Scottish Law Commission

Discussion Paper No 102

LEASEHOLD CASUALTIES

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The Commission would be grateful if comments on this Discussion Paper were submitted by 31 July 1997. All correspondence should be addressed to:

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NOTES

1. In writing a later report on this subject, the Commission may find it useful to be able to refer to, and attribute, comments submitted in response to this paper. If no request for confidentiality is made, the Commission will assume that comments on the paper can be used in this way.

2. Those who wish copies, or further copies, of this Discussion Paper for the purpose of commenting on it should contact the Commission at the above address.

DISCUSSION PAPER ON LEASEHOLD CASUALTIES

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PART I INTRODUCTION

Terms of reference

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

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

This reference is limited to the specific problem of leasehold casualties. We are aware that there is a broader problem as to the future of long leases of residential property as part of the Scottish system of property law. Long leases of, say, 999 years or more are an anomaly in the system. They would appear as even more of an anomaly if feudal tenure were to be replaced by a system of outright ownership. We will be considering at a later stage in our work on property law the more general problem of long leases. It is beyond the scope of this project.

Advisory group

1.2 In preparing this discussion paper we have been greatly assisted by the group of advisers whose names are given below.[1]

What are leasehold casualties?

1.3 A leasehold casualty is an extra amount, over and above the rent, which must be paid by the tenant to the landlord from time to time if the lease so requires.[2] A casualty may, for example, be payable every time a new tenant takes over the lease by virtue of an assignation or every time a tenant dies. Or the lease may provide for a "duplicand" - a double payment of rent - to be due, say, every 19 years even if there has been no change in the tenant. In practice leasehold casualties are payable under long or very long leases - for example, leases for 99 years or 999 years. Leases of this type are comparatively rare in Scotland where most property is held on feudal tenure. They are largely confined to specific areas of Scotland, being particularly prevalent in parts of Lanarkshire.

The anomalous and anachronistic nature of leasehold casualties

1.4 A hundred and fifty years ago leasehold casualties would not have appeared particularly unusual. At that time similar casualties were common in land held on feudal tenure - the normal way of holding land in Scotland. However, provision was made by the

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

[2] The Long Leases (Scotland) Act 1954, section 25 describes a leasehold casualty as "any grassum, duplicand or other periodical or casual payment stipulated in a lease or sub-lease to be payable in addition to the annual rent" . Virtually the only authority relating directly to leasehold casualties is contained in the cases of *Crawford v Campbell* 1937 SC 596; *Buchanan's Trs v Pagan* (1868) 7 M 1; *M R S Hamilton Ltd v Arlott,* 24 May 1995 (Court of Session, on appeal from the Sheriffdom of South Strathclyde, Dumfries and Galloway at Lanark, briefly reported at 1995 GWD 25-1355) and *Kaye and Others v Archibald* 27 June 1996 (Sheriff Court at Hamilton, unreported). However, many of the old cases on feudal casualties are of indirect relevance.

Conveyancing (Scotland) Act 1874 for the phasing out of feudal casualties and provision was made for their complete abolition by the Feudal Casualties (Scotland) Act 1914. The Act applied not only to feudal casualties but also to casualties under contracts of ground annual - a contract whereby a periodical payment was due in perpetuity by the owner of the ground to a person other than a feudal superior.[3]

1.5 The 1914 Act also gave the Court of Session power to apply the Act's redemption scheme to other types of casualties. Section 23 provided that

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

This power was never exercised and the view of the Lord President's Private Office is that it would be inappropriate at this stage to bring about a reform of the substantive law on leasehold casualties by such a method.[4] So leasehold casualties survive as a curious relic of the old, unreformed feudal law. However, they were to some extent treated in practice as if they had been abolished. They were not discussed in standard conveyancing textbooks. Many lawyers had never heard of them or assumed they had been abolished. The fact that the 1914 Act applied to ground annuals may have helped to foster this assumption. From the payer's point of view the practical effect of a ground annual and a ground rent under a very long lease is the same - a small annual payment, like feuduty but not feuduty, is due in respect of land to a person or body who is not a feudal superior. From the policy point of view it must have been difficult to see why the Act should have abolished casualties in relation to lands subject to a ground annual but not in relation to lands subject to a ground rent under a 999 year lease. In any event the position was that leasehold casualties were often ignored in practice. Many landlords did not claim them. In one area where leasehold casualties have caused problems the landlord at one time was the National Coal board. Its interest was in the extraction of coal and its attitude to its lessees was one of extreme benevolence.

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[3] The standard general textbook in use at the time of the 1914 Act explained that some ground annuals were, for historical reasons, payable instead of feuduty out of former church lands. Others were used in relation to building land.

> "Similarly, when land was subdivided - as for building purposes - and it was incompetent to arrange for a feuduty (there being a prohibition against subinfeudation or the subjects holding burgage), the device of reserving a ground annual was again adopted. This is a real burden laid on the lands of a fixed annual payment." Erskine, *Principles of the Law of Scotland* (19th ed 1895) p 143.

[4] Letter from the Lord President's Office to the Law Society of Scotland dated 13 January 1997 and copied to the Commission.

What is the problem?

1.6 Some landlords have begun to insist on their rights and have demanded substantial sums by way of casualties from tenants who had no idea that they were liable to pay them. In at least some cases it appears that the landlords in question are so-called "title raiders" who have bought up landlords' interests in the hope of being able, quite legitimately, to turn forgotten rights to their financial advantage.[5] This has led to calls for reform of the law.[6]

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

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

PART II ORIGINS AND EVOLUTION

The use of ground leases

2.1 A "ground lease" (otherwise known as "building lease") is not a term of art but a rough description of a type of long lease whereby vacant land is let to a tenant who is permitted - sometimes even obliged[1] - to erect buildings on it. Such leases vary in duration. Many were granted for 99 years or 999 years. The Guthrie Committee which was set up in 1951 to examine the law on ground leases gave examples of even longer leases which came to light in the course of their investigations - eg 9,995 years from Whitsunday 1815[2]. Leases of this type normally date back to the late eighteenth or nineteenth century although in areas where their use became habitual[3] the chronological spread is much wider, with a handful granted as recently as the 1940's and 1950's and a fair number originating in the 1920's and 1930's. They are not entered into for residential purposes nowadays, because section 8 of the Land Tenure Reform (Scotland) Act 1974 severely curtails the permissibility of residential lets of more than twenty years.

Reasons for use of ground leases

2.2 Ground leases were often used because of restrictions on the granting of feu rights during the relevant period.[4] Many landed estates were subject to deeds of entail by which sub-feuing was barred. It was estimated that in 1825 half of the entire territorial property of Scotland was entailed.[5] The number of entails continued to rise until 1872. A limited power to feu was not accorded until 1848[6]. Even then, significant restrictions on the ability to alienate entailed land continued until the passage of the Entail (Scotland) Act 1914. A general prohibition of alienation would have struck at very long leases. However, some entails expressly permitted long leases and the Entail Improvement Act of 1770 permitted building leases for terms not exceeding 99 years. Given this situation, combined with the rapidly advancing industrial development of Scotland in the late eighteenth and nineteenth centuries, use of the long building lease to circumvent entails was understandable.

2.3 Nor was this the only motivating factor. Before 1938 non-entailed proprietors sometimes also found themselves subjected to titles which prohibited subinfeudation.[7] Land held on burgage tenure, assimilated to feu-farm only in 1874[8], could not be sub-feued either. A long lease would sometimes be chosen because it was simpler and cheaper than a feu, because in a small community where there existed a close relationship between landowners and their neighbours a long lease seemed adequate, because of a general sense of doubt about the legal complexities surrounding the right to feu or because the landowner wished

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[1] *Report of the Scottish Leases Committee* ("the Guthrie Committee") (1952) Cmnd 8656, para 28.
[2] Para 39.
[3] Eg the Coltness and Wishaw Estates in Lanarkshire.
[4] See the *Report of the Scottish Leases Committee* at paras 42-46.
[5] Para 44 of the above Report.
[6] By virtue of the Rutherfurd Act (Entail Amendments Act 1848).
[7] The Conveyancing Amendment (Scotland) Act 1938, s 8 rendered such prohibitions ineffective.
[8] Conveyancing (Scotland) Act 1874, s 25.

his family to retain ultimate control of developments or to profit from ownership of buildings put up by tenants on the leased ground.

A feudal substitute

2.4 It is clear that the long ground lease, and especially the type which was for 999 years or more, was a substitute for feudal tenure during a period when such tenure was often impossible of creation or else involved unattractive difficulties. In this respect the long ground lease was the functional equivalent of contracts of ground annual which in other parts of Scotland were used for precisely the same reasons. The land concerned was regularly viewed as being to all intents and purposes the property of the tenant. Long leases were often referred to as "feu-tacks" .[9] In these circumstances, it is hardly surprising that the terms of the lease frequently mirrored those which would have attached themselves to a contemporaneous feu and this practice opened the door to the imposition of casualties.

2.5 There were originally feudal casualties of various kinds, including the casualties of ward[10] and marriage[11] but these more archaic kinds fell on the abolition of ward-holding by the Tenures Abolition Act 1746. Until 1874[12], feudal casualties arose in the absence of stipulation to the contrary on both the succession of an heir (relief) and transfer to a singular successor or assignee (composition). The sum due was an extra year's feuduty in the former case and a year's rental or value in the latter.[13] Relief was of old common law origin. The complexities of feudal conveyancing meant that this casualty operated in a way which is surprising to contemporary lawyers who are not immersed in the old feudal law. The relief was not necessarily payable on the death of the proprietor of the property in question. It was payable on the death of the person who, under the pre-1874 law, would have been the last vassal entered with the superior.[14] As that vassal might have ceased to be the proprietor of the property in question many years ago and might be very difficult to trace, the casualty of relief was often vexatious to superiors and vassals alike.[15] Composition had its roots in statute law.[16] It was a sort of fine payable to the superior in recognition of the fact that he had lost his old common law rights to refuse to accept singular successors to the vassal.[17] Its

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[9] See e.g. *Buchanan's Trs v Pagan*, (1868) 7M 1.

[10] This entitled the superior of land held on ward-holding to the whole rent of the land during the minority of the vassal's heir.

[11] This originally entitled the superior of land held on ward-holding to a certain sum from minor heirs who refused to marry when required to do so by the superior. It took its rise from the notion that the superior had rights over the person as well as the property of the minor heir to the vassal. In the 17th century the normal casualty, known as "single avail" became fixed at three times, later twice, the free rent of the vassal's whole estate. If the superior offered a wife to the heir "who was in all respects his equal" and the heir married someone else a casualty of "double avail" was due. See Erskine, *Principles of the Law of Scotland* (19th ed, 1895) pp 147-148.

[12] The Conveyancing (Scotland) Act 1874, s 23 prevented feudal casualties from arising *ex lege* in subsequent feu grants.

[13] Bell, *Principles of the Law of Scotland* (10th edn) (herafter "*Principles*"), para 716.

[14] Under the pre-1874 law it was quite common for a disponee not to enter with the superior. The Conveyancing (Scotland) Act 1874 introduced the system whereby entry was implied from registration of the disponee's title but expressly provided (s 4(3)) that "such implied entry shall not entitle any superior to demand any casualty sooner than he could, by the law prior to this Act or by the conditions of the feu right, have required the vassal to enter or to pay such casualty irrespective of his entering". So the old law on "unentered" vassals continued to apply for the purpose of casualties.

[15] See Burns, *Extinction of Casualties* (2nd edn 1916) (hereafter "Burns") p 39 and the anonymous article on "The Casualties Bill" 29 SLR (1913) 257 at 258.

[16] The Act of 1469 c.36 and the Tenures Abolition Act 1746.

[17] *Encyclopaedia of the Laws of Scotland sv Casualties of Superiority*, para 246.

origins were explained very clearly in the official memorandum to the Feudal Casualties (Scotland) Bill in 1913.

> "According to the strict doctrine of the feudal system, no transmission of the feu was competent without the superior's consent. He could not be required to enter any successor to the original vassal except those to whom, by the charter, the grant was limited. By sundry Acts of Parliament the stringency of this rule was relaxed, the superior being taken bound to receive a singular successor as his vassal on payment of a year's rent. This fine or price was called composition, and consisted of a year's rent of the subjects under deduction of public burdens, repairs and stipend - or teind, if the teind was not feued out along with the land."[18]

2.6 Where composition was payable the amount due was specified in the old Act of 1469 c.36 as "a year's maill, as the land is set for the time" . Maill meant rent, but it was extended by the courts to cover a subfeuduty in those cases where the vassal had subfeued the lands. The Act did not cover the case where the vassal himself occupied the land but the courts held that in such a case the composition should be the amount of rent which the lands would produce if let.[19] The rateable value was sometimes used as a guide[20] but it was not conclusive and had to yield to proof of actual rental value.[21] The underlying principle was that of placing the superior in the vassal's position as regards the latter's income from the property for the year.[22] Where an actual rent was payable to the vassal for the year in question it was held to be quite wrong to use a notional rent based on a supposed return on capital.[23]

Transplantation of casualties into leases

2.7 Clauses reflecting the feudal liability for relief and composition were regularly incorporated into eighteenth and nineteenth century ground leases. It was noted in *Crawford v Campbell*[24] that

> "[t]he differentiation [between heirs and singular successors] points to the intention of the parties to the lease having been to provide for the payment of entry money in each case corresponding to the casualty which would have been payable to the superior had the lands been feued" .

Duplicands of the tack duty payable at fixed intervals also made repeated appearances as did provision for an extra fifth of liquidate penalty on failure to pay either tack duty or casualties within the time allowed.

Types of casualties

2.8 Research at Register House into a sample of registered leases[25] in 1964 produced the following results.

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[18] Public Bills, 1913, Vol 2, Bill 295.
[19] *Aitchison v Hopkirk* (1775) Mor 15,060; *Lord Blantyre v Dunn* (1858) 20D 1188; *Earl of Home v Lord Belhaven* (1903) 5F (HL) 13.
[20] See *M'Laren v Burns* (1886) 13 R 580 per Lords Craighill and Rutherfurd Clark.
[21] *Duke of Argyll v Bullough* (1904) 6F 949.
[22] *Crawford v Campbell* 1937 SC 596 at 602.
[23] *Earl of Home v Lord Belhaven* (1903) 5F (HL) 13.
[24] 1937 SC 596 at 602.

Of the 100 leases examined, 38 provided for casualties. In three of these cases the casualty was illusory and in two others the casualties had been discharged by recorded deed.

In the remaining 33 cases the casualties were as follows.

