (6) provides for immediate payment of the balance if an instalment is unpaid for forty two days and makes clear that in other cases the balance can be repaid at any time.

47 Service of notices under this Part

- (1) Service of a notice under any provision of this Part of this Act shall be effected by—
 - (a) delivering it to the former tenant or, as the case may be, the tenant;
 - (b) sending it by—
 - (i) registered post; or
 - (ii) the recorded delivery service,to that person at a place such as is mentioned in subsection (2) below; or
 - (c) in a case where a notice, sent under paragraph (b) above, is returned to the former landlord or, as the case may be, landlord with an intimation that it could not be delivered—
 - (i) delivering; or
 - (ii) sending it by post,with that intimation to the Extractor of the Court of Session.
- (2) The place referred to in subsection (1)(b) above is—
 - (a) the former tenant's or, as the case may be, the tenant's place of residence;
 - (b) that person's place of business;
 - (c) a postal address which that person ordinarily uses; or
 - (d) if none of those places or that address is known at the time of delivery or posting, whatever place is at that time that person's most recently known—
 - (i) place of residence;
 - (ii) place of business; or
 - (iii) postal address which that person ordinarily used.

- (3) For the purposes of this Act—
 - (a) an acknowledgement signed by the former tenant or, as the case may be, tenant, which conforms to Form A of schedule 17 to this Act;
 - (b) in the case of a notice sent under subsection (1)(b) above, a certificate signed by the former landlord or, as the case may be, landlord which conforms to Form B of that schedule and is accompanied by the postal receipt; or
 - (c) in the case of a notice delivered or sent under subsection (1)(c) above, an acknowledgement of receipt by the Extractor on a copy of the notice,
 shall be sufficient evidence of service of the notice.
- (4) The date on which a notice is served on a former tenant or, as the case may be, tenant shall be the date of delivery or, as the case may be, posting of the notice.
- (5) In this section, “notice” includes an instalment document.

NOTE

This section sets out the rules for service of a notice in respect of a compensatory or additional payment (and also a preliminary notice). Liability to pay depends on service of a notice and the date of service is the starting point for the period allowed for payment or return of the instalment document and for the quinquennial prescription. If the lease was held pro indiviso separate service is needed for each co-tenant (section 52(2)). The date of service is the date of delivery or posting. Provision is made in certain circumstances for service on the Extractor of the Court of Session. The section implements recommendation 37. See paragraphs 6.70 to 6.73 of the report.

48 Duty of collecting third party to disclose information

- (1) This section applies where a landlord or, as the case may be, former landlord receives or has at any time received from a third party an amount—
 - (a) collected in respect of rent from; and
 - (b) remitted to the landlord or former landlord on behalf of,
 a tenant or, as the case may be, former tenant.
- (2) The third party shall—
 - (a) if required by the landlord or, as the case may be, former landlord for the purpose of serving notice under section 31(2) of this Act; and
 - (b) in so far as it is practicable,
 forthwith disclose to the landlord or former landlord the information mentioned in subsection (3) below.
- (3) The information referred to in subsection (2) above is—
 - (a) the identity and address of the tenant or former tenant; and
 - (b) in a case where the rent remitted is part of a *cumulo* rent, the amount so collected from the tenant or former tenant.

NOTE

This section places a statutory duty on the collector of *cumulo* rent to disclose to the landlord information about the tenants from whom the rent has been collected and the amount so collected. This will help the landlord to identify the current tenants for the purposes of serving a notice under section 31(2) requiring

payment of a compensatory payment and to take advantage of the presumption in section 36(3) that an allocation of cumulo rent which follows an existing apportionment is deemed to be reasonable. The intention is for this section to come into force on Royal Assent. The section is modelled on section 14 of the 2000 Act. See paragraph 6.13 of the report.

49 Duty to disclose identity etc. of former tenant

- (1) This section applies where—
 - (a) a former landlord purports to serve notice under section 31(2) or 39(2) of this Act on the former tenant; and
 - (b) the person on whom that notice is served—
 - (i) was the tenant at some time before the appointed day; but
 - (ii) is not the former tenant.
- (2) The person on whom the notice is served shall forthwith disclose to the former landlord—
 - (a) the identity and address of the former tenant; or
 - (b) (if that person cannot do so) such other information as that person has which might enable the former landlord to discover that identity and address.

NOTE

This section places a statutory duty on a person on whom a notice was mistakenly served claiming a compensatory or additional payment to disclose the name and address of the proper tenant or, failing that, such other information as will enable the proper tenant to be traced. The section is modelled on section 15 of the 2000 Act. It implements recommendation 35(b). See paragraph 6.59 of the report.

50 Extinction by prescription of requirement to make compensatory payment or additional payment

In schedule 1 to the Prescription and Limitation (Scotland) Act 1973 (c.52) (which specifies obligations affected by prescriptive periods of 5 years under section 6 of that Act)—

- (a) in paragraph 1, after sub-paragraph (ac) there shall be inserted—

“(ad) to any obligation to make a payment under section 34, 42(2) or 43(5) of the Long Leases (Scotland) Act 2006 (asp 00);”;
- (b) in paragraph 2(e), for the words “, (aa), (ab) or (ac)” substitute “to (ad)”.

NOTE

This provision provides that the obligation to pay the compensatory or additional payment prescribes after 5 years. Prescription starts to run from the date that the obligation to pay arises, that is to say, the date of service of the notice in the case of a compensatory payment under section 34, and in the case of an additional payment under sections 42(2) or 43(5). This section implements recommendation 38. See paragraph 6.74 of the report.

51 Cumulo rent and cumulo premium

- (1) In this Part of this Act—

“*cumulo* rent” means, subject to subsection (2) below, a single rent payable under two or more leases; and

“*cumulo* premium” means, subject to subsections (2) to (4) below, a single premium payable under two or more leases.

- (2) Where such rent or premium—
 - (a) has been apportioned between or amongst—
 - (i) those leases; or
 - (ii) some of those leases; and
 - (b) the parties to those leases consented (whether expressly or by implication) to the apportionment,any rent or premium so apportioned is not *cumulo* rent or, as the case may be, not a *cumulo* premium and shall be the rent or premium payable under the lease for the purposes of this Part of this Act.
- (3) Subsection (4) below applies if—
 - (a) subsection (2) above applies to rent payable under two or more leases; and
 - (b) a single premium is payable under the leases.
- (4) Where this subsection applies, for the purposes of this Part of this Act—
 - (a) the premium shall be treated as if it were apportioned between or amongst the leases in the same proportion as the apportionment of rent; and
 - (b) that apportioned premium shall be the premium payable under the lease.

NOTE

This section defines *cumulo* rent for the purposes of the compensation scheme as a single rent payable under two or more leases. See paragraphs 6.11 and 6.12 of the report.

Subsection (2) qualifies the definition of *cumulo* rent by providing that, where a rent has been apportioned between the leases before the appointed day with the agreement express or implied of the parties (possibilities (i) and (ii) of paragraph 6.11) the rent apportioned to each lease is to be the rent for that lease. In the usual case that is the figure which forms the basis for the calculation of the compensatory payment under s 32.

A *cumulo* premium is defined in the same terms and with the same qualifications as a *cumulo* rent. Where subsection (2) applies (and except where the lease is a partially continuing lease) the premium so apportioned is the figure used to determine whether a claim in respect of the premium falls within the compensatory payment or additional payment regime.

The definition of *cumulo* premium is qualified further by subsections (3) and (4). They provide that, where a *cumulo* rent has been apportioned with the agreement of the parties but not the *cumulo* premium, the premium is allocated between the leases in the same proportions as the rent. Again unless the lease is a partially continuing lease, the sum allocated is the figure used to determine whether a claim in respect of the premium falls within the compensatory payment or additional payment regime.

52 Interpretation of Part 3

- (1) In this Part of this Act—

“former landlord”, in relation to a lease, means the person who was the landlord immediately before the appointed day; and

“former tenant”, in relation to a lease, means the person who was the tenant immediately before the appointed day.

- (2) Where, immediately before the appointed day, the right as tenant under a lease is held by two or more persons in common—
 - (a) they shall be severally liable to make any compensatory or, as the case may be, additional payment (but as between or, as the case may be, among themselves they shall be liable in the proportions in which they hold the right as tenant); and
 - (b) subject to section 47 of this Act they shall together be treated for the purposes of this Part of this Act as being a single tenant.

NOTE

Subsection (1) defines former landlord and former tenant for the purposes of part 3. It has to be read alongside the definition of landlord and tenant in section 68(1). The definitions include a person who has right to the interest but who has not completed title. If more than one person comes within the definition the latest such person is treated as the landlord or the tenant. This subsection implements recommendation 35(a). See paragraphs 6.56 to 6.58 of the report.

Subsection (2) regulates the liability of joint tenants as regards the compensatory or additional payment in a question with the former landlord and also among themselves. The subsection implements recommendation 35(d). See paragraph 6.61 of the report. It also makes clear that for the purposes of part 3 such tenants are to be treated as a single tenant bar for the provisions on service of a notice.

PART 4

EXEMPTION FROM CONVERSION AND CONTINUING LEASES

Exempt leases

53 Meaning of “exempt lease”

- (1) In this Part of this Act, a lease is an “exempt lease” if—
 - (a) the tenant under a qualifying lease registers a notice in accordance with section 54(1) of this Act;
 - (b) it is a lease to which section 55 of this Act applies; or
 - (c) it is a sublease to which section 56 of this Act applies.
- (2) If, immediately before the appointed day, land is subject to an exempt lease—
 - (a) that lease shall not become the right of ownership of the land;
 - (b) any right of ownership of that land existing immediately before the appointed day and any superior lease shall not be extinguished; and
 - (c) the provisions of this Act, in so far as they relate to—
 - (i) the conversion of a qualifying lease into the right of ownership; or
 - (ii) the extinction of a right of ownership or, as the case may be, lease, shall not apply.

NOTE

Subsection (1) defines the term "exempt lease". The main example is a lease in respect of which a notice of exemption has been registered under section 54. The other examples will not be found very often. A lease remains an exempt lease until a notice of recall is registered under section 57.

Subsection (2) sets out the consequences of a lease being an exempt lease when the appointed day arrives. The effect is to suspend the process of conversion in relation to that lease and any superior lease. Existing landlord-tenant relationships continue in force as before. This subsection implements recommendation 39(a). See paragraph 7.7 of the report.

54 Exemption of qualifying lease by registration of exemption notice

- (1) The tenant under a qualifying lease may, not later than 2 months before the appointed day, execute and register a notice in, or as nearly as may be in, the form contained in schedule 18 to this Act (referred to in this Act as an "exemption notice").
- (2) Where an exemption notice is registered the lease shall be an exempt lease.
- (3) This section is subject to section 58 of this Act.

NOTE

This section allows the tenant of a qualifying lease to opt out of conversion. It implements recommendation 39(a) and (b): see paragraphs 3.4 to 3.8 and 7.1 to 7.8 of the report.

Subsection (1) requires the tenant to register a notice of exemption at least two months before the appointed day.

Subsection (2) provides that on registration of the notice the lease becomes an exempt lease thus attracting the operation of section 53(2) which suspends the process of conversion.

Subsection (3) makes the section subject to s 58. This section sets out rules for the service and registration of a notice of exemption or a notice of recall.

55 Certain long leases registered close to or after the appointed day

Where a lease—

- (a) is not registered on the day falling 1 year before the appointed day;
- (b) would, had it been so registered, have been converted on the appointed day into a right of ownership under section 3(1)(a) of this Act;
- (c) despite not being registered, constitutes a real right in land; and
- (d) is subsequently registered (whether before, on or after the appointed day),

the lease shall, on the day of registration, be an exempt lease.

NOTE

An unregistered lease which otherwise satisfies the requirements for conversion is not a qualifying lease under section 1. This section makes provision for the situation where the lease is subsequently registered. It implements recommendation 43. See paragraphs 8.14 to 8.18 of the report.

An unregistered lease which is first registered in the year before the appointed day or at any time thereafter is treated as an exempt lease. This enables the lease to be converted into ownership by registering a notice

of recall under section 57. This procedure gives the landlord of that lease notification of conversion of the lease to ownership and the opportunity to register notices converting conditions into real burdens etc. Where first registration of the lease takes place in the year before the appointed day section 53(2) applies to suspend the process of conversion.

56 Subleases of exempt leases

- (1) This section applies where a tenant under an exempt lease grants a sublease which would have been converted on the appointed day into a right of ownership under section 3(1)(a) of this Act, had the sublease been registered immediately before the appointed day.
- (2) Where the sublease is registered (before, on or after the appointed day) it shall, on the day of registration, be an exempt lease.

NOTE

The tenant under an exempt lease may grant a sublease which fulfils the criteria for conversion. This section provides that on registration the sublease is to be treated as an exempt lease. The tenant may then register a notice of recall under section 57. The section implements recommendation 39(f). See paragraph 7.8 of the report.

Recall of exemption

57 Recall of exemption

- (1) The tenant under an exempt lease may execute and register a notice in, or as nearly as may be in, the form contained in schedule 19 to this Act (referred to in this Act as a “recall notice”).
- (2) On the day on which the recall notice is registered the exempt lease shall, subject to section 1(2) and 2 of this Act (modified, as the case may be, in accordance with subsection (3) below), be a qualifying lease which is no longer an exempt lease.
- (3) Where the recall notice is registered—
 - (a) on a day less than 6 months before the appointed day; or
 - (b) on or after the appointed day,this Act shall, subject to subsection (4) below, apply as if the appointed day were the first Whitsunday or, as the case may be, Martinmas occurring on or after the day which falls 6 months after the day on which the notice is registered.
- (4) Section 45 of this Act shall not apply in any case where a recall notice is registered in relation to the qualifying lease.
- (5) This section is subject to section 58 of this Act.

NOTE

This section allows the tenant under an exempt lease to register a notice of recall. This may be done before or after the appointed day. The section implements recommendation 40(a) to (d). See paragraphs 7.10 to 7.15 and 8.15 of the report.

Under subsection (2) on registration of a notice of recall the exempt lease becomes a qualifying lease provided it satisfies the requirements for conversion. In particular the unexpired duration of the lease must at the appointed day be more than 100 years. Section 2 is relevant where the exempt lease is followed by

the grant of a sublease which is also exempt (see section 56) or by the registration of an unregistered but otherwise qualifying sublease (see section 55).

Subsection (3) prescribes the appointed day where the notice of recall is registered in the six months before or on or at any time after the standard appointed day. The effect of deferring the appointed day is to give a landlord of the qualifying lease or any superior lease a period of six months in which to consider whether to register notices converting leasehold conditions into real burdens.

Subsection (4) removes the requirement for the landlord to serve a preliminary notice in order to claim compensation of more than £500. The purpose of such a notice is to invite consideration of opting out but that is no longer relevant where the decision to recall has been made.

Subsection (5) makes the section subject to section 58. This section sets out rules for the service and registration of a notice of exemption or a notice of recall.

Supplementary

58 Exemption notice and recall notice: supplementary

- (1) This section applies where a tenant under a qualifying lease or, as the case may be, an exempt lease is executing and registering an exemption notice or, as the case may be, a recall notice.
- (2) Except where it is not reasonably practicable to do so, the tenant under the qualifying or, as the case may be, exempt lease shall, before such notice is executed, send by post to the person registered as landlord under such lease and, as the case may be, under any superior lease a copy of—
 - (a) the notice; and
 - (b) the explanatory note—
 - (i) in the case of an exemption notice, which immediately follows the form in schedule 18 to this Act; or
 - (ii) in the case of a recall notice, which immediately follows the form in schedule 19 to this Act.
- (3) The tenant under the qualifying or, as the case may be, exempt lease shall, in the notice, state either—
 - (a) that a copy of the notice has been sent in accordance with subsection (2) above; or
 - (b) that it was not reasonably practicable for such a copy to be sent.
- (4) The notice shall be registered against the title of the tenant under the qualifying or, as the case may be, exempt lease.

NOTE

This section sets out rules for the service and registration of a notice of exemption or a notice of recall. It implements recommendation 39(c)(d) and (e) and recommendation 40(e). See paragraphs 7.5, 7.6 and 7.11 of the report.

Subsections (2) and (3) provide for the sending of a copy of the notice of exemption or notice of recall to the landlord of the qualifying or exempt lease and any landlord of a superior lease. Service can be on the person who is registered as landlord. Normally service is by post, and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

Subsection (4) requires the notice to be registered against the title of the tenant. This allows anyone dealing with the lease to see the position.

PART 5

GENERAL AND MISCELLANEOUS

59 The appointed day

In this Act, the “appointed day” means the first Whitsunday or, as the case may be, Martinmas occurring on or after the day 2 years after the day on which this section comes into force.

NOTE

This section fixes the appointed day, which is the day when qualifying leases are converted into ownership. Whitsunday (28 May) and Martinmas (28 November) are chosen because they are the dates on which rent is normally payable. The period of two years between the coming into force of the section under section 70 and the appointed day enables the qualifying lease to be identified ahead of conversion. This in turn enables the statutory notices for conversion of qualifying conditions etc to be served and registered before the appointed day.

60 Determination of duration of lease

- (1) In calculating the period for which a lease is granted for the purposes of any provision of this Act—
 - (a) any provision of a lease (however expressed) enabling the lease to be terminated earlier than the date on which it would otherwise terminate shall be disregarded;
 - (b) where a lease includes provision (however expressed) requiring the landlord to renew the lease, the period for which any such renewed lease would, were that provision complied with, be granted shall be added to the period for which the original lease is granted;
 - (c) where the period for which a lease is granted is expressed (in whole or in part) by reference to the lifetime of a person, the period expressed by reference to that lifetime shall—
 - (i) in a case where such person is deceased and the period beginning on the first day of the period for which the lease was granted and ending on the day that person died can be ascertained, be that period;
 - (ii) in a case where such person is identifiable and is not deceased, be deemed to be the period of life expectancy as calculated in accordance with the table of life expectancy set out in schedule 20 to this Act; or
 - (iii) in any other case, be deemed to be a period of 35 years; and
 - (d) where, before the end of the period for which a lease is granted, the parties to that lease enter into a subsequent lease—
 - (i) of the same subjects as the original lease; and
 - (ii) for a period beginning immediately after the end of the period for which such lease is granted,

the period for which the subsequent lease is granted shall be added to the period for which the original lease is granted.

- (2) Paragraphs (b) to (d) of subsection (1) above are subject to section 67 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) (prohibition of leases of more than 175 years).

NOTE

This section implements recommendation 3. See paragraphs 2.22 to 2.30 of the report.

The provision sets out a number of rules for calculating the period (including the unexpired duration) of a lease. The period of a lease is relevant for the purposes of working out whether a lease qualifies for conversion (section 1(2)(b)(c)); whether an additional payment can be claimed for the residual value of the reversionary interest (section 40(1)(d)) and how that value is to be assessed (section 41(3)(a)); and whether an additional payment can be claimed for the loss of a right to bring a lease to an end early (section 40(1)(e)). In each case the duration of the lease is calculated in the same way.

Subsection (1) sets out the rules for break options (which are disregarded), for renewals (which are included), for calculating the lifetime of a tenant (for the exceptional cases where this might be relevant), and for consecutive leases (which are included). A consecutive lease is a lease which is granted during the term of the first lease on essentially the same terms and conditions as the first lease and which is to run from the moment the first lease ends.

Subsection (2) makes clear that a calculation of the period of a lease in accordance with the rules in subsection (1) is subject to section 67 of the 2000 Act. That provision (with certain exceptions) prohibits the grant of a lease for more than 175 years and regulates the number of renewals that are permitted. The provision has no relevance for break options and so subsection (2) does not apply to such options.

61 Extinction of right of irritancy in certain leases

- (1) On and after the day on which this section comes into force, it shall not be competent for a lease to which subsection (2) below applies to be terminated by irritancy.
- (2) This subsection applies to a lease which, immediately before the day on which this section comes into force, is a right of lease in land which complies with paragraphs (b) to (d) of section 1(2) of this Act.

NOTE

This section prevents a lease of land which satisfies the requirements in subsection (2) from being terminated by irritancy on or after the date that the section comes into force. The intention is for the section to come into force on Royal Assent. The section implements recommendation 11(d). See paragraph 3.29 of the report.

The requirements are that the lease is granted for a period of more than 175 years, has an unexpired duration of more than 100 years and is not a lease of minerals. Registration is not a requirement.

For a lease that is converted or extinguished on the appointed day the effect of the section is to prevent the lease from being irritated in the period between the date of Royal Assent and the appointed day.

Irritancy includes a provision in a lease which deems a failure of the tenant to comply with any provision in the lease to be a material breach of contract.

62 Notices: pre-registration requirements

- (1) This section applies in relation to any notice which is to be submitted for registration under section 7 or Part 2 of this Act.
- (2) Except where it is not reasonably practicable to do so, the person who intends to execute the notice shall, before so doing, send by post to the tenant under the qualifying lease (addressed to “The Tenant” where the name of that person is not known) a copy of—
 - (a) the notice; and
 - (b) the explanatory note set out in whichever schedule to this Act relates to the notice.
- (3) The person who executes the notice shall, in the notice, state either—
 - (a) that a copy of the notice has been sent in accordance with subsection (2) above; or
 - (b) that it was not reasonably practicable for such a copy to be sent.

