

Scottish Law Commission

(Scot Law Com No 159)

Fifth Programme of Law Reform

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

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

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Fifth Programme of Law Reform

To: The Right Honourable the Lord Mackay of Drumadoon, QC
Her Majesty's Advocate.

Under section 3(1)(b) of the Law Commissions Act 1965 we have a duty to prepare and submit to you from time to time programmes for the examination of different branches of the law with a view to reform, including recommendations as to the agency (whether the Commission or another body) by which any such examination should be carried out.

We now have the honour to submit for your approval our Fifth Programme of Law Reform for the examination of the topics and branches of the law specified in Part II with a view to reform as there mentioned. We recommend that the Commission should be the examining agency in every case.

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

J G S MACLEAN, *Secretary*

7 February 1997

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Foreword

The publication of the Fifth Programme of Law Reform marks a fresh start for the Commission. The Programme supersedes all previous programmes and will guide the work of the Commission into the new millennium.

We hope that our Programme is relevant to current social needs; reflects appropriate priorities and sets out realistic target dates for completion of our short and medium-term projects.

Our overall aims are to produce well-considered proposals for reform that will eliminate outdated or imprecise rules of law the operation of which causes injustice. We look forward to our work in these areas. We will attempt to carry it out efficiently and expeditiously with the help of our dedicated staff, our colleagues in the profession and those interested bodies and individuals on whose advice we rely.

(Signed) BRIAN GILL, *Chairman*

Part I Introduction

Previous programmes

1.1 Since the establishment of the Commission in 1965 we have submitted four programmes of law reform containing seventeen items in all.¹ Work on many of these items has been completed or can now be discontinued. Other items are still the subject of current work, or are described in such wide terms that they are potentially a source of work for many years to come. But priorities have been changing lately and existing programmes, even when read with our annual reports, may fail to give an adequate impression of the content and balance of our current and prospective work. Further, a new Chairman, Lord Gill, has recently been appointed,² and we think it is right to declare publicly how we shall proceed under his direction. We therefore believe that now is the appropriate time to introduce a new programme of law reform, which will consolidate and supersede all previous programmes.

The new programme

1.2 We have also decided to change the established format. We conceive our new programme as the first of a series of rolling programmes, each running for a period of three to five years. The programme accordingly focuses on the short and medium-term projects which we expect to occupy most of our time and resources between 1997 and 1999. We have set what we hope are realistic targets for completion of these projects. Although it is intrinsically difficult to timetable complex law reform projects, we believe that it is essential to do so. It will enable departmental officials to assess more accurately the resources which we and they will need to ensure the regular production and implementation of proposals for reform. We also believe that our new approach will enhance standards of public accountability and demonstrate openly to Parliament and citizens how we shall deploy our resources.

1.3 While we are focusing on short and medium-term projects in this new programme, we do have a duty under section 3 of the Law Commissions Act 1965 to promote the systematic development and reform of the law. We must therefore look also to the long-term need for fundamental reform which will simplify and modernise the law. Accordingly, in Part II we distinguish between

- (a) short-term projects which we aim to complete before the end of 1997;
- (b) medium-term projects which will form the bulk of our work under this programme and which we aim to complete before the end of 1999; and
- (c) projects which are long-term, in the sense that they are not time-limited and may be carried forward from programme to programme, depending on progress made on short and medium-term projects.

¹ (1965) Scot Law Com No 1; (1968) Scot Law Com No 8; (1973) Scot Law Com No 29; (1990) Scot Law Com No 126.

² For 3 years from 1 October 1996.

These long-term projects may be transformed into short or medium-term projects as we work through the programme and as our thinking develops. The programme will be revised and replaced at regular intervals.

Consolidation and statute law revision

1.4 In light of your request under section 3(1)(d) of the Law Commissions Act 1965, we intend also to prepare and publish a programme of consolidation and statute law revision, which will be the fifth such programme and will run in parallel with this programme. Work under the previous programmes has been largely completed.³ The Fifth Programme of Consolidation and Statute Law Revision will accordingly consolidate and supersede all previous programmes.