> 15 provided for payment of a duplicand at a fixed period of years, 13 providing for payment every 19 years and 2 every 21 years.
>
> 8 provided for payment of a casualty on entry of each heir or assignee. Of these 6 provided for payment of a duplicand of the rent in the year of entry, 1 provided for payment of an extra half year's rent in the year of entry and 1 provided for payment of a duplicand of rent plus a sum equal to the annual value or rental of the subjects.
>
> 5 provided for payment of a casualty on entry of an heir, or of an assignee unless a casualty had been paid by a person still alive. These all provided for payment of a duplicand of the rent in the year of entry.
>
> 5 provided for payment of a casualty on entry of an heir or assignee and in respect of every lessee whose let endured for 19 years. These all provided for payment of a duplicand of the rent plus a sum equal to the annual value or rental of the subjects.

2.9 It is worth noting that the rents payable under typical ground leases of the type here under consideration are very low at today's values - often a matter of a few pence per year.[26] Accordingly casualties in the form of duplicands of the ground rent cause few practical problems and indeed are often not worth collecting. The type of casualty which causes practical problems is the type expressed in terms of actual annual value or rental value. We have been informed of cases where landlords were claiming substantial sums in respect of quite modest properties each time a casualty of this type fell due.

A concrete example

2.10 A very typical clause in a 999 year lease (running from 1857 and first recorded in 1882) reads as follows:

> "As also to pay to the said Donald Lindsay as Trustee foresaid and his successors and assignees proprietors of the said subjects the sum of Eight pounds sterling of additional rent for the first year's possession at the entry or succession of every heir to the said subjects and one full year's rent or value of the said subjects including all buildings erected or to be erected thereon according to the actual value thereof at the time for the first year's possession or entry of every assignee or singular successor succeeding or acquiring right or possession or of the right or possession opening to or devolving on him, her or them all over and above besides payment of the yearly rent before specified with a fifth part farther of liquidate penalty in case of failure and interest at the rate of Five pounds per centum per annum of the said respective sums from the time or times when the same shall become due till payment thereof" .

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[25] The first 100 leases registered, or for which transmissions were registered, in the County of Lanark from 1 January 1964.

[26] In one case we examined, the rent for a whole block of property consisting of six houses and five shops was nine shillings and eight and a half pence per year - less than 50p per year in today's currency - payable twice yearly. An attempt had been made to apportion this rent among the different units when they were "sold off" . Several houses were bound to pay one shilling a year by way of their portion of ground rent - clearly a sum not worth collecting nowadays.

The demise of feudal casualties

2.11 Given the fact that both the presence of casualties in long leases and their computation are derived from feudal tenure, it is ironic that leasehold casualties have escaped the fate which befell their feudal counterparts many years ago. We have already noted that the more archaic feudal casualties of ward or marriage fell with the Tenures Abolition Act 1746. In relation to the surviving types of casualties, there was a recommendation from the Law Commissioners in 1838 for abolition on due compensation.[27] Eventually sections 15-19 of the Conveyancing (Scotland) Act 1874 provided a scheme whereby the proprietor could insist on their redemption according to statutory terms. Section 23 prevented casualties from arising by operation of law in new feus and outlawed future stipulations for relief and composition, whilst stating that casualties of certain amount and payable at fixed intervals, rather than on events the time of whose occurrence was uncertain, remained lawful where contracted for. The redemption terms in the 1874 Act were too favourable to the superiors and proved unpopular with vassals, with the result that the Act was of limited value.[28] The Royal Commission on Registration of Title presided over by Lord Dunedin recommended in 1910 that there should be compulsory redemption of feudal casualties if a proper basis of compensation could be fixed.[29] A scheme was worked out by a committee under Sir George Paul and the Feudal Casualties (Scotland) Act 1914 introduced a redemption scheme which could be activated at the option of either superior or proprietor with a set timescale at the end of which outstanding casualties and corresponding rights to compensation on discharge were automatically extinguished. The redemption scheme in the 1914 Act was difficult and complicated but it achieved its purpose and feudal casualties are now a thing of the distant past.

Legislation on leasehold casualties

2.12 Leasehold casualties escaped these reforms, perhaps because of their localised nature and comparative rarity, but have not been totally exempt from legislative attention. The 1914 Act empowered the Court of Session to apply its provisions to other casualties by Act of Sederunt[30] but this power has never been exercised. By the Long Leases (Scotland) Act 1954, a right was given to tenants under leases of at least 50 years duration granted prior to 10 August 1914 to purchase as feus any parts of the subjects occupied by such lessees as their usual residences. This power to buy out the landlord's interest expired, in terms of the statute, on 1 September 1959.[31] The 1954 Act included provisions for calculating the appropriate redemption amounts for any casualties payable under the lease.[32] Finally,

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[27] See the *Third Report of Her Majesty's Law Commissioners (Scotland) 1838*, pp xiv - xv and xli - xlii.
[28] See Burns, p 22.
[29] *Report of the Royal Commission on Registration of Title in Scotland* (1910) Cd 5316 paras 30 and 60.
[30] See s 23.
[31] See s 1.
[32] Ss 7-9; Sch 2.

section 16 of the Land Tenure Reform (Scotland) Act 1974 banned the inclusion of stipulations for the payment of casualties in future leases.[33]

[33] See the Green Paper on Land Tenure Reform in Scotland (HMSO) 1972, para 76.

PART III CURRENT PROBLEMS

Conveyancing and the house market

3.1 It is evident from correspondence and representations received by the Commission, including representations from the Law Society of Scotland's Conveyancing Committee, that there is great concern in certain parts of Scotland about the current situation as regards casualties in local leases.

3.2 The disquiet often appears to relate to a change of landlords. A typical situation is that former landlords who did not claim casualties were replaced by landlords who either knew when they bought, or later discovered, the financial possibilities in leasehold casualties. As one firm of solicitors put it:

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

3.3 For many house and business purchasers, the damage is now done as their leasehold interests were bought prior to local solicitors being alerted to the fact that casualty payments were likely to develop into a live issue. Such people now face liability to make casualty payments. As regards future transactions, the view has been expressed that the housing market in certain limited areas has been affected in that it has become difficult to sell the tenant's interest in a long lease. Potential buyers are now insisting that the landlord's interest must first be acquired.

Registration of title

3.4 Correspondence has also been received by the Commission from the Registers of Scotland on this subject. The absence of a significant number of reported cases on leasehold casualties and the scant references to them in text books, coupled with their outdated appearance and the fact that until recently they seem to have lain very largely dormant, fostered a lack of awareness of their existence and import amongst experienced conveyancers and the staff of the Keeper of the Registers. It is also fair to say that the vagueness of many casualty provisions and the lack of authority have probably made it difficult to identify, isolate and understand leasehold casualty clauses even given a general consciousness of the problem. The result has been the omission of such clauses in some title sheets for leasehold interests in Lanarkshire where registration of title under the Land Registration (Scotland) Act 1979 is operative[1]. There are outstanding claims against the Keeper's indemnity fund from landlords in respect of loss of the right to pursue tenants for casualties. Some earlier claims have been settled.

[1] SI 1983/745.

Hardship to individuals

3.5 It is fairly clear that the current situation has led to hardship being caused to some individuals. Examples have been cited in correspondence to the Commission: a shopkeeper faced with a writ claiming £18,000 with interest, whose solicitors assumed when the shop was purchased that the landlords had no practical involvement; a woman who bought a flat, the casualty problem once again not being adverted to, and who became liable for a casualty of £2,000 (or £5,000 to buy out the landlord's interest); the tenant under a sub-lease of a public house who wished to purchase the main lease from the brewery but faced a casualty payment of £8,000-£10,000 if he did so, assistance from the brewery and compromise with the ultimate landlords having proved unforthcoming. Other examples were given in Parliamentary debates on this subject.[2] It is no doubt true that in many cases a person pursued for payment of a casualty of which he or she was unaware would have a claim against his or her solicitor, but that is not always the case and, in any event, claims against solicitors are not dealt with in a matter of days. The whole process, particularly if the claim against the solicitor is resisted, causes worry and distress.

Difficulties in applying the law

3.6 Another objection to casualty clauses in leases is their all too frequent vagueness. Casualties referring to the tack duty as a basis for division or multiplication can probably be adequately calculated subject to conversion into modern currency, but those demanding payment of the annual value or rental leave ample scope for disagreement and litigation. It may have been precisely this sort of difficulty which prompted Parliament to rule in section 23 of the Conveyancing (Scotland) Act 1874 that feudal casualties should in future be unlawful unless they were confined to fixed payments or the delivery of fixed quantities at set intervals and that it should no longer be possible to stipulate for the old casualties of relief and composition. Particular provisions for casualties often suffer from other uncertainties.[3] Indeed some may be too vague to be enforced. The anomalous nature of leasehold casualties gives rise to other difficulties in applying the law on such matters as prescription, waiver, the liability of successors and the position of sub-tenants. We discuss these difficulties below and make recommendations for resolving doubts which have arisen.

Scale of the problems

3.7 Estimating the number of "live" leasehold casualties, the proportion of them which are proving troublesome in practice and the degree of hardship being inflicted is difficult. One of the difficulties is uncertainty as to the attitude of landlords. It is possible that the discovery of the financial possibilities in leasehold casualties by some landlords in certain areas of Scotland will lead to other landlords taking a more commercial attitude than they have done in the past.

3.8 Nonetheless some idea of the scale of the problem can be obtained from published information. At the time of the deliberations of the Guthrie Committee, around 13,000

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[2] See the adjournment debates in the Houlse of Commons on 6 November and 13 November 1996.

[3] In accordance with the *contra proferentem* rule of interpretation and the preference for a construction which leads to freedom from burdens, any uncertainties will often fall to be resolved against the landlord. See e.g. *Buchanan's Trs v Pagan* (1868) 7M 1 (where it was held that a casualty payable by heirs of "one real year's rent of the subjects, in the same way as is used in feu holdings" gave the landlord a right only to a duplicand of the ground rent) and *Kaye and Others v Archibald,* 27 June 1996 (Sheriff Court at Hamilton, unreported) (where it was held that a provision for payment of a casualty on "every sale or transference" of the subjects did not give the landlord a right to a casualty on a partial transfer of the subjects).

unexpired long leases were recorded in the Register of Sasines. More than 4,000 were in Lanarkshire,[4] nearly 2,000 in Ayrshire and nearly 800 in Dumfries. Almost 9,000 of the 13,000 had more than a century still to run[5]. It is those very long leases (often granted for 999 years) which are the main source of problems in relation to casualties. Other long leases (for example, those originally granted for 99 years) may provide for casualties but any problems thus created are likely to be overshadowed by the fact that the lease itself will have a limited life.

3.9 We have already mentioned the research carried out by Register House in 1964 which indicated that approximately a third of the leases registered, or whose transmission was registered, in a certain period in the Register for the County of Lanark provided for casualties but that only about a fifth of these casualties took the form of a payment based on annual value, the rest being of the nature of a duplicand.[6] It is notw known how many of these casualties are valid and enforceable. It is not known how many of those which are valid and enforceable are likely to be enforced.

3.10 This limited survey suggests that the most troublesome form of casualty - that demanding payment of the annual value or rental - is not the commonest form of stipulation. Nonetheless it is sufficiently common to require consideration to be given to possible reforms.

3.11 The prohibition on the creation of casualties in leases executed after 1 September 1974[7], combined with voluntary redemption of casualties in pre-existing leases, the conversion of long leases into feus and the inadvertent abolition of some casualties as a result of registration of title must have had the effect of reducing the number of "live" casualties. However, it is not possible to quantify the reduction.

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[4] A search of the Lanark Title Sheet record, carried out in April 1977 by the Registers of Scotland, found that of the 114,207 registered titles in the County of Lanark the number of leasehold titles was 3929. This search did not cover the Register of Sasines but, as Lanark had been an operational area for registration of title for nearly 13 years, it is assumed that the number of leasehold titles for the county in that register is relatively small. *Letter from Deputy Keeper of the Registers to the Scottish Law Commission, 22 April 1997*.

[5] Cmnd 8656 (1952), para 38.

[6] See para 2.8 above.

[7] Land Tenure Reform (Scotland) Act 1974, ss 16 and 24(2).

3.12 All that can be said with confidence is that the problem is sufficiently large to be causing genuine anxiety to at least some of those selling and buying properties in certain parts of Scotland, their professional advisers and those involved in registering titles as a result of such transactions. At the same time it is worth stressing again that in Scotland leasehold tenure is very much a minority form of tenure[8] and that the problem of casualties does not now arise in relation to property held on feudal tenure.

[8] Even in the County of Lanark the number of registered leasehold titles is only 3.44% of the number of all registered titles. *Letters from the Deputy Keeper referred to in Note 4 above.*

PART IV EARLIER REDEMPTION SCHEMES

The relevance of earlier redemption schemes

4.1 The problem of devising a scheme for the redemption of casualties is not a new one. Some assistance can be derived from an examination of earlier redemption schemes. Indeed these schemes form part of the legal background in the light of which people must be supposed to have conducted their affairs. This was noted by the government of the day when the 1914 scheme for the redemption of feudal casualties was being introduced. It deliberately used the earlier 1874 scheme as a starting point.

> "In view of the fact that the 1874 Act has now been in existence for nearly 40 years, and that the rights of superiors and vassals have for that length of time been based on it, the measures of compensation fixed by that Act have, with certain modifications, been adopted in this Bill." [1]

Similarly, at the present time, it would not be unreasonable to take the scheme for the redemption of leasehold casualties in the Long Leases (Scotland) Act 1954 as an indication of the maximum levels of compensation which might be required on redemption. There can have been no reasonable expectations on anyone's part that leasehold casualties would last forever or that any sum payable on redemption would be any more generous than that provided for in the 1954 Act. The 1954 Act scheme can, however, only be understood in the light of the earlier schemes for the redemption of feudal casualties.

The 1874 scheme

4.2 The Conveyancing (Scotland) Act 1874 provided for redemption of feudal casualties (other than simple duplicands or similar regular payments) at the vassal's option on payment of compensation on the statutory terms. Its basic provisions were as follows.

> "in cases where casualties are exigible only on the death of the vassal such casualties may be redeemed on payment to the superior of the amount of the highest casualty, estimated as at the date of redemption, with an addition of fifty per cent;
>
> in cases where casualties are exigible on occasion of each sale or transfer of the property, as well as on the death of the vassal, such casualties may be redeemed on payment of two and a half times the amount of the casualty estimated as aforesaid payable on such occasions
>
> where the casualty consists of a sum calculated on the footing of an annual sum being paid for each year from the date of the last entry, such casualty may be redeemed upon payment of eighteen times the amount of such annual sum."