NOTE

This section applies to notices which require to be submitted for registration under section 7 (sporting rights) or under sections 13 (neighbour burdens), 18 (personal pre-emption or personal redemption burdens), 19 (economic development burdens), 20 (health care burdens), and 21 and 22 (conservation burdens). It is modelled on section 41 of the 2000 Act. It implements recommendation 22(a). See paragraphs 4.60, 4.61 and 5.16 of the report.

The section provides for the sending of a copy of the notice to the tenant under the qualifying lease. Normally service is by post and must precede registration. The notice must contain a statement about service, or an explanation as to why service was not reasonably practicable.

63 Notices and agreements: extent of Keeper’s duty

- (1) In relation to any notice submitted for registration under this Act, the Keeper of the Registers of Scotland shall not be required to determine whether the terms of section 58(2) or, as the case may be, 62(2) of this Act have been complied with.
- (2) In relation to any notice, or as the case may be agreement, submitted for registration under—
 - (a) section 13, 14 or 18 to 22 of this Act, the Keeper shall not be required to determine whether, for the purposes of subsection (1) of the section in question, a qualifying condition is enforceable by the person submitting the notice for registration;
 - (b) section 13 of this Act, the Keeper shall not be required to determine—
 - (i) in pursuance of subsection (5)(e) of that section, that an attempt to reach agreement has been made in accordance with section 15(2) of this Act; or
 - (ii) where the condition specified under subsection (5)(f) of that section is the condition mentioned in subsection (2)(a) of that section, whether the terms of that condition are satisfied;
 - (c) section 19 or 20 of this Act, the Keeper shall not be required to determine whether—
 - (i) the requirements of subsection (1) of the section in question are satisfied; or

- (ii) the statement made in pursuance of subsection (2)(g) of section 19 or, as the case may be, subsection (2)(f) of section 20 is correct; or
- (d) paragraph (c) of subsection (1) of section 14 of this Act, the Keeper shall not be required to determine whether the requirements of paragraph (a) of that subsection are satisfied.
- (3) The Keeper shall not be required to determine for the purposes of section 7(7) of this Act, whether immediately before the appointed day a sporting right is still enforceable.
- (4) The Keeper shall not be required to determine for the purposes of section 13(10), 14(9), 18(7), 19(4), 20(4), 21(5) or 22(5) of this Act, whether immediately before the appointed day a qualifying condition is, or is still, enforceable, or by whom.

NOTE

This section relieves the Keeper of the need to verify certain matters which the Keeper could not reasonably be expected to check. It is modelled on section 43 of the 2000 Act. The section implements recommendation 42(a). See paragraphs 8.9 to 8.11 of the report.

64 Referral to Lands Tribunal of notice dispute

- (1) Any dispute arising in relation to a notice registered under this Act may be referred to the Lands Tribunal; and, in determining the dispute, the Tribunal may make such order as it thinks fit discharging or, to such extent as may be specified in the order, restricting the notice in question.
- (2) An extract of any order made under subsection (1) above may be registered and the order shall take effect as respects third parties on such registration.

NOTE

This section gives the Lands Tribunal a broad jurisdiction to resolve disputes in relation to notices. The section applies not only to notices converting conditions into real burdens under part 2 of the bill but also to notices converting reserved sporting rights (section 7) and to exemption and recall notices (sections 54 and 57). The section is modelled on section 44(1) and (4) of the 2000 Act. It implements recommendation 24. See paragraphs 4.66 to 4.68 of the report.

Subsection (2) allows the registration of Lands Tribunal orders and provides that, on registration, they will affect third parties.

65 Circumstances where certain notices may be registered where initial submission for registration rejected

- (1) This section applies to—
 - (a) a notice submitted, before the appointed day, for registration under section 7(2) of this Act;
 - (b) an agreement submitted, before the appointed day, for registration under section 14(1)(c) of this Act;
 - (c) any notice submitted, before the appointed day, for registration under Part 2 of this Act; or
 - (d) an exemption notice submitted, before the day falling 2 months before the appointed day, for registration under section 54(1) of this Act,

which is rejected by the Keeper of the Registers of Scotland but which a court or the Lands Tribunal then determines is registrable.

- (2) Any notice or agreement to which this section applies which is not registered, may be registered—
 - (a) not later than the day falling 2 months after the day on which the court or the Lands Tribunal made the determination; but
 - (b) within such period as the Scottish Ministers may by order prescribe,and any such notice or agreement registered under this subsection on or after the appointed day or as the case may be the day falling 2 months before the appointed day shall be treated as if it had been registered before that day.
- (3) For the purposes of subsection (1) above, the application to the court, or to the Lands Tribunal, which has resulted in the determination shall require to have been made within such period as the Scottish Ministers may by order prescribe.
- (4) In this section, “court” means Court of Session or sheriff.

NOTE

This section allows late registration, within limits, if the initial rejection of a notice etc by the Keeper is judicially overturned. It implements recommendation 42(b). See paragraph 8.12 of the report. It is modelled on section 45 of the 2000 Act.

Subsection (1) identifies the notices etc in question. This should be read along with subsection (3) which provides for Scottish Ministers to specify a period of time within which application has to be made to the court or the Lands Tribunal.

Subsection (2) provides that a notice etc has to be registered within 2 months of the determination by the court or the Lands Tribunal, but within such period as Scottish Ministers may prescribe by statutory instrument under section 69. A notice which is registered after the appointed day is given retrospective effect.

The purpose of a longstop is to provide certainty for parties relying on the register. A different period may be prescribed for exempt leases. An exempt lease can be recalled at any time and so the appointed day for that lease is uncertain. In the normal case where the appointed day is certain the period that is set will depend on the progress made with applications to the court or the Lands Tribunal.

Subsection (4) defines court for the purposes of this section.

Miscellaneous

66 Power to prescribe forms and amend table of life expectancy

The Scottish Ministers may from time to time by order—

- (a) prescribe forms in substitution for any of the forms in schedules 1 to 19; and
 - (b) amend the table of life expectancy set out in schedule 20,
- to this Act.

NOTE

Almost all leases will be converted on the appointed day. In some cases (for example, where a notice of exemption is recalled) conversion will take place later on a deferred appointed day. Scottish Ministers are

therefore given power by this section to prescribe new forms in place of the forms set out in schedules 1 to 19 and also to update the table of life expectancy in schedule 20.

67 Consequential and minor amendments

Schedule 21 of this Act, which contains minor amendments and amendments consequential upon the provisions of this Act, shall have effect.

NOTE

This schedule gives effect to the schedule of minor and consequential amendments.

68 Interpretation

(1) In this Act, unless the context otherwise requires—

“the 2003 Act” means the Title Conditions (Scotland) Act 2003 (asp 9);

“additional payment” has the meaning given by section 39 of this Act;

“appointed day” has the meaning given by section 59 of this Act;

“compensatory payment” has the meaning given by section 31 of this Act;

“*cumulo* premium” has the meaning given by section 51(1) of this Act;

“*cumulo* rent” has the meaning given by section 51(1) of this Act;

“exempt lease” has the meaning given by section 53 of this Act;

“freshwater fish” means any fish living in fresh water, including trout and eels and the fry of eels but exclusive of salmon and of any kind of fish which migrate between the open sea and tidal waters;

“land” includes anything held or which, by its nature, may be held as a separate tenement;

“landlord”, in relation to a lease, means the person who has right as landlord under the lease, whether or not such person has completed title (and where more than one person comes within that description, the person who most recently acquired that right);

“Lands Tribunal” means Lands Tribunal for Scotland;

“lease” includes a sublease;

“owner”, in relation to any land, means the person who has right to the land, whether or not such person has completed title (and where more than one person comes within that description, the person who most recently acquired that right);

“qualifying lease” has the meaning given by section 1(1) of this Act;

“qualifying condition” means a condition which qualifies under section 9 of this Act;

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

“sporting right” has the meaning given by section 7(1) of this Act;

“superior lease” has the meaning given by section 3 of this Act; and

“tenant”, in relation to a lease, means the person who has right as tenant under the lease, whether or not such person has completed title (and where more than one person comes within that description, the person who most recently acquired that right).

- (2) Subject to the provisions of this Act, expressions used in this Act and in the 2003 Act shall have the same meaning in this Act as they do in that Act.

NOTE

Subsection (1) gives the meaning of certain terms. The majority of the terms have already been discussed in the Notes to the earlier sections of the bill.

Under subsection (2) expressions used in the 2003 Act and in this bill are to have the same meaning unless otherwise provided. Section 122 of the 2003 Act is the interpretation provision. This technique allows a number of terms to be used without further explanation – for example, benefited property, burdened property, conservation body, conservation burden, economic development burden, enactment, facility and service burdens, health care burden, local authority, manager burden, and notary public.

69 Orders

- (1) The powers conferred by this Act on the Scottish Ministers to make orders shall be exercisable by statutory instrument.
- (2) Each of those powers shall include power to make different provision for different purposes.
- (3) A statutory instrument containing an order under this Act shall be subject to annulment in pursuance of a resolution of the Scottish Parliament.

NOTE

This section regulates the making of orders under the bill.

70 Short title and commencement

- (1) This Act may be cited as the Long Leases (Scotland) Act 2006.
- (2) This Act (apart from sections 61 and 69 and this section) shall come into force on such day as the Scottish Ministers may by order appoint; and different days may be so appointed for different purposes.

NOTE

This section deals with the short title and the dates of commencement. Different elements of the bill may be brought into force at different times.

GENERAL NOTE

Notes to schedules 1 to 20 are at the end of schedule 20.

SCHEDULE 1
(introduced by section 7(2))

FORM OF NOTICE FOR PRESERVATION OF SPORTING RIGHTS

“FORM OF NOTICE FOR PRESERVATION OF RESERVED SPORTING RIGHTS

Name and address of landlord:

Description of land affected by sporting rights:

(see note for completion 1)

Terms of reserved sporting rights:

(see note for completion 2)

Any counter-obligation:

(see note for completion 2)

Title as landlord:

(see note for completion 3)

Service:

(see note for completion 4)

I swear [or affirm] that the information contained in this notice is, to the best of my knowledge and belief, true.

Signature of person sending notice:

(see note for completion 5)

Signature of notary public:

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord. He claims to be entitled to exercise the rights listed. Following registration of the notice in the Land Register or Register of Sasines under section [] of the Act, those rights will continue to be enforceable even after conversion of the lease to ownership.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Notes for completion of the notice

(These notes have no legal effect)

1. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2. Specify by reference to the appropriate Register the deed in which the sporting rights were reserved or the counter-obligation was imposed. Except where the reservation was by implication, set out the terms of the sporting rights or the counter-obligation in full or refer to the deed in such a way as to identify those rights or that counter-obligation.

3. Set out the landlord's title in conformity with note 1 above. If title has not been completed set out the midcouple(s) linking the landlord with the person who had the last completed title.

4. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the tenant under the qualifying lease (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the tenant under the qualifying lease at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the tenant under the qualifying lease for the following reason: [*specify the reason*]."

5. The landlord should not swear or affirm, or sign, until a copy of the notice has been sent (or otherwise) as mentioned in note 4. Before signing, the landlord should swear or

affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive affirmations) that, to the best of the landlord's knowledge and belief, all the information contained in the notice is true. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under sections 44 and 45 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39). Normally the landlord should swear or affirm, and sign, personally. If, however, the landlord is legally disabled or incapable (for example because of mental disorder) a legal representative should swear or affirm and sign. If the landlord is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign.”.

SCHEDULE 2
(introduced by section 13(5)(a))

FORM OF NOTICE FOR CONVERSION OF QUALIFYING CONDITION BY NOMINATION OF BENEFITED
PROPERTY

“NOTICE FOR CONVERSION OF QUALIFYING CONDITION BY NOMINATION OF
BENEFITED PROPERTY

Name and address of person sending notice:

Description of land nominated as burdened property:
(see note for completion 1)

Description of land nominated as benefited property:
(see note for completion 1)

Links in title:
(see note for completion 2)

Specification of condition met:
(see note for completion 3)

[Terms of qualifying condition(s)]:
(see note for completion 4)

Any counter-obligation:
(see note for completion 4)

Title to enforce the qualifying condition(s):
(see note for completion 5)

Service:

(see note for completion 6)

I swear [or affirm] that the information contained in this notice is, to the best of my knowledge and belief, true.

Signature of person sending notice:

(see note for completion 7)

Signature of notary public:

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord or by someone else who claims to be able to enforce the burdens and conditions in the title to your property. That person is also a neighbour. In this notice your property (or some part of it) is referred to as the "burdened property" and neighbouring property belonging to the person sending this notice is referred to as the "benefited property".

The person sending this notice asserts that the use of your property is subject to the "qualifying conditions" listed in the notice. By this notice that person claims the right to continue to enforce these qualifying conditions even after conversion of the lease to ownership, but as owner (or tenant) of the benefited (i.e. neighbouring) property. In order to take effect the notice must be registered in the Land Register or Register of Sasines under section [] of the Long Leases (Scotland) Act 2006. Registration preserves the qualifying conditions and means that they can continue to be enforced by the person and by that person's successors as owner (or tenant) of the benefited property.

Normally, for the notice to be valid, there must, on the benefited property, be a permanent building which is within 100 metres of the burdened property. That building must be in use as a place of human habitation or of human resort. However, the presence of a building is not required if the burden gives a right of pre-emption or redemption, or if the benefited property comprises, and the qualifying condition was created for the benefit of, minerals, salmon fishings or some other incorporeal property. Further, the Lands Tribunal for Scotland is able to dispense with these conditions if there would otherwise be material detriment to the person sending the notice.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Notes for completion of the notice

(These notes have no legal effect)

1. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.

2. Complete the section "Links in Title" only if the person sending the notice does not have a completed title to the land nominated as benefited property. Set out the midcouple(s) linking that person with the person who had the last completed title.

3. Insert one or more of the following:

"The benefited property has on it a [*specify type of building*] at [*specify address of building*] which is within 100 metres of the burdened property.";

"The qualifying condition comprises a right of [*specify pre-emption or redemption (or both)*]";

"The benefited property comprises, and (as is apparent from the terms of the qualifying condition) that condition was created for the benefit of, [*specify minerals or salmon fishings or some other incorporeal property*].";

"On [*specify date*] the Lands Tribunal for Scotland granted an order dispensing with the conditions.".

4. Specify by reference to the appropriate Register the deed or deeds in which the qualifying condition or counter-obligation was imposed. Set out the qualifying condition or counter-obligation in full or refer to the deed in such a way as to identify the qualifying condition or counter-obligation.

5. Specify the basis on which the title to enforce arises: for example, as the landlord of the person who is subject to the qualifying conditions, or as an owner (or tenant) of neighbouring property. Except where the person sending the notice is the landlord, explain the legal and factual grounds on which the title to enforce is based. In all cases set out the relevant property right held by the person in conformity with notes 1 and 2 above.

6. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the tenant under the qualifying lease (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery, by registered post or by ordinary post*] on [*date of posting*] to the tenant under the qualifying lease at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the tenant under the qualifying lease for the following reason: [*specify the reason*]."

7. The person sending the notice should not swear or affirm, or sign, until a copy of the notice has been sent (or otherwise) as mentioned in note 6. Before signing, the sender should swear or affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive affirmations) that, to the best of the sender's knowledge and belief, all the information contained in the notice is true. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under sections 44 and 45 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39). Normally the sender should swear or affirm, and sign, personally. If, however, the sender is legally disabled or incapable (for example because of mental disorder) a legal representative should swear or affirm and sign. If the sender is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign."

SCHEDULE 3

(introduced by section 14(1)(a))

FORM OF NOTICE SEEKING AGREEMENT TO THE CONVERSION OF QUALIFYING CONDITION

“NOTICE SEEKING AGREEMENT TO THE CONVERSION OF QUALIFYING
CONDITION(S)

Name and address of person sending notice:

Name and address of tenant under the qualifying lease:

Description of land which, if agreement is reached and the agreement registered, is to be the burdened property:

(see note for completion 1)

Description of land which, if agreement is reached and the agreement registered, is to be the benefited property:
(see note for completion 1)

Links in title:
(see note for completion 2)

Terms of qualifying condition(s):
(see note for completion 3)

Any counter-obligation:
(see note for completion 3)

Title to enforce the qualifying condition(s):
(see note for completion 4)

Service:
(see note for completion 5)

Signature of person sending notice:

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord or by someone else who claims to be able to enforce the burdens and conditions in the title to your property. That person is also a neighbour. In this notice your property (or some part of it) is referred to as the "burdened property" and neighbouring property belonging to the person sending this notice is referred to as the "benefited property".

The person sending this notice asserts that the use of your property is subject to the "qualifying conditions" listed in the notice. That person wishes to continue to enforce these qualifying conditions even after conversion of the lease to ownership, but as owner (or

tenant) of the benefited (i.e. neighbouring) property. That requires your written agreement. Such an agreement can then be registered in the Land Register or Register of Sasines under section [] of the Long Leases (Scotland) Act 2006. Registration preserves the qualifying conditions and means that they can continue to be enforced by the person and by that person's successors as owner (or tenant) of the benefited property.

In the absence of agreement the person may yet be able to enforce the qualifying conditions provided that person can meet certain statutory conditions or if that person applies to the Lands Tribunal for Scotland and the Tribunal grants an appropriate order on being satisfied by that person that there would be material detriment to that person as owner (or tenant) of the prospective benefited property were the qualifying conditions to be extinguished.

If the person sending this notice does apply to the Tribunal you may oppose the application and in doing so may be eligible for legal aid. You would not ordinarily have to meet the person's expenses. You are advised to consult your solicitor or other adviser if you wish to consider opposing the application or if you are uncertain about what is said in this notice.

Notes for completion of the notice

(These notes have no legal effect)

1. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
2. Complete the section "Links in Title" only if the person sending the notice does not have a completed title to the land which is to be the benefited property. Set out the midcouple(s) linking that person with the person who had the last completed title.
3. Specify by reference to the appropriate Register the deed or deeds in which the qualifying condition or counter-obligation was imposed. Set out the qualifying condition or counter-obligation in full or refer to the deed in such a way as to identify the qualifying condition or counter-obligation. You may if you wish propose and set out a modification to either the qualifying condition or to the counter-obligation (or modifications to both).
4. Specify the basis on which the title to enforce arises: for example, as the landlord of the person who is subject to the qualifying conditions, or as an owner (or tenant) of neighbouring property. Except where the person sending the notice is the landlord, explain the legal and factual grounds on which the title to enforce is based. In all cases set out the relevant property right held by the person in conformity with notes 1 and 2 above.
5. Do not complete until a copy of the notice, together with the explanatory note, has been delivered or sent to the tenant under the qualifying lease. Then insert the following:

"A copy of this notice has been served by [*specify whether by delivery, by recorded delivery, by registered post or by ordinary post*] on [*date of posting or delivery*] to the tenant under the qualifying lease at [*state address*]."

The notice should not be signed until a copy of it has been so delivered or sent.”.

SCHEDULE 4
(introduced by section 18(1))

FORM OF NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO PERSONAL PRE-EMPTION
BURDEN OR PERSONAL REDEMPTION BURDEN

“NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO PERSONAL PRE-
EMPTION BURDEN OR PERSONAL REDEMPTION BURDEN

Name and address of person sending notice:

Description of land which is to be the burdened property:

(see note for completion 1)

Terms of qualifying condition(s):

(see note for completion 2)

Any counter-obligation:

(see note for completion 2)

Title to enforce the qualifying condition(s):

(see note for completion 3)

Service:

(see note for completion 4)

I swear [or affirm] that the information contained in this notice is, to the best of my knowledge and belief, true.

Signature of person sending notice:

(see note for completion 5)

Signature of notary public:

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord or by someone else who claims to be able to enforce the burdens and conditions in the title to your property. In this notice your property (or some part of it) is referred to as the "burdened property".

The person sending this notice asserts that at present your property is subject to a right of pre-emption [*or* of redemption] enforceable by that person. By this notice that person claims the right to continue to enforce it even after conversion of the lease to ownership, but in a personal capacity. The notice, if it is registered in the Land Register or Register of Sasines under section [] of the Long Leases (Scotland) Act 2006 will allow that person to enforce the right as a personal pre-emption burden [*or* personal redemption burden] after conversion of the lease.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Notes for completion of the notice

(These notes have no legal effect)

1. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
2. Specify by reference to the appropriate Register the deed or deeds in which the qualifying condition or counter-obligation was imposed. Set out the qualifying condition or counter-obligation in full or refer to the deed in such a way as to identify the qualifying condition or counter-obligation.
3. Specify the basis on which the title to enforce arises: for example, as the landlord of the person who is subject to the qualifying conditions, or as the owner (or tenant) of neighbouring property. Except where the person sending the notice is the landlord, explain the legal and factual grounds on which the title to enforce is based. In all cases set out the relevant property right held by the person in conformity with note 1. If there is no completed title, set out the midcouple(s) linking the person sending the notice with the person who had the last completed title.

4. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the tenant under the qualifying lease (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the tenant under the qualifying lease at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the tenant under the qualifying lease for the following reason: [*specify the reason*]."

5. The person sending the notice should not swear or affirm, or sign, until a copy of the notice has been sent (or otherwise) as mentioned in note 4. Before signing, the sender should swear or affirm before a notary public (or, if the notice is being completed outwith Scotland, before a person duly authorised under the local law to administer oaths or receive affirmations) that, to the best of the sender's knowledge and belief, all the information contained in the notice is true. The notary public should also sign. Swearing or affirming a statement which is known to be false or which is believed not to be true is a criminal offence under sections 44 and 45 of the Criminal Law (Consolidation) (Scotland) Act 1995 (c.39). Normally the sender should swear or affirm, and sign, personally. If, however, the sender is legally disabled or incapable (for example because of mental disorder) a legal representative should swear or affirm and sign. If the sender is not an individual (for example, if it is a company) a person entitled by law to sign formal documents on its behalf should swear or affirm and sign."

SCHEDULE 5
(introduced by section 19(2)(a))

FORM OF NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO ECONOMIC DEVELOPMENT
BURDEN

"NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO ECONOMIC
DEVELOPMENT BURDEN

Name and address of body sending notice (being a local authority or the Scottish Ministers):

(see note for completion 1)

Description of land which is to be the burdened property:

(see note for completion 2)

Terms of qualifying condition(s):

(see note for completion 3)

Any counter-obligation:

(see note for completion 3)

Statement that purpose was to promote economic development:

(with supporting evidence: see note for completion 4)

Title to enforce the qualifying condition(s):

(see note for completion 5)

Service:

(see note for completion 6)

Signature of body sending notice:

(see note for completion 7)

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord or by someone else who claims to be able to enforce the burdens and conditions in the title to your property. That person is also [a local authority] *or* [the Scottish Ministers].

The [local authority asserts] [Scottish Ministers assert] that the use of your property is subject to the "qualifying conditions" listed in the notice, and that these conditions qualify as potential "economic development burdens". Economic development burdens are conditions imposed for the purpose of promoting economic development. By this notice the [local authority claims] [Scottish Ministers claim] the right to continue to enforce these qualifying conditions even after conversion of the lease to ownership. At that point they will become economic development burdens. In order to take effect the notice must be registered in the Land Register or Register of Sasines under section [] of the Long Leases (Scotland) Act 2006.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Notes for completion of the notice

(These notes have no legal effect)

1. Insert “the Scottish Ministers” or as the case may be the name and address of the local authority.
2. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
3. Specify by reference to the appropriate Register the deed or deeds in which the qualifying condition or counter-obligation was imposed. Set out the qualifying condition or counter-obligation in full or refer to the deed in such a way as to identify the qualifying condition or counter-obligation.
4. Provide the statement specified and set out any information which supports it.
5. Specify the basis on which the title to enforce arises: for example, as landlord of the person who is subject to the qualifying conditions, or as owner (or tenant) of neighbouring property. Except where the body sending the notice is a landlord, explain the legal and factual grounds on which the title to enforce is based. In all cases set out the relevant property right held by the body in conformity with note 2 above. If there is no completed title, set out the midcouple(s) linking the body with the person who had the last completed title.
6. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the tenant under the qualifying lease (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the tenant under the qualifying lease at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the tenant under the qualifying lease for the following reason: [*specify the reason*]."
7. The notice should not be signed until a copy of it has been sent (or otherwise) as mentioned in note 6. A duly authorised person may sign on behalf of the local authority or the Scottish Ministers.”.

SCHEDULE 6
(introduced by section 20(2)(a))

FORM OF NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO HEALTH CARE BURDEN

“NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO HEALTH CARE
BURDEN

The Scottish Ministers

Description of land which is to be the burdened property:

(see note for completion 1)

Terms of qualifying condition(s):

(see note for completion 2)

Any counter-obligation:

(see note for completion 2)

Statement that purpose was to promote the provision of facilities for health care:

(with supporting evidence: see note for completion 3)

Title to enforce the qualifying condition(s):

(see note for completion 4)

Service:

(see note for completion 5)

Signature by the Scottish Ministers:

(see note for completion 6)

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by the Scottish Ministers, in their capacity as your landlord or as a body who claims to be able to enforce the burdens and conditions in the title to your property.

The Scottish Ministers assert that the use of your property is subject to the "qualifying conditions" listed in the notice, and that these conditions qualify as potential "health care burdens". Health care burdens are conditions imposed for the purpose of promoting the provision of facilities for health care. By this notice the Scottish Ministers claim the right to continue to enforce these qualifying conditions even after conversion of the lease to ownership. At that point they will become health care burdens. In order to take effect the notice must be registered in the Land Register or Register of Sasines under section [] of the Long Leases (Scotland) Act 2006.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Notes for completion of the notice

(These notes have no legal effect)

1. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
2. Specify by reference to the appropriate Register the deed or deeds in which the qualifying condition or counter-obligation was imposed. Set out the qualifying condition or counter-obligation in full or refer to the deed in such a way as to identify the qualifying condition or counter-obligation.
3. Provide the statement specified and set out any information which supports it.
4. Specify the basis on which the title to enforce arises: for example, as landlord of the person who is subject to the qualifying conditions, or as owner (or tenant) of neighbouring property. Except where the Scottish Ministers are the landlord, explain the legal and factual grounds on which the title to enforce is based. In all cases set out the relevant property right held by the Scottish Ministers in conformity with note 1 above. If there is no completed title, set out the midcouple(s) linking the Scottish Ministers with the person who had the last completed title.

5. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the tenant under the qualifying lease (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the tenant under the qualifying lease at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the tenant under the qualifying lease for the following reason: [*specify the reason*].".

6. The notice should not be signed until a copy of it has been sent (or otherwise) as mentioned in note 5. A duly authorised person may sign on behalf of the Scottish Ministers.”.

SCHEDULE 7
(introduced by section 21(1))

FORM OF NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO CONSERVATION BURDEN

“NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO CONSERVATION
BURDEN

Name and address of body sending notice (being a conservation body or the Scottish Ministers):

(see note for completion 1)

Description of land which is to be the burdened property:

(see note for completion 2)

Terms of qualifying condition(s):

(see note for completion 3)

Any counter-obligation:

(see note for completion 3)

Title to enforce the qualifying condition(s):

(see note for completion 4)

Service:

(see note for completion 5)

Signature of body sending notice:
(see note for completion 6)

Signature of witness:

Name and address of witness:

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord or by someone else who claims to be able to enforce the burdens and conditions in the title to your property. That person is also [a conservation body by virtue of the regulations mentioned in the notice] *or* [the Scottish Ministers].

The [conservation body asserts] [Scottish Ministers assert] that the use of your property is subject to the "qualifying conditions" listed in the notice, and that these conditions qualify as potential "conservation burdens". Conservation burdens are conditions imposed in the public interest for the preservation or protection either of architectural or historic characteristics of land or of some other special characteristic of land derived from the flora, fauna, or general appearance of the land. By this notice the [conservation body claims] [Scottish Ministers claim] the right to continue to enforce these qualifying conditions even after conversion of the lease to ownership. At that point they will become conservation burdens. In order to take effect the notice must be registered in the Land Register or Register of Sasines under section [] of the Long Leases (Scotland) Act 2006.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Notes for completion of the notice

(These notes have no legal effect)

1. If the notice is being sent by a conservation body, give the year and number of the statutory instrument under which the status of conservation body was conferred.
2. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
3. Specify by reference to the appropriate Register the deed or deeds in which the qualifying condition or counter-obligation was imposed. Set out the qualifying condition or counter-obligation in full or refer to the deed in such a way as to identify the qualifying condition or counter-obligation.
4. Specify the basis on which the title to enforce arises: for example, as landlord of the person who is subject to the qualifying conditions, or as owner (or tenant) of neighbouring property. Except where the body sending the notice is a landlord, explain the legal and factual grounds on which the title to enforce is based. In all cases set out the relevant property right held by the body in conformity with note 2 above. If there is no completed title, set out the midcouple(s) linking the body with the person who had the last completed title.
5. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the tenant under the qualifying lease (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the tenant under the qualifying lease at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the tenant under the qualifying lease for the following reason: [*specify the reason*]."
6. The notice should not be signed until a copy of it has been sent (or otherwise) as mentioned in note 5. A duly authorised person may sign on behalf of the conservation body or the Scottish Ministers."

SCHEDULE 8
(introduced by section 22(1))

FORM OF NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO CONSERVATION BURDEN BY
NOMINATION OF CONSERVATION BODY OR SCOTTISH MINISTERS TO HAVE TITLE TO ENFORCE REAL
BURDEN

"NOTICE FOR CONVERSION OF QUALIFYING CONDITION INTO CONSERVATION
BURDEN BY NOMINATION OF CONSERVATION BODY OR SCOTTISH MINISTERS TO
HAVE TITLE TO ENFORCE REAL BURDEN

Name and address of person sending notice:

Nominee (being a conservation body or the Scottish Ministers):
(see note for completion 1)

Description of land which is to be the burdened property:
(see note for completion 2)

Terms of qualifying condition(s):
(see note for completion 3)

Any counter-obligation:
(see note for completion 3)

Title to enforce the qualifying condition(s):
(see note for completion 4)

Service:
(see note for completion 5)

Signature of person sending notice: (see note for completion 6)	Signature of consenting nominee: (see note for completion 7)
Signature of witness of person sending notice:	Signature of nominee's witness:
Name and address of witness:	Name and address of witness:

Date:

Explanatory note for tenant under the qualifying lease

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. The conversion will occur automatically, and all tenants holding under such leases will then become owners of the property. This notice is being sent to you as a person who is believed to be such a tenant.

The notice is sent by your landlord or by someone else who claims to be able to enforce the burdens and conditions in the title to your property. That person intends to nominate [a conservation body by virtue of the regulations mentioned in the notice] *or* [the Scottish Ministers] to have title to enforce certain of those conditions.

The person sending this notice asserts that the use of your property is subject to the "qualifying conditions" listed in the notice, and that these conditions qualify as potential "conservation burdens". Conservation burdens are conditions imposed in the public interest for the preservation or protection either of architectural or historic characteristics of land or of some other special characteristic of land derived from the flora, fauna, or general appearance of the land. By virtue of this notice the [conservation body] [Scottish Ministers] would have the right to enforce these conditions even after conversion of the lease to ownership. At that point the conditions will become conservation burdens. In order to take effect the notice must be registered in the Land Register or Register of Sasines under section [] of the Long Leases (Scotland) Act 2006.

This notice does not require you to take any action; but if you think that there is a mistake in it, or if you wish to challenge it, you are advised to contact your solicitor or other adviser.

Notes for completion of the notice

(These notes have no legal effect)

1. In the case of a conservation body, give the year and number of the statutory instrument under which the status of conservation body was conferred and the name and address of that body.
2. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number of the land or of the larger subjects of which the land forms part. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
3. Specify by reference to the appropriate Register the deed or deeds in which the qualifying condition or counter-obligation was imposed. Set out the qualifying condition or counter-obligation in full or refer to the deed in such a way as to identify the qualifying condition or counter-obligation.
4. Specify the basis on which the title to enforce arises: for example, as the landlord of the person who is subject to the qualifying conditions, or as the owner (or tenant) of neighbouring property. Except where the person sending the notice is the landlord, explain the legal and factual grounds on which the title to enforce is based. In all cases set out the relevant property right held by the person in conformity with note 2 above. If there is no completed title, set out the midcouple(s) linking the person sending the notice with the person who had the last completed title.

5. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the tenant under the qualifying lease (except in a case where this is not reasonably practicable). Then insert whichever is applicable of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to the tenant under the qualifying lease at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to the tenant under the qualifying lease for the following reason: [*specify the reason*].".

6. The notice should not be signed by the person sending it until a copy of it has been sent (or otherwise) as mentioned in note 5. A duly authorised person may sign on behalf of the person sending the notice.

7. The nominee should sign, so as to indicate consent, before that copy is sent (or otherwise) as so mentioned. A duly authorised person may sign on behalf of the nominee.”.

SCHEDULE 9
(introduced by section 31(3)(a))

FORM OF NOTICE REQUIRING COMPENSATORY PAYMENT ETC: *CUMULO* RENT

“NOTICE REQUIRING COMPENSATORY PAYMENT

To: [*name and address of former tenant*].

This notice is sent by [*name and address of former landlord*]. You are required to pay the sum of £ [*amount*] as a compensatory payment for the extinction of the *cumulo* rent of £ [*amount*] per annum due under the lease of [*give sufficient identification of the land leased*] dated [*give date of the lease*] and for the extinction of the other rights under the lease.

The attached appendix shows how I have allocated the *cumulo* rent among the leases to which it applied.

(*If the lease was subject to a cumulo premium, then add:*

Because the premium payable under the lease was a *cumulo* premium shared among several leases the attached appendix also shows how I have allocated the *cumulo* premium among the leases to which it applied.)

(*If arrears of the rent are also sought, then add:*

You are also required to pay the sum of £ [*amount*] as arrears of the rent.)

Signed: [*signature either of the former landlord or of the former landlord's agent; and if an agent signs the agent should put the word "Agent" after the signature*]

Date:

(*If payment is to be made to an agent of the former landlord then add:*

Payment should be made to: [*name and address of agent*].)

Appendix referred to in the Notice:

Total *cumulo* rent of £ [*amount*] is allocated as follows:

Tenant/former tenant (<i>see note for completion 1</i>)	Property leased (<i>see note for completion 2</i>)	Allocated rent (<i>see note for completion 3</i>)
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(*If the lease was subject to a cumulo premium, then add:*

Total *cumulo* premium of £ [*amount*] is allocated as follows:

Tenant/former tenant (<i>see note for completion 1</i>)	Property leased (<i>see note for completion 2</i>)	Allocated premium (<i>see note for completion 3</i>)
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Explanatory Note

(*This explanation, and the "Notes for completion of the Appendix" which immediately follows it, have no legal effect*)

This notice is being sent to you as a former tenant under a long lease.

On [*insert date of appointed day*] the lease of which you were a tenant was converted or extinguished by the Long Leases (Scotland) Act 2006. The Act applies to all leases of more than 175 years which on that day had more than 100 years left to run. By this notice your former landlord is claiming statutory compensation from you for the extinction of the rent and the other rights under the lease.

If no other lease to which the Act applies affected the property, your lease is converted by the Act into ownership. This means that you are now owner instead of tenant. The same is true if there was more than one lease over the property but your lease was the lowest such lease. If your lease was a higher lease it is now extinguished but you are able to make a parallel claim for compensation against your own former tenant.

To be valid this notice must have been sent within two years after the date on which the lease was converted or extinguished.

The amount due by you as compensatory payment is set out in the notice. It is calculated as that sum which would, if invested in 2½% Consolidated Stock at the middle market price at the close of business on [*insert the date of the day before the appointed day*], produce an annual sum equal to the rent. In practice the sum is arrived at by multiplying the rent by a factor known as the "compensation factor". This factor is [*insert factor*]. Because your rent was a *cumulo* rent – that is to say, was shared with the tenants of one or more other properties – it

was first necessary for your landlord to divide the rent among those properties. The way in which this has been done is set out in the appendix to the notice.

If the lease contained an obligation by the landlord to grant a renewal of the lease at fixed periods and for a premium not exceeding £100 (after division by the landlord), the rent may be treated as being increased by the amount of the premium divided by the number of years between each renewal. Because the premium was shared with the tenants of one or more other properties it was first necessary for the landlord to divide the premium (like a *cumulo* rent) among those properties. The way in which this has been done is set out in the appendix to the notice.

Where your lease has been converted the compensatory payment cannot exceed £500 unless you (or your predecessor) were given prior written notification by the former landlord (or the former landlord's predecessor). Such notification must have been given not later than six months before the date on which conversion took place.

If the compensatory payment is £50 or more you can choose to pay the sum due by instalments. You may do this by signing, dating and returning, within eight weeks, the enclosed instalment document. If, having returned the instalment document, you later sell, or transfer for valuable consideration, the property or any part of it you will lose the option of paying by instalments.

Unless you are paying by instalments you must pay the compensatory payment within eight weeks.

Your former landlord may also be claiming arrears of rent for the period before [*insert the appointed day*].

If you were not the tenant on [*insert the date of the day before the appointed day*], then this notice has been served on you in error and no payment will be due; but you nevertheless have to provide the person who sent you the notice, if you can, with such information as you have which might enable that person to identify the person who should have received notice instead of you.

If you think that the amount required from you is not due for that or any other reason, you are advised to consult your solicitor or other adviser.

Notes for completion of the Appendix

- 1 Insert the name of each tenant or former tenant.
- 2 Give sufficient identification of each property (including, where appropriate, the postal address) which was subject to the *cumulo* rent or *cumulo* premium.
- 3 Insert the amount of the *cumulo* rent or *cumulo* premium allocated to each lease.”.

SCHEDULE 10
(introduced by section 31(3)(b))

FORM OF NOTICE REQUIRING COMPENSATORY PAYMENT ETC: PARTIALLY CONTINUING LEASE

“NOTICE REQUIRING COMPENSATORY PAYMENT

To: *[name and address of former tenant]*.

This notice is sent by *[name and address of former landlord]*. Under the Long Leases (Scotland) Act 2006 part of the lease of *[give sufficient identification of the land leased]* dated *[give date of the lease]* is extinguished.

You are required to pay the sum of £ *[amount]* as a compensatory payment for the extinction of the rent of £ *[amount]* per annum due under the extinguished part of the lease and for the extinction of the other rights under that part of the lease.

The attached appendix shows which part of the lease is extinguished and shows how I have allocated the rent *[and the renewal premium]* between the extinguished part and the remainder of the lease.

(If the lease was subject to a cumulo rent, then add:

Because the rent payable under the lease was a *cumulo* rent shared among several leases the attached appendix also shows how I have allocated the *cumulo* rent among the leases to which it applied.)

(If the lease was subject to a cumulo premium, then add:

Because the premium payable under the lease was a *cumulo* premium shared among several leases the attached appendix also shows how I have allocated the *cumulo* premium among the leases to which it applied.)

(If arrears of the rent are also sought, then add:

You are also required to pay the sum of £ *[amount]* as arrears of the rent.)

Signed: *[signature either of the former landlord or of the former landlord's agent; and if an agent signs, the word "Agent" should be put after the agent's signature]*

Date:

(If payment is to be made to an agent of the former landlord then add:

Payment should be made to: *[name and address of agent]*.)

Appendix referred to in the Notice:

Subjects of lease

[Repeat identification of the land leased]

Converted subjects

[Give sufficient identification of the property (including, where appropriate, the postal address) in respect of which the lease is extinguished]

Continuing subjects

[Give sufficient description of the property (including, where appropriate, the postal address) in respect of which the lease continues]

Rent under the lease of £ [amount] is allocated as follows:

Converted subjects

Continuing subjects

(If lease was subject to a cumulo rent, then add:

Total cumulo rent of £ [amount] is allocated as follows:

Tenant/former tenant (see note for completion 1)	Property leased (see note for completion 2)	Allocated rent (see note for completion 3))
--	---	---

(If lease was subject to a renewal premium, then add:

Premium under the lease of £[amount] is allocated as follows:

Converted subjects

Continuing subjects

(If lease was subject to a cumulo premium, then add:

Total Cumulo premium of £[amount] is allocated as follows:

Tenant/ former tenant (see note for completion 1)	Property leased (see note for completion 2)	Allocated premium (see note for completion 3))
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Explanatory Note

(This explanation, and the "Notes for completion of the Appendix" which immediately follows it, have no legal effect)

This notice is being sent to you as a former tenant under a long lease.

On [insert date of appointed day] the lease of which you were a tenant was partially extinguished or converted by the Long Leases (Scotland) Act 2006. The Act applies to all leases of more than 175 years which on that day had more than 100 years left to run. By this notice your former landlord is claiming statutory compensation from you for the extinction of

some of the rent and the other rights under the lease. By this notice your former landlord is also fixing the rent (and renewal premium) for that part of the lease which continues in force (as a result of exemption or otherwise).

If no other lease to which the Act applies affected the converted subjects, that is to say the property in respect of which part of your lease is extinguished, that part of your lease is converted by the Act into ownership. This means that you are now owner instead of tenant. The same is true if there was more than one lease over that property but your lease was the lowest such lease. If your lease was a higher lease it is now extinguished but you are able to make a parallel claim for compensation against your own former tenant.

To be valid this notice must have been sent within two years after the date on which part of the lease was extinguished or converted.

The amount due by you as compensatory payment is set out in the notice. It is calculated as that sum which would, if invested in 2½% Consolidated Stock at the middle market price at the close of business on [*insert the date of the day before the appointed day*], produce an annual sum equal to the rent no longer due. In practice the sum is arrived at by multiplying the rent by a factor known as the "compensation factor". This factor is [*insert factor*]. The way in which the whole rent due under your lease has been divided between the property in respect of which your lease is extinguished or converted and the property in respect of which your lease continues is set out in the appendix to the notice.

