SCOTTISH LAW COMMISSION
(Scot Law Com No 118)

Recovery of Possession of Heritable Property

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

Presented to Parliament by the Lord Advocate
and the Secretary of State for Scotland
by Command of Her Majesty
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Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

To: The Right Honourable the Lord Fraser of Carmyllie, QC,
Her Majesty's Advocate

and

The Right Honourable Malcolm Rifkind, QC, MP,
Her Majesty's Secretary of State for Scotland

We have the honour to submit our Report on Recovery of Possession of Heritable Property.

(*Signed*) C K DAVIDSON, *Chairman*
E M CLIVE
PHILIP N LOVE
GORDON NICHOLSON
W A NIMMO SMITH

KENNETH F BARCLAY, *Secretary*
7 June 1989

We wish to acknowledge the considerable contribution to this long-standing exercise made by our immediate former Chairman, Lord Maxwell, and one of our former Commissioners, Mr John Murray, now Lord Dervaird. We are heavily indebted to them for their expertise and interest in this project.

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Part I Introduction

The reference

1.1 In 1983 we received from the Lord Advocate and the Secretary of State for Scotland a reference under section 3(1)(e) of the Law Commissions Act 1965 in the following terms:—

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

Background

1.2 The general law relating to recovery of possession of heritable property[1] (sometimes described as the law relating to removings and ejections) is in an unsatisfactory state. The problems associated with this branch of the law arise from statute, from the common law and from case-law. Statute law is unquestionably the main source of difficulty, in particular the Sheriff Courts (Scotland) Act 1907.[2] The provisions in the 1907 Act are unnecessarily complicated and can lead to confusion, particularly in regard to the statutory forms of notice to quit, the number and variety of periods of such notice and the processes by which questions relating to removing and ejection are brought before the court. It was said of the 1907 Act in one case[3] that it "had thrown the whole matter (the law relating to actions of removing and ejection), which was by no means devoid of confusion at any rate, into still greater confusion".

1.3 This area of law was considered by the Law Reform Committee for Scotland who made certain recommendations in their Second Report[4] concerning the statutory forms of notices to quit, the periods of notice to be given and the various court processes. These recommendations for amendment of the law were endorsed by the Committee on The Sheriff Court (the Grant Committee)[5] who noted[6] that the law and procedure relating to actions of removing and ejection were "in considerable confusion". A major improvement was made with the introduction in 1971[7] of a new sheriff court procedure, the summary cause for recovery of possession of heritable property. This procedure was introduced to resolve the dilemma of a person intending to raise an action to recover possession of heritable property from an occupier. Prior to the introduction of the 1971 Act such a person had to make the sometimes difficult choice between proceedings for removing and proceedings for ejection. Apart from this improvement many difficulties in this area of law remain, particularly in relation to notices to quit.

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1. Excluded from our consideration are the special statutory provisions regarding recovery of possession made in Part II of the Rent (Scotland) Act 1984 in respect of protected tenancies, statutory tenancies and short tenancies, in Part III of the Housing (Scotland) Act 1987 in respect of public sector tenancies (secure tenancies) and in Part II of the Housing (Scotland) Act 1988 in respect of assured tenancies and short assured tenancies: see para 1.8 below.
2. Referred to in the Report as the "1907 Act".
3. *Campbell's Trs* v *O'Neill* 1911 SC 188 by Lord Johnston at p 192.
4. Cmnd 114 (1957).
5. Cmnd 3248 (1967).
6. At para 635.
7. The Sheriff Courts (Scotland) Act 1971 (referred to in the Report as the "1971 Act"), s 35.

Consultation

1.4 Representations about the confused and uncertain state of the law on this subject were made to us by the Scottish Development Department (who were formerly concerned with this branch of the law) and by a number of informed individual commentators. This body of opinion had expressed concern at the state of the law and we were convinced of the compelling need for reform. We accordingly requested Mr A G M Duncan, formerly Senior Lecturer in the Department of Scots Law at Edinburgh University, to examine the law relating to actions for recovery of possession of heritable property and in particular to have regard to a number of difficult procedural problems encountered in this area. Mr Duncan provided us with a research paper entitled "Actions of Ejection and Removing"[1] and we are most grateful for his valuable assistance. The Research Paper was published in January 1984 simultaneously with our Memorandum[2] which highlighted and discussed the main issues of difficulty and put forward propositions for reform. In response to our consultation we received comments from legal practitioners and academic lawyers, from legal bodies and from other professional organisations. We are most grateful to all those who commented to us.[3]

Scope of our recommendations

1.5 Our recommendations are intended to rationalise and simplify an area of the law which is unnecessarily complicated, inconsistent and obscure. Most of our recommendations deal with questions relating to leases of heritable property. The remaining recommendations are concerned with court proceedings for removing from heritable property.

Leases

1.6 We should expand first of all on the scope of our recommendations which are concerned with leases. These recommendations are either directly concerned with or arose out of a consideration of matters relating to termination of a lease in ordinary course.[4] By this we mean termination by the giving of notice at the end of either the agreed duration of the lease or the period for which the lease has been continued in force by the common law principle of tacit relocation.[5] In the course of our consideration it seemed to us however that certain of our recommendations should be applied not just to the giving of a notice of termination but also to the giving of any notice under any enactment by one party to the lease to the other. We came to this conclusion because it seemed to us illogical or inconsistent to confine our recommendations to the giving of notices of termination. Accordingly we have framed our recommendations to cover any notice under any enactment where we considered this appropriate, although we appreciate that in doing so we may be straying beyond the terms of our reference. We think it useful however to raise the issue in our recommendations.

1.7 We make reference during our discussions in the Report to two categories of lease. One category is leases of agricultural holdings under the Agricultural Holdings (Scotland) Act 1949.[6] The other is non-agricultural leases, by which for the purposes

1. Referred to in the Report as the "Research Paper".
2. Consultative Memorandum No 59 on Recovery of Possession of Heritable Property; referred to in the Report as the "Memorandum".
3. A list of those submitting comments on the Memorandum is contained in Appendix B.
4. A lease may however be terminated during its currency, for example on the occurence of an iritancy. An irritancy is an event specified in a lease such as non-payment of rent which justifies termination. We made certain recommendations in relation to this matter in our Report on Irritancies in Leases (Scot Law Com No 75) which have been implemented by ss4 to 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.
5. The principle of tacit relocation operates in relation to most types of lease and where it applies has the effect of implying the consent of the parties to the renewal of the lease for a further period.
6. Referred to in the Report as the "1949 Act"; "agricultural holding" is defined in s 1 of the Act.

of the Report we mean any lease of heritable property other than a lease of an agricultural holding or a lease or tenure of certain other subjects. These other subjects are: allotments and allotment gardens under the Allotments (Scotland) Acts 1892 to 1950; crofts and the subjects of a cottar under the Crofting Acts; and the holdings of a landholder or a statutory small tenant under the Small Landholders (Scotland) Act 1911.[1] These subjects involve special considerations and so are already regulated by statute. For this reason we excluded these subjects from our review of matters pertaining to leases.[2]

Security of tenure legislation

1.8 In dealing with non-agricultural leases we do not make any recommendations which would affect the substantive law and the related procedural law contained in the Rent (Scotland) Act 1984, the Housing (Scotland) Act 1987 and the Housing (Scotland) Act 1988. These Acts carry into effect social policy—in particular providing domestic and public sector tenants with security of tenure in certain circumstances. It would not be appropriate for us to recommend any alterations to the law contained in these Acts.

Court proceedings

1.9 Our remaining recommendations are concerned with simplifying and improving the law concerning the various court proceedings for recovery of possession of heritable property generally.[3] We deal with proceedings for removing in the sheriff court under both summary cause and ordinary cause procedure. The Court of Session's jurisdiction in relation to removings is also examined. We are not considering here only cases in which a landlord, having purported to terminate a lease, wishes to institute proceedings to remove the tenant or former tenant who has remained in possession of the property. Certain court proceedings are for example also available to a proprietor who wishes to expel from his heritable property a person or persons who are occupying it without any title to do so. Our review of the law concerning proceedings for removing includes also a consideration of questions of title to sue and to defend, and certain general matters such as the law of violent profits, proceedings directed against unidentified persons in occupation of property, and the acceleration of procedures for removing persons in unlawful occupation of property.

Tacit relocation

1.10 The application of the principle of tacit relocation to certain types of leases has already been mentioned. There are certain issues associated with tacit relocation which we consider during the course of this exercise. We did not however undertake a detailed examination of the operation of this principle. To do so would be to raise problems of substantive law which are quite different in kind from the procedural and related problems with which the Report is concerned. A consideration of these problems could scarcely be confined to the substantive law of leases since the principle of tacit relocation applies elsewhere in the law, for example in the law relating to contracts of service and partnership.

1. Our definition of "non-agricultural lease" for the purposes of the Report is reflected in clauses 1(10) and 27(1) of the draft Bill contained in Appendix A.
2. We should point out however that certain of the subjects mentioned do in appropriate cirumstances fall within the definition of an agricultural holding under the 1949 Act.
3. These recommendations, in applying to heritable property generally, therefore apply to allotments, crofts and the other subjects listed in para 1.7 above as excepted from our definition of "non-agricultural lease": see paras 11.18-11.19 below, and clause 26 of the draft Bill in Appendix A.

Term and quarter days

1.11 It should be mentioned at this point that we have already dealt with one issue raised in the Memorandum. This concerned a definition of Whitsunday and Martinmas for entry and removal purposes from a farm. In the Memorandum[1] we suggested that Whitsunday and Martinmas should be defined in the absence of express stipulation to the contrary as 28 May and 28 November respectively for these purposes. On consultation we received an interesting response to this proposition. It was put to us that a review of the law relating to Whitsunday and Martinmas, and also Candlemas and Lammas, was required and that we should undertake this with a view to recommending an appropriate definition of these terms for all legal purposes. We undertook this review and following consultation published a Report[2] on this matter in October 1987.

Contracting out of statutory notice provisions

1.12 During the course of our exercise on recovery of possession of heritable property the judgment of the Second Division of the Court of Session was given in the case of *Morrison's Exrs* v *Rendall*.[3] It was apparent that this judgment raised an issue of law which was related to and which might have implications for our exercise. The case concerned the entitlement of parties to an agricultural lease to make an enforceable agreement to contract out of the statutory notice requirements relating to termination of such a lease—contained in section 24(1) of the 1949 Act. We accordingly prepared a Consultation Paper which examined the issues raised by *Morrison's Exrs*. This was published in July 1986. There was a wide response to this consultation including comments from legal practitioners and academic lawyers, from legal bodies and from various organisations representing the interests of either landlord or tenant. We are most grateful to all who commented to us.[4] Our recommendations on this issue are contained in this Report.[5]

Summary of contents

1.13 In Part II of this Report we examine in relation to both non-agricultural leases and leases of agricultural holdings the following matters: the form, content and period of notice of termination; presumptions where necessary as to the commencement and duration of a lease; the treatment of a tenancy which is in mixed use (that is where the property is used partly for agriculture and partly for a non-agricultural purpose); and resumption by a landlord of leased property. In Part III we are concerned with the entitlement of parties to contract out of statutory notice provisions relating to termination of a lease. We examine in Part IV various cases where the giving of notice of termination and indeed other notices involve special problems. These include for example the giving of notice of termination in the following cases: where there is a sub-tenancy in existence as well as a tenancy; and where there is more than one landlord of the property, each being the landlord of a separate part or each having an interest in common in the property.

1.14 In Part V we consider the problems associated with the existing statutory provisions relating to agricultural holdings in connection with the bequest or transfer on death of an interest in the lease and we recommend similar provisions in relation to non-agricultural leases. Questions of title to sue and to defend in relation to

1. Para 2.24, proposition 15.
2. Report on The Scottish Term and Quarter Days (Scot Law Com No 108); the Report contains a number of recommendations including the following: Whitsunday and Martinmas should be defined as 28 May and 28 November respectively (Recommendation 1); and Candlemas and Lammas should be defined as 28 February and 28 August respectively (Recommendation 3); and these Recommendations should apply for any legal purpose (Recommendation 5).
3. 1986 SLT 227; referred to in the Report as '*Morrison's Exrs*'.
4. A list of those submitting comments on the Consultation Paper is contained in Appendix C.
5. See Part III.

proceedings for removing are examined in Part VI. Parts VII, VIII and IX deal respectively with proceedings under the ordinary cause in the sheriff court, under the summary cause in the sheriff court, and in the Court of Session. We consider various general issues arising in relation to proceedings in Part X, namely the law of violent profits, proceedings against persons in illegal occupation of property who cannot be identified by the pursuer, and the acceleration of procedures in an action for removing persons in unlawful occupation of property. In Part XI we deal with various general and ancillary matters such as requirements in connection with the giving of notice. Finally in Part XII we set out a summary of our recommendations.

1.15 A draft Bill which would give legislative effect to our recommendations is contained in Appendix A. Implementation of many of our recommendations would of course affect leases of agricultural holdings. We should point out that the draft provisions which would achieve this have been drawn up separately from those concerning non-agricultural leases. They have been drafted as amendments to the 1949 Act and placed in Schedule 1 of the Bill.[1] Implementation of our recommendations in this manner would retain the present structure of separate legislative enactments dealing respectively with non-agricultural subjects and agricultural holdings. We consider that this arrangement is a logical one and is convenient for those who use these statutes. The draft provisions concerning agricultural holdings would also in this form be more easily assimilated into any future consolidation of the Agricultural Holdings Acts.

1. Clause 13 applies Part I of the draft Bill in relation to leases of agricultural holdings by introducing the amendments to the 1949 Act set out in Schedule 1.

Part II Termination of Leases

Introduction

2.1 It is a general rule that the expiry of the agreed duration of a lease does not in itself bring the lease to an end. Notwithstanding express provision in the lease to the contrary a lease can generally be brought to an end in ordinary course only by notice of termination given by either the landlord or the tenant to the other. Such notice is required in most cases as a result of the operation of the principle of tacit relocation. This principle is applied to leases of agricultural holdings by statute, in terms of section 3 of the 1949 Act.[1] Tacit relocation applies under the common law to most but not all types of leases. Certain types of lease are excluded from its application, such as seasonal lets of subjects—for example fishings and shootings. The intermittent or temporary nature of such leases can be said to be inconsistent with the application of the principle.[2] Where tacit relocation operates, it creates a presumption that where no effective action has been taken to terminate the lease, both parties wish it to be continued for a further period[3] on the same terms. Accordingly where tacit relocation applies no action for removal of a tenant in ordinary course can succeed unless it has been preceded by due notice of termination of the lease.

2.2 In this Part of the Report we are concerned with various matters relating to notice of termination of a lease, whether that lease is a non-agricultural one[4] or a lease of an agricultural holding. This Part therefore deals almost wholly with leases capable of being continued in force by tacit relocation, whether under the common law or under statute. In relation to notices of termination there are a number of different statutory provisions and requirements. This area of law requires simplification and rationalisation. In Section A of this Part we deal with the form and content of a notice of termination. Consideration is given in Section B to the period of notice required to be given. Finally various miscellaneous matters relating to termination of a lease are dealt with in Section C.

Section A: form and content of notice

Effect of notice of termination

2.3 In relation to leases which are capable of being continued in force by tacit relocation, there appears to be doubt as to whether the notice required to prevent the operation of tacit relocation requires the same degree of formality as the notice which a landlord would have to give as a preliminary to an action of removing.[5] If tacit relocation relies upon the implied consent of both the landlord and the tenant to a continuation of the lease, one line of argument may be that anything which signifies an absence of that consent should suffice to exclude tacit relocation. It seems

1. Section 3(1) provides that the tenancy of an agricultural holding shall, instead of coming to an end on the termination of the stipulated endurance of any lease, be held to be continued in force by tacit relocation for another year and thereafter from year to year, unless notice of termination under s 24 is given.
2. The various possible exceptions to the general rule of tacit relocation are discussed in the Research Paper paras 2.6-2.14; and see Rankine, *The Law of Leases in Scotland* (3rd edn)(referred to in the Report as "Rankine") p 599 and Paton and Cameron, *Landlord and Tenant* (1967)(referred to in the Report as "Paton and Cameron") p 223.
3. The period of continuation is one year where the original period of the lease was one year or longer, and the same period as the original period of the lease in any other case.
4. Our definition of the term "non-agricultural lease" for the purposes of the Report has already been outlined in para 1.7 above, and is reflected in clauses 1(10) and 27(1) of the draft Bill.
5. See Paton and Cameron, p 225, and Research Paper, para 2.2.

to us however that nothing would be gained from the recognition or introduction of any distinction of this kind and that to do so would simply create confusion and difficulty. It would be difficult for instance to justify a situation in which a tenancy had apparently been brought to an end in ordinary course but where it was not open to the landlord to take steps to recover possession from the former tenant. The majority of consultees were in agreement with the proposal put forward in the Memorandum that legislation should eliminate any difference there may be between the requirements for termination of a tenancy by excluding tacit relocation and the prerequisites for proceedings for recovery of possession.

2.4 As noted in paragraph 2.1 above where a lease is of a type which is capable of being continued in force by tacit relocation it will not come to an end at the termination of the stipulated endurance of the lease unless notice of termination is given. Moreover where the lease has been continued in force by tacit relocation it will not come to an end at the termination of the period for which it has been continued in force, unless such notice is given. We consider that it would be useful for any legislation dealing with the giving of notices of termination to enact these principles.

2.5 Accordingly we **recommend**:

1. **In relation to leases which are capable of being continued in force by tacit relocation:**

   (a) the requirements of a notice to prevent the operation of tacit relocation should be the same as those of a notice on which to found removal proceedings; and

   (b) any legislation concerning the giving of notices of termination should make it clear that the tenancy will not come to an end at the termination of the stipulated endurance of the lease, or if the lease has been continued in force by tacit relocation, at the termination of the period for which the lease has been so continued in force, unless notice of intention to bring the tenancy to an end has been given by one party to the other.

   (Paragraphs 2.3-2.4; clause 1(1) and Schedule 1, para 2, new s 24(1), each as read with clause 17(1))

Necessity for written notice

2.6 The basic common law rule is that a notice of termination must be definite and unconditional. Under common law oral notice was admitted for the termination of leases of urban subjects generally.[1] While the scope of this rule has been reduced by statute it has not been abolished. In the area where oral notice is still admissible it is unclear whether it is allowed in relation to leases of all kinds or only in relation to verbal leases or yearly tenancies.[2] The policy of statute in relation to the form of notice of termination is to introduce the requirement of written notice. Thus section 24(1) of the 1949 Act provides that the tenancy of an agricultural holding shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end. Also under section 112 of the Rent (Scotland) Act 1984 written notice is required to terminate the let of a dwellinghouse.

2.7 We take the view that this policy of requiring written notice of termination is well-founded. Oral 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. Most of our consultees agreed with our view, which endorses a recommendation of the Law Reform Committee for Scotland in their Second Report[3] that where there is a let the notice of termination should be in writing.

2.8 As noted this policy has already been achieved in relation to termination of the tenancy of an agricultural holding and the let of a dwellinghouse. This requirement however should be introduced in relation to other types of lease. We **recommend**:

1. A lease is an urban lease where the main subject let is the use of what has been placed on the surface of the ground, such as buildings of any kind: Paton and Cameron, p 70.
2. Paton and Cameron, p 272.
3. At para 12.

2. Notice to terminate a lease should always be in writing.

(Paragraphs 2.6-2.8; clause 1(1))

Single document

2.9 One issue arises in relation to a requirement to give notice in writing in order to terminate a lease, namely whether it should be necessary for the notice and any additional statutory statement which it must or may contain to be incorporated in a single document. For example a landlord's notice to quit an agricultural holding will often require to be complemented by an additional statement (if not two or more statements) if the notice is to receive effect or if the landlord wishes to avoid incurring liability for payment to the tenant of compensation for disturbance or to assist in the reorganisation of the tenant's affairs. The relevant sections will often require that the reasons for giving the notice be "stated in the notice"[1] or that the notice "contains a statement" giving a prescribed explanation or justification for the termination of the lease.[2] Section 112 of the Rent (Scotland) Act 1984 provides too that a notice to quit a dwellinghouse shall not be valid unless it is in writing and contains such information as may be prescribed.

2.10 The reaction of consultees to this issue varied considerably. Some took the view that to achieve certainty it should be provided by statute that any additional statement which must or may be included in a notice to terminate a lease must, to be effective for its purpose, form part of the content of a notice and cannot therefore be validly incorporated in any other document. Other consultees took the alternative view that it should be provided in statute that any such statement may be contained in or may accompany the notice. The remaining consultees were not in favour of any legislation on this issue at all, taking the view that in matters which have important financial consequences for the parties involved the courts should not be required to adopt too narrow or literal an approach but that their decision should depend rather on whether the substantial requirements of the statute have been met. This was the approach taken by the Court in a case[3] concerning a tenancy of an agricultural holding. In that case the envelope containing the landlord's notice to quit also contained a letter referring to the notice and explaining the reasons for it. The Court considered whether the contents of the letter were "contained" in the notice to quit—that is whether the letter was so closely connected with the actual notice to quit that it could be regarded as forming part of the notice. The Court, following English authority,[4] answered the question in the affirmative.

2.11 The mixed response to this question indicates a lack of substantial support for any form of legislative action. This persuaded us to confirm our initial view that it would be difficult to legislate further in this matter without the attendant risks of either placing unacceptable restraints upon the court's power to deal with individual cases in the light of their own circumstances, or conversely encouraging laxity in complying with the statutory requirements. We are therefore content that the courts should as at present be left to decide in any individual case whether the substantial requirements of statute have been met.

2.12 We **recommend** that:

3. In relation to any additional statement which under statute a notice of termination of a lease must or may contain, legislation should not require that the statement either be incorporated within the notice in a single document or accompany the notice in a separate document.

(Paragraphs 2.9-2.11)

Different notices by landlord and tenant

2.13 While the common law rule that a notice of termination of a lease must be definite and unconditional affects landlord and tenant alike, statute has imposed stricter requirements on the giving of notice by the landlord. For example where a landlord raises an action for removal of his tenant under section 36 of the 1907 Act that action must be preceded by due notice to the tenant in accordance with Form

1. See for example s 25(2) of the 1949 Act.
2. See for example the Agriculture (Miscellaneous Provisions) Act 1968, s 11(1).
3. *Barns Graham* v *Lamont* 1971 SLT 341.
4. *Turton* v *Turnbull* [1934] 2 K B 197.

L in Schedule 1 to the Act.[1] Similarly an action by the landlord under section 37 of that Act must be preceded by notice to the tenant in accordance with Form N.[2] In the converse case where the notice is given by the tenant it would seem that while Form L or Form N may be used their use is not obligatory.[3] A similar result follows from the scheme of the 1949 Act. Section 24(1) of the Act provides that the tenancy of an agricultural holding shall not come to an end unless written notice has been given by either party to the other of his intention to bring the tenancy to an end. There is the additional requirement in subsection (4) that where notice is given by the landlord it is to be given either in the same manner as notice of removal under section 6 of the Removal Terms (Scotland) Act 1886 or in the form and manner prescribed by the Sheriff Courts (Scotland) Act 1907.

2.14 Consultees were on the whole in favour of abolishing the distinction between the requirements imposed upon the landlord and those imposed upon a tenant as regards the form of notice of termination. Certain consultees however expressed reservations about this. It was felt by them that tenants do not have such ready access to professional advice as do landlords and so tend to act on their own without the benefit of such advice. These consultees therefore favoured the acceptance of any form of notice from a tenant which is clear and unambiguous. We take the view however that it is desirable to achieve consistency in the law concerning the form of notice of termination, whether it is given by a landlord or by a tenant. Moreover we go on in the following paragraphs to consider simplifications in the law regarding the form and content of such notices. Our recommendations on this will we think go at least some way to meeting the reservations expressed to us.

2.15 We **recommend**:

4. **The distinctions between the requirements imposed upon a landlord and those imposed upon a tenant as regards the form of notice of termination of a lease should be abolished.**

(Paragraphs 2.13-2.14; clause 1(1) and Schedule 1, para 2, new s 24(1))

Single form of notice

2.16 The relevant provisions concerning forms of notice of termination of a tenancy are contained in the 1907 Act, sections 34 to 38A and Rules 103 to 107 of Schedule 1 to the Act. Three forms of removal notice are given in the Schedule. Forms L and N are primarily forms of notice of removal to be given by landlords although they may be used with suitable modifications by tenants, whereas Form M is a form of letter of removal which can be used only by a tenant. Although the forms of notice are brief they have given rise to a considerable amount of litigation as any material departure from the prescribed form is likely to render the notice invalid. The following examples illustrate this. 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.[4] An inadequate or inaccurate description of the subjects will invalidate the notice[5] and a notice relating to part only of the subjects let is ineffectual.[6] The insertion of the wrong date (for example 15 May instead of 28 May) will usually be fatal.[7] Where Form L is the form that must be used the notice is invalid if it omits a reference to the lease or other document on which the notice is based.[8] The relevant statutory provisions of the 1907 Act are fully discussed elsewhere.[9] They were also considered by the Law Reform Committee for Scotland. We are in agreement with the conclusion reached by the Committee, namely that the provisions of the 1907 Act with regard to forms are confusing and create uncertainty.

1. Rule 104 in Schedule 1 to the 1907 Act as substituted by Act of Sederunt (Ordinary Cause Rules, Sheriff Court) 1983 (SI 1983/747) and amended by Act of Sederunt (Ordinary Cause Rules Amendment) 1983 (SI 1983/1546).
2. Rule 105, cited above.
3. See Rules 104 and 105, cited above; also Paton and Cameron, p 277.
4. See eg *Patten* v *Morison* 1919 35 Sh Ct Rep 252.
5. See eg *Scott* v *Livingstone* 1919 SC 1; *Cameron* v *Ferrier* 1912 28 Sh Ct Rep 220.
6. *Gates* v *Blair* 1923 SC 430; but see s 32 of the 1949 Act.
7. *James Grant & Co Ltd* v *Moran* 1948 SLT (Sh Ct) 8.
8. *Rae & Cooper* v *Davidson* 1954 SC 361.
9. See Research Paper, paras 3.26-3.30 and Paton and Cameron, p 266 et seq.

2.17 We therefore raised various questions in the Memorandum in relation to notices of termination in respect of leases of urban subjects. We discussed whether statute should prescribe a standard form of notice; and if so whether such a form should be strictly adhered to for a notice to be effective, or whether a notice not altogether in the statutory form should be effective if it conveys the required information with reasonable clarity. A further option would be to prescribe in statute certain essential requirements which a notice must contain, without prescribing also any form of notice. The adoption of any of these courses of action would supersede one question which has sometimes arisen in relation to the 1907 Act. This is whether the Act applies only where one of the court proceedings for which it provides is being adopted or on the other hand alters the substantive law on matters such as the period and form of notice for termination of tenancies.[1]

2.18 On consultation we received a variety of views regarding the approach which should be taken to regulate a notice of termination of urban subjects. Certain consultees took the view that a notice should be effective if it contained certain essential elements. The views of these consultees would appear to be met were statute to prescribe only essential requirements of a notice. Other consultees were in favour of a standard form of notice being prescribed by statute. Of these consultees certain were of the view that the form need not be strictly adhered to in order to be valid, so long as the general intent and purport of the notice followed that set out in the legislation. Another view expressed however was that there would be little hardship in imposing a strict requirement to follow a particular form prescribed in statute. These consultees were divided too as to whether statute should also prescribe the essential elements of a notice, possibly as a clear indication of what departure there may be from any statutory form of notice without invalidating the notice.

2.19 Having fully considered the various views given to us we have come to the conclusion that it would be sufficient for legislation simply to define or specify the essential elements of a valid notice of termination without going on to prescribe the actual form or terms of that notice. Any prescribed form would in any event require adaptation for different circumstances and cases. The approach we favour would avoid questions such as those which have already arisen as to the validity of a notice which does not completely adhere to a statutory form and as to whether a notice complies with provisions requiring it to be for example "as nearly as may be" in a prescribed form.[2]

2.20 We consider that the foregoing conclusion should be equally applicable to notices in respect of non-agricultural subjects and in respect of agricultural holdings. There may of course be special factors affecting the giving of a notice to quit an agricultural holding. It is not uncommon to find in a lease of an agricultural holding different dates of termination for different parts of the holding. The landlord may wish to exercise the power under section 32 of the 1949 Act to give a notice to quit part only of the holding. Lastly there may be a requirement that the notice contains some statutory statement in order to be effective or in order to avoid or reduce the landlord's liability for payment of compensation to the tenant. In our view any additional material in respect of a lease of an agricultural holding may simply be inserted in the notice along with any essential requirements.

2.21 In conclusion we **recommend**:

5. **In respect of leases of both non-agricultural subjects and agricultural holdings, statute should define or specify the essential requirements of a valid notice of termination of the lease and a standard form of notice should not be prescribed.**
(Paragraphs 2.16-2.20; clause 1(6) and Schedule 1, para 2, new s 24(6))

Essential requirements of notice of termination

2.22 We now consider the essential requirements of any notice of termination of a lease. It seems vital to retain in any such notice the elements common to Forms L, M and N of Schedule 1 to the 1907 Act—the name of the party giving the notice,

1. See para 2.31 below.
2. The 1907 Act, Schedule 1, Rules 104 and 105, and see *Rae & Cooper* v *Davidson*, cited above.

and a description or specification of the leased subjects in respect of which notice is given. To this we would add the address of the party giving the notice. The recipient of the notice may wish to challenge it or give a counter-notice in return. In most cases he would be aware of the other party's address from the terms of the lease. We consider however that it may be useful to require this information to be given in the notice so that it would be readily available to the recipient. It also seems desirable to improve upon the forms mentioned regarding the term of removal by requiring the stipulation of a specific date upon which the tenancy is to come to an end under the notice. These forms appear at present to envisage erroneously that removal will always take place at a Whitsunday or Martinmas term.

2.23 Form L imposes an additional requirement, namely the specification of the lease or other foundation for the giving of the notice. Although in certain circumstances such a reference could provide useful information, the giver of the notice might not always have this information at his disposal. In the situation where there is no written lease there may not be anything to which he can satisfactorily refer. In accordance with the preference expressed by consultees we consider therefore that there should not be any requirement to refer in a notice of termination to the lease or other relevant material. The insertion of this information into the notice would be at the discretion of the person giving it.

2.24 Forms L, M and N all contain a specific statement that the tenant is to remove from the leased subjects at the termination date of the lease. One question we considered[1] was whether it is essential that the word "remove" should be required to be used in the notice. Some consultees simply expressed a preference that any notice should contain the word "remove". One consultee gave a reason for favouring this approach, namely that unless reference to "remove" is made the intention of the notice may not be fully brought home to the tenant where notice is given by the landlord. Another consultee however maintained that this expression is not readily understood in its legal sense by lay persons.

2.25 After reflection we came to the view that a flexible approach to this question is preferable. We consider therefore that it should not be an essential requirement of a notice that the word "remove" is used, but instead the notice should make clear the intention of the party giving it to bring the tenancy to an end. Where this intention is explicit this in itself is a sufficient indication to the person receiving the notice that the lease is being terminated. We cannot see any reason why a notice in explicit terms should necessarily be invalid simply by reason of the omission of the word "remove". This approach is similar to the fairly flexible one taken by English law in this respect. The general position in England is that "the form of notice is immaterial provided that it indicates, in substance and with reasonable clearness and certainty, an intention on the part of the person giving it, to determine the existing tenancy at a certain time, and that the party to whom it is given could not be misled as to the intention of the giver, though the language may be ambiguous and lame".[2]

2.26 Under the relevant sections of the 1907 Act the notice must be given to the tenant or as the case may be to the proprietor but it may however be sent "by or on behalf of" the party giving the notice. This seems to be a sensible provision which should be retained. However there is a doubt which requires resolution, namely whether it should be necessary to state on whose behalf the notice is given when carried out by an agent or a sheriff officer. There are conflicting decisions on this.[3] Most consultees agreed with our proposal that where notice is given by an agent it should be necessary to specify the name of the party on whose behalf it is given. We consider that it would be useful for purposes such as the giving of a counter-notice if the name and address of the agent were also required to be given.

2.27 We conclude therefore by **recommending**:

1. See the Memorandum, para 2.11.
2. Hill and Redman, *The Law of Landlord and Tenant* (17th edn) para 402.
3. See *Grant* v *Bannerman* 1920 36 Sh Ct Rep 59 and cf *Seggie* v *Haggart* 1926 SLT (Sh Ct) 104.

6. **A notice of termination of a lease, whether of non-agricultural subjects or of an agricultural holding, should specify the following:**

   (a) the intention of the party giving the notice to bring the tenancy to an end;

   (b) the leased property;

   (c) the specific date on which the tenancy is to end;

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

   (e) where the notice is given by an agent, the name of the party on whose behalf it is given and the name and address of the agent.

   (Paragraphs 2.22-2.26; clause 1(6) and Schedule 1, para 2, new s 24(6))

Section B: minimum period of notice

2.28 An examination of the law relating to the period of notice of termination required to be given raises a number of points for consideration, mainly in the context of non-agricultural subjects. Many of these points are attributable to the nature and history of the statutory regulation of the period of warning required. We shall briefly describe the existing law, the difficulties which arise from it, and our recommendations for reform. We do this first in relation to non-agricultural subjects and then (in paragraphs 2.44-2.47) in relation to agricultural holdings.

Non-agricultural subjects

2.29 Sections 34 to 38A of and Rules 103-107 of Schedule 1 to the 1907 Act contain provisions relating to removings from non-agricultural subjects. Various periods of notice are prescribed, applicable to varying circumstances. These periods of notice are:

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

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

(c) "In the case of houses let with or without land attached not exceeding two acres in extent,[1] as also of land not exceeding two acres in extent without houses, as also of mills, fishings, shootings, and all other heritable subjects excepting land exceeding two acres in extent, and let for a year or more," the period is not less than 40 days (section 37 and Rule 103 of Schedule 1); and

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

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

2.31 The 1907 Act deals primarily with the sheriff courts and their procedure. There is a measure of doubt whether the foregoing provisions of the 1907 Act, which prescribe a minimum period of notice for termination, apply generally or only where a form of process for which the 1907 Act makes provision is being adopted. We

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

suggested in the Memorandum[1] that this doubt would not concern us were it to be made clear that any statutory minimum period of notice would apply irrespective of the form of any proceedings which may be adopted. Consultees were in agreement with this point.

2.32 We **recommend**:

7. Any prescribed minimum period of notice of termination of a non-agricultural lease should apply irrespective of the form of any court proceedings which may be adopted.

(Paragraphs 2.29-2.31; clause 1(1))

2.33 There is also some doubt whether the provisions of the 1907 Act override any conventional provision for a shorter minimum period of notice.[2] The Memorandum contained a suggestion[3] that any statutory minimum period of notice should apply irrespective of any different provision in the lease between the parties or otherwise agreed by them. Since then we have had the opportunity of considering this point fully in the light of a recent decision of the Court of Session. This matter is dealt with in Part III of the Report.

2.34 Where the 1907 Act applies the period of notice is considerably longer in the case of a lease of lands exceeding two acres in extent than in the case of other subjects. We put forward in the Memorandum[4] the suggestion by the Law Reform Committee for Scotland that "the nature of subjects be ignored as a factor which ought to affect the period of notice, especially since this is generally reflected anyway in the period of the let." Consultees were in agreement with this suggestion.

2.35 In dealing with non-agricultural leases the Committee considered that there was an unnecessary variety of periods of notice and recommended that this should be simplified by introducing two periods only, applicable in the absence of express stipulation in a lease for a longer period. The suggested periods were 40 days in the case of a let for a year or more, and 14 days or the period of the let, whichever is the shorter, in the case of all other lets. The Committee completed their Report shortly before the introduction of the statutory requirement for service of a notice to quit a dwellinghouse at least 28 days before the date of removal, and the related amendment in this connection to section 38 of the 1907 Act.[5] In the Memorandum[6] we conjectured that if the Committee's Report had been completed after the introduction of the statutory requirement referred to the Committee might in the interests of uniformity have tailored their recommendation to correspond with it.

2.36 The current requirement of notice in respect of dwellinghouses is now contained in section 112 of the Rent (Scotland) Act 1984,[7] under which notice is to be given not less than four weeks before the date on which it is to take effect. On consultation we raised for consideration whether for the sake of uniformity there should be for all non-agricultural leases a statutory minimum period of notice of 28 days or if shorter, the period of the lease. This latter suggestion was designed to meet one apparent difficulty with a provision such as section 112 of the 1984 Act. This is that in practice under the terms of this provision there could not be an effective letting of a dwellinghouse for less than 28 days. This situation arises from the requirement that a period of 28 days notice of termination is to be given taken along with the rule of law that a notice of termination must be given, during the currency of the let.

2.37 We received a variety of views from consultees on this proposal. Some accepted it. Certain consultees however considered that a minimum period of notice of 28 days

1. Para 2.19 and proposition 10.
2. See *Duguid* v *Muirhead* 1926 SC 1078, per Lord Constable at pp 1082-3, and cf *Viscountess Cowdray* v *Ferries* 1918 SC 210, per Lord Johnston at p 219.
3. Para 2.19.
4. Para 2.20; see para 13 of the Committee's Second Report.
5. See para 2.30 above.
6. Para 2.21.
7. Referred to in the Report as the '1984 Act'.

in respect of such leases would be too short in relation to some leases, for example a lease of a duration of one year or more. We appreciate this latter point of view. However it has to be borne in mind that the period of notice to be prescribed would be a minimum one only and accordingly parties can when drawing up their lease take into account other factors such as the duration of the lease or the nature of the subjects. In doing so they may agree that a longer period of notice shall apply should this be considered desirable.

2.38 Leaving aside for the moment the special case of leases of a very short duration, we consider it preferable to provide that a minimum period of notice should be given in respect of all non-agricultural leases rather than make different provisions applicable to leases depending on their type and duration. In these circumstances we think that the prescription of a period of notice of 28 days would be an adequate minimum period applicable in the absence of the parties' agreement to the contrary.[1] A provision to this effect would also have the merit of achieving consistency with the length of period of notice required by section 112 of the 1984 Act in respect of dwellinghouses.

2.39 Regarding short leases, in respect of which a 28 day period of notice would not be appropriate, one suggestion put to us was that the period of notice should be a period of one half the period of the lease. This seems a reasonable and practical solution, and preferable to a requirement to give notice of the whole period of the lease. The suggestion would allow notice of termination to be given during the currency of the let itself. Rather than relate this requirement to leases of a particular duration we came to the conclusion that the best solution would be to adopt a formula for notice of termination of non-agricultural leases, requiring minimum notice to be given of 28 days, or a period equal to half the period of the lease, whichever is the shorter period.

2.40 We **recommend** therefore:

8. **There should be a minimum period of notice of termination of non-agricultural leases of 28 days, or a period equal to half the period of the lease, whichever is the shorter period.**

(Paragraphs 2.34-2.39; clause 1(3))

Calculation of the period of notice

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

2.42 Consultees agreed with our suggestion that under modern conditions there is no justification for computing a period of notice otherwise than by reference to the effective date of the notice. We recommend accordingly. The desired result would

1. In Part III we deal with the entitlement of parties to a lease to agree to a longer or a shorter period of notice of termination than the minimum period stipulated in statute.
2. "House" is defined widely in s 3 of the Act to mean "a dwellinghouse, shop or other building and their appurtenances" and includes "a dwellinghouse or building let along with land for agricultural or other purposes".
3. Under section 4, removal is postponed for 24 hours where Whitsunday or Martinmas falls on a Sunday.
4. At p 562.

be achieved by framing any statutory notice provisions implementing our recommendations accordingly and also by the repeal of the 1886 Act since that Act would as a whole be overtaken by such provisions.

2.43 We **recommend** that:

9. Every period of notice of termination of a non-agricultural lease should be calculated by reference only to the period intervening between the date of giving the notice and the date on which it is to take effect.

(Paragraphs 2.41-42; clause 1(3) and Schedule 4 (repeal of the 1886 Act))

Agricultural holdings

2.44 Section 24(1) of the 1949 Act provides that the tenancy of an agricultural holding shall not come to an end unless not less than one year nor more than two years before the termination of the lease either party gives written notice to the other of his intention to bring the tenancy to an end. A similar period of notice is required under subsection (2) to terminate the tenancy in the case of a lease continued in force by tacit relocation. In the Memorandum we were not concerned with either the policy behind this section or with the terms of it.[1]

2.45 There is room however for clarification of a doubt concerning the date of termination of the lease of an agricultural holding where the lease ends at Whitsunday or Martinmas. Section 93(1) of the 1949 Act provides that, unless the context otherwise requires, Whitsunday and Martinmas in relation to any lease entered into on or after the first day of November 1948 mean respectively the 28th day of May and the 28th day of November. These definitions are stated to apply only to references to Whitsunday and Martinmas in the Act, and references to Whitsunday and Martinmas in a lease apparently continue to mean 15 May and 11 November respectively in the absence of an express stipulation or facts and circumstances which indicate the contrary.[2] Nevertheless there appears to be a doubt whether a notice to quit an agricultural holding at Whitsunday takes effect at 15 or 28 May where the lease is entered into on or after 1 November 1948 and the term Whitsunday is not further specified in the lease.[3]

2.46 In the Memorandum we proposed[4] therefore that it should be provided that where a tenant enters into or removes from a farm at the term of Whitsunday or Martinmas, the entry or removal terms should be 28 May or 28 November respectively, in the absence of express stipulation to the contrary. As noted in paragraph 1.11 above we have however already issued a Report which recommends a statutory definition of Whitsunday and Martinmas as 28 May and 28 November respectively for all legal purposes. We think that it would be helpful also to recommend the removal of the restriction in section 93(1) of the 1949 Act which applies the definitions of Whitsunday and Martinmas only in relation to leases entered into on or after the first day of November 1948. This restriction appears to have given rise to a certain degree of confusion in interpreting the meaning of the current definitions. These definitions apply to references to the term days in the Act itself and not also for all purposes relating to leases of agricultural holdings entered into on or after 1 November 1948.

2.47 We **recommend**:

10. The following words should be removed from the definition of Whitsunday and Martinmas in section 93(1) of the Agricultural Holdings (Scotland) Act 1949 (the 1949 Act): "in relation to any lease entered into on or after the first day of November, nineteen hundred and forty-eight."

(Paragraphs 2.45-2.46; Schedule 4)

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1. Implementation of various recommendations in this Part of the Report would however require a redrafting of section 24, as seen in Schedule 1, para 2 of the draft Bill in Appendix A.
2. See Connell *The Agricultural Holdings (Scotland) Acts* (6th edn) at p 20 and Gill *The Law of Agricultural Holdings in Scotland* at para 149. See also *Hunter* v *Barron's Trs* (1886) 13 R 883.
3. See *Stirrat* v *Whyte* 1968 SLT 157 at p 160 where the Sheriff expressed the opinion that in such a lease "Whitsunday" must be held to mean 15 May, and *Austin* v *Gibson* 1979 SLT (Land Ct) 12 where the Land Court took the contrary view that in a post-1948 lease the term "Whitsunday" must be construed as a reference to 28 May.
4. Para 2.24.

Section C: Miscellaneous matters relating to termination of leases

2.48 This Section is concerned with a number of miscellaneous issues of law. These are all connected in some way to termination of a lease. The issues include the resumption by a landlord of leased property; the treatment of a tenancy where the subjects are in mixed use (ie used partly for agriculture and partly for a non-agricultural purpose); establishing the termination date of a lease where the commencement date or the duration of the lease is uncertain; termination at a break-point in a lease; withdrawal of a notice of termination; termination of a lease other than by notice; the exception of the principle of tacit relocation in relation to certain types of non-agricultural leases; and the operation of section 27(4) of the 1949 Act in relation to the postponement of a notice to quit an agricultural holding.

Resumption of leased property

2.49 There is sometimes included in a lease a provision entitling the landlord during the currency of the lease to take back from the tenant possession of some part of the subjects for a particular purpose. This power of resumption in the landlord's favour is more commonly found in leases of agricultural holdings than in leases of non-agricultural subjects. The exercise of such a power can have an obvious adverse effect on the tenant's position. A safeguard to the tenant in this respect is provided by the refusal of the courts to sanction a resumption which constitutes what is sometimes called a fraud on the lease. For example a resumption which in effect invalidates the lease by leaving the tenant with a farm which is no longer a viable unit would be held to be a fraud on the lease. In such a case the landlord would not be entitled to exercise the right.[1] However it has been indicated that this safeguard may not be available where a resumption clause has been drawn up in terms which could be interpreted as covering the whole subjects of lease and where the power has been applied strictly according to its terms.[2] Our consideration of this matter therefore includes the possibility of a resumption of the whole subjects of let.

2.50 Regarding a resumption affecting an agricultural holding, exemption from the statutory provisions concerning notice to quit and security of tenure is expressly limited to the case where a notice is given in pursuance of a stipulation in a lease entitling the landlord to resume for exclusively non-agricultural purposes.[3] A resumption for agricultural purposes is therefore subject to the notice provisions of section 24(1) of the 1949 Act.

2.51 Both statute and the common law generally require the giving of a notice before removal of a tenant from leased property can take place. These rules do not apply to the exercise of a right of resumption,[4] with the exception noted in the preceding paragraph in the case of a resumption affecting an agricultural holding for agricultural purposes. Resumption clauses usually proceed on the basis that the landlord is entitled to exercise his powers at any time. These clauses sometimes make no provision for notice, or if providing for notice stipulate a period less than the statutory minimum in respect of a notice to quit. This practice has the support of certain judicial dicta.[5] In the Memorandum we proposed that a landlord should be required in relation to leases of both non-agricultural subjects and agricultural holdings to give written notice in all cases prior to the exercise of a power of resumption. Consultees accepted this proposal.

2.52 We therefore **recommend**:

11. In relation to leases of both non-agricultural subjects and agricultural holdings, a landlord should be required to give to the tenant written notice prior to the exercise of a power of resumption.
(Paragraphs 2.49-2.51; clause 4(1) and Schedule 1, para 4, new s 34A(1))

1. *Admiralty* v *Burns* 1910 SC 531; *Turner* v *Wilson* 1954 SC 296; *Glencruitten Trs* v *Love* 1966 SLT (Land Ct) 5.
2. *Edinburgh Corporation* v *Gray* 1948 SC 538, see remarks of Lord President Cooper at pp 545/546.
3. S 24(6)(*a*) of the 1949 Act.
4. *Alston's Trs* v *Muir* (1919) 2 SLT 8.
5. *Kininmonth* v *British Aluminium Co* 1915 SC 271; *Edinburgh Corporation* v *Gray* 1948 SC 538; see Research Paper, paras 3.35-3.36.

Period of notice: non-agricultural subjects

2.53 The next issue concerns the period of notice which should be given prior to the date of the intended exercise of a power of resumption. On consultation the view expressed to us was that the same minimum period of notice should be required as that applicable to termination of the lease in ordinary course. In respect of a lease of non-agricultural subjects, a requirement to this effect would seem appropriate. In accordance with Recommendation 8 above this would mean minimum notice of resumption of a period of 28 days, or a period equal to one half of the length of the period of let, whichever is the shorter.

2.54 We **recommend**:

12. The period of notice which a landlord should be required to give prior to the exercise of a right of resumption in respect of a non-agricultural lease should be at least either 28 days or the number of days equal to one half of the period for which the property is let, whichever is the shorter, before the date of the intended exercise of the right.

(Paragraph 2.53; clause 4(2))

Period of notice: agricultural holdings

2.55 The position regarding resumption for non-agricultural purposes under a lease of an agricultural holding is more complicated. This is due to provisions in the 1949 Act which in relation to certain claims for compensation require intimation to the landlord by the tenant of at least one month. These claims are for compensation for disturbance exceeding one year's rent under section 35(2)(*b*) and for the adoption of a special standard of farming under section 56.[1]

2.56 While there is no Scottish authority regarding the giving of any period of notice of such resumption in the case of an agricultural holding, there are cases on corresponding statutory provisions in force in England. It has been held in England[2] that provisions in a lease entitling a landlord to resume any part of an agricultural holding without giving such length of notice as will allow the tenant time to give due intimation of certain out-going claims, which require at least one month's notice before vacation of the land, are invalid and ineffective. This is on the basis that such a provision amounts to a purported contracting out of statutory rights of compensation. These rights cannot be renounced conventionally.[3] In one case the court took the view that while not being prepared to lay down a minimum period of notice, such notice must be considerably more than just one month.[4] It may be accepted that the English ruling is of significance in a case arising in Scotland under equivalent statutory provisions. However it seems preferable to enact for Scotland an express provision entitling the tenant to reasonable notice of a resumption rather than have this depend on an inference from other statutory rights.

2.57 The view put to us on consultation suggests that in respect of all subjects the period of notice of resumption should be the same as for notice of termination. Regarding leases of agricultural holdings this would mean a period of notice of between one and two years before the exercise of such a right of resumption. This period would be in line with the terms of section 24(1) of the 1949 Act concerning notice of termination in ordinary course. As already noted in paragraph 2.50 above this is in fact already the statutory policy in respect of one category of resumption affecting an agricultural holding, namely a resumption for agricultural purposes. A notice of between one and two years is required in such a case. We do not recommend any change in the statutory policy in relation to this class of resumption.

2.58 Regarding a resumption from an agricultural holding for non-agricultural purposes, a period of notice of between one and two years would seem excessive if not unduly restrictive. The present statutory policy is to exempt the exercise of such a right of resumption from the provisions of section 24.[5] Current practice appears

1. The statutory provisions for compensation apply on the resumption as if the part resumed were a separate holding vacated in consequence of a notice to quit—s 60(1) of the 1949 Act.
2. *In re Disraeli Agreement* [1939] Ch 382; *Coates* v *Diment* [1951] 1 All ER 890; *Beckett* v *Birmingham Corporation* [1956] 6 P & CR 352.
3. Agricultural Holdings Act 1986, s 78(1); cf s 64(1) of the 1949 Act.
4. *Beckett* v *Birmingham Corporation*, cited above, p 354.
5. See s 24(6)(a) of the 1949 Act.

to be that a resumption clause for non-agricultural purposes may entitle the landlord to exercise his powers at any time, giving either no notice or some period considerably less than the statutory minimum for a notice to quit. Given this background we favour the introduction of a requirement to give at least three months notice.[1] In the circumstances this appears to us to be a reasonable period of notice which would allow the tenant ample time in which to make due intimation to the landlord of any statutory claim for compensation.

2.59 We **recommend**:

13. The period of notice which a landlord should be required to give prior to the exercise of a right of resumption in respect of a lease of an agricultural holding should be

(a) where the purposes of the intended resumption are agricultural, not less than one year nor more than two years before the date on which it is intended to exercise the right (as currently required under section 24(6)(a) of the 1949 Act);

(b) where these purposes are non-agricultural, not less than three months before the date on which it is intended to exercise the right.

(Paragraphs 2.55-2.58; Schedule 1, para 4, new s 34A(2))

Subjects in mixed use

2.60 We now consider how a party to a lease is to proceed in giving notice of termination where the leased subjects are used partly for agriculture and partly for a non-agricultural purpose. This matter was examined in *McGhie* v *Lang*[2] where the Scottish Land Court decided that the agricultural part of the leased subjects should be isolated from the non-agricultural part and regarded as itself forming an "agricultural holding". The result of this decision is that either a notice to quit for the whole subjects must be given in conformity with the 1949 Act, or that separate notices must be given for the respective parts of the subjects. Various difficulties arise from this decision. The period of notice applicable for removal from the agricultural part of the subjects would be different from that applicable for the non-agricultural part. Also the 1949 Act contains a set of interrelated provisions which would be difficult to operate if part of leased subjects were excised from the rest and treated as outwith the operation of the Act.[3] Furthermore as noted by one of our consultees the division of the subjects into units of different usage would create thereafter two or more leases, contrary to the original intention of the parties.

2.61 It has been pointed out[4] that in *McGhie* v *Lang* the Land Court founded on a Court of Session decision[5], overlooking a crucial change in the definition of an agricultural holding introduced since that earlier decision by the 1949 Act.[6] In doing so the Land Court declined to follow the precedent of certain English decisions to the opposite effect on the equivalent English statutory provision. In a recent croft purchase application[7] the Land Court made significant remarks noting these oversights and indicating that the decision in *McGhie* v *Lang* required reconsideration.

2.62 On consultation we put forward the proposal that the subjects comprised in one tenancy should be regarded as either wholly an agricultural holding or wholly outside the agricultural holdings legislation, the test to be applied being that of predominant user. The determination of the character of the tenancy would of course apply for all purposes in connection with the lease and not just for the giving of notice

1. If a provision to this effect is introduced, s 24(6)(a) of the 1949 Act would no longer be required: the terms of that paragraph are therefore not included in the draft provision proposed as a substitute for s 24 (see Sch 1, para 2 of the draft Bill).
2. 1953 SLCR 22.
3. These difficulties are fully discussed in Gill, para 6.
4. Gill, para 6; Research Paper, para 3.50.
5. *McNeill* v *Duke of Hamilton's Trs* 1918 SC 221.
6. *McNeill* concerned the definition in the Small Landholders (Scotland) Act 1911 of an agricultural holding as "any piece of land held by a tenant which is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral." The definition for the purpose of the current Act omits the word "wholly", and refers to "the aggregate of the agricultural land comprised in a lease": s1(1) of the 1949 Act; and as regards England, see s 1(1) of the Agricultural Holdings Act 1986.
7. *Cameron* v *Duke of Argyll's Trs* 1979 Strathclyde RN 121.

of termination. As pointed out in the Memorandum[1] the predominant user test has been applied under English law since 1951. Gill notes[2] too that a similar test was in fact established in Scotland in a series of cases between 1886 and 1918. Consultees agreed with the adoption of this proposal.[3]

2.63 One qualification to this test is required before leased subjects predominantly used for agricultural purposes can be treated as being wholly an agricultural holding. This is that the use of the subjects for agriculture must, if it constituted the whole use of the property, come within the definition of an agricultural holding provided in section 1 of the 1949 Act. A qualification to this effect is required in order to maintain the policy of the Act in relation to the meaning of an agricultural holding.

2.64 We **recommend**:

14. Where leased subjects are used partly for agriculture and partly for non-agricultural purposes, the subjects should be regarded either as wholly an agricultural holding or as wholly non-agricultural subjects and the test of predominant use should be applied to determine how the whole subjects should be treated; but where the predominant use is an agricultural one the subjects should be treated as being wholly an agricultural holding only if they would be an agricultural holding if that use for agriculture constituted the whole use of the property.

(Paragraphs 2.60-2.63; clause 3 and Schedule 1, para 3, new s 24A)

Dates of commencement and termination of lease. Duration of lease

Non-agricultural leases

2.65 The Law Reform Committee pointed out in their Report that "it is frequently found in practice that difficulty is experienced in an action of removing in determining the proper ish, for example under a verbal let, or where the origin of the let is obscure."[4] Payment of rent in such tenancies may not assist in establishing the ish (ie the termination date). For example where rent is paid at Whitsunday and Martinmas the lease may be either a six month let running on tacit relocation or a yearly let with half-yearly payments. Where the termination date is uncertain the party in receipt of a notice of termination may claim that it has been served against the incorrect date and so is invalid.

2.66 The Committee suggested that in cases of this kind there should be a rebuttable presumption that the lease terminates at Whitsunday.[5] This suggestion found favour with certain but not all of our consultees. After reflection and bearing in mind certain comments made to us on consultation we have doubts as to the effect of such a statutory presumption in certain cases. In some instances the presumption would undoubtedly be of assistance. But other cases arise where the tenant is in possession of leased subjects and the entry date is known, although the termination date and therefore the duration of the lease is not known. A common law presumption exists to clarify such a position. The duration of a lease in such a case is taken to be one year.[6] The lease would where necessary be held to be running on tacit relocation, year by year, from the entry date. This common law presumption would therefore provide a date of termination for the lease where the entry date is known.

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1. Para 2.26.
2. Para 6.
3. One incidental point arises from the discussion of this matter in Gill, at para 6, footnote 38. S 60(2) of the 1949 Act (application of compensation provisions to parts of holdings) is there described as a dead letter. It no longer has any counterpart in the English legislation. By s 93(4) references in the Act to the use of land for agriculture include in relation to land forming part of an "agricultural unit" (s 93(1)), references to any use of the land in connection with the farming of the unit. We accordingly suggest the repeal of s 60(2), as noted in Sch 4 of the draft Bill.
4. Second Report, para 15.
5. We have already drawn attention in para 1.11 above to our Report on the Scottish Term and Quarter Days, which recommends a definition of Whitsunday as 28 May.
6. Paton and Cameron, p 7; *Gray* v *Edinburgh University* 1962 SC 157, see remarks of Lord Justice-Clerk at p 163.

2.67 Difficulties would not arise where the entry date itself could be shown to have been Whitsunday. In terms of both the Committee's suggested statutory presumption and under the operation of the common law presumption the termination date would fall on a Whitsunday term. However where the entry was shown to have been taken on a date other than Whitsunday the common law presumption would provide the lease with a termination date other than Whitsunday. This would clash with any statutory presumption that Whitsunday is the termination date of the lease. There may be dispute as to which presumption should be rebutted in this situation.

2.68 For this reason we decided against the Committee's suggested presumption. We came to the view that regarding non-agricultural leases of a type capable of being continued in force by tacit relocation,[1] it would be preferable to enshrine in statute the common law presumption that where a tenant is in possession of leased property and the duration of the lease cannot be ascertained, the lease is for a period of one year. A provision to this effect would supply the termination date of a lease where the entry date is known but the duration of the lease is not. In order to provide for the case where neither the entry date nor the termination date is known, we favour a statutory presumption that the entry date was 28 May.[2] The combination of these two presumptions would therefore provide a termination date for all cases.

Agricultural holdings

2.69 For similar reasons we likewise favour for leases of agricultural holdings a statutory presumption that where the entry date cannot be ascertained the lease commenced on 28 May.

2.70 We also wish to make provision in relation to leases of agricultural holdings for the cases where the tenant has entered into possession of the property and the entry date, but not the duration of the lease, is known. In this context however it may not be advisable simply to enact the common law presumption that the lease in these circumstances is for a period of one year. Certain provisions of the 1949 Act appear to have superseded this presumption. For the purposes of the 1949 Act "lease" is defined in section 93(1) as "a letting of land for a term of years, or for lives, or for lives and years, or from year to year"; and section 2(1) of the Act provides in relation to a lease of land for use as agricultural land for a shorter period than from year to year that in certain circumstances the lease is to take effect as if it were a lease of the land from year to year.[3] The 1949 Act does not therefore allow for leases of agricultural holdings of a duration which is less than from year to year.

2.71 There are two decisions by the Court of Appeal on the corresponding English statutory provisions that a lease for a term of one year is a lease for less than from year to year and is accordingly under section 2 converted to a lease from year to year.[4] Whatever the effect of these decisions on a lease in Scotland for a period of 1 year[5], it would appear that at least for the purposes of consistency with the other provisions of the 1949 Act, any statutory enactment of the common law presumption referred to would in the context of leases of agricultural holdings require to provide that the lease endures from year to year, rather than for a period of one year.

2.72 One further refinement is required in order that the statutory presumption might reflect the existing provisions and phraseology of the 1949 Act. This is that the deemed duration of the lease should be taken to be derived from the lease itself and not from the terms of a statutory provision. Thus any doubts of interpretation which might otherwise arise would be avoided. Sections 3 (continuation of leases by tacit relocation) and 24 (notice of termination) both refer to termination of "the stipulated endurance" of any lease. Where the duration of a lease is uncertain, our recommended statutory presumption that the lease stipulated that it would endure

1. Difficulties of the kind envisaged would not arise in relation to leases excepted from the operation of tacit relocation: these are normally leases of a short duration, which terminate without the necessity of service of notice.
2. This is the date which we have already recommended in a separate Report as the statutory definition of Whitsunday—see para 1.11 above.
3. Exceptions to this are provided for in s 2(1)—eg a grazing or mowing let.
4. *Lower* v *Sorrell* [1963] 1 QB 959; *Bernays* v *Prosser* [1963] 2 QB 592.
5. See Gill, paras 37 and 38.

from year to year would allow sections 3 and 24 to operate in relation to that lease without any difficulty of interpretation. Were the deemed duration of the lease derived from the terms of statute instead there might be doubt as to whether this constituted the "stipulated endurance" of the lease for the purposes of these sections.

2.73 We **recommend**:

15. **In respect of leases of non-agricultural subjects of a type capable of being continued in force by tacit relocation and leases of agricultural holdings, where a tenant has entered into possession of the leased property and the date of commencement of the lease cannot be ascertained, there should be a statutory presumption that the lease commenced on 28 May.**
(Paragraphs 2.65-2.69; clause 2(a) and Schedule 1, para 1, new s 10A(a))

16. **Where a tenant has entered into possession of leased property and the duration of the lease cannot be ascertained,**
    (a) **in the case of non-agricultural leases of a type capable of being continued in force by tacit relocation, there should be a statutory presumption that the lease is for a period of one year; and**
    (b) **in the case of leases of agricultural holdings, there should be a statutory presumption that the lease stipulated that it would endure from year to year.**
(Paragraphs 2.65-2.68, 2.70-2.72; clause 2(b) and Schedule 1, para 1, new s 10A(b))

Application to a break

2.74 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. These are referred to as break points in the lease. Breaks are common in long leases especially where at the commencement of the lease it is uncertain whether there will be any great commercial convenience to either party. The break may be in favour of either party or both. It is distinguishable from a right of resumption in the landlord's favour in that it is exercisable at only one or more stipulated points in time.