Advice to government departments

1.5 In addition to our work under this programme, and the proposed programme on consolidation and statute law revision, we shall continue to deal with any requests for advice received from government departments.⁴ We intend to establish new procedures for dealing with proposed requests, in consultation with departmental officials, in order to ensure that a proper balance is maintained between such work and work under our programmes.

1.6 We shall continue our present practice of supporting, on request, departmental officials charged with implementing reports which we have submitted to you. We regard this as an important contribution we can make to the legislative process as a permanent law reform agency. It potentially reduces expensive duplication of work, and our impression is that it is generally appreciated by departmental officials. We shall also continue to make the services of Commissioners or members of our legal staff available on the request, or with the prior approval of, your and other departments to assist with particular law reform projects, including those connected with European or international organisations, where their particular expertise makes this appropriate.

The work of the Law Commission

1.7 We must take account of work being carried out by the Law Commission under its *Sixth Programme of Law Reform*⁵ and a number of items included in that programme are of particular relevance to our work, namely

- company law⁶
- damages⁷
- law of trusts⁸

³ (1966) Scot Law Com No 2; (1973) Scot Law Com No 27; (1978) Scot Law Com No 46; (1982) Scot Law Com No 71.

⁴ Law Commissions Act 1965, section 3(1)(e).

⁵ (1995) Law Com No 234.

⁶ Item 9, page 36.

⁷ Item 2, pages 26-27.

⁸ Item 7, pages 32-33.

- limitation periods⁹
- third parties' rights against insurers.¹⁰

It is important to respond to this work where it may have implications for the law of Scotland, even if our own programme is interrupted in consequence. But because we cannot control the timing and content of the work we have not included it formally among our projects.

1.8 **Company law.** In its *Sixth Programme of Law Reform*, the Law Commission recommends -

"that an examination be made of such aspects of company law as may from time to time appear to the Law Commission and to the Department of Trade and Industry to require examination."

The Commission comments that the existence of this programme item will enable them to play an appropriate role, in co-operation with us, in the overhaul of parts of our company law to meet modern needs. We acknowledge the important role both Commissions have in this area and we shall make every effort to participate effectively in the work. Clearly, that may affect progress on our own programme in ways we cannot predict, although as yet our role has been a minor one in comparison with that of the Law Commission.

1.9 We have, however, participated in the review of shareholder remedies, which was initiated by the Law Commission and which proceeded on the following reference (February 1995) from the Lord Chancellor and the President of the Board of Trade:

"A review, in consultation with the Scottish Law Commission, of shareholder remedies, with particular reference to the rule in *Foss v Harbottle* (1843) 2 Hare 461 and its exceptions, sections 459 to 461 of the Companies Act 1985, and the enforcement of the rights of shareholders under the articles of association."

1.10 A consultation paper, to which we had contributed, was published by the Law Commission in October 1996.¹¹ We distributed it to consultees in Scotland and shall analyse any comments received from them and report to the Law Commission. We expect also to contribute to the final report.

1.11 **Damages.** The Law Commission proposes to carry out a number of studies on the law of damages. Some of these touch on areas where we have recently carried out work, for example, bereavement damages.¹²

1.12 While we have no immediate plans to resume work in any of these areas, we shall follow closely the Law Commission's progress. The Scottish Office regularly receives correspondence from members of the public suggesting that awards of damages in Scotland are lower than corresponding awards in England and Wales. It is Ministers' perception that the law of damages in both jurisdictions should be broadly comparable. The outcome of the Law Commission's work may therefore necessitate further work by us.

⁹ Item 3, page 28.

¹⁰ Item 10, pages 37-38.

¹¹ Consultation Paper No 142 (1996). The consultation period ended on 22 January 1997.

¹² Report on *The Effect of Death on Damages*, (1992) Scot Law Com No 134.

