SCOTTISH LAW COMMISSION
(Scot Law Com No 178)

Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

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The Hon Lord Gill, *Chairman*
Mr P S Hodge QC
Professor G Maher
Professor K G C Reid
Professor J M Thomson.

The Secretary of the Commission is Norman Raven. Its offices are at 140 Causewayside, Edinburgh, EH9 1PR.

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

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Jurisdictions under the Agricultural Holdings (Scotland) Acts

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

To: Jim Wallace Esq QC, MP, MSP, Deputy First Minister and Minister for Justice.

We have the honour to submit to the Scottish Ministers our Report on Jurisdictions under the Agricultural Holdings (Scotland) Acts.

(Signed) BRIAN GILL, *Chairman*

PATRICK S HODGE

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NORMAN RAVEN, *Secretary*
6 March 2000

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PART 1 - INTRODUCTION

CHAPTER 1

THE BACKGROUND TO THIS REFERENCE, THE TERMS OF REFERENCE AND OUR GENERAL APPROACH

Jurisdictions and procedures in the law of agricultural holdings

1.1 In the law of agricultural holdings in Scotland there are numerous jurisdictions, judicial and administrative. Some of them are exclusive. Some of them overlap. The present system of jurisdictions is the result of *ad hoc* provision made over the course of the last century. Judicial jurisdictions are held by arbiters, by the Lands Tribunal for Scotland, and by the sheriff court, the Scottish Land Court and the Court of Session. Administrative jurisdictions are held by the Scottish Ministers, by recorders, by the sheriff and by the Scottish Land Court.

1.2 The jurisdictions of the Court of Session, the sheriff court, the Scottish Land Court and the agricultural arbiters are exercised through separate systems of procedure.

1.3 In this Report we describe in detail the jurisdictions, first instance and appellate, that exist under the Agricultural Holdings (Scotland) Acts and related legislation and assess the merits and weaknesses of the present system.

The work of the Land Reform Policy Group

Its remit

1.4 On 30 October 1997 the Secretary of State established the Land Reform Policy Group with the following remit:

> "to identify and assess proposals for land reform in rural Scotland, taking account of their cost, legislative and administrative implications and their likely impact on social and economic development of rural communities and on the natural heritage."

1.5 The Land Reform Policy Group has considered numerous matters relating to land use and tenure in Scotland. One such matter has been the operation of the law of agricultural holdings.

The first consultation and its provisional proposals

1.6 In February 1998, the LRPG issued its first consultation paper.[1] The Group proposed that:

> "the overriding objective of land reform should be to remove the land-based barriers to the sustainable development of rural communities."[2]

1.7 Sustainable development was defined as:

[1] LRPG, *Identifying the Problems.*
[2] LRPG, *Identifying the Problems*, para 2.5.

> "development that is planned with appropriate regard for its longer term consequences, and is geared towards assisting social and economic advances that can lead to further opportunities and enhanced life-chances for rural people whilst protecting the environment."[3]

1.8 This proposal was generally supported. Thereafter the LRPG prepared more detailed proposals based on two main principles: (1) that there should be increased diversity in the ways in which land is owned and used and (2) that there should be increased community involvement in that ownership and use.

1.9 The LRPG's first consultation paper raised the topic of jurisdiction and procedure in agricultural holdings matters. The LRPG summarised the majority of responses on that topic as follows:

> "The existing arrangements for dispute arbitration were widely criticised as unnecessarily complex, prolonged and expensive; though there was a general acceptance that simplifying the procedures to save time and cost might be at the expense of transparent fairness in some cases."[4]

1.10 In the light of these responses the LRPG decided that one of the objectives of reform should be:

> "simpler and cheaper arrangements for resolution of disputes between agricultural tenants and their landlords".[5]

1.11 To implement this objective the LRPG put forward two provisional proposals as follows:

- To simplify the arbitration procedures, introducing stricter controls over the cost of arbitrations, and appointing a smaller, more experienced arbiters' panel, with more training and general guidance.[6]
- To extend the role of the Scottish Land Court to cover the appointment of arbiters, providing for all stated cases to go to the Land Court, and to introduce stricter time limits.[7]

The second consultation and recommendations for reform

1.12 These proposals were put out to further public consultation in September 1998. In January 1999 the LRPG published its "Recommendations for Action." In this document the Group recommended that its two provisional proposals should be implemented partly by legislation and partly by reform of the method of appointment to the Panel of Arbiters.[8]

1.13 The Group also made more detailed recommendations to the effect that there should be other methods of dispute resolution, including mediation; that the volume of detailed evidence required in an arbiter's award should be reduced; that it should be competent for hearings to be dispensed with; that there should be limits to the way in which the parties might be represented; that there should be restricted scope for appeal; and that there should be a fair allocation of costs between the parties.[9]

1.14 The Group also proposed that the method of valuation of bound sheepstocks and that the statutory obligations of landlord and tenant relating to fixed equipment should be simplified. The

[3] LRPG, *Identifying the Problems*, para 2.5.
[4] LRPG, *Identifying the Solutions*, para 8.1.
[5] LRPG, *Identifying the Solutions*, para 8.2.
[6] LRPG, *Identifying the Solutions*, para 10.1, LT5.
[7] LRPG, *Identifying the Solutions*, para 10.1, LT6.
[8] LRPG, *Recommendations for Action*, paras 5.2, 7.2.
[9] LRPG, *Recommendations for Action*, para 5.2.

Group recommended that legislation should extend the jurisdiction of the Scottish Land Court by permitting applications to be made to the Land Court by one party only; by giving the Land Court an investigative role; by transferring jurisdiction from the sheriff court to the Land Court in stated cases arising in arbitrations; by introducing stricter time limits for the issue of arbiters' findings and including automatic transfer to the Land Court in the event of undue delay; and by conferring power on the Land Court to order immediate removal in extreme cases of bad husbandry.[10]

The Land Reform Action Plan

1.15 In August 1999 the Scottish Executive published a Land Reform Action Plan setting out how the Executive proposed to give effect to the recommendations of the LRPG. Section D of the Plan deals with the Group's recommendations on the subject of agricultural holdings. Recommendation D2 is for "legislation to simplify and reduce the cost of dispute resolution and to extend the role of the Scottish Land Court".[11] The Scottish Executive makes the following proposal:

> "Following detailed consultation with the Landlord and Tenant Consultative Panel, a White Paper will be prepared, to issue by end April 2000, with the consultation phase to be completed by end July. A draft Bill will be published in Autumn 2000, and a further consultation period will follow."[12]

Our terms of reference

1.16 On 19 October 1999, in pursuance of the Land Reform Action Plan, the Deputy First Minister and Minister for Justice, Mr Jim Wallace QC MP MSP, asked us to report to him with recommendations on the matters set out in section D2 of the Plan.

1.17 Our terms of reference are as follows:

> "Taking account of the Land Reform Action Plan, to consider existing procedures for dispute resolution in the law on agricultural holdings, and other related matters, including appellate procedures, and to advise on possible reforms in jurisdiction and procedures with a view to improving access to justice and economy and speed and quality of justice."

1.18 In view of the nature of the reference, we are not asked to submit a draft Bill along with our Report.

1.19 Our terms of reference do not require us to consider questions of jurisdiction and procedure under any reformed system of agricultural tenancy that might emerge from the wider recommendations of the Land Reform Policy Group.

The relationship of our Report to the forthcoming White Paper

1.20 In view of the Scottish Executive's commitments in the Action Plan, we have been requested to report by the end of March 2000, so that our recommendations may be included in the White Paper.

The restricted nature of our remit

1.21 We have been asked to consider only a narrow area in the law of agricultural holdings. We have had some misgivings about this. In our view, the problems that we have had to consider in this Report are part of a set of wider questions that require to be examined in the law of agricultural

[10] LRPG, *Recommendations for Action*, para 5.2.
[11] Scottish Executive, Action Plan, section D2.
[12] Scottish Executive, Action Plan, section D.

holdings, for example security of tenure, fixed term tenancies, the form and manner of service of notices to quit, the grounds on which an incontestable notice to quit can be served, the grounds on which consent to the operation of a notice to quit can be granted, freedom of contract and so on. These are more deep-seated problems that relate to the policy of the Act itself. In our view, the Scottish Ministers should undertake a fundamental re-examination of the law in this area.

1.22 However, having examined the subject for the purposes of this Report, we are satisfied that the jurisdictional and procedural questions can conveniently be considered in isolation from the wider questions to which we have referred. We have nonetheless taken the liberty in the course of this Report of commenting on one or two specific areas of the substantive law where it seems to us that there is an obvious case for reform. The White Paper will give an opportunity for the wider review that we think should be undertaken.

The method of our research

1.23 Our method has been to identify the various jurisdictions and procedures in force in this area of the law, and their associated avenues of review and appeal. We have then examined the historical development of the legislation in order to explain how the jurisdictional and procedural provisions have reached their present state.

1.24 We have also carried out a statistical survey of the agricultural arbitration system; of agricultural holdings litigations, both first instance and appellate, in the ordinary courts and in the Land Court, and of the administrative jurisdictions of the Scottish Ministers. From the findings of this survey, and from our wider enquiries, we have made an appraisal of the practical operation of the system.

1.25 From this part of our study we have been able to identify the main weaknesses in the present system. We have then considered some options for reform to see which of them represent the best practical solutions to the problems that we have identified. These options include the recommendations of the LRPG.

1.26 Finally, we have have formulated our own recommendations in outline and in detail.

1.27 Our normal method of working is to prepare a discussion paper setting out a range of options for reform and to circulate it for an appropriate period for consultation. We then analyse the consultation responses and in the light of these decide on our recommendations, if any, for reform.

1.28 In view of the urgency of the reference to us, we recognised from the outset that it would not be practicable for us to put out a discussion paper for public consultation. In any event, we understand that the Deputy First Minister did not expect us to carry out such an exercise.

1.29 There have already been two public consultations on the subject-matter of our terms of reference. In essence our task is to examine the subject in the context of the Land Reform Action Plan and to express our own views on possible reforms. Our advice will then be published along with the White Paper and will be the subject of further public consultation. Thereafter there will be yet further consultation on the draft Bill.

1.30 There will therefore be further opportunities for the interest groups in this area of the law to put their points of view.

1.31 Although we have not been able to carry out a public consultation exercise, we have had access to the memoranda and comments, other than those that were confidential, that were submitted in response to the extensive consultation exercise carried out by the Land Reform Policy Group. That

exercise covered among many topics the general questions raised by our terms of reference. We have also been assisted by an Advisory Group of leading agricultural lawyers.[13]

The structure of this Report

1.32 In chapter 2 of this Report we set out a brief history of the legislation in order to demonstrate the lack of any systematic policy in the evolution of the dispute resolution process and to illustrate the accretion of sundry jurisdictions over the last century or so by *ad hoc* legislative provisions. We then demonstrate the incoherence of the existing structure of jurisdictions.

1.33 In Part II we examine the arbitration system. We show how arbitration has become detached from its original conception and purpose; how the general jurisdictional provisions are overlaid by a multiplicity of *ad hoc* jurisdictions that predate them, and how the supervisory and appellate jurisdictions within the system lack any logical pattern. We then examine how the system currently operates and identify its shortcomings.

1.34 In Part III we examine the jurisdictions of the civil courts at common law and under statute and identify the areas in which they appear to be deficient.

1.35 In Part IV we examine the jurisdictions and procedures of the Scottish Land Court in the light of the current practice in the Court, and identify the areas in which they appear to be deficient.

1.36 In Part V we examine three other jurisdictions within the agricultural holdings system, of which the most important is the administrative jurisdiction of the Scottish Ministers.

1.37 In Part VI we set out our guiding principles for reform, we review a range of options for reform and we set out our own proposals in outline and in detail.

1.38 Finally, in Part VII we consider the future for agricultural arbitration in the light of our proposals.

Our general conclusions

1.39 Our research into this matter and our own experience have confirmed the conclusion reached by the Land Reform Policy Group that there is widespread dissatisfaction on both sides of the tenanted sector of agriculture with the existing system of dispute resolution under the agricultural holdings legislation. The principal points of dissatisfaction are that the system is needlessly expensive and that it involves frustrating delay. We consider that this feeling of dissatisfaction is well-founded.

1.40 The following are the main problems:

- the various jurisdictions in this area of the law lack a coherent structure;
- the arbitration system is failing to deliver justice expeditiously and economically, and is unsuitable for many of the questions remitted to it;
- the procedures of the ordinary civil courts, both first instance and appellate, are not sufficiently expeditious in actions relating to agricultural holdings;
- the jurisdiction of the Scottish Land Court is needlessly restricted.

Our approach to reform

1.41 In formulating our proposals for reform we have adopted the following general priorities:

[13] Paras 1.43-1.44 *infra*.

- dispute resolution should in every case be carried out by whichever decision-maker, whether court or individual, is best qualified to deal with the question in issue;
- every dispute in this area of the law should be resolved as expeditiously as is reasonably practicable both at first instance and at appeal;
- procedures should be designed to minimise expense to the parties.

1.42 Our priorities of quality, expeditiousness and economy are in line with those of the Land Reform Action Plan and of the Scottish Ministers,[14] and are in line with our terms of reference.

Our Advisory Group

1.43 In the preparation of our Report and recommendations, we have been assisted by four leading practitioners in this field: Mr J Gordon Reid QC, Mr Robert D Sutherland, Advocate, Mr Alasdair G Fox WS and Mr Donald G Rennie OBE WS. Mr Reid and Mr Sutherland have special expertise in litigation and arbitration relating to agricultural holdings. Mr Fox and Mr Rennie have wide experience in agricultural arbitrations and are members of the Land Reform Landlord and Tenant Consultative Panel. Mr Rennie is a former Secretary of the Scottish Agricultural Arbiters' Association.

1.44 The members of our Advisory Group have read and commented on drafts of this Report and have provided us with information not readily accessible in published sources. We are grateful to them for their advice.

Acknowledgments

1.45 We are grateful to the Chairman of the Scottish Land Court, the Hon Lord McGhie, and his colleagues, and to Mr Duncan D McDiarmid and Mr Alistair B Campbell, both former members of the Court, all of whom have commented on our outline proposals.

1.46 We are grateful too to Mr Keith Graham, the Principal Clerk of the Scottish Land Court, Mr John L Anderson, the Principal Clerk of the Court of Session, Mr Tom Higgins, the Depute Principal Clerk of Justiciary, the staff of the Scottish Record Office, the staff of the Scottish Executive Rural Affairs Department, and those sheriff clerks who responded to our enquiries. From these sources we have obtained much useful information as to the practical operation of the system.

1.47 We have also received helpful information from Mr Malcolm Strang Steel WS, the Secretary of the Scottish Agricultural Arbiters' Association, and from the Royal Institution of Chartered Surveyors in Scotland on the important question of arbitration costs.

[14] Parliamentary Answer by the Minister, Mr Ross Finnie, MSP (S1W-2652) 19 Nov 1999.

CHAPTER 2

THE HISTORY OF DISPUTE RESOLUTION IN THE LAW OF AGRICULTURAL HOLDINGS

Common law arbitration

1.48 In agricultural tenancies, practical questions between landlord and tenant were traditionally resolved by arbitration. The arbiter was often a neighbour of the parties. In most cases the arbitration was conducted by means of an informal hearing when the arbiter met the parties at the holding, heard their representations to him and made his inspection. In this way, practical questions such as the state of repair of drains and fences were settled promptly and with the minimum of formality.

1.49 Arbitration by a single arbiter has always been competent at common law[15] but in farming disputes there is a long-established tradition of arbitration by two arbiters and an oversman. This system of jurisdiction is associated in modern times with the waygoing valuation of standing crops, manures and the like.[16] It is our impression that this method of arbitration has become less common in modern practice.[17]

1.50 In agricultural arbitrations considerable informality of procedure was permissible.[18] It is obvious from the cases and from the writers that in the development of agricultural arbitration procedural informality went hand in hand with the essentially practical nature of the arbiter's task. In most cases the decision rested largely on the arbiter's findings from his own inspection of the farm.[19] This philosophy was supported by the courts throughout the nineteenth century.

1.51 The traditional idea of informality in agricultural arbitrations was re-stated at the start of the twentieth century in *Paterson v Glasgow Corporation.*[20] But the increasing alertness of the law to questions of natural justice and, in the case of agricultural holdings, the codification of arbitration procedure[21] have meant that the modern system of agricultural arbitration has departed radically from the traditional model.

Statutory arbitration

1.52 Under the Agricultural Holdings (Scotland) Acts there are general arbitration provisions the effect of which is to compel the parties to resolve by arbitration almost all of the questions likely to arise between them. In addition, and it would seem unnecessarily, the legislation requires the parties to resort to arbitration on numerous specific questions arising under individual sections.

1.53 To demonstrate the shortcomings of the arbitration system and to justify our approach to reform of the law, we begin by reviewing the development of the general arbitration provisions and related jurisdictions and describing the specific jurisdictions that are in effect.

The growth of the general arbitration provisions and the development of the related jurisdictions of the sheriff court, the Scottish Land Court, the recorder and the Scottish Ministers

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[15] *Hamlyn & Co v Talisker Distillery* (1894) 21 R (HL) 21 at 27, 2 SLT 12 at 14, per Lord Watson.
[16] *Gibson v Fotheringham*, 1914 SC 987; *Cameron v Nichol*, 1930 SC 1.
[17] Hunter, *Law of Landlord and Tenant,* 4th ed (1876) at p 392.
[18] *Nivison v Howat*, (1883) 11 R 182; *Gibson v Fotheringham, supra.*
[19] Rankine, *The Law of Leases in Scotland,* 3rd ed (1916) at p 468; Hunter, *Law of Arbitration in Scotland* (1980), at p 375.
[20] (1901) 3F (HL) 34, Lord Robertson at p 40.
[21] Now in Sch 7 to the 1991 Act.

1.54 *Agricultural Holdings (Scotland) Act 1883*. Statutory arbitration between the landlord and the tenant of an agricultural holding originated in the first Agricultural Holdings (Scotland) Act (the 1883 Act) in relation to waygoing claims for compensation. The 1883 Act was primarily concerned with creating and making effective the tenant's right to compensation at his waygoing for certain specified improvements;[22] but it also took into account the landlord's claims for the tenant's breaches of the lease.[23]

1.55 If the parties failed to agree on "the amount and mode and time of payment of compensation to be paid" by either, their difference was to be settled by a reference.[24]

1.56 The 1883 Act provided that the reference could be conducted by a single referee or, where the parties failed to concur in the appointment of a referee, by two referees and an oversman.[25] Where the reference was to be conducted by two referees and an oversman the sheriff had power, on default of an appointment of a referee by either party, to appoint a "competent and impartial person" to be a referee.[26] Where the two referees failed to appoint an oversman, the sheriff had a similar power.[27] Either party was entitled to require that the oversman should be appointed by the sheriff himself.[28]

1.57 The 1883 Act specified the basic elements of procedure for arbitration on the parties' waygoing claims by arbitration.[29] These form the basis of the modern code of procedure set out in Schedule 7 to the 1991 Act.

1.58 In view of the later history of arbitration under the Acts, the time limits imposed by the 1883 Act are significant. The Act obliged a single referee to pronounce his award and have it ready for delivery within 28 days after his appointment.[30] Where there were two referees they were subject to the same time limit, the period running from the date of the later of the two appointments; but they were entitled jointly to extend that period to no longer than 49 days. If the two referees failed to comply with these time limits, their powers automatically ceased and the matters referred to them stood referred to the oversman.[31] The oversman had to pronounce his award and have it ready for delivery within 28 days; but that period could be extended by the sheriff, on the application of either party or of the oversman, to a maximum of 49 days.[32] These time limits were consistent with the practical nature of the questions remitted to arbitration by the Act.

1.59 The Act entitled the referee or referees or oversman to award expenses.[33] The amount of expenses was subject to taxation by the auditor of the sheriff court. The taxation was subject to review by the sheriff.[34]

1.60 The award in every case had to specify certain statutory particulars[35] and had to fix a date for payment of the money awarded for compensation, expenses or otherwise.[36]

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[22] ss 1-23.
[23] s 6.
[24] s 8.
[25] s 9.
[26] s 9(6).
[27] s 9(9).
[28] s 10.
[29] ss 7-23.
[30] s 15.
[31] s 16.
[32] *ibid.*
[33] s 18.
[34] *ibid.*
[35] s 17.
[36] s 19.

1.61 There was also a more drastic exclusion of the parties from recourse to the courts. If the sum claimed as compensation was £100 or less, the award was final.[37] Where the sum claimed exceeded £100, which would represent £4700 today,[38] either party was entitled to appeal against the award to the sheriff, within a time limit of 7 days, on certain specified grounds, all of them matters of law.[39] On appeal, the sheriff was entitled in his discretion to remit the case to be re-heard in whole or in part by the referee or referees or oversman with such directions as he might think fit. The decision of the sheriff on appeal was final.[40]

1.62 The 1883 Act also introduced the statutory irritancy for non-payment of rent, which was exclusive to the sheriff.[41]

1.63 The Act conferred a further jurisdiction on the sheriff associated with the tenant's new statutory right of bequest.[42] It entitled the landlord to object to the legatee.[43] If the landlord objected, it fell to the legatee to petition the sheriff for decree of declarator that he was tenant as from the date of death of the deceased tenant.[44] If the landlord established any reasonable ground of objection to the satisfaction of the sheriff, the sheriff had to declare the bequest null and void. Otherwise he had to grant decree in terms of the legatee's petition.[45] The sheriff had the power in such cases to regulate *interim* possession of the holding.[46]

1.64 The Act also conferred on the tenant a limited right of removal of his fixtures and buildings at the termination of the tenancy.[47] If the landlord elected to purchase any such fixture or building, and therefore to pay to the tenant its fair value, any difference as to that value was to be determined by a reference, but in this case without right of appeal to the sheriff.[48]

1.65 Under the Act, there were therefore only two jurisdictions, that of the referee, or of two referees and an oversman, and that of the sheriff, which was both judicial and administrative.

1.66 *Market Gardeners Compensation (Scotland) Act 1897*. This Act, which was to be read and construed as part of the 1883 Act, enlarged the scope of the tenant's rights to compensation in the case of a market gardening tenant by providing an express right to compensation in respect of certain specified market gardening improvements. It also extended to the market gardening tenant the rights of a tenant under the 1883 Act to remove certain fixtures and buildings and conferred a further right on the market gardening tenant to remove certain fruit trees and bushes.[49] All questions of compensation arising in such cases were subject to the existing arbitration provisions of the 1883 Act.

1.67 *Agricultural Holdings Act 1900.* The 1900 Act applied to England and Wales and to Scotland.[50] Probably for this reason it no longer used the terminology of references and referees. Instead, it adopted the terminology of arbitrations and arbiters.[51] This terminology has been consistently used ever since.

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[37] s 20.
[38] Source: Bank of England, monetary analysis department.
[39] s 20.
[40] *ibid.*
[41] s 27.
[42] s 29.
[43] s 29(c).
[44] s 29(d).
[45] s 29(d) and (e).
[46] s 29(f).
[47] s 30.
[48] s 30, *proviso* 5.
[49] ss 3 and 6.
[50] s 11.
[51] ss 2 and 10.

1.68 The 1900 Act amended jurisdiction and procedure in arbitration. It provided that any dispute as to claims for compensation in respect of improvements, whether statutory or at common law or in terms of the lease, was to be settled by arbitration in accordance with the provisions of the lease or, if no such provisions existed, in accordance with the procedure set out in the Second Schedule to the Act.[52] It enacted a more detailed code of arbitration procedure[53] which has survived, with few amendments, in Schedule 7 to the 1991 Act. The Act made an important jurisdictional modification by providing that wherever a claim fell to be determined by arbitration, the arbitration had to be carried out by a single arbiter unless the parties agreed otherwise.[54] This was the first legislative restriction on the traditional system of arbitration by two arbiters and an oversman.

1.69 The procedural code set out in the Second Schedule to the Act distinguished between those cases where the arbitration was carried out by a single arbiter and those where, by election of the parties, it was carried out by two arbiters and an oversman.[55] Questions of law arising in the course of the arbitration were made subject to the opinion of the sheriff on a case stated by the arbiter and to a right of appeal from the sheriff to the Court of Session.[56]

1.70 The significant jurisdictional feature of the 1900 Act was that it introduced the administrative jurisdiction of the Board of Agriculture, later to become that of the Secretary of State and now the Scottish Ministers, and ended the administrative jurisdiction of the sheriff to appoint arbiters. The arbitration procedure was made subject to the administrative jurisdiction of the Board of Agriculture, for example in the appointment of arbiters and oversmen, the granting of extensions of time and the prescribing of forms.[57]

1.71 However, the 1900 Act conferred on the sheriff new supervisory powers to remove an arbiter for misconduct[58] and to set aside an award where the arbiter had misconducted himself or where the arbitration or award had been improperly procured.[59]

1.72 *Agricultural Holdings Act 1906*. The 1906 Act was a United Kingdom statute. It abolished statutory arbitration by two arbiters and an oversman. It provided that all questions that were referred to arbitration under the Acts or under the lease were to be determined by arbitration by a single arbiter, notwithstanding any agreement to the contrary.[60] It also made a minor amendment to the Schedule of arbitration procedure in the 1900 Act.[61]

1.73 The 1906 Act conferred on the tenant new rights to compensation for damage by game[62] and for disturbance in cases where the landlord terminated the lease "without good and sufficient cause and for reasons inconsistent with good estate management."[63] Questions arising under these provisions were to be determined in default of agreement by arbitration.[64]

1.74 The 1906 Act also conferred on the tenant the right of freedom of cropping and disposal of produce.[65] If the tenant exercised these rights in such a manner as to injure or deteriorate the holding, or to be likely to do so, the landlord had available to him at any time the remedy of damages rather

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[52] s 2.
[53] Second Sch.
[54] s 2(5).
[55] s 2; s 10(3).
[56] s 2(6); s 10(3).
[57] *ibid* Part I, paras 1, 5, 10, 16; Pt II, paras 4, 7, 13.
[58] Second Sch, Pt I, para 6 and Pt II, para 14.
[59] *ibid*, Pt I, para 13 and Pt II, para 14.
[60] s 1(2).
[61] s 1(3).
[62] s 2.
[63] s 4.
[64] ss 2(2) and 4.
[65] s 3(1).

than compensation. In default of agreement the amount of damages was to be determined by arbitration.

1.75 The Act also created the office of recorder. It provided that if at the commencement of any tenancy entered into after the commencement of the Act either party so required, a record of the condition of the buildings, fences, gates, roads, drains, ditches, and cultivation of the holding should be made within three months after the commencement of the tenancy. The parties were free to appoint their own recorder. In default of agreement the appointment was to be made by the Board of Agriculture and Fisheries.[66]

1.76 The 1906 Act was to come into operation on 1 January 1909;[67] but in the event it was superseded by the 1908 Act which came into force on the same date.

1.77 *Agricultural Holdings (Scotland) Act 1908*. The 1908 Act was a consolidating statute. It repealed the 1883 Act, the 1897 Act, the 1900 Act and the 1906 Act, so far as those were not already repealed. The 1908 Act incorporated all of the provisions of the 1906 Act and brought them into force. By then, it had become established that in relation to arbitrations there were two supervisory jurisdictions: the jurisdiction of the Board of Agriculture and Fisheries to appoint the arbiter, to extend the time for the award and to specify forms for proceedings in arbitrations; and the jurisdiction of the sheriff to remove an arbiter for misconduct; to rule on any question of law arising in the course of arbitration and submitted to him by way of stated case; to set aside an award where an arbiter had misconducted himself or where the arbitration or award had been improperly procured; and to review the taxation by the auditor of the sheriff court of the expenses of the arbitration.

1.78 *Agricultural Holdings (Scotland) Amendment Act 1910*. The provisions for compulsory arbitration by a single arbiter introduced by the 1906 Act and re-enacted in the 1908 Act gave rise to dissatisfaction within the industry. The Scottish Chamber of Agriculture were of the view that the wording of the single arbiter provision prevented ordinary waygoing valuations from being carried out by the traditional, and by 1906 almost exclusively used, method of arbitration by two arbiters and an oversman. This view was confirmed by the House of Lords in *Stewart* v *Williamson*.[68] In the light of that decision Parliament, at the Chamber's behest, passed the 1910 Act.[69] The 1910 Act was a short Act which amended the 1908 Act on this point. It provided that section 11 of the 1908 Act, which dealt with procedure in arbitrations, would no longer apply to "valuations of sheep stocks, dung, fallow, straw, crops, fences, and other specific things the property of an outgoing tenant, agreed under a lease to be taken over from him at the determination of a tenancy by the proprietor or incoming tenant, or to any questions which it may be necessary to determine in order to ascertain the sum to be paid in pursuance of such agreement."[70] In effect all such valuations and differences were to be resolved outwith the 1908 Act. This exclusion has survived to the present day.[71]

1.79 As the law stood after the 1910 Act, arbitration was the compulsory method of determining statutory claims for compensation and the exceptional claim of the landlord for damages under section 23(2) of the 1908 Act. All such claims involved questions of practical agriculture and valuation. At this stage in the history of the legislation, it was not contemplated that an arbiter would have any jurisdiction in questions of law.

1.80 *Agriculture Act 1920*. This Act applied to England and Wales and to Scotland. Its Scottish provisions were for the most part enacted by means of an adaptation of the terminology of the English

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[66] s 7.
[67] s 9.
[68] 1910 SC (HL) 47.
[69] The history of this controversy is briefly referred to by Sir Isaac Connell, who was directly involved in it, in *The Agricultural Holdings (Scotland) Act 1923,* at pp 8-9.
[70] s 1.
[71] 1991 Act, ss 68-72, Sch 10.

sections. The Act created the right of the tenant to compensation for disturbance where the tenancy was terminated by notice to quit. This compensation was payable on waygoing except in certain specified cases where the tenant had been at fault.[72] The excepted cases were in substance those in which an incontestable notice to quit can now be served under the 1991 Act. One of the excepted cases was the case where an agricultural committee[73] had granted a certificate of bad husbandry. In such a case, the Act conferred on either party a right of appeal to an arbiter. The arbiter could reverse the decision of the committee and either grant or revoke the certificate.[74]

1.81 The calculation of compensation for disturbance was set at a fixed sum of one year's rent; but could be greater on proof by the tenant of loss. In the latter case the calculation of compensation was a matter for arbitration.[75] However, the Act extended the jurisdiction of the arbiter in such cases to cover the question whether compensation was payable at all.[76]

1.82 The 1920 Act empowered the agricultural committees to override a landlord's refusal, or unreasonable delay, to consent to the making by the tenant of a Part I improvement and, in cases where the landlord had refused, or unreasonably delayed, to agree in writing that the holding, or a part of it, should be treated as a market garden, direct that the tenant's right to compensation for improvements should apply to all or some of the statutory list of market garden improvements.[77] However, the 1920 Act entitled either party to require that the power of the committee in either of these cases should be exercised by an arbiter.[78]

1.83 The 1920 Act introduced the right to compensation for high farming.[79] The right was conditional on there being a record made under the 1908 Act. The proof and the valuation of this claim were matters for arbitration.[80]

1.84 Having provided for arbitration as the means of resolving numerous specific questions, the 1920 Act then introduced an extensive general arbitration provision which has been a key provision of the legislation ever since. Section 18 provided as follows:

> "18.-(1) Any question or difference arising out of any claim by the tenant of a holding against the landlord for compensation payable under the Act of 1908 or for any sums claimed to be due to the tenant from the landlord for any breach of contract or otherwise in respect of the holding, or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant or for any breach of contract or otherwise in respect of the holding, and any other question or difference of any kind whatsoever between the landlord and the tenant of the holding arising out of the termination of the tenancy of the holding or arising, whether during the tenancy or on the termination thereof, as to the construction of the contract of tenancy shall be determined by arbitration under the Act of 1908.
>
> (2) Any such claim as is mentioned in this section shall cease to be enforceable after the expiration of two months from the termination of the tenancy unless particulars thereof have been given by the landlord to the tenant or by the tenant to the landlord, as the case may be, before the expiration of that period:

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[72] s 10.
[73] That is to say, an area committee constituted by the Board of Agriculture under the Corn Production Act 1917, s 11(2) (1920 Act, s 34(1)(d)).
[74] 1920 Act, s10(2).
[75] s 10(6), (10).
[76] *ibid.*
[77] 1908 Act, s 29 (cf 1920 Act, s 34(1)(e)).
[78] s 15(7).
[79] s 16.
[80] *ibid.*

Provided that, where a tenant lawfully remains in occupation of part of a holding after the termination of the tenancy, particulars of a claim relating to that part of the holding may be given within two months from the termination of the occupation.

(3) This section shall not apply in the case of a tenancy which terminates before the commencement of this Act.".