2.75 Termination of the lease at a break point is normally governed by the terms of the lease.[1] One case however indicates that clear and explicit notice is necessary where advantage is to be taken of a break.[2] Also in England the House of Lords have confirmed the necessity for due notice at a break.[3] In the Research Paper the opinion was offered[4] that any statutory provisions regarding notice of termination of a tenancy should apply whether termination is taking place at the expiry of the lease or at an earlier date under a break clause. We think that the position regarding termination at a break point should be regulated by statute so as to provide a statutory minimum period of notice. We therefore agree with this suggestion.

2.76 We **recommend**:

17. **The statutory notice provisions which we recommend regarding termination of both non-agricultural leases and leases of agricultural holdings should apply to termination at a break point provided for in the lease.**
(Paragraphs 2.74-2.75; clause 1(2) and Schedule 1, para 2, new s 24(2))

Withdrawal of notice of termination

2.77 Where a notice of termination of a lease has been served, whether by the landlord or by the tenant, it is possible to envisage conditions in which the party who

1. Paton and Cameron, p 243.
2. *Strachan* v *Hunter* 1916 SC 901.
3. *Edell* v *Dulieu* [1924] AC 38.
4. Para 3.17.

served the notice might wish to withdraw it. The notice may have been served without proper advice[1] or circumstances may have changed since the date of service. If the consent of the other party can be obtained before the notice and the lease expire, the notice can be treated as having been withdrawn and the tenancy can continue either on the original basis and for a period of up to one year or on new terms agreed between the parties.[2]

2.78 It has been held that where a notice has been expressly accepted, it cannot be repudiated by the giver of the notice.[3] One question which has not been settled however is whether a notice of termination can be withdrawn without the consent of the recipient. Obviously there should be no question of an entitlement to withdraw without the recipient's agreement where the notice has been expressly accepted. Similarly there should be no such question where the recipient has not expressly accepted a notice but has acted in reliance on it. The recipient may have done so by for example vacating the property or entering into missives of let for an alternative property. In so doing he would be prejudiced by withdrawal of the notice of termination.

2.79 On consultation we received different views on this question. One view was that a party should be entitled to withdraw a notice of termination without the consent of the recipient unless that recipient has acted in such a way as to be prejudiced by the subsequent withdrawal. After careful consideration we came to the conclusion that such an approach would be likely to lead to uncertainty and dispute in practice. There may be difficulties in proving that a recipient of a notice has acted in reliance on it so as to be prejudiced by its withdrawal. We are accordingly in agreement with the other view put to us on consultation, that the party who served a notice of termination should be entitled to withdraw it only with the consent of the party to whom it is given. A rule of law to that effect would be clear, and simple to operate in practice.

2.80 We **recommend**:

18. A party who has given a notice of termination should be entitled to withdraw it only with the consent of the party to whom the notice is given.
(Paragraphs 2.77-2.79; clause 1(7) and Schedule 1, para 2, new s 24(7))

Termination of tenancy other than by notice

2.81 It is commonly stipulated in a lease that if certain circumstances occur during the currency of the lease termination is immediately to take place and the landlord is to have the right to remove the tenant. On such occurrences the tenant is not entitled to receive notice of termination as he would were the lease being terminated by the landlord either at the natural expiry date or at the end of the period of continuation of the lease where it has been continued by tacit relocation. Accordingly we would wish to make it clear in any legislative provisions implementing our recommendations regarding notice of termination that these provisions do not affect any such right of the landlord to remove a tenant.

2.82 This policy is already contained in section 24(5) of the 1949 Act. Section 24 makes provision as to the giving of notices to quit. Subsection (5) provides that nothing in the section shall affect the right of the landlord of an agricultural holding to remove a tenant in certain stipulated circumstances. The first is where the tenant's estate has been sequestrated. We do not however propose to adopt this case as regards non-agricultural leases, nor do we recommend its retention in section 24(5). The sequestration of a tenant's estate has never been a ground of legal irritancy.[4] It can

1. For example a landlord of a tenancy of an agricultural holding may wish to withdraw the notice if it does not comply with the requirements of s 11 of the Agriculture (Miscellaneous Provisions) Act 1968 for exemption from liability for compensation to the tenant under s 9 of that Act.
2. Erskine, *Institute* II, VI, 35; Paton and Cameron, p 227.
3. *Gilmour* v *Cook* 1975 SLT (Ld Ct) 10.
4. "Irritancy" means annulment or termination. A legal irritancy is one which is implied by law. A conventional irritancy is an event specified in a lease as justifying termination.

be relied on to found an action of removing only if it is the subject of a conventional irritancy.[1] The incurring by the tenant of any irritancy of his lease or other liability to be removed, whether by failure to pay rent or otherwise, is in fact the next case in subsection (5) in which the landlord's right to remove the tenant without having to give notice under the section is preserved. This provision should be retained in section 24(5) and a similar provision should be introduced into legislation concerning notices of termination of non-agricultural leases.

2.83 Lastly there may exist statutory provisions of a specialised nature which provide the landlord with the right to remove the tenant in certain circumstances without having to give notice. We consider that it would be useful for any legislation to provide a safety-net to preserve the effect of any such provision.

2.84 We **recommend**:

19. Nothing in our foregoing recommendations regarding notice of termination of non-agricultural leases or in section 24 of the 1949 Act should affect the right of a landlord to remove a tenant without notice—

(a) where the tenant has incurred any irritancy of the lease or other liability to be removed by failure to pay rent or otherwise; or

(b) under any other enactment.

(Paragraphs 2.81-2.83; clause 1(8) and Schedule 1, para 2, new s 24(8))

Where tacit relocation excepted

2.85 In paragraph 2.1 above we discussed the general rule that the mere expiry of the agreed period for the duration of a lease does not in itself bring the lease to an end. Where tacit relocation is applied to a lease under either statute or the common law, a notice of termination must be given in order to bring the lease to an end. We pointed out however that tacit relocation does not apply to certain types of lease, for example leases of fishings and shootings, where the intermittent or temporary nature of the tenancy can be said to be inconsistent with the application of the principle. For present purposes we classify such leases as non-agricultural ones.[2]

2.86 Where a non-agricultural lease is of a type which is not capable of being continued in force by tacit relocation the tenancy simply comes to an end at the termination of the stipulated endurance of the lease. It is not necessary to give notice of intention to terminate the tenancy. Implementation of our recommendations in this Part of the Report concerning termination of non-agricultural leases capable of being continued in force by tacit relocation would result in detailed legislation concerning notices of termination. In order to avoid the possibility of any doubt or confusion arising as to the position concerning termination of non-agricultural leases not capable of being continued in force by tacit relocation, we take the view that any legislation should expressly provide that in such cases no notice shall be required to be given by either party for the purpose of bringing the tenancy to an end at the termination of the stipulated endurance of the lease.

2.87 Accordingly we **recommend**:

20. It should be made clear in any legislation concerning notices of termination of non-agricultural leases that in relation to any such lease of a type which is not capable of being continued in force by tacit relocation, a notice shall not be required in order to bring the tenancy to an end at the termination of the stipulated endurance of the lease.

(Paragraphs 2.85-2.86; clause 1(9))

1. Rankine, p 542; see Gill, paras 125 and 134 (footnote 43).
2. In para 1.7 above we stated that for the purposes of the Report by the term non-agricultural lease we mean any lease of heritable property other than a lease of an agricultural holding and the lease or tenure of certain other subjects mentioned in that paragraph. Leases not capable of being continued in force by tacit relocation fall within our meaning of non-agricultural lease.

Section 27(4) of the 1949 Act: postponement of operation of notice to quit

2.88 In the course of considering the notice to quit procedures in the 1949 Act concerning termination of leases of agricultural holdings we came across an ambiguity in the wording of the provisions of section 27(4) of the Act. This section makes provision for certain situations where a landlord has given a notice to quit and has received in return from the tenant a counter-notice under section 25(1). The first situation concerns the application by a landlord to the Land Court for consent to the operation of the notice to quit. Section 27(1) provides for the making of such an application. The second situation is where a tenant, who has received a notice to quit in connection with which any question arises under section 25(2), requires such question to be determined by arbitration. Section 27(2) makes procedural requirements for such a case. In relation to such an arbitration or application to the Land Court for their consent to the operation of a notice to quit, section 27(3) provides that the operation of the notice to quit shall be suspended until the issue of the arbiter's award or of the decision of the Land Court as the case may be.

2.89 Where the Land Court's decision or the arbiter's award is given the suspension of the operation of the notice to quit is lifted. It may be however that the date of the decision or award is relatively close to the date on which the notice to quit is to take effect. This may be somewhat unfair on the tenant and the policy behind section 27(4) appears to be to give the Land Court the discretion on an application to them by the tenant to postpone the operation of the notice to quit. This provision operates where the decision or award is given "at a date later than six months before the date on which the notice to quit is expressed to take effect". It therefore appears that the policy of the provision is to permit the Land Court to give the tenant notice of up to six months after the date of issue of the decision or award before the notice to quit takes effect.

2.90 This policy does not however seem to be reflected in the wording of the discretion given to the Land Court by section 27(4), where it is stated that the Land Court may postpone the operation of the notice to quit "for a period not exceeding twelve months". This could be interpreted as allowing the postponement of the operation of a notice to quit for up to twelve months from the date on which it was expressed to take effect. This would mean for example that the Land Court have a discretion to give to the tenant notice of 17 months in a case where a decision or award is given five months before the date on which the notice was expressed to take effect.

2.91 We consider that the opportunity should be taken to clarify the policy on this matter by amending the provisions of section 27(4) to allow the Land Court a discretion to postpone the operation of the notice to quit for a period not exceeding six months from the final determination of the case, whether this is by the decision of the Land Court or the award of the arbiter. Such a provision would ensure that the Land Court has the discretion to give to the tenant a clear period of notice of up to six months.

2.92 We **recommend**:

21. The discretion of the Land Court on an application by the tenant under section 27(4) of the 1949 Act should be restricted to the postponement of the operation of a notice to quit for a period not exceeding six months from the final determination of the decision or award.

(Paragraphs 2.88-2.91; Schedule 3, para 5)

Part III Statutory Provisions on Notice of Termination: Contracting Out

Introduction

3.1 While we were in the course of formulating our recommendations for the Report the judgment of the Second Division of the Court of Session was given in the case of *Morrison's Exrs* v *Rendall*.[1] It was apparent that this judgment raised an issue of law which was related to and which had implications for our recommendations.

3.2 The issue raised in the case was whether parties to a lease of an agricultural holding are entitled to make an enforceable agreement to contract out of the statutory notice requirements relating to termination of such a lease. These requirements are contained in section 24(1) of the 1949 Act. That provision contains a prohibition on contracting out from its terms. Section 24(1) reads as follows:

> "Notwithstanding the termination of the stipulated endurance of any lease of an agricultural holding, the tenancy shall not come to an end unless, not less than one year nor more than two years before the termination of the lease, written notice has been given by either party to the other of his intention to bring the tenancy to an end.
>
> The provisions of this subsection shall have effect notwithstanding any agreement or any provision in the lease to the contrary."

3.3 In *Morrison's Exrs* it seems to have been generally agreed that the last sentence of section 24(1) applied so as to prohibit agreements to contract out of the provision where the agreement was incorporated in the lease itself or was made in advance of the commencement of the lease. The point at issue was whether the prohibition extends further than this and prohibits agreements made during the currency of the lease. It was held that the prohibition did so. This decision apears to mean in particular that in terms of statute parties to a lease of an agricultural holding cannot during the currency of the lease enter into an agreement enforceable in law either to terminate the lease at the due date without the required notice or to terminate the lease at the due date with another period of notice being given than that specified in statute.

Contracting out agreements in practice

3.4 Various types of circumstances can however be envisaged in which parties to a lease, either of an agricultural holding or of non-agricultural subjects, may wish

1. 1986 SLT 227; referred to in the Report as "Morrison's Exrs". The facts of this case are as follows. The defender was the tenant of a farm, of which the pursuers were the heritable proprietors. The contract of lease was based on missives of let which were renewed on a yearly basis for the period from 1 March to 31 January. This arrangement was followed so that the farm could be sold on the death of Mrs Morrison, who was one of the heritable proprietors. Each time the lease was renewed for the period from 1 March to 31 January the defender signed a letter of removing undertaking to remove from the farm at 31 January. The last executed missives of let were for the period from 1 March 1981 to 31 January 1982, at which last-mentioned date the defender, in terms of a letter of removing, undertook to remove. An offer of renewal of lease for the period from 1 March 1982 to 31 January 1983, and a letter of removal, were sent to the defender for signature but were never signed by him. Mrs Morrison died on 1 April 1982. The pursuers averred *inter alia* that the defender then stated that he would remove from the subjects let at 31 January 1983; that this offer or undertaking had been accepted by the pursuers; that the defender failed to remove; and that the pursuers were accordingly prejudiced thereby because they were unable to offer the subjects for sale at an open market valuation. The pursuers conceded that at the date of the expiry of the last written agreement, 31 January 1982, the defender enjoyed the tenancy of an agricultural holding under the 1949 Act, and that the letters of removing signed along with the execution of that last agreement were invalid.

during the currency of the lease to contract out of statutory notice provisions relating to termination. The first is where during the currency of the lease one party wishes termination to take place at some point before the due date. This type of situation might occur where that party wishes to be freed of the obligations of the lease—the tenant for example may want to take up an offer of employment or enter into a tenancy elsewhere. The landlord on the other hand may want to use the leased subjects himself or put the subjects to an alternative use. In any of these cases the other party to the lease may be happy to agree to the proposed termination. Agreement may perhaps be given in return for an incentive such as a financial consideration.

3.5 Another type of circumstance is where by omission the requisite notice of termination has not been served timeously. Both parties may in fact wish termination to take place on the due date. They may wish to agree to this on the basis of giving a shorter period of notice than that stipulated in statute.

3.6 There may also be cases where during the currency of the lease parties might wish to agree that a shorter period of notice of termination than that stipulated in statute will apply. This might occur particularly in relation to a lease of an agricultural holding. In terms of section 24(1) of the 1949 Act a long period of notice is required to terminate such a lease—a period of between one and two years. This type of situation may for example occur where the landlord is hoping to apply for and obtain the grant of planning permission for an alternative use of the leased subjects. He may wish to be in a position to obtain vacant possession of the subjects as soon as possible after receiving planning permission. It may be desirable to secure this position in advance by obtaining an agreement to the effect that only a short period of notice will be given in this event.[1]

3.7 To conclude, various circumstances may arise in which both parties to a lease may wish to avail themselves of an opportunity to agree during the currency of a lease to contract out of the statutory notice provisions relating to termination. We understand that such contracting out agreements are in fact made and carried out in practice—or in relation to leases of agricultural holdings, were made and carried out at least until the interpretation of section 24(1) given in *Morrison's Exrs*.

Renunciation of a lease

3.8 We should point out that if parties to a lease of whatever nature wished to terminate the lease outwith the statutory notice provisions they can apparently achieve the same result in practice as a contracting out agreement by using the common law method of renunciation of the lease.[2] This was recognised in *Morrison's Exrs* by the Lord Justice-Clerk and Lord Robertson.[3] Renunciation of a lease is a consensual arrangement constituted by an offer from the tenant to renounce the lease and acceptance of this by the landlord. This method could be used to terminate the lease either on short notice or with immediate effect: ie without any notice being served at all. In relation to leases of agricultural holdings we are primarily concerned with the working of the statutory scheme contained in the 1949 Act. It is however desirable to achieve consistency in the law between what parties may do in terms of statute on the one hand and under the common law on the other.

Consultation

3.9 We undertook a review of the issues of law raised by *Morrison's Exrs*. In July 1986 we published a Consultation Paper examining these issues and putting forward

1. Another detailed example of the type of situation mentioned in this paragraph, bearing similarities to the circumstances of the parties in *Morrison's Exrs*, is provided in para 11 of the Consultation Paper.
2. Paton and Cameron, p 238.
3. *Morrison's Exrs* p 230E, p 233L-234A.

proposals for reform of the law. There was a wide response to our consultation, including comments from legal practitioners and academic commentators; from legal bodies; and from organisations representing the interests of either landlord or tenant. We are most grateful to all who commented to us.[1]

LEASES OF AGRICULTURAL HOLDINGS

Review of prohibition on contracting out

3.10 In the Consultation Paper we noted that the provisions of section 24(1) of the 1949 Act are of crucial importance to the parties to a lease of an agricultural holding. It is vital that where it is necessary the protection given by this provision to both parties is not avoided or deprived of effect in any way. The protection is necessary where one of the parties is in a vulnerable position. Normally the tenant is in such a position during the stage of negotiation of the terms of the lease. Were it not for a prohibition on contracting out of section 24(1) during this stage attempts might be made by the landlord to impose in the lease or in a separate agreement made before the commencement of the lease a stipulation contracting out of the provisions of section 24(1), or binding the parties to do so at a later date (eg during the currency of the lease). Agreement to such a stipulation might be held out to a tenant as a condition of his obtaining the grant of the lease. A prospective tenant might have to or feel he had to accept such a stipulation in order to obtain the grant of the lease.

3.11 In fact we take the view that in the normal case where the date of entry to the subjects of lease is a date occurring after the conclusion of the contract of lease, the tenant is in a potentially vulnerable position until the date of entry. At that date the tenant enters into possession of the subjects and thereby secures a more favourable position in relation to the landlord.[2] As at the date of entry, on entering into possession the personal right which the tenant had under the lease is in the circumstances under the Leases Act 1449 perfected into a real right which is valid against singular successors of the landlord.[3] Also in any negotiations after that date the landlord would be dealing with a party who is in actual possession of the property. Physical possession of the subjects gives the tenant an advantage in such negotiations. We therefore consider that for present purposes the date on which the tenant takes entry is the most significant date. It is the date on which the tenant assumes his strongest position in relation to the landlord.

3.12 There is one case where entry into possession does not in itself give the tenant a real right. This is where the tenant has an interest in a long lease which has not been registered in terms of section 3(3) of the Land Registration (Scotland) Act 1979. Under that provision the lessee's interest in a long lease[4] has to be registered before a real right is acquired. In such a case we consider that the tenant's entry into possession of the subjects is still the most significant point in time in the context of the parties' bargaining position. If the tenant's interest in the lease has not already been registered by then the lease should normally be in the tenant's hands and available for the purposes of registration. For the purpose of consistency we also think it preferable to take one date as a turning point for the tenant in all cases rather than choose different dates for different circumstances.

3.13 While it is accepted that section 24(1) must contain a prohibition on contracting out, the question of policy which arises is whether that prohibition should extend any

1. A list of those submitting comments on the Consultation Paper is contained in Appendix C.
2. This applies even though the tenant may in advance of the agreed date of entry have occupied part of the leased subjects so as to prepare the ground and sow crops. In such a case the occupation is merely the exercise of a limited right or privilege in advance of the date of entry: *Millar* v *M'Robbie* 1949 SC 1.
3. Before entering into possession the tenant may however already have obtained a real right by recording the lease in the Register of Sasines, where it is registrable under the Registration of Leases (Scotland) Act 1857: see ss 1, 2 and 16 of the Act.
4. "Long lease" is defined in s 28(1) of the 1979 Act as meaning a probative lease exceeding 20 years, or subject to a provision whereby the lease could be renewed at the grantee's request and the total duration could exceed 20 years.

further in time so as to prohibit contracting out agreements made subsequent to the tenant's entry into possession. We came to the conclusion that while a prohibition on contracting out in section 24(1) is required in the public interest, it need only cover contracting out agreements made in advance of the date on which the tenant enters into possession of the subjects. It need not prohibit agreements made after that date, since the tenant is then in a reasonable bargaining position in relation to the landlord.

3.14 Indeed it would seem to be the case that a wide prohibition in section 24(1) which prohibited agreements made during the currency of the lease would be unduly restrictive. We have already considered various types of circumstances in which both parties, each acting on the basis of a reasonable bargaining position in relation to the other, might in fact wish to contract out of that provision during the currency of the lease. In such cases it appears to be in the interests of both parties to allow this course of action. Such agreements might continue to be made in practice where it suits the parties to do so. As pointed out by the Lord Justice-Clerk in *Morrison's Exrs*[1] such agreements would be effective if both parties acted on the basis of the agreement. If one party does not do so difficulties will however be experienced with regard to the enforcement of the agreement.

3.15 For the foregoing reasons we concluded our review in the Consultation Paper by suggesting as a general principle that while a prohibition in section 24(1) on contracting out is necessary and is vital to the interests of the parties it need in fact cover the period in time only up to the date on which the tenant enters into possession of the subjects. We put forward for consideration the proposition that the parties to a lease should be entitled, at any time after the tenant has entered into possession of the subjects, to contract out of the statutory notice provisions contained in section 24(1) of the 1949 Act.

3.16 We should say that we are aware that if parties were given such an entitlement, they might agree to such a short period of notice of termination that they would be precluded from relying on certain other provisions of the 1949 Act. These other provisions are section 25, in terms of which a tenant may, in response to receipt of a notice to quit, serve a counter-notice seeking to restrict the operation of the notice to quit; and the various compensation provisions which operate on the termination of the tenancy. Certain of the compensation provisions require notice of intention to claim to be given a certain period before termination of the tenancy in order for compensation to be recoverable. At the stage of putting our proposition forward we were inclined to the view that the parties, when entering into a contracting out agreement from section 24(1), would take these considerations into account when agreeing on the period of notice of termination which is to be given. The parties could agree to a period of notice which would allow these various statutory provisions to be relied upon where necessary. Alternatively in the case of the compensation provisions the parties could for instance as part of the contracting out agreement make a settlement in lieu of any statutory claims for compensation which would be lost as a result of the agreement.

3.17 With one exception consultees were in agreement with our proposition. Many consultees agreed in particular that the date on which the tenant enters into possession of the subjects is a landmark in time and that thereafter the tenant does not require statutory protection such as a prohibition of contracting out agreements. Certain consultees commented that it was as a general principle important to retain for parties their freedom to contract as and when they wished. It was recognised that at present parties do on occasion resort to common law arrangements which have the same effect as a contracting out agreement. Renunciation of the lease was given as an example of this.

3.18 One consultee did not favour our proposal. This was the National Farmers' Union for Scotland ("the NFU"). The NFU stated that they disagreed with the reasoning which led to our conclusion that there were no policy reasons in the

1. *Morrison's Exrs*, p 230J.

Agricultural Holdings Acts nor any practical reason why parties should not be able to enter into a contracting out agreement after the tenant had entered into possession. The view was put forward that section 24(1) of the 1949 Act is one of the cardinal provisions of the establishment and maintenance of security of tenure and that any modification of this would seriously prejudice the safeguard offered to the tenant. The NFU stated that they would therefore prefer as a matter of policy to maintain the position as expressed in the interpretation of section 24(1) given in *Morrison's Exrs*.

3.19 It is appreciated that this particular consultee has a vital interest in matters affecting the agricultural community. We took note of the NFU's comments on our proposal. However given the practical reasons and the policy objectives which lay behind our proposition, and given also the overwhelming support which we received for this on consultation, we have concluded that we should proceed to recommend the adoption of this proposition as a general principle.

3.20 After careful consideration we decided also in recognition of the value of the comments made to us by the NFU to recommend an important qualification to this principle. The qualification is that any entitlement to contract out should not prejudice recourse by either party to the lease to the security of tenure provisions or the compensation provisions of the 1949 Act. This objective could be achieved by a requirement that a minimum period of notice of termination should be given under any agreement contracting out of section 24(1), the minimum period being one which would allow the parties to give any requisite notice under either the security of tenure provisions or the compensation provisions of the 1949 Act. In the following paragraphs we discuss in detail these statutory provisions and our recommended requirement of a minimum period of notice. The effect of this requirement would mean that any statutory entitlement to contract out of section 24(1) would operate within the whole framework of the 1949 Act. This would recognise primarily the importance of the security of tenure provisions of the Act by preserving the availability of these provisions in all cases where a contracting out agreement has been made.

Minimum period of notice under contracting out agreement

3.21 The security of tenure provisions of the 1949 Act are built around the service of a notice to quit. One of the ways in which security of tenure is given to the tenant is by entitling him to seek to restrict the operation of a notice to quit received by him. Section 25(1) entitles a tenant to do this within one month of receiving a notice to quit by giving a counter-notice to the landlord. In such a case the notice to quit will not have effect unless the Secretary of State consents to it. While we recommend that parties should be entitled to contract out of section 24(1), as stated we also recommend a restriction on this entitlement so as to allow scope for the operation of section 25. The restriction is that parties should be required to give a minimum period of notice even under an agreement contracting out of section 24(1). The minimum period should be such as to allow sufficient time for the tenant to give a counter-notice under section 25 should he wish to do so.

3.22 In most cases where an agreement has been made we expect that the tenant will simply wish the lease to be terminated in terms of the agreement. He would then vacate the farm at the agreed date of termination. There may however be cases where the tenant wishes to respond under section 25 by giving a counter-notice to a notice to quit served on him in terms of a contracting out agreement. The agreement may however have been made at an early point in the lease and the tenant's circumstances may have changed since then. We consider it important that the tenant be allowed to give a counter-notice should he so wish. It would not be possible to give a timeous counter-notice if the agreement stipulated for a very short notice, of perhaps a couple of weeks.

3.23 The requirement of a minimum period of notice under a contracting out agreement would also be of significance in relation to the compensation provisions

of the 1949 Act. Section 35 of the Act provides for compensation to the tenant for disturbance. This applies where the tenant quits the holding in consequence of a notice to quit given by the landlord, or in consequence of a counter-notice given by the tenant in response to a notice to quit from a landlord relating to part only of the holding. In order for section 35 to come into operation therefore a contracting out agreement would require to provide for the giving of a notice to quit.

3.24 Furthermore section 56 of the 1949 Act provides for compensation to the tenant for the continuous adoption of a special standard of farming, and section 57 provides compensation for the landlord on termination of the tenancy for deterioration of the holding. In order for these provisions to operate, notice of intention to claim the appropriate compensation is required to be given before the date of termination of the tenancy. Under section 56(1)(i) the tenant is required to give at least one months notice to the landlord before termination and regarding compensation under sections 57(1) and 58 (compensation to landlord for deterioration of the holding), section 59(1) requires notice of at least three months before termination to be given by the landlord to the tenant. Section 64(1) provides in general that a landlord and tenant shall be entitled to compensation where provided for in the Act only in accordance with these provisions and notwithstanding any agreement to the contrary.

3.25 We have stated our recommendation that termination of a tenancy as a result of notice served in accordance with a contracting out agreement should give the parties sufficient time in which to submit a timeous notice of intention to claim any form of compensation provided for by the 1949 Act, and that it should give the tenant sufficient time in which to serve a counter-notice under section 25 in response to a notice to quit. It seems to us that the minimum period of notice which should be required under a contracting out agreement is three months. One minor difficulty with this however concerns the requirement of notice of three months under section 59(1). There does not however seem to be any particular reason why section 59(1) requires a period of notice of three months while section 56 requires a period of notice of one month. We consider therefore that section 59(1) should be amended to require only a period of notice of two months of intention to claim compensation. This would allow us to recommend a requirement that a minimum period of notice of three months be given notwithstanding any contracting out agreement from the terms of section 24(1).

Contracting out for a longer period of notice

3.26 Our consideration of an entitlement to contract out of statutory notice provisions was undertaken on the general assumption that there are occasions during the currency of a lease when parties may wish termination to take place on a shorter period of notice than the minimum stipulated. However we note that section 24(1) of the 1949 Act stipulates for a maximum as well as for a minimum period of notice of termination. The maximum period of notice under this provision is two years. Although few such cases may arise it may well be that on occasion parties wish to agree that a longer period of notice than the statutory maximum of two years shall apply. We can see no reason to prevent parties from agreeing to a longer period of notice than that stipulated. Indeed in line with the views of consultees the general principle which we wish to uphold where appropriate is that of the parties' freedom to contract as they please. Accordingly we think that parties should be entitled to agree to a longer period of notice than the maximum period provided for in section 24(1).

3.27 We have discussed various considerations which led to our recommendation that entitlement to enter into contracting out agreements for a shorter period of notice than the minimum stipulated should be restricted to the period following the tenant's entry to the subjects. These were concerned with the protection of the tenant, at a time when he would be in a vulnerable position, from the imposition of such a short period of notice as would be prejudicial to his position. These same considerations do not however appear to apply to agreements for a longer period of notice than the

maximum stipulated in statute. Furthermore such agreements would obviously not prejudice the parties' respective positions in any way with regard to the security of tenure provisions and the compensation provisions of the 1949 Act. We see no reason to recommend any similar restriction on the parties' entitlement to enter into a contracting agreement in this respect.

3.28 To conclude, our **recommendation** regarding the entitlement of parties to a lease of an agricultural holding to contract out of the statutory notice provisions relating to termination is as follows:

22.(a) Parties should be entitled to contract out of the statutory notice provisions relating to termination of leases of agricultural holdings contained in section 24(1) of the 1949 Act by agreeing—

(i) at any time, that a longer period of notice than the maximum stipulated will apply;

(ii) at any time after the tenant has entered into possession of the leased subjects, that a shorter period of notice than the minimum stipulated will apply, subject in all cases to a minimum period of notice of three months.

(Paragraphs 3.1-3.27; Schedule 1, paragraph 2, new s 24(4))

(b) As a consequence of the recommendation in paragraph (a) above, section 59(1) of the 1949 Act should be amended to require a period of notice of two months to be given before termination of the lease of intention to claim compensation under sections 57(1) or 58 for deterioration of the holding.

(Paragraphs 3.24-3.25; Schedule 3, paragraph 7)

Consistency with other provisions of the 1949 Act

3.29 One consultee brought to our attention a point concerning section 5 of the 1949 Act. This section concerns the respective liabilities of landlord and tenant for provision and maintenance of fixed equipment. Section 5(3) allows the parties to make an agreement contracting out of the statutory provision on this matter. It provides that such agreement may be made "after the lease has been entered into between the landlord and the tenant". This provision contrasts with our recommendation that parties should be entitled to contract out and provide for a shorter period of notice only after the tenant has entered into possession of the subjects. After consideration we are content to accept this distinction. It is our understanding that to propose an amendment of section 5(3) in order to bring it into line with our recommendation concerning contracting out for a shorter period of notice of termination would disturb existing practice in relation to that provision. We understand that it is common practice for parties to enter into a lease and then shortly or immediately thereafter as provided for in section 5(3) enter into an agreement varying the statutory provision regarding respective liabilities.

3.30 We also note the terms of section 12 of the 1949 Act. Subsection (1) provides that the tenant of an agricultural holding shall have freedom to practise any system of cropping and to dispose of the produce of the holding. Subsection (4)(b) however disapplies subsection (1) in the case of a tenancy other than one from year to year, as respects the year before the expiration of the lease. Obviously where parties enter into an agreement contracting out of section 24(1) and provide for the giving of a notice of termination of less than one year, this has implications for the operation of section 12(4). During the year before the tenant quits the holding in terms of a short notice given under a contracting out agreement he would presumably have practised freedom of cropping and disposal of produce until the notice is given.

3.31 However section 12(4) has not been developed to meet other situations in which the tenant quits the holding on either no notice or notice which is shorter than a period of one year. This would include for example the situation where the tenant incurs an irritancy of the lease upon which the landlord is entitled to rely so as to terminate the lease. Since the policy of section 12(4) has not been worked out to meet

such situations we do not feel inclined in this exercise to attempt to devise and recommend a scheme to amend the provision purely to meet the case where a notice shorter than the minimum stipulated in section 24(1) is given in terms of a contracting out agreement. In entering into such an agreement parties will require to bear in mind the implications of provisions such as section 12.

Contracting out of notice of resumption

3.32 We recommend in relation to leases of an agricultural holding the introduction of a requirement that where a landlord intends to exercise a right of resumption he shall give to the tenant written notice of a requisite period of his intention to do so.[1] Where the intended resumption is for agricultural purposes we recommend the retention of the present rule that the requisite period of notice be not less than one year nor more than two years.[2] Where the purposes of the resumption are non-agricultural we conclude that a minimum period of three months notice is required in order that the compensation provisions of the 1949 Act could be invoked where appropriate.[3]

3.33 While the minimum period of notice of three months must for this reason be retained in all cases regarding a resumption from an agricultural holding it may be that in some cases involving a resumption for agricultural purposes the tenant would be content to agree to allow resumption to take place on a shorter period of notice than the minimum period of one year recommended. We see no reason why the parties should not be able to contract out of any statutory provision in this respect and agree that a shorter notice of resumption will apply. This should as stated be subject in all cases to a minimum period of three months and also to the same safeguard that we have considered in relation to contracting out of notice provisions relating to termination—ie that it may be made only after the tenant has entered into possession of the leased subjects. Where however the parties wish to contract out of any notice provisions relating to either type of resumption by agreeing that a longer period of notice than that stipulated should apply we see no reason to either prevent this or restrict the making of such an agreement to any point in time.

3.34 We **recommend**:

23. Parties to a lease of an agricultural holding should be entitled to contract out of our recommended statutory notice provisions relating to the exercise of a right of resumption (see Recommendations 11 and 13 above) by agreeing—

(i) at any time, that a longer period of notice than that stipulated shall apply;

(ii) at any time after the tenant has entered into possession of the leased subjects, that a shorter period of notice than that stipulated shall apply, subject always to a minimum period of notice of three months.

(Paragraphs 3.32-3.33; Schedule 1, para 4, new s 34A(3))

NON-AGRICULTURAL LEASES

3.35 We now consider whether in the context of leases of non-agricultural subjects[4] parties should be entitled to contract out of statutory notice provisions relating to termination of the lease. The current provisions relating to removings from non-agricultural subjects prescribe a minimum period of notice depending partly on the nature of the leased subjects and partly on the period of lease. These provisions are contained in sections 34 to 38A of the 1907 Act and Rules 103 to 107 of Schedule 1 to the Act. A notice is required also to exclude tacit relocation of the lease and as a foundation for a subsequent action of removing.

1. Recommendation 11 (para 2.52) above.
2. Recommendation 13 (para 2.59) above.
3. See para 2.58 and Recommendation 13 (para 2.59) above.
4. We draw attention to the terms of para 1.7 above regarding the meaning of "non-agricultural leases" for the purposes of this Report.

3.36 There appears to be an element of public interest in the statutory provisions mentioned. The requirement to give a minimum period of notice is a safeguard to the tenant. A tenant is often in a weaker bargaining position in relation to the landlord during the period of negotiation of the lease. Were there no such requirement of a minimum period of notice the landlord might seek to impose in the lease a stipulation for a very short period of notice. The statutory provisions protect the tenant by requiring a notice to be given which gives him a reasonable warning of the termination date and a minimum period in which to arrange a removal and where necessary other accommodation. Likewise a landlord on the other hand when receiving a notice requires a minimum period in which to reorganise his affairs—for example by arranging for the lease of the subjects to a new tenant.

3.37 We have already recommended[1] in relation to such types of non-agricultural lease as are capable of being continued in force by tacit relocation that these leases should not come to an end by virtue of the termination of the stipulated endurance of the lease (or where the lease has been so continued in force, by virtue of the termination of the period for which it has been so continued in force) unless written notice of a minimum period has been given by one party to the other of his intention to bring the tenancy to an end.

3.38 Consultees generally agreed with our view that as a matter of policy parties should not be entitled to contract out of any statutory provision implementing these recommendations before the date on which the tenant enters into possession of the subjects. This policy was suggested as a necessary one 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 often the tenant. In the context of leases of agricultural holdings we have already examined in detail the desirability of such a policy in relation to contracting out agreements for a shorter period of notice than that stipulated. Broadly speaking similar reasoning applies in relation to the types of non-agricultural lease now under consideration.

3.39 We have already identified circumstances in which parties to a lease may wish to enter into a contracting out agreement during the currency of the lease.[2] Consultees agreed that it was important to uphold the parties' freedom of contract in this respect. One legal practitioner considered this particularly important in the context of commercial leases. There did not seem to be any reason to restrict the parties' freedom of contract on this matter once the tenant has entered into possession of the subjects.

3.40 Accordingly we conclude that in general parties to a non-agricultural lease should have the same right to contract out and agree to a shorter period of notice than the minimum stipulated as we recommend for parties to a lease of an agricultural holding. There are however two types of non-agricultural leases which are subject to special statutory provision. These require further consideration. They are tenancies of shops and tenancies regulated by the Rent (Scotland) Act 1984. We deal with these types of tenancies separately. First of all we deal in the following paragraphs with further considerations relating to a general entitlement to contract out of statutory notice provisions relating to termination in the context of non-agricultural leases.

3.41 We gave some consideration as to whether the entitlement to contract out in relation to non-agricultural leases should as in the case of leases of agricultural holdings be subject to a minimum period of notice. While there are no statutory compensation provisions or security of tenure provisions affecting non-agricultural leases which depend upon a notice of termination having been given, we decided on balance that there would be merit in requiring a short period of notice as a minimum applicable even under a contracting out arrangement. We think that a minimum period of notice of 48 hours would be sufficient in this respect. Given the consequences of termination of a lease we take the view that the parties should always be entitled under statute to receive a minimum warning of the termination date by way of notice even under a contracting out arrangement. The agreement may have been made at

1. See Recommendations 1 (para 2.5), 2 (para 2.8) and 8 (para 2.40) above.
2. See paras 3.4-3.7 above.

some date well before the termination date. It may not have been immediately implemented by the giving of notice. The parties may therefore benefit from the retention of the long established practice of being entitled to receive a warning notice prior to the termination date of the lease.

3.42 As in the case of leases of agricultural holdings however we can see no reason to place a restriction on an entitlement to enter into a contracting out agreement for a longer period of notice than that stipulated in statute. We consider that the parties should be able to make an agreement for a longer period of notice in the lease itself or at any other time.

Tenancy of Shops

3.43 We think that in the case of tenancies of shops an exception should be made to the entitlement to enter into arrangements contracting out of the statutory notice provisions relating to termination. A limited security of tenure is given to the tenant of a shop under the Tenancy of Shops (Scotland) Act 1949. Section 1 of the Act entitles a tenant who has received notice of termination and who cannot obtain a renewal of the tenancy on terms satisfactory to him to apply to the sheriff for a renewal of the tenancy. This entitlement is to be exercised at any time before the notice takes effect and not later than 21 days after service of the notice.

3.44 The security of tenure given to the tenant by this provision could be prejudiced were the parties entitled to contract out by stipulating for a shorter period of notice than that provided in statute. Service on the tenant of a shorter period of notice than the minimum stipulated may not allow him sufficient time in which to apply to the sheriff for a renewal of the tenancy should he wish to do so. We do not wish to disturb the policy behind this security of tenure provision. We consider therefore that the right to contract out of statutory notice provisions and provide for a shorter period of notice than the minimum stipulated should not apply to subjects covered by this Act.

3.45 On the other hand to entitle parties to a tenancy of a shop to agree to a longer period of notice than the minimum stipulated would not interfere with the operation of the security of tenure provisions of the Act. We are in favour of entitling the parties to do this.

Tenancies regulated by the Rent (Scotland) Act 1984

3.46 There is another category of tenancy which we do not include within the scope of our recommendation that parties be entitled to contract out of the statutory notice provisions regarding termination. This is tenancies regulated by the Rent (Scotland) Act 1984.[1] In the Memorandum we reviewed the law generally relating to recovery of possession of heritable property. We did not consider the special issues which arise in relation to the 1984 Act. Indeed in the introduction to the Memorandum we indicated that it would not be appropriate for us to make any recommendations for alteration of enactments which carry into effect social policy—eg the substantive law contained in the Rent Acts. Likewise in the subsequent Consultation Paper we dealt specifically with the issue of entitlement to contract out of statutory notice of termination provisions in relation to non-agricultural subjects covered by the 1907 Act. We did not include in our review any specialities arising in relation to the scope of the 1984 Act.

3.47 With one exception consultees to our Consultation Paper replied in a similar vein and agreed to the principle of entitling parties to contract out of statutory notice provisions in relation to subjects regulated by the 1907 Act alone. One consultee however specifically raised the issue of tenancies regulated by the 1984 Act. That

1. Referred to in the Report as the "1984 Act".

consultee was not in favour of extending the scope of an entitlement to contract out to cover the provisions of the 1984 Act. This view was taken on the basis that to permit such contracting out would water down the security of tenure afforded by the 1984 Act.

3.48 The significant provision of the 1984 Act in relation to notice of termination is section 112. This section applies to any premises let as a dwellinghouse. Its scope is not therefore limited to protected tenancies[1] or Part VII contracts.[2] Section 112 provides for a minimum notice to quit of four weeks, whether the notice is given by the landlord or the tenant. Since we do not wish to disturb the operation of the 1984 Act in any way we consider that where a tenancy falls within the scope of section 112 the parties should not be entitled to contract out of the provision. A minimum notice of four weeks will always have to be given in relation to such tenancies.

3.49 While a review of the 1984 Act was not included in this exercise we may say however that in the context of domestic tenancies an absolute requirement of a minimum notice of four weeks seems to be a reasonable one. We also do not envisage there being much demand in practice for an entitlement to contract out in this context, nor given the relatively short period of time involved any degree of difficulty or hardship caused by the absence of any such entitlement.[3]

3.50 If our recommendations concerning non-agricultural leases generally are implemented this will result in statutory provisions concerning various aspects of notices of termination. Certain of these provisions would apply to notices relating to tenancies regulated by the 1984 Act. An example of this would be the provisions concerning the content of the notice. On certain other aspects there may however be conflict between the provisions of the 1984 Act and any legislation implementing our recommendations. For example legislation implementing our recommendations would entitle the parties to contract out of statutory notice provisions and agree to a shorter period of notice than the minimum stipulated, while section 112 of the 1984 Act provides for a minimum period of notice of four weeks.

3.51 We would not wish there to be any confusion or doubt concerning the application or otherwise of the respective statutory provisions in any case. We would wish it to be clear for example that in the instance cited the terms of section 112 would apply in the case of a domestic tenancy. The parties to that tenancy should not be able to avail themselves of any separate statutory entitlement to contract out in respect of non-agricultural leases. We consider therefore that it would be useful for any legislation implementing the recommendations in the Report to state that its provisions were without prejudice to the operation of the 1984 Act in relation to any tenancy—or indeed in relation to any sub-tenancy.

3.52 In conclusion our **recommendations** concerning the entitlement of parties to a non-agricultural lease to contract out of statutory notice provisions relating to termination are as follows:

24. Subject to Recommendations 25 and 26 below parties to a non-agricultural lease should be entitled to contract out of our recommended statutory notice provisions relating to termination by agreeing—

(a) at any time, that a longer period of notice than that stipulated shall apply;

(b) that a shorter period of notice than the minimum stipulated shall apply subject to a minimum period of notice of 48 hours in all cases and provided

1. A "protected tenancy" is defined in s 1 of the 1984 Act.
2. A "Part VII contract" is defined in s 63 of the 1984 Act.
3. Indeed we note that any attempt to introduce an entitlement to contract out in relation to the 1984 Act would encounter technical difficulties. It may be difficult for instance to integrate an entitlement to contract out into sections 71 to 75, which deal with security of tenure for lessees under Part VII contracts as administered by rent assessment committees.

that the agreement is made at any time after the tenant has entered into possession of the leased subjects.

(Paragraphs 3.35-3.42; clause 1(4))

25. **Parties to the tenancy of a shop should not be entitled to agree under Recommendation 24(b) above that a shorter period of notice than the minimum stipulated shall apply.**

(Paragraphs 3.43-3.45; Schedule 3, para 2)

26. **Implementation of our Recommendations should not affect the operation of the provisions of the Rent (Scotland) Act 1984 in relation to any tenancy or subtenancy.**

(Paragraphs 3.46-3.51; clause 25)

Contracting out of notice of resumption

3.53 We recommend[1] the introduction of a requirement that where a landlord intends to exercise a right of resumption affecting non-agricultural subjects he should give the tenant written notice of his intention to do so, and the period of notice should be at least 28 days or half the period of the let, whichever is shorter. As in the case of leases of agricultural holdings, we see no reason why parties to a non-agricultural lease should not be able to contract out of any statutory provision in this respect and agree that a period of notice of resumption other than that stipulated will apply.

3.54 Where the agreement is for a shorter period of notice we consider that it should be subject to a minimum period of notice of 48 hours. As discussed in paragraph 3.41 above we recommend this minimum period in relation to all cases of termination of non-agricultural leases, and the effect of a resumption is the termination of the tenancy in respect of the subjects resumed. The entitlement to contract out should also be subject to the same safeguard as we have recommended in relation to leases of agricultural holdings—ie it should be entered into only after the tenant has entered into possession, unless the agreement is for a longer period of notice than that stipulated, in which case it may be made at any time.

3.55 Accordingly we **recommend**:

27. **Parties to a non-agricultural lease should be entitled to contract out of our recommended statutory notice provisions relating to resumption of leased property (see Recommendations 11 and 12 above) by agreeing—**

    (a) at any time, that a longer period of notice than that stipulated shall apply; or

    (b) at any time after the tenant has entered into possession of the leased subjects, that a shorter period of notice than that stipulated shall apply, subject in all cases to a minimum period of notice of 48 hours.

(Paragraphs 3.53-3.54; clause 4(3))

GENERAL REQUIREMENTS: BOTH TYPES OF LEASE

3.56 We now consider two general matters which relate to all types of agreements to contract out of statutory notice provisions, whether relating to termination of the lease or resumption of leased property, and whether entered into by parties to a non-agricultural lease or a lease of an agricultural holding.

1. Recommendations 11 (para 2.52) and 12 (para 2.54) above.

Constitution of contracting out agreements

3.57 One consultee suggested that contracting out agreements should be required to be in writing. We are concerned to protect the parties' respective positions where necessary and to ensure that any contracting out agreement is freely entered into by all concerned. Such a requirement would demonstrate not only the consensual nature of any agreement but also that the agreement was entered into after the tenant's entry to the subjects. It would also tend to eliminate any difficulties of proof there may be in relation to the agreement, in any court proceedings. We therefore agree that any contracting out agreement should be in writing.

3.58 Accordingly we **recommend**:

28. Any agreement contracting out of statutory notice provisions should be required to be in writing.
(Paragraph 3.57; clauses 1(4), 4(3) and Schedule 1, para 2, new s 24(4) and para 4, new s 34A(3))

Effect of agreements on successors

3.59 We envisage that in practice, as is the case with documents amending a lease, any contracting out agreement would be kept with the principal lease. It will be a matter for the parties whether the agreement should be registered. This will depend on the circumstances of the leasing arrangement such as whether the lease is a long one[1] and is registered under the Registration of Leases (Scotland) Act 1857 or the Land Registration (Scotland) Act 1979, and whether the contracting out agreement is about to be implemented by service of notice.

3.60 There may however be cases where an agreement is made but is not immediately implemented by service of notice, or indeed is not intended to be implemented until a later date during the lease. In such cases the identity of the parties to the lease may in the meantime change. This may be due to the death of one of the parties, or on the sale or assignation of an interest in the tenancy or in the leased subjects. We think it reasonable that as with the other terms of the lease negotiated by the original parties, any successor to a party to a contracting out agreement should be bound by the terms of that agreement. The agreement will be in writing and so should be readily available to any successor to a party to it.

3.61 We **recommend**:

29. Any agreement contracting out of statutory notice provisions should be binding on any successors to the parties to it.
(Paragraphs 3.59-3.60; clauses 1(5), 4(4) and Schedule 1, para 2, new s 24(5) and para 4, new s 34A(4))

1. A long lease is for the purposes of the 1857 Act a probative lease for a period exceeding 20 years (s 1 of the Act) and for the purposes of the 1979 Act, is defined in s 28(1) of that Act (see para 3.12, footnote 4, above).

Part IV Giving Notice in Special Cases

Introduction

4.1 Certain situations may arise which present special problems to a party to a lease wishing to give notice to the other party. In this Part we consider the problems raised by such situations. We consider the giving of notice in the following cases: where there is a sub-tenant in possession of the leased property; where there are a number of landlords of the property, in the case where each is the landlord of a separate part of the property and in the case where each has an interest in common in the property; where the notice is given before the interest of either party is transferred (in the case of the tenant, other than by assignation) or before the death of either party; where the tenant's interest has been assigned in security; the giving of notice where the property is subject to a proper liferent.

4.2 There is a further situation which may arise during the currency of a lease and which presents particular considerations and difficulties. This is where one of the parties to a lease dies, or where a sub-tenant dies. There may be questions concerning succession to the deceased tenant's interest in the tenancy and regarding procedural requirements of notification to the landlord in such cases. We accordingly deal separately with the various issues raised by the death of a party to a lease. We consider these issues in Part V.

4.3 Certain of the cases dealt with in this Part concern only the giving of notice which results in termination of the lease in respect of all or part of the leased property. This includes not just a notice of termination but also a notice of resumption. Other situations however lend themselves to a consideration not only of the giving of a notice which results in termination but also of other notices which a party may be entitled or required to give under any enactment.[1] In each case under review we therefore consider the types of notice to which any recommendation should apply.

Subtenancies

4.4 We consider first the case where leased property is subject not only to a tenancy but also to a sub-tenancy. We do so since problems may arise where the landlord decides to seek vacant possession of the property. Where the sub-tenancy is to be terminated at or prior to the expiry of the tenancy the normal rules as to service of notice of termination generally apply as between the tenant and the sub-tenant. The landlord will not normally be involved at this stage unless the sub-tenancy has been entered into without his authority and in the absence of any implied legal power to sub-let.

4.5 Questions arise however in the situation where the landlord wishes to obtain vacant possession, the tenancy has been terminated but the tenant has not given notice to the sub-tenant who remains in possession of the property. The current rule of law regarding a sub-tenant's right to possess property under a sub-lease is that his right to occupy the property is dependent on the tenant's right to possess the subjects

1. For example a notice under s 4 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 which relates to a monetary breach of a lease and which must be given before a landlord can rely on an irritancy clause and treat the lease as terminated; under the 1949 Act: counter-notice under s 25(1) by the tenant invoking the security of tenure provisions, notice by the tenant under s 51 of intention to carry out improvements, notices relating to compensation claims—for example under s 56(1) and 59(1).

under the principal lease. Thus the sub-lease cannot continue beyond the expiry of the tenancy. Where the tenancy is terminated the sub-tenant's right to occupy the subjects of the sub-lease is extinguished. Nevertheless in a case where the tenant is empowered to sub-let either expressly or by implication the courts have decided that the sub-tenant cannot simply be ejected without warning on termination of the principal tenancy.[1] This rule will apply too where the landlord has expressly consented to the granting of the sub-lease, notwithstanding any prohibition of sub-letting. Where however the sub-lease has not been authorised the sub-tenant is in the same position as any other occupier without right or title and may be ejected without warning.[2]

4.6 The legal position of the authorised sub-tenant who remains in possession after the expiry of the principal lease is however anomalous. In many cases the landlord will not have been a party to the sub-lease. Thus there can be no question of the sub-tenant's continuing possession being based on tacit relocation since there will be no contractual relationship which may be continued.

4.7 There are particular statutory provisions which bear on this issue. Special provision is made in section 19 of the 1984 Act for the protection of sub-tenants of dwellinghouses which are subject to a protected or statutory tenancy. Under the section where the principal tenancy is terminated the sub-tenant is deemed to become the tenant of the landlord on the same terms as the original sub-tenancy. Section 17 of the Land Tenure Reform (Scotland) Act 1974 makes provision for interposed leases. Under the provision where an interposed tenancy terminates during the subsistence of the original or main tenancy which has become the sub-tenancy, the landlord-tenant relationship is re-established between the proprietor and the occupier under the original tenancy. On the other hand with agricultural holdings it seems to be assumed that a sub-tenancy must terminate with the principal tenancy from which it is derived as the security of tenure conferred by the 1949 Act is not available to the sub-tenant when the principal tenancy is terminated by the landlord.[3]

4.8 In the absence of any such statutory provision or of special agreement the legal basis for the sub-tenant's continuing possession is unclear. The courts have expressly declined to comment on this point, although recognising the authorised sub-tenant's right to some form of notice.[4] There are however indications that the courts were assuming that notice could be given by the landlord to the sub-tenant[5] and that the notice would require to be such as could be founded on in an action of removing.

4.9 It seemed to us that it would be useful for a landlord to have an express right to give notice of some kind to a sub-tenant in possession of leased property. The landlord could himself ensure that the sub-tenant receives notice to remove. He would no longer have to rely on the principal tenant giving such notice. Also if a landlord were entitled to give notice to the sub-tenant during the currency of the sub-tenancy in order to terminate that sub-tenancy, he would be in a position to bring the sub-tenant's right to occupy to an end either at the same date as the termination of the tenancy or at a date shortly thereafter. This would save the landlord having to take steps after the end of the tenancy against the sub-tenant in order to obtain vacant possession of the property. Vacant possession could therefore be obtained at the earliest possible date.

4.10 For these reasons we put forward a suggestion in the Memorandum[6] that a landlord should be entitled to give a notice to an authorised sub-tenant in order to terminate the sub-tenancy. Consultees were in agreement with this. We initially therefore intended to adopt this proposal as a recommendation. However when we came to consider the consequences of implementing such a recommendation we perceived difficulties in following this course of action. Such a recommendation leaves

1. *Robb* v *Brearton* (1895) 22 R 885.
2. Rankine, pp 520-521; Paton and Cameron, pp 224 and 257.
3. S 27(5) of the 1949 Act.
4. *Robb* v *Brearton*, cited above, per Lord Adam at p 887.
5. *Robb* v *Brearton*, cited above, per Lord M'Laren at p 888 and also see *Robb* v *Menzies* (1859) 21 D 277.
6. Para 4.12.

open certain complex questions which would require to be dealt with in any legislative provision.

4.11 For example in the Memorandum we envisaged that a notice by a landlord to terminate an authorised sub-tenancy need not be linked to any particular date or term. This recognises that for various reasons, such as having to ascertain the identity of the sub-tenant, a landlord may not be in a position to give notice to the sub-tenant at the same time as he requires to give notice in order to terminate the tenancy. It may therefore be necessary to give the landlord a right to give notice to the sub-tenant which terminates the sub-tenancy at a later date than the termination of the tenancy.

4.12 If the sub-tenancy is to continue until a later date however it would then be desirable to clarify the status of the sub-tenancy during the period between the end of the tenancy and the end of the sub-tenancy. Since the tenancy would have been terminated there would be no sub-tenancy as such. It may have to be provided for example that there is a new tenancy agreement during this period between the former head landlord and the former sub-tenant, as landlord and tenant respectively. In particular in any such arrangement the effect of a notice to terminate the sub-tenancy served by the landlord before but taking effect after the termination of the tenancy would have to be preserved in order to ensure it brought the new tenancy to an end. The legislative provisions which would be required to deal with this situation would be complex and unwieldy. We concluded that such an approach would not be justifiable in order to provide for cases where the sub-tenant is to be removed shortly after the end of the tenancy.

4.13 We considered a number of other solutions which would achieve the same objectives—ie giving the sub-tenant in possession a formal right to receive notice of some kind of the impending termination of the tenancy and also therefore of the sub-tenancy; and entitling the landlord to take steps himself to ensure that the sub-tenant receives the proper notice, rather than relying on the tenant to do so. After careful consideration we came to the following view. First in order to avoid any of the problems associated with a sub-tenancy continuing beyond the termination of the tenancy we favour an express provision retaining the current rule of law that any sub-tenancy automatically falls with the tenancy. Our main recommendation is to require any person who is giving notice to terminate a tenancy to give a copy of the notice to any sub-tenant in possession of the leased property. This would therefore apply whether the notice is being given by the landlord to a tenant and is therefore either a notice to quit or a notice of resumption, or whether the notice is being given by a tenant to his landlord. It would also apply to a notice of termination of a lease given either by the landlord or the deceased tenant's executor to the other under a separate statutory provision, section 16(3) of the Succession (Scotland) Act 1964.[1] In any of these cases the effect of the notice would be to terminate the tenancy and also therefore the sub-tenancy.

4.14 In order to ensure that this policy works in practice we recommend that the principal notice should be ineffective unless when it is given a copy of the notice is sent at the same time to the sub-tenant in possession. This policy is clear and simple compared to the original proposal discussed earlier. It would also achieve the aims of ensuring that the sub-tenancy is brought to an end, that the sub-tenant receives adequate warning in writing of this, and that the landlord can where initiating the termination himself ensure that the sub-tenant receives the requisite warning.

4.15 We can foresee one type of situation which may arise and in respect of which provision should also be made. This is where both the landlord and the tenant wish the tenancy to come to an end on the due date. One of the parties may serve notice to terminate the tenancy on the other party, but may fail to give a copy of this to the sub-tenant in possession. Also in the case of service of a notice of resumption by the landlord, he may fail to give a copy of this to the sub-tenant in possession.

1. Referred to in the Report as the "1964 Act"; termination of the lease under s 16(3) may occur generally where the tenant has died and the executor is satisfied that the interest in the tenancy cannot be disposed of according to law or where the interest is not disposed of within one year.

In terms of our recommended policy such omissions render the notice ineffective. We consider that this policy may be unfair on the recipient of the notice, who may have agreed that or wish that termination should take place in reliance on notice being given by the other party. In this situation it would most likely be too late for the recipient of the notice to give notice himself of termination timeously to the other and send a copy of this to the sub-tenant in possession. We see no harm in allowing the recipient of a notice to cure any omission or failure of the other party in this respect and himself give to the sub-tenant a copy of the notice received by him. He should however be required to do this as soon as practicable after receiving the notice. Where the copy notice is given in this way the principal notice would be effective and both the tenancy and the sub-tenancy would then be terminated.

Chain of sub-tenancies

4.16 We are aware that in relation to a particular property there may be in existence at the same time not just one but several sub-tenancies. In such a case there would in effect be a head landlord (who may be the proprietor of the subjects), the tenant, a chain of intermediate sub-tenants, and finally the sub-tenant actually in possession of the property.[1] This type of sub-leasing occurs particularly with commercial subjects. The concern of the courts appears to be to give some protection not to intermediate sub-tenants but to the sub-tenant who is actually in possession of the subjects. The latter is the person who would be required to remove physically where a landlord at any point in the chain wishes to obtain vacant possession of the property. Our recommendations in the preceding paragraphs seek to reflect this concern in legislative form. Any legislative provision in this respect should apply not only to the standard case of the landlord—tenant—sub-tenant relationship, but also to the more complicated situation where there is in existence a chain of sub-tenancies—ie it should apply to a sub-tenancy of any degree.

4.17 We do not see any reason why any intermediate sub-tenants in the chain—ie those sub-tenants other than the one who is physically in possession of the subjects—should be entitled to receive a copy notice. There may be a number of such sub-tenants. It may be difficult for a landlord to establish the identity of all of them were any copy notice required to be given. We accordingly think that the current rule alone should apply to intermediate sub-tenants, namely that where a tenancy is terminated the sub-tenancies of the property likewise come to an end.

Right of resumption

4.18 A lease may contain a right of resumption of property in favour of the landlord. The exercise of this right may affect an authorised sub-tenancy of the property. Where the landlord resumes the property the effect of this is to bring the tenancy of that property to an end. The sub-tenancy will fall with the principal tenancy and the sub-tenant in possession will require to remove. The sub-tenant should of course be aware of the terms of the lease to the principal tenant. He should therefore be aware that there is a right of resumption over the property.

4.19 Despite this the landlord may exercise his right of resumption yet find that the sub-tenant is continuing in possession beyond the termination of the principal tenancy and the sub-tenancy. It may be that as in the case of termination by notice the sub-tenant would be held to be entitled to notice before vacating the property. We are therefore in favour of extending to the exercise of a right of resumption[2] our recommendations concerning the giving of a copy notice to the sub-tenant in possession. This would ensure that the sub-tenant receives adequate written notice of the intended exercise of the right of resumption and therefore of the impending termination of the sub-tenancy.