1.13 **Law of trusts.** The Law Commission proposes to examine a number of topics in the law of trusts, including the rule against perpetuities and excessive accumulations; and the personal and proprietary remedies available for the recovery of property that has been transferred in breach of trust or fiduciary duty or in circumstances which constitute a devastavit by personal representatives. Such other aspects may be included as from time to time appear to the Law Commission and the Lord Chancellor's Department to require examination.

1.14 We too include in our programme a long-term project on the law of trusts.¹³ It may be that the work of the Law Commission will influence the content and timing of that project.

1.15 **Limitation periods.** The Law Commission is now engaged on a comprehensive examination of the law on limitation periods with a view to its simplification and rationalisation. Since 1970 we have published a number of reports on prescription and limitation of actions.¹⁴ The last, which deals with latent damage, remains unimplemented.

1.16 We recognise that we may have to re-visit some of these issues, if the Law Commission's work should seem to lead to unacceptable divergences in the two jurisdictions. It may be that if further work on the topic should be required it would be an appropriate subject of a reference from you under section 3(1)(e) of the Law Commissions Act 1965. We would then be able to assess how urgent the work was and how it might affect progress on our other projects.

1.17 **Third parties' rights against insurers.** In its *Sixth Programme of Law Reform*, the Law Commission recommends -

"that the Law Commission, jointly with the Scottish Law Commission, examine the scope and operation of the Third Parties' (Rights Against Insurers) Act 1930 in the light of the current law and market practices of the insurance industry."

The Commission comments that the project will give the two Commissions the opportunity to work together to ensure that the law in this area is updated in line with modern needs and practices.

1.18 The Law Commission's aim is to produce a joint discussion paper during 1997 and a report before the end of 1998. We are participating fully in the project, although the Law Commission has the major role.

¹³ See paras 2.43-2.45.

¹⁴ (1970) Scot Law Com No 15; (1983) Scot Law Com No 74; (1989) Scot Law Com No 122.

Part II Fifth Programme of Law Reform

Preliminary

2.1 In this part we set out for your approval our Fifth Programme of Law Reform, which will occupy us until the end of 1999. The programme consolidates and supersedes all previous programmes.¹ We recognise that circumstances may change within the period of the programme and that new priorities may emerge. If it seems that work is required which falls outwith the scope of the programme, we shall seek either a formal modification of the programme or a reference under section 3(1)(e) of the Law Commissions Act 1965.

2.2 The new programme consists of a number of specific short, medium or long-term projects,² which we have gathered together as discrete items under the following general headings or branches of the law:

- Civil remedies - Diligence
- Codification
- General principles of private law
- Obligations
- Persons
- Property
- Trusts.

The centre-piece of the programme is our work on property, which we expect to absorb the largest part of our resources between 1997 and 1999. After that we attach the highest priority to completing our work on diligence within the period of the programme.

Item No 1: Civil remedies - Diligence

2.3 Our current and prospective work on civil remedies consists of projects on

- diligence on the dependence and admiralty arrestments
- inhibitions and adjudications.

2.4 **Diligence on the dependence, etc.** Diligence on the dependence is a provisional measure giving security to litigants for sums claimed by them in court actions which have not yet been determined. Only two types of diligence can be used on the dependence: arrestment and inhibition. Arrestment attaches debts and moveable property due to the defender by a third party. The most common item arrested is the defender's bank account. Inhibition prohibits debtors from voluntarily disposing of their heritable property or from contracting further debts to the prejudice of the inhibiting creditor.³

¹ See para 1.1.

² Para 1.3 sets out what we mean by short, medium and long-term projects.

³ For inhibitions see further paras 2.7-2.8.

2.5 Diligence on the dependence is necessary to prevent defenders from disposing of their property or transferring it abroad so as to defeat the claims of creditors who bring court action against them. It also gives the pursuer a preference in competition with other creditors of an insolvent defender. On the other hand unrestricted use of such diligence can have an unjust impact on defenders. Their credit may be damaged and their businesses destroyed. This may occur even where the court eventually decides that the debts claimed by their creditors were not due.

2.6 We have already considered these issues in some detail and consulted on them.⁴ Our aim is to submit a report to you before the end of 1997.