1.85 The inaccurate sidenote to the section was "Arbitration on quitting holding" but, as was obvious from subsection (1), the section extended to questions or differences arising during the tenancy. The nature of these questions and differences was unrestricted. This was the first extension of the arbiter's jurisdiction to cover questions of law. The section in this way introduced one of the basic defects in the compulsory arbitration system which has caused problems up to the present day.[81]

1.86 The 1920 Act also established the Panel of Arbiters. In default of agreement between the parties the arbiter had to be appointed from the Panel.[82] Under the 1920 Act the Panel was appointed by the Lord President of the Court of Session.[83] Where the Board of Agriculture made an individual appointment of an arbiter, his remuneration was fixed by the Board. Where the arbiter was appointed by the parties, his remuneration, in default of agreement, was fixed by the auditor of the sheriff court, subject to appeal to the sheriff.[84]

1.87 The 1920 Act also amended the provisions as to the making of records.[85] Under the 1908 Act, the right to have a record made was available to either party at the commencement of the tenancy.[86] The 1920 Act entitled either party to have a record made at any time during the tenancy. The scope of the record was extended to cover improvements made by the tenant, or for which the tenant was entitled to compensation,[87] and fixtures or buildings which the tenant was entitled to remove.[88]

1.88 *Agricultural Holdings (Scotland) Act 1923*. This was the second consolidation. The general arbitration provision in the extended form enacted in section 18 of the 1920 Act became section 15 in the consolidating Act of 1923. The sidenote to section 15 was "Matters to be referred to arbitration".

1.89 *Small Landholders and Agricultural Holdings (Scotland) Act 1931*. The scope of the general arbitration jurisdiction was again widened in 1931. Section 32 of the 1931 Act substituted a new section 15(1) in the 1923 Act as follows:

> "Any question or difference between the landlord and the tenant of a holding arising out of any claim by the tenant against the landlord for compensation under this Act or any Act by this Act repealed, or out of any claim by either party against the other for breach of contract or otherwise in respect of the holding or out of any claim by the landlord against the tenant for waste wrongly committed or permitted by the tenant or as to the construction of the lease, and any other question or difference of any kind whatsoever between the landlord and the tenant arising out of the tenancy or in connection with the holding (not being a question or difference as to liability for rent) shall, whether such question or difference arises during the currency or on the termination of the tenancy, be determined by arbitration."

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[81] cf chs 5 and 6 (paras 2.44-2.141).
[82] 1920 Act, s 21; s 34.
[83] 1920 Act, s 21.
[84] 1920 Act, s 21(2).
[85] 1920 Act, s 26.
[86] 1908 Act, s 24.
[87] *ie* because the tenant on entry had met the outgoing tenant's claim for compensation for an improvement made by him: 1908 Act, s 7.
[88] *ie* under 1908 Act, s 21.

1.90 The 1931 Act required that the Lord President should consult with the Board of Agriculture before making appointments to the panel of arbiters.[89] The Act also amended the rules of procedure governing arbitrations.[90]

1.91 The 1931 Act made another important change to the extent of the arbitration jurisdiction. Section 34 entitled the parties to bypass the arbitration system altogether and refer their dispute to the Land Court by joint application.[91] This was the first extension of the jurisdiction of the Land Court to the agricultural holdings legislation.

1.92 In the 1931 Act the jurisdiction formerly exercised by the area agricultural committees in relation to improvements for which the landlord's prior consent was a condition of compensation was transferred to the Department of Agriculture.[92] In cases where the Department was the landlord, this jurisdiction was conferred on an arbiter.[93] In all arbitrations in which the Department was a party as landlord of the holding, the administrative jurisdictions of the Department were exercised by the sheriff.[94]

1.93 *Sheep Stocks Valuation (Scotland) Act 1937*. The 1937 Act was necessitated by the problems caused by the making of excessive allowances in contractual sheepstock valuations for acclimatisation and hefting.[95] The 1937 Act applied to sheepstock valuations under leases which required the tenant at the termination of the tenancy to leave the stock on the holding to be taken over by the landlord or the incoming tenant at a price or valuation to be fixed by arbitration.[96] The Act obliged the arbiter to disclose his valuation method by showing the basis of valuation of each class of stock and to give a breakdown of any amount included in respect of acclimatisation or hefting or of any other consideration or factor for which he made special allowance. If the arbiter failed to comply with these requirements his award could be set aside by the sheriff.[97] The 1937 Act introduced into sheepstock valuations the procedure of stated case to the sheriff with a right of appeal to the Court of Session.[98]

1.94 The Act further extended the jurisdiction of the Land Court. It entitled the parties to have any question as to the price or value of sheep stock under section 1 determined by the Land Court on joint application.[99]

1.95 *Hill Farming Act 1946*. The 1946 Act enacted an extensive series of measures to put the hill farming economy on a new and more secure footing. Part of the Act related to sheepstock valuations under leases entered into after the commencement of the Act.[100] The Act introduced valuation by statutory formula[101] and specified the particulars that were to be set out in the arbiter's award.[102] The Act entitled either party to insist that any sheepstock valuation under the Act should be carried out by the Land Court.[103] This provision was exceptional. Until then the jurisdiction of the Land Court in all other agricultural holdings questions had depended on the making of a reference by agreement of the parties. The Land Court was also given jurisdiction under paragraph 4 of Part 1 of the Second

[89] s 33, amending s 17(1) of the 1923 Act.
[90] Then set out in the Second Schedule to the 1923 Act; 1931 Act, s 39.
[91] See now 1991 Act, s 60(2).
[92] s 28.
[93] s 35(1).
[94] s 35(2).
[95] The history of the matter is set out in Gill, *Law of Agricultural Holdings in Scotland*, 3rd ed, ch 25 (hereinafter "Gill").
[96] s 1(1).
[97] s 1(2).
[98] s 2(1) and (2).
[99] s 3.
[100] ss 28-30.
[101] s 28, Second Schedule, Pts I and II.
[102] *ibid,* Pt III.
[103] s 29.

Schedule to determine three-year average prices in Whitsunday valuations where the sales evidence was deficient.

1.96 The 1946 Act provisions, together with the statutory method of valuation, caused difficulties for the Land Court.[104] In two cases, *Garrow and Another*[105] and *Tufnell and Nether Whitehaugh Co*,[106] the statutory formula was impossible to apply because of the lack of the necessary sales evidence. In some cases it was only by the agreement of parties that the Court considered itself able to make any valuation of the stock, the valuation in such a case being outwith the Act altogether.

1.97 Formula valuations under the 1946 Act also produced results that were out of all relationship with the marketplace. In *Garrow and Another*[107] the Land Court found that the value of the stock arrived at by the application of the statutory formula was much below the value that would have been realised if it had been sold on the open market. In *Tufnell and Nether Whitehaugh Co,*[108] the stock valued under the 1946 Act Rules was valued at around two-fifths of the value that the 1937 Act provisions would have produced. This prompted the Land Court to observe that

> "as a result of changes brought about by economic forces the whole foundation of the 1946 Act has been rendered inaccurate and unreliable, and as a method of achieving a fair valuation is now totally discredited and produces an inequitable award."[109]

1.98 We understand that in the current state of the hill farming economy the problem identified in these cases is now experienced in reverse. The valuation formulae produce values in excess of the value of the stock in the ring. It is apparent therefore that the system is defective both when hill farming is prosperous and when it is depressed. Moreover, when the market is depressed, the system gives the opportunity to the tenant to manipulate the market with a view to inflating the value of the stock. This area of the law is in urgent need of reform.

1.99 *Agriculture (Scotland) Act 1948*. The 1948 Act was a landmark. It was an attempt to maximise agricultural production in the immediate post-war conditions and to put the tenanted sector on a new footing. This Act greatly extended the jurisdictions of the Land Court.

1.100 Part I of the Act consisted of 215 sections which amended and extended the provisions of the 1923 and 1931 Acts. Part I resulted from the deliberations of a small working party established in July 1946 by the Department of Agriculture for Scotland. Two of the members were nominated by the representative organisations of landlords and tenants. The proposals of the working party were extensively discussed with the representative organisations of the industry and were for the most part incorporated in the 1948 Act.

1.101 The most far-reaching of the 1948 Act provisions was the introduction of security of tenure. Section 7 of the 1948 Act provided that where the tenant resisted a notice to quit, the notice would not have effect unless the Secretary of State consented to its operation on one or more of the specified grounds. The functions of the Secretary of State on such questions were delegated to the Agricultural Executive Committees established under the 1948 Act.[110] Where either party was dissatisfied with the decision of the Secretary of State, he had a right of appeal to the Land Court.[111]

1.102 As part of a series of provisions entitling the landlord in certain cases to serve an incontestable notice to quit, the 1948 Act conferred jurisdiction on the Secretary of State to grant or withhold a

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[104] cf *MacKinnon v Secretary of State*, 1949 SLCR 19; *Pott's JF v Johnstone*, 1951 SLCR 22.
[105] 1958 SLCR 13.
[106] 1977 SLT (Land Ct) 14.
[107] *supra*.
[108] *supra*.
[109] *ibid* at p 19.
[110] ss 68-69.
[111] s 7(6).

certificate of bad husbandry.[112] In such a case a landlord aggrieved by a proposed refusal of a certificate was entitled to refer the matter to the Land Court.[113]

1.103 With the introduction of security of tenure, the question of rent review became one of major importance. The 1923 Act[114] had provided that where the landlord requested arbitration on the amount of the rent and the tenant refused to agree to the request, the landlord was entitled to serve notice to quit without liability to pay compensation for disturbance. Conversely, if the tenant requested arbitration on the amount of the rent and the landlord refused to agree to the request, the tenant became entitled to serve notice to quit with a right to compensation for disturbance. These provisions did not deal fairly with a tenant who wished to contest the rent but who did not wish to leave the holding.

1.104 The 1948 Act provided that either party could demand a reference to arbitration on the amount of the rent. Under the 1948 Act, the arbiter had an uncontrolled discretion as to the criterion by which he assessed the rent. He was required merely to "determine what rent should properly be payable".[115]

1.105 Under the 1948 Act the Secretary of State retained numerous jurisdictions, for example the jurisdiction to vary the extent of permanent pasture that the tenant was required by the lease to maintain.[116]

1.106 The 1948 Act also extended the jurisdiction of the Land Court in relation to succession to leases. Under the 1883 Act,[117] which conferred on the tenant a right to bequeath his lease, the landlord had a right of objection to the legatee the decision on which rested with the sheriff.[118] The 1948 Act transferred that jurisdiction to the Land Court.[119]

1.107 Until 1948, the right of the heir-at-law to succeed to the lease was absolute. The 1948 Act made the heir-at-law subject to the same right of objection by the landlord and conferred jurisdiction on that question on the Land Court.[120]

1.108 In the 1948 Act an attempt was made to clarify the scope of the general arbitration provision, namely section 15 of the 1923 Act, as amended by the 1931 Act. For this purpose a new and all-embracing arbitration provision was added in section 22 of the 1948 Act which was expressly without prejudice to any other provision of the 1923 Act.

1.109 Section 22 provided *inter alia* as follows:

> "(1) Without prejudice to any other provision of this Act or of the Act of 1923, any claim of whatever nature by the tenant or the landlord of a holding against his landlord or his tenant, being a claim which arises –
>
> (a) under the Agricultural Holdings (Scotland) Acts 1923 and 1931, or this Act or any custom or agreement, and

[112] s 5(1)(a).
[113] s 5(1); Sch 2, para 4.
[114] s 12.
[115] s 11(2).
[116] s 12.
[117] And the consolidations of 1908 and 1923.
[118] cf para 1.63 *supra*.
[119] Sch 9, para 11.
[120] s 20.

(b) on or out of the termination of the tenancy of the holding or part thereof after the commencement of this part of this Act, shall, subject to the provisions of this section, be determined by arbitration …

(7) Subsection (1) of section 6 and subsection (2) of section 15 of the Act of 1923 (which relate to the reference of matters of arbitration) shall cease to have effect; and in subsection (1) of the said section 15 for the words from the beginning to "any other question or difference" there shall be substituted the words "save as otherwise expressly provided in this Act, any question or difference".

1.110 The remainder of section 22 provided for the giving of notice of claims and the timetable for the submission of claims to arbitration. Since section 15 of the 1923 Act, as amended, remained unrepealed, there were then two general arbitration provisions in force. Both of these provisions have survived the consolidations of 1949 and 1991. They constitute the present sections 60 and 62 of the 1991 Act.

1.111 So far as we are aware, none of the writers has attempted to provide any justification for the extension of compulsory arbitration to questions of law, nor any logical explanation of the overlaps of these two general arbitration sections and the specific arbitration provisions in other sections.

1.112 The Notes on Clauses to the 1948 Bill demonstrate that in the view of the draftsman of the 1948 Bill the arbitration provisions looked to the settlement of practical disputes and not to questions of law.[121] In view of the wording of the section this was plainly not the case.

[121] The Notes include the following analysis of the problem:

"Statutory provision as to the settlement by arbitration of questions arising between landlords and tenants of agricultural holdings has existed for very many years. The 1923 Act contains what is, on the face of it, a very comprehensive provision in section 15 (as amended by section 32 of the 1931 Act) as to the reference of such questions to arbitration, but in practice it has proved very difficult to say with any certainty what is the exact scope of the provision and such questions have frequently been the subject of litigation before the courts. This clause is designed to clear up the position.

Another point which the clause is designed to deal with is the tendency for negotiations on such claims to drag on for some time before they are actually referred to arbitration and the clause contains provisions to speed up the reference and settlement of claims by arbitration.

The reason for applying arbitration procedure and confining the courts to the decision of questions of law arising in relation to the determination of questions of this kind is that they are concerned with technical farming matters which are not really suitable for settlement by the courts. Moreover it is very desirable that these claims should be settled speedily and with as little cost as possible.

Subsection (1) provides that any claim of whatever nature between landlord and tenant of an agricultural holding which arises on or out of the termination of the tenancy of the holding after the commencement of this part of the Bill must, unless the parties settle it between themselves, be determined by arbitration.

It applies to claims under the 1923 Act or under this Bill or under custom or agreement …

… In addition to these claims arising on or out of termination of a tenancy, there are other questions which arise during the course of a tenancy and which the 1923 Act or this Bill refers to arbitration - such as claim for damage by game (1923 Act, section 11) or demands for variation of rent (clause 11 of this Bill). Arbitrations on such matters will be subject to the same code of procedure as matters arising on the termination of the tenancy. This subsection requires that these claims shall be determined by arbitration in accordance with the rules of the 1923 Act …

1.113 The 1948 Bill was debated in the House of Lords. In the course of the debate the Minister came under pressure to substitute the Land Court for the arbiter in disputes between landlord and tenant in view of the reputation of the Court, its standing in the agricultural community and its expertise in legal questions under the Acts. This was opposed by the Minister on the basis that arbitration gave the advantages of speed and economy.[122] That claim may have been valid in 1948. It is not valid now.

1.114 The 1948 Act also introduced the requirement that the membership of the panel of arbiters should be reviewed not less than every 5 years.[123] This was based on advice to the Minister that the panel required to be drastically reconstituted.[124]

1.115 Section 84 of the Act modified and further enlarged the provisions of section 35 of the 1931 Act. It introduced the rule that where the Secretary of State was a party to an arbitration the nomination of the arbiter, and the determination of his remuneration, should be made by the Land Court. This provision abolished the jurisdiction of the sheriff in such matters under the 1931 Act.

1.116 Part I of the 1948 Act introduced a further jurisdictional complication by entitling either party to refer to the Land Court any dispute arising out of the making of a record of the holding.[125]

1.117 Part I also conferred on the Secretary of State a number of administrative jurisdictions, of which the most important related to the approval of short-term lets not attracting security of tenure.[126]

1.118 Part II of the 1948 Act was concerned with the promotion of good estate management and good husbandry by the owners and occupiers of agricultural land and with the dispossession of those who failed to attain the appropriate standards. These provisions also conferred on the Secretary of State a power of compulsory purchase of the land in certain circumstances.[127]

> Subsection (7). As the provisions of this clause are drafted in the form of alterations and additions to the scheme for arbitration contained in the 1923 Act, this subsection makes the necessary amendments in that Act:
>
> It repeals subsection (1) of section 6 which provided for determination of claims to compensation for improvements by arbitration and which is now absorbed by subsection (1) of this clause. [Subsection (2) of section 6 which remains in operation requires that where a claim for compensation under the 1923 Act has been referred to arbitration, the arbiter shall give effect in his award to any agreement between the parties substituting where that is permissible, compensation other than that laid down in the Act.] It repeals subsection (2) of section 15 of the 1923 Act which is replaced by this clause with amendments; it repeals that part of subsection (1) of section 15 as amended by section 32 of the 1931 Act which defines the matters which are to be referred to arbitration as this is replaced by subsection (1) of this clause. The provisions of subsection (1) of section 16 of the 1923 Act remain in operation, ie, that the determination shall be by single arbiter in accordance with the rules of the second schedule of the 1923 Act notwithstanding any agreement between the parties for a different method."

[122] Hansard, House of Lords, Vol 156, cols 688-693. Cf Notes on Clauses, *supra*.

[123] s 23.

[124] The Notes on Clauses contain the following comment:

> "No complete revision of the panel of arbiters originally appointed by the then Lord President in 1921 has ever been made because there was no statutory authority to expunge the names of persons once appointed. The panel has been strengthened from time to time however by the addition of new personnel to meet the depletions caused by deaths etc and in 1943 its strength was increased from 90 to 134. Preliminary steps are now being taken towards the revision of the panel in anticipation of the passing of the Bill. But with the passing of the years a certain amount of dead wood has accumulated and representations have been made by both farming and landlord interests that there ought to be a drastic reconstitution of the panel at an early date and that the panel should thereafter be subject to periodic revision."

[125] 1948 Act, s 24, Ninth Sch, para 17 amending s 37 of the 1923 Act.

[126] 1948 Act, s 17; now 1991 Act, s 2. See ch 11 (paras 5.1-5.18).

[127] s 31.

1.119 In Part II of the 1948 Act, the Land Court was given jurisdiction to assess the merits of a proposal made by the Secretary of State to give a direction to a landowner to provide specified fixed equipment on his land.[128] The Land Court's decision on the proposal[129] was to be made in the form of a report to the Secretary of State,[130] who was obliged to act in accordance with the report.[131]

1.120 The Land Court was given a similar jurisdiction in relation to proposals by the Secretary of State to issue certificates of bad estate management as a prelude to compulsory purchase of the land in question[132] and other adjacent or contiguous land;[133] in relation to the approval of a tenant to whom the owner or occupier of agricultural land proposed to let it where either of them was dispossessed of the land on the ground of bad husbandry;[134] in relation to a proposed refusal by the Secretary of State to dispossess the owner or occupier of land during the currency of a warning notice in cases of bad estate management or of bad husbandry,[135] and in relation to a proposed direction by the Secretary of State as to the stocking of a deer forest or grouse moor with sheep or cattle, or both.[136]

1.121 The Land Court was also given an incidental jurisdiction to determine that for the purposes of Part II a specified person should be treated, exceptionally, as being the owner of the land.[137]

1.122 In Part III the Land Court was given jurisdiction arising from the provisions for directions by the Secretary of State for the control of injurious animals and birds and the prevention of escapes of animals kept in captivity.[138] Where the relevant direction by the Secretary of State was not complied with, the Secretary of State was entitled to have the necessary steps taken on his own authority and to recover the reasonable cost of doing so.[139] In case of dispute, the Land Court were empowered to determine the reasonable cost[140] and to allocate expense reasonably incurred in such matters on a just and equitable basis.[141]

1.123 Under Part III of the Act the Land Court was also given jurisdiction to vary on an equitable basis the amount recoverable by or from a landowner in respect of expenses incurred by the Secretary of State in carrying out deer control[142] and the proceeds of the sale of the carcasses.[143]

1.124 Part IV of the Act conferred on the Secretary of State more general powers of acquisition and management of agricultural land.

1.125 In Part IV the Land Court was given jurisdiction to determine questions as to the entitlement of the Secretary of State to acquire land in order to ensure its full and efficient use.[144]

1.126 In consequence of the new jurisdictions conferred on the Land Court, which were in the event invoked on only a few occasions, the Act authorised an increase in the complement of the Court from five members to seven.[145]

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[128] ss 29-30.
[129] s 30(2).
[130] s 71(2).
[131] s 71(4).
[132] s 31(4) and (5).
[133] s 31(2)(3).
[134] s 32(1).
[135] s 34(1)(5); s 27(1)(3).
[136] s 36(1), (4).
[137] s 38.
[138] ss 39-40.
[139] s 41.
[140] s 41(2).
[141] s 41(4).
[142] s 44.
[143] s 45(4).
[144] s 57(2), (3).

1.127 In the aftermath of the 1948 Act the scope of the arbitration provisions was considered by the Inner House in two important cases. In *Houison-Craufurd's Trs v Davies*[146] the landlords served notice of resumption on the tenant and, on his refusal to vacate the land in question, raised an action of removing in the sheriff court. The sheriff held that the defences were irrelevant. When the case came before the Inner House the defender for the first time took the plea that the question could be resolved only by arbitration. It was held by a majority that the action had to be sisted for arbitration. The majority held that the arbitration section[147] was imperative and could not be waived. The Court was therefore bound to give effect to a plea of arbitration no matter at which stage the plea was raised.[148] In that case Lord Justice-Clerk Thomson commented on the uncertainty that the arbitration provisions in the 1948 and 1949 Acts had caused.[149]

1.128 The problem was raised again soon after in *Brodie v Kerr* and in *McCallum v Macnair* both of which were heard together by a court of seven judges.[150] In the former case the landlord raised an action of declarator and removing in the sheriff court based on a contractual irritancy for non-payment of rent. In the latter the landlord raised an action of removing in the sheriff court based on a notice to quit. In each case the action was defended on the merits. In each case a plea of arbitration was added during the course of the action. The court sisted both actions on the view that arbitration was mandatory.[151]

1.129 *Agricultural Holdings (Scotland) Act 1949*. This was the first of the two post-War consolidations. The over-riding jurisdiction of the arbiter, and the overlap of the sections in the 1923 and 1948 Acts to which we have referred, were continued in sections 68 and 74 of the 1949 Act.

1.130 *Agriculture Act 1958*. The 1958 Act made a major extension to the jurisdiction of the Land Court. Section 3 of the Act transferred to the Land Court the powers previously vested in the Secretary of State as to the giving or withholding of consent to the operation of notices to quit. The Act also transferred to the Land Court the powers of the Secretary of State to grant certificates of bad husbandry for the purposes of notices to quit. The 1958 Act moderated the restrictions of the 1949 Act on the operation of notices to quit in cases where the tenant was a successor tenant. It entitled the landlord to serve an incontestable notice to quit on such a tenant within certain time limits whether he had succeeded as a legatee or as heir-at-law.[152]

1.131 *Deer (Scotland) Act 1959*. Part I of this Act established the Red Deer Commission with the general functions of conservation and control of red deer. This legislation superseded the functions of the Secretary of State in such matters under Part III of the 1948 Act.[153]

1.132 Section 11 of the Act amended the jurisdiction conferred on the Land Court by the 1948 Act. It gave a right of appeal to the Court to an owner or occupier aggrieved by the Commission's

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[145] s 70(1).
[146] 1951 SC 1.
[147] Then s 74 of the 1949 Act.
[148] *Houison-Craufurd's Trs*, *supra*, L Keith at p 10.
[149] "There can be no doubt that the difficulty in this case arises from the uncertainty in the Act (*sc* the 1949 Act) as to the ambit of the jurisdiction conferred on the sheriff and the arbiter respectively. The general tendency has undoubtedly been gradually to extend the scope of arbitration, but the border line between the extended jurisdiction of the arbiter and what remains of the sheriff's jurisdiction has not been defined." *ibid* at pp 6-7.
[150] 1952 SC 216.
[151] In these cases Lord Patrick, who had dissented in *Houison-Craufurd's Trs, supra*, concluded that the opinion that he had expressed in that case was unsound (at p 239).
[152] 1958 Act, s 6.
[153] Para 1.122 *supra*.

statement of expenses in the case where the Commission enforced a deer control scheme on the failure of the owner or occupier to do so.[154]

1.133 *Succession (Scotland) Act 1964*. The 1964 Act conferred jurisdiction on the sheriff in relation to the transfer on intestacy of the deceased's interest in an agricultural lease. This provision remains in force. It provides that the statutory one-year period for the transfer of a deceased tenant's interest under a lease may be extended either by agreement between the landlord and the deceased's executor or, failing this, by the sheriff on a summary application by the executor.[155]

1.134 The sheriff's power under section 16 of the 1964 Act is a power to rule on the substantive merits of an application for an extension where the executor's power to transfer is not in issue. If the landlord contends that the right to transfer has already been lost, for whatever reason, that issue must be dealt with in the ordinary courts.[156] In *Gifford v Buchanan*[157] it was held that the sheriff is not empowered to extend this one year period after its expiry.

1.135 *Agriculture (Miscellaneous Provisions) Act 1968*. This Act further extended the jurisdiction of the Land Court. Before the 1968 Act a landlord was entitled to serve on a successor tenant notice to quit which the tenant could not resist.[158] The 1968 Act amended this by restoring protection to the near-relative successor by entitling him to serve a counter-notice requiring that the operation of the notice to quit should be subject to the consent of the Land Court. The 1968 Act provided certain special grounds on which consent could be granted in such cases. These were additional to the grounds available under the 1949 Act against any tenant.[159]

1.136 *Agriculture (Miscellaneous Provisions) Act 1976*. The 1976 Act introduced further protections for the tenant. Before this Act the tenant, on receiving a demand to remedy an alleged breach of his obligations in relation to the fixed equipment, which he might consider to be the landlord's responsibility, had to decide whether to comply in full with the demand, perhaps at great expense and under the pressure of a time limit, or to deal only with that part of it, if any, that he considered to be his responsibility and for which he considered that a reasonable period for compliance had been stipulated. The disadvantage of the latter option was that if a notice to quit was served founded on the demand, the tenant had to peril his tenancy on his succeeding before the arbiter on the inevitably ensuing notice to quit.[160]

1.137 The 1976 Act attempted to deal with this problem. Sections 13 and 14 provided a tenant who was faced with a demand to remedy with three new lines of defence. These enlarged the jurisdiction of the arbiter and conferred new jurisdictions on the Land Court.

1.138 First, the arbiter was given power to modify the demand. He could impose reasonable time limits on all or any of the items specified in the demand, whether or not a time limit was already specified. He could delete from the demand any item that he considered to be unnecessary or unjustified, having regard to the interests of good husbandry and sound management of the estate. If he considered that the demand specified remedial action involving undue difficulty or expense, he could substitute other methods or materials for those specified in the demand.[161] To moderate the

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[154] The powers of the Commission were extended by the Deer (Amendment) (Scotland) Act 1967 and the Deer (Amendment) (Scotland) Act 1982. The 1982 Act extended the scope of the legislation to cover sika deer and such other deer as might be specified by direction of the Secretary of State (s 1).
[155] 1964 Act, s 16(3)(b).
[156] *Rotherwick's Trs v Hope* 1975 SLT 187; Gill, 3rd ed, para 34.09.
[157] 1983 SLT 613; cf *Assuranceforeningen Skuld v IOPCF*, *The Times*, 14 June 1999; 1999 GWD 16-766.
[158] 1958 Act, s 6, *supra*.
[159] Gill, 1st ed, paras 194-198.
[160] Gill, 2nd ed, para 342: see also *Nicholls Trs v Maclarty* 1971 SLCR App 85.
[161] s 13(1).

consequence of these provisions on the landlord's interests, the Land Court was given power to vary the period of a notice to quit founded on a breach of the modified demand to remedy.[162]

1.139 Second, the arbiter was given the power to relieve the tenant of the consequences of a breach by reason of a change in circumstances occurring between the service of the demand and the expiry of the time specified or extended. If the arbiter found that such a change in circumstances existed, he could modify the time limit. If the demand was fulfilled late, he could retrospectively extend the time limit. If the breach remained unremedied, he could extend the period for compliance to one that he considered to be reasonable.[163]

1.140 The final action open to the tenant was to require that the operation of a notice to quit on his default should be subject to the consent of the Land Court. In that event, the only ground on which the Land Court might refuse consent was that a fair and reasonable landlord would not insist on possession.[164]

1.141 *Agricultural Holdings (Amendment) (Scotland) Act 1983*. Before the 1983 Act the arbitration provisions made no distinction between rent review and other cases. The 1983 Act introduced new procedures designed to ensure greater uniformity in the practice of rent assessment and to ensure that the difficult provisions relating to scarcity and other factors[165] should be authoritatively interpreted by the Land Court.

1.142 The 1983 Act amended the jurisdictions of the arbiter and the Land Court in rent cases; but only where the arbiter was appointed by the Secretary of State or by the Land Court.[166] First, the arbiter was given power to state a case on a question of law to the Land Court. It followed from this that the jurisdiction of the sheriff in stated cases of this kind was abolished.[167] These provisions were continued in the 1991 Act. The arbiter can state such a case, at any stage of the proceedings, on the request of one of the parties or on his own initiative. The Land Court's decision is final.[168]

1.143 In addition, the 1983 Act conferred an appellate jurisdiction on the Land Court in rent arbitrations.

1.144 The 1983 Act amended the Sixth Schedule to the 1949 Act in rent cases by requiring the arbiter in such cases, if he was appointed by the Secretary of State or by the Land Court, to state in writing his findings of fact and the reasons for his decision. This statement had to be made available to the Secretary of State and to the parties.[169] Then, as now, rent cases constituted the great majority of statutory arbitrations.

1.145 If the parties made their own choice of arbiter, the arbiter was not required to state in writing his findings in fact and reasons. In such cases the parties lost the right of appeal to the Land Court and any stated case from the arbiter had to go to the sheriff.[170] This remarkable, and in our view unnecessary, complication has occasioned no difficulty in practice. So far as we are aware, no case has been stated to the sheriff in a rent arbitration since 1983.

1.146 *Agriculture Act 1986*. The 1986 Act added milk quota compensation claims to the areas of jurisdiction of the arbiter and the Land Court. Schedule 2 to the Act provided, *inter alia*, that the

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[162] s 13(2), (3).
[163] s 13(4)(b).
[164] s 14(1)-(5).
[165] 1949 Act, s 7, as amended by 1958 Act, s 2 and 1983 Act, s 2.
[166] 1949 Act, Sch 6, para 20A, as added by 1983 Act, s 5(2)(f).
[167] *ibid.*
[168] Now 1991 Act, Sch 7, para 22.
[169] 1949 Act, Sch 6, para 9A added by 1983 Act, s 5(2)(c).
[170] Under Sch 6, para 19.

valuation of the tenant's waygoing claim for milk quota compensation and the advance determination of standard quota and tenant's fraction[171] were to be carried out by arbitration or by joint application to the Land Court.[172] For the purposes of arbitration on these questions, the 1986 Act imported the procedural provisions of the Sixth Schedule to the 1949 Act.

1.147 *Dairy Produce Quotas Regulations 1986 (SI No 470).* With the introduction of the milk quota regime, the Land Court was given a jurisdiction to carry out certain apportionments and prospective apportionments of quota under the Dairy Produce Quotas Regulations 1986. The Regulations have been regularly updated. Those currently in force are the Dairy Produce Quotas Regulations 1997.[173]

1.148 *Agricultural Holdings (Scotland) Act 1991*. The 1991 consolidation incorporated the sheepstock legislation. It re-enacted the general arbitration provisions of sections 68 and 74 of the 1949 Act in sections 60 and 62.

1.149 *Deer (Amendment) (Scotland) Act 1996 and Deer (Scotland) Act 1996*. These statutes amended the powers of the Commission, which was re-named the Deer Commission for Scotland,[174] and extended the scope of the legislation to a wider range of species of deer.[175]

1.150 The Deer (Scotland) Act 1996 is a consolidating Act. It continues the jurisdiction of the Land Court in relation to the expenses of deer control measures carried out, on default of the owner or occupier, by the Commission.[176]

Conclusions

1.151 We have traced the growth of the jurisdictional powers in the Agricultural Holdings (Scotland) Acts and related legislation in detail. We have done so in order to demonstrate the unsystematic way in which jurisdictions have evolved over the last century or more. This historical outline leads us to conclude that the present system of jurisdictions lacks any coherent structure. It is needlessly complex. It is difficult for anyone but the most dedicated expert to understand.

1.152 Further to demonstrate the point, we show the present structure of jurisdictions and related avenues of supervision, review and appeal in diagrammatic form in Figures 1 to 5 in the Appendix. In our view, these figures alone make the case for reform.

