Scottish Law Commission

promoting law reform

(DISCUSSION PAPER No 165)

Discussion Paper on Aspects of Leases: Termination

discussion paper

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May 2018

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

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The Commission would be grateful if comments on this Discussion Paper were submitted by 14 September 2018.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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Glossary and List of Abbreviations

1853 Act. Sheriff Courts (Scotland) Act 1853.

1870 Act. Apportionment Act 1870.

1886 Act. Removal Terms (Scotland) Act 1886.

1907 Act. Sheriff Courts (Scotland) Act 1907.

1949 Act. Tenancy of Shops (Scotland) Act 1949.

1979 Act. Land Registration (Scotland) Act 1979.

2010 Act. Legislative Reform (Scotland) Act 2010.

Agricultural lease. A lease of **agricultural property**.

Agricultural property. Any land or building which is used for the purpose of **agriculture**.

Agriculture. In general terms, agriculture is the science or practice of farming, including cultivation of the soil for the growing of crops and the rearing of animals. In terms of the Agricultural Holdings (Scotland) Act 1991, s 85, agriculture *"includes horticulture, fruit growing, seed growing, dairy farming, livestock breeding and keeping, the use of land as grazing land, meadow land, osier land, market gardens and nursery grounds, and the use of land for woodlands where that use is ancillary to the farming of land for other agricultural purposes*". "agricultural", when used to describe land or a holding, is to be construed in this way for the purpose of the Act (see section 1 of the Act for a definition of "agricultural land" and "agricultural holding").

Benefited property. The land benefitted by a **real burden** or **servitude.** The more traditional term is '**dominant tenement**'.

BGB. Or "Bürgerliches Gesetzbuch", is the body of codified private law which forms the civil code of Germany.

Burdened property. The land burdened by a **real burden** or **servitude.** The more traditional term is '**servient tenement**'.

Commercial lease. A **lease** of **commercial property**.

Commercial property / commercial real estate. Heritable property used for commercial purposes, not including residential or agricultural property.

Common law. The body of law derived from custom and judicial precedent.

Contract of service. A contract between a business and a self-employed individual.

Contract of partnership. Also known as a "partnership agreement", the contract which sets out the rights and responsibilities of each partner in a business partnership.

Conveyance. The process of transferring heritable property from one owner to another. Conveyance also means a deed of transfer.

Creditor. A person (natural or legal) to whom another person (a debtor) is indebted.

Debtor. A person (natural or legal) who owes a debt to another person (a creditor).

Delectus personae. The selection of a specific person because of personal considerations.

Diligence. The set of procedures whereby unpaid unsecured creditors can enforce their claim against the assets, corporeal and incorporeal, of the debtor.

Dominant tenement. The more traditional term for **benefitted property.**

European Convention on Human Rights. The Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome in 1950, to which all member states of the Council of Europe are party.

Feu charter. In the feudal system, the grant of title from superior to **vassal**.

Feudal system. The system of land tenure which existed in Scotland until 28 November 2004.

Gross value added. The measure of the value of goods and services produced in an area, industry or sector of an economy.

Ground annual. A non-feudal yearly duty chargeable on heritable property – similar to rent – the creation of which has been prohibited since 1974.

Hansard. The official record of debates held in the UK Parliament. It also includes records of votes and written ministerial statements.

Head landlord. The landlord of a **head lease**, under which **sub-leases** have been granted.

Head lease. The original **lease** granted by a **proprietor**, under which **sub-leases** have been granted.

Heritable interest. A right in **heritable property.**

Heritable property. Generally speaking, land or rights in land.

Heritable security. A right in security over **heritable property.**

Heritable title. The right of ownership of **heritable property.**

Institutional writers. Certain writers who have produced works which are judicially recognised as authoritative sources of law. Their works generally follow the style and structure of the Institutes of Justinian. Examples include Stair, Bankton, Erskine and Bell.

Irritancy. Unilateral termination of the **lease** by the landlord, without compensation, by reason of breach of **lease** conditions by the **tenant**. See Chapter 7.

Keeper of the Registers. The Keeper of the Registers of Scotland, in whose name all acts and decisions, in relation to the registers, are made. The Keeper heads the Department of the Registers of Scotland. The Keeper is responsible for numerous registers, two of which are the **Land Register** and the **Register of Sasines**.

Landlord. The party to the contract of **lease** who grants the **lease**; the proprietor of heritable property which is the subject of the **lease**. Also known as the “lessor”.

Land Register of Scotland. Or “Land Register” for short. This is the register established by the 1979 Act to replace, on a phased basis, the **Register of Sasines**.

Lease. A contract under which one person, the lessor (**landlord**), grants to another, the lessee (**tenant**), the right to use the property for a fixed time in return for a regular, periodical payment known as rent. It is capable of becoming a **real right**, by possession or registration depending on the type of **lease**. A long **lease** (over 20 years) must be registered in the Land Register to confer a real right.

Leasehold interest. The right conferred on a **tenant** by a **lease** to enjoy exclusive possession of the property in question.

Ordinary cause rules. The rules which apply to procedures in the sheriff court where the value of the claim is over £5000.

Personal right. A right against a person. Also called a claim. Contracts create personal rights, but such rights can also have other sources.

Proprietor. The owner of property.

Real burden. An obligation affecting land, which normally requires something to be done or not to be done by the **proprietor**.

Real right. A direct right in land (or moveable property). Real rights divide into (i) the right of ownership and (ii) the subordinate real rights such as **servitudes**.

Register of Sasines. Established by the Registration Act 1617. It is a register of deeds rather than a register of title. It is being gradually replaced by the **Land Register.**

Registers of Scotland. Also called “RoS”. A non-ministerial Government department that is headed by the **Keeper of the Registers** of Scotland. See https://www.ros.gov.uk/.

Residential lease. A **lease** of **residential property**.

Residential property. Any land or building that is used or suitable for use as a dwelling. This excludes property used for **agricultural** or commercial purposes.

Roman law. The legal system of ancient Rome. Roman law forms the basis of civil law in many countries today, and greatly influenced the development of Scots common law.

SDLT/LBTT. Land and Buildings Transaction Tax (LBTT) is a tax applied to residential and non-residential land and buildings transactions (including commercial purchases and commercial leases) where a chargeable interest is acquired. LBTT replaced UK Stamp Duty Land Tax (SDLT) in Scotland from 1 April 2015.

Security of tenure. The statutory right of a **tenant** to occupy the subject of a **lease** to which he/she is party.

Servient tenement. The more traditional term for **burdened property.**

Servitude. A subordinate real right in favour of one property over a neighbouring property. An example is a servitude of way. (A servitude of way is a private right of way. There are also public rights of way.)

Sheriff clerk. Staff of the Scottish Court Service, responsible for the day-to-day running of the sheriff courts, including programming court business.

Standard security. A heritable security regulated by the Conveyancing and Feudal Reform (Scotland) Act 1970 and effectively now the only form of heritable security. Generally, a standard security in Scotland is the equivalent of a mortgage in England and Wales.

Sub-lease. A **lease** by a **tenant** of part or all of leased property to another person (**sub-tenant**).

Sub-tenant. A person who leases property from a **tenant.**

Summary cause rules. The rules which apply to procedures in the sheriff court where the value of the claim is over £3000 up to £5000. There are some circumstances where these rules apply to claims of less than £3000, including actions for recovery of possession of heritable property.

Superior. The feudal term for the person holding heritable property immediately from the Crown.

Tacit relocation. The continuation of a **lease** after its expiry by operation of law because neither party has taken steps to terminate the arrangement. See Chapter 2.

Tenant. A person who occupies, in terms of a **lease**, heritable property belonging to a landlord to whom the **tenant** pays rent.

Vassal. The feudal term for the person holding the land from a **superior**.

Chapter 1 Introduction

Introduction

1.1 A lease is a contract under which one party, the landlord, grants to another, the tenant, the right to use property for a period of time normally in return for regular periodical payments known as rent. There are basically three types of lease in Scotland: agricultural leases; residential leases; and commercial leases. Both agricultural leases and residential leases are heavily regulated while commercial leases on the other hand are, on the whole, unregulated. This Discussion Paper, with the exception of one chapter,[1] focusses on commercial leases and specifically on issues relating to, or arising from, termination of commercial leases.

1.2 In response to the consultations for our Eighth and Ninth Programmes of Law Reform, stakeholders in the commercial property sector made representations to us concerning problems in practice relating to the termination of commercial leases. These representations were not restricted to just one problem but included a number of issues, and this Discussion Paper has been drafted with a view to addressing some of these challenges. The subject of reform of the proprietary aspects of leases was included within our Ninth Programme of Law Reform, and approved by the Scottish Government. It has been carried forward into our Tenth Programme of Law Reform, where the project is now not restricted to proprietary aspects.

Economic background

1.3 Commercial property is one of the fundamental building blocks of the Scottish economy. It includes essential economic and social infrastructure, commercial space in which virtually all types of business operate and the shopping centres, restaurants, cinemas, sports stadia and the like in which people spend their leisure time. It is a key driver of growth and productivity. It attracts long term domestic and overseas capital investment. It provides employment to substantial numbers of people.

1.4 The Registers of Scotland 10 year Property Market Report[2] shows that in the 10 years to 2016/2017 there were more than 35,000 transactions of commercial property valued at more than £29 billion.[3] In 2016/2017 the value of commercial property sales was £3.3 billion.[4] Investment transactions totalled £2.8 billion in 2017[5]. Between 2016 and 2017 transactions increased by 39% in Scotland compared to 27% for the UK as a whole.[6] The Fraser of Allander Institute produced an analysis of the commercial property sector[7] from construction and real estate activities which indicated that the sector contributes almost £4.8

[1] Chapter 8 (*Confusio* and leases).
[2] www.ros.gov.uk/property-data/property-statistics/the-10-year-report at page 30.
[3] The annual average was £2.9 billion with 3552 transactions.
[4] www.ros.gov.uk/property-data/property-statistics/the-10-year-report at page 30.
[5] Fraser of Allander Institute: "The economic contribution of the commercial property sector", March 2018. This Report was commissioned by the Scottish Property Federation.
[6] *Ibid.*
[7] *Ibid.*

billion to Scottish GVA.[8] Such activity, according to the Institute, helps support around 49,000 jobs directly, and a further 43,000 through spill over effects, in Scotland.

1.5 The commercial property sector makes a wide contribution to taxation through the economic activity which it supports. Occupiers of commercial property pay non-domestic rates. In 2011-2012, non-domestic rates income in Scotland was £2.2 billion. This had risen to £2.8 billion by 2015-2016. In 2015-2016 non-domestic rates comprised 16.2% of local government income. Land and Buildings Transaction tax (LBTT) in the year 2016–2017 on non-residential property was over £175 million.[9]

1.6 Commercial leases are an integral part of the commercial property sector. Use of commercial leases has grown dramatically in Scotland since the 1970s, allowing businesses the flexibility of leasing their property, thus releasing valuable funding for growth, rather than it being tied up in funding ownership of property.

What is a commercial lease?

1.7 A commercial lease is a contract between an owner of a property, known as the landlord, and an occupier of the property, known as the tenant governing a commercial property. Essentially commercial property is property which is neither agricultural nor residential. The contract regulates the occupancy of the property by the tenant. It gives the tenant exclusive possession of the property in exchange for which the tenant will pay to the landlord a rent, which is generally fixed at a market level. In addition to the rent the tenant will normally undertake other obligations, the extent of which will usually depend on the lease duration. In a longer lease the tenant will more usually undertake to pay all other financial outgoings related to the property, eg rates and insurance, and will normally also undertake to keep the property in good repair and look after the property as if it were the owner. In shorter leases it is more normal for the rent to include an element for rates, insurance and repairs but in turn the landlord will retain liability for these.

1.8 Commercial leases will vary in duration. The duration of the lease will normally depend on the use to which the tenant proposes to put the property. For example, if a party wishes to store boxes in a property for a year, then that party might take a lease of a very basic building or shed for a year. On the other hand, if a party wishes to occupy a building with a view to carrying out specialist services, for example servicing of emergency vehicles, then the party would look to take a much longer lease of a building which would allow the party to install his or her specialist equipment and operate from the same premises to allow continuity of business.

1.9 There may be variations on this basic theme. If the tenant is a newly formed entity with no credit rating, then the landlord may have asked for a guarantee of the tenant's obligations under the lease. In such cases one may see the guarantor as a party to the lease. Alternatively in these circumstances, the landlord may require a deposit and there may be, in addition to the lease, a deposit agreement.

1.10 Although the lease itself is simply a contract, Scots law provides that a tenant may obtain a real right in the property which is the subject of the lease by possession for short

[8] Gross Value Added.
[9] Fraser of Allander Institute Report noted at footnote 5 above.

leases[10] and by registration in the Land Register for long leases.[11] A real right is a right which is valid not just against the landlord but against the whole world. This ability to obtain a real right differentiates leases from other types of contract.

The role of legislation

1.11 Notwithstanding the importance of commercial leases to the economy, there is very little statutory regulation of commercial leases. Although leases of commercial property have evolved in Scotland alongside those of agricultural and residential properties, the modern commercial lease was imported from England in the 1970s. At that time the legal profession, under commercial pressure, simply modified the English lease for the Scottish jurisdiction, without importing the legislative superstructure[12] for leases which exists in England and Wales. The rules governing commercial leasing in Scotland instead evolved through custom and practice. It would appear that successive governments and institutional investors have seen a strong case for keeping regulation to a minimum. Surveyors argue that this makes Scotland a more attractive place to invest in the commercial leasing sector. They contrast the Scottish situation with England and Wales where there is a substantial body of landlord and tenant legislation. Investors argue that the English legislation reduces flexibility.

1.12 Accepting the arguments on flexibility and the benefits to a free market of little statutory regulation does mean that custom and practice need to be clearly understood and accepted by all within the commercial leasing sector. Where there is doubt as to the nature of practice, there are inevitable costs to the sector. If all solicitors engaged in commercial leasing are applying the same rules of practice, then transactions leading to the grant of a lease or the termination of a lease will move along smoothly, quickly and without complication. If however there are arguments among solicitors as to what the practice actually is, or should be, then that will mean that transactions take longer and are more costly for clients. In addition, where there is doubt as between solicitors as to the rules, there can often be an imbalance between the rights of landlord and tenant. These costs and any such imbalances often lead to increased legal fees, delays, disputes and litigation, or they may influence decisions on whether or not to invest in the commercial property sector in Scotland. It should be noted that the Property Standardisation Group, which was formed in 2001 to produce agreed forms of documents and procedures for Scottish commercial property transactions, has made good progress in their aim.[13] Notwithstanding their good work, we have still received the representations referred to in paragraph 1.2 above.

1.13 In Germany and France, where there are commercial leasing markets of comparable sophistication, leases are regulated under their civil or commercial codes. These codes differentiate between agricultural and commercial leases.

The need for reform

1.14 This Discussion Paper addresses six areas where we have had representations form stakeholders to the effect that the law is unclear, or that the law is outdated and impeding economic development.

[10] Leases Act 1449.
[11] Registration of Leases (Scotland) Act 1857.
[12] Law of Property Act 1925; Landlord and Tenant Act 1954.
[13] http://www.psglegal.co.uk/.

Tacit relocation

1.15 Scotland inherited from Roman law the doctrine of tacit relocation.[14] This doctrine provides that certain contracts, although entered into for a definite period of time, require notice of termination to be issued prior to the end of the contract in order to terminate the rights and obligations of the parties under the contract and bring it to an effective end. If notice is not served, then the contract continues. This applies not only to most types of lease but also to contracts of service and contracts of partnership. In this paper we examine the doctrine of tacit relocation, although this paper restricts itself to where the doctrine applies to leases. We consider the evolution of the doctrine in Scotland and compare this with its evolution in other legal systems, for example South Africa and Germany. We consider the consequences of the implied term of tacit relocation for commercial leases. While accepting that it may have a place in relation to agricultural leases, many stakeholders consider that as a doctrine it is not fit for purpose in a sophisticated commercial leasing market, and that it simply leads to unwanted outcomes. Stakeholders advise us that the business community are incurring increased fees and delays as a result of the operation of tacit relocation.

Notices to quit

1.16 The Scottish legal system has had to develop rules which apply to the giving of notices to terminate leases in order to cope with the doctrine of tacit relocation. Such rules attempt to ensure that anyone involved in the drafting, or day to day management, of leases is able to use the rules to ensure that the doctrine is avoided, if that is what is desired. Common law principles have evolved alongside legislation relating to notices of termination or, as we refer to them in this discussion paper, notices to quit.

1.17 We published a Report in 1989 entitled Recovery of Possession of Heritable Property[15]. This Report addressed both agricultural and non-agricultural leases. Most of its recommendations have not been implemented. This paper does not undertake a wholesale review of the law on notices to quit, but rather restricts itself to notices to quit in relation to commercial leases. Notices to quit in agricultural leases are already governed by legislation, as are those relating to residential leases, and so we do not give them consideration. The commercial leasing market has evolved considerably since 1989, but our 1989 Report has been a useful point of reference, and we are grateful to our predecessors for their work on the topic. This Discussion Paper will review the legislation and common law relating to notices to quit in commercial leases.[16]

Apportionment of rent

1.18 This Discussion Paper will consider the topic of apportionment of rent[17] at early termination of a lease. Recent English case law has caused stakeholders to approach us and ask for clarification of the law in Scotland in this situation.

Tenancy of Shops (Scotland) Act 1949

1.19 In an area with little legislation, one exception is the 1949 Act. Stakeholders have expressed a desire for this piece of legislation to be repealed. Stakeholders advise us that

[14] Tacit relocation is discussed in Chapter 2.
[15] Scot Law Com No 118 (1989).
[16] Notices to quit are discussed in Chapters 3 and 4.
[17] Apportionment of rent is discussed in Chapter 5.

the 1949 Act is being used by national retailers for whom the protection of the Act was not originally intended. Consideration will be given as to why this Act was introduced, how it sits in a system with little other statutory regulation, and whether indeed there is still a need for it at this stage in the development of the commercial leasing market. This Discussion Paper will ask whether the Tenancy of Shops (Scotland) Act 1949 should be repealed.[18]

Irritancy

1.20 We published a Discussion Paper in 2001 on Irritancy in Leases of Land.[19] This was followed by a Report[20] in 2003.[21] This Discussion Paper and Report were undertaken partly in response to judicial observations in the first *Dollar Land* case,[22] where concern was expressed that the law of irritancy in Scotland may act as a deterrent to investment in Scottish commercial property. Our 2003 Report has not been implemented. In drafting this Discussion Paper we have held consultations with stakeholders in order to try to understand whether they consider further reform in this area to be necessary. Feedback thus far has been that reform is unnecessary. We will consider the current position on irritancy and the question of further reform in this paper.[23]

Confusio

1.21 Scotland has received this doctrine from Roman law. It has been argued that, when the rights of the landlord and the tenant under a lease come to be vested in the same person, the lease is extinguished by virtue of *confusio*. Stakeholders advise us that the operation of *confusio* in relation to leases is still the subject of disagreement in practice. The doctrine of *confusio* in the context of commercial leases does appear to affect a surprisingly large number of stakeholders. We have been asked to review the law with a view to clarifying it. We are told that the lack of clarity is causing problems in practice, thus increasing costs to clients and consequentially costs to the economy. As part of our review we will consider how the concept of *confusio* has developed and whether it was ever intended to apply to leases. We will also give consideration to the current practice adopted by the Keeper of the Registers of Scotland.[24]

1.22 Our consideration of the law in this area is intended to cover all leases, regardless of the use to which the property may be put. Following discussions with the Keeper of the Registers of Scotland, and given the impact of *confusio* on registered leases, we have concluded that clarification of the operation of the doctrine of *confusio* should be applicable to all types of leases, be they agricultural, commercial or residential.

1.23 This Discussion Paper also contains a Glossary and Abbreviation of Terms, as well as an Appendix (a list of those with whom we consulted in the preparation of this Discussion Paper), in order to assist the reader.

[18] The Tenancy of Shops (Scotland) Act 1949 is discussed in Chapter 6.
[19] DP No 117 (2001).
[20] Scot Law Com No 191 (2003).
[21] The main recommendations of the 2003 Report are discussed in Chapter 7 of this Paper.
[22] See Lord Jauncey's comments in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1992 SC(HL) 104 at 127.
[23] Irritancy is discussed in Chapter 7.
[24] *Confusio* is discussed in Chapter 8.

Legislative competence

1.24 In terms of section 29 of the Scotland Act 1998 a provision is outside the legislative competence of the Scottish Parliament if, amongst other things, it relates to reserved matters, as defined in Schedule 5 of that Act. The views expressed in this Discussion Paper relate to aspects of the Scots law of property. The law of property and obligations are not reserved matters in terms of Schedule 5 and accordingly the matters discussed within this paper are within the legislative competence of the Scottish Parliament.

1.25 A further aspect of legislative competence in terms of section 29 of the 1998 Act is that an Act of the Scottish Parliament must be compatible with the Convention rights and with European Union law. We take the view that any of the possible options for reform described in this paper, if enacted, would be compatible with the requirements of both the ECHR and EU law.

Impact assessment

1.26 In the Report which will follow this Discussion Paper we will provide a business and regulatory impact assessment (BRIA) of the probable impact of our eventual recommendations. In the meantime, we will be grateful for any responses to this paper which provide evidence on, or otherwise address, either the economic impact of the present law or the anticipated impact of any of the possible options for reform described in this paper, or both. We would refer consultees to the final question in Chapter 9 in this respect.

Acknowledgements

1.27 We are extremely grateful to the parties listed in the Appendix who contributed to the preparation of this Discussion Paper. The members of our Advisory Group[25] provided important and thought-provoking discussion, as well as consideration of some draft chapters. Hannah Frahm (LLM) provided comparative legal material in respect of Germany and France, and Dr Frankie McCarthy assisted with consideration of human rights aspects. We are also grateful to our predecessors at the Commission for the work undertaken on the previous Scottish Law Commission publications which are referenced in this Discussion Paper.

[25] See Appendix.

Chapter 2 Tacit relocation

Introduction

2.1 The doctrine of tacit relocation has its roots in Roman law.[1] The doctrine provides that leases, although entered into for a fixed period of time, require the serving of a notice of termination before they may actually be terminated. The presumption is that if nothing is done, parties consent to continue or extend their lease. If neither party to the lease has given notice of their intention to terminate the lease, the parties are, by their silence, taken to have agreed that the lease should continue. To non-lawyers the concept of the continued existence of a contract after the expiry date contained on the face of the lease, as a result of both parties doing nothing, may seem a strange one.

2.2 The doctrine also applies to contracts of partnership. Where a partnership continues after the end of its agreed fixed term, without the parties making any new agreement, the contract is held by law to be extended by tacit relocation. Lord Watson in *Neilson v Mossend Iron Co*[2] set out the effect of tacit relocation in contracts of partnership: "When the members of a mercantile firm continue to trade as partners after the expiry of their original contract without making any new agreement that contract is held by law to be prolonged or renewed by tacit consent, or, as it is termed in Scotland, by tacit relocation."[3] The doctrine also applies to certain contracts of service or employment.[4] This chapter restricts itself to consideration of the doctrine as it applies to leases.

2.3 Many other countries across the world recognise the concept of tacit relocation,[5] but most do so on the basis of positive action of a party, while Scots law operates through an act of omission.

Historical Development

2.4 The institutional writers all had different ways of describing the effect of tacit relocation. Stair said that tacit relocation is that which is presumed to be in the mind of both parties, after the end of a lease when neither the landlord gave warning nor the tenant renounced.[6] Erskine notes that if the tenant is allowed to remain in possession after the end of a lease then under Roman law the parties were understood to have entered into a new lease upon the same conditions as the former lease.[7] Despite this reference to a new lease he does go on to explain that the doctrine adopted into our law and given the name of tacit relocation requires the consent of both parties for "continuing the lease". Bell states that, in order to put an end to a lease, notice must be served, and if there is no such notice the parties are held to have renewed their agreement[8]. Hume said that "if, on arrival of the last year, both parties continue silent – no intimation being made on either side of any purpose to

[1] In Justinian's Digest: *taciturnitate utriusque partis colonum reconduxisse videri* (D 19.2.13.11).
[2] (1886)13 R (HL) 50.
[3] (1886) 13 R (HL) 50, at 54.
[4] H L MacQueen and the Rt Hon Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, 2017), p 121.
[5] See paras 2.18–2.38.
[6] Stair, *Institutions of the Law of Scotland* 2.9.23.
[7] Erskine, *Institutes of the Law of Scotland* 2.6.35.
[8] Bell's *Principles of the Law of Scotland,* § 1265.

separate – it is reasonably construed in our practice, as in Roman law, that they tacitly renew their bargain, on the same terms as before, for another year."[9]

2.5 Rankine calls tacit relocation the constructive renewal of a lease[10] but Paton and Cameron point out that tacit relocation is not to be confused with renewal. Renewal implies the making of a new lease by agreement whereas tacit relocation implies the prolongation of an existing one by tacit consent.[11]

2.6 Lord President Clyde in the unreported case of *Cowe v Millar*[12] stated: "When a tacit relocation occurs under a lease what truly takes place is a prolongation of the tenancy". He made it clear that it is the old contract that remains. It is not displaced, it is prolonged. This judgement was followed in *Douglas v Cassillis & Culzean Estates.*[13] There at first instance the Sheriff (Dickson) quoted from Lord President Clyde in *Cowe* and on appeal the Second Division of the Court of Session upheld the Sheriff's decision with the Lord Justice-Clerk (Cooper) confirming that there is ample support for the view that whatever may be the stipulated period of endurance, that period may be extended by tacit agreement of the parties.