4.3 These terms were worked out by assuming that a casualty due only on death would on average become exigible once every twenty five years and that a casualty due on transfer or death would on average become exigible once every fifteen years. A figure was then

[1] Memorandum on the Feudal Casualties (Scotland) Bill (Public Bills 1913, Vol 2, Bill 295).

calculated which would, if invested at 4% compound interest with a yearly break, provide such payments at these intervals in perpetuity.[2] The result of these calculations, when rounded out, brought out the multipliers of 1.5 and 2.5 used in the Act. In fact the assumptions made were too favourable to superiors in a number of respects and it was generally felt that the statutory terms were too harsh on vassals. For example, it was assumed that the notional investment must be sufficient to produce the highest type of casualty in perpetuity even although, in death or transfer cases, lower casualties would in fact have been payable from time to time. No discount for early payment was given to vassals, apparently because it was assumed that vassals would always exercise their option shortly before a casualty was due. This was an unrealistic assumption. Some vassals would be forced to exercise their option at other times for practical reasons. It is also not clear that any account was taken of such factors as difficulties and expenses of collection and the possibilities of avoidance. There should have been some allowance for the fact that superiors would be offered a trouble-free return instead of a potentially troublesome investment. The scheme was also too rigid. For these reasons it was a comparative failure and did not achieve its objective.[3] The lesson for reform of the law on leasehold casualties is clear.

The 1914 scheme

4.4 The scheme of the 1914 Act differed from that of the 1874 Act in one important respect. Redemption was possible at the option of the superior or the vassal, and if the option was not exercised within 15 years casualties were extinguished automatically. This meant that it was no longer possible to assume, however unrealistically, that the option would be exercised immediately before a casualty fell due. It became necessary to try to assess, by reference to expectation of life tables in some cases, when the next casualty might fall due and to build in a discount for early payment. This made the system for compensation under the 1914 Act much more complicated than that in the 1874 Act. However, the basic multipliers of 1.5 and 2.5 were used again.

4.5 The 1914 Act tried to meet the criticism that the 1874 Act had, in those cases where different casualties were payable on death and transfer, adopted assumptions based on the highest type of casualty payable (normally composition) when in fact the next casualty might have been a lower form (normally relief). It did so by giving a special abatement for those cases where the next casualty might be relief payable by an heir. A flavour of the Act's provisions may be given by reproducing those relating to (a) casualties exigible on death and (b) casualties exigible on transfer as well as on death.

> "The compensation payable on the redemption of casualties under this Act shall (failing agreement) be fixed as follows -
>
> (a) In cases where casualties are exigible on the death of the vassal the compensation shall be such sum as will, with the addition of simple interest at the rate of four per cent per annum, produce one and a half times the highest casualty on the arrival of the time at which the next casualty might be expected to become exigible: Provided that, if at the date as at which compensation is to be fixed, and after payment of such casualty (if any) as may then be exigible, the state of the title is

[2] See Burns, pp 21 to 22.
[3] See Burns, p 22.

such that the next casualty may be relief, and the amount of such relief is less than the amount which would be payable as composition, the compensation shall be fixed on the assumption that the next casualty will be payable on the expiry of the period of twenty-five years from the date as at which compensation is to be fixed, or otherwise on the arrival of the time when the next casualty might be expected to become exigible, whichever period is the greater:

(b) In cases where casualties are exigible on the occasion of each sale or transfer of the property as well as on the death of the vassal, the compensation shall be such sum as will, with the addition of simple interest at the rate of four per cent per annum, produce two and a half times the highest casualty on the arrival of the time at which the next casualty might be expected to become exigible: Provided that, if at the date as at which compensation is to be fixed and after payment of such casualty (if any) as may then be exigible, the state of the title is such that the next casualty may be relief, and the amount of such relief is less than the amount which would be payable as composition, the compensation shall be fixed on the assumption that the next casualty will be payable on the expiry of the period of fifteen years from the date as at which compensation is to be fixed, or otherwise on the arrival of the time when the next casualty might be expected to become exigible, whichever period is greater:"

4.6 The problem of deciding when the next casualty might be expected to become exigible was solved by the use of life expectancy tables set out in a schedule to the Act. A casualty due on death was expected to fall due on the expiry of the proprietor's life expectancy. A casualty due on transfer was expected to fall due after three fifths of the proprietor's life expectancy had elapsed.[4]

4.7 The 1914 Act differed from the 1874 Act also in that it covered redemption of duplicands and similar payments. Here the statute provided for redemption on the following terms.

"(d) In cases where casualties are payable in virtue of the terms and conditions of the feu at fixed and regularly recurring intervals the compensation shall be such sum as will, with the addition of simple interest at the rate of four per cent per annum, produce on the next recurrence of the fixed interval a sum representing thirty-seven and a half times the highest casualty divided by the number of years constituting such interval."

4.9 The 1914 Act was not regarded as a politically controversial measure. The Bill passed entirely unamended and undebated throughout all its stages. There were other matters of concern to politicians at the time. War was declared a few days before the Bill received the Royal Assent. However, the provisions in the 1914 Act did not escape criticism from the technical point of view.[5] They were complicated and difficult to apply and yet they did not cover all possible cases. They were unfair to vassals in using simple interest rather than compound interest as the basis for the discount. The abatement provisions, although apparently sophisticated, were actually rather arbitrary in their operation and did not meet the criticism that the 1874 Act had been unfair to vassals in making the assumption that the higher amount of casualty would be payable every 25 or 15 years in perpetuity even if in fact

[4] 1914 Act s 6.

[5] See the articles in the Scottish Law Review at Vol 29 (1913) p 257; Vol 30 (1914) at p 1 and Vol 32 (1916) pp 256 and 277.

some of the future casualties would be of the lower amount. The real criticism of the 1874 Act was that the multipliers of 1.5 and 2.5 were too high and gave an unfair benefit to superiors. The 1914 Act covered more situations than the 1874 Act had done but it was still framed in a rigid way, without a general section to sweep up cases not covered by the particular provisions.[6] The terms used and the underlying complexity of the law on feudal casualties also gave rise to a number of uncertainties as to how the Act might apply in different situations. It achieved its purpose but it was not necessarily a suitable model to be followed in later legislation.

4.10 It is worth noting, however, that the effect of the discounting and abatement provisions in the 1914 Act was often to produce a redemption figure for "death" casualties which was less than the amount of the casualty next payable. The reason for this was that the superior was obtaining the use of money earlier than he would otherwise have done and could invest it. The examples given in the practitioner's textbook on the Act show that the amounts actually payable in various different circumstances (proprietors with different life expectancies, titles in different states and so on) were rarely more than the amount of the casualty itself and were sometimes just over half that amount.[7] In the case of "death and transfer" casualties the higher multiplier of 2.5 meant that the amounts of compensation payable were generally more than the amount of the casualty itself but were often about one and a half times the casualty when discount and abatement were taken into account.[8]

4.11 It is also worth noting that both the 1874 Act scheme and the 1914 Act scheme were very attractive to vassals in one type of situation which is not likely to arise now in relation to leasehold casualties. If the land feued was still undeveloped at the time when redemption became possible but the vassal intended to build on it, it was very attractive to the vassal to redeem on the statutory terms. The redemption sum would be based on the rental for undeveloped land and the casualties would be extinguished forever.

The 1954 scheme

4.12 The Long Leases (Scotland) Act 1954 conferred on tenants under long residential leases a right to buy out the interest of their landlords within a limited period of years. It contained redemption terms for leasehold casualties. Under the 1954 Act the basis of compensation ("the appropriate amount") in the case of a casualty payable on death was the amount of the casualty. In the case of a casualty payable on death and transfer, the basis of compensation was one and two thirds times the highest such casualty. In both cases, however, there was provision for a "relief abatement" which, if it applied, reduced the appropriate amount by half. The text of paragraph 1 of Schedule 2 to the Act, which contains the redemption scheme, is as follows.

> "1. The appropriate amount in respect of the casualties payable under any lease or sub-lease shall be -
>
> (*a*) such sum as may be determined by agreement between the landlord or intermediate landlord, as the case may be, and the occupying lessee, or

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[6] One view was that the power given to the Court of Session by s 23 was intended to fill this gap. See Burns, pp 124 - 125. But this view seems to be at variance with the actual words of the section.
[7] See Burns, pp 154-163.
[8] See Burns, pp 164-166.

(*b*) in default of such agreement, -

(i) where casualties are exigible only on the death of the person holding the interest of lessee under the lease or sub-lease, a sum equal to the highest casualty or, if a feu right is to be granted of a part only of the property let under the lease or sub-lease, the proportion of such casualty attributable to the subjects to be comprised in the feu right:

Provided that if at the date of the notice given under section one of this Act by the occupying lessee and after payment of any casualty which may then be exigible the state of the title is such that the next casualty may be that payable on the entry or succession of an heir, and the amount of the casualty payable by an heir is less than the amount which would be payable on the entry of a singular successor, the said sum shall be subject to an abatement of one-half;

(ii) where casualties are exigible on the occasion of each transfer of the lease or sub-lease as well as on the death of the person holding the interest of lessee under the lease or sub-lease, a sum equal to one and two-thirds times the highest casualty or one and two-thirds times the proportion of such casualty attributable to the subjects to be comprised in the feu right, as the case may be:

Provided that if at the date of the said notice and after payment of any casualty which may then be exigible the state of the title is such that the next casualty may be that payable on the entry or succession of an heir, and the amount of the casualty payable by an heir is less than the amount which would be payable on the entry of a singular successor, the said sum shall be subject to an abatement of two-fifths;

(iii) where casualties are payable at fixed and regularly recurring intervals, such sum as will, with the addition of simple interest at the rate of five per centum per annum, produce on the next recurrence of the fixed interval a sum representing twenty-five times the highest casualty or twenty-five times the proportion of such casualty attributable to the subjects to be comprised in the feu right, as the case may be, divided by the number of years constituting such interval.

4.13 The actual method of providing compensation was by adding one twentieth of the appropriate amount to the feuduty payable under the feu right which replaced the long lease.[9]

4.14 There is not much published information about the reasoning behind the redemption terms used in the 1954 Act. The Guthrie Committee stated that[10] "[m]uch trouble was experienced in redemption of feudal casualties under the Act of 1914, particularly with regard to outstanding casualties" because of the great complexity of the scheme employed. So it is not surprising that the 1954 Act should have adopted a simpler approach. The report

[9] S 7(1)(b)(ii).
[10] Para 68(5).

of the proceedings in the Scottish Standing Committee on the Long Leases (Scotland) Bill reveals only that the redemption formula was based on that set out in the 1914 Act. It seems reasonably clear that the redemption terms in the 1954 Act were a response to the criticisms which had been made of the schemes of the 1874 Act and the 1914 Act. The 1874 Act had, with good reason, been regarded as being unduly generous to superiors. The 1914 Act had tried to address this by building in discount and "relief abatement" provisions. It had, however, been criticised as being too complicated and rigid. The 1954 Act tried to remedy the fundamental defect of the 1874 Act by reducing the multipliers and preserving the "relief abatements" used in the 1914 Act. If full effect were given to the relief abatements, as was presumably intended by the drafters of the 1954 Act, the net result would have been that the redemption amount in the case of "death" casualties would often be a half of the amount of the casualty itself and the redemption amount in the case of "death and transfer" casualties would often be the amount of the highest such casualty. In the case of duplicands the 1954 Act, as will be seen from paragraph 1(b)(iii) of the schedule quoted above, used the same technique as the 1874 Act but with a numerator of twenty five instead of thirty seven and a half. The reason for this change is not known but it may perhaps be viewed as a response to the criticism that the use of simple interest, rather than compound interest, was unfair to the vassal. Whatever may have been the reasoning, the net effect of the 1954 Act provisions was a scheme which was in some respects more crude, but also more simple, than a scheme on the lines of the 1914 Act would have been. The change to a simpler and cruder system was no doubt justifiable on the grounds that the 1954 scheme was an optional one.

Criticisms of the 1954 scheme

4.15 One serious criticism of the 1954 Act scheme is its attempt to preserve the "relief abatements" of the 1914 Act. References to the "state of the title" being such that the next casualty might be that payable on entry or succession of an heir made sense in the context of feudal casualties because in the feudal system there were cases where the state of the title, even in those cases where a casualty was payable on both death and transfer, might be such that the next casualty could not possibly be relief.[11] This is not the case in leasehold tenure and the provisions on this point in the 1954 Act seem inappropriate. They are open to other criticisms too. For example, it is not easy to see what, under paragraph 1(b)(i) of the second schedule to the 1954 Act, would be the amount of a casualty payable on the entry of a singular successor, given that the paragraph applies to casualties payable on death only.

[11] This was the case where a singular successor (A) was infeft but the last casualty had been paid by a previous proprietor (X) who was still alive. In this case, because of section 4(3) of the Conveyancing (Scotland) Act 1874, no casualty of relief would be payable on A's death while X was still alive because the fee was "full" and no casualty of relief was payable on X's death either because at that point A or his successor would have had to enter with the superior and pay a composition. See Bell, *Principles* paras 709 and 723. So the next casualty could only be a composition. See the examples in Burns, pp 157 - 158 and 162.

4.16 Another criticism of the 1954 Act scheme is that, like its predecessors, it was too rigid. It had no general clause to sweep up cases not otherwise covered and it did not cover all cases. It did not, for example, cover the case (not unknown in practice in relation to feudal casualties and therefore not impossible in relation to leasehold casualties) where a casualty was payable only on transfer.

PART V IS REFORM NECESSARY?

The argument for doing nothing

5.1 On one view of the situation, the fact that some landlords have enforced rights thought to be moribund is not in itself an argument for reform. Nor is the fact that this may have caused hardship or distress to some individuals. There will always be some people who make good bargains and some people who make bad bargains. Where the law is obscure, some people will be badly advised and some people will be well advised. This applies to both landlords and tenants. It may be that some existing landlords have bought cheaply as a result of the seller's ignorance of the potential value of casualties. On the other hand some landlords may have bought too dearly because they underestimated the legal uncertainties of rights to casualties and the precariousness of their supposed entitlements. It may be that some former tenants got more for their property than they would have got if the buyer had realised the potential impact of casualties. It may be that some existing tenants have bought their property too dearly, not having been advised of the liability to pay leasehold casualties. In some cases there may be claims based on professional negligence. But these problems are not, on this view, relevant to a law reform exercise. Such an exercise must assume that people have bought and sold in the knowledge of factors which any well advised buyer or seller would take into account.