1.153 But the problem is not simply that the structure of jurisdictions is unnecessarily complex. It goes beyond that because in certain circumstances different jurisdictions interact in an unsatisfactory way. For example, under section 7(3)(a) of the 1991 Act the landlord has the remedy of interdict in a case where the tenant has exercised his rights of freedom of cropping and disposal of produce in such a way as to injure or deteriorate, or to be likely to injure or deteriorate, the holding. The remedy of interdict is one that only the court can grant. However, for the purposes of any proceedings for interdict under section 7(3)(a), section 7(4) provides that the question whether the tenant is exercising or has exercised his rights in such a manner as to injure or deteriorate, or to be likely to injure or deteriorate, the holding is one that must be determined by arbitration. In practice, therefore, if the landlord were to raise an action of interdict against the tenant, the action would have to be sisted for arbitration. Moreover, since the certificate of the arbiter on the question in issue would be conclusive

[171] 1986 Act, Sch 2, para 10(1).
[172] *ibid*, para 11(1). The definitions of the technical terms used in this context and the complex method of calculation are set out in Gill, 3rd ed, ch 29.
[173] SI No 733, w.e.f. 1 April 1997.
[174] Now Deer (Scotland) Act 1996, s 1.
[175] Now Deer (Scotland) Act 1996, s 45(1) "deer".
[176] s 9.

proof of the facts stated in the certificate,[177] the function of the court, once the arbitration was concluded, would be a mere formality.

1.154 There are similar unsatisfactory interactions between the jurisdiction of the arbiter and the jurisdiction of the Land Court. Under section 41 of the 1991 Act the Land Court has jurisdiction to direct that certain market gardening improvements carried out by the tenant shall qualify for compensation. One consequence of such a direction may be that the holding may have to be divided into two parts, one of them being the part to which the market gardening provisions relate. In that event the rent must be allocated between the two parts. In default of agreement, that allocation must be done by an arbiter.

1.155 In sheepstock valuations carried out by an arbiter under Schedule 9 or Schedule 10 to the 1991 Act, where the necessary sales evidence is deficient, the Land Court has sole jurisdiction to determine the relevant prices by reference to prices realised at sales from similar stocks kept in the same district and under similar conditions.[178] In such an arbitration the proceedings will therefore have to be sisted to enable the Land Court to make this determination. Once the determination is made by the Court, the matter then has to be referred back to the arbiter for completion of the valuation process.

1.156 In our view the interaction of jurisdictions in these cases serves no obvious purpose and may be conducive to unnecessary delay and expense.

1.157 In this chapter we have not considered the jurisdictions of the Lands Tribunal for Scotland in agricultural holdings matters. These jurisdictions stand apart from the main body of the agricultural holdings legislation. We deal with them separately in chapter 13 (paragraphs 5.33-5.38).

[177] 1991 Act, Sch 7, para 15.
[178] 1991 Act, Sch 9, Pt I, para 4 and Sch 10, Part I, para 4.

PART 2 - THE ARBITRATION SYSTEM

CHAPTER 3

THE EXISTING JURISDICTIONS OF STATUTORY ARBITERS

The general jurisdiction of the statutory arbiter

2.1 Section 60(1) of the Agricultural Holdings (Scotland) Act 1991 provides as follows:

> "60 (1) Subject to subsection (2) below and except where this Act makes express provision to the contrary, any question or difference between the landlord and the tenant of an agricultural holding arising out of the tenancy or in connection with the holding (not being a question or difference as to liability for rent) shall, whether such question or difference arises during the currency or on the termination of the tenancy, be determined by arbitration."

> "62(1) Without prejudice to any other provision of this Act, any claim by a tenant of an agricultural holding against his landlord or by a landlord of an agricultural holding against his tenant, being a claim which arises, under this Act or any custom or agreement, on or out of the termination of the tenancy (or of part thereof) shall, subject to subsections (2) to (5) below, be determined by arbitration."

2.2 The scope of this provision is fundamentally at variance with the traditional concept of agricultural arbitration. Its effect is that, with the exception of one category of case,[179] every dispute between landlord and tenant, no matter what its nature, must be resolved by arbitration unless the parties agree to refer the dispute to the Scottish Land Court.[180]

2.3 Section 62(1) adds a further general arbitration provision in relation to waygoing claims.

> "62.-(1) Without prejudice to any other provision of this Act, any claim by a tenant of an agricultural holding against his landlord or by a landlord of an agricultural holding against his tenant, being a claim which arises, under this Act or under any custom or agreement, on or out of the termination of the tenancy (or of part thereof) shall, subject to subsections (2) to (5) below, be determined by arbitration."

The specific statutory jurisdictions of the arbiter

2.4 Despite the general arbitration provisions, the 1991 Act has retained numerous specific arbitration provisions that have accumulated in earlier legislation. It is not obvious in every case what purpose these serve. Moreover, other legislation affecting landlord and tenant has adopted the arbitration procedure set out in Schedule 7 to the 1991 Act; for example, in relation to milk quotas.[181]

The specific jurisdictions of the arbiter under the 1991 Act

2.5 The following specific questions are remitted to arbitration under the 1991 Act

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[179] *viz* waygoing valuations under s 61(7) of the 1991 Act, paras 2.18-2.19 *infra* and ch 2 (para 1.78).
[180] s 60(2), *infra*.
[181] 1986 Act, Sch 2, para 11(1).

- any question arising as to the operation of section 2 in relation to any lease; section 2 relates to approved short term lets and seasonal lets for grazing or mowing;[182]
- the determination of the terms of a tenancy where there is no lease in writing or where there is such a lease but it does not contain the basic terms specified in Schedule 1 or contains terms inconsistent with Schedule 1 or with section 5;[183]
- the liabilities of the parties in respect of the fixed equipment and fire insurance over the fixed equipment;[184]
- in proceedings for interdict under section 7(3), the question whether the tenant is exercising his statutory right of cropping so as to cause injury or deterioration to the holding;[185]
- the question whether it is expedient to reduce the extent of the specified permanent pasture in order to secure the full and efficient farming of the holding;[186]
- variation of rent;[187]
- consequential variation of rent in arbitrations under sections 4 and 5;[188]
- variation of rent in consequence of certain landlord's improvements;[189]
- the determination of the amount of compensation payable to an outgoing tenant on a forced sale or removal of implements, fixtures, produce or stock which the tenant has agreed to sell to the landlord or the incoming tenant and for which the tenant has not received timeous payment;[190]
- questions arising under section 22(2) of the Act, that is to say in relation to the grounds on which an incontestable notice to quit may be served;[191]
- reduction of rent where the tenant has been dispossessed of part of the holding;[192]
- the determination of the rents payable in respect of (a) any part of the holding that has been the subject of a direction by the Land Court that that part should be treated as a market garden and (b) the balance of the holding;[193]
- the determination of any compensation payable to the landlord on account of the tenant's failure to maintain any item of fixed equipment in a case where the liability for the maintenance or repair of the item is transferred from the tenant to the landlord under section 4;[194]
- the determination of the compensation payable to the tenant upon the loss of part of the holding under a notice to quit that part, or in consequence of the resumption of part of the holding by the landlord in pursuance of a provision in the lease;[195]
- the determination of any compensation payable to the tenant as a result of damage to crops caused by game;[196]
- the determination of waygoing valuations which, if they had fallen to be decided by reference to a valuation date immediately before 16 May 1975, would have been decided by reference to fiars prices.[197]

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[182] s 2.
[183] s 4. In such an arbitration the arbiter may vary the rent by reason of the effect of his award (s 14).
[184] s 5. This too may involve variation of rent (s 14).
[185] s 7.
[186] s 9.
[187] s 13.
[188] s 14.
[189] s 15.
[190] s 19.
[191] s 23.
[192] s 31.
[193] s 41.
[194] s 46.
[195] s 49.
[196] s 52.
[197] s 61(8).

Arbitration in sheepstock valuations under the 1991 Act

2.6 The 1991 consolidation also incorporated the provisions of the 1937 Act and the 1946 Act. These provisions apply only to valuations under leases that require the tenant, at the termination of the tenancy, to leave the sheepstock on the holding to be taken over by the landlord or the incoming tenant. Such an agreement must stipulate that the price or valuation of the stock will be fixed by arbitration.[198]

2.7 Where a lease was entered into before the 1946 Act came into force, the arbiter's award must show the basis of valuation of each class of stock and state separately any amounts included in respect of acclimatisation or hefting or any other consideration or factor for which he has made special allowance.[199]

2.8 Where the lease was entered into after the 1946 Act came into force, the arbiter must make a valuation by the formulae set out in Schedules 9 and 10 to the 1991 Act.[200]

2.9 Where the lease was entered into after the coming into force of the 1937 Act, whether the valuation is governed by the 1937 Act or the 1946 Act provisions,[201] the arbiter may at any stage of the proceedings, and shall, if so directed by the sheriff, submit a stated case to the sheriff on any question of law arising in the arbitration.[202] The decision of the sheriff on the stated case is final unless either party appeals to the Court of Session. There is no appeal from the decision of the Court of Session.[203]

2.10 If the arbiter fails to comply with the requirements of section 68 of the 1991 Act as to the form of the award or the method of valuation, the sheriff may set aside the award.[204]

2.11 Arbitrations carried out under the provisions of the 1991 Act may be carried out by two arbiters and an oversman.[205]

Arbitration on milk quota compensation claims under the Agriculture Act 1986

2.12 Unless the parties agree to refer the claim to the Land Court, every waygoing claim by a tenant for compensation for milk quota must be determined by arbitration. The arbitration is conducted under the 1991 Act.[206]

Arbitration under the Dairy Produce Quotas Regulations 1997 (SI 1997/No 733)

2.13 Arbitration to determine an apportionment or prospective apportionment of milk quota on the transfer of part of a quota holding[207] is governed by Schedule 3 to the 1997 Regulations. In an arbitration on an apportionment, the arbiter may be appointed by agreement between transferor and

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[198] s 68(1).
[199] s 68(2).
[200] s 68(3).
[201] *sc* as now incorporated into ss 68-72 of the 1991 Act.
[202] s 69(1).
[203] s 69(2).
[204] s 68(4).
[205] s 72(b) "arbiter".
[206] 1986 Act, Sch 2, para 11(1)(a).
[207] As defined in reg 2(1); cf Gill, 3rd ed, para 29.06.

transferee;[208] or by the Scottish Ministers on the application of either of them,[209] or failing such an agreement or application, by the Scottish Ministers at their own instance.[210]

2.14 In an arbitration on a prospective apportionment the arbiter may be appointed by agreement between the occupier and any other interested party. In default of such an agreement the arbiter may be appointed by the Scottish Ministers on the application of the occupier.[211] If the apportionment is necessitated by a confiscation of quota by the Intervention Board the arbiter may be appointed by the producer whose quota has been confiscated, provided that all those having an interest in the holding agree. Failing such an agreement, the Scottish Ministers may appoint the arbiter on the application of the producer.[212]

2.15 Where the Scottish Ministers are a party to the arbitration, the Land Court has sole jurisdiction to appoint an arbiter.[213] The Land Court also has sole jurisdiction to appoint an arbiter in cases where the apportionment or prospective apportionment results from a notice by the Intervention Board under regulation 10 challenging the accuracy of information submitted to the Board, or agreed between the parties, as to the areas used for milk production on a land transfer or on a prospective apportionment of quota.[214]

Limitations on the jurisdictions of the statutory arbiter

2.16 At common law the arbiter has no power to award damages except where that power is expressly conferred.[215] The 1991 Act refers to the awarding of damages as a remedy between landlord and tenant only in the context of section 7(3)(b).[216] A sheriff court decision supports the view that a statutory arbiter has power to award damages and that that power is not confined to section 7.[217]

2.17 Moreover the arbiter has no power to grant orders such as interdict or removal, or to grant orders *ad factum praestandum*.[218]

Exclusions from the jurisdiction of the statutory arbiter

2.18 Section 61(7) of the 1991 Act provides as follows:

> "(7) This section and section 60 of this Act shall not apply to valuations of sheep stocks, dung, fallow, straw, crops, fences and other specific things the property of an outgoing tenant, agreed under a lease to be taken over from him at the termination of a tenancy by the landlord or the incoming tenant, or to any questions which it may be necessary to determine in order to ascertain the sum to be paid in pursuance of such an agreement, whether such valuations and questions are referred to arbitration under the lease or not."

2.19 All such valuations and questions are therefore to be determined outwith the 1991 Act. They may be governed by an arbitration clause in the lease. If there is no such clause they could, in theory at least, be determined by litigation. In practice, all such valuations and questions are determined by

[208] Within 28 days of the change of occupation of the holding or part of it: 1997 Regulations, Sch 3, para 3(1).
[209] 1997 Regulations, Sch 3, paras 3(2) and 3(4); Scotland Act 1998, s 53.
[210] *ibid*, para 3(3).
[211] *ibid*, para 4(1).
[212] *ibid*, para 3(4).
[213] *ibid*, para 5(3).
[214] *ibid*, para 5(1).
[215] Stair Encyclopedia, Reissue 1, *Arbitration*, para 50.
[216] *ie* for abuse by the tenant of his rights to freedom of cropping.
[217] *Hill v Wildfowl Trust (Holdings) Ltd*, 1996 SLT (Sh Ct) 46.
[218] *eg*, s 7(3), (4).

arbitration. The arbitration is not governed by Schedule 7. Unlike arbitrations under Schedule 7, it is governed by the Arbitration (Scotland) Act 1894.[219] It may be carried out by two arbiters and an oversman.

[219] s 61(1).

CHAPTER 4

SUPERVISORY JURISDICTIONS OVER ARBITERS AND APPEALS AGAINST ARBITERS' DECISIONS

Introduction

2.20 In this chapter we consider the means by which the actings and decisions of arbiters are subject to supervision and review, and the means by which arbiters' decisions are subject to appeal.

2.21 By supervision we mean, for example, the procedures by which arbiters are appointed and removed from office, their remuneration decided, and their awards reduced. By review we refer to the procedures by which the arbiter's decision is subject to judicial control on questions of law, that is to say by the procedure of stated case. The procedure of stated case is not an appellate procedure. In practice, it is commonly invoked to challenge proposed findings on points of law issued by an arbiter; but the statute entitles the arbiter to state a case on any question of law arising in the course of the arbitration.[220] The arbiter need not first issue proposed findings. He may state a case as soon as the point arises, even without its being debated by the parties. The theory is that the arbiter is subject to binding judicial guidance from the outset of the arbitration.

2.22 In practice stated cases are almost invariably required by one of the parties after the arbiter issues his proposed findings. For these reasons, we refer to stated case procedure as "review" of the arbiter's decision.

Appointment

Statutory appointment

2.23 *Under the 1991 Act*. In the absence of agreement between the parties, a member of the statutory panel of arbiters is appointed by the Scottish Ministers on a written application by either party.[221] Where the Scottish Ministers are a party to the dispute, the appointment is made by the Land Court.[222]

2.24 *Under the Agriculture Act 1986*. In milk quota compensation claims similar rules apply. Arbitrations on such claims are carried out under the 1991 Act.[223]

2.25 *Under the Dairy Produce Quotas Regulations 1997*. The rules for the appointment of an arbiter on an apportionment or a prospective apportionment of milk quota have been set out in chapter 3 at paragraphs 2.13-2.15.

Private appointment

2.26 In arbitrations under the 1991 Act the parties are free to make their own choice of arbiter.[224] In arbitrations under the 1997 Regulations the appointment may be made by agreement of the relevant parties in each case.[225] Appointments are usually made in writing by way of a joint reference.

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[220] 1991 Act, Sch 7, para 20.
[221] 1991 Act, Sch 7, para 1; Scotland Act 1998, s 53.
[222] 1991 Act, s 64.
[223] Sch 2, para 11(1)(a); cf ch 3 (para 2.12).

Remuneration

Statutory appointment

2.27 *Under the 1991 and 1986 Acts.* If the arbiter has been appointed by the Scottish Ministers, or prior to 1 July 1999 the Secretary of State, his remuneration is fixed by the Scottish Ministers.[226] The arbiter normally applies to the Rural Affairs Department to fix the fee on the basis of an hourly rate. If the arbiter has been appointed by the Land Court, his remuneration is fixed by the Land Court.[227]

2.28 *Under the Dairy Produce Quotas Regulations 1997.* Where the arbiter is appointed by the Scottish Ministers, or before 1 July 1999 by the Secretary of State, his remuneration is fixed by them.[228] Where the arbiter is appointed by the Scottish Land Court his remuneration is fixed by the Court.[229]

Private appointment

2.29 Where the arbiter has been appointed by the parties, his remuneration will usually be fixed by agreement. Where agreement cannot be reached, either party or the arbiter can apply to have the fee fixed by the auditor of the sheriff court, subject to a right of appeal to the sheriff.[230]

Removal

Under the 1991 Act, the 1986 Act and the 1997 Regulations

2.30 The power to remove an agricultural arbiter for misconduct is reserved to the sheriff.[231]

At common law

2.31 It is probably the law that the Court of Session has power to remove an arbiter from office for misconduct, but there is no authority on the point.[232]

Review and appeal

Non-rent cases (the 1991 Act, the 1986 Act and the 1997 Regulations)

2.32 *Review by the sheriff by stated case.* Where any question of law arises in the course of an arbitration, but not after its conclusion, the arbiter may remit the question for the opinion of the sheriff by way of stated case.[233] He must state a case if so directed by the sheriff on the application of either party.[234]

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[224] 1991 Act, Sch 7, para 1.
[225] cf ch 3 (at para 2.14).
[226] 1991 Act, s 63(3)(a); Scotland Act 1998, s 53.
[227] 1991 Act, s 64.
[228] 1997 Regs, Sch 3 para 9(b); Scotland Act 1998, s 53.
[229] 1997 Regs, Sch 3 para 9(c).
[230] 1991 Act, s 63(3)(b); 1997 Regs, Sch 3, para 9(a).
[231] 1991 Act, Sch 7, para 23; 1997 Regs, Sch 3, para 21.
[232] cf Irons and Melville, *Arbitration*, pp 125-6.
[233] 1991 Act, Sch 7, para 20; and s 69(1) (sheepstock valuations); 1997 Regs, Sch 3, para 20.
[234] *ibid.*

2.33 *Appeal to the Court of Session*. In arbitrations conducted under the 1991 Act, which include arbitrations on milk quota compensation claims under the 1986 Act,[235] there is a right of appeal to the Court of Session against the decision of the sheriff on a stated case.[236]

2.34 In arbitrations under the 1997 Regulations, the decision of the sheriff on a stated case is final.[237]

Rent cases (the 1991 Act)

2.35 *Statutory appointment*. Where the arbiter is appointed by the Scottish Ministers or by the Land Court, any case that he is required to state on a point of law must be stated to the Land Court and not to the sheriff.[238] The legislation does not provide for the arbiter being directed to state a case.[239]

2.36 In such cases there is an appeal against the arbiter's decision to the Land Court on any question of law or fact.[240]

2.37 There is an appeal to the Court of Session against the decision of the Land Court on an appeal from the arbiter.[241]

2.38 There is no appeal to the Court of Session from the decision of the Land Court on a stated case from the arbiter in a rent review.[242]

2.39 *Private appointment*. Since an arbiter privately appointed by the parties is not subject to the provisions introduced by the 1983 Act,[243] any case stated by him on a question of law will be stated to the sheriff.[244]

2.40 There is no appeal to the Land Court in such cases.

2.41 There is an appeal from the sheriff to the Court of Session.[245]

Reduction

Statutory (1991 Act and 1997 Regulations)

2.42 In arbitrations under the 1991 Act and the 1997 Regulations the sheriff has the power to set aside the award.[246]

Common law

2.43 It appears that the Court of Session has a common law power to reduce an award.[247]

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[235] 1986 Act, Sch 2, para 11(1)(a).
[236] 1991 Act, Sch 7, para 21 and s 69(2) (sheepstock valuations).
[237] 1997 Regs, Sch 3, para 20.
[238] 1991 Act, Sch 7, para 22.
[239] *ibid*.
[240] 1991 Act, s 61(2).
[241] Scottish Land Court Act 1993, s 1(6)-(7); and Scottish Land Court Rules 1992, 88 to 94.
[242] 1991 Act, Sch 7, para 22.
[243] Now 1991 Act, Sch 7, para 22.
[244] *ibid*, paras 20-21.
[245] 1991 Act, Sch 7, para 21.
[246] 1991 Act, Sch 7, para 24; 1997 Regs, Sch 3, para 22.
[247] *Dunlop v Mundell* 1943 SLT 286.

CHAPTER 5

THE ARBITRATION SYSTEM IN PRACTICE

Classification of arbitrations

2.44 The main division in the system is between compulsory arbitrations under the comprehensive provisions of the 1991 Act and elective arbitrations that are expressly excluded from its scope.

2.45 Within the class of compulsory arbitrations there is a further distinction between those where the arbiter is appointed by the Scottish Ministers or, in cases to which the Scottish Ministers are a party, by the Land Court; and those where the arbiter is chosen and appointed by the parties.

Compulsory arbitrations

Non-rent cases

2.46 In arbitrations falling within section 60 the appointment will normally be made by the Scottish Ministers on the application of one of the parties or of both. But the parties may agree on the choice of an arbiter. In either event the arbiter is subject to the code of procedure set out in Schedule 7 to the 1991 Act.

Rent cases

2.47 In the case of a rent arbitration certain special provisions apply.[248]

2.48 *Arbiter appointed by the Scottish Ministers or by the Land Court*. The 1983 Act made a basic distinction between arbitrations carried out by an arbiter appointed by the Secretary of State (now the Scottish Ministers) or by the Land Court and those carried out by an arbiter chosen and appointed by the parties. The provisions of the 1983 Act are now consolidated in the 1991 Act.

2.49 An arbiter appointed in this way is required in making his award to give a summary of the evidence and to state in writing his findings in fact and the reasons for his decision under a series of specific heads.[249] He has to make this statement available to the Scottish Ministers[250] so that the award may be entered in a register of such awards. This register is available for public inspection.

2.50 If a case is stated by the arbiter on a question of law arising in the course of a rent arbitration the case must be stated to the Land Court and not to the sheriff. In such cases there is a right of appeal to the Land Court from the final decision of the arbiter. The appeal to the Land Court is final.

2.51 *Arbiter chosen by the parties*. The parties are free to appoint their own arbiter, who need not be a member of the Panel of Arbiters. If the arbiter is appointed in this way, the Land Court has no locus. The normal procedures of stated case to the sheriff and appeal to the Court of Session apply.

Arbiters appointed by the Scottish Ministers or by the Land Court

Appointment to the Panel of Arbiters

[248] 1991 Act, s 13; cf chs 2 (at paras 1.141-1.145) and 4 (at paras 2.35-2.41).
[249] Sch 7, para 10.
[250] *ibid*.

2.52 Where the arbiter is appointed in this way, he is chosen from the statutory Panel of Arbiters. Legislation provides for the composition of the Panel to be reviewed by the Lord President of the Court of Session after consultation with Scottish Ministers no less frequently than every five years.[251] In practice, the membership of the Panel is reviewed every five years. The most recent review was carried out in 1998. The membership of the Panel was reduced from 100 to 68 at the 1998 review. The majority of the Panel are not actively involved in arbitration.

2.53 The method of appointment to the Panel is as follows. The Rural Affairs Department of the Scottish Executive applies to the Lord President of the Court of Session for consent to its proceeding with a review of the membership of the Panel. When consent is granted, the Department asks all existing members if they wish to continue to serve on the Panel. The Department also invites various interested bodies to make nominations and to provide biographical and professional information about their nominees. In the most recent review the nomination of suitably qualified women and representatives of ethnic minorities was positively encouraged.

2.54 The Department classifies the nominations by geographical area. The Department then discusses the nominations with the bodies that have made them and finalises the list. If the approval of the Ministers and of the Lord President is then obtained, the chosen nominees are invited to accept appointment. The Lord President's final approval of the size of the Panel is obtained once the final number of acceptances is known. The successful and unsuccessful candidates are notified and the results of the review are published.

2.55 In making appointments to the Panel, the Department adopts the following criteria:

- to preserve a body of experience in the Panel, existing members are encouraged to continue;
- there should be a suitable mix of backgrounds and qualifications;
- no member of the Panel should have reached the age of 65 by the end of the 5-year period of service;
- if possible there should be both male and female members and members of ethnic minorities.

Qualifications, experience and training

2.56 Prospective members of the Panel are not formally examined as to their qualifications and suitability. After appointment to the Panel arbiters are not given training by the Department nor is there any other source of systematic professional education or development.

2.57 Past, present and prospective members of the statutory Panel may be members of the Scottish Agricultural Arbiters' Association. Members of the Association also carry out private arbitrations from time to time. The Association keeps its members informed of relevant legal developments.

2.58 Membership of the Association is not a condition of appointment to the Panel. Many candidates for appointment are not members of the Association. Not all appointees join the Association.

2.59 Tables 1 and 2 illustrate the composition of the Panel. The membership of the Panel covers a wide range of backgrounds and experience. Many of the Panel have experience in a number of different disciplines. Only one of the current members has a legal qualification.

Table 1

Panel of Arbiters - breakdown by qualification

Qualification	No in 1998	No in 1993	% of Total in 1998	% of total in 1993

[251] 1991 Act, s 63(2); Scotland Act 1998, s 53.

Owner Occupier	9	15	13.24	15
Tenant Farmer	11	16	16.18	16
Owner Occupier & Tenant Farmer	11	23	16.18	23
Owner Occupier & Valuer	4	3	5.88	3
Owner Occupier, Tenant Farmer & Valuer	0	1	0	1
Owner Occupier, Tenant Farmer & Factor	1	1	1.47	1
Owner Occupier, Chartered Surveyor & Factor	0	1	0	1
Chartered Surveyor	16	11	23.53	11
Chartered Surveyor & Factor	0	4	0	4
Chartered Surveyor & Owner Occupier	3	2	4.41	2
Chartered Surveyor & Tenant Farmer	1	1	1.47	1
Chartered Surveyor & Valuer	1	1	1.47	1
Land Agent/Factor	2	5	2.94	5
Auctioneer/Valuer	7	12	10.29	12
Tenant Farmer & Factor	0	1	0	1
Factor & Valuer	0	1	0	1
Solicitor	1	0	1.47	0
Chartered Surveyor & Solicitor	0	1	0	1
Horticulturist	1	1	1.47	1

Source : Scottish Executive Rural Affairs Department

Table 2

Panel of Arbiters - breakdown by nominating body[252]

Body	No in 1998	No in 1993	% of total in 1998	% of total in 1993
NFUS	6	10	8.82	10
RICS	6	1	8.82	1
SLF	1	0	1.47	0
SOAEFD	4	5	5.88	5
RHAS	1	0	1.47	0

[252] NFUS – National Farmers' Union of Scotland; RICS - The Royal Institution of Chartered Surveyors in Scotland; SLF – Scottish Landowners' Federation; SOAEFD – Scottish Office Agriculture, Environment and Fisheries Department (now Scottish Executive Rural Affairs Department); RHAS – Royal Highland & Agricultural Society of Scotland; SAAA – Scottish Agricultural Arbiters' Association; IAAS – Institute of Auctioneers and Appraisers in Scotland.

SAAA	1	1	1.47	1
IAAS	0	1	0	1
Others	49	82	72.07	82

Source : Scottish Executive Rural Affairs Department

These Tables demonstrate that the Panel is conceived to be a panel of practical agriculturists.

2.60 A number of significant changes are apparent following the review undertaken in 1998. The most significant is the increase in the number of chartered surveyors who serve on the Panel. In percentage terms their representation has more than doubled. As a result there has been a drop in the level of representation of auctioneers, valuers and factors. While the percentage of tenant farmers has remained steady, if account is taken of multi-disciplinary members, the overall representation accorded to farmers has decreased across the board since 1993.

2.61 In 1993, 17% of the Panel consisted of new members. In 1998, that proportion had almost doubled to 30.9%. Although many of the new appointees have had some experience of private arbitration, their experience may not have included the operation of Schedule 7 to the 1991 Act and they will have had no previous experience of the special requirements of statutorily appointed arbiters in rent arbitrations. Over the last 10 years the great majority of arbitrations have been on rent reviews.[253] Some members of the Panel have had no previous experience of acting as an arbiter.

Choice of arbiter

2.62 The appointment is made by the Scottish Ministers, except in those cases where the Scottish Ministers are a party to the dispute. In these latter cases the appointment is made by the Land Court. If the Scottish Ministers are not a party to the dispute, the choice of the arbiter is made by Ministers on the advice of the Rural Affairs Department. The parties have no say in the matter.

2.63 The Panel is divided into the following geographical regions: Borders, Central, Dumfries and Galloway, Fife, Grampian, Highland, Strathclyde, Tayside and Orkney and Shetland. The Department allocates an arbiter from the region within which the holding is situated. If the impartiality of the arbiter is not potentially prejudiced by a connection with either of the parties to the dispute, no other criterion is applied.

2.64 If the arbiter is chosen by the Scottish Land Court, the appointment is made in a similar way.

2.65 Statutory appointments are not spread evenly across the range of arbiters available. One might expect this to happen if appointments were made by reference to experience and the nature of the dispute. In practice the determining criteria are basic geography and a lack of relationship to the parties. As a result, a small number of arbiters acquire considerable experience in their field, whereas the great majority of them acquire little or none. In the present Panel, the number of appointments that each member has received ranges from 0 to 46. Nine Panel members who have served since 1993 or before have yet to receive an appointment. This means that, with the addition of the new members appointed in 1998, 44.1% of the present Panel have no experience of arbitration under the 1991 Act. Thirteen members who have served since 1993 or earlier, 19.1% of the Panel, have conducted only one arbitration. Only seven of the current members, 10.3% of the Panel, have conducted ten or more arbitrations.

The nature of the questions remitted

[253] cf Table 3, (para 2.66) *infra.*

2.66 Table 3 demonstrates that rent review consistently predominates as the subject matter of arbitrations.

Table 3

Number of arbitrations by type of appointment

Type of Appointment	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**
Rent reviews	35	49	30	52	27	54	33	54	60	16
Other	10	12	9	10	8	7	9	11	6	7
Total	**45**	**61**	**39**	**62**	**35**	**61**	**42**	**65**	**66**	**23**

Source : Scottish Executive Rural Affairs Department

Number of appointments and number of cases reaching final decision

2.67 Tables 4, 5 and 6 show the average number of appointments per annum over 3, 5 and 10 year periods, the number of final awards made per annum and the average number of final awards over the same periods. Table 7 shows the number of awards registered in rent arbitrations since 1983.

Table 4

Average number of arbiters appointed yearly over last 3, 5 and 10 years

Type of Appointment	**Over 3 years**	**Over 5 years**	**Over 10 years**
Rent reviews	43.33	43.4	41
Other	8	8	8.9
Total	51.33	51.4	49.9

Source : Scottish Executive Rural Affairs Department

Table 5

Number of arbitration cases yearly reaching a final decision

Year	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**
No of cases	10	7	23	41	23	6	9	5	10	13

Source : Scottish Executive Rural Affairs Department

Table 6

Average number of arbitration cases yearly reaching a final decision over last 3, 5 and 10 years

Type of Appointment	**Over 3 years**	**Over 5 years**	**Over 10 years**
No of cases	9.33	8.6	14.7

Source : Scottish Executive Rural Affairs Department

Table 7

Number of awards registered in rent arbitrations since 1983

Effective Date of Award	1983	1984	1985	1986	1987	1988	1989	1990
No of cases	1	13	23	8	6	6	9	0

Effective Date of Award	1991	1992	1993	1994	1995	1996	1997	1998
No of cases	5	7	0	3	1	3	9	7

Source : Scottish Executive Rural Affairs Department

2.68 These tables demonstrate, *inter alia,* that the great majority of appointments are not pursued to a conclusion. There was a significant drop in the number of appointments in 1998; but over the periods of the past three and five years the yearly average number of appointments has remained constant and has been slightly higher than the average figure for the past ten years. It is therefore premature, in our view, to assume that the recent downturn in the number of appointments will continue. The Scottish Executive Rural Affairs Department has already indicated that it expects the figures for 1999 to show an increase from 1998 levels.[254]

Stated cases to the sheriff

2.69 We have been unable to obtain statistics regarding the number of cases stated to the sheriff under the 1991 Act. The annual Civil Judicial Statistics published by the Scottish Executive do not identify agricultural holdings cases as a specific category. All actions that relate to heritage are classed together. Courts Group, which has administrative responsibility for collating the data from the individual sheriff courts, receives the information already classified in the format used in the annual report. It has been unable to give us any further information.

2.70 We therefore asked each sheriff clerk for statistical information regarding the number of stated cases submitted over the last 10 years. All 47 sheriff clerks responded to our enquiry. The majority of them were unaware of the sheriff's jurisdiction in such matters. Many of the sheriff clerks were unable to carry out a full search of their records because of the volume of the caseload over the period. Our investigations were also hampered by the system by which actions are recorded. Cases are indexed by the names of the parties rather than by subject matter. The sheriff clerks therefore had to rely to a great extent on the recollections of sheriffs and of long-serving members of their staffs.

2.71 The results of our survey show that the stated case procedure is seldom used in the sheriff court. 45 of the sheriff clerks reported that they were unaware of any such cases having arisen in their districts over the 10-year period. There have been four such cases in the Dumfries area, but we were advised that three of them concerned the same two parties. There have also been two such cases in Perth Sheriff Court.

Appeals to the Court of Session

2.72 Because of the method of cataloguing actions and the volume of the caseload, the Principal Clerk of the Court of Session was unable to provide specific details of the number of appeals made to the Court of Session under the 1991 Act.

