Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 59

Recovery of Possession of Heritable Property

JANUARY 1984

This Consultative Memorandum is published for comment and criticism and does not represent the final views of the Scottish Law Commission

The Commission would be grateful if comments on this Consultative Memorandum were submitted by 30 June 1984. All correspondence should be addressed to:-

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SCOTTISH LAW COMMISSION

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RECOVERY OF POSSESSION OF HERITABLE PROPERTY

PART I INTRODUCTION AND SCOPE OF REFERENCE

1.1 We have received from the Lord Advocate a reference under section 3(1)(e) of the Law Commissions Act 1965 in the following terms:-

> "To consider and advise on procedural and related requirements in connection with the recovery of possession of heritable property, with particular reference to notices to quit, title to sue and to defend in actions for recovery of possession, and the relevant court procedures, with a view to rationalisation and simplification of the law."

1.2 We have been aware for some time that the law relating to actions for recovery of possession of heritable property is unsatisfactory. The Second Report[1] of the Law Reform Committee for Scotland drew attention to the confused and unnecessarily complicated state of the law as regards the statutory forms of notices to quit, the number and variety of periods relating to service of such notices, and the processes by which questions relating to removing and ejection are brought before the court. The recommendations by the Law Reform Committee for amendment of the law were endorsed by the Committee on The Sheriff Court (the Grant Committee), who noted[2] that the law and procedure relating to actions of removing and ejection were "in considerable confusion". A major improvement was made

[1] Cmnd. 114 (1957).

[2] At para. 635 of their Report (Cmnd. 3248 (1967)).

with the introduction in 1971[1] of the new summary cause for recovery of possession of heritable property. This reduced some of the difficulties of the older forms of action but many difficulties, particularly those relating to notices to quit, still remain. Representations about the confused and uncertain state of the law have been made to us by the Scottish Development Department (who were formerly concerned with this branch of the law) and by a number of informed individual commentators. This formidable body of opinion that there is a compelling need for amendment of the law persuaded us to invite Mr A G M Duncan, formerly Senior Lecturer in the Department of Scots law at Edinburgh University, to examine the law relating to actions for recovery of possession of heritable property. We asked Mr Duncan to have particular regard to a number of difficult procedural problems encountered in this branch of the law. Mr Duncan has provided us with a valuable research paper for which we are greatly indebted. We are publishing his research paper, which is entitled "Actions of Ejection and Removing", simultaneously with the publication of this Memorandum.

1.3 The problems associated with this branch of the law arise, as Mr Duncan's paper[2] shows, both from the common law and from statute. Statute law is unquestionably the main source of difficulty, in particular the Sheriff Courts (Scotland) Act 1907. As was said of that Act in the case

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[1] Sheriff Courts (Scotland) Act 1971 ("the 1971 Act"), s.35.

[2] Hereinafter referred to as the "Research Paper".

of Campbell's Trustees v. O'Neill[1] it "had thrown the whole matter [the law relating to actions of removing and ejection], which was by no means devoid of confusion at any rate, into still greater confusion."[2] The difficulties resulting from statute are, therefore, our principal concern in this Memorandum although we do not ignore the difficulties resulting from the common law and the decided cases. Underlying any consideration of the problems examined in this Memorandum is the common law principle of tacit relocation. The principle operates so as to procure the prolongation by implied consent of leases to which it applies.[3] Thus, service of a notice excluding the operation of the principle is a prerequisite for any action of recovery of possession based on the expiry of the period of a lease. There are some problems associated with tacit relocation which properly form part of the considerations in this Memorandum,[4] but we do not make a detailed examination of the operation of the principle. To do so

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[1] 1911 S.C. 188.

[2] Per Lord Johnston at p.192. Difficulty can of course arise before the stage of raising an action, for example the difficulty in certain circumstances of deciding upon whom a notice to quit can competently be served.

[3] The scope of the application of the principle is not entirely free from doubt. For example, although many modern commentators (see e.g. Gloag, Contract (2nd edn.) at p.733) take the view that tacit relocation does not apply to "seasonal" lets of furnished houses, this is at variance with the view expressed by Rankine (Leases, 3rd edn. at p.288). Rankine's view was preferred in Robertson v. McIntosh (1920) 36 Sh.Ct.Rep. 227.

[4] See e.g. paras. 4.4-4.9 below.

would be to raise problems of substantive law which are quite different in kind from the procedural and related problems with which this Memorandum is concerned and which could scarcely be confined to the substantive law of leases since the principle of tacit relocation applies elsewhere in the law, for example in the law relating to contracts of service and partnership.

1.4 The proposals are therefore directed at the rationalisation and simplification of an area of the general law that is unnecessarily complicated, inconsistent and obscure. The starting point is that there is a lease which the landlord or the tenant can validly bring to an end in ordinary course and wishes to do so or, in a case not involving a lease, that there is a property occupied by a person without title whom the landlord wishes to expel. It follows from what we have said that we shall not, and indeed we do not think that we appropriately could, make any recommendations for alteration of enactments which carry into effect social and agricultural policy, that is, the substantive law contained in the Rent Acts and the Agricultural Holdings Acts.

1.5 The Memorandum is divided into two main parts. The first deals with the procedures for termination of leases in ordinary course, the second with actions for recovery of possession generally. In the first part, we examine the law governing the form and content of notices of termination of leases and the requirements for service of such notices. There is also discussion of a number of special cases, such as termination of sub-tenancies and

the effect of the death of the owner or occupier of the property. The second part of the Memorandum deals principally with the rules concerning title to sue and to defend in actions for recovery of possession, and with questions arising from the introduction and operation of the summary cause for recovery of possession of heritable property. We conclude with a Summary of Questions on which we would welcome observations.

1.6 Appended to the Memorandum is a short paper by Mr John Murray Q.C., one of our members, discussing some of the specialities relating to the termination of leases of agricultural holdings.

PART II FORM AND PERIOD OF NOTICE

A. - Form of Notice

Preliminary

2.1 It is a general rule that the mere expiry of the agreed period for the duration of a lease does not bring the lease to an end. Notwithstanding express provision to the contrary in the lease, a lease can generally be brought to an end in ordinary course only by actual notice of termination given by the landlord or tenant.[1] This requirement of notice results from the application of the principle of tacit relocation (that is, renewal of the lease by implied consent). The principle creates a presumption that, where no effective action has been taken to terminate a lease, both parties wish it to be continued for a further period[2] on the same terms. Accordingly, where tacit relocation applies, no action for removal of a tenant in ordinary course can succeed unless it has been preceded by due notice of termination of a lease. The question has, however, been raised "whether the notice required to prevent the operation of tacit relocation requires the same degree of formality as the notice which a landlord would have to give as a preliminary to an

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[1] For possible exceptions to the general rule, see Research Paper paras. 2.6-2.14.

[2] The period of continuation is one year where the original period of the lease was one year or longer, and the same period as the original period of the lease in any other case (subject to certain statutory variations).

action of removing."[1] The question is reasonable, because it seems logical to suppose that if tacit relocation relies upon the implied consent of both the landlord and the tenant to a continuation of the lease, anything that signifies an absence of that consent should suffice to exclude tacit relocation. In practice, however, the courts have been reluctant to recognise any distinction between the notice required to bring a tenancy to an end and the notice required as a foundation for removal of the tenant.[2] Rankine says simply[3] that "tacit relocation operates wherever (1) summary ejection is incompetent, and (2) effectual steps have not been taken for removing or, after having been taken, have been abandoned or passed from". It seems to us that nothing would be gained from the recognition or introduction of any distinction of the kind under discussion, and that to do so would simply create confusion and difficulty. It would be difficult to justify an intermediate situation in which a tenancy had apparently been brought to an end

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[1] Paton and Cameron, Landlord and Tenant, at p.225. See also Research Paper at para. 2.2.

[2] But see Hamilton District Council v. Maguire 1983 S.L.T. (Sh.Ct.) 76.
In Rae v. Davidson 1954 S.C. 361 Lord Birnam attempted the further distinction (at pp. 378-9) that a notice which was strictly in accordance with the statutory form was necessary for the summary removal of the tenant (i.e. without the assistance of the court) but not as a mere foundation for an action of removing. His opinion was, however, not shared by the Lord Justice-Clerk (Thomson) and Lord Mackintosh.

[3] At p.598.

but it was not open to the landlord to take steps to recover possession from the former tenant. We agree, therefore, with Mr Duncan[1] that -

> "one object of any legislative changes ... should be the elimination of any difference there may be between the requirements for termination of the tenancy by excluding tacit relocation, and the prerequisites of proceedings for recovery of possession."

We would welcome the views of consultees on this question.

Different notices by landlord and tenant

2.2 So far as the form and content of a notice of termination are concerned, the basic common law rule, affecting landlord and tenant alike, is that the notice must be definite and unconditional.[2] But stricter requirements have been imposed upon the landlord by statute, notably the Sheriff Courts (Scotland) Act 1907 and the Agricultural Holdings (Scotland) Act 1949.[3] Where, for example, a landlord raises an action for removal of his tenant under section 36 of the 1907 Act, that action must be preceded by due notice to the tenant in accordance with Form L in Schedule 1 to the Act.[4] Similarly, an action by the landlord under section 37 must be preceded by

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[1] See para. 3.30 of Research Paper.

[2] See Research Paper, para. 3.32.

[3] Hereinafter "the 1907 Act" and "the 1949 Act" respectively.

[4] Rule 104 in Schedule 1 to the 1907 Act as substituted by Act of Sederunt (Ordinary Cause Rules, Sheriff Court) 1983 (S.I. 1983/747) and amended by Act of Sederunt (Ordinary Cause Rules Amendment) 1983 (S.I. 1983/1546).

notice to the tenant in accordance with Form N.[1] In the converse case, where the notice is given by the tenant, it would seem that while Form L or Form N may be used, their use is not obligatory.[2] The use by the tenant of Form M likewise appears not to be obligatory. A similar result follows from the scheme of the 1949 Act. Section 24 of that Act provides[3] that the tenancy of an agricultural holding shall not come to an end unless inter alia "written notice has been given by either party to the other of his intention to bring the tenancy to an end." But there is the additional requirement where the notice is given by the landlord that it shall be given either -

> "(a) in the same manner as notice of removal under section 6 of the Removal Terms (Scotland) Act 1886; or
>
> (b) in the form and manner prescribed by the Sheriff Courts (Scotland) Act 1907."[4]

We would be grateful for the views of consultees on whether the distinction between the requirements imposed upon a landlord and the less stringent requirements upon a tenant as regards the form of notice should be preserved

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[1] Rule 105 ibid.

[2] See Rules 104 and 105 in Schedule 1 to the 1907 Act, also Research Paper at paras. 3.26 and 3.32 and Paton and Cameron at p.277.

[3] In ss. (1).

[4] See s.24(4). For a construction of the provision see Rae v. Davidson cited above.

or whether (as suggested in the Research Paper[1]) the distinction should be abolished. The case for abolition may be reinforced if an acceptable standard form of notice for termination of a lease can be devised.[2]

Necessity for written notice

2.3 The first question which arises for consideration under this head is whether the notice required to terminate a lease should always be in writing or whether oral notice should continue to be sufficient in the area where it is still recognised. We have already noted that written notice by the landlord or the tenant is always necessary for the termination of a lease of an agricultural holding.[3] At common law oral notice was admitted for the termination of leases of urban subjects generally. Statute has not abolished this common law rule but it has reduced its scope.[4] Moreover, even in the area where oral notice is still allowed it is unclear whether it is allowed in leases of all kinds or only in verbal leases or yearly tenancies.[5] The policy of statute to introduce the requirement of written notice is, in our view, well founded. Oral notice is by its nature imprecise and uncertain. There may be doubt or differences of opinion

[1] At para. 3.32.

[2] See below, paras. 2.8-2.14.

[3] See para. 2.2 above.

[4] Written notice is now required to terminate the let of a dwellinghouse - Rent (Scotland) Act 1971, s.131. See also 1907 Act, s.38A.

[5] See Paton and Cameron at p.272.

about what was said or the meaning of what was said. There may also be disagreement about, or difficulties in recollecting, the time when the notice was given. Accordingly, we endorse the recommendation in paragraph 12 of the Second Report of the Law Reform Committee for Scotland[1] "that where there is a let the notice [of termination] should be in writing". We would welcome the views of consultees on this question.

Single document

2.4 Where the notice required for the termination of a lease must be in writing, should it also be necessary for the notice and any additional statutory statement which it must or may contain to be incorporated in a single document? A landlord's notice to quit an agricultural holding will often require to be complemented by such a statement (or even by two or more statements) if the notice is to receive effect or if the landlord wishes to avoid liability for the payment to the tenant of compensation for disturbance or "to assist in the reorganisation of the tenant's affairs."[2] The provisions of the relevant sections will often require that the reasons for giving the notice be "stated in the notice"[3] or that the notice "contains a statement" giving a prescribed explanation or justification for the termination of the lease.[4] In Barns Graham v.

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[1] Cited above. See also para. 3.21 of Research Paper.

[2] See Appendix, paras. 15 and 16.

[3] See, for example, s.25(2) of the 1949 Act.

[4] See, for example, Agriculture (Miscellaneous Provisions) Act 1968, s.11(1).

Lamont[1] the envelope containing the landlord's notice to quit also contained a letter referring to the notice and explaining the reasons for it. The first question for decision by the Court (and the only question which is relevant to this Memorandum) was whether the contents of the letter were "contained" in the notice to quit, that is, was the letter so closely connected with the actual notice to quit that the letter could be regarded as forming part of the notice. The Court, following English authority,[2] answered the question in the affirmative. The question under discussion, while it is no doubt primarily relevant to the tenancies of agricultural holdings, could also arise in connection with the termination of leases of other kinds of subjects. For example, section 131 of the Rent (Scotland) Act 1971 as amended by section 123(1) of the Housing Act 1974 provides that a notice to quit premises let as a dwellinghouse shall not be valid unless it is in writing and contains such information as may be prescribed.[3]

2.5 The Research Paper states[4] that there may be "justification for a statutory provision making clear that, when by statute or otherwise, data such as reasons for the

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[1] 1971 S.L.T. 341.

[2] Turton v. Turnbull [1934] 2 K.B. 197.

[3] The Notices to Quit (Prescribed Information) (Protected Tenancies and Part VII Contracts) (Scotland) Regulations 1980 (S.I. 1980/1667) prescribe the information that must be given in notices to quit relating to tenancies to which the Regulations apply.

[4] At para. 3.22

notice being given have for any purpose to be included in a notice to quit, such data, to be effective for their purpose, must form part of the content of that notice and cannot validly be incorporated in any other document." The justification for this approach is, no doubt, that it is conducive to certainty. Mr Duncan has advanced the opinion that the decision in Barns Graham v. Lamont -

> "seems bound to give rise to litigation which would not take place on a strict and literal view of the directions of the Acts for certain information being given in notices to quit. It is unlikely that anyone having the relevant statutory provisions in view would put the prescribed information in a letter instead of in the notice to quit and accordingly the terms of any letter on which a party may found to make good the omission of certain necessary information from a notice to quit will probably have been framed without regard to the statutory provision in question." [1]

Since, at least in the case of agricultural holdings, it is likely that the landlord will have obtained professional advice in respect of the notice to quit, it is arguable that there is no need to relax the statutory requirement in order to protect professional advisers from the consequences of their failure to have regard to the terms of a statute.

2.6 There is, however, the counter-argument that in matters which have important financial consequences for the parties involved, the courts should not adopt too narrow or literal an approach but that their decision should depend rather on whether the substantial requirements of

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[1] "Agricultural Holdings - Reorganisation Payments Again" by A G M Duncan, 1973 S.L.T. (News) 141 at p.142.

the statute have been met. This was the approach favoured by the court in Barns Graham v. Lamont, where the tenant received simultaneously the notice to quit and a covering letter stating the landlord's reason for service of the notice. Is this essentially different from incorporation of the landlord's statement in gremio of the document constituting the actual notice to quit?

2.7 Our view at this stage is that it would be difficult to legislate further in this matter without the attendant risks of either placing unacceptable restraints upon the court's power to deal with individual cases in the light of their own circumstances or, conversely, encouraging laxity in complying with the statutory requirements. We should, nevertheless, be grateful for the views of consultees on these three questions:-

(1) Is it desirable to provide that a notice to quit and any additional statement which it must or may contain must be expressed within the same document? or

(2) Should it be provided that any additional statement may be contained in or may accompany a notice to quit? or

(3) Is it desirable not to legislate in this matter at all but rather to leave it to the court to decide in any case where the question arises whether a statement is or is not contained in the notice to quit?

Single form of notice

2.8 The Law Reform Committee for Scotland recommended that a single form of notice for urban removings should be

provided.[1] The Committee were of the opinion that the provisions of the Sheriff Courts (Scotland) Act 1907 in regard to forms were confusing and had created uncertainty. The relevant provisions as amended by subsequent legislation are sections 34 to 38A of, and Rules 103 to 107 of Schedule 1 to, the Act. Three forms of removal notice are given in the Schedule: Forms L and N are primarily forms of notice of removal to be given by landlords (although they may also be used with suitable modifications by tenants), whereas Form M is a form of letter of removal which can be used only by a tenant. The statutory provisions to which we have referred are fully discussed in the Research Paper[2] and in Paton and Cameron.[3] A question that has sometimes arisen is whether these provisions of the 1907 Act apply only where a form of process for which the Act makes provision is being adopted or whether the provisions alter the substantive law on matters such as the period and form of notice for termination of tenancies.[4] The preferred view is that the provisions do not alter the substantive law, although in practice the statutory forms of notice are almost always used whatever the nature of any subsequent proceedings for removal in ordinary course. The point becomes of academic interest if it appears that a standard form or a form containing standard requirements can be devised for all cases.