5.2 There is no reason, on this view, to do anything about leasehold casualties. On this view they are reasonable contractual provisions, freely entered into by the landlord and the tenant or their predecessors. They function rather like a rent review clause in a lease and take account of the fact that the landlord may have been disposing of the ground for a very long period in exchange for a low fixed ground rent not in itself subject to increase to keep pace with inflation. Casualties based on annual value may seem severe to tenants, but in relation to the current capital value of the land they may be no more severe than was initially envisaged by the contracting parties. The situation where a landlord stipulated for a low ground rent and casualties is no more objectionable than if a landlord had stipulated for a high ground rent and no casualties.

The argument for reform

5.3 Those favouring reform would generally concede that nothing can be done about past transactions. It would be impossible to undo past transactions in order to compensate those, whether landlords or tenants, who have made bad bargains at the expense of those who have made good bargains. Whole chains of past transactions cannot be unravelled. However, proponents of reform would argue that this is not an argument for doing nothing for the future.

5.4 Proponents of reform might argue that leasehold casualties are open to the same objections as feudal casualties were. Duplicands were seen as devices for extracting more money from vassals or tenants who had already reached the limit of the feu or rent they

were willing, or able, to pay.[1] Casualties based on rental value were regarded as unjust and vexatious because they taxed the vassals or tenants on the value of their own improvements. They had the flavour of fines or penalties. The imposition of recurrent liability for potentially large capital sums on the tenants of what is often quite modest housing may in itself cause distress. The legal difficulties and the problems of calculation of casualties based on rental value add to the problems. It is significant that abolition of feudal casualties was recommended as long ago as 1838, that the Acts of 1874 and 1914 provided for the phasing out of feudal casualties and that it has not been possible to create new leasehold casualties since 1974.[2] The trend of legislative policy has been clear for a very long time and there is, on this view, no good reason for changing its direction at this time.

Assessment and conclusion

5.5 In our view reform of leasehold casualties is necessary. We do not wish to exaggerate the case for reform, and we recognise that there is some force in the freedom of contract argument. Nonetheless leasehold casualties based on rental value do have objectionable features and seem to us to be different in their impact from a simple additional ground rent. Quite apart, however, from the social effects of enforcing leasehold casualties there is a strong case on purely legalistic grounds for removing them from Scottish property law. They are a troublesome anomaly in the system.

[1] See the article on "The Casualties Bill" in 29 SLR (1913) 257 at 258. "The dodge of the duplicand is thus in effect the superior's way of getting something for nothing. In this light we should shed no tears over its retrospective abolition on very moderate terms ..."
[2] Land Tenure Reform (Scotland) Act 1974, s 16.

PART VI LIMITING THE PROBLEMS

Introduction

6.1 There are several areas of legal difficulty relating to leasehold casualties which could with advantage be clarified and improved. Not only would this resolve doubts in the existing law but it would also in some cases serve to limit the current problems.

Prescription of particular payments

6.2 There are uncertainties in the law on the prescription of leasehold casualties.

6.3 The starting point is section 6 of, and Schedule 1 to, the Prescription and Limitation (Scotland) Act 1973 which provide that the 5-year prescription applies to any obligation to pay a sum of money due in respect of a particular period "by way of rent or other periodical payment under a lease".

6.4 The first question is whether a casualty is a "periodical payment". A duplicand payable, say, every nineteen years would clearly be a periodical payment. Is a casualty due at irregular intervals, for example, when there is a change of tenant, a "periodical payment"?[1] It is clear from the wording of the 1973 Act, which refers to payments "under a lease" and not to payments due by a particular tenant, that the matter has to be considered by reference to the whole duration of the lease. In the context of, say, a 999 year lease a casualty payable periodically at irregular intervals during the currency of the lease could on one view be said to be a periodical payment. From the landlord's point of view there is a payment which falls due, not once and for all, but at intervals throughout the duration of the lease. For payments to be periodical, it may not be essential in all contexts that the intervals between payments be fixed or regular. The argument the other way is that the word "periodical" normally implies regular intervals and that there is no reason to depart from that meaning in this statutory context.

6.5 The next question is whether a particular payment of a leasehold casualty is due in respect of a particular period. It seems clear from the scheme of the Act that the purpose of the words "due in respect of a particular period" is to distinguish between an obligation to pay a particular example of a periodical payment (such as a particular half year's rent or feuduty or ground annual) and the underlying obligation to make the payments from time to time as they fall due. It is only the obligation to pay on a particular occasion which prescribes in five years. The draftsman could not readily have referred to a "particular sum of money" because it might have been argued that that referred, say, to the feuduty of a particular amount rather than the feuduty due on a particular occasion. If this is the contrast which is intended by the phrase "due in respect of a particular period", as we believe it is,

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[1] In *M.R.S. Hamilton Ltd v Arlott* 24 May 1995 (Court of Session, reported incompletely at 1995 GWD 25-1355) the sheriff had held that a casualty had prescribed after five years as a periodical payment under para 1 (a) (v) or (vi) of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973. However, on appeal counsel for the tenant apparently conceded that the casualty concerned was not a periodical payment for this purpose. The sheriff's decision was overturned but the point on periodical payments was not discussed.

then the phrase should not, in our view, be construed in a narrow way which would introduce a distinction, with no apparent policy justification, between payments due in respect of periods and payments due in respect of events. In the present context the phrase serves to distinguish a particular payment of casualty, due for example on the entry of a particular assignee, from the underlying obligation to pay a casualty every time one falls due. It is not difficult, on this approach, to identify the particular periods in respect of which leasehold casualties are due. Duplicands are due in respect of the particular year in which a double rent is payable. They are in effect a simple doubling of the rent due in respect of that year. Casualties of relief or composition are due for the period specified in the lease if it deals with this point. The lease might, for example, provide that they are due in respect of the first year's occupation by the new tenant.[2] If nothing is said in the lease on this point then they are due in respect of the whole period of the new tenant's tenancy. The fundamental point is that in each case it is the obligation to make the particular payment in question - whether it is due in respect of a particular year or in respect of the whole period of a particular tenant's occupancy - which is subject to the five year prescription.

6.6 In the only case where this point has been raised the sheriff decided that a leasehold casualty due on the entry of an assignee was a periodical payment due under the lease and that, for this reason, the obligation to make the particular payment prescribed in five years under section 6 of the 1973 Act.[3] He also decided that for another reason, which was legally unsound, the obligation prescribed in five years. On appeal to the Court of Session, counsel for the tenant did not seek to support the sheriff's decision on the periodical payment ground and apparently conceded that the payment was not due by way of a periodical payment under the lease. Instead counsel attempted unsuccessfully to have the sheriff's decision upheld on the other ground. The case is an unsatisfactory authority for these reasons.[4]

6.7 It seems to us that duplicands and similar casualties certainly are periodical payments due in respect of particular periods under a lease. Casualties due at irregular intervals may not be. If the five year period of negative prescription does not apply to a particular casualty then the 20 year period of the long negative prescription would apply.[5] This is a remarkably long period for a payment of this nature.

6.8 Paragraph 1 (g) of Schedule 1 to the Prescription and Limitation (Scotland) Act 1973 applies the five year prescriptive period to

> "any obligation arising from, or by reason of any breach of, a contract or promise, not being an obligation falling within any other provision of this paragraph" .

This provision as originally enacted did not apply to any obligation constituted or evidenced by a probative writ.[6] The restriction, which had the extreme effect of quadrupling the prescriptive period simply because a document was signed by a witness, has now been removed by the Requirements of Writing (Scotland) Act 1995 but the change does not apply

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[2] See e g the typical clause reproduced at para 2.10 above.
[3] See *M.R.S. Hamilton Ltd v Arlott,* above.
[4] For the difficulties caused by concessions by counsel on a matter of law see e.g. *Marshall v William Sharp & Sons Ltd* 1991 S.L.T. 114 and *John Thorburn & Sons v Border Harvesters Ltd* 1992 S.L.T. 549.
[5] Prescription and Limitation (Scotland) Act 1973 s 7.
[6] Prescription and Limitation (Scotland) Act 1973, Sch 1 para 2(c). See *M.R.S. Hamilton v Arlott,* above where para 2(c) was the basis of decision in the Court of Session.

to any document executed or anything done before 1 August 1995.[7] This means that paragraph 1(g) is, for all practical purposes, irrelevant to leasehold casualties.

6.9 Questions may arise as to the date from which the prescriptive period begins to run. The 1973 Act provides that the starting point is the "date when the obligation became enforceable".[8] The date when an obligation to pay a particular casualty becomes enforceable will depend on the terms of the lease. The lease may, for example, provide that payment of the extra amounts due by virtue of the casualty is to be made along with the rent for the year in question at Whitsunday and Martinmas. Or it may simply provide that a casualty is to be payable on entry. Where the lease provides for arbitration in relation to the casualty the date when prescription starts to run would seem to depend on the precise terms of the obligation. If the obligation is to pay the rental value on a particular date and the provision for arbitration is merely part of a dispute-resolving machinery then it would seem that the prescriptive period would begin to run from the date when the casualty was due. The landlord could interrupt the prescription by making a claim in the arbitration and the interruption would date from the giving of any preliminary notice relating to the arbitration.[9] If, however, the obligation is only to pay such an amount as may be fixed by two arbiters, or an oversman in case of disagreement, then it may be, as was argued in *M.R.S. Hamilton v Arlott*,[10] that the prescriptive period does not begin to run until an amount has been fixed. In such a case questions may arise as to whether the obligation to appoint an arbiter has prescribed. In the case mentioned it was held that as the obligation to appoint an arbiter was contained in a probative writ it was subject to the 20 year long negative prescription. However, it could also be argued that the scheme of the Act is more consistent with the view that even in such a case prescription begins to run as soon as the triggering event enabling the landlord to set the arbitration machinery in motion has occurred.

6.10 From the point of view of policy there can be little doubt that the obligation to pay a particular casualty ought to be subject to the five year prescription and that the prescriptive period ought to run from the date when the obligation falls due and machinery can be put in motion for its quantification or enforcement. It might also be useful to make it clear that where a lease provides for payment of a casualty on the "entry" of a singular successor the reference is to the date of registration of the assignation of the lease.[11] We recommend that

1. It should be provided that, for the purposes of section 6 of the Prescription and Limitation (Scotland) Act 1973,

(a) an obligation to pay a leasehold casualty is an obligation to pay a sum of money due in respect of a particular period by way of a periodical payment under the lease

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[7] Requirements of Writing (Scotland) Act 1995, s 14(2) and (3) and Sch 5.
[8] Prescription and Limitation (Scotland) Act 1973 s 6(1)(3).
[9] See the Prescription and Limitation (Scotland) Act 1973 s 9(3).
[10] See above.
[11] An alternative would be to provide that entry should be taken to be the date of entry under the missives or any earlier date on which possession was actually given under the lease in question. However, this would be to depart from the feudal analogy which is so important in casualties. It is clear that in relation to feudal casualties "entry" referred to the process of entering with the superior (ie taking infeftment) and not to the process of gaining physical entry to the premises.

(b) an obligation to pay a casualty on the occurrence of an event becomes enforceable on the date when the event occurs, unless the lease provides that it is enforceable on another specified date, even if the amount of the casualty has not been quantified at the relevant date

(c) where a lease provides for a casualty to be payable on the entry of a person, the date of entry should be taken to be the date of registration of the assignation of the lease to that person

(d) the setting in motion of machinery for the quantification of a leasehold casualty is a relevant claim.

Prescription of right to recover future casualties

6.11 One of the main causes of difficulty and distress in relation to leasehold casualties has been that the practice of landlords in not claiming payments over a long period lulled tenants and their advisers into a false sense of security. There was a widespread assumption that casualties would not be claimed in fact. The question for consideration here is whether abandonment in fact, if sufficiently clear and prolonged, might have led to the loss of the legal right to exact future casualties.

6.12 Section 7 of the Prescription and Limitation (Scotland) Act 1973 provides for the extinction of most obligations by the long negative prescription of twenty years. It provides as follows.

> "(1) If, after the date on which any obligation to which this section applies has become enforceable, the obligation has subsisted for a continuous period of twenty years -
>
> (a) without any relevant claim having been made in relation to the obligation, and
>
> (b) without the subsistence of the obligation having been relevantly acknowledged
>
> then as from the expiration of that period the obligation shall be extinguished...
>
> (2) This section applies to an obligation of any kind (including an obligation to which section 6 of this Act applies), not being . . . an obligation specified in Schedule 3 to this Act as an imprescriptible obligation."

6.13 Schedule 3 lists eight kinds of rights and obligations which are imprescriptible for the purposes of section 7. Only the first three are of any possible interest in the present context.

6.14 The first kind of imprescriptible right is "any real right of ownership in land". This makes it clear that the landlord's right to the land itself would not be lost by non-enforcement of any lesser rights under the lease for a period of twenty years or more. It does not, however, apply to the right to casualties as such.

6.15 The second kind of imprescriptible right is "the right in land of the lessee under a recorded lease". Again this does not apply to casualties.

6.16 The third kind of imprescriptible right is "any right exercisable as a *res merae facultatis*" . The meaning of this provision can be understood only by reference to the prior law. At first sight it makes little sense. Most rights are merely facultative in the sense that a creditor can choose not to exercise them. However, the cases under the old law suggest that the phrase refers to rights which can be exercised or not at any time, at the will of the creditor, and which are of such a kind that a diligent creditor would not be expected to exercise them promptly unless that suited him or her in the circumstances. Typically they are rights which of their very nature give the creditor an option exercisable at a time of his or her own choosing. For example, a right to build a mill on one's own ground was held to be *merae facultatis* and imprescriptible.[12] The same applied to a right to open a door into a common stair.[13] Similarly a right to take infeftment was held to be a right *merae facultatis,*[14] as was a right to revoke a donation[15] and a right of redemption.[16] A right to a monetary payment which falls due on a particular date would not, it is thought, be a right exercisable as a *res merae facultatis.*[17]

6.17 If this assessment of the nature of a right exercisable as a *res merae facultatis* is correct there is no reason to suppose that an obligation to pay casualties, or the corresponding right to the payment of casualties, is imprescriptible.

6.18 There remains the question whether an obligation (not being accessory to an obligation to pay a principal sum)[18] to pay sums of money at intervals over a period of years prescribes in total, even as to future payments, by non-exercise of the corresponding right for twenty years or whether it must be regarded as a series of separate obligations, with prescription running separately in relation to each one as it falls due. There was some doubt on this point under the old law,[19] but the prevailing view was that the obligation had to be regarded as a series of separate obligations.[20] This view is reinforced now by the words of section 7 of the 1973 Act which refer to the date when the obligation "has become enforceable". An obligation to make payments at intervals becomes enforceable only in stages and therefore must prescribe only in stages.