2.7 **Inhibitions and adjudications.** An inhibition is a diligence affecting the debtor's heritable property. It prevents the debtor disposing of, or creating securities over, such property and also gives the inhibiting creditor a preference in relation to the proceeds of sale over creditors whose debts were incurred after the inhibition. Inhibition is used as a protective measure by a creditor during the dependence of a debt action to prevent the debtor defeating the claim by disposing of property. It is also used as an indirect means of enforcing decrees for payment of money.

2.8 We intend to examine those areas of the law of inhibition which currently cause difficulties. For example, warrant to inhibit can be granted only by the Court of Session. This creates extra procedure and expense in sheriff court actions. Also, it is difficult to match the names of proprietors of property registered in the Sasine or Land Registers with the names in the Personal Register of people who have been inhibited and therefore prevented from transacting with their property. A transaction which was settled in the belief that there was no inhibition registered against the proprietor may be found later to have been struck at by an inhibition. This may give rise to claims against the Keeper of the Land Register and others.

2.9 We intend to issue a discussion paper on these and other aspects of inhibition during 1997.

2.10 Adjudication is a diligence used by creditors primarily for attaching their debtor's heritable property. In order to adjudge the creditor must have already obtained a decree for the debt.

2.11 Adjudication has remained almost unchanged since 1672. It takes the form of a Court of Session action and registration of the decree gives the creditor a security over the heritable property of the debtor specified in the decree. The debtor has a ten-year period in which to pay off the debt. At the end of this period a creditor whose debt remains unsatisfied can bring a further action in the Court of Session declaring the ten-year period of redemption to be at an end. Registration of the decree in this further action transfers the ownership of the property irredeemably from the debtor to the creditor. Adjudications are hardly ever used in current practice because they are expensive, and ineffective in providing prompt payment of the debt. They are also unduly harsh on debtors since a creditor may take over land of great value for non-payment of a relatively modest debt.

⁴ See Discussion Paper No 84 - *Diligence on the Dependence and Admiralty Arrestments* (1989). The report following on this may also deal with the principle of the fair sharing of the fruits of arrestments and poidings which was considered in Discussion Paper No 79 - *Equalisation of Diligences* (1988).

2.12 We have already published proposals for replacing adjudication by a new diligence whereby the creditor could sell the debtor's land in order to obtain payment of the debt.⁵ Responses were received and consultations took place with representatives of the Law Society of Scotland and other organisations. The absence at that time, however, of up-to-date searches disclosing real rights (such as adjudications) registered in the Sasine Register made it difficult to proceed. The recent computerisation of the Presentment Book, which facilitates searches of real rights registered up to the previous day's close of business, has removed this difficulty.

2.13 We therefore intend to submit to you, before the end of 1999, a report containing recommendations for the reform of inhibitions and for the replacement of adjudication by a new diligence as proposed.⁶ Our recommendations will take account of previous consultations. We would hope also to have the benefit of further discussions with representatives from the Law Society of Scotland and the Registers of Scotland and with other interested parties.

Item No 2: Codification

2.14 Section 3(1) of the Law Commissions Act 1965 provides:

"3.-(1) It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law . . .".

2.15 Codification was given prominence in the *First Programme of the Scottish Law Commission* in relation to the law of evidence and the law of obligations.⁷ Subsequently much work was done during the 1960s and 1970s preparing codes in these areas. The projects eventually foundered, however, perhaps because they were simply too ambitious for the time. As a result of that early experience, and growing criticism of codification, no further attempt has been made to codify any substantial area of law in a single piece of legislation. However, later incremental statutory reforms initiated by the Commission, for example in family law, can be seen as requiring only consolidation to become a code in all but name. Many would accept without hesitation that codification in this form is a worthwhile aim.

2.16 We continue to believe, however, that there may also be a place for codification in the wider traditional sense; that is, a comprehensive legislative re-statement of the general principles underlying some unified area of the common law. We therefore propose, as a long-term project, to carry out a feasibility study of codification, focusing on a restricted area of the law as a pilot exercise. We have in mind as possible candidates selected topics in the law of property or in the law of obligations, for example, servitudes, contract or unjustified enrichment.⁸

⁵ See Discussion Paper No 78 - *Adjudications for Debt and Related Matters* (1988).