Stated cases to the Scottish Land Court (rent cases)

[254] LRPG Landlord and Tenant Consultative Panel Consultation Paper, 9 March 1999.

2.73 There have been five stated cases from arbiters in rent arbitrations under paragraph 22 of Schedule 7 to the 1991 Act in the last 10 years.[255]

Appeals to the Scottish Land Court (rent cases)

2.74 There have been nine appeals against an arbiter's award in rent arbitrations under section 61(2) of the 1991 Act in the last 10 years.[256]

Removal of arbiter and setting aside of the award (1991 Act, Sch 7, paras 23-24)

2.75 We have been unable to obtain statistics on this remedy, which is reserved to the sheriff.[257] All of the information available to us suggests that this procedure is rarely invoked.

Arbiter chosen and appointed by the parties

2.76 The appointment of an arbiter of the parties' choice has the advantage that the parties will have an arbiter in whom they have expressed their confidence. The arbiter need not be a member of the statutory Panel. In such cases the arbiter is subject to the procedural provisions of Schedule 7.

2.77 The appointment of such an arbiter has special significance in the case of a rent review. In such a case the parties enjoy confidentiality since the award is not published in the register of rent awards. On the other hand, the arbiter will have no obligation to summarise the evidence or to specify his findings in fact and the reasons for his decision in accordance with the requirements of paragraph 10 of Schedule 7.[258] Moreover, the parties will not be entitled to have a case stated to the Land Court on a question of law, nor to appeal to the Land Court against the final award.

The office and functions of the arbiter's clerk

2.78 The arbiter is entitled, but not obliged, to appoint a clerk at the stage of the arbitration at which the parties' cases have been lodged.

2.79 If the arbiter decides to appoint a clerk, the choice of the clerk is at his sole discretion.

2.80 The function of the clerk is to represent the arbiter in his communications with the parties; to make arrangements for the hearing; to guide the arbiter on matters of evidence, procedure and substantive law during the course of the arbitration; and to draft the award and any stated case that the arbiter may be required to submit.

2.81 The legislation does not require that the arbiter's clerk should have any particular qualifications. He need not be a lawyer. There is no system of training. The arbiter's choice of clerk is not necessarily determined by the clerk's expertise in this area of the law. Often the clerk is chosen because he is the arbiter's own solicitor.

2.82 In some cases, the arbiter conducts the arbitration without a clerk.

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[255] Source: Scottish Land Court.
[256] Source: Scottish Land Court.
[257] 1991 Act, Sch 7, paras 23, 24.
[258] Scots law traditionally does not require an arbiter to state reasons for his decision: *Williamson v Fraser* 1739 Mor 665, *Rogerson v Rogerson* (1885) 12 R 583. Recent developments in the law of judicial review may qualify this in circumstances where the procedure adopted by parties gives rise to an implied obligation to state reasons in the interests of fairness: *R v Home Secretary ex parte Doody* [1994] 1 AC 531, *R v Civil Service Appeal Board* [1991] 4 All ER 310.

2.83 In arbitrations conducted under Schedule 7 to the 1991 Act, paragraph 19 provides that it shall not be lawful to include in the expenses of and incidental to the arbitration and award, or to charge against any of the parties, the remuneration or expenses of the clerk unless the clerk was appointed after the submission of the claim and answers to the arbiter and with either the consent of the parties or the sanction of the sheriff. In practice, in most cases the parties agree to the appointment of the clerk, thereby making his fees and expenses a proper charge in the arbitration. The exercise of the sheriff's power under this provision is unheard of in modern practice.

Expenses

2.84 The question of expenses is for the discretion of the arbiter[259] except in relation to the remuneration and expenses of the clerk, which are specially dealt with.[260]

Elective arbitrations

2.85 Section 61(7) of the 1991 Act excludes waygoing valuations from the compulsory arbitration provisions of the 1991 Act. We have discussed this provision in chapter 3.

2.86 An arbitration on such matters is not governed by Schedule 7. The arbitration may be conducted by a single arbiter or by two arbiters and an oversman. In either case there is no obligation to give a detailed award of the kind specified in paragraph 10 of Schedule 7.

2.87 Since such arbitrations are private there are no available statistics. We understand that a significant number of them are conducted by two arbiters and an oversman. In such cases each party appoints his own arbiter. Usually the arbiters appoint the oversman. We understand that this form of arbitration is declining in popularity, probably because of the cost.

[259] 1991 Act, Sch 7, paras 17, 18.
[260] *ibid*, para 19.

CHAPTER 6

THE STRENGTHS AND WEAKNESSES OF THE STATUTORY ARBITRATION SYSTEM

Introduction

2.88 Arbitration has been the central method of dispute resolution throughout the history of agricultural disputes. There is an ingrained arbitration culture in the agricultural world. Even in those forms of contract that are designed to avoid the application of the Agricultural Holdings (Scotland) Acts, for example contractor agreements and share farming contracts, the contract almost always provides for the resolution of disputes by arbitration.

2.89 We have formulated our proposals with the aim that in those disputes for which it is appropriate the arbitration system should survive in an improved form. There will always be disputes between landlord and tenant that will relate to practical agricultural questions, such as maintenance of fixed equipment and valuation of waygoing claims. For such disputes arbitration will be pre-eminently suitable. The abolition of compulsory arbitration, which we propose in this Report, will not remove such disputes from the arbitration system. The merits of arbitration as the appropriate procedure in such cases will remain evident to the parties. One of the central purposes of our proposals is to remove from the arbitration system those disputes which would be better dealt with in a legal forum.

The strengths of the system

2.90 If the arbitration system is assessed from a reading of the law reports, its many strengths may be overlooked. The particular strengths of arbitration are that it gives the parties the opportunity to have an agricultural question decided by an expert in the subject; it enables parties to have the dispute resolved privately and in confidence; and, potentially at least, it enables the parties to have their dispute resolved expeditiously and economically. The great majority of arbitrations are conducted informally and to the satisfaction of both sides. Within the agricultural industry there is widespread support for arbitration as a method of dispute resolution.

Criticisms of the system

2.91 Much of the criticism of the system stems from the operation of the rent review provisions of the 1991 Act, the complexity of which is a major cause of difficulty for arbiters and their clerks and tends to cause delay and expense. Moreover, in rent arbitrations carried out by statutorily appointed arbiters the benefit of confidentiality no longer applies. Since 1983 all awards in such arbitrations have been kept in a register available for public inspection.

2.92 Criticism is not, however, confined to rent arbitrations. There is also criticism of the fact that the system of compulsory arbitration may require the case to be decided by an arbiter who has no expertise in the subject matter of the dispute. There appears also to be a general feeling that the merits of expeditiousness and economy now apply in only the simplest arbitrations.

A typical statutory arbitration

2.93 In a typical contemporary arbitration the early stages are completed expeditiously under statutory time limits; but the subsequent stages become increasingly dilatory. One explanation for this is that the statutory steps for the intimation of the claim, the application for the appointment of the arbiter, and the lodging of the parties' cases have to be undertaken to a timetable required by the legislation. But after these preliminary stages there is no statutory timetable. Once the preliminary

steps are concluded, the parties may not be in any haste to complete the proceedings. They may wish to leave the proceedings in abeyance to give the opportunity for negotiation. In short, at the early stages the parties are under the timetables mandatorily imposed by the Act; but in the later stages they have a greater opportunity to control the progress of the arbitration.

2.94 On receipt of an application for appointment of the arbiter, the Scottish Ministers generally issue an Instrument of Appointment within a few days. The appointment is at once intimated to the parties. The parties must lodge statements of case with the arbiter within the mandatory period of 28 days from the appointment. It is customary for the arbiter to allow parties a period for adjustment of their cases. That process may take several weeks. When it is completed, the arbiter may appoint a proof or, if there are preliminary pleas, a debate.

2.95 In general, if the arbitration relates solely to valuations at waygoing, for example the valuation of the tenant's improvements, the arbitration will be carried out promptly. Both parties are concerned in such a case to conclude matters. The outgoing tenant in particular is concerned to receive prompt payment of his compensation.

2.96 In more formal arbitrations involving questions of law or complex rent questions, the duration of the arbitration is scarcely less than that of an ordinary litigation. There is often some delay before the proof or debate can be held, especially if either of the parties has instructed counsel. After the proof or debate the arbiter normally issues proposed findings against which either party is entitled to make representations.

2.97 If either party is dissatisfied with the proposed findings and requires the arbiter to state a case on a question of law, there may be considerable delay while the clerk to the arbitration prepares the draft stated case and the parties propose adjustments to it.

2.98 In rent arbitrations, Land Court hearings on stated cases and appeals can be arranged without delay. In such cases the main factor causing delay is the availability of counsel.

2.99 In arbitrations not relating to rent, the position is less satisfactory. In such cases there is normally a delay of several months between the lodging of the case with the sheriff clerk and the hearing on it. The availability of counsel is generally a factor contributing to the delay. It is not unusual for the sheriff clerk to allocate only one day for the hearing. If the sheriff has other business to deal with on the day of the hearing, the hearing may not be concluded within the rest of the day. It will then be continued to a date to be fixed. This normally involves a further delay of several months, especially if counsel is instructed for either party. Where the court appoints a hearing that may require more than one day of the court's time, it is common for the matter to be dealt with in single days' hearings stretching over a number of months or, in some cases of which we have heard, over a year or more. After the conclusion of the hearing, the sheriff normally makes *avizandum.*

2.100 If there is no appeal against the sheriff's decision, the matter will be returned to the arbiter for the issue of the award or, if the decision does not exhaust the questions in issue, for a proof or a further debate. This involves further delay.

2.101 The unsuccessful party is entitled to appeal to the Court of Session. An appeal inevitably involves a prolonged delay.

2.102 As a general rule it can said that, even if there is no stated case or appeal, an arbitration will last for several months at least and may well last for a year or more. If a stated case and an appeal are involved, even in the Land Court, the duration will probably exceed two years.

The defects of the system

The Panel is too large

2.103 On any view, the Panel is too large. The reason is obvious. Because the arbiters are appointed on a geographical basis, the Panel has to contain a suitable number of arbiters from each of the Department's administrative areas, some of which are unlikely to produce many arbitrations. This results in there being members appointed who may never have the opportunity to conduct an arbitration.

The Panel's resources are not properly deployed

2.104 By reason of the size of the Panel, the majority of its members are inactive. On the other hand, an individual member may be deprived of the opportunity to carry out an arbitration requiring his own special skill by reason only of the fact that he does not live in the relevant geographical area. A suitably qualified arbiter available within the relevant area may not necessarily be appointed. Under the present system, for example, a rent arbitration on an mixed arable/stock farm may be carried out by an arbiter who is a hill farmer.

No proper training

2.105 There is no systematic training of the members of the Panel. If compulsory arbitration were to continue, the proper use of the resources of the Panel would require that there should be systematic training both on first appointment and at regular intervals thereafter. In such a system, in our view, the minimum requirements would be that the arbiter had to be familiar with the basic principles of evidence and procedure; the requirements of natural justice; and the principal decisions on the main topics in the subject, such as rent review.

2.106 However, for the reasons that we give in this chapter and in chapter 16 (paras 6.27-6.34) we consider that compulsory arbitration should not survive because it suffers from more fundamental weaknesses.

Unsuitability for certain of the questions remitted

2.107 The arbitration system is defective in principle. By reason of the mandatory provisions of the 1991 Act, the parties are obliged to remit to arbitration important questions that all but one of the present Panel are not qualified to decide, namely questions of law. Typical questions of law are whether a notice to quit is valid[261] or whether the landlord has waived his right to enforce it.[262]

2.108 *Taylor v Brick*[263] is a good example of the problem. In that case there were two questions, whether the notice to quit was valid in form and whether a letter from the tenant in reply to it constituted a valid counter-notice. These were pure questions of law; but the Lord Ordinary, who was pre-eminently qualified to decide them, had to dismiss the landlord's action on the basis that the court had no jurisdiction to entertain it. In the result the landlord's claim for vacant possession fell to be determined by arbitration before an arbiter who would almost inevitably be unqualified to decide the points on which it depended.

2.109 That was a case in which only questions of law were in issue; but in many arbitrations that appear at first to involve only questions of fact or valuation, there are underlying legal questions. For example, in arbitrations on waygoing claims for the value of Part II improvements,[264] a question of law often emerges as to whether the landlord gave a valid prior consent in accordance with the requirements of the 1991 Act.

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[261] *Milne v Earl of Seafield* 1981 SLT (Sh Ct) 37.
[262] *Cayzer v Hamilton (No 2)* 1996 SLT (Land Ct) 21.
[263] 1982 SLT 25.
[264] 1991 Act, Pt IV.

2.110 The problem of the resolution of a question of law in an arbitration conducted by a man of skill is a problem that is not unique to agricultural arbitrations. It is encountered frequently in building and civil engineering arbitrations. In such arbitrations the problem is often surmounted by the appointment of a legally qualified assessor. The 1991 Act makes no express provision for such a procedure.

2.111 In cases involving questions of law the arbiter's decision is in most cases largely determined by the advice given by his clerk who, unlike the arbiter, is not appointed by the Department or by the parties. The clerk, too, need not be a lawyer.

2.112 Arbitration is an even less satisfactory procedure where the arbiter decides, as he is entitled to do, that he will conduct the arbitration without a clerk. This can happen in cases involving law as well as fact.

2.113 We consider that, on any view, a system that compulsorily refers to arbitration questions that the arbiter may not be properly qualified to decide is basically defective. Reform should proceed on the principle that every question arising between landlord and tenant should be decided by whichever tribunal is best qualified to make a sound and reliable decision in which the parties will have confidence.

Arbitration is in some cases an incomplete remedy

2.114 In an important set of cases, namely those in which the landlord seeks vacant possession, the arbitration will result only in a decision on the merits of the dispute. If the landlord is successful in the arbitration and the tenant refuses to quit, the landlord must then have recourse to the ordinary courts to make his right effective.[265] This causes further delay.[266]

Delay

2.115 The arbitration system is also seriously deficient in practice. The various jurisdictions for review and appeal have a built-in scope for delay. This defect has caused widespread dissatisfaction in the legal profession and on both sides of the tenanted sector of agriculture.

2.116 In all but the simplest and most informal cases, arbitrations last at best for months and at worst for years. In some cases the procedure of stated case and appeal may involve only a preliminary question of law. In such cases the conclusion of the proceedings in the stated case or in the subsequent appeal will mark only the beginning of the arbitration if there remain substantive questions on the merits.

2.117 To illustrate the point, we take some examples from the law reports.

2.118 In *Milne v Earl of Seafield*[267] the landlord's notice to quit was served on 3 May 1976. It required the tenant to remove at Whitsunday 1977. The arbiter stated a case on a question of law as to the proper date of the ish. The case was not heard by the sheriff principal until November 1978. His decision was given on 13 November 1978 about eighteen months after the date of ish.

2.119 In *Exven v Lumsden*[268] the original question between the parties was whether the tenancy ended on 27 February 1977. The matter was tested by an action for declarator and removing raised in the Court of Session in June 1978. The action was thereafter sisted to enable the question to be determined by arbitration.[269] The arbiter was appointed in August 1979. During the course of the

[265] *Houison-Craufurd's Trs v Davies supra.*
[266] cf paras 2.115-2.121 *infra*.
[267] 1981 SLT (Sh Ct) 37.
[268] 1982 SLT (Sh Ct) 105.
[269] *sc* under s 74 of the 1949 Act.

arbitration the tenant amended his case to raise a new contention to the effect that a further lease had been entered into for a year from 28 February 1977. The competency of the arbiter's deciding that question was the subject of a stated case. The case was heard before the sheriff principal on 14 October 1981. The sheriff principal gave his decision on 3 November 1981. That decision resolved only the preliminary issue. Almost four years after the dispute began, the central question in the case remained to be decided.

2.120 *Hill v Wildfowl Trust (Holdings) Ltd*[270] involved a claim by the tenant for compensation for the landlord's breach of the lease. The arbiter was appointed by the Secretary of State on 25 April 1994. He issued a draft award in which he proposed to decide that he had no jurisdiction to deal with the question remitted to him. He stated a case to the sheriff on the point. On 27 March 1995, the sheriff held that the arbiter had jurisdiction[271] and returned the case to him. A debate on relevancy was heard by the arbiter on 19 and 20 June 1995. The arbiter issued a further draft award. At the landlord's request, the arbiter stated a case. The sheriff issued his decision on the stated case on 3 October 1996,[272] about 2½ years after the arbitration had begun. The landlord then applied to the Land Court for consent to the operation of a notice to quit. These proceedings are currently sisted in the Land Court pending the outcome of the arbitration.

2.121 Where the arbitration is challenged on a question of competency and the matter has to be resolved in the ordinary courts, with the normal opportunities for appeal, the delay may be extreme. For example, in *Cormack v McIldowie's Exrs*[273] the tenant died on 21 September 1970. The landlord served notice to quit on the executors of the deceased tenant on 25 November 1970 specifying ish at Martinmas 1971. The executors removed at that date. They made a waygoing claim on 5 January 1972. The arbiter was appointed on 19 April 1972. *Interim* interdict against the arbiter was refused by the Lord Ordinary on 5 May 1972 and granted by the Inner House on 11 May 1972. The decision of the Lord Ordinary on the question of interdict was given on 13 February 1974. The decision of the Inner House upholding the Lord Ordinary was given on 26 March 1975. The decision was to the effect that the landlord's objection to the competency of the arbitration was groundless. It was only then that proceedings in the arbitration could begin.

Expense

2.122 Agricultural arbitration has traditionally been regarded as an informal and inexpensive form of dispute resolution, but in modern practice it is usually both formal and expensive. It is expensive in part because of the complexity of the legislation. One example of this is the cost associated with the detailed matters that the arbiter must decide in a rent review arbitration.[274] This requirement adds considerably to the burden on the arbiter's clerk. It normally involves the inspection of several comparable farms and inevitably adds to the expense.

2.123 Arbitration is also expensive in relation to the quality of evidence and legal representation that is nowadays considered to be appropriate. Several practitioners have told us of spending races between parties to agricultural arbitrations. For example, if the landlord instructs counsel or an expert surveyor from one of the leading agricultural practices, it is almost inevitable that the tenant will be advised to do the same. In some rent arbitrations the total cost of the arbitration is out of all proportion to the gain to the successful party. A similar spending race can take place in Land Court litigation; but, for reasons that we demonstrate, the cost of Land Court litigation is considerably cheaper than arbitration.

[270] 1996 SLT (Sh Ct) 46; 1995 SCLR 778 (Sh Ct).
[271] 1996 SLT (Sh Ct) 46.
[272] *Hill v Wildfowl Trust (Holdings) Ltd (No 2)* 1998 SLT (Sh Ct) 89.
[273] 1974 SLT 178 (OH); 1975 SLT 214 (IH).
[274] cf s 13; *Aberdeen Endowments Tr v Will,* 1985 SLT (Land Ct) 23.

2.124 The parties' respective judgments as to the amounts that they are prepared to spend on an arbitration may vary widely. In a rent review of a farm on a tenanted estate, for example, the landlord may consider it worthwhile to spend more on the arbitration than the sum at stake, if a successful outcome will determine or at least influence other forthcoming reviews on the estate and in consequence enhance the capital value of the estate. The tenant, on the other hand, may think it more economical to concede an increase on a three-year review if the total amount of the concession is less than his probable costs in the arbitration. Such concessions can have a knock-on effect on the overall level of agricultural rents and may therefore significantly affect the economy of the tenanted sector.

2.125 In all but the simplest and most informal arbitrations the cost exceeds that which would be incurred if the dispute were litigated in the Land Court. We deal with this in chapter 10 (at paras 4.40-4.42). In some cases there is therefore an incentive to a well-funded landlord to put the pressure of costs on the tenant by refusing to agree to a joint application to the Land Court.

2.126 We are here considering a formal arbitration on significant questions of law or of fact. Rent arbitrations are the commonest form. In such arbitrations, for the reasons that we have given, the complexity of the section causes unreasonable expense. There is no doubt that in such cases arbitration is *per se* more expensive than litigation in the Land Court.

2.127 In a typical arbitration the basic expenses are constituted by:

- the arbiter's fee, fixed at an hourly rate by the Scottish Ministers, for the hearing and the preparation of the award; the current hourly rate is £48; on top of this the arbiter is entitled to charge for secretarial support and general office expenses;
- the clerk's fee, also fixed at an hourly rate; the clerk's fee is usually based on the recommended rate set by the Law Society of Scotland; the current recommended hourly rate is £91.50; the rate is generally greater where the clerk is a specialist in the subject; in general, the clerk's fees exceed those of the arbiter;
- the hire of the venue.

In addition, the arbitration often involves the following expenses:

- overnight accommodation for the arbiter and the clerk;
- hourly fees for inspection of the subject holding;
- in a rent arbitration, travel costs and hourly fees for inspection of other holdings cited as comparables.

2.128 Tables 8A and 8B set out the ranges and the averages of the arbiters' fees fixed by the Secretary of State and the Scottish Executive in the last three years for which statistics are available. Table 8A relates to cases that have proceeded to a final award, although in some cases the award may have given effect to a settlement reached before the final hearing. Table 8B relates to cases that did not proceed to a final award because, for example, the arbiter's appointment was revoked by agreement of the parties.[275] Even in such cases, a fee of £480 is recorded as having been fixed in the latest year for which we have statistics.

2.129 Table 9 combines the data set out in Tables 8A and 8B to give the ranges and averages of all arbiters' fees fixed by the Secretary of State and the Scottish Ministers in the same years.

Table 8A

Range of statutory arbiter's fees for arbitrations proceeding to final award

Year	1996	1997	1998

[275] See Gill, 3rd ed, paras 36.08-36.09.

Lowest fee awarded	£48.00	£120.00	£120.00
Highest fee awarded	£5,568.00	£6,482.34	£1,464.00
Average fee	£1,231.55	£1,859.94	£606.00

Statistics based on information provided by the Scottish Executive and refer only to arbitrations that have proceeded to final award.

Table 8B

Range of statutory arbiter's fees for arbitrations not proceeding to final award

Year	1996	1997	1998
Lowest fee awarded	£36.00	£96.00	No case
Highest fee awarded	£192.00	£480.00	No case
Average fee	£72.24	£201.60	No case

Statistics based on information provided by the Scottish Executive and refer only to arbitrations that did not proceed to final award.

Table 9

Range of statutory arbiter's fees for all arbitrations

Year	1996	1997	1998
Lowest fee awarded	£36.00	£96.00	£120.00
Highest fee awarded	£5,568.00	£6,482.34	£1,464.00
Average fee	£777.91	£1,372.19	£606.00

Statistics based on information provided by the Scottish Executive and refer to all arbitrations in which the Secretary of State or the Scottish Executive fixed the arbiter's fee.

2.130 These tables relate to the arbiter's fees only. There then has to be added the fees of the clerk and the outlays and expenses of the arbiter and the clerk.

2.131 We have obtained several estimates of the costs of a rent arbitration in a case where the hearing lasts for two days and where the arbiter spends a further two days on inspections of the holding and the comparables. The costs involved would be the fees of the arbiter and of his clerk, their outlays and expenses and the hire of the venue. The estimates given to us fall in the range of about £3,000 to about £9,500. These costs are not determined by the level of the rental value. The main determinant is the time spent by the arbiter and the clerk.

2.132 These figures suggest that where the probable amount of the variation of the rent is modest, say £1,000 - £2,000 annually for three years, the whole exercise may be uneconomic.

2.133 In a case where the rental value is low, the arbiter may economise by acting without the assistance of a clerk; but that course may compromise the quality of the decision since the legal questions may be just as complex as in a major arbitration.

2.134 To these arbitration costs must be added the parties' own expenses which in most cases of any significance will involve legal fees, travel costs and outlays and the fees of expert witnesses. In the typical case to which we have referred each party's own expenses would probably be in the range £3,000 to £6,000, but could well be considerably more.

2.135 The Scottish Land Court Reports have one modern example of the Court's fixing the fee of an arbiter whom the Court had appointed under section 64 of the 1991 Act.[276] That was a case in 1993 that was settled two days before the hearing. The arbiter's claim for 15 hours as "time spent in reading statements etc and in preparation for the hearing" was restricted by the Court to 10 hours. The total claim was calculated at 23½ hours which the Court assessed at £42 hourly, which was then the Secretary of State's rate. The arbiter's fee was therefore £987; but, as the Court pointed out, there remained the arbiter's outlays and the clerk's fee, all of which would be subject to taxation by the auditor of the sheriff court.[277] Almost certainly these items would have brought the total costs of the arbiter and his clerk to at least double the amount of the arbiter's fee. That seems not to have been a particularly complex arbitration. The landlord's only comparables were negotiated rents on the same estate, one of which was tendered by the tenant also, as his only comparable. The arbiter had inspected only one holding which he himself had brought to the parties' notice as a possible comparable.

2.136 We have not been given any official view as to the reasons for the recent sharp reduction in the average amount of the arbiters' fee; but we are reasonably sure that the explanation lies in the current economic conditions in the industry. We have reliable evidence that a greater number of arbitrations are being settled, and settled at an earlier stage, than in former years.

2.137 In chapter 10 (at paras 4.40-4.42) we compare these figures with Land Court fees in comparable cases. Although it is probably impossible to make an exact comparison of costs between the two procedures we are satisfied that our figures are sufficiently robust to justify the general conclusions that we draw on this aspect of the problem.

Quality of decisions

2.138 It is hardly surprising that there should be procedural mishaps in agricultural arbitrations. In many cases the arbiter is confronted with complex legal as well as factual questions. He may have little or no experience of formal legal procedures. He may not have been alerted to the fundamental requirements of natural justice. The clerk will usually be experienced in landlord and tenant matters; but he may have only limited experience of procedural technicalities or of drafting interlocutors, decisions and reasons.

2.139 The law reports bear out the anecdotal evidence that arbiters and their clerks have difficulty with legal matters such as the application of section 13 of the 1991 Act,[278] the procedural requirements of natural justice,[279] and the seemingly straightforward requirements of paragraph 5 of Schedule 7.[280]

Confidence in the arbitration system

2.140 There is a common perception that the arbitration system is not adequate for the questions submitted to it. It is commonly believed that it is more expensive *per se* than litigation; that it is

[276] *Secretary of State v Brown* 1993 SLCR 41.
[277] *ibid*, at p 45. The Court had no jurisdiction over these expenses: 1991 Act, Sch 7, paras 17-19.
[278] *eg Earl of Seafield v Stewart* 1985 SLT (Land Ct) 35; *Shand v Christie's Trs* 1987 SLCR 29; *Strathclyde RC v Arneil* 1987 SLCR 44.
[279] *eg Strang v Abercairney Estates* 1992 SLT (Land Ct) 32.
[280] *eg Strang v Abercairney Estates, supra, Murray v Fane* 1996 GWD 20-1141.

needlessly time-consuming, and that in many cases the arbiter's decision on the question or difference submitted to him lacks authority.

2.141 In our view, these perceptions have some justification. But whether or not they are well-founded, the fact that they are widely held erodes confidence in the arbitration system, and in the agricultural holdings system generally. They constitute one of many reasons why landowners are reluctant to enter into traditional leases of agricultural land.

PART 3 - THE JURISDICTIONS OF THE CIVIL COURTS

CHAPTER 7

THE JURISDICTIONS OF THE SHERIFF COURT

Jurisdictions under the Agricultural Holdings (Scotland) Act 1991, the Succession (Scotland) Act 1964 and the Agriculture Act 1986

3.1 The sheriff has statutory jurisdiction in agricultural holdings matters in the following cases:

- to remove the tenant for non-payment of rent under section 20 of the 1991 Act;
- in a stated case from an arbiter (other than a rent arbiter appointed by the Scottish Ministers or by the Land Court) on any question of law arising in the course of an arbitration;[281]
- removal of an arbiter for misconduct and the setting aside of the award;[282]
- on appeal from a decision of the auditor of the sheriff court on the amount of the remuneration of the arbiter;[283]
- to review a taxation of expenses as between party and party in an arbitration,[284] and, for the purposes of expenses, to sanction the appointment of a person to act as clerk or to assist the arbiter;[285]
- to grant an extension of time under section 16 of the Succession (Scotland) Act 1964;[286]
- to set aside an award of an arbiter in a sheepstock valuation under section 68 of the 1991 Act;
- in a stated case from an arbiter in a sheepstock valuation under section 69 of the 1991 Act;
- under section 77 of the 1991 Act to make or recall an appointment of a tutor, curator or other guardian to a landlord or tenant who is a pupil or a minor or is of unsound mind, for the purposes of the Act; and likewise under section 55(5) for the purposes of section 54;
- to exercise all jurisdictions of the sheriff under the 1991 Act in relation to arbitrations on milk quota compensation under the Agriculture Act 1986.[287]

3.2 The jurisdictions confided to the sheriff by the 1991 Act are exercisable by the sheriff principal and the sheriff alike.[288] Wherever the jurisdiction is exercised by the sheriff, no appeal lies to the sheriff principal.[289] The contrary applies where the sheriff is exercising his normal jurisdiction under the Sheriff Courts (Scotland) Acts 1907 and 1971, for example in actions of removing.[290]

Jurisdictions under the Dairy Produce Quotas Regulations 1997 (SI No 733)

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[281] 1991 Act, Sch 7, paras 20-22.
[282] *ibid* paras 23-24.
[283] 1991 Act, s 63(3)(b).
[284] 1991 Act, Sch 7, paras 17-19.
[285] *ibid* para 19.
[286] See ch 2, para 1.133.
[287] 1986 Act, Sch 2, para 11.
[288] s 67.
[289] cf *Cameron v Ferrier* (1912) 28 Sh Ct Rep 220.
[290] 1991 Act, 20(2).

3.3 In arbitrations under Schedule 3, Part II, to the 1997 Regulations the sheriff has jurisdictions in relation to expenses, stated cases, removal of the arbiter and the setting aside of the award.[291]

Jurisdictions in actions relating to the existence of a tenancy

3.4 In addition the sheriff has jurisdiction in ordinary actions relating to the existence of the tenancy, typically in actions for declarator that a tenancy exists or that a tenancy has come to an end, and in related actions for removing from heritable property. The ordinary jurisdiction formerly exercised by the sheriff in actions of removing and ejection was transferred to the summary jurisdiction of the sheriff in relation to actions for recovery of possession of heritable property.[292]

Current practice

3.5 We have sought information from every sheriff clerk in Scotland.[293] We have been unable to obtain complete information for every sheriffdom as to the number of first instance agricultural holdings litigations, at common law or under any of the specific statutory jurisdictions. In the circumstances, we think that it would be unhelpful, and possibly misleading, if we tabulated such detailed information as we have obtained. We can say however that it is our clear impression that these jurisdictions, both specific and general, are seldom invoked.

The defects of the current system

Actions of removing

3.6 By common consent summary cause procedure is unsuitable for cases of the complexity and importance that are typical of actions of removing from agricultural land. Those advising the pursuer normally add a crave for declarator or for declarator and interdict, thereby circumventing the provisions of section 35(1)(c) of the 1971 Act, and enabling the matter to be dealt with in the ordinary court.[294] While this device ensures that the case will be dealt with by appropriate procedure, it also brings with it the penalty of delay.

Stated Cases from arbiters

3.7 In chapter 6 (paras 2.115-2.121) we have discussed the delays that are commonly associated with this procedure.

3.8 A further problem is that in many cases the sheriff is not familiar with this complex area of the law. In such cases the stated case imposes a considerable burden on the sheriff. In view of the infrequency of stated cases, it is unlikely that any sheriff will have an opportunity to become properly experienced in the legislation. In our view the submission of stated cases to sheriffs is not a sensible use of judicial resources in circumstances where a specialist court is available for the task.

Conclusions

3.9 From our discussions with sheriff clerks and with practitioners we can see no cogent reason why any of the statutory jurisdictions of the sheriff in agricultural holdings cases should be retained. We are also persuaded that there is good reason why parties should be discouraged from invoking the common law jurisdiction of the sheriff court in actions for recovery of heritable property if, as we propose, the jurisdiction of the Land Court is to be enlarged.

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[291] See ch 3 (paras 2.13-2.15).
[292] Sheriff Courts (Scotland) Act 1971, s 35(1)(c) as amended.
[293] See ch 5 (paras 2.69-2.71).
[294] See Gill, 3rd ed, ch 21.

CHAPTER 8

THE JURISDICTIONS OF THE COURT OF SESSION

Jurisdictions

3.10 The Outer House of the Court of Session has jurisdiction in any ordinary action in which the *de quo* is whether or not an agricultural tenancy exists.[295] The Inner House of the Court of Session has jurisdiction in appeals from the decisions of sheriffs in stated cases and has jurisdiction in appeals from the Scottish Land Court by way of special case. It also has its normal appellate jurisdiction in appeals from the sheriff court.

3.11 There is an important and unresolved question as to the extent of the first instance jurisdiction of the Court of Session in actions of removing and ejection.

