

SCOTTISH LAW COMMISSION  
Discussion Paper No 112



# Discussion Paper on Conversion of Long Leases

April 2001

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## NOTES

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<sup>1</sup> Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (S.I. 1999/1820).



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## ABBREVIATIONS

1954 Act

Long Leases (Scotland) Act 1954

1967 Act

Leasehold Reform Act 1967

2000 Act

Abolition of Feudal Tenure etc.(Scotland) Act 2000

Guthrie Report

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

Paton & Cameron, *Landlord and Tenant*

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

Rankine, *Leases*

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

Reid, *Property*

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

Scot Law Com No 165

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

Scot Law Com No 168

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

Scot Law Com No 181

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

Stair Memorial Encyclopaedia

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



# PART 1 INTRODUCTION

## Background

1.1 In recent years we have been engaged in a major review of the structure of land law in Scotland. Our *Report on Abolition of the Feudal System*,<sup>1</sup> published in 1999, was implemented by the Abolition of Feudal Tenure etc. (Scotland) Act 2000. A Title Conditions (Scotland) Bill, based on our *Report on Real Burdens* (2000),<sup>2</sup> is to be introduced to the Scottish Parliament later this year. A slightly earlier report, on the *Law of the Tenement* (1998),<sup>3</sup> awaits implementation. Although important work remains to be done in other areas of property law,<sup>4</sup> the present discussion paper marks the final stage of this structural review. In essence it seeks to apply to certain types of long lease the principle of conversion already applied to feus by the Abolition of Feudal Tenure etc. (Scotland) Act. Under that Act all feus are to be converted into ownership, on a day yet to be announced and known as the “appointed day”. Feudal vassals will then become outright owners.<sup>5</sup> The present paper seeks to extend that scheme to tenants holding under certain categories of long lease.<sup>6</sup>

1.2 Other work has been, or will be, carried out on the law of leases. Our *Report on Leasehold Casualties* (1998)<sup>7</sup> is implemented by the Leasehold Casualties (Scotland) Bill which has completed its parliamentary passage and is awaiting royal assent.<sup>8</sup> This Bill abolishes the casualties –payments due on assignation and on certain other occasions –payable under some long leases. It also abolishes the remedy of irritancy for most leases of 175 years or more.<sup>9</sup> A separate review of the law of irritancy as it affects commercial leases is being carried out as part of our *Sixth Programme of Law Reform*,<sup>10</sup> and we intend to publish a discussion paper in the course of this year. However, we have no plans to consider the law of landlord and tenant more generally, and the effect of the proposals in the present paper, if implemented, will be to reduce the number of properties held under lease.

## Empirical work

1.3 A study of the incidence of long leases was carried out in 1951 for the Scottish Leases Committee chaired by Lord Guthrie. This involved an examination of all search sheets in the Register of Sasines for the period 1905-1951. The results, which disclosed 13,151 current leases, were tabulated both by length of initial grant and by unexpired duration. Almost

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

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

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

<sup>4</sup> As part of our *Sixth Programme of Law Reform* (Scot Law Com No 176, 2000) we are to review the system of registration of title as set out in the Land Registration (Scotland) Act 1979. In addition, we have received references on the law of the foreshore and seabed, and in relation to the problems arising out of *Sharp v Thomson* 1997 SC(HL) 66.

<sup>5</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 1 and 2.

<sup>6</sup> The paper comes within Item No 4: Property of our *Sixth Programme of Law Reform* (Scot Law Com No 176, 2000) paras 2.11 and 2.12.

<sup>7</sup> Scottish Law Commission, *Report on Leasehold Casualties* (Scot Law Com No 165, 1998).

<sup>8</sup> This is a Member's Bill in the Scottish Parliament, introduced by Mr Adam Ingram MSP. It completed Stage 3 on 8 March 2001.

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

<sup>10</sup> Scot Law Com No 176 paras 2.5 to 2.8.

9,000 leases were found to have more than 100 years still to run.<sup>11</sup> For the purposes of preparing this paper we have carried out a major study of our own, based on entries in the Land Register for the counties of Ayr, Clackmannan, Lanark, and Renfrew. In all we considered around 2,500 leases. As well as noting initial length and unexpired duration we also investigated the year of grant, the amount of rent payable, the type of property, whether there had been subletting or a partial assignation following division, and whether the minerals had been excepted. The full results are given in appendix A. We are greatly indebted to the Registers of Scotland for making the source material available and for putting the expertise of their staff at our disposal. Taken together, these two studies make it possible to draw a reasonably full picture of the incidence and use of long leases in Scotland today, and this has made our task of law reform much simpler than would otherwise have been the case.

1.4 Another factor contributing to a fuller understanding was the willingness of a number of solicitors with practical experience of long leases to share their knowledge with us. An advertisement in the legal press resulted in a great deal of useful information. We are grateful to those solicitors, as well as to others who helped us in various ways.<sup>12</sup>

### **What is a long lease?**

1.5 By ‘long lease’ is usually meant a lease that is sufficiently long to be registrable in the property registers, that is to say, in the Land Register or the Register of Sasines.<sup>13</sup> Registration of long leases –or ‘tacks’ to use the traditional name –first became possible in 1857.<sup>14</sup> It is now compulsory, except in the few parts of the country still served by the Register of Sasines.<sup>15</sup> Originally a lease could only be registered if it had been granted for more than 31 years,<sup>16</sup> but the figure was reduced to 20 years in 1974.<sup>17</sup> A long lease, therefore, is any lease with an initial duration of more than 20 years. Until modern times there was no upward limit and leases could be, and sometimes were, of prodigious length. Our survey disclosed 11 leases granted for a million years, all for property in Paisley. Since 1974 new residential leases have been restricted to 20 years and so cannot be long leases;<sup>18</sup> and since 2000 it has no longer been possible to grant any type of lease for more than 175 years.<sup>19</sup> Both restrictions were designed to prevent the creation of a second feudal system by means of long leases.

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<sup>11</sup> *Report of the Scottish Leases Committee* (Cmd 8656) (hereafter the ‘Guthrie Report’) paras 37 and 38 and appendix II.

<sup>12</sup> We should particularly mention: Mr A M Bowman, Messrs Bonar Mackenzie WS; Mr J C N Craxton, Messrs Craxton & Grant; Mr Fergus Ewing MSP; Mr D Stuart Allan, Fife Council; Mr Andrew Fraser, North Ayrshire Council; Mr J D Grandison, Messrs Pomphreys; Mr Neil D Lambe, Office of Law Reform, Northern Ireland; Messrs McJerrrow & Stevenson; Mr Ian T Mackay, SOLAR; Mr Malcolm McRae, Highland Council; Ms Lynne Raeside, The Royal Institution of Chartered Surveyors in Scotland; Professor Robert Rennie; Professor Peter Robson; Mr Peter Sharp, Messrs Murray & Tait; Mr S R Waters, Messrs Waters Rule & Co.

<sup>13</sup> At present there are two property registers, the Register of Sasines and the Land Register, dating, respectively from 1617 and 1981. The Register of Sasines is now being phased out, county by county, and by 2003 it is expected that the Land Register will be in operation for all parts of Scotland.

<sup>14</sup> Registration of Leases (Scotland) Act 1857 s 1.

<sup>15</sup> Compulsory in the sense that a real right cannot otherwise be obtained: see Land Registration (Scotland) Act 1979 s 3(3).

<sup>16</sup> Hence the survey carried out for the Guthrie Committee was restricted to leases of over 31 years.

<sup>17</sup> Land Tenure Reform (Scotland) Act 1974 sched 6 para 1.

<sup>18</sup> Land Tenure Reform (Scotland) Act 1974 ss 8 to 10.

<sup>19</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67. There are transitional exceptions, including for subleases.

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

1.7 Many of the ultra-long leases date from the period before 1900. Often they were used as alternatives to feus in cases where feuing was not permitted. Land held on burgage tenure could not be feued,<sup>21</sup> while in the case of other tenures feuing was sometimes forbidden in the original charter.<sup>22</sup> But the main obstacle was the entail. It is estimated that in 1825 half of the territorial property of Scotland was entailed, and the percentage continued to rise during the next 50 years.<sup>23</sup> Entailed land could not be feued at all until 1848,<sup>24</sup> and not freely until 1914.<sup>25</sup> Many long leases, therefore, were substitutes for feus. Of course this is not the whole story. Our survey shows that ultra-long leases continued to be granted after 1914, when the restrictions on entails fell away;<sup>26</sup> and doubtless leases were sometimes granted before that date for reasons which had nothing to do with entails, for example because they were simpler and therefore cheaper, or because of local estate practice. But long leases were never popular in Scotland in the manner of south of the border, where the alternative of feuing was not available.<sup>27</sup> In Scotland feus were usually preferred to leases; and where leases were used it tended to be because feuing was not possible. It must be stressed, however, that from a functional point of view there was –and is –little to choose between the two.<sup>28</sup> Both provide an income stream for the granter, and both allow the imposition of use restrictions and other obligations on the grantee. A feu was sometimes analysed as a lease of perpetual duration,<sup>29</sup> and many ultra-long leases too approached perpetuity in duration.

### Earlier conversion schemes

1.8 The role of the 2000 Act in converting feus to ownership has already been mentioned. A scheme for the conversion of long leases was introduced by the Long Leases (Scotland) Act 1954 and was in operation between 1954 and 1959. This implemented the recommendations of the Guthrie Committee, mentioned earlier. A lease was eligible for conversion if it was of residential property and had been granted before 14 August 1914 for

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<sup>20</sup> Appendix A paras 11 and 12.

<sup>21</sup> This obstacle disappeared in 1874 when burgage tenure was assimilated to feu farm tenure by s 25 of the Conveyancing (Scotland) Act 1874.

<sup>22</sup> Such provisions were rendered ineffective by s 8 of the Conveyancing Amendment (Scotland) Act 1938.

<sup>23</sup> Guthrie Report para 44.

<sup>24</sup> Entail Amendment Act 1848 ss 4 and 24.

<sup>25</sup> Entail (Scotland) Act 1914 s 4.

<sup>26</sup> Appendix A para 16 and chart 9.

<sup>27</sup> In England subinfeudation was abolished in 1290 by the statute *Quia Emptores*.

<sup>28</sup> For this reason ultra-long leases were sometimes referred to as ‘feu-tacks’: see *Buchanan’s Trs v Pagan* (1868) 7 M 1.

<sup>29</sup> For a discussion of the relationship between feus and leases, see Martin Hogg, ‘Leases: Four Historical Portraits’ in Kenneth Reid and Reinhard Zimmermann (eds), *A History of Private Law in Scotland* (2000) vol 1, pp 369-71.

a period of at least 50 years.<sup>30</sup> The cut-off date of 1914 was an acknowledgement of the restrictions on the feuing of entailed property which were in operation until then. Conversion was at the election of the tenant. The landlord granted a conveyance against payment of compensation. If the lease had more than 100 years to run, the rent and casualties were converted into feuduty. In other cases payment was also due in respect of the landlord's residual ownership.<sup>31</sup> The scheme appears to have been successful to some degree, although detailed figures are not available.<sup>32</sup> Certainly our survey suggests a decline in the number of long leases. The Guthrie Report disclosed that in 1951 a little under 3% of properties were held on long lease.<sup>33</sup> Today the figure is probably around 2%.<sup>34</sup> No doubt there were other factors at work as well. Some leases will simply have come to an end. In other cases, if rent had ceased to be paid, the tenant may have acquired ownership by recording an *a non domino* conveyance.<sup>35</sup> But conversion, whether under the 1954 Act or, after 1959, on an equivalent but voluntary basis, seems to have played an important role.

1.9 Other conversion schemes were, and remain, available on a more restricted basis. A special scheme for tenancies-at-will was introduced in 1979.<sup>36</sup> There has been a right to buy houses leased from local authorities or other social landlords since 1980.<sup>37</sup> And the Crofters (Scotland) Act 1993 contains a conversion scheme for crofts. All three schemes are summarised in appendix B, but, with the exception of the first, they are of little assistance for present purposes.

1.10 Finally, brief mention may be made of conversion schemes operational in the other jurisdictions of the United Kingdom. In England and Wales it has been possible to convert ultra-long leases since 1881.<sup>38</sup> The Leasehold Reform Act 1967 allows the conversion of leases of houses for more than 21 years on payment of compensation, a right extended to flats in 1993.<sup>39</sup> There is comparable legislation in Northern Ireland.<sup>40</sup> These schemes too are summarised in appendix B. We have derived some help from them all but particularly from the 1967 Act.

## Our proposals in summary

1.11 Our main proposal is that a conversion scheme should be introduced for ultra-long leases. The scheme would follow closely the scheme for conversion of feus introduced by the 2000 Act. The details are set out in parts 2 and 3. The scheme would be compulsory and automatic, but with the possibility of an opt-out by the tenant. A lease would qualify if it had been granted for more than 175 years and if there was still a substantial period, such as 100 years, left to run. In practice, most qualifying leases will have been granted for 999 years

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<sup>30</sup> Long Leases (Scotland) Act 1954 s 1.

<sup>31</sup> 1954 Act ss 7 and 8.

<sup>32</sup> See, however, para 4.3.

<sup>33</sup> Guthrie Report para 37. This figure is derived by disregarding the 3,224 leases which had expired.

<sup>34</sup> Appendix A para 9. The ratio of ultra-long to "ordinary" leases appears to be roughly 2:1.

<sup>35</sup> Guthrie Report paras 43-4. For a recent (and unsuccessful) example see *B G Hamilton Ltd v Ready Mixed Concrete (Scotland) Ltd* 1999 SLT 524.

<sup>36</sup> Land Registration (Scotland) Act 1979 ss 20 to 22. For tenancies-at-will, see paras 70 to 81 of the Guthrie Report. There are very few such tenancies.

<sup>37</sup> The current legislation is the Housing (Scotland) Act 1987.

<sup>38</sup> See now s 153 of the Law of Property Act 1925.

<sup>39</sup> Leasehold Reform, Housing and Urban Development Act 1993.

<sup>40</sup> Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971; Property (Northern Ireland) Order 1997, SI 1997/1179 (NI8). A Ground Rents Bill is currently being considered by the Northern Ireland Assembly.

or similar. On a specified day all ultra-long leases would be converted into ownership, and the residual ownership of the landlord would be extinguished. Certain leasehold conditions could remain in force as real burdens, and provision is also made for servitudes. Compensation would be due for the loss of rent but not for the loss of the landlord's residual ownership.

1.12 In part 4 we consider whether a second scheme is needed for the small number of residential ground leases which are too short to qualify under the main scheme. A two-scheme model is found both in England and Wales and in Northern Ireland.<sup>41</sup> Necessarily a scheme for shorter leases would be different in nature. The landlord would need to be compensated for the loss of what, in many cases, would be a valuable asset; and the potential cost to the tenant means that the scheme could not be compulsory or automatic. In drawing up a second scheme we have followed quite closely the Long Leases (Scotland) Act 1954, described earlier.<sup>42</sup> At this stage we reach no concluded view as to whether a second scheme ought to be introduced but merely set out the arguments for and against.

### **Which Parliament?**

1.13 Legislation to give effect to our proposals would be within the legislative competence of the Scottish Parliament.<sup>43</sup> The law of landlord and tenant is not a reserved matter.<sup>44</sup> Further the legislation would not, in our view, be in breach of the European Convention on Human Rights. Our principal scheme is modelled on existing legislation of the Scottish Parliament,<sup>45</sup> and so, like that legislation, must be assumed to comply with the European Convention;<sup>46</sup> and for reasons given later the second scheme, which may or may not form part of our final recommendations, would also appear to comply.<sup>47</sup>

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<sup>41</sup> See appendix B to this paper.

<sup>42</sup> Para 1.8.

<sup>43</sup> Scotland Act 1998 s 29.

<sup>44</sup> Reserved matters are listed in sched 5 of the 1998 Act.

<sup>45</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000.

<sup>46</sup> Scotland Act 1998 s 31.

<sup>47</sup> See para 4.32.

# PART 2      CONVERSION: IN PRINCIPLE

## Introduction

2.1      In this part of the discussion paper we canvass the principle of converting ultra-long leases into ownership. The details of a possible scheme are discussed in part 3. We postpone until part 4 the question of whether conversion should be extended to leases of a shorter duration.

## The case for conversion

2.2      Most ultra-long leases were granted for periods such as 999 years and have still many hundreds of years to run. This means that they are barely distinguishable from feus, and indeed were often granted as an alternative to feus, in circumstances where feuing was not possible.<sup>1</sup> A theoretical difference is that, while feus are perpetual, even an ultra-long lease will, eventually, come to an end by expiry of its term. But the prospect is so remote that the possibility can hardly enter into the consciousness of either landlord or tenant, and the landlord's ownership has no economic value beyond the right to receive rent and leasehold casualties. The reversionary interest itself is valueless.

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

2.4      In the case of feus, these disadvantages were considered sufficient grounds for conversion into proper ownership. That conversion is effected by the Abolition of Feudal Tenure etc. (Scotland) Act 2000,<sup>4</sup> following on a report by this Commission.<sup>5</sup> It may plausibly be argued that the reform of land tenure would be incomplete without the

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<sup>1</sup> Para 1.7.

<sup>2</sup> For which see Scot Law Com No 168 paras 1.16 to 1.19.

<sup>3</sup> Conveyancing and Feudal Reform (Scotland) Act 1970 ss 1 and 2. Recommendations for the reform of these provisions are contained in part 6 of our *Report on Real Burdens* (Scot Law Com No 181, 2000).

<sup>4</sup> For the moment, however, the feudal system is still with us. Abolition occurs on a day (the 'appointed day') to be fixed by statutory instrument. See Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 1 and 71.

<sup>5</sup> Scot Law Com No 168.

conversion of ultra-long leases. A pseudo-feu should be treated in the same way as the real thing.

2.5 In fact the difficulties with leases extend beyond those with feus. Because ultra-long leases are relatively rare, and are concentrated within small geographical areas, they are unfamiliar to many legal practitioners. The result is often an increase in transaction costs when the property comes to be sold. Several firms of solicitors complained to us of this difficulty. An agent for the purchaser who is unfamiliar with the type of holding is likely to ask inappropriate questions and to seek assurances on matters on which assurance is either not required or could not reasonably be obtained. Worse than this, a contract to buy a house or land expressed in standard terms does not cover the possibility that the title might be held on long lease. This means that, unless the terms have been appropriately adjusted, a purchaser can refuse to proceed with the transaction on the basis that the title offered is merely one of lease. Such cases occur, and have been litigated.<sup>6</sup>

2.6 A tenant under a long lease may also encounter difficulties in relation to mortgages. A small number of lenders will not advance money on the security of a lease.<sup>7</sup> Others are wary of potential problems, such as premature termination as a result of irritancy or of confusion.<sup>8</sup> Renewable leases are particularly troublesome. Although a 99-year perpetually renewable lease with 10 years to run may seem to the tenant like a perpetual lease, it may seem like a 10-year lease to the lender. This is because the lender will have to depend on the tenant renewing the lease on time and, following renewal, re-granting the security over the renewed lease. Meanwhile the lender is exposed to dangers such as the bankruptcy of the tenant, an inhibition preventing the re-grant, or a supervening security with a preferential ranking.

2.7 There are special difficulties with flatted properties. The common law of the tenement presupposes ownership rather than ultra-long lease. Yet tenements exist in which each flat is held under such a lease. In that case there is no applicable law, although in practice the law of the tenement is probably applied by analogy. In our *Report on the Law of the Tenement* we noted that we had “considered whether we should formalise the position by extending our proposals to flats which are held on exceptionally long leases but concluded that the issue is best approached as part of our long-term project on leasehold tenure”.<sup>9</sup> Accordingly, the draft Tenements (Scotland) Bill included in the *Report* makes no provision for ultra-long leases. The problem is solved if, as envisaged in the *Report*, such leases are converted into ownership.

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

2.9 The 2000 Act<sup>10</sup> makes a distinction between “proper” leases and leases which are so long as to amount to quasi-ownership. The line is drawn at 175 years. Since 9 June 2000,

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<sup>6</sup> *McConnell v Chassels* (1903) 10 SLT 790; *Fleming v Boswell* (Outer House, Nov 1948, unreported but noted at para 48 of the Guthrie Report).

<sup>7</sup> The Council of Mortgage Lenders’ *Handbook for Scotland* (2000) suggests that six lenders might come into this category.

<sup>8</sup> “Confusion” in this technical sense occurs where the same person is both landlord and tenant.

<sup>9</sup> Scot Law Com No 162 para 4.7.

<sup>10</sup> ie the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

when the relevant provision came into force, it has ceased to be possible to grant leases with a duration in excess of 175 years.<sup>11</sup> It would be consistent with the rule for new leases if existing leases which amount to quasi-ownership were now to be converted into proper ownership. Further, the 175-year limit will bring to a premature end those leases which are ultra-long only because they make provision for renewals. Two further renewals are permitted under the Act, but thereafter the lease cannot be renewed in such a way that it lasts for more than 175 years.<sup>12</sup>

2.10 A practical point is that a scheme already exists. If ultra-long leases are truly pseudo-feus, then it would be logical to apply to such leases the scheme which applies for the conversion of feus. And in fact the scheme set out in the 2000 Act could be used almost as it stands.<sup>13</sup>

2.11 Finally, the case *against* conversion is weak. It could not be said, as might be said of leases of much shorter duration, that conversion interferes with the freely negotiated terms of a contract. The original contract has long since become a property right, and there has been no free negotiation. Nor could it be said that conversion will confer a windfall benefit on one party at the expense of the other. So far as the tenant is concerned, the conversion operates only at a technical level. It brings the law into line with reality. But the economic value of his asset is likely to remain unchanged. Landlords who suffer loss –in practice loss of the income stream from payment of rent – will be compensated, in the same way as superiors are compensated for loss of feuduty under the 2000 Act.

2.12 We conclude that the case for conversion is convincingly strong. Our proposal, on which we invite comment, is therefore that

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

The rest of this part of the paper considers the way in which such a conversion scheme might work.

### **Qualifying leases**

2.13 A lease should qualify for conversion only if its duration is so long as to amount virtually to ownership. Leases shorter than this have a valuable role to play in the property market and are not touched by our proposed reform. Thus nothing in our proposals will affect the 25-year commercial lease or the 60-year PFI/PPP lease<sup>14</sup> or the 99-year ground lease. In part 4, however, we consider whether there might be a case for the conversion of shorter residential leases.

2.14 Our survey of leases suggests a clear dividing line between ordinary long leases on the one hand and leases which amount to virtual ownership on the other. If our figures can

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<sup>11</sup> 2000 Act s 67. There are some exceptions.

<sup>12</sup> 2000 Act s 67(4)(a), (b), discussed in para 3.60.

<sup>13</sup> Para 3.1.

<sup>14</sup> For which see Anne Ferguson and Liz Scobbie, "Property Aspects of PFI transactions" (2000) 44 Greens Property Law Bulletin 1.

be relied on, most long leases have been granted either for around 999 years or for 125 years or less. There is little in between.<sup>15</sup> As many as half of the leases (1269) revealed by our search of the Land Register were granted for exactly 999 years. Most of the others had a duration of 125 years or less. Of the ordinary leases, the typical lengths were 25, 60, 99 or 125 years, with the first being by far the most common. Our survey discloses only 2 leases in the range 126-175 years, and a further 21 in the range 175-299 years. The next cluster of leases does not occur until between 700 and 800 years.<sup>16</sup> On the basis of these figures, the dividing line between the two types of leases would seem to be 125 years. That indeed was the durational limit which was included, on our recommendation, in the bill to abolish the feudal system. In the course of the bill's parliamentary passage, however, the limit was raised from 125 to 175 years, and as the law now stands it is competent to lease land for up to, but not beyond, 175 years.<sup>17</sup> This suggests that 175 years might be a convenient point of division. Certainly the qualifying period could not be lower than that, for it would be illogical for a lease to be permitted by a recent act of parliament only to be converted into ownership by virtue of a later act. Our survey suggests that there would be little difference in practice between a limit of 125 years and one of 175 years.

2.15 There is also a second factor to be taken into account. As a lease begins to approach its close the line is crossed between quasi-ownership and mere lease. At that point conversion should cease to be possible. Another way of putting the matter is to say that, if the end of a lease is sufficiently imminent for the landlord's interest to acquire an independent value (that is to say a value beyond that attributable to the income stream from the rent), the tenant can no longer be considered as the virtual owner of the land and should not be entitled to become the actual owner, or at least not without payment of compensation. In the case of most of the leases with which we are concerned, this will not occur for many hundreds of years into the future. If an initial grant of more than 175 years is taken as the mark of an ultra-long lease, then there were 1781 such leases in our survey. Of those, 1531 (86%) had more than 700 years still to run, while a mere 43 (2%) were due to expire within the next 175 years (and none within the next 50).<sup>18</sup>

2.16 The difficulty remains of fixing a minimum unexpired duration for the purposes of a conversion scheme. Under the equivalent scheme in England and Wales, conversion is allowed of certain leases, without payment of compensation, provided that the unexpired term is not less than 200 years.<sup>19</sup> In Scotland an unexpired term of 100 years was the point at which conversion under the Long Leases (Scotland) Act 1954 could proceed without compensation.<sup>20</sup> The scheme currently operational in Northern Ireland requires only 50 years.<sup>21</sup> No doubt the differences are partly attributable to the difficulty of putting a value on the landlord's interest. In order to assist our understanding of this question, we asked the Royal Institution of Chartered Surveyors in Scotland for their view on the point at which the value of a landlord's interest in a long lease can be treated as negligible. In the course of

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<sup>15</sup> Appendix A paras 11 and 12.

<sup>16</sup> Appendix A chart 3.

<sup>17</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67.

<sup>18</sup> Appendix A para 14. The total excludes the small number of leases for which the unexpired duration is not known.

<sup>19</sup> The current provision is s 153 of the Law of Property Act 1925 although based on an earlier provision of 1881. For a discussion, see Megarry & Wade, *The Law of Real Property* (6<sup>th</sup> edn by Charles Harpum, 2000) paras 14-178 to 14-181.

<sup>20</sup> Long Leases (Scotland) Act 1954 ss 7 and 8.

<sup>21</sup> Property (Northern Ireland) Order 1997, SI 1997/1179 (NI8). It is intended that this Order be superseded by the Ground Rents Bill currently before the Northern Ireland Assembly. Again the qualifying period is 50 years.

a full and helpful response, it was suggested that the appropriate figure was an unexpired duration of 100 years.<sup>22</sup>

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

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

2.19 These options operate to different effect only at the very margins. Almost all ultra-long leases would comfortably satisfy the criteria in either option and so would qualify for conversion. In order to bring out such differences as there are, we tested the options against our database of long leases. If option A were used, 1653 leases would qualify for conversion. Option B would bring in an additional 2.4% of leases – some 40 in all. Mainly these are residential leases. The reason that they fall within option B but not option A is that they have an unexpired duration of between 100 and 175 years. Given the size of the sample, however, these figures cannot be assumed to be completely reliable, and we would welcome views on the likely effect of using one option rather than the other.

2.20 Although neither option was before the Royal Institution of Chartered Surveyors in Scotland, it may possibly be inferred from the following passage in their response that they would prefer option A:

“Turning to commercial leases, many of which will have been granted by local authorities since the 1960s and 1970s, we would suggest that, in order to be consistent with the policy on lease length as set out in the Abolition of Feudal Tenure etc (Scotland) Act, that it would appear appropriate for the cut off point of virtual ownership to be set at 175 years. While we accept that the residual value between 100 and 175 years may be nominal, we would argue that in ‘institutional perception’ terms, there could certainly be some value. Given that the majority of commercial ground leases are granted for a period of 125 to 150 years, with funding agreed on this basis, we would be concerned that a cut off point of 100 years could discourage institutional investors from proceeding with developments.”

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<sup>22</sup> But see also para 2.20 below in relation to commercial leases.

Nonetheless, it may be that the initial requirement of 175 years set by option B would also be sufficient to allay the worries which RICS express; and the position would be reinforced if there was a special rule for the local authority leases, as is suggested below.<sup>23</sup> The response just quoted was given in the context of commercial ground leases. The main gain from option B is that it allows the conversion of a larger number of residential leases. An initial limit of 175 years would admit two familiar types of residential lease, namely leases for 99 years renewable once (making a total of 198 years) and leases for 19 years renewable 9 times (making a total of 190 years); and a shorter unexpired duration is also more favourable. If the effect of option B is to admit more residential leases but without at the same time drawing in ordinary commercial ground leases,<sup>24</sup> then it is probably to be preferred. A difficulty with option A is that it would leave unconverted a certain number of residential leases notwithstanding that the value of the landlord's interest was negligible.<sup>25</sup> That difficulty would, however, be met in a different way if a separate scheme were to be introduced for shorter residential leases.<sup>26</sup>

2.21 Two final points may be mentioned. First, a number of questions require to be resolved as to how the length of leases is to be measured for the purposes of qualifying for conversion. These are considered further in part 3.<sup>27</sup> Secondly, the actual figures included in the two options are for the purposes of discussion only. We would welcome views on whether they require to be adjusted. For example, some consultees might favour an initial period longer than the 175 years suggested for option B. The English scheme requires an initial period of 300 years.<sup>28</sup> A longer period would remove any need to make special provision for local authority leases,<sup>29</sup> but would have the disadvantage of excluding a larger number of residential leases.

2.22 We invite views on the following questions:

2. (a) **In determining which leases qualify for conversion would it be preferable to follow**
  - (i) **option A (unexpired term of more than 175 years) or**
  - (ii) **option B (initial grant for more than 175 years coupled with an unexpired term of more than 100 years)?**
- (b) **In relation to the preferred option, are the suggested limits for length of lease satisfactory or should different limits be substituted?**

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<sup>23</sup> Para 2.23.

<sup>24</sup> The policy of the law is to allow ordinary commercial ground leases, ie leases of up to 175 years. See Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67.

<sup>25</sup> RICS were satisfied that, in relation to residential leases at least, 100 years was an appropriate measure for the purposes of conversion: "We agree that leases granted in the 1800s for residential purposes, many of which contain outdated conditions such as obligations to grind malt at a local mill, should be extinguished and converted into ownership. In these cases, we agree that if the lease has more than 100 years to run, the value of the landlord's interest in the leased property is negligible ..."

<sup>26</sup> For which see part 4.

<sup>27</sup> Paras 3.59 to 3.67.

<sup>28</sup> See now the Law of Property Act 1925 s 153(1).

<sup>29</sup> For which see para 2.23.

## Leases by local authorities

2.23 We understand that ground leases are occasionally granted by local authorities for periods in excess of 175 years. Our survey picked up several 200-year leases granted by the same local authority in the 1960s. A different local authority has brought to our attention a relatively recent lease, of a shopping centre, with an initial term of 206 years. If a local authority grants a ground lease, it does so on the basis that, at some point in the future, the land will revert to the authority and become available for public purposes. To allow such leases to be converted into ownership is, it may be argued, contrary to the public interest. Yet some at least of those leases would fall within the proposed conversion scheme, at least on the figures suggested above.<sup>30</sup> If this argument is thought to have merit, a solution can readily be provided. A special exemption could be introduced for leases in which the head landlord was a local authority.<sup>31</sup> This would not apply to all local authority leases, of course. A lease which was in substance an alienation would remain subject to the conversion scheme – in the same way as feus granted by a local authority are so subject under the 2000 Act. We imagine that the policy objective would be achieved by setting a maximum duration of 300 years. Local authority leases of up to 300 years would be exempt from conversion. Leases for a longer term would not. We invite views on the question

- 3. Should there be exempted from conversion any lease in which the head landlord is a local authority and which has been granted for a period not exceeding 300 years?**

If the exemption is approved, we would also welcome views on the following question:

- 4. Should the exemption mentioned in proposal 3 be extended to other public bodies and, if so, to which?**

## Lease as a real right

2.24 It goes almost without saying that the lease must have been constituted as a real right. The idea of conversion is to transform one real right (lease) into another real right (ownership). There can be no question of upgrading a right which is merely contractual. A lease is made real either by taking possession under the Leases Act 1449 or by registration under the Registration of Leases (Scotland) Act 1857; but not all contractual leases fall within the terms of the two Acts. The requirement of a real right would apply only to the original lease, and it would be no bar to conversion that its current holder had not yet completed title by registration or possession.<sup>32</sup>

## Supplementary criteria

2.25 Thus far, the only measure used to identify leases which would qualify for conversion is duration. Our provisional view is that there is no need for supplementary

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<sup>30</sup> If the figures were adjusted upwards, however, a special exemption would cease to be necessary.

<sup>31</sup> Naturally this would have no effect on residential leases by local authorities, which are in practice never granted for long periods and which in any case have their own conversion scheme under part III of the Housing (Scotland) Act 1987.

<sup>32</sup> This is the same rule as applies to the conversion of the right of *dominium utile* under s 2(1) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

criteria and that duration alone achieves a sufficient separation between quasi-ownership and lease proper. Nonetheless we give brief consideration to other possible factors.

2.26 **Rent.** The equivalent scheme in England and Wales is confined to ultra-long leases “without any rent, or merely with a peppercorn rent or other rent having no money value”.<sup>33</sup> This may be one reason why the scheme –in existence now for 120 years –has been little used. Our survey suggests that, for leases likely to be covered by our own proposed scheme, the rent is usually very small.<sup>34</sup> Of 1705 leases in our sample with a known rent and with a duration of more than 175 years, a mere 19 (1.1%) had an annual rent of more than £100, and only a further 7 (0.4%) had a rent of more than £50. More than two thirds (1160) had a rent of less than £5. As a broad generalisation, more recent leases tended to have higher rents. The highest rent of all, £5,000, was for a 999-year lease granted in 1978. But small rents were often found in modern leases also, such as the rent of £1 for a 999-year lease granted in 1996.

2.27 We do not think that a high rent should be a bar to conversion. So long as the landlord is fairly compensated for the loss of income, it should not matter whether the rent is high or low. Indeed with high rents the difficulty is more one for the tenant than for the landlord. A tenant may be unwilling, or unable, to pay the capitalised value of an annual rent of several thousand pounds. Later we suggest that a tenant who does not wish to pay should be able to opt out of the conversion scheme and continue with his lease.<sup>35</sup>

2.28 **Date of lease.** The 1954 Act scheme applied only to leases granted before 10 August 1914.<sup>36</sup> This was apparently on the basis that 1914 marked the removal of the final restrictions on subinfeudation. From that point on, it was argued, the use of a lease must be taken to be a matter of choice and not merely as a substitute for the feu which was not available.<sup>37</sup> We see no reason for perpetuating this restriction. Even before 1914 there must have been many leases which were granted by preference and not merely by default; and our survey shows that ultra-long leases continued to be granted on a regular basis even after 1914. Further, it should not be assumed that the preference for leases was always shared by the tenant. A person acquiring land may have to take it in the form that it is offered, or not take it at all. There may possibly be an argument that very recent leases ought not to be converted into ownership, at least where the original parties are still in place. But we do not support a restriction even in a case such as this. If a date restriction were to be introduced it would be necessary to decide whether it applied only to the original head lease or to later subleases also. The 1954 Act restriction is confined to head leases, and a restriction which encompassed subleases would be likely to produce random results.