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[1] Second Report, para. 12. The Committee did not regard the tenancies of agricultural holdings as within their remit.

[2] See paras. 3.26 to 3.30.

[3] See pp. 266 *et seq*.

[4] See para. 3.6 of Research Paper and cases cited thereunder. See also Paton and Cameron at p.274.

2.9 Forms L, M and N are all very brief. They do little more than provide for the landlord (or the tenant) giving notice to the other party to the lease that he is required to remove (or that he will remove) from the leased subjects (which must be described) at a specified term.[1] Form L requires in addition the specification of the lease, letter of removal or other foundation for the notice of removal. Although the forms of notice are brief they have given rise to a considerable amount of litigation, as any material departure from the prescribed form is likely to render the notice invalid. A notice by the landlord must explicitly require the removal of the tenant, and that requirement is not fulfilled by a mere statement that the tenancy is to terminate at a specified date.[2] An inadequate or inaccurate description of the subjects will invalidate the notice,[3] and a notice relating to part only of the subjects let is ineffectual.[4] The insertion of the wrong date (for example, 15th instead of 28th May) will usually be fatal.[5] Where Form L is the form that must be used, the notice is invalid if it omits a reference to the lease or other document on which the notice is based.[6] Where the notice is given by the landlord's agent or by a

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[1] The forms appear to envisage - erroneously - that removal will always take place at a Whitsunday or Martinmas term.

[2] See e.g. Patten v. Morison (1919) 35 Sh.Ct.Rep. 252.

[3] See e.g. Scott v. Livingstone 1919 S.C. 1; Cameron v. Ferrier (1912) 28 Sh.Ct.Rep. 220.

[4] Gates v. Blair 1923 S.C. 430. But see s.32 of the 1949 Act.

[5] James Grant & Co.Ltd. v. Moran 1948 S.L.T. (Sh.Ct.) 8.

[6] Rae v. Davidson cited above.

sheriff officer, it is unclear whether it is necessary to state the name of the party on whose behalf the notice is given.[1] But the direction that a notice may be signed by the landlord's law agent is satisfied by the agent signing in his firm's name.[2] Where there is postal service, it is fatal to overlook the requirement that the notice be sent by registered letter (or recorded delivery), even although receipt of the notice is admitted by the addressee.[3]

2.10 There appears to be little justification for retaining the only substantial difference between Form L and Form N (the requirement in the former to refer to the lease or other foundation for service of the notice), and Form M and Form N are truly different only to the extent that the former is framed for use by a tenant and the latter for use by a landlord.[4] Accordingly, it might well be feasible to evolve a single form of notice or to make provision for a notice having standard requirements applicable to every kind of lease.[5] There are specialities in the case of agricultural holdings which we discuss below.

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[1] See Grant v. Bannerman (1920) 36 Sh.Ct.Rep. 59 and cf. Seggie v. Haggart (1926) S.L.T. (Sh.Ct.) 104.

[2] Rutherford v. Oswald 1945 S.L.T. (Sh.Ct.) 9.

[3] Department of Agriculture for Scotland. v. Goodfellow 1931 S.C. 556. See also paras. 3.1-3.6 below for a discussion of the statutory provisions relating to the manner of service of a notice to quit.

[4] But Form N may be adapted for use by a tenant - see Rule 105 of Schedule 1 to the 1907 Act.

[5] As we have already observed, statute may in certain cases require the notice to contain, or provide for it containing, additional statements.

2.11 The Research Paper questions[1] whether it is essential that the word "remove" or its equivalent should be used in the statutory notice, and adds:

> "It has been suggested earlier that one object of any legislative changes in this matter should be the elimination of any difference there may be between the requirements for termination of the tenancy by excluding tacit relocation, and the prerequisites of proceedings for recovery of possession. In these circumstances it may be for consideration whether the style of notice to be prescribed for general use should take the form of an intimation that the tenancy of the particular subjects will terminate at some particular date(s) or term(s)."

A possible objection to this proposal is that if a landlord can give an effectual notice which simply states that the lease will terminate at a specified date, the onus is upon the tenant to deduce that he must remove on that date. The inference may not be very difficult to make, but a notice in the terms suggested may nevertheless seem less satisfactory than one which explicitly and unequivocally requires the tenant to remove. It may be thought, moreover, that a notice which is a prerequisite to an action for the removal of a tenant should in fact include the word "remove". It is observed that English law is fairly flexible in this respect. The general position is that "the form of notice is immaterial provided that it indicates, in substance and with reasonable clearness and certainty, an intention on the part of the person giving it, to determine the existing tenancy at a certain time,

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[1] At para. 3.30.

and that the party to whom it is given could not be misled as to the intention of the giver, though the language is ambiguous and lame."[1]

2.12 It seems essential to retain the remaining requirements of a notice of termination in so far as they are common to Forms L, M and N, that is, a description of the subjects from which the tenant is to remove and a specification of a date or term of removal. But the manner of statement of these requirements could certainly be improved.[2] There remains, of course, the question whether it should also be necessary to refer to the lease or other foundation for service of the notice (as in Form L) or whether any such reference can be omitted (as in Form N).[3] The reference could, in certain circumstances, provide useful information but the giver of the notice might not always have the information at his disposal or there might well be nothing to which he can satisfactorily refer.[4] Perhaps the most straightforward and satisfactory solution would be to allow but not require a reference to the lease or other relevant material to be incorporated in any notice.

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[1] Hill and Redman, The Law of Landlord and Tenant (16th edn.), para. 404.

[2] For example, the Forms all presuppose that a tenancy will terminate at a Whitsunday or Martinmas term (as opposed to any date in the year). Forms L and N are also inconsistent with each other in respect that one does not require an additional statement of the precise date of the term of removal whereas the other does.

[3] Where the use of Form L is obligatory, the omission of the reference is fatal to the notice - Rae v. Davidson cited above.

[4] Notices under s.36 of the 1907 Act require to be in Form L even although that section applies where the tenant's occupation is "without any written lease". See para. 3.29 of the Research Paper.

2.13 The notice must, under the relevant sections of the 1907 Act, be given to the tenant or, as the case may be, the proprietor but it may be sent "by or on behalf of" the party giving the notice. This seems eminently sensible but there are, as we have noted,[1] conflicting decisions as to whether it should be necessary to state on whose behalf the notice is given when the giving is done by an agent or sheriff officer. It would seem desirable that the doubt on this matter should be resolved.

2.14 We put forward the following specimen form of notice as a reference point for further consideration of matters arising from paragraphs 2.8 to 2.13:

> To: (Name and address of tenant or landlord, as the case may be)
>
> [You are required]* [I am] to remove from (identify subjects)** on (date or dates as appropriate).
>
> Dated this day of
>
> (Signature)***
>
> * Delete/modify as appropriate.
>
> ** A reference to the relevant lease may be inserted, if desired.
>
> *** Where the notice is served by an agent, executor, or other person not a party to the lease, that person should specify in the notice the capacity in which (and for whom) he is acting.

[1] See para. 2.9 above.

Agricultural holdings

2.15 We have observed that while a notice of removal by the tenant of an agricultural holding must be in writing, there is no specific requirement as to the form of the writing.[1] Where, however, the notice is given by the landlord of the holding, the practical effect of the statutory provisions is that the notice must conform to Form L in Schedule 1 to the 1907 Act.[2] We have already invited our consultees to say whether this distinction between the requirements imposed upon a landlord and those imposed upon a tenant should be preserved or abolished.[1]

2.16 The Research Paper notes[3] that the special features affecting a notice to quit an agricultural holding include the possibility of (a) different dates of termination for different parts of the holding,[4] (b) the exercise by the landlord of the power under section 32 of the 1949 Act to serve a notice to quit part only of the holding, and (c) the requirement that the notice contain some statutory statement in order to give the notice validity or to avoid or reduce the landlord's liability for payment of compensation to the tenant. There should be no difficulty about the adjustment or expansion of any standard form of notice to quit to accommodate the case where there are different

[1] See para. 2.2 above.

[2] Rae v. Davidson cited above.

[3] In para. 3.31.

[4] For a discussion of the difference between an agricultural lease having more than one ish and a lease having only one ish although providing for vacation of parts of the holding before the ish, see Milne v. The Earl of Seafield 1981 S.L.T. (Sh.Ct.) 37.

terms (or dates) for quitting different parts of the leased subjects. Indeed, Form L already makes provision for such a case. Likewise, the adaptation of any standard form to meet the case where the removal relates to only part of an agricultural holding should not present difficulty, involving nothing more than a clear description of the part of the holding to be vacated instead of a description of the entire holding. The remaining special feature of an agricultural holding to which we have referred - the possible need for a statutory statement in addition to the notice as such - has already been the subject of discussion.[1] We should, however, be grateful for the observations of our consultees on any question relating to the adaptation of any standard notice of termination (whether given by the landlord or the tenant) to accommodate a notice relating to an agricultural holding (or part of a holding).

B. - Period of Notice

Preliminary

2.17 An examination of the law relating to the period for service of a notice of termination raises a number of points for consideration, many of them attributable to the nature and history of the statutory regulation of the period of warning required to be given. There are many different periods of notice, arguably "an unnecessary variety of periods of notice",[2] the length of the period depending partly on the nature of the leased subjects and partly on the period of the lease. Again, where the

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[1] See paras. 2.4 to 2.7 above.

[2] Second Report of the Law Reform Committee for Scotland, para. 13.

tenant of a dwellinghouse is required to remove at Whitsunday or Martinmas the removal date will usually be 28 May or 28 November, but the period of notice is measured by reference to 15 May or 11 November.[1] There is also a doubt as to whether the provisions of the Sheriff Courts (Scotland) Act 1907 prescribing a minimum period of notice override any conventional provisions which would produce a different effect. We shall briefly describe the difficulties of the existing law and invite the views of our consultees as to how the law might be reformed.

Non-agricultural subjects

2.18 Sections 34 to 38A of, and Rules 103 to 107 of Schedule 1 to, the 1907 Act contain provisions relating to removings. The periods of notice under these provisions are as follows:-

(1) "in the case of a lease of lands exceeding two acres in extent" for three years or more, the period is not less than one year nor more than two years (Rule 103 of Schedule 1);

(2) in the case of a lease of such lands "held from year to year under tacit relocation or for any other period less than three years", the period is not less than six months (Rule 103 of Schedule 1);

(3) "in the case of houses let with or without land attached not exceeding two acres in extent,[2] as also of land not exceeding two acres in extent without

[1] Removal Terms (Scotland) Act 1886, s.4.

[2] The drafting of this provision has been criticised by Rankine (at p.572) as being ambiguous.

houses, as also of mills, fishings, shootings and all other heritable subjects excepting lands exceeding two acres in extent" let for a year or more, the period is not less than 40 days (section 37, and Rule 103 of Schedule 1); and

(4) "where houses or other heritable subjects are let for a shorter period than a year", the period, "in the absence of express stipulation", is not less than 40 days where the period of the let exceeds four months and "at least one-third of the full period of the duration of the let" in other cases, subject to a minimum period of 28 days in every case (section 38).

The requirement of a minimum period of notice of 28 days was introduced into section 38 of the 1907 Act by the Rent Act 1957 against the background that under section 16 of that Act the 28 day minimum period would apply in every case where notice to quit premises let as a dwellinghouse was given. Section 38 was, however, amended in such a way - perhaps too widely - as to make a minimum period of notice of 28 days apply in every case where houses or other heritable subjects (except presumably lands exceeding two acres in extent and, of course, agricultural holdings) are let for a shorter period than one year.

2.19 There is a measure of doubt whether the foregoing provisions of the 1907 Act prescribing a minimum period of notice for termination of a lease (a) apply generally or only where a form of process for which the 1907 Act makes provision is being adopted,[1] and (b) override any

[1] See para. 3.6 of Research Paper and cases cited thereunder, also para. 2.8 above.

conventional provision for a shorter minimum period of notice.[1] These questions need not concern us if it is agreed that it should be made clear that any statutory minimum period of notice should apply whatever the form of process being used and irrespective of any different provision in the lease between the parties or otherwise agreed by them. That is the effect of section 131 of the Rent (Scotland) Act 1971, which provides that no notice to quit any premises let as a dwellinghouse shall be valid unless it is in writing and "is given not less than four weeks before the date on which it is to take effect." We should be grateful for the observations of our consultees on this question.

2.20 The provisions of the 1907 Act prescribing a minimum period of notice for termination of a lease are stated to apply to heritable subjects generally, but the period of notice for termination in the case of an agricultural holding is otherwise regulated.[2] Where the 1907 Act applies, the period of notice is considerably longer "in the case of a lease of lands exceeding two acres in extent" than in the case of other subjects. The Law Reform Committee for Scotland suggested[3] "that the nature of the subjects may be ignored as a factor which ought to affect

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[1] See Duguid v. Muirhead 1926 S.C. 1078 per Lord Constable at pp. 1082-3, and cf. Viscountess Cowdray v. Ferries 1918 S.C. 210, per Lord Johnston at p.219.

[2] See s.24(1) of the Agricultural Holdings (Scotland) Act 1949 and para. 2.24 below.

[3] At para. 13 of their Second Report.

the period of notice, especially since this factor is generally reflected in the period of the let". The Committee also considered that there was "an unnecessary variety of periods of notice" and concluded as follows:-

> "It is recommended that the matter be simplified by providing that - (a) in the case of a let for a year or more the period of notice should be forty days, but (b) in the case of all other lets the period should be fourteen days or the period of the let, whichever is the shorter. These provisions would apply only in the absence of any express stipulation in a lease for a longer period of notice."[1]

2.21 The Law Reform Committee completed their Report shortly before the introduction of the requirement for a notice to quit a dwellinghouse to be served at least 28 days before the date of removal and the related amendment of section 38 of the 1907 Act.[2] If their Report had not been completed till after the introduction of the requirement, it is possible that they would have tailored their recommendation to correspond with it, that is, they might have substituted a period of 28 days for the periods of 40 days and 14 days recommended by them. Such a variation of the recommendation would in any event recognise the virtue of uniformity.

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[1] The Committee stated in the submission at the beginning of their Report that none of its recommendations was intended to apply to agricultural holdings.

[2] See para. 2.18 above.

Removal Terms (Scotland) Act 1886

2.22 Section 4 of the Removal Terms (Scotland) Act 1886 provides that where the tenant of a house[1] is to remove from the house at Whitsunday or Martinmas, the tenant shall "in the absence of express stipulation to the contrary" remove from the house at noon on 28 May or, as the case may be, 28 November.[2] The section also provides that "in all cases in which warning is required 40 days before a Whitsunday or Martinmas term of removal, such warning shall be given 40 days before the 15th day of May and the 11th day of November respectively".[3] Rankine explains[4] that the mischief which section 4 of the 1886 Act sought to abate "was that a custom had existed in Scotland whereby, for the purpose of a tenant's entry to and removal from a house, a period beyond the date of the legal term of entry or removal was allowed within which such entry or removal might take place, and that the period so allowed had not been uniform but had varied accoring to local usage." The 1886 Act in effect standardised the period of grace by postponing the tenant's actual date of removal in the case of a Whitsunday removal to 28 May and in the case of a Martinmas removal to 28 November. It is

[1] "House" is defined widely in s.3 of the Act to mean "a dwellinghouse, shop, or other building and appurtenances" and includes "a dwellinghouse or building let along with land for agricultural purposes".

[2] Removal is postponed for 24 hours where Whitsunday or Martinmas falls on a Sunday.

[3] A similar requirement is contained in the concluding proviso to s.37 of the 1907 Act.

[4] At p.562.

suggested in the Research Paper[1] "that under modern conditions there is no justification for computing a period of notice otherwise than by reference to the effective date of that notice." Amendment of the law to accord with that suggestion might require little more than the repeal of the concluding portion of section 4 of the 1886 Act and of the concluding proviso to section 37 of the 1907 Act. We should be glad to know whether consultees agree with the suggestion that every period of notice should be calculated by reference only to the period intervening between the date of service of the notice and the date on which it is to take effect.

Agricultural holdings

2.23 Section 24(1) of the Agricultural Holdings (Scotland) Act 1949 provides that the tenancy of an agricultural holding shall not come to an end unless "not less than one year nor more than two years before the termination of the lease" either party gives written notice to the other of his intention to bring the tenancy to an end. While we would not be disposed to make any observations upon the length of the period of notice required under section 24(1) unless there was evidence of strong and widespread dissatisfaction with it, there is room for clarification of a doubt concerning the date of termination when the period ends at Whitsunday or Martinmas.

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[1] At para. 3.5.