3.12 We last examined the general jurisdiction of the Court of Session in relation to the removal of occupiers from land in 1989.[296] At that time we said that the law appeared to be that actions of removing from heritable property were excluded from the original jurisdiction of the Court of Session. The basis for this proposition was said to be found in the Sheriff Courts (Scotland) Act 1907, in long established practice and in the obsolescence of statutes providing for the granting of a decree of removing in the Court of Session.[297] We also said that the Court of Session had jurisdiction in relation to composite actions where removing was sought as ancillary to another conclusion, and that extraordinary removings were dealt with in the same way.[298] We recommended, *inter alia*, that it should be competent to raise an action for removing in the Court of Session notwithstanding that the action did not contain any other conclusion. This recommendation was included in the draft Bill annexed to our Report.[299] It has not been implemented.

3.13 We are indebted to Mr Robert D Sutherland, Advocate, for having given us access to his recent research into the history of the matter. The starting point in Mr Sutherland's research is the Act 39 of 1555. The Act introduced a requirement of at least 40 days notice prior to the Whitsunday preceding the ish date for the lease, and required the landlord to apply to the Lords of Council or Sheriff or other Judges Ordinary for an order on the tenant to remove. The Act applied only to agricultural land.

3.14 The notice procedure under the Act of 1555 was found to be cumbersome. A simpler procedure was introduced by an Act of Sederunt of 1756. This procedure was additional to that available under the Act of 1555 and was held to be limited to the jurisdiction of the Judge Ordinary (a sheriff).[300] This procedure subsequently became more common than procedure under the 1555 Act.

3.15 By the beginning of the twentieth century procedure under the Act of 1555 was considered to be obsolete.[301] The Act was repealed by the Statute Law Revision (Scotland) Act 1964.

3.16 The development of removing as a principal remedy appears to be entirely a matter of statute. After the statutory basis of the Court of Session jurisdiction, the Act of 1555, fell into desuetude, the

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[295] *Taylor v Brick* 1982 SLT 25*; Garvie's Trs v Still* 1972 SLT 29.
[296] *Recovery of Possession of Heritable Property*, Scot Law Com No 118.
[297] *Recovery of Possession of Heritable Property*, Scot Law Com No 118, para 9.1.
[298] *Recovery of Possession of Heritable Property*, Scot Law Com No 118, para 9.2.
[299] *Recovery of Possession of Heritable Property*, Scot Law Com No 118, Recommendation 96, and Draft Bill, Clause 16(1).
[300] *Cameron v McDonald*, 1804, Mor 13,875.
[301] See *Campbell's Trs v O'Neill*, 1911 SC 188, per Lord Johnston at p 193.

only statutory provisions remaining in force that expressly dealt with actions of removing were the Sheriff Court (Scotland) Acts and the related Rules.[302] The widely accepted view[303] is that the Court of Session has no jurisdiction in actions of removing where removing is the principal remedy sought, but has jurisdiction to grant decree of removing where that remedy is sought as an ancillary remedy to another remedy; for example, declarator of title or declarator of irritancy.

3.17 Rule 45A of the Court of Session appears to offer a partial solution by providing a procedure for service on unnamed occupiers which applies "only to a conclusion for removing in an action of removing against a person or persons in possession of heritable property without right or title to possess the property".[304] Rule 45A is based on our 1989 recommendations. It contemplates the raising of petitions for removing in the Court of Session against occupiers of land whose identities are not known. This remedy is not competent in the Sheriff Court.

3.18 Because of challenges to the Court of Session's power to grant orders for removing there has also developed an alternative practice of seeking equivalent orders in a petition under section 46 of the Court of Session Act 1988. Since this is a petition process this procedure is not open to the objection that it is an action of removing. The Inner House allowed service of such a petition in *Oliver & Son Ltd Petitioners*,[305] but in that case there was no contradictor. The Court was not asked to determine any question other than the question whether it was possible to serve the petition on un-named occupiers of an identifiable piece of land.

3.19 There is therefore no clear and binding authority that proceedings under section 46 of the Court of Session Act 1988 can competently achieve what could not be achieved in an ordinary action of removing.

3.20 The Court of Session has no jurisdiction to grant either a conclusion for ejection, or to grant warrant to eject. Properly known as "summary ejection", ejection as a substantive proceeding does not require the landowner to issue a notice of removal. The remedy is appropriate where the defender's title is precarious, either because he has had no title, or because his title has already been brought to an end by the court.[306] This remedy is available exclusively in the sheriff court.[307]

3.21 Ejection as an ancillary remedy arises both in actions of removing in the Court of Session and the sheriff court. In an action in the sheriff court the crave seeks warrant for ejection. In an action in the Court of Session there is no operative conclusion for ejection. The pursuer has to obtain letters of ejection and apply to the sheriff for an operative order for ejection.[308] The use of letters of ejection procedure appears still to be competent.[309]

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[302] Sheriff Courts (Scotland) Act 1907, ss 34-38A; Sheriff Courts (Scotland) Act 1971, s 35(1)(c); Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, r 68-69.

[303] See McLaren, *Court of Session Practice*, p 153; Rankine, *Leases*, (3rd ed), pp 578, 586; Thompson & Middleton, *Court of Session Practice*, p 28; Paton and Cameron, *Landlord and Tenant*, pp 260-1, 283; Maxwell, *Court of Session Practice*, p 100; A G M Duncan, *Research Paper on Actions of Ejection and Removing*, para 7.19; *Recovery of Possession of Heritable Property*, Scot Law Com No 118, Parts IX and X and Draft Bill; *Michael v Carruthers*, 1998 SLT 1179 at p 1186F.

[304] RC 45A.1(1).

[305] 1999 SLT 1039.

[306] See *Gibson & Son Ltd v Gibson*, (1899) 36 SLR 522, Lord Moncrieff at p 524; *Lowe v Gardiner*, 1921 SC 211 At p 215; *Cairns v Innes*, 1942 SC 164 at p 171.

[307] See *Campbell's Trs v O'Neill*, 1921 SC 188; Hunter, *Landlord and Tenant*, (1876, 4th ed), Vol II, pp 99-100, 102-4; 2nd Report of the Law Reform Committee for Scotland, (1957) paras 3 and 6; Paton and Cameron, *Landlord and Tenant*, p 284; *Middleton v Booth*, 1986 SLT 450 at p 452H-K. See now Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976, r 68 and 68A.

[308] *Campbell's Trs v O'Neill*, 1921 SC 188 at p 197. See also *Encyclopaedia of the Laws of Scotland*, (1928) Vol 6, para 266, and *Recovery of Possession of Heritable Property*, Scot Law Com No 118, paras 9.8-9.12.

[309] See A G M Duncan, *Research Paper on Actions of Ejection and Removing*, para 8.10; *Recovery of Possession of Heritable Property*, Scot Law Com, (1989), para 9.8.

3.22 Notwithstanding the doubts that have been raised as to the competency of such actions, such actions are from time to time raised and dealt with in the Court of Session.

3.23 By common consent reform of the law of removings is long overdue.[310] We recommended significant reforms in 1989 in our Report on *Recovery of Possession of Heritable Property.*[311] However, we make our recommendations in this Report on the assumption that there will be no reform of the law of removings in the near future.

Current practice

First instance

3.24 The judicial statistics do not identify those cases raised in the Court of Session that relate to agricultural holdings. Our experience, and that of the Court of Session administration, is that normally only a few such cases are current at any time, say five or fewer.

Appellate

3.25 Our experience, and that of the Court of Session administration, is that there are seldom more than one or two such appeals current, whether from the Outer House, the sheriff court or the Land Court.

Defects of the Court of Session jurisdiction

3.26 The main criticism of the Court of Session in first instance matters relates to the delay in the fixing of diets and the uncertainty as to the Court's power to order removal of a party *ad interim* from an agricultural holding.

3.27 Where the Court gives an *interim* decision regulating the *status quo*, the ensuing delay may cause pressure on parties to settle. Moreover, questions as to *interim* possession may involve matters of agricultural practice relating to handover arrangements in which the Court of Session has no particular expertise.

3.28 In appeals, the single most important complaint is that of delay. A recent case is a good example. In *Harvey v McTaggart and Mickel*[312] the applicant applied to the Land Court under section 11(5) of the 1991 Act for an order declaring her to be tenant as from the death of her father on 23 December 1996. The application was lodged on 26 March 1997. The Land Court ruled on the preliminary issue of jurisdiction on 15 October 1997. Following a proof the Court issued an order granting the declarator sought on 26 June 1998. The respondents lodged their application for a special case on 23 July 1998. Following adjustment in the Land Court, the special case was lodged in the Court of Session on 27 November 1998. The hearing on the case took place before the Inner House on 2 November 1999. The decision of the Extra Division was given on 2 December 1999. This timetable is typical of such appeals.[313]

[310] See Gill, 3rd ed, para 21.01.
[311] Scot Law Com No 118.
[312] 1999 GWD 40-1906 (Extra Division).
[313] In the previous case to be appealed from the Land Court, the Land Court's decision was given on 14 October 1993. The appeal was heard by the Court of Session on 25 October 1994 and the decision was given on 16 November 1994: *Fane v Murray* 1995 SLT 567.

PART 4 - THE SCOTTISH LAND COURT

CHAPTER 9

THE JURISDICTIONS OF THE SCOTTISH LAND COURT

Constitution of the court

4.1 The Scottish Land Court is a body corporate. Its powers are conferred by statute. It has no residual common law jurisdiction, even where the parties agree to submit to its jurisdiction.[314] The statutory provisions regulating the constitution and practice of the court are to be found in the Scottish Land Court Act 1993 and the Scottish Land Court Rules 1992. In terms of the 1993 Act the Court may have up to seven members.[315] The quorum of the Court is three members.

4.2 The Court currently consists of the Chairman, who was formerly a member of the senior Bar and has the status of a Court of Session judge,[316] and three lay members appointed for their agricultural knowledge and experience. One of the lay members serves on a part-time basis.

4.3 The provisions for the appointment of a Deputy Chairman having the qualifications required for the office of Chairman[317] ensure that the Court will always have the necessary legal expertise.

4.4 Administrative and legal support is provided to the Court by staff seconded from the Scottish Executive. The Principal Clerk of the Land Court is appointed under statute by the Scottish Ministers.[318] In practice the Principal Clerk is a qualified solicitor seconded from the office of the Solicitor to the Scottish Executive. The Court is empowered to obtain further specialist advice as necessary.[319]

4.5 The Court is empowered to delegate its authority to a divisional court consisting of one or two of its members. This power is extensively used in crofting cases but it is seldom used in agricultural holdings cases.[320] Orders or determinations of a divisional court are subject to review upon appeal by a full court consisting of the Chairman and two members. Not more than one of the panel on appeal may have been a party to such order or determination.[321] There has not been a case in recent years in which the divisional court member has taken part in the hearing of the appeal.

History of the Land Court's jurisdiction

4.6 The Scottish Land Court is the statutory successor to the original Crofters Commission, which was established under the Crofters (Scotland) Act 1886 in order to regulate disputes between crofters and their landlords. The Scottish Land Court was constituted in more or less its current form on 1 April 1912.[322]

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[314] *Garvie's Trs v Still* 1972 SLT 29.
[315] 1993 Act, s 1(2).
[316] 1993 Act, s 1(3).
[317] Scottish Land Court Act 1993, Sch 1, paras 9-10.
[318] 1993 Act, s 1(8), Sch 1, para 7; Scotland Act 1998, s 53.
[319] Sch 1, para 8.
[320] In modern practice divisional courts sit in agricultural holdings cases only in interlocutory matters: *eg Kirkcaldy DC v Forrester* 1996 SLCR 142 (expenses).
[321] Sch 1, para 6(2).
[322] Small Landholders (Scotland) Act 1911, s 3.

4.7 The Land Court had no jurisdiction in relation to agricultural holdings until 1931. In the 1931 Act the Court was given jurisdiction to deal with disputes between landlords and tenants of agricultural holdings where such matters were submitted to the Court by way of joint application.[323] This enabled the parties to by-pass the otherwise mandatory arbitration provisions of the legislation. Further jurisdictions came to the Court in the Sheepstocks Valuation (Scotland) Act 1937 and the Hill Farming Act 1946.

4.8 In chapter 2 (paras 1.99-1.126) we have set out the major extensions of the jurisdiction of the Land Court that were effected by the Agriculture (Scotland) Act 1948. In the 1948 Act there were two significant restrictions on the jurisdictions conferred on the Court, namely that the first instance jurisdiction in applications for certificates of bad husbandry and for consent to the operation of notices to quit were retained by the Secretary of State.[324] In the Agriculture Act 1958 these jurisdictions were transferred exclusively to the Land Court.[325]

4.9 In the Agriculture (Miscellaneous Provisions) Act 1975, the Land Court was given a new jurisdiction in relation to demands to remedy fixed equipment served by a landlord upon his tenant.[326]

4.10 In the Agricultural Holdings (Amendment) (Scotland) Act 1983 the Land Court was given power in rent arbitrations to hear stated cases and to act in such cases as a court of appeal from the arbiter.

4.11 The Court has further *ad hoc* jurisdictions under the 1991 Act and certain *ad hoc* jurisdictions under other legislation.

The specific jurisdictions of the Scottish Land Court

The 1991 Act

4.12 The following specific jurisdictions are assigned to the Scottish Land Court under the 1991 Act:

- under section 8 on any question or difference arising out of the making of a record of the holding;
- under sections 11 and 12 in relation to an objection by the landlord to a legatee or acquirer;
- under sections 22(1), 23, 24 and 25 on an application for consent to the operation of a notice to quit;
- under section 26 on an application for a certificate of bad husbandry;
- under sections 32 and 66 in relation to notices to quit to which section 66 applies;
- under section 39 on an application by the tenant for approval of a proposed improvement falling within Part 2 of Schedule 5;
- under section 41 in relation to market garden improvements under Schedule 6;
- under section 55(7), in the case of a non-near relative successor tenant, on any question arising between landlord and tenant as to the purpose for which the tenancy is being terminated;
- under section 61(2) on an appeal against the award of a statutory arbiter in a rent arbitration under section 13(1);

[323] 1931 Act, s 34.
[324] cf ch 2 (paras 1.101 and 1.102).
[325] 1958 Act, s 3; First Sch, Pt II.
[326] cf ch 2 (para 1.130).

- under section 64 an administrative jurisdiction, in lieu of that of the Scottish Ministers,[327] in cases to which the Scottish Ministers are a party, to appoint an arbiter and fix his remuneration;
- under section 80, a general jurisdiction in lieu of that of the Scottish Ministers in all cases where the Scottish Ministers are the landlord or the tenant of the holding; this jurisdiction applies to any provision of the Act under which any matter relating to the holding is referred to the decision of the Scottish Ministers or to any provision relating to an arbitration concerning the holding;
- under paragraph 22 of Schedule 7 in a stated case from a statutory arbiter on any question of law arising in the course of a rent arbitration under section 13(1);
- under section 70, where the lease was entered into after November 6, 1946, to value a sheepstock under the Act if either party to the lease requires it;
- under paragraph 4 of Part 1 of Schedule 9 and paragraph 4 of Part 1 of Schedule 10 to determine three-year average prices in lieu of their being ascertained by an arbiter in sheepstock valuations to which those provisions apply;

Milk quotas

- under paragraphs 10(1) and 11(4) of Schedule 2 to the 1986 Act (as amended by Schedule 11 to the 1991 Act) a similar jurisdiction in lieu of that of the Scottish Ministers in milk quota arbitrations;
- under Schedule 3 to the 1997 Regulations to appoint an arbiter in the case of an apportionment of quotas to which the Scottish Ministers are to be a party[328] and in cases initiated by the Intervention Board;[329] and in all such cases to fix the remuneration of the arbiter;[330]

Miscellaneous

- under section 41 of the 1948 Act, where a direction by the Scottish Ministers for the control of injurious animals and birds or for the prevention of escapes of captive animals[331] has not been complied with and the Scottish Ministers have taken the necessary steps on their own authority and sought recovery of the cost; where the matter is in dispute, the Land Court is empowered to determine the reasonable cost of such measures[332] and to allocate the expense reasonably incurred between the parties responsible on a just and equitable basis; [333]
- under section 57 of the 1948 Act to conduct an inquiry and to report to the Scottish Ministers on a reference by them in connection with a proposed exercise of their power under that section to acquire land compulsorily to ensure its full and efficient use for agriculture;[334]
- under section 9 of the Deer (Scotland) Act 1996 in an appeal by the owner or occupier of land subject to a deer control scheme against the amount sought to be recovered from him by the Deer Commission for Scotland under section 8.

The joint application jurisdictions

4.13 On joint application of the parties, the Scottish Land Court has the following jurisdictions:

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[327] Functions previously conferred on the Secretary of State were transferred to the Scottish Ministers with effect from 1 July 1999, Scotland Act 1998, s 53.
[328] Except in an arbitration initiated by the Intervention Board: 1997 Regulations, Sch 3, Part 2, para 5(3).
[329] *ibid* para 5(1).
[330] *ibid* para 9(c).
[331] Under ss 39 and 40 of the Act.
[332] s 41(2).
[333] s 41(4); cf *Argyll AEC v Elliot*, 1961 SLCR 3; *Northern AEC v Work*, 1961 Orkney RN 2131.
[334] cf *Secretary of State v Maclean*, 1950 SLCR 33.

- a general jurisdiction to determine any question which under the 1991 Act, or the lease, is required to be determined by arbitration;[335]
- where the lease was entered into on or before November 6, 1946, to determine any question which would fall to be decided by a sheepstock valuation in lieu of its being determined in the manner provided in the lease;[336]
- to determine a milk quota compensation claim in place of an arbiter;[337]
- to carry out an apportionment or prospective apportionment of milk quota under the 1997 Regulations in lieu of an arbiter .[338]

4.14 We understand that several of these jurisdictions have never been exercised; for example, those in applications arising out of the making of a record of the holding;[339] in milk quota cases under the 1986 Act[340] and the 1997 Regulations;[341] and in appeals relating to deer control schemes.[342]

The limits of the Land Court's jurisdiction

4.15 There are serious limitations on the Court's jurisdiction. The principal limitations are that the Court has no jurisdiction to rule on questions relating to the existence of the landlord-tenant relationship; that outwith its express jurisdictions it can rule on other legal and practical questions only by agreement of the parties, and then only where the subject matter of the question is within its competence; that in succession cases the Court has no power to rule on the validity of a bequest or a transfer of a tenancy; and that the Court has limited power to regulate matters *ad interim,* no power to pronounce interdicts, limited power to award damages and no power to accept contractual references. We now consider these topics in turn.

No power to decide whether a tenancy exists

4.16 Until 1998 the law was reasonably clear. As was said in *Garvie's Trustees v Still*[343] the Scottish Land Court is a creature of statute and its powers and jurisdiction lie solely within the narrow limits which statute lays down. Since the Court had power to rule only on questions between landlord and tenant, it was held in that case that, even with the agreement of the parties, the Court had no power to rule on the question whether the relationship of landlord and tenant existed.

4.17 The exact limits of this doctrine have not been precisely defined. The point arose in *Craig and Davidson.*[344] In that case the nature of the dispute was in essence whether the contractual arrangements made by the parties and the parties' subsequent actings were such as to create a tenancy under the Acts. The Land Court held that it could not explicate its own jurisdiction where the extent of its jurisdiction was the only issue in the case. That was a case where the proceedings were in effect for declarator. The point was considered again in *Eagle Star Ins Co Ltd v Simpson*.[345] In that case the owners of the land served a notice to quit on the respondent. The respondent was the acquirer of the interest of the previous tenant. He served a counter-notice. The owners then applied to the Land Court for consent to the operation of the notice. At the date of the application, an action was depending in the sheriff court at the instance of the owners to determine whether the death of the former tenant had brought the lease to an end. It was argued that the owners could not deny that they

[335] 1991 Act, s 60(2).
[336] 1991 Act, s 70(1)(a).
[337] 1986 Act, Sch 2, paras 10(1) and 11(1) (as amended by the 1991 Act, Sch 11).
[338] 1997 Regulations, regs 8, 9 and 10, Sch 3.
[339] 1991 Act, s 8(6).
[340] Sch 2, *supra*.
[341] Regs 8-10; Sch 3, Pt 2, para 5.
[342] Deer (Scotland) Act 1996, s 8.
[343] *Garvies's Trs v Still* 1972 SLT 29, Lord Justice-Clerk Grant at p 36.
[344] 1981 SLT (Land Ct) 12.
[345] 1984 SLT (Land Ct) 37.

had the status of landlord and at the same time seek a remedy open only to a landlord. It was recognised by the parties that the existence of the landlord-tenant relationship was a precondition of the Land Court's jurisdiction on the consent application. In that case the Land Court held that it could explicate its own jurisdiction where that question was a necessary preliminary to the exercise of its substantive jurisdiction on the central question between the parties.

4.18 Despite these areas of uncertainty, there was no doubt as to the basic rule that, in line with *Garvie's Trs v Still*[346], the Court had no jurisdiction to decide whether the relationship of landlord and tenant existed between the parties. It was generally considered that this limitation was an unnecessary constraint. It required the ordinary courts to decide many cases, often involving questions of mixed fact and law, that the Land Court was well qualified to decide.

4.19 In 1998 the point arose again in an unexpected way. In *Harvey v McTaggart & Mickel*[347] the applicant applied to the Land Court for a declarator that she was the tenant of a holding under a lease that had been held by her late father. The landlords denied that the tenancy constituted an agricultural tenancy in terms of the 1991 Act. The Land Court granted the application having upheld a submission that the wording of the relevant provision of the 1991 consolidation, which imported into the holdings legislation certain provisions of the Small Landholders (Scotland) Acts[348] had had the effect of conferring jurisdiction on the Court to decide the question. On appeal, the Court of Session held that the 1991 Act, as a consolidating statute, could not have had that effect.[349]

4.20 The point that we now have to consider is whether the Land Court should have a general power to rule on such a question even where that is the only question in the case.

Power to decide on an arbitration question is dependent on a joint application

4.21 The power of the court to rule upon matters that would otherwise be compulsorily remitted to an arbiter is limited to those cases where the parties agree to submit a joint application to the court.[350]

No power to rule on the validity of bequests or on transfers of tenancies on intestacy

4.22 Under sections 11 and 12 of the 1991 Act the Land Court has jurisdiction to rule on the suitability of a legatee or acquirer of a tenancy to whom the landlord has taken objection. This is a limited jurisdiction. It entitles the Court to decide only on the suitability of the legatee or acquirer from the point of view of his personal probity, his agricultural knowledge and experience or his financial ability to run the holding. The Court has no power to rule on the underlying validity of the bequest or transfer. It is for consideration whether this restriction should be relaxed.

Limited power to regulate matters ad interim

4.23 The Court has limited power to grant other orders regulating the occupation and management of the holding during the dependence of the dispute. It has power to regulate *interim* possession of the holding in cases where an objection is outstanding against a legatee[351] or acquirer;[352] but it has no general control over the practical questions of an *interim* nature that arise in almost every case. The nature of disputes between landlord and tenant of an agricultural holding is such as to raise the question whether, properly to do justice between the parties, the Court should have the express power to regulate all questions relating to the management of the holding *ad interim.* This power would

[346] *supra*.
[347] 1998 SLT (Land Ct) 20.
[348] Which gave the Land Court power to rule on the existence of a tenancy to which those Acts applied.
[349] 1999 GWD 40-1906.
[350] 1991 Act, s 60(2).
[351] s 11(7).
[352] s 12(4).

enable the Court to make orders on questions such as the accommodation of livestock, the repair and maintenance of fixed equipment, the payment of grants and subsidies, the management of quota, and so on.

4.24 One particular power that would have considerable practical effect would be a power to order the immediate removal of the tenant in cases where there was a *prima facie* case of bad husbandry.

No power to grant interdicts

4.25 The Court has no power to pronounce interdicts or *interim* interdicts.[353] For this reason the landlord has to resort to the ordinary courts to prevent the commission by the tenant of an irremediable breach of the lease. Such an application may involve specialised agricultural questions.

Uncertainty as to the Court's power to award damages

4.26 There is only one case in which the agricultural holdings legislation expressly confers the remedy of damages rather than compensation, namely under section 7(3)(b) of the 1991 Act where the tenant has abused his rights to freedom of cropping and disposal of produce. There has always been uncertainty as to whether this remedy can be granted by an arbiter.

4.27 There is no authority of the Court of Session on the question whether the general arbitration provisions confer a power on the arbiter to award damages. It has been held in the sheriff court that section 60 of the 1991 Act, which we have discussed in chapters 2 and 3 (in particular at para 2.16), is broad enough to entitle an arbiter to award damages for breach of the lease.[354] This implies that the same power exists under section 7. If this view is correct, the Land Court will have the same jurisdiction where such questions are brought before it by joint application.

4.28 On any view, the question of the Court's power to award damages should be statutorily clarified.

No power to accept contractual references

4.29 This is a serious limitation on the powers of the Court. In this respect the Court's jurisdiction differs significantly from that of the Lands Tribunal. The experience of the Tribunal is that this power, although not frequently invoked, is one that can be of value to parties who seek an authoritative decision on specialised questions of valuation that would otherwise have to be resolved by litigation or arbitration.

Appeals

4.30 There is an appeal from a decision of the Land Court to the Court of Session by way of special case,[355] except where the decision has been made on a stated case in a rent arbitration.[356] There is no appeal from the decision of the Court of Session.[357]

[353] *Urquhart v Urquhart* 1977 SLCR App 46; *Strathern v MacColl* 1993 SLT 301.
[354] *Hill v Wildfowl Trust (Holdings) Ltd*, 1996 SLT (Sh Ct) 46, at pp 48-49.
[355] Scottish Land Court Rules 1992 (SI No 2656).
[356] 1991 Act, Sch 7, para 23.
[357] Small Landholders (Scotland) Act 1911, s 25(2).

CHAPTER 10

CURRENT PRACTICE IN THE SCOTTISH LAND COURT

Introduction

4.31 We have consulted with the Chairman, the members and the Principal Clerk of the Scottish Land Court with a view to establishing whether the resources of the Court are at present fully utilised and whether they would be sufficient to deal with any increase in work that would be likely to result from an enlargement of the Court's jurisdiction. We have compiled some statistical data on the workload of the Court. To provide a useful comparison with the cost of arbitration we set out details of the Court's fee structure. We then assess the record of the Court with a view to assessing its suitability to exercise the enlarged jurisdiction that we envisage.

The workload of the Land Court in agricultural holdings cases

Applications to the Court under the 1949 and 1991 Acts

4.32 Table 10 shows the number of applications to the Scottish Land Court over the last 10 years for which statistics are available, broken down by subject matter.

Table 10

Applications made to the Scottish Land Court 1989-1998

Year	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998	TOTAL
Consent applications	1	5	3	2	3	4	11	-	5	18	**52**
Improvement cases	-	-	-	-	-	-	-	-	-	-	-
Rent cases	-	-	2	1	1	-	-	-	-	1	**5**
Rent stated cases	1	1	2	-	-	-	1	-	-	-	**5**
Rent Appeals	-	1	1	-	4	-	1	-	1	1	**9**
Bad husbandry cases	2	-	-	-	-	1	1	-	-	-	**4**
Joint applications	-	-	-	3	1	2	2	1	5	-	**14**
Miscellaneous	-	1	-	1	-	1	-	-	-	1	**4**
Succession	-	-	-	4	-	1	-	-	3	1	**9**
Total number of applications	**4**	**8**	**8**	**11**	**9**	**9**	**16**	**1**	**14**	**22**	**102**

Source : Scottish Land Court

4.33 Few general trends can be seen in the statistics; but it is clear that joint application procedure is rarely used by comparison with statutory arbitration. The commonest cases before the Land Court are applications for consent to notices to quit. These comprise over one half of the caseload.

4.34 In our view, the considerable expertise in agricultural matters available in the Land Court is significantly under-employed on account of the Court's restricted jurisdiction in such matters.

4.35 Our central proposal in this Report is that compulsory arbitration should be abolished and that either party should be entitled to apply to the Land Court.[358] If that proposal were to be implemented, we would not expect that all of the work presently carried out by arbiters would be added to the workload of the Court. On the contrary, we would expect that much of that work, because of its practical nature or because of the parties' desire for confidentiality, would continue to be done by private arbitration. We cannot accurately estimate how much of that work there would be. We later recommend that there should be an express reservation of the parties' right, in all but a small number of specified cases, to resolve their disputes by any method of dispute resolution that they choose.[359]

Sheepstock valuations

4.36 None of the applications in Table 10 related to a sheepstock valuation. Until 1991 such valuations were governed by the Sheep Stocks Valuation (Scotland) Act 1937 and the Hill Farming Act 1946. The provisions of these Acts relating to sheepstock valuations were incorporated in the 1991 consolidation.

4.37 In such cases the Land Court has jurisdiction to determine three-year average prices in cases where the sales evidence is deficient. This power involves a reference to the arbiter, a reference to the Land Court on the short question of the three-year average prices, and a reference by the Court back to the arbiter for completion of the valuation. The system is virtually unworkable. In practice, it is never resorted to. The parties in such cases usually agree the figures in order to expedite the resolution of the dispute. In sheepstock valuations it is obvious that a one-stop solution is to be preferred.

Applications under the Agriculture Act 1986 and the Dairy Produce Quotas Regulations 1997

4.38 The Land Court have received no applications under the 1986 Act and the 1997 Regulations. However, in the case of *Broadland Properties Estates Limited v Mann*[360] the Court required to consider, in the course of a rent appeal, the appropriate method of valuing allocated milk quota and transferred milk quota in terms of section 16 of the 1986 Act. In that case the Court gave a decision of major importance which has guided arbiters in all cases of rent valuation involving an element of dairying.

Appeals to the Court of Session by Special Case

4.39 There have been 3 appeals from the Land Court since 1990.[361]

The cost of litigation in the Land Court

Court fees

4.40 Table 11 sets out the fees of the Court.

Table 11

Scottish Land Court fees

Type of application	Fee Payable £

[358] See para 6.70 *infra*.
[359] See paras 6.138-6.139 *infra*.
[360] 1993 SLCR 1.
[361] Source – the Scottish Land Court.

(a)	**Valuation of sheep stocks**	
	Awards not exceeding £100	6.00
	Awards exceeding £100:-	
	For the first £100 thereof	6.00
	For every additional £100 or part thereof	3.00
	Where application dismissed or withdrawn before valuation	75.00
(b)	**Arbitration as to rents**	
	Rental as fixed by Court, not exceeding £500	50.00
	Rental as fixed by Court exceeding £500:	
	For the first £500	50.00
	For every additional £100 or part thereof	7.50
	Where application dismissed or withdrawn before rent fixed	80.00
(c)	**Appeals against awards by an arbiter**	
	Fee payable on lodging appeal	65.00
	Rental as fixed by Court not exceeding £500	30.00
	Rental as fixed by Court exceeding £500:	
	For the first £500	30.00
	For every additional £100 or part thereof	3.00
	Where application dismissed or withdrawn before rent fixed	85.00
(d)	**Claims for compensation**	
	Awards not exceeding £100	12.00
	Awards exceeding £100:	
	For the first £100 thereof	12.00
	For every additional £100 or part thereof	5.00
	Where application dismissed or withdrawn before compensation fixed	80.00
(e)	**Other Applications**	
	Principal application	100.00
	When more than one applicant (each additional applicant)	50.00
	For each respondent	45.00
(f)	**Appeals and motions for rehearing**	
	Each appellant, or motioner	60.00
(g)	**Hearings and Inspections**	
	For each day or part thereof the Court sits or inspects - payable by the applicant	120.00
(h)	**Additional fee**	
	Where the application is granted, dismissed or withdrawn after the hearing order has been received by each party but before the commencement of the hearing – payable by the applicant	120.00

Source: Scottish Land Court

4.41 Applications under the 1991 Act are divided into five categories for feeing purposes. Valuation of sheepstocks, rent arbitrations, rent appeals and compensation claims attract fees *ad valorem*. All other actions attract standard fees as shown in the table. In addition to the basic administrative fees, the daily hearing fee is payable for every day or part of a day on which the Court sits or inspects.

Illustration of Land Court fees for typical rent review application

4.42 The Land Court fees for a case similar to the arbitration case considered in chapter 6 (at para 2.131) would be as follows:-

Daily rate for hearing and inspections - 4 days at £120 £480.00

Ad valorem fee on rent fixed at £5,000 *pa*	£387.50
Total fee payable	£867.50[362]

The record of the Scottish Land Court in recent years

4.43 The Court is ideally constituted for the resolution of agricultural disputes. Its Chairman has the rank of a judge of the Court of Session. Its practical members have a wide technical knowledge of agriculture in Scotland, skill in valuation and long experience of practical farming. By reason of its members' involvement in the agricultural world and the knowledge that they gain from hearings and from inspections, the Court is familiar with practice and with current economic conditions in all sectors of agriculture. The Court therefore has the same range of practical skills that are expected of an agricultural arbiter, but has the advantage of hearing a much wider range of cases from all parts of Scotland. In addition to the legal eminence of its Chairman, the Court has a considerable body of legal knowledge among its practical members arising from their familiarity with the legislation and the case law. The Court also has the advantage of a skilled administration that includes lawyers familiar with the legislation.