2.29 **Value of property.** The value of the property which is leased was at one time considered relevant for the purposes of Rent Act protection, which was seen as a social

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<sup>33</sup> See now s 153(1) of the Law of Property Act 1925. By s 153(4), however, rent not exceeding £1 is extinguished if it has not been paid for 20 years. The lease then becomes convertible.

<sup>34</sup> Appendix A para 17.

<sup>35</sup> Paras 2.43, 3.7 and 3.8.

<sup>36</sup> Long Leases (Scotland) Act 1954 s 1(1).

<sup>37</sup> Guthrie Report para 68(2)(i).

reform for relatively low-cost housing.<sup>38</sup> It does not seem of relevance to a technical reform which is intended to convert economic ownership into actual ownership.

2.30 **Type of property.** The 1954 Act scheme was directed at leases of houses rather than at leases which were ultra-long, although many of the leases converted would also have fallen into the ultra-long category. Non-residential leases were excluded from the 1954 Act.<sup>39</sup> By contrast, the English scheme for ultra-long leases makes no distinction by type of property. We do not propose such a distinction. In particular we do not suggest that leases of commercial property be excluded. If, for example, a tenement is built on land held on an ultra-long lease, it does not seem reasonable, or indeed practicable, that the shops on the ground floor should be treated in a different way from the flats above. Or again there seems no reason for excluding a 999-year lease of a factory or pub granted in 1891<sup>40</sup> if a lease of a house for the same period would be converted.<sup>41</sup> The basic principle should be universal convertibility. The question of whether any exceptions are required is considered below.

### Exempt leases

2.31 **Inalienable property.** Some property which can be leased is not capable of being transferred outright. This is either because of the nature of the property itself or because of some limitation of power affecting the landlord. Shootings and freshwater fishings fall into the first category.<sup>42</sup> Both can be leased<sup>43</sup> but neither is a separate tenement capable of being owned separately from the land (or river). By contrast, the right to fish for salmon is a separate tenement and may be alienated as well as leased.<sup>44</sup> Property which is in its nature inalienable could not be included in our proposed scheme.

2.32 The position is different if inalienability is attributable merely to a lack of power in the owner/landlord. Here the property is capable of alienation, but not by its current owner. A further distinction requires to be made between a restriction of power which rests on obligation and one which is attributable to a lack of capacity.<sup>45</sup> The former has no effect even on voluntary transfer. So property is not inalienable merely because its owner has agreed with a third party that it should not be sold. A sale would be legally effective, although the seller would be liable for breach of contract.<sup>46</sup> Similarly, trustees are always able to sell trust property even where this would be in breach of trust. If obligational restrictions have no effect on voluntary sale, there is no reason why they should prevent conversion under our scheme. This is true even of rights of pre-emption. While, however, conversion would not be prevented by a pre-emption,<sup>47</sup> the pre-emption (if constituted as a

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<sup>38</sup> Rent (Scotland) Act 1984 s 1(1)(a) (protected/regulated tenancies). Houses above a certain rateable value were excluded from protection. Today there is no such exclusion for assured tenancies under the Housing (Scotland) Act 1988.

<sup>39</sup> Long Leases (Scotland) Act 1954 s 1(1).

<sup>40</sup> As in the lease litigated in *B G Hamilton Ltd v Ready Mixed Concrete (Scotland) Ltd* 1999 SLT 524.

<sup>41</sup> Such a lease is far from being an "ordinary" commercial ground lease (for which see note 24).

<sup>42</sup> See generally, Rankine, *Leases* pp 501-07; Paton & Cameron, *Landlord and Tenant* pp 78-84.

<sup>43</sup> Freshwater and Salmon Fisheries (Scotland) Act 1976 s 4; *Palmer's Trs v Brown* 1989 SLT 128.

<sup>44</sup> For separate tenements, see Reid, *Property* paras 207-13.

<sup>45</sup> Reid, *Property* para 599.

<sup>46</sup> In addition, if the purchaser was in bad faith, the transfer would be reducible by the creditor in the obligation on basis of the "offside goals" rule. See eg *Rodger (Builders) Ltd v Fawdry* 1950 SC 483.

<sup>47</sup> This is the solution reached in the conversion scheme for tenancies-at-will: see Land Registration (Scotland) Act 1979 s 21(9). And see also *Ross & Cromarty District Council v Patience* 1997 SC(HL) 46. In any event, a conversion of the kind proposed could not be characterised as a sale and so would not trigger the pre-emption.

real burden) would continue to affect the property in the hands of the tenant-acquirer and would take effect at the first post-conversion sale.

2.33 A restriction of power attributable to lack of capacity is a different matter. Without capacity there can be no transfer, and a purported transfer would be void –subject to the special rule that validates all entries made on the Land Register.<sup>48</sup> Here, however, the scheme need not be as exacting as the law on voluntary transfer. Conversion should be excluded only where the lack of capacity is founded on strong grounds of public policy. In our provisional view, lack of capacity on the part of the landlord should not normally have the effect of preventing conversion of a lease into ownership. Thus conversion should not be defeated merely because, on the relevant day, the landlord happened to be *incapax* or happened to be a body corporate without capacity to alienate land. And on a practical level, the Keeper could hardly be expected to make inquiries, in respect of all qualifying leases on the Land Register, as to the legal capacity of the landlord on that day. Where, however, the legislature has chosen to remove capacity in a particular case, we think that the rule should be different.<sup>49</sup> The only example of which we are aware concerns the National Trust for Scotland, which, while given general powers of alienation, is unable to alienate a building which is held for the express purpose of preservation.<sup>50</sup>

2.34 **Existing conversion schemes.** A number of other conversion schemes are already on the statute book.<sup>51</sup> Tenants of council and other public sector housing have a right to buy their house on payment of a discounted sum.<sup>52</sup> Crofters can buy their crofts.<sup>53</sup> And a person holding under a tenancy-at-will can become owner on payment of limited compensation.<sup>54</sup> There seems no reason why two schemes should not run in parallel, with the result that a person who qualifies under both would have a choice of schemes. We do not suggest, therefore, that qualification under an existing scheme should be a bar from qualification under the new scheme. As it happens, however, the existing schemes do not usually apply to ultra-long leases of the kind which will be covered by the new scheme. A crofting lease was traditionally a lease from year to year,<sup>55</sup> while a tenancy of public sector housing may be of even shorter duration. The term ‘tenancies-at-will’ covers a range of customary holdings which almost defy satisfactory definition,<sup>56</sup> and whether a particular tenancy satisfies the requirements of the new scheme would need to be determined on a case-by-case basis.

2.35 **Minerals.** There seems no reason for exempting leases of minerals as such, although it may be necessary to provide for the continuation of the conditions often found in such leases.<sup>57</sup> In many –perhaps in most –cases mineral leases will be too short to qualify for conversion.

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<sup>48</sup> Land Registration (Scotland) Act 1979 s 3(1).

<sup>49</sup> By this we mean an absolute removal of capacity. Thus we would not include the, quite common, case where alienation is permissible but requires the consent of a particular person, such as the Secretary of State or Scottish Ministers. Further, we would exclude provisions which apply generally, such as those in the Age of Legal Capacity (Scotland) Act 1991.

<sup>50</sup> National Trust for Scotland Order Confirmation Act 1947 (c xxxviii) s 4(1).

<sup>51</sup> See Appendix B paras 3 to 6.

<sup>52</sup> Housing (Scotland) Act 1987 part III.

<sup>53</sup> Crofters (Scotland) Act 1993 ss 12 to 19.

<sup>54</sup> Land Registration (Scotland) Act 1979 ss 20 to 22.

<sup>55</sup> Hence the original definition of ‘crofters’ in s 34 of the Crofters Holdings (Scotland) Act 1886.

<sup>56</sup> *Maclean v Kershaw* 1993 SCLR 145. The definition for the purposes of the statutory conversion scheme is contained in s 20(8) of the 1979 Act. The fullest treatment of tenancies-at-will is that contained in the Guthrie Report at paras 70-81.

<sup>57</sup> See para 3.26 below.

2.36 **Nature of use.** The view has already been expressed that the scheme should apply both to commercial leases (ground leases, in practice) and also to mineral leases. Presumably a lease of agricultural subjects, if of ultra-long duration, ought also to be covered. It has not been suggested to us that any other type of lease merits exemption, although we would welcome views.

2.37 **Nature of landlord.** A special rule for leases of between 175 and 300 years by local authorities was mentioned earlier.<sup>58</sup> Beyond that, we are not aware of any grounds for exempting leases simply on the basis of the type of landlord involved. In particular, it does not seem necessary to exempt leases granted by the Crown (acting through the Crown Estate Commissioners), or by Scottish Ministers or other governmental bodies. Doubtless most such leases would not qualify in any event, as not being granted for the requisite period.

2.38 **Other grounds.** We are not aware of other grounds on which a lease ought to be exempted from the conversion scheme, but we would welcome views.

2.39 **Proposal.** We propose for consideration that:

5. **A lease should be exempted from the conversion scheme if -**

(a) **it is a lease of property which is of its nature inalienable, or**

(b) **the head landlord is a person prevented by statute from alienating property of the type which is subject to the lease.**

### **Voluntary or compulsory?**

2.40 It is necessary to decide whether the proposed scheme should be voluntary or compulsory. Naturally, any conversion scheme must be compulsory as respects the landlord; but it need not be compulsory for the tenant. Here there seem three choices. The scheme could be compulsory, or it could be voluntary, or it could be compulsory but subject to the possibility of an opt-out. The 1954 Act scheme was voluntary, as are the various schemes in force in England and Wales. The scheme for ultra-long leases which operates in Northern Ireland is compulsory.<sup>59</sup>

2.41 In the case of ultra-long leases, we do not think that a conversion scheme should be wholly voluntary. If ultra-long leases are undesirable, then proper provision ought to be made for their removal. A voluntary scheme would do only half the job. As under the 1954 Act scheme, a significant number of tenants would fail to take the steps necessary to achieve conversion.<sup>60</sup> At best the conversion process would be slow and sporadic. At worst many leases would remain unconverted.

2.42 An advantage of a compulsory scheme is that it solves the problem of subleases. Suppose, for example, that A leases to B for 999 years, that B subleases to C for the same period, and that C subleases to D also for 999 years. In respect of the same piece of land

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<sup>58</sup> Para 2.23.

<sup>59</sup> Appendix B para 13.

<sup>60</sup> Para 4.3.

there are then three leases, all classified as ultra-long and all, in principle, capable of conversion under the scheme. As with the scheme for abolition of the feudal system, the ultimate right to become owner rests with the tenant holding under the lowest qualifying lease (D in the example).<sup>61</sup> If conversion is compulsory, therefore, the rule can simply be that, on the trigger event, the lowest qualifying lease is converted into ownership. All intermediate leases then fall. If, however, conversion is voluntary, the position is unavoidably more complex. The tenant with the ultimate right (D) might fail to take the necessary steps to achieve conversion; and rather than allow the complex chain of leases to remain in existence, it would seem preferable to give intermediate qualifying tenants the right to become owner. Thus B, for example, would be able to convert his lease into ownership. If this was done, B would replace A as owner and the chain would be one link shorter. But B's title would then be lost if either C or D sought to convert. B might therefore be owner for 30 years, or for 30 days. In practice he might conclude that the rewards from conversion were not worth the effort.

2.43 It may be assumed that, in the normal case at least, a qualifying tenant will not be opposed to conversion. It is true that conversion may involve the payment of money as compensation for the extinction of the rent,<sup>62</sup> but in most cases the rent is so small that the amount due will be regarded as an acceptable price for becoming owner. Occasionally, however, that will not be so. If the rent is high, a person may prefer to stay as tenant than to make a substantial one-off payment, especially if the lease has still hundreds of years to run. This argues for a scheme which is normally compulsory but from which it is possible to opt out. Opting out, probably, would be rare, but it ought at least to be possible. The result is a compromise. The principle of compulsion would produce a uniform and complete pattern of conversion, while the principle of opting-out would prevent a tenant having to accept a benefit for which he did not wish to pay.

### **One day or many?**

2.44 If conversion is to be compulsory, it must also occur automatically, without either landlord or tenant being required to do anything. For otherwise there is the risk that the relevant action would not be taken.<sup>63</sup> Automatic conversion can be achieved in broadly two ways. One is to say that on a particular day (which we may refer to as the "appointed day"), all ultra-long leases are converted into ownership. The other is to provide for conversion on the occurrence of a particular event, such as the first time the lease is assigned after the legislation comes into force. The choice, in other words, is between conversion on a single day and conversion on different days running some years into the future. Both versions would be perfectly workable, although the latter presents fewer difficulties for the Land Register. Our provisional view, however, is in favour of conversion on a single day. A once and for all conversion would be simpler, and also much quicker. It would provide a fixed date which would be known to both landlord and tenant and which could be used as a baseline for the registration of notices (for the preservation of conditions, for example, or for opting out) and for the collection of compensation for the extinction of rent. In the case of tenements and other properties with shared facilities, conversion on a single day would ensure uniformity of holding and would avoid a situation where, for many years to come,

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<sup>61</sup> See further para 3.3.

<sup>62</sup> Paras 3.9 to 3.20.

<sup>63</sup> A requirement that the landlord do something, such as grant a disposition, would meet the obvious difficulty that in a significant number of cases the landlord is untraceable.

some occupiers are owners and others hold on ultra-long leases. Finally, conversion on a single day would allow the use, with adaptations, of the scheme already enacted for the abolition of the feudal system. Not only would that save time and effort, but it would also mean that the scheme for leases would be recognisable and familiar to solicitors and other advisers.

2.45 There is one case in which automatic conversion would not be possible. A real right of lease can be acquired without registration in the property registers.<sup>64</sup> A real right of ownership cannot. This difference precludes automatic conversion in a case where the lease is unregistered, for it would be contrary to principle, as well as unworkable in practice, for a person to be owner without a registered title. Nor would it be acceptable, following conversion, for the person with a registered title (the former landlord) not to be owner. It should be emphasised that our concern is with unregistered *leases* and not with an unregistered title to a lease which has itself been registered. It sometimes happens, for example, that, while the lease has been registered, the current holder has not completed his title by registration – in the same way as a person entitled to ownership may not have completed title. Failure to complete title is not a disqualification for conversion, for the conversion affects, not the title, but the lease itself. On the appointed day all qualifying leases will be converted into ownership. The effect, for the unregistered holder, will be to convert a right to become tenant into a right to become owner.<sup>65</sup>

2.46 It is impossible to know how many ultra-long leases are currently unregistered. Almost certainly the numbers are small. In practice an unregistered lease could not be used as security for a loan,<sup>66</sup> so that a person wishing to take out a mortgage cannot avoid registration. Further, once an area is operational for the purposes of the Land Register, all future assignments require to be registered if they are to confer a real right.<sup>67</sup> By 2003 the whole country will be operational and so subject to this rule.<sup>68</sup> This means that, within a fairly short time, most remaining unregistered leases will find their way on to the register. If, however, a lease remains unregistered on the appointed day, there can be no question of automatic conversion. Instead conversion should be triggered by registration, which in practice will occur on the first transfer after the appointed day. Until that time the lease will remain in force.<sup>69</sup>

2.47 Summing up the previous section, we propose that:

- 6. On a day to be appointed (the ‘appointed day’) there should be automatic conversion of all qualifying leases into ownership, except that –**
  - (a) it should be possible for a tenant to elect that there should be no conversion; and**

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<sup>64</sup> The real right is completed by possession, under the Leases Act 1449.

<sup>65</sup> Feudal abolition works in precisely the same way. What is converted into ownership, by s 2(1) of the 2000 Act, is the ‘estate of *dominium utile*’. The question of entitlement to that estate is then resolved by the usual rules of property law.

<sup>66</sup> In theory there could be an assignment in security, but the creditor’s right could be completed only by taking possession. It was the difficulty of creating securities over unregistered leases which was the main impetus behind the introduction of a registration scheme in 1857.

<sup>67</sup> Land Registration (Scotland) Act 1979 s 3(3).

<sup>68</sup> The timetable is set out at 1997 SLT (News) 218.

<sup>69</sup> For further details, see paras 3.76 to 3.78.

**(b) in a case where a lease is unregistered, conversion should not occur until the time of registration.**

The details of the conversion scheme are the subject of part 3.

# PART 3      CONVERSION: A POSSIBLE SCHEME

## Introduction

3.1 In this part we set out a possible scheme for the conversion of ultra-long leases into ownership. The meaning of “ultra-long” in this context was considered in part 2.<sup>1</sup> A lease which qualifies for conversion may be referred to as a “qualifying lease”. Wherever possible, the scheme follows the rules introduced by the Abolition of Feudal Tenure etc. (Scotland) Act 2000 for the conversion of *dominium utile* into ownership.

## From lease to ownership

3.2 On a day to be appointed by Scottish Ministers by statutory instrument (the “appointed day”),<sup>2</sup> the real right of lease would be converted into the real right of ownership.<sup>3</sup> By the time that legislation is likely to be passed, the feudal system would have been abolished, so that “ownership” in this context means simple, rather than feudal, ownership.<sup>4</sup> The conversion would happen automatically, by force of statute. At the same time the right of the existing owner (the landlord) would be extinguished. It is important to be clear about the legal mechanism involved. In some conversion schemes the landlord grants a conveyance to the tenant, so that the tenant receives the landlord’s title, good or bad, encumbered or unencumbered. Under the scheme here proposed the tenant receives a new statutory title, and the landlord’s title is, simultaneously, extinguished. In the language of property law, this is original and not derivative acquisition. Further, the conversion is of the right itself, without regard to the question of who might, for the time being, be its holder. All that happens is that one real right becomes another. If the current holder has sold the right of lease but the conveyancing has not been completed by the appointed day, the purchaser has a right to acquire ownership rather than, as before, a right to acquire a lease; and the seller is, for a limited period, the owner of the land. Only extant leases qualify. If the lease had been extinguished before the appointed day – by irritancy, for example, or by renunciation – nothing would survive to be converted.

3.3 If property has been sublet, the relevant lease is the lowest to qualify as ultra-long. The reversionary interest of those higher up the chain is remote and of negligible value. So if A, the owner of land, leases to B for 999 years, who subleases to C for 900 years, who subleases to D for 899 years, who subleases to E for 15 years, the person holding the lowest ultra-long lease is D. On the appointed day D becomes owner, but subject to the (unconverted) 15-year lease held by E.<sup>5</sup> A’s right of ownership is extinguished, as are the intermediate rights of lease held by B and C.

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<sup>1</sup> Paras 2.13 to 2.22.

<sup>2</sup> Note that this is not intended to be the same day as the “appointed day” for the purposes of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (s 71). The conversion of leases could not occur as early as the abolition of the feudal system.

<sup>3</sup> Other than leases which are unregistered: see paras 3.76 to 3.78.

<sup>4</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 2(1).

<sup>5</sup> A variant is that the land may have been divided and only a part sublet to D. In that case D becomes owner of the part, and C owner of the rest.

## Subordinate real rights

3.4 Conversion is a purely technical change. Insofar as the right was encumbered before the appointed day, it should continue to be encumbered thereafter. Existing subordinate real rights, in other words, should remain in place.<sup>6</sup> At this point, however, it is necessary to distinguish (i) encumbrances affecting the lease from (ii) encumbrances affecting the land itself. If the tenant grants a standard security, that is an encumbrance affecting the lease. But if the landlord grants a security, that is an encumbrance affecting the land. The security subjects, in other words, are different in the two cases.<sup>7</sup> The two classes of encumbrance need not be treated in the same way. It seems self-evident that encumbrances affecting the *lease* before conversion should affect the land after conversion. So a standard security over the lease becomes a standard security over the land.<sup>8</sup> But it is less clear that existing encumbrances affecting the *land* should survive the extinction of the landlord's interest. Here it may be necessary to distinguish between what may be termed "occupational" and "non-occupational" encumbrances. If an encumbrance affects the manner in which the land is occupied and used, then, arguably, it should survive conversion. Otherwise there is both a windfall gain and an unjustified loss. Servitudes, real burdens and public rights of way are the main examples falling into this category: although granted by the owner, all bind the tenant and affect his use. Conversely, an encumbrance which has no impact on occupation and use should fall with the extinction of the landlord's interest. Here the only examples seem to be security and proper liferent.<sup>9</sup> A security over land encumbered by an ultra-long lease is of no more value than a security over a feudal superiority and, like the latter, should be extinguished on the appointed day. Naturally, extinction would have no effect on the personal obligation of the debtor; and the security itself would survive insofar as it affected other subjects, as usually it would. Proper liferents, in this context at least, are more or less unknown.

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

3.6 The discussion so far has been confined to subordinate real rights, ie to encumbrances external to the lease.<sup>10</sup> We postpone until later our consideration of the conditions of the lease itself, for example use restrictions or the obligation to pay rent.<sup>11</sup>

## Opting out

3.7 Feudal abolition did not allow of exceptions. A complex and outdated system of land tenure could not have been preserved merely for the benefit of a small number of vassals who, for one reason or another, were reluctant to move to full ownership. With

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

<sup>7</sup> Thus s 9(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970, as amended, prospectively, by sched 12 para 30(6)(a) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, provides that a standard security may be granted over "any land or real right in land". A lease is a real right in land. The distinction is not, however, always so clear with other real rights. For example, if the tenant grants a sublease, it seems a matter of analytical preference whether this is classified as a real right in the land or as a real right in the lease.

<sup>8</sup> Later we set out special rules for conditions contained in the lease itself: see paras 3.28 to 3.58.

<sup>9</sup> A third example, but one already accounted for, is leases higher up in the chain.

<sup>10</sup> See Reid, *Property* para 349 for the distinction between intrinsic and extrinsic encumbrances.

<sup>11</sup> Paras 3.9 ff.

leases the position is different. Leasing will remain a popular method of landholding in the future, as in the past. If, therefore, a tenant under a qualifying lease wishes to remain as tenant, he should be free to do so.<sup>12</sup> This will usually be because the cost of redeeming the rent<sup>13</sup> exceeds the likely return from conversion to ownership.<sup>14</sup> The scheme can readily accommodate the idea of opting out. We envisage that the appointed day for conversion would not occur for at least two years after the legislation received royal assent. During that period any holder of a qualifying lease would be able to prevent conversion by registering, against the lease, a notice in a prescribed form. A copy of the notice would also be served on the landlord (or landlords, in a case of a chain of leases).<sup>15</sup> The notice may be termed a "notice of exemption". If the lease were held *pro indiviso*, any tenant could register such a notice. Where, unusually, the original lease had not been registered, registration of the notice would, as a practical matter,<sup>16</sup> require to be accompanied by registration of the lease.<sup>17</sup> Only the tenant would be able to register a notice. It would obviously be unacceptable if conversion could be prevented by the landlord, or, in a case involving a chain of leases, by an intermediate landlord/tenant. It is for consideration whether the notice should be capable of being withdrawn, whether before or after the appointed day.

### The scheme in summary

3.8 The scheme outlined above may be summarised in the form of a proposition:

**7. We invite views on the following possible scheme for the conversion of ultra-long leases into ownership:**

**(a) A lease would be a qualifying lease for the purposes of the scheme if, on the appointed day –**

- (i) it complied with proposals 2 and 3 in respect of unexpired duration;**
- (ii) it was registered in the Land Register or Register of Sasines;**
- (iii) it was not an exempt lease in terms of proposal 5 or of (d) below; and**
- (iv) in a case where, in respect of any land, the above criteria were fulfilled by more than one lease, it was the lowest such lease.**

**(b) On the appointed day, in relation to any qualifying lease of land –**

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<sup>12</sup> Para 2.42.

<sup>13</sup> For redemption of rent, see paras 3.9 to 3.20 below.

<sup>14</sup> Occasionally there may also be other factors. For example, it may have been in the spirit of the original arrangement between the parties that the person disposing of the land should remain as nominal owner.

<sup>15</sup> Except where this was impracticable, eg because their identity was unknown.

<sup>16</sup> In the absence of a title sheet/search sheet for the lease, there would be nowhere for the notice to be registered.

<sup>17</sup> Special rules for unregistered leases are discussed at paras 3.76 to 3.78. However, a lease registered as part of the process of registering a notice of exemption would not be unregistered as at the appointed day and hence would not be subject to those rules.

- (i) the right of lease would be converted into ownership;
  - (ii) any right of lease higher than the converted right would be extinguished;
  - (iii) the landlord's ownership would be extinguished; and
  - (iv) any right in security or proper liferent over the land would cease to affect the land.
- (c) Following conversion, the land would be subject to any subordinate real right which, immediately before the appointed day, affected –
- (i) the lease, and
  - (ii) (except as mentioned in (b)(iv) above) the land.
- (d) A lease which is otherwise a qualifying lease would be exempted from conversion if, before the appointed day, any tenant –
- (i) executed a notice of exemption;
  - (ii) sent a copy of the notice to the landlord or landlords (except where not reasonably practicable to do so); and
  - (iii) registered the notice in the Land Register or Register of Sasines.

### Compensation for loss of rent

3.9 **Amount of compensation.** On conversion into ownership, rent would cease to be due, and the (former) landlord should be compensated for the loss of income. In practice most rents are likely to be small –according to our survey, less than £5 in around two thirds of all qualifying leases.<sup>18</sup> The treatment of feuduty provides an obvious model for compensation. Where feuduty is “redeemed” (ie extinguished by being bought out), the superior is entitled to be paid such sum as, if invested in two and a half per cent Consolidated Stock, would produce an annual sum equal to the feuduty. The idea is that the superior could exchange one investment for the other without disturbance to the income stream. This formula was used, both in the original provisions for redemption contained in the Land Tenure Reform (Scotland) Act 1974,<sup>19</sup> and also in the 2000 Act, which provides for the extinction of all remaining feuduties.<sup>20</sup> If the case for conversion is that qualifying leases are quasi-feus, then there is obvious merit in applying to rent the rules which already apply to feuduty.

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<sup>18</sup> Appendix A para 17.

<sup>19</sup> Land Tenure Reform (Scotland) Act 1974 ss 4 –6.

<sup>20</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 9. It is also used to a limited extent in the Leasehold Reform Act 1967 sched 1 para 7A in relation to certain types of profit rent.

3.10 It is possible to argue, however, that the feuduty rules are unduly generous. When the rules were first introduced, in 1974, the price of two and a half per cent Consolidated Stock resulted in a feuduty “factor” (ie the figure by which the annual feuduty required to be multiplied in order to arrive at the redemption sum) of 6.3. Since 1974 there has been a steady rise in the price of Consolidated Stock, with the result that the feuduty factor is now in excess of 20. In 1974 a feuduty of £5 could be redeemed for £31.50. The price today would be more £100 or more. This suggests that the price of Consolidated Stock may no longer be a reliable measure of compensation. Admittedly it was re-used as recently as the 2000 Act, but in a context where consistency was required with the 1974 Act provisions. In the case of redemption of rent, there is no earlier model which need be treated as binding;<sup>21</sup> and the fact that rent, unlike feuduty, is not perpetual in character may also point to less generous terms. The scheme for conversion of leases which operates in Northern Ireland uses a fixed multiplier of 12.<sup>22</sup> That is close to the multiplier of 8-10 suggested for feuduty by the Royal Institution of Chartered Surveyors in Scotland in written evidence to the Justice and Home Affairs Committee of the Scottish Parliament at stage 1 of the Abolition of Feudal Tenure etc. (Scotland) Bill.<sup>23</sup> According to RICS:

{W}e do not consider that ... [a multiplier of 20] is a true reflection of the current market position. Circumstances have changed since the introduction of the 1974 Act: entire superiorities change hands at multipliers of less than half this redemption factor. It would therefore seem unfair if former vassals were required to pay more than the multiplier for which entire superiorities change hands.”

At this stage we do not make a firm proposal and simply invite views as to the multiplier which should apply for the redemption of rent:

8. (a) **Should compensation for loss of rent be calculated by reference to –**
  - (i) **the value of two and a half per cent Consolidated Stock; or**
  - (ii) **a multiplier of the annual rent?**
- (b) **If a multiplier is preferred, what figure should be selected?**

3.11 **Compensation due only if claimed.** Under the 2000 Act the superior must ask for compensation. Otherwise none is due, and the feuduty is extinguished without payment.<sup>24</sup> The claim is made in the form of a prescribed notice, served on the vassal, and specifying the amount due. This procedure seems appropriate also in respect of compensation for rent. If, as sometimes, the rent had already been informally “redeemed”, typically by using the 1974 Act scheme for feuduty, no claim could be made. For this and for other reasons the take-up of compensation claims is likely to be patchy. Often rent is so small as to be barely worth collecting. It may not in fact have been collected for many years. Sometimes also there is no identifiable landlord. In cases such as this it may be assumed that compensation will not

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<sup>21</sup> However, it may be noted that under the 1954 Act scheme the multiplier for profit rent, in a case where the unexpired duration was 96 years or more, was 19.85. See Long Leases (Scotland) Act 1954 s 9 and sched 3.

<sup>22</sup> Property (Northern Ireland) Order 1997, SI 1997/1179 (NI8) art 15 and sched 1.

<sup>23</sup> The evidence, which is dated 2 November 1999, is reproduced as part of the Stage 1 Report issued by the Justice and Home Affairs Committee on 9 December 1999.

<sup>24</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 8.

normally be claimed. But where the rent is substantial, or at any rate has been regularly collected, landlords will presumably enforce their rights.

**3.12 Interaction with notice of exemption.** A difficulty peculiar to the conversion of leases is the interaction with notices of exemption. The problem can be shortly stated. A tenant can opt out of conversion by registering a notice of exemption,<sup>25</sup> and since conversion will otherwise occur on the appointed day, this must be done before that day. In practice, however, a tenant is likely to opt out only because of the cost of compensation. The question is how he is to be alerted to this cost in sufficient time to register the relevant notice. An obvious solution would be to require all claims for compensation to be made *before* the appointed day (and not after, as under the 2000 Act scheme).<sup>26</sup> If no claim were made, it is improbable that the tenant would register a notice of exemption. But in the event of a claim, the tenant could make an informed choice. This solution, favourable to the tenant, may be thought unfair to the landlord. Already the landlord must serve a notice in order to receive compensation. The effect of the proposal is that the notice would require to be served before the appointed day, at a time when the lease was still in existence and the tenant was continuing to pay rent. Not all landlords may be sufficiently well-informed to serve a notice in time. The policy choice, it seems, is between protecting the tenant and protecting the landlord; and the decision reached may depend on an evaluation of the relative states of knowledge of the parties. A tenant who is ignorant of the possibility that compensation might be claimed will not register a notice of exemption. A landlord who is ignorant of the fact that compensation is due will not serve the relevant claim. A practical resolution may lie in the fact that, while the ignorance of the tenant is remediable, provided that the compensation claim is served before the appointed day, the ignorance of the landlord may not be much affected by when the claim has to be served. A well-informed landlord will serve before the appointed day. A badly-informed landlord will not serve at all – and in practice will probably not be collecting rent at the moment. A requirement of service before the appointed day would in any event be consistent with the requirement, suggested below (and derived from the 2000 Act), that a notice preserving conditions of the lease must be registered before that day.<sup>27</sup> If there were thought to be practical difficulties with this timetable, they could be met by allowing a generous interval between royal assent and the appointed day.

**3.13 A scheme in outline.** Our preliminary view, therefore, is that a claim for compensation should be served before the appointed day. Indeed, in order to allow the tenant sufficient time to register a notice of exemption, it ought to be served no later than three months before that day. A possible scheme would be the following. Compensation would be claimed by service of a notice by the landlord. Payment would then be due on the ‘redemption day’ stipulated in the notice, which could not be less than three months after the date of service. Each lease would thus have a different redemption day. Liability for payment would rest with the person who was tenant on the date of service; and payment would be due to the person who was landlord on that date. A person would qualify as tenant or landlord even although title had not been completed by registration (or possession).<sup>28</sup> The claim would be an ordinary personal debt, due by one person to another,

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<sup>25</sup> Para 3.7.

<sup>26</sup> Section 8(1) of the 2000 Act requires that claims be made within two years of the appointed day.

<sup>27</sup> Para 3.43.

<sup>28</sup> This follows the definition of ‘superior’ and ‘vassal’ in s 16(1) of the 2000 Act. There is no definition of ‘landlord’ or ‘tenant’ in the Leasehold Casualties (Scotland) Bill.

and, unlike rent, it would not be secured by the landlord's hypothec.<sup>29</sup> The debt would continue to be due even if the tenant sold the lease before the appointed day, or indeed before the redemption day; but in that case the liability would presumably be reflected in the price achieved. No rent would be exigible for any period after the redemption date, although liability for arrears would remain, in the usual way. Thus, rather like feuduty under the 1974 Act, the redemption of rent would precede the extinction of the lease itself.<sup>30</sup> In other respects the scheme would follow the rules set out in part 3 of the 2000 Act. For example, the tenant could opt to pay by half-yearly instalments in any case where the amount due was £50 or more. The number of instalments would depend on the amount due, up to a maximum of 20 instalments in the case of a total debt of £1500.<sup>31</sup> The debt would be subject to the five-year negative prescription.<sup>32</sup>

3.14 Special mention should be made of cases where the original subjects of let have been divided, by assignation of a part. Our survey suggests that this may have occurred in more than half of all leases.<sup>33</sup> Although the issue seems not to have been litigated, the position appears to be that a single rent remains due in respect of both parts, and that the tenant of either can be required to pay the full amount (except where the landlord has agreed to the contrary).<sup>34</sup> Even if the assignation contains an informal apportionment of rent (as may happen in around 40% of cases),<sup>35</sup> it is doubtful whether this binds the landlord. So far as the compensation scheme is concerned, it would be for the landlord to apportion the amount due between the parts, having particular regard to any informal apportionment currently in existence.<sup>36</sup> The rules in the 2000 Act for *cumulo* feuduty provide a ready model.<sup>37</sup> The notice would specify the apportioned compensation payment.

3.15 Once a notice has been duly served, payment of compensation could be avoided only by service and registration of a notice of exemption. The debt would then cease to be due, but the lease would survive the appointed day and rent would continue to be payable. In practice it may be expected that the tenant would register the notice during the three-month interval between service and redemption, but later registration should not be excluded. If rent, provisionally redeemed on the redemption date, were to be revived by the later registration of a notice of exemption, the tenant would become liable for the rent attributable to the intermediate period.

3.16 If no claim for compensation was made, the obligation to pay rent would be extinguished on the appointed day, and no compensation would then be due.

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<sup>29</sup> Any more than compensation for loss of feuduty is secured by the superior's hypothec, or in any other way. See 2000 Act s 13.