Termination of tenancy other than by notice

4.20 We are aware that a tenancy may terminate in a number of different ways other than by the giving of notice of termination. A landlord may treat the lease as

1. It should be noted that a person who is an intermediate sub-tenant in relation to those above him in the hierarchical leasing arrangement will be at the same time a landlord in relation to those beneath him in the hierarchy ie in relation to the person to whom he himself sub-let the property and in relation to any sub-tenants of his own tenant.
2. We have already recommended (see Recommendation 11 (para 2.52) above) that the exercise of a right of resumption should always be preceded by the giving of notice.

terminated in reliance on an irritancy clause in the lease which the tenant has breached.[1] Another method is where the lease was granted to a partnership and the partners or one of them has the power to dissolve. The exercise of this power would terminate the lease without the necessity of serving notice of termination.[2] There is also the case where the tenancy terminates by operation of the principle of *confusione* or confusion—ie the fusing together or merging of the interest of the tenant in the tenancy with that of his landlord.[3] In these circumstances the tenancy comes to an end on the date of the merging of the interests.[4]

4.21 In paragraph 4.13 above we indicate that we favour the retention of the existing rule of law that any sub-tenancy falls with the tenancy. This rule would apply whether the tenancy is terminated by the giving of notice or otherwise. We consider that any person accepting the grant of a sub-tenancy should accept also any inherent risks in doing so—for example that the tenancy may suddenly be terminated without the giving of notice, with a consequent similar effect on the sub-tenancy.[5]

4.22 Our **recommendations** in this area of law thus far are:

Recommendations 30-32 below apply where property is subject both to a tenancy and to any sub-tenancy authorised either expressly or impliedly by the landlord of the tenant; and they apply to a sub-tenant of any degree where there is in existence a chain of sub-tenancies of the property:

30. **Where a tenancy of leased property is brought to an end any sub-tenancy of the property should also come to an end.**
(Paragraphs 4.4-4.13, 4.16-4.17; clauses 5(2), 27(1) (definition of "sub-tenant"), Schedule 1, para 4, new s 34B(2), Schedule 3, para 10(a)(ii) (definition of "sub-tenant"))

31. **Where there is a sub-tenant in possession of leased property, a notice to quit or notice of resumption given by the landlord to the tenant, or a notice of intention to bring the tenancy to an end given by the tenant to his landlord, or a notice of termination given by either the landlord or the deceased tenant's executor to the other under section 16(3) of the Succession (Scotland) Act 1964 (the 1964 Act), should not be effective unless a copy of the notice is given to the sub-tenant in possession either by the party giving the notice at the same time as he gives it, or by the recipient of the notice as soon as practicable after receiving it.**
(Paragraphs 4.14-4.15, 4.18-4.19; clause 5(3) and Schedule 1, para 4, new s 34B(3))

Contracting out

4.23 In Part III of the Report we make recommendations concerning the entitlement of parties to a lease to contract out of statutory notice provisions relating to termination. Where a landlord and tenant make a contracting out agreement the terms of this will form part of the leasing arrangement. Where a sub-lease is thereafter granted the sub-tenant should be aware of the agreed period of notice. This agreement will be significant to him. When notice of termination is given he will receive a copy of the notice, giving him warning for whatever period of notice has been agreed in advance of the date of termination of the principal tenancy and thus also of the sub-tenancy.

4.24 It may be however that a contracting out agreement is made between a landlord and a principal tenant after the grant of a sub-tenancy. The agreement will obviously

1. Restrictions are however placed on the landlord's entitlement to rely on an irritancy clause in the lease by ss 4-7 of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985.
2. Gill, para 3.
3. Paton and Cameron, p 102.
4. The principle of *confusione* operates in different circumstances. It may occur by way of assignation by the tenant of his interest in the tenancy to his landlord; or it may occur on the death of the tenant where the landlord succeeds to the tenant's interest. Confusion would seem to operate too where the tenant acquires the land, for example by purchase or succession.
5. The sub-tenant may of course have recourse against the tenant in terms of any agreement in the sub-lease regarding the giving of notice prior to the termination of the sub-tenancy.

affect the position of the sub-tenant in possession. One method of dealing with this in practice would be to bring in the sub-tenant in possession as a party to the agreement. The sub-tenant would therefore be consenting to the giving of any variation in the statutory period of notice. Where this course of action is not taken and a contracting out agreement—particularly one for a shorter period of notice than that stipulated—is implemented by service of notice the sub-tenant would receive a copy notice giving him a different period of warning than that expected. Depending on the terms of the sub-tenancy, the sub-tenant may be able to found a claim for any loss suffered against the principal tenant in such a case. Other than this a sub-tenant would have to accept the position as one of the risks or consequences of taking on a sub-lease.[1]

Compensation for disturbance under the 1949 Act

4.25 A sub-tenant in possession of an agricultural holding is entitled to compensation for disturbance under section 35(1) of the 1949 Act on quitting the holding in either of two circumstances. The first is where a notice to quit the holding is given to the sub-tenant by his landlord (ie by the tenant in the landlord—tenant—sub-tenant situation). The second is where the sub-tenant gives a counter-notice to his landlord accepting a notice to quit part of the holding served on him under section 33 of the Act as a notice to quit the entire holding. In terms of our recommendations concerning termination of a sub-tenancy there is however one further situation which results in termination of the sub-tenancy at the instance of a party other than the sub-tenant himself. This is where notice of termination of the tenancy is given by either party to the tenancy to the other and copied to the sub-tenant in possession. Where the tenancy is terminated in this manner either by the landlord or by the tenant this results in termination of the sub-tenancy also. The sub-tenant is thereby through no action of his own disturbed from his possession of the holding. We consider that in these circumstances the sub-tenant should be entitled to receive compensation for disturbance under section 35 of the 1949 Act as if the sub-tenancy had been terminated by a notice to quit given to the sub-tenant by his landlord.

4.26 We **recommend**:

32. Where the sub-tenancy of a person in possession of an agricultural holding is terminated by virtue of a notice given by either party to the tenancy to the other, the sub-tenant should be entitled to compensation for disturbance under section 35 of the 1949 Act as if the sub-tenancy had been terminated by virtue of a notice to quit given to him by his landlord.

(Paragraph 4.25; Schedule 3, para 6)

More than one separate landlord

4.27 Property which is subject to one tenancy may have more than one landlord, each being the landlord of a separate part of the property. This may happen after the death of the original landlord. On succession the subjects may be divided into two or more parts, each passing into separate ownership. It may occur too on the sale of part of the subjects. However arising this situation can lead to particular problems. In Scotland for example one such landlord of a separate part (or "part-landlord" which is the term we shall now use for the purposes of this discussion) is unable to terminate the lease in respect of his part only of the leased subjects, without the consent of the tenant and the other co-proprietors of the whole subjects.[2] In England however a part-landlord may serve notice to quit in respect of his part of the property alone. The tenant is entitled to treat the notice as terminating the whole of the original tenancy.[3]

4.28 While consultees were in favour of dealing with the difficulties which exist in this area of law the views we received were divided on whether to adopt a scheme

1. There may of course be particular statutory provision concerning the position of the sub-tenant where the principal tenancy is terminated: see s 19 of the 1984 Act and s 17 of the Land Tenure Reform (Scotland) Act 1974, both discussed in para 4.7 above.
2. *Gates* v *Blair* 1923 SC 430.
3. Law of Property Act 1925, s 140(1), (2).

similar to the English one. After careful consideration we came to the view that a part-landlord should in principle be able to terminate the lease in respect of his own part of the subjects. The part-landlord may wish to sell his part of the property with vacant possession. It would seem unfair if he were prevented from doing so by being unable to obtain the consent of the other part-landlords and the tenant to the termination of the tenancy in respect of his own part of the subjects.

4.29 Similarly we think that the tenant in such a case should be entitled to bring the tenancy of part of the subjects to an end by giving notice to the landlord of that part. The tenancy may comprise two or more separate but identifiable subjects. It is easy to imagine circumstances in which the tenant might wish to retain the tenancy of one part of the subjects and give up the tenancy of the other part or parts.

4.30 These recommendations apply to the giving of a notice whether it be a notice to quit or a notice of intention to terminate a tenancy. However our recommendations concerning termination of the tenancy of part of property should be applied also to the case of termination of a lease under another statutory provision, section 16 of the 1964 Act. This permits the giving of a notice of termination by or to a deceased tenant's executor in certain circumstances. It may be desired to exercise this statutory right in the situation where there are part-landlords.

4.31 We recognise however that there will be cases where the parties to the lease do not wish to permit termination of the tenancy in respect of part only of the property. This may be so particularly from the tenant's point of view where the different parts of the property are each used in such a way that they are interdependent. Examples of this might include the lease of a house and a garage, or a shop and an adjoining house, or an industrial unit with adjoining commercial premises. In such cases the tenant and the landlords may have an interest in the continuation of the tenancy in respect of each part of the property. We recommend therefore that the entitlement to give notice in respect of part only of the subjects should be subject to any agreement to the contrary. Such agreement might be made in the lease itself where separate owners conjoined to let property under one tenancy. In the more common case where the division of the subjects occurs during the currency of the lease, the agreement may then be made in a separate document.

4.32 Accordingly we **recommend**:

Recommendations 33 to 39 below apply where property which is subject to one tenancy has more than one landlord, each being the landlord of a separate part:

33. **Subject to any agreement to the contrary in the lease or otherwise to which all the landlords are parties, it should be competent to bring the tenancy of part of leased property to an end either by notice to quit given by the landlord of that part to the tenant or to the deceased tenant's executor under section 16(3) of the 1964 Act, or by notice of intention to bring the tenancy to an end given by the tenant or by the deceased tenant's executor to the landlord of that part.**
(Paragraphs 4.27-4.31; clause 6(2) and Schedule 1, para 4, new s 34C(2))

Response to notice to quit

4.33 We have already stated that the different parts of a property subject to one tenancy may be interdependent in use. In such a case the tenant may be placed in a difficult position should he receive a notice to quit from a part-landlord in respect of the tenancy of one part only of the property. It may be that the tenant would not wish to continue the tenancy in respect of the other part or parts of the property. He would most likely be unable to give a timeous notice of intention to terminate the tenancy in respect of the other parts of the property. The tenant may therefore be faced with the prospect of having to continue with a tenancy of subjects which perhaps may not be economically or commercially viable. That tenancy could only be terminated at the next term day.

4.34 For these reasons we are attracted to a scheme along the lines of the English one contained in sections 140(1) and (2) of the Law of Property Act 1925. Under these provisions a tenant on receipt of a notice to quit part of leased subjects can

respond by giving a notice which terminates the whole of the lease. We consider that a similar scheme could be used to deal with cases where there are two or more separate landlords. We recommend that a tenant or (as pointed out in paragraph 4.30 above) a deceased tenant's executor should have a right to respond to a notice to quit or, as the case may be, a notice under section 16(3) of the 1964 Act by giving to the landlord of any other part of the property an effective notice of intention to terminate the tenancy in respect of that other part. We consider that any notice so given should bring the tenancy of the other part to an end at the same date on which the tenancy of the first part (ie the part in respect of which notice was given by the part-landlord) is to come to an end. Bringing the tenancy of the two parts to an end on the same date would cause less confusion and would make it easier to arrange for matters such as compensation, or apportionment of rent for the continuing tenancy in respect of other parts of the property.

Period of Notice

4.35 Where a part-landlord or a tenant gives notice of termination in respect of part only of the leased subjects, a period of notice will require to be given in accordance with the statutory requirements.[1] The question then arises as to the period of notice which would be appropriate where a tenant, in response to receiving a notice (the "first notice") terminating the tenancy of part of the leased property, gives a notice (the "second notice") to terminate the tenancy of another part of the property. We have already pointed out that it would be desirable to achieve termination of the tenancy of the various parts of the property at the same date. This means that the period under any second notice should operate within the period of the first notice and expire on the same date as the first notice. There seems to us to be two objectives regarding the determination of the period to be given under any second notice: the tenant on receipt of a first notice should be given a reasonable period in which to decide whether to give a second notice in response; and the landlord who is to receive a notice of the second type should receive notice of a period which is reasonable in the circumstances.

4.36 In the case of a non-agricultural lease we consider that these objectives would be met by a requirement to give under a notice of the second type a period of at least 14 days, or a period equal to half the period specified in the first notice, whichever is the shorter period, ending on the date on which the tenancy of the part in relation to which the first notice has been given is to come to an end.

4.37 The position in respect of leases of agricultural holdings is somewhat different. The 1949 Act takes into account the nature and use of the subjects let. Accordingly a lengthy period of notice of termination is required: under section 24(1), a period of between one and two years. It would be consistent with the policy of the Act to ensure that a relatively long period of notice is given where the tenancy of part of the leased property is being terminated under a second notice. It would also be desirable to ensure that the possibility of further part-terminations is settled fairly quickly following the giving of a notice of the first type by one part-landlord. We therefore favour a requirement in the case of agricultural holdings that any notice of the second type should be given within 28 days from receipt of the first notice by the tenant (or as the case may be by the deceased tenant's executor). This gives the tenant a reasonable period in which to consider his position in relation to the tenancy of the other parts. It also ensures that another part-landlord would receive a minimum of nearly 11 months notice of termination under a notice of the second type.

4.38 To conclude, we **recommend**:

34.(a) Where the tenant or the deceased tenant's executor is given a notice to quit part of the leased property (the "first part") under Recommendation 33 above, he should be entitled to give a notice to the landlord or landlords of any other part or parts of the leased property of his intention to bring the

1. Regarding non-agricultural leases, in terms of any legislation implementing our Recommendation 8 (para 2.40 above); regarding leases of agricultural holdings, in terms of s 24(1) of the 1949 Act; regarding a notice given to or by a deceased tenant's landlord, in terms of s 16(4) of the 1964 Act.

tenancy of that other part or parts to an end, on the same date as the tenancy of the first part.

(Paragraphs 4.33-4.34; clause 6(3) and Schedule 1, para 4, new s 34C(3))

(b) Any notice under this Recommendation should—

(i) regarding a non-agricultural lease, give a period of notice of not less than 14 days ending with the date on which the tenancy of the first part of the leased property is to come to an end, or a period equal to half the period specified in the notice in respect of that first part, whichever is the lesser period;

(ii) regarding a lease of an agricultural holding, be given within 28 days beginning with the date on which the tenant or executor is given the notice under Recommendation 33 above.

(Paragraphs 4.35-4.37; clause 6(4) and Schedule 1, para 4, new s 34C(4))

Termination of Tenancy of Whole Subjects

4.39 While making recommendations concerning termination of the tenancy of part or parts of leased property (whether of non-agricultural subjects or of an agricultural holding) we should point out that we do not wish to disturb or cast doubt upon existing rules of law regarding the bringing to an end of the tenancy of the whole subjects. We would wish to safeguard the right of all the landlords to bring the whole tenancy to an end by giving the tenant a notice to quit all the leased property or by giving a notice regarding all the leased property to the deceased tenant's executor under section 16(3) of the 1964 Act. We would also want to protect the entitlement of the tenant or the deceased tenant's executor to bring the whole tenancy to an end by giving to all the landlords the appropriate notice of intention to do so. We are of the view that any legislation implementing our recommendations should contain an express provision safeguarding these rights to terminate the whole tenancy.

4.40 Accordingly we **recommend**:

35. Any legislation implementing Recommendations 33 and 34 above should contain an express provision entitling all the landlords to bring the whole tenancy to an end by giving to the tenant a notice to quit the whole of the leased property or to the deceased tenant's executor a notice of termination in respect of the whole of the property under section 16(3) of the 1964 Act, and entitling the tenant or the deceased tenant's executor to bring the whole tenancy to an end by giving notice of his intention to do so to all the landlords of the leased property.

(Paragraph 4.39; clause 6(5) and Schedule 1, para 4, new s 34C(5))

Agreement to contract out

4.41 In Part III we made recommendations concerning the entitlement of parties to contract out of statutory notice provisions relating to termination of a lease or resumption of leased property. It may be that an agreement to contract out is made between a landlord and a tenant and thereafter the landlord's interest in the property becomes divided. Implementation of our recommendation[1] that any such agreement should be binding on any successors to the parties to it should avoid any problems regarding the implementation of the agreement. All the parties should be aware of the terms of the agreement and would be bound by it.

4.42 We are concerned however by the case where following a division of the landlord's interest an agreement to contract out is sought between one part-landlord only and the tenant. Where such an agreement is made and implemented by the giving of notice this would result in termination of the tenancy of part of the property. This may however have adverse consequences regarding the giving of a second notice by the tenant to another part-landlord. Where the agreement is for a shorter period of notice of termination than that stipulated in statute and this notice is given to the tenant, the tenant may in response give a notice of termination to the landlord of another part of the property under Recommendation 34 in paragraph 4.38 above.

1. Recommendation 29 (para 3.61) above.

That other landlord would as a consequence receive from the tenant a very short period of notice. He would most likely have been unaware of the existence of the contracting out agreement between the first part-landlord and the tenant. It seems unfair that he be adversely affected by an agreement of which he is unaware. This situation would be avoided if all the persons who are part-landlords at the time when an agreement is made were required to be brought in as parties to the agreement.

4.43 Accordingly we **recommend**:

36. No agreement to contract out of statutory notice provisions relating to termination should have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.
(Paragraphs 4.41-4.42; clause 6(6) and Schedule 1, para 4, new s 34C(6))

Determination of rent and compensation

4.44 Where the tenancy of part or parts of leased property is brought to an end questions may arise concerning the rent and compensation payable in respect of that or those parts. Following a division of the subjects into separate ownership during the currency of a lease the previous arrangement of payment of rent by the tenant in one sum may have continued. Payment may be made to a factor or agent, or it may be made to one landlord who thereafter remits a portion of the whole rent to the other part-landlords in terms of an informal agreement between them. On termination of the tenancy of a part of the subjects it may be important however to determine the rent attributable to that part and also any other part of the property. This determines the rent which remains payable by the tenant in respect of the remaining part or parts. It is important also since the determination of compensation in respect of the part terminated under certain statutory provisions is based on the rent of the property.[1]

4.45 Given these circumstances it is obvious that all parties to the lease have an interest in the determination of the rent on the termination of the tenancy of part of the property. We therefore recommend that the determination should be carried out in such a way as may be agreed between the tenant and all his landlords. We consider that a method of resolving any disagreement should also be stipulated. Following the example of section 61 of the 1949 Act (determination of claims for compensation where holding divided) we recommend that, failing agreement between the parties, the determination be carried out by arbitration and that the arbiter should have the power to direct that the expenses of the arbitration shall be paid by the parties in such proportions as he shall determine. We also recommend that any such determination should take into account any depreciation in the value to the tenant of the residue of the property or the holding caused by the tenancy of the part or parts being brought to an end or by the use to be made of the part or parts in respect of which the tenancy is being brought to an end.[2]

4.46 Compensation or a consideration may be payable on the termination of the tenancy of part or parts of leased property. This compensation or sum may arise from the terms of the lease or from any other agreement between the parties or as a result of a common law claim. In the context of agricultural holdings compensation usually arises from the operation of special statutory provisions.[3] Such compensation is usually paid to the tenant but certain provisions cover payment by the tenant.[4] Where the tenancy of part or parts of leased property is brought to an end we consider that determination of any compensation or sum payable by or to the tenant under any rule of law, statutory or otherwise, should be determined along the same lines as we recommend in respect of determination of rent.

4.47 We **recommend**:

1. See for example s 35(2)(a) of the 1949 Act (compensation to tenant for disturbance).
2. This recommendation follows the provision already made in s 34 of the 1949 Act (reduction of rent where tenant dispossessed of part of holding) regarding depreciation of the value to the tenant of the residue of the holding in the case of a severance.
3. See for example ss 37 of the 1949 Act (compensation for old improvements), 48 (compensation for new improvements), 56 (compensation for continuous adoption of special standard of farming).
4. See for example ss 57 and 58 of the 1949 Act (compensation payable by the tenant for deterioration of the holding).

37.(a) Where the tenancy of part or parts of leased property is brought to an end the following matters should be determined in such a way as may be agreed between the tenant and all his landlords, or failing such agreement, by arbitration:

(i) the rent attributable to the tenancy of that part or those parts and the rent payable for the tenancy of any other part of that property, taking into account any depreciation of the value to the tenant of the residue of the property or the holding caused by the tenancy of the part or parts being brought to an end or by the use to be made of the part or parts in respect of which the tenancy is being brought to an end; and

(ii) any compensation or sum payable by or to the tenant under any rule of law in relation to the tenancy of the part or parts being brought to an end;

(b) Where any matter is settled by arbitration the expenses of this should be directed by the arbiter to be paid by the landlords and the tenant in such proportions as he shall determine.

(Paragraphs 4.44-4.46; clause 6(7) and Schedule 1, para 4, new s 34C(7))

4.48 There is one further issue arising in relation to compensation on the termination of a tenancy of part of a holding. This is in the context of the legislation on agricultural holdings. The statutory provisions operate so as to give an entitlement to compensation where the tenant quits the holding at the termination of the tenancy.[1] By contrast where the tenancy of part of the holding is terminated under our recommendations the tenant will at the date of termination be quitting only part of the holding.

4.49 Section 60 of the 1949 Act already applies the compensation provisions of the Act in the two cases where that statute recognises the termination of the tenancy of part of a holding. These cases are where a notice to quit part of a holding is given under section 32 of the Act and where a landlord resumes possession of part of a holding.[2] The section operates by applying the compensation provisions of the Act as if the part of the holding were a separate holding which the tenant had quitted in consequence of a notice to quit.

4.50 If our foregoing recommendations on this matter were implemented the termination of the tenancy of part of the holding could occur as a result of procedures other than those currently stipulated in section 60 of the 1949 Act. Such termination could occur by notice to quit given by a landlord of part of the holding in respect of that part or by notice of intention to bring the tenancy of part of the holding to an end given by the tenant[3] or by notice of the second type given by a tenant of intention to bring the tenancy of another part of the holding to an end.[4] In our view the termination of the tenancy of part of an agricultural holding under our recommendations should give rise to an entitlement to compensation under the 1949 Act as if that part of the holding were a separate holding, the tenancy of which had terminated in consequence of a notice under the Act. There does not seem to be any reason why the landlord or the tenant should be deprived of any appropriate compensation[5] simply because the tenancy of part of the holding was brought to an end rather than the tenancy of the whole holding. This appears to be the policy of the 1949 Act at present as seen in the terms of section 60, which provide for an entitlement to compensation in the cases where the tenancy of part of a holding can at present be brought to an end.

4.51 We **recommend**:

1. See for example ss 56(1), 57(1), 58.
2. See s 60(1)(a) and (b).
3. Recommendation 33 (para 4.32) above.
4. Recommendation 34 (para 4.38) above.
5. The tenant for example has the right to compensation for improvements to the holding: see eg s 48 of the 1949 Act.

38. Where the tenancy of part of an agricultural holding is terminated by a notice given either by a landlord or a tenant under Recommendation 33 above, or by a notice given by a tenant under Recommendation 34 above, an entitlement to compensation under the provisions of the 1949 Act should arise as if that part of the holding were a separate holding the tenancy of which had terminated in consequence of a notice under the Act.

(Paragraphs 4.48-4.50; Schedule 3, para 8)

Compensation for disturbance

4.52 Section 35(1) of the 1949 Act requires particular consideration. This provision gives the tenant the right to compensation for disturbance in certain circumstances. The first is where the tenancy is terminated by a notice to quit the holding given by the landlord. The other is where the tenancy is terminated by a counter-notice by the tenant under section 33 (ie where the tenant has received a notice to quit part of the holding and exercises his entitlement to treat it as a notice to quit the entire holding). The policy behind section 35 appears to be to give the tenant an entitlement to compensation for disturbance where termination is either at the instance of or is initiated by the landlord. The tenant is as a result of the landlord's action disturbed from his possession of the holding.

4.53 Where the tenancy of part of the holding is brought to an end by reason of a notice to quit given by the landlord of that part to the tenant (under Recommendation 33 above[1]) as a result of Recommendation 38 above[2] the tenant would be entitled to compensation for disturbance under section 35 of the 1949 Act. Where on the other hand the tenancy of part of the holding is brought to an end by way of a notice given by the tenant to the landlord of that part under Recommendation 34 above,[3] there would of course be no question of entitlement to compensation for disturbance arising in the circumstances.

4.54 The final case of termination of the tenancy of part of a holding under our recommendations would be where the tenant, having himself first received notice to quit from one part-landlord in respect of a part of the holding, gives notice of termination in respect of another part of the holding to the part-landlord of that other part. We do not think that entitlement to compensation for disturbance should be extended to cover this case. The second part-landlord in such a situation would not himself have taken or initiated any action leading to termination of the tenancy of his part of the holding. It would therefore be unreasonable to impose upon that part-landlord an obligation to pay to the tenant compensation for disturbance for that part. In our view such a situation is distinguishable from the case where a tenant gives a counter-notice to his landlord under section 33 of the 1949 Act and on the termination of the whole tenancy thereby obtains an entitlement to compensation for disturbance. In this latter case there would only be one landlord of the tenancy. That landlord himself would have given notice to quit part of the holding to the tenant, thereby leaving himself open to the possibility that the tenant will in return give him a counter-notice under section 33 and so become entitled to receive from him compensation for disturbance in respect of the whole subjects.

4.55 To conclude we do not see any need to make recommendations specifically concerning the tenant's entitlement to compensation for disturbance under section 35 of the 1949 Act where the tenancy of part of the holding has been terminated.

Sub-tenant in possession of property

4.56 Where there is more than one landlord of leased property, each being the landlord of a separate part, the property may be subject not just to a tenancy but to a sub-tenancy or sub-tenancies. Our consideration of this situation applies only where any sub-tenancy has been authorised either expressly or impliedly by the landlord of the tenant. We have already[4] made recommendations concerning the effect on any sub-tenancy of the termination of the tenancy and regarding the giving of a copy of any notice of termination to the sub-tenant in possession of the property.

1. Para 4.32.
2. Para 4.51.
3. Para 4.38.
4. See paras 4.4-4.26 above.

We consider that where under our recommendations in this section of the Report one or all of the part-landlords or the tenant give a notice of termination, and there is an authorised sub-tenant in possession of the property, in order for such notice to be effective a copy of it should be given to that sub-tenant.

4.57 Where a sub-tenant in possession of property receives a copy notice of termination of the tenancy of a part of the property, we consider that he should have a right to give a notice to his own landlord (ie the tenant) to terminate the sub-tenancy in respect of any other part of the property. We recommend in paragraphs 4.33-4.34 above[1] that the tenant should have a similar right. A sub-tenant may have similar reasons for wishing to give up the sub-tenancy of another part. The sub-tenant's entitlement in this respect should be subject to the same requirements as those we recommend in the case of the tenant. Therefore the sub-tenancy of the second part or parts of the property should be terminated at the same date on which the sub-tenancy of the first part is to come to an end, and the period of notice to be given should be similar to that we recommend in paragraphs 4.35-4.38 above.[2]

4.58 We should say that as far as the tenant's position is concerned we do not think that he would be unduly prejudiced by the exercise of the sub-tenant's entitlement. Having himself received a notice to quit part of the property from the landlord, the tenant would be aware that the sub-tenant would receive a copy of this and would be entitled to terminate the sub-tenancy of another part of the property. The tenant would also of course have the right to give to another part-landlord notice to terminate the tenancy of another part of the subjects. If he either ascertains that the sub-tenant is intending to terminate the sub-tenancy of another part or suspects that this may be the case, and he (the tenant) does not in these circumstances wish to retain the tenancy of that part, then he himself could give notice to terminate the tenancy of that other part.

4.59 In paragraphs 4.44-4.47 above[3] we made recommendations concerning the determination of rent, and compensation or any other sum, in the case where the tenancy of part or parts of leased property are brought to an end. We think that these recommendations should also apply to the determination of similar matters between the sub-tenant and his landlord (ie the tenant) where the sub-tenancy of part or parts of leased property is brought to an end under our recommendations.

4.60 There is one further issue which arises in the context of leases of agricultural holdings. This concerns the sub-tenant's entitlement to compensation under the 1949 Act on the termination of the sub-tenancy in respect of part of a holding. Regarding the compensation provisions in general, we recommend[4] that in certain cases the tenant should be entitled to compensation on the termination by notice of the tenancy of part of the holding as if that part were a separate holding which the tenant had quitted in consequence of a notice to quit. We consider that the same policy should be applied to the termination of the sub-tenancy of part of a holding by or as a consequence of notice.

4.61 A sub-tenancy of part of a holding could terminate by or as a result of a notice in a number of different ways under our recommendations. It could terminate as a result of a notice by the sub-tenant to the tenant or by the tenant to the sub-tenant, in respect of part of the holding, under Recommendation 33 above.[5] It could terminate as a result of a notice by the sub-tenant to the tenant under Recommendation 34 above[6] where the sub-tenant has himself first received notice in respect of another part of the holding.[7] Furthermore the sub-tenancy of part of the holding could

1. Recommendation 34 (para 4.38) above.
2. Recommendation 34(b) (para 4.38) above.
3. Recommendation 37 (para 4.47) above.
4. Recommendation 38 (para 4.51) above.
5. Para 4.32 above.
6. Para 4.38 above.
7. In the two situations mentioned the tenant and the sub-tenant would of course be in a landlord—tenant relationship and would be able to give notice to each other as such under Recommendations 33 and 34 above.

terminate as a consequence of termination of the tenancy by notice. The tenancy may be terminated by way of notice given by either the landlord or the tenant to the other under Recommendation 33 above, or by notice given by the tenant to a landlord under Recommendation 34 above. The sub-tenancy of part of the holding would fall if the tenancy of that part is brought to an end in terms of our Recommendation 30 above,[1] provided that a copy of the notice bringing the tenancy to an end is given to the sub-tenant in possession under Recommendation 31 above. In any of these cases the sub-tenant should receive compensation under the 1949 Act as if the part of the holding in question were a separate holding, the sub-tenancy of which had terminated by or in consequence of a notice under the Act.

4.62 We now consider the specific case of compensation for disturbance under section 35 of the 1949 Act. We have already discussed the terms of this provision in paragraph 4.25 above. We recommend (Recommendation 32)[2] that where the sub-tenancy of a person in possession of a holding is terminated by virtue of a notice given by either party to the tenancy to the other, the sub-tenant should be entitled to compensation for disturbance as if the sub-tenancy had been terminated by virtue of a notice given to him by his landlord. We consider that the sub-tenant should similarly be entitled to compensation for disturbance in respect of the termination of the sub-tenancy of part of the holding. This result would however be achieved by implementation of our recommendation in paragraph 4.60 above (ie that a sub-tenant should be entitled to compensation on the termination by notice of the tenancy of part of the holding as if that part were a separate holding which the sub-tenant had quitted in consequence of a notice to quit), taken along with implementation of Recommendation 32.

Recommendations

4.63 We conclude with our **recommendations** concerning the situation where there is more than one landlord of leased property, each being a landlord of a separate part, and where the property is subject not just to a tenancy but to a sub-tenancy or sub-tenancies:

39. Where there is a sub-tenant in possession of leased property and the sub-tenancy has been authorised either expressly or impliedly by the landlord of the tenant—

(a) any notice to terminate the tenancy of part of the property under Recommendations 33 or 34 above, and any notice to terminate the whole of the tenancy under Recommendation 35 above, should not be effective unless a copy of the notice is given to the sub-tenant under Recommendation 31 above.

(b) Where the sub-tenant is given a copy of a notice under paragraph (a) above in respect of part of the property (the first part) he should be entitled to give to the tenant a notice of intention to bring the sub-tenancy of any other part of the property to an end on the same date on which the tenancy of the first part is to come to an end.

(c) The period of notice to be given under paragraph (b) above should be the same period as that applicable under Recommendation 34(b) above.

(d) Where the sub-tenancy of part or parts of leased property is brought to an end under this Recommendation the following matters should be determined in such a way as may be agreed between the sub-tenant and his landlord (ie the tenant), or failing such agreement, by arbitration:

(i) the rent attributable to the sub-tenancy of that or those parts and the rent payable for the sub-tenancy of any other part of that property, taking into account any depreciation in the value to the sub-tenant of the residue of the property or the holding caused by the sub-tenancy of the part or parts being brought to an end or by the use to be made of the part or parts in respect of which the sub-tenancy is being brought to an end; and

1. Para 4.22 above.
2. Para 4.26 above.

(ii) any compensation or sum payable by or to the sub-tenant under any rule of law in relation to the sub-tenancy of the part or parts being brought to an end;

and where any matter is settled by arbitration the expenses of this should be apportioned by the arbiter between the sub-tenant and his landlord.

(Paragraphs 4.56-4.59; clause 6(8) and Schedule 1, para 4, new s 34C(8))

(e) The sub-tenant should, on quitting part of an agricultural holding in consequence of termination of the sub-tenancy of that part by reason of a notice under the 1949 Act, be entitled to compensation under the provisions of the Act as if that part of the holding were a separate holding which the sub-tenant had quitted in consequence of a notice under the Act.

(Paragraphs 4.60-4.61; Schedule 3, para 8)

More than one landlord, each with interest in common

4.64 We now examine problems arising in relation to property which is subject to one tenancy, but where there is more than one landlord and the interest of each landlord in the property is an interest in common. Questions have arisen as to the effect of a notice to quit served by one of such landlords without the consent of the other landlords. On the one hand the rules governing the management of common property do not generally confer on any one proprietor the right to proceed without the consent of the other co-proprietors. However on the other hand the principle of tacit relocation requires the implied consent of all parties to the continuation of the tenancy agreement and so a notice by one co-proprietor as landlord would indicate that party's unwillingness that a lease should continue. An argument similar to the latter has in fact been accepted by the courts in one fairly recent case where notice of termination was served by one of the two joint tenants. It is worth reviewing the arguments raised in that case.

4.65 In *Smith* v *Grayton Estates Ltd*[1] the court accepted that there were three possible consequences of a notice of removal served by one of two joint tenants.[2] The first was that the notice was effective as regards the tenant who served it but left the non-consenting tenant in possession as sole tenant. This argument was abandoned in the case and it appears that it would have been rejected on the ground that a landlord who had entered into a contract with joint tenants could not be obliged to accept a sole tenant in their place. As an alternative it was argued that the notice was ineffective unless served with the concurrence of both joint tenants, the consequence of which would have been to oblige the tenant who served the notice to continue with the lease in spite of his unwillingness to do so. It appears that such a consequence would have had little practical effect in the case other than on the joint liability for rent. The tenant who gave notice in fact lived elsewhere and was not involved in the running of the farm leased, which was worked by the other joint tenant. However that argument was said by the court to overlook the meaning and effect of tacit relocation.

4.66 The third argument put forward on behalf of the landlord was accepted by the court. This was to the effect that tacit relocation required the silent consent of all parties, including all joint tenants, to the continuation of the lease. Thus the consequence of notice served by one joint tenant was termination of the joint tenancy.

4.67 We can see no reason why the effect of a notice of termination by one landlord with an interest in common in the property should differ from the effect of a notice served by one joint tenant. Consultees agreed with the proposition we put forward in the Memorandum that one such landlord should be able to serve an effective notice of termination without the consent of the other landlords. The notice should therefore

1. 1960 SC 349.
2. Per Lord President Clyde at p 354.

be treated as having been given by all the landlords. We favour too the application of this principle to the giving of notice in the converse situation: the tenant should be permitted to give notice of termination to one of the landlords and such notice should be treated as having been given to all the landlords. This would be particularly useful to the tenant in the case where he is faced with a number of landlords and is not sure of the identity of all of them for the purposes of giving notice. Lastly any provision should be applied not just to any notice in terms of our recommendations but also to any notice of termination given by either any of the landlords or a deceased tenant's executor under section 16(3) of the 1964 Act.

4.68 Accordingly we **recommend**:

Recommendations 40-43 below apply where property which is subject to one tenancy has more than one landlord, the interest of each landlord being an interest in common.

40. Any notice to quit given by any of the landlords to the tenant and any notice of intention to terminate the tenancy given by the tenant to any of the landlords should have effect as if it had been given by or to all the landlords, as the case may be; and any provision in this respect should be applied to any notice of termination given under section 16(3) of the 1964 Act.

(Paragraphs 4.64-4.67; clause 7(2), (3) and Schedule 1, para 4, new s 34D(2), (3))

4.69 Under legislation implementing Recommendation 31 above[1] the landlord or the tenant would be required to give a copy of a notice of termination to the sub-tenant in possession of the property in order that the notice be effective. Where a copy notice is so given, it too should have effect as if it had been given by all the landlords.

4.70 We **recommend**:

41. Where there is a sub-tenant in possession of the leased property, a copy notice given to the sub-tenant by any of the landlords, or by the tenant, or by the deceased tenant's executor, under Recommendation 31 above should have effect as if it had been given by all the landlords.

(Paragraph 4.69; clause 7(4) and Schedule 1, para 4, new s 34D(4))

Entitlement to receive copy notice

4.71 While we recommend for practical reasons that one landlord having an interest in common should be entitled to give an effective notice to quit we nevertheless consider that the interest of the other landlords in the tenancy should be recognised. These other landlords should be entitled to be made aware of any developments affecting the tenancy or any steps taken in relation to it. To ensure that this is achieved we favour a requirement that any landlord who has under our recommendations either given a notice to quit to a tenant or a copy notice to quit to a sub-tenant, or received a notice of termination from a tenant, should serve a copy on all the other landlords as soon as practicable following the giving or the receipt of the notice or copy notice. We do not consider there to be any appropriate statutory sanction which would adequately deal with a failure to serve a notice or copy notice on other landlords. However a landlord in breach of this requirement may be liable to the other landlords at common law in respect of any loss sustained by them.

4.72 We **recommend**:

42. A landlord who has either given a notice to the tenant or the deceased tenant's executor under Recommendation 40 above or a copy notice to quit to a sub-tenant under Recommendation 41 above, or who has received a notice of termination from a tenant or a deceased tenant's executor under Recommendation 40 above, should as soon as practicable thereafter serve a copy of the notice on all the other landlords.

(Paragraph 4.71; clause 7(5), (6) and Schedule 1, para 4, new s 34D(5), (6))

1. Para 4.22 above.

Contracting out of statutory notice provisions

4.73 In the case where there is more than one landlord of a property, each being the landlord of a separate part, we made a recommendation[1] concerning entitlement to contract out of statutory notice provisions. We think that a similar recommendation should apply in the case where the interest of a number of landlords is an interest in common. No contracting out agreement should have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.

4.74 We **recommend**:

43. No agreement to contract out of statutory notice provisions relating to termination should have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.
(Paragraph 4.73; clause 7(7) and Schedule 1, para 4, new s 34D(7))

Notice given before transfer or death

4.75 In the Memorandum we examined one aspect of the law relating to the right of an acquirer of an interest in leased property to rely on a notice given before the acquisition of that interest. One rule of law is that the purchaser of leased property may proceed on the basis of an assignation to him of a notice to quit served by the original landlord prior to the sale.[2] We proposed[3] that a purchaser who has acquired title to the landlord's interest in the property and taken entry to the subjects should be entitled to rely on a notice of termination of a lease served by the seller without having to obtain an assignation from the seller in his (the purchaser's) favour.

4.76 We were initially inclined to recommend an express provision deeming the notice of termination in such circumstances to have been given by the acquirer. After consideration we did not see any reason to confine such a provision to notices of termination. We take the view that the provision could usefully extend to any notice (or counter-notice in the case of agricultural holdings) served under any enactment. It would seem inconsistent for example were a new landlord expressly entitled to rely on a notice to quit given by the previous landlord but not on a timeous notice of intention to claim compensation for deterioration of the holding under section 58 of the 1949 Act.

4.77 There are furthermore situations in which the tenant's interest in a tenancy may be transferred. The usual method of doing this is by assignation. We consider separately[4] such assignations in relation to notices. A tenant's interest may however be transferred other than by assignation. The interest in the tenancy of a matrimonial home[5] may for example be transferred by the court to a non-entitled spouse[6] or a non-entitled partner[7] under sections 13 and 18 respectively of the Matrimonial Homes (Family Protection)(Scotland) Act 1981.[8] A notice or counter-notice may have been given by the tenant before the transfer. It may be useful to a new tenant to be entitled under statute to rely on that notice or counter-notice.

4.78 We then considered other ways in which the interest of a landlord in leased property, or as the case may be the interest of a tenant in the tenancy, may change hands. Such a change may result from the death of a party to the lease. Unless it is provided that the lease terminates on the death of one of the parties, the deceased's interest in the leased property or in the tenancy will be passed on under the law of succession. We take the view that the legatee of the deceased's interest or the acquirer

1. Recommendation 36 (para 4.43) above.
2. *Grant* v *Bannerman* (1920) 36 Sh Ct Rep 59.
3. Para 4.1.
4. See paras 4.84-4.88 below.
5. Defined in s 22 of the Act.
6. Defined in s 1 of the Act.
7. Defined in s 18(1) of the Act.
8. Certain subjects, including agricultural holdings, are excluded from the scope of these provisions: see section 13(7) of the Act.

of that interest as intestate estate of the deceased should equally be entitled by statute to rely on any notice or counter-notice served by the deceased before his death. Accordingly we recommend that it be provided by statute that where a notice has been given by a party to the lease who then dies, that notice should if effective when served continue to be so.

4.79 We are aware that where a transfer of an interest is made a transferee may on occasion immediately sell or pass on that interest to another person. This may occur particularly in relation to the sale of leased property, where the purchaser under missives may sell the property to a third party without first taking title himself. In such a situation we consider that any notice given by the transferor before the first transfer should be deemed to have been given by the person deriving title from the transferee.

4.80 We consider that for the avoidance of doubt it would be useful to apply these recommendations not just where notice has been given by the party to the lease who was the transferor or the person who later died, but also where notice has been given to that party by the other party to the lease. It may seem unusual for legislation to provide in detail for the giving of notice by a party to a lease before a transfer or death, yet not provide for the converse situation. We would not wish to leave room for any doubt in this respect concerning the interpretation of any legislative provision.

4.81 We **recommend**:

44. Where one party to a lease has either given to or received from the other party a notice (or in the case of agricultural holdings a counter-notice) under any enactment, and following the giving or receiving of the notice or counter-notice that party—

(a) if the landlord, transfers his interest in the property, and if the tenant, transfers his interest in the tenancy otherwise than by assignation, any such notice should be deemed to have been given by or to the transferee or any person deriving title from him; or

(b) dies, any such notice given by or to the person who has died should, if effective, continue to be so.

(Paragraphs 4.75-4.80; clause 8 and Schedule 1, para 4, new s 34E)

4.82 The discussion in the foregoing paragraphs raises one question in the context of agricultural holdings. This concerns section 31 of the 1949 Act, which makes provision regarding a notice to quit where during the currency of the notice the landlord enters into a contract for the sale of his interest in the land. Section 31 is a re-enactment of a provision in earlier legislation which was designed to protect the tenant from receiving a notice to quit served by the landlord solely to enable him to sell the subjects with vacant possession.[1] The provision is however no longer necessary given the security of tenure afforded by the 1949 Act. Consultees agreed that the section should be repealed.

4.83 We **recommend**:

45. Section 31 of the 1949 Act should be repealed.

(Paragraph 4.82; Schedule 4)

Assignation of tenant's interest

4.84 Questions may arise as to entitlement to receive notice of termination of a tenancy—or indeed any other notice—where the tenant has assigned his interest in the tenancy. The Act of Sederunt of 1756[2] provides that where the assignation has

1. Gill, paras 206-208.
2. Now embodied in ch XV of the Codifying Act of Sederunt 1913; see s 3 for the provisions mentioned.

not been intimated by instrument[1], removing proceedings or warnings against the original tenant will be effective against the assignee. The Act applies to agricultural leases only although this rule appears to apply under the common law to leases generally.[2] On consultation we proposed that this rule should be retained but the requirements as to the form of intimation should be clarified.[3] Consultees agreed to this.

4.85 We accordingly **recommend** in principle:

46. Where the tenant has assigned his interest in the tenancy and the assignation has not been intimated to the landlord as required by Recommendation 47 below, the common law rule that notices or proceedings for removing against the original tenant are effective against the assignee should be retained.

(Paragraph 4.84; clause 9(1) and Schedule 1, para 4, new s 34F(1), each as read with clause 17(1))

Form of intimation

4.86 The majority of consultees considered that any of the following methods of intimation to the landlord of an assignation would be acceptable: intimation in writing to the landlord; the landlord's consent to the assignation in the deed of assignation; and the registration of the assignation or an interest in the assignation. This latter category applies where an assignation is registrable under the Registration of Leases (Scotland) Act 1857, or an interest in the assignation is registrable under the Land Registration (Scotland) Act 1979. We accept these suggestions and consider that a requirement to make intimation using one of these methods should apply whether the assignation is in security or otherwise.

4.87 It may be argued that actings on the part of the landlord such as acceptance of rent may also indicate knowledge of an assignation. However it was generally considered on consultation that it would be unsound to rely on this as a method of intimation. In the case of receipt of rent for example it may not be clear that payment is being made not by the original tenant but by an assignee.

4.88 Accordingly we **recommend**:

47. Where a tenant has assigned his interest in a tenancy, whether in security or otherwise, intimation to the landlord of the assignation should be effective for the purposes of Recommendation 46 above only where:

(a) the assignation has been intimated in writing to the landlord;

(b) the landlord has consented to the assignation in the deed of assignation; or

(c) in the case of an assignation registrable under the Registration of Leases (Scotland) Act 1857 or in the case of an interest in an assignation registrable under the Land Registration (Scotland) Act 1979, the assignation or interest has been so registered.

(Paragraphs 4.86-4.87; clause 9(1) and Schedule 1, para 4, new s 34F(1))

Assignation in security by landlord

4.89 Assignation in security of the landlord's interest in leased property may affect relations between landlord and tenant in a number of ways. A problem may arise as to the landlord's title to sue for removal of the tenant in cases where the security is constituted by an *ex facie* absolute disposition by the party from whom the landlord purchased the subjects in favour of the landlord's creditors. In such cases the landlord will not be infeft. Infeftment is as a normal rule required to the raising of an action for recovery. This matter is discussed later in the Report.[4] This same problem will

1. According to Rankine (p 521) this meant notarial intimation of some kind, although there is listed at p 182 various less formal methods of intimation which are recognised in practice.
2. Rankine, p 520.
3. See paras 4.86-4.87 and Recommendation 47 below.
4. See paras 6.20-6.24 below.

not arise where the assignation is by way of a standard security[1] since the landlord will be infeft under such an arrangement.

4.90 Also the statutory conditions applicable to standard securities in the absence of an agreement to the contrary prohibit the letting of the security subjects without the prior written consent of the creditor.[2] A lease granted in breach of that condition by the debtor under a standard security may be subject to reduction at the instance of the creditor with the result that the tenant may be removed by the landlord's heritable creditor without notice of termination.[3] It appears to be settled now that a creditor has title to sue for the tenant's removing.[4]

4.91 Lastly in the event of the landlord being in default under the standard security the heritable creditor may enter into possession of the security subjects, recover rent due under the lease and exercise his debtor's other rights in relation to the granting and management of leases.[5] Thus the heritable creditor will stand in for the original landlord in any further dealings relating to the tenancy.

Assignation in security by tenant

4.92 An effective security over a tenant's interest in a tenancy could be created either by an assignation in security by the tenant or by the granting of a standard security by the tenant over the interest and the recording of the security in the Register of Sasines or the registering of the interest in the security in the Land Register for Scotland. Where the tenant's interest has been assigned or granted in security and duly intimated the same problems as discussed in the preceding three paragraphs may arise in relation to any sub-tenancy granted after the creation of the security.[6]

4.93 In the Memorandum we mentioned one further question which arose for consideration in such a case. This concerned entitlement to receive notice of termination where the creditor is in possession of the security subjects. After reflection we extended our consideration of this point to cover entitlement to receive any notice (or counter-notice in the case of agricultural holdings) given by the landlord under any enactment. The creditor has a vital interest in the security subjects and would therefore have an interest in any significant developments affecting the tenancy. The creditor may for example have an interest in receiving a notice of resumption, or a notice under section 4(2) of the Law Reform (Miscellaneous Provisions)(Scotland) Act 1985 relating to a monetary breach of the lease by the tenant.[7]

4.94 Where the creditor has entered into possession of the security subjects on default by the debtor (the tenant), he will not be entitled to remain in possession beyond the expiry of the debtor's lease. However in terms of the creditor's powers of management under standard condition 10 of Schedule 3 to the 1970 Act in relation to subjects under a standard security, he will be entitled to challenge any notice of termination of the tenancy on any grounds which would have been available to the original tenant. He will also be entitled to respond as appropriate to any other type of notice given to him in place of the original tenant. The tenant on the other hand would not be in a position to take an interest in matters affecting the tenancy unless of course he redeemed the security and took his original place under the tenancy again. We think that it would be useful to provide expressly in legislation that any

1. Introduced by the Conveyancing and Feudal Reform (Scotland) Act 1970 (referred to in the Report as the "1970 Act") for heritable securities created on or after 29 November 1970.
2. The 1970 Act s 11, and Sch 3, standard condition 6.
3. *Trade Development Bank* v *Warriner & Mason (Scotland) Ltd* 1980 SC 74.
4. *Trade Development Bank* cited above; there appear to have been doubts about this in earlier legislation: see Research Paper, para 4.17.
5. The 1970 Act, s 24 and Sch 3, standard condition 10.
6. *Trade Development Bank* v *Warriner & Mason (Scotland) Ltd* cited above; but see also "Real Conditions in Standard Securities" by K G C Reid, 1983 SLT 169 and 189.
7. Such a notice is required before the landlord can rely on a clause in the lease (ie an irritancy clause) purporting to terminate the lease or enabling the landlord to do so, on the occurrence of a monetary breach of the lease.

notice under any enactment should in order to be effective be given to a creditor in possession of the security subjects and that it should not be necessary to give the notice to the tenant in default under the security.

4.95 We **recommend**:

48. Where the tenant's interest in a tenancy has been assigned in security or where the tenant has granted a standard security over the interest and the security has been recorded in the Register of Sasines or the interest in the security has been registered in the Land Register for Scotland, any notice (or counter-notice in the case of agricultural holdings) given under any enactment by the landlord should not be effective where the creditor has entered into possession of the security subjects unless it is given to the creditor, and in that case it should not be necessary to give such notice to the tenant.
(Paragraphs 4.93-4.94; clause 9(2) and Schedule 1, para 4, new s 34F(2))

Creditor in possession

4.96 We have mentioned above that where a landlord's heritable creditor takes possession of the leased property on the landlord's default the creditor will stand in for the landlord in any further dealings in relation to the tenancy. The position is similar where the tenant's creditor enters into possession of the security subjects on the tenant's default. In any legislative provisions implementing our recommendations a reference to a party or to the parties to the lease or to the landlord or tenant should therefore include a reference to any creditor in possession of the leased property unless of course the context otherwise requires. We consider that an express provision to this effect would prove useful.

4.97 We **recommend**:

49. In any legislation implementing our recommendations any reference to a party or to the parties to the lease or to the landlord or tenant should, unless the context otherwise requires, include a reference to any creditor in possession of the leased property.
(Paragraph 4.96; clause 27(4) and Schedule 3, para 10(c), new s 93(8))

Liferenters and fiars

4.98 There is another case of limited or divided ownership of property subject to a lease which gives rise to questions of entitlement to give notice and subsequent title to seek recovery of possession of the property. This is where there is an interest of liferent and fee in the property. Such questions may relate not just to the giving of notice of termination but to the giving of any notice or counter-notice under any enactment. We understand that a liferent created through the medium of a trust rather than a proper or direct liferent is however more commonly encountered in modern practice. Where action requires to be taken under a trust liferent this will normally be within the powers of the trustees. For example a trustee has the right to remove tenants.[1] Accordingly we consider it unnecessary to recommend any amendments to the law relating to trust liferents.

4.99 Regarding proper or direct liferents the liferenter has the implied power to grant leases for the duration of his life but not beyond it.[2] There appears however to be some doubt in the authorities concerning the rule that all parties with proprietory interests in the subjects affected must join in any removing proceedings, namely the extent to which the rule applies where liferents are involved. It is not clear where a lease is granted by a liferenter and fiar acting together whether both must join in any proceedings for removal of the tenant or on the other hand the liferenter alone

1. S 4(1)(c) of the Trusts (Scotland) Act 1921.
2. Rankine, p 78.

may do so in order to vindicate or enforce his rights and ensure his enjoyment of the liferent.[1]

4.100 Most consultees took the view that the proper liferenter should be entitled to seek recovery of possession of heritable property without the consent or concurrence of the fiar and that it would not be necessary or desirable to give an equivalent right to the fiar. In the context of this Part of the Report this would mean that only the proper liferenter should be entitled to give a notice to quit. The question of entitlement to raise proceedings is dealt with later.[2] We consider that the entitlement of a liferenter to act alone and give notice without the consent of the fiar should extend to the giving of any notice, copy notice or counter-notice under any enactment. On consultation it was generally considered too that in any action relating to removings the fiar need not be called as a co-defender.[3]

4.101 The question remains whether the liferenter should be required to intimate to the fiar the giving of any such notice, by for example giving to him a copy of the notice. Receipt of a copy notice in this case would not however entitle the fiar either to take any action in respect of the notice or to be called as a co-defender in any action. On balance therefore we came to the conclusion that a liferenter should not be required to intimate the giving of any notice to the fiar.

4.102 We **recommend**:

50. Where the interest of the landlord in leased property is subject to a proper liferent, for the purposes of giving any notice, copy notice or (in relation to leases of agricultural holdings) counter-notice under any enactment the liferenter alone should be deemed to be the landlord of the leased property and the interest of the fiar should be disregarded.

(Paragraphs 4.98-4.101; clause 12 and Schedule 1, para 4, new s 34I)

Notice as admission of title

4.103 Difficulties may sometimes arise in determining whether a party in occupation of another person's property has a title to be so. The problem of selecting the appropriate process (ie an action of removing or an action of ejection) has to a large extent been resolved by the adoption of one process for recovery of possession of heritable property under the summary cause procedure.[4] Where a landlord and tenant relationship of any kind exists however there is still the requirement for due notice to be given before a landlord can proceed with an action. It may be that in disputed or inconclusive circumstances the fact of notice having been given may lead on balance to the conclusion that the defender is a tenant.

4.104 We invited views in the Memorandum on whether there is a need for a statutory provision making it clear that the giving of notice to quit does not imply recognition of any title to occupy.[5] Certain consultees took the view that a statutory provision to this effect was desirable. The other view expressed on consultation was that there was no need to legislate on this matter. This problem was discussed in the Research Paper[6] where it was suggested that any problem which may exist could be avoided by an express statement in the notice that it was served without prejudice to the landlord's position on the matter of title. After consideration of the views given to us we also concluded that there was no need to legislate on this matter since any possible question could in practice be dealt with in the manner suggested. We accordingly do not make any recommendation on this point.

1. See the Research Paper, para 4.12.
2. See paras 6.12-6.13 below.
3. See para 6.32 below.
4. Provided for in s 35(1)(c) of the Sheriff Courts (Scotland) Act 1971.
5. This is a recommendation of the Law Reform Committee in their Second Report, para 14.
6. Para 3.40.

Part V Notice Procedures on Death of Party to the Lease

Introduction

5.1 In this Part of the Report we consider the various problems which arise where one of the parties to a lease has died. Regarding succession to an interest in the lease, problems do not arise as far as the landlord is concerned where he is the proprietor of the leased property. His interest in the lease on his death passes with the ownership of the land itself either under his will or on his intestacy.[1] His successor may enforce the conditions of the lease against the tenant. Where the tenant has died, the lease would terminate where devolution of the tenant's interest has been excluded, for example where the duration of the lease is expressed to be for the tenant's lifetime or for the duration of his tenure of an office. However succession to the tenant's interest in a tenancy may arise where the lease itself provides for this or does not exclude it,[2] or where this can be implied from its nature. It may also arise under statute: for example certain limited powers of bequest have been given to tenants of agricultural holdings under section 20 of the 1949 Act; and under section 29 of the Succession (Scotland) Act 1964[3] a tenant may despite an implied condition of the tenancy prohibiting assignation bequeath his interest under the tenancy to certain persons.

5.2 We therefore examine problems concerning succession to the tenant's interest in the tenancy where the tenant has died. In such cases the interest in the tenancy may be transferred to another person either by special destination in the lease, by bequest of the deceased tenant or by transfer of the interest by the deceased tenant's executor as intestate estate. For the purposes of this exercise this examination involves primarily a review of procedures regarding the notification of the transfer to the landlord.[4] We discuss this first in the context of non-agricultural leases (in relation to which there are not at present any existing statutory provisions) and then in the context of leases of agricultural holdings, in respect of which procedures for notification are laid down in sections 20 and 21 of the 1949 Act. Where during the currency of the lease there has been a successful transfer of an interest in the tenancy whether by bequest or otherwise, the lease continues to run but with a new tenant.

5.3 We consider thereafter the situation where either the landlord or the tenant has died, and the lease is continuing but the other party desires to terminate the tenancy. This question is examined also in the context of sub-tenancies: where it is desired to terminate a sub-tenancy, and the sub-tenant in possession of the leased property has died. In these cases problems may be encountered in terminating the lease.

DEATH OF TENANT

5.4 We have already stated that where there is a question of succession to a deceased tenant's interest in a tenancy, that interest may be transferred by a special destination

1. On intestacy means in the absence of a valid will.
2. On the question of the exclusion of successors on the death of a tenant under an agricultural tenancy, see further "Agricultural Tenancies: The Exclusion of Successors", A G M Duncan, Journal of the Law Society of Scotland 1988, p 384.
3. Referred to in the Report as the "1964 Act".
4. In the Memorandum we examined certain questions relating to notification to a landlord of a bequest or a transfer as intestate estate of the deceased, in order that the landlord may be put in a position to exercise his rights with regard to termination of the lease.

in the lease or by a bequest by the tenant. In the absence of a special destination or a validly exercised power of bequest, the interest will devolve on the deceased tenant's executor representing the persons entitled to succeed on intestacy. Under section 14 of the 1964 Act the deceased tenant's interest in the tenancy vests in his executor for administrative purposes by virtue of the executor's confirmation thereto. The executor is then under a duty to administer the interest and dispose of it according to law. He may transfer it to anyone with the landlord's consent or to anyone where there is no prohibition on assignation. Notwithstanding any express or implied prohibition of assignation in the lease, the executor may under the 1964 Act[1] transfer the tenant's interest where the deceased tenant has not made a valid bequest of the interest, or where a bequest is refused or there has been no bequest, to any person who would be entitled to succeed to the tenant's estate on intestacy. Where a transfer of the tenant's interest is made by an executor who is not yet confirmed that transfer may be validated by the executor subsequently obtaining confirmation to it.[2]

5.5 The executor usually has a period of one year in which to transfer the interest in a tenancy.[3] The period begins at the date of the tenant's death or in certain other cases including the bequest of an interest in an agricultural holding, from the resolution of any question as to the validity of that bequest.[4] Entitlement on the part of either the landlord or the executor to give notice to terminate the lease in so far as it relates to the deceased tenant's interest arises where the transfer has not been carried out within the period stipulated. It may arise however at any time where the executor is satisfied that the interest cannot be disposed of according to law and has so informed the landlord.[5]

5.6 The period of notice to be given is regulated under section 16(4) of the 1964 Act. In the case of an agricultural lease[6] this is such period as may be agreed, and failing agreement, a period of between one and two years ending with such term of Whitsunday or Martinmas as may be specified in the notice. In the case of other leases the period is six months unless a shorter period is prescribed by statute. Thus where the lease has more than one year to run after the tenant's death and an executor is appointed timeously, section 16 will either permit transfer of the deceased's interest or enable the lease to be terminated sooner than would otherwise have been possible.

5.7 One point arises from the terms of section 16(4) of the 1964 Act. This concerns the entitlement of the landlord and the deceased tenant's executor to agree on the period of notice to be given where a notice is to be served under section 16(3). Paragraph (a) of section 16(4) allows these parties to agree on the period of notice in relation to an agricultural lease and failing such agreement the period specified in that paragraph would apply. In the case of any other lease however, paragraph (b) merely stipulates for a period of six months with the proviso that this shall be without prejudice to any enactment prescribing a shorter period of notice in relation to the lease in question. There does not seem to be any reason for this inconsistency between the provisions of these two paragraphs. In the circumstances of section 16(3) of the Act it would appear to be in the interests of all the parties to be entitled in relation to any type of lease to agree on a period of notice other than that stipulated. This would for instance entitle these parties to agree to termination of the lease on a very short period of notice. We therefore recommend that the landlord and the deceased tenant's executor should in relation to all types of lease be entitled to agree on the period of notice which should be given in a notice under section 16(3) of the 1964 Act, and that failing such agreement the period of notice stipulated in section 16(4) of the Act should be given.

5.8 We **recommend**:

51. A landlord and a deceased tenant's executor should in relation to all types of leases be entitled to agree on the period of notice to be given in any notice under

1. S 16(2).
2. *Garvie's Trs* v *Garvie's Tutors* 1975 SLT 94.
3. This period may be extended on summary application to the sheriff: s 16(3)(b) of the 1964 Act.
4. S 16(3)(b) of the 1964 Act.
5. S 16(3)(a) of the 1964 Act.
6. This term is defined in s 16(9). It includes an agricultural holding.

section 16(3) of the Succession (Scotland) Act 1964; and failing such agreement the period of notice stipulated in section 16(4) of the Act should be given.
(Paragraph 5.7; Schedule 3, para 11(b))

Non-agricultural leases

Notification of bequest or transfer as intestate estate

5.9 As regards leases of agricultural holdings, special provision is made by statute concerning the bequest or transfer as intestate estate of a deceased tenant's interest in a lease.[1] These provisions primarily require notification to the landlord of acceptance of such a bequest or transfer. There are no similar provisions requiring notification of such bequests or transfers in the case of non-agricultural leases, although it may be advisable to intimate to the landlord in such cases.[2] Consultees agreed with our proposal that in principle provision should be made for non-agricultural leases along the lines of that applicable to leases of agricultural holdings. There are however certain improvements to the statutory provisions concerning agricultural holdings which could be made in order to simplify the procedures and ensure that they will work smoothly in practice. Certain of the improvements we have in mind apply equally to any provisions which would require notification to the landlord in the case of non-agricultural leases. We mention these points where appropriate in the ensuing paragraphs.

Bequest of interest

Requirement to give notice

5.10 The general thrust of the existing statutory provision for agricultural holdings is, where a tenant's interest in a lease is bequeathed, to require the legatee of that interest if he is accepting the bequest to give notice of this acceptance to the landlord under the lease. We recommend a similar requirement where a tenant's interest in a non-agricultural lease is bequeathed.