⁶ See para 2.12. The report may also deal with the principle of the fair sharing of the fruits of diligence against heritable property which was considered in Discussion Paper No 79 - *Equalisation of Diligences* (1988).

⁷ (1965) Scot Law Com No 1, Memorandum by the Commission, paras 8, 10.

⁸ See paras 2.27-2.29.

Item No 3: General principles of private law

2.17 In our Report on *Three Bad Rules in Contract Law* we left for further consideration the question of interpretation because several consultees had suggested that it should be dealt with more widely than in relation to contract alone.⁹

2.18 The topic is mainly important from the legal point of view and only indirectly from a social point of view. Legally it is important because it would enable us to simplify and rationalise the law on extrinsic evidence in the interpretation of writings. The law is notoriously unsatisfactory and complicated and is becoming increasingly out of touch with what actually happens in courts. Radical simplification would be of benefit in legal proceedings generally. It would fit with the new procedural ethos in the courts of eliminating unnecessary legal debates and trying to keep actions moving rapidly. It would directly benefit litigants and indirectly the public.

2.19 Our work on the topic has already reached an advanced stage. In August 1996 we published Discussion Paper No 101 on *Interpretation in Private Law*, following up previous suggestions and taking account of further comments made on an earlier draft by our Working Party on Contract Law.¹⁰ We are now preparing our report, which we aim to submit to you during 1997.

Item No 4: Obligations

2.20 Our current and prospective work on the law of obligations consists of projects on

- contract
- unjustified enrichment.

2.21 **Contract.** In a series of reports, starting in 1983, we have reviewed aspects of the law of contract as part of an ongoing exercise to modernise the Scottish law on contract and to make it more clear and accessible.¹¹ It is important to continue the work, if business in Scotland is to benefit from recent European and international developments. For example, our recommendations on formation of contract, if implemented, would bring the law of Scotland into line with the rules on formation of contract now governing a very large proportion of international trade under the Vienna Convention on Contracts for the International Sale of Goods.¹² We therefore propose to carry the exercise forward by examining remedies for breach of contract and penalty clauses. In this we shall work closely with our Working Party on Contract Law.¹³

⁹ (1996) Scot Law Com No 152, following on Discussion Paper No 97 - *Contract Law - Extrinsic Evidence, Supersession and the Actio Quanti Minoris* (1994).

¹⁰ The present members of the Working Party are listed in Appendix I to our *Thirty-First Annual Report 1995-96*, Scot Law Com No 156.

¹¹ Report on *Rectification of Contractual and Other Documents*, (1983) Scot Law Com No 79; Report on *Requirements of Writing*, (1988) Scot Law Com No 112; Report on *Formation of Contract: Scottish Law and the United Nations Convention on Contract for International Sale of Goods*, (1993) Scot Law Com No 144; Report on *Three Bad Rules in Contract Law*, (1996) Scot Law Com No 152.

¹² See our Report on *Formation of Contract: Scottish Law and the United Nations Convention on Contracts for the International Sale of Goods*, (1993) Scot Law Com No 144, para 1.7.

¹³ The present members of the Working Party on Contract Law are listed in Appendix I to our *Thirty-First Annual Report 1995-96*, Scot Law Com No 156.

2.22 The Faculty of Advocates in particular has suggested to us that we should look at penalty clauses. There is concern that the existing law produces injustice, especially where a clause is cleverly drafted so as to achieve the effects of a penalty clause without actually being a penalty clause. So far as other remedies for breach of contract are concerned, the main objective would be clarification of the law and removal of doubts rather than wholesale reform. However, there are particular problems in relation to specific implement and in relation to the measure of damages. We held a seminar on 21 October 1995 at which various areas of difficulty were discussed. Our Working Party on Contract Law had also suggested that we should examine remedies for breach of contract. We would hope that our examination of the topic would be able to draw on recent international instruments, including the Vienna Convention already referred to,¹⁴ and the UNIDROIT principles of international commercial contracts, so as to ensure that Scottish law benefits from the best international practice in this area.