<sup>30</sup> For the avoidance of doubt it would probably be necessary to provide that the lease continues (until the appointed day), notwithstanding the absence of rent. For the equivalent provisions in respect of feuduty, see ss 4(3) and 5(3) of the Land Tenure Reform (Scotland) Act 1974.

<sup>31</sup> 2000 Act s 10.

<sup>32</sup> 2000 Act s 12.

<sup>33</sup> Of the 2608 leases in respect of which we have information of this point, division had occurred in 1503 cases (57.63%).

<sup>34</sup> If only by analogy with *cumulo* feuduty.

<sup>35</sup> Of the 1476 divided leases where our survey provided information on this point, there was informal apportionment in 586 (39.7%).

<sup>36</sup> Including an informal apportionment arising out of actual practice in the payment of rent.

<sup>37</sup> 2000 Act s 9(3), (4).

3.17 **Intermediate leases.** In most of the properties affected by the scheme there is only a single landlord and a single tenant.<sup>38</sup> Where intermediate leases exist, however, the position becomes more complicated. Earlier<sup>39</sup> we gave the example of a case in which A, the owner of land, leases to B for 999 years, who subleases to C for 900 years, who subleases to D for 899 years. Each tenant pays rent to his landlord. How is the compensation scheme to operate in such a case? There seem two possibilities. One would be for each landlord to claim from D (the future owner) compensation only in respect of the “profit” rent, ie that part of the rent due to him which exceeds the rent due to his own landlord. So if B paid £10 to A but collected £15 from C, B’s profit rent would be £5. The other possibility would be for each landlord to claim the full amount from his own immediate tenant, leaving it for that tenant to claim further down the line. Thus A would claim from B on the basis of a rent of £10, B from C on the basis of a rent of £15, and so on. A number of considerations suggest that this second solution is preferable. One is that it takes proper account of the fact that some of the intermediate rents may no longer be claimed. If B does not in practice pay to A, then his real profit rent –and hence his real loss on redemption –is £15 and not £5. If he can only claim for £5, then –on the basis that A will not in fact make a claim –the subtenants will have got off too lightly. Another factor is the possible difficulty of identifying the qualifying subtenant. Occasionally, too, there may not be a profit rent at all. B may have sublet for less than he pays to A. In such a case the first solution would not be workable. Finally, there is the question of consistency with the 2000 Act, which allows intermediate superiors to claim in full from their immediate vassals.

3.18 **Non-monetary rents.** In around 1% of the leases in our survey the rent, or part of the rent, was expressed in non-monetary form. For example, in one lease six fat hens formed part of the rent. Another supplemented a low monetary rent with four bolls of good and sufficient oat farm meal. If compensation is to be payable, it is necessary to find some method of converting these rents into monetary value.

3.19 Roughly speaking, such rents divide into three categories. First, there is the case where the lease itself provides the basis of conversion: for example, fifteen and a quarter pecks of oat meal conform to the highest Candlemas fiars prices. Here no legislative help seems needed. In relation to the particular example quoted, the courts which set fiars prices were abolished by the Local Government (Scotland) Act 1973, but the Act provides that any periodical payment ascertained by reference to such prices is now to be the average value of the payment during the three years prior to abolition.<sup>40</sup> Secondly, and much more commonly, there are rents payable in, or by reference to, grain or other fungibles but without an express basis of conversion. Here we are content to adopt the solution of the Long Leases (Scotland) Act 1954 which ties the value to the average value of such fungibles during the previous ten years.<sup>41</sup> Finally, there are other, miscellaneous cases, for which a statutory formula would be out of place. Such cases are rare, but in two of the leases in our survey the rent included providing the services of a labourer for three days to work on the roads in a particular town. In this case –and in practice no doubt in the other cases also –it is for the parties to agree their own valuation.<sup>42</sup> In the absence of agreement the landlord

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<sup>38</sup> Our figures suggest that there are intermediate leases in only around one fifth of cases.

<sup>39</sup> Para 3.3.

<sup>40</sup> Local Government (Scotland) Act 1973 s 228.

<sup>41</sup> Long Leases (Scotland) Act 1954 s 19(a).

<sup>42</sup> Long Leases (Scotland) Act 1954 s 19(b). The proviso, which extinguishes such rents if not claimed for ten years, seems to discriminate unfairly against this type of rent.

will simply select a figure for inclusion in the compensation notice, and if necessary the issue can be judicially tested in an action for payment.

3.20 **Proposal.** The scheme outlined above may be summarised in the form of a proposition:

9. We invite views on the following possible scheme for the payment of compensation in respect of extinction of rent:

(a) Compensation would be payable provided that a notice, in prescribed form, was served by the landlord on the tenant not later than three months before the appointed day.

(b) The notice would stipulate –

(i) the amount of compensation, and

(ii) the date (the ‘redemption day’) on which payment was due.

(c) The redemption day could be not less than three months after service of the notice but not later than the appointed day.

(d) In relation to a single rent due in respect of properties held by different tenants, it would be for the landlord to apportion the compensation, having regard to any informal apportionment of rent currently in existence.

(e) A non-monetary rent would be converted into its monetary equivalent, and in a case where the rent was ascertained by reference to the value of grain or other fungibles, the equivalent would be taken to be the average value during the previous ten years.

(f) On the redemption day, the compensation would become payable by the person who, on the date of service of the notice, was the tenant of the property to the person who, on that date, was the landlord; but where the compensation was £50 or more, payment could be made by instalments.

(g) Rent would cease to be payable –

(i) in respect of any period on or after the redemption day or

(ii) where no compensation notice had been served, in respect of any period on or after the appointed day

but liability for arrears would be unaffected.

(h) A mid-landlord would have the same right to claim compensation as any other landlord.

- (i) In other respects, the scheme would follow the rules for feuduty set out in part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

### Compensation for loss of other money payments

3.21 **Leasehold casualties.** A casualty is an obligation to pay money (other than rent) at certain intervals, regular or irregular –for example, every 19 years, or on the assignation of the lease. However, leasehold casualties will be extinguished following the enactment of the Leasehold Casualties (Scotland) Bill, currently before the Scottish Parliament. The Bill applies to all leases granted for a period of not less than 175 years and so will cover all the leases which qualify for our scheme.<sup>43</sup>

3.22 **Renewal premiums.** Later we suggest that a renewal which the landlord is bound to grant should be counted for the purposes of determining the duration of a lease, and hence the eligibility for conversion.<sup>44</sup> Sometimes, however, renewal is granted only against payment of money. For example, in the so-called Blairgowrie leases (leases for 99 years, perpetually renewable) it is provided that the landlord

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

Where, as usually, the renewal premium (grassum) is tied to the ground rent, it is likely to be very small –less than £1 in the example quoted above. Occasionally the amount due is larger. We found one example in which payment was a full year’s rental value “whatever that may happen to be”.<sup>45</sup> With renewable leases the tenant will usually need to count at least one renewal in order to bring the unexpired duration to the qualifying level for the purposes of conversion, and occasionally more than one will be required. This suggests both that compensation should be given for the loss of such renewal premiums as are required to reach the qualifying level, but also –in view of the very small number of cases, and the derisory sums often involved –that the method of calculation need not be very sophisticated. The simplest approach would be to treat renewal premiums as an additional rent, spread evenly over the period of the lease. So a premium of £10 payable for renewal every 99 years would be treated as an additional rent of £0.10 a year. This figure could then be added to the rent for the purposes of calculating compensation in the manner already described. This method has the merit of simplicity, while achieving a certain amount of rough justice. It favours the tenant if the next renewal is expected shortly and the landlord if it is still a long way off. Alternatively, it would be possible to provide for a much more precise calculation, based on the current value of a right to receive the premium on the date on which it is due.<sup>46</sup> In that case a statement of the valuation principle would seem sufficient, leaving the parties to agree on the actual figure.<sup>47</sup> The very small numbers

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<sup>43</sup> Leasehold Casualties (Scotland) Bill s 1(1) (as amended at Stage 2 on 14 February 2001). The further limitation, that the lease must have been granted before 1 September 1974, is due to the fact that leasehold casualties could not be imposed after that date. See Land Tenure Reform (Scotland) Act 1974 s 16.

<sup>44</sup> See paras 3.60 to 3.63.

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

<sup>46</sup> For a discussion of this method, which is used in the Leasehold Casualties (Scotland) Bill, see Scot Law Com No 165 paras 5.4 ff (and especially para 5.5).

<sup>47</sup> An example is s 3(1)(e) of the Leasehold Casualties (Scotland) Bill.

involved would probably not justify the preparation of a special statutory table of values.<sup>48</sup> As with claims for rent, the compensation would require to be claimed by notice served not later than three months before the appointed day.<sup>49</sup>

3.23 Maintenance obligations are considered later.<sup>50</sup> Those apart, we are not aware of money payments due by a tenant other than the payments already described, but we would welcome further information and views.

3.24 Our proposal is that

10. (a) **The rules for compensation claims in respect of loss of rent, set out in proposal 9, should apply equally to compensation claims for loss of renewal premiums.**
- (b) **We invite views as to whether the amount payable in respect of renewal premiums should be determined –**
  - (i) **by counting as additional rent the figure produced by dividing the premium by the renewal period, or**
  - (ii) **by assessing the current value of the right to receive the premium on the date when it would be due.**

### **Reservations and pertinents**

3.25 In principle the property which comes to be owned under the scheme should be the same as the property which was previously let. The change is to the nature of the right, and not to the thing in which the right is held. Thus any reservations from the property formerly let should be reflected in the property now owned; and any pertinents of the lease – additional rights exercised in association with the property but beyond its boundaries<sup>51</sup> – should become pertinents of ownership. This principle is, however, subject to the rules of pertinents and separate tenements as they apply to ownership. Occasionally a lease may contain reservations or pertinents which would not be recognised in the context of ownership. For example, only certain rights can be reserved, as separate tenements, from the ownership of the surface of the land itself.<sup>52</sup> A reservation which fell outside this limited category would be inept and would need to be disregarded on conversion into ownership.<sup>53</sup>

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<sup>48</sup> The tables and formulae contained in the Leasehold Casualties Bill are not suitable for this purpose because they presuppose a recurring payment rather than, as in the present case, what will usually be only a single payment for a single renewal.

<sup>49</sup> Para 3.13.

<sup>50</sup> Paras 3.40 to 3.52.

<sup>51</sup> For pertinents, see Reid, *Property* paras 199 to 206; *Caledonian Heritable Ltd v Canyon Investments Ltd* 2001 GWD 1-62.

<sup>52</sup> Reid, *Property* paras 207 to 212.

<sup>53</sup> An example is woods, which are reserved by implication from leases: see Rankine, *Leases* p 210. Sporting rights may also cause difficulty, unless they are re-classified as real burdens. See Paton & Cameron, *Landlord and Tenant* p 79.

3.26 Minerals are not included in a lease of land except by express provision,<sup>54</sup> and indeed an express reservation of minerals was almost universal in Victorian ground leases, in much the same way as it was universal in feus from the same period. Indeed the wording is much the same as found in feus, so that the bare reservation of minerals is accompanied by ancillary rights to work (sometimes from the surface), and by provisions about compensation. These ancillary rights and obligations form an integral part of the reservation itself,<sup>55</sup> and, strictly, need not be separately provided for under the scheme.<sup>56</sup> Conversion would effect a separation of minerals from the surface –the minerals would be owned by the former landlord and the surface by the former tenant. Relations between them would then be regulated by the ancillary rights and obligations contained in the original clause of reservation. The same broad principles would regulate cases where the minerals were separated by grant rather than by reservation –cases where, in other words, the lease was of minerals with the surface reserved to the landlord.

3.27 Pertinents may be either corporeal or incorporeal. The principal incorporeal pertinents (servitudes and real burdens) are considered more fully below. Corporeal pertinents are usually shared with other properties and so are held *pro indiviso*. The standard example occurs in tenements. Where whole tenements are held on leasehold tenure, the lease of each flat includes, expressly or, possibly, by implication,<sup>57</sup> a shared right to certain common parts, such as the common passage and stair. On conversion of the lease, the shared right would become a right of ownership in common.

### Leasehold conditions

3.28 Rent has already been discussed.<sup>58</sup> In this section we are concerned with other leasehold conditions. Most such conditions are found in the lease itself, or in a later variation or re-grant of the lease, but in 1985 statute recognised, retrospectively, the possibility of conditions being included in assignments of leases, whether in the actual deed of assignment or in a separate deed of conditions.<sup>59</sup> Conditions of this kind seem not to be common, and are unknown except in cases of partial assignment.<sup>60</sup>

3.29 Not all conditions found in leases are enforceable in a question between successors. Enforceability requires that the condition is *inter naturalia* of the lease, that is to say, of a kind which belongs naturally in a lease of the type in question.<sup>61</sup> Very few conditions, however,

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<sup>54</sup> Rankine, *Leases* pp 208-9. Hence s 12(c) of the Long Leases (Scotland) Act 1954. The reason, according to Erskine II.6.22, is that 'In a lease of lands, the use which the lessee acquires in the subject let is not understood to comprise every right, which was before competent to the landlord, but is limited to those yearly fruits which either naturally, or by the lessee's industry, spring up from the surface.'

<sup>55</sup> Reid, *Property* paras 264 to 266.

<sup>56</sup> This is also the approach which was adopted in the conversion of feus into ownership. See Scot Law Com No 168 para 6.5. Note however s 12(b) of the Long Leases (Scotland) Act 1954, which was presumably included for the avoidance of doubt, in recognition of the fact that the original lease was changing form.

<sup>57</sup> It may be necessary to resolve this doubt, if the (former) landlord is not to be left with ownership of the roof and other common parts.

<sup>58</sup> Paras 3.9 to 3.20 above.

<sup>59</sup> Registration of Leases (Scotland) Act 1857 s 3(2)-(5) (inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 3).

<sup>60</sup> Being the case for which the 1985 legislation was designed. See J M Halliday, *Conveyancing Law and Practice* vol 2 (2<sup>nd</sup> edn by I J S Talman, 1997) p 886.

<sup>61</sup> See eg W M Gordon, *Scottish Land Law* (2<sup>nd</sup> edn, 1999) para 23-22.

fail to make the grade. Our discussion of leasehold conditions is confined to those conditions which are capable of binding successors.<sup>62</sup>

3.30 Our discussion is also confined to conditions of the actual lease being converted. In cases involving leasehold chains, it sometimes happens that the terms of the qualifying lease are different from those of leases higher up the chain. But only the former are relevant, for conditions in a mid- or head- lease are unenforceable against a subtenant;<sup>63</sup> and if conditions are not binding on a subtenant before conversion, they should not be binding thereafter.

3.31 It will be convenient to divide leasehold conditions into three categories. In the first place there are those conditions which, had the original grant been a conveyance rather than a lease, would have been classified as positive servitudes. Secondly, there are those conditions which, in a conveyance, would be regarded as real burdens. And finally there are those conditions which fall into neither of the first two categories but are peculiar to leases. Common examples are restrictions on assignation or subletting, or provisions about surrendering the property on the expiry of the lease. It need hardly be said that conditions of this last kind have no place once a lease has become ownership, and so should not survive the process of conversion. Servitudes and real burdens require a fuller discussion.

### **Positive servitudes**

3.32 A servitude requires two properties in separate ownership, for there must be both a burdened property (servient tenement) and a benefited property (dominant tenement).<sup>64</sup> Almost always, this requirement prevents servitudes from being created in leases. So if A leases to B reserving a right of access over the land leased in favour of other land not leased, the fact that A owns both areas of land prevents the right from qualifying as a servitude. The same is true if right and obligation are reversed, and the access right is conferred on B. At most the parties have a leasehold right which operates as a kind of quasi-servitude.<sup>65</sup> In theory a lease might reserve or create a right which affected land owned by some third party, thus allowing a proper servitude to come into existence, but this is almost unknown in practice. Conversion will not end the need for the access and other rights created or reserved in a lease. If A required a right of access over land at a time when it was still his but tenanted, he will need the right all the more once the land comes to belong to B. The solution readily presents itself. Any right granted or reserved in a lease which, if the lease had been a conveyance (leading to separation of ownership), would have been classified as a positive servitude should take effect as a servitude on the appointed day. A's quasi-servitude, in other words, would become a proper servitude.

3.33 This proposal may not go far enough. It is not uncommon for tenants (or landlords) to exercise 'rights' over the others' property which are not expressly provided for in the lease. Thus the pipes and other services to the landlord's property may pass through the property which is tenanted; or the only reasonable access to the back garden of the tenanted

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<sup>62</sup> Even if, on the appointed day, the original parties are still in place. But see para 3.57 below.

<sup>63</sup> *Fergusson v Brown* (1901) 9 SLT 341; Bell, *Principles* s 1252; R Hunter, *Law of Landlord and Tenant* (3rd edn, 1860) vol II p 168; *Stair Memorial Encyclopaedia* vol 13 para 382. However, in an extended commentary on *Purves v Gentle* (1797) Hume 794, Hume suggests that the rule might be different in respect of "obligations which can only be performed by the person who is in the natural possession of the lands". In practice, of course, a head landlord might be able to secure compliance by recourse to irritancy.

<sup>64</sup> In this paper we follow the new terminology proposed by the Title Conditions (Scotland) Bill.

<sup>65</sup> DJ Cusine and R R M Paisley, *Servitudes and Rights of Way* (1998) paras 1.18 to 1.21.

property may be by way of a lane forming part of the landlord's property. Often the other property belonging to the landlord will itself be leased to someone else, perhaps on another ultra-long lease; but the principle is the same whether it is leased or not. If the two properties were already in separate ownership, a right exercised in the manner just described would usually be classified as a servitude. Sometimes this would be because a servitude was implied into the original conveyance which separated the properties; but in any event a servitude would usually have been acquired by exercise of the right for the twenty years of positive prescription.<sup>66</sup>

3.34 A reasonable solution would be to give the former tenant (or landlord), on conversion, the benefit of any period of quasi-prescription. Thus the rule might be that, on the appointed day, the property should have the benefit of, but also be subject to, all servitudes which, if the properties had been separately owned since the date of the lease, would have been constituted by positive prescription or otherwise. This gives weight to past use. Without such a rule the former tenant (or landlord) might be deprived of a right which was reasonably required for the proper enjoyment of his property.<sup>67</sup> A possible objection is the absence of the opportunity to interrupt prescription. If, at the time when the 'right' was being exercised, the landlord (or tenant) had known that statute would later allow such exercise to qualify for the purposes of prescription, then he might have been less forbearing. He should not be penalised for his neighbourliness. There is some force in this objection. But it should be set in the context of the fact that the running of prescription is rarely interrupted and that the proposed rule will operate even-handedly as between landlord and tenant. Further, it is possible that weight is already given by the current law to possession of quasi-servitudes by a tenant.<sup>68</sup> Our provisional view is in favour of the introduction of such a rule. The only reasonable alternative would be to treat conversion as a deemed conveyance by landlord to tenant, thus invoking the existing law of implied servitudes. This would produce much the same result, although giving rise to greater uncertainty.

3.35 In theory implied servitudes might equally be part of the rule now proposed, for if the properties were deemed to have been separately owned since the date of the lease, servitudes might have been implied at the time of the deemed separation. But that would be of significance only in the rare case of a qualifying lease granted within the last twenty years. For leases older than that, the 'right' will either have been exercised, in which case it would be established by positive prescription on the principle already mentioned, or it will not have been exercised, in which case it will have been extinguished by negative prescription.<sup>69</sup>

3.36 Much the same issue arises if the land originally leased is divided into two or more units, whether by partial assignation or by partial sublease; and once again the solution

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<sup>66</sup> Prescription and Limitation (Scotland) Act 1973 s 3(2).

<sup>67</sup> It is possible to address this issue more directly in a conversion scheme which operates by a conveyance from landlord to tenant. See para 4.45 and, for an example from England and Wales, s 10 of the Leasehold Reform Act 1967.

<sup>68</sup> *Little v Irving* (2000), reported and commented on in R R M Paisley and D J Cusine (eds), *Unreported Property Cases from the Sheriff Courts* (2000) pp 120-37.

<sup>69</sup> Prescription and Limitation (Scotland) Act 1973 s 8. Of course what is being extinguished here is a deemed, and not an actual, servitude. The effect of the proposed rule is to put the former landlord and tenant in precisely the same position as if the original lease had been a conveyance. Thus the deemed conveyance and deemed servitudes are accompanied by deemed negative prescription.

seems to lie in treating the units as if they had been in separate ownership, in this case from the date of division.

3.37 No special rule would be needed in relation to property not owned by the landlord.<sup>70</sup> For the purposes of prescription, possession by a tenant is as good as possession by the landlord.<sup>71</sup> Hence if a tenant exercises a right in the nature of a servitude over property belonging to a third party, at the end of twenty years a servitude will be created by prescription in the usual way. The right attaches to the tenanted property as a pertinent, and will continue to do so when, as a result of conversion, the property ceases to be tenanted.

3.38 We provisionally propose that:

11. (a) **On the appointed day the land formerly affected by the lease should be subject to, or as the case may be take the benefit of, such positive servitudes as would have existed on that day if –**
  - (i) **the lease had been a conveyance of the land, and accordingly**
  - (ii) **that land had been in separate ownership since the date on which the lease was constituted as a real right.**
- (b) **The same rule should apply in respect of any partial assignation or partial sublease prior to the appointed day.**

3.39 We have limited our discussion to servitudes which are positive in character on the basis that, by the time any legislation came to be passed, the Title Conditions (Scotland) Bill will be in force, and negative servitudes will have been assimilated with real burdens.<sup>72</sup> Thus any provision in a lease which is capable of forming a negative servitude will be governed by the rules, discussed below, for real burdens.

## **Real burdens**

3.40 **Conditions as quasi real burdens.** Many ultra-long leases contain conditions which, in a conveyance, would be classified as real burdens. Indeed the connection is made overt in the style books, which tend to import for leases the model clauses already given in the context of feus and other conveyances;<sup>73</sup> and it is plain that in drafting conditions of title the Victorian conveyancer made little or no distinction between feus and ultra-long leases. Ground leases from this period tend to conform to a standard pattern. There is an obligation to build and maintain a house. The land is to be fenced and the fences duly maintained. And there are certain restrictions on use, most notably a prohibition of enumerated nuisances. Often there is an irritancy clause, and sometimes a right of pre-emption. Occasionally there is a clause of redemption.<sup>74</sup> Sometimes the special nature of the property

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<sup>70</sup> Sometimes, of course, property not owned by the landlord today would have been so owned at the time of the granting of the lease and so would be subject to the rule described above.

<sup>71</sup> Prescription and Limitation (Scotland) Act 1973 s 15(1) (definition of ‘possession’).

<sup>72</sup> See Scot Law Com No 181 paras 12.2 to 12.14.

<sup>73</sup> R Bell, *A System of the Forms of Deeds used in Scotland* (1800) vol III p 116; *Scots Style Book* (1904) vol 5 p 326-7.

<sup>74</sup> In leases, however, it may sometimes be difficult to distinguish a clause of redemption from an ordinary break provision in favour of the landlord.

requires additional terms. In the case of tenement flats, for example, provisions are often added about common maintenance. Doubtless particular provisions were sometimes inserted in order to negative an obligation which would otherwise have fallen on the landlord, most notably the obligation of repair.<sup>75</sup>

3.41 If conditions such as these are to survive the conversion to ownership, they will have to be transformed from leasehold conditions into real burdens.<sup>76</sup> Not all conditions will qualify, however. Real burdens are subject to restrictions as to content, for example that they must not be repugnant with ownership.<sup>77</sup> Once the Title Conditions Bill is enacted, irritancy will no longer be recognised in respect of real burdens.<sup>78</sup> But the main excluding factor is title to enforce. A real burden requires a benefited as well as a burdened property. On conversion the formerly tenanted land is capable of forming the burdened property; but if, as usually, the conditions were previously enforceable only by the landlord, there will be no benefited property.

3.42 **Three feudal principles.** The problem of a real burden without a benefited property is familiar from the conversion of feus into ownership. The result of the abolition of superiorities is to leave many of the (feudal) real burdens without a benefited property to which enforcement rights can attach. The solution adopted by the 2000 Act rests on three broad principles. In the first place, a superior who owns land in the immediate neighbourhood can nominate that land as a new benefited property in the real burden (subject to some qualifications); and a superior which is a designated conservation body can preserve the right to enforce such burdens as qualify as conservation burdens, even in the absence of a benefited property. Otherwise superiors lose all enforcement rights. In the second place, enforcement rights held by third parties survive. Where neighbours have a right to enforce burdens, those rights are unaffected by feudal abolition. This is because the benefited properties are not feudal in character. Finally, special rules are made for facility burdens and service burdens, in view of their special importance. It is possible, as well as desirable, to adapt these principles for use in leasehold conversion.

3.43 **The first principle: nomination of a benefited property.** The first principle needs little in the way of adaptation. Like a superior, a landlord may, or may not, own other land in the immediate neighbourhood. Any land which is owned could be nominated as the benefited property in the leasehold condition. On the appointed day the condition would then become a real burden. A landlord would not be considered as “owning” any land which was subject to another ultra-long lease,<sup>79</sup> since that ownership would be lost on the appointed day. The details of the nomination process are set out in sections 18 to 21 of the 2000 Act and only a brief summary need be given here. Nomination requires the service and registration of a notice before the appointed day. Usually land can be nominated only if it contains a permanent building in use as a place of human habitation or resort and lying not more than 100 metres from the burdened property (ie the property subject to the leasehold

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<sup>75</sup> On which see generally Paton & Cameron, *Landlord and Tenant* pp 131-5.

<sup>76</sup> This has no counterpart in the conversion of feus to ownership, because the feuing conditions were already real burdens.

<sup>77</sup> Scot Law Com No 181 part 2.

<sup>78</sup> Title Conditions (Scotland) Bill s 56. Sometimes in leases substantive provisions are tied into an irritancy clause. For example, certain restrictions are declared enforceable by irritancy (only). Naturally, restrictions of this kind would fall with the irritancy clause.

<sup>79</sup> Any more than a superior is, under the 2000 Act, treated as “owning” other land in respect of which he has only *dominium directum*.

conditions); but there are some exceptions, as well as a discretion in the Lands Tribunal to waive this requirement in cases of substantial loss or disadvantage to the proposed benefited property. Even where there is qualifying property, a condition would be preserved as a real burden only if the landlord registers a notice, for otherwise there would be no means of identifying the property. It would be for the landlord to decide whether it is worth the trouble. A factor to bear in mind is that if the Title Conditions Bill is enacted in the form recommended in our *Report on Real Burdens*, many conditions which are more than 100 years old would be liable to extinction, after the appointed day, by registration of a notice of termination by the burdened owner. The practical effect may be virtually to restrict preservation to conditions in leases granted within the last 100 years.

3.44 Scottish Ministers are empowered to draw up a list of conservation bodies.<sup>80</sup> A landlord which appeared on the list would be able to preserve conditions which were capable of qualifying as conservation burdens. The detailed rules are set out in the 2000 Act.<sup>81</sup> A conservation burden is one which has the purpose of preserving or protecting the architectural or historical characteristics of land or any other special characteristics (including one derived from the flora, fauna or general appearance of the land). A qualifying condition is preserved by service and registration of a notice before the appointed day. On the appointed day the condition is converted into a conservation burden, and is enforceable in perpetuity by the (former) landlord or its successors as conservation bodies.

3.45 Normally only the immediate landlord could save conditions, because only that landlord would have a right to enforce the conditions under the present law.<sup>82</sup> This would exclude head landlords in cases of conversion of subleases. However a right to save conditions would lie, if, exceptionally, the head landlord had a right of enforcement on the principle of *jus quaesitum tertio*.<sup>83</sup>

3.46 **The second principle: enforcement rights held by third parties.** The second principle is relatively unimportant in the context of leasehold conversion. In feus it is common for enforcement rights to be held also by third parties, usually co-feuars. A main cause is the development of a doctrine of implied enforcement rights in cases such as *Hislop v MacRitchie's Trs*.<sup>84</sup> There is no authority to suggest that comparable rules apply in the case of leasehold conditions.<sup>85</sup> Unless, therefore, there is an express statement that the conditions are to be enforceable by third parties in their capacity as tenants (or owners) of neighbouring property, it appears that no third party rights exist. Such statements in leases are uncommon, if not actually unknown.

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<sup>80</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 26 (a provision which is likely to be replaced by s 33 of the Title Conditions (Scotland) Bill).

<sup>81</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 27 and 28.

<sup>82</sup> *Stair Memorial Encyclopaedia* vol 13 para 383.

<sup>83</sup> *Sears Properties Netherlands BV v Coal Pension Properties Ltd* 2000 SCLR 1002.

<sup>84</sup> (1881) 8 R(HL) 95.

<sup>85</sup> Writing in 1967, Paton & Cameron (*Landlord and Tenant* p 98) express the view that: "The question has not arisen whether one lessee may enforce against a neighbouring co-lessee restrictions contained in the latter's lease (for example, building conditions contained in a long lease) on the ground of similarity of condition and mutuality of interest, but there seems no reason why this should not be possible, if there is a reference to a common plan or a stipulation in each long lease that the same restrictions are to be imposed in all the others". But this idea has not been taken up by the case law.

3.47 A particular difficulty concerns conditions imposed in (partial) assignments.<sup>86</sup> Suppose that A holds 3 hectares on a 999-year lease. He assigns the lease to B in respect of 2 of those hectares. The assignment contains a number of conditions designed to protect the amenity of the remaining hectare retained by A. Enforceability is problematic.<sup>87</sup> The relevant legislative provision<sup>88</sup> says merely that, on registration, the conditions

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

The meaning of this provision is difficult to grasp. A possible reading is that conditions in an assignment are deemed to be conditions of the lease itself, and hence enforceable by the landlord against the assignee, now his tenant. But it seems improbable that it was intended to give enforcement rights to the *landlord* in relation to conditions generally imposed for the benefit of the *cedent* (or perhaps of co-assignees). A more natural reading of the provision, therefore, is that it does no more than ensure that the assignee, and successors, are to be bound. This, however, leaves open the question of title to enforce. If the land had been owned rather than leased, and the 2 hectares disposed rather than assigned, there would usually be an implication that the conditions were to be enforceable by A and his successors as owners of the retained hectare.<sup>89</sup> Again, however, there is no suggestion that the doctrine applies in the case of leasehold conditions. If that is correct, it would follow that the conditions in the assignment would be enforceable by A and his successors only where it was expressly so provided. Otherwise the conditions would have no more than contractual effect.

3.48 The position may be summarised in this way. There is no authority to suggest that the doctrine of implied enforcement rights applies to leases. In the absence of such a doctrine, a third party can have enforcement rights only where these have been expressly granted in the lease or other constitutive deed. There must, in other words, be express nomination of a benefited property. Where this has been done, we suggest that on the appointed day the condition should become a real burden in favour of that property. But otherwise leasehold conditions would not survive, on this principle at least.

3.49 **The third principle: survival of all facility burdens and service burdens.** A facility burden is one which provides for the maintenance or regulation of a facility of benefit to some other property. In practice this is usually a shared facility such as the common part of a tenement building or a private road or a boundary wall. A service burden is one which relates to the provision of services (such as the supply of water) to land other than the burdened property. Service burdens are rarely encountered in practice, but facility burdens are common. The standard obligation to maintain a fence, mentioned earlier,<sup>90</sup> is a facility

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<sup>86</sup> For which see para 3.28 above.

<sup>87</sup> Reid, *Property* para 352. The difficulties do not depend on the particular example given. Another standard case where conditions might be used in assignments is where a tenement is built on land held on an ultra-long lease, and (partial) assignments are granted of the individual flats.

<sup>88</sup> Registration of Leases (Scotland) Act 1857 s 3(2) (inserted by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 3).

<sup>89</sup> Reid, *Property* paras 403 and 404.

<sup>90</sup> Para 3.40.

burden.<sup>91</sup> So are obligations to maintain the common parts of tenements. The principle operated by the 2000 Act is that, whatever may happen to other real burdens on feudal abolition, facility burdens and service burdens should always survive.<sup>92</sup> From the appointed day they will be enforceable by all those who take benefit from them.<sup>93</sup> The benefited properties, in other words, will be those properties which have (and are intended to have) the benefit of the facility or, as the case may be, of the service. So in relation to burdens of common maintenance in a tenement, the benefited properties will be all the flats in that tenement. The same rule can be applied in respect of leasehold conditions. On the appointed day all conditions which are concerned with services or facilities would become service burdens or facility burdens, enforceable as under the 2000 Act.

**3.50 Adjustment of terminology.** The broad effect of the principles just described is that some leasehold conditions will become real burdens and survive the appointed day while others will be extinguished with the lease itself. In relation to those which survive there will need to be some adjustment of terminology. Leasehold conditions impose obligations on “assignees and their successors”. The obligations are not in perpetuity but “during the currency of this lease”. The standard of maintenance required may be expressed as being that of “good and tenantable condition and repair”. And so on. Legislation providing for the conversion of leasehold conditions into real burdens would need to take some account of terminology.<sup>94</sup>

**3.51 Compensation for extinction of development value burdens.** One other aspect of the 2000 Act scheme may be mentioned. An occasional feature of feus was that a grant was made at a significant undervalue on the basis that the land could be used only for some limited purpose, such as the building of a church or a community hall. In effect, real burdens were being used to reserve to the superior the development value of the land.<sup>95</sup> Unless they can be preserved under some other heading, such “development value burdens” will be extinguished on the day of feudal abolition; but the 2000 Act allows the superior compensation in the event that, during the 20 years after that day, some use is made of the land which would have been prevented by the burdens.<sup>96</sup> We are not aware that ultra-long leases were ever used to reserve development value in this way, and we are reluctant to reproduce the, rather complex, provisions of the 2000 Act on this subject unless they are clearly necessary. Our preliminary thinking, therefore, is that they need not be reproduced, but we would welcome views from those with experience of ultra-long leases.

**3.52 Proposal.** Our proposal about the conversion of leasehold conditions into real burdens is as follows:

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<sup>91</sup> Provided it imposes an unequivocal obligation to maintain. Some versions of the clause seem designed only to relieve the landlord of any obligation, and leave open the question of liability with the lessee of the adjacent property.

<sup>92</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 23 (which is likely to be replaced by s 47 of the Title Conditions (Scotland) Bill). The actual terms “facility burdens” and “service burdens” appear only in the Title Conditions Bill.

<sup>93</sup> There is a minor exception for maintenance obligations which have been assumed by local authorities or other public authorities.

<sup>94</sup> Section 73 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000 makes provision in relation to feudal terminology.

<sup>95</sup> Scot Law Com No 168 paras 5.14 to 5.57.

<sup>96</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 ss 33 to 40.