Period of notice

5.11 The next question concerns the period within which such notice must be given. A landlord cannot be expected to wait indefinitely pending a decision by the legatee on whether or not to accept the deceased tenant's obligations under the contract of lease. Section 20(2) of the 1949 Act currently requires notice to be given to the landlord within 21 days from the death of the tenant or as soon as possible thereafter if prevented by some unavoidable cause from giving notice within that period. In our view the terms of this provision are not satisfactory. We accept that a strict requirement to give notification within a period of 21 days from the date of the tenant's death may in certain circumstances be unreasonable. For example the legatee may happen to be abroad or otherwise unobtainable during that short period of time and so it may not be possible to give notification timeously. The tenant's death is an event which could of course occur at any point in time. Accordingly any necessary preparations for giving notification timeously could not in most cases be made in advance.

5.12 On the other hand a provision allowing notice to be given at any time provided that there is sufficient justification for this seems to us to be too open-ended. Such a provision may be unfair on the landlord. It may require him to wait for a considerable or indefinite period of time before the deceased tenant's place in the tenancy is taken by a new tenant. We favour the stipulation of a realistic and reasonable period of time within which notification to the landlord should be given. This would avoid the need for an open-ended provision allowing later notification. We think that a period of three months would be a reasonable one for this purpose. We consider furthermore that the imposition of this time limit on the legatee for giving notice to the landlord is reasonable bearing in mind that our recommended consequence of failure by the legatee to give the requisite notice is not unduly drastic. We recommend in paragraph 5.15 below that in such a situation the legatee should be regarded as having refused the bequest rather than that the tenancy should terminate. The interest in the lease would then be available for transfer by the executor as intestate estate.[3]

5.13 We **recommend**:

1. Ss 20 and 21 of the 1949 Act.
2. See eg Paton and Cameron, p 176.
3. See also para 5.17 below.

Recommendations 52-58 below concern the bequest or transfer on death as intestate estate of an interest in a non-agricultural lease:

52. Where a tenant's interest in a non-agricultural lease is the subject of a bequest the legatee should, if he is accepting the bequest, give notice of his acceptance to the deceased tenant's landlord within the period of three months from the date of the tenant's death.

(Paragraphs 5.10-5.12; clause 21(1))

Failure to give notice

5.14 The next issue for consideration concerns the case where the legatee who is accepting a bequest of an interest in a non-agricultural lease fails to give the required notice to the landlord or does not give timeous notice. In the case of leases of agricultural holdings the consequence of this is not clear from the provisions of the 1949 Act. In the Memorandum we noted[1] two views on the current legal position. One is that such failure is at present likely to result in the loss of the right to claim the tenancy as legatee. The interest in the tenancy would then fall to be dealt with as intestate estate of the deceased's estate. The other view is that in such a case the tenancy must have terminated. The basis for this latter view is that no person would have any right remaining in the interest. Since the bequest was accepted the executor's role would have come to an end. He would not have any power to transfer the tenant's interest under section 16(2) of the 1964 Act. On the other hand the person who accepted the bequest would not have a right to the interest since he did not give the required notification to the landlord.

5.15 We carefully considered the comments on this point offered to us on consultation. These views favoured termination of the lease as the appropriate consequence of such failure to notify. We have had the opportunity however of considering this question again in the light of the policy of the 1949 Act. The approach we favour is that where notice to the landlord is not given as required the legatee should be regarded as having refused the bequest. This would mean that the interest in the lease could be transferred by the executor as intestate estate of the deceased. We think it reasonable to equate a failure to give notice with a refusal of the bequest. It may seem rather drastic to require the termination of the lease where there has merely been a failure to give an appropriate notification. There may well be a person willing to take over the deceased tenant's interest. The interest could then be transferred to that person as intestate estate.

5.16 This approach would be consistent with what appears to be the statutory policy on this matter as regards leases of agricultural holdings. Section 20(7) of the 1949 Act appears to reveal the general policy that a bequest of an interest in the lease should if defeated in some way result in that interest being treated as intestate estate of the deceased tenant in accordance with Part I of the 1964 Act. This provision—perhaps as an oversight—is not applied to a failure to notify the landlord of an acceptance of a bequest of an interest in a lease as required under section 20(2). It does however apply where a bequest has been refused or has been declared null and void by the Land Court under the provisions of section 20. We also note that under the 1964 Act where a bequest of an interest in a lease is refused by the legatee the consequence is not termination of the lease. Section 16(2)(b) entitles the executor in such a case to transfer the interest to any person entitled to succeed to the deceased's intestate estate or to claim legal rights or the prior rights of a surviving spouse out of the estate; otherwise the executor may transfer the interest to any other person with the landlord's consent.

5.17 Our recommended policy may also provide a safety-net for the occasional case where for a genuine reason a legatee who wishes to accept a bequest is unable to give the required notification timeously, and so is regarded as having refused the bequest. Under this recommendation the interest in the tenancy would then fall to be dealt with as the deceased's intestate estate. The executor under section 16(2) of

1. Para 4.22.

the 1964 Act may be able to transfer or take steps to transfer that interest to the person who was the legatee under the bequest.

Possession by legatee after bequest refused

5.18 Where the deceased tenant made a bequest of his interest in the tenancy, the legatee may take or be permitted to take possession of the leased property at or shortly after the tenant's death. Indeed where the legatee is a relative of the deceased tenant he may have been residing with the tenant in the property and so would be in occupation of it on the date of death. Where the legatee in this situation subsequently gives a timeous notice to the landlord under our recommendations that he is accepting the bequest, problems would not arise regarding the occupation of the property. The legatee would be held to be the tenant under the tenancy as from the date of the deceased tenant's death.

5.19 It occurred to us however that our recommendations may leave a gap in the law which would require to be filled. This would be where the legatee has or takes possession of the leased property after the deceased tenant's death, thereafter decides not to give or fails to give the requisite notice to the landlord, is accordingly regarded as having refused the bequest, but remains in occupation of the property. There may be doubt as to the legatee's standing in relation to any steps taken against him in order to recover possession of the property. It may not be clear whether the legatee is in the position of a person who was formerly in lawful occupation of the property and who should therefore be treated as such in any proceedings, or whether he is in the position of a person such as a squatter who is merely occupying the property illegally. Where the bequest is regarded as having been refused, the executor would thereafter presumably be in the course of transferring the interest in the tenancy to another person as intestate estate of the deceased. The executor will therefore wish to be in a position to grant vacant possession of the property to the transferee at the earliest possible date.

5.20 In the circumstances we do not think that there is any ground for treating the legatee as a person who was formerly in lawful possession of the property. We think that the position should be made clear by an express provision that where the legatee is under our recommendations regarded as having refused the bequest at the end of the period of three months in which notice may be given to the landlord, any occupation of the leased property by him as legatee after the end of this period should be regarded as unlawful.

5.21 Accordingly we **recommend**:

53. Where a legatee fails to give notice to the deceased tenant's landlord within the required period of time that he is accepting the bequest he should be regarded as having refused the bequest; and any occupation by him as legatee of the leased property after the end of the period of three months mentioned in Recommendation 52 above should be regarded as unlawful.

(Paragraphs 5.14-5.20; clause 21(2))

Effect of notice

5.22 We consider that where notice of acceptance of a bequest is given to the landlord as required, the lease should be held to be binding on the deceased tenant's landlord and the legatee as landlord and tenant respectively as from the date of the deceased tenant's death. A provision to this effect in respect of leases of agricultural holdings is found in section 20(2) of the 1949 Act. While such a provision would ensure continuity in the lease it should of course be subject to the lease being otherwise terminated at an earlier date. The lease may in particular be terminated in accordance with our recommendation concerning the giving of notice of termination to a deceased party.[1]

5.23 We **recommend**:

54. Where notice by the legatee is given under Recommendation 52 above to the deceased tenant's landlord the lease should be held binding on the landlord and

1. Recommendation 69 (para 5.68) below.

the legatee as landlord and tenant respectively as from the date of the deceased tenant's death unless it has been terminated under Recommendation 69 below or otherwise.

(Paragraph 5.22; clause 21(4)(a))

Section 16(8) of the 1964 Act

5.24 A consequential point arises in relation to section 16(8) of the 1964 Act. This section deals with a possible difficulty which might be caused by the co-existence of two statutory provisions, each dealing with the interest of a deceased tenant in a lease. It is designed to ensure that where an interest in a lease is the subject of a valid bequest by the deceased then, notwithstanding that under section 14 of the Act the interest is vested in the executor, certain statutory provisions which are intended to apply to a legatee of the interest in fact do so. For example in relation to agricultural holdings it ensures that section 20(2)-(7) of the 1949 Act applies to a legatee. Implementation of our recommendations regarding notification to a landlord by a legatee of acceptance of a bequest of an interest in a non-agricultural lease would mean that section 16(8) would require amendment: it should in that event include a reference to the new legislative provision. This would ensure that any new statutory provision would apply to a legatee of an interest in a non-agricultural lease despite the terms of section 14 of the Act.

5.25 We **recommend**:

55. Section 16(8) of the 1964 Act should be amended to ensure that notwithstanding the vesting in the executor of an interest in a non-agricultural lease under section 14 of the Act, any legislation implementing Recommendations 52-54 above will apply to a legatee of that interest.

(Paragraph 5.24; clause 21(6))

Transfer of interest as intestate estate

Requirement to give notice

5.26 In paragraph 5.9 above we recommend in principle that provision should be made requiring notification to a landlord by a person who has received the transfer of a deceased tenant's interest in a non-agricultural lease as intestate estate of the deceased. While this transfer will in most cases be effected by an executor distributing intestate estate under the 1964 Act, it may however be made by an executor who has not within the relevant period following a deceased tenant's death obtained confirmation. As pointed out in paragraph 5.4 above such a transfer by an unconfirmed executor may be validated by subsequent confirmation.

Period of notice

5.27 We now turn to the stipulation of a period of notice following the date of transfer within which notification should be made to the landlord by the transferee or acquirer of a deceased's interest in the tenancy as intestate estate. In the case of an interest in a lease of an agricultural holding section 21(1) of the 1949 Act provides that notification should be made within the period of 21 days from the date of the transfer or as soon as possible thereafter if notice is not given by then due to some unavoidable cause. We favour the introduction of a similar provision regarding the giving of notice to the landlord by a transferee of the transfer as intestate estate of a deceased tenant's interest in a non-agricultural lease.

5.28 On the face of it the stipulation of the relatively short period of 21 days for the giving of notice by a transferee might appear to be rather strict, particularly when compared with the period of three months which we recommend for the giving of notice to the landlord by a legatee.[1] However notification by the legatee would have to be made within a period of three months from the date of the tenant's death, and special provision is not recommended for failure to give notice due to some unavoidable cause. On the other hand where an interest is to be transferred as intestate estate of the deceased the executor has under section 16(2) of the 1964 Act one year within which to make the transfer. This period of one year provides ample time for the executor to plan the execution of the transfer. He can obtain confirmation, identify a person to whom to transfer the interest in the tenancy and in consultation with that person effect the transfer at a time when the transferee is able to give the appropriate notification to the landlord within 21 days.

1. Recommendation 52 (para 5.13) above.

5.29 We recognise however that a stipulation of a period of 21 days alone for the giving of notice to the landlord by a transferee might be viewed as unduly harsh given that our recommended consequence of failure by the transferee to give the requisite notice is termination of the lease.[1] There may be cases where the transferee is unavoidably prevented from giving notice timeously. It would seem rather drastic to require termination of the lease where there has simply occurred an unavoidable technical failure on the part of the transferee to operate the statutory notice provisions timeously. For this reason we recommend that the transferee should be permitted to give the appropriate notification to the landlord as soon as possible should he be prevented by some unavoidable cause from doing so within the period of 21 days from the date of the transfer.

5.30 We **recommend**:

56. Where the interest of a deceased tenant in a non-agricultural lease is transferred as intestate estate of the deceased to a person, that person should give notice of the transfer to the deceased tenant's landlord within a period of 21 days from the date of the transfer or, if he is prevented by some unavoidable cause from giving such notice within that period, as soon as possible thereafter.
(Paragraphs 5.26-5.29; clause 21(3))

Effect of notice

5.31 Where the required notice by the transferee is given to the landlord we recommend that the lease should be binding on the deceased tenant's landlord and the transferee as landlord and tenant respectively as from the date of transfer. This is the case with agricultural holdings in terms of section 21(1) of the 1949 Act. The lease cannot be held binding from the date of the tenant's death as is the case with notification of a bequest. Where the interest is being transferred the death may have been up to one year before the date of the transfer. During this period the executor would have been liable to the landlord for payment of any rent in respect of the leased subjects by virtue of his confirmation to the deceased tenant's interest in the lease.

5.32 Finally we should say again that our policy concerning the continuation of the lease with a new tenant will of course be subject to any earlier termination of the lease. This may occur for example where the termination date falls soon after the tenant's death. We make recommendations below concerning the giving of notice of termination where a party to a lease has died.[2]

5.33 We **recommend**:

57. Where notice by the transferee is given under Recommendation 56 above to the deceased tenant's landlord the lease should be held binding on the landlord and the transferee as landlord and tenant respectively as from the date of transfer, unless it has been terminated under Recommendation 69 below or otherwise.
(Paragraphs 5.31-5.32; clause 21(4)(b))

Failure to give notice

5.34 We now consider what should be the consequence of failure by a transferee to give the required notice to the landlord. The current legal position is not clear.[3] The consequence could be either termination of the tenancy or a return to the position whereby the interest is available for transfer on intestacy. We would be reluctant to see the process of transferring the tenant's interest lengthened by permitting an executor to make a further transfer. On intestacy a landlord at present already has to wait a considerable period of time for notification or otherwise of the transfer of an interest in a tenancy. The transfer may take up to one year to effect. In our view it would be an unreasonable burden on the landlord to extend this period in order to permit the executor to make a subsequent transfer or transfers of the interest until such time as the required notice is given to the landlord.

5.35 In the case of agricultural holdings section 21 of the 1949 Act does not specify the consequence of failure by a transferee to give the required notice. Consultees

1. Recommendation 58 (para 5.36) below.
2. Recommendation 69 (para 5.68) below.
3. The Memorandum, para 4.22.

took the view that the consequence of failure to give the required notice should be the termination of the lease as at the end of the appropriate period following the date of transfer. In terms of Recommendation 56[1] termination would thus take place at the end of the period of 21 days following the date of the transfer or at the end of that period as extended (ie where the transferee was prevented by some unavoidable cause from giving notice within the period of 21 days and gives notice as soon as possible thereafter). We accept this but wish to add a qualification in order to provide for the cases where more than one person has an interest as tenant. The lease may have been granted to tenants in common.[2] Where only one of these tenants has died, in the circumstances stated the lease should be treated as terminated only in so far as it relates to the interest of the transferee in question. Lastly we should say that any provision to the effect envisaged in this paragraph should apply notwithstanding any statutory provision requiring the giving of notice to terminate a lease and should of course be subject to the lease being terminated at an earlier date whether under our recommendations concerning termination of a lease by the giving of notice to a deceased party, or otherwise.

5.36 We **recommend**:

58. Notwithstanding any statutory provision requiring the giving of notice to terminate a lease, where the transferee fails to give notice of the transfer to the deceased tenant's landlord within the required period of time the lease or (if there is more than one person who has an interest in common as tenant) the lease in so far as it relates to the interest of the transferee should, if not otherwise terminated, be treated as terminated as from the end of the period of 21 days referred to in Recommendation 56 above or as from the end of that period as extended under that Recommendation.

(Paragraphs 5.34-5.35; clause 21(5))

Leases of agricultural holdings

Notification of bequest or transfer as intestate estate

Bequest of interest
Period of notice

5.37 Section 20 of the 1949 Act makes provision regarding the bequest of a tenant's interest in a lease of an agricultural holding. Section 20(2) requires notification to the landlord by a legatee who accepts the bequest within 21 days from the date of the tenant's death or as soon as possible thereafter if prevented by some unavoidable cause from giving notice within that period. In paragraphs 5.11-5.12 above we criticise this provision and recommend[3] that in the case of an interest in a non-agricultural lease notice should be required to be given within a period of three months from the date of the tenant's death. For reasons similar to those given in the case of non-agricultural leases we consider that this period of notice should also be applied to notification by a legatee to a landlord of acceptance of a bequest of an interest in a lease of an agricultural holding.

5.38 We **recommend**:

Recommendations 59-68 below concern the bequest or transfer on death as intestate estate of an interest in a lease of an agricultural holding:[4]

59. Where a deceased tenant's interest in a lease of an agricultural holding is the subject of a bequest and the legatee is accepting the bequest, he should be required to give within 3 months from the date of the tenant's death notice of that acceptance to the landlord under section 20(1) of the 1949 Act.

(Paragraph 5.37; Schedule 2, para 1(a))

1. Para 5.30 above.
2. The meaning of the term "tenants in common" is explained by Lord Ross in *Coats* v *Logan* 1985 SLT 221 at 225.
3. Recommendation 52 (para 5.13) above.
4. It will be noted from para 2 of Schedule 2 to the draft Bill annexed hereto that implementation of our Recommendations concerning the transfer of an interest as intestate estate involves completely re-drafting the current provisions of section 21 of the 1949 Act.

Objection and application to Land Court

5.39 Due to the special nature of a lease of an agricultural holding the 1949 Act provides[1] the landlord with the right to object to receiving a legatee as a tenant.[2] This right is exercised by giving a counter-notice to the legatee in response to receiving from him notification of his acceptance of the bequest. On receipt of a counter-notice the legatee may under section 20(4) of the 1949 Act apply to the Land Court for an order declaring him to be the tenant under the lease as from the date of the deceased tenant's death. There is no prescribed time limit within which such an application may be made by the legatee to the Land Court. Consultees agreed with our proposal to fill this gap by prescribing a time limit. We consider that a period of one month from the giving of the counter-notice would be appropriate for this purpose.

5.40 We **recommend**:

60. Where a legatee receives a counter-notice from the landlord objecting to receiving him as tenant under the lease, any application by the legatee to the Land Court under section 20(4) of the 1949 Act for an order declaring him to be tenant under the lease should be made within one month from the giving of the counter-notice.

(Paragraph 5.39; Schedule 2, para 1(b))

Failure to give notice to landlord

5.41 We think that the terms of section 20 require clarification regarding the consequences of failure by the legatee to give the required notice to the landlord. Section 20(7) declares that the right to the estate is to be treated as intestate estate of the deceased tenant where the legatee does not accept the bequest or if the bequest is declared null and void by the Land Court. This provision does not provide for the case where the legatee does accept the bequest, but does not give the required notice of this to the landlord under sub-section (1). In paragraphs 5.14-5.17 above in the case of non-agricultural leases we recommend[3] that failure by a legatee to give notice to the landlord should be regarded as refusal of the bequest resulting in the interest in the tenancy being treated as intestate estate of the deceased tenant. For similar reasons we recommend the same consequence in the event of failure by the legatee of an interest in an agricultural holding to either give the required notice to the landlord that he is accepting the bequest or make a timeous application to the Land Court for an order.

Possession by legatee after refusal of bequest

5.42 In the case of non-agricultural leases we pointed out in paragraph 5.19 above a possible gap in the law which may arise from any occupation of the property by the legatee after the date on which he would be held to have refused the bequest in the event of his failure to give the requisite notice to the landlord. Similarly a legatee of a tenant's interest in a lease of an agricultural holding may have or continue in possession of the holding after the interest is held to be treated as intestate estate of the deceased tenant. We therefore consider that in the context of agricultural holdings also it should be made clear that any occupation by the legatee as legatee of the leased property after the right to the lease has come to be treated as intestate estate should be regarded as unlawful.

5.43 We **recommend**:

61. Where the legatee fails to give notice to the deceased tenant's landlord within the required period of time that he is accepting the bequest or fails to make an application to the Land Court within the required period of time, the right to the lease should be treated as intestate estate of the deceased tenant; and any occupation by the legatee as legatee of the leased property after the right to the lease has become treated as intestate estate should be regarded as unlawful.

(Paragraphs 5.41-5.42; Schedule 2, para 1(c))

Transfer of interest as intestate estate

5.44 Section 21 of the 1949 Act deals with the acquisition of the lease of an agricultural holding by an "acquirer", defined in sub-section (6) as any person to whom the lease is transferred under section 16 of the 1964 Act. This means in effect that section

1. Section 20(3) of the 1949 Act.
2. There is no similar provision in respect of non-agricultural leases.
3. Recommendation 53 (para 5.21) above.

21 applies where the interest of a deceased tenant in such a lease is transferred to a person as intestate estate. We should say that while the existing provision in section 21 uses the term "acquirer" we prefer to use the term "transferee" to denote the person to whom the interest has been transferred.

5.45 Section 21(1) of the 1949 Act requires notice of the acquisition to be given to the landlord by the acquirer (ie the transferee) within 21 days from the date of acquisition or as soon as possible thereafter if prevented from doing so within that period by some unavoidable cause. In paragraphs 5.27-5.30 above we discuss and recommend[1] the adoption of a similar provision in the case of notification by a transferee to the landlord of the transfer of an interest in a non-agricultural lease as intestate estate. We likewise recommend the retention of a similar provision for the purpose of giving notice to the landlord under section 21 of the 1949 Act in respect of an interest in a lease of an agricultural holding. This period should likewise commence at the date of the transfer.

5.46 We **recommend**:

62. Where the interest of a deceased tenant in the lease of an agricultural holding is transferred to a person as intestate estate of the deceased tenant, the transferee should give notice of the transfer to the landlord of the holding within 21 days after the date of the transfer or, if he is prevented by some unavoidable cause from giving such notice within that period, as soon as possible thereafter.
(Paragraphs 5.44-5.45; Schedule 2, para 2, new s 21(1), (2))

5.47 Where the transferee fails to give the required notice we consider that the consequence should be the same as that which we recommend in paragraphs 5.34-5.36 above[2] in the context of non-agricultural leases. In other words the lease, or (if there is more than one person who has an interest in common as tenant) the lease in so far as it relates to the interest of the transferee should, unless otherwise terminated, be treated as terminated at the end of the period of 21 days following the date of the transfer. A provision to this effect should apply notwithstanding the terms of section 24(1) of the 1949 Act which stipulate that a notice of termination should be given in order to bring the tenancy to an end.

5.48 We **recommend**:

63. Notwithstanding section 24(1) of the 1949 Act, where the transferee fails to give notice of the transfer to the landlord within the required period of time the lease or (if there is more than one person who has an interest in common as tenant) the lease in so far as it relates to the interest of the transferee should if not otherwise terminated be treated as terminated as from the end of the period of 21 days referred to in Recommendation 62 above or as from the end of that period as extended under that Recommendation.
(Paragraph 5.47; Schedule 2, new s 21(7))

Objection and application to Land Court

5.49 Section 21(2) of the 1949 Act entitles the landlord within one month from the giving to him of notice of the transfer to object to receiving the acquirer (the transferee) as tenant under the lease by serving on him a counter-notice to this effect and then applying to the Land Court for an order terminating the lease. It is curious that although section 21(2) does not prescribe a time limit within which an application to the Land Court should be made it does however provide that the landlord may not so apply "before the expiration of one month from the giving of the counter-notice". We cannot see any reason to restrict an application to the Land Court in this way.

5.50 We do think on the other hand that a time limit should be placed on the landlord's entitlement to apply to the Land Court. Where a transferee of an interest has received a counter-notice from the landlord he will be aware that there are objections to him becoming tenant under the lease. He will therefore wish the issue

1. Recommendation 56 (para 5.30) above.
2. Recommendation 58 (para 5.36) above.

to be settled as quickly as possible. Where there is no statutory time limit for making an application to the Land Court however the landlord may not necessarily make a speedy application. Consultees agreed with our proposal that an appropriate time limit for this should be prescribed. We favour the removal of the current restriction in section 21(2) on the landlord's entitlement to apply to the Land Court and we consider that the exercise of this entitlement should be made subject to a time limit of one month from the giving of the counter-notice.

5.51 We **recommend**:

64. Where the landlord has given to the transferee a counter-notice under section 21(2) of the 1949 Act that he objects to receiving him as tenant under the lease, any subsequent application by the landlord to the Land Court for an order terminating the lease should be made within one month after the giving of the counter-notice; and the current provision in section 21(2) of the 1949 Act preventing the landlord from applying to the Land Court before the expiration of one month from the giving of the counter-notice should not be retained.
(Paragraphs 5.49-5.50; Schedule 2, para 2, new s 21(3))

5.52 Section 21(1) stipulates that the lease shall be binding on the landlord and the acquirer (the transferee) as landlord and tenant respectively as from the date of the acquisition unless the landlord gives a counter-notice. It does not provide for the situation where the landlord gives a counter-notice to the transferee but thereafter fails to apply to the Land Court to have the matter settled. We take the view that the lease should be held to be binding on the landlord and the transferee as landlord and tenant respectively from the date of the transfer unless the landlord both gives a counter-notice to the transferee and makes an application to the Land Court.

5.53 We **recommend**:

65. Unless the landlord both gives a counter-notice to the transferee under section 21(2) of the 1949 Act and makes an application to the Land Court for an order terminating the lease, the lease should be binding on the landlord and on the transferee as landlord and tenant respectively as from the date of the transfer.
(Paragraph 5.52; Schedule 2, para 2, new s 21(4))

5.54 The Land Court may consider that the landlord has established reasonable grounds of objection to receiving the transferee as tenant under the lease. Under section 21(3) of the 1949 Act the Land Court in such a case is empowered to make an order terminating the lease. However no provision is made to deal expressly with the situation where the Land Court is not satisfied that the landlord has reasonable grounds of objection. We consider that this omission should be rectified by an express provision that in such a case the lease should be binding on the landlord and the transferee as landlord and tenant respectively as from the date of the transfer.

5.55 We **recommend**:

66. It should be expressly provided that where in relation to an application submitted under section 21(2) of the 1949 Act the Land Court is not satisfied that the landlord has established any reasonable ground of objection to receiving the transferee as tenant, the lease should be binding on the landlord and on the transferee as landlord and tenant respectively as from the date of the transfer.
(Paragraph 5.54; Schedule 2, para 2, new s 21(5)(b))

5.56 The next issue concerns entitlement to possess the holding both pending any proceedings before the Land Court under section 21 of the 1949 Act, and also should the Land Court make an order under section 21(3) terminating the lease at a term of Whitsunday or Martinmas, until the term specified. The policy of the Act on this point is revealed in section 21(4). This provides that with the consent of the executor in whom the lease is vested under section 14 of the 1964 Act and unless the Land Court on cause shown otherwise direct, the acquirer (the transferee) shall have possession pending proceedings before the Land Court.

5.57 We cannot see any reason why the consent of the executor is required for such a case. The executor will already have effected a transfer of the interest in the holding to the transferee. He would have discharged his duties in relation to that interest, and presumably must be content that the transferee take possession of the holding. A safeguard is already provided by section 21 should there be any doubt as to the transferee's ability to manage the holding or his willingness to remove from the holding should an order of termination of the lease be made by the Land Court. Any doubts can be put to the Land Court who on cause shown are empowered to make an appropriate direction as to possession of the holding pending proceedings before them. We think therefore that there is no need to retain the requirement in the section of the executor's consent to possession of the holding by the transferee during this interim period.

5.58 Section 21 does not however regulate possession of the holding for the period between the making of an order by the Land Court terminating the lease and the termination of the lease at the term specified in that order. We think it reasonable to extend the transferee's entitlement to possess the holding to cover this period unless the Land Court on cause shown otherwise direct.

5.59 We **recommend**:

67. Unless the Land Court on cause shown otherwise direct, the transferee should be entitled to possess the holding pending proceedings before the Land Court under section 21 of the 1949 Act, and where the Land Court make an order terminating the lease at Whitsunday or Martinmas, up to the term specified; and the current provision in section 21(4) of the 1949 Act requiring the executor's consent to possession of the holding by the transferee pending proceedings under the section should not be retained.
(Paragraphs 5.54-5.58; Schedule 2, para 2, new section 21(6))

Compensation on termination of transferee's tenancy

5.60 Section 21(5) of the 1949 Act makes provision concerning the transferee's entitlement to compensation under the Act on the termination of the lease under the section. It provides that for the purposes of the provisions of the Act with respect to compensation such termination shall be treated as the termination of the acquirer's (the transferee's) tenancy of the holding, but that nothing in the section shall be construed as entitling him to any compensation for disturbance. It has come to our notice however that there is a statutory provision outwith the 1949 Act which concerns entitlement to compensation on the termination of the lease of an agricultural holding in Scotland. This provision is paragraph 2 of Schedule 2 to the Agriculture Act 1986. It deals with a tenant's entitlement to compensation for milk quota on quitting a tenancy where on the termination of the lease the tenant has milk quota registered as his in relation to a holding consisting of or including the tenancy. It should therefore be stipulated in addition to the current provision of section 21(5) of the 1949 Act that the termination of the lease under that section should be treated for the purpose of determining entitlement to compensation for milk quota under the Agriculture Act 1986 as the termination of the transferee's tenancy of the holding.

5.61 We **recommend**:

68. Termination of the lease of an agricultural holding under section 21 of the 1949 Act should for the purposes of determining entitlement to any payment under paragraph 2 of Schedule 2 to the Agriculture Act 1986 (compensation for milk quota) be treated as the termination of the transferee's tenancy of the holding.
(Paragraph 5.60; Schedule 2, para 2, new section 21(8))

DEATH OF PARTY TO A LEASE: GIVING NOTICE

5.62 Problems may occur where one party to a lease wishes to serve notice on the other, but that other party has died. Perhaps the most critical case is where the expiry date of the lease falls shortly after the death of the party in question and the other party wishes to serve notice of termination to bring the lease to an end. We are

primarily concerned with the giving of notice which results in termination, whether it is given under our recommendations concerning non-agricultural leases, under the 1949 Act, or under other statutory provision such as section 16(3) of the 1964 Act. However our consideration equally applies to the giving of any notice under any enactment, including therefore notices relating to matters such as intended improvements to the leased subjects, or compensation. It includes also in the case of leases of agricultural holdings the giving of any counter-notice under any enactment. Whatever the nature of the notice, problems may arise since it is not clear who owns or is responsible for the deceased's property between the date of his death and the date on which another party takes over the deceased's interest in the leased property or the tenancy ie in most cases the appointment or confirmation of his executor.[1] This situation may put the party wishing to give notice in a difficult position.

5.63 We should say that there are situations where it may at present be possible to terminate a lease with or without notice where a party has died. Section 16 of the 1964 Act for example applies where a tenant has died. In certain circumstances[2] it provides for the termination of the lease by the giving of notice. The provision is only of assistance however where the tenant's interest in the tenancy is vested in the executor by virtue of confirmation under section 14. Again in the case of a tenant's death there is authority that the lease does in certain circumstances come to an end at some point without the landlord having to give notice of termination.[3]

5.64 Regarding notices generally a significant feature of the agricultural holdings legislation is the definition of the terms "landlord" and "tenant" in section 93(1) of the 1949 Act. "Tenant" is widely defined and includes the executor, administrator, assignee, heir-at-law, legatee and next-of-kin of a tenant. A landlord of an agricultural holding may where the tenant has died be able to give an effective notice to one of such persons. The term "landlord" is similarly given a wide definition.

5.65 While it may be possible for a lease to be terminated with or without notice in the particular circumstances discussed in the preceding paragraphs, it would be desirable to clarify the position by an express statutory provision allowing a valid notice of termination to be given in all cases where the party who should receive it has died. As indicated it would in our view be valuable if such a provision covered not only notices of termination but also any other type of statutory notice.

Giving notice where party has died

5.66 The main issue in connection with such a provision concerns the person on whom the notice should be served. One suggestion[4] is to permit the giving of a notice to the tenant's "representatives" per the sheriff clerk of the appropriate district. We are not entirely happy with this suggestion since by the time an executor is confirmed and any notice is brought to his attention it may be too late for effective action to

1. M C Meston, *The Succession (Scotland) Act 1964* (2nd Edn) (referred to in the Report as "Meston") p 90.
2. See s 16(3)(a) and (b) ie where the executor is satisfied that the deceased tenant's interest cannot be disposed of according to law and so informs the landlord; and where the interest is not disposed of within one year or within an extended period of time under (b).
3. The decision in *Lord Rotherwick's Trs* v *Hope* 1975 SLT 187 indicates that a lease running on tacit relocation at the time of the tenant's death may terminate without notice if at the expiry of one year from the date of death the tenant's executor has failed to confirm to the estate and transfer the tenant's interest in the lease. This decision was impliedly approved by Lord Keith in *Morrison—Low* v *Paterson* 1985 SLT 255 at 267. In *Coats* v *Logan* 1985 SLT 221 it was decided that under common law a lease could not continue past its natural expiry date if the tenant had died but no executor had confirmed prior to that date. This was on the basis that tacit relocation required the tacit consent of all parties to a lease. In such a case there was no-one vested in that tenant's interest on whom tacit relocation could operate. The decision in this case also held that the statutory use of the term "tacit relocation" in s 3 of the 1949 Act imports the common law meaning of this principle so that the consent of all the parties to the lease is required for the principle to operate. However in a case where the landlord may wish to hold a lease as terminated by reason of abandonment by the tenant or his successors, the comments of the Lord President in a crofting case, *MacIver* v *MacIver* 1909 SC 639 at pp 642-643, may be taken to indicate that generally a declaratory process is required.
4. This suggestion is noted in Meston, p 90.

be taken in response to that notice. Another suggestion[1] is to allow notice to be given to the unnamed executors of the deceased tenant at the address of the tenanted subjects, with a copy being sent to the appropriate sheriff clerk. This received a mixed reaction on consultation. There does not seem to be any real advantage to be gained from copying the notice in this manner.

5.67 After consideration of the comments received we favour a suggestion by one consultee which applies whichever party to the lease has died. This is to entitle a party to a lease to give notice (or counter-notice in the case of leases of agricultural holdings) addressed to the deceased party without any requirement to give a copy of this to the sheriff clerk. We consider however that it would be helpful to require the notice to be addressed to the deceased party as if he were still alive. Such notice (or counter-notice) should be effective for its purpose, provided that this entitlement has not been brought to an end by another party taking over the deceased's interest in the tenancy or the leased property. The circumstances in which this may occur are discussed in paragraphs 5.69-5.73 below.[2]

5.68 We **recommend**:

69. Where a party to a lease dies, the other party should, unless Recommendation 70 below applies, be entitled after the death to give any notice (or counter-notice in the case of leases of agricultural holdings) under any enactment addressed to the deceased party (as if he were still alive) and that notice (or counter-notice) should be effective for its purpose.
(Paragraphs 5.66-5.67; clause 10(1) and Schedule 1, para 4, new s 34G(1))

Ending of entitlement to give notice to deceased party

5.69 As indicated already Recommendation 69 in the preceding paragraph is intended to cure a defect in the present law, allowing notice to be given by one party to the lease where the other party has died. The entitlement to give notice to a deceased person should not of course continue indefinitely. This entitlement should cease at the point when another party takes over the deceased's responsibilities in relation to the lease. In the following paragraphs we outline the circumstances which should bring to an end any entitlement to give notice addressed to a deceased person.

5.70 The first such circumstance is where the other party to the lease—ie the party who wishes to give a notice—receives notification of the confirmation of an executor-nominate or the appointment of an executor-dative in respect of the deceased party's estate. This would be a common case where another party takes over responsibility for the deceased's interests.

5.71 The next case is where a creditor has taken over the deceased's interest. The deceased's interest in the tenancy or the leased property may have been either assigned in security or made subject to an effective standard security—ie a standard security which has been recorded in the Register of Sasines or the interest in which has been registered in the Land Register of Scotland. Notification of the assignation in security or the grant of the standard security should be made to the other party to the lease, as should entry into possession of the security subjects by the creditor. Where therefore the person wishing to give the notice has been notified both of the granting of the assignation in security or the standard security and that since the death the creditor has entered into possession of the security subjects, the entitlement of that person to give notice addressed to the deceased party should cease.

5.72 A further case is where a legatee accepts the bequest of a deceased tenant's interest in a lease and gives notification of this to the landlord.[3] Where he does so

1. See the Research Paper, para 3.46.
2. See Recommendation 70 (para 5.74) below.
3. Such notification would be required in relation to non-agricultural leases in terms of our Recommendation 52 (para 5.13) above and in relation to leases of agricultural holdings is currently required by s 20(2) of the 1949 Act and see also our Recommendation 59 (para 5.38) above.

he takes over the deceased's interest in the tenancy and so should be entitled to receive any notice served in respect of that interest. We should say that it is necessary to stipulate this type of case separately from the case of notification of the appointment or confirmation of an executor.[1] An executor will no doubt in most cases be appointed or confirmed. However in some of these cases the first notification received by the landlord may well be given by a legatee. The legatee will most likely be advised of the bequest soon after the tenant's death. Given the time limit of 3 months from the tenant's death which we recommend for the giving of notice by the legatee to the landlord, the legatee's notification may well precede notification of any confirmation there may be.[2]

5.73 There is a qualification to this last case which we would make concerning leases of agricultural holdings. The 1949 Act gives a landlord the right to object to receiving a legatee as tenant. Objection is made by giving the legatee a counter-notice under section 20(3). The legatee may then apply to the Land Court for an order declaring him to be the tenant under the lease. We consider that the legatee's own notice to the landlord of his acceptance of the bequest should not bring to an end the landlord's entitlement to give notice to the deceased tenant where the landlord has given a counter-notice to the legatee. Pending settlement of the dispute concerning succession to the deceased tenant's interest we take the view that it would be preferable to allow notice to continue to be served on the deceased tenant. The landlord's entitlement to do this should however cease where he has been notified of an order by the Land Court under section 20(5) declaring that the legatee is the tenant.

5.74 We **recommend**:

70. The entitlement of a party to a lease to give a notice addressed to a deceased person under Recommendation 69 above should cease

(a) where that party has received notification of either confirmation of an executor-nominate to the estate of the deceased party or the appointment of an executor-dative to that party;

(b) where that party has been notified that the deceased's interest has been assigned in security or made subject to a standard security (the standard security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and that since his death a creditor has entered into possession of the security subjects;

(c) in the case of the death of the tenant under a lease of non-agricultural subjects, where the landlord has been notified under Recommendation 52 above that a legatee has accepted a bequest of the deceased tenant's interest in the lease;

(d) in the case of the death of the tenant under a lease of an agricultural holding, where the landlord has been notified—

(i) under section 20(2) of the 1949 Act that a legatee has accepted a bequest of the deceased tenant's interest in the lease, unless the landlord has given a counter-notice to the legatee under section 20(3); or

(ii) that the Land Court has made an order under section 20(5) of the 1949 Act declaring the legatee to be the tenant under the lease.

(Paragraphs 5.69-5.73; clause 10(2), (5) and Schedule 1, para 4, new s 34G(2), (5))

Right to respond to notice

5.75 In most cases the giving of a notice addressed to the deceased landlord or tenant should result in that notice coming to the attention of some person interested

1. Where a deceased tenant's interest in a tenancy is being dealt with on intestacy, the appointment or confirmation of an executor will of course precede the transfer of the interest to a transferee. It is not therefore necessary to stipulate as a separate case also notification by a transferee to the landlord.
2. It is possible also under the present law that a legatee of a bequest of an interest in heritage may complete or deduce his title by use of the will, rather than by transfer from an executor, although there are grave doubts about this course of action: see Meston, p 85. If this course of action is relied upon it is conceivable that there are cases where confirmation or appointment of an executor is not required.

in or concerned with the tenancy so that any necessary action can be taken. Such a person may desire to take steps to protect the deceased's interest by for example giving a counter-notice or challenging a notice to quit. Regarding the right of response to any notice addressed to a deceased party, there was on consultation some agreement to a suggestion that it should be open to any person interested in the deceased's estate, either under his will or on intestacy. We think however that a provision to this effect would be too wide for legislative purposes. For example we cannot see any reason why a legatee of a specific item of the deceased's estate other than the interest in the tenancy should be able to take any action regarding that interest.

5.76 We think therefore that entitlement to respond to any such notice should be restricted to any of the persons who have either a general interest in the deceased person's estate or a particular interest in the deceased's interest in the tenancy or in the leased property. Such persons would be a spouse of the deceased, a specific legatee of the interest in the tenancy or a residuary legatee, a person nominated in the will as an executor, and any person entitled to apply as executor-dative. We also include a creditor under any assignation in security or standard security over the interest in the lease where that creditor has not taken possession. We should say that our reference to a standard security should be taken to mean one which has been recorded in the Register of Sasines or one where the interest in the security has been registered in the Land Register of Scotland.[1] Lastly, in case these categories of persons might prove to be unduly restrictive in practice, we would also give an entitlement to respond to any other person with an actual or potential interest in the deceased's interest in the tenancy or in the leased property.

5.77 We pointed out that the entitlement to give a notice addressed to a deceased party to a lease should cease where responsibility for the deceased party's interest is taken over by another person. Similarly the right to respond to such a notice should cease when the responsibility for the deceased party's interest has been taken over. Thus where a creditor enters into possession of the security subjects he thereby becomes the new landlord or tenant as the case may be. Legislative provision would not in this circumstance be required in order to bring to an end the right of others to respond to a notice addressed to the deceased party. Similarly where a legatee accepts a bequest of the deceased tenant's interest in a tenancy and gives the appropriate notification to his landlord, he also assumes sole responsibility as a new tenant (unless of course in the case of a lease of an agricultural holding, the landlord successfully objects before the Land Court to receiving the legatee as tenant).

5.78 On the other hand where an executor-nominate has been confirmed to the estate of the deceased party, or an executor-dative has been appointed to the deceased, responsibility for the deceased party's interest will have been taken over although that interest would not have been finally disposed of. The executor should of course have sole responsibility for the deceased's interest until that interest has been disposed of. Accordingly it should be provided that the parties mentioned in paragraph 5.76 above should have the right to respond to a notice addressed to a deceased party to a lease until an executor is confirmed or appointed to that deceased party.

5.79 We **recommend**:

71. Where notice has been given addressed to a deceased party under Recommendation 69 above, and an executor-nominate has not been confirmed to the estate of the deceased or an executor-dative has not been appointed to him, then until such confirmation or appointment occurs any of the following persons should be entitled to act to protect the deceased's interest in the tenancy or in the leased property–

(a) the spouse of the deceased;

1. It is the recording of the standard security which operates to vest the interest in the grantee as a security: s 11(1) of the Conveyancing and Feudal Reform (Scotland) Act 1970; and the registering of an interest in a standard security vests in the person entitled to this a real right in and to the interest: s 3(1) of the Land Registration (Scotland) Act 1979.

(b) a specific legatee of that interest or a residuary legatee;

(c) any person nominated in a will of the deceased as an executor of him;

(d) any person entitled to apply to be appointed his executor-dative;

(e) if the deceased's interest has been assigned in security or made subject to a standard security (the standard security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and the creditor is not in possession thereof, the creditor;

(f) any other person with an actual or potential interest in the tenancy or in the leased property.

(Paragraphs 5.75-5.78; clause 10(3), (5) and Schedule 2, para 4, new s 34G(3), (5))

Operation of section 16 of the 1964 Act

5.80 We now consider a doubt concerning the operation of section 16 of the 1964 Act which applies where the tenant has died and his interest in the tenancy has vested in his executor. This concerns the entitlement of the landlord or the deceased tenant's executor to terminate a lease which is due to expire within one year from the date of the tenant's death. Under section 16(3) the executor has a period of one year from the date of the tenant's death in which to transfer this interest unless the lease is terminated earlier than this by due notice under the section.[1] We are of the view that it cannot have been the intention of this provision to prevent the termination of the lease at the earliest date on which this would have been possible had the tenant survived—ie at an expiry date of the lease occurring within one year from the tenant's death. We consider that an express provision is required in order to make this clear.

5.81 We **recommend**:

72. Where the date of termination of a lease falls within the period of one year following the deceased tenant's death and the deceased tenant's interest in the tenancy has vested in his executor by virtue of section 14 of the 1964 Act, an express provision should make it clear that notwithstanding section 16(3) of the 1964 Act the landlord or the deceased tenant's executor shall be entitled to give a notice to terminate the tenancy at that date.

(Paragraph 5.80; clause 10(4) and Schedule 2, para 4, new s 34G(4))

Death of sub-tenant in possession of leased property

5.82 We recommend[2] that where there is a sub-tenancy which has been authorised expressly or impliedly by the landlord and the sub-tenant is in possession of the leased property, any notice bringing the tenancy to an end should not be effective unless a copy of it is given to the sub-tenant in possession. We consider that our foregoing recommendations concerning entitlement to give a notice addressed to a deceased party to a lease (as if he were still alive) should be extended to allow a landlord, a part-landlord[3] or a tenant to give a copy notice where such a sub-tenant has died and was at the time of his death in possession of the leased property.

5.83 We **recommend**:

73. Where there is a sub-tenancy which has been authorised expressly or impliedly by the landlord of the tenant and the sub-tenant dies, and at the time of his death the sub-tenant was in possession of the leased property, the landlord and tenant should subject to Recommendation 74 below be entitled after the death to give a copy notice addressed to the deceased sub-tenant (as if he were still alive) under

1. Where for example under s 16(3)(a) the executor is satisfied that the interest cannot be disposed of according to law and has so informed the landlord.
2. Recommendation 31 (para 4.22) above.
3. See Recommendation 39(a) (para 4.63) above.

our Recommendations 31 or 39(a) above, and that copy notice should have effect as if it were given to the sub-tenant.

(Paragraph 5.82; clause 11(1) and Schedule 2, para 4, new s 34H(1))

5.84 As in the case of entitlement to give notice addressed to a deceased party to a lease, the entitlement to give a copy notice addressed to a deceased sub-tenant should cease where notification has been made that responsibility for the deceased sub-tenant's interest has been assumed. Accordingly that entitlement should cease where the tenant has been notified that one of the circumstances discussed in paragraphs 5.69-5.74 above has occurred in relation to the deceased sub-tenant's interest. The tenant would receive such notification in his capacity as landlord of the sub-tenant. In practice therefore where it is a landlord (ie the principal landlord) who wishes to give a copy notice to the sub-tenant in possession, he should take steps to ensure that he is aware of the correct identity of the sub-tenant in possession. Before giving the copy notice he could of course ascertain from the tenant whether the sub-tenant in possession has died and whether responsibility for the interest has been taken over by any person. The landlord could alternatively in permitting the grant of any sub-tenancy require notification to be made to him of any change in the identity of the sub-tenant.

5.85 We **recommend**:

74. The entitlement of the landlord or tenant to give a copy notice addressed to a deceased sub-tenant under Recommendation 73 above should cease—

(a) where the tenant has been notified of the confirmation of an executor-nominate to the estate of the deceased sub-tenant or the appointment of an executor-dative to him;

(b) where the tenant has been notified that the deceased's interest has been assigned in security or made subject to a standard security (the standard security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and that since his death the creditor has entered into possession of the security subjects;

(c) in the case of the death of the sub-tenant under a lease of non-agricultural subjects, where the tenant has been notified (as the sub-tenant's landlord) under Recommendation 52 above that a legatee has accepted a bequest of the deceased's interest in the sub-lease;

(d) in the case of the death of the sub-tenant under a sub-lease of an agricultural holding, where the tenant (as the sub-tenant's landlord) has been notified—

(i) under section 20(2) of the 1949 Act that a legatee has accepted a bequest of the deceased's interest in the sub-lease, unless the landlord has given a counter-notice to the legatee under section 20(3); or

(ii) that the Land Court has made an order under section 20(5) of the 1949 Act declaring the legatee to be the sub-tenant under the sub-lease.

(Paragraph 5.84; clause 11(2), (4) and Schedule 2, para 4, new s 34H(2),(4))

5.86 Where a copy notice has been given addressed to a deceased sub-tenant in possession of leased property, there should be an entitlement to act to protect the deceased's interest in the sub-lease until another party takes over as sub-tenant or until an executor has been confirmed to the estate of the deceased or appointed to him. In paragraph 5.76 above we listed the persons who would have an interest in acting to protect the interest of a deceased landlord or tenant. Similar considerations apply concerning the protection of a deceased sub-tenant's interest in a sub-tenancy and accordingly we consider that any of the persons in the categories mentioned should be entitled to act to protect that interest.

5.87 We **recommend**:

75. Where a copy notice has been given under Recommendation 73 above addressed to a deceased sub-tenant and an executor-nominate has not been confirmed to

the estate of the deceased or an executor-dative has not been appointed to him, then until such confirmation or appointment occurs any of the following persons should be entitled to act to protect the deceased sub-tenant's interest in the sub-tenancy–

(a) the spouse of the deceased;

(b) a specific legatee of that interest or a residuary legatee;

(c) any person nominated in a will of the deceased as an executor to him;

(d) any person entitled to apply to be appointed as his executor-dative;

(e) if the deceased's interest has been assigned in security or made subject to a standard security (the standard security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and the creditor is not in possession thereof, the creditor;

(f) any other person with an actual or potential interest in the tenancy or in the leased property.

(Paragraph 5.86; clause 11(3), (4) and Schedule 2, para 4, new s 34H(3), (4))

Part VI Title to Sue and to Defend

Title to Sue

6.1 In the course of the Report we have given detailed consideration to the termination of a tenancy of leased property or part of leased property by the giving of notice. We have considered this both in relation to tenancies of non-agricultural subjects, in which case notice of termination would be given under either legislation implementing our recommendations or under the 1964 Act, and in relation to tenancies of an agricultural holding, in which case notice would be given under either the 1949 Act or the 1964 Act.[1] At the termination of the tenancy the tenant may quit the subjects in which case no further action is required except to settle any outstanding claims between the parties.

6.2 If however the tenant refuses to quit voluntarily the landlord must resort to an action of removing. This is a process of law whereby a landlord seeks to enforce his tenant's obligation to give up possession of the subjects. The giving of notice of termination of the tenancy is generally required as a foundation for such an action.[2] Where under legislation implementing our recommendations, under the 1949 Act or under section 16(3) of the 1964 Act notice is required to be given in order to bring a tenancy of leased property or part of leased property to an end, such notice must be given prior to the institution of proceedings for removing the tenant from the leased property or that part. We consider that in the interests of clarity this requirement should be given legislative form. We recommend a general provision to this effect. However we go on to consider separately the giving of notice and the institution of proceedings in various of the special situations already dealt with in Part IV.

6.3 We **recommend**:

76. Where notice under legislation implementing our recommendations, the 1949 Act, or section 16(3) of the 1964 Act is required to be given for the purpose of bringing a tenancy of leased property or part of leased property to an end, it should be provided that such notice must be given prior to the institution of proceedings for removing the tenant from the leased property or that part.
(Paragraphs 6.1-6.2; clause 17(1))

More than one separate landlord

6.4 We have already considered[3] the termination of the tenancy of part of leased property (whether non-agricultural subjects or an agricultural holding) where the property is subject to one tenancy and there is more than one landlord, each being a landlord of a separate part. We recommend[4] the introduction of an entitlement in such a case to terminate the tenancy of part of the leased property either by notice to quit given by the landlord of that part or by notice of intention to bring the tenancy to an end given to the landlord of that part. Where the part-landlord has either given or received such notice, he should be entitled to rely on the notice to institute proceedings for removing the tenant from the part of the leased property to which the notice relates ie the part of which he is the landlord.

6.5 We also recommend[5] in such a case that a tenant who has received a notice from a part-landlord should be entitled in response to give a notice to the landlord or

1. Notice of termination of a lease may be given by either the landlord or the deceased tenant's executor to the other under s 16(3) of the 1964 Act.
2. Paton and Cameron, p 272.
3. Paras 4.27-4.32 above.
4. See Recommendation 33 (para 4.32) above.
5. Recommendation 34 (para 4.38) above.

landlords of any other part or parts of the leased property of his intention to bring the tenancy of that other part or parts to an end. The landlord who has received such notice should be entitled to rely on it to institute proceedings for removing the tenant from the part of the leased property of which he is the landlord.

6.6 We accordingly **recommend**:

77. Where property which is subject to one tenancy has more than one landlord, each being the landlord of a separate part, a landlord who has either given a notice to quit or received a notice under Recommendation 33 above, or a landlord to whom a tenant gave a notice under Recommendation 34 above, should be entitled to rely on that notice for the purpose of instituting proceedings for removing the tenant from the part of the leased property of which he is the landlord.

(Paragraphs 6.4-6.5; clause 17(2))

Landlords having interest in common

6.7 The current rule of law in relation to common property is that all co-proprietors involved in the granting of a lease must concur in an action for removal of the tenant.[1] The rule appears to be based on consideration of the fact that the tenant cannot be ejected by one co-proprietor when he can in fact trace his title to all co-proprietors. On the other hand it is not necessary that all co-proprietors should be parties to the removal of an intruder who is occupying the common property without title. Given that the distinction between actions of ejection and actions of removing has to some extent been superseded by the introduction of the summary cause for recovery of possession of heritable property,[2] consultees agreed that the rules as to title to sue should be the same whether the co-proprietor is seeking to remove a former tenant or to eject an intruder.

6.8 In the Memorandum we suggested as a general principle but also particularly in relation to common property[3] that the rules governing the giving of notice and title to sue should be consistent. In the case of property which is subject to one tenancy and which has more than one landlord, the interest of each landlord being an interest in common, we recommend[4] that any notice to quit given by any of the landlords to the tenant and any notice of intention to terminate the tenancy given by the tenant to any of the landlords should have effect as if it had been given by or to all the landlords as the case may be. Where the tenancy has been brought to an end in accordance with this recommendation the landlord in common who has either given or received a notice should therefore be able to institute proceedings for the purpose of removing the tenant from the leased property without obtaining the consent of the other landlords of the property.

6.9 We consider further that this entitlement to rely on the notice terminating the tenancy for the purpose of instituting proceedings for the removal of the tenant without obtaining the consent of the other landlords should be open to each of the landlords in question and not solely to the one landlord who gave or received the notice. The tenancy would have been validly terminated by the giving of notice of termination. All the landlords would have received a copy of the notice of termination[5] and so would be aware of the pending termination of the tenancy. Each of these landlords would have an interest in enforcing the tenant's obligation to remove should he not do so at the date of termination of the tenancy. It may even be that at the appropriate time the landlord who gave or received the notice of termination is not available to instruct the institution of proceedings. The granting of an entitlement to any of the landlords to rely on the notice given and institute proceedings for the removal of the tenant without having to obtain the consent of the other landlords would achieve consistency with the rule concerning title to sue in the case of the ejection of an intruder from common property.

1. *Aberdeen Station Committee* v *NB Railway Company* (1890) 17R 975.
2. Sheriff Court (Scotland) Act 1971, s 35; and given further our Recommendation 88 (para 7.14) below, that the distinction between actions of removing and actions of ejection should be abolished.
3. See paras 5.1 and 5.2.
4. Recommendation 40 (para 4.68) above.
5. Under Recommendation 42 (para 4.72) above.

6.10 In the Memorandum[1] we raised the question whether a co-proprietor who is instituting proceedings for the removal of the tenant without the consent of the other co-proprietors should be required to call these other co-proprietors as additional defenders. We received a mixed response to this question from consultees. After reflection we decided against making a recommendation on this point. We agree with the views of one consultee that any other co-proprietor should not be entitled to intervene in the removal proceedings. These other co-proprietors would on being provided with a copy of the notice of termination of the tenancy under our recommendations thereby receive adequate warning of the termination of the tenancy. These co-proprietors would therefore be aware that should the tenant fail to remove from the leased property at the date of termination, proceedings may then be instituted in order to remove him.

6.11 We **recommend**:

78. Where property which is subject to one tenancy has more than one landlord, the interest of each landlord being an interest in common, and notice has been given under Recommendation 40 above to bring the tenancy to an end, any of the landlords should be entitled to rely on that notice for the purpose of instituting proceedings for removing the tenant from the leased property without obtaining the consent thereto of the other landlords of the leased property.

(Paragraphs 6.7-6.10; clause 17(3))

Proper liferents

6.12 We discuss in paragraphs 4.98-4.102 above the recovery of possession of leased property in the case where there is an interest of liferent and fee in the property. We conclude that it is unnecessary to recommend any amendments to the law relating to trust liferents. Regarding proper liferents however we note the views of consultees that the proper liferenter should be entitled to seek recovery of possession of heritable property without the consent or concurrence of the fiar and that it would not be necessary or desirable to give an equivalent right to the fiar. We accordingly recommend[2] that where the interest of the landlord in leased property is subject to a proper liferent, for the purposes of giving any notice, copy notice or counter-notice under any enactment the liferenter alone should be deemed to be the landlord of the leased property and the interest of the fiar should be disregarded. In the context of reliance on such a notice for the purpose of instituting proceedings for removal of the tenant from the leased property, the liferenter should be given an entitlement to institute such proceedings without obtaining the consent of the fiar of the property.

6.13 We **recommend**:

79. Where the interest of the landlord in leased property is the subject of a proper liferent and a notice has been given under Recommendation 50 above to bring the tenancy to an end, the liferenter should be entitled to institute proceedings to remove the tenant from the leased property without obtaining the consent thereto of the fiar of the property.

(Paragraph 6.12; clause 17(4))

6.14 Implementation of the recommendation in the foregoing paragraph would not however fully reflect the policy that a fiar should not have an entitlement equivalent to the liferenter to institute proceedings for recovery of possession of heritable property. It may for example be open to a fiar to argue that he is entitled to institute proceedings for removal of a tenant from leased property in reliance on the termination of the tenancy by way of a notice given by the liferenter under Recommendation 50 above. Furthermore a fiar may also seek to institute proceedings for recovery of possession in a case where the giving of a notice is not a prerequisite to the raising of the action. Such a case would be where the property was occupied by an intruder—ie a person who never had a right or permission to occupy the property. In our view a provision is required to the effect that the fiar should not be entitled to institute proceedings for removing any person from the property whether or not the person ever had a right or permission to occupy the property.

1. Para 5.2.
2. Recommendation 50 (para 4.102) above.

6.15 We **recommend**:

80. Where the interest of the landlord in leased property is the subject of a proper liferent, the fiar should not be entitled to institute proceedings for removing any person from the property, whether or not the person ever had a right or permission to occupy the property.

(Paragraph 6.14; clause 17(5))

Resumption of leased property

6.16 A lease may stipulate circumstances in which the landlord may resume leased property. We recommend[1] in relation to both leases of non-agricultural subjects and leases of agricultural holdings that a landlord should be required to give to the tenant written notice prior to the exercise of the power of resumption. Despite having received the notice the tenant may fail to remove from the leased property on the date of the exercise of the right of resumption. The landlord may then wish to institute proceedings for removing the tenant from the leased property. We consider that any legislation should make it clear that in such a case notice of resumption under Recommendation 11 above must be given prior to the institution of proceedings for removing from that property.[2]

6.17 We **recommend**:

81. Where a lease stipulates circumstances in which the landlord may resume leased property, a notice of resumption under Recommendation 11 above must be given prior to the institution of proceedings by the landlord for removing from that property in pursuance of such a stipulation.

(Paragraph 6.16; clause 17(6) as read with the definition of "resumption notice" in clause 27(1) and Schedule 3, para 10(a)(ii))

Debtor under *ex facie* absolute disposition

6.18 The pursuer in any action may be required to establish his title to sue. In an action for recovery of possession of heritable property this generally means the pursuer's title must be completed by infeftment ie by recording in the Register of Sasines or registration in the Land Register. A problem may arise as to the landlord's title to sue for removal of the tenant where the landlord's interest has been assigned in security and that security is constituted by an *ex facie* absolute disposition by the party from whom the landlord purchased the subjects in favour of the landlord's creditors. In such a case a landlord will not be infeft. The only evidence of the landlord's radical right or reversionary interest in the property will be a back letter or similar document which will not be recorded or registered. The suggestion was made in the Research Paper[3] that it should be possible subject to the terms of any agreement with the creditor for the borrower to establish his title to sue on production of the relevant back letter or other document. If the landlord's title to institute proceedings for removal of the tenant is challenged, the production of this back letter or other document would indicate the true nature of the disposition of the property. Consultees were in agreement with this suggestion and so we proceed with a recommendation to this effect.

6.19 We **recommend**:

82. Where leased property is subject to a heritable security constituted by an *ex facie* absolute disposition and the landlord institutes proceedings for removing from the property, if the landlord's title to institute the proceedings is challenged he should be enabled to establish that title by the production of a back letter or other document showing the true nature of the disposition.