6.19 It seems therefore that the radical right to leasehold casualties would not prescribe under section 7 of the 1973 Act by non-exercise for twenty years. For similar reasons, it is thought that the right would not prescribe under section 8 of the Act which applies only to rights relating to property which are not correlative to an obligation to which sections 6 or 7

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[12] *Haigues v Halyburton* (1704) Mor 10,726.
[13] *Gellatly v Arrol* (1863) 1M 592.
[14] *Johnston of Corhead v Johnston of Newton* (1716) Mor 10,732. This is now covered by an express provision in paragraph (h) of Schedule 3 to the 1973 Act.
[15] *Turnbull v Husband* (1697) Mor 10,726.
[16] *Reid's Trs v Duchess of Sutherland* (1881) 8R 509.
[17] It is sometimes said that the reason why the "radical right" to feuduties does not prescribe is that it is *merae facultatis*. See eg the *Encyclopaedia of Scots Law*, Vol 9, p 404: Walker, *Prescription and Limitation of Actions* (5th ed 1996) p78. But the authority cited in support of this view (*Duke of Buccleuch v Officers of State* (1768) Mor 10,711) does not support it and it seems inappropriate to equiparate collection of feuduties to the exercise of an option.
[18] See the distinction drawn by Erskine, *Institute* III.vii.13. Where there is an obligation to pay a principal sum it may prescribe by the failure to take any action on it or to claim interest on it for twenty years and once the principal obligation has prescribed the accessory obligation to pay future interest also falls. Bell, *Principles,* para 609.
[19] Kames, *Elucidations* (1777) p 250 and Hume, *Lectures* (Stair Society, 1952) Vol III, p 66 were of the view that the obligation prescribed as a whole.
[20] *Lockhart v Duke of Gordon* (1730) Mor 10,736; *Henderson v Burt* (1858) 20D 402; Erskine, *Institute* III.vii.13; Bell, *Principles,* para. 609; Millar, *Prescription* (1893) p 92.

applies. In relation to each right to exact a casualty (for example on the entry of a new tenant) there is a correlative obligation covered by sections 6 and 7.

6.20 We do not think that it would be right to recommend a new provision to the effect that the radical right to leasehold casualties should prescribe merely on the ground that it had not been exercised or acknowledged for any period of twenty years. However, a new statutory prescription of the underlying right, based on the non-exercise of it on two or more occasions, would not be open to this criticism and we consider that later. First it is necessary to consider the possible relevance to leasehold casualties of the doctrine of waiver or discharge.

Waiver or discharge

6.21 Although prescription has sometimes been explained in terms of deemed abandonment of rights by non-use the true view is that it operates automatically regardless of the creditor's attitude to the debt. It is justified by objective considerations of public policy - to extinguish stale obligations and prevent people from being disturbed by claims which have been long forgotten.[21] There is, however, another doctrine - that of waiver of rights or discharge of obligations - which does proceed on the theory of voluntary abandonment or renunciation and which might have some application in relation to casualties which have not been claimed on successive occasions over a long period.

6.22 There is no real difficulty about the case of an express waiver or discharge. A landlord who had written to the tenant to say that he was waiving for himself and his successors the right to all outstanding or future casualties under the lease could not thereafter claim payment of a casualty. The same result would follow if the landlord's statement was expressed as a discharge of all the obligations in relation to casualties of the tenant and his successors under the lease.

6.23 The difficulty arises in relation to implied waiver or discharge.[22] Are there circumstances in which a waiver of rights, or a discharge of obligations, in relation to all outstanding or future casualties due under a lease could reasonably be implied from conduct on the part of a landlord over a sufficient period of time causing tenants to act on the assumption that the rights had been abandoned?

6.24 The leading case on waiver is *Armia Ltd v Daejan Developments Ltd*[23] where it was held that a party to a contract for the purchase of property had not waived its right to refuse a title which contained unacceptable burdens. In the course of his speech Lord Keith of Kinkel said;

> "The word 'waiver' connotes the abandonment of a right... The abandonment may be express, or it may be inferred from the facts and circumstances of the case...[T]he question whether or not there has been a waiver of a right is a question of fact, to be determined objectively upon a consideration of all the relevant evidence." [24]

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[21] See Hume *Lectures* (Stair Society, 1952) Vol III, 63 - 64.
[22] For the related plea of *mora*, taciturnity and acquiescence, see Walker, *Prescription and Limitation of Actions* (5th ed 1996) pp 139 - 143.
[23] 1979 SC (HL) 56.
[24] At p 72.

It was accepted in *Armia*[25] that it is not necessary for the party founding on an alleged waiver to show that he has suffered prejudice because of the actings of the other party but he must show that he has acted in some way in reliance on a belief induced by the words and conduct of the other party. It is also necessary that the party alleged to have waived a right must have been aware of it or must have been in such a position that he must have known that he had the right and cannot be heard to say that he was ignorant of it.[26]

6.25 It may be that in some cases, depending on the particular facts, a tenant could successfully plead that the landlord had impliedly waived the right to claim casualties. The problem of awareness of the right to casualties in general under the lease should not be acute. A landlord could hardly be heard to say that he was unaware of the terms of a lease granted by himself or his predecessors. However, there could be more difficulty in showing that the landlord was aware of an assignation giving the right to claim a casualty on a particular occasion.[27] The problem of acting in reliance on the supposed abandonment might also cause difficulty. It may be that a tenant has acted in reliance on a general assumption of abandonment or abolition rather than on specific conduct by the particular landlord. There could also be great difficulty in proving sufficiently unambiguous actings on the part of the landlord which had lulled the tenant into a false sense of security. In practice, too, a purchaser's solicitor could hardly be expected to accept a seller's assurance that the conditions necessary for an implied waiver or discharge had been satisfied. So the doctrine would be of value only in court proceedings.

A new statutory prescription based on non-exercise of rights

6.26 We have provisionally rejected the idea of applying the long negative prescription in its present form to the underlying right to leasehold casualties. Here we consider whether a new form of prescription would be justified, and practicable, in the special situation of leasehold casualties. It might, for example, be provided that where a leasehold casualty has, on the last two occasions when it fell due, been neither paid nor demanded within five years after the date on which it fell due, the casualty should be extinguished by prescription. The merit of this solution is that it would be related specifically to the non-exercise of the right on two or more occasions and not simply to the passage of time. In practice there would usually also be a lengthy passage of time because casualties only fall due, in the normal course of events, at infrequent intervals. The right to a duplicand payable every 21 years would, for example, fall under the proposed new prescription only after 47 years.[28] If properties subject to casualties on transfer change hands on average once every 15 years then the right to such a casualty would prescribe, on average, only after 35 years.

6.27 Our provisional view is that in the exceptional case of leasehold casualties some variation of the law on prescription would be justified. A large part of the real social problem of leasehold casualties at the present time is that attempts have been made to revive and enforce rights which in fact had not been exercised for decades. The situation is special because of the archaic nature of the right to exact casualties and the fact that feudal

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[25] See pp 68-69 and 71.
[26] *Porteous's Trs v Porteous* 1991 S.L.T. 129 at 132.
[27] If the landlord had been collecting rents regularly then a change in the tenant would be obvious, but the ground rents under very long leases are often so small as not to be worth collecting. So this source of information is often not in fact available to the landlord.
[28] Ie two periods of 21 years each plus an extra period of 5 years after the date when the second payment of the duplicand fell due.

casualties, and casualties in lands subject to ground annuals, have long been abolished. The extinction of anomalous and archaic rights by non-use is, we think, more easily to be inferred than the extinction of more normal rights. The protection of people from attempts to enforce unexercised and forgotten rights is particularly justifiable where the rights are of an archaic and anomalous nature.

6.28 We recognise that there will often be difficulties of proof in relation to events which may have occurred many years previously. The burden of proving, on the normal civil standard of balance of probability, the facts necessary for extinction by non-exercise would normally rest on the tenant. That burden might be difficult to discharge and it is for consideration whether the onus should be shifted to the landlord to produce a duplicate demand or a receipt. It may be reasonable to suppose that if the casualty had actually been paid or demanded the landlord would have a record of it. We invite views on this question. One great advantage of a solution based on a new prescription of this type is that it would deal satisfactorily with the situation where casualties exigible under a sub-lease have never been claimed or paid because the intermediate lessor has disappeared or become untraceable.

6.29 An important question is whether events prior to the date of commencement of the new legislation should be regarded as relevant, and if so on what conditions, for the purposes of a new statutory prescription based on non-exercise of rights. It is arguable that events prior to commencement ought to be regarded as relevant. The new prescription is designed to draw an appropriate legal conclusion from the non-exercise of rights in the past and to bring the law into line with reality. However, it must also be recognised that the effect would be to extinguish rights which a person taking legal advice would have been justified in thinking probably still subsisted.[29] We would be grateful for views on the question whether, in the special situation of leasehold casualties, it would be fair and reasonable to apply the new rule to events before, as well as after, the date of commencement of the new legislation, either unconditionally, or subject to a right on the part of the landlord to preserve the right to future casualties by notice, or perhaps only if one of the casualties fell due after the date of commencement. We invite views on the following proposition and questions.

2. (1) It should be provided that the right to future casualties of a particular type under a lease should be extinguished by prescription if a casualty of that type has, on the last two occasions when it fell due, been neither paid nor demanded within five years after the date on which it fell due.

(2) Views are invited as to whether it would be reasonable to place the onus on the landlord to produce evidence that the casualty had been paid or demanded.

(3) Should this new rule on prescription apply to events occurring before, as well as after, the date of commencement of the new legislation

(a) always

[29] We say "probably" because there might be doubts about the applicability of the ordinary law on waiver and long negative prescription.

(b) unless the landlord, before the expiry of one year after the date of commencement, gives notice that it is not so to apply

(c) only if one of the casualties fell due after the date of commencement

(d) never?

Before answering the above question consultees may wish to consider the options for abolition of leasehold casualties discussed in Part VII. Those options, if favoured, would supersede some possible responses to the above question.

Liability for former tenant's casualties

6.30 In the case of rents the assignee of a lease comes in place of the cedent and is liable not only for future rents but also for arrears.[30] The cedent also, however, remains liable for arrears.[31] On principle the same rule would probably apply to casualties but there appears to be no authority directly in point. As a matter of policy we do not see why the landlord should have a choice of debtor in the case of casualties. To hold a new tenant liable for arrears of casualty as well as any casualty falling due on his own entry or during his own tenure is only calculated to increase the hardship which the enforcement of these rights is already causing. The five year prescription of each casualty falling due limits the problem but does not eliminate it entirely as there could be two transmissions within a five year period. There could also be cases where the right had not prescribed because a relevant claim or acknowledgement had been made. We recommend that for the future:

3. It should be provided that an assignee of a lease is not liable for any arrears of casualties which fell due under previous tenancies.

Liability of sub-tenants

6.31 Leases of the type with which we are here concerned were often intended for building purposes in much the same way as feudal grants or contracts of ground annual. A plot of building land would be let to a lessee on a ground lease, the expectation being that the lessee would build houses or shops on it and dispose of the separate lots thus created. In very long building leases of this type there would be no implied prohibition of sub-leases and very often no express prohibition either. So it was quite common for the lessee, having built on the ground, to grant sub-leases of the individual plots thus created. One reason for preferring a sub-lease to a partial assignation was that a sub-lease enabled effective burdens to be created.[32] Sometimes also a lessee of a single piece of ground would grant a sub-lease of the whole of it if that was not prohibited by the lease. This was a well-recognised way of avoiding the payment of a casualty by way of composition on the entry of an assignee.[33]

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[30] Rankine, *Leases*, (3rd edn 1916) p 195.
[31] Rankine, *Leases*, (3rd edn 1916) p 194.
[32] At one time it was doubtful whether additional real conditions which would be binding on successors of an assignee could be effectively included in a partial assignation. This was permitted by s 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.
[33] See the *Report of the Scottish Leases Committee*, Appendix 5.

6.32 In the case of a sub-lease the original lease remains fully in place between the landlord and the original tenant. There is no assignation and hence the obligation to pay a casualty on assignation is avoided, or at least postponed until there is an assignation of the principal lease. The sub-lease may itself provide for the payment of casualties but that is a matter between lessee (the intermediate lessor) and sub-lessee.

6.33 Any obligation on a sub-lessee to pay casualties is owed to the person who granted the sub-lease and his or her successors (that is, to the intermediate lessor) and not to the landlord. There being no contractual link between the landlord and the sub-lessee, the landlord cannot claim a casualty from the sub-lessee.[34] The existing law seems to be clear but it would do no harm in a statute which was designed to minimise difficulties in this area to include an express provision to confirm the position. We suggest therefore that for the avoidance of any possible doubt:

4. It should be provided that a sub-tenant is not liable for any casualties other than those falling due under the sub-lease to the intermediate lessor.

Irritancies

6.34 Provisions in leases imposing obligations on tenants are commonly accompanied by irritancy provisions whereby the landlord is entitled to bring the lease to an end if the tenant is in breach of the obligations. These provisions are often very questionable from the point of view of fairness and public policy.[35] Existing legislation has limited their use in certain areas and we intend to examine their operation in other areas in the course of our work in property law generally.[36] In relation to leasehold casualties the sanction of irritancy seems to us to be entirely disproportionate and inappropriate. We recommend that:

5. It should be provided that the sanction of irritancy is not available in relation to leasehold casualties.

Duplicands

6.35 In relation to feudal casualties there was a great deal of difficulty in deciding whether a duplicand meant one extra feuduty or two extra feuduties for the year in question. There were conflicting decisions in the Court of Session and conflicting views among commentators. In some areas of Scotland the operation of the Feudal Casualties (Scotland) Act 1914 was "largely at a standstill owing to disagreement on this important point".[37] It was hoped that the matter might be decided by an appeal to the House of Lords but the result was a two-two split.[38] A special Act of Parliament had to be passed.[39] It provided that a duplication of feuduty was deemed to be one feuduty only over and above the normal feuduty for the year.[40] Similarly a duplicand or double of the feuduty was deemed to be inclusive of the feuduty for the year so that the amount of the casualty was

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[34] See Rankine, *Leases,* (3rd edn 1916) p 198 - 199. Rankine points out that this result follows even if the sub-lessee has bound himself in the sub-lease to implement all obligations incumbent on the lessee.
[35] See Rennie, "The Theory and Ethics of Irritancy" 1994 JR 283.
[36] See the Land Tenure Reform (Scotland) Act 1974 s 15 (feuduty); Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 4.
[37] Burns, pp 25-26.
[38] *Commercial Union Assurance v Waddell* 1919 SC (HL) 38.
[39] Duplicands of Feu Duties (Scotland) Act 1920.
[40] s 3.

only one extra feuduty.[41] These rules applied unless the feu writ declared that the duplicand or double feuduty was to be over and above the feuduty of the year or otherwise declared unequivocally that it was not to include the feuduty of the year.[42] Even if there were such an unequivocal provision, only one extra feuduty was due if the superior had ever accepted one as being sufficient under the feu writ in question.[43]

6.36 We suggest later ways in which duplicands might be phased out of the system of leasehold casualties and it is likely that, because of their small value in all or almost all cases, their abolition or redemption will not prove to be a contentious or difficult matter. Nonetheless it might be useful to resolve any possible doubt as to the meaning of a duplicand or similar payment.[44] We therefore suggest that:

6. It should be made clear by legislation that any reference in a lease to a duplicand (whatever the terms used and whether or not the duplicand is expressed to be payable over and above the rent) is deemed to be a reference to one extra rent for the period in question, and similarly for analogous terms.