12. (a) This proposal applies to conditions in the qualifying lease which are of their nature capable of being constituted as real burdens.
- (b) By notice registered before the appointed day, the landlord should be able to reallocate a condition to a new benefited property on the terms set out in sections 18 to 21 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000; and on the appointed day the condition should become a real burden.
- (c) By notice registered before the appointed day, a landlord which is a conservation body should be able to preserve a condition concerned with conservation on the terms set out in sections 27 and 28 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000; and on the appointed day the condition should become a conservation burden.
- (d) Where the right to enforce a condition is, by express provision, conferred on the tenant (or owner) of any particular property, on the appointed day the condition should become a real burden in respect of which that property is the benefited property.
- (e) Any condition which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land should, on the appointed day, become a facility burden.
- (f) Any condition which regulates the provision of services to other land should, on the appointed day, become a service burden.
- (g) The benefited properties –
- (i) in a facility burden should be any land to which the facility is (and is intended to be) of benefit, and also the heritable property which constitutes the facility; and
  - (ii) in a service burden should be any land to which the services are provided.

Many leasehold conditions will not fall under any parts of the above proposal and, like feudal real burdens following feudal abolition, will be extinguished on the appointed day.

### **Other conditions**

3.53 **Remaining conditions affecting the tenant.** Not all conditions will qualify as servitudes or real burdens under the rules just described. But since the remaining conditions would have no useful role once the lease itself had ceased to exist, they should simply be extinguished on the appointed day. Transitional provisions will be needed in respect of obligations which were outstanding as at the appointed day.<sup>97</sup>

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<sup>97</sup> For the equivalent provisions in feudal abolition, see 2000 Act ss 17(2), (3) and 54(2), (3).

3.54 **Conditions affecting the landlord.** Leasehold conditions may affect a landlord as well as a tenant. In fact express obligations on the landlord are uncommon in ultra-long leases, but obligations may be implied –for example, a warranty of title, or that the subjects are reasonably fit for the purposes of the lease.<sup>98</sup> Not all obligations bind successors of the original landlord: in order to do so, the obligation must be classified as *inter naturalia* of the lease.<sup>99</sup> Once a lease has been converted, it seems clear that the obligations on the former landlord should fall. Almost always, they are closely connected with the obligant’s status as landlord and, once that status is lost, cease to be appropriate. But even if that were not so, there would be the technical difficulty of identifying a property to which the obligations could attach. In the case of feudal abolition the 2000 Act makes clear that superiors’ obligations are extinguished on the appointed day.<sup>100</sup> An equivalent rule seems needed here, subject to two qualifications.

3.55 It occasionally happens that an obligation on the landlord is the direct counterpart of an obligation on the tenant. For example, the tenant may be bound to pay for maintenance which is then to be carried out by the landlord. In a case where the tenant’s obligation is converted into a real burden, under the rules suggested earlier, then the landlord’s counter-obligation should survive also and be binding on the former landlord or (in the case of facility or service burdens) on the replacement enforcer. The counter-obligation could not be independently enforced, but enforcement of the real burden would be prevented for as long as the counter-obligation remained outstanding. An equivalent rule is provided for in the 2000 Act.<sup>101</sup>

3.56 A second exception was mentioned earlier.<sup>102</sup> Any obligation in the nature of a servitude affecting other land belonging to the landlord would, on the appointed day, be converted into a servitude proper. It would therefore survive the extinction of the lease. This principle has no direct equivalent in the 2000 Act scheme.<sup>103</sup>

3.57 **Conditions enforceable contractually.** The 2000 Act makes an express saving for conditions of the feu insofar as they are enforceable contractually.<sup>104</sup> Conditions are enforceable contractually only in a question between the original parties (or their assignees). This means that if, on the appointed day, the original superior and vassal are still in place, the conditions of the feu will continue to be enforceable. In practice this affects mainly feudal real burdens, and so works for the benefit of the former superior rather than the former vassal. Our provisional view is that this principle should not be extended to leasehold conversion. Many, if not most, conditions of a lease presuppose the continued existence of the relationship of landlord and tenant. In the absence of such a relationship the conditions would be inappropriate where they were not actually oppressive. That is as true of conditions affecting the landlord as of conditions affecting the tenant. For example, it is difficult to see why a former landlord should continue to be bound to ensure that the subjects are reasonably fit for the purposes of the lease. If there is no lease, there can be no

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<sup>98</sup> Paton & Cameron, *Landlord and Tenant* pp 127-35.

<sup>99</sup> Thus an obligation to convey the subjects to the tenant on request has been held to fail the *inter naturalia* test. See *Bisset v Magistrates of Aberdeen* (1898) 1 F 87.

<sup>100</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 54. For the background, see Scot Law Com No 168 paras 4.92 to 4.96.

<sup>101</sup> 2000 Act s 25. By s 47 counter-obligations are extinguished on the extinction of the real burden itself.

<sup>102</sup> Paras 3.32 to 3.38.

<sup>103</sup> The reason is that such rights are already servitudes proper, because the benefited and burdened properties are already in separate ownership.

<sup>104</sup> 2000 Act s 75.

purposes; and the former landlord has no further connection with the subjects. A technical difficulty, which does not in practice apply in the feudal situation,<sup>105</sup> is that a landlord who was contractually liable on the appointed day would have no means of bringing that liability to an end. For, unlike the former tenant, he would no longer be in a position to bring in singular successors.<sup>106</sup>

3.58 We propose that

**13. (a) On the conversion of a qualifying lease into ownership, all the terms and conditions of the lease should cease to have effect, whether as real or as contractual conditions.**

**(b) However, the enforcement of a real burden created under proposal 12 should be subject to compliance with any obligation which was binding on the landlord immediately before the appointed day and which was the direct counterpart of the real burden.**

**(c) This proposal is subject to proposals 11 and 12.**

### Computation of duration

3.59 The duration of a lease determines whether it qualifies for conversion. Account must be taken both of initial duration and of the unexpired term remaining on the appointed day.<sup>107</sup> Although usually straightforward, the computation of duration may raise one or more of the following issues.

3.60 **Renewals.** Our survey disclosed examples of leases for an initial term but with an obligation on the landlord to renew. Case law also gives examples.<sup>108</sup> Usually the landlord need renew only once, or on a stipulated number of occasions, but sometimes there is an obligation of perpetual renewal. An example of the latter is the so-called ‘Blairgowrie lease’, which is a lease for 99 years perpetually renewable.<sup>109</sup> A grassum (premium) may be payable. The 2000 Act has now placed a cap on renewals. For leases executed on or after 9 June 2000 the total duration of a lease, including renewals, is restricted to 175 years.<sup>110</sup> For leases executed before that date, two renewals are permitted but any further renewals are subject to the 175-year limit.<sup>111</sup>

3.61 A renewal requires action on the part of the tenant. It is an option and not an automatic event. If the tenant fails to seek renewal, the lease either comes to an end or continues from year to year by tacit relocation. In either case the option to renew lapses.<sup>112</sup>

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<sup>105</sup> Because contractual provisions tend not to affect superiors.

<sup>106</sup> A former landlord has no real right to transfer to others. By contrast, not only could a former tenant transfer his real right (of ownership) to a singular successor, but in so doing could assign the contractual right against the former landlord.

<sup>107</sup> Paras 2.13 to 2.22.

<sup>108</sup> *Wight v Earl of Hopetoun* (1763) Mor 10,461; *Scott v Straiton* (1771) Mor 15,200; *Campbell v McLean* (1870) 8 M(HL) 40.

<sup>109</sup> Special provision for such leases was made by s 1 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, introducing a retrospective amendment to the Land Tenure Reform (Scotland) Act 1974 s 8(4)(ii).

<sup>110</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67(1), (2).

<sup>111</sup> 2000 Act s 67(4)(a), (b).

<sup>112</sup> *Commercial Union Assurance Co Ltd* 1964 SLT 62 (tacit relocation).

Despite, or perhaps because of, these dangers, it seems likely that renewals are usually both requested and granted. If the landlord is unknown, or uncooperative, an application may be made to the sheriff for the renewal to be executed by the sheriff clerk.<sup>113</sup>

3.62 It seems clear that renewals –both actual and potential –should be included in the calculation of the duration of leases. To do otherwise would be to understate the probable length of the lease. Renewals were included in the computation of duration for the 1954 conversion scheme and, much more recently, in both the 2000 Act and in the Leasehold Casualties Bill.<sup>114</sup> The latter provides, succinctly, that “where a lease includes provision (however expressed) requiring the landlord to renew the lease, the duration of any such renewed lease shall be added to the duration of the original lease”.

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

3.64 **Breaks.** Break options are sometimes found in ultra-long leases. Invariably they are in the landlord’s favour.<sup>115</sup> If it is to be assumed that a tenant will always exercise a right to renew,<sup>116</sup> then it is hard to resist the parallel assumption that a landlord will always exercise a right to break the lease. That, certainly, was the approach taken by the 1954 Act.<sup>117</sup> Break points which had already passed were ignored, but the lease was treated as coming to an end at the first break point after the legislation. Since break points almost always occur at intervals of less than 100 years, the effect of this approach would be to remove from our conversion scheme all leases with breaks.<sup>118</sup> The result is perhaps as it should be. Conversion is justified by the fact that the landlord’s interest is of negligible value;<sup>119</sup> but a landlord who can terminate in a few years time has an interest which is of considerable value. It is true that break options are disregarded for the purposes of the abolition of leasehold casualties, but the issue there is not primarily one of valuation.<sup>120</sup>

3.65 If break options are to count, however, there seems scope for a significant exception. The standard style of ultra-long lease given in the style books contains a break option which may be exercised only against payment of compensation for the value of the buildings. Here, for example, is the *Encyclopaedia of Scottish Legal Styles*:<sup>121</sup>

“hereby lets to the said CD .for a period of 999 years ... But notwithstanding the above term of endurance the landlord shall be entitled to put an end to this lease and

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<sup>113</sup> Land Registration (Scotland) Act 1979 s 22A.

<sup>114</sup> Long Leases (Scotland) Act 1954 s 18(1)(a); Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 67(2); Leasehold Casualties (Scotland) Bill s 9(2)(b) (as amended at Stage 2 on 14 February 2001).

<sup>115</sup> If the break option were conceived in favour of the tenant, then, for the purposes of computation of duration, it should be assumed that it would not be exercised.

<sup>116</sup> See para 3.62.

<sup>117</sup> Long Leases (Scotland) Act 1954 s 18(1)(c).

<sup>118</sup> This is because the scheme requires an unexpired duration of more than 100 years (or 175 years, on the alternative version): see proposal 2 in para 2.22. If a second scheme were to be introduced for residential ground leases (for which see part 4), conversion would be available under that scheme.

<sup>119</sup> Paras 2.2 and 2.15.

<sup>120</sup> Leasehold Casualties (Scotland) Bill s 9(2)(a) (as amended at Stage 2 on 14 February 2001). Similarly, the Leasehold Reform Act 1967 disregards break options in the calculation of qualifying duration (s 3(1)), but not in the calculation of compensation (s 9) where the terms of the individual lease are taken into account.

<sup>121</sup> *Encyclopaedia of Scottish Legal Styles* vol 6 (1937) pp 211-2. And see also *Scots Styles Book* vol 5 (1904) p 325-6.

to remove the tenant from the said subjects at the end of every 99 years thereof on premonition given six months before the term at which such removal is to take place ... and in case the landlord shall take advantage of any such break (but in that case only) he shall be bound to pay the tenant the value of the whole buildings or erections on the premises as the same shall be determined by two arbiters one named by the landlord and the other by the tenant ...”

Our survey produced a number of examples of such leases, and in at least one estate they appear to have been standard practice. A requirement to pay compensation is an acknowledgement that the substantial economic right lies with the tenant rather than with the landlord. In effect, the landlord is buying the tenant out. A break clause coupled with compensation is the functional equivalent of a clause of redemption or pre-emption in a feu. Our preliminary view, therefore, is that it should not prevent conversion under our scheme for ultra-long leases, and that it should be disregarded for the purposes of calculating duration.

3.66 **Leases for life.** Four of the leases in our survey were for the life of the first tenant plus a further period of years, the further period being either 361 years or, in one case, 741 years. No doubt such leases are extremely rare. Further, if our sample is typical, the leases so obviously qualify for conversion that it would not be necessary to make a precise calculation of the lifetime of the tenant. Nonetheless, a cautious view would be that it is necessary to make provision for how such a calculation might be attempted. Fortunately, the 1954 Act contains such a provision.<sup>122</sup> Except where there is information to the contrary, a lease for the lifetime of a person is treated by the 1954 Act as a lease for 35 years.<sup>123</sup> If, however, the tenant is currently in life, a calculation is made of life expectancy on the basis of a table set out in a schedule.<sup>124</sup>

3.67 **Proposal.** Our proposal is that:

14. **For the purposes of determining the duration of a lease –**
  - (a) **there should be included**
    - (i) **any renewal period which the landlord is bound to grant, and**
    - (ii) **the duration of any other lease which is to run consecutively with the current lease;**
  - (b) **there should be excluded any period after a break option which is exercisable by the landlord (other than a break option which can be exercised only on payment of compensation for the value of buildings);**
  - (c) **any reference to the lifetime of a tenant should be calculated as**

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<sup>122</sup> Long Leases (Scotland) Act 1954 s 18(1)(b).

<sup>123</sup> This does not of course mean that the first tenant had a life expectancy of only 35 years. Rather 35 years is the period of his life during which he is deemed to have held the lease.

<sup>124</sup> This would require to be adjusted to take account of the increase in life expectancy during the past 50 years.

- (i) the years during which the person was tenant, if known, or
- (ii) 35 years, or
- (iii) in a case where the tenant is alive, the years for which the person is likely to be tenant, having regard to a standard table of life expectancy.

### Registration issues

3.68 Automatic conversion has obvious implications for the Land Register. Until the appointed day the landlord is owner of the land. On or after that day, the tenant is owner, and the lease itself is extinguished. The change occurs by force of statute, without registration; and until the Register catches up it will be inaccurate. Some legislative assistance to the Keeper is required, as it was required under the 2000 Act.<sup>125</sup>

3.69 In the first place, it needs to be made clear that the Keeper has the power to make the necessary changes to the Register. These changes are likely to involve (i) altering the status of the title sheet from leasehold to ownership; (ii) deleting from the burdens section the conditions of the lease other than those converted into real burdens by registered notice or by statute;<sup>126</sup> (iii) adding to the burdens section any real burdens or servitudes which are registered (or recorded) under the title of the landlord and affect the land;<sup>127</sup> (iv) deleting the title sheet (if there is one) of the current owner (ie the head landlord); and (v) deleting the title sheets of any intermediate tenants. Normally rectification is prevented where it is to the prejudice of a proprietor in possession;<sup>128</sup> and while it is arguable that any prejudice to such a proprietor would be caused by the conversion legislation rather than by the consequential rectification, it seems as well to put the position beyond doubt by giving the Keeper express power to rectify.

3.70 In the second place, it is necessary to allow for the possibility of error. A mistake made by the Keeper in the course of the changes described above should be capable of being corrected; and again the necessary rectification should be allowed without regard to the position of a proprietor in possession. However, that proprietor should have the protection of the rule from the 2000 Act which prevents rectification to the effect of reinstating encumbrances which have been deleted in error.<sup>129</sup> So if the Keeper retains a leasehold condition or heritable security which ought to have been removed, he is free to remove it by a further process of rectification; but if he removes a condition or security in error, it cannot thereafter be reinstated, and the remedy of the (former) holder of the right is to claim indemnity from the Keeper.<sup>130</sup>

3.71 Next there is the issue of indemnity. Usually a person who suffers loss as result of rectification is entitled to indemnity.<sup>131</sup> But there would be little point in giving power to

<sup>125</sup> 2000 Act ss 3 and 46. For the background, see Scot Law Com No 168 paras 2.46 to 2.50.

<sup>126</sup> Paras 3.40 to 3.52.

<sup>127</sup> Para 3.4.

<sup>128</sup> Land Registration (Scotland) Act 1979 s 9(3).

<sup>129</sup> 2000 Act s 3(b) (adding a new subs (3C) to s 9 of the 1979 Act).

<sup>130</sup> Under s 12(1)(b) of the Land Registration (Scotland) Act 1979.

<sup>131</sup> Land Registration (Scotland) Act 1979 s 12(1)(b).

rectify if the Keeper was then made liable for payment of indemnity.<sup>132</sup> Hence indemnity requires to be excluded. It should be emphasised that this withdrawal of indemnity is confined to certain transitional changes arising out of leasehold conversion and does not affect other matters involving the title.

3.72 Finally, there is the question of timescale. Although the number of ultra-long leases is small, and the number registered in the Land Register smaller still, it will be impracticable for the Keeper to make the necessary alterations to the Register on the appointed day itself. Thus for a limited period the Register will not accurately reflect the post-conversion position. No one ought to be misled by this. The existence of the legislation will be well-known to any professional adviser; and if the landlord's title sheet is still on the Register, it will also be disclosed that the title is subject to an ultra-long lease.

3.73 Thus far our proposals follow closely the scheme laid down by the 2000 Act. But we propose one departure. Under the 2000 Act the alterations to the Register are, in effect, to occur in two distinct phases. First, *dominium utile* is upgraded to ownership and superiority title sheets are deleted. And secondly, those real burdens which do not survive abolition are deleted. The second phase is not to take place for some years after the appointed day, partly in recognition of the difficulty of the task to be performed.<sup>133</sup> In leasehold conversion, there are no existing real burdens to be evaluated and, if necessary, deleted. Rather there are leasehold conditions which, necessarily, fall with the lease itself. They could not sensibly be left on the Register until some later exercise. It is true that a small number of those conditions may be converted into real burdens under proposals mentioned earlier,<sup>134</sup> but by comparison with feudal abolition these should be easy to identify.<sup>135</sup> We suggest, therefore, that all changes to the Register be made at the same time, and as soon as is reasonably practicable after the appointed day.

3.74 It may be added that no action need be taken in relation to the Register of Sasines. The Sasine Register is a register of deeds and not of rights, whereas the proposed legislation will affect, not the original deeds themselves, but the rights to which the deeds give rise.

3.75 We propose that

**15. (a) It should be made clear -**

- (i) that any rectification of the Land Register which is required to take account of the legislation on leasehold conversion, or of anything done under or by virtue of that legislation, is not to be regarded as prejudicing any proprietor in possession, and**
- (ii) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification.**

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<sup>132</sup> The same solution is reached by s 3(c) of the 2000 Act.

<sup>133</sup> 2000 Act s 46. See Scot Law Com No 168 paras 4.21 to 4.25.

<sup>134</sup> Paras 3.40 to 3.52.

<sup>135</sup> If only because there is no problem of third party enforcement rights.

**(b) However, paragraph (a) should not apply insofar as the rectification involves the reinstatement of an encumbrance which was previously deleted.**

### **Unregistered leases**

3.76 A small number of ultra-long leases have never been registered and will remain unregistered on the appointed day.<sup>136</sup> Even if they otherwise qualify for conversion, therefore, they could not be converted on that day, for it is a fundamental, and sound, principle of Scots law that ownership of land cannot be acquired without registration. Instead conversion should occur on the day on which the lease is first registered. In other respects the scheme would operate in the manner already described, but with the substitution of the day of registration for the appointed day. One consequence would be to extend the period allowed for the service and registration of the various notices in the scheme: the notice claiming compensation for rent,<sup>137</sup> the notice converting conditions into real burdens,<sup>138</sup> and the notice of exemption.<sup>139</sup> But since the landlord will often have no advance warning of registration, the path of prudence will usually be to serve and register before the appointed day, as with registered leases.<sup>140</sup> The appointed day would continue to determine issues of duration. Thus a lease which had 110 years to run on the appointed day but only 90 years on the day of registration would be a qualifying lease for the purposes of the scheme.<sup>141</sup> This means that all ultra-long leases would be treated alike, and without regard to whether they are registered.

3.77 It may occasionally happen that the unregistered lease is a sublease and that the head lease is registered. In that case the head lease would be converted into ownership on the appointed day, as the lowest lease then qualifying,<sup>142</sup> but that ownership would be defeasible on registration of the sublease.

3.78 Our proposal is that

- 16. Where a lease fails to qualify for conversion only because it was not registered on the appointed day, it should become a qualifying lease on the day on which it is first registered; and proposals 7, 9, 11, 12 and 13 should apply with the substitution of “day of registration” for “appointed day”.**

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<sup>136</sup> Paras 2.45 and 2.46.

<sup>137</sup> Paras 3.13 to 3.16.

<sup>138</sup> Paras 3.43 and 3.44.

<sup>139</sup> Para 3.7.

<sup>140</sup> Naturally this does not apply to the notice of exemption, which is registered by the tenant. In practice this notice could be registered concurrently with the lease.

<sup>141</sup> This example assumes that option B applies: see proposal 2 in para 2.22.

<sup>142</sup> Para 3.3.

# PART 4 RESIDENTIAL GROUND LEASES

## Introduction

4.1 “Ground lease” is a convenient term, although not a technical one. As its name suggests, a ground lease is a lease of bare ground – of land not yet built on. In a ground lease the landlord supplies the land and the tenant the buildings; and the rent is attributable to the former but not to the latter.<sup>1</sup> Ground leases are invariably long, and sometimes ultra-long, in duration. For all of the nineteenth century and for some at least of the twentieth, they were used for the building of dwellinghouses. However, the Land Tenure Reform (Scotland) Act 1974 prevented the creation of new residential long leases,<sup>2</sup> so that where ground leases are granted today they are invariably of a commercial character. In this part of the paper, however, we are concerned exclusively with residential ground leases.

4.2 In 1954 there was introduced a statutory right to convert residential ground leases into ownership, on payment of compensation to the landlord. The Long Leases (Scotland) Act 1954 applied to all residential leases granted before 10 August 1914 for a duration of at least 50 years.<sup>3</sup> The date marked the passing of the Entail (Scotland) Act 1914, which removed the final obstacles to the granting of feus. Thereafter any ground lease would have been entered into as a matter of choice rather than necessity.<sup>4</sup> The Act substantially followed the recommendations of a committee set up in 1951 under the chairmanship of Lord Guthrie.<sup>5</sup> The scheme introduced by the 1954 Act was a form of compulsory purchase, at the option of the tenant. A tenant who wanted to buy served a notice in the statutory form.<sup>6</sup> This had to be done within five years of the commencement of the Act.<sup>7</sup> Thereafter the landlord was bound to grant a feu contract, on payment of compensation calculated according to a statutory formula.<sup>8</sup> After 1959 the right to buy ceased to be available, although the legislation has remained on the statute book.

4.3 The take-up of the 1954 Act scheme seems to have been patchy, and such figures as are available point to regional variations. In Moray, for example, 141 of the 361 surviving leases were converted between 1954 and 1959, whereas in Dumfries the corresponding figure was a mere two out of 793 leases.<sup>9</sup> No doubt one reason for the difference was the far

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<sup>1</sup> Guthrie Report paras 28 and 29. The position may be much the same where the landlord supplies the buildings but the tenant pays for them by means of initial grassum (premium). There too the rent may be attributable to the land alone.

<sup>2</sup> Land Tenure Reform (Scotland) Act 1974 ss 8 to 10. This excludes residential long leases of more than 20 years.

<sup>3</sup> Long Leases (Scotland) Act 1954 s 1(1). The Act did not distinguish between ground leases and other leases, but in practice almost all leases which satisfied the stated criteria would have been ground leases. Compare here the definition of ‘tenant-at-will’ in s 20(8) of the Land Registration (Scotland) Act 1979.

<sup>4</sup> Guthrie Report para 68(2)(i). And see also para 1.7.

<sup>5</sup> The committee reported in 1952: see *Report of the Scottish Leases Committee* (1952, Cmnd 8656) (referred to in this paper as the ‘Guthrie Report’).

<sup>6</sup> 1954 Act s 1(1) and 6.

<sup>7</sup> 1954 Act s 1(2).

<sup>8</sup> 1954 Act ss 7 to 14.

<sup>9</sup> These figures were made available to us in 1977 by Registers of Scotland. They include a small number of voluntary conversions from the same period. An article published in 1959 commented that ‘There is no evidence that the Act has so far been taken advantage of on any very extensive scale’: see J G Mitchell, ‘Some Notes on Long Leases’ (1959) 2 Conv Rev 186, 188.

larger number of leases in Moray which were close to expiry.<sup>10</sup> Leases came to an end for other reasons as well. Many were converted by agreement, either before 1954 or after 1959.<sup>11</sup> Those which were not converted will often have expired. The political impetus behind the 1954 Act was the fact that many leases granted in the second half of the nineteenth century were on the point of coming to an end.<sup>12</sup> They were kept alive artificially, by temporary legislation passed in 1951,<sup>13</sup> pending the report of the Guthrie Committee. Thereafter they were either converted under the 1954 Act or have now expired.<sup>14</sup> New residential ground leases, uncommon in the postwar period,<sup>15</sup> ceased to be competent altogether in 1974. It seems doubtful that there are many of the shorter ground leases left. Most ground leases which survive today are likely to have been granted for 999 years or other periods amounting to quasi-alienation,<sup>16</sup> and as such will fall to be converted automatically under the scheme for ultra-long leases set out in the earlier parts of this paper. With the enactment of that scheme the history of residential ground leases in Scotland would be substantially at an end.

4.4 Nonetheless some leases would remain. We have tried to make an assessment of the number of residential ground leases still in existence today but which would not qualify for conversion under the scheme for ultra-long leases. That scheme is intended to apply to all leases granted for more than 175 years, provided that there is an unexpired duration of 100 (or on one version 175) years.<sup>17</sup> Our survey of some 2,500 leases disclosed only 46 granted for 175 years or less and which might plausibly be regarded as residential.<sup>18</sup> To those must be added the small number of leases originally granted for longer than 175 years but which would be excluded from the conversion scheme because of a relatively short unexpired duration.<sup>19</sup> Our survey is of course incomplete in a number of important respects. It is confined to four out of the 33 registration counties in Scotland, although two of those (Ayr and Lanark) are thought to have the highest incidence of registered leases.<sup>20</sup> It covers only such period as the counties have been operational for the purposes of the Land Register – a period which ranges from nineteen years (Renfrew) to only three (Ayr).<sup>21</sup> And it omits both those leases which have never been registered and also those which, although registered, saw no activity during the period under scrutiny.<sup>22</sup> Any conclusions based on such a survey are necessarily speculative and subject to challenge. We would welcome any further information that consultees may be able to let us have. For the moment, however, it is possible to offer some views on both the relative and the absolute numbers of residential ground leases which would not qualify for conversion under our scheme; and the former at least are likely to be reasonably accurate. Our survey suggests that fewer than 2% of all

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<sup>10</sup> Unexpired duration is given in column 6 of the table in appendix II to the Guthrie Report.

<sup>11</sup> Guthrie Report paras 38 and 57 to 67.

<sup>12</sup> Guthrie Report para 7.

<sup>13</sup> Long Leases (Temporary Provisions) (Scotland) Act 1951.

<sup>14</sup> Some, however, may have been kept in existence by tacit relocation.

<sup>15</sup> Guthrie Report para 41.

<sup>16</sup> As part of the preparation of the Guthrie Report, a complete survey was carried out of all search sheets in the Register of Sasines for the period 1905-51. This disclosed 13,151 surviving long leases of which around two thirds were thought to be of ultra-long duration. See Guthrie Report paras 38 and 40. Our own survey produced similar results: see appendix A para 11.

<sup>17</sup> Paras 2.13 to 2.22.

<sup>18</sup> Appendix A paras 21 and 22.

<sup>19</sup> On option B of the conversion scheme (unexpired term of 100 years) there are only a handful of such leases. With option A, however, the numbers rise to 40. See para 2.19.

<sup>20</sup> Guthrie Report appendix II.

<sup>21</sup> The survey was carried out in 2000.

<sup>22</sup> In the absence of activity, such leases would remain in the Register of Sasines.

registered leases fall under this category, and that the absolute number of such leases is probably a matter of hundreds rather than thousands.

4.5 From time to time it has been suggested that the 1954 Act ought to be revived to allow the conversion of remaining residential ground leases.<sup>23</sup> In this part of the paper we consider whether there is merit in this suggestion in respect of the small number of such leases which will not be covered by our scheme for ultra-long leases.

### **The case for conversion**

4.6 **Forced substitute for feus.** The main justification for conversion advanced by the Guthrie Committee was that ground leases were often granted only because subinfeudation was unavailable – generally because the land was held under burgage tenure or was entailed, or because subinfeudation was expressly prohibited in the feu. In effect the leases were quasi-feus. Accordingly, once the final barrier to subinfeudation was removed in 1914, with the passing of the Entail (Scotland) Act, it seemed logical that the quasi-feus should be converted into actual feus. However, conversion on this view should be confined to pre-1914 leases, for as soon as subinfeudation came to be available, granting a lease became a matter of free choice with which the law should not interfere.<sup>24</sup>

4.7 Today this justification is plainly spent. Leases which are sufficiently long to count as quasi-feus will come within our scheme for the conversion of ultra-long leases. Other leases are not covered by the justification. Indeed there can hardly be any left from before 1914, for a typical short ground lease would have been granted for a period of 99 years. Our survey found only five such leases which might possibly be still in existence.

4.8 **Loss of a home.** By far the strongest argument in favour of conversion is that, at the end of a ground lease, the tenant loses his home while the landlord merely realises an investment. An investment can be compensated with money. A home cannot. A conversion scheme against payment of money would be a means of giving the home to the tenant while continuing to realise an investment for the landlord. Arguably that is the right way round. It is the length of the lease which turns a house into a home, just as it is the presence of the home which marks residential ground leases out from ground leases taken for commercial purposes. In leases of short duration the landlord might intend to re-occupy the property himself or through a member of his family. In that case the house is as much the home of the landlord as of the tenant. But once a lease passes the 50 years required by the 1954 Act, the landlord's interest is likely to assume a monetary form.

4.9 To some extent this argument is self-defeating. If a landlord is content with money rather than the eventual return of his property, he will be willing to enter into a voluntary

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<sup>23</sup> For example, this suggestion was made in some of the responses to our *Discussion Paper on Leasehold Casualties* (Scot Law Com DP No 102, 1997).

<sup>24</sup> Thus Guthrie Committee para 68(2)(i): "The only evidence of serious hardship placed before us related to cases in which ground leases had been granted because the landowner was unable to grant feus, either because of the prohibitions in a deed of entail or because of restrictions upon subinfeudation. In these cases the leases are expiring during a period of inflated values of heritable, and particularly residential, property and at a time of acute housing shortage. We consider that, as the landowner would almost certainly have granted a permanent right of feu had he had the power to do so, the lessee should be entitled to have his temporary right converted into a feu where the ground lease was granted before the passing of the Entail (Scotland) Act, 1914. Thereafter no real obstacles to the granting of feus remained and any ground leases granted were entered into voluntarily by both parties."

arrangement with the tenant. In that case a statutory scheme is unnecessary. But in practice not all landlords are content to give up their property, particularly if the property forms part of a larger estate the integrity of which they wish to protect.

**4.10 Absence of alternative accommodation.** Ground leases tend to be concentrated in particular areas, often reflecting the practice of a particular estate in the disposal of property. If a lease comes to an end and the tenant loses his home, there may be no alternative accommodation in the immediate vicinity. This may be especially the case in certain rural areas where accommodation is scarce. If so, the tenant will have to leave, not merely his home, but also the neighbourhood, with obvious implications for employment and for domestic life. The scale of this problem is difficult to assess and we would be grateful for the views of those with experience of residential ground leases.

**4.11 Absence of protection.** An ultra-long lease would be converted into ownership, under the scheme proposed earlier. A short lease of a dwellinghouse will often attract security of tenure, whether as a protected tenancy under the Rent (Scotland) Act 1984, a secure tenancy under the Housing (Scotland) Act 1987 or as an assured tenancy under the Housing (Scotland) Act 1988. The leases with which we are concerned here, however, are uniquely unprotected. They are too short to qualify for conversion into ownership, but have too low a rent, usually, to qualify for security of tenure.<sup>25</sup> The rent is low because, in a ground lease, it is attributable to the land and not to the buildings. The result is that the tenant has no right to stay on at the end of the lease, whether as owner under a conversion scheme or as tenant under a statutory tenancy. Admittedly this is an argument for reform in general rather than for the introduction of a new conversion scheme. But a conversion scheme would certainly provide a solution.<sup>26</sup>

**4.12 No compensation for improvements.** Once a lease expires, not only must the tenant leave the property but usually there is no entitlement to compensation for improvements. Most improvements – and certainly buildings – accede to the land and so become the property of the landlord. At the end of the lease they must be left behind, unless they qualify as trade<sup>27</sup> or agricultural<sup>28</sup> fixtures. Nor is there a claim in unjustified enrichment, for a tenant is deemed to have carried out the improvements for his own benefit during the period of his tenancy.<sup>29</sup> It is true that the position can be altered by agreement in the lease, so that a lease which contains no provision on the subject must be taken as having accepted the position as laid down by the general law.<sup>30</sup> And it is also true that the general law applies to all leases and not merely to ground leases. But in ground leases the improvements include a house, often of considerable value, and the loss to the tenant is correspondingly greater. Once again this is not precisely an argument for a conversion scheme. The landlord's ownership of the house is an unalterable fact, at least for existing leases. But the absence of compensation is at least indicative of the generally unfavourable position of the tenant under a ground lease.

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<sup>25</sup> In practice the statute which is most likely to be applicable is the Rent (Scotland) Act 1984. But by s 2 of that Act the rent must be at least two thirds of the rateable value of the property on 23 March 1965. See eg *Fennel v Cameron* 1968 SLT (Sh Ct) 30.

<sup>26</sup> Later (para 4.21) we suggest that security of tenure might be a more useful reform.

<sup>27</sup> *Brand's Trs v Brand's Trs* (1876) 3 R(HL) 16.

<sup>28</sup> Agricultural Holdings (Scotland) Act 1991 s 18. In fact this provision suspends the operation of accession.

<sup>29</sup> *Wallace v Braid* (1900) 2 F 754; *Dollar Land (Cumbernauld) Ltd v CIN Properties* 1998 SLT 992.

<sup>30</sup> Our survey suggests that such provisions are rare in ground leases, although we encountered some 999-year leases in which the landlord must pay for the value of the buildings in the event of exercising a break option.

## The case against conversion

4.13 A number of other factors argue against the introduction of a conversion scheme.

4.14 **Justified expectations.** If the original parties are still in place, then the lease is a consensual contract, freely entered into; and if, as almost always, the parties are successors, they are subject to rights and obligations which they have chosen to assume. In acquiring a lease a tenant buys with his eyes open. In most cases he will have had the benefit of legal advice. The price will have reflected the terms of the lease. A lease which has only twenty years to run and allows no compensation for improvements is worth much less in the market place than a lease with an unexpired duration of 900 years. The house, which will soon return to the landlord, was not built by the tenant but by some, usually remote, predecessor. In short, the tenant has received what he paid for, no more and no less. The same is true of the landlord. The property was bought subject to the lease, and the price paid will have been determined largely by the length of the unexpired term. In summary, each party to the lease has certain expectations, based on its terms. The law should hesitate before it interferes with such expectations, and with the established rights of parties.