2.7 It appears now to be accepted practice that tacit relocation is a prolongation, or a continuation or extension of the original lease.[14] Under the doctrine of tacit relocation the lease then continues on the same terms as before, except for duration. If the original lease is for more than one year it continues for a further year and then from year to year until appropriate notice of termination is given.[15] Regardless of the length of its original duration, the extension by tacit relocation is for only a year. If the lease is for less than one year, it continues for the same period as the original lease and so on successively until appropriate notice is given.[16]

2.8 The policy behind tacit relocation appears to have been the desire to promote soil cultivation, the tenant requiring a year to fully benefit from planting and reaping.[17] Leases in Scotland relating to agricultural (sometimes referred to as rural) properties are now separately regulated in many aspects including tacit relocation and notices to quit,[18] but the regulation of commercial or urban leases in relation to tacit relocation and notices to quit has not been properly addressed. The task of applying old legislation and practice, originally designed for agricultural leases, to a highly developed commercial leasing market is not an easy one and stakeholders have requested reform so that they may have a clear procedure applying to commercial leases. In Roman law the doctrine operated so that agricultural

[9] Hume, *Lectures* IV 101.
[10] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 598.
[11] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 222.
[12] 21 December 1921, only reported in Connell's *Agricultural Holdings (Scotland) Acts* (2nd edn, 1923), Appendix iv, p 346.
[13] 1944 SC 355.
[14] S Halliday, "Tacit Relocation" JR 4 2001, p 202; R Rennie (with Blair, Brymer, McCarthy and Mullen), *Leases* (2015), p 145; K S Gerber, *Commercial Leases in Scotland: A Practitioner's Guide* (3rd edn, 2016), p 172; A McAllister, *Scottish Law of Leases* (4th edn, 2013), p 218; *Pinkerton v Pinkerton* 1986 SLT 672; *Sea Breeze Properties Ltd v Bio-Medical Systems Ltd* 1998 SLT 319.
[15] Stair, *Institutions of the Law of Scotland,* 2.9.23; Bell's *Principles of the Law of Scotland,* § 1265.
[16] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 602; *Hamilton District Council v Maguire* 1983 SLT (Sh Ct) 76.
[17] *MacDougall v Guidi* 1992 SCLR 167; R Zimmermann, *The Law of Obligations* (1996), p 356.
[18] Currently by the Agricultural Holdings (Scotland) Acts 1991 and 2003, the Land Reform (Scotland) Act 2016, the Crofters (Scotland) Act 1993 and the Small Landholders and Agriculture Holdings (Scotland) Act 1931.

leases continued for a further year but for urban leases it appears that the renewal was simply from day to day.[19]

Leases to which tacit relocation does not apply

2.9 The doctrine rests on the tacit consent of the parties, so where there is no such consent the doctrine cannot apply. Therefore tacit relocation does not apply to certain types of leases. It does not apply to seasonal lets, for example shootings and fishings,[20] and grazings[21] which are of an intermittent or temporary nature and are thus inconsistent with the principle of tacit relocation. Grazings and mowings have in fact been singled out as exemptions from tacit relocation in the Agricultural Holdings (Scotland) Act 2003.[22] It has been suggested that holiday accommodation and student accommodation would fall within the category of leases to which tacit relocation should not apply, where the contract is for a single fixed term only and the intention is that tacit relocation would never apply. Rankine describes these types of leases as "intermittent on the face of them".[23] *MacHarg Petitioner* referred to these leases not requiring notices to quit as being a "universally understood principle".[24] In his article on tacit relocation Simon Halliday suggests that the intention of the parties appears to be the relevant issue here, and the intention is to contract for a fixed period only.[25] However, if it comes down to intention, then one might argue that any lease with a fixed term is a sufficiently strongly declared intention for a lease to cease at the end of the fixed term. It seems that the true explanation, in line with *MacHarg's* universally understood principle, is that as grazing leases were traditionally for the period from April/May to the end of October,[26] and shootings and fishing are linked to the open season, they were always for less than a year, and were not capable of being physically exercised for the rest of the year. There was in fact no grazing between the start of November and April. So there could be no tacit relocation because of the actual physical nature of the subjects. One can see why this might be extended to undergraduate student accommodation as there are only certain times of the year when centres of higher education are open and lectures are delivered. Since tacit relocation does not apply to these leases, no notice is required, unless the lease stipulates otherwise.

2.10 Tacit relocation does not apply to judicial leases.[27] These are leases granted by the authority of the court where an estate has been sequestrated.[28] However leases granted after an application under the Tenancy of Shops (Scotland) Act 1949 are not considered to be judicial leases[29] and therefore tacit relocation will operate in the absence of notice to quit at termination.

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[19] "*de die in diem*"; see R Hunter, *A Treatise on the Law of Landlord and Tenant* (3rd edn, 1860), p 507.
[20] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 599; A G M Duncan 1978 SLT News 157.
[21] *MacHarg Petitioner* (1805) M Appendix, 'Removing' 4; *Secretary of State for Air v Davidson* (1950) 66 Sh Ct Rep 59. Agricultural Holdings (Scotland) Act 2003, s 3.
[22] s 3.
[23] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 599.
[24] *MacHarg Petitioner* (1805) M Appendix, 'Removing' 4.
[25] Simon Halliday, "Tacit Relocation" JR 4 2001, p 202.
[26] *Secretary of State for Air v Davidson* (1950) 66 Sh Ct Rep 59.
[27] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 599.
[28] These are now unknown in practice.
[29] *Pow v Fraser and Carmichael* 1953 SLT (Sh Ct) 20; *White v Paton* (1953) 69 Sh Ct Rep 176; *Scottish Gas Board v Kerr's Trustees* 1956 SLT (Sh Ct) 69. The 1949 Act is discussed in detail in Chapter 6.

Agricultural leases

2.11 Agricultural leases in Scotland are subject to a separate regime, and tacit relocation is enshrined in the statutory scheme applying to such leases.[30] It is wholly understandable that leases relating to agricultural subjects require to provide enhanced protection for tenants. This has been recognised from Roman law times. This chapter does not discuss in any detail agricultural leases. It is however recognised that if there is to be a different system for commercial leases in relation to tacit relocation, then the definition of what is a commercial lease will be of critical importance. It is perhaps worth noting that the Agricultural Holdings (Scotland) Acts do not attempt to define tacit relocation. The Scottish Government glossary of terms[31] issued for ease of understanding agricultural legislation simply defines tacit relocation as "the continuation of an agricultural lease after its expiry by operation of law because neither party has taken steps to terminate the arrangement". We have considered whether it would be appropriate to try to produce a statutory definition of tacit relocation. Our provisional view is that we should not attempt to do so. The consequences of the operation of tacit relocation are well understood in practice. To attempt to define the doctrine in detail may lead to unintended adverse consequences for current legislation and leases.

Avoiding the operation of tacit relocation

2.12 If parties wish to avoid tacit relocation then they must give a notice of termination or, as it is more commonly called, a notice to quit, in accordance with the current law. We discuss Notices to Quit in Chapter 3.

Contracting out of tacit relocation

2.13 Tacit relocation rests on the presumed intention of the parties to the contract.[32] Lord Watson said that the legal effect of tacit relocation is "that all the stipulations and conditions of the original contract remain in force in so far as they are not inconsistent with any implied term of the renewed contract".[33] In other words tacit relocation only renews the terms of the original lease in so far as these are consistent with a lease from year to year. One of these implied terms is that during tacit relocation either party may terminate the lease by the requisite notice at the end of a year.[34]

2.14 If tacit relocation is an implied term, then there would appear to be no reason why parties cannot contract out of it. However, both Rankine[35] and Paton and Cameron[36] indicate that practice has long been settled to the effect that, notwithstanding any attempt to contract out in the drafting of the lease, notice is still necessary. It is interesting to contrast these views with the judgement in the case of *MacDougall v Guidi*[37] where first the Sheriff, and then the Sheriff Principal, accepted that in agricultural leases it is not possible to contract out of tacit relocation, referencing the tenderness of the law towards agricultural subjects, but could see nothing to prevent contracting out in a purely commercial or business lease. There is certainly authority for the parties being able to contract out of tacit relocation if the lease

[30] Agricultural Holdings (Scotland) Act 1991, s 3.
[31] http://www.gov.scot/Topics/farmingrural/Agriculture/agricultural-holdings/glossary.
[32] W M Gloag, *The Law of Contract* (2nd edn, 1929), p 734.
[33] *Neilson v Mossend Iron Co* (1886) 13 R HL 50.
[34] *Commercial Union Assurance Co Ltd v Watt and Cumine* 1964 SC 84, at 88 (Lord President Clyde).
[35] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 556.
[36] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 223.
[37] 1992 SCLR 167.

contains a provision to that effect and the lease is dated within a year of the removal.[38] More modern texts are less definitive than Rankine and Paton and Cameron,[39] and indeed Professor Rennie argues that it is difficult to see why parties cannot agree to exclude tacit relocation.[40]

2.15 It does seem surprising that in Scotland a fixed term tenancy cannot be effectively created. In *Smith v Grayton Estates Ltd*[41] Lord President Clyde said that "tacit relocation is the prolongation each year of the tenancy for a further one year if the actings of the parties to the lease show that they are consenting to this prolongation. For, as in all contracts, a tacit relocation or re-letting must be based on consent."[42] It is hard to see why this consent should not be excluded by the terms of the lease itself. In other areas where the effect of freedom of contract may be more drastic, eg the law on conventional irritancy, freedom of contract has successfully been upheld.[43]

2.16 The ability of parties to a lease to relocate tacitly is not among the essential elements necessary for its creation. It has judicially been described as an implied agreement, inherent in the bargain between the parties.[44] There seems to be no good reason why the implication should not be excluded by the terms of the lease itself. Indeed Bell's *Principles*[45] states that tacit relocation applies only "if there be nothing in the lease or in their conduct inconsistent with the presumption" of renewal.

2.17 Solicitors in practice do not seem to wish to address the issue of tacit relocation when a lease is drafted. Historical practice was to include wording which attempted to contract out of tacit relocation. Most leases contained, and indeed still contain, a clause along these lines: "the tenants bind and oblige themselves and their foresaids to flit and remove themselves, their servants, goods and gear of and from the premises at the expiry of the lease, and that without any previous warning or process of removing to be used against them". A more modern version might be: "at the termination date without any warning or process of removal to that effect to remove themselves and their subtenants and any other occupier from the property". Rather than helping clients to understand that they must do something to avoid the operation of tacit relocation, this sort of drafting appears to suggest that no notice to quit is required. It is not readily apparent why solicitors are not prepared to address this issue at the outset.

Comparative commentary

2.18 Tacit relocation is not unique to Scots law. It applies in various forms across the world.

[38] *Paxton v Slack* (1803) Hume 568.
[39] K S Gerber, *Commercial Leases in Scotland: A Practitioner's Guide* (3rd edn, 2016), p 173; A McAllister, *Scottish Law of Leases* (4th edn, 2013), p 221.
[40] R Rennie (with Blair, Brymer, McCarthy and Mullen), *Leases* (2015), p 149.
[41] 1960 SC 349.
[42] 1960 SC 349 at 354 (Lord President Clyde).
[43] *Dorchester Studios (Glasgow) Ltd v Stone* 1975 SC (HL) 56; *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90.
[44] *Douglas v Cassillis and Culzean Estates* 1945 SLT 258.
[45] Bell's *Principles of the Law of Scotland,* § *1265.*

South Africa

2.19 Parties are entitled to enter into fixed term leases. At the end of the lease the contract terminates automatically.[46] "If the parties agree upon a definite time for the expiration of the contract, it follows that no notice of termination is required. The contract expires by effluxion of time and with it the relationship of lessor and lessee ceases".[47] Tacit relocation applies in South Africa under the same name, but it does not operate in the same way as in Scotland. Under common law there is a distinction between leases created first, by tacit agreement between the parties before termination of the old lease, and secondly, leases which come into existence after the lease has expired through tacit agreement of the parties. The position in terms of statute is similar to the common law.[48]

2.20 Where a valid lease agreement exists between two parties South African law allows for that lease to be renewed implicitly. An example is:-

> "Suppose that A leases a house to B for one year from 1 May 2012. In March 2013 B visits A to pay a month's rent. A mentions that he will shortly be going overseas for six months. B says "in that case, I will pay you six months' rent now" and tenders the money, which A accepts saying "I am glad to hear that your grandchildren are coming to spend the June holiday with you. Remember that the east facing room is warm in the winter".

In such circumstances the lease is renewed.[49]

2.21 This is a good example of a lease tacitly renewed before termination. It is easily distinguishable from Scottish tacit relocation in that South African law will only imply a new lease when agreement between the parties can be evidenced by positive actions. In addition, such a lease would be considered to be a new lease rather than a continuation of the original lease as is the case in Scotland.[50]

2.22 When a lease expires in South Africa but both parties adopt and continue the position existing at the termination of lease, with the lessor content that the lessee should remain, and the lessee is content to remain, then a new lease is created.[51] The period of that new lease is that which the parties impliedly agree. If there is no tacit agreement as to duration then the lease is one for an indefinite period and is terminable on reasonable notice. In the case of a yearly lease of urban subjects a period of three months' notice would probably be adequate.[52]

Germany

2.23 The German law on tacit relocation[53] is set out clearly in the BGB. Articles 535–548 of the BGB contain general provisions for all types of leases. Articles 549–577a contain provisions for residential leases only, and articles 578–580a contain provisions on "other"

[46] Van Leeuwen RDI 4.21.6; Pothier, *Letting and Hiring* para 308; Van der Linden 1.15 .12.
[47] *Tiopaizi v Bulawayo Municipality* 1923 AD 317 (De Villiers JA).
[48] Rental Housing Act 1999, s 5.
[49] G Glover, *Kerr's Law of Lease and Sale* (4th edn, 2014), p 545.
[50] *BLP Investments Ltd v Angel's Precision Works Ltd and Others* 1987 a SA 308 (c) at 310l-311C.
[51] *Bowhay v Ward* 1903 TS 772 at 779 (Innes CJ).
[52] G Glover, *Kerr's Law of Lease and Sale* (4th edn, 2014), p 371.
[53] *Stillschweigende Verlängerung*.

leases, particularly commercial leases. Article 545 applies to both types of leases. For agricultural (or usufructuary) leases there are special provisions.[54]

2.24 In Germany the parties may enter into a fixed term lease. Such a lease automatically expires at the end of that period. Thus, unlike Scots law, no notice of termination is required.[55] The lease is, by its nature, a granting of use for a certain time only. The law prohibits perpetual leases,[56] which are those granted forever, with no end date and capable of being passed on to a successor, but allows indefinite leases which are not granted forever but have a duration which is specified as indefinite, for example "until the death of the landlord". The tenant is obliged to return the leased property at the end of the lease.[57] If the property is not returned to the landlord at termination the landlord may have a claim for rent and, potentially, damages.[58]

2.25 If the tenant does not return the property to the landlord at the end of the lease period, but continues to use the property after termination, and does this with the knowledge and approval of the landlord, then the lease may be extended by operation of law for an indefinite period of time.[59] However if one of the parties to the lease has declared his or her intention to the contrary to the other party within two weeks then the lease cannot be extended. For the tenant the two-week period starts at the end of the original lease. For the landlord the two-week period starts when he becomes aware that the tenant has continued in occupation. There appears to be no onus on the landlord to make haste and check the situation at the premises immediately. Continued use by the tenant is not just a matter of leaving possessions in the premises. There must be actual use.

2.26 Until 2001 the extension of the lease was a legal fiction: the lease was held to be extended for an indefinite period of time. However from 2001 the lease is prolonged as a matter of law so long as the conditions of article 545 of the BGB are met. If these conditions are met, leases with an original fixed duration continue in terms of the original contract subject to two differences. First, notwithstanding the term of the original contract the extension is for an indefinite period. Secondly, instead of any agreed period of notice in the original contract, the statutory notice period applies. This is six months for commercial leases.[60]

2.27 Crucially, parties are entitled to contract out of article 545 of the BGB. An exclusion in general terms is sufficient. In commercial leases it is common practice to exclude article 545. It is also worth noting that if the lease is extended by tacit relocation then the extension is for an indefinite period of time and the statutory notice provisions become applicable. As stated above, the statutory notice period for commercial leases is six months.

France

2.28 In France the general rules concerning leases may be found in the Code civil. Commercial leases are however mainly regulated by the Code de commerce. A characteristic of the general rules on leases is the freedom of the parties to negotiate their

[54] BGB § 585-597.
[55] BGB § 542.
[56] BGB § 542 read with § 544.
[57] BGB § 546.
[58] BGB § 546a.
[59] BGB § 545.
[60] BGB § 580a II.

lease contract as they please. This freedom is however significantly curtailed in the specific rules governing commercial leases. As with German law, perpetual leases are not permitted.

2.29 Leases may be entered into for a fixed period or for an indefinite period. Article 1737 of the Code civil provides that a lease ceases as a matter of law at the expiration of the fixed term, when the lease has been made in writing, without it being necessary to give a notice of termination.[61] An indefinite lease terminates after one of the parties gives notice, and the period of such notice depends on the "usage of the place" and on the terms of the contract, as the parties are in general free to agree on a notice period themselves.[62]

2.30 There are specific rules for agricultural and commercial leases which provide that the minimum duration of a lease must be nine years, and that is the case whether the lease is for a fixed duration or an indefinite period. The tenant, however, may terminate the lease at the end of every three year period by giving at least six months' notice.[63]

2.31 In a fixed term lease the lease expires automatically subject to two exceptions. First, the parties may contractually extend the lease period. Secondly tacit relocation[64] may apply as set out in article 1738 of the Code civil. If the tenant is left in possession and continues to use the property then, according to article 1738, a new, tacitly renewed contract takes the place of the original contract. The terms of the original contract apply to the new contract but the new contract is now for an indefinite period, and the contract may be terminated unilaterally according to the general rules of the Code civil.

2.32 For commercial leases of an indefinite period article L145-9 of the Code de commerce provides that leases shall end only by virtue of a notice given in accordance with custom and practice and at least six months in advance. In the absence of notice a written lease shall continue by tacit renewal in conformity with article 1738 of the Code civil.

2.33 As with Germany, the law allows the parties to contract out of article 1738.[65] In addition, French law goes further than German law and allows the parties to set out the consequences of a tacit relocation, for example that the new lease will only run for a definite period of time. The default rule provides that the renewed contract will be of indefinite duration. A common situation is that the parties agree that a lease, entered into for a fixed duration, renews itself at expiration for a fixed duration and so on. The prevailing opinion appears to be that this is competent and that it produces a lease of a fixed term.[66] The benefit to the parties is that they have a recurring contract which can only be terminated at the end of each period and not unilaterally at an earlier date.

Australia

2.34 Under Australian common law the presumption is that a fixed term lease will end automatically on the mutually agreed termination date.[67] There are three ways in which

[61] "il prend fin à l'arrivée du terme"; see Huet, Decocq et al, *Les Principaux Contrats Speciaux*, (3rd edn, 2012), p 715.
[62] See Malaurie / Aynes / Gautier, *Les Contrats Speciaux* (7th edn, 2014), p 365.
[63] Code de commerce § L. 145-9; Huet, Decocq et al, *Les Principaux Contrats Speciaux*, (3rd edn, 2012), p 789 f.
[64] *Tacite reconduction*.
[65] Gross / Bihr, Contrats – *Ventes civiles et commerciales, baux d'habitation, baux commerciaux,* Vol 1, (2002), p 353.
[66] *Ibid* p 353.
[67] B Edgeworth, C Rossiter, P O'Connor, A Godwin, *Sackville and Neave Australian Property Law* (10th edn, 2016), pp 700-717.

occupancy can be extended after the termination date. These are first by option to renew, secondly by holding over and thirdly by way of an implied lease. The first two operate in a similar way to that in England and Wales,[68] but the third way is more akin to the principle of tacit relocation. In these cases, where a fixed term lease comes to an end, but the tenant continues to pay rent, the law will imply a new tenancy. This is the closest parallel that can be drawn with tacit relocation, although it does differ in several aspects. First, the Australian implied lease can only arise through the positive actions of a party, continued occupation and payment of rent. Secondly, under Australian common law the implied lease is seen to be a new lease rather than an extension of the original.[69]

Canada

2.35 In the common law jurisdictions of Canada a lease may exist for a fixed term.[70] At common law a lease for a fixed term expires naturally on the expiration of the stated term.[71] If the tenant remains in possession the acceptance of rent may be taken to mean that a renewal has been agreed to, though the circumstances may dictate that only a periodic term or a tenancy at will has been created.[72] A periodic lease is one that is enjoyed for some recurring unit of time, for example month by month, and this type of lease continues until terminated by notice.[73] The notice required is the length of the tenancy period, although in the case of a yearly lease a six month notice period is the rule at common law.[74] A tenancy at will has no set period and continues only as long as the parties wish it.[75] Either may bring the lease to an end by notice. The creation of a tenancy at will may be implied, for example where a tenant remains on premises after the expiration of a previous tenancy with the landlord's consent. In that situation the terms of the original lease apply in so far as these are compatible with the new arrangement.[76]

England and Wales

2.36 The termination of commercial leases is regulated by statute. Part ll of the Landlord and Tenant Act 1954 confers security of tenure on certain business tenancies so that they do not come to an end at the contractual term date. A tenancy for a fixed term cannot be continued unless the tenancy is one to which the 1954 Act applies. If the property is occupied by the tenant at the termination date for business purposes the tenancy is continued by this statute until terminated in accordance with this statute. The tenant has the right to a new tenancy unless the landlord can demonstrate a ground of opposition in terms of section 30(1) of the Act. The old tenancy is continued in the interim. If the landlord's ground of opposition is upheld the tenant is entitled to statutory compensation. If a new tenancy is granted it can be up to 15 years, at market rent and on terms to be agreed, or failing agreement, set by the court. Either the landlord or the tenant may set this procedure in motion.

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[68] See paras 2.36-2.38.
[69] B Edgeworth, C Rossiter, P O'Connor, A Godwin, *Sackville and Neave Australian Property Law* (10th edn, 2016), p 718.
[70] B Ziff, *Principles of Property Law* (6th edn, 2014), p 291.
[71] *Ibid* at p 307.
[72] *Ibid.*
[73] *Ibid* at p 292.
[74] *Ibid.*
[75] *Ibid.*
[76] *Newfoundland (Attorney General) v Newfoundland Quick Freeze Ltd* (1980) 84 APR 139, 1980 Carswell Nfld 20 (TD).

2.37 Common law methods of termination are preserved, eg forfeiture, surrender or notice to quit by the tenant. Since 1 January 1970 the landlord and tenant may contract out of the 1954 Act. The procedure for contracting out was updated in 2003[77] to make it less cumbersome. It involves the tenant being given, and accepting, a warning notice before commencement of the lease. It is notable that, similar to other systems, the parties have a right to contract out.

2.38 If the lease is contracted out of the protections of the 1954 Act, but at the end of the lease the tenant remains in occupation, this situation is described as "holding over". A former tenant holding over may do so as a trespasser, a licensee or a tenant. From the landlord's perspective it is extremely important that the nature of the "holding over" is clear. Where the parties agree that they want to enter into a new lease and negotiations are under way, a tenancy at will is likely to arise.[78] A tenancy at will is outside the security of tenure provisions of the 1954 Act. If, however, negotiations break down, come to an end or indeed do not take place, but the tenant is paying a rent, the correct inference may be that a periodic tenancy has come into existence.[79] A periodic tenancy will have security of tenure under the 1954 Act.

Comparative summary

2.39 All comparable legal systems described above allow fixed term leases to be created. Where tacit relocation, or an equivalent doctrine, bears to operate, all of these systems allow the parties to contract out of tacit relocation. These comparable systems all expect parties to consider the duration of the lease when it is drafted. No other system, so far as we are aware, provides that the failure to serve a notice of termination before the stipulated expiry date results in the lease being tacitly relocated.

Challenges with the current law

2.40 The term "tacit relocation" is alien to non-lawyers. There is a knowledge gap which extends not only to the average non-lawyer, but across most of the business sector. Non-lawyers are always surprised to be told of the implied term. The lack of knowledge of the existence of tacit relocation causes unfairness and means that parties may find themselves liable for increased costs. A typical example of the sort of situation frequently cited by stakeholders is:

> L leases property A for a period of 5 years to T at a rental of £50,000 per annum. The lease commencement is 1 April 2010. In the last year of the lease T has noted that his business is becoming increasingly successful and would benefit from larger premises. T investigates larger premises and agrees to take a lease from L2 of property B from 1 April 2015 at an annual rental of £70,000. On 31 March 2015 T goes to see L and attempts to give back the keys of property A. L rejects the keys and advises T that, as he has not given 40 days' notice of this intention to terminate the lease of property A, T has extended his lease of property A for another year by virtue of tacit relocation. He advises T that in addition to the rent of £50,000, T will also be liable for all the other obligations and outgoings relating to Property A. T consults a solicitor, who confirms that notwithstanding that the lease of property A makes no mention of 40 days' notice, L is indeed correct. So T finds himself liable for both property A and property B for the period of one year.

[77] Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096).
[78] *Javad v Aqil* 1991 1 WLR 1007.
[79] *Walji v Mount Cook Land Ltd* [2002] 1 P & CR 13.