[41] s 4.
[42] ss 3 and 4.
[43] s 5.
[44] Evidence to the Guthrie Committee referred to occasional provisions for a quintupled rent every 19th year. See Cmnd 8656 (1952) Appendix 5, para 3.

PART VII ABOLITION OR REDEMPTION

Introduction

7.1 The limited clarifications and reforms recommended above would go some way to reduce the level of the difficulties currently being experienced in relation to leasehold casualties. Clearly, however, they would not go far enough. We suggest that the ultimate aim should be to phase out this type of exaction. Leasehold casualties have no place in a modern Scottish law on property. A statutory scheme for the abolition or redemption of leasehold casualties should be introduced.

The main issues

7.2 In relation to any statutory scheme two main issues arise for consideration. The first is whether a statutory scheme should provide (a) for abolition without any compensation being payable by the tenant to the landlord or (b) for redemption with the payment of compensation by the tenant to the landlord. Whichever option is chosen, further questions arise as to the form any scheme should take. The answers are not necessarily the same for all types of casualty.

Outright abolition

7.3 There is an argument that certain forms of casualty are so contrary to public policy that they could properly be abolished outright without any compensation and without giving the landlord any option to preserve them. The argument is that the right to exact casualties based on rental value when a property changes hands is like the right to exact a private fine. Indeed, it might be said, the feudal casualty of composition was often regarded as a fine payable by the new owner or vassal to the superior. The "offence" consisted of taking entry without the superior's consent. The law regards private fines as contrary to public policy.[1] It is too late for the courts to take the view that casualties are contrary to public policy but, it might be argued, there is no reason why the legislature should not. It could also be argued by those favouring outright abolition that "rental value" casualties in building leases are not, except possibly in a very indirect way in some cases, a return on capital laid out by the landlord or the landlord's predecessors to create the rental value. It is the tenant, or the tenant's predecessors, who have invested capital in building on the ground. A casualty provision allows the landlord to obtain part of the value of the tenant's improvements. It therefore operates to discourage improvements and developments. It also tends to impede the free operation of the housing market in certain areas. For these reasons too it could be said that it is contrary to public policy.

7.4 Although there is some force in this argument, and we would welcome views on it, our preliminary view is that it is too extreme.

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[1] *Craig v McBeath* (1863) 1M 1020 at 1022 ("Parties cannot lawfully enter into an agreement that the one party shall be punished at the suit of the other.").

7.5 There may, however, be a distinction to be drawn between casualties payable on the assignation of a lease during the tenant's lifetime and casualties payable on the transfer of the lease to a beneficiary on the tenant's death. We are not aware that casualties payable on death have in fact been exacted. In some circumstances it might be considered insensitive if they were. It may be, therefore, that there is a stronger case for abolishing casualties of this type without compensation than there is for abolishing casualties of composition.

7.6 There is a different argument for abolishing, without compensation or any protection of the landlord's interests, casualties based on a multiple of the ground rent. The typical such casualty is the duplicand payable every 19 years but many, perhaps most, casualties of relief on the death of a tenant are also of this nature. These casualties do not involve an exaction based on the value of the tenant's improvements. They are generally small in amount and, we believe, are rarely if ever exacted. They are little more than a nuisance in leasehold titles and there is a case for eliminating them from Scottish property law. The argument for abolishing them without compensation is that it can be assumed that they have, for practical purposes, no value or such a negligible value that the costs of a redemption or compensation scheme would not be justified. We would be grateful for views, particularly from the representatives of landlords, as to whether this assumption is justified.

7.7 It might be argued that landlords should be compensated out of public funds if any casualties having an actual value were abolished without any compensation being payable by the tenant. This would be a question for the government but some care would need to be taken to avoid setting a dangerous precedent. We do not believe that every law which is passed to remedy an injustice or correct an abuse needs to be accompanied by compensation out of public funds for those who were deriving benefit from it.

7.8 We have formed no concluded view on the question of outright abolition, without compensation, of some or all leasehold casualties but would welcome views, particularly from landlords and those representing landlords' interests.

7. We would welcome views on the question whether it would be acceptable to abolish without compensation

(a) all leasehold casualties based on rental value

(b) all leasehold casualties exigible on death

(c) leasehold casualties based on the ground rent or a multiple of the ground rent, or

(d) all leasehold casualties.

Abolition unless landlord opts for preservation

7.9 If outright abolition is rejected, the question would then arise whether there is some way of eliminating dead or abandoned casualties from the system while recognising the rights of those landlords who regard the casualty provisions in their leases as still alive.

7.10 The source of much of the difficulty in relation to leasehold casualties is that there are, and have been, many dead or abandoned casualties. "Dead" casualties are often the

result of sub-leases. The original tenant of a plot of building ground may have built flats or houses on it and granted long sub-leases in exchange for a capital sum. The sub-leases may have contained provisions for casualties, based on an apportionment of the casualties in the main lease and enforceable by the intermediate lessor, but on the sale of the last house or flat the intermediate lessor may have ceased to take any interest in the property and, in the course of time, may have become untraceable. In such cases both the casualties in the sub-leases and the casualties in the main lease may, for all practical purposes, be regarded as dead. Other dead casualties may be the result of defective drafting of the original provisions.[2] "Abandoned" casualties include those duplicands, and other casualties based on a multiple of the ground rent, which are of such trifling value that they have for many years not been worth collecting. They may also include other casualties which particular landlords have decided on principle not to collect.

7.11 One way of sifting out live casualties from the mass of dead or abandoned casualties would be to abolish all casualties, or all casualties of a particulary moribund type, as from a certain date unless the landlord has opted, by a simple notice, to preserve the right to the casualty. This would effectively and quickly clean the system of dead casualties while enabling those landlords who take a commercial attitude to casualties to preserve their position, subject to the provisions on redemption which we consider later. In order to preserve a record of the preservation of the casualty it would be necessary to provide for the notice to be registered in the Register of Sasines or, in the case of property on the Land Register, sent to the Keeper for noting on the title sheet. The notice would have to identify the lease under which the casualty is due and also the land in respect of which it is due. We can see attractions in this type of approach, if coupled with a scheme for the redemption of those casualties which are not abolished.

7.12 It might be objected that to require landlords to go through their records in order to identify leases with casualty provisions which are worth preserving and then to take a positive step to keep the casualties alive would be an unjustified imposition. Against this, however, it could be argued that only those landlords who have in fact abandoned their rights would not be in a position to exercise the option to preserve casualties and that the need to find an effective way of weeding dead or abandoned casualties out of the system justifies a requirement that the landlord should take a simple step to preserve the right of exaction. Any landlord who views rights to casualties as an important source of revenue, and particularly any landlord who has recently bought rights to casualties for commercial reasons, would easily be able to take the simple steps required. The sending and registration of a simple notice is not much to ask of landlords who wish to preserve their rights. There is a very strong practical argument for having such a system and that is that, if a scheme of compulsory redemption on a sale of the tenant's interest is introduced, it could be very difficult in many cases to identify the landlord to whom any redemption sum should be paid. This has been a real problem in relation to the redemption of feuduties. A system for identifying live casualties and the landlords with an interest in them might be thought to be highly desirable if not essential as a prerequisite to a scheme for compulsory redemption on sales.

7.13 We invite views on the following proposition and questions.

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[2] For example, a provision for the payment of a casualty on the assignation of the whole lease may not catch partial assignations. See eg *Kaye and Others v Archibald* 27 June 1996 (Sheriff Court at Hamilton, unreported).

8. (1) We would welcome views on the question whether it would be acceptable to abolish without compensation, unless the landlord opts for preservation,

(a) all leasehold casualties based on rental value

(b) all leasehold casualties exigible on death

(c) leasehold casualties based on the ground rent or a multiple of the ground rent, or

(d) all leasehold casualties.

(2) Casualties coming under this option would cease to be exigible after a date one year after the commencement of the new legislation unless the landlord gave notice before that date that the right to the casualty was preserved. The notice would have to be sent to the tenant and would have to identify the lease and the land in respect of which the casualty was due. A copy would have to be registered in the Register of Sasines or, in the case of land on the Land Register, sent to the Keeper for noting.

7.14 Any solution which requires notices to be registered has to be carefully assessed from the point of view of its potential burdens on the Department of the Registers. In this particular case, however, the number of notices is unlikely to be large. Leasehold casualties are confined to certain areas of Scotland and they do not feature in every long lease. Even where a lease does provide for a casualty, the casualty may be dead or abandoned. It would not be in the interests of landlords to incur the trouble and expense of sending and registering notices in respect of casualties of trifling value. The number of notices would therefore be limited. The registration process would not be a continuing one. There would be a time limit of a year. There would also be an incidental advantage from the registration process in that accurate information would become available as to the precise extent of surviving leasehold casualties.

7.15 The implications for conveyancing practice must also be taken into account. In the longer term there can be little doubt that the results of weeding out dead or abandoned casualties, and providing a redemption scheme for surviving casualties, would be wholly beneficial. In the period before the date of abolition of those casualties which landlords had not opted to preserve there could, however, be a temporary freezing effect on sales of property subject to casualty payments on transfer. Tenants might wish to wait and see whether the liability to pay a casualty would or would not survive the abolition date.[3] This is probably an inevitable feature of any scheme for statutory abolition as from a certain date and it ought to be possible for practitioners to find ways of countering or mitigating the effect. We suspect that any temporary problems would be much smaller in overall effect than the problems which would result from having to apply a statutory redemption scheme to all potentially exigible casualties.

[3] However, if a redemption scheme was also operating and the cost of redemption was reasonable then it would be unlikely that many tenants would wish to wait for a year before proceeding with a sale that was otherwise wanted.

7.16 The registration of a notice of preservation by the landlord would not cure any defects in the provision imposing the casualty and would not deprive the tenant of any defence to a claim for the casualty. A casualty provision which was void for uncertainty would still be void for uncertainty. A right which had already prescribed would not be restored. Care would need to be taken to make this clear in the drafting of any statutory provision to give effect to the above proposals.

A redemption scheme

7.17 In the rest of this part we will assume that, whether or not a scheme for abolition or partial abolition on any of the above lines is introduced, some leasehold casualties will remain. We will examine the possible forms that a scheme for redemption on statutory terms might take and invite views on some provisional proposals and questions.

An optional or compulsory redemption scheme?

7.18 An "optional" scheme as used here refers to a set of rules whereby at least one of the parties to the lease could call on the other to have the casualties in question extinguished on payment of a sum calculated as prescribed by the legislation, and under which casualties would not be extinguished unless and until such a call were made and followed by the appropriate action. A formula along these lines applied to feudal casualties between 1874 and 1914, redemption taking place at the vassal's option.[4] A "compulsory" scheme is one whereby the removal of leasehold casualties from the law is ensured by requiring redemption to take place regardless of personal choice on the occurrence of an event or the lapse of a specified period of time. The Land Tenure Reform (Scotland) Act 1974 provides, for example, for mandatory redemption of feuduty on transfer for value of the *dominium utile*, with the feuduty being discharged and the obligation to compensate arising on that occurrence.[5] There are other possible schemes. For example the Feudal Casualties (Scotland) Act 1914 provided that either the superior or the vassal could exercise an option for redemption. If neither did so, all feudal casualties and rights to compensation in respect of their demise were abolished on the expiry of 15 years from the commencement of the Act.[6]

7.19 In relation to leasehold casualties we think that a scheme for compulsory redemption on or by a fixed date, or for redemption at the option of the landlord, would merely exacerbate the problems which have arisen. Liability to pay any sizeable casualty will often arise only on entry of an assignee. To compel tenants who have no intention of selling their property, and who might never in the normal course of things have had to pay a casualty, to pay money to their landlord to redeem leasehold casualties would, we believe, be unacceptable. There would not, however, be the same objection to providing for compulsory redemption on the entry of an assignee of the lease following on a sale of the property. There would normally be some funds available at that time and in practice redemption would probably be insisted on by a purchaser in any event. The advantage of providing for compulsory redemption on sales is that it would help to cleanse the system of surviving casualties. The system might be a simplified version of that used for feuduties in the Land Tenure Reform (Scotland) Act 1974.[7] The casualty would be automatically

[4] Conveyancing (Scotland) Act 1874, ss 15-19.
[5] s 5.
[6] s 4.
[7] See the 1974 Act s 5.

redeemed on the registration of the assignation of the lease. The redemption sum would become a personal debt due to the landlord at that date by the seller. It would be subject to the normal prescriptive period of five years.[8] We have no doubt that a scheme for redemption of leasehold casualties on statutory terms should be introduced (if it is assumed that the option for outright abolition of all casualties is rejected) and that it should be capable of being activated at the option of the tenant. We have not formed a concluded view on the question whether redemption should be compulsory on an assignation of the lease on a sale of the tenant's rights in the property.

9. (1) In relation to leasehold casualties which are not caught by, or which survive, any abolition provisions, a scheme for their redemption on statutory terms should be introduced.

(2) The scheme should provide for redemption at the option of the tenant.

(3) Views are invited on the question whether it should also provide for compulsory redemption on registration of an assignation of the lease on a sale.

The statutory terms: background considerations

7.20 The underlying assumption of a redemption scheme for leasehold casualties is that a redemption figure is being sought which would not be unfair or unduly harsh to tenants, who must be offered the possibility of redemption on acceptable terms if the legislative policy is to be achieved, or unfair or unduly harsh to landlords.

7.21 In assessing what would be unfair to landlords it must be remembered that, for very many years, no well-advised person would have bought property subject to ultra-long leases as a safe long-term investment likely to yield a secure and trouble-free return in the form of casualties. It has been known since at least the beginning of this century that feudal casualties, and related types of casualties, were liable to be abolished. The power given in the 1914 Act to the Court of Session to introduce a scheme for the abolition of other casualties similar to that for the redemption of feudal casualties would in itself have put any knowledgeable adviser on guard and legislative developments since then have only reinforced the impression that leasehold casualties had a precarious existence. An investment in leasehold casualties would have been regarded by most advisers as a high risk investment. The legal and practical difficulties of collecting leasehold casualties,[9] and the unfortunate public image of landlords who do so, must also be kept in mind. The possibility of legitimate avoidance measures being taken is also a relevant, although perhaps not at present a very weighty, consideration. The landlord's interest in leasehold casualties cannot be regarded as a very marketable interest.