2.23 Our aim is to issue a discussion paper during 1997 and to submit a report to you before the end of 1999.

2.24 **Unjustified enrichment.** In 1993 the House of Lords held in the English case of *Woolwich Equitable Building Society v Inland Revenue Commissioners*¹⁵ that citizens may recover an undue payment of tax which they made to a public authority following an *ultra vires* demand. We subsequently published a discussion paper seeking views on whether the rule in the *Woolwich* case should be introduced by statute into the law of Scotland; or whether it would be better to develop broader and more liberal grounds of recovery of undue payments as part of a general review of the law of unjustified enrichment.¹⁶

2.25 We also examined the enactments dealing with refunds of the principal central and local government taxes and charges and provisionally proposed that a refund of undue payments should be permitted (subject to certain defences) whether or not the tax payer was in error. We considered whether reform of the law of unjustified enrichment as a whole would be better than a statutory reform of the common law rule enabling the government (and perhaps other public authorities) always to recover *ultra vires* disbursements made by them.

2.26 Our aim is to submit a report on these matters to you before the end of 1997.

2.27 We also think, as a result of our extensive work to date on obligations for the redress of unjustified enrichment, that the topic may be suitable for more comprehensive reform. We propose to undertake this as a long-term project.

2.28 In our Discussion Paper No 95 on *Recovery of Benefits Conferred Under Error of Law*,¹⁷ we sought views on provisional proposals that the rule precluding recovery of benefits conferred under error of law should be abrogated by statute. This proposal has been superseded by a recent case in which the Court of Session in effect abolished that rule.¹⁸ The decision of the Court made very significant advances in developing the Scots law of

¹⁴ See para 2.21.

¹⁵ [1993] AC 70.

¹⁶ Discussion Paper No 100 - *Recovery of Ultra Vires Public Authority Receipts and Disbursements* (1996).

¹⁷ Published in 1993.

¹⁸ *Morgan Guaranty Trust Company of New York v Lothian Regional Council* 1995 SC 151 (court of five judges).

unjustified enrichment,¹⁹ but also shows how difficult it is for the courts to reform the deep-rooted structural faults in the present law. There is uncertainty and undue complexity at every level, for example as to the differences between the main obligations or remedies of repetition, restitution and recompense; as to the scope and requirements of the forms of action or claim (*condictiones* and innominate actions) subsumed under repetition and restitution; and as to the specific grounds which have to be proved to establish a claim.²⁰

2.29 These defects remain. In a recent discussion paper,²¹ therefore, we invited comments on a proposal to publish a further discussion paper setting out a "non-binding" statement (or "restatement") of the existing law on unjustified enrichment and seeking views on whether comprehensive statutory codification or further piecemeal statutory reforms are desirable. In an appendix, we also published *Draft Rules on Unjustified Enrichment and Commentary* which had been prepared by Dr E M Clive to test the feasibility of codification.²² While opinion was divided, there was considerable support for such a discussion paper - hence our present proposal to undertake a further long-term project on the topic, possibly including an exercise in codification.²³

Item No 5: Persons

2.30 We propose, as a long-term project, to review and modernise the legislation relating to judicial factors. In our work on family law and incapable adults we had to spend a good deal of time scrutinising the provisions of the legislation in order to identify the necessary consequential amendments.²⁴ As a result we take the view that a radical overhaul of the legislation is necessary.

2.31 The project is likely to be mainly of a technical nature, although it is impossible to predict what points might be raised on consultation. We would propose to work closely with the Accountant of Court and his staff, who would be a major source of information and ideas on desirable reforms. Full consultation with the legal and accountancy professions would also be necessary. The topic is also such that it may well be appropriate to establish a small advisory group or working party at an early stage in order to ensure that we have practical support and guidance throughout the project.