2.41 Stakeholders have given us many examples of businesses reading their lease, not realising the existence of the implied term, and assuming that they can walk away from the premises at the termination date without having to do anything other than hand back the keys on the last day. These businesses often commit themselves to a new lease of alternative premises without realising that through their silence they have already committed themselves to a further year of rent on their current premises. In the small business sector, the cost of having to pay rent on two different properties can lead to businesses collapsing.

2.42 In the case of large property-owning organisations, substantial and costly resource requires to be employed in the management of leases generally, but particularly in relation to the avoidance of tacit relocation. There exist in both the public and private sectors large property-owning entities which require to constantly monitor their leases to ensure that they serve accurate notices to quit to obtain vacant possession of their properties, where that is necessary. While there may be cases where a landlord may be content for a tenant to continue in possession at the same rent, there may equally be cases where the landlord requires the property back so as to allow for redevelopment, or where a landlord has negotiated a higher rent with a new tenant. In order to ensure as seamless a flow of rent as possible skilled resource is required to ensure that tenants are required to remove at the appropriate date. Stakeholders advise us that if landlords had the ability to negotiate and enter into fixed term leases, which came to an end without notice at the end of the fixed term, there would be a saving in costs.

2.43 From representations made to us it would appear that the inability to enter into fixed term leases and the existence of an implied term in a lease providing for the application of the doctrine of tacit relocation causes uncertainty, a lack of clarity and a lack of fairness. It may be argued that for larger organisations that are able to pay for proper legal advice, this is less of a problem. However, for many small businesses this has been and continues to be a real problem. Leases bear to be fixed term on the face of them, but they are not. There is an implied term which is lurking there to catch out those with a lack of knowledge of the system.

How might the law be reformed?

2.44 In tacit relocation there has always been a differentiation between agricultural and commercial leases. Roman law was very clear in this respect giving a year under tacit relocation to agricultural leases, but it appears effectively nothing to urban leases. Agricultural leases in Scotland have their own statutory regime.[80] Commercial leases traditionally require more flexibility[81] and might benefit from a different regime.

2.45 Comparative legal systems across the world bear to operate the doctrine of tacit relocation, but none appears to operate it in the way it is operated in Scotland. Rather all other systems require positive actions to evidence consent for a continuation or renewal, while Scotland operates on the basis of doing nothing, or silence. It is very difficult to understand why consent should be evidenced by silence. It is clear from representations made to us that there is a lack of knowledge of the consequences of this silence.

2.46 Other systems which we have considered allow the parties to a commercial lease to contract out of tacit relocation. This allows parties, when addressing their commercial

[80] See para 2.11 above.
[81] See Chapter 1.

relationship at the outset, to discuss the term of the lease and consider what is best for that specific lease. Some systems defer consideration of tacit consent until actings after the end of a lease. To do that does of course mean that the status of occupation after the end of the fixed term is unclear.

2.47 There may be many possible options for reform of the doctrine of tacit relocation in relation to commercial leases. Asking solicitors to address the issue at the time of drafting of a lease will not be sufficient. Not all commercial leases are drafted by solicitors. We explore below two options for reform.

Option 1

2.48 One option which may address all the concerns of stakeholders is that the law could be reformed so that the doctrine of tacit relocation is dis-applied entirely in relation to commercial leases. It has been argued that the lack of knowledge of tacit relocation means that unless it is dis-applied, landlords will continue to issue draft leases with no mention of it and then tacit relocation will apply by default. We can see the reasoning here, and have some sympathy with this argument. Dis-applying tacit relocation from commercial leases would certainly simplify the whole regime of notices to quit, discussed in Chapter 3.

2.49 If the doctrine of tacit relocation were dis-applied in relation to commercial leases, the parties could be allowed to "contract in" or "opt in" to the doctrine, so that tacit relocation would apply. In that situation the issue of termination at the end of the lease and whether or not tacit relocation applied would be addressed at the outset and set out in the lease.

1. **Do consultees consider that tacit relocation should be dis-applied in relation to commercial leases?**

2. **If tacit relocation is dis-applied from commercial leases, should the parties to a commercial lease have the right to opt in to tacit relocation?**

2.50 However if tacit relocation is dis-applied from commercial leases, and the parties chose not to "contract in" or "opt in" to tacit relocation, what then happens at the end of the lease if the tenant remains in occupation and the landlord acts in a manner consistent with the lease continuing? One might contemplate drafting a statutory scheme for such a situation. It does seem to be counterintuitive to produce a statutory scheme which would simply set out that which tacit relocation currently achieves. However if consultees did favour such a solution a statutory scheme could address the status of the continued occupation and could also address what might be an appropriate period for the new statutory equivalent of tacit relocation. It may be that one might consider shorter periods, for example that any continued occupation would operate for six months rather than the one year period of tacit relocation.

3. **In the event that consultees consider that tacit relocation should be dis-applied from commercial leases, do consultees consider that a statutory scheme should be put in place to regulate what happens at the end of a fixed term lease if the parties have failed to opt into the current doctrine of tacit relocation but act as though the lease is continuing?**

Option 2

2.51 An alternative option might be to clarify the law to confirm that parties to a commercial lease have the right to simply contract out of tacit relocation. This would allow parties to address the issue at the outset and draft any appropriate terms into the lease. It would give landlords and tenants the certainty of entering into a fixed term lease, in the knowledge that it is just that – a fixed term lease – and that it will expire at the end of the fixed period, without any requirement for prior notice. Other legal systems across the world have adopted this practice and it appears to work.

2.52 Allowing parties to a commercial lease to contract out of tacit relocation would still ensure that the parties had the benefit of the doctrine of tacit relocation if they did not so contract. In this scenario of parties having the right to contract out, the doctrine would remain where no mention was made of it in the lease. It would seem sensible that, if parties are contracting out of tacit relocation, the appropriate contracting-out clause might address what would happen in the event that, at the end of the lease, both parties wished to continue with the lease. For example they might include a clause to the effect that if, at the end of the lease, the parties did wish the lease to continue, then it would continue but only for a fixed period, for example from month to month.

4. Should parties to a commercial lease have the right to contract out of tacit relocation?

5. If parties to a lease contract out of tacit relocation, and make no provision for what happens at the end of the lease, do consultees consider that tacit relocation should revive as the default situation if the parties act as if the lease was continuing after the termination date?

Chapter 3 Notices to quit – history and current law

3.1 In Chapter 1 we noted the concern of stakeholders that practice in relation to notices to quit is not clear. Stakeholders advise that current legislation is capable of different interpretations, and does not sit well with the common law, where the development of case law has added to the general confusion. This lack of clarity in the law leads to unfairness and increased costs for both landlords and tenants. We therefore start with a review of the legislation and the cases. Before we can consider how the law in relation to notices to quit may be made clearer, it will be necessary to consider the historical development of notices to quit but also to touch on the law in relation to removing of tenants generally.

3.2 A notice to quit may be given to prevent tacit relocation, or as a foundation for an action of removing, or both.[1] A notice to quit is sometimes referred to as a "notice of removing", and if instigated by the tenant as a "letter of removal". Removing is the technical term for the giving up of possession by a tenant. It may be during the lease or at termination, and may be voluntary from the tenant's perspective or may be instigated by the landlord.[2] If the tenant moves out at the end of a lease then the matter is at an end. If the tenant refuses to move then the landlord has to bring an action of removing. This chapter will focus on the notice to quit given to avoid tacit relocation. However any adjustment to the law in relation to notices to quit will require to be structured so that it complies with the rules which require to be followed to allow a party to instigate an action of removing.

Legislation

3.3 To review the subject of notices to quit it is necessary, briefly, to consider the historical development of the law and practice. We begin by looking at the older Acts. These applied to both rural and urban leases. The difference between these two types of lease was of particular importance in relation to the method of giving notice to quit. A rural lease is one where the main subject let is the use of the solum or ground and what is naturally on it or below it. An urban lease is where the main subject is what has been put on the ground artificially, such as buildings.[3]

3.4 Historically, and specifically prior to 1555, if a landlord wished to terminate a lease he would call at the tenant's house and intimate verbally that the tenant must remove on the second day after Whitsunday (15 May), and he would break a wooden dish or platter as a symbol that all agreement between him and the tenant was at an end.[4] In 1555 the Act Anent Warning of Tenants introduced more formal procedures. The main requirement was that a written notice had to be given to the tenant forty days before Whitsunday. However, it seems to have been generally agreed that not all the solemnities of the 1555 Act were required in removings from urban subjects[5]. All that was demanded by authority was that

[1] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 272.
[2] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 511; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967) p 245.
[3] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 70.
[4] R Hunter, *A Treatise on the Law of Landlord and Tenant* (3rd edn, 1860) Vol 2 p 38, citing Craig, ix. 4.
[5] *Riddell v Zinzan* 1671 M 13828.

there should have been fair warning of the intention to remove.[6] If the warning was not obeyed an action of removing would be raised in common form.[7] The shortest period regarded as safe (but not compulsory) was 40 days.[8] Section 1 of an Act of Sederunt of 1756 embodied this. It also gave landlords the option of bringing an action of removing before the Sheriff rather than the Court of Session. The action had to be called in court at least 40 days before Whitsunday. This Act of Sederunt rendered the 1555 Act practically obsolete.

3.5 The 1555 Act was finally repealed by the Statute Law Revision (Scotland) Act 1964. The Act of Sederunt of 1756 has never been repealed. The term of Whitsunday remained the only day against which the process could be raised until the Sheriff Courts (Scotland) Act 1853 which provided that a summons of removing could be raised at any time. The 1853 Act was repealed by the Sheriff Courts (Scotland) Act 1907.

3.6 A uniform rule regulating notices to quit in relation to houses in burghs was introduced by the Removal Terms (Burghs) Scotland Act 1881. This statute was repealed and its provisions extended to the whole country by the Removal Terms (Scotland) Act 1886. This Act was introduced in an attempt to regularise the notice periods across the country. A practice had developed of allowing a tenant to remain in occupation for a period beyond the legal term of removal, but such practice was not uniform. The 1886 Act relates to removal from "houses". It defines a house widely as a dwelling-house, shop, or other building and their appurtenances, and includes a dwelling-house or building let along with land for agricultural or other purposes.[9] The Act provides that in all types of "houses" where the term for removal from a house is Whitsunday or Martinmas, then in the absence of express stipulation to the contrary, the tenant must remove at noon on 28 May (if it is Whitsunday) or at noon on 28 November (if it is Martinmas), or in each case the following day where the termination date falls on a Sunday.[10]

3.7 The 1886 Act then goes on to provide that in all cases where warning is required 40 days before Whitsunday or Martinmas, such warning had to be given 40 days before 15 May and 11 November respectively.[11] This seems to have been a reflection of the common practice prior to the passing of this Act, but on the face of it does make the time periods more complicated.

3.8 A specific section[12] targeting shops or other buildings (and excluding a dwelling-house or building let along with land for agricultural purposes) provides that where these are let for four calendar months or less, notice, in the absence of express stipulation, has to be the equivalent of at least one third of the duration of the lease, but in any event no less than 28 days before the termination date. Section 6 of the 1886 Act provides that notices served in relation to a house (other than a dwelling-house or building let with land for agricultural purposes) may be given by registered letter signed by the landlord or tenant or by their

[6] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 563. *Wauchope v Hope 1767 M 13847.*
[7] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 563.
[8] Stair, *Institutions of the Law of Scotland,* 2.9.38.
[9] Removal Terms (Scotland) Act 1886, s 3.
[10] *Ibid* s 4.
[11] *Ibid*.
[12] *Ibid* s 5.

respective law agent or factor. It is important to note that there is no requirement for the notice to be in writing.[13]

3.9 The most recent Act dealing with notices to quit is the 1907 Act. This Act is regarded by many as the source of much confusion and uncertainty.[14] As may be seen from the foregoing summary of the old Acts, matters were not straightforward even before the 1907 Act.

The Sheriff Courts (Scotland) Act 1907

3.10 The 1907 Act provided certain new procedures for removing tenants. It dealt only with ordinary removings[15] and it did not render any of the former procedures incompetent.[16] The procedures introduced by the 1907 Act apply to cases in which no application to the court for removing is required. The relevant sections of the 1907 Act relating to termination of a tenancy are sections 34 to 38A. All notices in terms of these sections had to be in writing. These sections are considered below.

3.11 Section 34 introduced, for landlords, an ordinary removing by way of the registration in any court books and extract of a probative lease without the need for obtaining a court decree. This section applies to lands exceeding two acres in size. This can be done within the six-week period after the date of termination of the lease, and applies to a situation where there is a specified term of endurance of the lease. The period of notice to be given by the landlord in terms of section 34 is no less than one year and no more than two years prior to the termination date, where the lease is for three years or more in duration. Where the lease is running from year to year, or continuing by tacit relocation, or for any period less than three years, a period of notice of not less than six months is required.

3.12 Commenting on section 34, K G C Reid and G L Gretton[17] say:

> "Countless examples could be given of the poor condition of the statute book, but this is as good an example as any. One of the problems is that the section has not been updated. But even in 1907 it was a disgrace. Why is a provision about the law of leases to be found in a statute about the Sheriff Courts? More fundamentally, what does the section mean? To what extent is it about warrants to remove (which is how it starts off) and to what extent is it about length of notice and tacit relocation? We could carry on in this vein for some time."

3.13 Section 35 introduced a similar provision to section 34 for lands exceeding two acres where the tenant takes the initiative to terminate. This section applies whether or not the lease is in writing. This section provides that where the tenant has granted a letter of removal, either at the date of entering into a lease or at any other time, then the letter of removal has the same effect as an extract decree of removing and is a warrant for ejection in the same way as an extract lease is, in terms of Section 34. In terms of section 35 no notice is required if the letter of removal is given within the 12 month period before the date of termination of the lease.

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[13] Note that the 1886 Act was amended by the Removal Terms (Scotland) Act 1886 Amendment Act 1890. The amendment related to service contracts and notice of removal from houses related to service contracts.
[14] See the Law Reform Committee for Scotland, Cmnd 114 (1957) para 8; and *Campbell's Trustees v O'Neill,* 1911 SC 188 at 192 (Lord Johnston).
[15] At this time an ordinary removing applied to situations where the leases had come to its natural end. If it had come to an end prematurely for any reason then it was referred to as an extraordinary removing.
[16] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 266.
[17] K G C Reid and G L Gretton, *Conveyancing 2014* (2015), pp 36-37.

3.14 These two sections deal with land greater than two acres in extent. Rankine considers that sections 34 and 35 were probably intended to apply the law relating to farms and market gardens to all properties extending to more than two acres.[18] The provisions of these sections have been described as "so drastic and their operation so fraught with hazard to any who seek to invoke them that they are seldom if ever used".[19]

3.15 Section 36 allows the landlord to give notice of termination and then apply for warrant to eject on the basis of that notice. This section applies where the tenant is tenant of land exceeding two acres, held without a written lease, and requires not less than six months' notice to remove. The tenant is also entitled to serve not less than six months' notice of termination. This six months' notice entitles the proprietor, in the event of the tenant failing to remove, to apply for and obtain a summary warrant of ejection against the tenant. Although the section refers to a summary warrant of ejection, Rankine states that this is a misnomer and the reference should be to a summary warrant of removing.[20] Section 37 introduced the same system as section 36 of a notice of termination followed by application for a warrant to eject. Section 37 covers lets for a year or more where the subjects are a house, or more generally subjects other than land of two acres or more. This section is regarded as the section governing commercial leases. Both the landlord and the tenant are entitled to take advantage of this section. It provides for at least 40 days' notice before any term of Whitsunday (15th May) or Martinmas (11th November).

3.16 Section 37 has attracted criticism on three fronts. First, it still refers to 40 days' notice before the Whitsunday and Martinmas terms, as if these were the only termination dates. Secondly, it refers to ejection rather than removal. Thirdly, the drafting is confusing in relation to the calculation of the two acres and whether the land underneath the buildings should or should not be included in the calculation. Dealing with section 37, the case of *Campbell's Trustees v O'Neill*[21] addresses the second criticism. Lord Johnston stated that the summary ejection in section 37 of the 1907 Act was really a summary removing. He said "what Section 37 of the (1907) Act really effects is to provide a summary mode of commencing an action of removing, which, with confusing inaccuracy, it terms an application for a warrant for summary ejection." However the Lord President (Dunedin) and Lord Kinnear, while agreeing on the outcome of the case, did not agree with this interpretation of section 37. The Lord President came to the conclusion that the point of section 37 was to sweep away the part of the process which would have been an action of removing, and replace that with the simple 40 days' notice, which could then be followed by the stage of ejection.

3.17 Section 38 introduced, in relation to both houses and other heritable subjects, a summary application for removal where the lease is for less than one year. The notice period is to be no less than 28 days.

3.18 Under the current summary cause rules of the Sheriff Court where a decree for possession of heritable property is granted it has the same force and effect as a decree of removing or a decree of ejection, or a summary warrant of ejection or a warrant for summary ejection in common form, or a decree pronounced in a summary application for removing in

[18] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 571.
[19] Law Reform Committee for Scotland, Report (Cmnd 114, 1957), *cit* A G M Duncan, Research Paper on Actions of Ejection and Removing (Scot Law Com, 1984), para 7.2.
[20] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), at p 572.
[21] 1911 SC 188.

terms of sections 36, 37 and 38 of the 1907 Act respectively. These sections are therefore rarely used. It has been suggested that these sections have been left in force because they contain rules for periods and forms of notice which must be replaced before they can be removed from the statute book.[22]

3.19 Where any person or entity is in occupation of property without any right or title (such as a lease) to possess then, historically, the legal method of removing them was to bring an action of ejection.[23] An action of ejection involved no need for any warning. It proceeded as an ordinary cause and craved the "summary ejection" of the occupier. This action came within the common law jurisdiction of the Sheriff and is not dealt with by the 1907 Act. However, as has been noted above, the 1907 Act does provide in certain cases for a "summary warrant of ejection" and for a "warrant for summary ejection in common form". This use of the term "ejection", has served to confuse this area still further.[24]

3.20 Legislation on notices to quit has not advanced since the 1907 Act. Law reformers have put forward proposals. The Second Report of the Law Reform Committee for Scotland (Cmnd 114, 1957) pointed out that the number and variety of periods of notice made for unnecessary complexity. That Committee made clear recommendations which were endorsed by the Committee on the Sheriff Court (The Grant Committee, 1967) but never taken forward. A new Sheriff Court summary cause procedure for recovery of possession of heritable property was introduced by the Sheriff Courts (Scotland) Act 1971, but the difficulties with notices to quit were never addressed. We commissioned a Research Paper on the subject of Actions of Ejection and Removing. This was produced by A G M Duncan in January 1984 and was published alongside a consultative memorandum on Recovery of Possession of Heritable Property.[25] Following consultation we then published a Report on Recovery of Possession of Heritable Property in 1989.[26] This Report addressed both agricultural and non-agricultural leases, and included recommendations in relation to notices to quit.[27] The recommendations in the Report on termination and notices to quit were not implemented.[28] Some of our work on notices to quit within this report has been informed by the recommendations of the 1989 Report and we are grateful to our predecessors for that work.

Case law and commentary

3.21 There has been considerable, although not universal, support for the view that the 1907 Act, dealing primarily with courts and their procedures, applies only where a form of process for which it makes provision is adopted. It should not be regarded as altering the substantive law on matters such as the period of notice. Sheriff Mackenzie in *Gillies v Fairlie*,[29] which related to the lease of a house, stated that, "an Act to regulate procedure in the Sheriff Courts is not an enactment to which one would naturally look for an alteration in

[22] A G M Duncan, Research Paper on Actions of Ejection and Removing (Scot Law Com 1984) para 7.2.
[23] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 246.
[24] The introduction of Summary Cause Rules in 1976 means that all actions for recovery of possession of land are to be disposed of under summary cause procedure, except where there is a crave for payment exceeding £5000. This procedure makes no distinction between removings and ejections, and so the pursuer does not need to select which one to pursue.
[25] This was produced in response to a reference from the Lord Advocate to consider this area of law. See Scot Law Com CM No 59 (1984) at para 1.1.
[26] Scot Law Com No 118 (1989).
[27] See Part II of Scot Law Com No 118 (1989).
[28] Part of the Report was implemented by Chapter 45A of the Court of Session Rules inserted by Act of Sederunt 1996/ 2168 which relates to an action of removing against a person in possession without right or title to possess.
[29] (1920) 36 Sh Ct Rep 6.

the law of landlord and tenant."[30] He concluded that the 1907 Act only applied where the parties were pursuing a process provided for by the 1907 Act. This decision was approved by the First Division of the Court of Session in *Craighall Cast Stone v Wood Bros*[31] where Lord President Clyde said that Sheriff Mackenzie's judgement in *Gillies* was "admirably reasoned and admirably expressed", and agreed with every aspect of the Sheriff's opinion.[32] He further stated that section 37 (of the 1907 Act), "has only the limited effect of defining and regulating the new and special procedure with regard to removings which it was the object of the 1907 Act to introduce."[33] Lords Sands, Blackburn and Morison all agreed that the 1907 Act is a procedural Act. *Craighall* was, like *Gillies v Fairlie,* a lease of urban subjects. *Gillies* and *Craighall* were, interestingly, followed in *Milne v Earl of Seafield*[34] which dealt with agricultural subjects. *Gillies* and *Craighall* were also followed in *MacDougall v Guidi*,[35] where the Sheriff stated that, "the weight of authority, therefore, is that the remedies laid down under the 1907 Act in relation to this type and duration of lease apply to summary ejection and not to an action of removing."[36]

3.22 Lord President Clyde in *Craighall* commended the Sheriff in *Gillies*, "for arriving at the conclusion that, on a sound construction of the Act of 1907 neither section 37, nor section 37 combined with section 52 [now repealed], nor rule 110 [now repealed] has the effect of laying down a universal code for the regulation of notices to terminate all tenancies of the class referred to in Section 37, but that these provisions (separately or together) have only the limited effect of defining and regulating the new and special procedure with regard to removings which it was the object of the 1907 Act to introduce".[37]

3.23 There have however been cases where judges have taken a different view.[38] In *Duguid v Muirhead*,[39] the Lord Ordinary (Constable) held that the statutory provisions of the 1907 Act had to be "read as absolute and imperative."[40] This case related to agricultural subjects and had the added complication of claims for compensation. *Duguid* relies on the judgement of the House of Lords in *Glendinning v Board of Agriculture for Scotland*[41] which dealt with a notice served under section 18 of the Agricultural Holdings (Scotland) Act 1908. Section 18 was clear in its terms, and did not suffer from the complaints levelled at the 1907 Act. *Duguid* was in any event disapproved in the relatively recent case of *Lormor v Glasgow City Council.*[42]

3.24 *Lormor* deserves consideration as the judgement of the sheriff[43] was upheld and her analysis was endorsed by the Inner House.[44] The only real point at issue in *Lormor* was the

[30] (1920) 36 Sh Ct Rep 6 at 8.
[31] 1931 SC 66.
[32] *Ibid* at p 68.
[33] *Ibid* at p 69.
[34] 1981 SLT 37.
[35] 1992 SCLR 167.
[36] 1992 SCLR 167 at 172.
[37] *Craighall Cast Stone Co v Wood Brothers* 1931 SC 66 at 68.
[38] *Duguid v Muirhead* 1926 SC 1078; *Templeton v Graham* (1919) 35 Sh Ct Rep 249; *Robertson v McIntosh* 1922 SLT (Sh Ct) 7; *Montgomerie v Wilson* 1924 SLT (Sh Ct) 48.
[39] 1926 SC 1078.
[40] 1926 SC 1078 at 1086. Other cases where the 1907 Act was regarded as affecting the substantive law of landlord and tenant are *Templeton v Graham* (1919) 35 Sh Ct Rep 249 and *Robertson v McIntosh* 1922 SLT (Sh Ct) 7. It should be noted that *Duguid* was the decision of a single judge in the Outer House, whereas *Craighall* was a decision of the Inner House of the Court of Session.
[41] 1917 SC 264; 1918 SC (HL) 56.
[42] 2015 SC 213.
[43] *Lormor Ltd v Glasgow City Council*, Sheriff Swanson, Glasgow Sheriff Court, 19 September 2013, unreported.
[44] 2015 SC 213 at 218.

length of the period of notice required to be given by the tenant, Glasgow City Council, to prevent the operation of tacit relocation. The sheriff considered the position for urban subjects before the 1907 Act, considered what the Act had achieved and how it had affected the common law. She noted that it was the established position prior to the 1907 Act that in urban subjects an informal notice by the tenant of intention to quit was sufficient to exclude tacit relocation.[45] That had been decided in the case of *Hood v North British Railway Company.*[46] She noted separately at paragraph 17 that Rankine on *Leases* at p. 597 confirms that in the case of urban subjects, verbal notice, however informal, is sufficient, if seriously made and explicit.[47] This was confirmed more recently by Sheriff Kinloch.[48]

3.25 Sheriff Swanson then went on to consider sections 34 to 38 of the 1907 Act. She stated that it was always a matter of choice whether to use one of the special statutory procedures. She quoted Paton and Cameron[49] as confirming that the 1907 Act provides forms which may or may not be used depending on the circumstances. She confirmed that the 1907 Act did not render any of the pre-existing procedures for ordinary removing incompetent. Rather the 1907 Act defines cases in which no application to the Court for removing is required.