4.15 This argument may seem to have less force in a case where the lease has passed down a family without ever being exposed on the open market. At the least there may have been genuine misunderstandings. For if a house has been in the family for 100 years it may be natural to assume, without inquiry, that the present arrangements are permanent in nature. And that belief may have been reinforced by the words and actions of the current landlord. The distinction between lease and ownership, so apparent to the lawyer, is not always so clear to a person living, virtually rent-free, in a house. It is noteworthy that the 1954 Act scheme, while not generally available to those acquiring the lease after 10 May 1951, made an exception for acquisition by inheritance.<sup>31</sup> No doubt social and economic change means that cases of houses passing down families are increasingly rare. But in any event there are difficulties in saying that a person who acquires by inheritance and without payment is more deserving than a person who pays for what he receives.

4.16 **Previous opportunity.** A right to convert was conferred by the 1954 Act. There was thus a previous opportunity during the period from 1954 to 1959. On one view, the opportunity should not be renewed.<sup>32</sup> The force of this argument, however, is weakened by the fact that a significant number of the leases now surviving were granted after 1914 and hence would not have qualified under the 1954 Act scheme.

4.17 **Inappropriate solution.** Other solutions are possible and, perhaps, better. In French law,<sup>33</sup> and in the law of a number of other European countries, ground leases can be arranged in such a way that the building remains the property of the tenant. This development of the Roman doctrine of *superficies* was not received in Scots law, and could not now be introduced for existing leases without raising questions of compensation to the landlord. A more fruitful approach would be the conferral of security of tenure on the tenant. This might be done, for example, by deeming residential ground leases to be assured

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<sup>31</sup> Long Leases (Scotland) Act 1954 s 3.

<sup>32</sup> Thus, in rejecting the idea that compensation should be available as an alternative to conversion, the Guthrie Report argued (para 69) that 'where a lessee under an old ground lease of residential property fails to take advantage of the opportunity to obtain a feu title in accordance with our recommendations, we can see no reason why he should be given an alternative right to compensation'.

<sup>33</sup> Dalloz, *Encyclopédie Juridique* (2nd edn, 1970-98), *Répertoire de Droit Civil*, Tome X, *Superficie*.

tenancies within the Housing (Scotland) Act 1988. On expiry of the contractual lease the existing tenant would continue to be undisturbed for as long as he chose to remain in the property.<sup>34</sup> Security of tenure was extended to ground leases in England and Wales as long ago as 1954.<sup>35</sup> It would be for consideration whether the rent provisions of assured tenancies should also be applied, thus allowing the landlord to increase the rent to market levels.<sup>36</sup> In most cases this would result in a sharp increase in the levels of rent. A different approach would be to extend all residential ground leases for a period sufficient to ensure that the current tenant would not be evicted. In England and Wales extensions of 50 years are allowed in certain cases.<sup>37</sup> Obviously any alteration to the current position would need to comply with the European Convention on Human Rights, and questions of compensation may arise.<sup>38</sup>

**4.18 Cost to the tenant.** A conversion scheme could not be free.<sup>39</sup> The landlord would be deprived of his property, including property in the house. Compensation would need to be paid in return. A discussion of compensation levels may be postponed until later.<sup>40</sup> For present purposes it is sufficient to note that the level of compensation necessarily increases as a lease approaches its end, so that in its final years the amount payable is likely to be substantial.<sup>41</sup> For many tenants payment of such sums might be an impossibility; but if so, a conversion scheme would confer no benefit. Our survey gives some indication of the unexpired duration of leases of the kind under consideration, and hence of the likely levels of payment required. One third of the leases had either expired and were continuing, if at all, by tacit relocation,<sup>42</sup> or had less than 10 years to run. A further one fifth had less than 40 years to run.<sup>43</sup> Although the sample is too small to be reliable, the figures are instructive nonetheless.

**4.19 Escalation of compensation levels.** Conversion already occurs on a voluntary basis, although we have no information as to its frequency. A worry expressed by the Guthrie Committee was that the introduction of a statutory scheme might drive up the levels of

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<sup>34</sup> A successor would not generally be protected, however. See Housing (Scotland) Act 1988 s 18 and sched 5 part I (ground 7). Other grounds for repossession, both mandatory (part I) and discretionary (part II), are set out in sched 5.

<sup>35</sup> Landlord and Tenant Act 1954, implementing the majority view of the Jenkins Committee (*Leasehold Committee: Final Report* 1950, Cmnd 7982).

<sup>36</sup> Housing (Scotland) Act 1988 ss 24 and 25.

<sup>37</sup> Leasehold Reform Act 1967 ss 1 and 14. In Scotland the small scale of the problem might allow a more targeted approach. For example, extension might be confined to those who acquired the lease by succession, as opposed to by purchase on the open market; the additional period might be restricted to the number of years required to allow the lease to run for a further 50 years; and the lease might be non-assignable.

<sup>38</sup> No compensation is payable for the 50-year extension under the Leasehold Reform Act 1967, but the existing ground rent is increased to a modern ground rent, with a review after 25 years (s 15(2)). It is estimated that a modern ground rent is around a third of the market rent for the house as a whole (see *Commonhold and Leasehold Reform* (Cm 4843, 2000) p 158). By contrast a premium is payable for the 90-year extension of the lease of a flat, at a peppercorn rent, under part I chapter II of the Leasehold Reform, Housing and Urban Development Act 1993: see in particular ss 39(1), 56 and sched 13.

<sup>39</sup> Compare here the scheme for ultra-long leases, where no compensation is needed in respect of the vestigial interest of the landlord.

<sup>40</sup> Paras 4.23 to 4.33.

<sup>41</sup> How substantial will depend on whether some kind of discount is allowed, for which see paras 4.29 to 4.32. Without a discount the tenant would, in the case mentioned, require to pay practically the market value of the property.

<sup>42</sup> For the status of leases continuing by tacit relocation, see para 4.37.

<sup>43</sup> Appendix A chart 16.

compensation typically asked for in voluntary conversions.<sup>44</sup> In a voluntary conversion, the landlord might be disposed to be generous. He may know the tenant well. Sometimes the tenant is his employee. The tenant's family may have occupied the house for many years. They may have carried out, and paid for, major improvements. And so on. The Guthrie Committee found that conversion often took place on generous terms. A statutory scheme, however, could take no account of factors such as those just mentioned. Instead the transaction would have to be viewed purely on a commercial basis. If this increased the going rate for compensation, the tenant would be in a worse position than before. We find this argument difficult to assess and would be grateful for the views of those with experience of voluntary conversion.

**4.20 Complexity relative to numbers.** A conversion scheme would inevitably be complex, both to devise and thereafter to administer. It is true that a model already exists in the 1954 Act, but a considerable amount of adaptation would be required to make that scheme fit for modern conditions.<sup>45</sup> Some of the issues are explored later in this part.<sup>46</sup> Additional resources might be needed for the Lands Tribunal, which would play a central role in questions of valuation. It is not clear that the number of leases justifies the creation of a special scheme, particularly if the protection of tenants could be achieved in some other way. At a rough estimate, the number of leases potentially eligible might be less than 1000;<sup>47</sup> and of those it might reasonably be supposed that in around one half of all cases the tenant would be deterred from using the scheme, whether on ground of cost or for some other reason.<sup>48</sup> Whether a complex scheme should be introduced for the benefit of a few hundred leases may be open to question. It seems hardly necessary to emphasise that the position in England and Wales is entirely different, and that conversion schemes there are justified by the very large number of houses held on leasehold tenure. The scheme introduced by the 1967 Act, for example, was estimated to affect 1.25 million leases.<sup>49</sup>

## Evaluation

**4.21** We have found the various arguments difficult to assess. While there is an obvious attraction in giving the house to the tenant in exchange for compensation to the landlord, some may question whether a tenant who acquired a lease with his eyes open and at market value should receive an option to purchase for which he did not pay and which he had no reason to expect. It is undeniable, however, that a tenant holding under a residential ground lease lacks the security of tenure which is available to most long-term tenants of dwellinghouses. In the end the practical arguments may seem the most compelling. A conversion scheme would be complex without necessarily being very useful. If the real

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<sup>44</sup> Guthrie Report para 66: '[W]e are satisfied that the usual practice of Scottish landowners, so far from showing an insistence on their legal rights, has been generous. There have, of course, been instances in which a lessee has been faced with a demand for a price which took into account almost the whole of the landowner's legal rights at the enhanced current value, but it seems clear that these cases have been exceptional, and at the end of our inquiry we find ourselves somewhat anxious lest the publicity which this matter is receiving should result in the abandonment by Scottish landowners of the reasonable spirit which has usually characterised their negotiations with lessees until now.'

<sup>45</sup> The scheme outlined in part 3 for ultra-long leases would be unsuitable for a number of reasons, such as the principle of compulsion, the absence of compensation, and the treatment of leasehold conditions.

<sup>46</sup> Paras 4.34 ff.

<sup>47</sup> Para 4.4. It must be emphasised that our figures are based on a survey of a sample of registration counties for a limited period and so may under- (or over-) estimate the number of eligible leases. But on any view the overall numbers are small.

<sup>48</sup> See para 4.3 for the take-up rate under the 1954 Act.

<sup>49</sup> *James v United Kingdom* (1985) ECHR Series A no 98 para 19.

problem is thought to be the danger of eviction, then a better way forward might be the introduction of security of tenure, perhaps by means of an extension of the lease. That could be justified as a solution proportionate to the scale of the problem. For the moment, however, we have no concluded views and merely ask:

17. (a) **Is there a need for legislative protection for tenants holding under residential ground leases (not being ultra-long leases within proposal 2)?**
- (b) **If so, should such protection comprise -**
  - (i) **a right to convert the lease into ownership;**
  - (ii) **a right to security of tenure, for example by extension of the lease for a fixed period; or**
  - (iii) **some other form of protection (please specify)?**

4.22 As we have left open the possibility of a conversion scheme for residential ground leases, it is necessary to consider some of the issues raised by such a scheme. That is the subject of the remainder of this part.

## **Compensation**

4.23 **Method of calculation.** Probably the most important single issue is the calculation of the compensation payable by the tenant to the landlord.<sup>50</sup> In the postwar period a number of different conversion schemes have been introduced in the jurisdictions in the United Kingdom. Each employs a different method of calculating compensation, although there are often similarities. A summary of the schemes is given in Appendix B. For present purposes the main examples are, for Scotland the Long Leases (Scotland) Act 1954 and the Land Registration (Scotland) Act 1979 (for tenancies-at-will),<sup>51</sup> for England and Wales the Leasehold Reform Act 1967 (as amended) and the Leasehold Reform, Housing and Urban Development Act 1993, and for Northern Ireland the Leasehold (Enlargement and Extension) (Northern Ireland) Act 1971. Compensation is required in respect of two main rights, namely the right to receive the return of the property at the end of the lease, and the right to receive rent until that time.<sup>52</sup> A preliminary decision is whether to value these separately or together. If the original lease has been divided so that the tenant has a part only, it will be necessary to apportion the rent.<sup>53</sup>

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<sup>50</sup> If it is accepted (paras 2.15 and 2.16) that an unexpired duration of 100 years marks the point at which the landlord's interest ceases to have value, it follows that no compensation would be due in such a case, other than in respect of rent. That was also the position taken by the 1954 Act (s 8). In practice there will be very few leases with an unexpired duration of more than 100 years which would not qualify for conversion as an ultra-long lease.

<sup>51</sup> Land Registration (Scotland) Act 1979 ss 20 to 22.

<sup>52</sup> Occasionally other payments may be due, most notably renewal premiums (for which see para 3.22).

<sup>53</sup> This is a matter for agreement between the parties, which failing for decision by the Lands Tribunal. See Long Leases (Scotland) Act 1954 s 20. There should be a presumption in favour of any existing informal apportionment: see para 3.14. A difficulty is that only one of the parts may be being converted. Plainly, the tenants of the remaining parts should be bound by the apportionment only where they have agreed to it; but the landlord should not be able to claim rent to the extent that compensation has been paid.

4.24 The existing schemes suggest two main models for compensation. One is to make a direct valuation of the landlord's interest, taking into account the terms of the lease and its duration. This method is used in the English schemes of 1967 and 1993 and in the Northern Irish scheme of 1971. The other model is to value the property itself and then to deduct an amount which either represents the tenant's interest or which takes account of the fact that the landlord would not, but for conversion, receive the return of the property until the end of the lease. The property is valued on the basis of vacant possession, and taking into account any development potential released by the expiry of the lease.<sup>54</sup> This method was used by the 1954 Act in Scotland. Both methods have advantages and disadvantages.

4.25 The direct method of valuation, used in England and Wales and in Northern Ireland, can take account of the terms of the particular lease and may give a more accurate picture of the value of the tenant's acquisition. But, partly in consequence, the method is slower and more expensive, and more open to dispute. The valuer must determine the bids a seller would be likely to receive on the basis of the, often complex, assumptions set out in the particular scheme; and at least to start with there will be no comparisons to assist. In the process it may be necessary to assess relative long-term changes in the value of land. The English schemes have caused some problems in practice<sup>55</sup> and reform is proposed.<sup>56</sup>

4.26 The indirect method of valuation, used in Scotland in the 1954 Act,<sup>57</sup> is less refined, but also less complex. A valuation of the property (as opposed to the landlord's interest) is a familiar and straightforward exercise and is less likely to lead to disputes. The value of the landlord's interest is then derived by applying to the initial valuation a formula laid down by statute. The difficulty, of course, lies in devising an appropriate formula; but once this has been done the calculation is a simple matter, allowing the tenant to estimate in advance the likely cost of conversion.

4.27 The direct method of valuation offers a nuanced approach which is appropriate in cases where there is diversity of type and duration of lease. In the present case, however, there is little in the way of diversity. Once ultra-long leases are excluded, most remaining ground leases are granted for broadly similar periods and subject to broadly similar terms. Our inclination, therefore, would be to support the indirect method of valuation. Disputes as to valuation could be referred to the Lands Tribunal.<sup>58</sup>

4.28 **Merger or marriage value.** When considering different methods of valuation it is important to bear in mind that the separate values of the landlord's and the tenant's interest,

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<sup>54</sup> Thus the user restrictions in the lease would fly off, although some might be reimposed as real burdens (for which see para 4.45).

<sup>55</sup> For example, in *James v United Kingdom* ECHR Series B, vol 81 (1986) the applicant disclosed that for the properties sold under the 1967 Act, the time between the tenant intimating that he wanted to exercise the right and the date on which the property was actually conveyed ranged from between 1 and 13 years, the average being 4 years 8 months.

<sup>56</sup> *Commonhold and Leasehold Reform* (2000, Cmnd 4843) pp 149-53. At p 150 it is stated, in relation to the Leasehold, Housing and Urban Development Act 1993, that: "The Government is concerned that the present arrangements for determining the enfranchisement price are complex and uncertain and can lead to costly arguments, often over matters which have a relatively small impact on the overall price. They provide the opportunity for unscrupulous landlords to drag the process out in order to frustrate leaseholders' legitimate aims."

<sup>57</sup> And also under the legislation for the right to buy council houses: see Housing (Scotland) Act 1987 s 62.

<sup>58</sup> As under s 21 of the Leasehold Reform Act 1967. In 1954 the Lands Tribunal for Scotland was not yet in existence, and disputes were referred to a valuer appointed, failing agreement, by the sheriff: see s 7(3) of the 1954 Act.

when taken together, amount to less than the value of the property. This is because there is a value in owning *both* interests which is excluded when the interests are owned separately. This value is referred to as ‘merger value’ or ‘marriage value’. The landlord’s interest is therefore worth more to the tenant than to other purchasers because if the interest is acquired he will own the property outright, which is worth more than the aggregate of the two separate interests. In assessing compensation it is necessary to decide where the benefit of the marriage value should lie. One approach would be to say that compensation should be based on the landlord’s loss rather than on the tenant’s gain. In that case it is sufficient to compensate the landlord for the value of his interest, without regard to the marriage value. In the 1967 and 1993 schemes for England and Wales, however, marriage value is generally<sup>59</sup> shared between landlord and tenant, on the basis that ‘in a compulsory purchase, landlords are entitled to a fair market price for their interest in the building, including a share of the marriage value which would normally occur in an open market sale between willing parties when leasehold and freehold interests are merged’.<sup>60</sup> Ultimately the view taken on this question is likely to depend on the extent to which the tenant is thought entitled to a discount on the purchase price, a subject to which we now turn.

4.29 **Discount.** All conversion schemes so far introduced appear to offer the tenant some kind of discount on the acquisition of the landlord’s interest, although the nature of the compensation formulae makes the extent of the discount hard to assess. Certainly the price was discounted under the 1954 Act scheme which applied in Scotland.<sup>61</sup> The starting point for calculating compensation was the market value of the property with vacant possession in 1954. It was then assumed that the landlord would have received precisely this value on the eventual termination of the lease – an assumption which disregards inflation. Further, all leases were deemed to have at least 30 years to run. The sum payable to the landlord was then the 1954 value, reduced at 5% per annum compound interest for the unexpired duration of the lease. This took into account the fact that, but for the conversion, the landlord would not receive the value until termination. Thus if the land was valued in 1954 at £1000 and the lease, though due shortly to expire, was deemed to run for a further 30 years, the landlord would receive £231.<sup>62</sup> In addition, ground rent was converted into feuduty. Two aspects of this calculation strongly favoured the tenant. First, no allowance was made for inflation in land values, so that the landlord’s notional future entitlement was paid in 1954 prices; and secondly, there was a deemed extension of those leases which were due shortly to expire. The balance was redressed to some extent by the fact that the property was valued with vacant possession, thus awarding the marriage value to the landlord.

4.30 The 1967 Act scheme in England and Wales also offers discounted compensation.<sup>63</sup> For the purposes of calculating the value of the landlord’s interest, the lease is deemed to have been extended for 50 years. The broad effect is to exclude the value of the buildings, so that compensation is paid for the land alone.<sup>64</sup> Further, marriage value is withheld from the landlord.

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<sup>59</sup> But not under the 1967 Act scheme in its original form: see para 4.30.

<sup>60</sup> *Commonhold and Leasehold Reform* (2000, Cmnd 4843) p 150. The sharing of marriage value is thus reasserted as government policy.

<sup>61</sup> Long Leases (Scotland) Act 1954 s 7.

<sup>62</sup> This is the example given at para 68(4) of the Guthrie Report.

<sup>63</sup> Leasehold Reform Act 1967 s 9. See further Appendix B para 9.

<sup>64</sup> *James v United Kingdom* (1985) ECHR Series A no 98 para 23.

4.31 It is not for this Commission to determine whether, or to what extent, the price ought to be discounted, and we merely record some of the arguments for and against.<sup>65</sup> The Guthrie Committee advanced a number of specific justifications for the 1954 Act formula:<sup>66</sup>

‘In considering the terms upon which conversion should be granted we have taken into account (i) the strong probability that a permanent feu right would have been granted initially had the landowner had the power to do so; (ii) the fact that the property was built by the predecessors of the lessee; (iii) the present inflated values of property; and (iv) the existing practice of Scottish landowners with regard to conversion, which almost always takes into account the fact that their predecessors were not free to grant feus.’

Of those justifications, numbers (i) and (probably) (iv) would not seem to apply today.<sup>67</sup> In England and Wales, the white paper which preceded the 1967 Act placed most weight on the fact that the house was built, or paid for, by the lessee (ie justification (ii) of the Guthrie Committee):<sup>68</sup>

‘In the case of long leases, experience has shown that the system has worked very unfairly against the occupying leaseholder. The freeholder<sup>69</sup> has provided the land; but in the great majority of cases it is the leaseholder or his predecessor in title who at their own expense have built the house on the land. Whether this is so or not in all cases, it is almost universally true that over the years it is the lessee and his predecessors who have borne the cost of improvements and maintenance, and these will probably have cost far more than the original building itself ..[T]he price for enfranchisement must accordingly be based not on present market values but on the value of the land itself ..The price of enfranchisement must be calculated in accordance with the principle that in equity the bricks and mortar belong to the qualified leaseholder and the land to the landlord.’

The continued force of this kind of argument is difficult to assess. Whatever its merits 40 or 50 years ago, today it meets the difficulty that many of those now holding leases have no connection with the original lessee and simply bought the lease at market value, having due regard to its terms and duration. If so, there may not be much of a case for special treatment. In this connection it may be mentioned that the 1954 Act scheme had a cut-off point of 10 May 1951, and more recent acquirers of leases could not convert.<sup>70</sup> We would welcome the views of consultees, particularly those with practical experience of such leases.

4.32 Regard must also be had to the European Convention on Human Rights, and in particular to article 1 of the First Protocol, which provides that:

‘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

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<sup>65</sup> Here we are brief. But some of the arguments which apply to the principle of conversion (paras 4.6 to 4.21) apply here also.

<sup>66</sup> Guthrie Report para 68(4).

<sup>67</sup> Paras 4.6 and 4.7.

<sup>68</sup> *Leasehold Reform in England and Wales* (1966, Cmnd 2916) paras 1 and 11.

<sup>69</sup> ie the landlord.

<sup>70</sup> Long Leases (Scotland) Act 1954 s 3. This was partly to stop speculative acquisition: see Guthrie Report para 68(3). There was an exception for those acquiring by inheritance.

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 payment of taxes or other contributions or penalties.”

At the time when the 1954 Act scheme was introduced, UK citizens had no right of direct access to the European Commission of Human Rights. The 1967 Act scheme, however, was challenged before the Commission and the Court in a landmark case, *James v United Kingdom*.<sup>71</sup> The Court decided that the scheme did not breach article 1. In the Court’s view it was not manifestly unreasonable to characterise the ground lease system, as then operating, as a social injustice; and the elimination of a social injustice was an act in the “public interest”. Further, having regard to a State’s margin of appreciation, it could not be said that the level of compensation failed to afford a fair balance between the general interest of the community and the fundamental rights of individuals.<sup>72</sup> A challenge was also rejected under articles 6, 13 and 14 of the Convention.

4.33 **Questions for consideration.** We invite views on the following questions:

**18. In the event that a scheme for the conversion of ground leases is introduced -**

**(a) what would be the appropriate method of calculating the compensation due to the landlord?**

**(b) should the compensation be less than the value of the landlord’s interest and, if so, by how much should that value be discounted?**

#### **1954 Act as a model**

4.34 Any new scheme should be modelled so far as possible on the old. This is not only for economy of effort in respect of a scheme which would probably be little used but also because the Long Leases (Scotland) Act 1954 was itself a well-conceived piece of legislation. If success can be measured by an absence of reported case law, the 1954 Act was highly successful; and indeed the Act continued to be used, unofficially, as the basis of voluntary conversions long after it had ceased to apply. Much of the credit for this, no doubt, goes to the careful work of the Guthrie Committee. In the outline scheme described below we have followed the 1954 Act except where there seemed good reason not to do so.

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<sup>71</sup> (1985) ECHR Series A no 98.

<sup>72</sup> Thus para 56: ‘On the view that Parliament took, it logically follows that ‘in equity’ the tenant should only be required to pay for that part of the property which he has not already paid for, that is the value of the ground ... The objective pursued by the leasehold reform legislation is to prevent a perceived unjust enrichment accruing to the landlord on the reversion of the property. In the light of that objective, judged by the Court to be legitimate for the purposes of Article 1, it has not been established, having regard to the respondent State’s wide margin of appreciation, that the 1967 basis of valuation is not such as to afford a fair balance between the interests of the private parties concerned and thereby between the general interest of society and the landlord’s right of property”.

## Qualifying leases

4.35 **Residential lease for 50 years.** Following the 1954 Act, we suggest that a lease should qualify for conversion if it was granted for a period of 50 years or more and is currently occupied as a private dwellinghouse which forms the usual residence of the tenant.<sup>73</sup> A tenement flat could be a dwellinghouse for this purpose. The use would require to be lawful within the terms of the lease. A cut-off point of 50 years is not, we think, controversial.<sup>74</sup> In a lease of shorter duration the landlord may intend to resume personal use of the property, and should not be prevented from doing so.<sup>75</sup> A 50-year limit would, of course, exclude any lease granted since 1974.<sup>76</sup> Duration would be calculated on the principles set out in part 3.<sup>77</sup> We do not suggest any upper limit on duration, but in practice most leases granted for more than 175 years will be subject to automatic conversion under the scheme for ultra-long leases set out earlier.<sup>78</sup>

4.36 Under the 1954 Act a dwellinghouse includes any garden, garage or other pertinent,<sup>79</sup> and does not cease to count as such merely because it is also used for business, trade or professional purposes.<sup>80</sup> The position is different if the property comprises two separate parts – a dwellinghouse and some other part with some other use. Then the parts are treated as separable and only the dwellinghouse falls within the scheme.<sup>81</sup> This solution seems generally satisfactory. It means that a tenant who trades from his house can acquire the whole property, while a tenant who trades from a separate building,<sup>82</sup> also part of the lease, can acquire the house but must continue to rent the building. Occasionally this might cause practical difficulties, as where the buildings are worth more together than separately. If this is thought to be a serious problem, it would be possible to provide a judicial discretion to refuse conversion in appropriate cases.<sup>83</sup> The only alternative would be to attempt a characterisation of the lease as a whole. For example, the rule might be that a lease was eligible for conversion only if it was substantially residential in character.<sup>84</sup> But this would exclude some houses which probably ought not to be excluded, as well as being more difficult to operate in practice. Our provisional view is in favour of the 1954 Act solution.

4.37 **Tacit relocation.** The lease, of course, must still be in existence, for without a subsisting lease there is nothing to convert. But provided that there is a lease, the length of

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<sup>73</sup> For a consideration, and rejection, of other possible criteria, see paras 2.25 to 2.30. Special provision is made in s 2 of the 1954 Act for the case where the lease is held by a trust and the house occupied by a beneficiary. It is for consideration whether there should be an additional requirement that the lease be a ground lease, as in the scheme for conversion of tenancies-at-will: see Land Registration (Scotland) Act 1979 s 20(8)(a).

<sup>74</sup> Note however that in England and Wales the Leasehold Reform Act 1967 (s 3) applies to leases for more than 21 years.

<sup>75</sup> The Guthrie Report pointed out (para 69) that “in such cases it is obvious that parties must have had in mind throughout the period of the lease the limited duration of the right of occupation under the lease”.

<sup>76</sup> The Land Tenure Reform (Scotland) Act 1974 ss 8 to 10 in effect prevent the creation of residential leases for more than 20 years.

<sup>77</sup> Paras 3.59 to 3.67.

<sup>78</sup> In parts 2 and 3 of this paper. Since that scheme operates only on an “appointed day”, it is possible that the ground lease scheme would come into force first. If so, there would be no objection to its use in respect of longer leases which, on the appointed day, would have faced automatic conversion.

<sup>79</sup> Long Leases (Scotland) Act 1954 s 1(4)(b).

<sup>80</sup> 1954 Act s 1(4)(c).

<sup>81</sup> 1954 Act s 1(1).

<sup>82</sup> Or from a separate unit in the same building.

<sup>83</sup> This could be included as part of the discretion discussed in para 4.38.

<sup>84</sup> Leasehold Reform Act 1967 s 1(3)(a); Housing (Scotland) Act 1988 s 13(1).

the unexpired period is relevant only in relation to the amount of compensation.<sup>85</sup> A lease with three months to run would be eligible for conversion. So would a lease whose original term had expired but which was continuing by tacit relocation.<sup>86</sup> A number of the leases affected by our scheme will fall into that last category, and in order to prevent landlords avoiding the scheme by bringing such leases to an end we suggest that a right to convert should arise if the lease was subsisting on the day on which this paper is published, even if the lease has since been terminated (other than by fault of the tenant, or with his consent).<sup>87</sup> Some protection for *bona fide* third parties –such as purchasers from the landlord or new tenants –would probably be required. The problem of sudden termination was dealt with under the earlier scheme by special legislation which prevented the expiry of existing ground leases for a period of two years, pending the report of the Guthrie Committee and further legislation.<sup>88</sup>

**4.38 Exemptions.** Both the 1954 Act<sup>89</sup> and, for England and Wales, the 1967 Act<sup>90</sup> exempt leases where, on termination, the house is required by the landlord for his own residential use. The 1954 Act makes it a condition that the landlord's interest was acquired for that purpose, and by not later than 9 May 1951.<sup>91</sup> The exemption requires a court application, and the court must balance the interests of the parties. We suggest that this exemption be retained. If a house is home to both parties, the landlord's claim may reasonably take priority over that of the tenant.<sup>92</sup> At the very least it is a proper subject of judicial discretion. In the event that the exemption is established, our provisional view, following the 1954 Act, would be against the award of compensation to the tenant.<sup>93</sup>

**4.39** The other two exemptions in the 1954 Act are for (i) land acquired for development at the end of the lease<sup>94</sup> and (ii) land leased from a government department or local authority where it is certified by the Secretary of State that conversion is not in the public interest.<sup>95</sup> Neither seems especially compelling. A landlord who buys for development is not obviously more worthy of protection than a landlord who buys, say, for resale with vacant possession. In both cases the purpose is likely to be financial gain; and while it is true that conversion by the tenant would disappoint the expectations of the landlord, that is an argument against conversion at all –or at least against discounted compensation –rather than in favour of an exemption.<sup>96</sup> In England and Wales, proposed use for development is a

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<sup>85</sup> Compare here the scheme for ultra-long leases which requires an unexpired duration of at least 100 years. See paras 2.13 to 2.22.

<sup>86</sup> Tacit relocation means that a lease automatically continues for a further year if neither party has served a notice of termination on the other. A lease may be continued indefinitely in this way. This is treated as an extension of the original lease rather than as a new lease: see Paton & Cameron, *Landlord and Tenant* p 222. Leases continuing by tacit relocation were included within the 1954 Act scheme: see Guthrie Report para 68(3).

<sup>87</sup> It is for consideration whether leases which are subsisting on the day the legislation comes into force but are due shortly to expire should be given a brief statutory extension, as was done by ss 15 to 17 of the 1954 Act, in order to avoid a possible time gap between lease and ownership.

<sup>88</sup> Long Leases (Temporary Provisions) (Scotland) Act 1951. But while two years was sufficient to accommodate the Guthrie Report, it was not sufficient to accommodate the implementing legislation, which was not passed until 1954.

<sup>89</sup> 1954 Act s 5.

<sup>90</sup> Leasehold Reform Act 1967 s 18.

<sup>91</sup> The cut-off is to avoid collusive purchases, and some equivalent would be needed in any new legislation.

<sup>92</sup> Para 4.8.

<sup>93</sup> But compensation is payable under the 1967 Act: see s 18(4) and sched 2 para 5.

<sup>94</sup> 1954 Act s 5.

<sup>95</sup> 1954 Act s 4.

<sup>96</sup> Para 4.14.

ground for resisting an extension to the lease but not a conversion.<sup>97</sup> In relation to the second exemption (government departments and local authorities) we have no information which suggests that the public interest might be at risk, but we would welcome views.<sup>98</sup>

4.40 In our scheme for ultra-long leases we suggested that certain classes of inalienable property ought to be exempt, and we repeat that suggestion here.<sup>99</sup> And, as with that scheme, we see no reason for excluding a lease merely on the ground that it might also be subject to a different conversion scheme.<sup>100</sup> In practice, the only overlap is likely to be with the scheme for ultra-long leases itself.

4.41 We propose that

**19. In the event that a scheme for the conversion of ground leases is introduced**

- (a) A ground lease should be eligible for conversion if -**
  - (i) it was granted for a period of not less than 50 years, and**
  - (ii) the property is occupied by the tenant as a private dwellinghouse forming his usual residence.**
- (b) If part only of the property is occupied as a private dwellinghouse, only that part should be eligible for conversion.**
- (c) An expired lease should be eligible for conversion if the lease was subsisting at the date of publication of this discussion paper (except where terminated by agreement or due to the fault of the tenant).**
- (d) A lease continuing by tacit relocation should be treated as a subsisting lease.**
- (e) A lease should be exempted from the conversion scheme if it is a lease of property inalienable in the sense of proposal 5.**
- (f) If the landlord acquired his interest with the purpose of occupying the property as his residence on expiry of the lease, the sheriff should have a discretion to exempt the lease from conversion.**
- (g) Views are invited as to whether there should also be exempted -**
  - (i) leases where the landlord's interest was acquired for future development of the property;**

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<sup>97</sup> Leasehold Reform Act 1967 s 17.

<sup>98</sup> In England and Wales there is a limited exemption in a case where the property will be required for development within 10 years: see Leasehold Reform Act 1967 s 28.

<sup>99</sup> Paras 2.31 to 2.33.

<sup>100</sup> Para 2.34.

(ii) **leases from Scottish Ministers, government departments, and local authorities.**

**Notice and conveyance**

4.42 **Notice.** The scheme could not be compulsory, unlike the proposed scheme for ultra-long leases.<sup>101</sup> A qualifying tenant could not be compelled to accept a benefit which he might not want, and at a price which he could not afford or considered too high. Conversion, therefore, should be no more than an option; and as with other options it should be exercisable by service of a notice.<sup>102</sup> A statutory form would be provided.<sup>103</sup> There seems no reason to limit the service of a notice to the five years allowed by the 1954 Act.<sup>104</sup> The date of service would be significant in a number of respects. It would mark the moment at which the landlord was bound to sell and the tenant to buy.<sup>105</sup> A duly served notice would thus be the equivalent of missives of sale.<sup>106</sup> Further, the date would be used to determine whether the qualifying criteria, set out above, had been met.<sup>107</sup> This means that a lease which qualified on that day would remain in the scheme even if, by the time a conveyance was actually granted and registered, one or more of the conditions had ceased to be satisfied. Thus it would not matter if, after the notice had been duly served, the tenant died,<sup>108</sup> or ceased to occupy the house, or even if the lease came to an end. Any other rule might encourage delay on the part of the landlord. In the normal course of events, the interval between notice and conveyance is likely to be short.

4.43 **Conveyance.** Conversion is completed by registration in the Land Register.<sup>109</sup> A possible approach would be to allow registration of the option notice itself; and this has the obvious advantage of dispensing with the co-operation of the landlord. But our preference is to insist on a conveyance. A conveyance is the normal way in which land is transferred. Its use would import the standard rules of property law and conveyancing, and so remove the need for special provision in the legislation. It would give the opportunity to impose suitable real burdens and servitudes, and to confer servitudes on the acquirer. And above all, it would force the parties to reach agreement in respect of price, and other conditions, and ensure that the landlord was paid before ownership passed. Both the 1954 Act and the 1967 Act require the use of a conveyance.<sup>110</sup> The danger of delay can be met by requiring the

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<sup>101</sup> Paras 2.40 to 2.42.

<sup>102</sup> This rule of general practice is followed both by the 1954 Act (s 1(1)) and by the 1967 Act (s 8).

<sup>103</sup> See the 1954 Act s 6(1) and sched 1.

<sup>104</sup> 1954 Act s 1(2). The 1967 Act has no time limit.