Item No 6: Property

2.32 The law of property has been a major focus in our work since 1990.²⁵ Our current and prospective work consists of projects concerned with

¹⁹ For example, by affirming that the obligations and remedies of repetition, restitution and recompense are based on the single over-arching principle of unjustified enrichment.

²⁰ For a brief overview, see E M Clive, *Draft Rules on Unjustified Enrichment and Commentary* (published as an Appendix to Discussion Paper No 99 - *Judicial Abolition of the Error of Law Rule and its Aftermath* (1996), pp 15-19). The rules are also published in F D Rose (ed), *Blackstone's Statutes on Contract, Tort and Restitution 1996-97* (7th edn; 1996), p 400.

²¹ Discussion Paper No 99 referred to in footnote 20.

²² See footnote 20. The rules represent Dr Clive's personal views and not necessarily those of the Scottish Law Commission.

²³ See para 2.16.

²⁴ Report on *Family Law*, (1992) Scot Law Com No 135; Report on *Incapable Adults*, (1995) Scot Law Com No 151.

²⁵ See *Fourth Programme of Law Reform*, (1990) Scot Law Com No 126, Item No 16 - Property Law.

- feudal tenure²⁶
- leasehold tenure
- mutual boundary walls²⁷
- tenement property.²⁸

2.33 **Feudal tenure.** Almost all land in Scotland continues to be held on feudal tenure, under which multiple rights of ownership co-exist in the same piece of land. Our aim is to abolish this system, erected on the foundation of the ancient feudal relationship of superior and vassal, and to replace it with a modern system based on the principle of absolute ownership of land.

2.34 The case for abolition is well documented and not seriously disputed. Feudal theory is archaic. It reflects a state of society which has long since passed. The notion of multiple ownership of the same piece of land is complex without being useful. The system is susceptible to abuse and has been and continues to be exploited for financial gain at the expense of those who live on the land. It also complicates the practice of conveyancing and makes the process of acquiring and transferring land more expensive than it might otherwise be. There is a clear need to remedy these failings and to put in place a coherent and integrated system of land tenure.

2.35 Our aim is to submit to you, by the end of 1999, a report with draft legislation to abolish and replace the feudal system. In the course of that work we expect to identify further reforms which, though not essential to the primary reform, we may wish to pursue as a long-term project, including, for example, the consolidation of the conveyancing legislation. To assist us in our work we intend to set up a small advisory group.

2.36 **Leasehold tenure.** We propose to undertake, as a long-term project, an examination of leasehold tenure, in particular long leases of residential subjects. The problems caused by these leases are well documented. Tenants, on expiry of such a lease, lose possession of their homes which, in some cases, they and members of their family will have built. They may be entitled to no compensation or inadequate compensation. They may have to pay large sums to their landlord to buy back property which they regard as their own.

2.37 Long leasehold tenure has many of the characteristics of ownership. Thus leases for periods of 999 years, or leases subject to indefinite rights of renewal, are in practice if not in law equivalent to perpetual feus. They were recognised as such by some landlords and many were granted due to restrictions on the power to feu. It is a reasonable objective, therefore, after abolishing and replacing the feudal system, to consider how these forms of tenure should be integrated into the new system. Effective reform would alleviate immediate problems. It would also help to simplify the practice of conveyancing, with consequent savings in time and costs.

2.38 **Mutual boundary walls.** For some time, as resources permitted, we have been working on a project to clarify the rights and obligations of adjoining proprietors in respect of walls and fences erected on the boundary between their properties. The work was

²⁶ See Discussion Paper No 93 - *Property Law - Abolition of the Feudal System* (1991).

²⁷ See Consultation Paper - *Mutual Boundary Walls* (1992), a document not published and with restricted circulation.

²⁸ See Discussion Paper No 91 - *Law of the Tenement* (1990).

initially undertaken in response to representations received from a single individual and his Member of Parliament who were dissatisfied with the present law. There has been no widespread call for reform. It is clear, however, from correspondence received by the Scottish Office that the existing law can give rise to bitter disputes between neighbours. We have therefore decided to complete our examination of the law,²⁹ and we aim to submit a report to you before the end of 1999.