(Paragraph 6.18; clause 17(7))

Title capable of completion

6.20 We have already drawn attention to the general rule that in an action for recovery of possession of heritable property the pursuer's title must be completed by infeftment. In their Report the Law Reform Committee observed that infeftment

1. Recommendation 11 (para 2.52) above.
2. This is consistent with the terms of Recommendation 76 (para 6.3) above.
3. Para 4.16.

was not necessary for the disposal of property.[1] The Committee therefore recommended relaxation of this rule to make actions for recovery of possession of heritable property competent at the instance of "a person having right to the subjects by a title which has not been completed but which is capable of completion".[2]

6.21 In the Memorandum we suggested[3] that the Committee's proposition should be taken to mean that the pursuer's title should be capable of completion without the intervention of or assistance from any other person. Consultees were generally in favour of the Committee's recommendation taken along with our suggested qualification. We restrict our recommendation on this matter however to the giving of a notice to quit by a landlord and the raising of a subsequent action for recovery. It appears that where a party is seeking to protect a heritable right in a case where no competing title is founded upon, that party as a pursuer need only, as regards title, show an *ex facie* valid title in his favour.[4]

6.22 Under the current rule there is some doubt as to what stage in the proceedings the requirement for infeftment must be satisfied.[5] The Committee's recommendation was designed to be applied at the stage of taking decree. We have already suggested that the rules governing the giving of notice to quit and title to sue should be consistent. This would be achieved if the requirement discussed in the preceding paragraphs were to be applied at the stage of the giving of notice. Such a requirement would in fact be in accord with the current rule regarding the giving of notice to quit which is that such notice cannot be given unless a disposition is held entitling the giver to receive the rents of the subjects. It is not necessary that the disposition should have been recorded: effective notice may be served by an uninfeft proprietor.[6] At present a notice to quit may not be served by a prospective purchaser of property at the stage of conclusion of missives.[7]

6.23 In effect the requirement discussed would mean that for the purpose of giving notice to quit and instituting subsequent proceedings for recovery of possession of the property, only a person who is entitled to receive rent for or to take possession of the leased property would be so entitled. It will be noted that implementation of our recommendation on this point is suggested by way of giving an appropriate definition to the term "landlord" for the purposes of any relevant legislation. There is however at present in section 93(1) of the 1949 Act an extended definition of "landlord" for the purposes of the Act. Reference is made for example to entitlement to receive "the rents and profits" of any holding. We consider that an appropriate reference in this context would merely be to the receipt of the rent. Furthermore the definition is stated to include "the executor, administrator, assignee, heir-at-law, legatee, disponee, next-of-kin, guardian, curator bonis or trustee in bankruptcy, of a landlord". Certain of these references at least appear to be inappropriate. In any event we consider that these references are not required and that the term "landlord" could simply be defined as we have suggested.[8]

6.24 We **recommend**:

83. Any person who is entitled to receive rent for, or to take possession of, leased property should be entitled to give notice to quit and should have title to institute a subsequent action for recovery of possession of the leased property.

(Paragraphs 6.20-6.23; clause 27(1) (definition of "landlord") and Schedule 3, para 10(a)(i))

1. In terms of the Conveyancing (Scotland) Act 1924, s 3.
2. The Second Report of the Law Reform Committee, para 17.
3. Para 5.1.
4. See *Wills' Trs* v *Cairngorm Canoeing and Sailing School Ltd* 1976 SC (HL) 30 at p 38; *Pirie* v *Rose* 1884 11R 490; *LMS Railway Co* v *M'Donald* 1924 SC 835; *Mather* v *Alexander* 1926 SC 139.
5. See Research Paper, para 4.2 and *Walker* v *Hendry* 1925 SC 855.
6. *Walker* v *Hendry* cited above.
7. *James Grant & Co Ltd* v *Moran* 1948 SLT (Sh Ct) 8.
8. The definition of "tenant" in s 93(1) of the 1949 Act includes similar references, which also appear unnecessary or inappropriate. If these references were repealed also, a tenant would be defined under s 93(1) as the holder of land under a lease. This definition appears adequate. We therefore suggest, if only for the purposes of consistency, the repeal shown in Sch 4 to the draft Bill.

Tenants

6.25 In the Memorandum we mentioned[1] the difficulties in applying the Law Reform Committee's recommendation on title to sue to actions for recovery of possession of heritable property instituted by tenants. In the case of a registrable lease or a registrable interest in a lease[2] the tenant would have a title capable of completion by recording or registration. Regarding non-registrable leases however the tenant would not have such a title. In such cases, possession by the tenant is the equivalent of infeftment taken by a person acquiring a proprietary interest. Accordingly in the Memorandum we suggested an adaptation of the Law Reform Committee's recommendation to the effect that where a tenant institutes proceedings for removing, he should be entitled to establish title to sue by producing a right or title giving him a legal right to immediate possession, whether physical or civil as the case may be.[3] After reflection we came to the view that it would not in fact be necessary to make a recommendation on this matter.

6.26 Where a tenant has sub-let the property and raised an action against his sub-tenant, the question of title to sue will not arise since the sub-tenant would not be entitled to impugn the title of the person from whom he derived his own right. Where the tenant is the successor to a principal tenant, or is the holder of an interposed lease under section 17 of the Land Tenure Reform (Scotland) Act 1974, he could where necessary rely on the provision implementing Recommendation 83[4] above for the purpose of giving a notice and raising an action for removing. When a tenant is in the position of having to remove either a former tenant of the same subjects or a tenant or possessor not holding from him as tenant, his authority to remove may be derived from the terms of his lease. It may be an express power to remove, or an implied one. Failing this the tenant could obtain from the landlord an assignation of his title to remove. Otherwise he may proceed by declarator and removing.[5] These procedures appear to be adequate, offering the tenant a method of proceeding for removing irrespective of the situation in which he finds himself.

Agents or factors

6.27 Agents or factors are not entitled without express authority to institute proceedings for the removal of tenants or other occupiers of property even though they are empowered to grant leases on behalf of their principal.[6] An exception to this is made however by Rule 68 of the Summary Cause Rules, Sheriff Court 1976 which provides that a summary cause for the recovery of possession of heritable property raised under section 38 of the 1907 Act may be at the instance of a proprietor or factor or any other person by law authorised to pursue a process of removing. Section 38 of the 1907 Act deals with summary removings from heritable properties let for less than a year. On consultation the view was taken that there was no need to retain this exception in the case of removings affecting lets for less than a year and that the distinction between such removings and proceedings for recovery of possession generally should be abolished.

6.28 One comment put to us on consultation was that agents and factors should be entitled to raise actions for recovery of possession of heritable property on behalf of disclosed principals. In this connection we note in relation to leases of agricultural holdings the provision currently made in section 93(7) of the 1949 Act. This provides that anything which by or under the Act is required or authorised to be done by, to or in respect of the landlord or the tenant of an agricultural holding may be done by, to or in respect of any agent of the landlord or of the tenant. We consider that this is a useful provision and that a similar provision should be enacted in relation to leases of non-agricultural subjects. In view of the recommendations we make in the Report concerning the giving of a copy notice to a sub-tenant in possession of leased property, section 93(7) of the 1949 Act and any similar provision concerning

1. Para 5.5; and see the Research Paper, paras 4.14-4.15.
2. See Registration of Leases (Scotland) Act 1857, ss 1 (as amended), 16 and Land Registration (Scotland) Act 1979, s 3(3)(a).
3. Physical possession means actual occupation of the subjects and civil possession means an entitlement to receive the rent payable in respect of the property.
4. Para 6.24 above.
5. Rankine, p 519; Paton and Cameron, p 257.
6. Rankine, p 518.

non-agricultural leases should be extended to apply to sub-tenants and their agents also.[1]

6.29 We **recommend**:

84. In relation to leases both of non-agricultural subjects and of agricultural holdings, it should be provided that anything which by or under legislation implementing our recommendations or the 1949 Act as the case may be is required or authorised to be done by, to or in respect of the landlord, the tenant or the sub-tenant of the property may be done by, to or in respect of any agent of the landlord, the tenant or the sub-tenant.

(Paragraphs 6.27-6.28; clause 27(3) and Schedule 3, para 10(b))

Title to Defend

Service of notice as admission of title

6.30 We shall now deal with a number of questions which relate principally to entitlement to defend an action for recovery of possession of heritable property. The first question is whether any right or title on the part of an occupier can be inferred from the mere fact of notice having been given to him. It may not be clear whether a person in occupation of another person's property has a title to occupy it. In such circumstances the difficulty is that the giving of notice might imply an acknowledgement of right. The Law Reform Committee therefore recommended in their Report[2] the introduction of a statutory provision making it clear that service of notice of removing should not be held to imply the recognition of any title in the person on whom the notice was served.

6.31 The Law Reform Committee was particularly concerned[3] with the selection of the appropriate process for recovery of possession of heritable property. This problem has however for most purposes been resolved by the introduction[4] of a single form of summary cause for recovery of possession of heritable property applicable to former tenants and other persons entitled to notice of removal and to unauthorised occupiers who may be removed without warning. It does however continue to be necessary where a landlord and tenant relationship of any kind exists for due notice to be given before a landlord can proceed with an action. While certain of our consultees were in favour of the introduction of a statutory provision along the lines suggested by the Law Reform Committee, we do not think that there is sufficient reason to justify this course of action. As pointed out in the Research Paper[5] any remaining problem which may exist could be avoided by the insertion of an express statement in any notice that the notice is given without prejudice to the owner's or landlord's position regarding the matter of title. We accordingly do not make any recommendation on this issue.

Property owned in common and liferents

6.32 We deal in paragraphs 6.7-6.11 above with the institution of proceedings for recovery of possession of heritable property in the case where the property is subject to one tenancy and has more than one landlord, the interest of each landlord being an interest in common. In paragraphs 6.12-6.15 above we deal with the institution of such proceedings where the interest of the landlord in the property is subject to a proper liferent. In neither case do we recommend the introduction of a requirement when instituting the proceedings to call as co-defenders either the other landlords in common or the fiar as the case may be.

Sub-tenants

6.33 We discuss above[6] the termination of sub-tenancies which have been authorised by the landlord. One further question which arises for consideration concerns the

1. It will be noted that where notice of termination of a lease is given under our recommendations, if the notice is given by an agent, the notice should contain the name of the party on whose behalf it is given as well as the name and address of the agent (see Recommendation 6(e) (para 2.27) above).
2. Para 14.
3. Para 7.
4. Provided for in the Sheriff Courts (Scotland) Act 1971, s 35(1)(c).
5. Para 3.40.
6. Paras 4.56-4.63 above.

position of the principal tenant when an action is raised by the landlord against an unauthorised sub-tenant (who may be ejected without warning[1]) or against an authorised sub-tenant but without notice being given to the principal tenant. It appears to be accepted practice to call both the principal tenant and the sub-tenant in an action against an authorised sub-tenant.[2] There are also cases of actions against unauthorised sub-tenants in which the principal tenant has been called as an additional defender.[3]

6.34 We consider that a requirement should be introduced to call the principal tenant as an additional defender in all cases of actions against unauthorised sub-tenants. The principal tenant may have an interest to object to the action and he may have a ground of defence unknown to the sub-tenant. Most of our consultees agreed with our suggestion in this respect. Such a requirement would of course only apply where the principal tenancy is still subsisting when the proceedings are instituted. If the landlord had already taken steps to terminate the principal tenancy, any right of sub-tenancy there may be would fall with the principal tenancy.[4]

6.35 We **recommend**:

85. Where a tenant has granted a sub-lease of the leased property or any part of it, if his landlord institutes proceedings to remove the sub-tenant on the ground that the sub-tenancy is unauthorised, and the tenancy still subsists, the tenant should be called as a defender in the proceedings.

(Paragraphs 6.33-6.34; clause 18(1))

Deceased tenant's or sub-tenant's interest

6.36 We recommend[5] that where a party to a lease dies the other party should be entitled after the death to give any notice under any enactment addressed to the deceased party (as if he were still alive) and that notice should be effective for its purpose. In relation to the termination of an authorised sub-tenancy we make a similar recommendation[6] allowing the giving of a copy notice addressed to the deceased sub-tenant (as if he were still alive) where that sub-tenant has died and was in possession of the leased property at the time of his death. We also recommend[7] that, until responsibility for the deceased's interest in the tenancy or in the leased property has been taken over, any of certain categories of persons should be entitled to act to protect the deceased's interest.[8]

6.37 One specific way of taking steps to protect the interest of a deceased tenant or sub-tenant would be to defend any proceedings by the landlord for removing from the leased property or any part of it. Any of the persons in the categories listed would have an obvious interest in defending any such proceedings. While consultees were not unanimous in their views on this question, we consider that any person who under Recommendation 71 above is entitled to act to protect an interest of a deceased tenant, or any person who under Recommendation 75 above is entitled to act to protect the interest of a person who at the date of his death was a sub-tenant in possession of the leased property, should have a title to defend any proceedings by the landlord for removing from the leased property or any part of it.

6.38 As in the case of entitlement to respond to a notice given to a deceased tenant or sub-tenant,[9] the entitlement to defend discussed in the preceding paragraph should

1. Rankine, pp 520-521; Paton and Cameron, pp 224 and 257.
2. *Robb* v *Brearton* (1895) 22R 885.
3. *Cromar* v *Duke of Gordon* (1830) 8S 353; *Earl of Elgin* v *Walls* (1833) 11S 585; *Morison* v *Grant* (1893) 11 Sh Ct Rep 201.
4. See paras 4.5, 4.13 and 4.22 (Recommendation 30) above.
5. Recommendation 69 (para 5.68) above.
6. Recommendation 73 (para 5.83) above.
7. See Recommendation 71 (para 5.79) above and in the case of sub-tenants, Recommendation 75 (para 5.87) above.
8. These categories are: the deceased's spouse; a specific legatee of the deceased's interest in the tenancy or a residuary legatee; any person nominated in the will of the deceased as an executor; any person entitled to apply to be appointed as executor-dative of the deceased; if the deceased's interest has been assigned in security or made subject to a standard security and the creditor is not in possession, the creditor; and any other person with an actual or potential interest in the leased property or in the tenancy (see Recommendations 71 and 75 above).
9. See paras 5.77-5.78 and 5.86.

generally come to an end when responsibility for the deceased party's interest has been taken over. This would occur where an executor is confirmed to the estate of the deceased party or is appointed to him. Following confirmation or appointment the executor should be solely responsible for that interest until it has been disposed of. It would also occur where a person acquires the interest of the deceased in the tenancy or the sub-tenancy.[1] The executor or the acquirer as the case may be should take any necessary action regarding the defence of any proceedings for removing.

6.39 We consider however that it would not be appropriate to bring the entitlement to defend to an end immediately upon the confirmation or appointment of an executor or upon the acquisition of the interest. The executor may following his confirmation or appointment or the acquirer may following the date of acquisition require a period of time in which to consider what course of action to take. Should the executor or acquirer wish to continue with the defence in any proceedings he would require to give instructions for this. However he may not wish to defend any proceedings. For these reasons we are of the view that the entitlement to defend any proceedings should come to an end either after defences in the proceedings have been lodged by an executor of the deceased or by a person who has acquired the deceased's interest, or if no defences have been lodged by an executor or by the acquirer within a certain period after his confirmation or appointment, at the end of that period. We think that a period of 28 days following the date of confirmation, appointment or acquisition would provide ample time for the executor or the acquirer to consider his position and take any necessary action should he wish to do so.

6.40 We **recommend**:

86. Any person who under Recommendation 71 or Recommendation 75 above would be entitled to act to protect the interest of a deceased tenant, or of a person who at the date of his death was a sub-tenant in possession of the leased property, should have a title to defend any proceedings by the landlord for removing from the leased property or any part of it; but that entitlement should come to an end either after defences in the proceedings have been lodged by an executor of the deceased or by a person who has acquired the interest of the deceased, or if no defences have been lodged by such an executor within a period of 28 days after his confirmation or appointment or by a person who has acquired the interest of the deceased, at the end of that period.

(Paragraphs 6.36-6.39; clause 18(2))

1. The deceased's interest would be acquired by a creditor who enters into possession of that interest or by a legatee who accepts a bequest of the interest and gives the appropriate notification to the landlord.

Part VII Ordinary Cause Procedure in the Sheriff Court

Terminology for all proceedings

7.1 First of all we deal with a general point which relates to all types of proceedings for possession of heritable property. We have already drawn attention to the recommendation of the Law Reform Committee that one form of action should apply in all cases of proceedings for recovery of possession of heritable property. This recommendation was endorsed by the Grant Committee on Sheriff Court Procedure.[1] In response to these recommendations section 35 of the Sheriff Courts (Scotland) Act 1971[2] introduced the summary cause procedure for recovery of possession of heritable property.

7.2 The terminology used in this connection has however resulted in a perhaps unexpected difficulty. The use of the term "recovery" has in this context been held to restrict the application of the statutory provision to cases where the pursuer or his predecessors in title had formerly been in possession of the subjects.[3] It may be thought that this result was not intended given that there are many cases of proceedings for possession of heritable property where that is not the position. Such cases include for example actions by a landlord's successor in title, whether on the landlord's death or on the sale of his interest in the property; actions by the trustee in bankruptcy dispossessing the bankrupt; and actions by the heritable creditor or *ex facie* absolute security holder dispossessing the debtor.[4]

7.3 This difficulty could be avoided by adopting a different form of wording in the legislation relating to actions for possession of heritage. We favour a reference to proceedings for "removing from heritable property", whether the action is directed at a former tenant or at a person in occupation of the property without right or title to do so. We use this form of wording where appropriate in our discussions concerning possessory proceedings relating to heritage. We consider that to avoid the difficulty mentioned and for the purposes of consistency any existing legislative provisions dealing with such actions should be amended to use the form of wording suggested. This would mean amending the language presently used in section 35(1)(c) of the 1971 Act. It would also have to be provided that any reference in existing legislative provisions to the term "eject" or "ejection" should be construed respectively as a reference to remove or removing in terms of our recommendations.

7.4 We **recommend**:

87. Any proceedings for possession of heritage should be referred to as proceedings for removing from heritable property and any reference in any enactment to eject or ejection should be construed respectively as a reference to remove or removing in terms of our recommendations.

(Paragraphs 7.1-7.3; clauses 14(1), 15 and 16; Schedule 3 (the general amendment) and Schedule 4 (repeal of words in the 1971 Act))

1. Cmnd 3248 (1967).
2. Referred to in the Report as the "1971 Act".
3. *Prestwick Investment Trust* v *Jones* 1981 SLT (Sh Ct) 55.
4. It is however the practice for possessory actions by creditors under heritable securities in exercise of their statutory powers to proceed as summary applications: see s 29 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

Sheriff court: ordinary cause procedure

7.5 The two main possessory actions relating to heritage which were prior to the 1971 Act available in the sheriff court under ordinary cause procedure were actions of removing and actions of ejection. Ordinary cause procedure is still available in relation to such actions which do not fall within the scope of section 35(1)(c) of the 1971 Act. An action of removing is the procedure whereby a landlord removes a tenant from the property. An action of ejection is also an independent substantive action, one by which the proprietor or other person entitled to possession of heritable property removes a person in occupation who either has no right to occupy or whose title has been judicially terminated. An action of ejection cannot therefore be used unless the occupier is in possession by fraud, force or precarious possession.[1] The service of notice of removing is not therefore a prerequisite to the institution of proceedings for ejection. The process of ejection has however acquired another meaning, namely the accessory proceedings used to implement a decree of removing where the occupier of subjects does not relinquish possession or delays in doing so.[2]

The 1907 Act

7.6 Sections 34-38A of the 1907 Act deal with the procedure in ordinary removings in the sheriff court. Certain of these provisions introduced further difficulties into this branch of the law. The word "ejection" is used in relation to forms of process for removing tenants. Section 36 provides for a "summary warrant of ejection" and section 37 for a "warrant for summary ejection" in certain cases. The Act also provided new remedies in certain cases for removing or "ejecting" tenants without application to the Court (section 34) or without a decree of removal (section 35).

7.7 This state of affairs no doubt contributed to confusion as to the meaning of the terms "removing" and "ejection". In instituting an action under the ordinary cause procedure in the sheriff court it is however necessary for the pursuer to choose as his remedy either an action of removing or an action of ejection. His choice depends on the position taken by him as to the nature of the defender's occupancy of the subjects. Cases do arise in which it is difficult to establish whether or not a defender has a title to occupy the subjects and in such a case a decision must be taken whether or not to give a notice of removing. If the pursuer chooses the wrong remedy this may of course be fatal to his case.[3]

Introduction of the summary cause

7.8 Against this background the introduction of the new summary cause for recovery of possession of heritable property effected a significant improvement in the law. It enabled an intending pursuer to raise proceedings for recovery in the sheriff court under the summary cause procedure without having to commit himself as to the status of the occupier in selecting a particular form of process. Section 35(1)(c) of the 1971 Act simply requires all actions for recovery of possession of heritable property, unless concluding for payment of money exceeding £1,500[4] (excluding interest and expenses), to be dealt with as summary causes within the meaning of the Act.

Actions excluded from the summary cause

7.9 Certain possessory actions in the sheriff court are excluded from the scope of the summary cause procedure for recovery of possession of heritable property. As

1. Paton and Cameron, p 284.
2. Paton and Cameron, p 246-247.
3. Paton and Cameron, p 247.
4. This financial limit was set by The Sheriff Courts (Scotland) Act 1971 (Private Jurisdiction and Summary Cause) Order 1988, (SI 1988/1993).

already noted section 35(1)(c) of the 1971 Act excludes from the summary cause actions for such recovery where there is an alternative or additional claim for payment of a sum of money exceeding £1,500. While this is the only exception specifically stated in the 1971 Act a question arises as to which form of process is appropriate for other types of composite action, for example an action for declarator and removing or for removing and interdict. Actions for declarator or interdict alone cannot proceed as a summary cause.

7.10 The accepted view appears to be that a conclusion for a decree other than for removing takes an action out of the category of the summary cause and into that of an ordinary action.[1] Another case excluded from the scope of the summary cause is an action of removing under section 9 of the Land Tenure Reform (Scotland) Act 1974. That section deals with the use as a dwellinghouse of property subject to a long lease in contravention of section 8 of the Act and prescribes that the procedure in the action of removing is to be that in an ordinary cause.

Extraordinary removings

7.11 There is a further possessory action available in the sheriff court under the ordinary cause procedure. This is an action of extraordinary removing. It is a process used where a landlord wishes to remove his tenant before the natural termination of the lease. The action is the landlord's means of enforcing an irritancy, a break in favour of the landlord or a renunciation granted to him by the tenant. This contrasts with an action of ordinary removing which is the remedy for use against a tenant who does not give up possession at the date of termination of the lease. Section 5(4) of the 1907 Act confirms the jurisdiction of the sheriff court concurrently with the Court of Session in relation to extraordinary removings.

One form of ordinary cause proceeding

7.12 Actions will therefore continue to be instituted under the ordinary cause procedure in the sheriff court for removing from heritable property. This being the case we consider that certain recommendations could be made to improve and rationalise the law on this matter. First of all we take the view that the various existing forms of proceeding under the ordinary cause in the sheriff court—ie removings, ejections and extraordinary removings—should be replaced by one form of proceeding, namely an action for removing from heritable property. This reform would simplify the position regarding proceedings under the ordinary cause, thus mirroring the current simplified position under the 1971 Act regarding proceedings under the summary cause. We think that these existing forms of procedure should however continue to be available as a transitional measure following the commencement of any legislation implementing our recommendations, for the purpose of enforcing any notice or counter-notice given in accordance with existing law and procedures before the commencement date. Recommendation 111 in paragraph 11.21 below deals with this point.

7.13 The removal of the distinction between removings and ejections would in particular be valuable, finally bringing to an end the confusion and complications associated with these proceedings. We also do not see any justification for retaining a separate form of proceeding solely in connection with extraordinary removings. The nature of such an action is similar to that of actions of ordinary removing or ejection. These actions are all possessory actions relating to heritable property and it would seem logical that they should all be brought within the one form of proceeding.

7.14 We **recommend**:

1. This view appears however to have been rejected in a sheriff court decision, *Disblair Estates Ltd* v *Jackson* Aberdeen Sheriff Court, 24 November 1982; discussed in the Research Paper, para 7.19; we consider this question in paras 8.7-8.13 below.

88. Actions of removing, extraordinary removing and ejection in the sheriff court under the ordinary cause procedure should, subject to Recommendation 111 below, be abolished and replaced by one form of proceeding, an action for removing from heritable property.

(Paragraphs 7.5-7.13; clause 15(1))

Extract decree and charge to remove

7.15 The recommendation in the preceding paragraph has a consequential effect on certain provisions of the Sheriff Courts (Scotland) Extracts Act 1892.[1] Section 7(4) makes provision as to the import of the warrant for execution where the decree extracted is one of removing. Form 9 in the Schedule to the Act provides an extract warrant of summary ejection and Form 10 an extract decree of removal. Section 7(4) would require amendment so as to refer to an extract decree for removing from heritable property. Moreover reference is made in that provision to charging the defender, "his sub-tenants" and "dependents". It may be the case that an occupant of the property is not a sub-tenant or a dependent of the tenant but nevertheless has received permission from that tenant to occupy the property. We consider that the existing reference in section 7(4) should be replaced by a modern form of wording which would also cover this type of situation. We suggest that the charge to remove should be addressed to the defender and any other occupant deriving right or having permission from the defender.

Period of charge

7.16 The next point arising in connection with the provisions of the 1892 Act concerns the period of charge to be given prior to execution of the decree. Section 7(4) of and Form 10 in the Schedule to the Act relate to decrees of removing and provide for a charge of 48 hours before diligence. By contrast a charge is not required prior to diligence on an extract of a decree granted in an action of ejection—Form 9, being an extract warrant of summary ejection, makes no provision for a charge. The question arises as to the period of charge if any which should be required prior to diligence on an extract decree granted in the single form of proceedings which would be available under our recommendations in relation to ordinary cause procedure.

7.17 Certain of such actions would be directed against a person who had a title to occupy the property but whose right has been terminated. In such cases it may be felt that although a period of 48 hours is a short one, a charge of this period is a valuable step in bringing the decree to the defender's notice as he may not otherwise be aware of the existence of this decree. Other such actions would however be directed against a person in occupation of property without right or title to do so. In this type of case it may be thought unnecessary or undesirable to give a charge to the defender. This is the current position in relation to actions of ejection. The solution in our view is to require a period of charge of 48 hours while giving the sheriff the power on cause shown to dispense with this period. This would ensure that the period of charge is dispensed with only in appropriate cases.[2]

7.18 The existing Forms 9 and 10 in the Schedule to the 1892 Act would also require to be replaced by a single form, referring to an extract decree for removing from heritable property and to the granting of a warrant for removing the defender and any other occupant from the subjects. The opportunity could also be taken to effect another minor improvement. Form 10 relating to an extract decree of removal seems to envisage that the removal should take place on a term day. This may not be the case. We think that the sheriff should have the power to specify the date and time

1. Referred to in the Report as the "1892 Act".
2. We note that in cases where a charge has not been required ie in summary removing cases, an additional safeguard has been provided by the practice of sheriff officers to notify defenders either personally or by post of the date and time when they propose to execute the decree: see Research Paper, para 8.3 and Maher, *A Textbook of Diligence*, p 134.

of removing. The form of the extract decree should contain the date and time so specified. Finally it will be noted that in the provisions which we recommend as a replacement of section 7(4) of the 1892 Act and Forms 9 and 10 in the Schedule thereto, the opportunity has been taken to suggest the adoption of forms of wording more suitable to the present day.

Effect of the Matrimonial Homes (Family Protection) (Scotland) Act 1981

7.19 One further issue arises out of our recommendation that the charge following an extract decree for removing from heritable property should be directed against the defender and any other occupant deriving the right or having permission from the defender. This concerns the provisions of the Matrimonial Homes (Family Protection)(Scotland) Act 1981.[1] We have in mind the case where a tenancy of a property has been granted to one spouse. Where that property is the matrimonial home under the 1981 Act[2] for the purposes of the Act, in terms of section 1 that spouse is the entitled spouse and the other spouse is the non-entitled spouse. Section 1 of the Act gives the non-entitled spouse, who does not have a title to occupy the property, a statutory right to occupy it. Under section 3(1)(a) the non-entitled spouse may apply to the court for an order declaring his or her occupancy rights in relation to the property. Similarly section 18 of the 1981 Act makes provision regarding the occupancy rights of cohabiting couples. It permits the non-entitled partner to apply to the court for occupancy rights in a house for a period not exceeding 3 months (which period may be extended by the court).

7.20 We are concerned as to the situation where the title of the entitled spouse or partner to occupy a property under a tenancy has been brought to an end, a decree for removing has been granted and the charge has been given. We wonder whether the provisions of the 1981 Act would leave open a gap in the law by providing the non-entitled spouse or partner in such a case with a possible argument that the charge does not apply to them on the basis that they do not derive a right or permission to occupy the property from the defender (ie the entitled spouse or partner). The view may be taken by the non-entitled spouse or partner that their right to occupy the property is derived from an order of the court further to an application under the provisions of the 1981 Act. In our view however it is clear that in such a case, notwithstanding anything in the 1981 Act, for the purposes of the charge the non-entitled spouse or partner should be regarded as deriving right to occupy the property from the defender (ie the entitled spouse or partner).

7.21 Sections 1 and 18 of the 1981 Act apply where one spouse or partner as the case may be is entitled, or permitted by a third party, to occupy a matrimonial home. In so far as the Act gives to a non-entitled spouse or partner an occupancy right in respect of the matrimonial home, these rights are directed primarily against the entitled spouse or partner. In the case of a tenancy the Act therefore does not seek to give to the non-entitled spouse or partner a greater right to occupy the property than that held by the entitled spouse or partner. To conclude we think that this possible gap in the law should be closed by an appropriate provision in any legislation replacing section 7(4) of the 1892 Act.

7.22 We **recommend**:

89. Section 7(4) of the Sheriff Courts (Scotland) Extracts Act 1892 should be amended to provide that the decree extracted is for removing from heritable property, that the charge is to be directed against the defender and any other occupant deriving right or having permission from the defender, that the period of charge should be 48 hours, and that the period of charge may be dispensed with by the sheriff on cause shown.

(Paragraphs 7.15-7.17; clause 15(2))

1. Referred to in the Report as the "1981 Act".
2. "Matrimonial home" is defined in s 22 of the Act.

90. In the Schedule to the 1892 Act, Forms 9 and 10 should be replaced by one single form concerning an extract decree for removing from heritable property, and providing that the removing should be at the date and time specified by the sheriff.

(Paragraph 7.18; clause 15(3))

91. For the purposes of charging the defender and any other occupant as mentioned in Recommendation 89 above, if the defender is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981, then notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner (as also defined in these respective sections) should be regarded as deriving right from the defender.

(Paragraphs 7.19-7.21; clause 15(2))

Part VIII Summary Procedure in the Sheriff Court

8.1 We have already considered the question of terminology in relation to proceedings for possession of heritable property, and recommended that any such proceedings should be referred to as proceedings for removing from heritable property.[1] We now consider various questions raised in the Memorandum concerning the summary cause procedure for recovery of possession of heritable property introduced by section 35(1)(c) of the 1971 Act.

Summary Cause Rule 69

8.2 One preliminary point concerns the rules for the conduct of proceedings in the summary cause.[2] These have made available the results or effects of the processes which according to the circumstances of the case would formerly have been appropriate. Thus in Rule 69 of the Summary Cause Rules it is provided that decree for recovery of possession shall have 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 terms of sections 36, 37 and 38 respectively of the 1907 Act. We understand that the provisions of the 1907 Act referred to in that Rule have been left in force meantime since they contain rules for periods and forms of notice which must be replaced before these provisions can be repealed. Implementation of the recommendations contained in this Report concerning the periods and forms of notice would allow the provisions of the 1907 Act in question to be repealed. Once this has been effected, it may not be necessary to refer to the older forms of process in order to define the effect of a decree for recovery of possession in a summary cause. Consideration might then be given to an appropriate amendment to or repeal of Rule 69.

Period of *induciae*

8.3 In any court proceedings a period of time called the *induciae* is given between the service of the summons and the date on which the action may proceed. This period provides the recipient of the summons with the opportunity to consider whether or not he wishes to defend the action. In a summary cause the period of induciae is 14 days although the sheriff may on cause shown shorten this period subject to the giving of a minimum of 2 days notice.[3] In a case where there is no requirement for notice to quit to be given to the occupier prior to the institution of the proceedings[4], the period of the *induciae* may be the occupier's only period of warning that an action for recovery of possession of the property has been instituted against him. In an action against an occupier in possession of heritable property *vi clam aut precario*[5] and without right or title to possess or occupy however Rule 68A of the Summary Cause

1. See paras 7.1-7.4, including Recommendation 87, above; an amendment to s 35(1)(c) of the 1971 Act would be required to re-name the summary cause procedure: see clause 14(1) and Schedule 4 (repeal) of the draft Bill.
2. These rules are contained in the Act of Sederunt, SI 1976/476 as amended by subsequent Acts of Sederunt; and are referred to in the Report as the "Summary Cause Rules".
3. Rule 4 of the Summary Cause Rules.
4. For example a case where the occupier of property has no right or title to occupy.
5. This means a person in possession by force or stealth, or in precarious possession.

Rules provides the sheriff with a discretion to shorten or dispense with any period of time which would normally require to be observed in the processing of the action. A sheriff may therefore dispense entirely with the period of *induciae* although it may be that in practice the sheriffs do not do this.

8.4 This contrasts with the procedure under the common law action of ejection which proceeds as an ordinary cause under the rules contained in the 1907 Act. These rules enable the *induciae* on service in any case to be reduced to two days.[1] We therefore raised the question in the Memorandum whether there is any class of occupier without right or title in respect of whom the sheriff's power to shorten or dispense with the *induciae* under Rule 68A of the Summary Cause Rules should be limited.[2] There are several classes of occupier who may fall within the scope of the category of occupation without right or title. The category may include for example unauthorised sub-tenants, squatters in residential premises, students or workers engaged in a "sit-in", and those whose rights of occupancy are insufficiently exclusive to constitute a tenancy, such as "licensees".[3]

8.5 Most of our consultees considered that the sheriff's power under Rule 68A in relation to the period of *induciae* should not be limited in respect of any class of occupier without right or title. One consultee pointed out that in such actions the necessity in practice for service by way of the sheriff officer normally prevented unreasonably short *induciae* being used. We likewise favour the retention of the existing provision in Rule 68A on the basis that it is desirable to have available adequate and speedy court procedures to deal with any question relating to the removal of unauthorised occupiers of property.[4] We recognise that there may be cases where although speedy removal of the occupier is appropriate, the possession by that party has not been entirely unauthorised or unwarranted.[5] In such cases we believe that the sheriff would in exercising his discretion take into account the interests of the defender. We therefore do not make any recommendation to limit the sheriff's discretion under Rule 68A of the Summary Cause Rules to shorten or dispense with the *induciae*.

Problems of citation

8.6 In the Memorandum we raised the problems of citation in an action for recovery of possession of heritable property where there is doubt or ignorance as to the identity of any unauthorised occupier. In view of the importance of this issue, we deal with this question in relation to all forms of proceeding for removing from heritable property and not just therefore in relation to the summary cause procedure.[6]

Composite actions

8.7 In an action for removing from heritable property the pursuer may wish to claim an alternative or additional remedy to removing. He may claim payment of a sum of money, by way of damages or arrears of rent. He may seek interdict against

1. First Schedule to the 1907 Act, Rule 7 of the Ordinary Cause Rules.
2. We should mention that the application of Rule 68A to an action does not make it competent to shorten or dispense with the period of appeal which is to stand despite any early issue of an extract decree, although the lodging of a note of appeal will not operate as a sist of diligence unless the sheriff otherwise directs: Rule 81A.
3. On the question of licensees see Paton and Cameron, pp 12-15.
4. In such cases the availability of speedy court procedures may be important in order to persuade parties to use these proceedings rather than taking matters into their own hands: at common law physical ejection without a court order of occupiers without right or title was permissible in certain circumstances—Research Paper, para 7.13.
5. For example an employee occupier on termination of his employment: *Cairns* v *Innes* 1942 SC 164; a bankrupt proprietor: *White* v *Stevenson* 1956 SC 84.
6. See paras 10.21-10.33 below.

resumption of the unauthorised occupation. In an extraordinary removing based on an irritancy the first conclusion in the action may be for declarator of irritancy. It is not competent for certain of such composite actions to proceed as summary causes. Section 35(1)(c) of the 1971 Act provides that actions for the recovery of possession of heritable property should proceed as a summary cause except where there is an alternative or an additional claim for payment of a sum of money exceeding £1,500 (exclusive of interest and expenses). Thus an action cannot proceed as a summary cause where it includes a claim for a sum of money exceeding the limit stated. Such an action presumably must proceed as an ordinary cause. In our view the legislation should specifically provide for this.

8.8 Since the foregoing case is the only exception specifically stated in the 1971 Act, a question arises as to the form of process appropriate for other types of composite action. Actions for declarator or interdict alone cannot proceed as a summary cause. Reference is made in the Memorandum[1] to an unreported case in which an ordinary action for ejection and interdict was held by the sheriff to be incompetent. The judgment was based on the fact that only composite actions involving payment of a sum in excess of the summary cause limits are excluded from the procedures introduced by section 35 of the 1971 Act and therefore the action of ejection remained within the class "which must proceed by way of a summary cause". The sheriff indicated that the proper way for the pursuer to obtain interdict was by way of a separate ordinary action. He referred to the possibility that the two actions could be conjoined if the action for recovery of possession were directed to be treated as an ordinary action under section 37(2) of the 1971 Act. This approach is difficult to reconcile with the practice of dealing with extraordinary removings by way of composite actions under ordinary procedure in the sheriff court.

8.9 The discussion in the preceding paragraph raises a wider question which concerns the scope of the summary cause. The enactment of section 35(1)(c) of the 1971 Act has not resulted in the position recommended by the Law Reform Committee[2] that there should be one form of action for use in all cases where it is desired to recover possession of heritable property from an occupier. Statutory exceptions to the use of the new summary cause can be found in section 29 of the Conveyancing and Feudal Reform (Scotland) Act 1970 concerning actions for possession by the creditor under a standard security, and in section 9 of the Land Tenure Reform (Scotland) Act 1974 concerning the enforcement of the prohibition of long leases of residential property. These statutory provisions prescribe the use of summary application and ordinary procedure respectively. Extraordinary removings involving composite actions may proceed either in the Court of Session or as ordinary actions in the sheriff court.

8.10 Finally it appears to be the case that certain actions may continue to be raised under ordinary procedure in the sheriff court in the form of either an action of removing or an action of ejection. Thus it would seem that an action for recovery of possession should proceed under the ordinary cause in the sheriff court where there is a claim in addition or as an alternative to the decree for recovery, a decree for payment of money in excess of the statutory limit. It may also be competent to proceed under the ordinary cause in a composite action where for example interdict or declarator is sought along with removal. We therefore invited the views of consultees on the present scope of the summary cause for recovery of possession of heritable property.

8.11 One view put to us on consultation was that the scope of the summary cause should be widened to include ancillary matters such as declarators of irritancy, interdict and claims for damages which exceed the summary cause limits. On the other hand general comments were made to us to the effect that the summary cause procedure is not suited to any lengthy disputed case nor to any case involving questions of law. One view was that the summary cause procedures are not well designed to cope with actions against unauthorised occupiers. In an action against an unauthorised occupier, it may be desirable for example to seek not only removal of a person but

1. Para 7.7: *Disblair Estates Ltd* v *Jackson*.
2. Second Report, para 8.

also interdict against that person re-entering and occupying the property again. For these reasons the view was taken that it should be competent for any composite action involving recovery of possession of heritable property to be raised as an ordinary action.

8.12 After careful consideration of the various points put to us we took the view that we should not recommend any extension of the present scope of the summary cause procedure. We felt that any current procedural problems experienced in relation to summary cause actions for recovery of possession of heritable property will apply equally to the other forms of civil proceedings referred to in section 35 of the 1971 Act. The resolution of these problems as a whole lies outwith our present remit. We accept however the desirability of expressly providing that, notwithstanding section 35(1)(c) of the 1971 Act, it should be competent for a composite action to proceed as an ordinary cause where there is claimed as an alternative to or in addition to a decree for removing from heritable property either a decree other than a decree for payment of money (disregarding for this purpose any claim for a decree for expenses) or a decree for payment of money exceeding £1,500 (exclusive of interest and expenses).[1]

8.13 We **recommend**:

92. It should be provided that, notwithstanding section 35(1)(c) of the Sheriff Courts (Scotland) Act 1971, it shall be competent for an action for removing from heritable property to proceed as an ordinary cause in the sheriff court where in addition or as an alternative to a decree for removing there is claimed either a decree other than a decree for payment of money (disregarding for this purpose any claim for a decree for expenses) or a decree for payment of money exceeding £1,500 (exclusive of interest and expenses).

(Paragraphs 8.7-8.12; clause 14(2), new s 35(1B) of the 1971 Act)

Appeals

8.14 We also raised in the Memorandum the question of appeals in summary causes. Section 38 of the 1971 Act provides that in summary causes there is a right of appeal on any point of law from the final judgment only. There are no other provisions concerning appeals and therefore there is no right of appeal against the sheriff's decision on the facts in dispute nor against interlocutory judgments such as a decision on the need to find caution or on the amount of caution required. This position means that there is a certain reduction or restriction of the facilities for appeal in actions for recovery of possession of heritable property which could formerly have proceeded as ordinary causes.[2] The restriction of the scope of the appeal to points of law is inevitable due to the fact that in a summary cause the evidence is not recorded verbatim[3] and so the appeal must be by way of stated case.[4]

8.15 We appreciate that the restriction of the right of appeal is in line with the general simplification of procedures associated with the summary cause. Furthermore the consultees who commented on this issue appear to be content with the existing provision regarding the summary cause procedure. Accordingly we do not make any recommendations on this point.

1. A consequence of the introduction into the 1971 Act of a new provision referring to a specific monetary limit in relation to the summary cause is that an insertion into s 41(2) of the Act referring to that new provision would be required, to allow variation of that sum by Order in Council under s 41(1): see clause 14(3) of the draft Bill for the recommended consequential amendment.
2. Section 27 of the 1907 Act provides for an appeal against the final judgment and with leave against an interlocutory judgment, to the sheriff principal from a decision of the sheriff. It is generally considered that appeal to the Court of Session is competent in removings and ejections against final judgments and with leave generally against interlocutory judgments (Paton and Cameron, p 287).
3. Section 36(3) of the 1971 Act.
4. Rules 81-85.

Issue of extract decree

8.16 An extract of a decree must be issued before that decree can be enforced. Rule 89 of the Summary Cause Rules provides that at least 14 days must elapse between the date of granting decree and the issue of an extract of the decree. There is no power to shorten this period except in the case of actions against occupiers without right or title.[1] This rule is more restrictive than that which applied generally prior to the introduction of the summary cause procedure for recovery of possession and which applies still to ordinary cause actions.[2] For these reasons we suggested in the Memorandum that a provision should be made along the lines of Rule 90 of the Ordinary Cause Rules giving the sheriff in a summary cause action for recovery of possession of heritable property a discretion on cause shown to shorten the period which must elapse before an extract of the decree can be issued. Consultees were in favour of this suggestion. The Summary Cause Rules would require amendment in order to implement our recommendation in this respect. This would be achieved by subordinate legislation. The power to make the necessary instrument is contained in section 32 of the 1971 Act.

8.17 We **recommend**:

93. Where a decree in a summary cause action for recovery of possession of heritable property has been granted, the sheriff should have a discretion along the lines of that contained in Rule 90 of the Ordinary Cause Rules to shorten the period which must elapse before an extract of the decree may be issued.
(Paragraph 8.16; to be implemented by subordinate legislation)

8.18 The schedule to the Summary Cause Rules provides a form (Form U3) of extract decree in an action for recovery of possession of heritable property. This form does not mention a charge being given prior to diligence. Rule 91 of the Summary Cause Rules however provides that a charge on a decree granted in a summary cause is to be for a period of 14 days. The view could therefore be taken that a charge of a period of 14 days is to be given on a decree granted in the summary cause action for recovery of possession of heritable property. As already noted under Rule 68A the sheriff has the power to shorten or dispense with this period in the case of an action against an occupier without right or title.

8.19 A different view on this point could however be taken.[3] As originally framed Form U3 provided for a charge of 14 days to be given prior to diligence, which was in conformity with the terms of Rule 91. Reference to the period of charge has now been deleted from this form of extract decree (and from certain other forms in the same schedule).[4] The amendment made to these forms apparently proceeded on the view that reference to a charge for 14 days in the forms did not apply to cases in which a charge was not a necessary step preliminary to diligence on the particular extract decree. In the case of removings, it was considered that since the extract was in the form of a warrant to eject, a charge would not be required and accordingly Rule 91 would not apply. As has been pointed out however if it were intended to make an amendment rendering a charge unnecessary in all such cases proceeding as summary causes, it might be reasonable to expect to find this reflected in the terms of the Rules rather than being left dependent on the wording of a Form in the schedule.[5]

1. In a case against an occupier *vi clam aut precario* and without right or title to occupy, Rule 68A enables the sheriff in his discretion to shorten or dispense with any period of time provided for anywhere in the Summary Cause Rules.
2. In the Ordinary Cause Rules contained in the First Schedule to the 1907 Act (as substituted by SI 1983 No 747), under Rule 25 extract of a decree in absence may be issued on expiry of seven days from its date, while under Rule 90 a decree in a defended cause can be extracted on the expiry of 14 days; in each case the sheriff however has a discretion on cause shown to shorten the period referred to: in a defended cause this is subject to the proviso (Rule 90(3)) that the motion in this respect is made either in the presence of parties or the sheriff is satisfied that proper intimation of the terms of the motion has been made in writing to all other parties.
3. Research Paper, para 8.2.
4. By Act of Sederunt of 26 January 1978 (SI 112).
5. Research Paper, para 8.2.

8.20 By way of contrast we note that section 7(4) of the 1892 Act and Form 10 in the Schedule to the Act relate to decrees of removing and provide for a charge of 48 hours before diligence. However diligence on an extract of a decree granted in an action of ejection has required no charge. Form 9 in the Schedule to the 1892 Act is an extract warrant of summary ejection and makes no provision for a charge. The 1892 Act however did not affect summary removings as subsequently provided for in section 38 of the 1907 Act.[1] It appears from Form L in the First Schedule to the 1907 Act that diligence without charge was permitted in these summary removings. It also seems that a warrant for a summary ejection granted in terms of section 37 of the 1907 Act could be executed without a charge.[2]

8.21 Whatever the position may be with regard to a period of charge on a decree granted in the summary cause, there may well occur cases of occupation by those without right or title in which immediate enforcement of a decree for recovery of possession would be reasonable. The existing provision in Rule 68A permitting the sheriff to shorten or dispense with any period of charge there may be would be sufficient to meet such a case. Regarding other summary cause actions for recovery of possession of heritage we consider that the position regarding a period of charge should be clarified. We recommend[3] in relation to decrees for removing from heritable property in both the sheriff court under ordinary cause procedure and in the Court of Session that a period of charge of 48 hours should be given, with the court being empowered to dispense with this period on cause shown.[4] It seems reasonable to recommend that similar provision be made in the Summary Cause Rules. This recommendation would require to be implemented by subordinate legislation.

8.22 We **recommend**:

94. It should be provided in the Summary Cause Rules that prior to diligence on a decree for removing from heritable property granted in a summary cause action in the sheriff court, a charge of 48 hours should be given, but that the court should have a discretion to dispense with this period on cause shown.
(Paragraphs 8.18-8.21; to be implemented by subordinate legislation)

Summary application under the 1970 Act

8.23 While our exercise on removing from heritable property was in its final stages we noted the reports[5] in recent sheriff court cases which dealt with a point concerning a possessory action in respect of heritable property. The issue in these cases was whether it was competent to include a crave for removing or ejection in an application to exercise the remedies of a creditor under the Conveyancing and Feudal Reform (Scotland) Act 1970[6] where the debtor under the standard security is in default. This issue obviously falls within the scope of our remit. Although we do not have the benefit of consultees' views on this issue, we decided to make an appropriate recommendation to resolve the difficulty identified in these cases.

8.24 Section 24(1) of the 1970 Act entitles a creditor in a standard security, where the debtor is in default, to apply to the court for a warrant to exercise any of the remedies which he is entitled to exercise on a default. In terms of section 29(2) of the Act any such application should be made by way of a summary application.

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1. See s 2 of the 1892 Act.
2. See *Reid* v *Anderson* (1920) 36 Sh Ct Rep 11, Opinion of Sheriff Principal.
3. See Recommendation 89 (para 7.22) above and Recommendation 99(d) (para 9.12) below.
4. We have already noted also in para 7.17 (footnote 2) above that there is an additional safeguard in summary removing cases, being cases where a charge is not being required, since it has been the practice of the sheriff officers to notify defenders either personally or by post of the date and time when they propose to execute the decree.
5. *Mountstar Metal Corporation Ltd* v *Cameron* 1987 SLT (Sh Ct) 106, *Bradford & Bingley Building Society* v *Roddy* 1987 SLT (Sh Ct) 109, *Bradford & Bingley Building Society* v *Walker* 1988 SLT (Sh Ct) 33; see also *Cedar Holdings Ltd* v *Iyyaz* 1989 GWD 1-34 and *Clydesdale Bank plc* v *Findlay* 1989 GWD 2-83; see also the article entitled "Creditors' Remedies under a Standard Security", 1989 SLT 201.
6. Referred to in the Report as the "1970 Act".

8.25 The decisions in certain of the sheriff court cases referred to held that removing or ejection is not one of the remedies competent to a creditor under the 1970 Act, and accordingly removing or ejection could not competently be sought in a summary application under section 29(2) of the Act. In practice this seems to mean that a warrant for ejection can only be obtained by a separate action from the summary application for warrant to enter into possession, namely by way of an ordinary action in the sheriff court.

8.26 In *Bradford and Bingley Building Society* v *Roddy* the sheriff discussed[1] the meanings of the term "ejection". He concluded that in a summary application for warrant to enter into possession, a crave for ejection would be purely accessory to the first part of the crave and so could properly be treated as part of one of the remedies provided by the 1970 Act. On this basis it would be competent to include a crave for ejection in a summary application along with a crave for warrant to enter into possession of the security subjects. In spite of this reasoning the sheriff came to the decision referred to in the preceding paragraph. A decision on this point had already been taken by the sheriff principal of the same sheriffdom in *Mountstar Metal Corporation Ltd* v *Cameron*. The sheriff made clear his view that any relevant decision of his sheriff principal should be followed.[2] The sheriff in *Bradford & Bingley Building Society* v *Walker* also felt bound to follow the decision of his sheriff principal.[3]

8.27 We are in agreement with the view[4] expressed by one sheriff that it would be unfortunate if legislation intended to rationalise the law of heritable securities were to require the clumsy and expensive procedure of two separate processes (ie an ordinary action so as to obtain a warrant for ejection and a summary application for warrant to enter into possession under the Act) in order to bring about a practical result in a common situation. However the current provisions of the 1970 Act may be interpreted, the difficulty exposed in these sheriff court decisions could easily be cured by an insertion into the 1970 Act specifically providing the creditor with the remedy of removing the debtor from the security subjects where the debtor is in default under a standard security. This would require an amendment to paragraph 10 of Schedule 3 to the 1970 Act, which provision deals with the remedies of a creditor where the debtor is in default.

8.28 There are cases where the debtor under the standard security is not the proprietor of the security subjects.[5] Accordingly the remedy of removing should apply against the debtor or the proprietor of the security subjects. It should also apply to any other occupant deriving right or having permission from the debtor or the proprietor.[6] Lastly in paragraphs 7.19-7.21 above we discussed a point arising in relation to any occupant deriving right or having permission from the defender. This point arose from the provisions of the Matrimonial Homes (Family Protection)(Scotland) Act 1981 and may arise in relation to the remedy of removing under the 1970 Act sought by a creditor under a standard security where the debtor is in default. In order that the non-entitled spouse or non-entitled partner be regarded as deriving right from the debtor or the proprietor, Recommendation 91 in paragraph 7.22 above should be applied to the context of removing under the 1970 Act where the debtor is in default.

8.29 We **recommend**:

95. Where a debtor is in default under a standard security, the creditor should be specifically entitled under the Conveyancing and Feudal Reform (Scotland) Act 1970 to obtain the remedy of removing from the security subjects the debtor, the proprietor or any other occupant deriving right or having permission from

1. At pp 111E-112A.
2. At p 113C.
3. See p 36C, and the comments at p 34F-G on the practice in Dumbarton Sheriff Court to treat a crave for ejection as a normal and necessary application under Part II of the 1970 Act.
4. Expressed by the sheriff in *Bradford and Bingley Building Society* v *Roddy*, cited above, at p 111D.
5. The 1970 Act envisages such cases: see eg Schedule 3, paras 9 and 10 and the interpretation provisions.
6. This mirrors the provision recommended in relation to ordinary cause procedure in the sheriff court and procedure in the Court of Session, in Recommendations 89 (para 7.22) above and 99(c) (para 9.12) below respectively.

the debtor or the proprietor; and where the debtor or the proprietor is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, then, notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner as so defined should be regarded as deriving right from the debtor or the proprietor.

(Paragraphs 8.23-8.28; Schedule 3, para 12 (insertions into paragraph 10 of Schedule 3 to the 1970 Act))

Part IX Proceedings in the Court of Session

Actions for removing

9.1 The rule of law appears to be that actions for removing from heritable property[1] are excluded from the original jurisdiction of the Court of Session.[2] The authority stated for this proposition in Maclaren's textbook is sections 34-38 of the 1907 Act and the relevant Rules. Given that these provisions would be repealed as a result of implementation of our recommendations in the Report, we gave some consideration to the question of the Court of Session jurisdiction in relation to removings. The statutory provisions mentioned do not in fact make any explicit statement excluding jurisdiction by the Court of Session. The rule in question may therefore be founded on long-established practice and on the obsolescence of statutes which provided for the granting of a decree of removing in the Court of Session. A 1555 Act[3] for example concerned an action in the Court of Session or sheriff court to obtain a decree of removing, followed by an application to the sheriff to eject. This statute was regarded as long obsolete prior to its repeal in 1964.[4]

9.2 On the other hand the Court of Session does have jurisdiction in relation to composite actions where removing is sought as ancillary to another conclusion. It is therefore competent to raise proceedings in the Court of Session for declarator and removing or interdict and removing. Extraordinary removings are also dealt with in the Court of Session in the same way. An extraordinary removing is sought along with the principal conclusion for declarator of irritancy.[5] It would seem to be the case therefore that the restriction on the Court of Session's jurisdiction in relation to removings can be circumvented by the institution of proceedings in that Court seeking another conclusion as well as removing.

9.3 Finally we should say that there may be various reasons why an intending pursuer would wish to institute proceedings which include a conclusion for removing in the Court of Session. It may be considered that the highest court is the appropriate forum in which to deal with cases which involve a matter of principle or which have a high public or political profile, as would be the case for example in an industrial dispute where property is occupied as a result of a sit-in.

9.4 We recognise that these questions were not raised in the Memorandum and that as a result we have not had the benefit of the views of consultees on this. Having examined the issues however we feel that we should at least offer our views in the form of recommendations in the Report. We do already deal with a wide range of matters relating to removing from heritable property. After careful consideration we concluded that there did not seem to be any justification for excluding from the Court of Session's jurisdiction actions for removing from heritable property. There may be practical reasons for the institution of such an action in the Court of Session. As already pointed out a pursuer may at present be able to circumvent the restriction

1. We draw attention to our recommendation concerning the terminology which should be applied to all proceedings for removing from heritable property: Recommendation 87 (para 7.4) above.
2. Maclaren, *Court of Session Practice*, p 153.
3. c.39.
4. See Paton and Cameron, p 261; the repeal was effected by the Statute Law Revision (Scotland) Act 1964, Sch 1.
5. Paton and Cameron, p 262; it will be noted however that section 5(4) of the 1907 Act confirms the jurisdiction of the sheriff court concurrently with the Court of Session in relation to extraordinary removings.

on the Court's jurisdiction should he wish to do so. We therefore think that this restriction should be removed.

9.5 We **recommend**:

96. It should be competent to institute an action for removing from heritable property in the Court of Session notwithstanding that the action does not contain any other conclusion.

(Paragraphs 9.1-9.4; clause 16(1))

One form of conclusion

9.6 We mentioned already that it is competent to conclude for an extraordinary removing in the Court of Session in a composite action. In relation to actions under the ordinary cause in the sheriff court we recommend[1] that the various forms of proceeding competent at present should be replaced by one form of proceeding, namely an action for removing from heritable property. We recommend a similar rationalisation regarding the conclusions which may be sought in proceedings for removing in the Court of Session. It should be provided that the conclusion in any such action should be for removing from heritable property.

9.7 We **recommend**:

97. It should no longer be competent to conclude in an action in the Court of Session for an extraordinary removing and any action which would have contained such a conclusion should instead conclude for removing from heritable property.

(Paragraph 9.6; clause 16(5))

Letters of ejection

9.8 Where a decree for removing is granted in the Court of Session in a composite action the decree does not in itself form a warrant for diligence.[2] Where subsequent to the decree the defender refuses to remove from the property, the pursuer is required to execute and register a charge and then obtain letters of ejection directing the sheriff of the appropriate District to eject the occupier. In the Memorandum[3] we stated that although the procedure is apparently rarely used, it is unduly cumbersome. Consultees agreed with our suggestion that the requirement to obtain letters of ejection should be abolished.

9.9 We **recommend**:

98. Procedure by way of letters of ejection should be abolished.

(Paragraph 9.8; clause 16(4))

Extract decree and warrant

9.10 If the procedure by way of letters of ejection is abolished, provision would have to be made requiring every extract of a decree granted by the Court of Session for removing from heritable property to contain a warrant. We suggest that the form of this warrant should be prescribed by Act of Sederunt. It would have to be provided further in any legislation that it shall be lawful by virtue of the warrant to carry out a charge and any necessary diligence. We have already discussed what may be lawful by virtue of a warrant in an extract of a decree for removing from heritable property where the decree is granted by the sheriff under ordinary cause procedure.[4] We think that similar provision should be made in respect of a warrant contained in an extract

1. Recommendation 88 (para 7.14) above.
2. *Encyclopaedia of the Law of Scotland*, (1st Edn), Vol 6, para 266.
3. Para 8.1.
4. Paras 7.15-7.18, 7.22 above.

decree for removing from heritable property granted by the Court of Session. We suggest that the wording of any legislative provision in this connection should be consistent with that suggested in relation to the implementation of Recommendation 89 in paragraph 7.22 above in the case of a decree by the sheriff under ordinary cause procedure.[1]

9.11 In other words the charge should be directed against the defender and any other occupant deriving right or having permission from the defender; the period of the charge should be 48 hours; and the Court should have the power on cause shown to dispense with the period of charge. Lastly in paragraphs 7.19-7.21 above we discussed a point arising in relation to charging any occupant deriving right or having permission from the defender. This point arose from the provisions of the Matrimonial Homes (Family Protection) (Scotland) Act 1981. This same point may arise in relation to a charge given further to a decree for removing by the Court of Session. Accordingly Recommendation 91 in paragraph 7.22 above should be applied also to any charge given further to a decree for removing granted by the Court of Session, in order that the non-entitled spouse or non-entitled partner should be regarded as deriving right from the defender.

9.12 We **recommend**:

99.(a) It should be provided that every extract of a decree granted by the Court of Session for removing from heritable property should contain a warrant, and the form of the warrant should be prescribed by act of sederunt;

(b) it should be provided that it shall be lawful by virtue of the warrant to execute the necessary charge and carry out any necessary diligence; and in this connection the terms of any legislative provision should be consistent with those of any provision implementing Recommendation 89 above;

(c) the charge should be directed against the defender and any other occupant deriving right or having permission from the defender;

(d) the period of the charge should be 48 hours and the Court of Session should have the power on cause shown to dispense with the period of charge;

(e) for the purposes of paragraph (c) above, if the defender is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, then notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner should be regarded as deriving right from the defender.

(Paragraphs 9.10-9.11; clause 16(2), (3))

1. Clause 15(2) of the draft Bill implements Recommendation 89 above by amending and improving upon the existing provision made in section 7(4) of the 1892 Act.

Part X Court Proceedings: General Issues

Introduction

10.1 In this Part we consider certain important matters which relate to proceedings in court for removing from heritable property, whether raised in the sheriff court or in the Court of Session. The matters dealt with are the law of violent profits, proceedings against persons in illegal occupation of property who cannot be identified by the pursuer and the acceleration of procedures in an action for removing persons in possession of heritable property *vi clam aut precario*[1] and without right or title to possess or occupy that property.

Violent profits

10.2 In their Second Report the Law Reform Committee recommended[2] that in all actions for recovery of possession of heritable property it should be competent for the sheriff in his discretion to order the defender to find caution for violent profits.[3] "Violent profits" are described by the Committee as "the aggregate of the amount of any damage done by the defender to the subjects and the profit which the pursuer could have made out of the property during the period of unauthorised possession".[4]

Action for removing

10.3 The present position is that in any defended action for removing, the sheriff has the discretion to order the defender to find caution for violent profits.[5] It appears to be the practice that the exercise of the discretion will normally be determined by the nature of the defence submitted to the action.[6] Accordingly such an order will not be made if it appears that the defender has an instantly verifiable defence to the action. What constitutes such a defence must depend on the circumstances of a particular case. Apart from the nature of the defence, where there is some element in the landlord's case which requires proof, an order for caution will not be made. If the action for removing is not defended the sheriff does not have the power to order caution.[7]

Action of ejection

10.4 Regarding a defended action for ejection it appears that there is doubt as to whether the sheriff can competently make an order requiring the finding of caution for violent profits. On the one hand there are observations by the Court of Session in one case[8] that it is not competent to order caution in such actions. On the other hand, since that decision there have been instances of ejection in the sheriff court in which caution for violent profits has been ordered.[9]

1. As already pointed out, this means a person in possession by force or stealth, or in precarious possession.
2. In the Appendix at para 7.
3. The law at one time required the defender, in all actions for removing or ejection, to find caution for violent profits when giving defences, unless he could instantly verify a defence excluding the action. We note the view in McGlashan, *Sheriff Court Practice*, (4th ed), p 439, that "it is difficult to enforce the provision in cases of ejection without prior warning, and often may lead to great oppression".
4. But see para 10.9 below concerning the penal element of violent profits.
5. Rule 103(3) of the Ordinary Cause Rules.
6. *Milne* v *Darroch* (1937) 53 Sh Ct Rep 3.
7. *Blythswood Friendly Society* v *O'Leary* 1966 SLT (Sh Ct) 64.
8. *Inglis' Trs* v *Macpherson* 1910 SC 46.
9. *Glasgow Lock Hospital* v *Ashcroft* 1949 SLT (Sh Ct) 58 and *Fife County Council* v *Hatten* 1950 SLT (Sh Ct) 13; but in the latest reported case the order was refused as incompetent: *MacKays* v *James Deas & Son Ltd* 1977 SLT (Sh Ct) 10.