3.26 In summary, the 1907 Act requires written notice, but only if parties are using the simplified procedures provided for by the 1907 Act. The 1907 Act deals only with ordinary removings and its procedures do not render any of the former procedures incompetent. It would therefore appear that at common law in urban subjects the plea of tacit relocation may be excluded by verbal or informal notice by either party, provided that it is seriously made and explicit.

Drafting of commercial leases

3.27 The result of the confused state of legislation is that solicitors err on the side of caution. Even though the 1907 Act does not affect the common law, we are told that solicitors tend to comply with its terms as if they are compulsory in all situations. The application of separate sections of the 1907 Act to land of more than two acres causes problems. These sections may not have been intended to apply to urban subjects, and yet we are told that solicitors find themselves advising clients that if their industrial or commercial premises are larger than two acres they must, depending on the length of the lease, give at least one year's notice.

3.28 As we have already observed, historical practice by solicitors seems to have been to include wording which attempted to contract out of tacit relocation. Leases contained a clause along the lines: - "the tenants bind and oblige themselves and their foresaids to flit and remove themselves their servants, goods and gear of and from the premises at the expiry of the lease, and that without any previous warning or process of removing to be used against them".[50]

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[45] *Lormor Ltd v Glasgow City Council*, Sheriff Swanson, Glasgow Sheriff Court, 19 September 2013, unreported at para 16.
[46] (1895) 3 SLT 196.
[47] Sheriff Swanson also cited the cases of *Signet Group plc v C & J Clark Retail Properties Ltd* 1996 SC 44 and *Gilchrist v Westren* (1890) 17 R 363 as authority.
[48] *Brucefield Estate Trustee Company Limited v Computacenter (UK) Limited* [2017] SC LIV 38.
[49] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 274.
[50] See para 2.17.

3.29 This sort of wording, although historical, persists in modern leases and has served to further increase confusion, as it suggests, to the lay reader, whether they be a landlord or a tenant, that no notice of removal is required. As stated above, it is not entirely clear whether one may contract out of tacit relocation.[51] Stakeholders with whom we have spoken have all confirmed that, to be safe, they follow the approach set out in Rankine, and Paton and Cameron, and give notice in accordance with the periods set out in the 1907 Act.

Conclusion

3.30 To allow practitioners to be clear on what is required for a notice to quit in relation to a commercial lease, we consider that it may be appropriate to confirm that the terms of sections 34 to 38 of the 1907 Act do not regulate the requirements of notices to quit served in relation to the termination of commercial leases. These sections apply to, and are required for, agricultural leases.[52] We will discuss in the next chapter a proposed set of procedures for notices to quit in commercial leases.

6. Do consultees consider that the provisions of the 1907 Act should no longer regulate the giving of notice to quit in relation to the termination of commercial leases?

[51] See paras 2.13 -2.17.

[52] We note that the 1907 Act no longer regulates the giving of notice in relation to residential leases; this is regulated by the Housing (Scotland) Acts of 1988 and 2001 and, most recently, by the Private Housing (Tenancies) (Scotland) Act 2016.

Chapter 4 Notices to quit – options for reform

Introduction

4.1 Although it is by no means clear that the 1907 Act was intended to govern all notices,[1] most solicitors dealing with commercial leases do resort to that Act and its forms of notice. In this chapter we refer regularly to these forms. This is not intended to imply in any way that these forms are mandatory for all situations, but rather they are a useful point of reference since they are currently commonly used.

4.2 It is appropriate to note at this stage that we ask questions on the reform of the application of the doctrine of tacit relocation in Chapter 2. Depending upon the response from consultees to Chapter 2, this chapter and the questions contained in this chapter may be of less relevance. For example, if consultees favour giving parties the right, in commercial leases, to contract out of tacit relocation, then there will, as a consequence, be less need for notices.[2] On the other hand if there is no support for reform of the application of the doctrine of tacit relocation then this chapter will be of more relevance.

4.3 This chapter considers how, if consultees favour a new set of rules relating to notices to quit, we might frame provisions to govern the drafting and service of notices to quit for use in a modern commercial leasing market. It considers the minimum requirements, undertakes some comparison with foreign jurisdictions and addresses contracting out.

Form of notices to quit

4.4 The basic common law rule is that a notice to quit must be definite and unconditional.[3] As we have mentioned in Chapter 3[4] under the common law notices to quit may be verbal for urban subjects. Verbal notice is by its nature imprecise and uncertain. There may be doubt or differences of opinion as to what was said or as to the meaning of what was said. There may also be disagreement about or difficulties in recollecting the time when the notice was given. It would appear sensible that, to avoid difficulties, any notice to quit should be in writing.

7. Should notices to quit for commercial leases always be in writing?

4.5 While the basic common law rule that the notice to quit must be definite and unconditional applies to both landlords and tenants, the 1907 Act[5] drew distinctions between landlords and tenants. We wonder whether such a differentiation is unhelpful and causes uncertainty. We wonder whether it might be better to achieve consistency on the form of notice, whether it is given by a landlord or a tenant. In the succeeding paragraphs we

[1] See Chapter 3.
[2] It should be noted that even if there is support for contracting out, there will still be a requirement for notice in a default situation.
[3] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), pp 277-278.
[4] See para 3.26.
[5] See ss 34–38, discussed at paras 3.11-3.17 above.

consider the form and content and how a balance may be struck having regard to both the interests of landlords and the interests of tenants to ensure that the service of a notice to quit is as straightforward as is possible.

8. Should the content of the notice be the same for both landlords and tenants?

4.6 We have considered what should be contained in the notice and whether there should be a standard form. The current forms which tend to be used by solicitors are those referred to in the 1907 Act. However these forms, although brief, have given rise to some litigation. A notice by a landlord must explicitly require the removal of the tenant and that requirement is not fulfilled by a mere statement that the tenancy is to terminate at a specified date.[6] An inadequate or inaccurate description of the subjects will invalidate the notice.[7] A notice relating to part only of the subjects let is ineffectual.[8] The insertion of the wrong date will usually be fatal.[9] The 1907 Act forms were drafted in order to be used for the provisions of sections 34-38 of the 1907 Act. Modern forms would be more helpful.

4.7 We considered whether stakeholders might wish to have a prescribed form of notice to quit but our initial feedback from our Advisory Group is that they do not wish a standard form of notice which must be used in all instances. Instead they have advised us that they would prefer legislation which sets out certain essential requirements, but does not prescribe the form itself.

9. Do consultees wish to have a prescribed standard form of notice?

10. Would consultees prefer that statute should specify the essential requirements of a valid notice to quit rather than prescribing a standard form?

Essential requirements

4.8 The name of the party giving the notice, a description of the leased property and the date upon which the tenancy is coming to an end would all appear to be fundamental. Case law provides that the notice should make clear that the intention of the party giving it is to bring the lease to an end. It has been suggested to us that the notice should also include the address of the party giving the notice. In many cases this will be apparent from the lease, but its inclusion would be convenient for the party receiving the notice in case there is any challenge. It has also been suggested that for commercial leases a reference to the lease should be required. We would be keen to receive the views of consultees on the essential requirements for a notice to quit. Leases are often lost, and indeed some may never have existed in writing in the first place. We wonder whether in fact there will always be a lease document to which one can easily refer.

11. Do consultees consider that any notice given should contain the following:

(a) the name and address of the party giving the notice;

[6] *Patten v Morison* (1919) 35 Sh Ct Rep 252.
[7] *Scott v Livingston* 1919 SC 1; *Cameron v Ferrier* (1912) 28 Sh Ct Rep 220.
[8] *Gates v Blair* 1923 SC 430.
[9] *James Grant & Co Ltd v Moran* 1948 SLT (Sh Ct) 8.

(b) a description of the leased property;

(c) the date upon which the tenancy comes to an end; and

(d) wording to the effect that the party giving the notice intends to bring the commercial lease to an end?

12. Do consultees consider that one of the essential requirements should be a reference to the commercial lease itself?

13. Do consultees consider that any other content is essential?

4.9 Frequently such notices are given on behalf of a landlord or tenant, by a surveyor or a solicitor. In that situation it would seem sensible that the name and address of the agent is included in the notice as well as the name and address of the party on whose behalf it is given.

14. Do consultees agree that if the notice is given by an agent, the notice should contain the name and address of the agent and the name and address of the party on whose behalf it is given?

Period of notice

4.10 We considered the periods of notice set out in the 1907 Act in Chapter 3. Even before the 1907 Act, substantial periods of notice have always been the norm for agricultural leases, but historically that has not been the case for commercial or urban leases. Generally speaking, solicitors have tended to serve 40 days' notice to terminate a commercial lease, although where the property is greater than two acres in extent, some solicitors have adopted a "belt and braces" approach by using the longer periods set out in the 1907 Act. We need to consider, for commercial leases, whether 40 days is an appropriate period of notice. We also need to consider whether a distinction should be drawn between leases of a year or more, and those of less than a year.

4.11 We have already described the doubts about the application of sections 34 to 38 of the 1907 Act other than in relation to a form of process specifically provided for under the 1907 Act.[10] Given these doubts we need to consider whether any prescribed minimum period of notice should apply irrespective of the form of proceedings which may be adopted following upon the service of a notice to quit.

4.12 In 1907 a period of 40 days may have been thought to be ample time to organise one's affairs, and remove one's belongings from one property and settle them in another property. There would have been no cumbersome cabling, or large air conditioning units. Apart from the occasional cable for a light, most things could be uplifted and moved easily. In 2018, one might ask whether 40 days is sufficient time to organise a removal. Interaction with utility suppliers may involve lengthy notice periods. This paper does not deal with the complex subject of dilapidations; however, it may be argued by some that the length of a period of notice to quit a property must have regard to parties having time to undertake dilapidation works. In the case of some sectors of the economy, this period may require to allow time to undertake compliance with a regulatory process for obtaining competitive

[10] See Chapter 3.

quotes for such work. It is interesting to note that the Guthrie Committee recommended 90 days' notice as far back as 1950.[11]

4.13 In commercial leases of periods of more than a year, we are advised by stakeholders that where there is an option to break the lease before the termination date, the period of notice generally required to exercise the break option is a minimum of six months' prior written notice. One does have to ask why, if six months' notice is needed before a break, is the same amount of notice not needed before the end of a lease? It is surprising, given the length of many modern commercial leases, that the drafting does not usually address the period of notice which the parties would wish to receive prior to the termination of the lease. We are advised by stakeholders that one does come across more detailed drafting of notice periods in the case of national retailers operating a substantial portfolio of leased properties across the country.

Comparative commentary on periods of notice

4.14 It is of interest to note the periods of notice which are used in similar modern commercial leasing markets.

Germany

4.15 In Germany the parties to a fixed term lease are free to negotiate the length of period of notice. We are advised that the normal situation is that the parties will agree an appropriate period and it will be set out in the fixed term lease. If the lease is for an indefinite period of time the statutory notice period for commercial leases is six months.[12]

France

4.16 Historically, France and Scotland were in a similar position, with periods of notice differing depending in which part of the country the leased property was situated. However the Commercial Code now allows parties to negotiate the length of period of notice for a fixed term lease. It also provides for a period of at least six months' notice for indefinite leases.[13]

England and Wales

4.17 The standard form of notice by a landlord under the Landlord and Tenant Act 1954[14] must be no more than 12 months and no less than 6 months before the termination date. If a tenant does not wish a tenancy protected by the 1954 Act to continue after the end of a fixed term then the tenant may give written notice no later than 3 months before the end of the fixed term.[15] For a tenancy no longer protected by the 1954 Act the landlord must serve notice of not less than 3 months nor more than 6 months.[16]

[11] *Inquiry into the Tenure of Shops and Business Premises,* Cmnd 7903 (1950) para 48.
[12] BGB § 580a II.
[13] French Commercial Code § L145-9.
[14] s 25.
[15] s 27.
[16] R Hayes D Sawtell, *A Practical Guide to the Landlord and Tenant Act 1954: Commercial Tenancies* (2017), p 85.

South Africa

4.18 Periods of notice under the common law at the end of a fixed term tenancy are not required.[17] In a periodic lease the period of notice required is often related to the nature of the lease, but if the parties have failed to agree a period of notice then the period of the payment of rent will indicate the required notice period.[18] So if the rent is payable quarterly, then three months' notice will be required. There is an overriding requirement of reasonableness.[19] There are special rules for the protection of public sector tenancies.

Australia

4.19 Under the common law a valid lease must be of a duration that is certain.[20] A fixed term lease finishes at the termination date with no notice being required. There are minor exceptions for periodic tenancies and tenancies at will. In the periodic tenancy the notice will be for the period of regular extension, normally a week, a month or a year, depending on the initial drafting.[21] The tenancy at will requires reasonable notice.[22]

Comparative conclusions

4.20 The legal systems of the countries with which we have carried out a comparative exercise appear to operate on the basis that the parties will be sufficiently sensible and commercially aware to agree periods of notice for termination at the outset of negotiations on a lease. The fact that we do not do this in Scotland, or at least rarely do it, may be related to the fact that we adopted the style of commercial lease from England, and the terms of the standard English lease do not include notice periods at termination. However the English statutory default periods are longer than 40 days.[23]

Moving forward

4.21 In order to ensure that any system of giving of notice for commercial leases is as easy to operate as possible, it does seem appropriate for parties to be encouraged to address the period of notice at the time of entering into the lease. However if that is not done then for commercial leases Scots law would require to have a default period. It may be that consultees are content to retain the current 40 day period but we would be grateful for views.

15. Do consultees consider that the commonly used period of notice of 40 days is a sufficient period of notice and should remain the minimum default period of notice?

16. If consultees do not consider a period of 40 days' notice to be sufficient, then what do consultees consider would be an appropriate default period of notice for commercial leases?

[17] G Glover, *Kerr's Law of Lease and Sale* (4th edn, 2014), 23.3.1; *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325.
[18] G Glover, *Kerr's Law of Lease and Sale* (4th edn, 2014), 17.5.
[19] *Tiopaizi v Bulawayo Municipality* 1923 AD 317.
[20] B Edgeworth, C Rossiter, P O'Connor, A Godwin, *Sackville & Neave Australian Property Law* (10th edn, 2016), 8.14; *Say v Smith and Fuller* (1530) 1 Plow 269; 75 ER 410 (per Anthony Brown J at 272; 415).
[21] B Edgeworth, C Rossiter, P O'Connor, A Godwin, *Sackville & Neave Australian Property Law* (10th edn, 2016), 8.18.
[22] *Ibid* at 8.19.
[23] See para 4.17 above.

17. Do consultees consider that any prescribed minimum period of notice to quit for a commercial lease should apply irrespective of the form of any court proceedings which may be adopted?

Calculation of the period of notice

4.22 The Removal Terms (Scotland) Act 1886 is still in force and provides, by section 4, for the computation of periods of notice where leases have a termination date of Whitsunday or Martinmas. Although this situation was altered by the Term and Quarter Days (Scotland) Act 1990[24] – which regulates, in relation to Scotland, the dates of Whitsunday, Martinmas, Candlemas and Lammas[25] – there appears to be no good reason why parties to commercial leases should calculate their period of notice other than by reference to the effective date of the notice.

18. Do consultees agree that every period in a notice to quit for commercial leases should be calculated by reference only to the period intervening between the date of the giving of the notice and the date on which it is to take effect?

4.23 There is now clear authority to the effect that notices to quit must be served a period of clear days before the termination date.[26] In the event that a party is giving 40 days' notice, then exactly 40 days is not enough.[27] In the case of 40 days' notice this effectively means 41 days. If the lease itself provides for assumptions on how long a notice should take, for example many leases provide that a notice will deemed to have been received 48 hours after posting, then that 48 hour period will require to be taken account of in addition to the 40 day period.

19. Do consultees consider that it is necessary to have a statutory statement to the effect that any notice period will be construed as a period of clear days?

Should all leases have the same length of period of notice?

4.24 In leases of less than a year tenants are aware that their occupation is less permanent. Tenants agreeing to enter into a short term lease may do so for various reasons. They may not have the financial wherewithal to commit to a longer lease. Their business plan may foresee a need for larger premises after a year. Or they may simply be cautious and not want to make a bigger commitment. Whatever the reason, they will fully expect to have to move on. If one was to consider a standard notice period of six months for most leases, one might have to think about a shorter period for shorter leases. It would however be desirable to devise a system which was as simple and easy to operate as possible. The 1907 Act[28] provided that for leases of less than four months the notice period had to be at least one third of the duration of the lease, and where the lease was more than four months duration, but less than a year, notice had to be 40 days. In 1971 there was inserted a

[24] This Act implemented our Report on the Scottish Term and Quarter Days (Scot Law Com No 108 (1987)).
[25] Traditionally the Term Days are Whitsunday and Martinmas and the Quarter Days are Candlemas and Lammas.
[26] *Signet Group plc v C & J Clark Retail Properties Ltd* 1996 SC 444.
[27] *McLeod v George* (1933) 49 Sh Ct Rep 302.
[28] s 38.

proviso[29] to the effect that a minimum period of notice in leases of less than a year be no less than 28 days. This all seems overly complicated, and onerous for tenants.

4.25 The Second Report of the Law Reform Committee for Scotland[30] suggested simplification of periods of notice. They proposed that periods of notice for leases of more than a year should be 40 days and for leases of less than a year the notice period should be 14 days or the period of the lease, whichever is the shorter. The Committee reported shortly before the introduction of a statutory requirement of 28 days' notice in the case of dwelling houses by the Rent Act 1957.[31]

4.26 In discussion with our advisory group it was suggested that it might be more appropriate to differentiate between leases of three years or more, and those of less than three years.

20. In the context of the rules for giving notice, do consultees consider that it is appropriate to differentiate between commercial leases of one year or more and those of less than one year?

21. Would consultees prefer the differentiation to be at a different juncture, for example at the end of two or even three years?

Extent of property

4.27 The 1907 Act provided for different periods of notice depending on the extent of the relevant property. Stakeholders have told us that any such differentiation is unhelpful. It is not always readily apparent to a solicitor that a property may or may not be above a certain size. Likewise a client may not be aware of the exact extent of the ownership or leasehold. It would appear to be simpler for all concerned to have the same rules applying to all commercial properties, irrespective of their extent.

22. Do consultees consider that the same rules should apply irrespective of the extent of the property concerned?

One size fits all

4.28 It may be that a more radical solution should be considered. Consultees may wish to consider whether one form of notice to quit should apply to all commercial leases in the same way, irrespective of size, or type of property, and irrespective of the length of lease. In such a situation there could be a minimum default period, say three months, but in the event that the lease was shorter than the default period then the period of notice would be one half of the length of the lease. So, subject to the parties having agreed some other period of notice within the terms of the lease, in a lease for two months, the notice period would be one month, but in a lease of eight months the notice period would be the minimum default period of three months, and in a lease for eight years the default period would still be three months.

[29] Rent (Scotland) Act 1971, s 135(3), Sch 18 Pt II.
[30] Cmnd 114, 1957.
[31] Subsequently repealed by the Rent (Scotland) Act 1971.

23. Do consultees favour notices to quit which would apply to all commercial leases irrespective of the size and type of property and irrespective of the duration of the lease?

24. If there are to be provisions which apply equally to all commercial leases:

(a) what would be the preferred minimum default period for notice?

(b) for commercial leases with a duration of less than the default period, do consultees consider that the period of notice should be one half of the length of the commercial lease or some other fraction thereof?

Where the date of termination is unknown

4.29 This situation may arise where the lease was originally verbal, or where the lease has been lost. In cases such as this we would be keen to hear consultees' views on how this difficulty might be resolved. This may be a lease running on tacit relocation. Where the entry date is known, the common law presumption exists so that the lease is taken to be one of a year.[32] This would be held to be running on tacit relocation and therefore a date of termination is easily calculated. If the entry date is unknown one might consider adopting a statutory presumption of an entry date, say for example Whitsunday, 28 May.

25. Do consultees consider that in cases where a date of termination is unknown, but the date of entry is known, there should be a statutory presumption to the effect that the commercial lease is implied to be for a year, or do consultees consider that the existing common law presumption is sufficient?

26. Do consultees consider that in cases where the date of entry is unknown there should be a statutory presumption of 28 May as the date of entry, or some other date?

Break clauses

4.30 The terms of a lease may provide that it can be brought to an end at a stipulated point or points in time before its natural termination. Breaks are common in longer leases especially where, at the commencement of the lease, it is uncertain how a business will develop. The break option may be in favour of either party or both. Termination at a break is normally governed by the terms of the lease. The lease will normally specify how much notice is required if the tenant and / or landlord wishes to exercise the break. We would be interested in consultees' views on whether, for the purposes of consistency, notices to break should be governed by the same default rules as notices to quit.

27. Do consultees consider that notices exercising an option to break a lease before its natural termination should be required to conform to the same default rules as notices to quit?

[32] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 7; *Gray v Edinburgh University* 1962 SC 157 at 163 (Lord Justice-Clerk).

Withdrawal of notice to quit

4.31 Should the withdrawal of a notice to quit be permitted? It has been held that a notice cannot be repudiated after it has been expressly accepted.[33] However the question of whether a notice can be withdrawn without the consent of the recipient, does not appear to have been settled. Stakeholders advise us that in practice where an appropriate and valid notice has been served, it is generally accepted that such notice can only be withdrawn with the consent of both parties. This situation may arise frequently where one party has served a notice to quit to protect their position, but subsequently reaches agreement with the other party to extend the lease, possibly on slightly different terms. In a falling market for example a landlord might be keen to retain a tenant even if they have to accept a lower rental. In such a situation the parties would, in their new agreement, document their agreement to ignore the notice to quit, or treat it as if it had never been served.

28. Do consultees consider it necessary for there to be a statutory statement to the effect that a notice to quit may only be withdrawn with the consent of both parties?

Contracting out

4.32 Should parties be entitled to contract out of the provisions for notice which are discussed above? While it may seem straightforward that parties should be entitled to increase the periods of notice by agreement, the ability to shorten the period of notice requires closer consideration. There appears to be an element of public interest in notice periods. The requirement to give a minimum period is a safeguard for a tenant. A tenant is often in a weaker negotiating position prior to the outset of the lease. Statutory provisions protect the tenant by requiring notice to be given which gives a reasonable warning of the termination date and time in which to arrange removal and alternative premises. Likewise a landlord on the other hand requires a reasonable period to arrange for a new tenant.

4.33 Our 1989 Report recommended that parties should be entitled to contract out of the rules for notice, to provide a longer period. However it recommended that the parties could only contract out for a shorter period of notice after the commencement of the lease and the taking of possession by the tenant. This was suggested as necessary in order to protect the interests of whichever of the parties is in a weaker bargaining position during the negotiation of the terms of the lease. This is more often perceived as being the tenant. However, after the commencement of the lease various circumstances may arise which mean that the parties may wish to contract out of the provisions during the currency of the lease. One party may have offered the other a financial incentive to terminate the lease early. Both parties may have missed the requisite date for service of the termination notice, but still wish the lease to come to an end. There could be various reasons. It does therefore seem appropriate that any new set of rules make provision for contracting out. The recommendations of the 1989 Report may still be relevant.

4.34 Consideration should be given to specifying the form of a contracting out agreement, and in particular whether they should be in writing. If these agreements are to be binding on successors, they would have to be available to be examined by a successor. If consultees are attracted to the recommendation in the 1989 Report that contracting out for a shorter

[33] *Gilmour v Cook* 1975 SLT (Land Court) 10.

period could only take place after the commencement of the lease then, to ensure that they have actually been entered into after the commencement of the lease, it would be preferable to have these agreements in writing.

4.35 Regard will require to be had to the 1949 Act.[34] In the event that this Act is to subsist, then an appropriate carve out will be required so that parties cannot contract out of the provisions of the 1949 Act.

29. Do consultees consider that parties should be entitled to contract out of the provisions to agree a longer period of notice?

30. Do consultees agree that parties should be able to contract out of the provisions to agree a shorter period of notice?

31. Do consultees consider that any contracting out of the provisions to agree a shorter period should only be permitted after the commencement of the lease and after the tenant has taken possession of the leased property?

32. Do consultees agree that contracting out agreements should always be in writing?

Where tacit relocation does not apply

4.36 We pointed out in Chapter 2 that tacit relocation does not apply to certain types of lease where the intermittent or temporary nature of the tenancy can be said to be inconsistent with the principle of tacit relocation.[35] In this situation the lease simply comes to an end at the termination of the stipulated duration of the lease. It is not necessary to give notice. In order to avoid confusion it may be appropriate to make it clear that this situation will not be affected by any changes as a result of this Discussion Paper.

Multiple landlords and multiple tenants

4.37 In the field of commercial leases it may be that there are occasionally instances where a landlord or a tenant comprises more than one entity. There may be a situation of more than one landlord of distinct physical parts of the leased property, or it might be a case of several landlords with *pro indiviso* shares in the leased property. The same may apply in the case of tenants. One might expect that if that scenario existed at the date of entry under the lease, then the drafting of the lease would cover what should happen in relation to the giving or receiving of notices. In the case of a landlord consisting of more than one entity, the lease would normally nominate one of the parties, or even appoint an agent, to give and receive notices on behalf of the landlord. In the case of a multi-tenant at the outset of a lease, one would expect the landlord to insist upon appropriate provision in the lease. However, if a multi-landlord or multi-tenant situation comes to pass after the date of entry, then provision may be required to ensure that such situations are covered by any new proposals.

[34] See Chapter 6.
[35] See para 2.9 above.

33. Are consultees aware of any problems with service of notices in commercial leases in situations with multiple tenants or multiple landlords that might require the provision of specific legal rules?