4.44 The case law shows that however long the parties may take in the preparatory stages of Land Court cases, the Court is consistently prompt in issuing its decisions. In all of the bad husbandry applications that have come before it, where the decision must be issued within a statutory time limit of nine months,[363] the Court has completed the case within that limit.[364]

4.45 The Court has given clear guidance to arbiters and practitioners on numerous matters involving questions of law, valuation and practical agriculture, such as rent assessment,[365] sheepstock valuation,[366] bad husbandry[367] and milk quota valuation.[368]

4.46 In these cases the Court has interpreted complex legislation with practical agricultural considerations in mind. The clarity of the Court's decisions has reduced the areas of doubt in the law and, in our view, has reduced the burden of litigation on the Court.

4.47 In England the functions of the Land Court are, in general, discharged by the local Agricultural Land Tribunals.[369] The advantages of a centralised specialist court of law, whose decisions are fully reported, over a system of area tribunals was acknowledged in the previous edition of one of the leading English textbooks.[370]

4.48 We have the clear impression that the Court enjoys the confidence of both sides of the tenanted sector and of their advisers. We think that it is significant that there have been only three appeals from the Court since 1990.

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[362] Each party is liable for one half of the total fee.
[363] 1991 Act, s 22(2)(c) and s 26.
[364] *eg Luss Estates Co v Firkin Farm Co* 1985 SLT (Land Ct) 17; *Cambusmore Estate Trs v Little* 1991 SLT (Land Ct) 33; *Austin v Gibson* 1979 SLT (Land Ct) 12; *Ross v Donaldson* 1983 SLT (Land Ct) 26; *Buchanan v Buchanan* 1983 SLT (Land Ct) 31.
[365] *eg Aberdeen Endowments Tr v Will*, 1985 SLT (Land Ct) 23*; Earl of Seafield v. Stewart* 1985 SLT (Land Ct) 35; *Kinnaird Tr and Boyne* 1985 SLCR 19.
[366] *eg Tufnell and Nether Whitehaugh Co Ltd* 1977 SLT (Land Ct) 14.
[367] *eg Luss Estates Co v Firkin Farm Co, infra.*
[368] *eg Broadland Properties Estates Ltd v Mann* 1994 SLT (Land Ct) 7; 1993 SLCR 1.
[369] Agriculture Act 1947, s 73; Sch 9.
[370] cf Muir Watt, *Agricultural Holdings*, p 93, referring to the Land Court's development of the principles of hardship in applications for consent to the operation of notices to quit.

4.49 While we recognise that the Court has a considerable caseload in crofting cases,[371] Table 10 demonstrates, in our view, that in agricultural holdings cases the Court is not fulfilling its potential. The expertise of its members and of its administration makes it a judicial resource of high quality that in our view should lie at the centre of dispute resolution in the law of agricultural holdings.

[371] The Court's caseload in landholders' cases is nowadays light: cf *Stair Encyclopedia*, vol 6, para 964.

PART 5 - OTHER ADMINISTRATIVE AND JUDICIAL JURISDICTIONS

CHAPTER 11

THE ADMINISTRATIVE JURISDICTIONS OF THE SCOTTISH MINISTERS

The jurisdictions of the Scottish Ministers

5.1 Functions previously exercised by the Secretary of State for Scotland in relation to agricultural holdings matters were transferred to the Scottish Ministers with effect from 1 July 1999.[372]

5.2 The Scottish Ministers have a number of administrative jurisdictions in agricultural holdings matters. The jurisdictions are as follows:

- designation of agricultural land under section 86(1)[373] of the 1948 Act;
- approval of lettings for less than from year to year;[374]
- appointment and remuneration of recorders under section 17 of the 1991 Act;
- application of sums recovered by the landlord under fire insurance on the reinstatement of buildings;[375] this applies to pre-1 November 1948 leases only;[376]
- approval of an alternative provision made by the landlord or the tenant in lieu of his insurance obligation under Schedule 1;[377]
- extension of the period for the settlement of waygoing claims and appointment of arbiters therefor;[378]
- charging orders in respect of the tenant's rights to compensation and reorganisation payment under the 1991 Act and compensation under the Agriculture Act 1986,[379] and in respect of the right of a landlord who is not the owner of the *dominium utile* of the holding to repayment of compensation;[380]
- the making of rules for expediting or reducing the expenses of proceedings in arbitrations under the 1991 Act;[381]
- appointment and remuneration of arbiters;[382]
- variation of Schedules 5 and 6 of the 1991 Act;[383]
- the authorisation of powers of entry on and inspection of any land in connection with the exercise of the Scottish Ministers' powers under the 1991 Act;[384]

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[372] Scotland Act 1998, s 53.
[373] 1991 Act, s 1(2).
[374] s 2(1).
[375] s 6.
[376] s 5(6).
[377] s 4; Sch 1, paras 5 and 6.
[378] s 62.
[379] ss 75 and 55; 1986 Act, Sch 2, para 12.
[380] s 75.
[381] s 61(4).
[382] s 63.
[383] s 73.
[384] s 82.

- reference by the landlord regarding a proposed exercise by the tenant of his right of muirburn under section 24 of the Hill Farming Act 1946;
- variation of Schedule 10 of the 1991 Act in relation to sheepstock valuations;[385]
- the sanctioning of the authorisation by the tenant, as occupier of the land, of an additional number of persons to kill and take ground game under the Ground Game Act 1880;[386]
- the management, including letting, of land acquired by Scottish Ministers (or their predecessor) under the 1948 Act or otherwise placed at their disposal.[387]

The removal of adjudicatory functions from the Secretary of State

5.3 Most of the substantive jurisdictions formerly exercised by the Secretary of State for Scotland originated in the 1948 Act and were conferred at a time when the Scottish Land Court had only the most limited jurisdiction in agricultural holdings cases. At that time the power to consent to the operation of a notice to quit and to find a tenant guilty of bad husbandry was a ministerial matter. It was logical therefore that the ancillary administrative decisions should be exercised by the Secretary of State.

5.4 However, since 1958 the jurisdictions of the Secretary of State to rule on questions relating to bad husbandry and applications for consent to the operation of notices to quit have been exercised by the Land Court. Section 3 of the 1958 Act transferred to the Land Court the adjudicatory functions previously undertaken by the agricultural executive committees in such matters. Similarly, this provision transferred jurisdiction in such matters to agricultural land tribunals in England and Wales. In proposing these changes, the then government gave weight to the recommendations of the Report of the Franks Committee[388] that judicial functions such as these should be exercised by independent judicial bodies.

5.5 The Franks Committee report stated:

> "We regard it as wholly undesirable that these Committees should continue to exercise adjudicating functions in addition to their executive functions. Given such a combination the parties cannot feel that their case will receive a fair hearing and be impartially decided."[389]

5.6 In introducing this measure in the House of Commons the Secretary of State for Scotland, referred to the advantages of procedure in the Land Court as follows;

> "The Court, of course, already has experience of hearing appeals in such cases, and we are fortunate in not having to devise any new judicial machinery. Nor do we require to make detailed provision in the Bill as regards procedure, since such matters are covered by the rules of the Court."[390]

The administrative jurisdictions of the Scottish Ministers in practice

5.7 The residual jurisdictions of the Scottish Ministers under the 1991 Act relate mainly to the administration of the arbitration system. Several other jurisdictions such as the designation of agricultural land under the 1948 Act[391] and the approval of provisions alternative to insurance,[392] are

[385] s 68(5).
[386] 1948 Act, s 48; Ground Game Act 1880, s 1.
[387] 1948 Act, s 61.
[388] Report of the Committee on *Administrative Tribunals and Enquiries*, Cmnd 218, July 1957.
[389] Para 148.
[390] Hansard, House of Commons 1957-58, Vol 584, col 1300.
[391] s 86(1).
[392] 1991 Act, s 4; Sch 1.

obsolete. We confine ourselves in this Report to a brief consideration of the more important of these administrative functions.

Approval of short term lets

5.8 The jurisdiction of the greatest practical importance relates to the approval of short term lets under section 2(1) of the 1991 Act. This provision is closely connected with security of tenure. It provides that the Scottish Ministers may give approval in advance to the letting of agricultural land for a shorter period than from year to year and thereby prevent the let from taking effect as a lease from year to year with consequent security of tenure. Tables 12 and 13 shows that this jurisdiction is frequently exercised.

Table 12

Applications for consent to short term lets received by the Secretary of State

Year	Applications received	Applications processed	Applications granted
1997	170	135	See Table 13
1998	207	181	See Table 13

Statistics based on information provided by the Scottish Executive Rural Affairs Department

Table 13

Number of applications for consent to short term lets granted by the Secretary of State – specific districts only

Year	Hamilton	Highland	Ayr	Angus
1988	17	2	28	22
1989	17	5	19	26
1990	14	3	20	17
1991	8	4	7	17
1992	12	6	10	24
1993	3	8	8	20
1994	7	8	14	20
1995	5	11	13	24
1996	5	17	14	23
1997	8	10	19	26
1998	4	10	11	30
Total	**100**	**84**	**163**	**249**

Statistics based on information provided by the Scottish Executive Rural Affairs Department

5.9 The Scottish Executive provided us with annual statistics for the district offices in Angus, Ayr, Hamilton and the Highlands as shown in Table 13. In addition to these annual figures, the total number of consents granted over the period 1988-1998 for the Perth and Dumfries districts were 134 and 121 respectively. We were unable to obtain data from the remaining twelve area offices.

5.10 Applications for consent to short term lets are considered by the appropriate Scottish Executive Estate Management Department area office. There are eighteen area offices. The Department requires each applicant to submit details of the area of land to be leased and a map showing its location, with particular reference to any parts of the holding that are not to be subject to the short term lease. The applicant must also state the reasons for the application.

5.11 The principal justifications for a short term let that the Department accept are:

- the land is proposed for development in the local development plan and
- the holding is part of a larger estate and a re-organisation of the holdings on the estate is proposed.[393]

5.12 In the case of proposed development, the Department will consult closely with the planning authority and will modify its consent in line with any approved planning permission, or with the proposed scheduling of the development. In the case of re-organisation of estates, as a general rule the Department will allow the estate a period of only one year within which to complete the re-organisation.

5.13 Applications falling outwith the two principal categories are dealt with on their merits on a case by case basis. The Department expects to process each application within one month of receipt, subject to the applicant having disclosed all relevant information in his application.

5.14 It seems that this aspect of the work of the Department is not unduly burdensome. The decision on each of these matters is essentially an administrative matter and the Department has the administrative resources to deal with it. Each decision depends to a material extent on the local knowledge of the Department's area officers. There is also a significant element of departmental policy in the decision.

5.15 Section 2 of the 1991 Act exempts from security of tenure two forms of contract, namely approved short term lets, which we have discussed, and seasonal lets for grazing or mowing. The whole section is ripe for reconsideration in the light of experience of such contracts in recent years. Approved short term lets cause difficulties in practical operation in view of changes in cropping practices in recent years. Many intended grazing lets have resulted in the creation by accident of secured tenancies.[394] These have caused resentment, ill-will between neighbours[395] and, in at least one case, violence.[396] They have enabled opportunistic grazing tenants to take advantage of naïve landlords; and in some cases have brought the system into disrepute. The reform of section 2 is beyond the scope of our present remit, but we think that it would be desirable if the section were to be re-examined.

Administrative jurisdictions in relation to the arbitration system

5.16 We have described the exercise of these jurisdictions in chapter 4 (paras 2.23-2.25 and 2.27-2.28).

Appointment of recorders

5.17 We deal separately with this jurisdiction in chapter 12 (paras 5.19, 5.23 and 5.25).

Sheepstock valuations

5.18 An attempt was made in the 1983 Act to deal with the intractable problem of the valuation formulae in the Sheepstock Valuation (Scotland) Acts. The 1983 amendment is now set out in section 68(5) of the 1991 Act. It entitles the Scottish Ministers to vary Schedule 10 to the Act by Statutory Instrument. The exercise of this legislative power rests on Government policy.

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[393] Gill, 3rd ed, para 4.12.
[394] *eg Clamp v Sharp* 1968 SLT (Land Ct) 2, at p 2 I-J.
[395] *eg Davidson v Barrowman* 1978 SLCR App 155.
[396] That was the sequel to *Gairneybridge Farm Ltd and King* 1974 SLT (Land Ct) 8.

CHAPTER 12

RECORDERS

History

5.19 The office of recorder originated in the 1906 Act, which was superseded by the consolidating 1908 Act.[397] The 1906 Act, as re-enacted in the 1908 Act, provided that in the case of any tenancy entered into after the commencement of the Act, either party was entitled to require that a record of the holding should be made within three months after the commencement of the tenancy. The recorder was to be a person appointed by agreement of the parties or, in default of agreement, by the Board of Agriculture and Fisheries. In default of agreement the cost of making the record was to be borne by the landlord and tenant in equal proportions.[398] At that time the legislation was primarily concerned with the tenant's waygoing claims for improvements and for the newly created right to compensation for disturbance, and with the landlord's claims for deterioration and breaches of the lease.

5.20 As the legislation developed, the work of the recorder become more significant in view of the introduction of security of tenure, the provisions for rent review, and the provisions relating to the maintenance and repair of fixed equipment.

The significance of statutory records

5.21 The existence of a statutory record is a prerequisite of certain claims, namely the tenant's claim for compensation for high farming[399] and the landlord's claims for compensation for dilapidation and deterioration.[400]

5.22 The content of the record also has important practical implications for the parties; for example, in relation to waygoing claims and other remedies related to the husbandry of the holding and the adequacy and state of repair of the fixed equipment.

5.23 The original provisions for the making of the record permitted the parties to make their own choice of recorder.[401] Under the 1991 Act the record must be made by a person appointed by the Scottish Ministers[402] and must be made in a prescribed form.[403] If the record fails to comply with either requirement, it will not be a valid foundation for any of the statutory claims to which we have referred.[404]

Appointment

5.24 There is no panel of recorders. There are no formal qualifications for appointment. There is no course of training.

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[397] See ch 2 (para 1.75).
[398] 1906 Act, s 7; 1908 Act, s 24.
[399] 1991 Act, s 44.
[400] 1991 Act, s 45.
[401] Para 1.75, *supra*.
[402] 1991 Act, s 8(3).
[403] *ibid*; cf Agricultural Records (Scotland) Regs 1948 (SI No 2817) as amended by the Agricultural Records (Scotland) Amendment Regs 1979 (SI No 799).
[404] *supra*.

5.25 The appointment of the recorder is made by the Scottish Ministers. There is no appeal against the choice of the recorder; and there is no other form of redress against the choice, except where it is open to judicial review.

5.26 In those few cases where a recorder is appointed, the appointee is almost always a member of the panel of arbiters.

The work of the recorder

5.27 The work of the recorder involves a special agricultural expertise. It requires the recorder to decide what features of the holding require to be recorded; what the potential significance is of such features, and in what way they should be recorded. A well-drafted record is a highly detailed document with descriptions and measurements of the land and the fixed equipment, and nowadays with photographic and video evidence of the most significant features of the holding.

Statistics

5.28 As Tables 14 and 15 show, records of holdings are seldom made nowadays. The average number of appointments per year remains fairly constant at around 15.5.

Table 14

Number of recorders appointed

Year	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998
No of recorders	21	14	17	13	9	21	13	15	17	14

Source : Scottish Executive Rural Affairs Department

Table 15

Average number of recorders appointed yearly over last 3, 5 and 10 years

Period	Over 3 years	Over 5 years	Over 10 years
No of recorders	15.33	16	15.4

Source: Scottish Executive Rural Affairs Department

5.29 The figures shown in Table 16 indicate that the workloads and costs associated with the making of records are reasonably constant. They appear not to be unduly burdensome. The current rate for recorder's fees set by the Scottish Executive is £36 per hour.

Table 16

Average yearly workload and fees of recorders 1994-1998

Year	Average hours worked	Average overall fee (£)	Average fee per hour (£)
1994	46.32	1423.97	30.74
1995	46.68	1643.27	35.20
1996	38.93	1367.30	35.12
1997	30.66	1103.51	35.99
1998	26.83	931.37	34.71
TOTAL	37.93	1287.82	33.95

Source: Scottish Executive Rural Affairs Department
Note: All figures are rounded to two decimal places

Jurisdiction of the Land Court

5.30 A further jurisdictional complication dating from the 1948 Act[405] relates to the making and content of the record. Section 8(6) of the 1991 Act provides that any question or difference between the landlord and the tenant arising out of the making of the record under that section shall, on the application of either party, be referred to the Land Court for determination by them. We know of no case in which this remedy has been invoked.

Assessment

5.31 The work of the recorder is essentially administrative. The system, to the extent that it operates nowadays, appears to work efficiently and economically. We are not aware of any significant ground of complaint about it.

5.32 It is not obvious to us why the statutory effects of a record should depend on its having been made by a recorder appointed by the Scottish Ministers.

[405] See ch 2 (para 1.116).

CHAPTER 13

THE LANDS TRIBUNAL FOR SCOTLAND

5.33 The Lands Tribunal for Scotland has sole jurisdiction in questions of compensation under the Land Compensation (Scotland) Act 1973 and related legislation affecting agricultural holdings[406] and has a specific jurisdiction under the 1991 Act in relation to the compulsory acquisition of agricultural holdings.[407] In cases where there is an acquisition of tenanted land both landlord and tenant have a claim.

5.34 Table 17 relates to all applications to the Tribunal in compensation cases. As the table shows, this jurisdiction is seldom invoked. We do not have separate figures for those cases that involve agricultural holdings, but from our own experience and that of the experts whom we have consulted we think that the number of such cases is insignificant.

Table 17

Number of applications made to the Lands Tribunal for Scotland for arbitration in compensation for compulsory purchase

Year	**1989**	**1990**	**1991**	**1992**	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**
No of cases	59	0	13	16	17	18	13	10	14	9

Source: Civil Judicial Statistics – Courts Group, Scottish Executive 1998.

5.35 It is for consideration whether these powers should be assimilated with those of the Scottish Land Court.

5.36 If this jurisdiction had related solely to land subject to an agricultural tenancy, there would have been a case for its being assimilated with the existing jurisdictions of the Land Court. But this jurisdiction applies to all agricultural land, tenanted or not. In our view it would be logical that all jurisdictions in matters of compensation should remain within the exclusive jurisdiction of the Tribunal.

5.37 We have also had in mind that in a compensation case involving agricultural land the Lands Tribunal is entitled to sit with a member of the Land Court as an agricultural assessor.[408]

5.38 We therefore make no proposal for reform of the Lands Tribunal's jurisdiction in these matters.

[406] cf Gill, 3rd ed, ch 32, Appx II.
[407] ss 56-57; Sch 8.
[408] *eg* as in *Cameron v NCC* 1991 SLT (Lands Tr) 85.

PART 6 - PROPOSALS FOR REFORM

CHAPTER 14

GUIDING PRINCIPLES FOR REFORM

6.1 It is our impression that there is an increasingly urgent feeling within the industry and its related professions that the *status quo* is not a sensible option. The system is failing the industry.

6.2 We proceed on the basis that reform is required. The questions then become (a) on what principles reform should be based and (b) to what practical options those principles point? In this chapter we consider the first of these questions.

6.3 In our view, reform in this area of the law should follow three guiding principles.

There should be a better quality of justice for the parties

6.4 The existing system has the inevitable result that the arbiter appointed to decide a question between landlord and tenant may not be the appropriate person to decide it. Under such a system there is a greater likelihood that the parties, or one or other of them, will be dissatisfied with the decision and therefore will exercise every opportunity of appeal that is available. This in turn leads to delay and expense and puts a further burden on the resources of the courts. It also leads to a loss of confidence in the system. We are satisfied that this is at least one of the considerations that discourage landowners from letting land on agricultural tenancies.

6.5 In pursuit of this principle we suggest that the system should make it possible for every dispute between the landlord and the tenant of an agricultural holding to be dealt with by whichever tribunal is best fitted to give an expert decision on the question. Therefore, if the dispute relates solely to a practical farming question, the parties should be free to have it dealt with, in the first instance at least, by a practical person. But if the dispute relates to a matter of law or to a matter of agricultural expertise involving a more general question, or any combination of these questions, either party should be entitled to have it resolved by a specialist court.

6.6 On any view, the all-embracing provision whereby questions or differences between landlord and tenant are compulsorily remitted to arbitration is nowadays entirely inappropriate for the sort of questions that commonly arise.

All disputes between landlord and tenant of an agricultural holding should be dealt with expeditiously and without any avoidable delay

6.7 The exigencies of modern agriculture are such that both parties require to plan in detail for their respective investments in the holding. Grants and subsidies have to be applied for. Quotas have to be bought, sold and let. Contracts of employment have to be entered into. Borrowings have to be arranged and secured. Tax planning has to be done. Any system of dispute resolution that involves periods of years rather than weeks or months is inimical to all of these needs. Uncertainty during the course of an agricultural holdings dispute may inflict upon either party irrecoverable loss. Worse still, delay and expense can put pressure on a party to compromise a well-merited case. It is, we think, notorious that tenants make concessions in rent negotiations in order to avoid the trouble and expense of an arbitration. It is also notorious that the law's delays can lead to the payment by the landlord to

the tenant of an undeserved premium. We have in mind particularly the case where a landlord who is under stress to sell is faced with a seemingly groundless claim to a tenancy. In such a case the prospect of a protracted litigation may mean that the realistic option is to buy the claimant out.

6.8 For these reasons it is essential that the procedures by which disputes between landlord and tenant are resolved should have the minimum of formality consistent with justice and fair play, should give the parties the fewest possible opportunities to stall and to cause expense for tactical reasons, and should hold out to both parties the prospect of an early and final resolution of the dispute. In this way the disruptive effects upon the practical running of farms and estates of a long-running litigation can be minimised.

All disputes between landlord and tenant of an agricultural holding should be conducted as economically as possible with the minimum of expense

6.9 It is undesirable that money in the industry should be spent on protracted and unnecessarily complex litigations. It is also undesirable that one party should be able to force the other into a spending race, for example in the instruction of counsel and expert advisers as a means of exerting pressure. There is therefore a case for providing that certain expenses should be irrecoverable by one party from the other. In addition to the cost caused to individual litigants there is also the cost to the public purse. In making our proposals, we have had both costs in mind.

CHAPTER 15

OPTIONS FOR REFORM

The first instance process

6.10 There are two realistic options for reform. The first is to persist in the system of compulsory arbitration, but to amend the legislation with a view to accelerating procedures and reducing costs. The second is to abolish compulsory arbitration and introduce a new system centred on the Scottish Land Court.

6.11 Within these two broad options, there are many practicable variations in procedure; but at this stage we confine ourselves to the generality of these options and the basic questions of principle that underlie them.

Option 1 - Continuation of the compulsory arbitration system with amended procedures

6.12 There was considerable support for this approach among those who replied to the LRPG consultation document. It is fair to say that this was the approach that was primarily discussed in that document. In the event, this was the option favoured by LRPG in their recommendations.

6.13 The LRPG's paper *Recommendations for Action* published in January 1999 contains wide-ranging proposals for land reform across a whole spectrum of land-related issues. In his foreword, the Chairman of the Group refers to the need to

> "ensure that the Group's work constantly strikes the right balance between vision and desirability."[409]

6.14 It is the Group's view that their recommendations meet the twin criteria of (i) the optimum use of land for the benefit of those living and working in rural areas and (ii) cost-effectiveness.

6.15 The work of the LRPG seems to point towards piecemeal rather than comprehensive reform of the law of agricultural holdings. This however is a question that is beyond the scope of this Report.

6.16 The main LRPG proposals that have an impact on our present remit can be summarised as follows.

Legislation to simplify arbitration procedures:

- the use of simpler methods of dispute resolution including mediation
- reducing the volume of detailed evidence to be specified in the award
- permitting hearings to be dispensed with
- limiting the way in which parties can be represented
- restricting the scope for appeal
- stricter control over the cost of arbitrations and the fair allocation of costs between the parties
- creating a smaller and more experienced arbiters' panel
- change in the constitution of the arbiters' panel
- change in the process of selecting arbiters

Extension of the role of the Scottish Land Court:

[409] At p 1.

- appointment of arbiters
- applications by one party to be competent
- an investigative role
- jurisdiction in stated cases
- stricter time limits for the issue of arbiter's findings
- provision for transfer to the Land Court or ending of the case if cases are unduly prolonged
- power to the Land Court to order immediate removal of the tenant in bad husbandry cases

Wider opportunities for diversification:

- a statutory right to the tenant to seek arbitration or appeal to the Land Court if the landlord refuses consent for diversified activities

Miscellaneous

- legislation to simplify the valuation of sheep stocks.
- legislation to simplify the provisions on responsibility for fixed equipment.

6.17 This option offers considerable scope for reform. Arbitration procedures can readily be simplified by a variety of procedural measures, most of which have been discussed within the professions over the years.

6.18 The LRPG recommendations have the merit that they can readily be brought into law; that they will effect little disruption to the existing system; that they will be readily assimilated by those who presently work within the system, and by arbiters in particular; and that they hold out the prospect of fairly significant improvements in the system in the short term.

6.19 The package of proposals recommended by the LRPG is, overall, a realistic version of this option. However, for the reasons that we give in chapter 16 (paras 6.27-6.34), we consider that it has serious shortcomings.

Option 2 – Abolition of compulsory arbitration and extension of the jurisdiction of the Land Court

6.20 Under this option, the comprehensive jurisdiction of the agricultural arbiter is in effect transferred to a specialist court with expertise in all relevant disciplines. In this way a quality judicial resource is effectively deployed in the public interest and for the public benefit. We acknowledge that the Land Court members do not have a complete range of agricultural experience; but under a wider jurisdiction their experience would build up. At the same time, since arbitration itself is not proscribed, except in those cases where the legislation expressly proscribes it,[410] it remains available to parties in cases where they agree that it is the most suitable means of resolving their dispute. This proposal has the further merit that in all cases that are diverted from arbitration into the Scottish Land Court a complete layer of jurisdiction, namely that of review by stated case, is at once eliminated.

The appellate process

6.21 We consider that rationalisation of the appellate process is an essential counterpart to reform of jurisdiction and procedure at first instance.

6.22 Either of the options that we have considered gives scope for such a rationalisation.

Administrative jurisdictions

[410] *eg* in applications for consent to the operation of notices to quit. See further ch 9 (at para 4.8).

6.23 In our view, the options are for the transfer of those jurisdictions to the Land Court or the *status quo*.

Option 1: Transfer to the Land Court

6.24 This option would not introduce any novelty. Under the existing legislation, the Land Court has limited jurisdictions of an administrative nature in cases in which the Scottish Ministers are a party. We have described these jurisdictions in chapter 9 (see para 4.12). These jurisdictions have seldom been exercised;[411] but we understand that their exercise has occasioned no difficulty for the Court.

6.25 This option has the attraction of simplicity. It would unify virtually all judicial and administrative jurisdictions in agricultural holdings law in the Land Court.

Option 2: Status quo

6.26 This option recognises that the judicial and administrative jurisdictions are different in kind.

[411] The most recent example is *Secretary of State v Brown* 1993 SLCR 41.

CHAPTER 16

OUR PREFERRED OPTIONS

First instance

Option 1

6.27 In our view, the LRPG recommendations are too cautious. They assume the continuation of arbitration as the primary forum for dispute resolution. For the reasons that we have already given, that assumption fails to recognise the fundamental incompatibility between the expertise of the arbiter and the nature and scope of the questions remitted to him.

6.28 To the extent that the LRPG recommendations are intended to reduce the cost of arbitration, they are inadequate. Reforms such as a reduction in the amount of evidence that has to be set out in the arbiter's award, or a reduction in the extent of the written pleadings,[412] would in our view merely tinker with the problem and would effect only marginal economies. Such reforms could lead to injustice, particularly if they were associated with restricted rights of appeal.

6.29 Moreover we consider that the proposals take too restricted a view of the extension of the jurisdiction of the Land Court; for example, in the recommendations relating to the appointment of arbiters, stated cases to the Land Court, stricter time limits, and so on. These proposals fail fully to recognise the potential of the Land Court to be a successful court of universal jurisdiction in agricultural holdings disputes and the advantages of that for the litigants and for the public.

6.30 Lastly, we consider that certain of the proposals could have human rights implications. The proposals to dispense with hearings; to limit representation at the arbitration, and to allow immediate removal of a tenant during the dependence of a bad husbandry case, have the potential to cause injustice and are vulnerable to challenge on human rights grounds.

6.31 Other versions of this option could be devised that would avoid the human rights problems, and perhaps expedite procedures even more. But the LRPG proposals, although superficially attractive, have in our view significant shortcomings.

6.32 No matter what variation of option 1 is adopted, it remains open to the fundamental objection that compulsory arbitration under the 1991 Act requires the parties to have questions of law decided by an arbiter who in many cases will not be qualified to decide them. To put it another way, under this option the alternative of joint application procedure to the Land Court in effect gives either party a veto over access to the system's own expert court. In our view, this is an insuperable obstacle to worthwhile reform in this area of the law.

6.33 Our examination of the history of the legislation has persuaded us that compulsory arbitration of the comprehensive extent set out in the 1991 Act has no sound intellectual basis, and never has had. Having regard to contemporary evidence to which we have referred[413] we think that it is quite likely that the practical difficulties raised by comprehensive compulsory arbitration were never foreseen.

6.34 Whether or not those difficulties were foreseen, experience of compulsory arbitration in practice has demonstrated that in many important cases involving significant questions of law, the

[412] As the RICS has suggested.
[413] See ch 2 (at para 1.112-1.113).

arbitration system has failed. We refer to the numerous decisions on clear-cut legal issues that have been resolved only after prolonged and needlessly expensive procedures of stated case and appeal.[414]

Option 2

6.35 Option 2 is our preferred option. In our opinion, its advantages over option 1 are obvious.

6.36 There can scarcely be any dispute that option 2 will produce a better quality of justice. Moreover, by eliminating stated case procedure, option 2 will be on the whole more expeditious. We would therefore be deflected from option 2 only if its implementation were to involve unreasonable cost to the litigant, or to the public purse. In our view, neither is likely to be the case.

6.37 Option 2 should produce a considerable saving to the parties. We have shown that Land Court fees for hearings and inspections are significantly lower than the cost of hearings and inspections in arbitration. Moreover, under this option the parties will not incur the costs of preparation of the draft award, of drafting and adjusting the stated case, and the other incidental preliminary costs of the arbiter and his clerk.

6.38 From the parties' point of view, therefore, the proposal is merited on the grounds of cost. The question then becomes whether the proposal can be implemented at reasonable cost to the public purse.

6.39 Even if this proposal were to involve considerable cost in the provision of additional resources for the Land Court, we would consider it worthwhile. Agriculture is one of Scotland's major industries. The tenanted sector, in our view, is entitled to a system of justice that is efficient, competent and well-funded. If our proposal were to necessitate the making of additional appointments to the Land Court, and the provision of related administrative support, the cost would in our view be justified.

6.40 However, we think that any additional cost of this option to the public purse will not be significant. In consequence of the economic decline in Scottish agriculture, there is spare capacity in the Court. One full-time vacancy in the Court has been filled by a part-time appointment.

6.41 It is difficult to predict with accuracy what impact on the Court's workload any expansion of that jurisdiction would have. We recognise the possibility that the convenient and accessible justice that the Land Court will provide under our proposals will generate its own case load. But the Court considers that it has administrative and judicial capacity sufficient to accommodate the consequences of an enlargement of its jurisdiction along the lines that we propose. The Court has also indicated to us that it may be possible to extend the availability of its current part-time member. The Scottish Land Court Act 1993 provides for there being up to six practical members of the Court, that is to say more than twice the existing complement.[415] The Court positively supports our proposals.

6.42 On the whole, we consider that our proposals would concentrate resources where they would be most effectively deployed.

6.43 We think that there is a distinct possibility that our proposal would lead to a net decrease in public cost. The arbitration system lacks consistency and uniformity. Individual arbiters take different approaches in methodology on questions such as rental valuation, assessment of comparables, age discounting on improvements, and so on. Under our proposals the Land Court would have the opportunity to give authoritative guidance to parties and their professional advisers on legal and practical questions over the whole spectrum of landlord and tenant matters to which the Acts

[414] *eg* some of the cases cited in ch 6 (at paras 2.118-2.120).
[415] Scottish Land Court Act 1993 s 1(2). The appointments are made by the Queen on the recommendation of the Scottish Ministers (*ibid*).

apply. This would enhance public confidence in the system. It could prevent disputes or at least promote settlement of disputes before the stage of litigation. We therefore consider that there is a reasonable prospect that our proposals would result in an overall reduction in the number of disputes that are presently resolved by arbitration, or by the Land Court or by the ordinary courts of law.

6.44 There would be a saving in public cost in the elimination of a complete layer of jurisdiction, namely the intermediate jurisdiction, between first instance and appeal, that is involved in stated case procedure.

Appellate procedures

6.45 In our view, a reformed system of dispute resolution should be based on a two-stage procedure in all cases, namely a first instance decision and one opportunity of appeal.