(If the lease was subject to a cumulo rent, then add:

Because your rent was a *cumulo* rent – that is to say, was shared with the tenants of one or more other properties – it was first necessary for your landlord to divide the rent among those properties. The way in which this has been done is set out in the appendix to the notice.)

If the lease contained an obligation by the landlord to grant a renewal of the lease at fixed periods and for a premium not exceeding £100 (after division by the landlord), the rent may be treated as being increased by the amount of the premium divided by the number of years between each renewal. Because your lease is a partially continuing lease, it was necessary for the landlord to divide the premium between the part of the lease that is extinguished or converted and the part that continues in force. The way in which this has been done is shown in the appendix to the notice.

(If the lease was subject to a cumulo premium, add:

Because the premium (like a *cumulo* rent) was shared with the tenants of one or more other properties, it was first necessary (before division between that part of the lease that is extinguished or converted and that part that continues in force) for the landlord to divide the premium among the properties. The way in which this has been done is set out in the appendix to the notice.)

Where part of your lease has been converted the compensatory payment cannot exceed £500 unless you (or your predecessor) were given prior written notification by the former landlord (or the former landlord's predecessor). Such notification must have been given not later than six months before the date on which conversion took place.

If the compensatory payment is £50 or more you can choose to pay the sum due by instalments. You may do this by signing, dating and returning, within eight weeks, the enclosed instalment document. If, having returned the instalment document, you later sell, or

transfer for valuable consideration, the property or any part of it you will lose the option of paying by instalments.

Unless you are paying by instalments you must pay the compensatory payment within eight weeks.

Your former landlord may also be claiming arrears of rent for the period before [*insert the appointed day*].

If you were not the tenant on [*insert the date of the day before the appointed day*], then this notice has been served on you in error and no payment will be due; but you nevertheless have to provide the person who sent you the notice, if you can, with such information as you have which might enable that person to identify the person who should have received notice instead of you.

If you think that the amount required from you is not due for that or any other reason, you are advised to consult your solicitor or other adviser.

Notes for completion of the Appendix

- 1 Insert the name of each tenant and each former tenant.
- 2 Give sufficient identification of each property (including, where appropriate, the postal address) which was subject to the *cumulo* rent or *cumulo* premium.
- 3 Insert the amount of the *cumulo* rent or *cumulo* premium allocated to each lease.”.

SCHEDULE 11
(introduced by section 31(3)(c))

FORM OF NOTICE REQUIRING COMPENSATORY PAYMENT ETC. IN ORDINARY CASE

“NOTICE REQUIRING COMPENSATORY PAYMENT

To: [*name and address of former tenant*].

This notice is sent by [*name and address of former landlord*]. You are required to pay the sum of £ [*amount*] as a compensatory payment for the extinction of the rent of £ [*amount*] per annum due under the lease of [*give sufficient identification of the land leased*] dated [*give date of the lease*] and for the extinction of the other rights under the lease.

(If arrears of the rent are also sought, then add:

You are also required to pay the sum of £ [*amount*] as arrears of the rent.)

Signed: [*signature either of the former landlord or of the former landlord’s agent; and if an agent signs the agent should put the word "Agent" after the signature*]

Date:

(If payment is to be made to an agent of the former landlord then add:

Payment should be made to: *[name and address of agent].)*

Explanatory Note

(This explanation has no legal effect)

This notice is being sent to you as a former tenant under a long lease.

On *[insert date of appointed day]* the lease of which you were a tenant was converted or extinguished by the Long Leases (Scotland) Act 2006. The Act applies to all leases of more than 175 years which on that day had more than 100 years left to run. By this notice your former landlord is claiming statutory compensation from you for the extinction of the rent and the other rights under the lease.

If no other lease to which the Act applies affected the property, your lease is converted by the Act into ownership. This means that you are now owner instead of tenant. The same is true if there was more than one lease over the property but your lease was the lowest such lease. If your lease was a higher lease it is now extinguished but you are able to make a parallel claim for compensation against your own former tenant.

To be valid this notice must have been sent within two years after the date on which the lease was converted or extinguished.

The amount due by you as compensatory payment is set out in the notice. It is calculated as that sum which would, if invested in 2½% Consolidated Stock at the middle market price at the close of business on *[insert the date of the day before the appointed day]*, produce an annual sum equal to the rent. In practice the sum is arrived at by multiplying the rent by a factor known as the "compensation factor". This factor is *[insert factor]*.

If the lease contained an obligation by the landlord to grant a renewal of the lease at fixed periods and for a premium not exceeding £100, the rent may be treated as being increased by the amount of the premium divided by the number of years between each renewal.

Where your lease has been converted the compensatory payment cannot exceed £500 unless you (or your predecessor) were given prior written notification by the former landlord (or the former landlord's predecessor). Such notification must have been given not later than six months before the date on which conversion took place.

If the compensatory payment is £50 or more you can choose to pay the sum due by instalments. You may do this by signing, dating and returning, within eight weeks, the enclosed instalment document. If, having returned the instalment document, you later sell, or transfer for valuable consideration, the property or any part of it you will lose the option of paying by instalments.

Unless you are paying by instalments you must pay the compensatory payment within eight weeks.

Your former landlord may also be claiming arrears of rent for the period before [*insert the appointed day*].

If you were not the tenant on [*insert the date of the day before the appointed day*], then this notice has been served on you in error and no payment will be due; but you nevertheless have to provide the person who sent you the notice, if you can, with such information as you have which might enable that person to identify the person who should have received notice instead of you.

If you think that the amount required from you is not due for that or any other reason, you are advised to consult your solicitor or other adviser.”.

SCHEDULE 12
(introduced by section 39(4)(a))

FORM OF NOTICE REQUESTING ADDITIONAL PAYMENT

“NOTICE REQUESTING ADDITIONAL PAYMENT

To: [*name and address of former tenant*].

This notice is sent by [*name and address of former landlord*]. You are requested to pay compensation to me for the extinction of the right mentioned below. The right arises under the lease of [*give description of the land leased*] dated [*give date of the lease*]. I estimate the compensation due as being £ [*amount*]. The reasons for my estimate are given below.

Details of right extinguished:

[*Specify which of the rights listed in section 40(1) has been extinguished and on which a claim is founded. Where the right is expressed in the lease, set out its terms in full.*]

(*Where the right extinguished is the right to receive a premium and the premium is a cumulo premium and /or the lease is a partially continuing lease, give details of the way in which the premium has been divided.*)

(*Where the right is a right to development value, add:*

Explanation of how development value reserved from lease:

[*Set out or identify the condition or conditions of the lease which reserve development value and explain how development value is reserved.*])

Basis of estimate of compensation:

[*Give a full explanation of how the compensation is calculated.*]

Signed: *[signature either of the former landlord or of the former landlord's agent; and if an agent signs the agent should put the word "Agent" after the signature]*

Date:

(If payment is to be made to an agent of the former landlord then add:

Payment should be made to: [name and address of agent].)

Explanatory Note

(This explanation has no legal effect)

This notice is being sent to you as a former tenant under a long lease.

On *[insert date of appointed day]* the lease of which you were a tenant was converted or extinguished by the Long Leases (Scotland) Act 2006. The Act applies to all leases of more than 175 years which on that day had more than 100 years left to run. A compensatory payment may already have been claimed for the extinction of rent and other rights arising under the lease. By this notice the former landlord is claiming additional compensation in respect of the particular right mentioned in the notice.

If no other lease to which the Act applies affected the property, your lease is converted by the Act into ownership. This means that you are now owner instead of tenant. The same is true if there was more than one lease over the property but your lease was the lowest such lease. If your lease was a higher lease it is now extinguished but you may be able to make a parallel claim for compensation against your own former tenant.

To be valid this notice must have been sent within two years after the date on which the lease was converted or extinguished.

The amount claimed in the notice is an estimate by the former landlord. You are free to accept or reject this estimate. If you reject it, and no agreement can be reached, the Lands Tribunal can be asked to decide the correct figure.

Where your lease has been converted the amount claimed cannot exceed £500 unless you (or your predecessor) were given prior written notification by the former landlord (or the former landlord's predecessor). Such notification must have been given not later than six months before the date on which conversion took place.

If you accept the estimate you have a choice of paying the whole amount within eight weeks or (if the amount is £50 or more) of paying by instalments. To elect to pay by instalments you must sign, date and return the enclosed instalment document within eight weeks. If, having returned the instalment document, you sell, or transfer for valuable consideration, the property or any part of it you will lose the option of paying by instalments.

If you were not the tenant on *[insert the date of the day before the appointed day]*, then this notice has been served on you in error and no payment will be due; but you nevertheless have

to provide the person who sent you the notice, if you can, with such information as you have which might enable the person who sent you the notice to identify the person who should have received notice instead of you.

If you think that the amount required from you is not due for that or any other reason, you are advised to consult your solicitor or other adviser.”.

SCHEDULE 13
(introduced by section 43(3)(b))

FORM OF FURTHER NOTICE REQUIRING ADDITIONAL PAYMENT FOLLOWING AGREEMENT

“FURTHER NOTICE REQUIRING ADDITIONAL PAYMENT FOLLOWING AGREEMENT

To: *[name and address of former tenant]*.

This notice is sent by *[name and address of former landlord]*. The notice relates to the extinction of a right which arose under the lease of *[give description of the land leased]* dated *[give date of the lease]*, namely *[specify which of the rights listed in section 40(1) has been extinguished and on which the claim is founded]*.

The payment due to me for the extinction of the right has been agreed at £ *[amount]*. You are now required to pay this sum.

Signed: *[signature either of the former landlord or of the former landlord's agent; and if an agent signs, the word "Agent" should be put after the agent's signature]*

Date:

(If payment is to be made to an agent of the former landlord then add:

Payment should be made to: *[name and address of agent]*.)

Explanatory Note

(This explanation has no legal effect)

This notice is being sent to you as a former tenant under a long lease. It follows an earlier notice in which compensation was requested by the former landlord for the extinction of the right mentioned in the notice. The amount due by way of compensation has now been agreed with you as being the amount stated in the notice.

You have a choice of paying the whole amount within four weeks or (if the amount is £50 or more) of paying by instalments. To elect to pay by instalments you must sign, date and return the enclosed instalment document within four weeks. If, having returned the instalment document, you sell, or transfer for valuable consideration, the property or any part of it you will lose the option of paying by instalments.

To be valid this notice must have been sent within 5 years after the date on which the lease of which you were a tenant was converted or extinguished. ”.

SCHEDULE 14
(introduced by section 45(3)(a))

FORM OF PRELIMINARY NOTICE FOR COMPENSATORY PAYMENT EXCEEDING £500

“PRELIMINARY NOTICE FOR COMPENSATORY PAYMENT EXCEEDING £500

To: *[name and address of tenant]*.

This notice is sent by *[name and address of landlord]*. When the Long Leases (Scotland) Act 2006 (asp 00) comes fully into force you will be required to make a compensatory payment for the extinction of the rent of £ *[amount]* per annum due under the lease of *[give sufficient identification of the land leased]* dated *[give date of the lease]* and for the extinction of the other rights under the lease. I estimate the amount payable at £ *[amount]*.

No money is due now. When the 2006 Act comes into force a request for payment will be sent.

Please keep this notice and, if you sell the property before the Act comes into force, give it to the buyer (who will be liable in your place).

Signed: *[signature either of the landlord or of the landlord's agent; and if an agent signs, the word "Agent" should be put after the agent's signature]*

Date:

Explanatory Note

(This explanation has no legal effect)

This notice is being sent to you as a tenant under a long lease.

The Long Leases (Scotland) Act 2006, when it comes fully into force, will convert your lease into ownership. This means that you will become owner instead of a tenant, and that rent will no longer be payable. In exchange for the conversion, however, compensation is due to your landlord. This notice warns you of the amount of compensation that is likely to be claimed.

No payment is due now. Payment is due only after conversion takes place. *(If the appointed day has already been fixed, add: Conversion is due to take place on [insert date of appointed day].* A separate notice requesting payment will be sent at that time. Payment can usually be made by instalments payable twice yearly on the term days of Whitsunday (28 May) and Martinmas (28 November). The number of instalments depends on the total amount due as follows:

Amount due	Number of instalments
between £50 and £500	5
between £501 and £1000	10
between £1001 and £1500	15
more than £1500	20

If you fail to pay an instalment within 42 days after the day on which it is due, the whole balance of the payment will be due at once.

If you would rather remain as tenant than make the compensatory payment, you can choose to have your lease exempted from conversion. This is done by registration of a notice of exemption in the Land Register or Register of Sasines no later than 2 months before the date on which conversion would otherwise take place. If you wish to do this, you are advised to consult your solicitor or other adviser without delay.

If you have sold or transferred the property and are no longer the tenant, please give this notice to the new tenant.”.

SCHEDULE 15
(introduced by section 45(3)(b))

FORM OF PRELIMINARY NOTICE FOR ADDITIONAL PAYMENT EXCEEDING £500

“PRELIMINARY NOTICE FOR ADDITIONAL PAYMENT EXCEEDING £500

To: *[name and address of tenant]*.

This notice is sent by *[name and address of landlord]*. When the Long Leases (Scotland) Act 2006 (asp 00) comes fully into force you will be asked to pay compensation to me for the extinction of the right mentioned below. The right arises under the lease of *[give description of the land leased]* dated *[give date of the lease]*. I estimate the compensation due as being £ *[amount]*. The reasons for my estimate are given below.

No money is due now. When the 2006 Act comes into force a request for payment will be made.

Please keep this notice and, if you sell the property before the Act comes into force, give it to the buyer (who will be liable in your place).

Details of right being extinguished:

[Specify which of the rights listed in section 40(1) will be extinguished and on which a claim will be founded. Where the right is expressed in the lease, set out its terms in full.]

(Where the right extinguished is the right to receive a premium and the premium is a cumulo premium and /or the lease is a partially continuing lease, give details of the way in which the premium has been divided.)

(Where the right is a right to development value, add:

Explanation of how development value reserved from lease:

[Set out or identify the condition or conditions of the lease which reserve development value and explain how development value is reserved.]

Basis of estimate of compensation:

[Give a full explanation of how the compensation is calculated.]

Signed: [signature either of the landlord or of the landlord's agent; and if an agent signs, the word "Agent" should be put after the agent's signature]

Date:

Explanatory Note

(This explanation has no legal effect)

This notice is being sent to you as a tenant under a long lease.

The Long Leases (Scotland) Act 2006, when it comes fully into force, will convert your lease into ownership. This means that you will become owner instead of a tenant, and that rent will no longer be payable. In exchange for the conversion, however, compensation is due to your landlord. A basic compensatory payment is due for the extinction of rent and other rights arising under the lease. If this exceeds £500 you will be warned by a separate notice. The present notice warns you that the landlord will claim additional compensation in respect of the particular right mentioned in the notice.

No payment is due now. Payment is due only after conversion takes place. *(If the appointed day has already been fixed, add: Conversion is due to take place on [insert date of appointed day].* A separate notice requesting payment will be sent at that time. Payment can usually be made by instalments payable twice yearly on the term days of Whitsunday (28 May) and Martinmas (28 November). The number of instalments depends on the total amount due as follows:

Amount due	Number of instalments
between £50 and £500	5
between £501 and £1000	10
between £1001 and £1500	15
more than £1500	20

If you fail to pay an instalment within 42 days after the day on which it is due, the whole balance of the payment will be due at once.

The amount mentioned in the notice is an estimate by the landlord. When the time comes you will be free to accept or reject this estimate. If you reject it, and no agreement can be reached, the Lands Tribunal can be asked to decide the correct figure.

If you would rather remain as tenant than make the payment, you can choose to have your lease exempted from conversion. This is done by registration of a notice of exemption in the Land Register or Register of Sasines no later than 2 months before the date on which conversion would otherwise take place. If you wish to do this, you are advised to consult your solicitor or other adviser without delay.

If you have sold or transferred the property and are no longer the tenant, please give this notice to the new tenant.”.

SCHEDULE 16
(introduced by section 46(2)(a))
FORM OF INSTALMENT DOCUMENT
“INSTALMENT DOCUMENT

To: *[name and address of former landlord or agent]*.

I *[name and address of former tenant]* opt to make the compensatory payment *[or as the case may be additional payment]* of £ *[amount]* due under the notice dated *[date]* by *[number of instalments: see note for completion]* equal half-yearly instalments of £ *[amount]* on 28 May and 28 November each year, commencing on *[28 May or 28 November]* *[year]*.

I enclose payment of £ *[amount]* as an amount payable in addition to the compensatory payment *[or as the case may be additional payment]*.

Signed:

Date:

Explanatory Note

(This explanation has no legal effect)

You can choose to pay by instalments by signing, dating and returning this form within *[eight weeks or in the case of notice under section 43(2) four weeks]*, but if you do so you must enclose the further amount (10% over and above the payment) mentioned in this notice.

The amount due will be payable in 5, 10, 15, or 20 equal instalments (depending on the total amount). The first payment will be made at the first term day of Whitsunday (28 May) and Martinmas (28 November) which follows the return of the instalment document. Payments will be due half-yearly thereafter on 28 May and 28 November until payment in full has been made.

If you fail to pay an instalment within 42 days after the day on which it is due, the whole balance of the payment will be due at once.

If, having chosen to pay by instalments, you sell, or transfer for valuable consideration, the property or any part of it the whole balance of the payment will be due seven days after the sale or transfer.

If, after you receive this document, you sell, or so transfer, the property or any part of it without having signed, dated and returned this form, you will lose the right to obtain the option to pay by instalments and the entire amount due will be payable in accordance with the notice which accompanied this document.

If you have difficulty in making the payment you may be able to make arrangements with your former landlord different from those you would obtain by signing, dating and returning this form; but that is a matter on which you are advised to consult your solicitor or other adviser without delay.

Note for completion of the form by the former landlord

(This note has no legal effect)

You should fully complete all the blank parts of this form so that the former tenant only has to sign and date it.

Insert the number of instalments in accordance with the following table:

<i>Payment</i>	<i>Number of Instalments</i>
£50 but not exceeding £500	5
exceeding £500 but not exceeding £1,000	10
exceeding £1,000 but not exceeding £1,500	15
exceeding £1,500	20”.

SCHEDULE 17
(introduced by section 47(3))

ACKNOWLEDGEMENT OF SERVICE AND CERTIFICATE OF POSTING

“FORM A: ACKNOWLEDGEMENT OF SERVICE

I, [*name of tenant or former tenant*], acknowledge receipt of a notice under section [31, 39, 43 or 45] of the Long Leases (Scotland) Act 2006 [requiring a payment *or* claiming a payment *or* giving warning of a prospective claim for payment] [*add if applicable*, of an instalment document together with the explanatory note relating to that document] and of an explanatory note relating to the notice.

Signed: *[signature of tenant or former tenant]*

Date:

FORM B: CERTIFICATE OF POSTING

Notice under section [31, 39, 43 or 45] of the Long Leases (Scotland) Act 2006 [requiring a payment *or* claiming a payment *or* giving warning of a prospective claim for payment] was posted to *[name of tenant or former tenant]* at *[address]*, together with *[add if applicable, an instalment document, the explanatory note relating to that document and]* the requisite explanatory note relating to the notice, on *[date]*.

Signature: *[signature either of the landlord or former landlord or of the landlord or former landlord's agent; and if an agent signs, the word "Agent" should be put after the agent's signature]*

Date: ”.

SCHEDULE 18 *(introduced by section 54(1))*

FORM OF NOTICE OF EXEMPTION

“NOTICE SEEKING EXEMPTION FROM CONVERSION OF A QUALIFYING LEASE

Name and address of tenant under the qualifying lease:

Qualifying lease:
(see note for completion 1)

Description of land subject to the qualifying lease:
(see note for completion 2)

Title as tenant:
(see note for completion 3)

Name and address of landlord under the qualifying lease:

Name and address of landlord(s) under any superior lease:

Service:

(see note for completion 4)

Signature of tenant:

(see note for completion 5)

Signature of witness:

Name and address of witness:

Date:

Explanatory note for landlord

(This explanation has no legal effect)

When it comes fully into force the Long Leases (Scotland) Act 2006 will convert certain very long leases into ownership. This notice is being sent to you as a person who is believed to be a landlord under such a lease.

The lease described in the notice is eligible for conversion under the Act. This means that in the ordinary course of events the tenant under that lease would become the owner of the land. By this notice the tenant is exercising that person's right to have the lease exempted from conversion. Once the notice is registered in the Land Register or Register of Sasines the lease will cease to be eligible for conversion.

A notice of exemption can be recalled in the future. This is done by a notice of recall which will also be sent to you. Once an exemption is recalled, the lease is again eligible for conversion into ownership.

This notice is for information only and no action is required.

Notes for completion of the notice

(These notes have no legal effect)

1. Specify the parties, date, and date and place of registration.
2. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
3. Set out the tenant's title in conformity with note 2. If title has not been completed set out the midcouple(s) linking the tenant with the person who had the last completed title.
4. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the landlord under the qualifying lease and to the landlord under any superior lease (except in a case where this is not reasonably practicable). Then insert either, or both, of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to [*state name of landlord*] at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to [*state name of landlord*] for the following reason: [*specify the reason*]."
5. The notice should not be signed until a copy of it has been sent (or otherwise) as mentioned in note 4. A duly authorised person may sign on behalf of the tenant."