Sub–tenancies

4.38 Where a sub-tenancy is to be terminated at or prior to the expiry of a tenancy, the current position is that the normal rules as to service of notice to quit apply as between the tenant and the sub-tenant. If the tenant has not given appropriate notice to the sub-tenant, then the situation of the sub-tenant will depend on whether the sub-tenancy was authorised by the landlord or not. Where the sub-tenancy has not been authorised, the sub-tenant is in the same position as any other occupier without right or title and may be ejected without warning.[36] Where the sub-tenancy has been authorised, the sub-tenant's right to occupy the property is dependent on the tenant's right to occupy under the principal lease. Where the tenancy is terminated the sub-tenant's right to occupy is extinguished. However in a case where the tenant is empowered to sub-let, the sub tenant cannot be simply ejected without warning.[37] Consideration may be required to be given as to whether a landlord should be required to copy any notice to quit to any authorised sub-tenants.

34. Are consultees aware of concerns with service of notices on sub-tenants that might require the provision of specific legal rules?

Service of notices to quit

4.39 Schedule 1 of the 1907 Act provides that any notice under sections 34 to 38 of the Act may be served by a sheriff officer, by anyone entitled to give the notice or by the entitled person's solicitor or factor, posting by registered post or the first class recorded delivery service.[38] Although the current provisions of the 1907 Act were inserted by an Act of Sederunt in 1996[39] the form and pace of communication has moved on. The Interpretation and Legislative Reform (Scotland) Act 2010 provides, by Section 26,[40] a more modern code for service of documents, which includes the ability to serve by electronic means in the event of agreement. Such agreement could be incorporated in any lease at the outset.[41]

35. Do consultees consider that the service of notices to quit should be governed by the 2010 Act?

36. Do consultees consider that notices should be capable of being served in any other ways?

[36] Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), pp 520-521; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), pp 224 and 257.
[37] *Robb v Brearton (*1895) 22 R 885.
[38] Rule 34.8.
[39] Act of Sederunt (Sheriff Court Ordinary Cause Rules Amendment) (Miscellaneous) SI 1996/2445 rule 3(61) (November 1, 1996).
[40] s 26 provides that, where an Act of the Scottish Parliament or Scottish Instrument provides for something to be "served", then this may be done by being: delivered personally; sent to the person's proper address; sent by registered post or a recorded postal service; or delivered electronically (where this is agreed first by the parties).
[41] As a further matter it will be relevant to know when a notice served by electronic means becomes effective. Parties may, of course, provide for this in their lease. For a recent discussion by this Commission of a similar issue see paras 4.72-4.85 of the Report on Review of Contract Law (Scot Law Com No 252 (2018)).

Chapter 5 Apportionment of rent

Introduction

5.1 A recent Supreme Court case[1] has highlighted several areas of concern with regard to the apportionment and recovery of rent in cases where a lease is terminated early. Although this is an English case, stakeholders have expressed uncertainty as to the legal position in Scotland with regard to several aspects of the decision, namely:

- whether a tenant will be entitled to the repayment of rent which has been overpaid in cases of early termination;
- whether, in this respect, rent is to be considered as accruing day to day; and
- whether the Apportionment Act 1870 applies to Scotland.

5.2 The case concerned a tenant which exercised its right under a break clause to terminate the lease early but was not able to recover rent paid in advance of the break. In this chapter we question whether in Scots law, in the case of a commercial lease which requires rent to be paid in advance, a tenant will be able to recover rent which is attributable to the days which post-date any early termination of the lease.

5.3 Section 2 of the 1870 Act provides:

> "All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

5.4 The following cases illustrate how the courts have interpreted this section and should serve to highlight and contextualise the perceived problem.

English case law

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another[2]

5.5 In this case the tenant had exercised its right under the break clause to terminate the lease. The break notice was validly served in accordance with the terms of the lease and the question before the court was whether the tenant could recover the apportioned rent in respect of the days which post-dated the early termination.

5.6 The Court considered two avenues by which the tenant might be able to recover the apportioned rent. The first was through an implied term in the lease to that effect, and the second was through the operation of the 1870 Act.

[1] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72.
[2] [2015] UKSC 72.

5.7 The majority of the judgement is dedicated to a discussion of whether or not such a term could be implied – which was decided in the negative.

5.8 Significantly, the court highlighted that the 1870 Act only applied to leases which provide for rent payable in arrears. Lord Neuberger (the President) stated:

> "There is no doubt that section 2 [of the 1870 Act] applies to rent payable in arrear, as was held by Malins V-C in *Capron v Capron* (1874) LR 17 Eq 288. In *Ellis v Rowbotham* [1900] 1 QB 740 the Court of Appeal held that the 1870 Act did not apply to rent payable in advance and, ever since then, it has been assumed that this was the law. At the invitation of the court, it was argued on behalf of the claimant that the *Ellis* case should be overruled. I am satisfied that it should be approved."[3]

5.9 Indeed, from a close reading of the 1870 Act it is difficult to argue that the Act is intended to apply to sums payable in advance, especially when one considers the reference to "interest"[4] – as it is difficult to imagine a situation in which interest is to be paid in advance.

5.10 Thus, the court held that the tenant was not entitled to repayment of rent which it had paid for the period after the early termination of the lease.

QuirkCo Investments Ltd v Aspray Transport Ltd[5]

5.11 In this earlier case, a similar situation arose. The majority of this judgement is dedicated to a discussion of whether the tenant had fulfilled its obligations under the lease (a pre-requisite for the break notice to be effective) – namely whether unpaid insurance premiums had been due.

5.12 The court also considered whether, pursuant to a valid exercise of the break clause under the lease, the tenant would become entitled to repayment of the apportioned rent which was attributable to the days which post-dated the termination of the lease.

5.13 Judge Keyser QC, sitting as a judge of the High Court, was unambiguous in stating that the law does not provide for such repayment:

> "The common law does not permit apportionment of rent in respect of time. The Apportionment Act 1870 does not affect the date on which rent is payable and does not authorise apportionment in respect of time of rent payable in advance. The general principle is that rent payable in advance is payable in full on the due date, notwithstanding that the lease subsequently determines before the expiry of its term…"[6]

5.14 The law of unjustified enrichment was also considered – albeit briefly – but the court was of the opinion that in cases such as this, unjustified enrichment should not "operate to circumvent the scheme of obligations and entitlements contained in a valid contract*".*[7]

5.15 Thus, the current position in England and Wales is that for an apportionment of rent payable in advance to be recoverable in the event of early termination, express provision to

[3] *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72 at para 44.
[4] Apportionment Act 1870, s 2.
[5] [2012] L & TR 19.
[6] *Ibid* at para 63.
[7] *Ibid*.

this effect must be included in the lease agreement. This was clearly articulated by Judge Keyser QC in the *Quirkco* case:

> "A claim for recovery of the rent referable to the period between the termination of the lease and the end of the quarter must therefore rest on the terms of the lease itself."[8]

5.16 There are other English judgements (eg *PCE Investors Ltd v Cancer Research UK*[9]*)* that address the same situation, all of which come to the same conclusion through similar lines of reasoning – generally relying on *Ellis v Rowbotham*[10] which was recently affirmed by the *Marks and Spencer* case.[11]

The position in Scotland

5.17 Some stakeholders with whom we consulted were unsure as to whether the 1870 Act applies to Scotland. As there is nothing in the provisions of the Act to indicate that it has anything other than UK-wide extent, we consider that the Act does indeed apply to Scotland, although it has not been mentioned in any reported Scottish cases for over 50 years.[12] There are several cases from the start of the 20th century which mention the Act, though few go into much detail as to the way in which the Act operates. However, one judgement from 1909 does provide some useful insight.

Balfour's Executors v Inland Revenue[13]

5.18 In this case, upon a landowner's death, the Court held that in calculating the amount of estate duty to be paid, the amount of rent due should be calculated – in accordance with the 1870 Act – on a day to day basis as running from the date that the rent was due and payable under the terms of the lease to the date of the landowner's death:

> "the Apportionment Act… said, in terms, that, like interest on money lent, rent shall be considered as accruing from day to day. That expression seems to me to be perfectly clear. The moment that you come to a concluded period, that period is gone and done with; but then, the moment you have passed that period the new period begins to run, and that period is to be apportioned from day to day."[14]

5.19 The Court in *Balfour's Executors* made no distinction between rent payable in advance and rent payable in arrears – most likely because it was customary for rent to be payable in arrears at that time. It is important to note, however, that the 1870 Act would not have applied if the lease in *Balfour's Executors* had required rent to be payable in advance.

5.20 So while the 1870 Act does apply to Scotland, and provides that rent is accruable on a day to day basis, this will only be the case where rent is payable in arrears. There seems to be no authority for the apportionment of rent in Scotland where – as in the vast majority of commercial leases – rent is payable in advance. Following from the *Marks and Spencer* case, we can assume that the only way in which overpaid rent will be recoverable in the event of early termination is if the lease expressly provides for this. *Marks and Spencer* is a

[8] *Ibid* at para 64.
[9] [2012] EWHC 884 (Ch).
[10] [1900] 1 QB 740.
[11] [2015] UKSC 72 at para 44 (Lord Neuberger).
[12] Rankine, *A Treatise on the Law of leases in Scotland* (3rd edn, 1916), p 350.
[13] 1909 SC 619.
[14] *Ibid* at 622 (Lord President).

decision of the Supreme Court on the construction of a UK statute and we would expect it to be followed in Scotland.

Unjustified enrichment

5.21 As noted above, the court in the *QuirkCo Investments* case expressed the view that unjustified enrichment should not operate to undermine the terms of a valid contract. This was, of course, an English case. A similar approach was, however, taken by the Scottish Courts in the second *Dollar Land* case.[15] There, too, the courts were reluctant to utilise the doctrine of unjustified enrichment to prevent a significant loss to one party, deferring again to the terms of the lease itself. In his judgment, Lord Hope of Craighead said:

> "An obligation in unjustified enrichment is owed where the enrichment cannot be justified on some legal basis arising from the circumstances in which the defender was enriched. There can be no better justification for an enrichment than that it was obtained and is being retained in the exercise of a contractual right against the party who seeks to invoke the remedy."[16]

5.22 This suggests to us that the law of unjustified enrichment is unlikely to provide a remedy in cases where the lease provides that rent is payable in advance by the quarter and that exercise of a break clause can only be effective where the obligations under the lease (including the advance quarterly payment) have been met. In other words, where the terms of the lease do not provide for advance payments to be recoverable, we think that the courts are unlikely to look behind this. It seems to us that the courts in Scotland would be slow to find a remedy in unjustified enrichment if a case similar to *Marks and Spencer* arose here.

Property Standardisation Group commercial leases

5.23 In July 2017, the Property Standardisation Group (PSG)[17] published a suite of model office leases,[18] in November 2017 they published a suite of retail leases and in April 2018 they published a suite of model logistics/industrial leases. We understand that food and drink leases are the next suite due to be published. These leases are based largely on the Model Commercial Lease (MCL) which was launched in England and Wales in 2014, originally commissioned by the British Property Federation.

5.24 All of the PSG leases which have been published to date contain style break clauses which include appropriate protection to cover the situation identified in this chapter.

5.25 The PSG leases also contain repayment of rent clauses to protect the interest of the tenant in any instance of termination, be it through a break clause or otherwise. These will allow the tenant to recover rent which relates to days post-dating the termination date.

Conclusion

5.26 In summary, the 1870 Act does indeed apply to Scotland but it is evident from the English courts' treatment of the Act that it only applies to rent payable in arrears. Therefore, we consider that in Scots law, in the case of leases which require rent to be paid in advance,

[15] *Dollar Land (Cumbernauld) Ltd v CIN Properties* 1998 SC (HL) 90.
[16] *Ibid* at 94 (Lord Hope).
[17] The PSG was formed in 2001 to produce agreed forms of documents and procedures for Scottish commercial property transactions. http://www.psglegal.co.uk/.
[18] Second versions of the model leases were published in October 2017.

a tenant will not be able to recover rent which is attributable to the days which post-date the early termination of the lease, unless the terms of the lease specifically cover this. Nor do we think that unjustified enrichment would provide a remedy in such circumstances.

37. Do consultees agree that, unless provided for in the terms of the lease, Scots law does not provide for the recovery of rent paid in advance in circumstances where the lease is terminated early?

5.27 It appears to us that there are two ways of avoiding this situation: either to amend the 1870 Act; or to make specific provision within a lease to cover the repayment of rent paid in advance (for example, as the PSG lease does).

5.28 If the 1870 Act were to be amended so as to provide that the payment of rent paid in advance under a lease in Scotland is to be recoverable, then we consider that such an amendment would fall within the legislative competence of the Scottish Parliament.[19] However, it may be undesirable to have different rules as regards the recovery of advance rent payments operating in England and Wales and in Scotland. To do so may create confusion for investors as well as practical difficulties regarding the administration of monies due under a lease. Further, it will be noted that the 1870 Act does not just apply to rent. It also applies to annuities, dividends and other periodical payments.[20] Any amendment solely in respect of rent under Scottish leases would therefore need to be framed carefully.[21] A different option may be for the 1870 Act to be amended (either as regards rent or, if appropriate, more widely) in respect of all of the United Kingdom. However, such an amendment would require to be made by the UK Parliament and would require a full examination of the relevant law of England and Wales and of Northern Ireland.

5.29 If no such amendment as is described above is made, then it seems to us that the law does not currently provide any comfort to the tenant who has made payment of rent in advance. However, inserting a specific clause into the lease to cover the situation (in terms similar to the PSG lease) would seem to provide a means of addressing the situation in practice.

38. Do consultees think that an amendment to the 1870 Act to address the situation identified above would be desirable?

39. If consultees think that an amendment would be desirable, do consultees have views on whether it would be desirable for the law of Scotland in this respect to differ from the rest of the United Kingdom?

[19] The payment of rent under a lease in Scotland would fall within the ambit of Scots private law and therefore would not be in breach of any of the restrictions on legislative competence set out in s 29 of the Scotland Act 1998.

[20] For a discussion by this Commission of the application of the 1870 Act to trust income see Chapter 10 of the Report on Trust Law (Scot Law Com No 239 (2014)). This will be directly relevant where the rent under a lease is treated as trust income, eg where the lease is a trust asset.

[21] In particular to ensure that matters of law reserved to the UK Parliament were not encroached upon. For example, "annuities" is defined in s 5 of the 1870 Act as including salaries and pensions. The Act also covers dividends. The reservations in Schedule 5 of the Scotland Act 1998 relating to Employment, Trade and Industry and Social Security would therefore need to be carefully considered.

Chapter 6 Tenancy of Shops (Scotland) Act 1949

Introduction

6.1 The Tenancy of Shops (Scotland) Act 1949 is the only statutory form of security of tenure under Scots law for business tenancies. The Act affords a very limited security of tenure to shop tenants. Under Part II of the Landlord and Tenant Act 1954, all commercial tenants in England and Wales are afforded security of tenure. Essentially this means that the tenant can remain in possession of the premises after the agreed term of the lease has come to an end, unless the landlord successfully opposes a renewal[1] or if the parties have contracted out of Part II of the Act.[2] There is no equivalent legislation in Scotland.

6.2 The 1949 Act was originally passed in order to give protection to small shopkeepers in the post-war era. At this time there was a general concern that, due to the lack of available premises, shop tenants were being forced to pay inflated rents or face eviction without the option of buying the premises.[3] *Hansard* records of the House of Commons debate in 1949 show multiple references to "small shopkeepers." For example, Mr McGovern, MP for Glasgow Shettleston, stated that,

> "…most small shopkeepers would have had the pistol put to their heads either to buy at exorbitant prices or to quit the premises. This is part of the general ramp which has been going on with property of all kinds."[4]

6.3 The 1949 Act was originally intended to continue in force only until 31 December 1950;[5] however it was continued on a year-to-year basis[6] and later made permanent by the Tenancy of Shops (Scotland) Act 1964.[7] It has been put to us that the Act is no longer fulfilling its original purpose and should be repealed. Stakeholders have also suggested that the original problem that the Act sought to remedy no longer exists. In this chapter we therefore consider whether the 1949 Act should be repealed.

Operation of the Act

6.4 The Act allows for tenants of shops to apply to the sheriff for a renewal of their tenancy for a period of up to one year[8] upon being served with a notice of termination of tenancy. The application must be made not later than the expiry of twenty one days after the

[1] The seven grounds of opposition are found in s 30(1)(a)–(g) of the Landlord and Tenant Act 1954.
[2] Landlord and Tenant Act 1954, s 38A as inserted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096) article 22(1).
[3] See Lord Craigton's statement in *Hansard*, HL, Vol 257, col 1060-4 (30 April 1964).
[4] *Hansard*, HC, Vol 461, col 1747-65 (22 February 1949).
[5] s 3(3) of the Tenancy of Shops (Scotland) Act 1949 as originally enacted.
[6] By various Expiring Laws Continuance Acts of 1950-1963.
[7] The 1964 Act repealed s 3(3) of the 1949 Act, which was the provision originally bestowing upon that Act its temporary nature. The 1964 Act was later repealed by the Statute Law (Repeal) Act 1974 and it has been put to us that this repeal cast doubt on the duration and effect of the 1949 Act. However, once s 3(3) of the 1949 Act had been repealed and therefore removed, the Act's previously temporary status was also removed (regardless of the later repeal of the 1964 Act – see s 15 of the Interpretation Act 1978). The 1949 Act therefore remains in force on a permanent basis until it is amended or repealed.
[8] Tenancy of Shops (Scotland) Act 1949 s 1(2).

service of the notice.[9] The tenant can re-apply once the one-year extension has come to an end.[10]

6.5 The Act relates to 'shops', which are defined as any premises where any retail trade or business is carried on.[11] Whether or not the premises can be defined as a shop is to be assessed having regard to the character of the business. In an early case based on the 1949 Act, a garage where most of the premises were used for garaging and repair of cars and lorries, but the frontage contained two large windows in which articles for sale by retail were displayed, and there were three pumps for the sale of petrol, was accepted as falling within the definition of a shop. The test was based upon the character of the business, rather than the area covered by each of its components.[12] Similarly, a sub-post office was held to be a shop within the statutory definition.[13] Casual sales will not come within the definition. In the early case of *Golder v Thomas Johnston's (Bakers) Ltd*,[14] only one year on from the passing of the Act, a blacksmiths which manufactured articles for certain firms and also made repairs but did not retail any items was held not to be a shop even though it made sales to occasional customers. Premises which only offer a service cannot be a shop. So where an opticians made an application under the Act it would have been rejected, but for the fact that the opticians sold spectacles.[15] Sub-tenants cannot utilise the Act; it can only be used in a tenant-landlord relationship.[16]

6.6 The Act provides, in section 1(3), six circumstances where the sheriff may dismiss the application. These are;

(a) where the tenant is in breach of a material condition of their tenancy;

(b) where the tenant is declared bankrupt, or is divested of their estate by a trust deed or is a company unable to pay its debts;

(c) where the landlord has offered to sell the premises to the tenant;

(d) where the landlord has offered reasonable and suitable alternative accommodation to the tenant;

(e) where the tenant has given notice of termination of tenancy and as a result the landlord has contracted to sell or lease the premises or taken any other steps as a result of which the landlord would be seriously prejudiced if he could not obtain possession of the premises;

(f) that, having regard to all of the circumstances, the sheriff believes that greater hardship would be caused by renewing the tenancy for a further year than refusing to do so.[17]

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[9] Tenancy of Shops (Scotland) Act 1949 s 1(1).
[10] *Ibid* s 1(4).
[11] s 3(2) of the 1949 Act refers to the Shops Acts of 1912 to 1936 which provided this definition.
[12] *Thom v British Transport Commission* 1954 SLT (Sh Ct) 21.
[13] *King v Cross Fisher Properties* 1956 SLT (Sh Ct) 79.
[14] 1950 SLT (Sh Ct) 50.
[15] *Craig v Saunders & Connor* 1962 SLT (Sh Ct) 85.
[16] *Ashley Wallpaper Company Ltd v Morison Associated Companies Ltd.* (1952) SLT (Sh Ct) 25.
[17] *Louden v St Paul's Parish Church and Others* 1949 SLT (Sh Ct) 54. In this case, the Sheriff-substitute stated that when applying this test, where the hardships of parties appear equally balanced, the application should normally be decided in favour of the tenant. However, this test is applied to each case based upon its own peculiar facts.

6.7 The sheriff will consider these circumstances in light of subsections (1) and (2) of section 1 of the Act. Some case law suggests that the sheriff will lean more towards granting the application than not: in *Robertson v Bass Holdings Ltd*[18] Sheriff Poole stated that "I considered that the scheme and wording of the Act suggested an inclination towards the granting of an application which is then tempered by the provisions of ssection 1(3)."[19]

6.8 The sheriff has an overriding discretion to dismiss a tenant's application under section 1(3) if he or she thinks it reasonable to do so in all the circumstances. It has been pointed out that this consideration of reasonableness often overlaps with consideration of the "greater hardship" ground in section 1(3)(f).[20] Case law on the point suggests that the Act is intended only to offer security of tenancy to applicants, not to protect them from economic hardship.[21]

The Act in practice

6.9 The Act was a useful tool for small shopkeepers in the post-war era, in that it offered a limited security of tenure, and in so doing ensured that some small shops could be kept in business in the hope of stimulating the post-war economy. However, it has been put to us that the Act is no longer fulfilling that purpose, and has instead become an unnecessary anomaly in Scottish commercial lease law.

6.10 We recognise that part of the attraction of investing in commercial property in Scotland is the flexibility which our system affords, largely due to the lack of a legislative and regulatory 'superstructure' such as exists in England and Wales. Therefore, part of the argument for repealing the 1949 Act is that it is inconsistent to retain a piece of legislation which is now little used and, indeed, is being used by parties not intended by the Act. We have been informed that, in practice, when advising investors, the discussion will often begin with an outline of the lack of regulation of commercial leasing law in Scotland. However, attention has to be drawn to the 1949 Act in such cases; this can often introduce doubt into the minds of the investors.

6.11 Quantitatively, case law on the 1949 Act was most frequent in the 10 years following its enactment.[22] These cases tended to deal with the simple question of whether the premises in question came within the definition of a shop. Since this period, case law has been sporadic. However the two most recent cases dealing with the Act, *Edinburgh Woollen Mill Ltd v Singh*[23] and *Select Service Partner Ltd v Network Rail*[24] have highlighted the qualitative problems with the Act.

[18] 1993 SLT (Sh Ct) 55.
[19] *Robertson v Bass Holdings Ltd* 1993 SLT (Sh Ct) 55 at 56, although see the comment of Sheriff N A Ross in *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at para 25, which casts some doubt upon this interpretation.
[20] A McAllister, *Scottish Law of Leases* (4th edn, 2013), at 14.22.
[21] *Ibid* where the author cites the cases of *Stenhouse v East Kilbride Development Corporation* 1962 SLT (Sh Ct) 35 and *Robertson v Bass Holdings Ltd* 1992 SLT (Sh Ct) 55.
[22] See, for example, *Louden v St Paul's Parish Church and Others* 1949 SLT (Sh Ct) 54; *Golder v Thomas Johnston's (Bakers) Ltd* 1950 SLT (Sh Ct) 50; *Hill v McCaskill's Trustees* 1951 SLT (Sh Ct) 41; *Macleod v Mactavish* 1952 SLT (Sh Ct) 20; *Pow v Fraser & Carmichael* 1953 SLT (Sh Ct) 20; *Scottish Gas Board v Kerr's Trustees* 1956 SLT (Sh Ct) 69.
[23] 2013 SLT (Sh Ct) 141.
[24] 2015 SLT (Sh Ct) 116.

Edinburgh Woollen Mill Ltd v Singh

6.12 This case concerned a shop in Edinburgh. The facts of the case are relatively uncomplicated. The defender was the landlord of the shop premises, and had served a valid notice to quit requiring the pursuer to vacate the shop at the end of the lease. The pursuer and defender were direct competitors in the sale of Scottish-themed goods. None of the disqualifying factors within section 1(3), outlined above, was pled in the case. The defender did not attempt to argue that the renewal would cause 'greater hardship' than a refusal to renew.

6.13 In his decision the sheriff looked to *Hansard* in interpreting the purpose of the Act, which highlighted that it was for the primary purpose of supporting and protecting small shopkeepers in the post-war economy. This approach is supported by the case of *MacLeod v MacTavish,*[25] in which the sheriff considered that the policy of the Act was to prevent small shopkeepers being evicted by speculators who purchased properties and gave the shopkeepers the option of buying at an exorbitant price or being evicted.

6.14 The sheriff in *Edinburgh Woollen Mill* took the view that, in light of the original purpose of the Act, the application should fail. He stated that, upon consideration of *Hansard*, "the mischief which the 1949 Act was designed to address is no longer self-evident today…" Therefore, the pursuer could not rely on it. As a large company with an annual turnover of £161 million at the time, the considerations of injustice and economic oppression, from which the court ought to use the Act to protect small shopkeepers, did not exist in this case. The sheriff, in finding for the defender, characterised the dispute as "no more than an attempt to retain a highly successful site, and to keep it from a direct competitor".[26]

Select Service Partner Ltd v Network Rail

6.15 Although the court in this case also found in favour of the defender, it criticised the sheriff's reasoning in *Edinburgh Woollen Mill*. The facts again are relatively simple. A food outlet based in Edinburgh Waverley train station applied for an extension under the Act following service of a notice to quit. The landlords had duly served the notice to quit as they wished to lease the premises to a well-known coffee retailer instead.