<sup>105</sup> This is made express by s 8(1) of the 1967 Act. The tenant has a right to withdraw within one month of the determination of the price (s 9(3)); but this may not be necessary if a simple and predictable valuation formula is used.

<sup>106</sup> The right to buy scheme for council houses provides that the initial notice is to be followed by a formal offer and acceptance. See Housing (Scotland) Act 1987 ss 63 to 68. But this places the tenant's right to buy at the mercy of the landlord's willingness to respond, and does not seem appropriate in the case of a private sector scheme. If eg the tenant dies before offer and acceptance can be served, the right to buy is defeated: see *Ross v City of Dundee Council* 2000 SLT (Lands Tr) 2.

<sup>107</sup> As in the Long Leases (Scotland) Act 1954 s 1(1). But note the special rule for the subsistence of a lease (para 4.37).

<sup>108</sup> As in *Cooper's Exrs v Edinburgh District Council* 1991 SC(HL) 5 (right to buy a council house).

<sup>109</sup> By the time that the scheme was in force, all registration counties would be operational for the purposes of registration of title. Since the transfer would be for valuable consideration it would fall to be registered in the Land Register and not the Register of Sasines. See Land Registration (Scotland) Act 1979 s 2(1)(a)(ii).

<sup>110</sup> 1954 Act s 1(1); 1967 Act s 8(1).

landlord to grant a conveyance within a prescribed period, such as three months.<sup>111</sup> The parties would, however, be free to extend that period if they so wished, for example if they were still in negotiation in respect of the price.

4.44 By the time that any legislation was in force, the feudal system would have been abolished.<sup>112</sup> This means that the appropriate conveyance would be a disposition, and not a feu contract as under the 1954 Act. The disposition would be in normal form, and there seems no need to provide a statutory style.<sup>113</sup> It should narrate that it is granted in implement of the relevant legislation.<sup>114</sup> The property conveyed would be identical to the property leased and would include pertinents such as common rights.<sup>115</sup>

4.45 Where the landlord will continue to own other property in the area, the question of real burdens and servitudes arises. Even if the disposition were silent on the subject there would be implied in favour of the grantee such servitudes as are reasonably necessary for the enjoyment of property;<sup>116</sup> but it is obviously better that such servitudes should be expressed in the deed itself,<sup>117</sup> and they will then appear on the Land Register.<sup>118</sup> Similarly, the property retained by the landlord should be entitled to servitudes that are reasonably necessary.<sup>119</sup> In addition, it should be possible to include such real burdens as are reasonable in the circumstances.<sup>120</sup> Maintenance provisions would be an obvious example, as would use restrictions if previously contained in the lease.<sup>121</sup> We do not, however, think that there should be an automatic entitlement to upgrade the temporary conditions in a lease to the status of permanent real burdens.<sup>122</sup> In appropriate cases some of the burdens imposed could be made to affect the property retained by the landlord.<sup>123</sup> Disputes as to the terms of the deed could be referred to the Lands Tribunal.<sup>124</sup> If no property were retained by the landlord, it would not in practice be possible to impose either servitudes or real burdens.

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<sup>111</sup> Section 13(2) of the 1954 Act gives a judicial remedy if the landlord has failed to sign a feu contract within two months of being called on to do so.

<sup>112</sup> Abolition of Feudal Tenure etc. (Scotland) Act 2000.

<sup>113</sup> Compare s 11 and sched 4 of the 1954 Act. It is for consideration whether, as in sched 4, the landlord should be required to grant absolute warrandice. Clearly a sheriff clerk signing on behalf of an unknown landlord could not be expected to warrant the title.

<sup>114</sup> This is because registration has certain additional effects not accorded to ordinary dispositions. See below.

<sup>115</sup> As in the scheme for ultra-long leases: see paras 3.25 to 3.27.

<sup>116</sup> D J Cusine & R R M Paisley, *Servitudes and Rights of Way* (1998) paras 8.09 ff.

<sup>117</sup> See, however, *Inverness Seafield Co Ltd v Mackintosh* 2001 SLT 118, which turned on the speciality that, following *Bowers v Kennedy* 2000 SC 555, the implied right of access to landlocked property is not treated as an ordinary servitude.

<sup>118</sup> An implied servitude will not. See *Registration of Title Practice Book* (2<sup>nd</sup> edn, 2000) paras 6.54 to 6.58.

<sup>119</sup> It is for consideration whether special provision is needed for where the landlord omits to do this, particularly if the property is subject to another residential long lease eligible for conversion.

<sup>120</sup> See 1954 Act s 11(a) ("conditions and restrictions, being reasonable and appropriate in the circumstances"); Land Registration (Scotland) Act 1979 s 20(6) ("such terms and conditions ... as may be appropriate to the circumstances of the case"); and Housing (Scotland) Act 1987 s 64(1) ("such conditions as are reasonable").

<sup>121</sup> If use restrictions are imposed, they should be factored into the price. In other words, the property should be valued on the basis that the restrictions exist. This will only rarely make a difference, as where for example the effect of restrictions is to prevent development for which planning permission would otherwise be available.

<sup>122</sup> The position is different where the lease is so long as to amount to a quasi-feu. See paras 3.40 to 3.52. Section 11(a) of the 1954 Act may be explained on the basis that many of the leases with which the Act was concerned were ultra-long.

<sup>123</sup> However, as the law currently stands, this would require to be done in a separate deed of conditions. The position would be altered by the Title Conditions Bill: see Scottish Law Commission, *Report on Real Burdens* (Scot Law Com No 168, 2000) paras 3.11 to 3.14.

<sup>124</sup> Obvious precedents are s 21(1)(e) of the Land Registration (Scotland) Act 1979, and s 71(1)(d) of the Housing (Scotland) Act 1987.

4.46 The disposition would be executed, in the usual way, by the grantor only (ie by the landlord).<sup>125</sup> The landlord's reasonable conveyancing expenses should probably<sup>126</sup> be met by the tenant, but not expenses in relation to other matters. The tenant would be responsible for stamp duty and for registration dues. We would welcome views on whether valuation costs should also be included, as they are under both the 1954 and the 1967 Acts.<sup>127</sup> The risk is that if the tenant were to be liable for the landlord's expenses, up to and including a Lands Tribunal hearing, this might encourage unnecessary and unproductive disputes. It may be noted that valuation expenses are not included in the 1979 Act scheme for tenancies-at-will.<sup>128</sup>

4.47 **Effect of registration.** Registration in the Land Register will confer ownership on the tenant. To describe this process as "conversion" is convenient but not accurate. The lease does not become ownership. Rather the ownership previously held by the landlord passes, on registration, to the tenant.<sup>129</sup> In consequence, the tenant must ensure that the landlord has title to sell. It is true that a defective title would not alter the effect of registration, for in the Land Register the person registered as owner *is* owner,<sup>130</sup> but it would make the Register inaccurate and subject to the possibility of rectification.<sup>131</sup> Thus far there is no difference from an ordinary sale. Under the proposed scheme, however, registration would have a number of additional effects. Following the proposed scheme for ultra-long leases,<sup>132</sup> registration would extinguish all subordinate real rights affecting the land itself,<sup>133</sup> other than occupational encumbrances such as servitudes, real burdens, and public rights of way. Thus any standard security granted by the landlord would be extinguished, as would the lease itself and any intermediate leases.<sup>134</sup> On the other hand, any real rights affecting the lease would become real rights affecting the land. The only example likely to be encountered in practice is a standard security granted by the tenant.<sup>135</sup>

### Protection of heritable creditors

4.48 As the end of a lease approaches and the value of the landlord's interest increases, standard securities will become more common and also more valuable.<sup>136</sup> When, on registration of the tenant's disposition, such securities are lost, the creditor is not wholly unprotected. The personal obligation of the (former) landlord remains, and it would be possible for legislation to provide, as it is provided by the 1954 Act, that the landlord must apply the sale proceeds in repayment of the loan.<sup>137</sup> Further, in some cases at least the same debt will be secured on other property. A standard security which affected a second property would remain valid and effective in respect of that property. The question,

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<sup>125</sup> The 1954 Act s 11 also required execution by the tenant and by any intermediate landlord, for the purpose of renouncing the lease. Under our scheme, renunciation occurs automatically, on registration. See para 4.47.

<sup>126</sup> Conversion schemes usually so provide. But it may be noted that in the Ground Rents Bill, currently before the Northern Ireland Assembly, it is provided that expenses should lie where they fall.

<sup>127</sup> 1954 Act s 22; 1967 Act s 9(4)(e).

<sup>128</sup> Land Registration (Scotland) Act 1979 s 20(5).

<sup>129</sup> Compare the position in the earlier scheme, described in para 3.2.

<sup>130</sup> Land Registration (Scotland) Act 1979 s 3(1)(a).

<sup>131</sup> Land Registration (Scotland) Act 1979 s 9.

<sup>132</sup> Paras 3.4 to 3.6.

<sup>133</sup> Under the 1954 Act s 21(4), (5) heritable securities cease to affect the land.

<sup>134</sup> There could not in practice be a sublease below the converting tenant's lease, for otherwise the converting tenant could not fulfil the occupation requirement.

<sup>135</sup> This is expressly provided for by s 21(1)-(3) of the 1954 Act.

<sup>136</sup> Compare here the position of securities in ultra-long leases: see para 3.4.

<sup>137</sup> 1954 Act s 10(1).

however, arises as to whether more should be done. The landlord might fail to repay the loan. The creditor might not know that the tenant had exercised his right to convert and that the security was gone. And by the time that the true position emerged the (former) landlord might be insolvent. In England and Wales the 1967 Act requires the tenant to pay the creditor out of the sale price. If there is more than one creditor, each must be paid according to his ranking. The landlord is then paid the balance remaining.<sup>138</sup> There seems much to be said for this approach. It is fair to the creditor without being unfair to the landlord-debtor. The administrative difficulties, such as they are, do not seem insoluble. There are statutory precedents.<sup>139</sup> The tenant's duty would be confined to those securities registered not later than a fixed period –say 14 days –before his own registration.<sup>140</sup> This means that the tenant could rely on a search in the property register followed by an interim report prepared shortly before settlement.<sup>141</sup> If a security was disclosed, the creditor could be required to provide information as to the amount outstanding. Any restriction on redemption in the security would cease to apply,<sup>142</sup> but a creditor who wished the loan to continue would have the right to waive payment.<sup>143</sup>

## Identifying the landlord

**4.49 Unidentified landlords.** In most of the leases with which we are concerned, the tenant will have been making regular payments of rent and the identity of the landlord will be perfectly apparent. But if the amount due is small and the lease long, it is possible that the rent is no longer collected. In that case there may be occasionally be difficulties in identifying the landlord. It is true, of course, that some kind of title will exist somewhere on the property register. But the description may be so vague as to be virtually unintelligible, and there may not have been any transmissions in modern times. Further, even if the title can be properly located, there may be no identifiable person now living with whom it can be connected. The 1954 Act makes no provision for this situation,<sup>144</sup> but the solution of the 1967 Act, which we are content to adopt, is to require payment into court in exchange for a conveyance executed by a person authorised by the court.<sup>145</sup>

**4.50 Unregistered landlords.** The tenant must serve the notice on the landlord, that is to say, on the owner of the property in question; and, consistently with the scheme for ultra-long leases,<sup>146</sup> "owner" in this context should include a person who has right to the property but has not completed title by registration.<sup>147</sup> The standard examples are executors, or beneficiaries succeeding on death. In theory a tenant might occasionally be misled by the

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<sup>138</sup> 1967 Act s 12. The other possible approach, used for tenancies-at-will, is to leave the security in force but place the landlord under an obligation to procure its discharge. In effect this is the rule that applies in normal sales. See Land Registration (Scotland) Act 1979 ss 20(6), (7) and 22.

<sup>139</sup> Most notably the duty of a heritable creditor, in selling property, to pay the amount due under prior securities. See Conveyancing and Feudal Reform (Scotland) Act 1970 s 27.

<sup>140</sup> Fourteen days is the period allowed in standard letters of obligation for registration of the purchaser's title.

<sup>141</sup> The tenant's duty would not extend to floating charges, which do not appear on the property register. But unless a floating charge has attached, it would not affect the property once it had been transferred.

<sup>142</sup> See Conveyancing and Feudal Reform (Scotland) Act 1970 s 18(1), (1A).

<sup>143</sup> See proviso to s 10(1) of the 1954 Act. If the creditor could not be found, the amount due could be consigned in court. See Conveyancing and Feudal Reform (Scotland) Act 1970 s 27(2), (3), and para 4.49 below.

<sup>144</sup> Curiously, however, s 13(3) of the 1954 Act makes provision for intermediate landlords.

<sup>145</sup> 1967 Act s 27. Much the same procedure is used in respect of tenancies at will: see s 21(3) of the Land Registration (Scotland) Act 1979.

<sup>146</sup> Para 3.13.

<sup>147</sup> In the unlikely event that there were two such people, the "owner" would be the later person to acquire the right: see Abolition of Feudal Tenure etc. (Scotland) Act 2000 s 16(1) (definition of "superior").

register into serving a notice on, and paying, the wrong person. This might happen, for example, where the registered owner had disposed of the property and delivered the disposition but the purchaser had failed to register. Almost always, the “wrong” owner would disclose the true position. But if payment were accepted, we suggest that the tenant be exonerated, and payment be due by the “wrong” owner to his unregistered successor. The disposition would still be legally effective, as granted by the owner.<sup>148</sup>

### Intermediate landlords

4.51 In theory, the original lease may have been followed by a sublease, or even by a series of subleases. Our survey, however, suggests that this is rarely the case in residential ground leases. Of the 46 leases identified as possibly qualifying for conversion,<sup>149</sup> only two appear to be subleases. This may be compared with a figure of around 20% for long leases as a whole. But although subleases are probably infrequent, provision still requires to be made.

4.52 The starting point is that a sublease is, in principle, treated like any other lease. Hence if it was granted for 50 years and is occupied by the subtenant as a private dwellinghouse forming his usual residence, then it would qualify for conversion under the scheme.<sup>150</sup> A number of specialities arise. In addition to serving a notice on the owner of the land (ie the head landlord), a copy of the notice should also be served on all intermediate landlords, except where this is not reasonably practicable – for example, because the intermediate lease is not disclosed on the register and is not otherwise discovered, or because there appears to be no landlord extant. Service of a copy has two functions. In the first place, it alerts the recipients to the fact that their property right is about to be extinguished. This seems correct in principle as well as desirable in practice. Secondly, it gives notice that there may be a claim for compensation.

4.53 The attribution of compensation is not straightforward. The approach taken by the 1954 Act was to compensate intermediate landlords for “profit rent” (ie the difference between rent received and rent payable) but not for “profit years” (ie the unexpired term left once the sublease had come to an end). The subtenant made a payment for the capitalised value of the profit rent.<sup>151</sup> Otherwise he paid only the head landlord.<sup>152</sup> The 1967 Act, by contrast, provides for full compensation. The tenant is given the arduous task of identifying each intermediate landlord and of making payment on the basis of a complicated formula.<sup>153</sup> This means that with each additional sublease there is an additional valuation problem, and a new potential source of dispute and delay. In principle, it seems correct that an intermediate landlord should be compensated. If B holds from A on a lease with 90<sup>154</sup> years left to run, and C (the converting subtenant) holds from B on a lease which will expire next

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<sup>148</sup> If the notice was correctly served but the owner *subsequently* granted a disposition to a third party, this would be like any other case of double sale. The owner would be in breach of the statutory obligations imposed by the notice, and the title of a *male fide* acquirer would be vulnerable to reduction, and rectification, as an ‘offside goal’.

<sup>149</sup> Para 4.4.

<sup>150</sup> Paras 4.35 to 4.41. The same approach was taken by the 1954 Act: see s 1(1).

<sup>151</sup> 1954 Act s 9.

<sup>152</sup> 1954 Act s 7(1) provides for payment to the ‘landlord’. In s 1(3) ‘landlord’ is defined to mean ‘any person for the time being holding the interest of landlord under a lease’, and ‘lease’ is said not to ‘include a sublease’.

<sup>153</sup> 1967 Act s 5(4) and sched 1 para 7.

<sup>154</sup> The figure is chosen deliberately. If there were 100 years to run, B would normally become owner under the scheme for ultra-long leases. In that case, as explained below, he would receive all of the compensation.

year, it seems unjust that B should receive no compensation for the 89 free years. But most cases are not like this. Usually there is no intermediate lease at all, but if there is one the profit years will generally be meagre, if only because an intermediate lease with a substantial unexpired term will be converted into ownership under the scheme for ultra-long leases. The scale of the problem suggests a rough and ready solution. Our provisional view is that the subtenant should continue to pay only the head landlord, as under the 1954 Act.<sup>155</sup> The compensation would be calculated on basis of the unexpired duration of the *sublease*.<sup>156</sup> Thus if the sublease were substantially shorter than the head lease, the compensation would be correspondingly larger. The intermediate landlord would then have a claim against the head landlord for that proportion of the compensation figure which was attributable to his own lease.<sup>157</sup> If, as may be the case, the compensation formula is based on years of unexpired duration, this would be a relatively simple calculation. In practice, the amounts involved might be too small to make a claim worthwhile.

4.54 Very occasionally there might be an interaction between the scheme for ground leases and the scheme, described in parts 2 and 3, for ultra-long leases. Suppose that A leases to B for 999 years and B subleases to C for 99 years. C uses the property as a dwellinghouse. In principle, both B and C can convert and become owners, but B must give way to C, on the principle that the lower right always prevails.<sup>158</sup> But while C will not become owner without first serving a notice and registering a disposition, B will become owner automatically, on the appointed day.<sup>159</sup> There is not normally a difficulty if C serves a notice *after* the appointed day. In that case B has become owner in place of A, and there is no longer an intermediate lease. The compensation money is paid to B. But even if a notice is served before the appointed day, it seems clear that the money should go to B. For B alone has a right which is worthy of compensation, and A's residual ownership has no value.<sup>160</sup> This transitional problem is solved if the meaning of "owner" in the current scheme is extended to include an intermediate landlord who will become owner under the scheme for ultra-long leases.<sup>161</sup> Almost always, B's interest will be on the property register. In that case C will send the notice to the right person. In a case where B's interest was unregistered, and so overlooked, it would be possible to apply the rule, described earlier, for unregistered landlords.<sup>162</sup> Thus in paying A instead of B, C would be exonerated; but B would have a claim against A.

### The scheme in summary

4.55 The mechanics of the scheme can be summarised in the form of a proposal

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<sup>155</sup> If, however, the compensation formula distinguished loss of rent from loss of reversion (para 4.23), it would be possible to follow s 9 and require direct payments to intermediate landlords in respect of the former.

<sup>156</sup> Compare s 7(2) of the 1954 Act, which considers only the head lease. (Note that, by s 1(3), 'lease' means head lease.)

<sup>157</sup> Similarly, the holder of any other real right extinguished as a result of conversion could be allowed to make a claim against the head landlord. Heritable creditors having already been provided for, the only remaining category may be those –virtually unknown in practice –holding a proper liferent over the land.

<sup>158</sup> Para 3.3.

<sup>159</sup> Paras 2.40 to 2.47.

<sup>160</sup> Para 2.16.

<sup>161</sup> Since eligibility under that scheme depends on the unexpired duration of the lease, it may be necessary for the legislation itself to nominate the appointed day (as opposed to leaving this to delegated legislation).

<sup>162</sup> Para 4.50.

20. We invite views on the following possible scheme for the conversion of residential ground leases into ownership:
- (a) A tenant holding under a lease qualifying under proposal 19 would have an option to acquire ownership of the property in exchange for payment to the landlord of compensation.
  - (b) The option would be exercised by service of a notice, in statutory form, on the landlord.
  - (c) The landlord would be bound to grant a disposition of the property within three months of the notice, or such other period as may be agreed between the parties. Payment would be due at that time.
  - (d) The disposition would -
    - (i) state that it was granted in implement of the relevant legislation;
    - (ii) convey the property that was leased;
    - (iii) grant and reserve such servitudes as may be reasonably necessary for the enjoyment of the property and of any neighbouring property owned by the landlord; and
    - (iv) impose such real burdens as are reasonable in the circumstances.
  - (e) The reasonable conveyancing expenses of the landlord would be met by the tenant. It is for consideration whether the tenant should also meet the expenses of valuation.
  - (f) Registration in the Land Register would -
    - (i) transfer ownership from landlord to tenant;
    - (ii) extinguish the lease and any intermediate leases;
    - (iii) extinguish any right in security or proper liferent over the land; and
    - (iv) make the land subject to any subordinate real right which formerly affected the lease.
  - (g) Before paying the landlord, the tenant would be bound to apply the compensation money to the repayment of any loan secured by a heritable security affecting the land and registered not later than 14 days prior to registration of the disposition in his favour.

(h) If the landlord cannot be identified, the sheriff court should be empowered to authorise signature of the disposition and to receive payment of the compensation.

(i) If the qualifying lease is a sublease, the scheme should apply with the following modifications:

(i) except where not reasonably practicable, the tenant should serve a copy of the notice on all intermediate landlords;

(ii) compensation should be calculated on the basis of the unexpired term of the sublease; and

(iii) while the compensation payment should continue to be made to the head landlord, an intermediate landlord should have a claim on that sum to the extent that it is attributable to his own lease.

(j) For the purposes of this proposal, "landlord" means the owner of the land which is leased; and "owner" means

(i) the person who has right to the land whether or not he has completed title, or

(ii) if any person is entitled to become owner under proposals 7 or 16, that person.

### **Repeal of 1954 Act**

4.56 It has not been possible to use the 1954 Act scheme since 31 August 1959. Nonetheless the relevant part of the Act (part I) remains on the statute book. We suggest therefore that

**21. Part I of the Long Leases (Scotland) Act 1954 should be repealed.**

## **PART 5      SUMMARY OF PROVISIONAL PROPOSALS**

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

(Paragraph 2.12)
  
2.     (a)     In determining which leases qualify for conversion would it be preferable to follow
  - (i)     option A (unexpired term of more than 175 years) or
  - (ii)    option B (initial grant for more than 175 years coupled with an unexpired term of more than 100 years)?
  
- (b)     In relation to the preferred option, are the suggested limits for length of lease satisfactory or should different limits be substituted?

(Paragraph 2.22)
  
3.     Should there be exempted from conversion any lease in which the head landlord is a local authority and which has been granted for a period not exceeding 300 years?

(Paragraph 2.23)
  
4.     Should the exemption mentioned in proposal 3 be extended to other public bodies and, if so, to which?

(Paragraph 2.23)
  
5.     A lease should be exempted from the conversion scheme if -
  - (a)     it is a lease of property which is of its nature inalienable, or
  - (b)     the head landlord is a person prevented by statute from alienating property of the type which is subject to the lease.

(Paragraph 2.39)
  
6.     On a day to be appointed (the “appointed day”) there should be automatic conversion of all qualifying leases into ownership, except that –
  - (a)     it should be possible for a tenant to elect that there should be no conversion; and

(b) in a case where a lease is unregistered, conversion should not occur until the time of registration.

(Paragraph 2.47)

7. We invite views on the following possible scheme for the conversion of ultra-long leases into ownership:

(a) A lease would be a qualifying lease for the purposes of the scheme if, on the appointed day –

- (i) it complied with proposals 2 and 3 in respect of unexpired duration;
- (ii) it was registered in the Land Register or Register of Sasines;
- (iii) it was not an exempt lease in terms of proposal 5 or of (d) below; and
- (iv) in a case where, in respect of any land, the above criteria were fulfilled by more than one lease, it was the lowest such lease.

(b) On the appointed day, in relation to any qualifying lease of land –

- (i) the right of lease would be converted into ownership;
- (ii) any right of lease higher than the converted right would be extinguished;
- (iii) the landlord's ownership would be extinguished; and
- (iv) any right in security or proper liferent over the land would cease to affect the land.

(c) Following conversion, the land would be subject to any subordinate real right which, immediately before the appointed day, affected –

- (i) the lease, and
- (ii) (except as mentioned in (b)(iv) above) the land.

(d) A lease which is otherwise a qualifying lease would be exempted from conversion if, before the appointed day, any tenant -

- (i) executed a notice of exemption;
- (ii) sent a copy of the notice to the landlord or landlords (except where not reasonably practicable to do so); and
- (iii) registered the notice in the Land Register or Register of Sasines.

(Paragraph 3.8)

8. (a) Should compensation for loss of rent be calculated by reference to –
- (i) the value of two and a half per cent Consolidated Stock; or
  - (ii) a multiplier of the annual rent?
- (b) If a multiplier is preferred, what figure should be selected? (Paragraph 3.10)
9. We invite views on the following possible scheme for the payment of compensation in respect of extinction of rent:
- (a) Compensation would be payable provided that a notice, in prescribed form, was served by the landlord on the tenant not later than three months before the appointed day.
  - (b) The notice would stipulate –
    - (i) the amount of compensation, and
    - (ii) the date (the ‘redemption day’) on which payment was due.
  - (c) The redemption day could be not less than three months after service of the notice but not later than the appointed day.
  - (d) In relation to a single rent due in respect of properties held by different tenants, it would be for the landlord to apportion the compensation, having regard to any informal apportionment of rent currently in existence.
  - (e) A non-monetary rent would be converted into its monetary equivalent, and in a case where the rent was ascertained by reference to the value of grain or other fungibles, the equivalent would be taken to be the average value during the previous ten years.
  - (f) On the redemption day, the compensation would become payable by the person who, on the date of service of the notice, was the tenant of the property to the person who, on that date, was the landlord; but where the compensation was £50 or more, payment could be made by instalments.
  - (g) Rent would cease to be payable –
    - (i) in respect of any period on or after the redemption day or
    - (ii) where no compensation notice had been served, in respect of any period on or after the appointed day

but liability for arrears would be unaffected.

- (h) A mid-landlord would have the same right to claim compensation as any other landlord.
- (i) In other respects, the scheme would follow the rules for feuduty set out in part 3 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000.  
(Paragraph 3.20)
10. (a) The rules for compensation claims in respect of loss of rent, set out in proposal 9, should apply equally to compensation claims for loss of renewal premiums.
- (b) We invite views as to whether the amount payable in respect of renewal premiums should be determined –
- (i) by counting as additional rent the figure produced by dividing the premium by the renewal period, or
- (ii) by assessing the current value of the right to receive the premium on the date when it would be due.  
(Paragraph 3.24)
11. (a) On the appointed day the land formerly affected by the lease should be subject to, or as the case may be take the benefit of, such positive servitudes as would have existed on that day if –
- (i) the lease had been a conveyance of the land, and accordingly
- (ii) that land had been in separate ownership since the date on which the lease was constituted as a real right.
- (b) The same rule should apply in respect of any partial assignation or partial sublease prior to the appointed day.  
(Paragraph 3.38)
12. (a) This proposal applies to conditions in the qualifying lease which are of their nature capable of being constituted as real burdens.
- (b) By notice registered before the appointed day, the landlord should be able to reallocate a condition to a new benefited property on the terms set out in sections 18 to 21 of the Abolition of Feudal Tenure etc. (Scotland) Act 2000; and on the appointed day the condition should become a real burden.
- (c) By notice registered before the appointed day, a landlord which is a conservation body should be able to preserve a condition concerned with conservation on the terms set out in sections 27 and 28 of the Abolition of Feudal

Tenure etc. (Scotland) Act 2000; and on the appointed day the condition should become a conservation burden.

(d) Where the right to enforce a condition is, by express provision, conferred on the tenant (or owner) of any particular property, on the appointed day the condition should become a real burden in respect of which that property is the benefited property.

(e) Any condition which regulates the maintenance, management, reinstatement or use of heritable property which constitutes, and is intended to constitute, a facility of benefit to other land should, on the appointed day, become a facility burden.

(f) Any condition which regulates the provision of services to other land should, on the appointed day, become a service burden.

(g) The benefited properties –

(i) in a facility burden should be any land to which the facility is (and is intended to be) of benefit, and also the heritable property which constitutes the facility; and

(ii) in a service burden should be any land to which the services are provided.

(Paragraph 3.52)

13. (a) On the conversion of a qualifying lease into ownership, all the terms and conditions of the lease should cease to have effect, whether as real or as contractual conditions.

(b) However, the enforcement of a real burden created under proposal 12 should be subject to compliance with any obligation which was binding on the landlord immediately before the appointed day and which was the direct counterpart of the real burden.

(c) This proposal is subject to proposals 11 and 12.

(Paragraph 3.58)

14. For the purposes of determining the duration of a lease –

(a) there should be included

(i) any renewal period which the landlord is bound to grant, and

(ii) the duration of any other lease which is to run consecutively with the current lease;

(b) there should be excluded any period after a break option which is exercisable by the landlord (other than a break option which can be exercised only on payment of compensation for the value of buildings);

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

(i) the years during which the person was tenant, if known, or

(ii) 35 years, or

(iii) in a case where the tenant is alive, the years for which the person is likely to be tenant, having regard to a standard table of life expectancy.

(Paragraph 3.67)

15. (a) It should be made clear -

(i) that any rectification of the Land Register which is required to take account of the legislation on leasehold conversion, or of anything done under or by virtue of that legislation, is not to be regarded as prejudicing any proprietor in possession, and

(ii) that there is no entitlement to indemnity under section 12 of the Land Registration (Scotland) Act 1979 as a result of any such rectification.

(b) However, paragraph (a) should not apply insofar as the rectification involves the reinstatement of an encumbrance which was previously deleted.

(Paragraph 3.75)

16. Where a lease fails to qualify for conversion only because it was not registered on the appointed day, it should become a qualifying lease on the day on which it is first registered; and proposals 7, 9, 11, 12 and 13 should apply with the substitution of "day of registration" for "appointed day".

(Paragraph 3.78)

17. (a) Is there a need for legislative protection for tenants holding under residential ground leases (not being ultra-long leases within proposal 2)?

(b) If so, should such protection comprise -

(i) a right to convert the lease into ownership;

(ii) a right to security of tenure, for example by extension of the lease for a fixed period; or

(iii) some other form of protection (please specify)?

(Paragraph 4.21)

18. In the event that a scheme for the conversion of ground leases is introduced -

(a) what would be the appropriate method of calculating the compensation due to the landlord?

(b) should the compensation be less than the value of the landlord's interest and, if so, by how much should that value be discounted?

(Paragraph 4.33)

19. In the event that a scheme for the conversion of ground leases is introduced -

(a) A ground lease should be eligible for conversion if -

(i) it was granted for a period of not less than 50 years, and

(ii) the property is occupied by the tenant as a private dwellinghouse forming his usual residence.

(b) If part only of the property is occupied as a private dwellinghouse, only that part should be eligible for conversion.

(c) An expired lease should be eligible for conversion if the lease was subsisting at the date of publication of this discussion paper (except where terminated by agreement or due to the fault of the tenant).

(d) A lease continuing by tacit relocation should be treated as a subsisting lease.

(e) A lease should be exempted from the conversion scheme if it is a lease of property inalienable in the sense of proposal 5.

(f) If the landlord acquired his interest with the purpose of occupying the property as his residence on expiry of the lease, the sheriff should have a discretion to exempt the lease from conversion.

(g) Views are invited as to whether there should also be exempted -

(i) leases where the landlord's interest was acquired for future development of the property;

(ii) leases from Scottish Ministers, government departments, and local authorities.

(Paragraph 4.41)

20. We invite views on the following possible scheme for the conversion of residential ground leases into ownership:
- (a) A tenant holding under a lease qualifying under proposal 19 would have an option to acquire ownership of the property in exchange for payment to the landlord of compensation.
  - (b) The option would be exercised by service of a notice, in statutory form, on the landlord.
  - (c) The landlord would be bound to grant a disposition of the property within three months of the notice, or such other period as may be agreed between the parties. Payment would be due at that time.
  - (d) The disposition would -
    - (i) state that it was granted in implement of the relevant legislation;
    - (ii) convey the property that was leased;
    - (iii) grant and reserve such servitudes as may be reasonably necessary for the enjoyment of the property and of any neighbouring property owned by the landlord; and
    - (iv) impose such real burdens as are reasonable in the circumstances.
  - (e) The reasonable conveyancing expenses of the landlord would be met by the tenant. It is for consideration whether the tenant should also meet the expenses of valuation.
  - (f) Registration in the Land Register would -
    - (i) transfer ownership from landlord to tenant;
    - (ii) extinguish the lease and any intermediate leases;
    - (iii) extinguish any right in security or proper liferent over the land; and
    - (iv) make the land subject to any subordinate real right which formerly affected the lease.
  - (g) Before paying the landlord, the tenant would be bound to apply the compensation money to the repayment of any loan secured by a heritable security affecting the land and registered not later than 14 days prior to registration of the disposition in his favour.
  - (h) If the landlord cannot be identified, the sheriff court should be empowered to authorise signature of the disposition and to receive payment of the compensation.

(i) If the qualifying lease is a sublease, the scheme should apply with the following modifications:

- (i) except where not reasonably practicable, the tenant should serve a copy of the notice on all intermediate landlords;
- (ii) compensation should be calculated on the basis of the unexpired term of the sublease; and
- (iii) while the compensation payment should continue to be made to the head landlord, an intermediate landlord should have a claim on that sum to the extent that it is attributable to his own lease.

(j) For the purposes of this proposal, "landlord" means the owner of the land which is leased; and "owner" means

- (i) the person who has right to the land whether or not he has completed title, or
- (ii) if any person is entitled to become owner under proposals 7 or 16, that person.

(Paragraph 4.55)

21. Part I of the Long Leases (Scotland) Act 1954 should be repealed.

(Paragraph 4.56)

# APPENDIX A –Survey of Long Leases

## Aim of the survey

1. The aim of the survey was to investigate the incidence and use of long leases in Scotland.

## Methodology

2. During the period 20 March to 26 April 2000 information was obtained on 2679 leases from the Land Register of Scotland for the counties of Ayr, Clackmannan, Lanark and Renfrew.<sup>1</sup> The information was then stored on a computer database.<sup>2</sup> Some of the leases comprised a part only of the property originally leased, and as a result there is likely to have been a certain amount of double-counting, with the survey taking in both (or some or all) parts of an originally undivided lease and classifying each as a separate lease.

3. Ayr and Lanark were chosen because at the time of the survey carried out for the Guthrie Report in 1951<sup>3</sup> they were the counties with the most recorded leases in terms of numbers and, in the case of Lanark, as a percentage of all titles in the county.<sup>4</sup> They have also been operational for the Land Register for some time.<sup>5</sup> Clackmannan was preferred because it had a high incidence of recorded leases as a percentage of all titles in the county. Although Kirkcudbright and Wigtown had a slightly higher percentage of recorded leases than Clackmannan, Clackmannan was chosen because it has been an operational area for the Land Register for longer.<sup>6</sup> Renfrew was also chosen for this latter reason,<sup>7</sup> and while it had a lower percentage of leases, in 1951 Renfrew was ahead of Kirkcudbright and Wigtown in terms of numbers of leases.