SCHEDULE 19
(introduced by section 57(1))

FORM OF NOTICE OF RECALL

"NOTICE RECALLING PRIOR EXEMPTION FROM CONVERSION OF A
QUALIFYING LEASE

Name and address of tenant under the qualifying lease:

Qualifying lease:
(see note for completion 1)

Unexpired Duration:
(see note for completion 2)

Description of land subject to the qualifying lease:
(see note for completion 3)

Title as tenant:

(see note for completion 4)

Name and address of landlord under the qualifying lease:

Name and address of landlord(s) under any superior lease:

Notice of Exemption [or description of reasons for lease being exempt]:

(see note for completion 5)

Service:

(see note for completion 6)

Signature of tenant:

(see note for completion 7)

Signature of witness:

Name and address of witness:

Date:

Explanatory note for landlord

(This explanation has no legal effect)

The Long Leases (Scotland) Act 2006 provides for the conversion of certain very long leases into ownership. This notice is being sent to you as a person who is believed to be a landlord under such a lease.

The lease described in the notice is not currently eligible for conversion under the Act. This is because [a notice of exemption was previously registered] [the lease had not been registered][the lease is a sublease of a lease which itself is not eligible for conversion because [a notice of exemption in relation to that lease was registered][that lease had not been

registered]] in the Land Register or Register of Sasines. On registration of the current notice, eligibility will be acquired, and the lease will automatically be converted into ownership [after an interval of six months] [on (*state the date of the appointed day*)]. This means that the tenant will become the owner of the land and that you will lose any rights under the lease or in the land.

It may be possible to preserve certain rights under the lease by registration of an appropriate notice before the date of conversion. Compensation for loss of rent and other rights may also be due, and must be claimed not later than two years after the date of conversion. If you wish to pursue these matters further you are advised to consult your solicitor or other adviser without delay.

Notes for completion of the notice

(These notes have no legal effect)

1. Specify the parties, date, and date and place of registration.
2. State, to the nearest year, the number of years that the lease has left to run.
3. Describe the land in a way that is sufficient to identify it. Where the title to the land has been registered in the Land Register the description should refer to the title number. Otherwise it should normally refer to and identify a deed recorded in a specified division of the Register of Sasines.
4. Set out the tenant's title in conformity with note 3. If title has not been completed set out the midcouple(s) linking the tenant with the person who had the last completed title.
5. State the date and place of registration of the notice of exemption. If the recall follows the first registration of the qualifying lease rather than a notice of exemption, state the date and place of registration of the lease. (Where the lease is a sublease of a lease which is exempt from conversion state the date and place of registration of the notice of exemption of that lease if applicable).
6. Do not complete until a copy of the notice, together with the explanatory note, has been sent to the landlord under the qualifying lease and to the landlord under any superior lease (except in a case where this is not reasonably practicable). Then insert either, or both, of the following:

"A copy of this notice has been sent by [*specify whether by recorded delivery or registered post or by ordinary post*] on [*date of posting*] to [*state name of landlord*] at [*state address*]."; or

"It has not been reasonably practicable to send a copy of this notice to [*state name of landlord*] for the following reason: [*specify the reason*]."
7. The notice should not be signed until a copy of it has been sent (or otherwise) as mentioned in note 6. A duly authorised person may sign on behalf of the tenant."

SCHEDULE 20
(introduced by section 60(1)(c)(ii))

TABLE OF LIFE EXPECTANCY

Years of age of person	Period of life expectancy (years)	
	Male Life	Female Life
Birth to 4	74	79
5 to 9	69	75
10 to 14	64	70
15 to 19	59	65
20 to 24	55	60
25 to 29	50	55
30 to 34	45	50
35 to 39	41	45
40 to 44	36	40
45 to 49	31	36
50 to 54	27	31
55 to 59	23	27
60 to 64	19	22
65 to 69	15	18
70 to 74	12	15
75 to 79	9	11
80 to 84	7	8
85 and over	5	6

NOTES TO SCHEDULES 1 TO 20

Schedule 1

NOTE

This is the form of notice referred to in section 7(2) for the conversion of reserved sporting rights into separate tenements. It contains an explanatory note and notes for completion of the notice.

Schedule 2

NOTE

This is the form of notice referred to in section 13(1) for use by landlords and other persons entitled to enforce qualifying conditions who wish to convert such conditions into real burdens. It contains an explanatory note and notes for completion of the notice.

Schedule 3

NOTE

This is the form of notice referred to in section 14(1) for use by landlords and other persons entitled to enforce qualifying conditions who wish to enter an agreement converting such conditions into real burdens. It contains an explanatory note and notes for completion of the notice.

Schedule 4

NOTE

This is the form of notice referred to in section 18(1) of the bill for use by landlords and other persons entitled to enforce a qualifying condition who wish to convert the condition into a personal pre-emption burden or personal redemption burden. It contains an explanatory note and notes for completion of the notice.

Schedule 5

NOTE

This is the form of notice referred to in section 19(1) of the bill for use by a local authority or Scottish Ministers who wish to convert a qualifying condition into an economic development burden. It contains an explanatory note and notes for completion of the notice.

Schedule 6

NOTE

This is the form of notice referred to in section 20(1) of the bill for use by Scottish Ministers where they wish to convert a qualifying condition into a health care burden. It contains an explanatory note and notes for completion of the notice.

Schedule 7

NOTE

This is the form of notice referred to in section 21(1) of the bill for use by a conservation body or Scottish Ministers who wish to convert a qualifying condition into a conservation burden. It contains an explanatory note and notes for completion of the notice.

Schedule 8

NOTE

This is the form of notice referred to in section 22(1) of the bill for use by landlords and other persons entitled to enforce a qualifying condition who wish to convert the condition into a conservation burden in favour of a conservation body or Scottish Ministers. It contains an explanatory note and notes for completion of the notice.

Schedule 9

NOTE

This is the form of notice (with appendix) referred to in section 31(2) for claiming compensation where the rent payable was a *cumulo* rent. It contains instructions for completing the form, an explanatory note, a copy of which must be served with the notice (see section 31(4)), and notes for completion of the Appendix.

Schedule 10

NOTE

This is the form of notice (with appendix) referred to in section 31(2) for claiming compensation where the lease is a partially continuing lease. It contains instructions for completing the form, an explanatory note, a

copy of which must be served with the notice (see section 31(4)), and notes for completion of the Appendix.

Schedule 11

NOTE

This is the form of notice referred to in section 31(2) for claiming compensation in cases not involving a cumulo rent (schedule 9) or a partially continuing lease (schedule 10). It contains instructions for completing the form, and an explanatory note, a copy of which must be served with the notice (see section 31(4)).

Schedule 12

NOTE

This is the form of notice referred to in section 39(2) for claiming an additional payment. It contains instructions for completing the form, and an explanatory note, a copy of which must be served with the notice (see section 39(4)).

Schedule 13

NOTE

This is the form of notice referred to in section 43(2) for claiming an additional payment following agreement. It contains instructions for completing the form, and an explanatory note, a copy of which must be served with the notice (see section 43(3)).

Schedule 14

NOTE

This is the form of preliminary notice referred to in section 45(2) for a compensatory payment. It contains instructions for completing the form, and an explanatory note, a copy of which must be served with the notice (see section 45(4)).

Schedule 15

NOTE

This is the form of preliminary notice referred to in section 45(2) for an additional payment. It contains instructions for completing the form, and an explanatory note, a copy of which must be served with the notice (see section 45(4)).

Schedule 16

NOTE

This is the form of instalment document referred to in section 46(2). It contains notes for completing the form, and an explanatory note, a copy of which must be served with the document.

Schedule 17

NOTE

This schedule provides the form of acknowledgement of service (Form A) and the form of certificate of posting (Form B) referred to in section 47(3) which section regulates the service of notices in respect of a compensatory or additional payment.

Schedule 18

NOTE

This is the form of notice referred to in section 54(1) for use by the tenant of a qualifying lease who wishes to opt out of conversion. It contains an explanatory note and notes for completion of the notice.

Schedule 19

NOTE

This is the form of notice referred to in section 57(1) for use by the tenant of an exempt lease who wishes to recall the exemption. It contains an explanatory note and notes for completion of the notice.

Schedule 20

NOTE

This is the table of life expectancy referred to in section 60(1)(c)(ii) for use in certain circumstances in calculating the period of a lease where the period is expressed by reference to the lifetime of a person.

SCHEDULE 21 *(introduced by section 67)*

MINOR AND CONSEQUENTIAL AMENDMENTS

Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

- 1 In section 9(2B) (no standard security over personal pre-emption burden or personal redemption burden) of the Conveyancing and Feudal Reform (Scotland) Act 1970, after the words “Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)” insert “or as the case may be of section 18 of the Long Leases (Scotland) Act 2006 (asp 00)”.

NOTE

This amendment extends the rule in section 9(2B) of the 1970 Act which prevents a standard security being granted over a personal pre-emption burden or a personal redemption burden resulting from conversion under section 18A of the 2000 Act to a burden of that type which results from leasehold conversion.

Land Registration (Scotland) Act 1979 (c.33)

- 2 (1) The Land Registration (Scotland) Act 1979 shall be amended in accordance with this paragraph.
- (2) In section 3(6) (special provision as respects completion of title)—

- (a) the word “and” immediately preceding paragraph (c) is repealed; and
 - (b) after that paragraph insert “; and
 - (d) section 18(9)(a) of the Long Leases (Scotland) Act 2006 (asp 00).”.
- (3) In section 6 (title sheet)—
- (a) in subsection (1)—
 - (i) in paragraph (e), for “section 18, 18A, 18B, 18C, 19, 20, 27 or 27A of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5) or section 4(5), 50, 75 or 80 of the Title Conditions (Scotland) Act 2003 (asp 9)” substitute “any enactment mentioned in subsection (1A) below”; and
 - (ii) in paragraph (ee), for “section 18, 19 or 20 of that Act of 2000 or 4(5), 50, 75 or 80 of that Act of 2003” substitute “any enactment mentioned in subsection (1B) below”; and
 - (b) after subsection (1) insert—
 - “(1A) The enactments referred to in subsection (1)(e) above are—
 - (a) sections 18, 18A, 18B, 18C, 19, 20, 27 and 27A of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5);
 - (b) sections 4(5), 50, 75 and 80 of the Title Conditions (Scotland) Act 2003 (asp 9); and
 - (c) sections 13, 14, 18, 19, 20, 21 and 22 of the Long Leases (Scotland) Act 2006 (asp 00).
 - (1B) The enactments referred to in subsection (1)(ee) above are—
 - (a) sections 18, 19 and 20 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000;
 - (b) sections 4(5), 50, 75 and 80 of the Title Conditions (Scotland) Act 2003; and
 - (c) sections 13 and 14 of the Long Leases (Scotland) Act 2006.”.
- (4) In section 9 (rectification of the Land Register of Scotland), subsection (3B)—
- (a) the word “or” immediately following paragraph (a) is repealed; and
 - (b) after paragraph (b), insert “or
 - (c) any provision of the Long Leases (Scotland) Act 2006 (asp 00).”.
- (5) In section 12 (indemnity in respect of loss), subsection (3)(gg), after the words “Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)” insert “or as the case may be section 7 of the Long Leases (Scotland) Act 2006 (asp 00)”.
- (6) In section 28(1) (interpretation), in the definition of “incorporeal heritable right”, in paragraph (b), after the words “Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5)” insert “or as the case may be by section 7(1) of the Long Leases (Scotland) Act 2006 (asp 00)”.

NOTE

This paragraph amends certain sections of the Land Registration (Scotland) Act 1979.

The amendment in subparagraph (2) makes clear that it is not necessary to expedite a notice of title in the case of a personal pre-emption burden or personal redemption burden which is already on the Land Register.

Sections 6(1)(e) and (ee) of the 1979 Act were respectively amended and added by section 112 of the 2003 Act so as to require the Keeper, when altering the title sheet of a benefited or burdened property in order to take account of changes in respect of the preservation of feudal real burdens, to give details of the other property. The amendment in subparagraph (3) imposes on the Keeper a similar duty to cross-reference benefited and burdened properties when updating the Land Register to take account of leasehold conversion.

The amendment in subparagraph (4) makes clear that the Keeper can alter the Land Register to take account of leasehold conversion. As with the 2000 Act it does not permit the reinstatement of an encumbrance which has been deleted in error. Indemnity is excluded in respect of any changes made by the Keeper (see section 12(3)(cc) of the 1979 Act which applies to section 9(3B)). The amendment implements recommendation 41. See paragraphs 8.1 to 8.6 of the report.

The amendment in subparagraph (5) extends the exclusion of indemnity with regard to the enforceability of sporting rights converted into separate tenements under section 65A of the 2000 Act to those converted under the bill.

The amendment in subparagraph (6) allows the registration of sporting rights that are converted into separate tenements under section 7 of the bill. The amendment matches the amendment made to s 28(1) for sporting rights converted into separate tenements under s 65A of the 2000 Act. The amendment enables a separate title sheet to be opened for such rights under s 5(1)(a) of the 1979 Act.

Title Conditions (Scotland) Act 2003 (asp 9)

- 3 (1) The 2003 Act shall be amended in accordance with this paragraph.
- (2) In section 12 (division of a benefited property), in subsection (4)(a), after “Act” insert “or sections 23 or 25 of the Long Leases (Scotland) Act 2006 (asp 00)”.
- (3) In section 63 (manager burdens)—
- (a) in subsection (4)(d), for “the case mentioned in subsection (6)” substitute “either of the cases mentioned in subsection (6) or (6A)”;
- (b) in subsection (5)(a), for “the case” substitute “either of the cases”;
- (c) after subsection (6), insert—
- “(6A) The case is where—
- (a) a leasehold condition is imposed on the disposal, by virtue of section 61 of the Housing (Scotland) Act 1987 as modified by section 84A of that Act (application of right to buy in cases where landlord is lessee), of a landlord’s interest in a property by—
- (i) a person such as is mentioned in any of the sub-paragraphs of subsection (2)(a) of section 61; or
- (ii) a predecessor of such a person,
to a tenant of such a person; and
- (b) that condition is converted into a manager burden under section 24 of the Long Leases (Scotland) Act 2006 (asp 00) (conversion of qualifying conditions into manager burdens).”;

- (d) in subsection (8)(b)—
 - (i) for “that” substitute “those”; and
 - (ii) for “subsection (6)” substitute “subsections (6) or (6A)”.
- (4) In section 105 (consequential alterations to Land Register)—
 - (a) in subsection (2), for the words from “section”, where it first occurs, to “Act”, where it second occurs, substitute “—
 - “(a) section 18, 19 or 20 of the 2000 Act;
 - (b) section 13 or 14 of the Long Leases (Scotland) Act 2006 (asp 00); or
 - (c) section 4(5), 50, 75 or 80 of this Act,”; and
 - (b) in subsection (3), after paragraph (a) insert—
 - “(aa) any—
 - (i) notice under section 13 of the Long Leases (Scotland) Act 2006; or
 - (ii) agreement under section 14 of that Act,
 which converts a qualifying condition (within the meaning of that Act) into a real burden;”.
- (5) In section 122 (interpretation), subsection (1)—
 - (a) in the definition of “conservation burden” the word “or” immediately following sub-paragraph (a) is repealed and after sub-paragraph (b) insert—
 - “(c) obtained by virtue of section 21 of the Long Leases (Scotland) Act 2006 (asp 00) (conversion of qualifying condition to conservation burden); or
 - (d) obtained by virtue of section 22 of that Act (conversion of qualifying condition to conservation burden where conservation body or Scottish Ministers nominated to enforce);”;
 - (b) in the definition of “economic development burden”, at the end insert “and to a real burden created under section 19 of the Long Leases (Scotland) Act 2006 (asp 00) (conversion of qualifying condition to economic development burden)”;
 - (c) in the definition of “health care burden”, at the end insert “and to a real burden created under section 20 of the Long Leases (Scotland) Act 2006 (asp 00) (conversion of qualifying condition to health care burden)”;
 - (d) in the definition of “personal pre-emption burden” and “personal redemption burden” after the word “Act” insert “and section 18(1) of the Long Leases (Scotland) Act 2006 (asp 00)”.

NOTE

This paragraph amends certain sections of the Title Conditions (Scotland) Act 2003.

Subparagraph (2) amends section 12(4)(a) of the 2003 Act. Section 12(1) of that Act provides rules for what happens where part of a benefited property is divided. Subsection (4)(a) disapplies the rules where the property is a benefited property only by virtue of sections 52 to 56 of the Act. The equivalent provisions in the bill to sections 52 to 56 are section 23 (facility and service burdens) and section 25 (common schemes). Subsection (4)(a) is amended to refer to these sections. In these cases both parts of the benefited property are to have the right to enforce.

Subparagraph (3) amends section 63 of the Act. That section regulates manager burdens. A manager burden which was imposed on a sale under the right to buy provisions of the Housing (Scotland) Act 1987 is given a maximum life of 30 years. Also in such a case, as an exception to the general rule, the manager can be dismissed under s 64 of the Act. Section 63 is amended so that a qualifying condition which was imposed on a sale of the landlord's interest under the right to buy legislation and which is converted to a manager burden under section 24 of the bill is to be treated in exactly the same way.

Subparagraph (4) provides for alterations to be made to the Land Register following registration of a notice or agreement under this bill converting a qualifying condition into a real burden. The paragraph extends section 105 of the 2003 Act which made equivalent provision in the feudal context.

Subparagraph (5) amends the definition of certain personal real burdens in section 122(1) of the 2003 Act to make clear that they include burdens of that type that result from conversion under the provisions of this Act. The burdens in question are conservation burdens, economic development burdens, health care burdens, personal pre-emption burdens and personal redemption burdens.

Appendix B

List of those who submitted written comments on Discussion Paper No 112

Angus Council
A M Bowman, Solicitor
Centre for Research into Law Reform, University of Glasgow
Convention of Scottish Local Authorities
Council of Mortgage Lenders
J Crawford, Scottish Enterprise¹
J C N Craxton, Solicitor
Faculty of Advocates
Fife Council
Professor W M Gordon, University of Glasgow
B G Hamilton
J M Hart, Solicitor
R T B Jack, Solicitor
G Jamieson, Solicitor
Keeper of the Registers of Scotland
Lands Tribunal for Scotland
The Law Society of Scotland
A McAllister, University of Paisley
I W McDonald, Solicitor
Royal Institution of Chartered Surveyors in Scotland
Scottish Landowners' Federation
Scottish Law Agents Society
Scottish Natural Heritage
Society of Solicitors in the Supreme Courts of Scotland
Society of Writers to HM Signet²
South Lanarkshire Council
Dr A J M Steven, University of Edinburgh
S Wortley, University of Strathclyde

¹ This response is a personal response from the legal section of Scottish Enterprise.

² The response was prepared by two members of the Society (S M Notley and S L Richards) and while it was discussed and noted by the Council of the Society, according to their normal practice, it has not been formally adopted by them.

Appendix C

Survey of long leases

Aim of the survey

1. The aim of the survey was to investigate the incidence and use of long leases in Scotland.

Methodology

2. During the period 20 March to 26 April 2000 information was obtained on 2679 leases from the Land Register of Scotland for the counties of Ayr, Clackmannan, Lanark and Renfrew.¹ The information was then stored on a computer database.² Some of the leases comprised a part only of the property originally leased, and as a result there is likely to have been a certain amount of double-counting, with the survey taking in both (or some or all) parts of an originally undivided lease and classifying each as a separate lease.

3. Ayr and Lanark were chosen because at the time of the survey carried out for the Guthrie Report in 1951³ they were the counties with the most recorded leases in terms of numbers and, in the case of Lanark, as a percentage of all titles in the county.⁴ They have also been operational for the Land Register for some time.⁵ Clackmannan was preferred because it had a high incidence of recorded leases as a percentage of all titles in the county. Although Kirkcudbright and Wigtown had a slightly higher percentage of recorded leases than Clackmannan, Clackmannan was chosen because it has been an operational area for the Land Register for longer.⁶ Renfrew was also chosen for this latter reason,⁷ and while it had a lower percentage of leases, in 1951 Renfrew was ahead of Kirkcudbright and Wigtown in terms of numbers of leases.

¹ We are grateful to the staff of Registers of Scotland for supplying a list of the leasehold titles for each county, providing information on each title, and allowing the title sheets to be inspected. In particular we wish to thank Mr Ian Davis, Mr John Marshall, Mr Marcus MacKenzie, Mr Douglas Pentland, and the staff in Customer Services, for their advice and assistance.

² We wish to thank Ms Marina Miller for creating a database for the survey.

³ In April 1951 the Keeper of the Registers of Scotland carried out for the Guthrie Committee a survey of all search sheets in the Register of Sasines for the period 1905–1951. Its findings were published in appendix II of the Guthrie Report.

⁴ In both categories Lanark was in first place. This is probably still the case. O'Donnell and Rennie found that the greatest concentration of leasehold titles was in Lanarkshire: see D O'Donnell and R Rennie, "Non-Feudal Landholdings in Scotland" (1998) 3 SLPQ 31 at 49.