6.16 In coming to his decision the sheriff looked to the grounds in section 1(3), and found that it was reasonable in all the circumstances that the application be dismissed. However he found the sheriff's reasoning in *Edinburgh Woollen Mill* to be troubling. He opined that the wording of the 1949 Act is sufficiently clear and therefore did not warrant reference to external aids such as *Hansard*, as used by the sheriff in *Edinburgh Woollen Mill*. Therefore, whether or not the Act is outdated is not for the courts to decide. He stated that:

> "It may be that the 1949 Act is far less sophisticated than the comprehensive provisions of Pt II of the Landlord and Tenant Act 1954 in England and Wales, but the restriction of its application is not justified if the language of the Act does not permit it."[27]

6.17 Nevertheless, the conclusion of the case was similar to that of *Edinburgh Woollen Mill*; the pursuer could not argue sufficient hardship as they could afford to find premises

[25] 1952 SLT (Sh Ct) 20.
[26] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at para 30 (Sheriff N A Ross).
[27] *Select Service Partner Ltd v Network Rail* 2015 SLT (Sh Ct) 116 at para 11 (Sheriff N M P Morrison, QC).

elsewhere without suffering a tangible loss in revenue. However, the sheriff in this case made clear that this conclusion was reached on the merits of the case, rather than an analysis of external aids such as *Hansard*.

The need for the Act

6.18 In *Edinburgh Woollen Mill* the sheriff attempted to outline what the intended purpose and effect of the 1949 Act was. In doing this, he referred to extra-judicial material, in the form of *Hansard*. This highlighted that the original purpose of the Act was the protection of small shopkeepers, specifically those "ex-Service men who have put their gratuities into shops…",[28] from unfair landlord practices.

6.19 The criticisms of this use of parliamentary material made by the sheriff in *Select Service Partner Ltd* have been outlined. These are criticisms of judicial reasoning, rather than the substantive findings of the sheriff. Although he was critical of the use of *Hansard* as an aid to interpretation, the sheriff stated that:

> "If it were permissible to search for a mischief, one should be looking for what the mischief was thought to be in 1964, or one should be seeking to discover what Parliament intended in a ministerial statement in Parliament at *that* time."

6.20 Here, the sheriff made reference to the Tenancy of Shops (Scotland) Act 1964. This Act has now been repealed, but its purpose was to change the status of the 1949 Act from temporary to permanent. Looking to *Hansard* at this time, the reasoning for making the Act permanent was this:

> "There is still a sellers' market in shops and this may place the tenant at a disadvantage. Nor does it seem likely that this situation will change greatly in the foreseeable future. Furthermore, most Scottish tenancies are still on a year-to-year basis and the notice of termination…can create hardship for the tenant and the successful application to the sheriff can give him a breathing space."[29]

6.21 Therefore, in deciding to make the Act permanent, much emphasis was placed on, first, the assertion that the landlord was in a stronger bargaining position and, secondly, that a renewal of one year could give the tenant 'breathing space'.

6.22 In modern business tenancies, these arguments do not bear the same weight. Often, tenants will be in as strong a bargaining position as the landlord; *Select Service Partner Ltd* and *Edinburgh Woollen Mill* were cases brought by large companies; not small shopkeepers. The case of *Superdrug Stores plc v Network Rail Infrastructure Ltd*[30] also highlights this. The facts of the case are not integral to this discussion as the issues in the case were purely procedural and did not deal with substantive issues relating to the Act (although it was appealed to the Court of Session). However, it shows the size of the parties, in commercial terms, attempting to use the 1949 Act in order "to obtain a renewal of [their tenancy] on terms satisfactory to them."[31] The fact that these three cases are the most recent strongly suggests that it is no longer the case that the landlord is necessarily the party with the most power in the relationship. Such companies should reasonably be expected to withstand the

[28] *Edinburgh Woollen Mill Ltd v Singh* 2013 SLT (Sh Ct) 141 at para 24, Sheriff N A Ross quoting sections from *Hansard*.
[29] *Hansard*, HL, Vol 257, col 1060-4 (30 April 1964).
[30] 2006 SC 365.
[31] *Superdrug Stores plc v Network Rail Infrastructure Ltd* 2006 SC 365 at para 14 (Lord Osborne).

financial pressures of a business tenancy coming to an end, without having to rely on an extra year. Furthermore, the anecdotal evidence we have received from stakeholders strongly suggests that the Act can often be used as a threat against landlords by tenants to whom the Act was never intended to afford protection. It is therefore difficult to reconcile the original intention of the Act with the parties who now appear to be making use of it.

6.23 There is also a quantitative case for repeal. Case law on the matter is sparse, which would suggest that the Act is simply not being used. We conducted a sample from various sheriff clerks across Scotland as well as with the Scottish Courts and Tribunals Service Information Analysts, asking for figures on the number of applications made in recent years. We found that applications for extensions under the Act are not filed specifically under the heading of 'Tenancy of Shops', therefore no statistics could be provided. Anecdotally, however, neither the Information Analysts nor the sheriff clerks contacted were familiar with the Act, and could not recall any applications made under the Act during their tenures. Looking to *Hansard* in 1964, Lord Craigton stated that even at that time the number of applications to the sheriff under the 1949 Act had been steadily declining since its passing. He said that until 1957 the annual number was between 300 and 350, but by 1963 it had dwindled to 102 applications. From this, it may be inferred that the numbers would have continued to decline. Indeed, the fact that there have only been 8 reported cases in the Sheriff Court since the Act being made permanent in 1964 would strongly suggest that the number of applications is now extremely low.

6.24 From discussions with various stakeholders, there is a perception that the two cases discussed above have only confused matters, especially with regard to who is able to make use of the Act. The decision in *Edinburgh Woollen Mill* attempted to draw a line to the effect that large companies should not be able to use the Act. However, as the sheriff, quite rightly, stated in *Select Service Partner Ltd*, this is too subjective a test; how small does the business need to be to qualify for the Act? At what stage is the business too large to apply to the sheriff under the Act? In this regard, *Select Service Partner Ltd* appears to have allowed the door, which had been shut by *Edinburgh Woollen Mill* to larger companies, to remain open.

6.25 It is worth noting also a difference in respect of *where* many retail businesses operate now as compared to 1949 or even 1964. For example, many retail businesses now operate out of large, out-of-town units as opposed to smaller, high street premises. Such businesses do not easily fit within the "small shopkeeper" description referred to in paragraph 6.2 above.

6.26 Small businesses do, of course, continue to exist. We have spoken with stakeholders who represent small businesses in relation to acquiring and operating premises under commercial leases. None of them see any need for the Act to continue in operation in order to protect those for whom they act. We also note that the difficulty which the Act was originally designed to address – namely the vulnerability of small businesses in a climate where they was a scarcity of premises – no longer exists.[32]

6.27 The feedback which we have received from stakeholders is that wholesale repeal of the Act is necessary. The Act is seen by most in practice to be unnecessary, rarely used and the cause of confusion in qualifying the statement that there is no statutory regulation

[32] See for example The Times, 13 November 2017, page 18.
https://www.thetimes.co.uk/article/one-in-ten-scottish-shops-now-lying-empty-research-shows-9qpz0tk6f.

equivalent to the Landlord and Tenant Act 1954. Where it has been used in recent years, it is not by those small shopkeepers that the Act sought to protect originally.

6.28 Therefore we ask the question:

40. Should the Tenancy of Shops (Scotland) Act 1949 be repealed?

Chapter 7 Irritancy

Introduction

7.1 Irritancy is a right available to a landlord where a tenant has breached certain conditions of a lease. The effect of this right being exercised is not only that the lease is brought to an end but that the lease becomes void, as if it had never existed.[1] Irritancy is a right available only to a landlord and not to the other party to a lease, the tenant. Until just over 30 years ago, it was a right which could be exercised without the giving of notice.[2] It is a right which, if exercised correctly, means that the tenant must leave the premises and no compensation is payable by the landlord to the tenant.[3] On one view it is, as Rennie puts it, "the most draconian remedy available to a landlord".[4]

7.2 Despite the perceived and indeed sometimes actual ruthlessness[5] of irritancy as a remedy, arguments can nonetheless be made in its favour. It is a remedy available in the event of a breach of contract by a tenant – a contract which the tenant has agreed to and signed. It might therefore be argued that there is no unfairness to a tenant. The voluntary nature of the tenant's obligations has been recognised as relevant in the court's consideration of the tenant's property rights in respect of the equivalent English remedy of forfeiture.[6] Irritancy is also recognised[7] as a very effective remedy for a landlord to remove a tenant who is in breach of his obligations. It is, in almost all modern cases, a contractually stipulated remedy.[8]

7.3 The subject of irritancy has previously been considered by this Commission. In 2001, we published our Discussion Paper on Irritancy in Leases of Land.[9] In 2003, we published our subsequent Report[10] and associated draft Bill. The recommendations contained in the Report have not been implemented. Those recommendations are now almost 15 years old – a not insignificant amount of time in the world of commercial property. Nonetheless, they merit careful consideration. Our work within this chapter is informed by those recommendations and we are grateful to our predecessors for the work upon which they are founded. The purpose of this chapter is to summarise the current legal position on irritancy, reflecting on the 2003 Report, and to ask whether any reform of the law is currently required.

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[1] H L MacQueen and the Rt Hon Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, 2017), para 35.26.

[2] This position changed with the introduction of s 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

[3] Nor is the tenant likely to be able to make a successful unjustified enrichment claim against the landlord in respect of any sums retained by the landlord. See *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90 and H L MacQueen and the Rt Hon Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, 2017), at para 35.26.

[4] R Rennie (with Blair, Brymer, McCarthy and Mullen), *Leases* (2015) p 22-36.

[5] See *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104.

[6] *Di Palma v UK* (1988) 10 EHRR CD149 at 155.

[7] A number of stakeholders with whom we consulted pointed to the advantage of having irritancy as a remedy of "last resort" in order to remove a tenant who does not comply with the conditions of lease.

[8] Often referred to as "conventional irritancy". There still exists the possible remedy of common law "legal irritancy" ie for two years' non-payment of rent; however it is almost certain that any modern lease will in practice include a contractual provision regarding non-payment of rent which stipulates a shorter period.

[9] DP No 117 (2001).

[10] Scot Law Com No 191 (2003).

7.4 Our previous Discussion Paper was prompted in part by concerns raised by the House of Lords in the first *Dollar Land*[11] case. This case, which is discussed further at paragraph 7.14 below, resulted in an irritancy clause being enforced and the sub-tenant in question losing a significant amount of money. The House of Lords, although ultimately finding for the mid landlord, expressed concern that the practical result of the case was unsatisfactory because of the loss of huge sums to a tenant and consequent benefit to a landlord which the operation of an irritancy clause could bring about, and that this could potentially deter investors in Scottish commercial property.[12] Appendix D of our 2003 Report sets out the results of a survey that we conducted during preparation of the preceding Discussion Paper as to whether these fears were well-founded. The results suggested that they were not.[13]

Policy considerations and scope

7.5 Prior to writing this Discussion Paper, we conducted a scoping exercise on the aspects of the law of irritancy which may be in need of reform. A number of stakeholders[14] told us that, in their view, the current law on irritancy works well. There was also endorsement of the use of irritancy as a remedy of "last resort", for example to obtain clear title to a leased property which has been occupied by an obstructive or absconding tenant. Our discussions with stakeholders also yielded the following points which we have acknowledged as relevant policy considerations for this chapter:

- law and practice relating to commercial leasing in Scotland currently benefits from its flexibility and regulation should not unduly restrict this flexibility;

- any proposals for reforming the law on irritancy should strike an appropriate balance in terms of the powers, rights and obligations enjoyed and owed by landlords, tenants and relevant third parties;

- law and practice relating to irritancy should be clear and consistent, particularly with regard to the effects of irritancy on third parties such as sub-tenants and creditors;

- the law relating to irritancy, and any associated proposals for reform, should not threaten investment in commercial property.

7.6 To this list we would also add respect for parties' freedom of contract as an important policy consideration and a legal principle which should be adhered to.

7.7 As with much of the rest of this Discussion Paper, our focus in this chapter is in relation to irritancy in commercial leases. The 2003 Report recommended that its proposals extend to agricultural leases as well.[15] Such leases were not included within the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Provisions relating to irritancy of agricultural leases can now be found within the Agricultural Holdings (Scotland) Act 2003 (as amended

[11] *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104.
[12] *Ibid* at 126-7 (Lord Jauncey).
[13] Scot Law Com No 191 (2003), Appendix D.
[14] See, generally, the Appendix in relation to stakeholders for this project.
[15] And, to the extent that it was used as a remedy in this context, to residential leases as well: Scot Law Com No 191 (2003) paras 3.17-8 and Recommendation 7.

by the Land Reform (Scotland) Act 2016).[16] Accordingly, we do not propose to discuss irritancy in agricultural leases within this chapter.

A summary of the law and the 2003 Report

The effect of irritancy

7.8 As noted above, the current legal position where a right of irritancy is exercised effectively, is that the lease becomes void – as if it has never existed at all. On the face of it, this seems strange. It is both conceptually difficult and practically difficult.[17] We note that our 2003 Report recommended that this position be reversed, so that the effect of irritancy was forward-looking only:

> "1. (a) The effect of the exercise of an option to terminate a lease (ie an irritancy) should be to terminate the lease for the future except any provisions as to arbitration, compensation or quantification of damages or any other provisions intended to survive termination.
>
> (b) The termination of the lease should not affect any rights or liabilities that have already accrued before the termination of the lease takes effect."[18]

7.9 While there is much to be said for this recommendation, in that it avoids the conceptual and practical difficulties noted above, we wonder, upon reflection, whether it does carry the risk of making irritancy a more "attractive" remedy than it is at present, by placing it closer to other remedies for breach of a lease, for example rescission. Reforming the law so as to provide that rights or liabilities which have accrued prior to the irritancy are not affected would mean that a relevant claim for damages could be made. So the landlord, in that scenario, would achieve both the removal of the tenant (as with irritancy presently) and also be able to recover any debts due.[19] As noted above, it is generally agreed by stakeholders that irritancy is (and should be) a remedy of last resort. Our 2003 Report described the primary function of irritancy as a "compulsitor for performance of the tenant's obligations".[20] If that is so, then reforming the remedy so as to provide a greater incentive for a landlord to irritate the lease may go too far. Our 2003 Report proposed that the controls over the right to terminate the lease (which it was recommending as part of the reforms) should also apply to a landlord's right to rescind the lease as a result of material breach of contract.[21] The rationale for this was that, as the remedies of irritancy and rescission were so closely related, it would be unfair for a landlord to seek to avoid the new controls imposed by opting instead to rescind the lease, rather than irritate it, where the breach was material.[22] In other words, the choice of remedy should not be dependent on the steps which the landlord was required to undertake but rather upon the quality of the tenant's breach.

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[16] s 18 of the 2003 Act as amended.

[17] It is conceptually difficult to think of a lease which has existed for a period of time as never having existed at all. It is also practically difficult in the sense that it prevents rights and obligations which may have accrued under the lease from being enforced after the irritancy has taken effect.

[18] *Ibid* at Recommendation 1.

[19] This appears similar to rescission, where a material breach of contract would entitle the party not in breach to rescind and to recover damages. However, a lease requires to make specific provision for irritancy whereas rescission is generally available to the innocent party on a material breach (see R Rennie (with M Blair, S Brymer, F McCarthy and T Mullen), *Leases* (2015), paras 17-19). However, a party who wrongly elects to rescind can open themselves up to a damages claim (see H L MacQueen and the Rt Hon Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, 2017), para 10.21); it does not appear that the same effect was intended to apply in cases of irritancy by Recommendation 1 of the 2003 Report.

[20] Scot Law Com No 191 (2003), para 2.12.

[21] *Ibid* Recommendation 2.

[22] *Ibid* at para 3.6.

Legal and conventional irritancy

7.10 In simple terms, irritancy is a right available to a landlord where a tenant has breached certain conditions. An irritancy may be legal (ie the right exists by operation of the common law) or conventional (ie stipulated within the lease itself). The only current right of legal irritancy in Scots law arises where the tenant has failed to pay rent for a period of two years.[23] Conventional irritancy is much more common and, in particular in respect of payment, most modern leases would specify a much shorter period of non-payment.[24] Other conditions which, if breached, would give the landlord a right to irritate the lease, may also be specified – for example if the tenant allowed the property to fall into disrepair. In our 2003 Report, we recommended that the current legal irritancy be abolished and that a new statutory right to irritate a lease based on six months non-payment of rent be established.[25]

7.11 There is little more to say in relation to legal irritancy in respect of commercial leases, beyond what was contained in the 2003 Report. Stakeholders have informed us that there still exist leases which do not contain an irritancy clause, and in these cases, legal irritancy could still be relevant.

Statutory and common law provisions regulating irritancy in commercial leases

7.12 Sections 4 and 5 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 contain statutory provision relating to the irritancy of a lease for monetary and non-monetary breaches respectively. Section 4 provides, in respect of a monetary breach, that the landlord must serve a warning notice on the tenant allowing 14 days (or such longer period as is specified in the lease) to pay the arrears.[26] If the tenant fails to do so, the landlord may irritate the lease.[27] The tenant cannot "purge" the irritancy by payment of the arrears after the 14 day period has expired.[28] Our 2003 Report recommended increasing the time for payment from 14 days to 28 days (or such longer period as specified in the lease or as agreed between landlord and tenant as an extension to this time).[29]

7.13 Section 5 provides, in relation to non-monetary breaches, that a landlord may only exercise his right to irritate the lease if, in all the circumstances, a "fair and reasonable landlord" would do so.[30] There is no requirement to serve any warning notice. However, in assessing what is fair and reasonable, the courts should have regard to whether the tenant has been given a reasonable opportunity to remedy the breach.[31]

7.14 Sections 4 and 5 have been criticised for not giving sufficient protection against unfair results in cases of irritancy. In respect of section 4, the leading case which illustrates this point is the first *Dollar Land* case.[32] In that case, the mid-landlord of a shopping centre

[23] H L MacQueen and the Rt Hon Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, 2017), para 35.26.
[24] The Property Standardisation Group Model Commercial Lease (MCL-Retail-01), for example, provides that a landlord shall be entitled to terminate for a "monetary breach" (ie failure to make any payment when due) provided that he allows 14 days from service of a notice to pay before seeking to terminate the lease. Para 6.1.1.
[25] Scot Law Com No 191 (2003), Recommendations 5(a), (c) and (e).
[26] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 4.
[27] *Ibid* s 4(1).
[28] *Ibid* s 4(3).
[29] Scot Law Com No 191 (2003), Recommendations 11 and 12.
[30] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 5(1).
[31] *Ibid* s 5(3). The reasonable opportunity must have been provided prior to the act of termination. See *Maris v Banchory Squash Racquets Club Ltd* 2007 SC 501 at 507.
[32] *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104.

development irritated the lease of its tenant because of failure to pay rent. A warning notice in terms of section 4 had been served. Late payment of rent (after the expiry of the warning notice) was not accepted by the mid-landlord. The House of Lords rejected the tenant's challenge to the landlord's right to irritate, section 4 having been fully complied with. The result of this was that the tenant lost their investment in the shopping centre, amounting to around £2.2 million. The House of Lords felt unable to secure recompense for the tenant via the court's common law equitable power of relief, holding that the exercise of irritancy was not oppressive and thus the common law power could not be invoked.[33]

7.15 In respect of section 5, our 2003 Report refers to the case of *Blythswood Investments (Scotland) Limited v Clydesdale Electrical Stores Limited (In Receivership),*[34] where the court held that the "fair and reasonable landlord" test in section 5 was not a wholly objective test but meant that the court had to determine what a fair and reasonable landlord in the actual position of the landlord would have done in the particular circumstances of the case.[35] Our Report pointed out that this could sometimes lead to lengthy proofs on the particular facts and circumstances, and also required the court to intervene in commercial decisions.[36] It concluded that section 5 also proved problematic for this reason.

7.16 Our 2003 Report recommended the abolition of the 1985 Act provisions,[37] and their replacement with a new statutory scheme regulating irritancy which (a) drew a distinction between remediable and non-remediable breaches[38] rather than one between monetary and non-monetary breaches; (b) abolished the common law equitable power of relief[39] and included an overarching statutory power for the courts to prevent the lease being terminated if it would be a "manifestly excessive" response to the breach.[40]

Other aspects of the 2003 Report

7.17 Apart from the recommendations referred to above, we think it is worth highlighting the following aspects of our 2003 Report.

General scheme

7.18 As noted above, the broad scheme proposed by our 2003 Report was that options to terminate a lease upon a breach by the tenant (whether as a result of irritancy or rescission) should only be exercisable upon the giving of a notice of termination by the landlord.[41] Further, such notice should only be served where a warning notice had been served in advance in relation to remediable breaches, and an opportunity for remedying the breach had been given.[42] The general time period given to remedy breaches was to be at least 28 days (or such longer period as specified in the lease or agreed between the parties)[43] and, in respect of non-monetary breaches, the tenant was to be able to apply for an extension to the time period on the basis that it was unreasonably short.[44] It was also to be open to the tenant

[33] *Ibid* at 121-5 (Lord Jauncey).
[34] 1995 SLT 150.
[35] *Ibid* at 155 (Lord Cullen).
[36] Scot Law Com No 191 (2003), para 1.12.
[37] *Ibid* at Recommendation 6.
[38] *Ibid* at para 1.35 and see Recommendations 9 and 17.
[39] *Ibid* at Recommendation 4.
[40] *Ibid* at Recommendation 17(b).
[41] *Ibid* at Recommendation 8.
[42] *Ibid* at Recommendation 9.
[43] *Ibid* at Recommendation 11 and 12.
[44] *Ibid* at Recommendation 12(c).

to apply for an extension on the basis that they had substantially performed the obligation but needed more time to complete it.[45]

Insolvency

7.19 Another aspect of the 2003 Report which is worth noting is in relation to insolvency practitioners.[46] The Report recommended that, where a tenant under a lease had power to assign it, and where that tenant became insolvent, any insolvency practitioner appointed should have the option of suspending termination of the lease by the landlord for a period of at least six months (or longer, if specified in the lease), to allow the insolvency practitioner to assign the lease before it was terminated.[47] This was to be achieved by means of the landlord being required to offer a moratorium notice to the insolvency practitioner. The purpose of the moratorium notice was therefore to ensure that the landlord could not serve a notice of termination in relation to the tenant's insolvency unless a moratorium notice had first been served, in order to give the insolvency practitioner an opportunity to assign the lease. If the moratorium notice was not accepted within 28 days, or was accepted but the moratorium had expired without the tenant's interest under the lease being assigned, then the landlord could serve a notice of termination in relation to the insolvency.[48] If no insolvency practitioner was appointed, the tenant should be offered a suspension of the termination of the lease.[49]

7.20 Our 2003 Report also made clear that, where a moratorium notice was accepted, this would be in relation to the insolvency event only.[50] Therefore it would not prevent the landlord serving a notice of termination in relation to any other ground which would justify irritancy, for example, non-payment of rent. In these circumstances, the notice of termination should be served on the tenant and the insolvency practitioner,[51] the insolvency practitioner should be able to exercise the tenant's rights in relation to any such notice[52] but the insolvency practitioner should not thereby incur any liability for the tenant's obligations under the lease nor be taken to have adopted it.[53] This can be contrasted with the practice used in many modern Scottish leases, which generally provide that if an insolvency practitioner is appointed then they must accept full liability for payment of rent and all of the tenant's other obligations under the lease, until such time as the tenant's interest under the lease can be disposed of or the end of a specified period.[54]

7.21 When we discussed the proposed 2003 scheme relating to insolvency and moratorium notices with stakeholders, a number of them expressed concern that this would give too much power to insolvency practitioners. In particular, the proposal that insolvency practitioners should not have any liability in relation to the tenant's obligations as described at paragraph 7.21 above, gave rise to concern. A number of stakeholders expressed the view that insolvency practitioners currently have fairly wide-ranging powers and it is not necessary to increase these.

[45] *Ibid* at Recommendation 12(d).
[46] *Ibid* at Recommendations 13-15.
[47] *Ibid* at Recommendations 13(a)-(c) and 15.
[48] *Ibid* at Recommendation 15(d).
[49] *Ibid* at Recommendation 13(d).
[50] *Ibid* at para 3.57 and Recommendation 16(a).
[51] *Ibid* at Recommendation 16(b).
[52] *Ibid* at Recommendation 16(c).
[53] *Ibid* at Recommendation 16(d).
[54] See, eg, Property Standardisation Group Model Commercial Lease (MCL-Retail-01) 6.1.3.

Creditor protection

7.22 Some stakeholders have raised concerns that Scotland is losing investment in commercial property as a result of not having mandatory creditor protection. As a matter of good practice, Scottish law firms which regularly deal with commercial leases will include provision in the irritancy clause for a creditor to be notified, at the same time as the tenant, of any breach by the tenant and threatened irritancy by the landlord.[55] However, if this notification does not take place the only party who can take action against the landlord for this failure is the tenant.