7.22 It is also important to bear in mind the need for any redemption scheme to be simple and easy to put into operation. A scheme which required difficult distinctions to be made between different types of casualty or which required the use of complicated calculations would not be likely to be so effective as one which enabled the sum due on redemption to be

[8] This would be important in those cases where the landlord could not be traced.
[9] Including the real possibility that some apparently valid casualties may turn out to be unenforceable.

calculated quickly and easily. A complicated scheme based on arbitrary assumptions (as some earlier schemes were) is not necessarily less arbitrary than a simpler scheme.

Option 1 - a scheme based on a multiplier of the casualty

7.23 *The 1954 Act model*. Perhaps the most obvious option for consideration is a scheme based on that used in the 1954 Act[10] where the redemption sum would be a multiplier of the amount of the casualty or the highest casualty payable under the lease.

7.24 *No "relief abatement".* If such a scheme were adopted we would not wish to recommend the use of relief abatement provisions on the lines of those in the 1954 Act. In the case of "death or transfer" casualties the relief abatement provision in the 1954 Act was in the following terms.[11]

> "Provided that if at the date of the said notice and after payment of any casualty which may then be exigible the state of the title is such that the next casualty may be that payable on the entry or succession of an heir, and the amount of the casualty payable by an heir is less than the amount which would be payable on the entry of a singular successor, the said sum shall be subject to an abatement of two-fifths."

Such provisions may have had some place in a scheme for the redemption of feudal casualties, for the technical reasons given earlier.[12] They have no place, in our view, in a scheme for the redemption of leasehold casualties. However, as the relief abatement provisions of the earlier schemes had a considerable effect in many cases, often halving or almost halving the redemption sum due, it would be reasonable to compensate for their removal by adjusting the basis of calculation of the redemption sum.

7.25 *Appropriate formulas.* In the case where the only casualty payable is a duplicand or other such non-rent payment due at regular fixed intervals one obvious solution would be to follow the formula used in the 1954 Act. The basic amount would be 25 times the casualty divided by the number of years constituting the interval between the dates when the casualty falls due. The redemption sum would then be such a sum of money as would, with the addition of simple interest at 5% per annum (or whatever other rate might be more appropriate at the time of introducing the legislation), produce the basic amount on the next occurrence of the fixed interval.[13] One objection to that formula is that it is more complicated than necessary, bearing in mind that duplicands will generally be of small amount. Another objection is that it may not always be easy to determine, without a certain amount of research, when duplicands fall due. They may not have been collected for many years. There is therefore a strong argument for a simpler formula. It might be provided, for example, that the redemption sum for all duplicands payable under a lease should be one and a half times the duplicand. This would be more favourable to the landlord in many cases (particularly if there were still some years to run until the next duplicand fell due) but not in those cases where the duplicand was due within a few years. However, tenants would benefit from the much greater simplicity of the scheme. Our provisional preference is

[10] Long Leases (Scotland) Act 1954, ss 7 - 9 and Sch 2.
[11] Sch 2, para 1(b)(ii).
[12] See para 4.15.
[13] Tables can be produced to make the calculations easier. See e g Burns, pp 176-180.

for a simple scheme of this sort for those cases where duplicands fall to be redeemed[14] but we would welcome views.

7.26 In the case of casualties payable only in the event of a death,[15] the practical effect of the 1914 Act, when discount and relief abatement were taken into account, was that the redemption sum was rarely more than the amount of the casualty.[16] The 1954 Act provided that the redemption sum would be the amount of the casualty but that this should be halved if the relief abatement applied. It is not clear, however, that the relief abatement ever could apply in this case.[17] Taking this into account, it would not be unreasonable, or out of line with earlier schemes, to provide that the redemption figure should be the amount of the casualty. It is worth noting that such "death only" casualties might never in fact be payable or might be payable only at extremely long intervals. Life expectancies have increased considerably since 1914 and "death only" casualties are inherently avoidable by transfer during life. In many cases the landlord would, under a redemption scheme of the kind proposed, receive on redemption a sum which he would never otherwise have received. From the tenant's point of view, eliminating a "death only" casualty from the titles would not usually increase the value of his property by any significant amount, if at all. In short we think that in the case of casualties payable only in the event of a death a redemption sum of the amount of the casualty would be reasonable, if not actually over-generous, to the landlord.

7.27 In the case of casualties payable only on "death and transfer" the 1954 Act scheme provides for a redemption sum of one and two thirds the amount of the highest casualty. However, that is reduced by two fifths if the relief abatement applies, as it often would. The effect of that reduction (as three fifths of five thirds equals one) is that the redemption sum becomes simply the amount of the highest casualty. If no provision is made for relief abatement then we think that there should be a reduction in the basic multiplier of one and two thirds. A redemption sum of, say, the amount of the highest casualty payable might be considered a reasonable replacement for the 1954 Act formula if this particular type of redemption scheme is favoured and if there is to be no provision for relief abatement. From the landlord's point of view it must be considered doubtful whether anyone would pay more than that for a transfer of the right to exact future casualties of this nature.

7.28 As leasehold casualties can take various forms and combinations it would be essential to have a sweeping up provision to cover forms and combinations other than those mentioned above. We suggest that such a provision might provide that in the case of any other type of casualty, or combination of casualties, the redemption sum should be the amount of the highest casualty which might become exigible in the twenty years after the date of the redemption notice. Payment of that sum should discharge all the casualties due under the lease, with the exception of duplicands exigible at regular fixed intervals which would be subject to their own redemption regime.

7.29 *Outline of option 1.* If, as suggested above, the basic measure of the redemption sum for all casualties other than those of the duplicand type is the amount of the highest such casualty then it becomes possible to produce a scheme which, although starting from the

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[14] Most would be abolished automatically under some of the options discussed earlier.
[15] Again most such casualties might be abolished automatically under some of the options discussed earlier.
[16] See para 4.10 above.
[17] See para 4.15 above.

scheme in the 1954 Act, is expressed in a very much simpler way. In summary, option 1 might take the following form. It would, of course, apply only to a casualty which was still in existence at the redemption date. Many casualties might be eliminated from the system automatically if some of the options discussed earlier were adopted.

10. Option 1

(1) Where a casualty consists of a duplicand or similar payment due at fixed and regularly recurring intervals, the redemption sum for such payment would be one and a half times the amount of the duplicand or similar payment.

(2) Where the casualties payable under a lease take any other form, the redemption sum for all such casualties (other than any payment coming under paragraph (1) above) would be the amount of the highest such casualty which could become payable in the twenty years after the date of the redemption notice.

7.30 Option 1 would have the merit of being a development of schemes already used in relation to feudal and leasehold casualties. From the landlord's point of view it would also have the merit of basing the amount of the redemption sum on the amount of the casualties. However, the scheme would have the corresponding disadvantage of being based in some cases on actual rental value. That would involve a great deal of uncertainty and expense in most cases because of the need for expert valuations. It would also involve providing compensation to the landlord on the basis of value added to the land by the tenant or his or her predecessors. That in turn would mean that the redemption sums would sometimes be quite considerable - higher than many observers might expect.

Option 2 - a scheme based on a formula not related to the amount of the casualty

7.31 Another option would be to base the redemption sum for all casualties (other than duplicands and similar payments) on a formula not directly related to the amount of the casualties. This option would eliminate or reduce the problem of valuations. Several variants of this option are possible. The actual amount of the redemption sum brought out would depend, in some variants, on what multipliers or figures were chosen. There would be scope for fine tuning here in order to produce a fair and reasonable redemption scheme.

7.32 All variants of Option 2 would have some elements in common. The redemption sum for duplicands and similar casualties would be the same as in Option 1 - namely, one and a half times the amount of the casualty. In relation to all other casualties the redemption sum would be based on the formula unless the tenant opted to pay the amount of the highest such casualty. The possibility of paying a redemption sum equal to the highest casualty would be designed to prevent unusual cases giving rise to freak results. The purpose would be to ensure that the tenant would never be worse off than under Option 1. For the rest, the question is one of finding a suitable formula. We have identified several possibilities but consultees may be able to suggest others.

7.33 *Variant 1- multiple of ground rent.* The redemption sum for all casualties other than duplicand-type casualties would be a multiple of the ground rent. Ground rents are generally so low that the multiplier might have to be fairly high if a fair and reasonable figure were to be produced in the case of casualties based on annual rental value. To guard against the possibility of freak results in unusual cases (for example, an unusually high

ground rent and an unusually low rental value) the tenant would, as noted above, be given the option of redeeming for an amount based on the amount of the casualty.

7.34 The advantage of a scheme of this nature is that the redemption sum would generally be easy to calculate and would be related to the value placed by the original parties to the lease on the use of the ground itself. If an appropriate multiplier were chosen the amounts brought out could reflect a fair balance between the interests of landlords and tenants, taking into account also the public interest in eliminating leasehold casualties from Scottish property law. The scheme would have the great merit of being simple and of not requiring reference, in the normal case, to anything outside the titles for the purpose of calculating the redemption sum.

7.35 *Variant 2 - a scheme based on the last available valuation roll.* This variant would base the redemption sum, for casualties not based expressly on ground rent, on the figures in the last available valuation roll.[18] To cater for unusual cases it would again be prudent to give the tenant the option of redeeming non-ground-rent casualties for the amount of the highest such casualty. It would be for consideration whether the rateable value for a property stated in the last available roll should be increased by an allowance for inflation.

7.36 This scheme would be comparatively easy to operate and would make use of an existing record of rental values, albeit one compiled for a different purpose. However, it would base compensation partly on the value of tenants' improvements and it would require reference to material outside the titles. Any allowance for inflation would add a complicating factor which would be undesirable. On the other hand it might also be considered undesirable to base redemption sums on an admittedly out of date register.

7.37 *Variant 3 - a scheme based on council tax bands.* In the case of dwelling houses it would be possible to base redemption sums, for casualties not based expressly on ground rent, on the valuation bands set out in section 74 of the Local Government Finance Act 1992 for the purposes of the council tax. The bands set out in section 74 are as follows.

Range of values	Band
Values not exceeding £27,000	A
Values exceeding £27,000 but not exceeding £35,000	B
Values exceeding £35,000 but not exceeding £45,000	C
Values exceeding £45,000 but not exceeding £58,000	D
Values exceeding £58,000 but not exceeding £80,000	E
Values exceeding £80,000 but not exceeding £106,000	F
Values exceeding £106,000 but not exceeding £212,000	G
Values exceeding £212,000	H

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

It would be possible to provide, for example, that for houses in band A the redemption sum for all casualties not based on ground rent would be £x and to increase the redemption sum by £y for each succeeding band. In the case of property which is not a dwelling there will be no pre-existing band but the value of the property could be determined and the above banding system applied. Ascertainment of capital values within the above bands should not be unduly difficult or expensive and non-dwelling properties constitute only a small proportion of those in relation to which casualties are payable. So the system could work, even in relation to commercial properties, but with the one difference that a valuation would be required in the case of such properties. As in the two preceding options it would be prudent to give the tenant the option of redeeming non-ground-rent casualties for the amount of the highest such casualty.

7.38 This scheme would be arbitrary but it would provide a simple method of fixing a redemption sum which bore some relation to the value of the property. As houses have already been allocated to bands for council tax purposes there would be no need for any extra valuations in the case of residential property. It might, however, be objected that it is unfair to the tenant to base the redemption sum on the value of the property as that reflects the value of building by the tenant's predecessors. The force of this criticism would depend on the redemption sums chosen.

7.39 The above possibilities can be summed up as follows.

10. Option 2

(1) The redemption sum for a casualty which is expressly based on the ground rent or a multiple of the ground rent, would be one and a half times the amount of the casualty.

(2) The redemption sum for all other casualties due under the lease would be as follows, unless the tenant opted to pay a redemption sum equal to the amount of the highest such casualty:

Variant 1 **- a multiple of the amount of the annual ground rent**

Variant 2 **- the rateable value for the property stated in the last available valuation roll**

Variant 3 **- a sum fixed by reference to the valuation bands for council tax purposes.**

(3) Views are invited as to

(a) an appropriate multiplier for the purposes of Variant 1;

(b) whether there should be an allowance for inflation for the purposes of Variant 2; and

(c) appropriate redemption sums for the purposes of Variant 3.

Other options

7.40 It would be possible to devise other options, or other variants of Option 2. For example, the redemption sum for all casualties not based on ground rent could simply be based on the area of the property. To avoid difficulties of measurement the scheme could use fairly broad bands of area. For example, the redemption sum might be, say, £n for any property with an area of less than a quarter of an acre (which would no doubt include all tenement flats), increasing by £n for every quarter of an acre thereafter. Again the tenant could have the option of redeeming for the amount of the highest casualty. Or it might be provided that the redemption sum would be a fixed sum for properties below a certain value (or in certain lower council tax bands) but would be based on actual rental value in the case of properties of higher value. Consultees may be able to suggest other options.

Invitation for views

7.41 We invite views on the above options for a redemption scheme. All options assume that arrears of casualty which have fallen due on past occasions, and which have not prescribed, would remain due but that, in the case of a redemption triggered automatically by an assignation, the redemption sum would not be over and above the sum falling due on the occasion of the redemption itself. We would be particularly grateful for indications of the multipliers or other relevant figures which consultees would consider appropriate. We would also be grateful for suggestions for other options or combinations of options for calculating redemption sums.

PART VIII PROCEDURE

The 1954 model

8.1 The procedure for redeeming casualties at the option of the tenant[1] could be based on that used in the Long Leases (Scotland) Act 1954[2] with appropriate modifications. In order to redeem a leasehold casualty the tenant would have to give notice to the landlord requiring him to grant a discharge, or even a simple receipt, in a statutory form in accordance with the provisions of the new Act. The Act itself would fix the redemption price payable. There would be provisions to deal with the possibility that the landlord might refuse to grant the discharge. The tenant could, in that event, apply to the sheriff craving the sheriff to ordain the landlord to sign the necessary form. If the landlord still failed to sign, the sheriff could direct the sheriff clerk to sign on behalf of the landlord. The sheriff might be given power, at this stage, to resolve any dispute between the landlord and the tenant as to the amount of the redemption sum due under the Act. It is for consideration, however, whether such questions should be referred to the Lands Tribunal for Scotland. The appropriate solution might depend on the method adopted for determining the redemption sums. Some options would leave very little room for disputes.