2.24 Section 93(1) of the 1949 Act provides that "in this Act, unless the context otherwise requires ... 'Whitsunday' and 'Martinmas' in relation to any lease entered into on or after the first day of November nineteen hundred and forty eight mean respectively the twenty-eighth day of May and the twenty-eighth day of November". These definitions are stated to apply only to references to Whitsunday and Martinmas in the Act, and references to Whitsunday and Martinmas in a lease apparently continue to mean 15 May and 11 November respectively in the absence of an express stipulation or facts and circumstances which indicate the contrary.[1] Nevertheless, there appears to be a doubt whether a notice to quit an agricultural holding at "Whitsunday" takes effect at 15 or 28 May where the lease is entered into on or after 1 November 1948 and the term "Whitsunday" is not further specified in the lease.[2] There would be a similar doubt where the term "Martinmas" is used without further specification. It would be desirable to remove the doubt, perhaps by a provision modelled on section 4 of the Removal Terms (Scotland) Act 1886 to the

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[1] See Connell The Agricultural Holdings (Scotland) Acts (6th.edn.)at p.20 and Gill The Law of Agricultural Holdings in Scotland at para. 149. See also Hunter v. Barron's Trs. (1886) 13 R. 883. It is desirable, as the authors of the text books point out, that the parties to a lease should specify precisely what date is in contemplation in any reference in the lease to Whitsunday or Martinmas.

[2] See Stirrat v. Whyte 1968 S.L.T. 157 where Sheriff Kidd expressed the opinion (at p.160) that in such a lease "Whitsunday" must be held to mean 15 May, and Austin v. Gibson 1979 S.L.T. (Land Ct.) 12 where the Land Court took the contrary view that in a post-1948 lease the term "Whitsunday" must be construed as a reference to 28 May.

effect that where a tenant enters or removes from a farm at the term of Whitsunday or Martinmas, the entry and removal terms will "in the absence of express stipulation to the contrary" be 28 May or, as the case may be, 28 November. We should be grateful for the views of our consultees on this suggestion.

Resumption

2.25 It is relevant in this context to recall that in cases where resumption is permitted in terms of a lease of an agricultural holding (or, less commonly, of non-agricultural subjects) this may have the practical effect of terminating the lease, and is in any event to the same effect as would be a notice to quit part of the holding. There is no statutory requirement as to the period of warning before a power of resumption is exercised nor as to the form of the notice of resumption, and indeed written notice may not be necessary at all.[1] Where written notice is given, the requirement is simply that it be clear. Mr Duncan suggests that the absence of any statutory regulation of the exercise of a power of resumption is unsatisfactory, and that the matter deserves the attention of the legislature.[2] There is one question in particular on which we should welcome the views of consultees, that is, whether the exercise by the landlord of a power of resumption should be required to be preceded by an appropriate period of notice,[3] the period suggested

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[1] Kininmonth v. British Aluminium Co. Ltd. 1915 S.C. 271.

[2] See Research Paper, paras. 3.35 to 3.37.

[3] See also Appendix, para. 19.

being a period of at least two months in the case of an agricultural lease and - if it is considered desirable to legislate in respect of other kinds of leases - a minimum period of perhaps 40 or 28 days.

Subjects in mixed use

2.26 There is a doubt of a different kind where the leased subjects are used partly for agriculture and partly for some non-agricultural purpose. Such was the case in McGhie v. Lang[1] where the Land Court decided that the agricultural part of the leased subjects should be isolated from the non-agricultural part and regarded as itself forming an "agricultural holding". The result, as it is put in the Research Paper,[2] is "either that a notice to quit for the whole subjects must be given in conformity with the Agricultural Holdings Acts, or that separate notices must be given for the respective parts of the subjects." The difficulties resulting from the decision in McGhie include the difficulty that the period of notice applicable for removal from the agricultural part of the leased subjects would be different from that applicable for the non-agricultural part. The difficulties are fully discussed in the Research Paper and in Gill,[3] where it is pointed out that the decision was reached without regard to an alteration by the 1949 Act of the definition of the expression "agricultural holding" and that the Land Court have recently recognised the need for reconsideration of the decision. Both the Research Paper and Gill argue

[1] 1953 S.L.C.R. 22.

[2] At para. 3.50.

[3] Op. cit. para. 6. See also Appendix, para. 3.

strongly that the subjects comprised in one tenancy should be regarded either as wholly an agricultural holding or as wholly outside the Agricultural Holdings (Scotland) Acts, the test to be applied being that of predominant user. This is the test which has been applied under English law since 1951,[1] and Gill points out that a similar test was in fact established in Scotland in a series of cases between 1886 and 1918. Adoption of the test of predominant user would result in a notice to remove from the subjects of a lease either being wholly ruled by section 24 of the 1949 Act or being wholly unaffected by that section. We should be grateful for the observations of our consultees on the proposal to adopt the test of predominant user in relation to leased subjects in mixed use.

Uncertain date of termination of lease

2.28 The Law Reform Committee for Scotland point out that "it is frequently found in practice that difficulty is experienced in an action of removing in determining the proper ish, for example under a verbal let, or where the origin of the let is obscure."[2] A possible case might be a yearly tenancy where the rent is paid half-yearly at Whitsunday and Martinmas, but it is impossible to demonstrate at which of these terms the lease terminates. The result is that the landlord, if he wishes to serve a notice to quit, will have difficulty in selecting the

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[1] Howkins v. Jardine [1951] 1 K.B. 614.

[2] Second Report, para. 15.

correct term against which to serve the notice. The Committee suggest that in any case of this kind there should be a rebuttable presumption that the lease terminates at Whitsunday, which we suggest should be specified as 28 May. We should be grateful for the observations of our consultees on the proposal.

PART III SERVICE OF NOTICE

3.1 The following paragraphs relate to notices designed to terminate a lease at its expiry. Resumption or renunciation at a break point will normally be governed by the terms of the lease.[1] The manner of service of a notice of termination is governed by a series of statutory provisions which apply according to the nature of the lease, except as regards certain leases of urban subjects for a year or less which may be constituted by a verbal agreement and terminated by verbal notice.[2]

Urban subjects

3.2 Schedule 1 to the 1907 Act provides that any removal notice under sections 34-38 of that Act may be served by messenger-at-arms or sheriff officer, or by registered letter.[3] Regardless of the form of action, section 6 of the Removal Terms (Scotland) Act 1886 authorises service of notice by registered letter for all tenancies of houses, shops or other buildings not being let along with agricultural land for agricultural purposes. Service by recorded delivery letter has also been competent since 1962.[4] It is not clear, however, how far the foregoing provisions, which are drafted in terms of notices by landlords, apply to notices served by tenants.[5]

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[1] Rankine, p.530; Paton & Cameron, p.243. See also para. 2.25 above.

[2] Research Paper, para. 3.21; and see para. 2.3 above.

[3] Rule 106.

[4] Recorded Delivery Service Act 1962.

[5] Research Paper, para. 3.23.

Agricultural holdings

3.3 Section 90(1) of the 1949 Act provides that:

> "Any notice or other document required or authorised by or under this Act to be given to or served on any person shall be duly given or served if it is delivered to him, or left at his proper address, or sent to him by post in a registered letter."

However, the service of a notice to quit by the landlord of an agricultural holding is specifically covered by section 24(4) of the Act, which requires that such notice shall be given in the manner prescribed by the 1886 Act or by the 1907 Act. There is no equivalent provision for service by a tenant of notice of removal. Thus, it has been suggested that landlords must observe the provisions of section 24 while tenants may rely on the wider provisions of section 90.[1] We consider that any doubts as to the application of the two sections should be removed.

General

3.4 Although the wording of the relevant provisions of the 1886 and 1907 Acts is permissive, suggesting that other means of service may be available, the Scottish courts have taken a more restrictive view. Rule 113 of Schedule 1 to the 1907 Act was considered by the Court of Session in the case of Department of Agriculture v. Goodfellow.[2] The Court concluded that the choice was limited to one of the three methods of service set out in Rule 113. Thus, a tenant was able to claim that a notice to quit had been

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[1] Gill, para. 140.

[2] Cited above. Note that the current provisions are to be found in Rule 106 of the Schedule, as substituted by S.I. 1983/747.

incorrectly served and was therefore ineffective, even though he admitted receipt of the notice. It seems unfair that a tenant should be able to benefit from the informality of service in such a situation. Indeed, it has been suggested that notice of termination of a lease should be permitted to be given in any manner, provided that receipt is admitted or can be proved.[1] The means of proof are at present restricted, for certain purposes, by Rule 107 in Schedule 1 to the 1907 Act. Such relaxation might be said to be consistent with other moves to simplify the procedures for termination of leases and for recovery of possession of heritable property.

3.5 On the other hand, there are arguments in favour of introducing or retaining formal requirements of service. Historically, notice to remove replaced a separate action of removing which had to precede any action of ejection.[1] More importantly, it may be thought that the consequences of termination of a lease, or of failure to do so timeously, are such as to merit at least a degree of formality in the service of the relevant notices. Service by recorded delivery is a simple way of ensuring that notices are received or returned and of providing proof of postage. Service by messenger-at-arms or sheriff officer, while more expensive, is a secure and well-tried method which also eliminates problems of proof of service. In our Report on Irritancies in Leases,[2] we recommended that

[1] Research Paper, para. 3.24.
[2] Scot. Law Com. No.75 (1983).

notice of irritancy resulting from a tenant's failure to make any payment due under the lease should be served by recorded delivery. We have reached no firm conclusions on the type of procedure which should be adopted in respect of the present exercise.

3.6 We therefore invite views on the following questions:

(1) Should there be no restrictions on the method of service or of proof of service of notice of termination of a lease at its ish?

(2) Alternatively, should the method of service be prescribed?

(3) If so, should failure to observe a prescribed method of service render the notice of termination ineffective in all cases?

(4) Alternatively, should proof of receipt be admissible in any case, whether or not a prescribed method of service has been followed?

(5) Should the prescribed methods include service by registered post or by recorded delivery, and service by messenger-at-arms or sheriff officer, and should they apply to notices whether served by landlords or by tenants?

Withdrawal of notice

3.7 It is possible to envisage conditions in which a landlord or tenant might wish to withdraw a notice of removal: the notice may have been served without proper advice or circumstances may have changed since the date of service. If the consent of the other party can be obtained, before the notice and the lease expire, then the

notice can be treated as having been withdrawn and the tenancy can continue, either on the original basis and for a period up to one year or on new terms agreed between the parties.[1] The question as to whether a notice can be withdrawn without the consent of the recipient, does not appear to have been settled. It has however been held that a notice cannot be repudiated after it has been expressly accepted.[2] Obviously, in such a case, there can be no question of consent to withdraw. Similarly, although it would be more difficult to prove, there could be no question of consent to withdrawal of a notice which had been accepted by implication, i.e. the recipient's subsequent actings. It may be argued that the party who serves a notice should be held responsible for, and accept all the consequences of, doing so, with or without professional advice. On the other hand, that might be thought to be an unreasonable burden, particularly as regards leases of agricultural holdings, given the complexity of notice procedures and the possibility of circumstances changing in the course of a lengthy period of notice. Furthermore, there may be cases where the recipient of a notice would not be prejudiced by its withdrawal.

3.8 We therefore invite views on the following alternative propositions:

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[1] Erskine Institute of the Law of Scotland, II, VI, 35; Rankine, p.598.

[2] Gilmour v. Cook 1975 S.L.T. (Land Court) 10.

(1) It should not be possible for a notice of termination to be withdrawn, except by consent.

(2) It should be possible for a notice of removal to be withdrawn, except where it has been accepted either expressly or by implication. In this regard, we would also welcome views on what constitutes acceptance.

3.9 The service of a notice of termination of a lease may give rise to special problems in cases where, for example, the subjects of the lease have been sold, in whole or in part, or one of a number of joint tenants wishes to renounce the lease, or the tenant has died prior to the expiry of the lease but executors have not been appointed. These and other special cases are examined in the next section.

PART IV SPECIAL CASES

Sale of tenanted subjects

4.1 The tenanted subjects may be sold as a whole or there may be a partial sale. In either case, the purchaser cannot serve notice to quit until he holds a disposition entitling him to receive the rents of the tenanted subjects. Thus, a notice to quit may not be served by a prospective purchaser at the stage of conclusion of missives.[1] However, it is not necessary that the disposition should have been recorded: effective notice may be served by an uninfeft proprietor.[2] As an alternative, the purchaser may proceed on the basis of an assignation to him of a notice to quit served by the original landlord prior to the sale.[3] We do not propose any change in the law regarding purchasers under missives. However, we favour the suggestion that a purchaser who has acquired title and taken entry to tenanted subjects should be entitled to rely on a notice to quit served by the seller without an assignation thereof in his favour.[4] We note that section 31 of the Agricultural Holdings (Scotland) Act 1949, which re-enacts an earlier provision designed to protect the tenant of an agricultural holding in such a situation before the introduction of security of tenure under the 1949 Act, and is peculiar to agricultural holdings legislation, no longer appears to be required.[5]

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[1] James Grant & Co. Ltd. v. Moran cited above.

[2] Walker v. Hendry 1925 S.C. 855.

[3] Grant v. Bannerman cited above.

[4] See Research Paper, para. 4.7.

[5] Gill, paras. 206-208.

4.2 Where there has been a partial sale of the tenanted subjects, or where the subjects have been divided into two or more parts which have passed into separate ownership on the death of the original landlord, particular problems may arise. These are discussed in paragraphs 2.26 and 2.27 of the Research Paper, where the relevant rules of Scottish and English law are compared and contrasted. In Scotland, in the absence of express provision in the lease, a part-owner is unable to terminate the lease as respects his property alone, without the consent of the tenant and other part-owners.[1] Purported termination by a part-owner should be distinguished from partial termination of the lease of an agricultural holding under section 32 of the 1949 Act. In England, however, a part-owner may serve notice to quit in respect of his property alone, with the tenant being entitled to treat the notice as terminating the whole of the original tenancy.[2]

4.3 We would therefore welcome comments on the following questions:

(1) Does the common law rule against partial termination of tenancies give rise to problems in practice?

(2) If so, should provision be made for leases in general to permit a part-owner to serve notice to quit on the tenant in respect only of his property and to permit the tenant, on receipt of such a notice, to treat it as notice to quit the entire subjects of the original lease?

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[1] Gates v. Blair cited above.

[2] Law of Property Act 1925, s.140(1) and (2).

Joint property

4.4 Under this heading, we examine problems relating to the termination of leases involving more than two parties, in the sense that the subjects of lease are owned by two or more co-proprietors, or are leased to a number of joint tenants. The difficulties involved in applying the principles of tacit relocation to such leases are discussed in paragraph 2.25 of the Research Paper. On the one hand, tacit relocation requires the implied consent of all parties to the continuation of the tenancy agreement. On the other hand, the rules governing the management of common property do not generally confer on any one proprietor the right to proceed without the consent of other co-proprietors. Questions arise, therefore, as to the effect of a notice to quit served by one proprietor without the consent of other co-proprietors and of a notice of termination served by one tenant against the wishes of other joint tenants. It might be expected that the result would be the same in each case, and we can see no reason why the effect of a notice of termination served by one co-proprietor should differ from the effect of a notice served by one joint tenant.

4.5 The law requires that all co-proprietors involved in the granting of a lease must concur in an action for removal of the tenant.[1] The rule appears to be based on consideration of the fact that the tenant cannot be ejected by one co-proprietor when in fact he can trace his title to all co-proprietors.[2] However, it is not necessary that all

[1] Aberdeen Station Committee v. N.B. Railway Co. (1890) 17 R. 975.

[2] Ibid., per Lord Shand at p.984; cf. Millar v. Cathcart (1861) 23 D. 743, per Lord Curriehill at p.746.

co-proprietors should be parties to the removal of an "intruder" who is occupying the common property without title.[1] The question of title to sue, which is discussed further in Part V below, is relevant here in so far as it affects the answer to the question posed above regarding the effect of notice to quit served without the consent of all co-proprietors. A notice to quit may be of little practical effect if it cannot be followed up by proceedings for the tenant's removal.

4.6 It might be said that there can be no tacit relocation in a case where one or more co-proprietors have expressed their unwillingness to consent to continuation of the lease. Certainly, the courts have adopted a like argument in cases involving notice of termination served by one of two joint tenants. In a fairly recent case, it was held that tacit relocation was excluded by notice served by one joint tenant, even though the other was willing to continue.[2] However, Mr Duncan doubts whether that argument can simply be applied to notice by one co-proprietor[3] and there appears to be no direct authority on the matter. If notice by one co-proprietor is to be regarded as effective to exclude tacit relocation but the tenant remains in possession because of one or more co-proprietors' refusal to concur in proceedings being taken for his removal, questions arise as to whether the tenant can treat the

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[1] Aberdeen Station Committee and Millar cited above.
[2] Smith v. Grayton Estates Ltd. 1960 S.C. 349.
[3] See Research Paper, para. 2.25.

notice as repudiation of the lease, or alternatively, as to the legal basis for his continued possession. Is he then to be regarded as an "intruder" liable to be removed even without the concurrence of all co-proprietors?

4.7 We are of the view that the rules governing service of notice and title to sue should be coherent, if for no other reason than to avoid problems as to the legal basis of the tenant's possession. On that basis, only such co-proprietors as are entitled to sue for the removal of a tenant should be able to serve notice effective to exclude the tacit relocation of the tenant's lease. As to whether it should be necessary for all co-proprietors to concur in the service of notice or in raising proceedings for removal, we consider that the question should be resolved not only by reference to the rules regarding title to sue[1] but also to the position referred to above following service of notice of termination by one of a number of joint tenants.

4.8 In Smith v. Grayton Estates Ltd, the court accepted that there were three possible consequences of a notice of removal served by one of two joint tenants.[2] The first was that the notice was effective as regards the tenant who served it but left the non-consenting tenant in possession as sole tenant. This followed from an argument based on two 19th century cases relating to irritancy of

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[1] See para. 5.2 below.