7.23 This lack of compulsory notification leaves a creditor at potential risk of losing their security. We note that the 2003 Report recommended that a copy of all forms of warnings, moratorium notices and notices of termination should be served on qualifying creditors (those whose security was recorded in the Sasine Register or registered in the Land Register).[56]

The way forward

7.24 This chapter is not intended to provide a comprehensive review of the law of irritancy. That exercise has already been conducted by us and its results are contained in our 2003 Report. The 2003 Report remains unimplemented. Case-law has not developed significantly since that time; therefore the law on irritancy essentially remains the same as at the time of the 2003 Report. However, the commercial context in which the law operates has arguably changed. Landlords are not always in a strong position in the current financial climate – many would wish to find reasons to retain, rather than remove, a tenant. Stakeholders have advised us that many landlords are not exercising their right of irritancy because the result of doing so is that the landlord recovers the commercial property in its entirety and, in so doing, assumes responsibility for all the costs applicable to the premises. It seems possible therefore that landlords may not look to irritancy as a remedy as frequently, in the current commercial leasing market, as they may have done at times in the past.

7.25 Many of the recommendations contained in the Report may still represent an appropriate way of reforming the law. However, there are aspects of the Report that may be less appropriate for any current reform of the law of irritancy. Overriding these factors is the question of whether there is any pressing need for reform in this area.

7.26 We also note here that any new proposals for reforming the law of irritancy would require to be considered in light of the European Convention on Human Rights, particularly because some public sector landlords in Scotland (for example local authorities) are likely to hold significant property portfolios. In terms of article 1 of the first protocol to the ECHR, there must be no interference with someone's right to peaceful enjoyment of their property unless this is justified by means of pursuit of a legitimate aim in the public interest. The interference must also be proportionate.[57] Any right of a public sector landlord to interference with a tenant's real right under a lease, by means of exercise of an irritancy clause (which would result in the property being taken back from the tenant before the end of the lease), would need to comply with the ECHR in this respect. Any new proposals for reforming the

[55] See, eg, Property Standardisation Group Model Commercial Lease (MCL-Retail-01) 6.1.1 and 6.1.2.
[56] Scot Law Com No 191 (2003), Recommendations 19(b)-(d).
[57] See, eg, *James v United Kingdom* (1986) 8 EHRR 123.

law of irritancy would therefore need to be tested against this requirement as and when such proposals were made.

7.27 We are seeking consultees' views on the following matters:

41. Does the law of irritancy currently require reform?

42. If it does, what aspects of the law do consultees consider to be in need of reform?

Chapter 8 *Confusio* and leases

Introduction

8.1 This chapter will explore the extent to which the doctrine of *confusio* (confusion) applies to leases. The discussion in this chapter relates to all leases, irrespective of the use to which the property is being put.[1] It begins by looking at the Roman background before analysing the Scottish authorities. The Keeper's practice and the implications of the doctrine for different types of lease are also examined before we seek the views of consultees on possible reform.

Roman law

8.2 As a Roman law principle, *confusio* had three generally accepted applications: as a mode of original acquisition, where liquids became mixed;[2] in terminating contractual obligations where the creditor and debtor became the same person;[3] and in extinguishing servitudes where ownership of the benefited and burdened properties came to be owned by the same person.[4] While Scots law has adopted all three of these applications, this chapter will focus primarily on the second (when creditor and debtor to an obligation become the same person) as it is most pertinent to leases. However, an examination of the doctrine's development in Scots law will also involve some discussion of its other applications.

Confusion and consolidation compared

8.3 In Scots law, confusion – or *confusio* – in relation to an obligation is when the creditor and debtor become the same entity.[5] Consolidation – or *consolidatio* – is when a subordinate real right and a superior real right (typically ownership) in the same subject come to be held by the same entity.[6] Dr Ross Anderson has stated:

> *"Consolidatio* is sometimes said to apply to real rights as *confusio* applies to personal rights. Subordinate real rights may be consolidated with ownership where the owner of a thing acquires a subordinate real right that he, or a prior owner, granted in the thing. Alternatively the holder of a subordinate real right in a thing may acquire ownership of the thing. On such a merger, the subordinate real right is variously

[1] See Chapter 1, para 1.21.
[2] See R W Lee, *The Elements of Roman Law* (4th edn, 1956), p 133; J A C Thomas, *Textbook of Roman Law* (1976), p 169 and W W Buckland, *A Text-Book of Roman Law* (3rd edn, 1963), p 209. There is a similar doctrine in modern Scots law: see K G C Reid, *The Law of Property in Scotland* (1996) para 564.
[3] Lee, *The Elements of Roman Law* at p 417; Thomas, *Textbook of Roman La*w at p 342 and Buckland, *A Text-Book of Roman Law,* at pp 563-564.
[4] Lee, *The Elements of Roman Law* at 165; Thomas, *Textbook of Roman La*w at 201 and Buckland, *A Text-Book of Roman Law* at 266.
[5] Stair, *Institutions of the Law of Scotland,* 1.18.19; Erskine, *Institute of the Law of Scotland,* 3.4.23; Bell's, *Principles of the Law of Scotland* § 580 and H L MacQueen and the Rt Hon Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, 2017), para 3.40; Also, see R G Anderson, "A Whimsical Subject: *Confusio*", in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as Good Theory: Festschrift for George L Gretton* (2017) 31 pp 33–34, where Dr Ross Anderson explains that confusion can also prevent an obligation from ever coming into existence, when a person purports to enter into a transaction with him or herself. This, he describes as the 'Validity Principle'.
[6] Erskine 2.7.9; Reid*, Property* para 98.

> described as having been "consolidated" or "absorbed" or "amalgamated" with ownership."[7]

8.4 *Confusio* and *consolidatio* both describe the merging of rights in a person, though while *confusio* applies to personal rights and engages with the law of contract, *consolidatio* apparently has no application outside the law of heritable property.

8.5 Another important distinction between the two doctrines is that *confusio* operates *ipso jure* (ie automatically), whereas *consolidatio* does not. In *Healy & Young's Tr v Mair's Trs,* Lord Johnston stated, "I think that extinction or discharge [*confusione*] takes place *ex lege* and independently of intention".[8] Thus, *confusio* operates automatically in law, regardless of the intentions of the parties involved. *Consolidatio*, on the other hand, does not.[9] According to Professor Kenneth Reid:

> "If the property and the immediate superiority (or indeed two adjacent feudal *dominia*) come into ownership of the same person, it was once commonly thought that they merged, or became consolidated, *ipso facto,* but since 1787 the contrary has been settled.[10] Consolidation occurs by prescription,[11] or by disposition *ad remanentiam perpetuam,*[12] or by recorded minute of consolidation[13] or by deed of relinquishment.[14]" [15]

8.6 It has been settled since 1787 that the amalgamation of such real rights by consolidation does not occur automatically.[16]

8.7 Craig, Stair and Erskine discussed the extinction of a lease when the rights of a landlord and tenant come to be held by the same person, although they do not expressly describe this as *confusio* or *consolidatio*.[17]

8.8 The question of whether a lease can be extinguished by *confusio* has been explored on numerous occasions,[18] yet there is a conspicuous lack of consensus in both the commentary and case law. This chapter will analyse leases in terms of both confusion and consolidation.

Confusio and servitudes

8.9 Before considering the law in relation to leases, we consider that it will be helpful to look at the position for servitudes. Our reasoning is to see what lessons can be drawn from the authorities there, given that this is an area which has been discussed from Roman law onwards. Servitudes and the vast majority of leases share the feature that they are real rights.

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[7] R G Anderson, "A Whimsical Subject: *Confusio*", in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as Good Theory: Festschrift for George L Gretton* (2017) 31 at p 37.
[8] 1914 SC 893 at 899.
[9] *Bald v Buchanan* (1786) Mor 15084.
[10] *Ibid.*
[11] This is unless the destinations differ: *Zuille v Morrison* 4 March 1813 FC. In express consolidation, the superiority destination prevails: *Pattison v Henderson* (1868) 6 M (HL) 147.
[12] For the current form see the Conveyancing (Scotland) Act 1924 s II. The matter had also been regulated by earlier nineteenth-century statutes.
[13] Conveyancing (Scotland) Act 1874 (c 94), s 6; Conveyancing (Scotland) Act 1924, s 11.
[14] Titles to Land Consolidation (Scotland) Act 1868 s 110.
[15] Reid, *Property* para 98. Footnotes from original text.
[16] *Bald v Buchanan* (1786) Mor 15084.
[17] Craig 2.10.7; Stair 2.9.36; Erskine 2.6.44.
[18] See below, paras 8.16-8.43.

8.10 The possibility of servitudes being extinguished by *confusio* was accepted by the Scottish courts as far back as 1542,[19] and this position was confirmed by some of the institutional writers. Bankton stated that a servitude will be extinguished and, "nor will it revive unless in the conveyance it is otherwise provided…" This is because, as he stated, "[o]ne's own property cannot be affected with a servitude to himself."[20] Erskine categorically wrote that servitudes will be extinguished by *confusio* where the same person comes to own both benefited and burdened properties: "… a servitude thus extinguished revives not..." unless the servitude is reconstituted as of new upon future separation of the properties.[21]

8.11 In contrast, Bell was of the view that *confusio* will suspend a servitude where a separation may be anticipated, rather than extinguish it.[22] The case of *Donaldson's Trustees v Forbes*[23] is authority for this view. The case was one in which two properties came to be held by the same individual. The relevant issue was whether, upon the subsequent separation of ownership, the servitude which had previously existed continued to do so. Lord Glenlee, relying on the statement of Bell, [24] stated that the servitude may not be extinguished where the proprietor of the two properties holds them under distinct titles (for example, fee and entail[25]), thus "dividing himself into two persons". In the later case of *Union Bank of Scotland Ltd v The Daily Record (Glasgow) Ltd*,[26] Lord Low stated that where both properties come to be held by the same person, but on "distinct and divergent" titles, the servitude will revive upon separation.

8.12 Professor Gordon has noted that rights over land, and title to land in Scots law are more complex in nature than under Roman law. He too was of the view that where a property comes to be held by the same individual on different titles, the servitude will simply be suspended rather than extinguished, and automatically revives upon separation of the respective titles.[27]

8.13 Despite a lack of consensus on whether servitudes are extinguished or merely suspended by the operation of *confusio*, the institutional writers were generally agreed that, as a rule adopted from Roman law, *confusio* applies to servitudes, and case law has followed on this basis.[28] However, the fundamental question of *why* servitudes are capable of being extinguished by *confusio* never seems to have been addressed. As a real right,[29] a servitude will 'run with the land': it is enforceable against each singular successor of the land. If the same person comes to own both plots of land, there would be little sense in maintaining personal obligations. However, as a real right, it could be suggested that servitudes should remain in place, unaffected by *confusio*.[30] This is especially true if there is a third party right involved; for example, where there exists a lease over the benefited property.[31]

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[19] *Innes v Stewart* (1542) Mor 3081.
[20] Bankton 2.7.37.
[21] Erskine 2.9.37.
[22] Bell's *Principles of the Law of Scotland* § 997.
[23] (1838) 1 D 449.
[24] *Donaldson's Trs v Forbes (*1838) 1 D 449 at 453.
[25] These special types of title no longer exist.
[26] (1902) 11 SLT 71.
[27] W M Gordon, *Scottish Land Law* (2nd edn, 1999), para 24-96.
[28] See *Donaldson's Trs v Forbes (*1838) 1 D 449 and *Carnegie v MacTier* (1844) 6 D 1381.
[29] See R W Lee, *The Elements of Roman Law* (4th edn, 1956), p 160.
[30] See P O'Brien, "The Extinction of Servitudes Through Confusio" 1995 SLT (News) 228.
[31] See R G Anderson, "A Whimsical Subject: *Confusio*", in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as Good Theory: Festschrift for George L Gretton* (2017) 31, p 43: "…suppose plot of land A

Confusio and real burdens

8.14 In our Discussion Paper on Real Burdens in 1998[32] we proposed that *confusio* should not apply to real burdens, instead favouring the view of Professor Gordon[33] that they remain 'dormant' until an action is taken to remove them. This proposal was accepted by consultees and therefore we recommended a rule to this effect in our Report on Real Burdens in 2000.[34] Our recommendation was implemented by section 19 of the Title Conditions (Scotland) Act 2003, which provides:

> "A real burden is not extinguished by reason only that –
>
> (a) the same person is the owner of the benefited property and the burdened property or
>
> (b) in a case in which there is no benefited property, the person in whose favour the real burden is constituted is the owner of the burdened property."

8.15 Of course, leases are not the same as real burdens. However they do have similarities. Therefore, the question arises as to whether *confusio* should continue to be applied to a real right in property, such as the right of occupancy under a lease.

Confusio and leases

8.16 *Campbell v McKinnon*[35] is often cited in support of the contention that *confusio* operates to extinguish a lease. In this case, the question was whether a lease could remain in existence even after a tenant, who had occupied the premises, subsequently acquired a feu charter of their lot. Lord Curriehill favoured the view that the lease was extinguished. His judgement was based upon the views of Craig,[36] Stair[37] and Erskine[38] that leases will be extinguished when a tenant acquires the ownership of the tenanted property.[39]

8.17 Rankine agreed with Lord Curriehill, citing *Campbell v McKinnon* and stating that a "kindred mode of extinguishing a lease is *confusione*, by merger in the ownership through succession or singular title."[40] Professor McDonald also agreed with this position stating that, "the better view is that *confusio* does operate absolutely to extinguish the lease itself…"[41]

8.18 While the court in *Campbell* did indeed find the lease in question to be extinguished, they did not expressly base their reasoning on the doctrine of *confusio*. The statements of Craig,[42] Stair[43] and Erskine[44] which were cited in *Campbell*, while supporting the view that a lease will be extinguished upon the merging of the interests of landlord and tenant, do not

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has the benefit of a servitude over neighbouring property, B. A creditor takes a standard security over A. Subsequently ownership of plots A and B is united in the same owner. If the standard security holder has to enforce over plot A, plot A must continue to have the benefit of the servitude over plot B."

[32] Scot Law Com DP No 106 (1998), paras 5.53-5.59.
[33] See W M Gordon, *Scottish Land Law* (2nd edn, 1999), para 23-18.
[34] Scot Law No 181 (2000), paras 5.73-5.80.
[35] (1867) 5 M 636, (1st Division).
[36] Craig 2.10. 7.
[37] Stair 2.9.36.
[38] Erskine 2.6.44.
[39] (1867) 5 M 636 at 650.
[40] J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916), p 525.
[41] C Waelde (ed), *Professor McDonald's Conveyancing Opinions* (1998), p 201.
[42] Craig 2.10. 7.
[43] Stair 2.9.36.
[44] Erskine 2.6.44.

refer expressly to *confusio* either. Indeed, Stair's statement which is cited in *Campbell* refers to a case concerning not *confusio,* but *consolidatio.*[45]

8.19 In his judgement in *Campbell,* Lord Curriehill set out a convincing argument – with reference to *Bald v Buchanan* – as to why the lease in question would not be extinguished. However, out of deference to the statements of the institutional writers he adopted the alternative position, stating that he did not feel "at liberty to decide contrary to these authorities."[46] It is not entirely apparent why his interpretation of the institutional writers' statements led him to stray from his initial reasoning, which may in fact have been correct.[47] A similar criticism was made by Gloag, who stated that the court had founded on, "some very general expressions in the institutional writers."[48] Gloag's comments may lead one to question whether this case can be relied upon as conclusive evidence of *confusio* operating to extinguish a lease.

8.20 Another case which has been founded upon in support of the contention that *confusio* operates to extinguish a lease[49] is that of *Lord Blantyre v Dunn.*[50] Here a tenant acquired the landlord's right in the property and the question arose of whether the rent obligation was thus extinguished by *confusio*. Lord President (McNeill) stated:

> "…I adopt the view of the Lord Ordinary which is expressed towards the close of his note, that [*confusio*] at least operates a complete temporary suspension of the obligation for rent, and of the whole obligations *hinc inde* under the contract of lease; because these obligations of mutual debit and credit, are commensurate and co-relative, and they are, for the present, simply and unqualifiedly united in the same person. This being the actual state of matters in 1852 when the charter was taken out, I think the defender is not entitled to found upon the leases as then containing an effective obligation for rent…"[51]

8.21 Lord Ivory agreed, with the qualification that the obligations under the lease were extinguished rather than being temporarily suspended:

> "The tenant had become the proprietor. Mr Dunn took no step to keep up the leases. He was the sole party liable for the rents, if any rent was due. But he himself was simply and absolutely creditor in the obligation for rent, as well as debtor in that same obligation. Of necessity, therefore, *confusio* took effect, there being nothing done to prevent it; the whole obligations under the lease were therefore gone."[52]

8.22 Clearly then, Lord Ivory and the Lord President were of the opinion that the personal obligation of rent was subject to *confusio.* However, Lord Ivory went one step further, stating that the right of tenancy would be merged with the right of ownership. To this effect, he uses the analogy of a servitude:

> "[A] servitude is a burden on the servient tenement, as a lease is an incumbrance upon the lands. And when the owner of the servient tenement becomes owner of the dominant tenement, holding both subjects simply and absolutely in fee-simple, the

[45] *L Lesmore v Hutcheson* (1634) Mor 3084.
[46] (1867) 5 M 636 (1st Division) at 650.
[47] His initial reasoning may also have been more consistent with the case of *Earl of Zetland v Glover Inc* (1868) 6 M 292; (1870) 8 M (HL) 144.
[48] W M Gloag, *The Law of Contract* (2nd edn, 1929), p 727.
[49] See C Anderson, "Extinction of leases *confusione*" 2015 JR 79.
[50] (1858) 20 D 1188.
[51] *Ibid* at 1193.
[52] *Ibid* at 1197.

> burden of servitude becomes absorbed in the right of property *res sua nemini servit*. That has a very considerable analogy to the present case. And this being so, and taking all the circumstances into account, I feel myself unable to hold that here there was a subsisting lease."[53]

8.23 According to Lord Ivory, the right of tenancy will be merged with the right of ownership, *ipso jure,* upon the two rights becoming held by the same person. Lord Curriehill was also of the view that the rent obligation would be extinguished by *confusio,*[54] and agreed that the right of tenancy might be merged with the right of ownership.[55] Lord Deas agreed that the personal obligation of rent was extinguished *confusione.*[56]

8.24 The interests of creditor and debtor in the rent obligation had merged in the same person, and the obligation had thus been confused. However, it is important to note that the question before the court was whether the rent obligation was extinguished by *confusio,*[57] and the reasoning of the court focuses on the merging of personal rights and obligations, rather than real rights. The judgement must be understood in this context. The *ratio* of this case is that the personal obligation of rent is extinguished by *confusio* upon the rights of tenant and landlord coming to be held by the same person. It does not necessarily follow that real rights can be extinguished by operation of *confusio.*

8.25 In *Murray v Parlane's Trustee,*[58] Lord Rutherfurd Clark was of the opinion that ground annuals – in his view being no more than an obligation for payment of money – could be subject to *confusio*, but that the rights of *dominium utile* and superiority could not be consolidated by *confusio*.[59] This analysis is in line with the view that the application of *confusio* does not extend further than to personal rights.

8.26 Authority exists to the effect that the lease itself and the real rights conferred by it are capable of subsisting independently of the rent obligation.[60] In other words, *confusio* of the personal rights and obligations under a lease does not automatically result in the consolidation of the real rights and obligations which it confers. This view is supported by Professor Halliday's analysis of *Motherwell v Manwell*:[61]

> "The principle of *confusio*, as clearly explained by Lord Kinnear in *Motherwell v Manwell* (1903) 5 F 619 at pp 631; 632, is that it does not operate either payment or discharge of a debt but simply prevents the debt arising while the characters of creditor and debtor exist in the same person. It follows that *confusio* does not discharge or extinguish the lease: it simply suspends the obligation of payment of rent while the landlord and tenant are the same person."[62]

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[53] (1858) 20 D 1188 at 1197.
[54] (1858) 20 D 1188 at 1198.
[55] *Ibid*.
[56] (1858) 20 D 1188 at 1200.
[57] See (1858) 20 D 1188 at 1195 (Lord President (McNeill)): "The practical question for solution is, what was the condition of the leases at the date of the defender's entry in 1852? Was there, at that time, an effectual obligation against any party to pay rent under these leases? Was there at that time any actual tenant under these leases, or any rent accruing under them?" Also at 1198 (Lord Curriehill): "The question is, whether, in the year 1852, rent was payable to the defender in virtue of a set of these lands?" And at 1200 (Lord Deas): "No rent ever became legally due or exigible. And thinking this much to be clear, I do not consider myself now called on to decide more, as that is enough for disposing of this case."
[58] (1890) 18 R 287.
[59] (1890) 18 R 287 at 290.
[60] Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), pp 144-146; *Ross* v *Blair* (1627) Mor 15167; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 6.
[61] (1903) 5 F 619.
[62] D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (1992), p 379.

8.27 While there is an apparent divergence of views as to whether *confusio* operates to extinguish or merely temporarily suspend an obligation – as illustrated by the *Lord Blantyre* case – the point to be made here is that there exists authority to suggest that *confusio* applies only to personal rights and obligations.

8.28 In further support of this view, in the case of *Healy & Young's Tr v Mair's Trs,* Lord Johnston stated:

> "…confusion proper only applies to obligations which sound in the payment of money, though by analogy it has been extended to cases which do not directly come under that category. The doctrine rests on the common-sense view that a man cannot be both creditor of and debtor to himself, and therefor when the right of credit and the obligation of debit are merged in one person the obligation is extinguished *confusione*".[63]

8.29 The applicability of *confusio* to contractual obligations is beyond doubt. However, some modern cases have applied the doctrine of *confusio* to real rights in leases.[64]

Clydesdale Bank Plc v Davidson[65]

8.30 This case concerned the *pro indiviso* proprietors of farming land who attempted to grant a lease to one of their number. The question before the court was whether it was possible for the *pro indiviso* proprietors of heritable property to create a lease over it in favour of one of their own number. The case reached the House of Lords where Lord Hope of Craighead stated:

> "The fundamental objection to the argument that the arrangement is effective to confer on him a real right as a tenant of the property under a lease is that, as one of the *pro indiviso* proprietors, he already has a real right in the property as one of its heritable proprietors. The objection arises in this way. In the first place it is not possible for a person to have two real rights in the same property at the same time. This is because of the principle of confusio, by which the lesser right is absorbed into the greater right and is extinguished. The real right of a *pro indiviso* proprietor extends over the entire property, which is owned by each of the proprietors *in solidum*: *Grant v Heriot's Trust* (1906) 8 F 647, 658, per Lord President Dunedin. If he were to take possession as tenant he would, on taking possession, acquire a real right over the same property. But that real right cannot exist separately from his right of ownership. As it is the lesser right, it would from the outset have been absorbed into, and be indistinguishable from, the greater right of ownership. On this analysis the only additional rights which the appellant acquired under the arrangement, as he retained his real right in the property as one of the *pro indiviso* proprietors, were the personal rights which resulted from his contract with the other proprietors."[66]

8.31 It should be borne in mind that Lord Hope was addressing a situation of co-ownership. Nonetheless, he stated that the doctrine of *confusio* prevents an individual from having two distinct real rights over the same property. Both Lords Hope and Clyde made a clear distinction between the law of contract and the law of property in relation to the agreement in question. They stated that as a matter of contract law, it is entirely possible for co-owners of a property to contract with one of their number regarding the use or

[63] *Healy & Young's Tr v Mair's Trs* 1914 SC 893 at 898-899 (Lord Johnston).
[64] See *Clydesdale Bank Plc v Davidson* 1998 SC (HL) 51; *Serup v McCormack* 2012 SLCR 189 (SLC/73/10); and the opinion of Lord Macfadyen in *Howgate Shopping Centre v Catercraft Services Ltd* 2004 SLT 231.
[65] 1998 SC (HL) 51.
[66] *Ibid* at 56.

management of that common property.[67] In such a situation, debtor and creditor are held to be distinct persons; the creditor being the co-owners acting collectively and the debtor being one of their number acting individually. Therefore, *confusio* would not operate to extinguish the obligation. However, Lord Hope was clear in stating that in the law of property, if such an agreement were to create a real right – as, he argued, a lease necessarily would – then the lesser real right of occupancy would be absorbed by the greater real right of *pro indiviso* ownership and accordingly be extinguished by *confusio.*

8.32 As a House of Lords decision, the judgement in *Davidson* is the most definitive authority on the legal position of *pro indiviso* owners contracting with one of their number. It offers a careful examination of the distinction between the law of contract and the law of property in relation to such a situation and the decision has been followed in the more recent case of *Serup v McCormack.*[68] However, the contention that when an individual comes to hold two real rights in the same property, the greater right absorbs and extinguishes the lesser right *confusione* might be subject to qualification.

8.33 Indeed, there are certain circumstances in which two real rights may in fact be held by one person over the same property. For example, one could have a servitude over land and hold a standard security over the same land. Admittedly, this example does not involve real rights which are as correlative as the real rights of lease and ownership, and by no means illustrates an instance of the interests of debtor and creditor coming to rest in the same person – as is the case when the interests of tenant and landlord are acquired by the same person. However, it does illustrate a qualification to the assertion that a person cannot hold two real rights in the same property.

8.34 Specifically in relation to the question of whether *pro indiviso* owners can lease a property to one of their own, Professor Kenneth Reid offers the following analysis:

> "A question which has caused some difficulty is whether all owners in common can lease property to one of their number. It has been argued against such a lease that it breaches the rule that the same person cannot be both debtor and creditor in the same obligation. Nevertheless, it is submitted that if all the co-owners acting together are able to grant a lease to a third party, then, equally, they are able to grant a lease to one of their own number. Properly analysed, such a lease is an agreement between, on the one hand, the parties who, acting together, alone have a right of exclusive possession and, on the other hand, a party who by himself has no such right. The debtor and creditor are not the same."[69]

8.35 According to this analysis, the creditor and debtor in this kind of lease are not the same individual. The creditor and landlord on the one hand would be the co-owners acting collectively and the debtor and tenant on the other would be one of their number acting as an individual. The lack of a distinct common identity between creditor and debtor would thus allow for a valid lease to be formed, provided it were drafted correctly. By parity of reasoning, it can be argued that a person who is a *pro indiviso* proprietor could in fact have two real rights over the same property; the *pro indiviso* ownership and the real right of occupancy under a lease. The *pro indiviso* nature of the person's ownership is of importance here ie the creditor in this scenario is all of the co-owners acting together, rather than one of their number acting alone.