Extraordinary removing

10.5 Finally it appears to be the case that there have been doubts also as to whether an order of caution for violent profits is competent in extraordinary removings. There is authority which suggests that defenders in such cases were not required to find caution unless it was so stipulated as a term of the tenancy.[1] Furthermore in such cases a motion for caution might be met with the argument that there are certain facts which a pursuer, such as a landlord seeking an irritancy of the lease, will have to prove before decree in his favour can be granted. Until such proof the defender will not be in the position of an intruder liable for violent profits. It appears however that an order for caution is competent where the landlord's averments have set forth a prima facie case for removal so that the tenant is obliged to prove certain facts for the purpose of his defence.[2]

Agricultural tenancies

10.6 We should mention the position regarding caution in extraordinary removings affecting agricultural tenancies. Section 5 of Chapter XV of the Codifying Act of Sederunt of 4 June 1913[3] provides that a tenant under an agricultural tenancy who is one year in arrears with his rent or who has deserted or abandoned his farm leaving it uncultivated may have raised against him by his landlord an action in which he can be ordained to find caution within a certain time for the arrears and for the payment of rent for 5 crops following, or during the outstanding currency of the lease, if less. Failure to implement this order will result in decree for removal.

10.7 This provision has been partially superseded by section 19 of the 1949 Act which applies in cases where the ground of the action is arrears of rent. Section 19 of the 1949 Act entitles the landlord whose tenant is six months in arrears with his rent to raise an action for removal in the sheriff court, in which the sheriff may, unless the arrears of rent are paid or satisfactory caution is found for them and for one year's further rent, order the tenant's removal. Section 19(3) also provides that the provision in the Codifying Act of Sederunt shall not apply in any case where the procedure under section 19 of the 1949 Act is competent. Section 5 of the Codifying Act of Sederunt therefore in theory remains available only in the rare case of the tenant's desertion or abandonment of the farm. It is stated by one authority that even in that case the remedy of caution and removing provided for is in practice superseded.[4] Accordingly that provision should be repealed, if only to avoid confusion in cases where the question of caution arises in relation to an agricultural tenancy.[5]

Consultation: power to order caution

10.8 Given the confused and uncertain state of the law relating to caution for violent profits, we came to the view that a clear rule should be introduced in relation to all actions for removing from heritable property. We initially put forward the proposition[6] that the sheriff should have a discretion to order the finding of caution for violent profits in all such actions.[7] Consultees were in agreement with this proposition.

Assessment of violent profits

10.9 Following consultation we had the opportunity to consider certain wider questions relating to the law of violent profits. We note that violent profits are in fact penal damages which are intended to act as a deterrent against unwarrantable taking or keeping of possession of heritable property.[8] Thus by custom the rule applicable to subjects situated in burghs is that violent profits are estimated at double the rent; and in the case of other subjects they are assessed at the greatest profit that the landlord could have made either by possessing them himself or by letting them to others, as well as compensation for all the damage which they may have suffered at the hands of the wrongful possessor.[9] It seems to us that a particular rule which imposes damages at a penal rate is an exception to the general law of Scotland that

1. *Douglas* v *Idington* (1628) Mor 13892, *Rae* v *Henderson* (1837) 15 S 653.
2. *Cossar* v *Home* (1847) 9 D 617 and *Burton* v *Mechie* (1903) 21 Sh Ct Rep 63.
3. SR & O 1913 No 638; this provision was originally section 5 of the Act of Sederunt of 1756.
4. Rankine, p 536; and see the Research Paper, para 6.7.
5. See the Research Paper, paras 6.7 and 6.14; and paras 11.24 and 11.26 (Recommendation 113) below.
6. The Memorandum, para 7.10.
7. This would confirm that an order for caution for violent profits would be available under the procedures for recovery of possession of heritable property other than the ordinary cause procedure. There may for example be doubt as to the position at present regarding the making of an order for caution for violent profits in a summary cause action: see the Research Paper, paras 6.9-6.10.
8. Rankine, p 581; Paton and Cameron, p 280.
9. Rankine, p 585; Paton and Cameron, p 280.

penal damages are not awarded. The grand rule remains that the amount of any award should restore the pursuer to the position he would have been in if the wrong which caused him loss had not been committed by the defender.[1] We consider that the current rules of assessing the amount of violent profits are unacceptable in the present day.

10.10 Furthermore, on consultation it was suggested that a legislative provision should be adopted which avoided the use of the term "violent profits". On reflection we also came to the view that it would be preferable to use a modern form of wording rather than perpetuate the use of antiquated legal terminology by continuing to refer to "violent profits". If the penal element of violent profits and the term "violent profits" itself were removed, the law remaining on this matter would essentially relate to a financial claim based on the common law ie a claim for damages by an owner or landlord kept out of possession of heritable property, for loss resulting from the occupant's failure to remove and wrongful retention of possession.

Abolition of violent profits

10.11 It therefore occurred to us that the best approach to reform would appear to be in fact to recommend the complete abolition of the rules of law and procedure relating to violent profits, and to recommend in its place the introduction of the procedure agreed to by consultees in relation to any financial claim which the pursuer may have against the defender. In other words this would mean giving the court in any action for removing a person from heritable property a specific discretion to order the defender to find caution for any financial claim which the pursuer may have arising from any wrongful occupation of the property by the defender.

Any occupation by defender

10.12 While the law of violent profits relates to unlawful possession of property, in any action for removing a person from heritable property the pursuer may also have a financial claim arising from any lawful occupation of the property by the defender. Where for example an action for removing is raised against the tenant who remains in possession of the property beyond the termination of the lease, the pursuer may have a claim for any arrears of rent due by the defender. As a matter of policy it would seem reasonable to allow the court a discretion to order the finding of caution for claims such as arrears of rent arising from lawful occupation of the property, as well as in respect of any claim arising from unlawful occupation.

10.13 In certain cases at least it would appear that the courts have a general discretion to ordain the defender in an action for removing to find caution for arrears of rent.[2] Furthermore there is already a requirement in statute to find caution for arrears of rent in a certain action of removing. In an action under section 19 of the 1949 Act for removing the tenant from an agricultural holding for non-payment of rent, there is a requirement to pay the arrears of rent due or find caution for them to the satisfaction of the sheriff, and for one year's rent further, failing which the sheriff may decern the tenant to remove.

10.14 There is therefore precedent for enabling the courts in their discretion to ordain the defender in an action for removing to find caution for claims arising out of any lawful occupation of the property by the defender. It would in our view be preferable to introduce a provision giving the courts a specific discretion to order the finding of caution for such claims, rather than relying on the courts to exercise any general discretion they may have in this area. We therefore favour giving the court in any action for removing a person from heritable property a specific discretion which is wider than that discussed in paragraph 10.11 above as a replacement for the existing discretion to order caution for violent profits. We recommend giving the court a specific discretion to order the defender to find caution for any financial claim which the pursuer may have arising from any occupation of the property by the defender, whether lawful or unlawful.

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1. D M Walker, *Delict* (2nd edn), p 461.
2. See the styles of writ of removing from a furnished house in Dobie, *Sheriff Court Styles*, pp 420-422 and W J Lewis, *Sheriff Court Practice* (8th edn), pp 522-523.

Stage at which order may be made

10.15 We raised certain procedural points in the Memorandum. One point concerned the stage in any proceedings at which an order for the finding of caution for violent profits may be made. Under Rule 103 of the Ordinary Cause Rules in Schedule 1 of the 1907 Act the order for caution became a matter for the discretion of the court. A view is held however that the matter of caution for violent profits could only be raised and dealt with at a very early stage in a removing process.[1] There are on the other hand decisions showing that the matter will be considered as late as the closing of the record[2] and probably even at the stage of appeal.[3] It will however normally be in the pursuer's interest to raise the matter at the earliest possible stage in the proceedings. On this point consultees were in agreement with our suggestion that it should be open to the court to make an order for the finding of caution for violent profits at any stage in the proceedings.

Requirement to show cause

10.16 Although the court may at present in certain cases have a discretion to order the finding of caution for violent profits, we are concerned about giving the court a specific unfettered discretion in actions for removing to order the defender to find caution for any financial claim the pursuer might have arising from the defender's unlawful occupation. In some cases such exercise of the court's discretion might occur in a perfunctory manner without regard to all the relevant circumstances, for example by requiring a person who has reasonable grounds for defending an action to find caution. It seems to us that this might place an unreasonable burden on the defender and thus deter or hinder him in the pursuit of a valid defence. In our view this would not be in the public interest. We accordingly favour placing a restriction on the recommended entitlement to order the finding of such caution. In our view it should be provided that this entitlement shall only be exercised on cause shown to the court.

Recommendations

10.17 We **recommend**:

100. The rules of law and procedure relating to violent profits should be abolished.
(Paragraphs 10.1-10.11; clause 20(1))

101. In any action for removing a person from heritable property, the court, on cause shown, should be entitled to order the defender to find caution for any financial claim which the pursuer may have arising from any occupation of the property (whether lawful or unlawful) by the defender.
(Paragraphs 10.12-10.16; clause 20(2))

Repeals

10.18 We note that if Recommendations 100 and 101 above are implemented, certain legislative provisions would be superseded and should therefore be repealed. These are Rule 103 of the Ordinary Cause Rules (which gives the sheriff the discretion to order the defender to find caution for violent profits in any defended action of removing) and the Ejection Caution Act 1594.[4]

Implementation of order

10.19 Another incidental point concerning violent profits raised in the Memorandum concerned the means by which an order for caution may be implemented by a defender. In one case[5] certain *obiter* remarks were attributed to the sheriff principal to the effect that where an order for caution is pronounced it should normally take the form of a bond of caution since it would be oppressive and might result in serious injustice to require consignation. In another case[6] of an extraordinary removing where consignation for violent profits and arrears of rent had been ordered by the sheriff, the sheriff principal revoked the order *quoad* the violent profits element but did not make any adverse comment on the consignation procedure. It may be that on this matter the courts have regarded themselves as entitled in the exercise of a discretionary jurisdiction to order consignation as an alternative to or a substitute

1. See Paton and Cameron, p 281, stating that the motion for caution should be made as soon as appearance is entered.
2. *Milne* v *Darroch* (1937) 53 Sh Ct Rep 3; *Thomson's Trs* v *Harrison* (1958) 74 Sh Ct Rep 77.
3. *King* v *Wieland* (1858) 20D 960.
4. The 1594 Act was referred to in *Middleton* v *Booth* 1986 SLT 450; regarding the proposed repeals, see paras 11.24-11.26 (Recommendation 113) below.
5. *MacKays* v *James Deas and Son Ltd* 1977 SLT (Sh Ct) 10.
6. *Simpson* v *Goswami* 1976 SLT (Sh Ct) 94.

for the provision of caution. We took the view that it may be useful to enact an express provision dealing with this point, and raised this question on consultation. Consultees generally agreed that in response to an order to find caution for violent profits a defender should have the option to provide a bond of caution or other guarantee or to consign an appropriate sum in court as caution. This proposition should be applied to an order under Recommendation 101 above to find caution for a financial claim.

10.20 We accordingly **recommend**:

102. Where an order for caution has been made under Recommendation 101 above, the defender should have the option of providing caution either by means of a bond of caution or other guarantee or by consigning an appropriate sum in court as caution.

(Paragraph 10.19; clause 20(3))

Proceedings against unidentified persons

10.21 We now deal with a procedural difficulty which may arise when an action for removing from heritable property is directed against persons such as squatters or trespassers, who are unlawfully occupying the property. The person who is entitled to occupy the property (who may be the proprietor of the subjects, the landlord or the tenant) may not be aware of, or able to ascertain, the identity of some or all of the unauthorised occupiers. In raising an action the intending pursuer may not therefore be able to cite as defenders any or certain of the occupants against whom the action is to be directed.

10.22 Situations involving unidentified occupants are most likely to arise where property is occupied by a group of people in the context of some form of dispute or protest, as in a sit-in or occupation of university premises by a number of students, or an occupation of industrial or office premises by employees. Furthermore, any problem of identification may be compounded by fluctuation in the composition of the group in actual occupation of the premises, as in a continuous occupation achieved by using separate teams of people to occupy on a rota system. While there is statutory provision allowing for citation by public advertisement when the address of a defender is unknown,[1] no provision exists to cater for the situation where any defender's identity is unknown.

Consultation

10.23 A number of possible solutions to this problem were mentioned in the Memorandum.[2] One suggestion involves the pursuer calling at the property in question accompanied by an officer of court who would be authorised to demand details of the name and address of each individual occupier, thus enabling a summons to be completed. It was pointed out that this solution would in practice be time-consuming and expensive to operate, and might well run into serious difficulties of enforcement. Other suggestions are variants on a scheme permitting publication or other advertisement of the summons craving warrant to eject all unauthorised occupiers. Those answering the summons would be entitled to defend the action. On consultation we invited comments on this scheme. Most of our consultees did not favour this solution on the basis that this too would be a costly and time-consuming procedure which would not necessarily ensure that the occupiers of the property received adequate notice of the proceedings.

10.24 It seems to be generally agreed however that some procedure should be introduced which would assist an intending pursuer to overcome the hurdle represented by unidentified occupiers, and give that pursuer a warrant to have all occupiers other than the pursuer or persons there with his authority removed from the subjects. Any arrangement would however have to be reasonably fair to the occupants of the property by requiring all possible steps to be taken which would ensure that they

1. See for example the Summary Cause Rules, Rule 8.
2. See para 7.5.

became aware of the proceedings being raised against them and had the opportunity of defending the proceedings. From the pursuer's point of view he should have the same right to bring an action for removing any persons in occupation of the property who cannot be identified by him as he would have if he could identify those persons.

English procedure

10.25 We have carefully considered the rules introduced by subordinate legislation in England to deal with summary proceedings for recovery of possession of land which is unlawfully occupied by trespassers.[1] One of the main purposes of the procedure is to provide a person deprived of possession with a speedy remedy. This is achieved by shortening the steps and the time taken for obtaining a final order for possession of land. Provision is also made for cases of emergency.[2] It is desirable that there should be a method of accelerating procedures in an action raised against persons in occupation of heritable property without right or title to possess or occupy that property. In Scotland this is at present available only in relation to summary cause actions in the sheriff court for recovery of possession of heritable property. Rule 68A of the Summary Cause Rules permits the sheriff in such an action against a person in possession of heritable property *vi clam aut precario* and without right or title to possess or occupy, to dispense with any of the periods of time provided for anywhere in the Rules. We consider below[3] the introduction of a similar power in relation to such actions in the sheriff court under ordinary cause procedure and in the Court of Session.

10.26 The other main purpose behind the machinery introduced in England is to provide a procedure for claiming possession of land where it is not possible to identify each wrongful occupier. Thus while the name of any known occupant should be given in the summons and service of the summons should be effected on that person (as also in such other manner as the court may direct), the summons can also be directed against other persons in occupation of the property in question. In this event the summons is also required, unless the Court otherwise directs, to be served by affixing a copy of it to the main door or other conspicuous part of the premises, and if practicable by the insertion through the letter-box at the premises of a copy of the summons enclosed in a sealed envelope addressed to "the occupiers".[4]

10.27 In addition the person raising the action should provide along with the summons an affidavit stating his interest in the land, the circumstances in which land has been occupied without licence or consent and in which his claim to possession arises, and that he does not know the name of any person occupying the land who is not named in the summons. Any person not named as a defendant who is in occupation and who wishes to be heard on the question whether an order for possession should be made is entitled at any stage of the proceedings to be joined as a defendant.[5]

10.28 Finally in order to ensure that these proceedings are available only against the particular type of occupation mentioned, ie occupation by persons such as trespassers or squatters, it is provided that the procedures do not extend to a tenant or tenants holding over after the termination of a tenancy, but only against person or persons who entered into or remained in the premises without the licence or consent of the person claiming possession.[6]

Similar procedure for Scotland

10.29 We consider that there should be introduced for Scotland by subordinate legislation[7] a procedure which contains some salient features of the English procedures described in paragraphs 10.25-10.28 above. This would enable a person entitled to occupy heritable property in Scotland to overcome the procedural difficulties encountered in raising an action for removing against persons, such as

1. Order 113 of the Rules of the Supreme Court 1965 (SI 1776), see eg Supreme Court Practice 1985, Vol 1, p 1402; Order 113 was introduced by the Rules of the Supreme Court (Amendment No 2) 1970 (SI 1970/944); and also Order 24 of the County Court Rules 1981 (SI 1687); see eg County Court Practice 1985, p 370.
2. Regarding Order 113 for example, see Supreme Court Practice, cited above, p 1404, 113/1-8/3.
3. Paras 10.37-10.40 (Recommendation 105) below.
4. See Rule 4 of Order 113, cited above.
5. See Rule 5 of Order 113, cited above.
6. See Rule 1 of Order 113, cited above.
7. This would be by way of an act of sederunt.

trespassers or squatters, whom he is not able to identify. The intending pursuer in such a case should in principle be placed in the same position to bring an action for removing any unidentified persons in occupation of the property as he would be if he could identify the persons in occupation.

10.30 We appreciate that as regards court procedure there already exists statutory provisions enabling the making of procedural rules, namely section 32 of the Sheriff Courts (Scotland) Act 1971 and section 5 of the Court of Session Act 1988. Nevertheless we take the view that this matter is of such significance that the enabling provision regarding the making of the necessary procedural rules should be a specific one, rather than a general one. It is therefore suggested that a specific enabling provision in this regard should be included in any legislation implementing our recommendations.

10.31 We accordingly **recommend**:

103. A person entitled to occupy heritable property should have the same right to bring an action for removing any persons in occupation of the property who cannot be identified by him as he would have if he could identify these persons; and a provision enabling the necessary procedure to be prescribed by act of sederunt should be included in any legislation implementing our recommendations.

(Paragraphs 10.21-10.30; clause 19)

10.32 It should be made clear that any procedure as is prescribed will not be available against a person, such as a tenant, who had a title or other form of right to occupy the property and who has remained in occupation continuously since that title or right is alleged to have terminated. Persons falling within this category of occupant should of course be specifically named in the initial writ or in the summons and should therefore be cited in the normal way. We have already outlined[1] the other main features of the English procedures in so far as these would provide a method of overcoming the present obstacle in Scotland of citing unidentifiable defenders. We suggest that similar provision be made in any procedure rules introduced in Scotland to deal with this matter.[2] Our recommendation in the following paragraph outlines the main objectives which we suggest should be reflected in such procedural rules.

10.33 We therefore **recommend**:

104. Any procedure prescribed as mentioned in Recommendation 103 above should reflect the following objectives:

(a) The procedure should be available in an action for removing from heritable property a person such as a trespasser or squatter who has entered into the property and taken occupation of it without title or right to do so, but such procedure should not be available in the case of proceedings against a person such as a tenant who has or had a title or other form of right to occupy the property, and who has been in occupation continuously since that title or right is alleged to have come to an end;

(b) the summons or the initial writ should be served on any person in occupation named therein in accordance with normal procedures or in such other manner as the court may direct; and in addition the summons or the initial writ should be served, unless the court otherwise directs, by affixing a copy of the summons or the initial writ as the case may be, to the main door or other conspicuous part of the property, and if practicable, inserting through the letter-box at the property a copy of the summons or the initial writ enclosed in a sealed envelope addressed to "the occupiers";

(c) any person not named as a defender who is in occupation of the land and wishes to be heard on the question of whether a decree for removing should

1. Paras 10.25-10.28 above.
2. Regarding the requirement under the English procedure to lodge an affidavit containing certain information (see para 10.27 above), we envisage that in any Scottish procedure such information would be provided in the summons itself.

be granted should be entitled to apply at any stage of the proceedings to appear as a defender.

(Paragraph 10.32; to be implemented by subordinate legislation)

Use of Interdict

10.34 On consultation we noted a suggestion[1] that a solution to obtaining the removal of unidentified persons from property should be applied also to the obtaining of an interdict against the return of these persons. Interdict is certainly available at present to prevent the re-occupation of property by a named defender after the pursuer's right to possess the property has been established.[2] It may therefore be used in such cases to reinforce a decree for removing and provide the pursuer with a remedy of lasting effect.

10.35 The established rule of law in Scotland is that an interdict operates only against a person called as a defender to any action, on the basis of the principle that any person affected by an interdict must be made aware exactly what they are prohibited from doing, and that such persons must have an opportunity to make representations against the granting of interdict. Thus it has been held incompetent to obtain an interdict against named respondents "or any other person having notice of said interlocutor".[3] It was stated[4] that an interim interdict pronounced in such terms would conflict with the recognised practice and procedure in Scotland in relation to caveats (ie the procedure by which one who has reason to anticipate that interdict may be obtained against him may lodge a short request for notice in the event of an application for interdict).

10.36 To give consideration to empowering the court to grant interdict against unidentified persons, even if only along with or following the grant of decree for removing unidentified persons from heritable property where these persons were in unlawful occupation, would appear to raise questions of a complex and significant nature in relation to the law of interdict generally. Such a consideration lies outwith the terms of our present remit. As indicated in the Memorandum,[5] we doubt whether such a course of action would be appropriate, even in relation to actions of interdict designed to reinforce a decree in an action for removing from heritable property.[6]

Acceleration of procedures for removing persons in unlawful occupation

10.37 As already stated it is desirable that in actions for removing persons in possession of heritable property *vi clam aut precario*[7] and without right or title to possess or occupy that property, the courts should have the power to accelerate the necessary procedures. We have already discussed[8] the summary procedures available in England for the recovery of possession of land which is unlawfully occupied by persons such as trespassers. In the course of that discussion we noted that the only similar power in Scotland exists in relation to the summary cause action in the sheriff court for recovery of possession of heritable property, in terms of Rule 68A of the Summary Cause Rules.[9] This Rule gives the sheriff the power, on a verbal application, to shorten or dispense with any period of time provided for anywhere in these Rules.

1. The Research Paper, para 7.8.
2. *Baillie* v *Mackintosh* (1882) 19 SLR 352 and *Boswell's Trs* v *Pearson* (1886) 24 SLR 32.
3. *Lord Advocate* v *The Scotsman Publications Ltd* 1988 SLT 490; the decision of the Lord Ordinary (see pp 498-499), founding on *Pattison* v *Fitzgerald* 1823 2S 536, was approved by the Inner House (see for example the Opinion of the Lord Justice-Clerk at p 506). See also the article entitled "The Scope of Interdict", I S Dickinson, 1988 SLT 173.
4. By the Lord Justice-Clerk in *Lord Advocate* v *The Scotsman Publications Ltd*, cited above, at p 506.
5. At para 7.5.
6. Where it is not possible to obtain an interdict to reinforce a decree for removing and the persons already removed return to occupy the property again, the person entitled to possession may find an alternative remedy in s 3 of the Trespass (Scotland) Act 1865. This provision stipulates that it shall be an offence for any person to lodge in any premises (this term is widely defined in s 2) or occupy or encamp on any land, being private property, without the consent and permission of the owner or legal occupier of such premises or land.
7. This expression is defined in footnote 1 to para 10.1 above.
8. Paras 10.25-10.28 above.
9. These are contained in the Act of Sederunt, SI 1976/476 as amended by subsequent Acts of Sederunt.

10.38 In terms of Rule 68A the sheriff thus has the power in such an action to shorten or dispense with the period of *induciae*[1] or the period required for extracting the decree.[2] This Rule was introduced in 1980.[3] As far as we are aware there have been no difficulties arising as a result of any use in practice of the power contained in the Rule. Indeed as discussed above[4] we raised on consultation a question as to the scope of Rule 68A, namely whether there was any class of occupier of property to which the Rule should not apply. As indicated most of our consultees appear to be content with the terms of the Rule as it stands. We therefore accepted this, concluding that in exercising a discretion under Rule 68A the sheriff would take the interests of any defender into account.

10.39 While Recommendation 68A applies only in relation to summary cause actions for recovery of possession of heritable property, in terms of our Recommendations proceedings for removing from heritable property could be instituted in the sheriff court under the ordinary cause procedure[5] or in the Court of Session.[6] Such proceedings might be directed against a person in possession of heritable property *vi clam aut precario* and without right or title to possess or occupy that property. Where this is so there may be a need to accelerate the necessary procedures in the action. We can see no objection to enabling this, given that a similar power already exists in relation to summary cause actions. We therefore take the view that in any such proceedings in the sheriff court under the ordinary cause procedure or in the Court of Session, the court should have a power similar to that contained in Rule 68A, on a verbal application to shorten or dispense with any period of time provided for in the rules relating to the conduct of the proceedings. Any such power would require to be introduced into these rules by subordinate legislation.

10.40 We **recommend**:

105. In an action for removing from heritable property instituted in either the sheriff court under ordinary cause procedure (see Recommendation 88 above) or the Court of Session (see Recommendation 96 above) and directed against a person or persons in possession of the property *vi clam aut precario* and without right or title to possess the property, the court should have a power (similar to that contained in Rule 68A of the Summary Cause Rules) on a verbal application to shorten or dispense with any period of time provided for anywhere in the rules relating to the conduct of the proceedings.

(Paragraphs 10.37-10.39; to be implemented by subordinate legislation)

1. Provided for in Rule 4 of the Summary Cause Rules.
2. Provided for in Rule 89 of the Summary Cause Rules.
3. Act of Sederunt, SI 1980/455.
4. At paras 8.3-8.5.
5. See Recommendation 88 (para 7.14 above).
6. See Recommendation 96 (para 9.5) above.

Part XI General Matters

Giving notice

11.1 In the Memorandum[1] we gave consideration to the manner of giving a notice of termination of a lease at its expiry. Termination of a lease by way of resumption, or renunciation at a break point, will normally be governed by the terms of the lease.[2] Various statutory provisions regulate the manner of service of a notice of termination and these apply according to the nature of the lease, except as regards certain leases of urban subjects which may be terminated by verbal notice.[3]

11.2 As regards leases of urban subjects, Schedule 1 to the 1907 Act provides that any removal notice under sections 34-38 of the Act may be served by messenger-at-arms or sheriff officer, or by registered letter.[4] Regardless of the form of action, section 6 of the Removal Terms (Scotland) Act 1886 authorises service of notice by registered letter for all tenancies of houses, shops or other buildings not being let along with agricultural land for agricultural purposes. Furthermore in terms of section 1 of the Recorded Delivery Service Act 1962, it is competent to effect service by recorded delivery letter where any enactment provides for service by registered letter.

11.3 As regards leases of agricultural holdings, section 90 of the 1949 Act provides that:

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

Section 24(4) of the 1949 Act furthermore specifically provides for the giving of a notice to quit by the landlord of an agricultural holding. It requires that such notice shall be given in a manner prescribed by the 1886 Act or by the 1907 Act. There is no equivalent provision in the Act for service by a tenant of notice of removal. It has thus been suggested that landlords must observe the provisions of section 24 of the Act, while tenants may rely on the wider provisions of section 90.[5] We proposed in the Memorandum[6] that any doubt as to the application of sections 24 and 90 of the 1949 Act should be removed, and that the requirements for service of notice of termination by the tenant of an agricultural holding should be assimilated to the requirements for service of notice by the landlord. This was generally agreed on consultation. This would be achieved by the repeal of section 24(4) of the 1949 Act.

11.4 We **recommend**:

106. The requirements for the giving of notice in relation to a lease should apply irrespective of whether the notice is given by the tenant or by the landlord; and as a consequence section 24(4) of the 1949 Act should be repealed.
(Paragraphs 11.1-11.3; Schedule 1, para 2, new s 24, omitting subsection (4))

Manner of service

11.5 The wording of certain of the statutory provisions mentioned, namely those contained in the 1886 and the 1907 Acts, is permissive. This might suggest that other

1. At paras 3.1-3.6.
2. Rankine, p 530; Paton and Cameron, p 243.
3. See para 2.6 above.
4. Rule 106.
5. Gill, para 140.
6. At para 3.3.

means of service are available. An alternative view has however been taken by the court. The Court of Session considered[1] the provision in Schedule 1 to the 1907 Act[2] and came to the conclusion that the choice of the manner of service was limited to one of the three methods set out in the Rule. In this case the effect was that the tenant was able to claim that the notice to quit had been incorrectly served and was therefore ineffective, although he admitted receipt of the notice.

11.6 It seems unsatisfactory that in such a situation a tenant should be able to benefit from the informality of service. We sought the views of consultees on questions such as whether there should be no restriction on the method of service or of proof of service of notice of termination of a lease, whether the methods of service should be prescribed, and what the consequences of failure to observe any prescribed method of service should be.

11.7 We received a mixed set of views from consultees on the questions raised. Most consultees took the view that restrictions should be made regarding the manner of service of notice of termination, and that certain methods of service should be prescribed. Views were divided on whether failure to observe any prescribed method of service should render a notice ineffective in all cases, and on whether proof of service should be admissible in any case whether or not a prescribed method of service has been followed. After careful consideration of the various comments made to us, we decided to recommend the retention of certain formal requirements regarding the manner of service of notice of termination. The consequences of termination of a lease, or of failure to do so timeously, are of such importance as to merit at least some degree of formality regarding the service of the relevant notices. We favour the introduction for leases of non-agricultural subjects of a provision similar to the terms of section 90 of the 1949 Act.

11.8 We think that such a provision should be applied not just to the giving of a notice of termination of a lease but also to the giving of any notice or indeed any copy notice required or authorised to be given under any legislation implementing our recommendations. Such a provision would, in other words, provide that any such notice or copy notice shall be duly given if it is delivered to the person in question, or left at his proper address, or sent to him by post to his proper address in a registered letter (or, in terms of the Recorded Delivery Service Act 1962, a recorded delivery letter). Service by recorded delivery for example is a simple way of ensuring that notices are received or returned, and of providing proof of postage. The provision which we recommend would have the benefit of drawing upon an existing statutory provision regarding the service of notices in relation to leases which has been operated in practice for some time. Finally we note that any such provision introduced in relation to non-agricultural leases generally should also be applied to the giving of notice of termination of a lease under an existing statutory provision, namely section 16 of the Succession (Scotland) Act 1964.

11.9 Regarding leases of agricultural holdings, we have stated that in order to assimilate the requirements for service of notice of termination by the tenant with the requirements relating to service by a landlord, section 24(4) of the 1949 Act should be repealed.[3] We propose therefore that the existing terms of section 90 of the 1949 Act should be retained, subject to certain slight modifications or improvements. Section 90(1) for example simply requires the notice or document to be sent to the appropriate person "by post in a registered letter". We suggest that this should be amended to require in terms that it be sent to him "by post to his proper address in a recorded delivery letter or a registered letter".

11.10 We **recommend**:

107. It should be provided that any notice or copy notice required or authorised by any legislation implementing our recommendations in relation to non-agricultural leases, or by section 16 of the Succession (Scotland) Act 1964, to

1. *Department of Agriculture* v *Goodfellow* 1931 SC 556.
2. The provision considered by the court was Rule 113 of Schedule 1, the current equivalent provision being Rule 106 of the Schedule, as substituted by SI 1983/747.
3. Recommendation 106 (para 11.4) above.

be given to any person shall be duly given if it is delivered to him, or left at his proper address, or sent to him by post to his proper address in a recorded delivery letter or a registered letter; and section 90(1) of the 1949 Act should be amended in relation to the sending to any person of any notice or other document so as to require sending to him by post "to his proper address in a recorded delivery letter or a registered letter.".

(Paragraphs 11.5-11.9; clause 23(1), Schedule 3, para 11(c) (new s 16(5A) of the 1964 Act) and para 9(a) (amendment to s 90(1) of the 1949 Act))

Proper address

11.11 Section 90 of the 1949 Act makes further provision regarding the giving of notices. Similar provision should also be incorporated into any legislation governing the giving of notices in relation to non-agricultural leases. Section 90(2) concerns service on an incorporated company or body, and provides that due service is effected where any document is given to or served on the secretary or clerk of the company or body. Section 90(3) states that for the purposes of the section, the proper address of a person is in the case of the secretary or clerk of any incorporated company or body, the registered or principal office of the company or body, and in any other case, the person's last known address.

11.12 We note that there is an existing reference in section 90(3) to the application of the provision for the purposes of section 26 of the Interpretation Act 1889. That provision (and the 1889 Act itself) was repealed by the Interpretation Act 1978, section 7 of which makes similar provision regarding references to service by post. A reference to that provision for the purposes of section 90 does not appear to be necessary. Accordingly we simply propose the repeal of the words "and of section twenty-six of the Interpretation Act, 1889" where they occur in section 90(3).

11.13 We **recommend**:

108. Further to Recommendation 107 above, it should be provided that in the case of an incorporated company or body, any such notice or copy notice relating to a non-agricultural lease shall be duly given if it is given to the secretary or clerk of the company or body; and that for the purposes of that Recommendation, the proper address of a person is in the case of a secretary or clerk to a company or body, that of the registered or principal office of the company or body, and in any other case, the person's last known address; and in the equivalent provision contained in section 90(3) of the 1949 Act, the words "and of section twenty-six of the Interpretation Act, 1889" should be repealed.

(Paragraphs 11.11-11.12; clause 23(2),(3), Schedule 3, para 11(c) (new s 16(5B), (5C) of the 1964 Act) and Schedule 4 (repeal of words in s 90(3) of the 1949 Act))

Change of landlord

11.14 Section 90(4) of the 1949 Act provides that:

> "Unless or until the tenant of an agricultural holding shall have received notice that the person theretofore entitled to receive the rents and profits of the holding (hereinafter referred to as "the original landlord") has ceased to be so entitled, and also notice of the name and address of the person who has become entitled to receive such rents and profits, any notice or other document served on or delivered to the original landlord by the tenant shall be deemed to have been served on or delivered to the landlord of the holding."

This appears to be a useful provision, providing in effect that where there has been a change of landlord,[1] but the tenant has not received notice of the change, any notice given by the tenant to the original landlord shall be deemed to be duly given to the landlord under the tenancy.

11.15 We think the terms of section 90(4) could usefully be simplified while still reflecting this policy. There is however one qualification which should be made to

1. For the purposes of leases of both non-agricultural subjects and agricultural holdings we recommend a definition of "landlord" as any person who is entitled to receive rent for, or to take possession of, the leased property; see Recommendation 83 (para 6.24) above.

any such provision. This arises from our recommendations contained in Part V concerning the giving of notice where a party to a lease has died. We recommend[1] that where a party to a lease dies, the other party should generally be entitled after the death to give any notice under any enactment addressed to the deceased party (as if he were still alive), and that notice should be effective for its purpose. We go on to recommend however[2] that the entitlement of a party to give a notice addressed to a deceased party should cease where that party has received notification of either confirmation of an executor-nominate to the estate of the deceased party, or the appointment of an executor-dative to him.

11.16 In these cases the original landlord would have died, and although a new landlord may not have been found, an executor would have taken over responsibility for the deceased landlord's interest in the lease. Where the tenant has received notification from an executor, he should therefore give any notice to that executor, rather than to the original landlord in reliance on a provision such as section 90(4) of the 1949 Act. Accordingly section 90(4) and any similar provision concerning non-agricultural leases should be made subject to any provision implementing our recommendations concerning the giving of notice to a deceased party to a lease.

11.17 We **recommend**:

109. Subject to Recommendation 70 above (the ending of entitlement to give notice addressed to a deceased party to a lease), it should be provided that where there has been a change of landlord but the tenant has not received notice of the change, any notice given by the tenant to the original landlord shall be deemed to be duly given to the landlord under the tenancy.

(Paragraphs 11.14-11.16; clause 23(4) and Schedule 3, para 9(b) (new s 90(4) of the 1949 Act))

Allotments, crofts, etc.

11.18 In the Introduction at paragraph 1.7 we made clear that in using the term "non-agricultural leases" we mean, for the particular purposes of the Report, a lease of heritable property other than a lease of an agricultural holding or a lease or tenure of certain other subjects. These other subjects excepted from our definition for this purpose are: allotments and allotment gardens under the Allotments (Scotland) Acts 1892 to 1950; crofts and the subjects of a cottar within the meaning of the Crofters (Scotland) Act 1955; and the holdings of a landholder or a statutory small tenant under the Small Landholders (Scotland) Act 1911.

11.19 We wish to mention that, as noted in paragraph 1.9 of the Introduction, certain Parts of the Report deal with matters relating to court proceedings for removing from heritable property generally. The recommendations contained in those Parts therefore apply to such proceedings in connection with allotments and the other subjects excepted from our meaning of "non-agricultural lease". The relevant Parts are: Part VII (Ordinary Cause Procedure in the Sheriff Court), Part VIII (Summary Procedure in the Sheriff Court), Part IX (Proceedings in the Court of Session) and Part X (Court Proceedings: General Issues).[3]

Application to existing leases

11.20 We consider that it would be helpful to apply any legislation implementing our recommendations to leases existing at the commencement date. The only qualification

1. Recommendation 69 (para 5.68) above.
2. Recommendation 70 (para 5.74) above.
3. See clause 26 of the draft Bill, which in relation to allotments, allotment gardens, crofts, the subjects of a cottar and the holdings of a landholder or a statutory small tenant, provide that nothing in the Bill shall apply except the clauses in Part III of the Bill which deal with matters relating to proceedings for removing from heritable property (ie clauses 14-16, 19, 20) and the general clauses of the Bill (ie clauses 24, 27, 28 and 30 and clause 26 itself).

we recommend in this regard concerns any notice or counter-notice given before the commencement date of the legislation by any party to a lease to the other party. In our view the legislation should not operate retrospectively where a formal step such as the giving of a notice has been taken in respect of a lease before the commencement date of the legislation. The effect of any such notice or counter-notice should therefore be preserved, and it should be possible to found upon any such notice or counter-notice despite the enactment of legislation implementing our recommendations. In other words any such notice or counter-notice should have effect and be enforceable as if such legislation had not been passed. We have already noted[1] that the existing forms of action available in the sheriff court should be preserved after the commencement of any such legislation as a transitional measure for the purpose of enforcing any such notice or counter-notice.

11.21 We **recommend**:

110. Any legislation implementing our recommendations should, subject to Recommendation 112 below, apply to leases in existence at the commencement date of the legislation.

(Paragraph 11.20; clause 28(1))

111. Any notice or counter-notice given before the commencement date of any legislation implementing our recommendations by any party to a lease to another party should have effect and be enforceable as if the legislation had not been passed.

(Paragraph 11.20; clause 28(2))

Application to existing actions and decrees

11.22 We make a number of recommendations concerning proceedings for removing from heritable property. In view of the changes recommended to the various forms of action available at present, we consider that it would be appropriate to apply any implementing legislation only to such proceedings as are initiated following the commencement date of the legislation. The legislation should not therefore affect any action, in whatever form, raised before the commencement date where the purpose of that action is to remove a person from heritable property. Any such action should therefore continue according to the existing law and procedures until its ultimate conclusion, namely the enforcement of any decree granted in such an action.

11.23 We **recommend**:

112. Any legislation implementing our recommendations concerning proceedings for removing from heritable property should not affect either any action, in whatever form, raised before the commencement of the legislation where the purpose of the action is to remove a person from heritable property, or the enforcement of any decree granted in such an action.

(Paragraph 11.22; clause 28(3))

Repeals

11.24 If the recommendations put forward in the Report are implemented, a number of current statutory provisions will be either superseded or rendered obsolete. In the Memorandum[2] we stated that in particular the Act of Sederunt of 14 December 1756 (embodied in Chapter XV (Removings) of the Codifying Act of Sederunt of 4 June 1913)[3] will, in so far as it is not already obsolete, have been superseded.[4] We drew attention to sections 34 and 35 of the 1907 Act, which in so far as providing for summary diligence against tenants are described by the Law Reform Committee as

1. See para 7.12 and Recommendation 88 (para 7.14) above.
2. At para 8.3.
3. SR & O 1913 No 638.
4. See also paras 10.6–10.7 above.

"so drastic, and their operation so fraught with hazard to any who seek to invoke them, that they are seldom, if ever, used."[1] Furthermore sections 36-38A of the 1907 Act would be superseded by implementation of our recommendations as a whole concerning termination of tenancies. This would also be the case in respect of the relevant provisions in Schedule 1 to the 1907 Act, namely Rules 103 to 107, and in the Appendix, forms L, M and N. Consultees agreed to the repeal of sections 34-38A of the 1907 Act and of the provisions of the Act of Sederunt mentioned. We have already noted[2] too that one consequence of the repeal of sections 36-38A of the 1907 Act would be to consider amending or repealing Rule 69 of the Summary Cause Rules.

11.25 Our recommendations concerning termination of a tenancy would also supersede the provisions of the Removal Terms (Scotland) Act 1886 and accordingly that Act should also be repealed. Finally in view of our recommendations concerning the abolition of the law and procedures relating to violent profits, the Ejection Caution Act 1594 would also require to be repealed.[3]

11.26 We **recommend**:

113. In the event of implementation of the foregoing recommendations, the following statutory provisions should be repealed: Chapter XV (Removings) of the Codifying Act of Sederunt of 4 June 1913; the Ejection Caution Act 1594; the Removal Terms (Scotland) Act 1886; and sections 34 to 38A of the Sheriff Courts (Scotland) Act 1907 along with Rules 103 to 107 in Schedule 1 to the Act and forms L, M and N in the Appendix; and consideration should be given to amending or repealing Rule 69 of the Summary Cause Rules.
(Paragraphs 11.24-11.25; clause 29(2),(3) and Schedule 4)

1. At para 5.
2. Para 8.2 above.
3. See para 10.18 above.

Part XII Summary of Recommendations

1. In relation to leases which are capable of being continued in force by tacit relocation:

(a) the requirements of a notice to prevent the operation of tacit relocation should be the same as those of a notice on which to found removal proceedings; and

(b) any legislation concerning the giving of notices of termination should make it clear that the tenancy will not come to an end at the termination of the stipulated endurance of the lease, or if the lease has been continued in force by tacit relocation, at the termination of the period for which the lease has been so continued in force, unless notice of intention to bring the tenancy to an end has been given by one party to the other.

(Paragraphs 2.3-2.5; clause 1(1) and Schedule 1, para 2, new s 24(1), each as read with clause 17(1))

2. Notice to terminate a lease should always be in writing.

(Paragraphs 2.6-2.8; clause 1(1))

3. In relation to any additional statement which under statute a notice of termination of a lease must or may contain, legislation should not require that the statement either be incorporated within the notice in a single document or accompany the notice in a separate document.

(Paragraphs 2.9-2.12)

4. The distinction between the requirements imposed upon a landlord and those imposed upon a tenant as regards the form of notice of termination of a lease should be abolished.

(Paragraphs 2.13-2.15; clause 1(1) and Schedule 1, para 2, new s 24(1))

5. In respect of leases of both non-agricultural subjects and agricultural holdings, statute should define or specify the essential requirements of a valid notice of termination of the lease and a standard form of notice should not be prescribed.

(Paragraphs 2.16-2.21; clause 1(6) and Schedule 1, para 2, new s 24(6))

6. A notice of termination of a lease, whether of non-agricultural subjects or of an agricultural holding, should specify the following:

(a) the intention of the party giving the notice to bring the tenancy to an end;

(b) the leased property;

(c) the specific date on which the tenancy is to end;

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

(e) where the notice is given by an agent, the name of the party on whose behalf it is given and the name and address of the agent.

(Paragraphs 2.22-2.27; clause 1(6) and Schedule 1, para 2, new s 24(6))

7. Any prescribed minimum period of notice of termination of a non-agricultural lease should apply irrespective of the form of any court proceedings which may be adopted.

(Paragraphs 2.29-2.32; clause 1(1))

8. There should be a minimum period of notice of termination of non-agricultural

leases of 28 days, or a period equal to half the period of the lease, whichever is the shorter period.

(Paragraphs 2.34-2.40; clause 1(3))

9. Every period of notice of termination of a non-agricultural lease should be calculated by reference only to the period intervening between the date of giving the notice and the date on which it is to take effect.

(Paragraphs 2.41-43; clause 1(3) and Schedule 4 (repeal of the 1886 Act))

10. The following words should be removed from the definition of Whitsunday and Martinmas in section 93(1) of the Agricultural Holdings (Scotland) Act 1949 (the 1949 Act): "in relation to any lease entered into on or after the first day of November, nineteen hundred and forty-eight.".

(Paragraphs 2.45-2.47; Schedule 4)

11. In relation to leases of both non-agricultural subjects and agricultural holdings, a landlord should be required to give to the tenant written notice prior to the exercise of a power of resumption.

(Paragraphs 2.49-2.52; clause 4(1) and Schedule 1, para 4, new s 34A(1))

12. The period of notice which a landlord should be required to give prior to the exercise of a right of resumption in respect of a non-agricultural lease should be at least either 28 days or the number of days equal to one half of the period for which the property is let, whichever is the shorter, before the date of the intended exercise of the right.

(Paragraphs 2.53-2.54; clause 4(2))

13. The period of notice which a landlord should be required to give prior to the exercise of a right of resumption in respect of a lease of an agricultural holding should be—

(a) where the purposes of the intended resumption are agricultural, not less than one year nor more than two years before the date on which it is intended to exercise the right (as currently required under section 24(6)(a) of the 1949 Act);

(b) where these purposes are non-agricultural, not less than three months before the date on which it is intended to exercise the right.

(Paragraphs 2.55-2.59; Schedule 1, para 4, new s 34A(2))

14. Where leased subjects are used partly for agriculture and partly for non-agricultural purposes, the subjects should be regarded either as wholly an agricultural holding or as wholly non-agricultural subjects and the test of predominant use should be applied to determine how the whole subjects should be treated; but where the predominant use is an agricultural one the subjects should be treated as being wholly an agricultural holding only if they would be an agricultural holding if that use for agriculture constituted the whole use of the property.

(Paragraphs 2.60-2.64; clause 3, and Schedule 1, para 3, new s 24A)

15. In respect of leases of both non-agricultural subjects of a type capable of being continued in force by tacit relocation and leases of agricultural holdings, where a tenant has entered into possession of the leased property and the date of commencement of the lease cannot be ascertained, there should be a statutory presumption that the lease commenced on 28 May.

(Paragraphs 2.65-269, 2.73; clause 2(a) and Schedule 1, para 1, new s 10A(a))

16. Where a tenant has entered into possession of leased property and the duration of the lease cannot be ascertained,

(a) in the case of non-agricultural leases of a type capable of being continued in force by tacit relocation, there should be a statutory presumption that the lease is for a period of one year; and

(b) in the case of leases of agricultural holdings, there should be a statutory presumption that the lease stipulated that it would endure from year to year.
(Paragraphs 2.65-2.68, 2.70-2.73; clause 2(b) and Schedule 1, para 1, new s 10A(b))

17. The statutory notice provisions which we recommend regarding termination of both non-agricultural leases and leases of agricultural holdings should apply to termination at a break point provided for in the lease.
(Paragraphs 2.74-2.76; clause 1(2) and Schedule 1, para 2, new s 24(2))

18. A party who has given a notice of termination should be entitled to withdraw it only with the consent of the party to whom the notice is given.
(Paragraphs 2.77-2.80; clause 1(7) and Schedule 1, para 2, new s 24(7))

19. Nothing in our foregoing recommendations regarding notice of termination of non-agricultural leases or in section 24 of the 1949 Act should affect the right of a landlord to remove a tenant without notice—

(a) where the tenant has incurred any irritancy of the lease or other liability to be removed by failure to pay rent or otherwise; or

(b) under any other enactment.
(Paragraphs 2.81-2.84; clause 1(8) and Schedule 1, para 2, new s 24(8))

20. It should be made clear in any legislation concerning notices of termination of non-agricultural leases that in relation to any such lease of a type which is not capable of being continued in force by tacit relocation, a notice shall not be required in order to bring the tenancy to an end at the termination of the stipulated endurance of the lease.
(Paragraphs 2.85-2.87; clause 1(9))

21. The discretion of the Land Court on an application by the tenant under section 27(4) of the 1949 Act should be restricted to the postponement of the operation of a notice to quit for a period not exceeding six months from the final determination of the decision or award.
(Paragraphs 2.88-2.92; Schedule 3, para 5)

22.(a) Parties should be entitled to contract out of the statutory notice provisions relating to termination of leases of agricultural holdings contained in section 24(1) of the 1949 Act by agreeing—

(i) at any time, that a longer period of notice than the maximum stipulated will apply;

(ii) at any time after the tenant has entered into possession of the leased subjects, that a shorter period of notice than the minimum stipulated will apply, subject in all cases to a minimum period of notice of three months.
(Paragraphs 3.1-3.28; Schedule 1, paragraph 2, new s 24(4))

(b) As a consequence of the recommendation in paragraph (a) above, section 59(1) of the 1949 Act should be amended to require a period of notice of two months to be given before termination of the lease of intention to claim compensation under sections 57(1) or 58 for deterioration of the holding.
(Paragraphs 3.24-3.25, 3.28; Schedule 3, paragraph 7)

23. Parties to a lease of an agricultural holding should be entitled to contract out of our recommended statutory notice provisions relating to the exercise of a right of resumption (see Recommendations 11 and 13 above) by agreeing—

(i) at any time, that a longer period of notice than that stipulated shall apply;

(ii) at any time after the tenant has entered into possession of the leased subjects, that a shorter period of notice than that stipulated shall apply, subject always to a minimum period of notice of three months.
(Paragraphs 3.32-3.34; Schedule 1, para 4, new s 34A(3))

24. Subject to Recommendations 25 and 26 below parties to a non-agricultural lease

should be entitled to contract out of our recommended statutory notice provisions relating to termination by agreeing—

(a) at any time, that a longer period of notice than that stipulated shall apply;

(b) that a shorter period of notice than the minimum stipulated shall apply subject to a minimum period of notice of 48 hours in all cases and provided that the agreement is made at any time after the tenant has entered into possession of the leased subjects.

(Paragraphs 3.35-3.42, 3.52; clause 1(4))

25. Parties to the tenancy of a shop should not be entitled to agree under Recommendation 24(b) above that a shorter period of notice than the minimum stipulated shall apply.

(Paragraph 3.43-3.45, 3.52; Schedule 3, para 2)

26. Implementation of our Recommendations should not affect the operation of the provisions of the Rent (Scotland) Act 1984 in relation to any tenancy or sub-tenancy.

(Paragraphs 3.46-3.52; clause 25)

27. Parties to a non-agricultural lease should be entitled to contract out of our recommended statutory notice provisions relating to resumption of leased property (see Recommendations 11 and 12 above) by agreeing—

(a) at any time, that a longer period of notice than that stipulated shall apply; or

(b) at any time after the tenant enters into possession of the leased subjects, that a shorter period of notice than that stipulated shall apply, subject in all cases to a minimum period of notice of 48 hours.

(Paragraphs 3.53-3.55; clause 4(3))

28. Any agreement contracting out of statutory notice provisions should be required to be in writing.
(Paragraphs 3.57-3.58; clauses 1(4), 4(3) and Schedule 1, para 2, new s 24(4) and para 4, new s 34A(3))

29. Any agreement contracting out of statutory notice provisions should be binding on any successors to the parties to it.
(Paragraphs 3.59-3.61; clauses 1(5), 4(4) and Schedule 1, para 2, new s 24(5) and para 4, new s 34A(4))

Recommendations 30-32 below apply where property is subject both to a tenancy and to any sub-tenancy authorised either expressly or impliedly by the landlord of the tenant; and they apply to a sub-tenant of any degree where there is in existence a chain of sub-tenancies of the property:

30. Where a tenancy of leased property is brought to an end any sub-tenancy of the property should also come to an end.
(Paragraphs 4.4-4.13, 4.16-4.17, 4.22; clauses 5(2), 27(1) (definition of "sub-tenant") and Schedule 1, para 4, new s 34B(2), Schedule 3, para 10(a)(ii) (definition of "sub-tenant"))

31. Where there is a sub-tenant in possession of leased property, a notice to quit or notice of resumption given by the landlord to the tenant, or a notice of intention to bring the tenancy to an end given by the tenant to his landlord, or a notice of termination given by either the landlord or the deceased tenant's executor to the other under section 16(3) of the Succession (Scotland) Act 1964 (the 1964 Act), should not be effective unless a copy of the notice is given to the sub-tenant in possession either by the party giving the notice at the same time as he gives it, or by the recipient of the notice as soon as practicable after receiving it.
(Paragraphs 4.14-4.15, 4.18–4.19, 4.22; clause 5(3) and Schedule 1, para 4, new s 34B(3))

32. Where the sub-tenancy of a person in possession of an agricultural holding is terminated by virtue of a notice given by either party to the tenancy to the other, the sub-tenant should be entitled to compensation for disturbance under section 35 of the 1949 Act as if the sub-tenancy had been terminated by virtue of a notice to quit given to him by his landlord.

(Paragraphs 4.25-4.26; Schedule 3, para 6)

Recommendations 33 to 39 below apply where property which is subject to one tenancy has more than one landlord, each being the landlord of a separate part:

33. Subject to any agreement to the contrary in the lease or otherwise to which all the landlords are parties, it should be competent to bring the tenancy of part of leased property to an end either by notice to quit given by the landlord of that part to the tenant or to the deceased tenant's executor under section 16(3) of the 1964 Act or by notice of intention to bring the tenancy to an end given by the tenant or by the deceased tenant's executor to the landlord of that part.

(Paragraphs 4.28-4.32; clause 6(2) and Schedule 1, para 4, new s 34C(2))

34.(a) Where the tenant or the deceased tenant's executor is given a notice to quit part of the leased property (the "first part") under Recommendation 33 above, he should be entitled to give a notice to the landlord or landlords of any other part or parts of the leased property of his intention to bring the tenancy of that other part or parts to an end, on the same date as the tenancy of the first part.
(Paragraphs 4.33-4.34, 4.38; clause 6(3) and Schedule 1, para 4, new s 34C(3))

(b) Any notice under this Recommendation should—

(i) regarding a non-agricultural lease, give a period of notice of not less than 14 days ending with the date on which the tenancy of the first part of the leased property is to come to an end, or a period equal to half the period specified in the notice in respect of that first part, whichever is the lesser period;

(ii) regarding a lease of an agricultural holding, be given within 28 days beginning with the date on which the tenant or executor is given the notice under Recommendation 33 above.

(Paragraphs 4.35-4.38; clause 6(4) and Schedule 1, para 4, new s 34C(4))

35. Any legislation implementing Recommendations 33 and 34 above should contain an express provision entitling all the landlords to bring the whole tenancy to an end by giving to the tenant a notice to quit the whole of the leased property or to the deceased tenant's executor a notice of termination in respect of the whole of the property under section 16(3) of the 1964 Act, and entitling the tenant or the deceased tenant's executor to bring the whole tenancy to an end by giving notice of his intention to do so to all the landlords of the leased property.

(Paragraphs 4.39-4.40; clause 6(5) and Schedule 1, para 4, new s 34C(5))

36. No agreement to contract out of statutory notice provisions relating to termination should have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.

(Paragraphs 4.41-4.43; clause 6(6) and Schedule 1, para 4, new s 34C(6))

37.(a) Where the tenancy of part or parts of leased property is brought to an end the following matters should be determined in such a way as may be agreed between the tenant and all his landlords, or failing such agreement, by arbitration:

(i) the rent attributable to the tenancy of that part or those parts and the rent payable for the tenancy of any other part of that property, taking into account any depreciation in the value to the tenant of the residue of the holding caused by the tenancy of the part or parts being brought to an end or by the use to be made of the part or parts in respect of which the tenancy is being brought to an end; and

(ii) any compensation or sum payable by or to the tenant under any rule of law in relation to the tenancy of the part or parts being brought to an end;

(b) Where any matter is settled by arbitration the expenses of this should be directed by the arbiter to be paid by the landlords and the tenant in such proportions as he shall determine.

(Paragraphs 4.44-4.47; clause 6(7) and Schedule 1, para 4, new s 34C(7))

38. Where the tenancy of part of an agricultural holding is terminated by a notice given either by a landlord or a tenant under Recommendation 33 above, or by a notice given by a tenant under Recommendation 34 above, an entitlement to compensation under the provisions of the 1949 Act should arise as if that part of holding were a separate holding the tenancy of which had terminated in consequence of a notice under the Act.

(Paragraphs 4.48-4.51; Schedule 3, para 8)

39. Where there is a sub-tenant in possession of leased property and the sub-tenancy has been authorised either expressly or impliedly by the landlord of the tenant—

(a) any notice to terminate the tenancy of part of the property under Recommendations 33 or 34 above, and any notice to terminate the whole of the tenancy under Recommendation 35 above, should not be effective unless a copy of the notice is given to the sub-tenant under Recommendation 31 above.

(b) Where the sub-tenant is given a copy of a notice under paragraph (a) above in respect of part of the property (the first part) he should be entitled to give to the tenant a notice of intention to bring the sub-tenancy of any other part of the property to an end on the same date on which the tenancy of the first part is to come to an end.

(c) The period of notice to be given under paragraph (b) above should be the same period as that applicable under Recommendation 34(b) above.

(d) Where the sub-tenancy of part or parts of leased property is brought to an end under this Recommendation the following matters should be determined in such a way as may be agreed between the sub-tenant and his landlord (ie the tenant), or failing such agreement, by arbitration:

(i) the rent attributable to the sub-tenancy of that or those parts and the rent payable for the sub-tenancy of any other part of that property, taking into account any depreciation in the value to the sub-tenant of the residue of the holding caused by the sub-tenancy of the part or parts being brought to an end or by the use to be made of the part or parts in respect of which the sub-tenancy is being brought to an end; and

(ii) any compensation or sum payable by or to the sub-tenant under any rule of law in relation to the sub-tenancy of the part or parts being brought to an end;

and where any matter is settled by arbitration the expenses of this should be apportioned by the arbiter between the sub-tenant and his landlord.

(Paragraphs 4.56-4.59, 4.63; clause 6(8) and Schedule 1, para 4, new s 34C(8))

(e) The sub-tenant should, on quitting part of an agricultural holding in consequence of termination of the sub-tenancy of that part by reason of a notice under the 1949 Act, be entitled to compensation under the provisions of the Act as if that part of the holding were a separate holding which the sub-tenant had quitted in consequence of a notice under the Act.

(Paragraphs 4.60-4.61, 4.63; Schedule 3, para 8)

Recommendations 40-45 below apply where property which is subject to one tenancy has more than one landlord, the interest of each landlord being an interest in common.

40. Any notice to quit given by any of the landlords to the tenant and any notice of intention to terminate the tenancy given by the tenant to any of the landlords should have effect as if it had been given by or to all the landlords, as the case may

be; and any provision in this respect should be applied to any notice of termination given under section 16(3) of the 1964 Act.
(Paragraphs 4.64-4.68; clause 7(2), (3) and Schedule 1, para 4, new s 34D(2), (3))

41. Where there is a sub-tenant in possession of the leased property, a copy notice given to the sub-tenant by any of the landlords, or by the tenant, or by the deceased tenant's executor, under Recommendation 31 above should have effect as if it had been given by all the landlords.
(Paragraphs 4.69-4.70; clause 7(4) and Schedule 1, para 4, new s 34D(4))

42. A landlord who has either given a notice to the tenant or the deceased tenant's executor under Recommendation 40 above or a copy notice to quit to a sub-tenant under Recommendation 41 above, or who has received a notice of termination from a tenant or a deceased tenant's executor under Recommendation 40 above, should as soon as practicable thereafter serve a copy of the notice on all the other landlords.
(Paragraphs 4.71-4.72; clause 7(5), (6) and Schedule 1, para 4, new s 34D(5), (6))

43. No agreement to contract out of statutory notice provisions relating to termination should have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.
(Paragraphs 4.73-4.74; clause 7(7) and Schedule 1, para 4, new s 34D(7))

44. Where one party to a lease has either given to or received from the other party a notice (or in the case of agricultural holdings a counter-notice) under any enactment, and following the giving or receiving of the notice or counter-notice that party—

(a) if the landlord, transfers his interest in the property, and if the tenant, transfers his interest in the tenancy otherwise than by assignation, any such notice should be deemed to have been given by or to the transferee or any person deriving title from him; or

(b) dies, any such notice given by or to the person who has died should, if effective, continue to be so.
(Paragraphs 4.75-4.81; clause 8 and Schedule 1, para 4, new s 34E)

45. Section 31 of the 1949 Act should be repealed.
(Paragraphs 4.82-4.83; Schedule 4)

46. Where the tenant has assigned his interest in the tenancy and the assignation has not been intimated to the landlord as required by Recommendation 47 below, the common law rule that notices or proceedings for removing against the original tenant are effective against the assignee should be retained.
(Paragraphs 4.84-4.85; clause 9(1) and Schedule 1, para 4, new s 34F(1), each as read with clause 17(1))

47. Where a tenant has assigned his interest in a tenancy, whether in security or otherwise, intimation to the landlord of the assignation should be effective for the purposes of Recommendation 46 above only where:

(a) the assignation has been intimated in writing to the landlord;

(b) the landlord has consented to the assignation in the deed of assignation; or

(c) in the case of an assignation registrable under the Registration of Leases (Scotland) Act 1857 or in the case of an interest in an assignation registrable under the Land Registration (Scotland) Act 1979, the assignation or interest has been so registered.
(Paragraphs 4.86-4.88; clause 9(1) and Schedule 1, para 4, new s 34F(1))

48. Where the tenant's interest in a tenancy has been assigned in security or where the tenant has granted a standard security over the interest and the security has been recorded in the Register of Sasines or the interest in the security has been registered in the Land Register for Scotland, any notice (or counter-notice in the case of agricultural holdings) given under any enactment by the landlord should not be

effective where the creditor has entered into possession of the security subjects unless it is given to the creditor, and in that case it should not be necessary to give such notice to the tenant.