[2] Per Lord President Clyde at p.354.

leases involving joint tenants[1] in which the court decided that one joint tenant could insist on remaining in possession notwithstanding the bankruptcy of the other. The argument was abandoned in Smith's case and would, it appears have been rejected on the ground that a landlord who had entered into a contract with joint tenants could not be obliged to accept a sole tenant in their place. As an alternative, it was argued that the notice was ineffective unless served with the concurrence of both joint tenants, the consequence of which would have been to oblige the tenant who served the notice to continue with the lease in spite of his unwillingness to do so. It appears that such a consequence would have had little practical effect in Smith's case, since the tenant who gave notice in fact lived elsewhere and was not involved in the running of the farm leased. It had for some years been worked by his brother, the other joint tenant, from whom alone the landlord had been in the practice of accepting rent. However, that argument was said by the court to overlook "the meaning and effect of tacit relocation." The court accepted the third argument, put forward on behalf of the landlord, to the effect that tacit relocation required the silent consent of all parties, including all joint tenants, to the continuation of the lease. Thus, the consequence of notice served by one joint tenant was termination of the joint tenancy. The tenant who was willing to continue in possession and meet the obligations formerly incumbent on the two tenants jointly, in theory

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[1] Young v. Gerard (1843) 6 D. 347.
Buttercase & Geddie's Tr. v. Geddie (1897) 24 R. 1128.

but not in practice, was obliged to quit. The decision in Smith v. Grayton Estates Ltd. has stood for over 20 years.

4.9 We therefore invite comment on the following proposals:

(1) With regard to the termination of leases by co-proprietors, the rules governing title to sue and service of notice to quit should be consistent.

(2) The principles followed in Smith v. Grayton Estates Ltd. should be applied to notices served by co-proprietors, with the result that a notice to quit which complies with the relevant formalities should be effective to terminate a tenancy and to entitle the proprietor serving it to sue for recovery of possession, even though he proceeds without the concurrence of other co-proprietors.

Sub-tenancies

4.10 The right of a sub-tenant to occupy the subjects of the sub-lease is dependent on the principal tenant's right to remain in possession of the subjects of the principal lease, which may of course be co-extensive. Thus, the sub-lease cannot persist beyond the expiry of the principal tenancy. When the principal lease is terminated, the sub-tenant's right to occupy the subjects of the sub-lease is extinguished. Nevertheless, the courts have decided that a sub-tenant cannot simply be ejected without warning on termination of the principal lease in a case where the principal tenant is empowered to sub-let, either expressly or by legal implication.[1] The same rule will apply where

[1] Robb v. Brearton (1895) 22R. 885.

the landlord has expressly consented to the granting of the sub-lease, notwithstanding any prohibition of sub-letting. Where, however, the sub-lease has not been authorised, the sub-tenant is in the same position as any other occupier without right or title and may be ejected without warning.[1]

4.11 The position of the authorised sub-tenant who remains in possession after the expiry of the principal lease is anomalous.[2] In many cases, the landlord will not have been a party to the sub-lease. Thus, there can be no question of the sub-tenant's continuing possession being based on tacit relocation, since there will be no contractual relationship which may be continued. In other cases, the landlord may have been a party to the sub-lease as a consenter. Special provision is made in section 17 of the Rent (Scotland) Act 1971 for the protection of sub-tenants of dwellinghouses which are subject to a "protected" or "statutory" tenancy. Under that section, where the principal tenancy is terminated on specified grounds, the sub-tenant is deemed to become the tenant of the landlord, on the same terms as the original sub-tenancy. In the absence of such statutory provision, or of special agreement, the legal basis for the sub-tenant's continuing possession is unclear.

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[1] Rankine, pp. 520/521.
Paton & Cameron, pp. 224 and 257.

[2] Research Paper, para. 2.29.

4.12 The courts, while recognising the authorised sub-tenant's right to some form of notice, have expressly declined to comment on the legal basis for his continued possession.[1] There are, however, indications that the courts were assuming that notice could be served by the landlord on the sub-tenant[2] and that the notice would require to be such as could be founded on in an action of removing. Unfortunately, this last point begs the question, since the period and form of a notice sufficient to form the basis for an action of removing depend at present not only on the nature of the subjects let but also on the period of the lease.[3] In the case of the sub-tenant remaining in possession after termination of the principal tenancy, there will normally be no lease on which to base such a calculation. We are therefore attracted to the suggestion made by Mr Duncan in paragraph 5.5 of the Research Paper to the effect that, after the expiry of the principal tenancy, the landlord should be able to terminate any authorised sub-tenancy upon the minimum statutory period of notice and that the effective date of such notice should not be tied to any particular date or term. We invite comments on that suggestion.

4.13 Where an authorised sub-tenancy is to be terminated at the same time as the principal tenancy, notice may be

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[1] Robb v. Brearton cited above, per Lord Adam at p.887.

[2] Robb v. Brearton cited above, per Lord M'Laren at p.888 and see also Robb v. Menzies (1859) 21 D. 277.

[3] See para. 2.18 above.

served either by the principal tenant or by the landlord.[1] The application of the Act of Sederunt of 1756, which provides that proceedings or warnings against the principal tenant are to be effectual against sub-tenants, appears to be limited to unauthorised sub-tenancies under agricultural leases.[2] The position of sub-tenants of agricultural holdings is further regulated by the 1949 Act.[3] We suggest below that the Act of Sederunt of 1756 should be repealed, but we do not think that the general position, in terms of which the appropriate notice may be given either by the landlord or by the principal tenant, requires to be modified. We would suggest, however, in line with our proposal relating to proceedings raised by a purchaser on the basis of a notice to quit served by the seller,[4] that it should not be necessary for notice to quit served by the principal tenant to be assigned to the landlord, and would welcome comments on that suggestion.

4.14 Somewhat different considerations may apply where the sub-tenancy is to be terminated prior to the expiry of the principal lease. In that situation, the normal rules as to service of notice of termination apply as between the principal tenant and the sub-tenant.[5] The landlord in

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[1] Robb v. Menzies cited above.

[2] See Research Paper, paras. 5.2 and 5.4.

[3] S.27. See also Gill, para. 32.

[4] See para. 4.1 above.

[5] See Research Paper paras. 4.14-4.15, and para. 5.5 below for discussion of the tenant's title to sue.

the principal tenant will not normally be involved unless the sub-tenancy has been entered into without his authority and in the absence of any implied legal power to sub-let. In such a case, it appears that the proper course is for the principal tenant to be called as an additional defender in proceedings against the sub-tenant. We return to this below, along with the question of citation as defenders of sub-tenants whose identity is unknown.[1]

4.15 A question is raised in the Research Paper as to whether authorised sub-tenants should be entitled to receive notice of termination of the principal tenancy, as distinct from any entitlement to be called as defenders in removal proceedings which might affect their right to remain in possession.[2] We consider, however, that the proposals discussed in the preceding paragraphs will offer adequate protection to sub-tenants in any question of termination of leases or sub-leases, so that the suggested procedure is unnecessary. In addition, the difficulties of service of notice in cases where the existence of the sub-tenancy or identity of the sub-tenant is unknown are such as to render any such procedure unduly cumbersome or unworkable.

Assignation

4.16 Questions as to entitlement to receive notice of termination of a tenancy may also arise where the tenant's

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[1] See paras. 7.4-7.5 below.

[2] See Research Paper, para. 5.6.

interest has been assigned or where the interest of either the landlord or the tenant has been assigned in security. The Act of Sederunt of 1756 provides that where a tenant's interest under a lease has been assigned but the assignation has not been intimated by instrument then proceedings or warnings against the original tenant will be effective against the assignee. This appears to be the position at common law in respect of urban as well as agricultural leases, even though the application of the Act of Sederunt is restricted to the latter.[1] We propose, as suggested in the Research Paper,[2] that the rules should be retained, subject to clarification of the requirements for due intimation. Following Mr Duncan's suggestion, we consider that, in the absence of actings on the landlord's part indicating knowledge of the assignation, such as acceptance of rent from the assignee, only written intimation, or the registration or recording of the assignation, should be sufficient. We note that the assignee's title to remove sub-tenants depends also on due intimation of the assignation.[3]

4.17 Assignation in security of the landlord's interest may affect relations between the landlord and the tenant in a number of ways. First, a problem may arise as to the landlord's title to sue for removal of the tenant in cases where the security is constituted by an ex facie absolute disposition by the party from whom the landlord purchased

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[1] See Research Paper, para. 5.2

[2] See Research Paper, para. 5.3

[3] See Research Paper, para. 4.14.

the subjects in favour of the landlord's creditors. In such a case, the landlord will not be infeft. As we have suggested that the right to serve notice of termination should coincide with the right to sue for recovery of possession,[1] we note at this point the suggestion made by Mr Duncan that evidence of the landlord's radical or reversionary right should be sufficient to entitle him to proceed.[2] The question of title to sue is discussed further below.[3] The same problem will not arise where the assignation is effected by way of a standard security,[4] since the landlord will be infeft under such an arrangement.

4.18 Second, the statutory conditions applicable to standard securities in the absence of an agreement to the contrary prohibit the letting of the security subjects without the prior written consent of the creditor.[5] A lease granted in breach of that condition by the debtor under a standard security may be subject to reduction at the instance of the creditor, with the result that the tenant may be removed by the landlord's heritable creditor without notice of termination.[6] Doubts under earlier legislation about

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[1] See para. 4.7 above.

[2] Research Paper, para. 4.16.

[3] See Part V.

[4] Introduced by the Conveyancing and Feudal Reform (Scotland) Act 1970 for heritable securities created on or after 29 November 1970.

[5] 1970 Act, s.11 and Schedule 3, standard condition 6.

[6] Trade Development Bank v. Warriner & Mason 1980 S.L.T. 223.

the creditor's title to sue for the tenant's removing appear to have been resolved.[1] Third, in the event of the landlord being in default under the standard security, in terms of standard condition 9, the heritable creditor may enter into possession of the security subjects, recover rent due under the lease and exercise his debtor's other rights in relation to the granting and management of leases.[2] Thus, the heritable creditor will stand in for the original landlord in any further dealings relating to the tenancy.

4.19 Where the interest of the tenant has been assigned in security, the same problems may arise in relation to any sub-tenancy granted after the creation of the security.[3] In addition, the question arises as to whether the tenant's creditor should be entitled to notice of termination of the tenancy. A suggestion that a tenant's creditors should have the same right as the tenant to receive notice of irritancy was considered in our Report on Irritancies in Leases.[4] However, in that case we recognised, as with sub-tenancies, that a right to be notified would be useless without some concomitant right to proceed with the tenancy in place of the tenant, and that the introduction and operation of such a scheme would be fraught with difficulties. We consider that similar difficulties would be encountered if

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[1] See Research Paper, para. 4.17 and Trade Development Bank.

[2] 1970 Act, s.21 and Schedule 3, standard condition 10.

[3] Trade Development Bank v. Warriner & Mason cited above. But see also "Real Conditions in Standard Securities" by K G C Reid, 1983 S.L.T. 169 and 189.

[4] Cited above.

such a scheme were to be introduced for termination at the ish and that, in any event, the case for introduction of the procedure would be weaker. The creditor will be presumed to know the stipulated endurance of the lease which forms his security and cannot expect the lease to continue beyond the date of expiry, whereas he will not normally be able to anticipate irritancy giving rise to premature termination of the secured lease. We therefore propose no change. In the case where a creditor has entered into possession on default by the tenant, he will not be entitled to remain in possession beyond the expiry of his debtor's lease. However, in terms of the creditor's powers of management under standard condition 10, he will be entitled to challenge any notice of termination of the tenancy on any grounds which would have been available to the original tenant. The creditor in possession should therefore be entitled to receive notice of termination in place of the original tenant.

Death of landlord or tenant

4.20 The practical problems involved in the termination of a lease after the death of one of the parties are discussed by Mr Duncan in general terms and by Mr Murray[1] with specific reference to agricultural leases. We shall examine the problems involved in serving, or in responding to, notices of termination following the death of one of the parties.

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[1]See Appendix, paras. 21-28.

Death of tenant

4.21 Except where a lease is expressed so as to expire on the death of the tenant, section 16 of the Succession (Scotland) Act 1964 provides that the tenant's interest under the lease will vest after his death in his executor for administrative purposes by virtue of the executor's confirmation under section 14 of that Act. The executor is then empowered, notwithstanding any express or implied prohibition of assignation which would have bound the tenant, to transfer the tenant's interest in fulfilment of a bequest or, failing such a bequest, to any person who would be entitled to succeed to the tenant's estate on intestacy (i.e. in the absence of a valid will).[1] The Act provides that this power must be exercised within one year of the tenant's death or, in the case of an agricultural lease, of the resolution of any question as to the validity of a bequest.[2] A transfer of the tenant's interest by an unconfirmed executor may be validated by subsequent confirmation.[3] Where the executor does not exercise his power within the time limit or is satisfied that it will not be possible so to dispose of the tenant's interest, the lease may be terminated by notice from the executor or from the landlord. The period of notice is not less than one nor more than two years for agricultural leases, unless another period is agreed, and six months for other leases unless a shorter period is prescribed by statute.[4]

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[1] Succession (Scotland) Act 1964, s.16(2).

[2] Succession (Scotland) Act 1964, s.16(3).

[3] Garvie's Trs. v. Garvie's Tutors 1975 S.L.T. 94.

[4] Succession (Scotland) Act 1964, s.16(4).

Thus, where the lease has more than on year to run after the tenant's death and an executor is confirmed timeously, section 16 will either permit transfer of the tenant's interest or will enable the lease to be terminated sooner than would otherwise have been possible.

Notification of bequest or transfer

4.22 Except as regards agricultural leases, for which special provision has been made,[1] there is no requirement for the person to whom the tenant's interest is bequeathed or transferred to notify the landlord of his acceptance of the bequest or transfer. It is suggested in the Research Paper that such provision might usefully be introduced for non-agricultural leases, in order that the landlord may be put in a position to exercise his rights with regard to termination of the lease.[2] We would welcome comment on this suggestion. Whether or not the suggestion is adopted, it would seem that some consideration should be given to clarification of the consequences of failure to comply with the requirement as presently applicable to agricultural leases.[3] Although the consequences are not spelled out in the 1949 Act, it is suggested that failure to give notice timeously is likely to result, in the absence of agreement with the landlord, in loss of the right to claim the

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[1] 1949 Act, ss.20 and 21.

[2] See Research Paper, para. 3.43.

[3] See Appendix, paras. 22 and 24.

tenancy as legatee or acquirer.[1] It has been suggested elsewhere that the consequences of acceptance of a valid bequest followed by failure to notify the landlord will be termination of the tenancy, since acceptance of the bequest will deprive the executor of any power to transfer the tenant's interest under section 16(2) of the 1964 Act.[2] Acceptance of an invalid bequest will not, however, have the same result. As to failure by an acquirer who has taken the interest on transfer from the tenant's executor to give timeous intimation, it is not clear whether the consequence is termination of the tenancy or a return to the position whereby the interest is available for transfer as if on intestacy.[3]

4.23 A further problem arising from the provisions of the Agricultural Holdings (Scotland) Acts relating to the transfer of a tenant's interest on death concerns the landlord's right to object to the legatee or acquirer. We do not wish to suggest that a similar right should be conferred on landlords in non-agricultural leases. However, we would welcome views on whether there should be any prescribed time limit, in respect of agricultural leases, for the making of an application to the Land Court, either under section 20 of the 1949 Act for an order declaring the legatee to be tenant or under section 21 of that Act for an order terminating the lease.[4]

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[1] "Agricultural Law", Law Society of Scotland, 1982, pp. 122/123 and 128.

[2] Gill, para. 298.

[3] "Agricultural Law", p.128.

[4] See Appendix, para. 24(f).

Absence of executor

4.24 Section 16 of the 1964 Act only applies in cases where the tenant's interest has vested in the executor by virtue of the latter's confirmation under section 14 of the Act. However, it appears that in many cases no executor will have been appointed or, if appointed, obtained confirmation to the tenant's estate. This situation may make it very difficult, if not impossible, for the landlord to serve notice of termination of the lease.[1] There is authority to suggest that a lease which is running on tacit relocation at the time of the tenant's death may terminate without notice if, on the expiry of the period of one year from the date of death, the tenant's executor has failed to confirm to the estate and to transfer the tenant's interest in the lease.[2] And it was decided in a recent, unreported case that, at common law, a lease could not continue beyond its ish if the tenant had died but no executor had been confirmed prior to that date, since there was no-one vested in the tenant's interest on whom tacit relocation could operate.[3] Nevertheless, in terms of the 1949 Act, the lease of an agricultural holding can be brought to an end only by notice to quit served in accordance with section 24 of that Act. Furthermore, "tenant" is defined in section 93 of the Act as including, amongst others, the executor, administrator, assignee, heir-at-law, legatee or next-of-kin of a tenant. Thus, it would appear

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[1] See Research Paper, para. 3.43.

[2] Lord Rotherwick's Trs. v. Hope 1975 S.L.T. 187.