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[67] *Ibid* at 59 (Lord Clyde).
[68] 2012 SLCR 189 (SLC/73/10).
[69] Reid, *Property* para 28.

8.36 In *Pinkerton v Pinkerton*,[70] it was held that an agreement by an individual to let a farm to himself, his wife, and his two children was a valid lease. Lord Mackay of Clashfern stated:

> "…If the father of the late Alexander Pinkerton had granted the lease in favour of the persons named as tenants in the lease I am examining and on his father's death Alexander Pinkerton succeeded to the ownership of the land as an individual during the currency of the lease, would this involve a concourse of debtor and creditor in such a way as to merge the interests of the tenants with those of the landlord? I think it would be hard to see why the interests of Mrs Pinkerton and her other son should be lost in this way. This confirms me in the view that the landlord and tenant are sufficiently different here for a valid agreement between them in the terms stated to be possible."[71]

8.37 Lord Mackay's reasoning was in line with Professor Kenneth Reid's analysis whereby a group of individuals acting together on the one hand should be regarded as a distinct identity from one of their number acting individually.[72]

8.38 It was also suggested in *Serup* that a tenant's temporary right of exclusive possession may not be a "lesser" right than a *pro indiviso* proprietor's permanent right of non-exclusive possession.[73] Professor Kenneth Reid expressed a similar opinion in his commentary on the *Davidson* decision:

> "A lease is a temporary right of exclusive possession. *Pro indiviso* ownership is a permanent right of non-exclusive possession (ie the possession must be shared with the other co-owners). Since the lease gives more (an exclusive right) than pro indiviso ownership, as well as less (a temporary right), it is not self-evident that, on concurrence, the former would automatically become absorbed into the latter."[74]

8.39 These comments are pertinent to situations involving a *pro indiviso* proprietor contracting with him or herself, and highlight the distinction between *pro indiviso* ownership and sole ownership. However, Lord Hope's statement that when a person comes to hold two real rights in the same property, the lesser right will be absorbed by the greater, was not restricted to cases of *pro indiviso* ownership. Subsequent citation of *Davidson* presents it as authority for the position that *confusio* automatically extinguishes a tenant's right when it comes to be held by the landlord, regardless of whether ownership is held *pro indiviso* or alone.[75]

8.40 As highlighted above,[76] *confusio* has been said to apply only to personal rights whereas *consolidatio* applies to real rights. It may be that the merging of real rights under a lease is more akin to *consolidatio* than *confusio*, as the rights being amalgamated are often real rights, rather than personal rights. While *consolidatio* normally operated in the context of feudal tenure, it could be argued that the amalgamation of real rights in the now-abolished feudal system is similar to the amalgamation of the real rights of landlord and tenant.[77]

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[70] 1986 SLT 672.
[71] *Ibid* at 676.
[72] However, see The Hon Lord Gill, *Agricultural Tenancies* (4rd edn, 2017), para 4-31 where Lord Gill suggests that in light of *Clydesdale Bank plc v Davidson,* the decision in *Pinkerton v Pinkerton* may be open to reconsideration.
[73] SLC/73/10 at para 39.
[74] *Clydesdale Bank plc v Davidson* 1998 SCLR 278 at 290.
[75] *Howgate Shopping Centre* 2004 SLT 231 at para 59 (Lord Macfadyen).
[76] See para 8.4 above.
[77] On the feudal system, as a general rule, there were separate rights of vassals and superiors. If two of these separate rights came into the ownership of the same person, they could be consolidated or merged so that they

Consolidation is conditional on a positive act, as demonstrated by *Bald v Buchanan.*[78] Therefore, should the merging of real rights under a lease be conditional on a positive act showing the intent of the parties, such as the entering into and registration of a minute?

8.41 The need for a positive act of consolidation presumably stems from the fact that real rights are enforceable against the world and concern third parties. When a real right is created through registration of a lease, then it logically follows that for the extinction of that right, a positive act eg registering a minute of consolidation is necessary. But what, then, is the position with regard to unregistered leases? Is it the case that an unregistered lease can be extinguished by *confusio, ipso jure,* but a registered lease can only be consolidated and extinguished through a positive act? There is no clear answer to this question.[79]

8.42 Leases are capable of conferring different types of right.[80] Leases under Roman law were[81] and Scottish common law leases[82] are contractual in nature and confer personal rights. However, in Scots law, leases can become real rights by virtue of possession or statute.[83]Thus, leases in Scots law exist in an interesting intersection between the law of contract and the law of property. The distinction between the nature of the rights conferred in these two areas of law is a distinction which perhaps deserves further judicial scrutiny, as the distinction is crucial to determining which doctrine operates to extinguish those rights when they are merged.

8.43 It may be the case that when a lease is regarded as a personal, contractual agreement, it will be capable of being extinguished by *confusio, ipso jure,* but when the lease is held to be a real right, its extinction should be by consolidation and conditional on a positive act showing the intent of the parties, such as registration of a minute.

Merger in English law

8.44 In English law, when a tenant acquires the landlord's interest, the lease can be extinguished by merger.[84] As in Scots law, the interests of landlord and tenant can only be merged if the person who comes to hold the two interests does so in the same capacity,[85] and there exists no intervening estate.[86] However, unlike Scots law, in English law there must be intention to merge the two interests before the lease can be extinguished.[87] In the

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became one right. The effect of such consolidation or merger was to extinguish the lesser of the two rights. See Reid, *Property* para 98 (G L Gretton).

[78] (1786) Mor 15084.

[79] For a discussion of whether the registration of a lease should have bearing on whether it will be subject to *confusio*, see D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (1992).

[80] C Bury and D Bain, "A, B and C to A, revisited" 2013 JR 77; Lord Gill, "Two Questions in the Law of Leases", in F McCarthy, J Chalmers and S Bogle (eds), *Essays in Conveyancing and Property Law in Honour of Professor Robert Rennie* (2015), p 255; P Webster, "The Continued Existence of the Contract of Lease", in A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as Good Theory: Festschrift for George L Gretton* (2017), p 119.

[81] Lee, *The Elements of Roman Law* at p 321; Buckland, *A Text-Book of Roman Law* at p 500.

[82] G CH Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 85.

[83] Leases Act 1449; Registration of Leases (Scotland) Act 1857 s 2.

[84] K Gray and S F Gray, *Elements of Land Law* (5th edn, 2008), p 425; M Dixon, *Modern Land Law* (8th edn, 2012), p 269.

[85] *Chambers v Kingham* (1878) 10 Ch D 743.

[86] *Burton v Barclay* 131 ER 288; (1831) 7 Bing 745.

[87] Law of Property Act 1925, s 185; *Re Fletcher* [1917] 1 Ch 339.

absence of express intention, there is an equitable presumption against merger if the person who has come to hold the two interests would benefit from them being kept separate.[88]

Merger in German law

8.45 In German law, a real right in property is not extinguished when the holder of that right acquires ownership of the land in question, or vice versa.[89]

Practice of the Keeper

8.46 The practice of the Keeper of the Registers of Scotland in relation to *confusio* depends on the information provided in the application for registration. If it is clear that the applicant is treating the lease as extinguished by *confusio*, and appropriate evidence is produced, then the Keeper will give effect to this. However, where the intention is unclear, or where removal of the registered lease would prejudice the registered real right of a third party (for example, a heritable creditor with a real right in security over a registered lease), both the landlord's and tenant's rights will be left on the register. If parties wish to remove a lease from the register at a later stage due to *confusio*, the Keeper would treat this as a request to rectify the register in terms of section 80 of the Land Registration etc. (Scotland) Act 2012. This provides that the Keeper must rectify the register when she becomes aware of a manifest inaccuracy and where what is needed to remedy the inaccuracy is also manifest. If the two parties disagree about the operation of *confusio*, it is unlikely that the Keeper will be able to rectify in the absence of a determination by the Lands Tribunal or the courts.

Practical examples

8.47 Where the head tenant in a commercial lease acquires ownership and the landlord's interest in the leased premises, it may be desirable to keep the lease alive for funding purposes: the head lease may be required to stay in place in order for obligations incumbent on the sub-tenant to remain in place; third parties often have a security granted over the head lease which the head tenant wishes to remain in place; the interest of the head tenant could also be sold for investment or management purposes, and therefore would need to remain in place for this to occur.

8.48 An example provided to us involved a company which purchased both the ownership (heritable title) and long leasehold interest of a mixed retail and office development. The titles were nevertheless kept separate by the Keeper. There was a concern at the time of purchase that *confusio* would apply automatically to extinguish the head lease, and thus result in the collapse of the occupational sub-leases. The head landlord proceeded to enter into minutes of agreement with each occupational sub-tenant to the effect that if the sub-leases were to collapse upon the possible extinction of the head lease as a result of *confusio*, the head landlord would grant new leases to the sub-tenants at the head landlord's cost.

8.49 In a similar example, ownership of a development and the head tenancy had come to vest in the same party. The interests had not been merged by the Keeper but the prospective purchasing investors were concerned that the occupational sub-leases within

[88] *Capital Counties Bank Ltd v Rhodes* [1903] 1 Ch 631; *EDF Energy Networks (EPN) plc v BOH Ltd* [2011] EWCA Civ 19; [2011] L & TR 15.
[89] BGB § 889.

the structure would fall away as a result of the purchase. Therefore, they attempted to work around this by purchasing the heritable interest in the development and in addition taking an assignation of the tenant's interest. Whilst the decision in *Howgate Shopping Centre*[90] indicated that sub-tenancies shall remain in place upon the interest of the head lease vesting in the landlord, the parties in this situation were clearly not convinced that *confusio* would not apply.

8.50 We have been informed that workarounds such as these are fairly commonplace. Whilst they may offer a practical solution, they inevitably lead to increased and unnecessary time and costs being incurred. For example, obtaining agreements with every occupational sub-tenant in a large shopping centre will take a long time, with little ability to advise on the length of time this may take. Investors in such situations would benefit from certainty. It was therefore suggested to us that clarification of this area would be welcomed.

Sub-leases

8.51 Sub-leases are generally governed by the same rules as leases.[91] As with an ordinary lease, a sub-lease can acquire the status of a real right[92] and the requirements necessary to constitute a lease as a real right apply equally to sub-leases.[93]

8.52 A sub-lease can be of the whole subjects of the head lease or of only part, and can be for the remainder of the duration of the head lease or of only part.[94] Where a sub-lease is granted for the remaining duration of the head lease, it will terminate upon the natural termination of the head lease.[95]

8.53 Where a sub-lease confers a real right in property, it is safe against the granter of that sub-lease and his or her singular successors, and normally also against the head landlord and his or her singular successors. Thus, a sub-lease as a real right can be secure against the head landlord even when the head tenant abandons the lease or renounces it in favour of the head landlord.[96] Similarly, when a head lease is extinguished by *confusio* and the interests of head tenant and head landlord merge in the same person, a sub-lease will be unaffected.[97]

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[90] 2004 SLT 231.

[91] Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), p 190; G C H Paton and J G S Cameron, *Landlord and Tenant* (1967), p 164; R Rennie, *Leases* (2015), p 295.

[92] *Ibid.*

[93] Leases Act 1449; registration under the Registration of Leases (Scotland) Act 1857, the Land Registration (Scotland) Act 1979 and the Land Registration etc (Scotland) Act 2012.

[94] Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), p 172; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 164; R Rennie, *Leases* (2015), p 296.

[95] Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), p 191; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 166; R Rennie, *Leases* (2015), p 296.

[96] G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 166; This is notwithstanding the terms of the Stair Memorial Encyclopaedia *Landlords and Tenants Reissue,* which states at para 354 that the renunciation of a head-lease will cause a sub-lease to fall away. This has long been acknowledged in practice as not accurately reflecting the true legal position. See A McAllister, *Scottish Law of Leases* (4th edn, 2013), p 173 on limitations of subtenant's rights.

[97] *Howgate Shopping Centre Ltd v Catercraft Services Ltd* 2004 SLT 231; J M Halliday, *Conveyancing Law and Practice* (2nd edn, 1997) Vol 2, p 917; Halliday's Conveyancing Opinions, pp 377 *et seq*; R Rennie, *Leases* (2015), pp 297-298.

8.54 A sub-lease will not survive an irritancy of the head lease.[98] Nor will a sub-lease survive a situation in which the head lease is found to be void.[99] In such circumstances, the sub-tenant will normally have a claim for damages against the head tenant.[100] Where a head lease is brought to an end through a contractually agreed break option, it would seem that the sub-lease will also terminate on the basis that the tenant was aware of the possibility of a break option upon entering into the sub-lease agreement.

The agricultural dimension

8.55 Stakeholders have informed us that the practical problems highlighted above in relation to commercial tenancies do not arise in relation to agricultural tenancies. On the contrary, in the vast majority of agricultural tenancies we are told that it is desirable, where the interests of the landlord and the tenant come to vest in the same person, that the interests merge *ipso jure.* The reason we have been given for this is that, from the landlords perspective, land is much more valuable unencumbered by the lease.

8.56 We are told that it is rare for the landlord and tenant of an agricultural lease to become the same party. Secure 1991 Act leases can come to an end by agreement where the landlord or tenant "buys out" the other's share or by operation of law where a tenant exercises the pre-emptive right to buy. When this happens, *confusio* purportedly operates to automatically extinguish the lease. Otherwise, a notice to quit or renunciation of the lease by the tenant would be necessary to terminate the lease. A renunciation is not binding unless the tenant acts on it ie he or she actually moves out of the property in question. Until the tenant has moved out of the property, he or she is entitled to revoke the renunciation.

8.57 According to the stakeholders with whom we discussed the issue, the agricultural sector will generally rely on the cases of *Davidson* and *Serup* as authority for *confusio* applying to leases.

The residential dimension

8.58 Residential tenancy agreements typically have an element of *delectus personae* and as a result, sub-letting is not generally permitted. Therefore, the practical problems highlighted above in relation to *confusio* in commercial tenancies will not usually apply to residential tenancies.

Conclusion

8.59 This chapter aims to highlight the apparent lack of clarity which surrounds the application of *confusio* to leases. Commentary from certain authors suggests that *confusio* is a principle which traditionally applied to personal obligations under the law of contract, and over time has been extended by analogy to real rights under the law of property. The gradual extension of the principle has created an increasingly conspicuous divergence of views as to how and when *confusio* will operate in Scots law. There is authority both in Scots law and in other jurisdictions to support the view that the amalgamation of real rights – as may exist in a lease – is akin to *consolidatio* and thus, should not occur *ipso jure.* Instead, a positive act

[98] Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), p 191; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 167; R Rennie, *Leases* (2015), p 297.
[99] Rankine, *The Law of Leases in Scotland* (3rd edn, 1916), p 191; G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967), p 167; R Rennie, *Leases* (2015), p 297; *Middleton v Yorstoun* (1826) 5 S 162; *Middleton v Megget* (1828) 7 S 76.
[100] *Ibid.*

such as registration of a minute may be necessary for the real rights under a lease to be merged.

8.60 Examples from stakeholders highlight that *confusio* does not work smoothly in a modern system of commercial leasing, and that it can prejudice transactions and deter investment. Further, the debate which surrounds the application of *confusio* contributes to the confusion over the doctrine in practice.

8.61 Therefore, we ask the questions:

43. Do consultees agree that a clear statement of the law in respect of *confusio* and leases is required?

44. If consultees agree that a clear statement of the law is required, do consultees consider that a positive action showing the intent of the parties, such as registration of a minute, should be required before the interest of landlord and tenant are consolidated?

Chapter 9 List of questions

1. Do consultees consider that tacit relocation should be dis-applied in relation to commercial leases?

(Paragraph 2.49)

2. If tacit relocation is dis-applied from commercial leases, should the parties to a commercial lease have the right to opt in to tacit relocation?

(Paragraph 2.49)

3. In the event that consultees consider that tacit relocation should be dis-applied from commercial leases, do consultees consider that a statutory scheme should be put in place to regulate what happens at the end of a fixed term lease if the parties have failed to opt into the current doctrine of tacit relocation but act as though the lease is continuing?

(Paragraph 2.50)

4. Should parties to a commercial lease have the right to contract out of tacit relocation?

(Paragraph 2.52)

5. If parties to a commercial lease contract out of tacit relocation, and make no provision for what happens at the end of the lease, do consultees consider that tacit relocation should revive as the default situation if the parties act as if the lease was continuing after the termination date?

(Paragraph 2.52)

6. Do consultees agree that the provisions of the 1907 Act should no longer regulate the giving of notice to quit in relation to the termination of commercial leases?

(Paragraph 3.30)

7. Should notices to quit for commercial leases always be in writing?

(Paragraph 4.4)

8. Should the content of the notice be the same for both landlords and tenants?

(Paragraph 4.5)

9. Do consultees wish to have a prescribed standard form of notice?

(Paragraph 4.7)

10. Would consultees prefer that statute should specify the essential requirements of a valid notice to quit rather than prescribing a standard form?

(Paragraph 4.7)

11. Do consultees agree that any notice given should contain the following:

(a) the name and address of the party giving the notice;

(b) a description of the leased property;

(c) the date upon which the tenancy comes to an end; and

(d) wording to the effect that the party giving the notice intends to bring the commercial lease to an end?

(Paragraph 4.8)

12. Do consultees consider that one of the essential requirements should be a reference to the commercial lease itself?

(Paragraph 4.8)

13. Do consultees consider that any other content is essential?

(Paragraph 4.8)

14. Do consultees agree that if the notice is given by an agent, the notice should contain the name and address of the agent and the name and address of the party on whose behalf it is given?

(Paragraph 4.9)

15. Do consultees consider that the commonly used period of notice of 40 days is a sufficient period of notice and should remain the minimum default period of notice?

(paragraph 4.21)

16. If consultees do not consider a period of 40 days' notice to be sufficient, then what do consultees consider would be an appropriate period of notice for commercial leases?

(Paragraph 4.21)

17. Do consultees consider that any prescribed minimum period of notice to quit for a commercial lease should apply irrespective of the form of any court proceedings which may be adopted?

(Paragraph 4.21)

18. Do consultees agree that every period in a notice to quit for commercial leases should be calculated by reference only to the period intervening between the date of the giving of the notice and the date on which it is to take effect?

(Paragraph 4.22)

19. Do consultees consider that it is necessary to have a statutory statement to the effect that any notice period will be construed as a period of clear days?

(Paragraph 4.23)

20. In the context of the rules for giving notice, do consultees consider that it is appropriate to differentiate between leases of one year or more and those of less than one year?

(Paragraph 4.26)

21. Would consultees prefer the differentiation to be at a different juncture, for example at the end of two or even three years?

(paragraph 4.26)

22. Do consultees consider that the same rules should apply irrespective of the extent of the property concerned?

(Paragraph 4.27)

23. Do consultees favour notices to quit which would apply to all commercial leases irrespective of the size and type of property and irrespective of the duration of the lease?

(Paragraph 4.28)

24. If there are to be provisions which apply equally to all commercial leases:

(a) what would be the preferred minimum default period for notice?

(b) for leases with a duration of less than the default period, do consultees consider that the period of notice should be one half of the length of the lease or some other fraction thereof?

(Paragraph 4.28)

25. Do consultees consider that in cases where a date of termination is unknown, but the date of entry is known, there should be a statutory presumption to the effect that the lease is implied to be for a year, or do consultees consider that the existing common law presumption is sufficient?

(Paragraph 4.29)

26. Do consultees consider that in cases where the date of entry is unknown there should be a statutory presumption of 28 May as the date of entry, or some other date?

(Paragraph 4.29)

27. Do consultees consider that notices exercising an option to break a lease before its natural termination should be required to conform to the same default rules as notices to quit?

(Paragraph 4.30)

28. Do consultees consider it necessary for there to be a statutory statement to the effect that a notice to quit may only be withdrawn with the consent of both parties?

(Paragraph 4.31)

29. Do consultees consider that parties should be entitled to contract out of the provisions to agree a longer period of notice?

(Paragraph 4.35)

30. Do consultees agree that parties should be able to contract out of the provisions to agree a shorter period of notice?

(Paragraph 4.35)

31. Do consultees consider that any contracting out of the provisions to agree a shorter period should only be permitted after the commencement of the lease and after the tenant has taken possession of the leased property?

(Paragraph 4.35)

32. Do consultees agree that contracting out agreements should always be in writing?

(Paragraph 4.35)

33. Are consultees aware of any problems with service of notices in commercial leases in situations with multiple tenants or multiple landlords that might require the provision of specific legal rules?

(Paragraph 4.37)

34. Are consultees aware of concerns with service of notices on sub-tenants that might require the provision of specific legal rules?

(Paragraph 4.38)

35. Do consultees consider that the service of notices to quit should be governed by the 2010 Act?

(paragraph 4.39)

36. Do consultees consider that notices should be capable of being served in any other ways?

(Paragraph 4.39)

37. Do consultees agree that, unless provided for in the terms of the lease, Scots law does not provide for the recovery of rent paid in advance in circumstances where the lease is terminated early?

(Paragraph 5.26)

38. Do consultees think that an amendment to the 1870 Act to address the situation identified above would be desirable?

(Paragraph 5.29)

39. If consultees think that an amendment would be desirable, do consultees have views on whether it would be desirable for the law of Scotland in this respect to differ from the rest of the United Kingdom?

(Paragraph 5.29)

40. Should the Tenancy of Shops (Scotland) Act 1949 be repealed?

(Paragraph 6.28)

41. Does the law of irritancy currently require reform?

(Paragraph 7.27)

42. If it does, what aspects of the law do consultees consider to be in need of reform?

(Paragraph 7.27)

43. Do consultees agree that a clear statement of the law in respect of *confusio* and leases is required?

(Paragraph 8.61)

44. If consultees agree that a clear statement of the law is required, do consultees consider that a positive action showing the intent of the parties, such as registration of a minute, should be required before the interest of landlord and tenant are consolidated?

(Paragraph 8.61)

45. Are there any other aspects relating to the termination of commercial leases in Scotland, as discussed in this Paper, to which consultees would wish to draw our attention?

46. Do consultees have any comments on the possible economic impact of any of the changes discussed in this paper?

Appendix

List of parties with whom we consulted in the preparation of this Discussion Paper

1. We use the word "stakeholders" throughout this Discussion Paper. We use this to mean some or all of the various persons with whom we consulted during the preparation of this paper. These are detailed further below. The purpose of such meetings was to discuss the areas of law which we consider within this paper and to help ensure that we gained an understanding of what the current problems with these were, both in practical and conceptual terms, so that we could capture the issues accurately within the Discussion Paper and present possible options for reform. We are extremely grateful to those listed for their time and input in those discussions.

Advisory Group

2. Our advisory group comprises eleven members from legal practitioner, surveyor and academic backgrounds. They are: **Morag Angus**, Chief Surveyor, Scottish Procurement and Commercial Directorate, Scottish Government; **Denis Garrity**, Faculty of Advocates; **Paul Haniford**, Partner, Property, Dentons UK and Middle East LLP; **Dr Frankie McCarthy**, Senior Lecturer, School of Law, University of Glasgow; **Odell Milne**, Partner, Land and Rural Business, Brodies LLP; **Lionel Most,**[1] (retired), former Partner at Burness Paull LLP; **Brian Reeves**, Chartered Surveyor, Brian Reeves and Co and member of RICS; **Ann Stewart**, Head of Knowledge Management, Real Estate, Shepherd and Wedderburn LLP; **Catherine Stone**, Counsel, Legal, and Business Affairs, EDI Group; **Richard Whyte**, Partner, Real Estate, Brodies LLP; and **Eric Young**, Partner, Eric Young & Co.

3. We held a meeting with the majority of our advisory group in September 2017. We also corresponded with members by email and/or had smaller, separate meetings with individuals or groups of individuals where necessary to discuss particular issues or to receive comments on draft chapters of this paper.

Other organisations and individuals with whom we informally consulted

4. We also met with representatives from a number of other organisations and certain interested individuals, to ensure that any concerns they had about the current state of the law were reflected as far as possible within our Discussion Paper. These organisations and individuals were:

- Brodies LLP;
- Burness Paull LLP;
- CMS Cameron McKenna Nabarro Olswang LLP;
- Dentons UK and Middle East LLP;

[1] We are particularly grateful to Mr Most for his consideration of, and insightful comment on, many of the draft chapters.

- DLA Piper Scotland LLP;
- Federation of Small Businesses (Scotland);
- Pinsent Masons LLP;
- Registers of Scotland;
- Royal Institute of Chartered Surveyors (in Scotland);
- Scottish Property Federation (meeting with the Commercial Committee which included partners from Dentons UK and Middle East LLP and MacRoberts LLP, as well as surveyors from Montagu Evans, CBRE and Graham & Sibbald);
- Shepherd & Wedderburn LLP.
- Mike Blair, Gillespie MacAndrew LLP.
- Iain Doran, CMS Cameron McKenna Nabarro Olswang LLP.
- Barry Sealey, Member of Archangels.

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