⁵ Lanark became an operational area on 3 January 1984, and Ayr on 1 April 1997.

⁶ Clackmannan became an operational area on 1 October 1992. Kirkcudbright and Wigtown became operational areas on 1 April 1997.

⁷ Renfrew became an operational area on 6 April 1981.

4. Table 1 shows the number of leases examined in each county together with a comparison of the numbers which existed in 1951.

	Number of leases examined	% of leasehold titles examined	Number of leases in 1951
Ayr	303	100	1988
Clackmannan	193	100	305
Lanark	1220	25	4153
Renfrew	963	50	655

Table 1: Number of leases examined

It will be seen that the survey examined all leasehold title sheets for Clackmannan and Ayr, one half of the title sheets for Renfrew, and one quarter of the title sheets for Lanark. For practical reasons, the search did not include the Register of Sasines. There is therefore excluded from the survey any pre-existing lease which saw no activity during the period under review of a kind which would induce first registration in the Land Register.

5. Information was taken from the title sheets about:

- title number
- date of registration
- address of property
- name of original landlord
- consideration
- start year of lease
- duration
- rent
- partial assignments and allocations of rent
- subleases
- whether the minerals had been excepted.

6. Some information was not available, namely:

- name of original landlord for 55 leases
- consideration for 114 leases
- start year for 57 leases
- duration for 80 leases
- original rent for 268 leases
- whether the lease had been assigned in part or not for 71 leases⁸
- whether on a partial assignment the rent under the original lease had been allocated for 27 leases⁹
- the amount of the allocated rent, where the rent had been allocated, for 12 leases¹⁰
- whether the lease was a sublease for 244 leases and
- whether the minerals had been excepted for 37 leases.

⁸ There were 1503 assignments in part.

⁹ 1.80% of the 1503 assignments in part.

¹⁰ 2.05% of the 586 leases for which the rent had been allocated.

7. In addition to searching the Land Register we placed a notice in the *Journal of the Law Society of Scotland* and also contacted a number of persons with knowledge and experience of long leases. We are grateful to those solicitors and others¹¹ who helped us in various ways. 51 further leases were received from this source, and while they are not included in the survey, they were useful in supplementing and explaining the information obtained from the Register.

8. The estate search for that part of the Seafield Estate which is in Moray was also examined as it was known that the Estate had a practice of granting long leases at the end of the 19th century.

Incidence and distribution

9. The number of title sheets examined (2360) was smaller than the total number of leases (2679). In other words, some title sheets included two or more leases. This was usually because two distinct properties were registered under the same title or because a second lease extended or re-granted the first. In general the total number of leases has been used as the base figure for this survey, but in considering the incidence of leases it is more helpful to focus on the number of title sheets. We know that the total number of title sheets on the Land Register for the counties of Ayr, Clackmannan, Lanark and Renfrew at the time of the survey was 278,200. If the incomplete figures for Lanark and Renfrew are grossed up to 100, we also know that the total number of *leasehold* title sheets for the four counties was 6454. This means that only 2.3% of property titles in the four counties were held on leasehold tenure. That compares with the 6.9% in the same four counties disclosed by the 1951 survey.¹² It is, of course, a matter of speculation as to whether the 2000 figures are representative for the country as a whole; but in view of the fact that the 1951 survey found that the average incidence of leases throughout the country was considerably *less* (only 2.8%) than the incidence in the four counties under scrutiny, it seems likely that 2.3% over-states the incidence of leasehold titles in Scotland today.

10. So far as distribution is concerned, the survey suggests that long leases were used only by certain landed estates,¹³ with the result that it is a normal form of land tenure only in certain distinct geographical areas.¹⁴

Initial duration¹⁵

11. A number of charts are given at the end of this survey. Chart 1 shows the overall distribution of leases by length while charts 2 and 3 show the same information in closer focus.¹⁶ On the basis of these charts it appears that:

¹¹ See para 1.4 n 12 of the discussion paper.

¹² This figure is the percentage of search sheets attributable to surviving leases. In calculating this percentage there has been excluded from the total number of search sheets the search sheets of the 1024 leases in those counties that had expired by 1951.

¹³ Research in files from the early 1950s in the National Archives of Scotland suggests that various estates around Scotland granted 99-year leases of residential properties, such as the Breadalbane Estate, the Buccleuch Estate, the Hamilton & Kinneil Estate, the Kippendavie Estate, the Macdonald Estate, and the Seafield Estate.

¹⁴ This is supported by the evidence received from practitioners with experience of long leases. They referred to pockets of leases in Alva, Ardrossan, Saltcoats, Stevenson, and Wishaw.

¹⁵ It was not possible to ascertain the duration of 80 leases so the sample here is 2599 leases.

- 1786 leases had an initial duration of more than 175 years while the remaining 813 leases had a duration of 175 years or less. Thus the ratio of “ultra-long” to “ordinary” leases is approximately 2:1.
- Most leases were granted for either 20, 25, 60, 99, or 999 years.
- Only 2 leases were granted for between 126 and 175 years.
- No leases were granted for between 176 and 199 years.¹⁷
- Only 21 leases were granted for between 200 and 299 years.
- 1765 leases (68%) were granted for 300 years or longer.
- 380 leases were granted for between 700 and 998 years.¹⁸
- 1269 leases (49%) were granted for a period of 999 years.
- The longest duration was 1,000,000 years.¹⁹

12. Table 2 gives further information about the most popular lengths of lease.

Initial duration	20	25	60	99	999
Number of leases	60	313	51	60	1269
% of total	2.31%	12.04%	1.96%	2.31%	48.83%
Average number of years to expiry	12	14	50	74	860
Shortest number of years to expiry ²⁰	1	1	30	55	745
Longest number of years to expiry	18	24	59	98	995

Table 2 Initial duration

Unexpired duration

13. Chart 4 (at the end of this survey) shows the unexpired duration of all leases examined other than

- 86 leases for which there was insufficient information
- 25 leases which may be continuing on tacit relocation, and
- 35 leases with 1645 or more years remaining.

14. Table 3 shows the numbers and categories of lease covered by the various periods.

Unexpired duration (in years)	Number of leases	% of total²¹	Number of leases of 175 years or under	Number of leases of more than 175 years
--------------------------------------	-------------------------	--------------------------------	---	--

¹⁶ For practical reasons the charts exclude leases with an initial duration of more than 1030 years, of which there were 44 ranging from 1,037 years to 1,000,000 years.

¹⁷ The break between 125 years and 200 years may be due to the practice of granting commercial leases for 125 years to encompass the three 40-year cycles of building, trading and demolition.

¹⁸ 14.62% of the sample leases. Some of the 380 leases may be subleases granted for the remaining term of leases originally granted for 999 or 900 years. 41.35% (184) of all leases identified as subleases for which the length was known (445 leases) were granted for over 125 and under 999 years. Others may be re-grants of original 999 or 900 year leases which have been lost or not recorded.

¹⁹ 11 leases were granted for 1,000,000 years. All were of properties in Paisley and were granted between 1825 and 1892.

²⁰ Disregarding those which may be continuing on tacit relocation.

0 – 49	671	25.88%	671	0
50 – 175	184	7.10%	141	43
176 – 199	7	0.27%	0	7
200 – 500	34	1.31%	0	34
500 – 700	166	6.40%	0	166
700 – 999	1496	57.69%	0	1496
1000 – 1000000	35	1.35%	0	35

Table 3 Unexpired duration

15. It is instructive to bring together the figures on initial and on unexpired duration. These show that most leases of more than 175 years were granted for at least 700 years and have at least 700 years remaining.

Initial duration by year of grant

16. Charts 5 to 10 (at the end of this survey) show the minimum and maximum lengths of leases granted in particular periods of time.²² They bring out the popularity of the 999-year lease from about 1750 until about 1930. 151 such leases were granted between 1746 and 1800, and 932 between 1801 and 1900; but only 173 were granted between 1900 and 1974, and a mere 10 since then. The explanation for the post-1974 decline is probably the change in the law to prevent new residential leases for more than 20 years.²³ Certainly it appears that practically all of the 999-year leases granted between 1900 and 1974 were of residential property.²⁴ Conversely the fact that only 10 of the 755 leases in the survey granted since 1974 were 999-year leases suggests that ultra-long leases were not favoured in commercial circles.

Rent²⁵

17. **Leases of more than 175 years.** The rent is known for around 95% (1705) of the leases granted for an initial period of more than 175 years. Only 26 leases (1.52% of the sample) have a rent of more than £50, and of those a mere 7 have a rent of much more than £100. Of the other leases:

- 1160 (68.03%) have a rent of £5 or less
- 505 (29.62%) have a rent of between £5.01 and £30, and
- 14 (0.82%) have a rent of between £30.01 and £50.

18. **Leases of 175 years and under.** The rent is known for around 79% (644) of the leases granted for an initial period of 175 years and under. The rents vary enormously ranging from one pence to over a million pounds:

²¹ The base figure is 2593 leases. This is derived by subtracting from the full total of 2679 leases the 86 leases in respect of which the unexpired duration is uncertain. The figure includes leases which may be continuing by tacit relocation.

²² But, for practical reasons, excluding leases of more than 999 years.

²³ Land Tenure Reform (Scotland) Act 1974 ss 8 to 10.

²⁴ Based on the address of the property and the name of the landlord, we estimate that all but 11 of the 173 999-year leases were of residential property.

²⁵ Rent here is the original unallocated rent under the lease, as most allocations do not appear to have had the landlord's approval. See para 3.14 of the discussion paper.

- 99 leases (15.37%) have a rent of £10 or less
- 33 leases (5.12%) have a rent of between £10.01 and £100
- 54 leases (8.39%) have a rent of between £100.01 and £1000
- 133 leases (20.65%) have a rent of between £1000.01 and £5000
- 250 leases (38.82%) have a rent of between £5000.01 and £50000
- 73 leases (11.34%) have a rent of between £50000.01 and £400000
- 1 lease has a rent of £700000, and
- 1 lease has a rent of £1152750.

The rent depends both on the date when the lease was granted and on the nature of the property leased. However, the amount of the rent is not always a reliable indicator of the date of the grant. For example, two 999-year leases were granted in the 1990s for a rent of £1 and £0.01 respectively.

19. Charts 11 to 14 (at the end of this survey) show the average rent for leases granted during different periods. For leases prior to 1950 the average rent rarely rose above £20.²⁶

Leases of more than 175 years

20. Two thirds of the leases in the survey were granted for more than 175 years. There are 1694 leases of more than 175 years for which the rent, start date and length are all known, and which have not expired. 95% of those (1612) were of 700 years or more with at least 200 years remaining²⁷ and a rent of less than £120; and practically all (1692) were of 175 years or more with at least 100 years remaining and a rent of less than £120.

Residential leases of 175 years or less

21. The information from the Land Register did not indicate which properties were residential. However an attempt has been made to estimate the number of leases of 175 years or less which might be of residential property.

22. The first step was to exclude leases granted after 1974, the year in which it ceased to be possible to grant residential leases for more than 20 years.²⁸ Of the 813 leases for 175 years or under, only 76 were granted before 1975; and of those 76, and taking a generous view as to what might be residential, 46 may have a residential address. This suggests that leases of this length are rarely residential in character, and that most residential ground leases were granted for much longer periods, such as 999 years.

23. Chart 15 shows the lengths of the 46 leases, and chart 16 the number of years remaining under the leases disregarding those which might be continuing by tacit relocation. Most of the 46 leases were granted by a public or local authority, or by particular landed estates. The properties are mainly in East Kilbride, Girvan, Greenock, Glasgow or Hamilton.

²⁶ The average rent of £60 in 1873 is due to the 10 properties which form part of a lease granted in 1873 for a rent of £101.54. The average of £24.17 in 1924 reflects a single lease granted for £24.17. 5 properties in the survey are held under partial assignments of this lease.

²⁷ However there were no such leases with between 200 and 500 years remaining.

²⁸ Land Tenure Reform (Scotland) Act 1974 ss 8 to 10.

24. Evidence provided by solicitors suggests that the duration of a residential lease generally depends on location. For example, leases in Saltcoats have tended to be granted for 99 years, sometimes with an option to extend for a further 99 years; leases in Stevenson have tended to be granted for 369 years (19 x 19); leases in Ardrossan and Wishaw for 999 years;²⁹ and leases in Alva for 999 years³⁰ with a break option for the landlord every 99 years.

25. The rents for those leases for which information was available ranged from £0.97 to £193,500. More precisely there were

- 8 leases with a rent of £10 or less
- 2 leases with a rent between £11 and £100
- 7 leases with a rent between £101 and £500
- 3 leases with a rent between £501 and £1000
- 4 leases with a rent between £1001 and £2000
- 3 leases with a rent between £2001 and £3000
- 1 lease with a rent between £3001 and £4000
- 2 leases with a rent between £4001 and £5000
- 2 leases with a rent between £5000 and £8500
- 3 leases with a rent over £8500.

²⁹ This was borne out by the survey. 318 leases in Wishaw were examined, of which 263 leases were granted for 999 years and 298 were granted for at least 812 years. The length of 3 leases in Wishaw was unknown. 18 leases in Ardrossan were examined, and the lengths of 14 of these leases was known. 11 were for 999 years, and 2 for 855 years.

³⁰ This was borne out by the survey. 171 leases in Alva were examined. Of the 163 leases of which the length was known, 161 were granted for 999 years and 1 for 979 years.