[3] Coats v. Logan, unreported 1982 (Lord Ross). See also Tenants' Rights, Etc. (Scotland) Act 1980, s.12(1)(a).

that the common law position has been superseded, at least as regards agricultural leases, by a statutory requirement for notice to quit. However, there may be some doubt as to the effect of a notice served on, for example, a deceased tenant's legatee or next-of-kin to whom the tenant's interest has not been transferred.[1]

4.25 Even if it is possible for a lease to be terminated without notice in the circumstances described above, it might be thought preferable that there should be some provision for service on unconfirmed executors, or on other persons interested in the estate of the deceased tenant.[2] Such a provision would assist the landlord wishing to terminate the lease on expiry in ordinary course or in exercise of his rights on the occurrence of a breach of contract or an irritancy. In addition, it should perhaps be made clear whether a lease which is due to expire within a year of the tenant's death can be terminated by due notice served by the landlord, notwithstanding the provisions of section 16. This is a point on which there appears to be no clear authority. On the one hand, it might be argued that it is implicit in the scheme of section 16 that the executor must be free to deal with the tenant's interest at any time up to the expiry of a year from the date of the tenant's death, or earlier termination in virtue of a notice given under section 16(3) of the 1964 Act. On the other hand, it may be argued that it cannot have been the legislators' intention that section 16 should prevent a landlord from terminating a lease at

[1] See Research Paper, para. 3.45 and Meston, The Succession (Scotland) Act 1964, 3rd. edn., 1982, p.90.

[2] See Research Paper, para. 3.46.

the earliest date on which he would have been able to do so had the tenant survived.

4.26 If provision is to be made for notice to be served on interested parties other than confirmed executors, two related questions arise. The first concerns the parties who may receive service and the address at which they may do so, and the second relates to the right of any party in receipt of a notice to take such steps as may be necessary to preserve the tenant's interest. Mr Duncan suggests[1] that any provision should permit the tenancy to be terminated in normal course and should also ensure that adequate opportunity is given for preservation of the tenant's interest, for example, by service of a counter-notice under section 25 of the 1949 Act. Mr Duncan concludes that these requirements could best be met by provision for service of a notice on the executors (un-named) of the tenant at the address of the tenanted subjects, with an additional requirement for a copy of the notice to be sent to the sheriff clerk for the Sheriff Court District in which the subjects are situated.[1] It is not, however, suggested that any duties should be imposed on the sheriff clerk with regard to publication of copy notices served on him. As to the right of response, Mr Duncan suggests that, in the absence of executors, it should be open to any person interested in the tenant's estate, either under his will or on intestacy, to take the necessary action.[2] We therefore

[1] See Research Paper, para. 3.46.

[2] See Research Paper, para. 3.47.

invite comments on the foregoing suggestions and on Mr Duncan's related proposal that only executors should be entitled to serve notice of termination.[1]

Death of landlord

4.27 The problems ensuing from the death of the landlord during the currency of a tenancy will be less serious in practice than those which may result from the death of the tenant.[2] If the suggestions noted above for service of notice on un-named executors of the tenant are accepted, similar provision could be made for service on the landlord's executors. However, a problem might arise as to the appropriate address for service. The address of the tenanted subjects would clearly be inappropriate. The notice is more likely to come to the attention of those interested in the landlord's affairs if served at the last known address of the landlord or his agent. Provision could be made for copy notices to be sent to the sheriff clerk for the Sheriff Court District in which the tenanted subjects are situated, without the sheriff clerk being under any duty to publish receipt of copy notices. The right to respond on receipt of such a notice would similarly extend to all parties interested in the landlord's estate, either under his will or on intestacy. The right of parties other than duly appointed executors would not extend to the service of a notice of termination.

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[1] See Research Paper, para. 3.49.

[2] See Research Paper, para. 3.48.

4.28 In the remainder of the Memorandum we consider a number of problems relating to actions for recovery of possession of heritable property, whether raised on the termination of a lease or otherwise. We examine preliminary problems relating to title to sue and to defend such actions, procedural problems regarding the form of the action, including the question of caution for violent profits, and finally problems relating to the enforcement of decree.

PART V TITLE TO SUE

General

5.1 The pursuer in any action may be required to establish his title to sue. In an action for recovery of possession of heritable property, this means that the pursuer's title must be completed by infeftment.[1] The position of liferenters and tenants as pursuers in such actions is discussed below.[2] The title of an executor will be completed by confirmation.[3] The Law Reform Committee observed that infeftment was not necessary for the disposal of property[4] and therefore recommended relaxation of this rule to make actions for recovery of possession of heritable property competent at the instance of "a person having right to the subjects by a title which has not been completed but which is capable of completion."[5] We think that this should be taken to mean that the pursuer's title should be capable of completion without the intervention of or assistance from any other person, and that the recommendation should be implemented on that basis. Under the present rule, there is some doubt as to the stage at which the requirement for infeftment must be satisfied.[6]

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[1] I.e. by recording in the Register of Sasines or registration in the Land Register.

[2] See paras. 5.3 and 5.5 below.

[3] See para. 4.21 above and Research Paper, paras. 3.49 and 4.8.

[4] In terms of the Conveyancing (Scotland) Act 1924, s.3.

[5] Second Report, para. 17.

[6] See Research Paper, para. 4.2 and Walker v. Hendry, cited above.

The Law Reform Committee's recommendation was designed to be applied at the stage of taking decree.[1] It has been suggested above that the rules governing service of notice to quit and title to sue should be consistent.[2] We think that consistency would be achieved if the requirement discussed above were to be applied from the stage of service of notice or of raising proceedings, thus excluding the purchaser under missives.[3] We would therefore welcome comments on the foregoing.

Joint property

5.2 We have suggested, in relation to the termination of leases of property owned or tenanted jointly, that the rules governing title to sue and the service of notice to quit should be consistent,[4] and further that notice served by one co-proprietor, with or without the consent of other co-proprietors, should be effective to terminate a lease.[5] The effect of a notice served by one joint tenant is already recognised.[6] It is competent for one co-proprietor to take proceedings for the removal of an "intruder" without the concurrence of other co-proprietors.[7] Since the distinction between actions of removing and actions of

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[1] Second Report, para. 17.

[2] See para. 4.7 above.

[3] See para. 4.1 above.

[4] See para. 4.7 above.

[5] See para. 4.9 above.

[6] Smith v. Grayton Estates Ltd. cited above.

[7] See para. 4.5 above.

ejection has largely been abolished following the introduction of the summary cause for recovery of possession of heritable property,[1] it is desirable that the rules as to title to sue should be the same whether the co-proprietor is seeking to remove a former tenant or to eject an "intruder". In this connection, we invite comment on the suggestion by Mr Duncan that a co-proprietor should be able to take proceedings for recovery of possession of heritable property without the concurrence of other co-proprietors only if the latter are called as additional defenders.[2] If that suggestion is accepted, a further question arises as to the point at which a co-proprietor whose title is incomplete should be entitled to be called as an additional defender. If the owner of a pro indiviso share in tenanted subjects disposes of his share, at what point should his successor be entitled to be called as an additional defender in his stead? From the point of view of the co-proprietor who is required to notify others, we suggest that the only workable solution is to restrict the right to be called as an additional defender to infeft co-proprietors as evidenced by the Registers. We do not consider, however, that any non-consenting co-proprietor called as an additional defender should be entitled to defend the action on the basis of non-consent. We would welcome views on whether the defences open to such additional defenders should be limited to those which would have been open to the tenant, plus the right to challenge the pursuer's title to sue.

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[1] Sheriff Court (Scotland) Act 1971, s.35 and see para. 7.8 below.

[2] See Research Paper, paras. 4.5 and 4.11.

Liferents

5.3 Similar problems may arise where a proper liferenter seeks to recover possession of heritable property without the consent or concurrence of the fiar. These are discussed in the Research Paper,[1] where it is suggested that provision might be made for the liferenter to be enabled to raise proceedings without the consent of the fiar, provided that the latter is called as a co-defender. We would welcome views on whether such a provision is either necessary or desirable and on whether there is any need for a similar provision to govern any action by a fiar without the consent of the liferenter. Where action requires to be taken under a trust liferent, this will normally be within the powers of the trustees and should not involve either the liferenter or the fiar.[2]

Debtors under *ex facie* absolute dispositions

5.4 Where the purchase of a property has been financed with a loan secured by way of an *ex facie* absolute disposition, the proprietor (i.e. the borrower) may never have been infeft.[3] The only evidence of his radical right, or reversionary interest, will be an unrecorded back letter or similar document. We support the suggestion in the Research Paper that it should be possible, subject to the terms of any agreement with the creditor for the borrower to establish his title to sue on production of the relevant back letter or other document,[4] and we invite comments thereon.

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[1] See Research Paper, paras. 4.12-4.13.

[2] Trusts (Scotland) Act 1921, s.4(c); and see Research Paper, para. 4.12.

[3] See para. 4.17 above.

[4] See Research Paper, para. 4.16.

Tenants

5.5 The difficulties involved in applying the Law Reform Committee's recommendation to actions at the instance of tenants are also discussed in the Research Paper.[1] Except in the case of registrable leases,[2] the tenant will not have a title capable of completion by recording. Thus, it is suggested that that requirement should be adapted in the case of non-registrable leases by substitution of a condition requiring that the pursuer should be entitled to immediate possession of the subjects.[1] Possession may be physical (i.e. actual occupation) or civil (i.e. an entitlement to receive the rents). Once again, we support and invite comments on that suggestion.

Factors or agents

5.6 The last case which requires to be examined under this heading concerns actions at the instance of factors or agents. Special provision is made in Rule 68 of the Summary Cause Rules for proceedings to be raised by factors and any other person authorised by law so to do. It applies only to leases for less than a year. The inclusion of such a rule gives rise to the following questions raised by Mr Duncan:[3]

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[1] Paras. 4.14-4.15.

[2] See Registration of Leases (Scotland) Act 1857, s.1 (as amended) and Land Registration (Scotland) Act 1979, s.3(3)(a).

[3] See Research Paper, paras. 4.18-4.19.

(i) Is it intended that there should continue to be, in the case of removings affecting lets for less than a year, a facility which will not be available in other cases to which the new summary cause applies?

(ii) Is it intended, despite the adoption of one common form of action for recovery of possession of heritable property, to maintain in this respect the distinction between summary removings as provided for in section 38 and the relative rules in the 1907 Act, on the one hand, and proceedings for recovery of possession generally, on the other?

PART VI TITLE TO DEFEND

Service of notice as admission of title

6.1 We have considered, in Part IV above, the rights of various classes of occupiers to receive notice of termination of a tenancy. In this section, we shall examine a number of related areas of difficulty concerning principally entitlement to defend an action for recovery of possession of heritable property. The first area of difficulty involves a general question as to whether any right or title on the part of an occupier can be inferred from the mere fact of notice of termination having been served on him. This is discussed by Mr Duncan,[1] who suggests that any problem which may exist could be avoided by an express statement by the landlord that notice was served without prejudice to the landlord's position on the matter of title. We are inclined to agree. As Mr Duncan observes, many of the difficulties in this connection have been removed by the introduction of a single form of summary cause for recovery of possession of heritable property applicable to former tenants and other persons entitled to notice of removal and to unauthorised occupiers who may be removed without warning. Nevertheless, we would welcome views on whether there is a need for a statutory provision making it clear that service of notice to remove does not imply recognition of any title to occupy.[2]

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[1] See Research Paper, para. 3.40.

[2] See also Second Report of Law Reform Committee, para. 14.

Joint property and liferents

6.2 We have suggested that it should be competent for a co-proprietor to take proceedings for recovery of possession, without the consent of other co-proprietors, provided that the others are called as co-defenders, and that a liferenter should be able to proceed by calling the non-consenting fiar as a co-defender.[1] Clearly, were these suggestions to be adopted, there would be no doubt as to the entitlement of the co-proprietors or fiar to defend the action. However, we have identified other categories of person in relation to whom difficulties may arise.

Sub-tenants

6.3 We have discussed the termination of sub-tenancies above with particular regard to the rules relating to service of notice.[2] As Mr Duncan notes, the right to receive notice of termination will normally coincide with the right to be called as a defender in removal proceedings.[3] However, one question which remains to be considered is the position of the principal tenant when an action is raised by the landlord against an unauthorised sub-tenant, who may be ejected without warning,[4] or against an authorised sub-tenant but without notice being given to the principal tenant.[5] It appears to be accepted

[1] See paras. 5.2 and 5.3 above.

[2] See paras. 4.10-4.15 above.

[3] See Research Paper, para. 5.1.

[4] See para. 4.10 above.

[5] See para. 4.14 above.

practice to call both the principal tenant and the sub-tenant in an action against an authorised sub-tenant, and there are also cases of actions against unauthorised sub-tenants in which the principal tenant has been called as an additional defender.[1] We consider that the principal tenant should be entitled to be called as a defender in any action for the removal or ejection of a sub-tenant, authorised or unauthorised, and we invite comments on that suggestion.

Creditors and others

6.4 In considering the effect of assignation of the interests of a landlord or tenant, we suggested that a creditor in possession should be entitled to receive notice of termination of the tenancy.[2] In terms of the rules governing heritable securities, the creditor will, in such a situation, be entitled to defend any action for recovery of possession. With regard to the termination of leases after the death of the tenant, we have suggested that it should be competent for notice to be served on executors (un-named) at the address of the tenanted subjects and for any person interested in the deceased's estate to take the necessary action on receipt of such a notice.[3] If the foregoing suggestion is acceptable, we would welcome views on whether the right of response should extend to defending any subsequent action of removal, or whether that should

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[1] See Research Paper, para. 5.4

[2] See para. 4.19 above.

[3] See para. 4.26 above.

be open only to the occupier against whom proceedings have been raised or, in a case where the subjects are vacant, the executors of the deceased.

Occupiers whose identity is unknown

6.5 There will be cases where the identity of a person entitled to receive notice or to be called as a defender will not be known to the landlord. The problem, which is a general one, is discussed by Mr Duncan with particular reference to the service of notices on sub-tenants.[1] We think, however, that a general solution is required, and this is examined further below.[2]

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[1] See Research Paper, paras. 5.6-5.8.

[2] See paras. 7.4-7.5 below.

PART VII THE SUMMARY CAUSE

7.1 Under this heading, we shall consider a number of procedural points raised in Chapters 7 and 8 of the Research Paper relating to the form and conduct of actions for recovery of possession of heritable property and to the enforcement of decrees granted therein.

Period of induciae

7.2 The term induciae describes the period between the service of a summons and the date by which the court must be notified of the recipient's intention to enter defences. Thus, in a case where there is no requirement for notice to quit to be served on the occupier,[1] the period of the induciae may be the occupier's only warning of an action against him for recovery of possession of the property. In terms of Rule 68A of the Summary Cause Rules, it is possible, in an action against a person in possession without right or title, for any period which would normally require to be observed in the processing of an action for recovery of possession to be shortened or dispensed with. Although it is understood that it has not been the practice of sheriffs to dispense entirely with the period of induciae, that is nevertheless theoretically possible.[2] Under the procedures which were available for the ejection of unauthorised occupiers prior to the introduction of the new summary cause, the induciae could

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[1] See e.g. paras. 4.5 and 4.10 above.

[2] See Research Paper, paras. 7.3-7.6.

be reduced to a minimum of 48 hours.[1] A question therefore arises as to whether there should also be, under the Summary Cause Rules, some form of minimum protection for occupiers without right or title.

7.3 In order that an application may be made under Rule 68A for shortening of or dispensation with the induciae, it appears that the pursuer must aver in the statement of claim which is lodged with the summons that the defender is in fact in possession without right or title.[2] However, there are many classes of occupier who may fall into that category. Apart from the case of the unauthorised sub-tenant discussed above,[3] there are those whose rights of occupancy are insufficiently exclusive to constitute a tenancy, such as "licensees".[4] Squatters in residential premises and workers engaging in a "work-in" or "sit-in" may also fall into the category of occupiers without right or title.[5] Even if ejection without court order may still be competent in some of these cases,[6] we consider that adequate and speedy court procedures should be available for the resolution of any questions as to title and for the removal of unauthorised occupiers. However, we also think that a balance should be struck between the provision of such procedures and the protection of the

[1] See Research Paper, para. 7.5.
[2] See Research Paper, para. 7.3
[3] See para. 4.10 above.
[4] See Research Paper, para. 7.10.
[5] See Plessey Co. PLC v. Wilson 1983 S.L.T. 139.
[6] See Research Paper, para. 7.13

legitimate interests of those against whom such proceedings may be directed.[1] We therefore invite views on whether there is any class of unauthorised occupier of heritable property in respect of whom the sheriff's power to shorten or dispense with the induciae under Rule 68A of the Summary Cause Rules should be limited.

Problems of citation

7.4 The procedures discussed above for speeding up the process of recovery of possession of heritable property will be of little value if there is doubt or ignorance as to the identity of the unauthorised occupiers.[2] As Mr Duncan observes, the problem is most likely to occur in cases of multiple occupancy, particularly where the composition of the group in occupation is not static. The Summary Cause Rules make provision for citation by public advertisement[3] when the address of the defender is unknown. However, the rules do not cater for the situation in which the defender's identity is unknown.