6.46 In most civil litigations there are two stages of appeal; but in cases of the kind that we are considering in this report, we consider that a single right of appeal is sufficient and appropriate. Under our proposals, the decision at first instance would have been made by a specialist court. In our view the interests of an expeditious conclusion to the case justify the restriction of the opportunities of appeal. Moreover, the history of the Land Court over the last 20 years shows that few decisions of the Court have been appealed. In all such cases there has been only one stage of appeal.[416] This restricted right of appeal also applies in the cases before the Lands Tribunal for Scotland. We are not aware that this has caused any dissatisfaction. We therefore recommend that the right of appeal from the Land Court to the Court of Session should continue to be final.

6.47 In cases where, under our preferred proposal, there was an elective arbitration, it is to be assumed that the decision was one that an arbiter was best qualified to make, that is to say a decision on a practical agricultural question, and we can see no injustice to parties in restricting the right of appeal. If the parties elected in such a case to remit a question of law to an arbiter, perhaps for overriding reasons of confidentiality, they would do so in the knowledge that only one opportunity of appeal would be available.

6.48 In cases where the decision is made by an arbiter, we recommend that the single right of appeal should be that of appeal to the Land Court. If the decision involved a possible error of law, the Land Court would be well-qualified to put it right. On the other hand, if the appeal was on a question of fact, such as the valuation of a rent and the related question of the interpretation of evidence of comparables, the appeal would almost certainly necessitate a re-hearing. That would add to the delay and expense. In our view, it would be reasonable to provide that if parties chose to have arbitration, they should accept the consequence that the decision would be appealable on legal grounds only. For these reasons, we recommend that the single opportunity of appeal to the Land Court should be limited to questions of law.

Administrative jurisdictions

Option 1

6.49 The fact that the Land Court has for many years had an alternative administrative jurisdiction to that of the Secretary of State, and now of the Scottish Ministers, in the appointment of arbiters suggests that a general transfer of administrative jurisdiction to the Court would create a simpler and more convenient system.

Option 2

[416] Small Landholders (Scotland) Act 1911, s 25(2).

6.50 On closer consideration of the matter however we prefer the option of the *status quo*. The Land Court is fundamentally a judicial body that makes its decisions by judicial methods on an application of the law to the facts that it finds. It does not have any function in the application of policy.

6.51 Each of the administrative jurisdictions that the Scottish Ministers now exercise involves questions of practical agriculture and questions of policy, whether legislative or departmental. The judgments on which such decisions are made take into account the detailed local knowledge of the Department's officers.

6.52 We do not think that it would be appropriate that the Land Court should have any general jurisdiction in matters such as the appointment of recorders, or the fixing of an arbiter's remuneration. These are questions in which the Court has no particular expertise. The choice by the Land Court of an individual to act as a recorder or as an arbiter could be open to misunderstanding and might be a source of embarrassment to the Court. The fixing of remuneration is partly a matter for the skill of a court auditor and partly a matter of policy as to the basis and the scale on which arbiters or recorders should be remunerated.

6.53 Moreover, if an administrative decision now made by the Department were to be made by the Land Court, the Court's position in any subsequent litigation arising from the decision could be compromised. An obvious example would be where the Court was required to rule on the validity of a section 2 approval[417] that it had given or on the conduct of an arbiter that it had appointed.

6.54 For these reasons, we are satisfied that these jurisdictions should remain with the Scottish Ministers.

6.55 We recognise of course that the Land Court already has a limited jurisdiction of this kind in cases where the Scottish Ministers are a party. In our view, the existing administrative jurisdictions of the Land Court are in many ways inappropriate. They are conferred on the Court by necessity. Their existence is not jurisprudentially satisfactory. We do not consider that these jurisdictions should be extended.

6.56 We would point out, however, that the abolition of compulsory arbitration would relieve the Scottish Ministers of a considerable burden imposed by the administration of the Panel of Arbiters and the appointment of arbiters in individual cases.

[417] *eg* in a case such as *NCB v Drysdale* 1989 SC 217.

CHAPTER 17

OUR OUTLINE PROPOSALS

Our general conclusions

6.57 Our consideration of the present system of dispute resolution in the law of agricultural holdings is perhaps the first comprehensive review of the subject in modern times. We have examined the practical working of the system and analysed the relationship between the various procedures and jurisdictions that are now in force. We have provided for the first time a collation of all relevant and available data in a single source.

6.58 In our view the system requires radical reform. The jurisdictions are needlessly complex and should be simplified.

6.59 Our preference is that the jurisdictions should be centred on the Land Court as a court of virtually universal jurisdiction in agricultural holdings cases. Simplification of jurisdictions would produce a better quality of justice. It would make it easier to introduce procedural reforms with a view to expediting decisions and reducing the cost to the litigant.

6.60 In keeping with these proposals, which will involve the abolition of a multiplicity of appellate and supervisory jurisdictions, we recommend that the system should be based in every case on a two-stage procedure, consisting of a first instance decision and only one opportunity of appeal.

6.61 Our clear preference is that the existing system of compulsory arbitration and its statutory procedures should be abolished and that either party should be entitled to require that the dispute should be resolved by the Land Court. The effect of these proposals would be that disputes between landlord and tenant would be resolved by arbitration only if the parties agreed to that course.

6.62 Along with the abolition of the compulsory arbitration system there should also be abolition of the related jurisdictions of the sheriff. There would be no need for them to be retained.

6.63 We consider that the Scottish Land Court is ideally suited to be the forum in which all of these judicial functions should be unified. Our examination of the whole matter persuades us that, by reason of its expertise in both agriculture and law, the Court has a vital role to play in the resolution of agricultural tenancy disputes and that the existing restrictions upon its powers needlessly limit the parties' access to high quality justice. We therefore propose that the Land Court should be given a wide jurisdiction as a court of first instance and that parties to agricultural holdings disputes hitherto resolved by arbitration should be entitled to have them resolved by the Court itself. It would be for the Court itself to decide what procedure was appropriate in each case.

6.64 The extension of its jurisdiction that we recommend would create an opportunity for the introduction of expedited procedures in the Court.

6.65 If that opportunity is to be taken, it would seem appropriate that such procedures should also be devised for the appellate system.

6.66 The compulsory element in the recorder system should be dealt with in a similar way. The parties should be free in all cases to appoint their own recorder and obtain the benefits of a statutory record that the 1991 Act provides. If the parties are unable to agree on the choice of the recorder, the Scottish Ministers should be empowered to make the appointment on the application of either party.

Outline proposals for first instance jurisdiction

6.67 In outline, we propose that reform should proceed under the following main headings

- The Scottish Land Court should acquire a universal jurisdiction in questions between landlord and tenant.
- Recourse to the Land Court should be available to either party without the consent of the other.
- Notwithstanding the extended jurisdiction of the Land Court, the Court should have the power to remit a case in its discretion to the Court of Session or to the sheriff court.
- The Court of Session should have the power to require that a case before the Land Court should be transferred to it or to remit a case before it to the Land Court.
- The sheriff court should have the power to remit a case in its discretion to the Land Court.
- The existing system of compulsory arbitration should be abolished.
- Reform of this area of the law should expressly reserve the parties' right to have their disputes resolved by any competent mode, subject always to suitable anti-avoidance provisions.
- However, this reservation should be subject to certain express statutory exceptions where the Land Court already has exclusive jurisdiction.
- In cases where arbitration is resorted to, the procedural provisions of Schedule 7 to the 1991 Act should no longer apply. It should be left to the parties to decide on the procedure to be followed in any individual case.
- In such cases there should be no procedure for stated case under the 1991 Act, the 1986 Act, the 1997 Regulations or under the Administration of Justice (Scotland) Act 1971.
- The Land Court should be given the powers presently held by the sheriff under Schedule 7 to the 1991 Act to remove an arbiter for misconduct and to reduce an award. This provision should be without prejudice to the existing jurisdictions of the Court of Session.
- The introduction of expedited procedures in the Land Court should be done by way of amendment of the Land Court's Rules.
- The specific statutory jurisdictions of the sheriff under the 1991 Act and under section 16 of the Succession (Scotland) 1964 should be transferred to the Land Court.
- The jurisdiction of the Court of Session in judicial review should be unaffected by these proposals.
- The administrative jurisdictions presently exercised by the Scottish Ministers should remain with them.
- The statutory office of recorder should be abolished. The parties should be free to appoint the recorder of their choice in any case. If the parties cannot agree on the choice of the recorder the appointment should be made by the Scottish Ministers.

Outline proposals for appellate procedures

6.68 We recommend that all litigations in this area of the law should be governed by a two-stage system of procedure, namely that there should be a first instance decision and one opportunity of appeal. If the case is raised in the Land Court, there should be a right of appeal to the Court of Session. If the case is submitted to arbitration, there should be an appeal to the Land Court. If the case is raised in the Outer House of the Court of Session or in the sheriff court, there should be an appeal to the Inner House only.

6.69 Figure 6 of the Appendix sets out our outline proposals in diagrammatic form.

CHAPTER 18

OUR DETAILED PROPOSALS

Abolition of compulsory statutory arbitration

6.70 It is plain to us on the available evidence that, for the reasons that we have given, the compulsory arbitration system cannot be sufficiently improved by minor adjustments. The system is structurally unsound. We recommend that the compulsory element should be abolished.

6.71 We recommend that the abolition of compulsory arbitration should extend not only to arbitration under the 1991 Act but also to arbitration under the Agriculture Act 1986 and the Dairy Produce Quotas Regulations 1997.

6.72 The abolition of compulsory arbitration would necessitate the repeal of the provisions relating to the detailed form of awards in rent arbitrations and to the closing of the register of such awards. In our view, this would not be a significant loss. The register has proved to be of limited value to parties and their advisers. The raw data that are contained in the registered awards do not provide reliable guidance to the interpretation of those awards in later cases.

6.73 On the other hand those rent cases that are decided by the Land Court will give better guidance in view of the detailed form of the Court's judgments in such cases.[418]

The revised jurisdiction of the Land Court

6.74 The Land Court has expertise in both legal and agricultural matters. It is therefore capable of deciding the entire range of disputes between landlord and tenant. We recommend that it should be given a universal jurisdiction in all landlord and tenant disputes.

6.75 We recognise however that the enlargement of the Land Court's jurisdiction may impose an added burden on the Court. How such pressures should be dealt with procedurally should be a matter for the Court.

Applications to the Land Court not to be conditional on the agreement of the other party

6.76 This consequence will follow from the enlargement of the Court's jurisdiction that we propose. It is probably the single most significant reform that the jurisdiction of the Court requires. It is central to our whole approach to reform in this area.

Power to determine whether a tenancy exists within section 1 of the 1991 Act or whether such a tenancy has come to an end

6.77 We recommend that in addition to a universal jurisdiction in disputes arising between landlord and tenant of agricultural land, the Land Court should have a jurisdiction equal with that of the Court of Session and the sheriff court to determine whether or not the landlord-tenant relationship exists in any individual case involving agricultural land.[419] The latter question can arise in two cases: where it is agreed that there is a tenancy but it is disputed whether the tenancy is agricultural;[420] or

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[418] *eg Buccleuch Estates and Kennedy* 1986 SLCR 1; *Mackenzie v Bocardo SA* 1986 SLCR 53; *Broadland Properties Estates Ltd v Mann* 1994 SLT (Land Ct) 7.

[419] The Court has a similar jurisdiction in crofting and landholders cases: Crofters (Scotland) Act 1993, s 53; Small Landholders (Scotland) Act 1911, s 25.

[420] *eg* a garden centre.

where it is not agreed that there is a tenancy at all.[421] We envisage that this power would be exercised in cases where that question was the sole issue or was necessarily a preliminary issue to other questions arising between the parties.

6.78 If the Land Court should hold that no relationship of landlord and tenant exists, or that any such relationship has come to an end, the Court should have jurisdiction in relation to the consequences of its decision; that is to say, the power to make its decision effective by means of orders for removal, interdicts and the like. We deal specifically with this point later in this chapter (see paras 6.84-6.94).

6.79 This reform would at once solve the practical problems raised in cases such as *Eagle Star v Simpson*,[422] where jurisdictional complexities cause a duplication of administrative resources, excessive cost and unreasonable delay.

6.80 It could be argued that the Land Court has no special expertise in the questions relating to the existence of a tenancy. In our view, this is not necessarily the case. Many such disputes arise from the informal occupation by the claimant of agricultural land. A typical case arises where an informal seasonal grazing let granted under section 2 of the 1991 Act is followed by uninterrupted possession beyond the duration of the season. In such cases the issue is often one of mixed fact and law in which questions of agricultural practice may well be involved. Similarly, if the question is whether there is a tenancy within the meaning of section 1 of the 1991 Act and the answer depends on whether the land is used for agriculture for the purposes of a trade or business, the Court's expertise will immediately be relevant.

6.81 We recognise however that there will be cases where the question may be a pure question of law involving no agricultural question at all; or one in which the existence of third party interests or the importance of the question, or of some related question, may be such that the case might be more appropriately dealt with by the ordinary courts. We therefore recommend that the Land Court should have the power to remit such cases to the Court of Session or the sheriff court in its discretion and that the Court of Session and the sheriff court should have power to direct that the case should be transferred to the Land Court.[423]

Sheepstock valuations

6.82 In keeping with our proposals we recommend that the jurisdiction now reserved to arbiters in sheepstock valuations should be given to the Land Court. In these cases too the parties should be free to have such questions decided by an arbiter or by two arbiters and an oversman.

Validity of bequests and transfers

6.83 In our view, the jurisdiction to determine the validity of bequests and transfers of agricultural tenancies should remain with the ordinary courts. Notwithstanding the extended jurisdiction exercised by the Land Court in crofting cases, we consider that there is no compelling reason why the Land Court should have such jurisdiction in agricultural holdings cases. The validity of a bequest or of a transfer of a lease may be part of a larger question: for example, the validity of a will. When the validity of a succession to a tenancy is under challenge, interests other than those of the would-be successor tenant may be affected. It would be wrong to give the Land Court the power to make a ruling on the validity of a bequest or transfer, because the other persons interested in the estate would not be represented. Alternatively, if they were represented, the proceedings would be fundamentally altered in character and would become as complex and protracted as a comparable litigation in the

[421] *eg* in cases under s 2 of the 1991 Act.
[422] 1984 SLT (Land Ct) 37; 1983 SLCR 1.
[423] See also paras 6.105-6.116 *infra*.

civil courts. On balance we consider that the transfer of such jurisdiction to the Land Court would be an unnecessary reform that could create as many problems as it solved.

Remedies

General principle

6.84 Our proposed enlargement of the jurisdiction of the Land Court would make it necessary to extend and clarify the range of remedies that the Court may competently grant. The general principle should be that the Land Court should have power to grant any remedy that is required to give effect to the rights of the parties in any matter falling within its jurisdiction.

Specific remedies and interdict

6.85 We therefore propose that the Land Court should have power to pronounce decrees or orders of permanent and *interim* interdict and permanent and *interim* orders *ad factum praestandum*, including for example orders regulating accommodation of livestock, erection or dismantling of fences, carrying out of maintenance work, and ancillary handover arrangements. If the Land Court holds a lease to be void *ab initio* or valid but subsequently terminated by avoidance or rescission or otherwise, it may have to redress economic imbalances by an order for delivery (specific restitution) of moveable goods.

Reduction

6.86 At present, the remedy of reduction is within the exclusive jurisdiction of the Court of Session except that the sheriff has jurisdiction to reduce a deed *ope exceptionis*. Since we recommend that the Land Court should have jurisdiction to hold that a lease is invalid, it follows that the Land Court should also have jurisdiction to give practical effect to its decision by pronouncing a decree of reduction of the lease. Likewise the Land Court should have power to reduce a notice to quit or other writing which it holds to be invalid. Since the Chairman of the Land Court has the status of a Court of Session judge, we do not consider that such a power would constitute a material derogation from the Court of Session's exclusive jurisdiction.

Rectification

6.87 This statutory remedy is reserved to the Court of Session and the sheriff court.[424] It is conceivable that in proceedings as to the existence of a tenancy or the interpretation of a lease either party might plead that the relevant document was defectively expressed and should be rectified. In our view, the remedy of rectification should be open to the Land Court in cases falling within its jurisdiction.

Damages and other substitutionary redress

6.88 We recommend that the Land Court should have the power to award damages or other substitutionary or pecuniary remedies. The parties have certain statutory rights to compensation; but they also have the usual remedies at common law for breach of contract, including damages. The right to damages is of particular significance in relation to the occupation of land under a claim to a

[424] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 8(9).

tenancy that has been found to be groundless; or after a right of tenancy has expired; or in breach of a contract to remove.[425]

6.89 If the Land Court holds a lease to be void *ab initio* or valid but subsequently terminated by irritancy or otherwise, it may have to redress the resulting economic imbalances by an order for the redress of unjustified enrichment, for example, by recompense or payment of implied rent.[426]

6.90 The remedy of violent profits[427] is archaic and is seldom encountered in modern practice. We have recommended elsewhere that the rules of law and procedure relating to violent profits should be abolished and replaced by a judicial power in an action of removing to require the defender to find caution for any financial claim of the pursuer arising from his or her wrongful occupation of the property.[428] We regard this matter as outside our current terms of reference.

Removal or ejection

6.91 At present the Land Court has no power to order the removal or ejection of a party from any land. In our view the power to order removing or ejection from the land in question is a necessary adjunct to the power to rule on the existence of an agricultural tenancy.

6.92 This power would be exercisable in cases where the Court found that no tenancy existed or that a tenancy that had existed had come to an end. It would apply not only to the tenant, or the claimant to a tenancy, but to other parties occupying the land; for example, employees.

6.93 We suggest that there should be one major exception to this power, namely that the Land Court should not have the power to order removal of an occupier from the holding *ad interim*. Our reasons are, in brief, that such a power could inflict financial and other hardship for which the evicted party, if ultimately successful, would never be properly compensated. Moreover, such a remedy could result in consequences, in matters such as grants and quotas, that might be irrevocable. The exercise of such a power could have far-reaching human rights implications.

6.94 The justification commonly advanced for the creation of such a power is that an ultimately unsuccessful party who is able to retain possession of the holding during the currency of a litigation may obtain undeserved benefits that the successful party may never retrieve. We recognise the force of this argument. We consider that the preferable way to avoid such problems is to have a judicial and procedural structure that is responsive to the urgency of such litigations and can have them resolved to finality much more promptly than the present system can. Many of these problems would be at least palliated if under our proposals the Land Court could order the finding of caution in a suitable amount, or the giving of suitable undertakings *in foro*, as a condition precedent to the prosecution of a party's case or defence.

Supervisory jurisdiction over elective arbitrations

6.95 In the simplified system that we propose, we recommend that the existing jurisdictions of the sheriff in agricultural arbitrations should be abolished. In a reformed system where arbitration is elective, almost all of these jurisdictions will be unnecessary.

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[425] cf Gill, 3rd ed, ch 21.
[426] *eg Glen v Roy* (1882) 10 R 239.
[427] Gill, 3rd ed, para 21.03.
[428] See our Report on *Recovery of Possession of Heritable Property* (1989) Scot Law Com No 118, Recommendations 100 and 101 (para 10.17).

6.96 However, one of these jurisdictions will continue to be essential and will therefore have to be re-allocated, namely the jurisdiction to remove an arbiter for misconduct and to set aside the award.[429] The obvious solution is to transfer this jurisdiction to the Land Court.

Retention of joint application procedure

6.97 The existing joint application procedures before the Land Court should be retained for cases where the parties, for their own reasons, concur in that process.

6.98 There is a good practical reason for this. Under the existing Table of Fees the primary liability for the Court's fees rests with the party who is the applicant.[430] There is also the consideration that under this procedure the parties have the opportunity to lodge an agreed statement of facts. Joint Application procedure would therefore be valuable in cases where the parties were agreed on the issue that they wished to test.

Saving for exclusive jurisdictions of the Land Court

6.99 Under the 1991 Act, the Land Court has sole jurisdiction in applications for certificates of bad husbandry; in applications for consent to the operation of notices to quit; in applications for consent to the making of certain improvements with right to compensation, and in certain applications relating to demands to remedy fixed equipment.

6.100 These are important cases in which Parliament has considered it appropriate that the Land Court alone should have jurisdiction. We see no reason why such cases should be made justiciable by arbitration. We therefore recommend that these exclusive jurisdictions should be continued.

Expedited procedures in the Land Court

6.101 Under these proposals all existing compulsory arbitration jurisdictions will be abolished, whether under the 1991 Act or otherwise. That proposal, if implemented, would result in the diversion of numerous cases from arbitration to the Land Court.

6.102 We are in no doubt that the effective implementation of our proposed jurisdictional reforms requires that there should be expedited procedures at every stage. Under these proposals the critical area for expedited procedure would clearly be Land Court litigation. The Land Court would be in effect a court of universal jurisdiction in the law of agricultural holdings. It would be at the heart of the dispute resolution process.

6.103 We have not attempted to make proposals for such expedited procedures, even in outline. To have done so would have required extended consultation with the Land Court, the professions and the relevant interest groups. The urgency of our remit precluded it. Without such extended consultation, we think that it would be unhelpful for us to go into the matter in any greater detail. In our view, procedural reform is not a matter on which primary legislation is required. The Land Court has adequate powers to devise and enforce such procedures under paragraph 12 of Schedule 1 to the Scottish Land Court Act 1993. The aim of procedural reform should be to retain maximum flexibility in the Court's procedures.

6.104 In our view, the Court itself is the body best fitted to devise such procedures. We therefore recommend that the Court should be invited to consider whether its procedures are capable of being made more responsive to the needs of parties. We have in mind the possibility that the Court could

[429] 1991 Act, Sch 7, paras 23-24.
[430] See Table 11, para 4.40 *supra*.

amend its Rules to provide for the simplification, and the minimum of adjustment, of written pleadings; the use of written evidence; the fixing of accelerated diets, and the issuing of abbreviated judgments, at least in the more straightforward cases.

Transmission of causes between the ordinary courts and the Land Court

From the Land Court to the ordinary courts

6.105 *To the Court of Session*. The extension of the Land Court's jurisdiction will create for the first time an overlap of original jurisdiction between the Court of Session and the Land Court. It is important, in our view, that the Land Court should have the power to remit to the Court of Session any case so far as it relates to any matter not within the exclusive jurisdiction of the Land Court.

6.106 The power should be exercisable at the discretion of the Court in every case, even if the parties are agreed on that course. There may be cases where the Land Court would consider that the case was not appropriate for the Court of Session, whatever the parties' views. In such a case it would not be right that the parties should be entitled on their own election to burden the Court of Session with an inappropriate litigation.

6.107 We recommend that third parties claiming an interest should be entitled to enter the Land Court process to request a remit to the Court of Session. This would seem to be a necessary remedy in cases where the existence of a tenancy is in issue. For this purpose the Land Court Rules should require an applicant to specify those third parties whose interests are or may be affected by the application, and should provide for appropriate intimation of the application in such cases.

6.108 In addition, we recommend that the Court of Session should have the power, on the application of any party having an interest, to require the Land Court to remit to it any pending application. This would enable the Court of Session to exercise jurisdiction in cases in which a narrow agricultural holdings question between the parties raised questions of wider significance.

6.109 The creation for the first time of overlapping jurisdictions between the ordinary courts of law and the Land Court would raise the possibility that two processes dealing with the same subject matter could be depending simultaneously in the Court Session and the Land Court.[431] Under the existing law, the mechanism for resolving a contingency between a Court of Session cause and a sheriff court cause is that the Court of Session, if satisfied that the contingency exists, has a duty, and not a mere discretionary power, to grant warrant to the clerk of the sheriff court for transmission of that cause to the Court of Session.[432]

6.110 This mechanism could be applied with modifications to resolve contingencies involving Land Court processes. Where a contingency arises between causes in the Court of Session and the Land Court, we consider that the Inner House of the Court of Session should have a discretionary power, on the application of any party in the Court of Session cause, to grant warrant to the principal clerk of the Land Court for transmission of the Land Court cause to the Court of Session which would assume jurisdiction so far as the cause related to any matter not within the exclusive jurisdiction of the Land Court. Even where there is no such contingency, we consider that the Inner House, on petition, should have power to grant such a warrant. We do not consider that the exercise of either of these powers would derogate from the status of the Land Court or its Chairman. The exercise of such a power would simply recognise that the case involved interests wider than those that were relevant to the immediate issue in the Land Court.

[431] That is to say, a "contingency".
[432] Court of Session Act 1988, s 33.

6.111 In any litigation that affects third party rights and interests, actually or potentially, the question will always arise as to whether the court before which it has been raised is the most suitable forum. The criteria on which such remits should be ordered or warrants granted should be

- the existence of significant third party rights or interests;
- the nature and importance of the case;
- any other sufficient cause.

6.112 *To the sheriff court*. We think that it would be useful if the Land Court were given a discretionary power to remit a case to the sheriff court where the Court was satisfied that that course would be appropriate. We consider it unlikely that many such cases would arise.

To the Land Court from the ordinary courts

6.113 *From the Court of Session*. We recommend that the Court of Session should have a discretionary power, on the application of either party, to remit to the Land Court any case falling within the jurisdiction of the Land Court where it appears to the Court of Session that the Land Court is better fitted to decide the question in issue.

6.114 This power would be in line with the power of the Court of Session to remit to the sheriff court.[433] It could be exercised on a similar criterion to that set out in section 14 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

6.115 *From the sheriff court*. For similar reasons, we recommend that the power of the sheriff to remit to the Court of Session[434] should be extended to include a power to remit to the Land Court in an appropriate case.

6.116 Where a contingency arises between a Land Court cause and a sheriff court cause, the Land Court, if satisfied that the contingency exists, should have a discretionary power to grant warrant to the sheriff clerk for transmission of that cause to the Land Court.

Land Court to be given a general power to act in contractual references

6.117 Although it falls outwith our terms of reference, which direct our attention to the law of agricultural holdings, we think it worth mentioning that there would be some utility in the Land Court's being given a power, similar to that conferred on the Lands Tribunal[435] to accept, at its discretion, a contractual reference on any question falling within the scope of the Court's expertise. This would be of considerable value in cases between a tenant and a purchaser under missives of the landlord's interest. We also have in mind the possibility that the Court could be asked to carry out valuations such as those inherent in the handover arrangements between seller and purchaser of agricultural land. The exercise of any such power would be conditional on the Court's willingness to accept the reference. This power would also be of value to the parties in a depending case where an issue emerged that was not otherwise within the jurisdiction of the Court.

Abolition of the statutory jurisdictions of the sheriff court

6.118 In consequence of the abolition of the compulsory jurisdiction of the arbiter, the arbitration-related jurisdictions of the sheriff under the 1991 Act, the 1986 Act and the 1997 Reglations would also be abolished.

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[433] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s. 14.
[434] Sheriff Courts (Scotland) Act 1971, s. 37.
[435] Lands Tribunal Act 1949, s 1(5). See *Cameron v NCC* 1991 SLT (Lands Tr) 85; *James Jackson & Sons v British Gas* (1996) 36 RVR 239.

6.119 We recommend that the other statutory jurisdictions of the sheriff under the 1991 Act should be abolished[436] and that those jurisdictions should be transferred to the Land Court.

6.120 We also recommend that the jurisdiction of the sheriff[437] to extend the time within which the interest of a deceased tenant under a lease may be transferred to an eligible acquirer, should be transferred to the Land Court. The sheriff's existing jurisdiction under section 16(3)(b) of the 1964 Act applies to all leases. Our proposal will therefore result in there being two jurisdictions under that section. We consider however that this will not cause difficulty. The section already discriminates between agricultural leases, whether under landholders or croft tenure or under the Agricultural Holdings (Scotland) Acts, and all other leases,[438] so the distinction is already well recognised in the professions. Moreover, the section has little practical significance. There is only one reported case in which it has been invoked in relation to a lease of an agricultural holding[439] and there is no reported case in which it has been invoked in relation to any other type of lease. If our proposal is accepted it would seem logical and sensible to extend the jurisdiction of the Land Court under section 16(3)(b) to leases under landholders and crofting tenure. In this way the residual jurisdiction of the sheriff under section 16(3)(b) in relation to non-agricultural leases will have little or no significance.

Retention of common law jurisdictions of the Court of Session and the sheriff court

6.121 The jurisdiction of the Court of Session and the sheriff court at common law to rule on the existence or otherwise of the tenancy would remain; but should be discouraged by suitable provisions as to expenses.

6.122 The Court of Session has a general discretion to refuse or to restrict an award of expenses where a successful action ought to have been raised in a lower court.[440] The sheriff has a similar discretion where a successful ordinary action ought to have been raised as a summary cause or as a small claim.[441]

6.123 It may be therefore that the problem could be dealt with satisfactorily within the existing powers of the respective courts. However, we consider that it would be useful if legislation expressly recognised that to invoke the jurisdiction of an inappropriate form in an agricultural holdings dispute could be penalised in the court's decision on expenses.

Administrative functions of the Scottish Ministers

6.124 The administrative functions of the Scottish Ministers that we have described concern matters that are essentially administrative. The decisions to which they relate involve the local knowledge and the agricultural expertise of the Department's officers. In our view, it is essential that in any reform the position of the courts should not be compromised by any involvement in the decision-making process.

6.125 We refer to our discussion of this point in chapter 16 (paras 6.49-6.56).

The appellate procedures of the Court of Session

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[436] *ie* under s 20 in statutory irritancies for rent arrears.
[437] Under s 16 of the 1964 Act.
[438] See s 16(3)(b).
[439] *Gifford v Buchanan* 1983 SLT 613.
[440] *eg McIntyre v Munro* 1990 SLT 117; *Rooney v F W Woolworth* 1990 SLT 257; *Coyle v Wm Fairey Installations* 1991 SLT 638; *Dunnachie v Redpath Dorman Long* 1991 SCLR 409; *Sunderland v N B Steel Group* 1992 SLT 1146.
[441] *Walker v J G Martin Plant Hire* 1995 SCLR 398. The Land Court too has a similar discretion: cf Gill, 3rd ed, para 37.07; Graham, *Scottish Land Court Practice*, pp 56-60; Scottish Land Court Act 1993, s 1; Sch 1, para 15.

6.126 The timescales of Court of Session appeals are not appropriate to the needs of practical agriculture. It would be unfortunate if an expedited system of dispute resolution at first instance were to be frustrated by delays of a year or more in cases that went to appeal.

6.127 We therefore express the hope that the procedures of the Court of Session could be expedited in similar fashion in such cases.

6.128 Although our terms of reference are wide enough to cover the appellate procedures of the Court of Session so far as they relate to agricultural holdings cases, we have not attempted to analyse options for reform of those procedures in any detail. That would be a major project in itself. We decided at an early stage that within the time limit set for us in this project we could not satisfactorily carry out even a tentative appraisal of outline proposals.

6.129 We therefore confine ourselves to the observation that the creation of a specialist division of the Court of Session to deal with appeals from the Scottish Land Court, the Lands Tribunal for Scotland, and perhaps appeals under section 239 of the Town and Country Planning (Scotland) Act 1997, is one that merits consideration. The workload of the Lands Valuation Appeal Court has been greatly reduced in recent years in consequence of the abolition of domestic rating. It is a matter for consideration whether that court, in an enlarged and modified form, could serve as the basis of a specialist appellate court or division to which such appeals could be referred under expedited procedures. It may be, however, that since there would probably be few such appeals, the straightforward solution would be to mark them for early diets in the Inner House.

Abolition of the statutory office of recorder

6.130 There is no good reason why the effects of a statutory record should be conditional on the recorder's being appointed by the Scottish Ministers. The interest of the Scottish Ministers in appointing a recorder is to ensure that the appointee is a competent agriculturist in whom the parties will have confidence. The criteria are the same as those that would apply to the appointment of an arbiter.

6.131 In our view, the parties should be free to appoint their own recorder to make a record that will have all of the consequences of a statutory record under the 1991 Act. The parties should be free to require the recorder to adopt the format of the record hitherto prescribed by statutory instrument,[442] or some agreed format of their own. The detailed content will remain a matter for the recorder. If the record is deficient in format or in detail, the parties will simply have to bear the consequences when that question arises, for example at waygoing. Under this proposal the recorder's fee would be a matter for negotiation with the parties.

6.132 If one party refuses to concur in the appointment of a recorder, or if the parties cannot agree on the choice of the recorder, we propose that the appointment should be made by the Scottish Ministers. Failing agreement, the Scottish Ministers should be empowered to fix the fee.

6.133 In keeping with our approach to the role of the Land Court we recommend that the existing right of either party of recourse to the Land Court on any question or difference arising out of the making of the record should be retained. Since the making of the record is a pre-eminently practical exercise we recommend that, for the avoidance of doubt, the decision of the Land Court in such a case should be declared to be final.

[442] See ch 12 (at para 5.23).