4. Table 1 shows the number of leases examined in each county together with a comparison of the numbers which existed in 1951.

	Number of leases examined	% of leasehold titles examined	Number of leases in 1951
Ayr	303	100	1988
Clackmannan	193	100	305
Lanark	1220	25	4153
Renfrew	963	50	655

**Table 1: Number of leases examined**

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<sup>1</sup> We are grateful to the staff of Registers of Scotland for supplying a list of the leasehold titles for each county, providing information on each title, and allowing the title sheets to be inspected. In particular we wish to thank Mr Ian Davis, Mr John Marshall, Mr Marcus MacKenzie, Mr Douglas Pentland, and the staff in Customer Services, for their advice and assistance.

<sup>2</sup> We wish to thank Ms Marina Miller for creating a database for the survey.

<sup>3</sup> In April 1951 the Keeper of the Registers of Scotland carried out for the Guthrie Committee a survey of all search sheets in the Register of Sasines for the period 1905-1951. Its findings were published in appendix II of the Guthrie Report.

<sup>4</sup> In both categories Lanark was in first place. This is probably still the case. O'Donnell and Rennie found that the greatest concentration of leasehold titles was in Lanarkshire: see D O'Donnell and R Rennie, 'Non-Feudal Landholdings in Scotland' (1998) 3 SLPQ 31 at 49.

<sup>5</sup> Lanark became an operational area on 3 January 1984, and Ayr on 1 April 1997.

<sup>6</sup> Clackmannan became an operational area on 1 October 1992. Kirkcudbright and Wigtown became operational areas on 1 April 1997.

<sup>7</sup> Renfrew became an operational area on 6 April 1981.

It will be seen that the survey examined all leasehold title sheets for Clackmannan and Ayr, one half of the title sheets for Renfrew, and one quarter of the title sheets for Lanark. For practical reasons, the search did not include the Register of Sasines. There is therefore excluded from the survey any pre-existing lease which saw no activity during the period under review of a kind which would induce first registration in the Land Register.

5. Information was taken from the title sheets about:

- title number
- date of registration
- address of property
- name of original landlord
- consideration
- start year of lease
- duration
- rent
- partial assignments and allocations of rent
- subleases
- whether the minerals had been excepted.

6. Some information was not available, namely:

- name of original landlord for 55 leases
- consideration for 114 leases
- start year for 57 leases
- duration for 80 leases
- original rent for 268 leases
- whether the lease had been assigned in part or not for 71 leases<sup>8</sup>
- whether on a partial assignment the rent under the original lease had been allocated for 27 leases<sup>9</sup>
- the amount of the allocated rent, where the rent had been allocated, for 12 leases<sup>10</sup>
- whether the lease was a sublease for 244 leases and
- whether the minerals had been excepted for 37 leases.

7. In addition to searching the Land Register we placed a notice in the *Journal of the Law Society of Scotland* and also contacted a number of persons with knowledge and experience of long leases. We are grateful to those solicitors and others<sup>11</sup> who helped us in various ways. 51 further leases were received from this source, and while they are not included in the survey, they were useful in supplementing and explaining the information obtained from the Register.

8. The estate search for that part of the Seafield Estate which is in Moray was also examined as it was known that the Estate had a practice of granting long leases at the end of the 19<sup>th</sup> century.

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<sup>8</sup> There were 1503 assignments in part.

<sup>9</sup> 1.80% of the 1503 assignments in part.

<sup>10</sup> 2.05% of the 586 leases for which the rent had been allocated.

<sup>11</sup> See para 1.4 n 12 of the discussion paper.

## Incidence and distribution

9. The number of title sheets examined (2360) was smaller than the total number of leases (2679). In other words, some title sheets included two or more leases. This was usually because two distinct properties were registered under the same title or because a second lease extended or re-granted the first. In general the total number of leases has been used as the base figure for this survey, but in considering the incidence of leases it is more helpful to focus on the number of title sheets. We know that the total number of title sheets on the Land Register for the counties of Ayr, Clackmannan, Lanark and Renfrew at the time of the survey was 278,200. If the incomplete figures for Lanark and Renfrew are grossed up to 100, we also know that the total number of *leasehold* title sheets for the four counties was 6454. This means that only 2.3% of property titles in the four counties were held on leasehold tenure. That compares with the 6.9% in the same four counties disclosed by the 1951 survey.<sup>12</sup> It is, of course, a matter of speculation as to whether the 2000 figures are representative for the country as a whole; but in view of the fact that the 1951 survey found that the average incidence of leases throughout the country was considerably *less* (only 2.8%) than the incidence in the four counties under scrutiny, it seems likely that 2.3% over-states the incidence of leasehold titles in Scotland today.

10. So far as distribution is concerned, the survey suggests that long leases were used only by certain landed estates,<sup>13</sup> with the result that it is a normal form of land tenure only in certain distinct geographical areas.<sup>14</sup>

## Initial duration<sup>15</sup>

11. A number of charts are given at the end of this survey. Chart 1 shows the overall distribution of leases by length while charts 2 and 3 show the same information in closer focus.<sup>16</sup> On the basis of these charts it appears that:

- 1786 leases had an initial duration of more than 175 years while the remaining 813 leases had a duration of 175 years or less. Thus the ratio of “ultra-long” to “ordinary” leases is approximately 2:1.
- Most leases were granted for either 20, 25, 60, 99, or 999 years.
- Only 2 leases were granted for between 126 and 175 years.
- No leases were granted for between 176 and 199 years.<sup>17</sup>
- Only 21 leases were granted for between 200 and 299 years.
- 1765 leases (68%) were granted for 300 years or longer.

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<sup>12</sup> This figure is the percentage of search sheets attributable to surviving leases. In calculating this percentage there has been excluded from the total number of search sheets the search sheets of the 1024 leases in those counties that had expired by 1951.

<sup>13</sup> Research in files from the early 1950s in the National Archives of Scotland suggests that various estates around Scotland granted 99-year leases of residential properties, such as the Breadalbane Estate, the Buccleuch Estate, the Hamilton & Kinneil Estate, the Kippendavie Estate, the Macdonald Estate, and the Seafield Estate.

<sup>14</sup> This is supported by the evidence received from practitioners with experience of long leases. They referred to pockets of leases in Alva, Ardrossan, Saltcoats, Stevenson, and Wishaw.

<sup>15</sup> It was not possible to ascertain the duration of 80 leases so the sample here is 2599 leases.

<sup>16</sup> For practical reasons the charts exclude leases with an initial duration of more than 1030 years, of which there were 44 ranging from 1,037 years to 1,000,000 years.

<sup>17</sup> The break between 125 years and 200 years may be due to the practice of granting commercial leases for 125 years to encompass the three 40-year cycles of building, trading and demolition.

- 380 leases were granted for between 700 and 998 years.<sup>18</sup>
- 1269 leases (49%) were granted for a period of 999 years.
- The longest duration was 1,000,000 years.<sup>19</sup>

12. Table 2 gives further information about the most popular lengths of lease.

<b>Initial duration</b>	<b>20</b>	<b>25</b>	<b>60</b>	<b>99</b>	<b>999</b>
Number of leases	60	313	51	60	1269
% of total	2.31%	12.04%	1.96%	2.31%	48.83%
Average number of years to expiry	12	14	50	74	860
Shortest number of years to expiry <sup>20</sup>	1	1	30	55	745
Longest number of years to expiry	18	24	59	98	995

**Table 2 Initial duration**

### **Unexpired duration**

13. Chart 4 (at the end of this survey) shows the unexpired duration of all leases examined other than

- 86 leases for which there was insufficient information
- 25 leases which may be continuing on tacit relocation, and
- 35 leases with 1645 or more years remaining.

14. Table 3 shows the numbers and categories of lease covered by the various periods.

<b>Unexpired duration (in years)</b>	<b>Number of leases</b>	<b>% of total<sup>21</sup></b>	<b>Number of leases of 175 years or under</b>	<b>Number of leases of more than 175 years</b>
0 –49	671	25.88%	671	0
50 –175	184	7.10%	141	43
176 –199	7	0.27%	0	7
200 –500	34	1.31%	0	34
500 –700	166	6.40%	0	166
700 –999	1496	57.69%	0	1496
1000 –1000000	35	1.35%	0	35

**Table 3 Unexpired duration**

<sup>18</sup> 14.62% of the sample leases. Some of the 380 leases may be subleases granted for the remaining term of leases originally granted for 999 or 900 years. 41.35% (184) of all leases identified as subleases for which the length was known (445 leases) were granted for over 125 and under 999 years. Others may be re-grants of original 999 or 900 year leases which have been lost or not recorded.

<sup>19</sup> 11 leases were granted for 1,000,000 years. All were of properties in Paisley and were granted between 1825 and 1892.

<sup>20</sup> Disregarding those which may be continuing on tacit relocation.

<sup>21</sup> The base figure is 2593 leases. This is derived by subtracting from the full total of 2679 leases the 86 leases in respect of which the unexpired duration is uncertain. The figure includes leases which may be continuing by tacit relocation.

15. It is instructive to bring together the figures on initial and on unexpired duration. These show that most leases of more than 175 years were granted for at least 700 years and have at least 700 years remaining.

### Initial duration by year of grant

16. Charts 5 to 10 (at the end of this survey) show the minimum and maximum lengths of leases granted in particular periods of time.<sup>22</sup> They bring out the popularity of the 999-year lease from about 1750 until about 1930. 151 such leases were granted between 1746 and 1800, and 932 between 1801 and 1900; but only 173 were granted between 1900 and 1974, and a mere 10 since then. The explanation for the post-1974 decline is probably the change in the law to prevent new residential leases for more than 20 years.<sup>23</sup> Certainly it appears that practically all of the 999-year leases granted between 1900 and 1974 were of residential property.<sup>24</sup> Conversely the fact that only 10 of the 755 leases in the survey granted since 1974 were 999-year leases suggests that ultra-long leases were not favoured in commercial circles.

### Rent<sup>25</sup>

17. **Leases of more than 175 years.** The rent is known for around 95% (1705) of the leases granted for an initial period of more than 175 years. Only 26 leases (1.52% of the sample) have a rent of more than £50, and of those a mere 7 have a rent of much more than £100. Of the other leases:

- 1160 (68.03%) have a rent of £5 or less
- 505 (29.62%) have a rent of between £5.01 and £30, and
- 14 (0.82%) have a rent of between £30.01 and £50.

18. **Leases of 175 years and under.** The rent is known for around 79% (644) of the leases granted for an initial period of 175 years and under. The rents vary enormously ranging from one pence to over a million pounds:

- 99 leases (15.37%) have a rent of £10 or less
- 33 leases (5.12%) have a rent of between £10.01 and £100
- 54 leases (8.39%) have a rent of between £100.01 and £1000
- 133 leases (20.65%) have a rent of between £1000.01 and £5000
- 250 leases (38.82%) have a rent of between £5000.01 and £50000
- 73 leases (11.34%) have a rent of between £50000.01 and £400000
- 1 lease has a rent of £700000, and
- 1 lease has a rent of £1152750.

The rent depends both on the date when the lease was granted and on the nature of the property leased. However, the amount of the rent is not always a reliable indicator of the date of the grant. For example, two 999-year leases were granted in the 1990s for a rent of £1 and £0.01 respectively.

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<sup>22</sup> But, for practical reasons, excluding leases of more than 999 years.

<sup>23</sup> Land Tenure Reform (Scotland) Act 1974 ss 8 to 10.

<sup>24</sup> Based on the address of the property and the name of the landlord, we estimate that all but 11 of the 173 999-year leases were of residential property.

<sup>25</sup> Rent here is the original unallocated rent under the lease, as most allocations do not appear to have had the landlord's approval. See para 3.14 of the discussion paper.

19. Charts 11 to 14 (at the end of this survey) show the average rent for leases granted during different periods. For leases prior to 1950 the average rent rarely rose above £20.<sup>26</sup>

### **Leases of more than 175 years**

20. Two thirds of the leases in the survey were granted for more than 175 years. There are 1694 leases of more than 175 years for which the rent, start date and length are all known, and which have not expired. 95% of those (1612) were of 700 years or more with at least 200 years remaining<sup>27</sup> and a rent of less than £120; and practically all (1692) were of 175 years or more with at least 100 years remaining and a rent of less than £120.

### **Residential leases of 175 years or less**

21. The information from the Land Register did not indicate which properties were residential. However an attempt has been made to estimate the number of leases of 175 years or less which might be of residential property.

22. The first step was to exclude leases granted after 1974, the year in which it ceased to be possible to grant residential leases for more than 20 years.<sup>28</sup> Of the 813 leases for 175 years or under, only 76 were granted before 1975; and of those 76, and taking a generous view as to what might be residential, 46 may have a residential address. This suggests that leases of this length are rarely residential in character, and that most residential ground leases were granted for much longer periods, such as 999 years.

23. Chart 15 shows the lengths of the 46 leases, and chart 16 the number of years remaining under the leases disregarding those which might be continuing by tacit relocation. Most of the 46 leases were granted by a public or local authority, or by particular landed estates. The properties are mainly in East Kilbride, Girvan, Greenock, Glasgow or Hamilton.

24. Evidence provided by solicitors suggests that the duration of a residential lease generally depends on location. For example, leases in Saltcoats have tended to be granted for 99 years, sometimes with an option to extend for a further 99 years; leases in Stevenson have tended to be granted for 369 years (19 x 19); leases in Ardrossan and Wishaw for 999 years;<sup>29</sup> and leases in Alva for 999 years<sup>30</sup> with a break option for the landlord every 99 years.

25. The rents for those leases for which information was available ranged from £0.97 to £193,500. More precisely there were

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<sup>26</sup> The average rent of £60 in 1873 is due to the 10 properties which form part of a lease granted in 1873 for a rent of £101.54. The average of £24.17 in 1924 reflects a single lease granted for £24.17. 5 properties in the survey are held under partial assignments of this lease.

<sup>27</sup> However there were no such leases with between 200 and 500 years remaining.

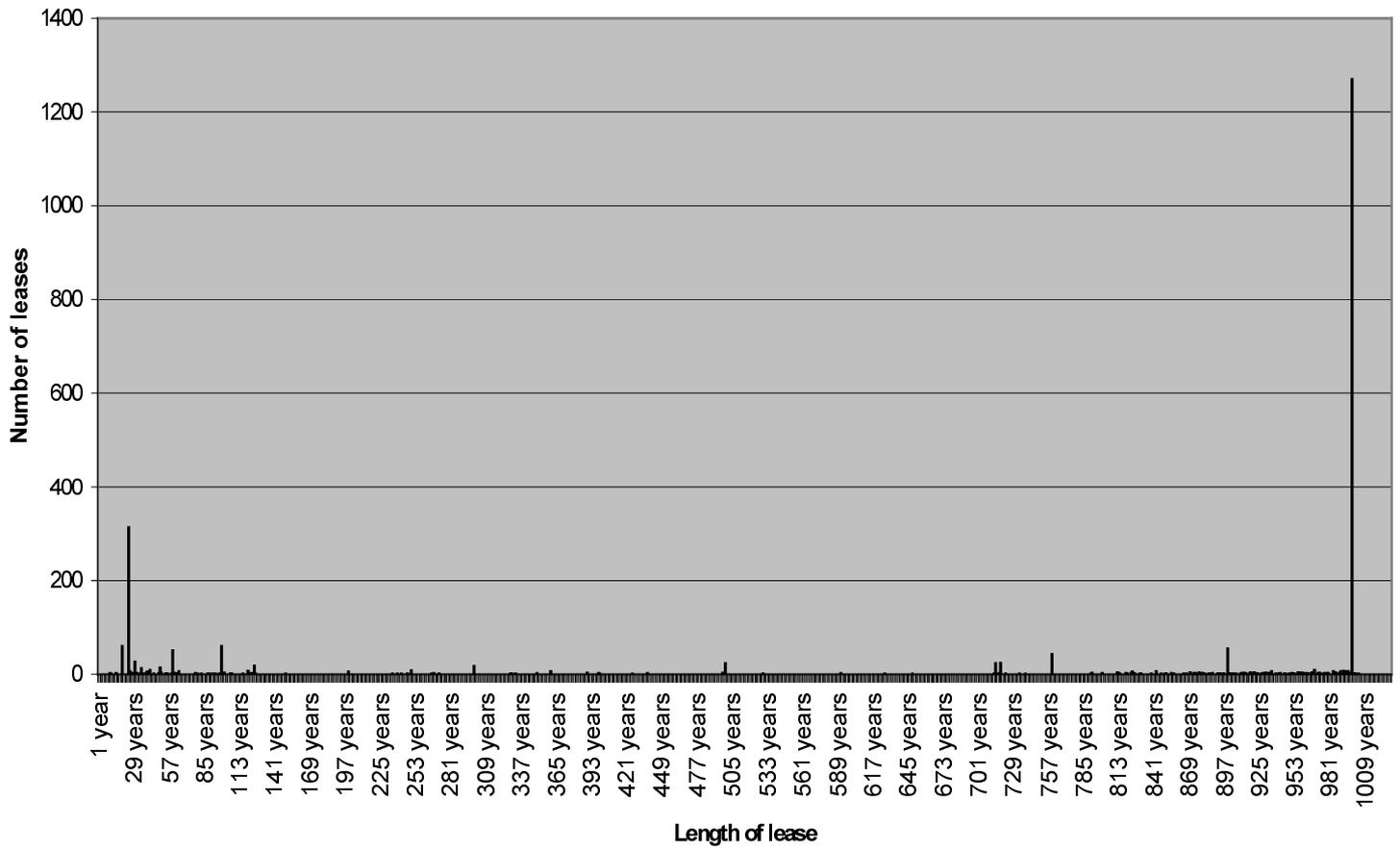
<sup>28</sup> Land Tenure Reform (Scotland) Act 1974 ss 8 to 10.

<sup>29</sup> This was borne out by the survey. 318 leases in Wishaw were examined, of which 263 leases were granted for 999 years and 298 were granted for at least 812 years. The length of 3 leases in Wishaw was unknown. 18 leases in Ardrossan were examined, and the lengths of 14 of these leases was known. 11 were for 999 years, and 2 for 855 years.

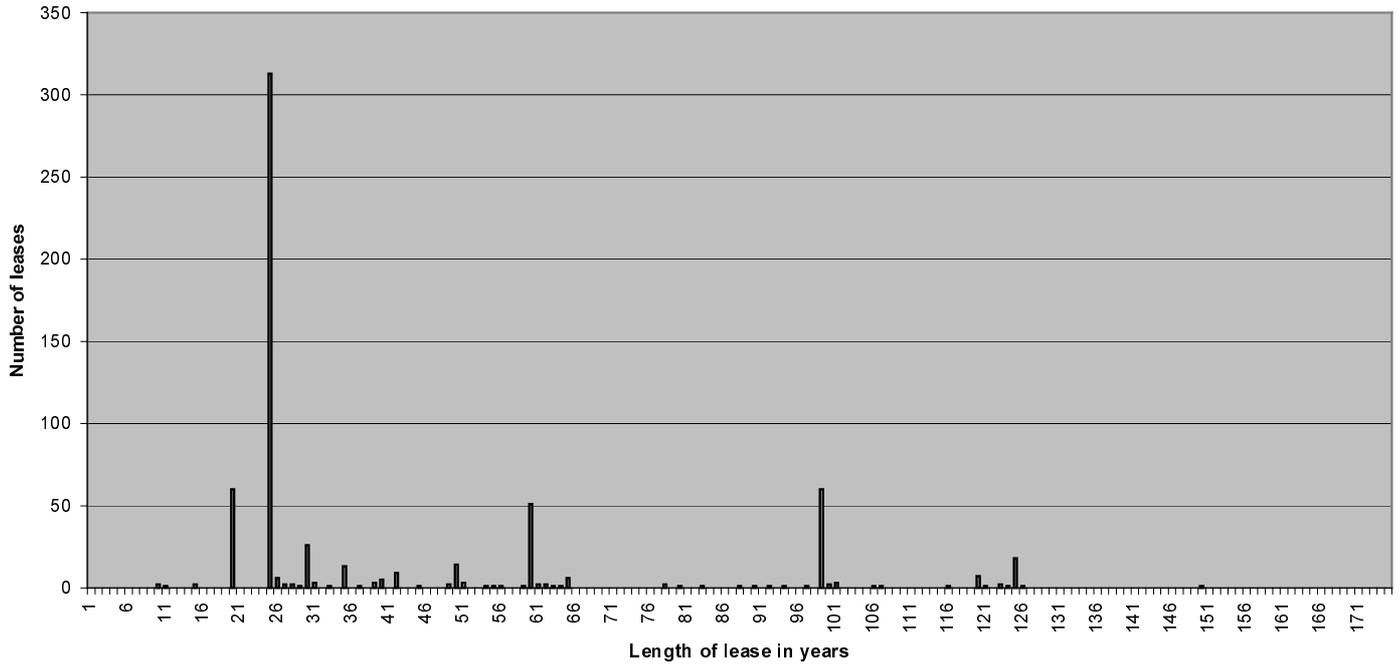
<sup>30</sup> This was borne out by the survey. 171 leases in Alva were examined. Of the 163 leases of which the length was known, 161 were granted for 999 years and 1 for 979 years.

- 8 leases with a rent of £10 or less
- 2 leases with a rent between £11 and £100
- 7 leases with a rent between £101 and £500
- 3 leases with a rent between £501 and £1000
- 4 leases with a rent between £1001 and £2000
- 3 leases with a rent between £2001 and £3000
- 1 lease with a rent between £3001 and £4000
- 2 leases with a rent between £4001 and £5000
- 2 leases with a rent between £5000 and £8500
- 3 leases with a rent over £8500

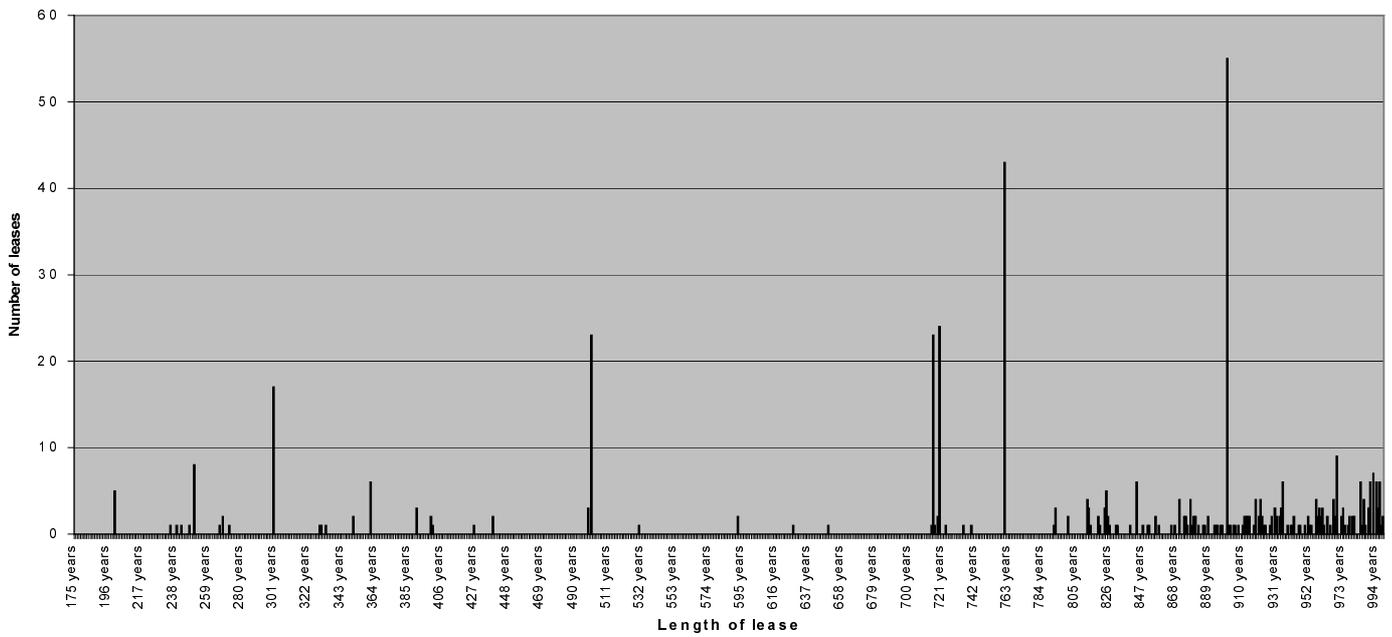
Chart 1 –Distribution of leases of 1030 years or less



**Chart 2 –Distribution of leases of 175 years or less**



**Chart 3 –Distribution of leases of between 175 and 998 years**



**Chart 4 –Years remaining for unexpired leases with less than 1645 years to run**

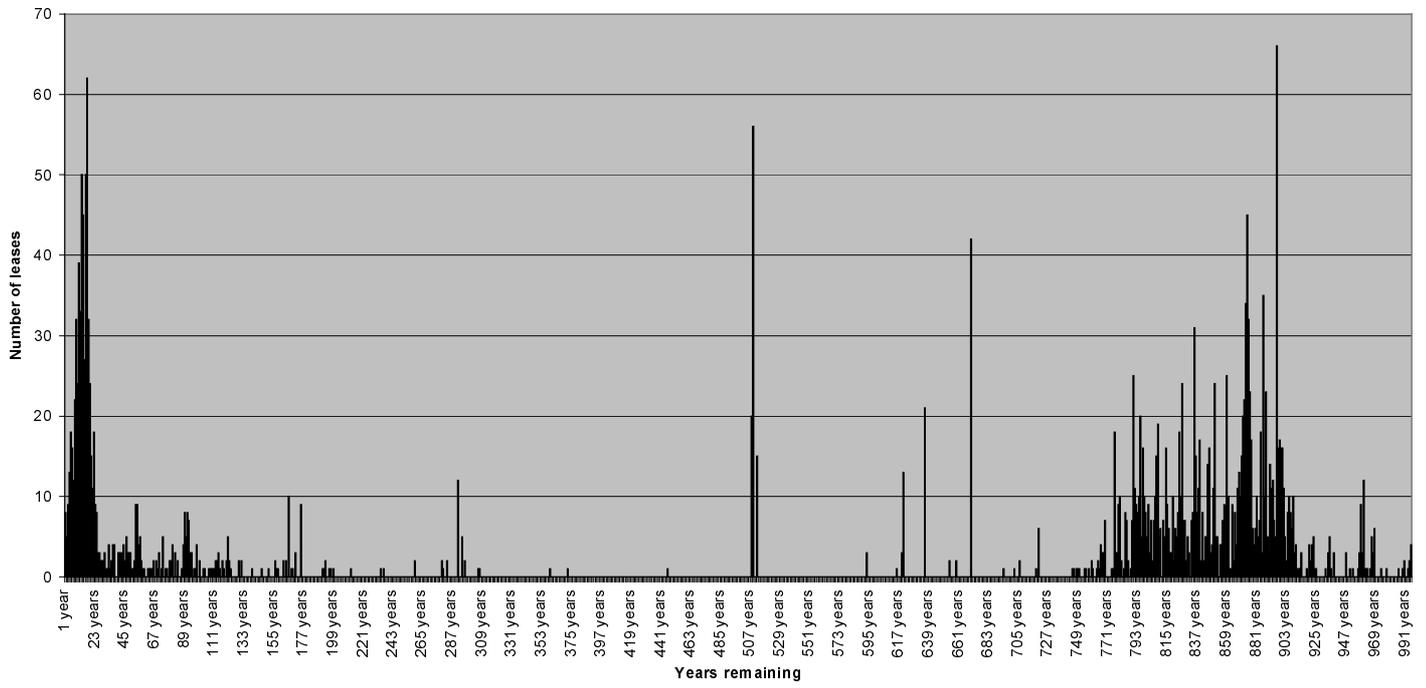


Chart 5 –Minimum/Maximum length of lease for each year of grant for period 1692 –1750

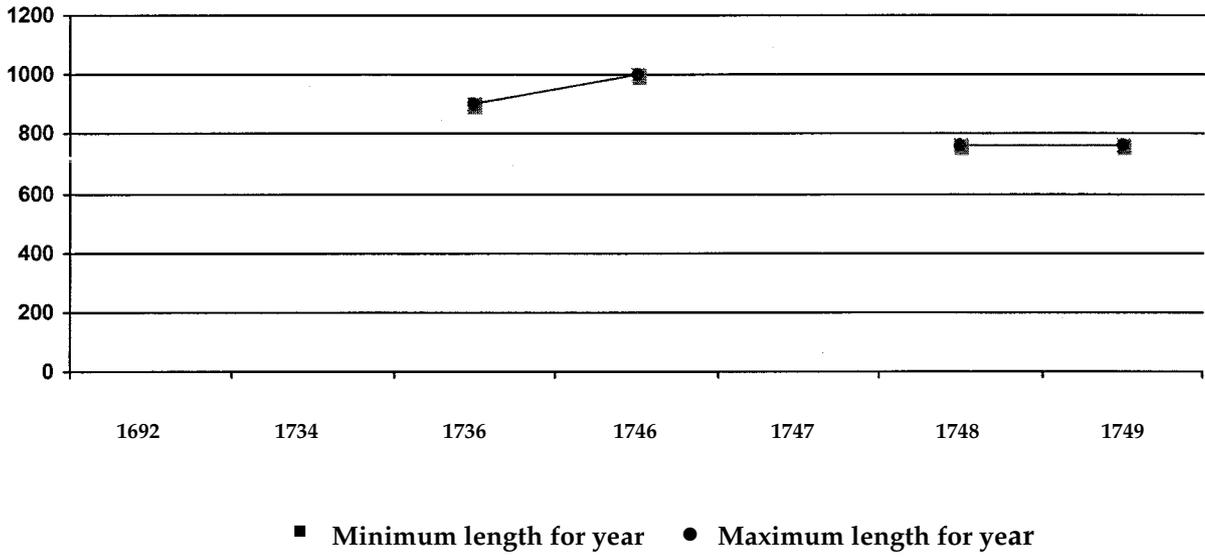


Chart 6 –Minimum /Maximum length of lease for each year of grant for period 1750 –1800

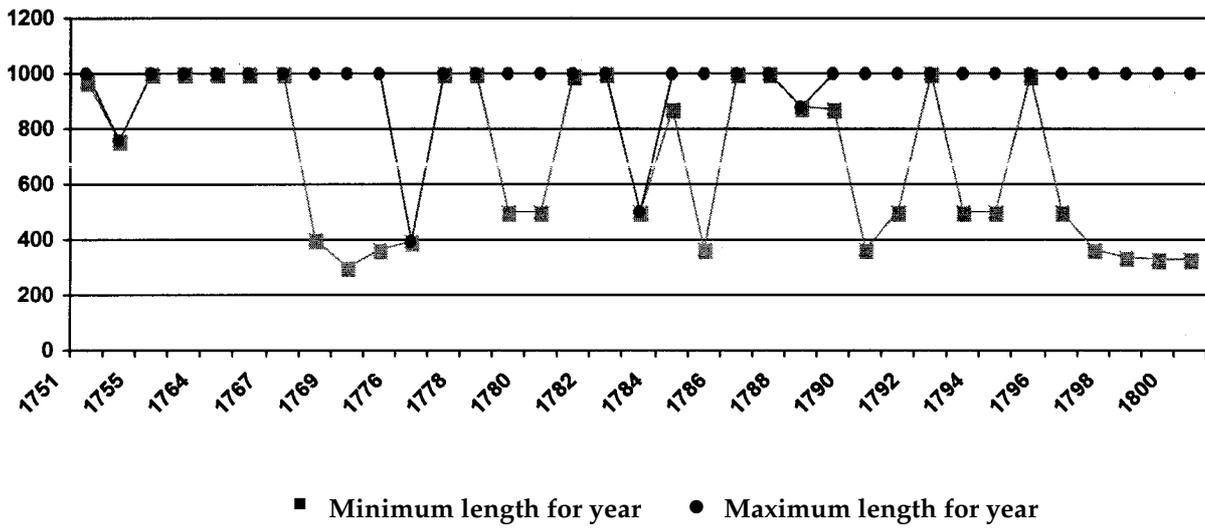


Chart 7 –Minimum/Maximum length of lease for each year of grant for period 1800 –1850

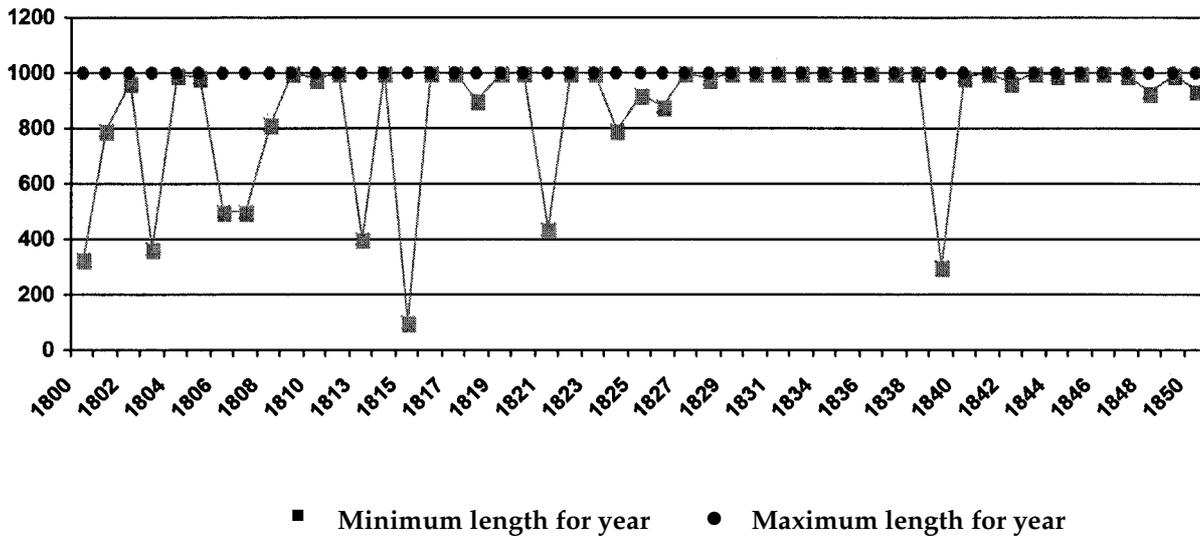


Chart 8 –Minimum/Maximum length of lease for each year of grant for period 1850 –1900