7.5 A number of solutions to this problem have been suggested and are discussed in the Research Paper.[4] One involves the pursuer in calling at the property in question accompanied by an officer of court who would be authorised to demand details of the name and address of each individual occupier, thus enabling a summons to be completed. However, as Mr Duncan points out, this solution

[1] See Research Paper, para. 7.6.
[2] See Research Paper, paras. 7.7-7.8.
[3] Rule 8.
[4] See paras. 7.7-7.9.

would itself involve problems of time and expense and might well run into serious difficulties of enforcement. Other suggestions are variants on a scheme permitting publication or other advertisement of a summons craving warrant to eject all unauthorised occupiers. Those answering the summons would be entitled to defend the action. We consider that there may be more merit in that scheme and therefore invite comments on whether provisions along those lines would be desirable. It has been suggested that a solution could also be applied to actions of interdict designed to reinforce an action for recovery of possession.[1] However, we doubt whether its application to such cases would be appropriate. Given the serious consequences of a breach of interdict (which may amount to contempt of court), it may be thought that inderdict should be granted only against named and identifiable persons.

Composite actions

7.6 The pursuer in an action for recovery of possession of heritable property may wish to claim an alternative or additional remedy. He may claim payment of a sum of money, e.g. by way of damages or arrears of rent, or interdict against resumption of the unauthorised occupation. In an extraordinary removing based on an irritancy,[2] the pursuer's first conclusion may be for declarator of the irritancy. Not all of these composite actions may proceed

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[1] See Research Paper, para. 7.9.

[2] "Irritancy" is commonly used to denote an event specified in a lease as justifying termination. See further our Report on Irritancies in Leases, cited above.

as summary causes. Section 35 of the Sheriff Courts (Scotland) Act 1971, which introduced the new summary cause, provides that actions for the recovery of possession of heritable property should proceed as a summary cause except where there is an alternative or an additional claim for payment of a sum of money exceeding £1,000.[1] Thus, where the action includes a pecuniary claim which exceeds the summary cause limits, it cannot proceed as a summary cause. However, as that is the only exception specifically stated in the 1971 Act, a question arises as to which form of process is appropriate for other types of composite action. Actions for declarator or interdict alone cannot proceed as summary causes.

7.7 Reference is made in the Research Paper to a recent case in which an ordinary action for ejection and interdict was held by the sheriff to be incompetent.[2] The sheriff's judgment was based on the fact that only composite actions involving payment of a sum in excess of the summary cause limits are excluded from the procedures introduced by section 35 of the 1971 Act. He was therefore of the opinion that the action for ejection remained within the class "which must proceed by way of a summary cause". The sheriff indicated that the proper way for the pursuer to obtain interdict was by way of a separate ordinary action and referred to the possibility that the two actions could be conjoined if the action for recovery of possession were directed to be treated as an ordinary action under section

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[1] 1971 Act, s.35(1)(c). See also Research Paper, para. 7.19.

[2] Disblair Estates Ltd. v. Jackson, Aberdeen Sheriff Court, 24 November 1982, discussed in para. 7.19 of the Research Paper.

37(2) of the 1971 Act. Such an approach is difficult to reconcile with the practice of dealing with extraordinary removings by way of composite actions under ordinary procedure in the sheriff court. This raises a more general question regarding the scope of the summary cause, which we now discuss.

Scope of the summary cause

7.8 Although the Law Reform Committee recommended that there should be "one form of action for use in all cases where it is desired to recover possession of heritable property from an occupier,"[1] that has not been the result of the implementation of section 35 of the 1971 Act.[2] Statutory exceptions to the use of the new summary cause are to be found in section 29 of the Conveyancing and Feudal Reform (Scotland) Act 1979, concerning actions for possession by the creditor under a standard security, and in section 9 of the Land Tenure Reform (Scotland) Act 1974, concerning the enforcement of the prohibition of long leases of residential property, which prescribe summary application and ordinary procedure, respectively. Extraordinary removings involving composite actions may proceed either in the Court of Session or as ordinary actions in the sheriff court.[3] Thus, the scope of the summary cause for recovery of possession of heritable property is somewhat limited. We would be interested to receive views on

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[1] Second Report, para. 8.

[2] See Research Paper, paras. 7.16-7.19.

[3] See paras. 7.6-7.7 above and Research Paper, para. 7.18.

whether its scope is thought to be unduly limited. We would also welcome comments on the practice of courts in dealing with composite actions.

Appeals

7.9 Mr Duncan observes that the introduction of the new summary cause procedure has meant that, in some cases which might formerly have proceeded as ordinary causes, there has been some reduction in the opportunities available for appeal.[1] The right of appeal is limited to the final judgment, and to a point of law only. Thus there is no right of appeal against the sheriff's decision on the facts in dispute, nor can there be any appeal against interlocutory judgments such as a decision on the need to find, or on the amount of, caution.[2] While we appreciate that this is in line with a general simplification of procedures, we would be interested to receive views on whether it gives cause for concern in practice.[2]

Caution for violent profits

7.10 The Law Reform Committee for Scotland recommended that "it should be provided that caution for violent profits may competently be sought in all actions for the recovery of possession of heritable property."[4] "Violent profits" are described by the Committee as "the aggregate of the amount of any damage done by the defender to the

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[1] See Research Paper, para. 7.15.

[2] See also para. 7.10.

[3] Second Report, para. 16.

subjects and the profit which the pursuer could have made out of the property during the period of unauthorised possession." The present position is that in any defended action of removing the sheriff may order the defender to find caution for violent profits.[1] There is a doubt whether the sheriff may competently make such an order in a defended action for ejection[2] or in an extraordinary removing.[3] The questions that appear to arise for consideration are as follows:

(1) Do consultees agree that the sheriff should have discretion to order the finding of caution for violent profits in all actions for the recovery of possession of heritable property?

(2) Should it be open to the sheriff to make such an order at any stage in the proceedings?[4]

(3) Should it be competent for the sheriff to proceed either by requiring the defender to provide a bond of caution or other guarantee or by requiring him to consign an appropriate sum as caution for violent profits?

Issue of extract decree

7.11 The issue of an extract decree is a necessary prerequisite for enforcement. The Summary Cause Rules provide that at least 14 days must elapse between the date

[1] Schedule 1 to the 1907 Act, Rule 103.

[2] See Research Paper, paras. 6.3 to 6.5.

[3] See Research Paper, para. 6.6.

[4] See Research Paper, para. 6.11.

of granting decree and the issue of an extract thereof.[1] If an appeal is lodged within that period, no extract may be issued until the appeal has been heard. There is, however, an exception to this rule in respect of actions against occupiers without right or title.[2] In such cases, the period of issue of the extract decree may be shortened on application. Mr Duncan observes that the rule is more restrictive than those which applied prior to the introduction of the new summary cause and suggests that a general discretionary provision for shortening the period might be desirable.[3] We invite comments on that suggestion.

Enforcement of decree

7.12 Normally, diligence on an extract decree granted in a summary cause must proceed on a charge of 14 days.[4] However, it appears that no charge is required in the case of a decree for recovery of possession of heritable property. The reasons for this are discussed in the Research Paper.[5] The effect is that a decree may be enforced immediately after the extract has been issued. Although the position is no different from that which obtained under some of the procedures which were replaced by the new summary cause, we understand that it has been the practice of sheriff officers to give warning of their intention to enforce decree in summary cases.[6] It is suggested in the Research Paper that

1Rule 89.

[2]Rule 68A and see para. 7.2 above.

[3]See Research Paper, para. 8.1.

[4]Rule 91.

[5]See Research Paper, para. 8.2.

[6]See Research Paper, para. 8.3.

warnings should be legally required in all cases and that the period should be 72 hours unless varied by the court.[1] We accept that there will be cases of unauthorised occupation in which immediate enforcement of a decree for recovery of possession would be reasonable. However, we doubt whether such a practice would be universally acceptable, given the variety of different classes of occupier who may be removed or ejected by way of a summary cause. The suggestion for a basic period of warning, subject to variation according to circumstances, appears to be sufficiently flexible to cope with the situation which may arise. We therefore invite comments on whether provisions should be made along these lines, as suggested in the Research Paper.

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[1] See Research Paper, para. 8.3.

PART VIII MISCELLANEOUS

Letters of ejection

8.1 We have referred above to the possibility of decree of removing being granted in the Court of Session in a composite action involving, for example, declarator or reduction.[1] It appears that if the unsuccessful defender subsequently refuses to remove, the pursuer is required to execute and register a charge and then to obtain letters of ejection directing the sheriff of the appropriate District to eject the occupier.[2] Although we understand that the procedure is rarely used, we agree with the suggestion in the Research Paper that it is unduly cumbersome. We therefore invite views on whether the requirement to obtain letters of ejection should be abolished.

Ejection without court order

8.2 Physical ejection of unauthorised occupiers, without an order of the court, was competent at common law and is probably still competent in certain circumstances.[3] These have been limited by statute[4] and by the courts.[5] The party taking such action may be liable in damages, e.g. for wrongful ejection. Although this topic is discussed further in the Research Paper, it is outwith the scope of this Memorandum.

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[1] See para. 7.8 above.

[2] See Research Paper, para. 8.10.

[3] See Research Paper, para. 7.13.

[4] E.g. Rent Act 1965, s.32.

[5] Brash v. Munro & Hall (1903) 5 F. 1102.

Repeals

8.3 If the reforms discussed in the foregoing sections of this Memorandum are implemented, a number of current statutory provisions will be rendered obsolete. In particular, we consider that the Act of Sederunt of 14 December 1756 will, in so far as it is not already obsolete, have been superseded. We also consider that sections 34-38A of the 1907 Act should be repealed.[1] Sections 34 and 35 of that Act, in so far as providing for summary diligence against tenants are described in the Second Report of the Law Reform Committee as "so drastic, and their operation so fraught with hazard to any who seek to invoke them, that they are very seldom, if ever, used."[2] Accordingly, it seems undesirable to retain or re-enact the provisions of the sections, and sections 36-38A of the 1907 Act will no longer have a function.[3]

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[1] See Research Paper, paras. 3.26, 3.33, 3.39, 4.19, 7.2 and 8.9.

[2] See para. 5.

[3] It may, however, be necessary for part of s.38 to be re-enacted if the retention of special rules for actions at the instance of factors or agents is favoured.

PART IX SUMMARY OF QUESTIONS

1. Should the requirements of a notice to prevent the operation of tacit relocation be the same as those of a notice on which to found removal proceedings? (para. 2.1).

2. As regards leases of subjects other than agricultural holdings, should the distinctions between the requirements imposed upon a landlord and those imposed upon a tenant as regards the form of notice of termination of lease be abolished? (para. 2.2).

3. Should it be provided that notice to terminate a lease must always be in writing? (para. 2.3).

4(a) Should it be provided that a notice to terminate a lease and any additional statutory statement which it must or may contain must be expressed within the same document? or

(b) Should it be provided that any such statement may be contained in or may accompany the notice? or

(c) Is it desirable not to legislate in the matter at all? (paras. 2.4 to 2.7).

5(a) In respect of all leases of subjects other than agricultural holdings (see question 9 below), should there be one standard form of notice of termination for use by landlords and tenants?

(b) Are there any categories of lease in respect of which a standard form would not be appropriate?

(c) Should the form of notice be provided by statute (see para. 2.14 for specimen form)?

(d) If so, should notice in this form alone be recognised as effective?

(e) Alternatively, should a notice, although not in the statutory form, be effective if it conveys with reasonable clarity the required information?

(f) If so, should the required information be specified by statute? (paras. 2.8 to 2.11).

6. Should it suffice for a notice by a landlord to refer only to the termination of the lease at a specified date or should it contain a specific requirement that the tenant is to remove at that date? (para. 2.11).

7. Should a requirement (as in Form L in Schedule 1 to the Sheriff Courts (Scotland) Act 1907) to refer in a notice of termination to the lease or other foundation for service of the notice be retained or should the inclusion of such references be discretionary? (para. 2.12).

8. Where the notice is given by an agent or by an officer of court, should it be necessary to state on whose behalf it is given? (para. 2.13).

9. Is it practicable to adapt any standard notice of termination of a non-agricultural lease to accommodate a notice of termination relating to an agricultural holding? (para. 2.16).

10. Should any prescribed minimum period of notice of termination of a lease apply whatever the form of process and irrespective of any different provision in the lease between the parties or otherwise agreed by them? (para. 2.19).

11. Is there agreement in principle with the view of the Law Reform Committee that the nature of the leased subjects should be disregarded in any consideration as to what should be the appropriate minimum period for notice of termination of a lease? (para. 2.20).

12. On the assumption that the 28 day minimum period of notice is retained for leases of dwellinghouses, then, in the interests of uniformity, should a minimum period of 28 days or, if shorter, the period of the lease be introduced for other leases, except leases of agricultural hoidings? (para. 2.21).

13(a) If the Law Reform Committee's view is not accepted, is there any criterion other than the extent of the leased subjects (as in the Sheriff Courts (Scotland) Act 1907) to which the period of notice should be related?

(b) Are there any kinds of lease for which minimum periods of notice should not be prescribed or for which any such period of notice should apply only in the absence of any conventional provision to the contrary? (paras. 2.20 and 2.21).

14. Is it considered that every period of notice should be calculated by reference only to the period intervening between the date of service of the notice and the date on which it is to take effect? (para. 2.22).

15. Should it be provided that where a tenant enters or removes from a farm at the term of Whitsunday or Martinmas, the entry and removal terms should in the absence of express stipulation to the contrary be 28 May or 28 November? (para. 2.24).

16(a) Should a landlord be required to give notice prior to the exercise of a power of resumption?

(b) If so, should the period of notice be 2 months in respect of resumption of agricultural holdings and (i) 28 or (ii) 40 days in respect of other subjects? (para. 2.25).

17. Where leased subjects are used partly for agricultural and partly for non-agricultural purposes, should it be provided that the subjects should be regarded either as wholly an agricultural holding or as wholly non-agricultural, the test to be applied being that of predominant user? (para. 2.26).

18. Where there is uncertainty as to the date of termination of a lease, should there be a rebuttable presumption that the lease terminates at Whitsunday (i.e. 28 May)? (para. 2.28).

19(a) Should there be provision for the removal of any doubt as to the application of sections 24 and 90 of the Agricultural Holdings (Scotland) Act 1949?

(b) If so, should the requirements for service of notice of termination by the tenant of an agricultural holding be assimilated to the requirements for service of notice by a landlord? (para. 3.3).

20(a) Should there be no restriction on the method of service or of proof of service of notice of termination of a lease at its ish?

(b) Alternatively, should the method of service be prescribed?

(c) If so, should failure to observe a prescribed method of service render the notice of termination ineffective in all cases?

(d) Alternatively, should proof of service be admissible in any case, whether or not a prescribed method of service has been followed?

(e) Should the prescribed methods include service by registered post or by recorded delivery, and service by messenger-at-arms or sheriff officer, and should they apply to notices whether served by landlords or by tenants? (paras. 3.4 and 3.5).

21(a) Should it be possible for a notice of termination of a lease to be withdrawn (i) only with consent of the recipient, or (ii) without the consent of the recipient?

(b) If (ii) is favoured, should express or implied acceptance operate as a bar to withdrawal of the notice?

(c) In what circumstances should acceptance be implied? (para. 3.7).

22. Should a purchaser who has acquired title and taken entry to leased subjects be entitled to rely on a notice of termination of a lease served by the seller without an assignation in favour of the purchaser? (para. 4.1).

23. Should section 31 of the Agricultural Holdings (Scotland) Act 1949 be repealed? (para. 4.1).

24(a) Does the existing rule of law under which there is a prohibition of partial termination of a lease by a part-owner of the tenanted subjects give rise to problems?

(b) If so, should provision be made for leases in general to permit a part-owner to serve notice to quit on the tenant in respect only of his property and to permit the tenant, on receipt of such a notice, to treat it as notice to quit the entire subjects of the original lease? (para. 4.2).

25(a) Where there are co-proprietors of tenanted subjects should the rules governing service of notice of termination of the lease by a co-proprietor or by the co-proprietors and the rules governing title to sue by them be consistent with each other?

(b) Should the rule be that one of two or more co-proprietors should be entitled to serve a notice and to institute proceedings for recovery of possession, even though he proceeds without the concurrence of the other co-proprietor or co-proprietors? (paras. 4.4 to 4.8).

26. Where a principal tenancy has been terminated, should a landlord be entitled to terminate any authorised sub-tenancy upon the minimum statutory period of notice, not linked to any particular date or term? (para. 4.12).

27. Should a landlord be entitled to proceed against a sub-tenant on the basis of a notice of termination served on the latter by the principal tenant, without the necessity of assignation to the landlord? (para. 4.13).

28. Should it be made clear that notice of termination of a lease served on the original tenant will be effective against that tenant's assignee unless (a) the assignation has been intimated to the landlord in writing, or has been recorded or registered, or (b) there have been actings on the landlord's part indicating knowledge of the assignation? (para. 4.16).

29. Should provision be made for notification to the landlord of acceptance by a legatee or acquirer of the interest in a non-agricultural lease along the lines of sections 20 and 21 of the Agricultural Holdings (Scotland) Act 1949? (para. 4.22).

30. Should provision be made in respect of all leases for the consequences of failure by the legatee or acquirer so to notify the landlord, as follows:
    (a) In respect of failure to notify acceptance of a valid bequest, termination of the tenancy?
    (b) In respect of failure in any other circumstances, either:
        (i) a return to the position where the tenant's interest is available for transfer as on intestacy, or
        (ii) termination of the tenancy? (para. 4.22).

31. Should there be a time limit on the making of an application to the Land Court (a) under section 20 of the Agricultural Holdings (Scotland) Act 1949 for an order declaring the legatee to be tenant, or (b) under section 21 of that Act for an order terminating the lease? (para. 4.23).