Sub-leases

8.2 In theory sub-leases do not present any particular problem. A sub-tenant would be involved only with the intermediate landlord and would be concerned only to redeem any casualty due under the sub-lease. The intermediate landlord would be concerned only to redeem any casualty due under the main lease. In practice, however, intermediate landlords may be non-existent or difficult to find. A plot of ground may have been developed and split up into units by the original tenant who may then have sold off the units, apportioning the rent and other prestations among the sub-tenants and taking the sub-tenants bound to pay to the landlord. The sub-tenants may have paid the rent to the landlord for many decades. The original tenant may have disappeared or died and his or her successors may be impossible to trace. The 1954 Act made provision for the case where an intermediate landlord was unknown or could not be found. In such a case the tenant could apply to the sheriff for an order dispensing with the intermediate landlord's signature and directing the sheriff clerk to sign on behalf of the intermediate landlord. The sheriff could, if he thought fit, require the tenant to consign in court the sums payable under the Act. Whether any such provision is necessary in the new Act would depend on the response to the other options discussed earlier. Some of those options would have the effect of weeding out of the system automatically those cases where intermediate landlords had disappeared. If such a provision were necessary, then we think that it should apply to all landlords and not just to intermediate landlords.

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[1] The question of automatic redemption on an assignation is covered in para 7.19 above.
[2] See, in particular, ss 1, 6, 13 and 28.

Provisional proposals

8.3 We would welcome views on the following provisional proposals.

11. (1) If a scheme for redemption at the option of the tenant is introduced, the procedure should be based on that in the Long Leases (Scotland) Act 1954 with appropriate modifications.

(2) The process should be begun by a notice by the tenant to the landlord requiring the landlord to grant a discharge of the stated casualties (or perhaps just a simple receipt) in statutory form in exchange for the statutory redemption sum.

(3) There should be provision for an application to the sheriff if the landlord is unco-operative.

(4) There should be provision to enable the sheriff to dispense with the signature of a landlord who is unknown or cannot be found (if such cases have not been eliminated from the system under earlier options).

PART IX HUMAN RIGHTS

Introduction

9.1 Both tenants and landlords have certain basic human rights in relation to their property and possessions which have to be kept in mind and respected in devising any scheme for reform of the law on leasehold casualties.

The European Convention on Human Rights

9.2 Article 1 of the First Protocol to the European Convention on Human Rights provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Duke of Westminster's case

9.3 One of the most interesting cases on article 1 of the First Protocol for present purposes is *James v United Kingdom*[1] which concerned leasehold property in London belonging to the trustees of the late Duke of Westminster. The trustees were aggrieved by the impact of the (English) Leasehold Reform Act 1967 on title to houses developed by the Westminster family in Belgravia. Under the enfranchisement provisions of that Act, tenants of these houses under long leases were exercising their right to convert their leasehold tenure into full ownership. Such lessees had to pay a price in order to buy out the Duke of Westminster's trustees, but the redemption price was in most cases designed to reflect the value of the site excluding the house and tenants were able to buy and then sell on, if they wished, at a very substantial profit.

9.4 The European Court of Human Rights concluded that it would only be in exceptional circumstances that deprivation of ownership without compensation would be lawful under the Convention, as "the protection of the right of property .... would be largely illusory and ineffective in the absence of any equivalent principle".[2] Nonetheless, the court found that it was within the Convention to gear compensation towards a recognition of the lessee's "moral entitlement" to the house and that there had been no breach of the Convention. That such a "moral entitlement" existed was a legitimate view which it was open to the executive and legislature to take, particularly given the wide margin of appreciation enjoyed by States

[1] ECHR, 21 February 1986, Series A No 98.
[2] Para 54 of judgment.

in the field of economic and social policy. The court also rejected the notion that compulsory transfer of property from one individual to another could never be in the public interest. Significantly, it was pointed out that there could be a public interest in ensuring the fairness of private legal relations.

> "Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature."[3]

Moreover it was generally recognised by Contracting States that housing was "a prime social need, the regulation of which cannot entirely be left to the play of market forces".[4] Measures designed to achieve greater social justice might not require compensation to be payable at full market value.[5] However, the means chosen must be reasonable and suited to achieving the legitimate aim being pursued. There had to be a reasonable relationship of proportionality between the means employed and the aim sought to be realised. A fair balance had to be struck between the demands of the general interest and the requirements of the protection of the individual's fundamental rights. The court also noted that the reference to "the general principles of international law" in article 1 of the First Protocol did not apply as between a State and its own nationals. The relevant provision in such a case was "subject to the conditions provided for by law" . This did not mean that a State was free to pass any law it liked. There had to be compatability with the rule of law in a more general sense. However, it was clear that Contracting States enjoyed a wide margin of appreciation in assessing what was in the public interest and what was appropriate compensation.

9.5 The *James* case was concerned with deprivation of property. The landlords actually lost their property in the land in question. That would not be the case if legislation simply provided for the loss of certain rights relating to property. Such a case would not fall within the second sentence of paragraph 1 of article 1 to the First Protocol but only within paragraph 2.[6]

Other cases

9.6 In the earlier cases of *Handyside*[7] and *Marckx*[8] the European Court of Human Rights had noted that the reference in paragraph 2 of the First Protocol to enforcing "such laws as it deems necessary to control the use of property in accordance with the general interest" set up the Contracting State as the sole judge of what was necessary in the general interest.

9.7 The case of *Mellacher and Others*[9] is possibly the most relevant decision of the European Court of Human Rights for present purposes. It was concerned with the Austrian

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[3] Para 47.
[4] Para 47.
[5] On the question of the adequacy of compensation see also *Lithgow and Others*, ECHR, 8 July 1986, Series A No 102 esp at para 121.
[6] *Handyside,* ECHR ,7 December 1976, Series A No 24. The court noted in this case that the structure of article 1 and the *travaux préparatoires* showed that the second sentence was intended to apply only to someone who was deprived of ownership (*"privé de sa propriété"*).
[7] ECHR, 7 December 1976, Series A No 24. This case was concerned with the forfeiture of moveable property for the protection of public morals.
[8] ECHR, 13 June 1979, Series A No 31. This case was concerned with the succession rights of persons born out of wedlock.
[9] ECHR, 19 December 1989, Series A No 169.

Rent Act of 1981 which regulated the rents of certain properties by providing that the rent was to be fixed at so much per square metre. This resulted in a great reduction in some of the rents due to the applicants. The justification for the measure was the need to iron out great disparities between the rents for equivalent apartments, caused partly by an earlier easing of rent controls. The Act also aimed to make property available at reasonable prices to less affluent members of the population and to provide incentives for the improvement of sub-standard property. The European Court of Human Rights accepted that these were legitimate aims in the general interest.[10] The court found that this case did not involve a formal or a *de facto* expropriation. There was no transfer of the applicants' property and they were not deprived of their right to use, let or sell it. They were admittedly deprived of part of their income from the property but this amounted in the circumstances only to a control of the use of property. So it was the second paragraph of article 1 which applied.[11] The second paragraph reserved to Contracting States the right to enact such laws as they deemed necessary to control the use of property in accordance with the general interest. Such laws were especially called for and usual in the field of housing which in modern societies was a central concern of social and economic policies. In order to implement such policies the legislature had to have a wide margin of appreciation both with regard to the existence of a problem of public concern warranting measures of control and as to the choice of detailed rules for the implementation of such measures. Referring to its earlier decision in *James* the court said that it would respect the legislature's judgement as to what was in the general interest unless the judgment was manifestly without reasonable foundation.[12] Although the rent reductions were "striking in their amount" in some cases, the court concluded that the measures taken by the State were not so inappropriate or disproportionate as to take them outside the State's margin of appreciation.

> "The fact that the original rents were agreed upon and corresponded to the then prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice."[13]

9.8 Another case of some interest in the present context is the case of *Fredin*.[14] This concerned the loss of a permit to extract gravel. The court emphasised the need for proportionality and a fair balance but again stressed that the State enjoyed a wide margin of appreciation as to means and as to what was justified in the general interest. The court noted, among other things, that in this case the applicants had been aware when they made their investment that there was a possibility under the then existing law that they might lose their permit after a certain date. The applicants could have had no legitimate expectations of being able to continue their exploitation for a long period of time. In the circumstances it could not be said that the decision to revoke their licence was inappropriate or disproportionate.

Conclusion

9.9 It is clear that article 1 of the First Protocol to the European Convention on Human Rights will have to be kept firmly in mind in devising any scheme for the phasing out of

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[10] Para 47.
[11] Para 44.
[12] Para 45.
[13] Para 56.
[14] ECHR, 18 February 1991, Series A No 192.

leasehold casualties. It is also clear, however, that that article does not prevent measures to control the use of property which are necessary in the general interest. It certainly does not have the effect of freezing archaic laws or preventing desirable reforms. However, even if the phasing out of leasehold casualties is a legitimate social objective - a matter on which there can surely be little room for doubt - the requirements of appropriateness and proportionality, fairness and balance must be kept in mind in choosing an appropriate way of achieving the objective. We invite consultees to consider which combination of the options set out above, or any other options or combination of options which they may wish to consider, would be the best way of achieving the objective while preserving the necessary proportionality, fairness and balance.

PART X SUMMARY OF PROVISIONAL PROPOSALS

1. It should be provided that, for the purposes of section 6 of the Prescription and Limitation (Scotland) Act 1973,

   (a) an obligation to pay a leasehold casualty is an obligation to pay a sum of money due in respect of a particular period by way of a periodical payment under the lease

   (b) an obligation to pay a casualty on the occurrence of an event becomes enforceable on the date when the event occurs, unless the lease provides that it is enforceable on another specified date, even if the amount of the casualty has not been quantified at the relevant date

   (c) where a lease provides for a casualty to be payable on the entry of a person, the date of entry should be taken to be the date of registration of the assignation of the lease to that person

   (d) the setting in motion of machinery for the quantification of a leasehold casualty is a relevant claim.

(Para. 6.10)

2.(1) It should be provided that the right to future casualties of a particular type under a lease should be extinguished by prescription if a casualty of that type has, on the last two occasions when it fell due, been neither paid nor demanded within five years after the date on which it fell due.

(2) Views are invited as to whether it would be reasonable to place the onus on the landlord to produce evidence that the casualty had been paid or demanded.

(3) Should this new rule on prescription apply to events occurring before, as well as after, the date of commencement of the new legislation

   (a) always

   (b) unless the landlord, before the expiry of one year after the date of commencement, gives notice that it is not so to apply

   (c) only if one of the casualties fell due after the date of commencement

   (d) never?

(Para. 6.29)

3. It should be provided that an assignee of a lease is not liable for any arrears of casualties which fell due under previous tenancies.

(Para. 6.30)

4. It should be provided that a sub-tenant is not liable for any casualties other than those falling due under the sub-lease to the intermediate lessor.

(Para. 6.33)

5. It should be provided that the sanction of irritancy is not available in relation to leasehold casualties.

(Para. 6.34)

6. It should be made clear by legislation that any reference in a lease to a duplicand (whatever the terms used and whether or not the duplicand is expressed to be payable over and above the rent) is deemed to be a reference to one extra rent for the period in question, and similarly for analogous terms.

(Para. 6.36)

7. We would welcome views on the question whether it would be acceptable to abolish without compensation

(a) all leasehold casualties based on rental value

(b) all leasehold casualties exigible on death

(c) leasehold casualties based on the ground rent or a multiple of the ground rent, or

(d) all leasehold casualties.

(Para. 7.8)

8.(1) We would welcome views on the question whether it would be acceptable to abolish without compensation, unless the landlord opts for preservation,

(a) all leasehold casualties based on rental value

(b) all leasehold casualties exigible on death

(c) leasehold casualties based on the ground rent or a multiple of the ground rent, or

(d) all leasehold casualties.

(2) Casualties coming under this option would cease to be exigible after a date one year after the commencement of the new legislation unless the landlord gave notice before that date that the right to the casualty was preserved. The notice would have to be sent to the tenant and would have to identify the lease and the land in respect of which the

casualty was due. A copy would have to be registered in the Register of Sasines or, in the case of land on the Land Register, sent to the Keeper for noting.

(Para. 7.13)

9.(1) In relation to leasehold casualties which are not caught by, or which survive, any abolition provisions, a scheme for their redemption on statutory terms should be introduced.

(2) The scheme should provide for redemption at the option of the tenant.

(3) Views are invited on the question whether it should also provide for compulsory redemption on registration of an assignation of the lease on a sale.

(Para. 7.19)

10.(1) We invite views on the following options for determining the sums payable on the redemption of leasehold casualties.

Option 1 - variation of 1954 Act scheme

(1) Where a casualty consists of a duplicand or similar payment due at fixed and regularly recurring intervals, the redemption sum for such payment would be one and a half times the amount of the duplicand or similar payment.

(2) Where the casualties payable under a lease take any other form, the redemption sum for all such casualties (other than any payment coming under paragraph (1) above) would be the amount of the highest such casualty which could become payable in the twenty years after the date of the redemption notice.

(Para. 7.29)

Option 2 - redemption sum based on formula

(1) The redemption sum for a casualty which is expressly based on the ground rent or a multiple of the ground rent, would be one and a half times the amount of the casualty.

(2) The redemption sum for all other casualties due under the lease would be as follows, unless the tenant opted to pay a redemption sum equal to the amount of the highest such casualty:

Variant 1 - a multiple of the amount of the annual ground rent

Variant 2 - the rateable value for the property stated in the last available valuation roll

Variant 3 - a sum fixed by reference to the valuation bands for council tax purposes.

(3) Views are invited as to

(a) an appropriate multiplier for the purposes of Variant 1;

(b) whether there should be an allowance for inflation for the purposes of Variant 2; and

(c) appropriate redemption sums for the purposes of Variant 3.

(Para. 7.39)

(2) We invite suggestions for other options or combinations of options for calculating redemption sums.

(Para. 7.41)

11.(1) If a scheme for redemption at the option of the tenant is introduced, the procedure should be based on that in the Long Leases (Scotland) Act 1954 with appropriate modifications.

(2) The process should be begun by a notice by the tenant to the landlord requiring the landlord to grant a discharge of the stated casualties (or perhaps just a simple receipt) in statutory form in exchange for the statutory redemption sum.

(3) There should be provision for an application to the sheriff if the landlord is uncooperative.

(4) There should be provision to enable the sheriff to dispense with the signature of a landlord who is unknown or cannot be found (if such cases have not been eliminated from the system under earlier options).

(Para 8.3)