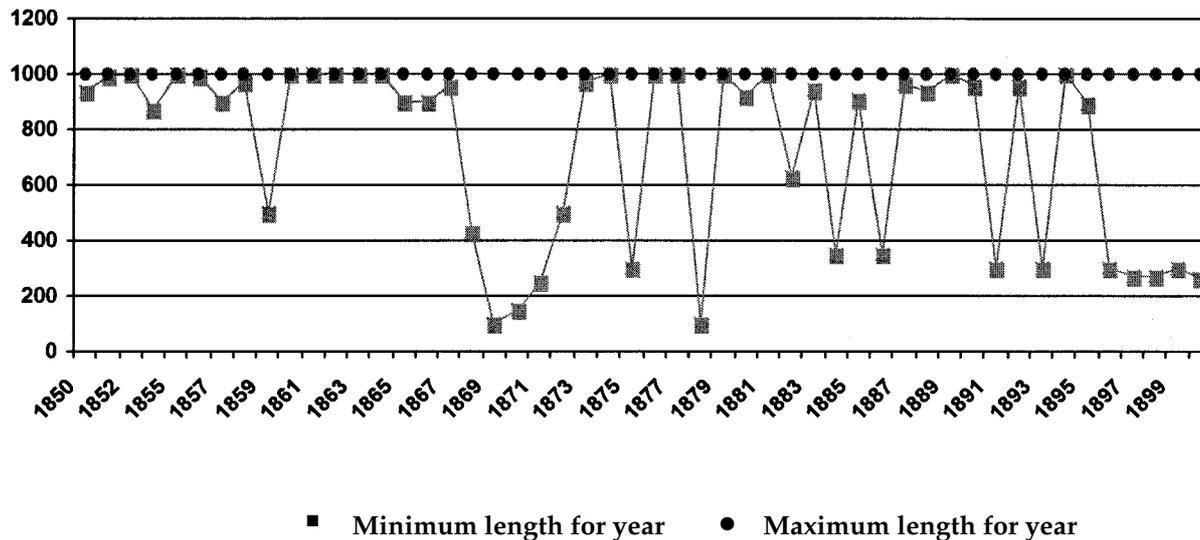


Chart 9 –Minimum/Maximum length of lease for each year of grant for period 1900 –1950

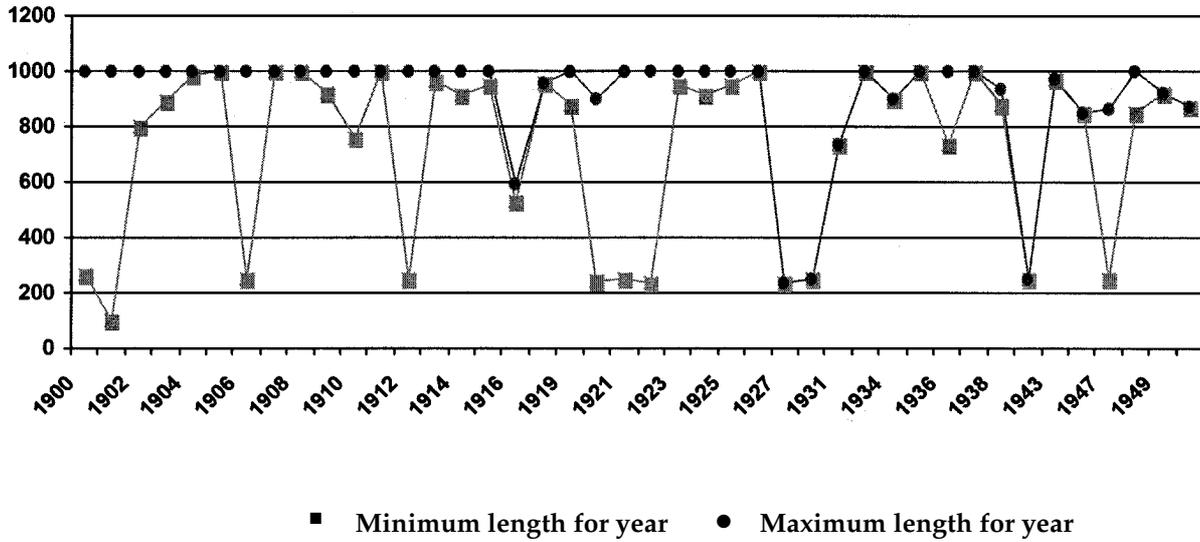


Chart 10 –Minimum/Maximum length of lease for each year of grant for period 1950 –2000

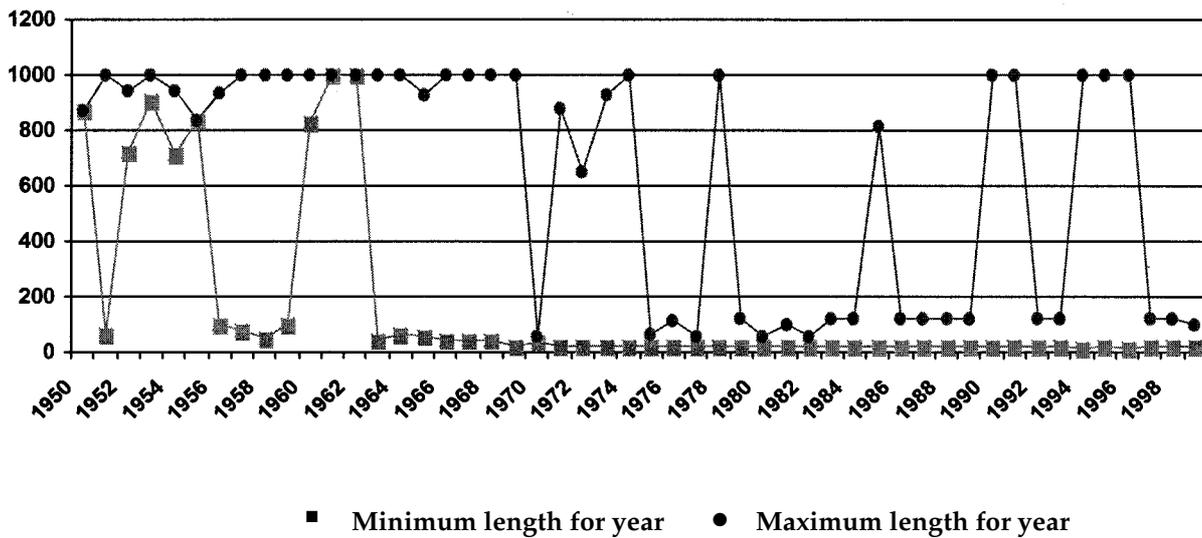


Chart 11 - Average annual rent (in £s) for leases granted between 1692 and 1870

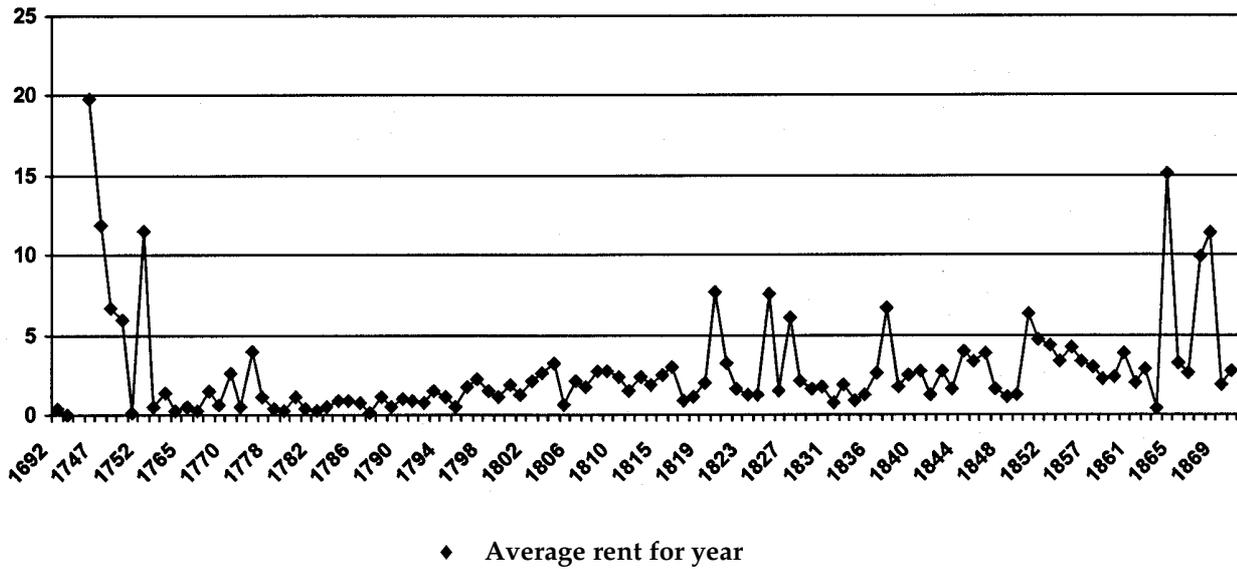


Chart 12 - Average annual rent (in £s) for leases granted between 1870 and 1950

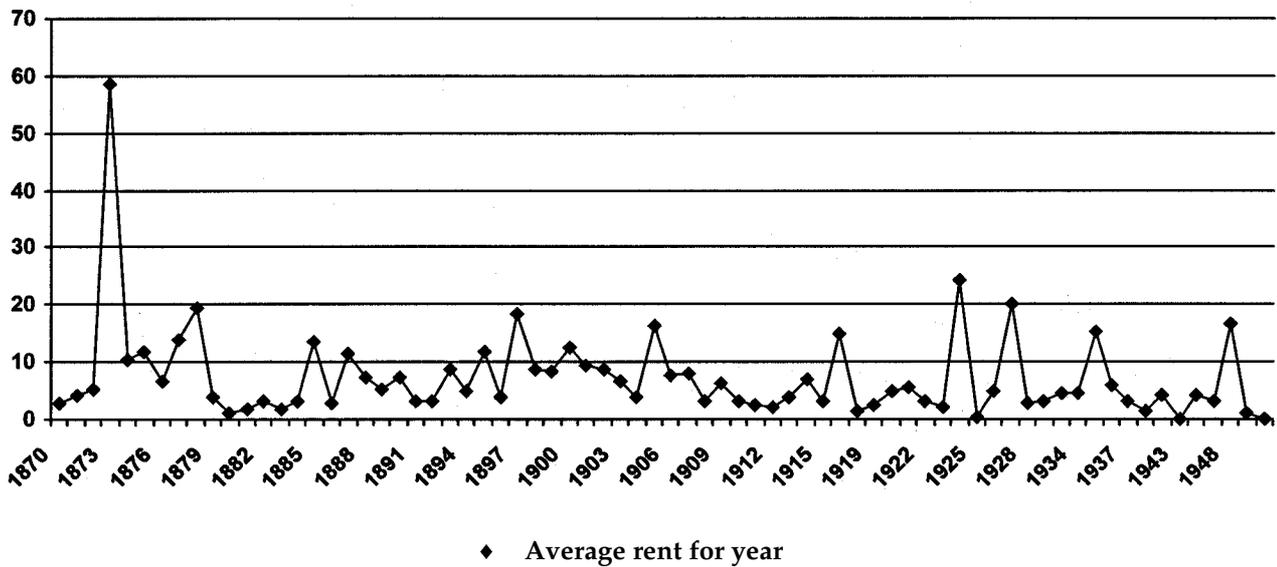


Chart 13 –Average annual rent (in £s) for leases granted between 1950 and 1964

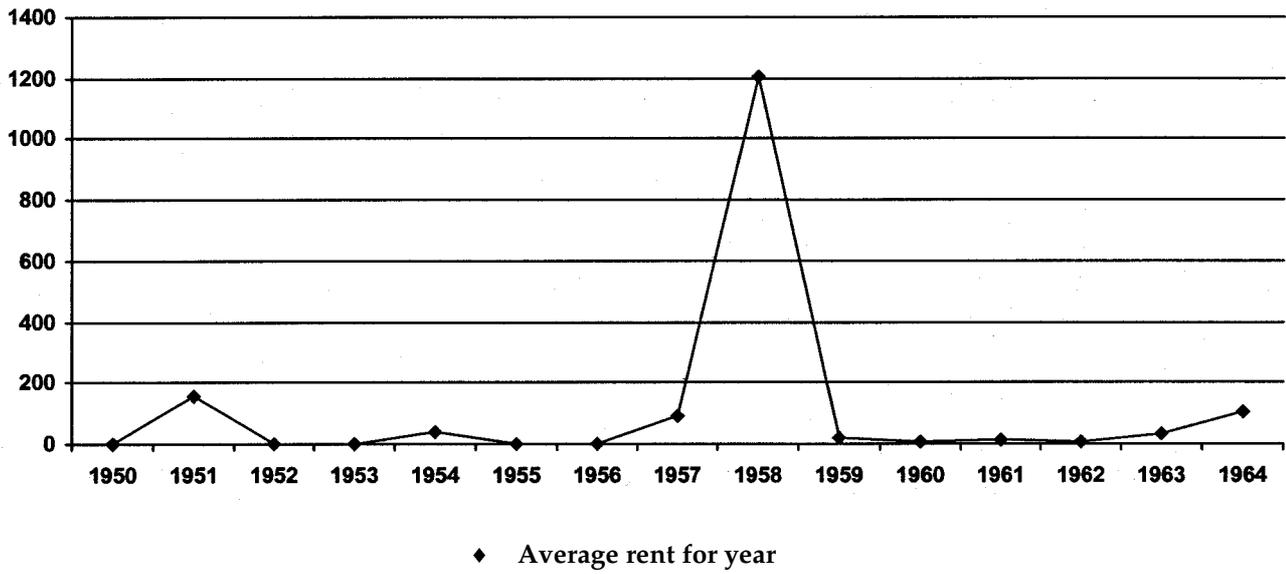
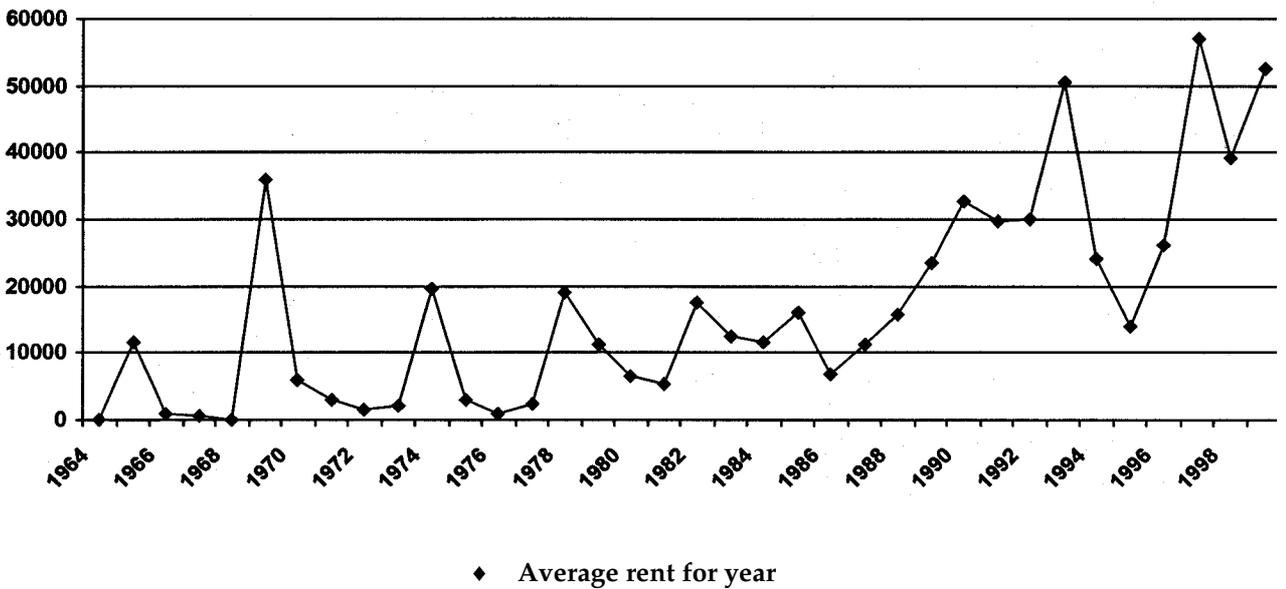
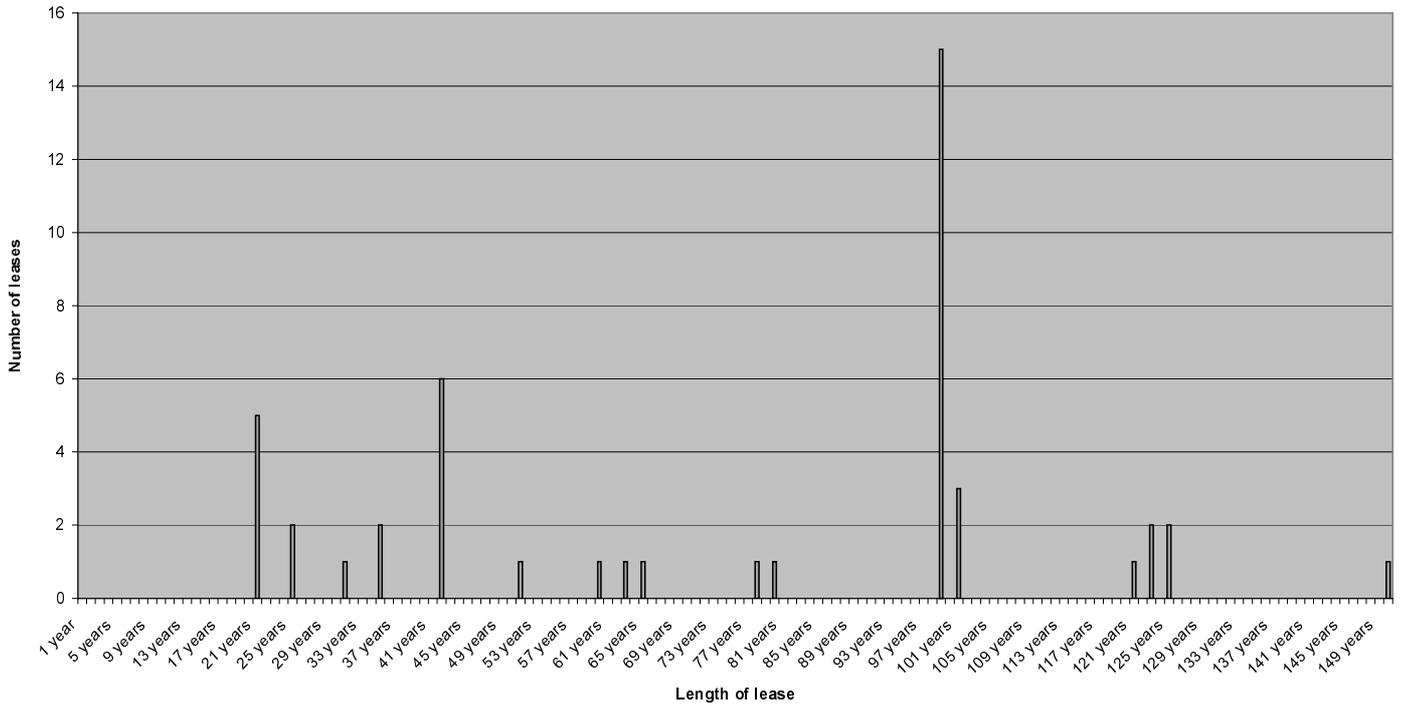


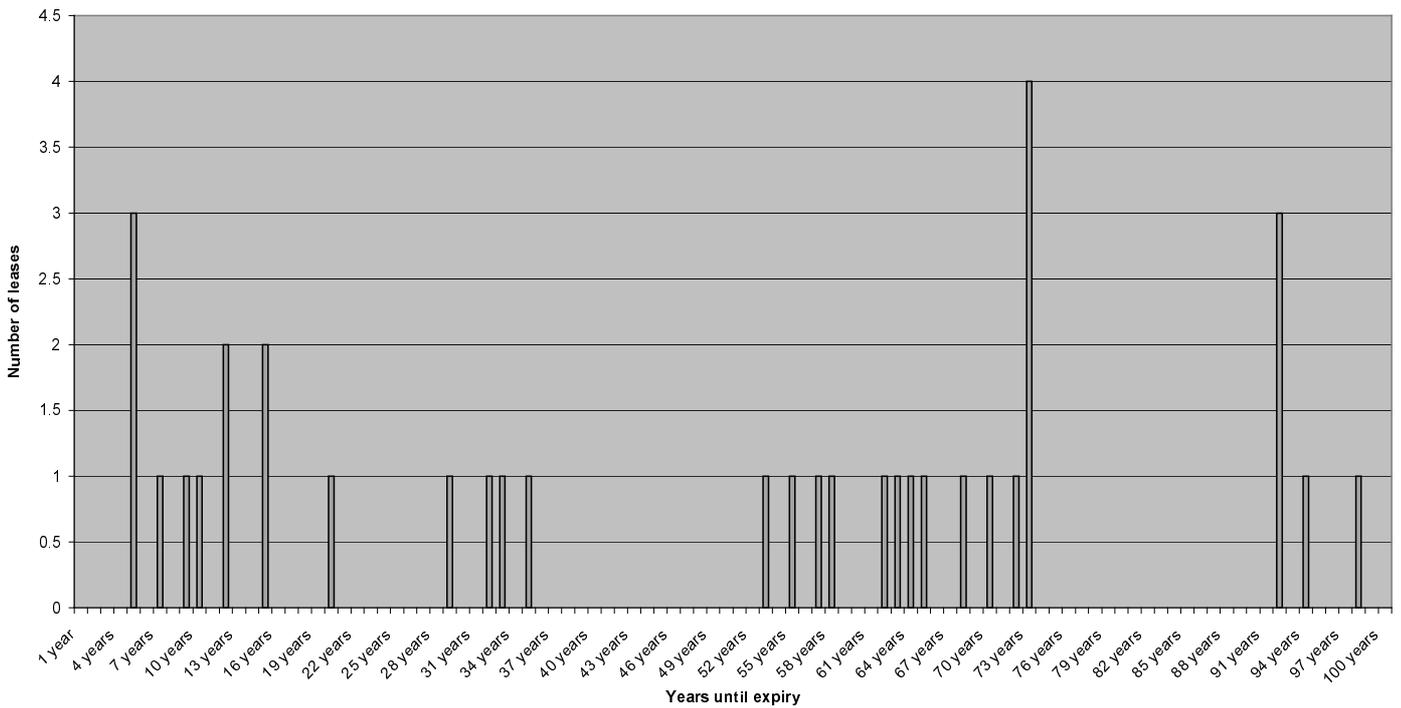
Chart 14 –Average annual rent (in £s) for leases granted between 1964 and 2000



**Chart 15 –Length of residential leases of 175 years or less granted before 1975**



**Chart 16 –Years remaining for residential leases of 175 years or less granted before 1975**



**Note**

In Chart 16:

The 10 leases with less than 20 years to run were granted for less than 60 years.

The 5 leases of between 25 and 54 years to run were granted for between 60 and 98 years.

The 9 leases with between 55 and 70 years to run, and 2 of the leases with 73 years to run were granted for 99 years.

The lease with 20 years to run, that with 72 years to run, 2 of those with 73 years to run and the 5 leases with more than 80 years to run, were granted for longer than 99 years.

# APPENDIX B - Other Conversion Schemes

## SECTION 1: SCOTLAND

### Residential long leases

1. The Long Leases (Scotland) Act 1954 conferred a right to acquire ownership of leased property during the period from 1 September 1954 to 31 August 1959. The scheme applied to residential leases for at least 50 years granted before 14 August 1914.<sup>1</sup>

2. Compensation was payable by the tenant. In all conversions, the landlord was entitled to compensation for loss of rent<sup>2</sup> and for loss of leasehold casualties. In addition, if the lease had an unexpired period of 100 years or less, the landlord was entitled to compensation for the loss of his residual right of ownership, calculated as follows.<sup>3</sup> First, the property was valued on the basis that it was being sold on the open market on 1 September 1954 with vacant possession and subject to a feuduty equal to the rent payable for the property. Next, the unexpired duration of the lease was calculated, but was deemed to be 30 years if shorter than that period. Finally the compensation was calculated as the amount which would, if invested at compound interest of 5% per annum, with yearly rests, for the unexpired period of the lease, produce at the end of that period a sum equal to the value of the property as previously calculated.

### Tenancies-at-will

3. The Land Registration (Scotland) Act 1979<sup>4</sup> gives tenants-at-will the right to acquire ownership of the land. A tenant-at-will is defined as someone who is by custom and usage<sup>5</sup> the occupier of land on which there is a building erected or acquired for value by him or by a predecessor. The rent must be attributable to the land and not the buildings, and the right of occupation must be in perpetuity.<sup>6</sup> Tenancies-at-will are uncommon in practice.

4. The tenant must pay compensation as well as the landlord's costs of conveying the land. The compensation is the value of the land without the buildings but assuming that residential planning permission has been granted (or, if lower, 4% of the value of the property including the buildings). An additional sum, not to exceed 90% of the first sum, is payable in order to discharge any heritable security granted by the landlord over the property.

### Council houses

5. Under the Housing (Scotland) Act 1987 a secure tenant of a public sector landlord can purchase the leased property at a discount. To qualify, the tenant must have occupied the property as his only or principal residence and must have been in occupation for at least two

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<sup>1</sup> Long Leases (Scotland) Act 1954 s 1(1). For an account of the Act, see J G Mitchell, 'Some Notes on Long Leases' (1959) 2 Conv Rev 186.

<sup>2</sup> Provided by the rent previously payable continuing to be payable as feuduty.

<sup>3</sup> Long Leases (Scotland) Act 1954 s 7.

<sup>4</sup> Land Registration (Scotland) Act 1979 ss 20-22.

<sup>5</sup> See *Maclean v Kershaw* 1993 SLCR 145.

<sup>6</sup> 1979 Act s 20(8).

years immediately prior to the purchase. If the tenant exercises his right, the landlord arranges a valuation of the property. The property is valued assuming that it is available for sale on the open market with vacant possession, but taking no account of the tenant's and his predecessors' improvements. The tenant is then entitled to purchase the property at this value less a discount of between 32% and 70%.<sup>7</sup> If he sells within 3 years, the tenant must repay some or all of the discount.<sup>8</sup>

## Crofts

6. The Crofters (Scotland) Act 1993 confers on crofters a right to buy both the site of the croft house, including the house itself, and also any land which is part of the croft.<sup>9</sup> In relation to the latter, however, the Scottish Land Court can prevent a purchase which would cause substantial harm to the remaining estate of the landlord.<sup>10</sup> Compensation for the land is assessed at 15 times the rent. Half of the discount implied by this formula must be repaid if the land is sold within five years.<sup>11</sup> Compensation for the site of the house is based on the market value of the site, without buildings and on the assumption that no development would be permitted. The amount payable is sometimes no more than a few pounds.<sup>12</sup> If the landlord provided the house or other fixed equipment, the tenant must also pay half of its value.<sup>13</sup>

## SECTION 2: ENGLAND AND WALES

### Ultra-long leases

7. Under a rule which dates back to 1881<sup>14</sup> the tenant of a lease granted for more than 300 years with more than 200 years left to run is entitled to "enlarge" his interest to ownership provided that no rent of any value<sup>15</sup> is payable under the lease. To convert the lease to ownership the tenant simply executes a declaration to that effect. No compensation is payable to the landlord. The resulting ownership is subject to the same provisions and obligations as would have applied to the lease if it had not been converted.<sup>16</sup>

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<sup>7</sup> The tenant is always entitled to a 32% discount, and is entitled to an additional 1% (2% for flats) discount for every year beyond the 2 years continuous occupation immediately preceding the date of service of the application to purchase the house. The maximum discount of 60% (70% for flats) is reached after 30 years (15 years for flats). These discounts are reduced by s 42 of the Housing (Scotland) Bill, currently before the Scottish Parliament.

<sup>8</sup> A disposal in the first year triggers repayment of 100% of the discount; in the second year, 66% of the discount; and in the third year, 33% of the discount.

<sup>9</sup> Crofters (Scotland) Act 1993 s 12. In addition part 3 of the Land Reform (Scotland) Bill, which was published in draft on 22 February 2001, will, if enacted, give to crofting community bodies a right to buy certain croft land.

<sup>10</sup> 1993 Act s 13(2).

<sup>11</sup> 1993 Act s 14.

<sup>12</sup> *Fraser v Noble* 1977 SLT (Land Ct) 8 (£5); *Corbett v Assynt Estates* 1995 SLCR 122 (£30).

<sup>13</sup> 1993 Act s 15.

<sup>14</sup> Section 65 of the Conveyancing and Law of Property Act 1881 as amended by s 11 of the Conveyancing Act 1882, now both replaced by s 153 of the Law of Property Act 1925.

<sup>15</sup> Section 153(4) provides that if the rent is not more than £1 and the rent has not been collected for 20 years, 5 of which must have been after 1 January 1926 when the Law of Property Act 1925 came into force, the rent will be deemed to have ceased to be payable. No arrears or future payments can be exacted in this case: section 153(5).

<sup>16</sup> The provision has caused difficulties. What, for example, happens to conditions which are acceptable in leases but not in simple ownership of the ground, such as an obligation not to alienate the property, or to remove at the end of the period of the lease? See eg T P D Taylor, *The Enlargement of Leasehold to Freehold*, (1958) 22 Conv (NS) 101.

## Residential long leases

8. The Leasehold Reform Act 1967, and subsequent legislation, allow conversion of residential long leases against payment of compensation. To qualify under the 1967 Act a tenant must occupy a house (but not a flat) worth less than a statutory limit as his only or main residence under a lease of more than 21 years at a low rent.<sup>17</sup> Various types of lease,<sup>18</sup> and some landlords,<sup>19</sup> are exempt from the conversion scheme; and the landlord can, on limited grounds, defeat the right to convert.<sup>20</sup>

9. Compensation is based on the market value of the landlord's residual interest, ie on the value of the property subject to the lease.<sup>21</sup> Two factors serve to reduce this amount. First, the lease is deemed to have been extended for 50 years;<sup>22</sup> and secondly it is assumed that the tenant is not a potential purchaser, thus excluding the marriage value.<sup>23</sup> No separate compensation is due in respect of rent. The expenses of both parties are borne by the tenant.<sup>24</sup>

10. Later legislation applies the 1967 Act scheme to more expensive housing.<sup>25</sup> The compensation terms, however, are less favourable. Thus there is no deemed extension of the lease (although in some cases the tenant is treated as having security of tenure), the marriage value is to be divided between landlord and tenant, and regard must be had to any consequential decline in the value of other property owned by the landlord.<sup>26</sup>

11. Flats were originally excluded from the scheme, mainly because there is no equivalent in freehold tenure of positive covenants in leasehold tenure. If a flat were to be converted from leasehold to freehold, therefore, the existing maintenance covenants would fly off. The problem is circumvented by the Leasehold, Housing and Urban Development Act 1993<sup>27</sup> which allows tenants to join together to acquire ownership of the entire building. Under this process, known as collective enfranchisement, ownership is vested in a nominee company controlled by the tenants, and the individual flats are then leased back on 999-year leases at a nominal rent. Strictly, therefore, there is no conversion, for the tenants remain tenants; but the leases are so long as to amount virtually to ownership. In some cases quasi-ownership may come to be upgraded to full (commonhold) ownership under the Commonhold and Leasehold Reform Bill currently before Parliament, but that is likely to require the consent of

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<sup>17</sup> Leasehold Reform Act 1967 ss 1 – 4A. The tests are similar to those giving security of tenure under the Landlord and Tenant Act 1954. Instead of conversion, a tenant under a qualifying lease has a right to have the lease extended for 50 years: see ss 1(1) and 14 – 16.

<sup>18</sup> Eg agricultural leases: s 1(3) of the 1967 Act.

<sup>19</sup> Eg certain public authority landlords can be exempted: s 28 of the 1967 Act.

<sup>20</sup> Eg the right to convert may be defeated if the landlord needs the house to live in himself: 1967 Act s 18. The Rent Acts allow a landlord to remove a tenant on the same ground. The tests applied by the court in the two situations are very similar.

<sup>21</sup> 1967 Act s 9(1).

<sup>22</sup> The rent in this deemed extension is to be a ground rent only, disregarding buildings: see 1967 Act s 15(2).

<sup>23</sup> For marriage value, see para 4.28. The valuer is directed to make a number of other assumptions, for example that the property is being sold with and subject to the rights and burdens to which the conveyance to the tenant is to be made.

<sup>24</sup> 1967 Act s 9(4).

<sup>25</sup> Leasehold Reform, Housing and Urban Development Act 1993 ss 63 – 66; Housing Act 1996 ss 105, 106 and sched 9 paras 1 and 2.

<sup>26</sup> 1967 Act ss 9(1A), (1C) and 9A.

<sup>27</sup> Leasehold Reform, Housing and Urban Development Act 1993 part I, chapter I (ss 1 – 38). Alternatively, under chapter II of part I (ss 39 – 62) individual tenants can obtain a 90-year extension of their lease, at a peppercorn rent, on payment of a premium.

all the tenants. The criteria under the 1993 Act are much the same as under the 1967 Act, and compensation is payable on the same basis.<sup>28</sup> Thus the 1993 Act is confined to buildings containing flats held on long leases at a low rent and which are primarily residential in character. The agreement of two thirds of the tenants is required. These criteria are altered to some extent by the Commonhold and Leasehold Reform Bill.<sup>29</sup>

### SECTION 3: NORTHERN IRELAND

#### Residential long leases

12. The Leasehold (Enlargement and Extension) Act 1971 provides a conversion scheme modelled on the (English) Leasehold Reform Act 1967. It applies to residential leases for more than 21 years at a rent which does not exceed a ground rent.<sup>30</sup> Compensation is calculated in the same way as under the 1967 Act.<sup>31</sup>

#### Residential ultra-long leases

13. A different scheme operates for residential leases if the unexpired duration is more than 50 years.<sup>32</sup> This was introduced by the Property (Northern Ireland) Order 1997.<sup>33</sup> On redemption of the ground rent, the lease is converted into ownership.<sup>34</sup> Redemption can occur at any time but is compulsory on the first occasion on which the lease is transferred.<sup>35</sup> The redemption figure is 12 times the annual rent.<sup>36</sup> No compensation is payable in respect of the landlord's interest.

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<sup>28</sup> For compensation, see 1993 Act s 32 and sched 6.

<sup>29</sup> For the background to this Bill, see *Commonhold and Leasehold Reform* (Cm 4843, 2000).

<sup>30</sup> Leasehold (Enlargement and Extension) Act 1971 s 1. As under the 1967 Act the tenant has the alternative of a 50-year extension.

<sup>31</sup> 1971 Act s 14.

<sup>32</sup> Property (Northern Ireland) Order 1997 art 7(3), (4).

<sup>33</sup> SI 1997/1179 (NI 8). The Order is to be replaced by the Ground Rents Bill, currently before the Northern Ireland Assembly, which is in much the same terms. This implemented vol 1, part 1 of *The Final Report of the Land Law Working Group* (Department of Finance and Personnel for Northern Ireland, Office of Law Reform, 1990).

<sup>34</sup> 1997 Order art 20(2): a certificate of redemption operates, where 'the land was held .for a leasehold estate ... to enlarge the rent-payer's estate into an estate in fee simple ...'

<sup>35</sup> 1997 Order arts 5 and 6.

<sup>36</sup> 1997 Order art 15 and sched 1.