32(a) Should provision be made for service of a notice of termination on executors (un-named) of a deceased tenant at the address of the tenanted subjects, and for a copy of the notice to be sent to the sheriff clerk for the Sheriff Court District in which the subjects are situated, it being understood that the sheriff clerk would not be under any duty to publicise receipt of copy notices?

(b) In the absence of executors, should it be possible for any person interested in the deceased tenant's estate, either under his will or on intestacy, to take any action necessary for the preservation of that estate on receipt of a notice of termination? (para. 4.26).

33. Should similar provision be made for service of a notice of termination on un-named executors of a deceased landlord at the last known address of the landlord or his agent, with a copy to the sheriff clerk for the Sheriff Court District in which the tenanted subjects are situated (who would not be under any duty to publicise such copy notices), and for the right to take necessary steps on receipt of such a notice? (para. 4.27).

34(a) Should the right to serve notice of termination after the death of the landlord or tenant be restricted to the executors of the deceased?

(b) Should confirmation be a further requirement? (paras. 4.26 and 4.27).

35. Should the law be altered so as to provide that notice may be served, and that proceedings may be instituted and decree for recovery of possession may competently be taken on the expiry of the period of a lease, by a person having right to the subjects by a title which has not been completed but which is capable of completion without the intervention of or assistance from any other person? (para. 5.1).

36(a) Should a co-proprietor be entitled to institute proceedings for recovery of possesion on the expiry of the period of a lease regardless of the attitude of other co-proprietors to the institution of those proceedings?

(b) Should a co-proprietor be entitled so to proceed only if other co-proprietors are called as additional defenders?

(c) If so, should the defences open to such additional defenders be limited to those which would have been open to the tenant plus the right to challenge the pursuer's title?

(d) Should the right to be called as an additional defender be limited to infeft co-proprietors? (para. 5.2).

37. Is it necessary or desirable that provision should be made for a proper liferenter to institute proceedings for recovery of possession without the consent of the fiar provided that the latter is called as a co-defender, and vice versa? (para. 5.3).

38. Should the debtor under an ex facie absolute disposition be entitled to take proceedings for recovery of possession of the property on production of a back letter or other doucment evidencing his reversionary right? (para. 5.4).

39. Should the tenant under a non-registrable lease be entitled to take proceedings for recovery of possession of the subjects of lease on proof of his right to immediate possession (physical or civil) of the subjects? (para. 5.5).

40(a) In the case of removings affecting lets for less than a year, should there continue to be a facility for actions to be raised at the instance of factors or agents?

(b) Should the distinction between summary removings under section 38 and the relative rules of the 1907 Act, on the one hand, and proceedings for recovery of possession generally, on the other hand, be maintained? (para. 5.6).

41. Should there be a statutory provision to the effect that the service of a notice of termination should not be taken to imply recognition of any right or title in the person on whom the notice is served? (para. 6.1).

42. In any action by a landlord for recovery of possession against a sub-tenant, whether authorised or unauthorised, should the principal tenant be entitled to be called as an additional defender? (para. 6.3).

43. If it is to be competent for notice of termination to be served on executors (un-named) at the address of the tenanted subjects, (a) should it be possible for anyone interested in the deceased's estate to defend an action for recovery of possession? or (b) should that right be limited to executors of the deceased and to the person in occupation of the subjects? (para. 6.4).

44. Is there any class of occupier in respect of whom the sheriff's power to shorten or dispense with the induciae under Rule 68A of the Summary Cause Rules should be limited? (paras. 7.2 and 7.3).

45. Where the identity of an unauthorised occupier or of one or more of a number of such occupiers is unknown, would it be desirable to overcome the problem of citation by provision for advertisement of a summons craving warrant for ejection of all unauthorised occupiers? (para. 7.5).

46. Is the scope of the summary cause for recovery of possession of heritable property unduly limited? (paras. 7.6 to 7.8).

47. What is the practice of the courts in dealing with composite actions as regards the form in which the action may be raised? (paras. 7.6 and 7.7).

48. Should the right of appeal in a summary cause continue to be limited to the final judgment, and to a point of law only? (para. 7.9).

49(a) Should the sheriff have discretion to order the finding of caution for violent profits in all actions for the recovery of possession of heritable property?

(b) If so, should it be open to the sheriff to make such an order at any stage in the proceedings? and

(c) Should it be competent for him to require the defender either to provide a bond of caution or other guarantee or to consign an appropriate sum as caution? (para. 7.10).

50. Should provision be made for the shortening, at the discretion of the sheriff, of the period for extract of decree in a summary cause for recovery of possession of heritable property? (para. 7.11).

51(a) Should there be a legal requirement for a period of warning to be given prior to the enforcement of a decree in a summary cause for recovery of possession of heritable property?

(b) If so, should the period be 72 hours or such shorter period as may be fixed by the court? (para. 7.12).

52. Should the requirement for letters of ejection for the enforcement of a decree of removing obtained in the Court of Session be abolished? (para. 8.1).

53. Should sections 34 and 35 of the Sheriff Courts (Scotland) Act 1907 be repealed along with the superseded provisions of the Act of Sederunt of 14 December 1756 and sections 36-38A of the 1907 Act? (para. 8.3).

APPENDIX AGRICULTURAL HOLDINGS

CONTENTS

AGRICULTURAL HOLDINGS

Introduction

1. In this paper a number of special features of the law applying to recovery of possession of agricultural holdings which require to be given separate treatment are examined. An agricultrual holding is defined by the Agricultural Holdings (Scotland) Act 1949[1] as being "the aggregate of the agricultural land comprised in a lease not being a lease under which the said land is let to the tenant during his continuance in any office appointment or employment held with the landlord."[2] Agricultural land is defined as land used for agriculture which is so used for the purposes of a trade or business.[3] Agriculture is itself given a very wide definition and includes horticulture, fruit growing, seed growing, dairy farming and livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes. Livestock includes any creatures kept for the production of food, wool, skins or fur or for the purpose of its use in the farming of land.[4] Thus, enterprises such as fish farming or mink farming will constitute agricultural holdings on land let for that purpose. The extent of the

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[1] Hereinafter referred to as the "1949 Act".

[2] 1949 Act, s.1(1).

[3] 1949 Act, s.1(2).

[4] 1949 Act, s.93(1).

subjects is not material[1] and may be confined to the site of the building in which the agricultural activity is carried on. Even a dwellinghouse let for occupation by workers engaged in agriculture may constitute an agricultural holding.[2]

2. The fact that land is governed by the special provisions relating to agricultural holdings does not mean that it necessarily falls outwith the protection provided by other statutes. A croft within the meaning of the crofting legislation will normally also be an agricultural holding, as will small landholdings falling under the statutory provisions relating to them. This part of the Memorandum is not, however, concerned with any specialities which may affect such agricultural holdings because of those other provisions.[3]

Land in mixed use

3. One question which arises for consideration is whether the definition quoted above permits land let under a lease to be divided, so that part only constitutes an agricultural holding. The Scottish Land Court has held that it is possible to do so, and has excised the non-agricultural subjects so as to determine the extent of the agricultural holding. In so doing they followed the principle of excision applied by the Court of Session in McNeill v. Duke

[1] Stevens v. Sedgeman [1951] 2 K.B. 434.
[2] Blackmore v. Butler [1954] 2 Q.B. 171.
[3] See below, para. 31.

of Hamilton's Trs.[1] upon the construction of different statutory definitions contained in the Small Landholders (Scotland) Act 1911 and the Agricultural Holdings (Scotland) Act 1908. In England, despite the similarity of definition contained in the Agricultural Holdings Act 1948 to that contained in the Scottish Act of 1949, excision is not possible and the Court applies the test of substantial character.[2] The importance of this point is that at common law it is not competent to serve a notice to quit relating to part only of the subjects comprised in a single tenancy.[3] This may, therefore, create difficulties for a landlord who has to serve a notice to quit in compliance with the statutory provisions relative to agricultural holdings but who presumably cannot in such circumstances recover possession of the non-agricultural part although that has been in some sense excised.[4]

Security of tenure

4. The cardinal feature of the present agricultural holdings system is that security of tenure is afforded to the tenant.[5] Thus, the 1949 Act provides that, notwithstanding the termination of the stipulated endurance of any

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[1] 1918 S.C. 221.

[2] Howkins v. Jardine [1951] 1 K.B. 614.

[3] Gates v. Blair 1923 S.C. 430.

[4] On this point, see also Research Paper, paras. 3.50 and 3.51.

[5] Under the former statutory provisions a notice to quit was enforceable against the tenant at the appropriate ish, but a landlord might find himself nonetheless liable to pay compensation for disturbance to his tenant. Indeed he would do so unless the reason for service of the notice to quit fell within the categories regarded by the legislation as justifiable.

lease, the tenancy shall be held to be continued in force by tacit relocation for another year and thereafter from year to year unless not less than one nor more than two years notice has been given by either party to the other. It is incompetent to contract out of these provisions.[1]

5. The provisions of the Sheriff Courts (Scotland) Act 1907 relating to removings have effect for agricultural holdings subject to the provisions of section 24 of the 1949 Act. Section 24(4) of that Act provides that notice by the landlord to the tenant "shall be given either (a) in the same manner as notice of removal under section 6 of the Removal Terms (Scotland) Act 1886 or (b) in the form and manner prescribed by the Sheriff Courts (Scotland) Act 1907 and such notice shall come in place of the notice required by the said Act of 1907". Despite the wording of that provision it has been held that it is essential to adhere as nearly as possible to the form of notice prescribed in Form H annexed to the 1907 Act.[2] Failure to do so may be fatal to the validity of the notice.

6. Assuming such a notice has been validly served, whether or not it takes effect depends in the first place upon the attitude of the tenant. He has a period of one month from the giving of such notice to determine whether to require that notice to be justified on the "merits" by the landlord.[3]

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[1] 1949 Act, ss. 3 and 24.

[2] Rae and Cooper v. Davidson 1954 S.C. 361. Form H has now been replaced by Form L (S.I. 1983/747).

[3] 1949 Act, ss. 25(1) and 27(2).

There are two separate bases for such a challenge depending on the form of the notice to quit itself. We consider next, therefore, the forms in which a landlord may serve a notice to quit, and the effect of any challenge by the tenant.

Notices requiring consent of Land Court

7. If, in any case, a landlord serves a notice to quit which complies with the provisions of the Sheriff Courts (Scotland) Act 1907 as to form, it will identify the lease and require the tenant to remove at a stated date or dates, being the conventional ish under the lease. It need not contain any statement as to the reason for giving the notice to quit. If in response the tenant timeously serves a counter-notice under section 25(1) of the 1949 Act, the notice to quit is ineffectual unless the Land Court consents to its operation. Further the landlord must make application to the Land Court for such consent within one month of the service on him of the tenant's counter-notice, failing which the notice to quit is spent for all purposes.[1]

8. The grounds upon which the Land Court is entitled to consent to the operation of a notice to quit are limited to those specified in section 26(1) of the 1949 Act. These are as follows:-

(a) that the carrying out of the purpose for which the landlord proposes to terminate the tenancy is desirable in the interests of good husbandry as respects the land to which the notice relates treated as a separate unit;

[1] 1949 Act, s.27(1).

(b) that the carrying out thereof is desirable in the interests of sound management of the estate of which the land to which the notice relates forms part or which that land constitutes;

(c) that the carrying out thereof is desirable for the purposes of agricultural research, education, experiment or demonstration, or for the purposes of the enactments relating to small holdings or such holdings as are mentioned in section 64 of the Agriculture (Scotland) Act 1948 or allotments;

(d) that greater hardship would be caused by withholding than by giving consent to the operation of the notice;

(e) that the landlord proposes to terminate the tenancy for the purpose of the land's being used for a use, other than agriculture not falling within paragraph (c) of subsection (2) of [section 25], that is, not being a use for which permission has been granted on an application made under the enactments relating to town and country planning or for which (otherwise than by virtue of any provision of these enactments) such permission is not required.

Only if the Land Court is satisfied that one or more of these grounds has been established may it grant consent to the operation of the notice to quit. The Act states that it "shall" do so, but there follows a very important proviso that, notwithstanding that they are satisfied, the Land Court shall withhold consent to the operation of the

notice to quit if in all the circumstances it appears to them that a fair and reasonable landlord would not insist on possession.

9. In granting consent to the operation of a notice to quit the Land Court may impose such conditions as it thinks requisite to secure that the land to which the notice relates will be used for the purpose for which the landlord proposes to terminate the tenancy.[1] Where such a condition is imposed and the Crown makes application to the Land Court wherein it is proved that the landlord failed to comply with the condition within a time-limit specified or has acted in contravention of the condition then the Land Court may impose a penalty on the landlord of up to two years' rent of the holding, or part, at the rate payable immediately before the termination of the tenancy.[2]

Notices not requiring consent of Land Court

10. The provisions of the Act relative to the consent of the Land Court do not apply to all notices to quit which may be served in the statutory form. In particular these provisions do not apply:-

(1) where the notice to quit relates to land which is permanent pasture which the landlord has not been in the habit of letting out as an agricultural holding and which is let subject to conditions that the period is definite and limited and that the land is to be sowed down at waygoing with permanent grass seeds;

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[1] 1949 Act, s.26(5).

[2] 1949 Act, s.30.

(2) where the land is required for a non-agricultural use for which planning permission has been granted (or, by virtue of the planning acts, is not required);

(3) where the Land Court within the previous nine months has issued a certificate that the tenant was not farming in accordance with the rules of good husbandry;

(4) where the tenant has failed to comply with a demand in writing requiring him to pay any rent due in respect of the holding within two months or within a reasonable time to remedy a remediable breach of any term of his tenancy which was not inconsistent with his responsibility to farm in accordance with the rules of good husbandry;

(5) where the landlord's interest in the holding has been materially prejudiced by an irremediable breach by the tenant of his obligations;

(6) where the tenant has become notour bankrupt or has executed a trust deed for creditors.[1]

11. So far as all these provisions are concerned it is essential that the notice to quit states the relevant reason, or reasons if more than one is to be founded upon. In each case the statute expressly provides that the relevant matter be stated "in the notice". Nevertheless case law in an analogous context suggests that the requirement may be satisfied if the relevant fact is stated in a document accompanying the notice, at least if it is enclosed in the same envelope.[2] Moreover, where timing is

[1] S.25(2)(b), (c), (d), (e), (f) and (g), respectively, of the 1949 Act.

[2] Barns Graham v. Lamont 1971 S.L.T. 341.

particularly relevant, in each of cases (4), (5) and (6) above, the time which requires to be considered is the date of giving the notice to quit.

12. In the circumstances mentioned above the consent of the Land Court under section 26 of the Act is not required, at least in the first instance. Instead, the tenant is given an opportunity to challenge such a notice by arbitration. He may within one month of the service of the notice to quit on him require a question falling under any of the provisions of section 25(2) to be determined by arbitration. Failure to give such a notice timeously debars the tenant from challenging the notice to quit on other than formal grounds. The notice by the tenant must be sufficiently specific to require arbitration. Protest or asking for the consent of the Land Court will not suffice.[1] There is no time limit for the reference to arbitration which might follow such a notice by the tenant. If the arbiter's award upholds the reason stated in the notice to quit that will render the notice enforceable at its due date. If the award is such that the reason stated is bad, then it may be that the notice would still otherwise function as a notice to quit, but as one requiring the consent of the Land Court. In that event, the tenant is allowed a further period of one month to serve a counter-notice as already mentioned.[2]

[1] Mountford v. Hodkinson [1956] 1 W.L.R. 422.
[2] 1949 Act, s.27(2).

Notices based on tenant's remediable breach

13. There is however a further complication. Where the ground stated in the notice to quit relates to the tenant's failure to remedy a remediable breach of a term of his tenancy (case 4 above), being a remediable breach involving the doing by the tenant of work of provision, repair, maintenance or replacement of fixed equipment, the tenant has a series of options. He may, within a month of the time the notice to quit is served, serve a counter-notice; if he does so, but notice to quit shall not have effect unless the Land Court consents to its operation.[1] This seems to involve that the Land Court will also determine the issue of whether there is a breach which is remediable and has not been remedied. If within a month after the giving of the notice to quit the tenant also serves a notice as mentioned above under section 27(2) of the 1949 Act, then the counter-notice under section 14 of the 1976 Act is to be of no effect.[2] However, where the tenant has served a notice requiring arbitration and the notice to quit would otherwise have effect in consequence of the arbitration, then within one month of the conclusion of the arbitration the tenant may serve a counter-notice on the landlord, and in such case the notice shall not have effect unless the Land Court consents.[3] At whichever stage the consent of the Land Court is involved, the Court must consent unless it appears to them that a fair and reasonable landlord would not insist on possession.[4]

[1] Agriculture (Miscellaneous Provisions) Act 1976, s.14(1) and (2).

[2] Ibid. s.14(2).

[3] Ibid. s.14(3).

[4] Ibid. s.14(4).