2.39 **Tenement property.** The existing law of the tenement is based on common law rules that developed in the 17th century. These rules are now widely seen as defective, particularly as they provide no mechanism for collective decision-making by owners. As a consequence it is often difficult to obtain the necessary agreement to carry out repairs. Our aim is to remedy these defects.

2.40 In practice the common law rules are often varied or supplemented by express provisions in title deeds. New tenements are usually governed by a deed of conditions which makes sufficient provision for maintenance and management. For those tenements reform of the law is hardly needed. The main problem lies with existing tenements. In general, the older the tenement, the less adequate the provisions in title deeds are likely to be. In the case of some very old tenements there are no provisions at all in the title deeds and the common law applies without modification. It is for those tenements that reform of the law is most needed.

2.41 Reform would benefit a substantial proportion of the population. Domestic flats, including flats in tenements, in blocks of four and in converted houses, accounted for some 38% of the total occupied housing stock in Scotland in the early 1990s.³⁰ Our proposals would also extend to tenements used for business purposes. An effective legal regime for tenement property would therefore do much to encourage the upkeep of both the housing and the business stock.

2.42 Our work on the topic is now well advanced, after a radical change in policy following on our initial discussion paper.³¹ The new approach has been tested in two seminars attended by legal practitioners, architects and representatives of local authorities and consumer bodies.³² It has wide support. Accordingly, we aim to submit to you, before the end of 1997, a report with recommendations applying to both existing and new tenements, whether used as dwelling-houses or as business premises. The draft Bill, which will be annexed to the report, will restate with modifications the existing common law of the tenement. It will contain a management scheme which will apply automatically to all tenements, unless disapplied or varied, as well as a voluntary management scheme which can be adopted as an alternative, either with or without variation.

Item No 7: Trusts

2.43 We propose, as a long-term project, to carry out an examination of certain aspects of the law of trusts. However, the timing and content of the project may be influenced by the

²⁹ See Consultation Paper - *Mutual Boundary Walls* (1992), a document not published and with restricted circulation.

³⁰ Scottish Homes, *Scottish House Condition Survey* (1991), paras 2.1, 2.4 and Figure 2.3.

³¹ Discussion Paper No 91 - *Law of the Tenement* (1990).

³² The seminars, held in September 1995 and September 1996, were organised in association with the University of Edinburgh and the University of Glasgow, respectively.

work of the Law Commission, which is presently engaged on a review of the law of trusts in conjunction with the Trust Law Committee.³³ We may have to consider proposals from those bodies, in consultation with the Law Society of Scotland and the Scottish branch of the Society of Trust and Estate Practitioners, to see whether the suggested reforms would be suitable for Scotland.

2.44 In conjunction with the Law Commission and the Trust Law Committee we have assisted HM Treasury in the preparation of a consultation document, *Investment Powers of Trustees*, containing proposals for the repeal of, or substantial amendment to, the Trustee Investments Act 1961.³⁴ Further work from us may be needed if the proposals are to be implemented.

2.45 We are aware of other current problems which may require further work from us. For example, there is a doubt whether trustees' power to appoint and pay factors under section 4 of the Trusts (Scotland) Act 1921 allows trust funds to be placed under the control of fund managers. It is increasingly common to have investments managed in this way. Another problem is the use of nominee accounts by trustees. Recent developments in share dealing, especially the introduction of a five day rolling settlement for stock-market transactions, have favoured the uses of nominee holdings. There are practical problems too in relation to the strict accumulation period under section 5 of the Trusts (Scotland) Act 1961. For example, a testamentary trust by parents for the benefit of their handicapped child has a maximum accumulation period of 21 years, yet the child concerned may live for very much longer after the parents' death.

³³ See paras 1.13-1.14. The Trust Law Committee is a group of practising trust lawyers and academics which was formed under the Chairmanship of Sir John Vinelott to press for the reform of trust law. The membership includes a Scottish representative nominated by the Law Society of Scotland.

³⁴ Published in May 1996.