Chart 1 – Distribution of leases of 1030 years or less

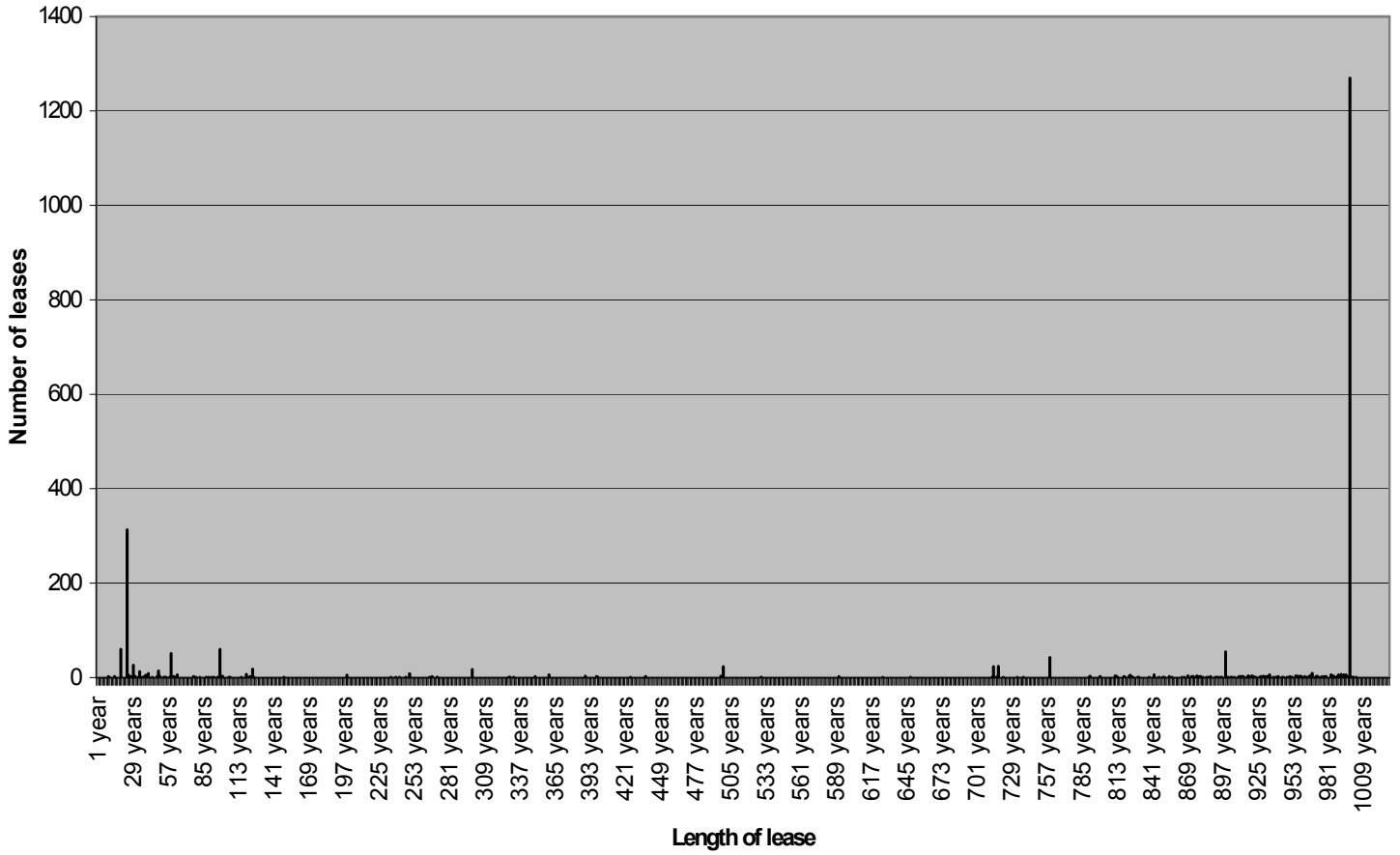


Chart 2 – Distribution of leases of 175 years or less

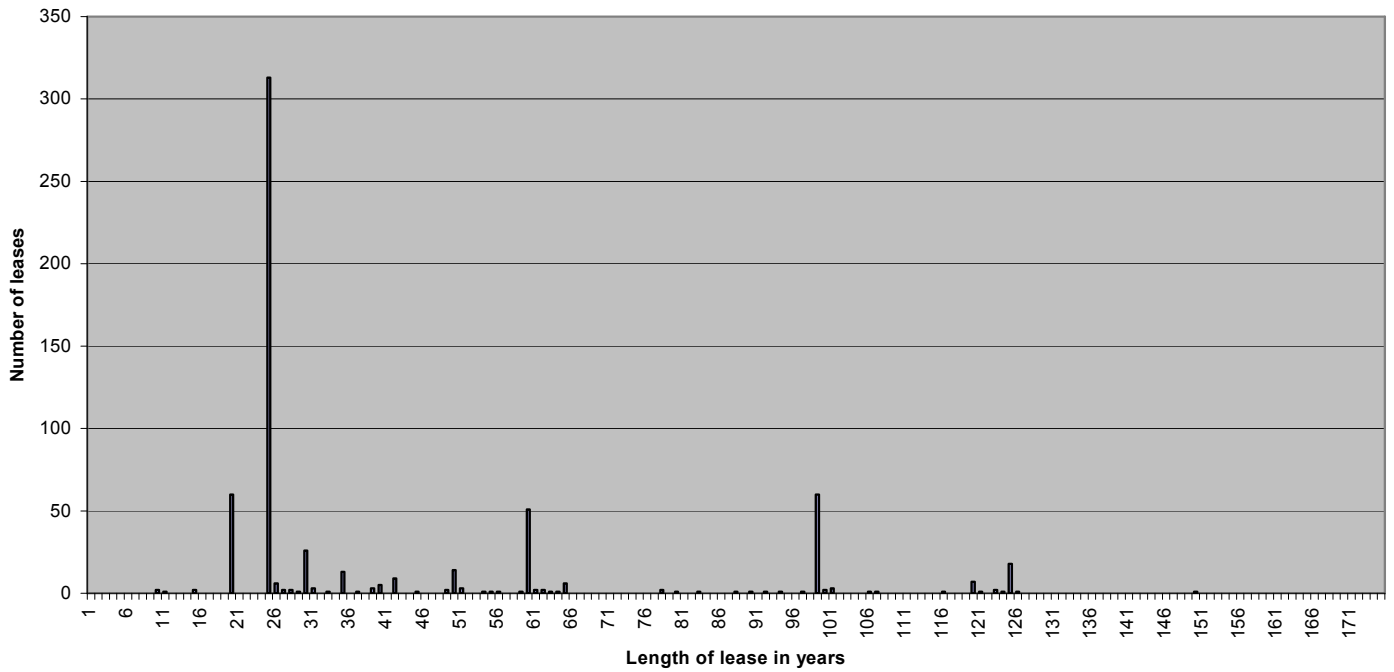


Chart 3 – Distribution of leases of between 175 and 998 years

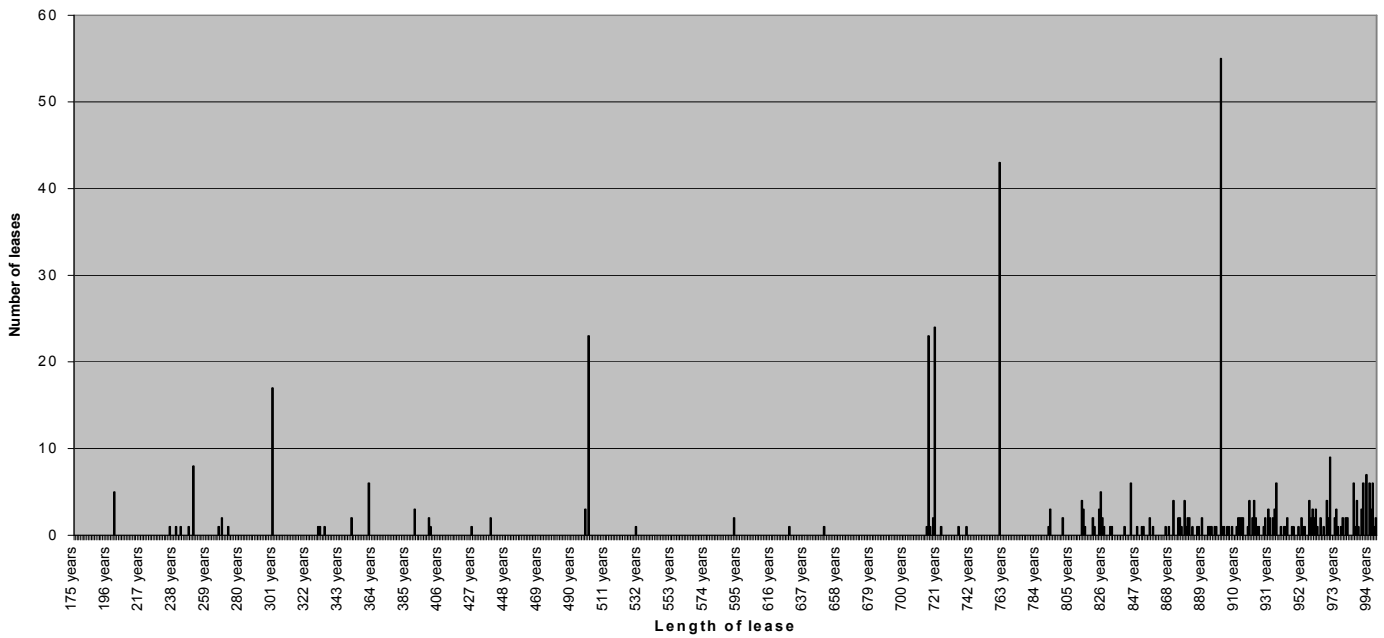


Chart 4 – Years remaining for unexpired leases with less than 1645 years to run

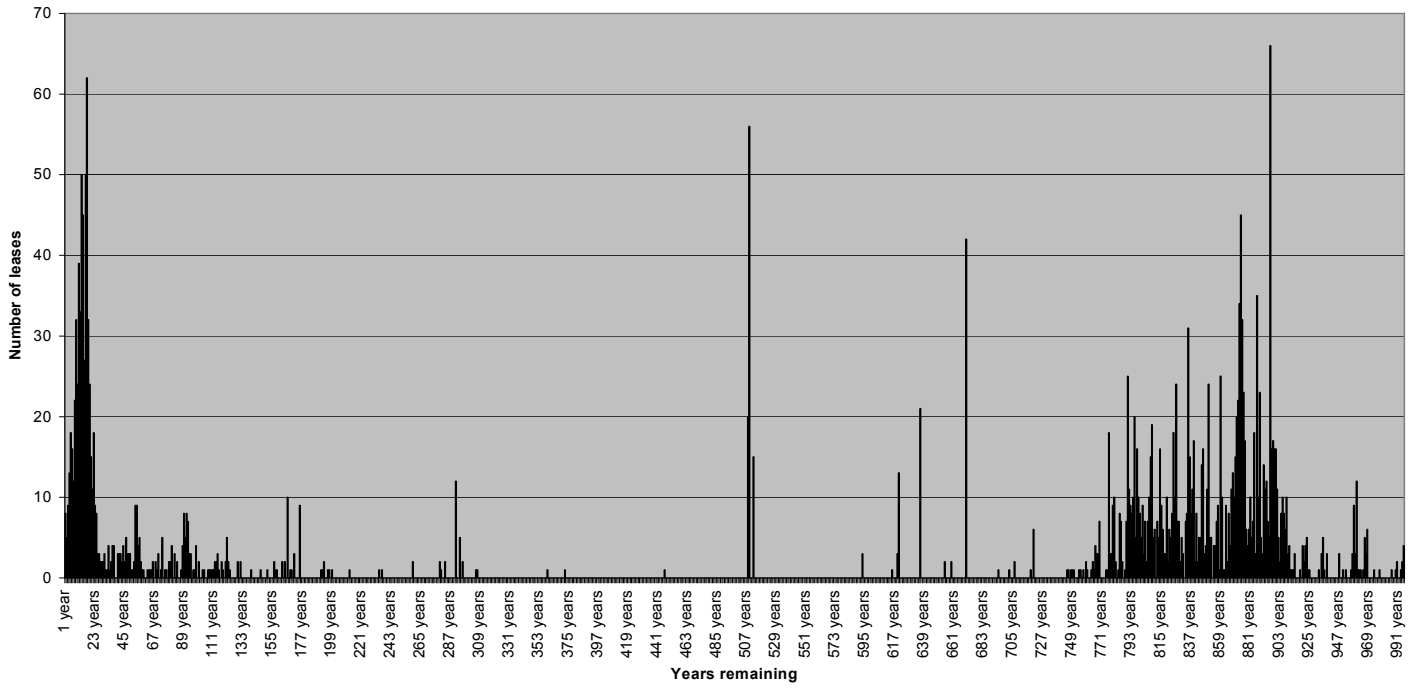


Chart 5 – Minimum/Maximum length of lease for each year of grant for period 1692–1750

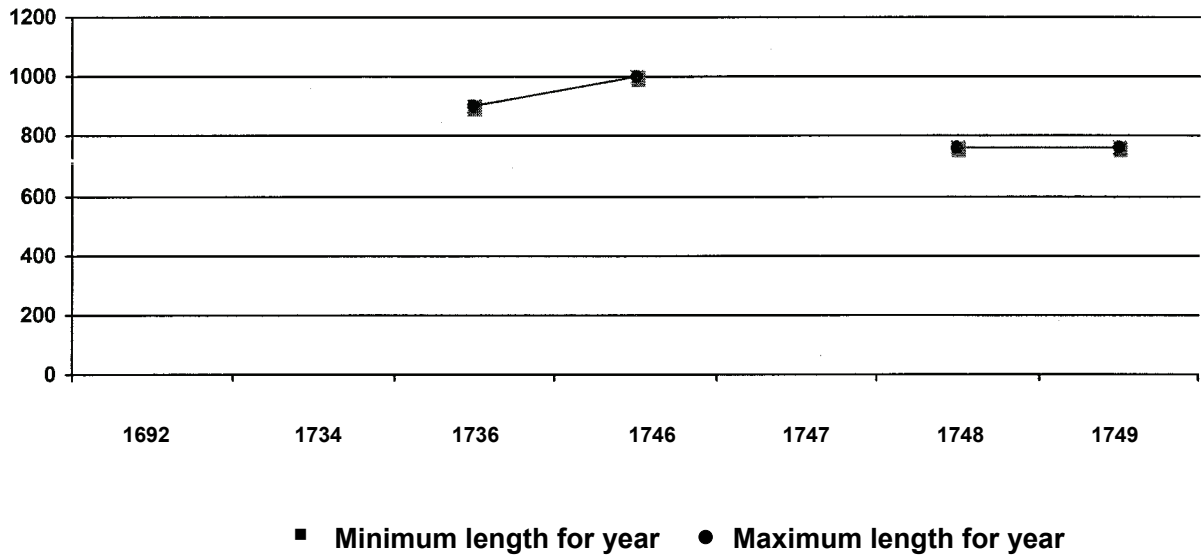


Chart 6 – Minimum /Maximum length of lease for each year of grant for period 1750–1800

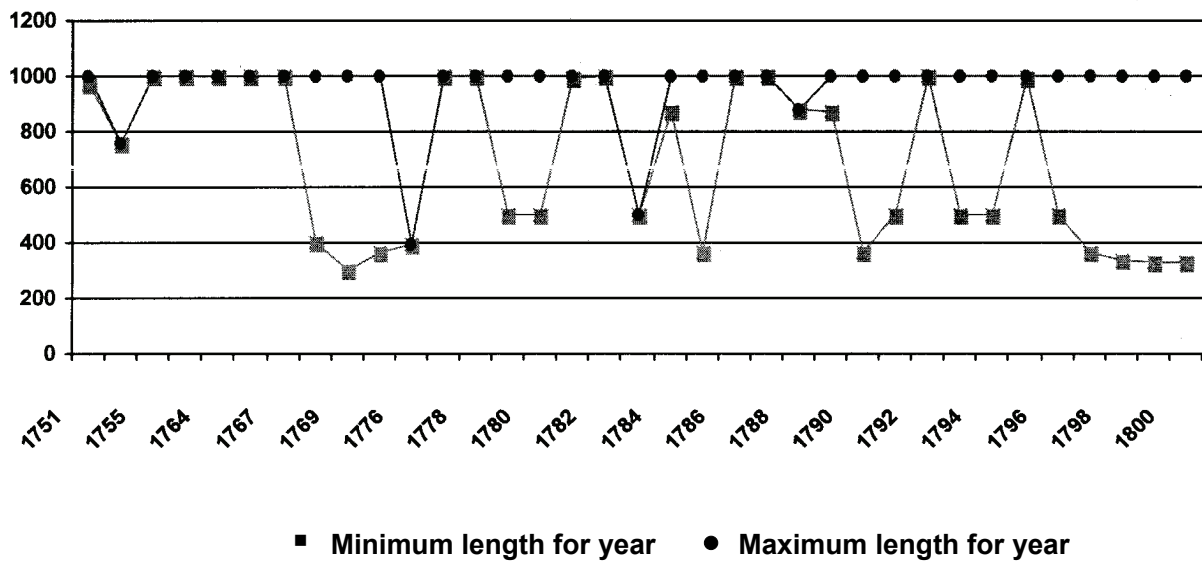


Chart 7 – Minimum/Maximum length of lease for each year of grant for period 1800–1850

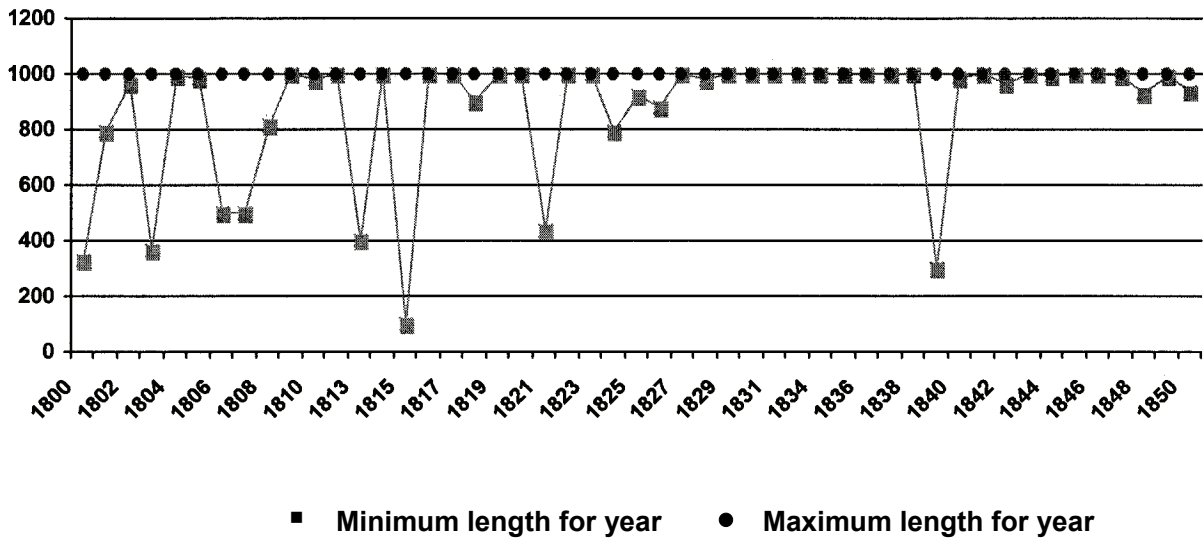


Chart 8 – Minimum/Maximum length of lease for each year of grant for period 1850–1900

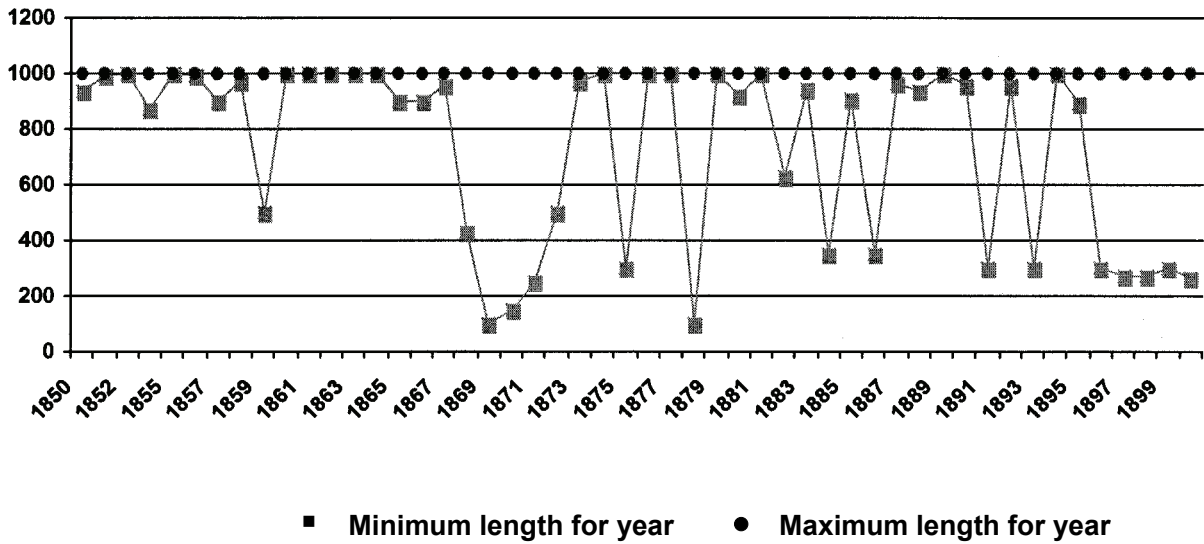


Chart 9 – Minimum/Maximum length of lease for each year of grant for period 1900–1950

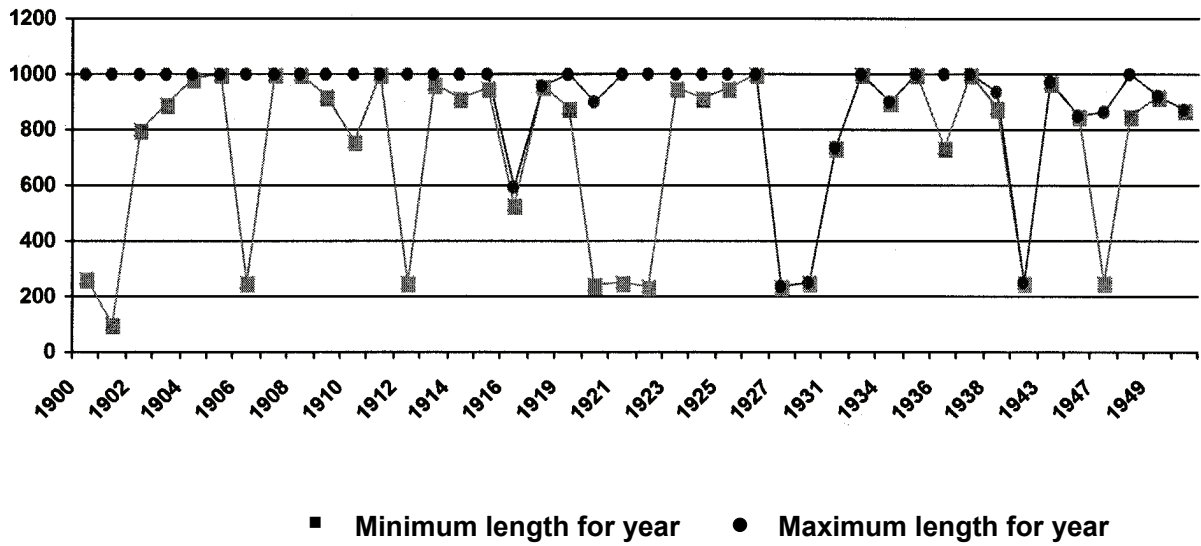


Chart 10 – Minimum/Maximum length of lease for each year of grant for period 1950–2000