Notices relating to fixed equipment

14. There remains one further complication. The Agriculture (Miscellaneous Provisions) Act 1976, by section 13, gives a tenant particular powers to challenge the service on him of a demand in writing requiring him to carry out works of provision, repair, maintenance or replacement of fixed equipment.[1] These involve reference to arbitration; the arbiter has wide powers, including power to specify times for the performance of the relevant works.[2] Where he does so, the landlord (or the arbiter) may apply to the Land Court to specify a date for termination of the tenancy by notice to quit should the tenant fail to remedy the breach by the specified time.[3] Where the Land Court has specified such a time then the notice to quit may be served against that time within one month of expiration of the period specified for completion of the remedial works, and the notice will be valid though it may be less than one year or not at a conventional ish.[4] However, where such a notice has been served, the tenant may serve a counter-notice, preventing the notice from taking effect without the consent of the Land Court.[5]

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[1] The same power exists where a notice to quit has been given founded on failure to comply with a demand. If the arbiter considers that although the time as fixed by the landlord, or as extended by the arbiter, was reasonable, some subsequent event made it unreasonable, he may then extend or further extend the time.

[2] Agriculture (Miscellaneous Provisions) Act 1976, s.13(1).

[3] Ibid. s.13(2).

[4] Ibid. s.13(3).

[5] Ibid. s.14(3).

Further considerations

15. It is important to appreciate the advantages to a landlord to proceed on the basis outlined in paragraphs 10 to 14 above rather than upon the basis of a straightforward notice to quit, in respect of which a counter-notice will invariably require the consent of the Land Court for effective termination. The first reason is that in all cases, except those involving works of repair just mentioned there is no discretion involved. If the arbiter is satisfied on the reason stated then the notice stands valid subject only to issues of formal validity. There is no general discretion such as is conferred on the Land Court by the 'fair and reasonable landlord' test. The second reason is that where a notice to quit is given in plain form, i.e. without stating any reason, which is all that is required in the cases involving the consent of the Land Court, then in general the landlord will be bound to pay compensation for disturbance, fixed at a minimum of one and maximum of two years' rent.[1] That does not apply in the cases mentioned in paragraph 10 other than case (2), where the land is taken for non-agricultural use.

16. In addition to compensation payable under the 1949 Act, in cases falling within the relevant provisions of the Agriculture (Miscellaneous Provisions) Act 1968,[2] the landlord has to pay a further sum equivalent to four times the annual rent. That obligation is excluded, in cases

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[1] 1949 Act, s.35.

[2] Hereinafter referred to as the "1968 Act".

where it otherwise would apply, under certain specified circumstances. In particular it does not apply where the notice to quit contains a statement that the landlord's purpose in terminating is desirable on any of the grounds specified in section 26(1)(a), (b), (c) or (d) of the 1949 Act.[1] Because of the way the statutes have been drawn, most payments of additional compensation under the 1968 Act do not arise because the land is required for non-agricultural uses, but because notices to quit omit to state that the purpose of termination falls under section 26(1)(a) to (d) of the 1949 Act, even although one such purpose is the ground on which the landlord seeks to terminate.

Rent arrears

17. Further provision for termination is made by section 19 of the 1949 Act. That provides that where six months' rent of an agricultural holding is due and unpaid the landlord may raise an action of removing against the tenant in the sheriff court concluding for removal at the next ensuing term of Whitsunday or Martinmas. Unless the arrears then due are met or caution found for them and one further year's rent the court may order decree of removing accordingly. In practice this provision works only to ensure that rent is paid appropriately.

Irritancy and sequestration

18. The provisions as to notice to quit in the Act are expressly stated not to affect irritancies or other liabilities to remove at common law prior to the

[1] 1968 Act, ss. 9 and 11.

stipulated ish.[1] No special point arises in this regard, save that any question in dispute between landlord and tenant as to the occurrence or enforcement of an irritancy requires to be dealt with by arbitration.[2] In practice, therefore, actions of removing tend to be raised in reliance upon such irritancy and have to be sisted to enable the merits of the dispute to be dealt with by arbitration. The consequences for a landlord in terms of time required to procure the removal of a tenant can be very serious. The same exclusion of notices to quit arises when there has been a sequestration of the estate of the tenant under the Bankruptcy (Scotland) Act 1913.[1]

Resumption

19. Powers of resumption are commonplace in agricultural holdings. While these powers are preserved by the 1949 Act,[3] at least for the non-agricultural purposes, there are certain specialities of the agricultural holdings legislation which require consideration in relation thereto. At common law, no notice is required for the exercise of such a power; and so, where a lease is silent it would be presumed that resumption is instantly exerciseable. However this may create a problem of validity in the case of an agricultural holding. In general terms, every tenant is entitled on quitting a holding to certain types of compensation, and these apply also where part of the holding is resumed.[4] The rights to

[1] 1949 Act, s.24(5).

[2] 1949 Act, s.74 and Sixth Schedule.

[3] 1949 Act, s.24(6).

[4] 1949 Act, s.60(1).

compensation are to apply irrespective of the provisions of the lease or agreements to the contrary.[1] But it is a statutory precondition of the exercise of his rights in certain circumstances, that the tenant shall have given notice of his intention to make the particular claim not less than a specified period before the termination of the tenancy (or part).[2] With a power of resumption exerciseable at literally a moment's notice, these compensation provisions become unworkable. There is English authority for the view that in consequence of such statutory provisions the power of resumption is altogether void.[3] There is no Scots authority bearing directly on the point.

20. It is perhaps worth noting at this stage that the principle of mutuality, which may operate so as to debar a landlord from exercising an irritancy clause when he is in breach of his own obligations under the lease,[4] has no application where the landlord is exercising a statutory right such as termination on the basis of a notice to quit.[5] Nor does it apply to the exercise of a power of resumption,

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[1] 1949 Act, s.64(1).

[2] 1949 Act, s.56. Provision is made to secure the same results as regards additional compensation where there has been resumption as would apply in the case of a notice to quit: 1968 Act, ss. 9 and 11, taken with s.60 of the 1949 Act.

[3] Coates v. Diment [1951] 1 All E.R. 890.

[4] MacNab of MacNab v. Willison 1960 S.L.T. (Notes) 25.

[5] Wilson-Clarke v. Graham 1963 S.L.T. (Sh.Ct.) 2.

at least in the general case, because a claim of resumption is, generally, a reservation of rights inherent in the landlord ex dominio and does not fall under the principle of mutuality.[1]

Succession

21. While the general provisions of the 1949 Act are intended to maintain security of tenure even after the stipulated ish, detailed provisions have been enacted to deal with the specific problem of succession. The basic rule against which termination provisions have to be considered is that leases expressly excluding assignees cannot, and even prior to the Succession (Scotland) 1964 could not, be made the subject of a bequest by the tenant.[2] Leases with an implied exclusion of assignees may be bequeathed, as the law now stands, to any person entitled to succeed on intestacy to the deceased's estate. Leases which are freely assignable or can be freely bequeathed are rare. Prior to 1964, the lease descended automatically to the heir at law where there was no valid bequest. The effects of the 1964 legislation will have to be considered in detail later, but the relevant provisions consist largely of machinery to try to ensure that one only of the deceased's "heirs in intestacy" is to take up the lease.

Testate succession

22. Where a bequest of an interest in a tenancy has been validly made the legatee is bound to intimate it to the

[1] Edmonstone v. Lamont 1975 S.L.T. (Sh.Ct.) 57.
[2] Kennedy v. Johnstone 1956 S.C. 39.

landlord within twenty one days of the death.[1] Failure to do so without unavoidable cause entitles the landlord to reject him. While it is clear that to give such notice imports acceptance of the bequest, it is not so clear what the result of non-intimation is. If it is to be treated as repudiation of the bequest the interest under the lease can then be dealt with as intestate estate.[2] If timeous notice of a bequest is given the landlord may object: and if he does the legatee may apply to the Land Court for an order declaring him to be tenant.[3] If the Land Court find that there is a reasonable ground of objection to him, they must declare the bequest null and void. Otherwise he is declared tenant from the date of death.[4] Where the bequest is declared null and void that is not however the end of the tenancy, which then falls to be treated as intestate estate of the deceased.[5]

Intestate succession

23. In the case of intestacy, the executors become vested in the tenant's interest in the lease by virtue of confirmation.[6] They are entitled to transfer it to any one

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[1] 1949 Act, s.20(2).

[2] However in Coats v. Logan November 1982 (unreported) Lord Ross held that while a late intimation without unavoidable cause barred the legatee's right to claim the tenancy it did not affect the validity of his acceptance of the bequest, so that it could not be treated as intestate estate.

[3] 1949 Act, s.20(3) and (4).

[4] 1949 Act, s.20(5).

[5] 1949 Act, s.20(7).

[6] Succession (Scotland) Act 1964, s.14.

of the persons who might take on intestacy,[1] and may do so in any mode competent at common law or by a docquet on the confirmation. The acquirer of the lease is bound to intimate that fact to the landlord within twenty one days. The landlord may then object to him, and follow this by an application to the Land Court for an order terminating the lease.[2] If the Land Court finds the ground of objection to be well founded they must terminate the lease.[3] Otherwise the acquirer becomes tenant from the date of the transfer to him.

Consequential problems

24. Should the executors fail within a year of the death (or the date that a bequest is declared null and void) to transfer the lease according to law the landlord may serve a year's notice on the executors terminating the tenancy at any term of Martinmas or Whitsunday, and may do so irrespective of the terms of the lease, or any enactment or rule of law to the contrary effect.[4] These provisions have given rise to a series of litigations which highlight some of the problems involved.

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[1] Succession (Scotland) Act 1964, s.16(2).

[2] 1949 Act, s.21.

[3] 1949 Act, s.21(3).

[4] Succession (Scotland) Act 1964, s.16(3) and (4) and see Gifford v. Buchanan 1983 S.L.T. 613.

(a) Executors may not be confirmed within a year of the death, or may fail timeously to confirm to the lease. Nevertheless they may validly transfer an interest in the lease within that year, the transfer being retroactively validated by the grant of confirmation.[1]

(b) Executors may not be confirmed at all. In that event there is authority to suggest that on the expiry of one year from the death the landlord is entitled to bring an action against a would-be heir "in possession" concluding for his removal on the basis of constructive abandonment of the lease.[2]

(c) Leases are very commonly drawn in the form "to A and his heirs", which before 1964 would in any event have been the result of the common law as regards an unassignable lease. This is not a special destination and has, therefore, no effect on the powers and duties of executors.[3]

(d) Where an executor is a member of the family, and wishes to transfer the lease to himself as one of the category permitted by statute, the transfer is subject to the rule of auctor in rem suam.[4]

(e) A legatee and an acquirer are both required to intimate the acquisition of their respective interests within twenty one days. No specific sanction is stated in the legislation for failure. The Land Court has expressed

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[1] Garvie's Trs. v. Garvie's Tutors 1975 S.L.T. 94.
[2] Rotherwick's Trs. v. Hope 1975 S.L.T. 187.
[3] Cormack v. McIldowie's Exrs. 1974 S.L.T. 178.
[4] Inglis v. Inglis 1983 S.L.T. 437.

the view that failure to intimate a bequest timeously entitled the landlord to have the bequest declared null and void.[1]

(f) Where a bequest or acquisition is timeously intimated and objections timeously taken by the landlord, no time limit is fixed for the application to the Land Court by the party requiring to do so. It has been held that there is no obligation to make such application within a year of the death.[2]

(g) Tacit relocation in relation to agricultural holdings takes effect by virtue of section 3 of the 1949 Act, which provides that the tenancy of an agricultural holding shall, instead of coming to an end on the termination of the stipulated endurance of any lease, be held to be continued in force by tacit relocation for another year, and thereafter from year to year, unless notice to quit is given in a particular time and manner. Thus, a question might be thought to have arisen as to whether the lease could be terminated in any other way. However, the Court appear to have accepted that tacit relocation, even statutory tacit relocation, will not arise if at the anniversary of the ish there is no-one in the character of tenant able to provide the necessary consent for its continuation.[3]

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[1] Wight v. Marquis of Lothian's Trs. 1952 S.C.C.R. 25. But in so stating the Land Court was almost certainly exceeding its jurisdiction (Garvie's Trs. v. Garvie's Trs. 1972 S.L.T. 29).

[2] Gladstone v. Halliday (November 1981, Lord Allanbridge, unreported).

[4] Rotherwick Trs. v. Hope cited above.

Termination of successor's tenancy

25. Assuming that no such problems arise and that the legatee or acquirer has duly given notice and the landlord has either not objected or any objections have not been made out before the Land Court, special provisions are provided for the termination of such a successor's interest in the tenancy. In the case of any person other than a near relative,[1] the landlord is entitled to serve a notice to quit which that person cannot challenge by counter-notice.[2] The timing of such a notice is slightly complex, depending on relationships between the date of acquisition and the ish of the lease, but in general the effect is to entitle the landlord to terminate on the first or second ish next occuring after the successor's acquisition of his interest, or, where appropriate, the later date when a notice to quit would have been competent. Such a termination gives no right to the enhanced compensation already mentioned, provided the landlord is to use the ground for agriculture only and that is stated in the notice.[3]

26. Where the legatee or acquirer is a near relative, he is in general treated in the same way as the deceased tenant so far as termination is concerned. However, certain additional grounds for obtaining the consent of the Land Court are specified, subject to the same time

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[1] Defined as a spouse or child, natural or adopted, of the deceased tenant by the 1968 Act, s.18(7).

[2] 1949 Act, s.25(2)(h), inserted by the Agricultural Holdings (Amendment) (Scotland) Act 1983.

[3] 1968 Act, s.11(7).

limits as have already been mentioned. These additional grounds are, in the case of tenancies created prior to 1st January 1984:-

(1) that the near relative has not sufficient training in agriculture nor experience in farming to farm the holding with reasonable efficiency;

(2) that the holding (or the unit of which it is part) is not a unit capable of full-time employment for at least two people, and that it is intended by the landlord to amalgamate it within two years of termination with other specified lands;

(3) that the near relative, from before the death, occupied specified agricultural land capable of full-time employment for at least two people.

In the case of post-1983 tenancies, in addition to those cases, there is added the case where the near relative does not have sufficient financial resources to farm the land with reasonable efficiency.[1]

27. In all these cases: the ground must be stated in the notice to quit, the consent of the Land Court must be obtained in case of challenge, even if the ground stated is made out the Land Court may in most instances apply the "fair and reasonable" landlord proviso, and termination thereunder gives no right to enhanced compensation.

Executors as tenants

28. Apart from problems of termination such as may arise when there has been a death and succession to the tenancy,

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[1] 1949 Act, Ninth Schedule, inserted by the 1983 Act cited above.

the executors may find themselves as tenants vested in the deceased's interest and in occupation of the land. A notice to quit may already have been served on the deceased tenant or the executor's own acts may justify the serving of a notice to quit on them. In the particular case where an irremediable breach of the lease causing material prejudice to the interest of the landlord is relied on by him as the basis for a notice to quit, the arbiter is not to make an award in favour of the landlord unless the arbiter is satisfied that it is reasonable, the interest being vested in the executor as such, that the award should be made.[1]

Exclusion of assignees

29. At common law the let of agricultural land impliedly excludes assignees. It is normal practice in a lease in writing expressly to exclude them. In the present context, that has an important consequence where a lease is granted to a partnership. Unless it can be held that that lease is truly one in favour of the house, i.e. the firm through whatever changes in composition it may undergo, the occurrence of an event giving rise to dissolution of the partnership will automatically bring the tenancy to an end.[2] Indeed, even without dissolution of the partnership, the tenancy may be brought to an end in respect that the landlord consented only to particular persons farming the land in partnership and not to some other combination.[3]

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[1] Succession (Scotland) Act 1964, s.16(6).

[2] Inland Revenue v. Graham's Trs. 1971 S.C. (H.L.) 1.

[3] Jardine-Paterson v. Fraser 1974 S.L.T. 93.

Where the partnership is dissolved, at any rate, the surviving or remaining partners may have the right to complete work begun but unfinished in respect of the tenancy (e.g. to complete an annual cycle of cultivation) but no further right. No notice of any sort is necessary in order to remove the surviving partners and the appropriate action appears to be one of removing, doubtless accompanied by a declarator.[1]

Liferent leases

30. These were fairly uncommon until Inland Revenue v. Graham's Trs.[2] Since then, there has been a revival in their use. The consequence of a liferent lease is that on the termination of the liferent the landlord is entitled to immediate possession. There is no requirement for warning or notice of any kind. Thus, where a tenant in a liferent lease died on the 19th of the month, a petition was presented on 25th of that month for the summary removal of his representatives and granted by the sheriff, an advocation to the Court of Session was refused and the reclaiming motion against that refused, all within eight weeks of the petition being presented.[3]

Crofts

31. The status of crofts and crofters is entirely a matter of statute law. Whatever the term for which land comprising a croft has been let, the tenant thereof, the

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[1] Partnership Act 1890, s.38.

[2] Cited above.

[3] Stewart v. Grimmond's Representatives 1796 Mor. 13853.

crofter, enjoys security of tenure. The only bases upon which he can be removed, other than his own voluntary renunciation of the croft, are if either one year's rent of the croft has not been paid or the crofter has broken one or more of the statutory conditions relative to his conduct of the croft. On an application by the landlord, the Land Court, after considering objections by the crofter, may make an order for his removal.[1] An order of the Land Court ordering the removal of a crofter may be enforced as if it were a decree of the sheriff having jurisdiction in the relevant area.[2] This represents a change in that, before 1976, the Land Court had to rely on the sheriff pronouncing a decree in conformity with their order for enforcement of the Court's orders. In light of the foregoing special provisions, it is not thought necessary to consider further the position of crofters and others enjoying the like status.

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[1]Crofters (Scotland) Act 1955 and Second Schedule.

[2]Crofting Reform (Scotland) Act 1976, s.17.