(Paragraphs 4.93-4.95; clause 9(2) and Schedule 1, para 4, new s 34F(2))

49. In any legislation implementing our recommendations any reference to a party or to the parties to the lease or to the landlord or tenant should, unless the context otherwise requires, include a reference to any creditor in possession of the leased property.

(Paragraphs 4.96-4.97; clause 27(4) and Schedule 3, para 10(c), new s 93(8))

50. Where the interest of the landlord in leased property is subject to a proper liferent, for the purposes of giving any notice, copy notice or (in relation to leases of agricultural holdings) counter-notice under any enactment the liferenter alone should be deemed to be the landlord of the leased property and the interest of the fiar should be disregarded.

(Paragraphs 4.98-4.102; clause 12 and Schedule 1, para 4, new s 34I)

51. A landlord and a deceased tenant's executor should in relation to all types of leases be entitled to agree on the period of notice to be given in any notice under section 16(3) of the Succession (Scotland) Act 1964; and failing such agreement the period of notice stipulated in section 16(4) of the Act should be given.

(Paragraphs 5.7-5.8; Schedule 3, para 11(b))

Recommendations 52-58 below concern the bequest or transfer on death as intestate estate of an interest in a non-agricultural lease:

52. Where a tenant's interest in a non-agricultural lease is the subject of a bequest the legatee should, if he is accepting the bequest, give notice of his acceptance to the deceased tenant's landlord within the period of three months from the date of the tenant's death.

(Paragraphs 5.10-5.13; clause 21(1))

53. Where a legatee fails to give notice to the deceased tenant's landlord within the required period of time that he is accepting the bequest he should be regarded as having refused the bequest; and any occupation by him as legatee of the leased property after the end of the period of three months mentioned in Recommendation 52 above should be regarded as unlawful.

(Paragraphs 5.14-5.21; clause 21(2))

54. Where notice by the legatee is given under Recommendation 52 above to the deceased tenant's landlord the lease should be held binding on the landlord and the legatee as landlord and tenant respectively as from the date of the deceased tenant's death unless it has been terminated under Recommendation 69 below or otherwise.

(Paragraphs 5.22-5.23; clause 21(4)(a))

55. Section 16(8) of the 1964 Act should be amended to ensure that notwithstanding the vesting in the executor of an interest in a non-agricultural lease under section 14 of the Act, any legislation implementing Recommendations 52-54 above apply to a legatee of that interest.

(Paragraphs 5.24-5.25; clause 21(6))

56. Where the interest of a deceased tenant in a non-agricultural lease is transferred as intestate estate of the deceased to a person, that person should give notice of the transfer to the deceased tenant's landlord within a period of 21 days from the date of the transfer or, if he is prevented by some unavoidable cause from giving such notice within that period, as soon as possible thereafter.

(Paragraphs 5.26-5.30; clause 21(3))

57. Where notice by the transferee is given under Recommendation 56 above to the deceased tenant's landlord the lease should be held binding on the landlord and

the transferee as landlord and tenant respectively as from the date of transfer, unless it has been terminated under Recommendation 69 below or otherwise.

(Paragraphs 5.31-5.33; clause 21(4)(b))

58. Notwithstanding any statutory provision requiring the giving of notice to terminate a lease, where the transferee fails to give notice of the transfer to the deceased tenant's landlord within the required period of time the lease or (if there is more than one person who has an interest in common as tenant) the lease in so far as it relates to the interest of the transferee should, if not otherwise terminated, be treated as terminated as from the end of the period of 21 days referred to in Recommendation 56 above or as from the end of that period as extended under that Recommendation.

(Paragraphs 5.34-5.36; clause 21(5))

Recommendations 59-67 below concern the bequest or transfer on death as intestate estate of an interest in a lease of an agricultural holding:

59. Where a deceased tenant's interest in a lease of an agricultural holding is the subject of a bequest and the legatee is accepting the bequest, he should be required to give within 3 months from the date of the tenant's death notice of that acceptance to the landlord under section 20(1) of the 1949 Act.

(Paragraphs 5.37-5.38; Schedule 2, para 1(a))

60. Where a legatee receives a counter-notice from the landlord objecting to receiving him as tenant under the lease any application by the legatee to the Land Court under section 20(4) of the 1949 Act for an order declaring him to be tenant under the lease should be made within one month from the giving of the counter-notice.

(Paragraphs 5.39-5.40; Schedule 2, para 1(b))

61. Where the legatee fails to give notice to the deceased tenant's landlord within the required period of time that he is accepting the bequest or fails to make an application to the Land Court within the required period of time, the right to the lease should be treated as intestate estate of the deceased tenant; and any occupation by the legatee as legatee of the leased property after the right to the lease has become treated as intestate estate should be regarded as unlawful.

(Paragraphs 5.41-5.43; Schedule 2, para 1(c))

62. Where the interest of a deceased tenant in the lease of an agricultural holding is transferred to a person as intestate estate of the deceased tenant, the transferee should give notice of the transfer to the landlord of the holding within 21 days after the date of the transfer or, if he is prevented by some unavoidable cause from giving such notice within that period, as soon as possible thereafter.

(Paragraphs 5.44-5.46; Schedule 2, para 2, new s 21(1), (2))

63. Notwithstanding section 24(1) of the 1949 Act, where the transferee fails to give notice of the transfer to the landlord within the required period of time the lease or (if there is more than one person who has an interest in common as tenant) the lease in so far as it relates to the interest of the transferee should if not otherwise terminated be treated as terminated as from the end of the period of 21 days referred to in Recommendation 62 above or as from the end of that period as extended under that Recommendation.

(Paragraphs 5.47-5.48; Schedule 2, new s 21(7))

64. Where the landlord has given to the transferee a counter-notice under section 21(2) of the 1949 Act that he objects to receiving him as tenant under the lease, any subsequent application by the landlord to the Land Court for an order terminating the lease should be made within one month after the giving of the counter-notice; and the current provision in section 21(2) of the 1949 Act preventing the landlord from applying to the Land Court before the expiration of one month from the giving of the counter-notice should not be retained.

(Paragraphs 5.49-5.51; Schedule 2, para 2, new s 21(3))

65. Unless the landlord both gives a counter-notice to the landlord under section

21(2) of the 1949 Act and makes an application to the Land Court for an order terminating the lease, the lease should be binding on the landlord and on the transferee as landlord and tenant respectively as from the date of the transfer.

(Paragraphs 5.52-5.53; Schedule 2, para 2, new s 21(4))

66. It should be expressly provided that where in relation to an application submitted under section 21(2) of the 1949 Act the Land Court is not satisfied that the landlord has established any reasonable ground of objection to receiving the transferee as tenant, the lease should be binding on the landlord and on the transferee as landlord and tenant respectively as from the date of the transfer.

(Paragraphs 5.54-5.55; Schedule 2, para 2, new s 21(5)(b))

67. Unless the Land Court on cause shown otherwise direct, the transferee should be entitled to possess the holding pending proceedings before the Land Court under section 21 of the 1949 Act, and where the Land Court make an order terminating the lease at Whitsunday or Martinmas, up to the term specified; and the current provision in section 21(4) of the 1949 Act requiring the executor's consent to possession of the holding by the transferee pending proceedings under the section should not be retained.

(Paragraphs 5.54-5.59; Schedule 2, para 2, new s 21(6))

68. Termination of the lease of an agricultural holding under section 21 of the 1949 Act should for the purposes of determining entitlement to any payment under paragraph 2 of Schedule 2 to the Agriculture Act 1986 (compensation for milk quota) be treated as the termination of the transferee's tenancy of the holding.

(Paragraphs 5.60-5.61; Schedule 2, para 2, new s 21(8))

69. Where a party to a lease dies, the other party should, unless Recommendation 70 below applies, be entitled after the death to give any notice (or counter-notice in the case of leases of agricultural holdings) under any enactment addressed to the deceased party (as if he were still alive) and that notice (or counter-notice) should be effective for its purpose.

(Paragraphs 5.66-5.68; clause 10(1) and Schedule 1, para 4, new s 34G(1))

70. The entitlement of a party to a lease to give a notice addressed to a deceased person under Recommendation 69 above should cease

(a) where that party has received notification of either confirmation of an executor-nominate to the estate of the deceased party or the appointment of an executor-dative to that party;

(b) where that party has been notified that the deceased's interest has been assigned in security or made subject to a standard security (the standard security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and that since his death a creditor has entered into possession of the security subjects;

(c) in the case of the death of the tenant under a lease of non-agricultural subjects, where the landlord has been notified under Recommendation 52 above that a legatee has accepted a bequest of the deceased tenant's interest in the lease;

(d) in the case of the death of the tenant under a lease of an agricultural holding, where the landlord has been notified—

(i) under section 20(2) of the 1949 Act that a legatee has accepted a bequest of the deceased tenant's interest in the lease, unless the landlord has given a counter-notice to the legatee under section 20(3); or

(ii) that the Land Court has made an order under section 20(5) of the 1949 Act declaring the legatee to be the tenant under the lease.

(Paragraphs 5.69-5.74; clause 10(2), (5) and Schedule 1, para 4, new s 34G(2), (5))

71. Where notice has been given addressed to a deceased party under Recommendation 69 above, and an executor-nominate has not been confirmed to the estate of the deceased or an executor-dative has not been appointed to him, then until such

confirmation or appointment occurs any of the following persons should be entitled to act to protect the deceased's interest in the tenancy or in the leased property—

(a) the spouse of the deceased;

(b) a specific legatee of that interest or a residuary legatee;

(c) any person nominated in a will of the deceased as an executor of him;

(d) any person entitled to apply to be appointed his executor-dative;

(e) if the deceased's interest has been assigned in security or made subject to a standard security (the standard security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and the creditor is not in possession thereof, the creditor;

(f) any other person with an actual or potential interest in the tenancy or in the leased property.

(Paragraphs 5.75-5.79; clause 10(3), (5) and Schedule 2, para 4, new s 34G(3), (5))

72. Where the date of termination of a lease falls within the period of one year following the deceased tenant's death and the deceased tenant's interest in the tenancy has vested in his executor by virtue of section 14 of the 1964 Act, an express provision should make it clear that notwithstanding section 16(3) of the 1964 Act the landlord or the deceased tenant's executor shall be entitled to give a notice to terminate the tenancy at that date.

(Paragraphs 5.80-5.81; clause 10(4) and Schedule 2, para 4, new s 34G(4))

73. Where there is a sub-tenancy which has been authorised expressly or impliedly by the landlord of the tenant and the sub-tenant dies, and at the time of his death the sub-tenant was in possession of the leased property, the landlord and tenant should subject to Recommendation 74 below be entitled after the death to give a copy notice addressed to the deceased sub-tenant (as if he were still alive) under our Recommendations 32 or 39(a) above, and that copy notice should have effect as if it were given to the sub-tenant.

(Paragraphs 5.82-5.83; clause 11(1) and Schedule 2, para 4, new s 34H(1))

74. The entitlement of the landlord or tenant to give a copy notice addressed to a deceased sub-tenant under Recommendation 73 above should cease—

(a) where the tenant has been notified of the confirmation of an executor-nominate to the estate of the deceased sub-tenant or the appointment of an executor-dative to him;

(b) where the tenant has been notified that the deceased's interest has been assigned in security or made subject to a standard security (the standard security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and that since his death the creditor has entered into possession of the security subjects;

(c) in the case of the death of the sub-tenant under a lease of non-agricultural subjects, where the tenant has been notified (as the sub-tenant's landlord) under Recommendation 52 above that a legatee has accepted a bequest of the deceased's interest in the sub-lease;

(d) in the case of the death of the sub-tenant under a sub-lease of an agricultural holding, where the tenant (as the sub-tenant's landlord) has been notified—

(i) under section 20(2) of the 1949 Act that a legatee has accepted a bequest of the deceased's interest in the sub-lease, unless the landlord has given a counter-notice to the legatee under section 20(3); or

(ii) that the Land Court has made an order under section 20(5) of the 1949 Act declaring the legatee to be the sub-tenant under the sub-lease.

(Paragraphs 5.84-5.85; clause 11(2), (4) and Schedule 2, para 4, new s 34H(2), (4))

75. Where a copy notice has been given under Recommendation 73 above addressed to a deceased sub-tenant and an executor-nominate has not been confirmed to the

estate of the deceased or an executor-dative has not been appointed to him, then until such confirmation or appointment occurs any of the following persons should be entitled to act to protect the deceased sub-tenant's interest in the sub-tenancy—

(a) the spouse of the deceased;

(b) a specific legatee of that interest or a residuary legatee;

(c) any person nominated in a will of the deceased as an executor of him;

(d) any person entitled to apply to be appointed as his executor-dative;

(e) if the deceased's interest has been assigned in security or made subject to a standard security (the security having been recorded in the Register of Sasines or the interest therein having been registered in the Land Register of Scotland) and the creditor is not in possession thereof, the creditor;

(f) any other person with an actual or potential interest in the tenancy or in the leased property.

(Paragraphs 5.86-5.87; clause 11(3), (4) and Schedule 2, para 4, new s 34H(3), (4))

76. Where notice under legislation implementing our recommendations, the 1949 Act, or section 16(3) of the 1964 Act is required to be given for the purpose of bringing a tenancy of leased property or part of leased property to an end, it should be provided that such notice must be given prior to the institution of proceedings for removing the tenant from the leased property or that part.

(Paragraphs 6.1-6.3; clause 17(1))

77. Where property which is subject to one tenancy has more than one landlord, each being the landlord of a separate part, a landlord who has either given a notice to quit or received a notice under Recommendation 33 above, or a landlord to whom a tenant gave a notice under Recommendation 34 above, should be entitled to rely on that notice for the purpose of instituting proceedings for removing the tenant from the part of the leased property of which he is the landlord.

(Paragraphs 6.4-6.6; clause 17(2))

78. Where property which is subject to one tenancy has more than one landlord, the interest of each landlord being an interest in common, and notice has been given under Recommendation 40 above to bring the tenancy to an end, any of the landlords should be entitled to rely on that notice for the purpose of instituting proceedings for removing the tenant from the leased property without obtaining the consent thereto of the other landlords of the leased property.

(Paragraphs 6.7-6.11; clause 17(3))

79. Where the interest of the landlord in leased property is the subject of a proper liferent and a notice has been given under Recommendation 50 above to bring the tenancy to an end, the liferenter should be entitled to institute proceedings to remove the tenant from the leased property without obtaining the consent thereto of the fiar of the property.

(Paragraphs 6.12-6.13; clause 17(4))

80. Where the interest of the landlord in leased property is the subject of a proper liferent, the fiar should not be entitled to institute proceedings for removing any person from the property, whether or not the person ever had a right or permission to occupy the property.

(Paragraphs 6.14-6.15; clause 17(5))

81. Where a lease stipulates circumstances in which the landlord may resume leased property, a notice of resumption under Recommendation 11 above must be given prior to the institution of proceedings by the landlord for removing from that property in pursuance of such a stipulation.

(Paragraphs 6.16–6.17; clause 17(6) as read with the definition of "resumption notice" in clause 27(1) and Schedule 3, para 10(a)(ii))

82. Where leased property is subject to a heritable security constituted by an *ex*

facie absolute disposition and the landlord institutes proceedings for removing from the property, if the landlord's title to institute the proceedings is challenged he should be enabled to establish that title by the production of a back letter or other document showing the true nature of the disposition.

(Paragraphs 6.18-6.19; clause 17(7))

83. Any person who is entitled to receive rent for, or to take possession of, leased property should be entitled to give notice to quit and should have title to institute a subsequent action for recovery of possession of the leased property.
(Paragraphs 6.20-6.24; clause 27(1) (definition of "landlord") and Schedule 3, para 10(a)(i))

84. In relation to leases both of non-agricultural subjects and of agricultural holdings, it should be provided that anything which by or under legislation implementing our recommendations or the 1949 Act as the case may be is required or authorised to be done by, to or in respect of the landlord, the tenant or the sub-tenant of the property may be done by, to or in respect of any agent of the landlord, the tenant or the sub-tenant.

(Paragraphs 6.27-6.29; clause 27(3) and Schedule 3, para 10(b))

85. Where a tenant has granted a sub-lease of the leased property or any part of it, if his landlord institutes proceedings to remove the sub-tenant on the ground that the sub-tenancy is unauthorised, and the tenancy still subsists, the tenant should be called as a defender in the proceedings.

(Paragraphs 6.33-6.35; clause 18(1))

86. Any person who under Recommendation 71 or Recommendation 75 above would be entitled to act to protect the interest of a deceased tenant, or of a person who at the date of his death was a sub-tenant in possession of the leased property, should have a title to defend any proceedings by the landlord for removing from the leased property or any part of it; but that entitlement should come to an end either after defences in the proceedings have been lodged by an executor of the deceased or by a person who has acquired the interest of the deceased, or if no defences have been lodged by such an executor within a period of 28 days after his confirmation or appointment or by a person who has acquired the interest of the deceased, at the end of that period.

(Paragraphs 6.36-6.40; clause 18(2))

87. Any proceedings for possession of heritage should be referred to as proceedings for removing from heritable property and any reference in any enactment to eject or "ejection" should be construed respectively as a reference to remove or removing in terms of our recommendations.
(Paragraphs 7.1-7.4; clauses 14(1), 15 and 16; Schedules 3 (the general amendment) and 4 (repeal of words in the 1971 Act))

88. Actions of removing, extraordinary removing and ejection in the sheriff court under the ordinary cause procedure should, subject to Recommendation 111 below, be abolished and replaced by one form of proceeding, an action for removing from heritable property.

(Paragraphs 7.5-7.14; clause 15(1))

89. Section 7(4) of the Sheriff Courts (Scotland) Extracts Act 1892 should be amended to provide that the decree extracted is for removing from heritable property, that the charge is to be directed against the defender and any other occupant deriving right or having permission from the defender, that the period of charge should be 48 hours, and that the period of charge may be dispensed with by the sheriff on cause shown.

(Paragraphs 7.15-7.17, 7.22; clause 15(2))

90. In the Schedule to the 1892 Act, Forms 9 and 10 should be replaced by one

single form concerning an extract decree for removing from heritable property, and providing that the removing should be at the date and time specified by the sheriff.
(Paragraphs 7.18, 7.22; clause 15(3))

91. For the purposes of charging the defender and any other occupant as mentioned in Recommendation 89 above, if the defender is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981, then notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner (as also defined in these respective sections) should be regarded as deriving right from the defender.
(Paragraphs 7.19-7.22; clause 15(2))

92. It should be provided that, notwithstanding section 35(1)(c) of the Sheriff Courts (Scotland) Act 1971, it shall be competent for an action for removing from heritable property to proceed as an ordinary cause in the sheriff court where in addition or as an alternative to a decree for removing there is claimed either a decree other than a decree for payment of money (disregarding for this purpose any claim for a decree for expenses) or a decree for payment of money exceeding £1,500 (exclusive of interest and expenses).
(Paragraphs 8.7-8.13; clause 14(2), new s 35(1B) of the 1971 Act)

93. Where a decree in a summary cause action for recovery of possession of heritable property has been granted, the sheriff should have a discretion along the lines of that contained in Rule 90 of the Ordinary Cause Rules to shorten the period which must elapse before an extract of the decree may be issued.
(Paragraphs 8.16-8.17; to be implemented by subordinate legislation)

94. It should be provided in the Summary Cause Rules that prior to diligence on a decree for removing from heritable property granted in a summary cause action in the sheriff court, a charge of 48 hours should be given, but that the court should have a discretion to dispense with this period on cause shown.
(Paragraphs 8.18-8.21; to be implemented by subordinate legislation)

95. Where a debtor is in default under a standard security, the creditor should be specifically entitled under the Conveyancing and Feudal Reform (Scotland) Act 1970 to obtain the remedy of removing from the security subjects the debtor, the proprietor or any other occupant deriving right or having permission from the debtor or the proprietor; and where the debtor or proprietor is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, then, notwithstanding anthing in that Act, the non-entitled spouse or non-entitled partner as so defined shall be regarded as deriving right from the debtor or the proprietor.
(Paragraphs 8.23-8.29; Schedule 3, para 12 (insertions into paragraph 10 of Schedule 3 to the 1970 Act))

96. It should be competent to institute an action for removing from heritable property in the Court of Session notwithstanding that the action does not contain any other conclusion.
(Paragraphs 9.1-9.5; clause 16(1))

97. It should no longer be competent to conclude in an action in the Court of Session for an extraordinary removing and any action which would have contained such a conclusion should instead conclude for removing from heritable property.
(Paragraphs 9.6-9.7; clause 16(5))

98. Procedure by way of letters of ejection should be abolished.
(Paragraphs 9.8-9.9; clause 16(4))

99.(a) It should be provided that every extract of a decree granted by the Court of Session for removing from heritable property should contain a warrant, and the form of the warrant should be prescribed by act of sederunt;

(b) it should be provided that it shall be lawful by virtue of the warrant to execute the necessary charge and carry out any necessary diligence; and in this connection the terms of any legislative provision should be consistent with those of any provision implementing Recommendation 89 above;

(c) the charge should be directed against the defender and any other occupant deriving right or having permission from the defender;

(d) the period of the charge should be 48 hours and the Court of Session should have the power on cause shown to dispense with the period of charge;

(e) for the purposes of paragraph (c) above, if the defender is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, then notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner should be regarded as deriving right from the defender.

(Paragraphs 9.10-9.12; clause 16(2), (3))

100. The rules of law and procedure relating to violent profits should be abolished.

(Paragraphs 10.1-10.11, 10.17; clause 20(1))

101. In any action for removing a person from heritable property, the court, on cause shown, should be entitled to order the defender to find caution for any financial claim which the pursuer may have arising from any occupation of the property (whether lawful or unlawful) by the defender.

(Paragraphs 10.12-10.17; clause 20(2))

102. Where an order for caution has been made under Recommendation 101 above, the defender should have the option of providing caution either by means of a bond of caution or other guarantee or by consigning an appropriate sum in court as caution.

(Paragraphs 10.19-10.20; clause 20(3))

103. A person entitled to occupy heritable property should have the same right to bring an action for removing any persons in occupation of the property who cannot be identified by him as he would have if he could identify these persons; and a provision enabling the necessary procedure to be prescribed by act of sederunt should be included in any legislation implementing our recommendations.

(Paragraphs 10.21-10.31; clause 19)

104. Any procedure prescribed as mentioned in Recommendation 103 above should reflect the following objectives:—

(a) The procedure should be available in an action for removing from heritable property a person such as a trespasser or squatter who has entered into the property and remained in occupation of it without title or right to do so, but such procedure should not be available in the case of proceedings against a person such as a tenant who has or had a title or other form of right to occupy the property, and who has been in occupation continuously since that title or right is alleged to have come to an end;

(b) the summons or the initial writ should be served on any person in occupation named therein in accordance with normal procedures or in such other manner as the court may direct; and in addition the summons or the initial unit should be served, unless the court otherwise directs, by affixing a copy of the summons or the initial writ to the main door or other conspicuous part of the property, and if practicable, inserting through the letter-box at the property a copy of the summons or the initial writ enclosed in a sealed envelope addressed to "the occupiers";

(c) any person not named as a defender who is in occupation of the land and wishes to be heard on the question of whether a decree for removing should be granted should be entitled to apply at any stage of the proceedings to appear as a defender.

(Paragraphs 10.32-10.33; to be implemented by subordinate legislation)

105. In an action for removing from heritable property instituted in either the sheriff court under ordinary cause procedure (see Recommendation 88 above) or the Court of Session (see Recommendation 96 above) and directed against a person or persons in possession of the property *vi clam aut precario* and without right or title to possess the property, the court should have a power (similar to that contained in Rule 68A of the Summary Cause Rules) on a verbal application to shorten or dispense with any period of time provided for anywhere in the rules relating to the conduct of the proceedings.

(Paragraphs 10.37-10.40; to be implemented by subordinate legislation)

106. The requirements for the giving of notice in relation to a lease should apply irrespective of whether the notice is given by the tenant or by the landlord; and as a consequence section 24(4) of the 1949 Act should be repealed.

(Paragraphs 11.1-11.4; Schedule 1, para 2, new s 24, omitting subsection (4))

107. It should be provided that any notice or copy notice required or authorised by any legislation implementing our recommendations in relation to non-agricultural leases, or by section 16 of the Succession (Scotland) Act 1964, to be given to any person shall be duly given if it is delivered to him, or left at his proper address, or sent to him by post to his proper address in a recorded delivery letter or a registered letter; and section 90(1) of the 1949 Act should be amended in relation to the sending to any person of any notice or other document so as to require sending to him by post "to his proper address in a recorded delivery letter or a registered letter.".

(Paragraphs 11.4-11.10; clause 23(1), Schedule 3, para 11(c) (new s 16 (5A) of the 1964 Act) and para 9(a) (amendment to s 90(1) of the 1949 Act))

108. Further to Recommendation 107 above, it should be provided that in the case of an incorporated company or body, any such notice or copy notice relating to a non-agricultural lease shall be duly given if it is given to the secretary or clerk of the company or body; and that for the purposes of that Recommendation, the proper address of a person is in the case of a secretary or clerk to a company or body, that of the registered or principal office of the company or body, and in any other case, the person's last known address; and in the equivalent provision contained in section 90(3) of the 1949 Act, the words "and of section twenty-six of the Interpretation Act, 1889" should be repealed.

(Paragraphs 11.11-11.13; clause 23(2),(3), Schedule 3, para 11(c) (new s 16(5B), (5C) of the 1964 Act) and Schedule 4 (repeal of words in s 90(3) of the 1949 Act))

109. Subject to Recommendation 70 above (the ending of entitlement to give notice addressed to a deceased party to a lease), it should be provided that where there has been a change of landlord but the tenant has not received notice of the change, any notice given by the tenant to the original landlord shall be deemed to be duly given to the landlord under the tenancy.

(Paragraphs 11.14-11.17; clause 23(4) and Schedule 3, para 9(b) (new s 90(4) of the 1949 Act))

110. Any legislation implementing our recommendations should, subject to Recommendation 111 below, apply to leases in existence at the commencement date of the legislation.

(Paragraphs 11.20-11.21; clause 28(1))

111. Any notice or counter-notice given before the commencement date of any legislation implementing our recommendations by any party to a lease to another party should have effect and be enforceable as if the legislation had not been passed.

(Paragraphs 11.20-11.21; clause 28(2))

112. Any legislation implementing our recommendations concerning proceedings for removing from heritable property should not affect either any action, in whatever form, raised before the commencement of the legislation where the purpose of the

action is to remove a person from heritable property, or the enforcement of any decree granted in such an action.

(Paragraphs 11.22-11.23; clause 28(3))

113. In the event of implementation of the foregoing recommendations, the following statutory provisions should be repealed:– Chapter XV (Removings) of the Codifying Act of Sederunt of 4 June 1913; the Ejection Caution Act 1594; the Removal Terms (Scotland) Act 1886; and sections 34 to 38A of the Sheriff Courts (Scotland) Act 1907 along with Rules 103 to 107 in Schedule 1 to the Act and forms L, M and N in the Appendix; and consideration should be given to amending or repealing Rule 69 of the Summary Cause Rules.

(Paragraphs 11.24-11.26; clause 29(2), (3) and Schedule 4)

Appendix A

REMOVING FROM HERITABLE PROPERTY (SCOTLAND) BILL

ARRANGEMENT OF CLAUSES

DRAFT

OF A

BILL

TO

A.D. 1989.

Make amendments to the law in Scotland relating to removing from heritable property; to make provision in respect of leased property relating to the giving of notice generally by either party to the other; to make provision in relation to the bequest, and the transfer on intestacy, of a tenant's interest in a lease; and for connected purposes.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

NOTICES IN RELATION TO NON-AGRICULTURAL LEASES

Notices of termination.

1.—(1) Where a non-agricultural lease is of a type which is capable of being continued in force by tacit relocation, the tenancy shall not come to an end—

(*a*) at the termination of the stipulated endurance of the lease; or

(*b*) if the lease has been so continued in force, at the termination of the period for which the lease has been so continued in force,

unless either party has given, in writing, the requisite period of notice to the other party of his intention to bring the tenancy to an end.

(2) Where a non-agricultural lease is of such a type as aforesaid and it provides for a break in favour of both parties or either party, it shall not be competent for a party to bring the tenancy to an end at the break unless he has given, in writing, the requisite period of notice to the other party of his intention to do so.

(3) Subject to subsection (4) below, the requisite period of notice under this section shall be a period of not less than—

(*a*) 28 days, or

(*b*) the number of days which is equal to half the period for which the property is let,

whichever is the shorter, before the date—

(i) of termination of the stipulated endurance of the lease, or

(ii) of termination of the period for which the lease has been continued in force, or

(iii) of the break provided for in the lease,

(as the case may be).

(4) The requisite period of notice under this section shall be such period as the parties agree in writing—

(*a*) if the agreed period is longer than the period applicable under subsection (3) above; or

(*b*) if the agreed period is shorter than the period so applicable (the shorter period being a period of not less than 48 hours) and the agreement is made at any time after the tenant has entered into possession of the leased property.

(5) An agreement under subsection (4) above shall be binding on any successors to the parties to it.

(6) A notice by either party to the other under this section shall specify—

(*a*) the intention of the party giving the notice to bring the tenancy to an end;

(*b*) the leased property;

(*c*) the date on which the tenancy is to come to an end;

(*d*) the name and address of the party giving the notice, or, if the notice is given by an agent, the name of the party on whose behalf it is given and the name and address of the agent.

(7) A notice given under this section may be withdrawn only with the consent of the party to whom it is given.

Clause 1

General

Clause 1 implements the Recommendations of the Report concerning the giving and the effect of a notice of termination of a non-agricultural lease. It provides for the period of notice to be given and the information to be specified in such a notice. The expressions "a non-agricultural lease" and "non-agricultural property" are defined for the purposes of the Bill (see clause 27(1)) as having the meanings given in clause 1(10)(a) and (b) respectively. "Notice to quit" is also defined in clause 27(1) in relation to non-agricultural leases as a notice under this clause by a landlord to a tenant.

Subsection (1)

This subsection (as read with clause 17(1)) implements Recommendation1(a). It also implements Recommendations 1(b), 2 and 4. The general rule is laid down that the giving of a written notice of termination is required to prevent any continuation of the tenancy which would otherwise be implied by operation of the common law principle of tacit relocation (ie the renewal of the tenancy by the implied consent of the parties).

Subsection (2)

This subsection implements Recommendation 17 in relation to non-agricultural leases. It requires the giving of notice under this clause in order to bring a tenancy to an end at a break point provided for in the lease.

Subsection (3)

This subsection implements Recommendation 8. It also implements Recommendation 9, in conjunction with the repeal in Schedule 4 of the Removal Terms (Scotland) Act 1886. The subsection requires the giving of a minimum period of notice of termination of whichever is the shorter of the following periods: 28 days, or a period equal to half the period of the lease. It also provides that the period of notice should be calculated in relation to the date on which the notice is to take effect.

Subsection (4)

In implementation of Recommendations 24 and 28, this subsection entitles parties to a non-agricultural lease to agree to a period of notice of termination other than that required under subsection (3). This entitlement is subject to the restrictions in paragraph (b) where the agreement is for a shorter period of notice than the minimum stipulated. These are that in all cases a minimum of 48 hours' notice must be given and that the agreement must be made at any time after the tenant has entered into possession of the leased property.

Subsection (5)

The principle laid down in Recommendation 29 is reflected in this subsection in relation to contracting out agreements under subsection (4).

Subsection (6)

This subsection implements Recommendations 5 and 6 in relation to non-agricultural leases. It specifies the information to be inserted in a notice of termination.

Subsection (7)

This subsection implements Recommendation 18 in relation to non-agricultural leases.

(8) Nothing in the foregoing provisions of this section shall affect the right of a landlord to remove a tenant—

(*a*) who by failure to pay rent or otherwise has incurred any irritancy of his lease or other liability to be removed; or

(*b*) under any other enactment.

(9) Where a non-agricultural lease is of a type which is not capable of being continued in force by tacit relocation, no notice shall be required to be given by either party for the purpose of bringing the tenancy to an end at the termination of the stipulated endurance of the lease.

(10) Subject to section 26 of this Act, in this Act—

(*a*) "a non-agricultural lease" means any lease of heritable property other than a lease of an agricultural holding; and

(*b*) "non-agricultural property" means property which is subject to a non-agricultural lease.

Presumptions as to commencement and duration of lease.

2. Where under a non-agricultural lease which is of a type which is capable of being continued in force by tacit relocation the tenant has entered into possession of the leased property, there shall be a presumption—

(*a*) if the date of commencement of the lease cannot be ascertained, that the lease commenced on 28th May;

(*b*) if the duration of the lease cannot be ascertained, that the lease is for one year.

Treatment of tenancy where leased property is in mixed use.

3. Where leased property is used partly for agriculture and partly for a purpose other than agriculture, then, for the purposes of this Act, if the property does not fall to be treated by virtue of section 24A of the 1949 Act as being wholly an agricultural holding, it shall be treated as being wholly let under a non-agricultural lease.

Subsection (8)

This subsection implements Recommendation 19. A landlord has the right in certain circumstances to remove a tenant without having to give notice of termination of the lease. This subsection preserves any right a landlord may have in this respect.

Subsection (9)

Tacit relocation (this term is explained in the note to subsection (1)) does not apply to certain types of non-agricultural leases, such as leases of fishings and shootings. In relation to such leases, a notice does not require to be given in order to achieve termination at the due date. For the avoidance of doubt this subsection preserves that position. It implements Recommendation 20.

Subsection (10)

This subsection defines "a non-agricultural lease" and "non-agricultural property" for the purposes of the Bill. Excluded from these definitions are the subjects listed in clause 26, namely allotments and allotment gardens, crofts, cottars, and the holdings of a landholder or a statutory small tenant: see paragraph 1.7 of the Report.

Clause 2

This clause introduces a presumption as to the date of commencement of a lease, and a further presumption as to the duration of a lease, where these terms cannot be ascertained and where the tenant is in possession of the property. Paragraph (a) implements Recommendation 15 in relation to non-agricultural leases. Paragraph (b) implements Recommendation 16(a).

Clause 3

This clause, taken along with the new section 24A of the Agricultural Holdings (Scotland) Act 1949 contained in paragraph 3 of Schedule 1, implements Recommendation 14. It provides that leased property in mixed use (ie property used partly for agriculture and partly for non-agricultural purposes) shall be treated as a non-agricultural lease where, on application of the rule contained in the new section 24A, the property does not fall to be regarded as wholly an agricultural holding. "The 1949 Act", "agriculture" and "agricultural holding" are defined in clause 27(1).

Resumption notices.

4.—(1) Where a non-agricultural lease contains a right of resumption of the leased property in favour of the landlord, the landlord shall not be entitled to exercise that right unless he has given, in writing, the requisite period of notice to the tenant of his intention to do so.

(2) Subject to subsection (3) below, the requisite period of notice under this section shall be not less than—

(*a*) 28 days, or

(*b*) the number of days which is equal to half the period for which the property is let,

whichever is the shorter, before the date of the intended exercise of the right.

(3) The requisite period of notice under this section shall be such period as the parties agree in writing—

(*a*) if the agreed period is longer than the period applicable under subsection (2) above; or

(*b*) if the agreed period is shorter than the period so applicable (the shorter period being a period of not less than 48 hours) and the agreement is made at any time after the tenant has entered into possession of the leased property.

(4) An agreement under subsection (3) above shall be binding on any successors to the parties to it.

Clause 4

General

Clause 4 implements the general policy of the Report in relation to resumption by a landlord of property subject to a non-agricultural lease, namely that notice should be given to the tenant before the exercise of any right of resumption. The term "resumption notice", used later in the Bill, is defined in clause 27(1) as a notice under this clause.

Subsection (1)

This subsection implements Recommendation 11 in relation to non-agricultural leases. It requires a landlord, before exercising a right of resumption over property subject to a non-agricultural lease, to give to the tenant notice in writing of his intention to do so.

Subsection (2)

In implementation of Recommendation 12, this subsection stipulates the minimum period of notice required before the exercise of a right of resumption in relation to property subject to a non-agricultural lease.

Subsection (3)

This subsection implements Recommendations 27, and 28 in part. It permits parties to agree to the giving of a period of notice other than that required under subsection (2), subject to the restrictions in paragraph (b) where a shorter period than that stipulated is agreed. These are that in all cases a minimum of 48 hours' notice must be given and that the agreement must be made at any time after the tenant has entered into possession of the leased property.

Subsection (4)

This subsection implements the general rule contained in Recommendation 29 in relation to contracting out agreements under subsection (3).

Notices of termination and other notices—special cases

Sub-tenancies.

5.—(1) This section applies where non-agricultural property is subject both to a tenancy and to any sub-tenancy authorised (either expressly or impliedly) by the landlord of the tenant.

(2) Where this section applies, the bringing to an end of a tenancy of the leased property shall also bring to an end any sub-tenancy thereof.

(3) Where this section applies and there is a sub-tenant in possession of the leased property—

(*a*) a notice to quit or resumption notice given to a tenant by a person who is his landlord or a notice given to a deceased tenant's executor under section 16(3) of the Succession (Scotland) Act 1964 ("the 1964 Act") by the landlord shall be ineffective unless—

(i) the landlord at the same time gives a copy of the notice to the sub-tenant in such possession; or

(ii) the tenant or the deceased tenant's executor as soon as practicable after he receives the notice gives a copy of it to that sub-tenant;

(*b*) a notice by a tenant under section 1 of this Act given to a person who is his landlord of his intention to bring the tenancy to an end or a notice by a deceased tenant's executor under the said section 16(3) to the landlord shall be ineffective unless—

(i) the tenant or the deceased tenant's executor at the same time gives a copy of the notice to the sub-tenant in such possession; or

(ii) the landlord as soon as practicable after he receives the notice gives a copy of it to that sub-tenant.

Clause 5

General

This clause implements Recommendations 30 and 31 in relation to non-agricultural leases. It provides for the termination of any authorised sub-tenancy of leased property where the tenancy is terminated, and that any notice to terminate the tenancy or resume property subject to the tenancy shall be ineffective unless a copy is given to the sub-tenant in possession of the property. The clause covers the situation where there is a chain of sub-tenancies in relation to the property: see the definition of "sub-tenant" in clause 27(1).

Subsection (1)

This subsection applies clause 5 to non-agricultural property which is subject both to a tenancy and to any authorised sub-tenancy.

Subsection (2)

This subsection implements Recommendation 30 in relation to non-agricultural leases. It enacts the existing rule of law that the termination of a tenancy also brings any sub-tenancy of the property to an end (see paragraph 4.5 of the Report).

Subsection (3)

This subsection implements Recommendation 31 in relation to non-agricultural leases. It provides that where there is a sub-tenant in possession of the property, any notice of termination of the tenancy or any resumption notice shall be ineffective unless a copy of the notice is given to the sub-tenant.

More than one separate landlord.

6.—(1) This section applies where non-agricultural property which is subject to one tenancy has more than one landlord, each landlord being the landlord of a separate part of the property.

(2) Where this section applies, then, subject to any agreement to the contrary (in the lease or otherwise) to which all the landlords are parties, it shall be competent for—

(*a*) the landlord of part of the leased property to give notice to quit to the tenant or notice to the deceased tenant's executor under section 16(3) of the 1964 Act; or

(*b*) the tenant to give notice of intention to bring the tenancy of part of the leased property to an end under section 1 of this Act, or the deceased tenant's executor to give notice under the said section 16(3), to the landlord of that part,

and any such notice shall be effective for the purpose of bringing the tenancy of that part to an end.

(3) Where the tenant or the deceased tenant's executor is given a notice in pursuance of subsection (2)(a) above by the landlord of part of the leased property ("the first part"), a notice given by the tenant or executor to the landlord of any other part of the leased property of his intention to bring the tenancy of that part to an end shall, subject to subsection (4) below, be effective for the purpose of bringing the tenancy of that other part to an end on the date on which the tenancy of the first part is to come to an end.

(4) A notice under subsection (3) above shall not be effective unless the period of notice is a period of not less than 14 days or a period which is equal to half the period specified in the notice under subsection (2)(a) above, whichever is the lesser period.

(5) The foregoing provisions of this section are without prejudice to the right—

(*a*) of all the landlords to bring the whole tenancy to an end by giving the tenant a notice to quit all the leased property or by giving the deceased tenant's executor a notice under section 16(3) of the 1964 Act; or

(*b*) of the tenant or of the deceased tenant's executor to bring the whole tenancy to an end by giving notice under section 1 of this Act or the said section 16(3) (as the case may be) of his intention to do so to all the landlords of the leased property.

(6) Where this section applies, no agreement under section 1(4) of this Act shall have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.

(7) Where the tenancy of part or parts of leased property is brought to an end by virtue of this section—

(*a*) the rent attributable to the tenancy of that part or those parts and the rent payable for the tenancy of any other part of that property (having regard to any depreciation in the value of any such other part caused by the tenancy of the part or parts being brought to an end or by the use to be made of the part or parts); and

(*b*) any compensation or sum payable by or to the tenant under any rule of law in relation to the tenancy of the part or parts being brought to an end,

shall be determined in such a way as may be agreed between the tenant and all his landlords or, failing such agreement, as may be determined by arbitration; and the expenses of the arbitration shall be directed by the arbiter to be paid by the aforesaid persons in such proportions as he shall determine.

Clause 6

General

In relation to non-agricultural leases, this clause provides for the termination of the tenancy and any authorised sub-tenancy of property which is subject to one tenancy but which has more than one landlord, each landlord being the landlord of a separate part of the property.

Subsection (1)

This subsection applies the clause to the type of situation described above.

Subsection (2)

This subsection implements Recommendation 33. It overturns the existing rule of law by permitting termination of the tenancy of part of leased property by notice given either by the landlord of that part to the tenant or the deceased tenant's executor, or by the tenant or the deceased tenant's executor to the landlord of that part. "The 1964 Act" is defined in clause 27.

Subsection (3)

This subsection implements Recommendation 34(a). It recognises that the separate parts of the property may be used interdependently and therefore that where the tenancy of one part is brought to an end the tenant may not wish to retain the tenancy of the other part or parts. It enables the tenant in such a case to terminate the tenancy of any other part of the property by giving a notice to the landlord of that part.

Subsection (4)

This subsection implements Recommendation 34(b)(i). It provides for the minimum period of notice to be given in a notice under subsection (3).

Subsection (5)

This subsection implements Recommendation 35. This preserves the existing position whereby the whole tenancy can be brought to an end by notice given either by or to all of the landlords.

Subsection (6)

In implementation of Recommendation 36, this subsection ensures that all of the separate landlords are brought in as parties to any agreement to contract out of the statutory notice provisions relating to termination of the lease. Failing this, the agreement is ineffective.

Subsection (7)

This subsection provides the method for determining the rent attributable to, and any compensation or sum payable in respect of, the tenancy of any part of leased property brought to an end under this clause, and also the rent payable for the tenancy of any other part of that property. It implements Recommendation 37.

(8) Where there is a sub-tenant in possession of the leased property whose sub-tenancy has been authorised (either expressly or impliedly) by all the landlords of the tenant—

(*a*) a notice under subsection (2) or (3) above shall be effective only if a copy of it is given to the sub-tenant under section 5(3) of this Act;

(*b*) if the sub-tenant is given a copy of a notice in pursuance of paragraph (a) above in respect of part of the property sub-let to him ("the first part"), a notice given by him to the tenant in respect of any other part of the property sub-let to him of his intention to bring his sub-tenancy of that part to an end shall, subject to subsection (4) above (as applied by paragraph (c) below), be effective for the purpose of bringing his sub-tenancy of that other part to an end on the date on which the tenant's tenancy of the first part is to come to an end;

(*c*) subsection (4) above shall apply to a notice given under paragraph (b) above as it applies to a notice given under subsection (3) above;

(*d*) subsection (5) above shall have effect as if at the end there were added the following proviso—

"Provided that a copy of any such notice as aforesaid is given under section 5(3) of this Act to the sub-tenant in possession of the leased property.";

(*e*) subsection (7) above shall have effect as if any reference to the tenancy or tenant included a reference to the sub-tenancy or sub-tenant respectively and as if after the words "his landlords" there were inserted the words "or the sub-tenant and his landlord".

Subsection (8)

This subsection implements Recommendation 39(a)-(d). It makes provision for the situation where there is a sub-tenant in possession of the property whose sub-tenancy has been authorised by all the landlords of the tenant. Paragraphs (a) and (d), taken together, implement Recommendation 39(a) and in relation to the situation covered by this clause, maintain the policy of Recommendation 31, namely that a copy of any notice to terminate the tenancy of property should not be effective unless a copy of the notice is given to the sub-tenant. Paragraph (b) implements Recommendation 39(b), giving the sub-tenant in possession the right, on receiving a copy of a notice of termination in respect of part of the property, to give to the tenant a notice to terminate the sub-tenancy of any other part of the property. The period of notice to be given by the sub-tenant in any notice under paragraph (b) is regulated by paragraph (c), in implementation of Recommendation 39(c). Paragraph (e) implements Recommendation 39(d) by applying the terms of subsection (7) with appropriate modifications to meet the case where there is a sub-tenant in possession of the property.

Landlords having interest in common.

7.—(1) This section applies where non-agricultural property which is subject to one tenancy has more than one landlord, the interest of each landlord being an interest in common.

(2) Where this section applies, any notice given under section 1 of this Act—

(*a*) by any of the landlords to the tenant; or

(*b*) by the tenant to any of the landlords,

shall have effect as if it had been given by or (as the case may be) to all the landlords.

(3) Where this section applies, any notice given under section 16(3) of the 1964 Act—

(*a*) by any of the landlords to the deceased tenant's executor; or

(*b*) by the deceased tenant's executor to any of the landlords,

shall have effect as if it had been given by or (as the case may be) to all the landlords.

(4) Where this section applies and there is a sub-tenant in possession of the leased property, a copy of a notice to quit or of a notice under the said section 16(3) given to the sub-tenant by any of the landlords, or by the tenant or by the deceased tenant's executor (as the case may be), under section 5(3) of this Act shall have effect as if it had been given by all the landlords.

(5) A landlord who has given a notice in pursuance of subsection (2)(a) above to the tenant or in pursuance of subsection (3)(a) above to the deceased tenant's executor or a copy notice in pursuance of subsection (4) above to a sub-tenant, shall as soon as practicable thereafter serve a copy of the notice on all the other landlords.

(6) A landlord who has received a notice in pursuance of subsection (2)(b) or (3)(b) above shall as soon as practicable thereafter serve a copy of the notice on all the other landlords.

(7) Where this section applies, no agreement under section 1(4) or of this Act shall have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.

Clause 7

General

In relation to non-agricultural leases, this clause provides for the termination of the tenancy of property which is subject to one tenancy and has more than one landlord, the interest of each landlord being an interest in common.

Subsection (1)

This subsection applies the clause to the type of situation described above.

Subsections (2) and (3)

These subsections implement Recommendation 40. They remove a difficulty in the existing law (see paragraph 4.64 of the Report) by enabling the tenancy to be terminated by notice given by any of the landlords in common. The tenant and the deceased tenant's executor are given a reciprocal right to terminate the tenancy by giving notice to any of the landlords.

Subsection (4)

In implementation of Recommendation 41, this subsection reflects the policy contained in subsections (2) and (3) in relation to the requirement (under clause 5(3)) to give a copy of a notice by a landlord to a sub-tenant in possession of the property.

Subsections (5) and (6)

These subsections, taken together, implement Recommendation 42. The requirement to serve a copy notice of termination on other landlords in common recognises their interest in the tenancy and that they should be made aware as soon as possible of any developments affecting it.

Subsection (7)

This subsection implements Recommendation 43. It ensures that all of the landlords in common are brought in as parties to any agreement to contract out of the statutory notice provisions relating to termination of the lease. Failing this, the agreement is ineffective.

Notice given before interest of either party transferred or before death.

8.—Where—

(*a*) the interest of the landlord in non-agricultural property has been transferred, or the tenant's interest in the tenancy has been transferred otherwise than by assignation, or the landlord or the tenant has died; and

(*b*) before such transfer or death, a notice has been given under any enactment by or to the transferor or person who has died,

any such notice shall be deemed to have been given by or to the transferee or any person deriving title from him or, in the case of a notice given by or to the person who has died, shall, if effective, continue to be so.

Assignation of tenant's interest.

9.—(1) Where a tenant's interest in a lease has been assigned, whether in security or otherwise, a notice given by the landlord under this Act to the assignor shall be deemed to have been given to the assignee unless, before such notice is given,—

(*a*) the assignation has been intimated in writing to the landlord; or

(*b*) the landlord has consented to the assignation in the deed of assignation; or

(*c*) in the case of an assignation registrable under the Registration of Leases (Scotland) Act 1857 or in the case of an interest in an assignation registrable under the Land Registration (Scotland) Act 1979, the assignation or interest has been so registered.

(2) Any notice given under any enactment by the landlord of non-agricultural property after the tenant's interest has been assigned in security, or after the tenant has granted a standard security and the security has been recorded in the Register of Sasines or the interest in the security has been registered in the Land Register of Scotland, shall not be effective if the creditor has entered into possession of the security subjects, unless it is given to the creditor, but in that case it shall not be necessary to give such notice to the tenant.

Clause 8

This clause implements Recommendation 44 as regards non-agricultural leases. It provides for the continuing effectiveness of a notice under any enactment in two separate situations. The first (paragraph (a)) is where the interest of the landlord in the property has been transferred, or the interest of the tenant in the tenancy has been transferred otherwise than by assignation (see paragraph 4.77 of the Report), and before the transfer such a notice has been given either by or to the transferor. (The giving of notice where a tenant's interest has been assigned is dealt with by clause 9.) The second situation (paragraph (b)) is where either the landlord or the tenant has died, and such a notice has been given before the death either by or to the person who has died.

Clause 9

General

This clause concerns the giving of notice where a tenant's interest in a non-agricultural lease has been assigned.

Subsection (1)

In implementation of Recommendations 46 and 47, this subsection (as read with clause 17(1)) reflects the current position whereby notices and proceedings for removing by a landlord directed against an assignor of a tenant's interest in a lease are effective against the assignee unless intimation is made to the landlord. The subsection prescribes the methods for making such intimation.

Subsection (2)

This subsection implements Recommendation 48, providing that where a tenant's interest has been made subject to a security and the creditor has entered into possession of the security subjects (this would occur on default by the tenant), any notice by the landlord under any enactment should in order to be effective be given to the creditor, and need not be given to the tenant.

Giving of notice after death of party to lease.

10.—(1)Where in relation to non-agricultural property which is subject to a tenancy a party to the lease dies, any notice given under any enactment after the death addressed to the deceased party (as if he were still alive) by the other party, shall be an effective notice unless subsection (2) below applies.

(2)This subsection applies if, at the time of the giving of the notice, the person giving it—

(*a*) has been notified of the confirmation of an executor-nominate to the estate of the party to whom the notice is addressed or the appointment of an executor-dative to that party;

(*b*) has been notified that the deceased's interest has been assigned in security and that since his death the creditor has entered into possession of the security subjects; or

(*c*) in the case of the death of the tenant, has been notified under section 21(1) of this Act that a legatee has accepted a bequest of the deceased tenant's interest in the lease.

(3) Where notice has been given in pursuance of this section addressed to a deceased party and an executor has not been confirmed or appointed as mentioned in paragraph (a) of subsection (2) above, then, until such confirmation or appointment occurs, any of the following persons may act to protect that interest—

(*a*) the spouse of the deceased;

(*b*) a specific legatee of that interest or a residuary legatee;

(*c*) any person nominated in a will of the deceased as his executor;

(*d*) any person entitled to apply to be appointed as the deceased's executor-dative;

(*e*) if the deceased's interest in the tenancy or in the leased property has been assigned in security but the creditor is not in possession thereof, the creditor;

(*f*) any other person with an actual or potential interest in the leased property or in the tenancy.

(4) Where the interest of a deceased tenant under a non-agricultural lease has vested in the deceased's executor by virtue of section 14 of the 1964 Act and the date of termination of the lease falls within the period of one year immediately following the deceased's death, then, notwithstanding section 16(3) of that Act, the landlord or the executor of the deceased tenant shall be entitled to give notice for the purpose of bringing the tenancy to an end on that date.

(5) This section applies where a standard security has been granted in respect of an interest and—

(*a*) the security has been recorded in the Register of Sasines; or

(*b*) the interest in the security has been registered in the Land Register of Scotland,

as it applies where an interest has been assigned in security.

Clause 10

General

This clause implements, as regards non-agricultural leases, Recommendations 69, 70(a),(b) and (c), 71 and 72. It fills a gap in the law concerning the entitlement of a party to a lease to give a notice where the other party has died. Provision is made for the giving of any notice under any enactment during the interim period between the death and the point at which another person assumes responsibility for the deceased's interest in the leased property or in the tenancy.

Subsection (1)

In implementation of Recommendation 69, this subsection enables any notice under any enactment to be given after the death of a party to a lease, by way of addressing the notice to the deceased party as if he were still alive. This entitlement is subject to the provisions of subsection (2).

Subsection (2)

This subsection implements Recommendation 70(a) and (c) and, read along with subsection (5), Recommendation 70(b). Subsection (1) as read with this subsection provides that the entitlement to give any notice addressed to the deceased party as if he were still alive comes to an end where the person entitled to give the notice has been notified that one of the events specified has occurred: ie in effect, either that another person has assumed responsibility for the deceased's interest in the tenancy or that a new tenant has been found.

Subsection (3)

Subsection (3) implements Recommendation 71(a)-(d),(f) and, read along with subsection (5), Recommendation 71(e). It provides that the categories of persons listed shall have the right to act to protect the interest of the deceased party in the leased property or the tenancy where notice has been given addressed to the deceased party under subsection (1), until such time as an executor-nominate has been confirmed to the estate of the deceased party or an executor-dative appointed to him. The right to so act would also come to an end where a new landlord or tenant, as the case may be, takes over the deceased party's interest, as where a legatee accepts a bequest of the deceased tenant's interest and gives the appropriate notification to the landlord (see paragraph 5.77 of the Report).

Subsection (4)

This subsection implements Recommendation 72 in relation to non-agricultural leases, and clarifies a doubt concerning the operation of section 16(3) of the Succession (Scotland) Act 1964 (see paragraph 5.80 of the Report).

Subsection (5)

This subsection, as read with subsection (2)(b), implements Recommendation 70(b). As read with subsection (3)(e), it also implements Recommendation 71(e).

Giving of termination or resumption notice where sub-tenant has died.

11.—(1) Where—

(*a*) non-agricultural property is subject to a sub-tenancy which has been authorised (either expressly or impliedly) by the landlord of the tenant;

(*b*) the sub-tenant dies; and

(*c*) at the time of death the sub-tenant was in possession of the leased property,

a copy notice given under section 5(3) or 6(8) of this Act after the death addressed to the deceased sub-tenant (as if he were still alive) shall, unless subsection (2) below applies, have effect as if it were given to the sub-tenant.

(2) This subsection applies if the tenant or (as the case may be) the deceased tenant's executor at the time when the copy notice is given has been notified—

(*a*) of the confirmation of an executor-nominate to the estate of the deceased or the appointment of an executor-dative to him;

(*b*) that the deceased's interest has been assigned in security and that since his death the creditor has entered into possession of the security subjects; or

(*c*) under section 21(1) of this Act, that a legatee has accepted a bequest of the deceased's interest in the sub-lease.

(3) Subsection (3) of section 10 of this Act shall apply in relation to such a copy notice as aforesaid as it applies in relation to a notice given in pursuance of that section but as if in paragraphs (e) and (f) for the word "tenancy" there were substituted the word "sub-tenancy".

(4) This section applies where a standard security has been granted in respect of an interest and—

(*a*) the security has been recorded in the Register of Sasines; or

(*b*) the interest in the security has been registered in the Land Register of Scotland,

as it applies where an interest has been assigned in security.

Proper liferents.

12. Where the interest of the landlord in non-agricultural property is the subject of a proper liferent, then, for the purpose of the giving of any notice or copy notice under any enactment, the liferenter shall be deemed to be the landlord of the leased property and the interest of the fiar shall be disregarded.

PART II

APPLICATION OF PART I TO LEASES OF AGRICULTURAL HOLDINGS

Application of Part I to leases of agricultural holdings.

13. For the purpose of applying Part I of this Act in relation to leases of agricultural holdings, the 1949 Act is amended as set out in Schedule 1 to this Act.

Clause 11

This clause implements Recommendations 73, 74 (a)-(c) and 75 in relation to non-agricultural leases. Where notice of termination or resumption is given and there is an authorised sub-tenant in possession of the property, clauses 5(3) and 6(8) require a copy of the notice to be given to the sub-tenant. Clause 11 enables a copy of such notices to be given in the case where the sub-tenant in possession of the property has died and responsibility for his interest has not been assumed by another person.

Subsection (1)

This subsection implements Recommendation 73. It enables a copy notice to be given to the deceased sub-tenant as if he were still alive. This entitlement is subject to subsection (2).

Subsection (2)

This subsection implements Recommendation 74(a) and (c) and, as read with subsection (4), Recommendation 74(b). It provides that the entitlement of the landlord or tenant to give a copy notice under subsection (1) comes to an end where notification has been given that one of the circumstances specified has occurred. Such notification would be made to the tenant in his capacity as the deceased sub-tenant's landlord.

Subsection (3)

In implementation of Recommendation 75, this subsection stipulates (by referring to clause 10(3)) the categories of persons who are entitled to act to protect the deceased sub-tenant's interest in the sub-tenancy where a copy notice has been given under subsection (1) addressed to the deceased sub-tenant. The entitlement ceases where an executor-nominate has been confirmed to the estate of the deceased or an executor-dative appointed to him or where a new sub-tenant is found.

Subsection (4)

This subsection, as read with subsection (2)(b), implements Recommendation 74(b).

Clause 12

This clause implements Recommendation 50 in relation to non-agricultural leases. It is designed to simplify the position regarding the giving of notice where the interest of the landlord in leased property is held by a proper liferenter (a person entitled to use the property during his lifetime) and a fiar (the person with the full right to the subjects on the termination of the liferent).

Clause 13

The Recommendations implemented in relation to non-agricultural leases by Part I of the draft Bill also relate to leases of agricultural holdings. These Recommendations, in so far as affecting leases of agricultural holdings, are implemented by way of amendment to the Agricultural Holdings (Scotland) Act 1949 (see paragraph 1.15 of the Report). This clause introduces the amendments to the 1949 Act, as set out in Schedule 1.

PART III

PROCEEDINGS FOR REMOVING FROM HERITABLE PROPERTY

Summary causes.

14.—(1) In section 35(1)(c) of the Sheriff Courts (Scotland) Act 1971—

(*a*) after the words "and actions" there shall be inserted the words "for removing from heritable property and";

(*b*) the words "heritable or" shall be omitted;

(*c*) after the word "such" there shall be inserted the words "removing or".

(2) After subsection (1A) of the said section 35 there shall be inserted the following subsection—

"(1B) Notwithstanding subsection (1)(c) above, where in an action for removing from heritable property there is claimed in addition, or as an alternative, to a decree for such removing—

(*a*) a decree other than a decree for payment of money (exclusive of expenses); or

(*b*) a decree for payment of money exceeding £1,500 (exclusive of interest and expenses),

it shall be competent for the action to proceed as an ordinary action.".

(3) In section 41(2) of the Sheriff Courts (Scotland) Act 1971 after the words "and (c)" there shall be inserted the words "of subsection (1) and paragraph (b) of subsection (1B)".

Clause 14

General

This clause relates to the existing summary cause procedure in the sheriff court for recovery of possession of heritable property.

Subsection (1)

Section 35(1)(c) of the Sheriff Courts (Scotland) Act 1971 introduced the summary cause procedure in the sheriff court for recovery of possession of heritable property. In part implementation of Recommendation 87, this subsection changes the terminology for these proceedings to actions "for removing from heritable property".