CHAPTER 19

SAVINGS FOR EXISTING JURISDICTIONS AND PROCEDURES

Court of Session

6.134 We recommend that the Court of Session should continue to have jurisdiction in all matters affecting agricultural holdings except where that jurisdiction is excluded.[443] We see no reason to deprive the Court of Session of jurisdiction to rule on the question whether a tenancy exists. However, we recognise that the existence of that jurisdiction should not be used as a means of delaying the resolution of a dispute. We have therefore recommended, in chapter 18, (a) that the Court of Session should have a power to remit a case involving such a question to the Land Court and (b) that where a case is brought in the Court of Session which could have been brought in the Land Court the Court of Session should have an express power to reflect that consideration in its decision on expenses.

Sheriff Court

6.135 For similar reasons we have recommended that the existing jurisdiction of the sheriff court to deal with actions involving a question as to the existence of a tenancy should be retained, but that the sheriff should have a discretionary power to remit such a case to the Land Court. We make a similar proposal in the matter of expenses to the proposal that we have made in relation to the Court of Session.

Existing exclusive Land Court jurisdictions

6.136 For the reasons that we have given,[444] we consider that those questions that Parliament has reserved exclusively to the Land Court[445] should continue to be so reserved.

Statutory jurisdictions outwith the Agricultural Holdings (Scotland) Acts

6.137 We recommend that all existing jurisdictions of the Land Court outwith the Agricultural Holdings Acts,[446] for example, in relation to milk quotas, should be retained; but that dispute resolution under these provisions should be regulated by the expedited procedures that we recommend.

Alternative methods of dispute resolution

Alternative methods

6.138 We consider it important that in any reformed system the law should recognise and uphold the freedom of the parties to agree that their dispute should be resolved by whatever method they jointly prefer. In agricultural disputes arising in rural communities there are often social as well as commercial reasons why the parties should wish to retain confidentiality in the resolution of their dispute. The law should therefore reserve to parties the power to have any question or difference that under the present law would be determined by compulsory arbitration resolved by private arbitration, mediation, alternative dispute resolution or the like.

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[443] *eg* under the 1991 Act, ss 22 and 24 (consent to quit).
[444] See ch 18 (at paras 6.99-6.100).
[445] *eg* objections to legatees and acquirers (1991 Act, ss 11-12) and consents to the operation of notices to quit (*ibid*, ss 22 and 24).
[446] These are listed in ch 9 (at para 4.12).

6.139 There are numerous forms of alternative dispute resolution and mediation. Not all of them are binding. Mediation, for example, is normally intended not to be binding. Where the parties elect for another form of dispute resolution, the irrevocability of their election should depend on the terms of their agreement.

Private arbitrations by a single arbiter

6.140 It is important that the legislation should recognise the freedom of parties to agree on a private arbitration; for example, where parties wish the question in dispute and the evidence relating to it to remain confidential to themselves. We therefore recommend that the legislation should expressly save the option for voluntary private arbitration in any given case that is not otherwise excluded from the scope of arbitration. This would enable the arbitration system to survive in cases for which it is appropriate.

6.141 In such a case there would be no need for the mandatory provisions of Schedule 7. The parties could adopt those provisions or they could adopt the *Arbitration Rules of the Law Society of Scotland*[447] or the *Scottish Arbitration Code : for use in domestic and international arbitrations.*[448]

Arbitration by two arbiters and an oversman

6.142 We recommend that the option to have arbitration by two arbiters and an oversman should remain open to the parties where they agree on such a procedure.

Election for arbitration to be irrevocable

6.143 We recommend that where the parties have submitted to arbitration by either method, the execution of the submission should be irrevocable.

[447] cf Stair Encyclopedia, Reissue 1, *Arbitration*, paras 45 and 112.
[448] Prepared by the Scottish Council for International Arbitration (1999).

CHAPTER 20

APPLICATION, TRANSITIONAL AND ANTI-AVOIDANCE PROVISIONS

Application and transitional provisions

Application to existing leases

6.144 In our view, it is essential that our proposals should apply to all existing leases. In consequence of security of tenure, traditional agricultural leases are rarely granted nowadays. Such leases as are granted at all are almost always granted on a limited partnership basis for a fixed, and usually short, term.[449] Such leases seldom provoke contentious rent reviews or other disputes, probably because of the dominant position of the landlord under the contractual arrangements. If existing tenancies were to be excluded from the scope of our proposals, little would be achieved. Existing agricultural landlords and tenants should be the primary beneficiaries of reform.

Transitional provisions

6.145 It is inevitably a rather arbitrary judgment as to the applicability of these proposals to existing disputes. In our view, the most easily applied criterion would be that from the appointed day the new proposals should govern all existing disputes, except those in which an instrument of appointment of an arbiter had already been issued.

6.146 Existing processes in the Scottish Land Court, either by single or joint application, would continue in the normal way.

Anti-avoidance provision

6.147 Arbitration clauses are common in many types of contract other than leases. In such cases, the parties commit themselves to the jurisdiction of an arbiter in advance of the occurrence of any dispute under the contract. In contemporary practice, an arbitration clause in an agricultural lease is otiose except perhaps in relation to those waygoing claims that are excluded from compulsory arbitration under the 1991 Act.

6.148 If our proposal for the abolition of compulsory arbitration were to be implemented, arbitration clauses in agricultural leases would assume a new significance. Arbitration clauses included unnecessarily in existing leases would become operative. In a new lease it would become open to the parties to include such a clause, the scope of which would be for negotiation. These consequences would have a serious effect on the impact of our proposed reforms.

6.149 In our view it would be essential that the reforms that we propose should contain an anti-avoidance provision to make ineffective any agreement of the parties made in advance, whether in the lease or in a collateral or subsequent agreement, that all questions or differences, or any specific question or difference, that should arise between them should be determined by arbitration or by any mode of resolution other than litigation in the Land Court. A similar provision should apply to any arbitration clause in an existing lease.

6.150 In our view, such a provision would be essential for two main reasons. First, it would take proper account of the parties' respective bargaining positions. If the tenant's agreement to a mandatory arbitration clause were to be an essential condition on which the landlord agreed to let the land or if the landlord insisted on such a condition as a *quid pro quo* of a subsequent agreement, for

[449] Gill, 3rd ed, paras 1.13-1.16.

example on rent or on improvements, the landlord would be in a position to inflict on the tenant the added expense of an arbitration and possibly involve him in the spending race to which we have referred.

6.151 We also consider that it is essential that the parties should not be entitled to agree in advance to prorogate the jurisdiction of the civil courts in any question that may arise between them. The nature of the dispute may be one that they cannot foresee.

6.152 It would be undesirable that such a clause included in an existing lease, and hitherto otiose, should unexpectedly acquire a particular force that the parties did not envisage when they entered into the contract.

6.153 In our view, there is an important public interest that every dispute should be determined by the tribunal best fitted to decide it. It should not be in the power of the parties to decide in advance of any question arising between them that any such question should be added to the caseload of the civil courts.

6.154 On the other hand we can see no strong objection to the parties agreeing *ad hoc* to prorogate any specific jurisdiction other than that of the Land Court once the dispute has arisen. In such circumstances we consider that neither party will be at such a disadvantage to the other as to be under pressure to agree to exclude the jurisdiction of the Land Court. We would expect that neither party would be willing to give up the advantage of a decision of the case by the Land Court. On the other hand, if the parties are agreed that the dispute is best resolved by arbitration or by some other mode of resolution, the probability is that that will be the appropriate mode of resolution in that particular case. If the case for arbitration is good at the time when the dispute breaks out, that will be apparent to the parties.

6.155 We consider that the problem could be adequately dealt with by a provision to the effect that notwithstanding any agreement to the contrary, any party to any dispute arising from the operation of the lease should be entitled to apply to the Land Court for the resolution of the problem.

PART 7 – THE FUTURE FOR AGRICULTURAL ARBITRATION

CHAPTER 21

7.1 At present the parties to an agricultural holdings dispute can avoid the jurisdiction of the arbiter only if they agree to refer the dispute to the Land Court. Our proposals are based on the converse principle.

7.2 We see no reason to fear that our proposals will lead to the extinction of agricultural arbitration. Under our proposals, the parties will be free, in all but those cases that are already excluded from it, to elect to have their dispute resolved by arbitration. Our proposals merely eliminate the compulsory element.

7.3 On the contrary, we consider that the arbitration system will benefit in numerous ways. It will be relieved of the burden of those cases for which it is unsuitable. Since parties will be free to choose their arbiter, there will be a greater opportunity for proficient arbiters to act in cases involving their own special expertise, and to act in cases in any part of the country.

7.4 It will also be open to parties to agree with the arbiter on the amount of his fee, or on the basis on which it will be calculated. In the result, arbitration fees will be subject to market forces and not, as now, to ministerial control.[450] Arbiters will be free to offer their services in any part of Scotland. The result will be the creation of a free market in arbitration services, entry to which will be unrestricted. In such a market, arbiters will compete on cost, efficiency and expertise. Such competitiveness will tend to moderate the costs of arbitration and enhance its quality. In our view, that will be in the public interest.

7.5 Even if the jurisdiction of the Land Court is reformed as we propose, there will remain many disputes for which arbitration will continue to be pre-eminently suited; for example waygoing valuations, rent reviews of a more straightforward kind, demands to remedy fixed equipment and sheepstock valuations.

7.6 There will also be cases, but many fewer we would expect, involving questions of law, where the parties will wish to elect for arbitration in order to obtain the benefits of confidentiality. Under our proposals, the parties in such cases will be free to choose a legally qualified arbiter.

7.7 In our view, these proposals would put agricultural arbitration on a new footing. They will concentrate arbitrations into those areas of agricultural holdings practice where arbitration is the most suitable means of resolving disputes and they will enable the standard of arbitration to be raised in a free and competitive market. In the long run the success of agricultural arbitration will depend on the expertise of those who practise it.

[450] 1991 Act, s 63.

APPENDICES

Figures

Figure 1: ARBITRATION UNDER THE 1991 ACT

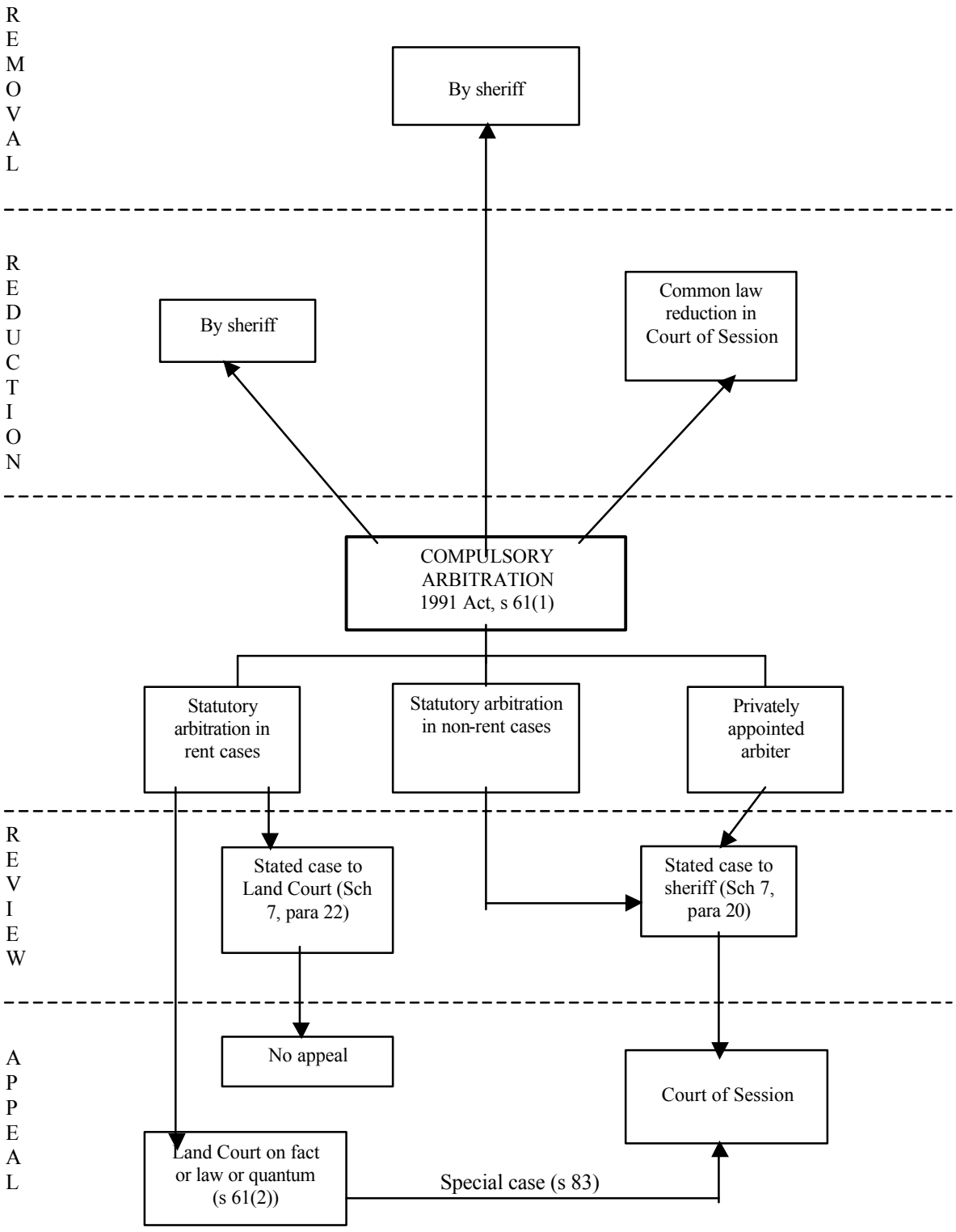


Figure 2: ELECTIVE ARBITRATION

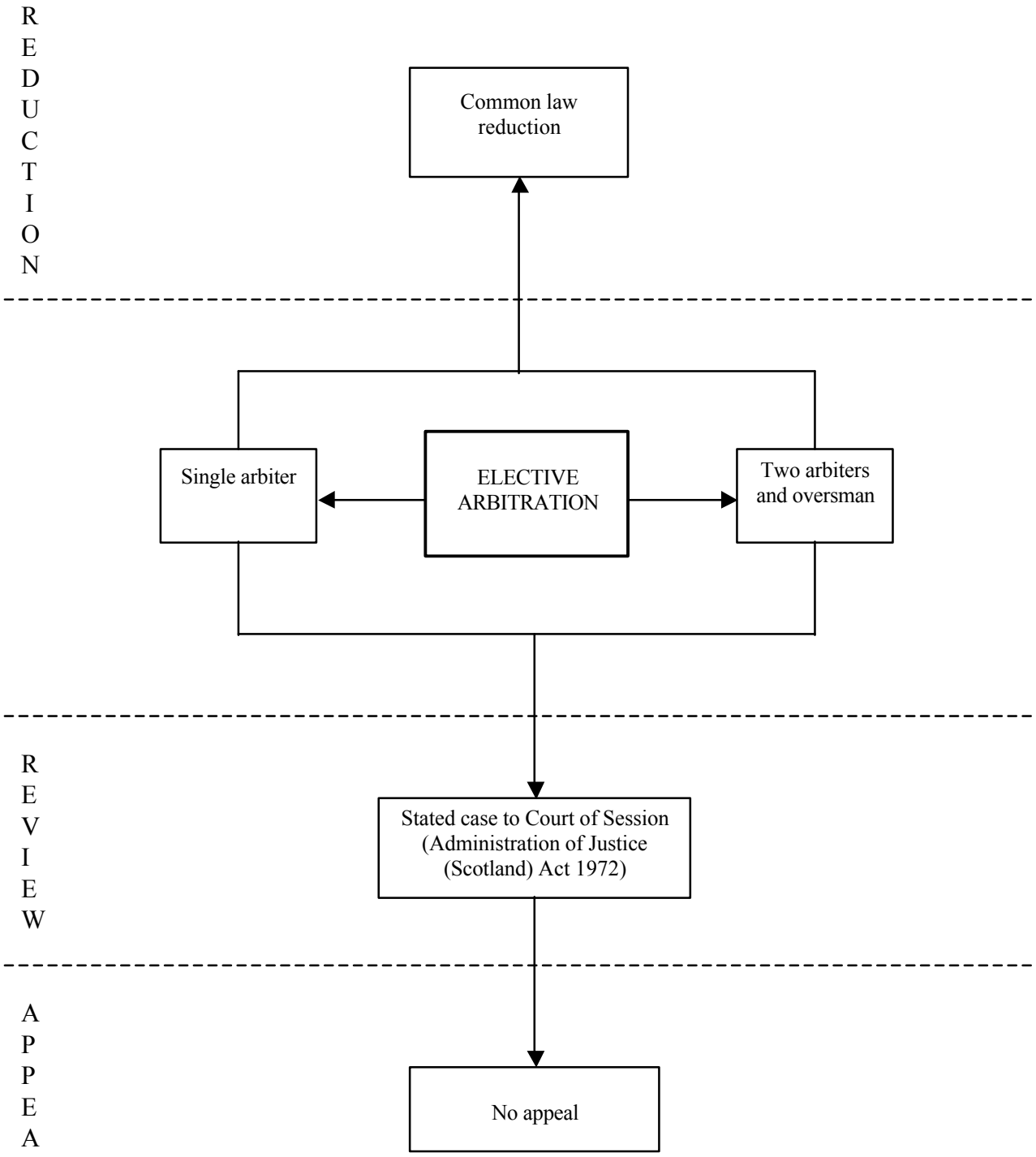
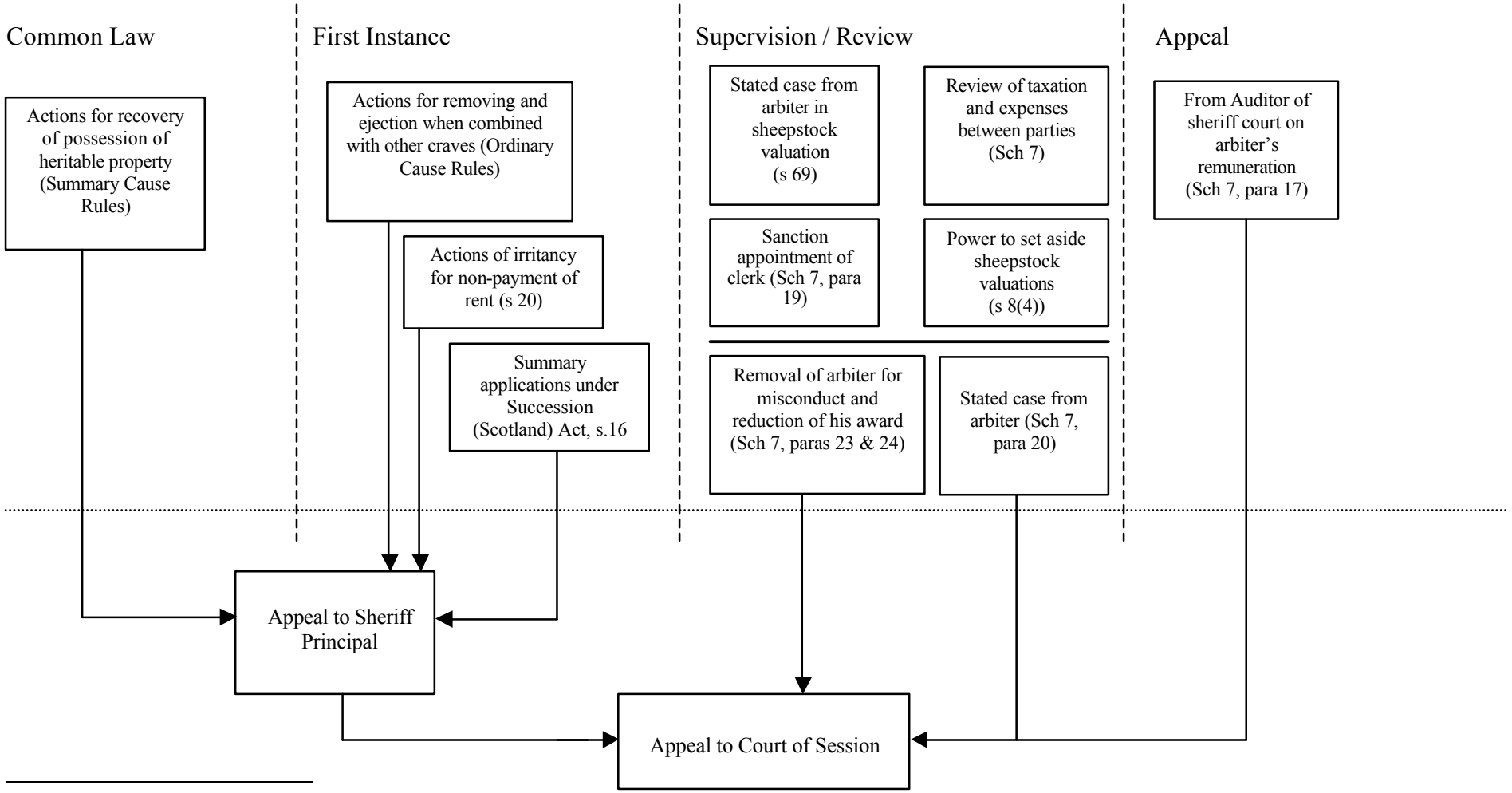
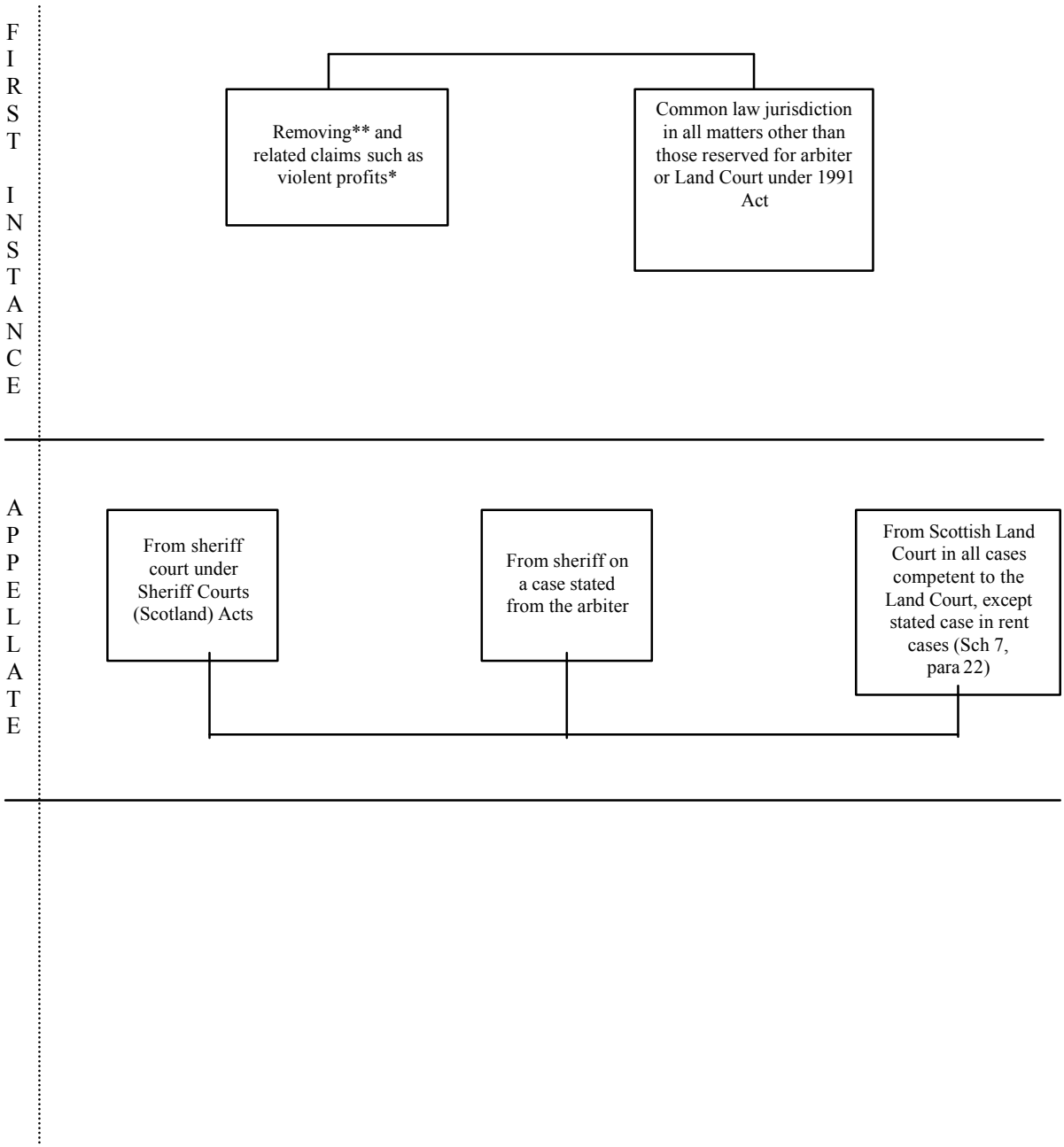


Figure 3: PRINCIPAL JURISDICTIONS OF THE SHERIFF COURT*



* All references are to the 1991 Act, except where otherwise stated.

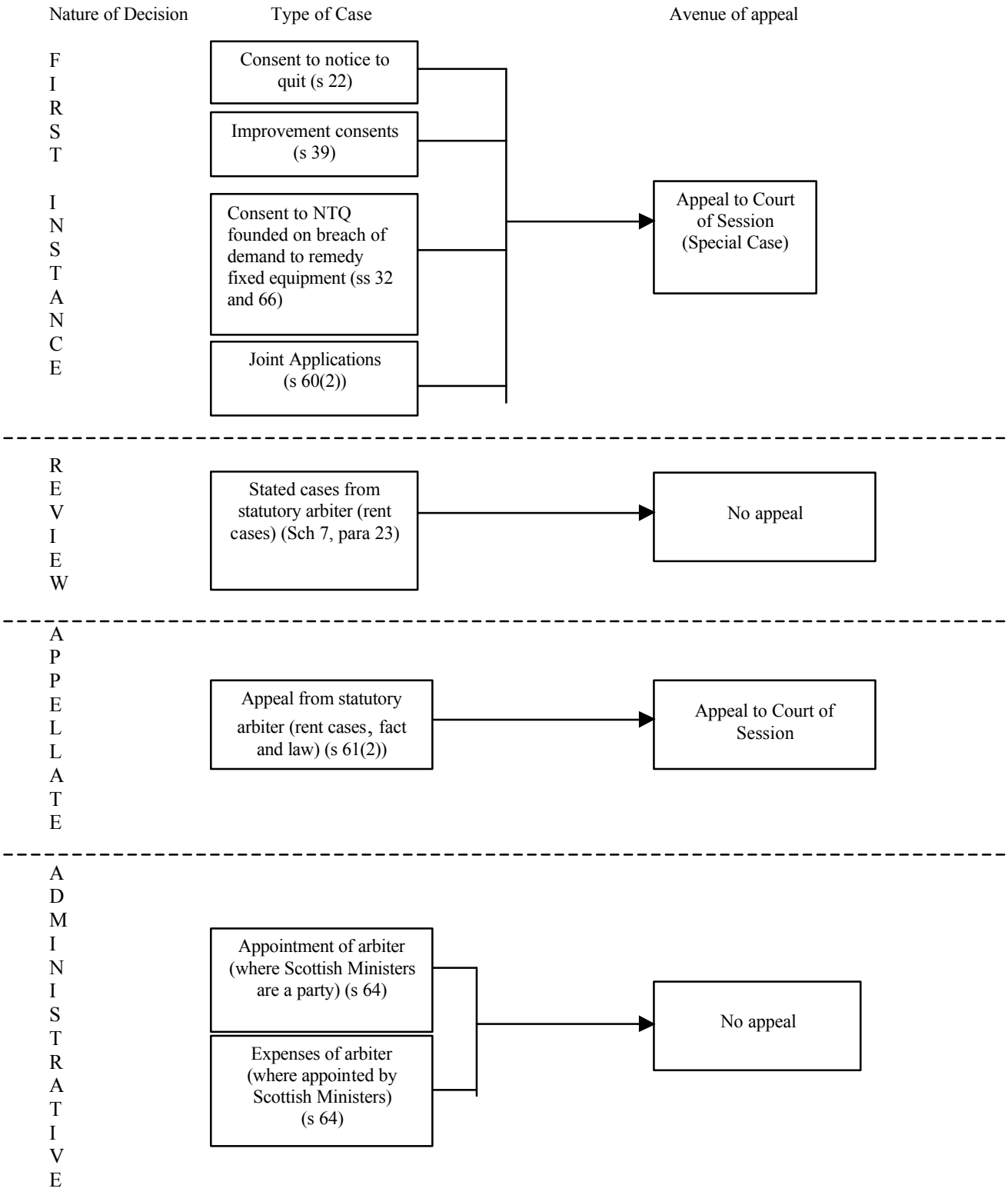
Figure 4: PRINCIPAL JURISDICTIONS OF THE COURT OF SESSION*



* All references are to the 1991 Act, unless otherwise stated.

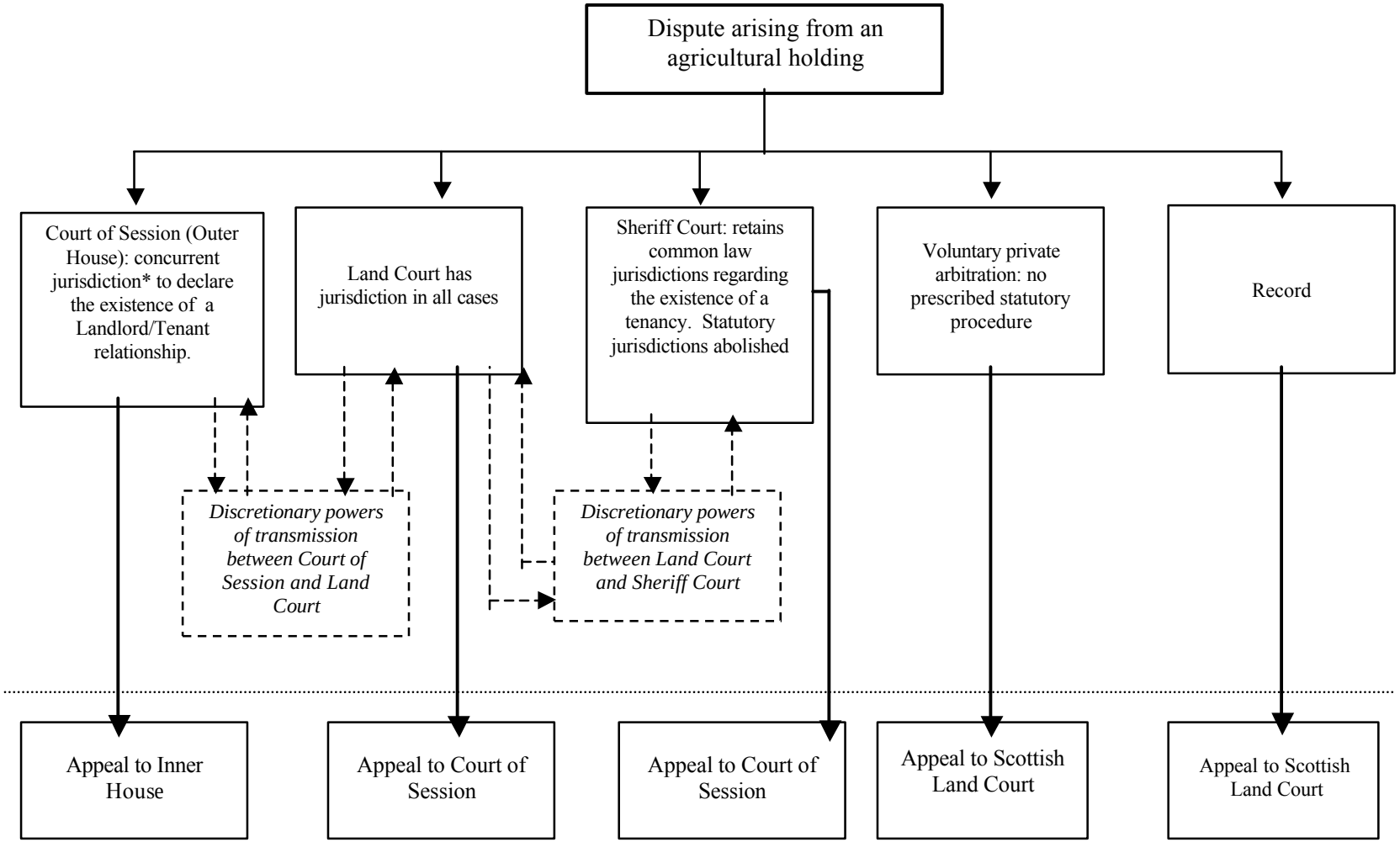
** See Chapter 8 (paras 3.10-3.23) for discussion on the competency of Court of Session jurisdiction in actions for ejection.

Figure 5: PRINCIPAL JURISDICTIONS OF THE SCOTTISH LAND COURT*



* All references are to the 1991 Act.

Figure 6: THE PROPOSED SYSTEM



* With the Land Court and the sheriff court.