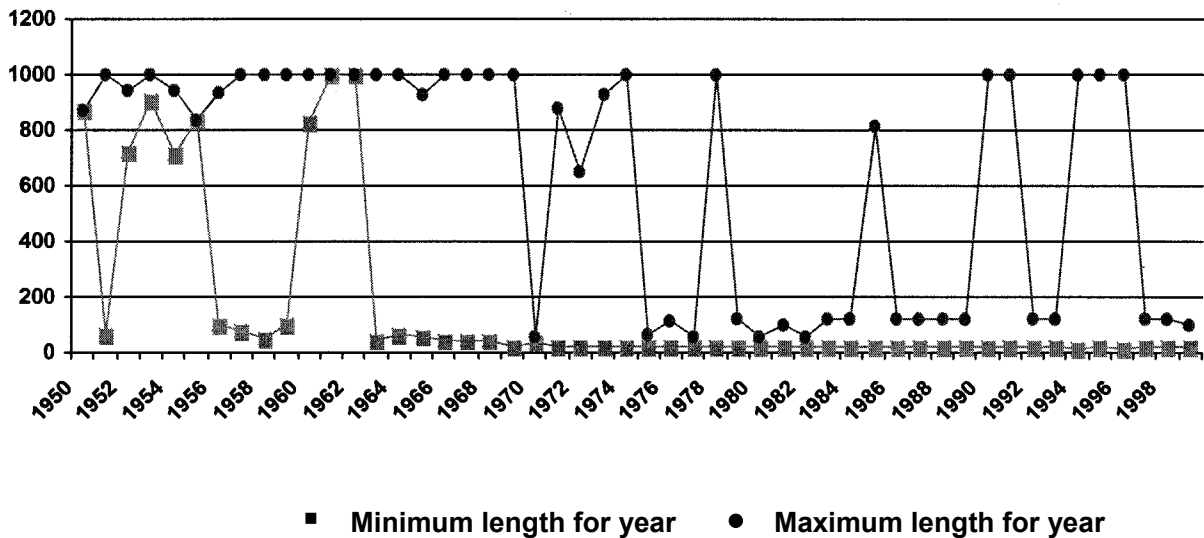


Chart 11 - Average annual rent (in £s) for leases granted between 1692 and 1870

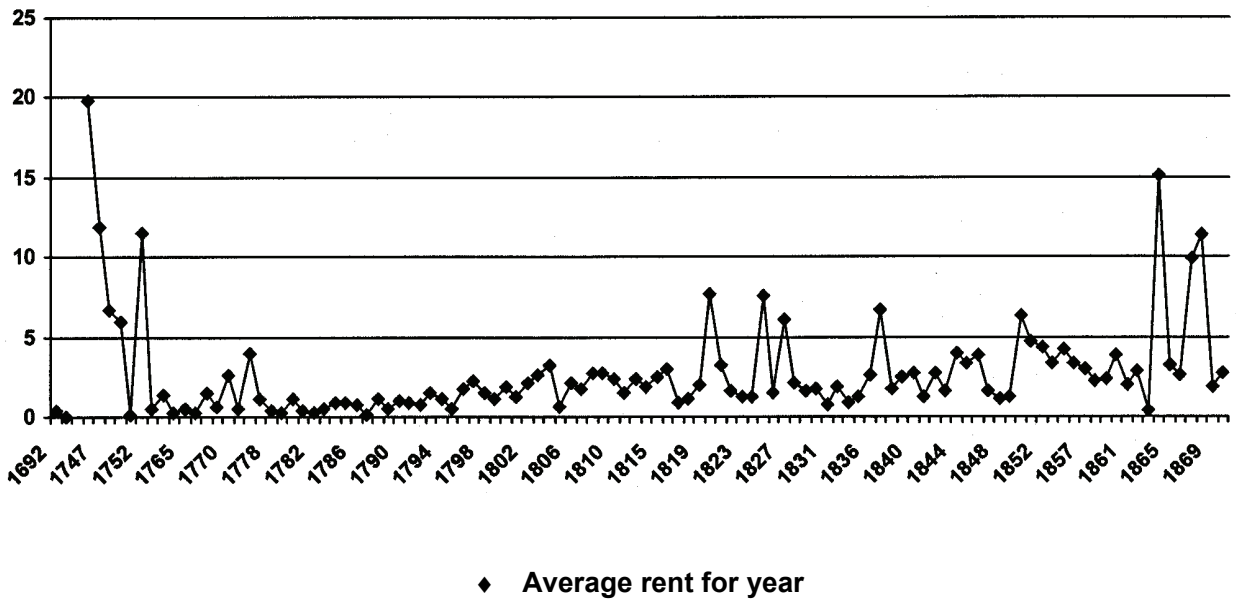


Chart 12 – Average annual rent (in £s) for leases granted between 1870 and 1950

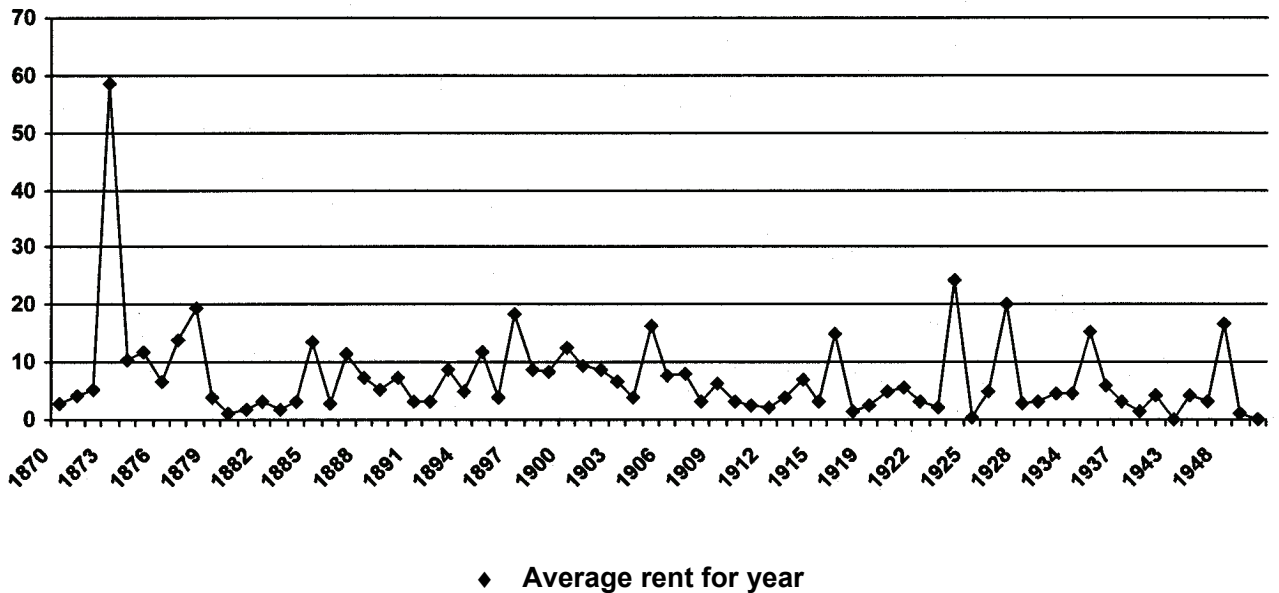


Chart 13 – Average annual rent (in £s) for leases granted between 1950 and 1964

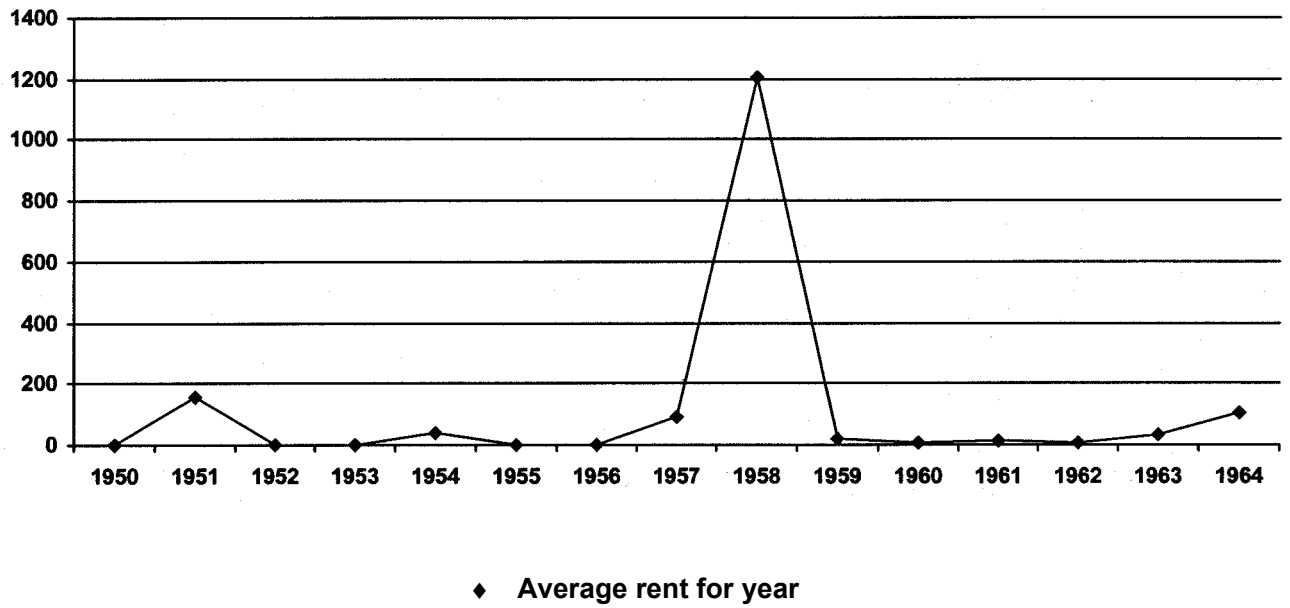


Chart 14 – Average annual rent (in £s) for leases granted between 1964 and 2000

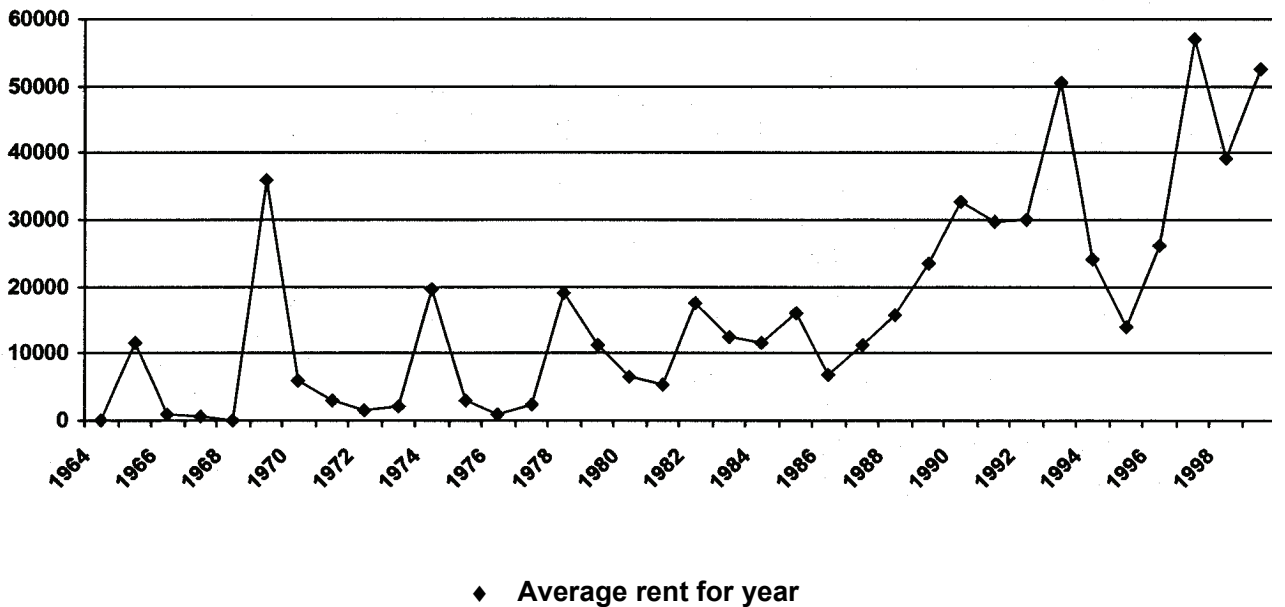


Chart 15 – Length of residential leases of 175 years or less granted before 1975

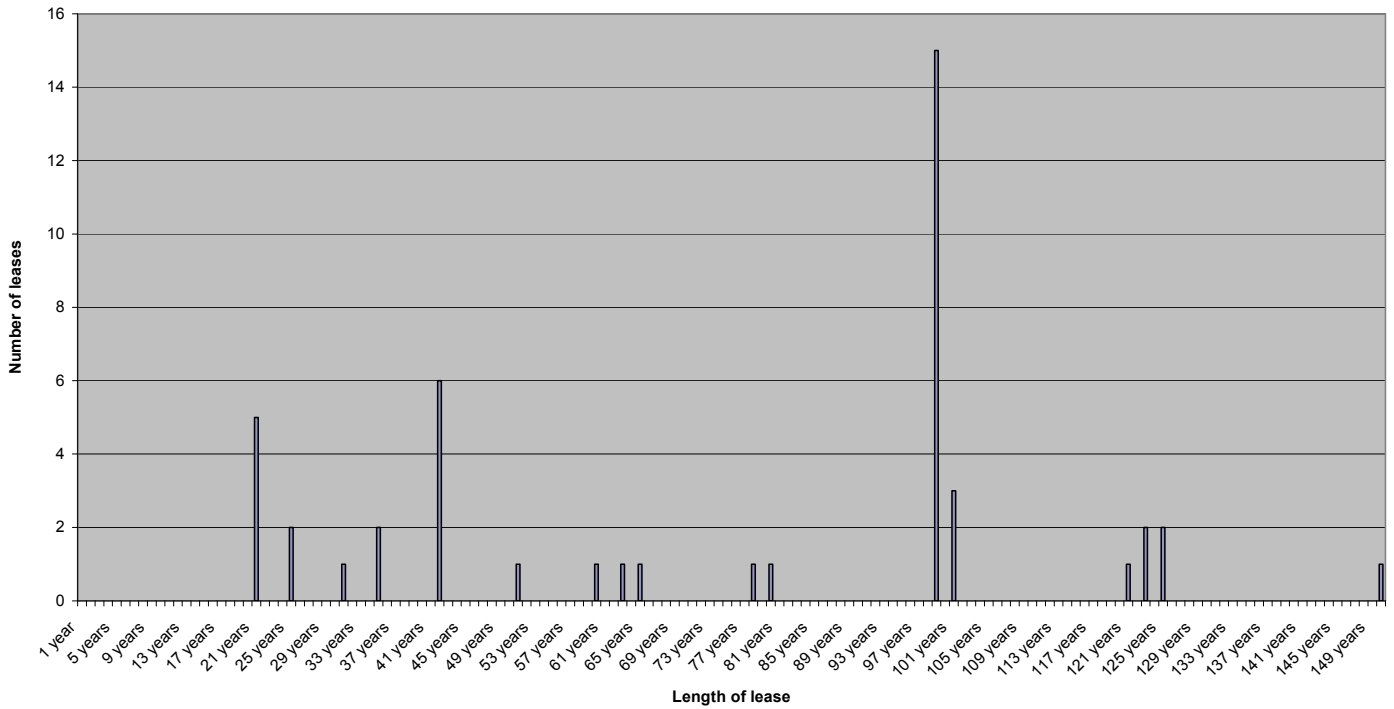
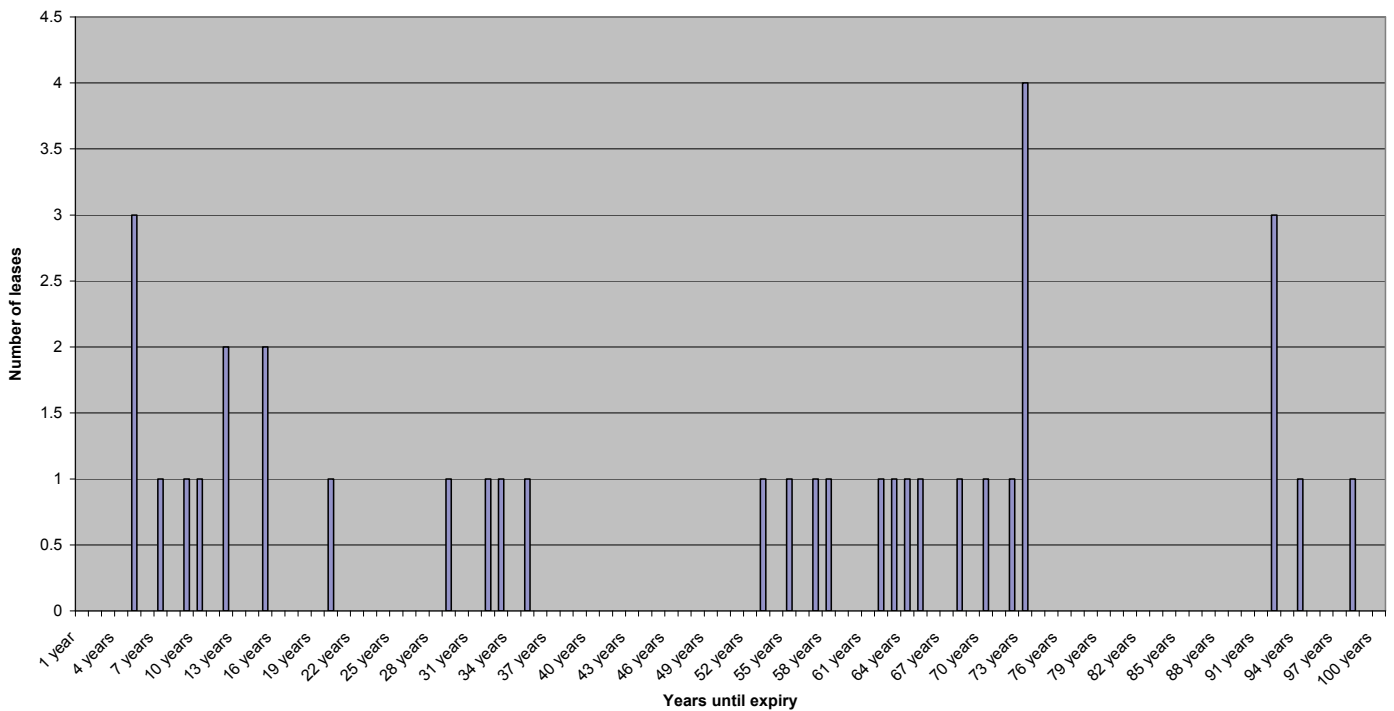


Chart 16 – Years remaining for residential leases of 175 years or less granted before 1975



Note

In Chart 16:

The 10 leases with less than 20 years to run were granted for less than 60 years.

The 5 leases of between 25 and 54 years to run were granted for between 60 and 98 years.

The 9 leases with between 55 and 70 years to run, and 2 of the leases with 73 years to run were granted for 99 years.

The lease with 20 years to run, that with 72 years to run, 2 of those with 73 years to run and the 5 leases with more than 80 years to run, were granted for longer than 99 years.

Appendix D

Clauses extracted from a 999 year lease of land in Wishaw granted in 1901

I. It shall not be lawful to the second parties or their foresaids at any time during the currency of the foregoing Lease to divide or let into separate portions the subjects thereby let without the written consent of the first party nor to sell or convey the same or any part thereof or assign the foregoing Lease in whole or in part until the second parties or their foresaids shall have first offered in writing to sell or assign or renounce the same to the first party or his foresaids at the same rate or price that may have been offered by any other person (such offer being *bona fide*) the first party or his foresaids being bound to declare their acceptance or rejection of the offer in writing within twenty-one days of the receipt thereof provided that in the event of the second parties or their foresaids selling by auction they shall give the first party or his foresaids fourteen days' previous notice in writing of the time and place of such sale and the upset price to be asked and if the second parties or their foresaids shall do in the contrary then not only shall the right to be granted by them to any other person or persons be void and null without declarator or other process of law but they shall thereby forfeit all right to the said subjects and the same shall revert to the first party or his foresaids as if the sale and conveyance had never been made.

II. The first party and his successors reserve all coins or antique articles of value intrinsic or otherwise which may be found within the said piece of ground or in excavating the same as also the whole mines minerals metals fossils coal clay blackband and other ironstone limestone freestone slate marble and other stone whether ornamental or for building or other purposes and all substances within or on the said piece of ground with full power and liberty to the first party or his foresaids or any person authorised by him or them to search for work win raise calcine and carry away the same and to make bores sink pits or shafts open quarries erect houses steam engines and machinery and to make aqueducts levels drains roads railways and others necessary for all or any of these purposes and to resume possession of so much of the said subjects as he may consider desirable for any of these purposes the first party and his foresaids being liable to make compensation to the second parties and their foresaids for any ground so taken possession of or resumed as the same may be ascertained by an arbiter or arbiters mutually chosen or their oversman. But it is hereby expressly agreed that the first party and his foresaids or his or their Tacksman shall not be liable for any damage that may happen to the said piece of ground or buildings now or hereafter erected thereon or for loss of water by or through the working past or future of the coal or other minerals in or under the same or in the neighbourhood thereof.

III. The second parties and their foresaids shall be bound and obliged at their own expense to fence and enclose when required by and to the satisfaction of the first party and his foresaids the said area or piece of ground in so far as that is not already done and to keep the same sufficiently fenced and enclosed during the whole period of the Lease as also within two years from the date of their entry to build and thereafter to maintain during the whole period of the Lease upon the said area or piece of ground a dwelling house or other buildings of stone and slated as good as and not inferior to those in the immediate neighbourhood not under the value of thirty years' purchase money of the stipulated tack

duty conform to plans to be submitted to and approved of in writing by the first party or his foresaids or his or their factor the lower floor of which house (excepting cellar floors not occupied for dwellings) shall be at least one foot above the highest surface level of the street or road in front of the premises or of the external ground immediately around the house if the road or street be lower or of such other height above said level as the first party or his foresaids shall fix And the second parties shall be bound to leave such portion of the ground let as the first party or his foresaids or factor may deem necessary for the purpose of a footpath along any street or streets or road or roads that may constitute any boundary of the subjects let and the ground so left shall when required by the first party or his foresaids be formed into a proper footpath with curbstone and stone or brick water channel at the expense of the second parties and their foresaids and afterwards maintained at their sole expense and the front walls and fences shall unless otherwise specially allowed by the first party be of stone ashlar work Further in respect that a footpath has been or is to be formed by the first party along the North East boundary of the said piece of ground the second parties shall as at the date of their Entry pay to the first party the cost of formation of the said footpath so far as bounding said piece of ground at the agreed upon rate of two shillings and sixpence per lineal foot of frontage and the second parties and their foresaids shall thereafter maintain said footpath and free and relieve the first party of all questions with or liability to the Town Council of the Burgh of Wishaw or other Local Authority in respect of the same as well as of all questions and liability in regard to the formation and maintenance of any adjoining roads or streets.

IV. The second parties and their foresaids shall be bound at their own expense to drain the whole subjects let and from within the dwelling house or houses to be erected thereon to lay and thereafter to maintain at their own expense drains for effectively discharging the sewage to the main sewer if there be one in any adjoining street or roadway or if there be no such main sewer then the second parties and their foresaids shall be bound at their own expense to continue and thereafter to maintain their said drains to any point not exceeding one hundred yards from the boundary of the subjects let which the first party or his foresaids may indicate and in respect that a public drain or sewer runs along the South East and South of the subjects let the said Town Council of Wishaw shall be entitled to enter upon the said subjects for the purpose of cleaning or repairing said drain the second parties and their foresaids hereby relieving the first party and his foresaids of all claims of compensation or other questions in connection with any such operations but without prejudice to the second parties right to make or prefer any claim for compensation against the said Town Council in connection with any such operations.

V. The second parties and their foresaids shall not keep nor permit their tenants or the occupiers of the subjects under them to keep an hotel inn or public house or to sell or manufacture on the subjects let any excisable or intoxicating liquors or materials without the annual written permission of the first party or his successors the second party and possessors or tenants under them acting on the contrary shall not only be bound to pay to the first party or his foresaids a rent or tack duty of one hundred pounds sterling for the year or any part of a year in which this condition is infringed and that over and above the tack duty exigible for the year but shall also lose and forfeit their right and interest in and to the subjects leased and the buildings erected or to be erected thereon and the foregoing Lease shall in the option of the first party or his foresaids become extinct void and null without declarator or other process of law to that effect and the first party or his foresaids shall be entitled to enter to the possession of the said piece of ground and the houses and other buildings erected or to be erected thereon in the same manner as if the whole years of the

Lease had expired and they shall be entitled to remove the second parties and their foresaids summarily from the possession of the said subjects and to obtain a decree of removing or other warrant necessary for that purpose from the Sheriff of the County within which the said subjects are situated or any judge competent without any warning or premonition whatever.

VI. The second parties and their foresaids shall at all times maintain the houses buildings footpaths flagstones pavements gates drains and fences on the subjects let in a good and tenantable state of repair and the premises in front neat and clean and free from any buildings projection manure filth or nuisance and that to the satisfaction of the first party or his foresaids or the Inspector of Nuisances for the district and the second parties and their foresaids are prohibited (without the written consent of the first party or his foresaids) from carrying on any trade or manufacture or erecting any steam engine or other machinery on the premises which shall be considered or deemed by the first party or his foresaids a nuisance or dangerous to the neighbourhood and when works or manufactures not of an offensive nature are carried on the second parties and their foresaids shall be bound to consume the smoke from engine fires and furnaces according to the latest and most approved plans in practice at the time for that purpose.

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