Subsection (2)

Section 35(1)(c) of the 1971 Act does not at present specifically provide for the cases which fall outwith the category of action required to proceed by way of the summary cause. These are actions where there is sought in addition to or as an alternative to a decree for recovery, a decree other than a decree for payment of money (exclusive of expenses) or a decree for payment of money exceeding £1,500 (exclusive of interest and expenses). Subsection (2) provides that such actions can competently proceed as ordinary actions in the sheriff court. This implements Recommendation 92.

Subsection (3)

The amendment in this subsection to section 41(2) of the 1971 Act is a consequence of the new section 35(1B)(b) inserted by subsection (2) above (see the footnote to paragraph 8.12 of the Report).

Ordinary cause proceedings in sheriff court.

15.—(1) Actions of removing, extraordinary removing, and ejection in the sheriff court in relation to heritable property are hereby abolished, and any action in relation to such property which, but for this subsection, would have been required to proceed by way of an action of removing, extraordinary removing or ejection shall, subject to section 28(2) of this Act, after the commencement of this Act proceed by way of an action for removing from heritable property.

1892 c.17

(2) For subsection (4) of section 7 of the Sheriff Courts (Scotland) Extracts Act 1892 there shall be substituted the following subsections—

"(4) If the decree extracted is for removing from heritable property, it shall be lawful, by virtue of the said warrant—

(*a*) to charge the defender, and any other occupant deriving right or having permission from the defender to remove from the subjects or premises mentioned in the extract and to remove their effects from those subjects or premises, on the date specified in the extract, if the charge is given at least 48 hours before that date, or within 48 hours after the giving of the charge if the charge is given later; and

(*b*) if he fails to obey the charge, to remove the defender and any such occupants and effects from the subjects or premises (an inventory of the effects removed being made by the person executing the diligence) and, if necessary for the purpose of such removing, to open shut and lockfast places:

Provided that the sheriff may, on cause shown, dispense with the period of charge.

(4A) For the purposes of subsection (4) above, if the defender is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981, then, notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner as so defined shall be regarded as deriving right from the defender.".

1981 c.59

(3) In the Schedule to the said Act of 1892 for forms 9 and 10 there shall be substituted the following form—

"9—EXTRACT DECREE FOR REMOVING FROM HERITABLE PROPERTY

At the day of 19 , in an action for removing at the instance of pursuer against defender, the sheriff granted warrant for removing the defender, and any other occupant, and their effects, from the subjects or premises specified, such removing not being sooner than (date and time specified by the sheriff) and granted decree against the defender for payment to the pursuer of £... of expenses: and granted warrant for all lawful execution hereon.

Date of extract decree Sheriff clerk.".

Clause 15

General

This clause introduces changes to proceedings for removing under ordinary cause procedure in the sheriff court, and makes consequential changes to the form of extract decree and the warrant for removing a defender.

Subsection (1)

In implementation of Recommendations 87 in part and 88, this subsection replaces the existing forms of proceeding under the ordinary cause for removing a person from heritable property with an action for removing from heritable property. The existing forms are however saved for transitional purposes (see clause 28(2) and (3)). Thus the existing forms of proceeding will be available to enforce any notice or counter-notice given before the commencement date of the legislation, and any action raised before the commencement date will not be affected by the legislation.

Subsection (2)

This subsection implements Recommendations 89 and 91, making certain amendments to section 7(4) of the Sheriff Courts (Scotland) Extracts Act 1892 regarding the form of extract decree and the warrant for removing a defender. In particular a period of charge of 48 hours is introduced and the sheriff is given a discretion on cause shown to dispense with this period. The provision made in subsection (4A) prevents any possible clash between a charge under section 7(4) of the 1892 Act (as amended) and the terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, by making it clear that an entitled spouse or entitled partner of a defender is to be regarded so far as service of the charge is concerned as deriving right or permission to occupy the subjects from the defender rather than by virtue of the 1981 Act (see paragraph 7.20 of the Report).

Subsection (3)

In implementation of Recommendation 90, this subsection replaces forms 9 and 10 in the Schedule to the 1892 Act with one single form of extract decree for removing from heritable property.

Proceedings in the Court of Session.

16.—(1) It shall be competent for the Court of Session to entertain an action for removing from heritable property notwithstanding that the action contains no other conclusion.

(2) Every extract of a decree granted by the Court of Session for removing from heritable property shall contain a warrant in a form prescribed by act of sederunt, and it shall be lawful by virtue of the said warrant—

(*a*) to charge the defender and any other occupant deriving right or having permission from the defender to remove from the subjects or premises mentioned in the extract and to remove their effects from those subjects or premises, on the date specified in the extract, if the charge is given at least 48 hours before that date, or within 48 hours after the giving of the charge if the charge is given later; and

(*b*) if he fails to obey the charge, to remove the defender and any such occupants and effects from the subjects or premises (an inventory of the effects removed being made by the person executing the diligence) and, if necessary for the purpose of such removing, to open shut and lockfast places:

Provided that the Court of Session may, on cause shown, dispense with the period of charge.

(3) For the purposes of subsection (2) above, if the defender is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection)(Scotland) Act 1981, then, notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner as so defined shall be regarded as deriving right from the defender.

1981 c.59

(4) Procedure by way of letters of ejection is hereby abolished.

(5) Any rule of law which empowers an action in the Court of Session to contain a conclusion for an extraordinary removing is hereby abolished, and any action which, but for this subsection, would have contained such a conclusion shall, subject to section 28(2) of this Act, after the commencement of this Act contain a conclusion for removing from heritable property.

Clause 16

General

This clause concerns proceedings for removing from heritable property in the Court of Session.

Subsection (1)

This subsection implements Recommendations 87 in part, and 96. The existing rule is that removing can only be sought in the Court of Session where the conclusion for removing is ancillary to another conclusion, such as declarator or interdict. This subsection enables an action for removing from heritable property to be instituted in the Court of Session.

Subsection (2)

This subsection implements Recommendation 99(a)-(d). It provides that a warrant shall be included in every extract of a decree granted by the Court of Session for removing from heritable property, and enables the form of the warrant to be prescribed by act of sederunt. It also makes provision similar to that contained in clause 15(2) concerning the acts which may lawfully be carried out by virtue of the warrant, namely the charging of the defender and the carrying out of any necessary steps to enforce the decree.

Subsection (3)

This subsection implements Recommendation 99(e). It makes provision similar to that contained in clause 15(2) in relation to a similar action in the sheriff court.

Subsection (4)

The existing procedure in the Court of Session for enforcing a decree of removing is the obtaining of letters of ejection. Subsection (2) supersedes that procedure. Subsection (4) accordingly abolishes procedure by way of letters of ejection, in implementation of Recommendation 98.

Subsection (5)

This subsection implements Recommendation 97, abolishing the right to conclude for extraordinary removing in an action in the Court of Session and directing any action which would have contained such a conclusion to conclude instead for removing from heritable property. A saving is made for transitional purposes (see clause 28(2)).

Rules relating to institution of proceedings following notice of termination.

17.—(1) Where notice under this Act, the 1949 Act or section 16(3) of the 1964 Act is required to be given for the purpose of bringing a tenancy, or any part thereof, to an end, proceedings may be instituted for removing the tenant or (as the case may be) the deceased tenant's executor from the leased property or that part, if, but only if, such notice has been given.

(2) Where section 6 of this Act or section 34C of the 1949 Act applies—

(*a*) a landlord who has given a notice to quit to the tenant or a notice to the deceased tenant's executor in pursuance of paragraph (a) of subsection (2) of the said section 6 or 34C or who has been given a notice by the tenant or the deceased tenant's executor in pursuance of paragraph (b) of the aforesaid subsection; or

(*b*) a landlord to whom the tenant or the deceased tenant's executor has given a notice in pursuance of subsection (3) of the said section 6 or 34C,

shall be entitled to rely on that notice for the purpose of instituting proceedings for removing the tenant or (as the case may be) the deceased tenant's executor from the part of the leased property of which he is the landlord.

(3) Where section 7 of this Act or section 34D of the 1949 Act applies and notice has been given in pursuance of subsection (2) of the said section 7 or 34D to bring the tenancy to an end, any of the landlords shall be entitled to rely on that notice for the purpose of instituting proceedings for removing the tenant or (as the case may be) the deceased tenant's executor from the leased property without obtaining the consent thereto of the other landlords of the leased property.

(4) Where the interest of the landlord in leased property is the subject of a proper liferent and a notice has been given in pursuance of section 12 of this Act or section 34I of the 1949 Act to bring the tenancy to an end, the liferenter shall be entitled to institute such proceedings as aforesaid without obtaining the consent thereto of the fiar of the property.

(5) Where the interest of the landlord in leased property is the subject of a proper liferent, the fiar shall not be entitled to institute proceedings for removing any person from the property, whether or not the person ever had a right or permission to occupy the property.

(6) Where a lease stipulates circumstances in which the landlord may resume leased property, the landlord shall be entitled to institute proceedings for removing from that property in pursuance of such a stipulation if, but only if, he has given a resumption notice.

(7) Where leased property is subject to a heritable security constituted by an *ex facie* absolute disposition and the landlord institutes proceedings for removing from it, then, if his title to institute the proceedings is challenged, he may establish that title by the production of a back letter or other document showing the true nature of the disposition.

Clause 17

General

This clause lays down various rules concerning the institution of proceedings in court for removing from leased property. It applies to notices given in respect of both non-agricultural leases and leases of agricultural holdings.

Subsection (1)

This subsection, as read with clause 1(1), implements Recommendation 1(a); it also implements Recommendation 76. The basic rule is that proceedings for removing a tenant may be instituted only where any notice required to bring a tenancy to an end has been given.

Subsection (2)

This subsection implements Recommendation 77 and applies where property is subject to one tenancy and has more than one landlord, each being a landlord of a separate part. It provides that where notice of termination of the tenancy of part of a property has been given, the landlord of the part affected is entitled to rely on that notice for the purposes of instituting proceedings for removing the tenant from that part.

Subsection (3)

This subsection implements Recommendation 78. It applies where the property has more than one landlord, the interest of each landlord being an interest in common, and where the property is subject to one tenancy. The subsection enables any of the landlords in common to rely on a notice of termination so as to institute proceedings for removing the tenant from the leased property without having to obtain the consent of the other landlords in common.

Subsection (4)

This subsection implements Recommendation 79 by permitting the liferenter who has given the appropriate notice to institute proceedings for removing the tenant from the leased property without requiring to obtain the consent of the fiar.

Subsection (5)

In implementation of Recommendation 80, this subsection deprives the fiar of any right to institute proceedings for removing in any circumstances, whether in the case where prior notice is not required (as in proceedings to remove squatters) or in reliance on a notice given by the liferenter (under clause 12, or section 34I of the 1949 Act (as inserted by Schedule 1, ...paragraph 4))...

Subsection (6)

This subsection implements Recommendation 81. It allows a landlord to institute proceedings for removing from leased property in exercise of a power of resumption only where he has given the required notice of resumption.

Subsection (7)

In implementation of Recommendation 82, this subsection resolves a difficulty facing a landlord at present when instituting proceedings for removing from the property, where the property is subject to a heritable security constituted by an *ex facie* absolute disposition (see paragraph 6.18 of the Report).

Provisions relating to title to defend in proceedings.

18.—(1) Where a tenant has sub-let the leased property or any part thereof, then, if—

(*a*) the landlord of the tenant institutes proceedings to remove the sub-tenant on the ground that the sub-tenancy is unauthorised; and

(*b*) the tenancy still subsists,

the tenant shall be called as a defender in the proceedings.

(2) Any person who—

(*a*) under subsection (3) of section 10, or that subsection as applied by section 11(3), of this Act, or

(*b*) under subsection (3) of section 34G of the 1949 Act or that subsection as applied by section 34H(3) of that Act,

is entitled to act to protect the interest of a deceased tenant, or of a person who at the date of his death was a sub-tenant in possession of the leased property, shall have a title to defend in any proceedings by the landlord for removing from the leased property or any part thereof, but shall cease to be so entitled—

(i) after defences in the proceedings have been lodged by an executor of the deceased or by a person who has acquired the interest of the deceased; or

(ii) if no defences have been lodged by an executor of the deceased within a period of 28 days after his confirmation or appointment or by a person who has acquired the interest of the deceased within a period of 28 days after such acquisition, at the end of that period.

Proceedings for removing unidentifiable squatters.

19.—A person entitled to occupy heritable property shall, in accordance with such procedure as may be prescribed by act of sederunt, have the same right to bring an action for removing of any persons in occupation of the property who cannot be identified by him as he would have if the persons in such occupation were identifiable by him.

Abolition of violent profits, and finding of caution.

20.—(1) The rules of law and procedure relating to violent profits are hereby abolished.

(2) In any action for removing a person from heritable property, the court, on cause shown, shall be entitled to order the defender to find caution for any financial claim which the pursuer may have arising from any occupation (whether lawful or unlawful) of the property by the defender.

(3) Where an order has been made under this section, the defender may provide caution either by means of a bond of caution or other guarantee or by consigning an appropriate sum in court as caution.

Clause 18

General

This clause deals with questions relating to the defence of proceedings for removing from heritable property in two particular situations.

Subsection (1)

This subsection implements Recommendation 85. The requirement to call the tenant as a defender recognises that the tenant may have a defence to the action instituted against the sub-tenant.

Subsection (2)

This subsection implements Recommendation 86. Where a party to a lease dies, during the period before responsibility for the deceased party's interest in the tenancy is taken over, certain persons are given the right to act to protect that interest. Where the party who died was a tenant, or was at the date of his death a sub-tenant in possession of the leased property, one way of acting to protect the interest of the deceased is to defend any proceedings by the landlord for removing from the property. Subsection (2) gives a title to defend to such persons in these situations and makes provision regarding the ending of that entitlement.

Clause 19

This clause implements Recommendation 103. It meets the difficulties of citation experienced in raising an action for removing against persons occupying heritable property who cannot be identified. The clause enables an appropriate procedure for citing such persons to be prescribed by act of sederunt. The objectives of any such procedure are dealt with in Recommendation 104.

Clause 20

General

This clause introduces a procedure in part replacement of the law of violent profits (which are penal damages intended to act as a deterrent against unwarrantable taking or keeping of possession of heritable property).

Subsection (1)

This subsection implements Recommendation 100. A rule imposing damages at a penal rate is inconsistent with the general law of damages in Scotland.

Subsection (2)

This subsection implements Recommendation 101. It retains, but in a wider form, one of the features of the law of violent profits. The order to find caution for any financial claim may relate to any occupation of the property by the defender, and not simply to unlawful occupation by him. It may for example cover a claim for arrears of rent.

Subsection (3)

This subsection implements Recommendation 102, giving the defender an option as to the manner of providing any caution required under subsection (2).

PART IV

BEQUEST, OR TRANSFER ON DEATH, ON LEASE

Non-agricultural leases.

21.—(1) Where a tenant's interest in a non-agricultural lease is validly bequeathed, the legatee shall, if he is accepting the bequest, give notice of that acceptance to the deceased tenant's landlord within a period of 3 months after the death of the tenant.

(2) If the legatee does not give notice under subsection (1) above, he shall be regarded as having refused the bequest; and any occupation by him as legatee of the leased property after the end of the period of 3 months mentioned in that subsection shall be regarded as unlawful.

(3) Where the interest of a deceased tenant in a non-agricultural lease is transferred to a person ("the transferee") as intestate estate of the deceased, the transferee shall give notice of the transfer to the deceased tenant's landlord within 21 days after the date of the transfer or, if he is prevented by some unavoidable cause from giving such notice within that period, as soon as possible thereafter.

(4) Where notice is given—

(*a*) under subsection (1) above, the lease shall be binding on the deceased tenant's landlord and on the legatee, as landlord and tenant respectively, as from the date of death of the deceased tenant;

(*b*) under subsection (3) above, the lease shall be binding on the deceased tenant's landlord and the transferee, as landlord and tenant respectively, as from the date of the transfer,

unless and until the lease has been terminated under section 10 of this Act or otherwise.

(5) Notwithstanding section 1(1) of this Act, where the transferee does not give notice under subsection (3) above, the lease, or (if there is more than one person who has an interest in common as tenant) the lease in so far as it relates to the interest of the transferee, shall, if not otherwise terminated, be treated as terminated as from the end of the period of 21 days referred to in subsection (3) above or as from the end of that period as extended under that subsection.

(6) In section 16(8) of the 1964 Act—

(*a*) the words "is an interest under an agricultural lease and" are hereby repealed; and

(*b*) at the end there shall be added the following words "or, as the case may be, subsections (1), (2) and (4)(a) of section 21 of the Removing from Heritable Property (Scotland) Act 1989."

Leases of agricultural holdings.

22. Sections 20 and 21 of the 1949 Act are amended as set out in Schedule 2 to this Act.

Clause 21

General

In terms of the existing law, where a tenant under a non-agricultural lease dies and the lease continues to run, the interest of the tenant may be transferred to another person as a bequest of the tenant or by his executor as intestate estate (ie in accordance with the rules which apply in the absence of a valid will or bequest). In implementation of Recommendations 52-58, this clause makes detailed provision on this matter.

Subsection (1)

In implementation of Recommendation 52, this subsection places a new obligation on the legatee of a deceased tenant's interest in a lease to notify the landlord if he is accepting the bequest.

Subsection (2)

This subsection implements Recommendation 53. It stipulates the consequence of failure by the legatee to give notice under subsection (1). Where a bequest is regarded as having been refused, the interest in the tenancy will fall to be distributed as intestate estate of the deceased.

Subsection (3)

In implementation of Recommendation 56, this subsection places a new obligation on a person who has received the transfer of a deceased tenant's interest in the lease as intestate estate to notify the landlord. While notice must be given within a period of only 21 days from the date of transfer, the executor has however under section 16 of the Succession (Scotland) Act 1964 a period of one year in which to arrange the transfer; and in view of the consequence of failure to give notice timeously (ie termination of the lease: see subsection (5)), provision is made for later notification where the failure is due to some unavoidable cause.

Subsection (4)

This subsection implements Recommendations 54 and 57. Where the appropriate notice is given under subsection (1) or (3), it provides that in general the lease continues to run with the legatee or, as the case may be, the transferee, as the new tenant.

Subsection (5)

In implementation of Recommendation 58, this subsection stipulates the consequence of failure by the transferee to give notice under subsection (3), namely termination of the lease in so far as it relates to the interest of the transferee.

Subsection (6)

The amendments in this subsection are designed to ensure the application of the relevant provisions of this clause to a legatee of an interest in a non-agricultural lease, notwithstanding the vesting in the executor of the interest under section 14 of the 1964 Act. The subsection implements Recommendation 55.

Clause 22

Recommendations 59-68 concern the bequest, or transfer on death as intestate estate, of a tenant's interest in a lease of an agricultural holding. These Recommendations are implemented by way of amendment to sections 20 and 21 of the Agricultural Holdings (Scotland) Act 1949. This clause introduces the amendments to the 1949 Act, as set out in Schedule 2.

PART V

GENERAL

Giving of notices etc. in relation to non-agricultural leases.

23.—(1) Any notice or copy notice required or authorised by this Act to be given to any person shall be duly given if it is delivered to him, or left at his proper address, or sent to him by post to his proper address in a recorded delivery letter or a registered letter.

(2) In the case of an incorporated company or body, any such notice or copy notice shall be duly given if it is given to the secretary or clerk of the company or body.

(3) For the purposes of this section, the proper address of a person is—

(*a*) in the case of a secretary or clerk to a company or body, that of the registered or principal office of the company or body;

(*b*) in any other case, the person's last known address.

(4) Subject to section 10 of this Act, where there has been a change of landlord but the tenant has not received notice of the change, any notice given by the tenant to the original landlord shall be deemed to be duly given to the landlord under the tenancy.

Application of Act to Crown.

24. This Act shall apply to a lease of heritable property in which the Crown has an interest.

Operation of Rent (Scotland) Act 1984.
1984 c.58

25. This Act is without prejudice to the operation of the Rent (Scotland) Act 1984 in relation to any tenancy or sub-tenancy.

Application of Act to allotments and crofts etc.

26. Nothing in this Act (apart from sections 14, 15, 16, 19, 20, 24, 27, 28, and 30 and this section) shall apply in relation to—

(*a*) an allotment or an allotment garden within the meaning of the Allotments (Scotland) Acts 1892 to 1950;

(*b*) a croft or the subject of a cottar within the meaning of the Crofters (Scotland) Act 1955; or

1955 c.21.

(*c*) the holding of a landholder or a statutory small tenant within the meaning of the Small Landholders (Scotland) Act 1911.

1911 c.49.

Clause 23

This clause concerns the giving of any notice or copy notice under the Bill in relation to a non-agricultural lease. It makes provision generally similar to that already contained in section 90 of the Agricultural Holdings (Scotland) Act 1949.

Subsection (1)

This subsection implements Recommendation 107 in part. It makes provision regarding the manner of giving any notice or copy notice.

Subsections (2) and (3)

These subsections implement Recommendation 108 in part.

Subsection (4)

The provision made in this subsection implements Recommendation 109. It is subject to clause 10, so that where notification has been given that an executor-nominate to a deceased landlord has been confirmed or an executor-dative appointed, any notice by the tenant should be given to that executor (rather than to the original landlord).

Clause 25

This clause implements Recommendation 26. It prevents any possible clash in relation to any tenancy or sub-tenancy between the provisions of the Bill (in particular those concerning the entitlement to contract out of statutory notice provisions relating to termination of a lease) and the provisions of the Rent (Scotland) Act 1984, by providing that the terms of the 1984 Act shall prevail.

Clause 26

The subjects specified in this clause are excluded from the definition of "a non-agricultural lease" (see clauses 1(10) and 27(1)) for the purposes of the Bill. Certain provisions of the Bill however deal with proceedings for removing from heritable property generally. It is intended that these provisions should apply in relation to the subjects specified. Clause 26 specifies the particular provisions of the Bill which apply to these subjects (see paragraphs 11.18-11.19 of the Report).

Interpretation.

1949 c.75

27.—(1) In this Act unless the context otherwise requires—

"the 1949 Act" means the Agricultural Holdings (Scotland) Act 1949;

"the 1964 Act" means the Succession (Scotland) Act 1964;

"agriculture" has the same meaning as in section 93(1) of the 1949 Act;

"agricultural holding" has the same meaning as in section 1 of the 1949 Act, but includes leased property treated as an agricultural holding under section 24A of that Act;

"landlord" in relation to a non-agricultural lease, means any person who is entitled to receive rent for, or to take possession of, the leased property;

"a non-agricultural lease" has the meaning assigned by section 1(10)(a) of this Act;

"non-agricultural property" has the meaning assigned by section 1(10)(b) of this Act;

"notice to quit" in relation to a non-agricultural lease, means notice given under section 1 of this Act by a landlord to a tenant;

"a resumption notice" means a notice under section 4 of this Act;

"sub-tenant" means a sub-tenant of any degree, and, in relation to a sub-tenant, "tenant" means the landlord of the sub-tenant and "landlord" means the landlord of the tenant, and "sub-tenancy" and "tenancy" shall be construed accordingly.

(2) In relation to agricultural holdings, expressions used in this Act and in the 1949 Act have the same meanings in this Act as in that Act.

(3) Anything which by or under this Act is required or authorised to be done by, to or in respect of a landlord, tenant or sub-tenant may be done by, to or in respect of any agent of the landlord, tenant or sub-tenant.

(4) In relation to a non-agricultural lease, any reference to a party or to the parties to the lease or to the landlord or tenant shall, unless the context otherwise requires, include a reference to any creditor in possession of the leased property.

Clause 27

Subsection (1)

The definition of "landlord" implements Recommendation 83 in relation to non-agricultural leases. Otherwise the definitions in this subsection have already been noted in the appropriate contexts.

Subsection (3)

This subsection implements Recommendation 84 in relation to non-agricultural leases.

Subsection (4)

This subsection implements Recommendation 49. A creditor who enters into possession of the leased property on default by the debtor becomes in effect a party to the lease, whether as landlord or tenant.

Transitional provisions.

28.—(1) Subject to subsection (2) below, this Act shall apply in relation to leases, whether entered into before or after the commencement of this Act.

(2) Any notice or counter-notice given before the commencement of this Act by any party to a lease to another party shall have effect and be enforceable as if this Act had not been passed.

(3) Nothing in this Act shall affect—

(*a*) any action (in whatever form) raised before the commencement of this Act whose purpose is to remove a person from heritable property; or

(*b*) the enforcement of any decree granted in such an action.

Minor and consequential amendments, repeals and revocation.

29.—(1) The enactments mentioned in Schedule 3 to this Act shall have effect subject to the minor and consequential amendments respectively specified in that Schedule.

(2) The enactments set out in Schedule 4 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

(3) In the Codifying Act of Sederunt 1913, Chapter XV is hereby revoked.

Short title, commencement and extent.

30.—(1) This Act may be cited as the Removing from Heritable Property (Scotland) Act 1989.

(2) This Act shall come into force on the expiry of the period of 2 months beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

Clause 28

This clause makes various transitional provisions.

Subsection (1)

This subsection implements Recommendation 110.

Subsection (2)

This subsection implements Recommendation 111. Various existing forms of court proceedings are saved as a transitional measure for the purpose of enforcing any notice or counter-notice given before the commencement date of the legislation (see clauses 15(1) and 16(5)).

Subsection (3)

This subsection implements Recommendation 112.

Clause 29

Subsections (2) and (3)

These subsections implement Recommendation 113.

SCHEDULES

Section 13.

SCHEDULE 1

APPLICATION OF PART I TO LEASES OF AGRICULTURAL HOLDINGS

Amendments of the Agricultural Holdings (Scotland) Act 1949

1. After section 10 there shall be inserted the following section—

"Presumption as to commencement of lease.

10A. Where under a lease of an agricultural holding the tenant has entered into possession of the holding, then, if—

(*a*) the date of commencement of the lease cannot be ascertained, there shall be a presumption that the lease commenced on 28th May;

(*b*) the duration of the lease cannot be ascertained, the lease shall be deemed to have stipulated that it would endure from year to year.".

2. For section 24 there shall be substituted the following section—

"Notices of termination.

24.—(1) In the case of a lease of an agricultural holding the tenancy shall not come to an end—

(*a*) at the termination of the stipulated endurance of the lease; or

(*b*) if the lease has been continued in force by tacit relocation, at the termination of the period for which the lease has been so continued in force,

unless either party has given, in writing, the requisite period of notice to the other party of his intention to bring the tenancy to an end.

(2) Where the lease of an agricultural holding provides for a break in favour of both parties or either party, it shall not be competent for a party to bring the tenancy to an end at that break unless he has given, in writing, the requisite period of notice to the other party of his intention to do so.

(3) Subject to subsection (4) below, the requisite period of notice under this section shall be not less than one year nor more than two years before the date—

(*a*) of termination of the stipulated endurance of the lease; or

(*b*) of termination of the period for which the lease has been continued in force; or

(*c*) of the break provided for in the lease,

(as the case may be).

(4) The requisite period of notice under this section shall be such period as the parties agree in writing—

(*a*) if the agreed period is longer than the period applicable under subsection (3) above; or

(*b*) if the agreed period is shorter than the period so applicable (the shorter period being a period of not less than 3 months) and the agreement is made at any time after the tenant has entered into possession of the leased property.

(5) An agreement under subsection (4) above shall be binding on any successors to the parties to it.

(6) A notice by either party to the other under this section shall specify—

(*a*) the intention of the party giving the notice to bring the tenancy to an end;

(*b*) the leased property;

Schedule 1

General

Part I of the Bill implements in relation to non-agricultural leases the Recommendations of the Report concerning the general rules applicable to notices of termination, and the giving of notices of termination and other notices in special cases. This Schedule implements these Recommendations in relation to leases of agricultural holdings. This is done by way of amendment to the Agricultural Holdings (Scotland) Act 1949. In the following Notes, any equivalent provision of the Bill in relation to non-agricultural leases is referred to in brackets by the appropriate clause number for any relevant explanatory comments thereon. Attention is then drawn to any provision or information relating solely to leases of agricultural holdings.

Paragraph 1

This paragraph implements Recommendation 15 in relation to leases of agricultural holdings, and Recommendation 16(b). (See clause 2.) The terms of section 10A(b), in deeming the lease to have stipulated that it would endure from year to year, reflect the existing provisions of the 1949 Act (see paragraphs 2.70-2.72 of the Report).

Paragraph 2

This paragraph implements various Recommendations as regards leases of agricultural holdings. As read along with clause 17(1), it implements Recommendation 1; it further implements Recommendations 2, 4, 5, 6, 17, 18, 19, 22(a), 28 and 29 in part, and 106. (See clause 1.) Implementation of these Recommendations requires the substitution of a new provision for the existing section 24 of the 1949 Act. The new section 24 omits certain provisions of the existing section 24. It does not repeat the following provisions:–The proviso to subsection (1), which is overtaken by Recommendation 22(a) and the new section 24(4) regarding the entitlement of parties to contract out of the statutory notice provisions; subsection (3), which is overtaken by the repeal in Schedule 4 of the provisions of the 1907 Act referred to in the subsection; subsection (4), in implementation of Recommendation 106 that the requirements for the giving of notice should apply irrespective of whether the notice is given by the tenant or by the landlord; part of subsection (5), in implementation of Recommendation 19 regarding the grounds on which the landlord should have a right to remove a tenant without notice; and subsection (6)(a), which is overtaken by Recommendations 11 and 13 and the new sections 34A(1) and (2) of the 1949 Act (see paragraph 4 of this Schedule) regarding the giving of notice of resumption.

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(*c*) the date on which the tenancy is to come to an end;

(*d*) the name and address of the party giving the notice, or, if the notice is given by an agent, the name of the party on whose behalf it is given and the name and address of the agent.

(7) A notice given under this section may be withdrawn only with the consent of the party to whom it is given.

(8) Nothing in this section shall affect the right of a landlord to remove a tenant —

(*a*) who by failure to pay rent or otherwise has incurred any irritancy of his lease or other liability to be removed;

(*b*) under any other enactment.

(9) The provisions of this section relating to notice shall not apply to subjects let under a lease for any period less than a year, except a lease which by virtue of section 2 of this Act takes effect as a lease from year to year.".

3. After section 24 there shall be inserted the following section—

"Leased property in mixed use.

24A. Leased property which is used partly for agriculture and partly for a purpose other than agriculture shall, notwithstanding section 1 of this Act, be treated, for the purposes of this Act, as being wholly an agricultural holding where the property—

(*a*) is predominantly used for agriculture; and

(*b*) would be an agricultural holding if that use for agriculture constituted the whole use of the property.".

4. After section 34 there shall be inserted the following—

"Resumption of land

Resumption notices.

34A.—(1) Where a lease of an agricultural holding contains a right of resumption of the leased property in favour of the landlord, the landlord shall not be entitled to exercise that right unless he has given, in writing, the requisite period of notice to the tenant of his intention to do so.

(2) Subject to subsection (3) below, the requisite period of notice under this section shall be—

(*a*) if the purposes for which the landlord intends to resume leased property are agricultural purposes, not less than 1 year nor more than 2 years; or

(*b*) if those purposes are non-agricultural purposes, not less than 3 months,

before the date of the intended exercise of the right.

(3) The requisite period of notice under this section shall be such period as the parties agree in writing—

(*a*) if the agreed period is longer than the period applicable under subsection (2) above; or

(*b*) in the case of a resumption for agricultural purposes, if the agreed period is shorter than the period so applicable (the shorter period being a period of not less than 3 months) and the agreement is made at any time after the tenant has entered into possession of the leased property.

(4) An agreement under subsection (3) above shall be binding on any successors to the parties to it.

Paragraph 3

This provision, read along with clause 3 in relation to non-agricultural leases, implements Recommendation 14. It provides the rule to be applied to leased property in mixed use in order to determine whether that property falls to be regarded as wholly an agricultural holding.

Paragraph 4

Section 34A

This provision implements, as regards leases of agricultural holdings, Recommendations 11, 13, 23, and 28 and 29 in part. (See clause 4.) It implements the general policy of the Report in relation to resumption by a landlord of property subject to a lease of an agricultural holding, namely that notice should be given to the tenant before the exercise of any right of resumption. The term "resumption notice", used in later provisions of the Schedules, is defined as a notice under this provision: see Schedule 3, paragraph 10(a)(ii), which inserts this definition into section 93(1) of the 1949 Act.

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Notices of termination and other notices—special cases

Sub-tenancies.

34B.—(1) This section applies where an agricultural holding is subject both to a tenancy and to any sub-tenancy authorised (either expressly or impliedly) by the landlord of the tenant.

(2) Where this section applies, the bringing to an end of a tenancy of the agricultural holding shall also bring to an end any sub-tenancy thereof.

(3) Where this section applies and there is a sub-tenant in possession of the holding—

(*a*) a notice to quit or resumption notice given to a tenant by a person who is his landlord or a notice given to a deceased tenant's executor under section 16(3) of the Succession (Scotland) Act 1964 by the landlord shall be ineffective unless—

(i) the landlord at the same time gives a copy of the notice to the sub-tenant in such possession; or

(ii) the tenant or the deceased tenant's executor as soon as practicable after he receives the notice gives a copy of it to that sub-tenant;

(*b*) a notice by a tenant under section 24 of this Act given to a person who is his landlord of his intention to bring the tenancy to an end or a notice by a deceased tenant's executor under the said section 16(3) to the landlord shall be ineffective unless—

(i) the tenant or the deceased tenant's executor at the same time gives a copy of the notice to the sub-tenant in such possession; or

(ii) the landlord as soon as practicable after he receives the notice gives a copy of it to that sub-tenant.

More than one separate landlord.

34C.—(1) This section applies where an agricultural holding which is subject to one tenancy has more than one landlord, each landlord being the landlord of a separate part of the holding.

(2) Where this section applies, then, subject to any agreement to the contrary (in the lease or otherwise) to which all the landlords are parties, it shall be competent for—

(*a*) the landlord of part of the holding to give notice to quit to the tenant or notice to the deceased tenant's executor under section 16(3) of the Succession (Scotland) Act 1964; or

(*b*) the tenant to give notice of intention to bring the tenancy of part of the holding to an end under section 24 of this Act, or the deceased tenant's executor to give notice under the said section 16(3), to the landlord of that part,

and any such notice shall be effective for the purpose of bringing the tenancy of that part to an end.

(3) Where the tenant or the deceased tenant's executor is given a notice in pursuance of subsection (2)(a) above by the landlord of part of the holding ("the first part"), a notice given by the tenant or executor to the landlord of any other part of the holding of his intention to bring the tenancy of that part to an end shall, subject to subsection (4) below, be effective for the purpose of bringing the tenancy of that other part to an end on the date on which the tenancy of the first part is to come to an end.

(4) A notice under subsection (3) above shall not be effective unless it is given within the period of 28 days beginning with the date on which the tenant or executor is given the notice under subsection (2)(a) above.

Section 34B

This provision implements Recommendations 30 and 31 as regards leases of agricultural holdings. (See clause 5.) It provides for the termination of any sub-tenancy of an agricultural holding at the same time as the tenancy is terminated. It also provides that any notice of termination of the tenancy and any notice of resumption shall be ineffective unless a copy of the notice is given to the sub-tenant in possession of the holding. The definition of "sub-tenant" for the purposes of the 1949 Act is introduced into section 93(1) by paragraph 10(a)(ii) of Schedule 3. Provision is made for the sub-tenant's entitlement to compensation for disturbance under section 35 of the 1949 Act in Schedule 3, paragraph 6 (see Recommendation 32).

Section 34C

This provision implements as regards leases of agricultural holdings Recommendations 33, 34(a) and (b)(ii), 35, 36, 37 and 39(a)-(d). (See clause 6.) It provides for the termination of the tenancy and sub-tenancy of property which is subject to one tenancy and which has more than one landlord, each landlord being the landlord of a separate part of the property. Provision is made regarding the entitlement of the tenant or sub-tenant to compensation on the termination of the tenancy or sub-tenancy of part of the holding in Schedule 3, paragraph 8, by way of amendment to section 60 of the 1949 Act (see Recommendation 39(e)).

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(5) The foregoing provisions of this section are without prejudice to the right—

(*a*) of all the landlords to bring the whole tenancy to an end by giving the tenant a notice to quit the whole holding or by giving the deceased tenant's executor a notice under section 16(3) of the Succession (Scotland) Act 1964; or

(*b*) of the tenant or of the deceased tenant's executor to bring the whole tenancy to an end by giving notice under section 24 of this Act or the said section 16(3) (as the case may be) of his intention to do so to all the landlords of the holding.

(6) Where this section applies, no agreement under section 24(4) of this Act shall have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.

(7) Where the tenancy of part or parts of a holding is brought to an end by virtue of this section—

(*a*) the rent attributable to the tenancy of that part or those parts and the rent payable for the tenancy of any other part of that holding (having regard to any depreciation in the value of any such other part caused by the tenancy of the part or parts being brought to an end or by the use to be made of the part or parts); and

(*b*) any compensation or sum payable by or to the tenant under any enactment or rule of law in relation to the tenancy of the part or parts being brought to an end,

shall be determined in such a way as may be agreed between the tenant and all his landlords or, failing such agreement, as may be determined by arbitration; and the expenses of the arbitration shall be directed by the arbiter to be paid by the aforesaid persons in such proportions as he shall determine.

(8) Where there is a sub-tenant in possession of the holding whose sub-tenancy has been authorised (either expressly or impliedly) by all the landlords of the tenant—

(*a*) a notice under subsection (2) or (3) above shall be effective only if a copy of it is given to the sub-tenant under section 34B(3) of this Act;

(*b*) if the sub-tenant is given a copy of a notice in pursuance of paragraph (a) above in respect of part of the holding sub-let to him ("the first part"), a notice given by him to the tenant in respect of any other part of the holding sub-let to him of his intention to bring his sub-tenancy of that part to an end shall, subject to subsection (4) above (as applied by paragraph (c) below), be effective for the purpose of bringing his sub-tenancy of that other part to an end on the date on which the tenant's tenancy of the first part is to come to an end;

(*c*) subsection (4) above shall apply to a notice given under paragraph (b) above as it applies to a notice given under subsection (3) above;

(*d*) subsection (5) above shall have effect as if at the end there were added the following proviso—

"Provided that a copy of any such notice as aforesaid is given under section 34B(3) of this Act to the sub-tenant in possession of the holding.";

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(*e*) subsection (7) above shall have effect as if any reference to the tenancy or tenant included a reference to the sub-tenancy or sub-tenant respectively and as if after the words "his landlords" there were inserted the words "or the sub-tenant and his landlord".

Landlords having interest in common.

34D.—(1) This section applies where an agricultural holding which is subject to one tenancy has more than one landlord, the interest of each landlord being an interest in common.

(2) Where this section applies, any notice given under section 24 of this Act—

(*a*) by any of the landlords to the tenant; or

(*b*) by the tenant to any of the landlords,

shall have effect as if it had been given by or (as the case may be) to all the landlords.

(3) Where this section applies, any notice given under section 16(3) of the Succession (Scotland) Act 1964—

(*a*) by any of the landlords to the deceased tenant's executor; or

(*b*) by the deceased tenant's executor to any of the landlords,

shall have effect as if it had been given by or (as the case may be) to all the landlords.

(4) Where this section applies and there is a sub-tenant in possession of the holding, a copy of a notice to quit or of a notice under the said section 16(3) given to the sub-tenant by any of the landlords, or by the tenant or by the deceased tenant's executor (as the case may be), under section 34B(3) of this Act shall have effect as if it had been given by all the landlords.

(5) A landlord who has given a notice in pursuance of subsection (2)(a) above to the tenant or in pursuance of subsection (3)(a) above to the deceased tenant's executor or a copy notice in pursuance of subsection (4) above to a sub-tenant, shall as soon as practicable thereafter serve a copy of the notice on all the other landlords.

(6) A landlord who has received a notice in pursuance of subsection (2)(b) or (3)(b) above shall as soon as practicable thereafter serve a copy of the notice on all the other landlords.

(7) Where this section applies, no agreement under section 24(4) of this Act shall have effect unless all the persons who were landlords at the time when the agreement was entered into were parties to the agreement.

Notice given before interest of either party transferred or before death.

34E. Where—

(*a*) the interest of the landlord in an agricultural holding has been transferred, or the tenant's interest in the holding has been transferred otherwise than by assignation, or the landlord or the tenant has died; and

(*b*) before such transfer or death, a notice or counter-notice has been given under any enactment by or to the transferor or person who has died,

any such notice or counter-notice shall be deemed to have been given by or to the transferee or any person deriving title from him or, in the case of a notice or counter-notice given by or to the person who has died, shall, if effective, continue to be so.

Section 34D

This provision implements as regards leases of agricultural holdings Recommendations 40-43. (See clause 7.) It concerns the termination of the tenancy of an agricultural holding which is subject to one tenancy and has more than one landlord, the interest of each landlord being an interest in common.

Section 34E

This provision implements as regards leases of agricultural holdings Recommendation 44. (See clause 8.) It provides for the continuing effectiveness of a notice under any enactment given before the interest of a party to the lease is transferred (otherwise than by assignation in the case of the tenant's interest) or before the death of either party.

Sch. 1

Assignation of tenant's interest.

34F.—(1) Where a tenant's interest in an agricultural holding has been assigned, whether in security or otherwise, a notice or a counter-notice given by the landlord under any enactment to the assignor shall be deemed to have been given to the assignee unless, before such notice is given,—

(*a*) the assignation has been intimated in writing to the landlord; or

(*b*) the landlord has consented to the assignation in the deed of assignation; or

(*c*) in the case of an assignation registrable under the Registration of Leases (Scotland) Act 1857 or in the case of an interest in an assignation registrable under the Land Registration (Scotland) Act 1979, the assignation or interest has been so registered.

(2) Any notice or counter-notice given under any enactment by the landlord of an agricultural holding after the tenant's interest has been assigned in security, or after the tenant has granted a standard security and the security has been recorded in the Register of Sasines or the interest in the security has been registered in the Land Register of Scotland, shall not be effective if the creditor has entered into possession of the security subjects, unless it is given to the creditor, but in that case it shall not be necessary to give such notice to the tenant.

Giving of notice after death of party to lease.

34G.—(1) Where in relation to an agricultural holding which is subject to a tenancy a party to the lease dies, any notice or counter-notice given under any enactment after the death addressed to the deceased party (as if he were still alive) by the other party, shall be an effective notice unless subsection (2) below applies.

(2) This subsection applies if, at the time of the giving of the notice, the person giving it—

(*a*) has been notified of the confirmation of an executor-nominate to the estate of the party to whom the notice is addressed or the appointment of an executor-dative to that party;

(*b*) has been notified that the deceased's interest has been assigned in security and that since his death the creditor has entered into possession of the security subjects; or

(*c*) in the case of the death of the tenant, has been notified—

(i) under subsection (2) of section 20 of this Act that a legatee has accepted a bequest of the deceased tenant's interest in the lease, unless the landlord has given a counter-notice to the legatee under subsection (3) of that section; or

(ii) that the Land Court has made an order under subsection (5) of that section declaring the legatee to be the tenant under the lease.

(3) Where notice has been given in pursuance of this section addressed to a deceased party and an executor has not been confirmed or appointed as mentioned in paragraph (a) of subsection (2) above, then, until such confirmation or appointment occurs, any of the following persons may act to protect that interest—

(*a*) the spouse of the deceased;

(*b*) a specific legatee of that interest or a residuary legatee;

(*c*) any person nominated in a will of the deceased as his executor;

(*d*) any person entitled to apply to be appointed as the deceased's executor-dative;

Section 34F

This provision, as read with clause 17(1), implements Recommendation 46 in relation to leases of agricultural holdings. It also implements Recommendations 47 and 48. (See clause 9.) It concerns the giving of notice where a tenant's interest in a lease of an agricultural holding has been assigned.

Section 34G

This provision implements in relation to leases of agricultural holdings Recommendations 69-72. (See clause 10.) It makes provision for the giving of any notice under any enactment during the interim period between the death of a party to the lease and the point at which another person assumes responsibility for the deceased party's interest in the lease. Subsection (2)(c) specifies the additional cases in the context of agricultural holdings of notification to a landlord which brings to an end the landlord's entitlement to give notice under this provision. These cases concern the taking over of a deceased tenant's interest by a legatee (see Recommendation 70(d)).

Sch. 1

(*e*) if the deceased's interest in the tenancy or in the holding has been assigned in security, the creditor;

(*f*) any other person with an actual or potential interest in the holding or in the tenancy.

(4) Where the interest of a deceased tenant under a lease of an agricultural holding has vested in the deceased's executor by virtue of section 14 of the Succession (Scotland) Act 1964 and the date of termination of the lease falls within the period of one year immediately following the deceased's death, then, notwithstanding section 16(3) of that Act, the landlord or the executor of the deceased tenant shall be entitled to give notice for the purpose of bringing the tenancy to an end on that date.

(5) This section applies where a standard security has been granted in respect of an interest and—

(*a*) the security has been recorded in the Register of Sasines; or

(*b*) the interest in the security has been registered in the Land Register of Scotland,

as it applies where an interest has been assigned in security.

Giving of termination or resumption notice where sub-tenant has died.

34H.—(1) Where—

(*a*) an agricultural holding is subject to a sub-tenancy which has been authorised (either expressly or impliedly) by the landlord of the tenant;

(*b*) the sub-tenant dies; and

(*c*) at the time of death the sub-tenant was in possession of the holding,

a copy notice given by the landlord or tenant under section 34B(3) or 34C(8) of this Act after the death addressed to the deceased sub-tenant (as if he were still alive) shall, unless subsection (2) below applies, have effect as if it were given to the sub-tenant.

(2) This subsection applies if the tenant at the time when the copy notice is given by the landlord or tenant has been notified—

(*a*) of the confirmation of an executor-nominate to the estate of the deceased or the appointment of an executor-dative to him; or

(*b*) that the deceased's interest has been assigned in security and that since his death the creditor has entered into possession of the security subjects; or

(*c*) under subsection (2) of section 20 of this Act that a legatee has accepted a bequest of the deceased's interest in the sub-lease, unless the landlord has given a counter-notice to the legatee under subsection (3) of that section; or

(*d*) that the Land Court has made an order under subsection (5) of that section declaring the legatee to be the sub-tenant under the sub-lease.

(3) Subsection (3) of section 34G of this Act shall apply in relation to such a copy notice as aforesaid as it applies in relation to a notice given in pursuance of that section but as if in paragraphs (e) and (f) for the word "tenancy" there were substituted the word "sub-tenancy".

Section 34H

This provision implements as regards leases of agricultural holdings Recommendations 73-75. (See clause 11.) Where notice of termination or resumption is given and there is an authorised sub-tenant in possession of the property, the new sections 34B(3) and 34C(8) require a copy of the notice to be given to the sub-tenant. This provision enables a copy of such notices to be given in the case where the sub-tenant in possession of the holding has died and responsibility for his interest has not been assumed by another person. Subsection (2)(c) and (d) make provision for the further cases in the context of agricultural holdings where the tenant (as the sub-tenant's landlord) has been notified that a legatee has taken over the deceased sub-tenant's interest in the sub-tenancy, thus bringing to an end the entitlement under this provision of the landlord or the tenant to give a copy notice addressed to the deceased sub-tenant (as if he were still alive) (see Recommendation 74(d)).

Sch. 1

(4) This section applies where a standard security has been granted in respect of an interest and—

(*a*) the security has been recorded in the Register of Sasines; or

(*b*) the interest in the security has been registered in the Land Register of Scotland,

as it applies where an interest has been assigned in security.

Proper liferents.

34I. Where the interest of the landlord in an agricultural holding is the subject of a proper liferent, then, for the purpose of the giving of any notice, counter-notice or copy notice under any enactment, the liferenter shall be deemed to be the landlord of the leased property and the interest of the fiar shall be disregarded.".

Section 34I

This provision implements Recommendation 50 in relation to leases of agricultural holdings. (See clause 12.)

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Section 22.

SCHEDULE 2

BEQUEST, OR TRANSFER ON DEATH, OF LEASE

Amendments of the Agricultural Holdings (Scotland) Act 1949

1. Section 20 (bequest of lease) shall have effect subject to the following modifications—

(*a*) in subsection (2) for the words from "accepts" to "thereafter" there shall be substituted the words "is accepting the bequest, give notice of that acceptance to the landlord of the holding within 3 months after the death of the tenant.";

(*b*) in subsection (4) after the word "may" there shall be inserted the words "within one month after the giving of the counter-notice";

(*c*) for subsection (7) there shall be substituted the following subsection—

"(7) If—

(*a*) the legatee does not—

(i) give notice under subsection (2) above; or

(ii) apply under subsection (4) above; or

(*b*) the bequest is declared null and void under subsection (5) above,

the right to the lease shall be treated as intestate estate of the deceased tenant in accordance with Part I of the Succession (Scotland) Act 1964; and any occupation by the legatee of the holding as legatee after the right to the lease has become treated as intestate estate under this subsection shall be regarded as unlawful.".

2. For section 21 there shall be substituted the following section—

"Transfer, otherwise than under s.20, of deceased tenant's interest in lease.

21.—(1) This section applies where the interest of a deceased tenant in a lease of an agricultural holding is transferred to a person ("the transferee") as intestate estate of the deceased.

(2) Where this section applies, the transferee shall give notice of the transfer to the landlord of the holding within 21 days after the date of the transfer or, if he is prevented by some unavoidable cause from giving such notice within that period, as soon as possible thereafter.

(3) Where notice has been given to the landlord under subsection (2) above, he may, within one month after the giving of the notice, give to the transferee a counter-notice intimating that he objects to receive the transferee as tenant under the lease; and within one month after the giving of the counter-notice the landlord may apply to the Land Court for an order terminating the lease.

(4) Unless the landlord—

(*a*) gives a counter-notice under subsection (3) above; and

(*b*) having given such a counter-notice, makes an application to the Land Court in accordance with that subsection,

the lease shall be binding on the landlord and on the transferee, as landlord and tenant respectively, as from the date of the transfer.

Schedule 2

General

In Part IV of the Bill, clause 21 makes provision regarding the bequest, or the transfer on death as intestate estate, of a deceased tenant's interest in a non-agricultural lease. In relation to leases of agricultural holdings, provision on these matters is already contained in sections 20 and 21 of the Agricultural Holdings (Scotland) Act 1949. This Schedule implements the Recommendations of the Report regarding the bequest, or transfer on death as intestate estate, of a deceased tenant's interest in a lease of an agricultural holding. This is done by way of modifications to the provisions of section 20 and the substitution of a new provision in place of section 21.

Paragraph 1

The provision in (a) implements Recommendation 59. It amends section 20(2) by requiring a legatee who is accepting the bequest of a tenant's interest in a lease of an agricultural holding to give notice of this to the landlord within a new time limit, namely 3 months from the death of the tenant.

The provision made in (b) implements Recommendation 60. It requires a legatee who wishes to apply to the Land Court under section 20(4) for an order declaring him to be the tenant under the lease to do so within one month after the giving to him of a counter-notice from the landlord objecting to receiving him as tenant under the lease.

The provision made in (c) implements Recommendation 61. To achieve this a new subsection is substituted for section 20(7), incorporating the existing provision in that subsection.

The new provision stipulates the consequence of failure by the legatee to give notice under section 20(2), or to apply to the Land Court under section 20(4), namely that the right to the lease shall be treated as intestate estate of the deceased tenant.

Paragraph 2

This paragraph implements Recommendations 62-68. To achieve this a new provision is substituted for the existing section 21 of the 1949 Act. The provision concerns the transfer as intestate estate of a deceased tenant's interest in a lease of an agricultural holding. In part implementation of Recommendation 64, the substituted section does not retain the existing provision in section 21(2) preventing the landlord from applying to the Land Court before the expiration of one month from the giving of the counter-notice; and in part implementation of Recommendation 67, it does not retain the existing provision in section 21(4) requiring the executor's consent to possession of the holding by the transferee pending proceedings under the section.

Subsections (1) and (2)

These subsections implement Recommendation 62. The existing time limits in section 21(1) for the giving of notice to a landlord by a transferee are retained. The period of 21 days is reasonable in most cases since the executor has a period of one year under section 16 of the Succession (Scotland) Act 1964 in which to make the transfer; and the provision allowing later notification (where any failure to give notice timeously is due to some unavoidable cause) may prevent any unfairness which might be caused in such a case by the stipulation in subsection (7) of the consequence of failure to give notice: ie termination of the lease in so far as it relates to the interest of the transferee.

Subsection (3)

This subsection implements Recommendation 64 in part. The right of the landlord to object to receiving the transferee as tenant under the lease is already contained in the existing section 21(2). This subsection introduces a time limit on any application by the landlord to the Land Court for an order terminating the lease.

Subsection (4)

In implementation of Recommendation 65, this subsection fills a gap in the existing provisions by stipulating the consequence of failure by the landlord to give a counter-notice and make an application to the Land Court under subsection (3).

Sch. 2

(5) If the Land Court, on an application being made to them under subsection (3) above,—

(*a*) are satisfied that the landlord has established any reasonable ground of objection, they shall make an order terminating the lease to take effect as from such term of Whitsunday or Martinmas as they may specify;

(*b*) are not so satisfied, the lease shall be binding on the landlord and on the transferee, as landlord and tenant respectively, as from the date of the transfer.

(6) The transferee shall, unless the Land Court on cause shown otherwise direct, have possession of the holding—

(*a*) pending any proceedings under this section; and

(*b*) if the Land Court are satisfied as mentioned in subsection (5) above, until the term specified in an order under that subsection for the termination of the lease.

(7) Notwithstanding section 24(1) of this Act, where the transferee does not give notice under subsection (2) above, the lease, or (if there is more than one person who has an interest in common as tenant) the lease in so far as it relates to the interest of the transferee, shall, if not otherwise terminated, be treated as terminated as from the end of the period of 21 days referred to in subsection (2) above or as from the end of that period as extended under that subsection.

(8) The termination of the lease under this section shall be treated for the purposes of—

(*a*) the provisions of this Act relating to compensation; and

(*b*) determining entitlement to any payment under paragraph 2 of Schedule 2 to the Agriculture Act 1986 (compensation for milk quota),

as the termination of the transferee's tenancy of the holding; but nothing in this section shall be construed as entitling the transferee to any compensation for disturbance.".

Subsection (5)

Paragraph (a) of this subsection generally retains the existing provision in section 21(3). Paragraph (b) implements Recommendation 66 and fills a gap in the existing provisions by providing for the case where the Land Court is not satisfied that the landlord has established any reasonable ground of objection to receiving the transferee as tenant.

Subsection (6)

This subsection implements Recommendation 67 in part. It retains most of the existing provisions of section 21(4) and makes additional provision regarding possession of the holding by the transferee where the Land Court has made an order terminating the lease.

Subsection (7)

In implementation of Recommendation 63, this subsection introduces a new provision stipulating the consequence of failure by the transferee to give notice under subsection (2).

Subsection (8)

This subsection implements Recommendation 68. It retains the existing provisions of section 21(5), while adding a provision dealing with the determination of entitlement on termination of the lease to compensation for milk quota under the Agriculture Act 1986.

Section 29(1).

SCHEDULE 3

MINOR AND CONSEQUENTIAL AMENDMENTS

General amendment

Any reference in any enactment to eject or ejection shall be construed respectively as a reference to remove or removing referred to in section 7 of the Sheriff Courts (Scotland) Extracts Act 1892 or section 16 of the Removing from Heritable Property (Scotland) Act 1989, as the case may be.

1892 c.17

Specific amendments

The Sheriff Courts (Scotland) Extracts Act 1892 (c.17)

1. In section 7 (import of the warrant for execution) in subsection (5) for the words "a removing" there shall be substituted the words "removing from heritable property.".

The Tenancy of Shops (Scotland) Act 1949 (c.25)

2. At the end of section 1 (provision for renewal of tenancies of shops), there shall be added the following subsection—

"(8) It shall be incompetent for the parties to make an agreement providing for a shorter period of notice for the termination of the tenancy of a shop than the requisite period of notice applicable under section 1(3) of the Removing from Heritable Property (Scotland) Act 1989.".

The Agricultural Holdings (Scotland) Act 1949 (c.75)

3. In section 19(1) (removal of tenant for non-payment of rent), for the word "eject" there shall be substituted the word "remove".

4. In the cross-heading before section 24 for the words "to quit" there shall be substituted the words "of termination".

5. In section 27(4) for the words "twelve months" there shall be substituted the words "six months after the decision or award.".

6. At the end of section 35 there shall be added the following subsection—

"(6) Where the sub-tenancy of a person in possession of an agricultural holding is terminated by virtue of a notice given by either party to the tenancy to the other of his intention to terminate the tenancy, this section shall have effect as if the sub-tenancy had been terminated by virtue of a notice to quit given to him by his landlord.".

7. In section 59(1) for the word "three" there shall be substituted the word "two".

8. In section 60(1) (application of compensation provisions to parts of holdings)—

(*a*) for paragraph (a) there shall be substituted the following paragraph—

"(a) the tenancy or sub-tenancy of part of an agricultural holding terminates by reason, or in consequence, of a notice under this Act; or";

(*b*) for the words from "which the tenant" to "notice to quit" there shall be substituted the words "the tenancy or sub-tenancy of which had terminated in consequence of a notice under this Act.".

Schedule 3

General amendment

The general amendment made implements Recommendation 87 in part and specifies the terminology to be adopted in relation to proceedings for possession of heritage.

Specific amendments

The Sheriff Courts (Scotland) Extracts Act 1892

Paragraph 1

This amendment is consequential to Recommendation 87 (terminology to be used for proceedings for possession of heritage), and Recommendation 89 and clause 15(2) (amendment of section 7(4) of the 1892 Act).

The Tenancy of Shops (Scotland) Act 1949

Paragraph 2

In implementation of Recommendation 25, this provision prevents parties to the tenancy of a shop from contracting out of the statutory notice provisions relating to termination of the tenancy and agreeing that a shorter period of notice than the minimum stipulated under clause 1(3) shall apply. To permit parties to do so would interfere with the operation of the security of tenure provisions under section 1 of the 1949 Act.

The Agricultural Holdings (Scotland) Act 1949

Paragraph 3

This provision is consequential to Recommendation 87 concerning the terminology to be used in relation to proceedings for removing from heritable property.

Paragraph 4

This provision reflects the fact that the new section 24 substituted by paragraph 2 of Schedule 1 deals with the giving of notice by either party of intention to bring the tenancy to an end.

Paragraph 5

In implementation of Recommendation 21, this provision clarifies the operation of the Land Court's discretion on an application by the tenant under section 27(4). This is discussed in paragraphs 2.88-2.91 of the Report.

Paragraph 6

Section 35 gives the tenant an entitlement to compensation for disturbance in certain cases of termination of a tenancy. This provision implements Recommendation 32, giving the sub-tenant an entitlement to such compensation where the sub-tenancy is terminated in certain circumstances.

Paragraph 7

This provision implements Recommendation 22(b). The amendment is a consequence of the new section 24(4) in Schedule 1, paragraph 2, which implements Recommendation 22(a), and permits parties to a tenancy to contract out of the statutory notice provisions relating to termination and agree that a shorter period of notice than the minimum stipulated will apply, subject to a minimum period of notice of 3 months. The amendment made in this paragraph enables the tenant to give a timeous notice under section 59(1) of intention to claim compensation where he has received a notice of termination of 3 months.

Paragraph 8

These amendments implement Recommendation 38 and are consequential to the entitlement to terminate the tenancy of part of an agricultural holding under the new section 34C(2) and (3) (see Schedule 1, paragraph 4), which implements Recommendations 33 and 34(a). In such cases of termination, the amendment provides for an entitlement to compensation under the provisions of the 1949 Act.

Sch. 3

9. In section 90—

(*a*) in subsection (1) for the words "in a registered letter" there shall be substituted the words "to his proper address in a recorded delivery letter or a registered letter.";

(*b*) for subsection (4) there shall be substituted the following subsection—

"(4) Subject to section 34G of this Act, where there has been a change of landlord but the tenant has not received notice of the change, any notice or document given or served by the tenant on the original landlord shall be deemed to be duly given to or served on the landlord under the tenancy.".

10. In section 93—

(*a*) in subsection (1)—

(i) in the definition of "landlord" for the words from "the rents" to the end there shall be substituted the words "rent for, or to take possession of, any agricultural holding;";

(ii) after the definition of "produce" there shall be inserted the following definitions—

"a resumption notice" means a notice under section 34A of this Act;

"sub-tenant" means a sub-tenant of any degree, and, in relation to a sub-tenant, "tenant" means the landlord of the sub-tenant and "landlord" means the landlord of the tenant, and "sub-tenancy" and "tenancy" shall be construed accordingly;";

(*b*) in subsection (7) after the words "or the tenant" there shall be inserted the words "or the sub-tenant" and at the end of that subsection there shall be added the words "or of the sub-tenant.".

(*c*) at the end there shall be added the following subsection—

"(8) Any reference in this Act to a party or to the parties to a lease or to the landlord or tenant shall, unless the context otherwise requires, include a reference to any creditor in possession of the leased property.".

The Succession (Scotland) Act 1964 (c.41)

11. In section 16 (provisions relating to leases)—

(*a*) in subsection (2)(c) the words "or section 20 of the Act of 1949" shall cease to have effect and after "1955" there shall be inserted the words "or the right to the lease is treated as intestate estate under section 20(7) of the Act of 1949,";

(*b*) in subsection (4) for the words from "the last" to "agreement" in paragraph (a) there shall be substituted the words "subsection (3) above shall be such period as may be agreed or, failing agreement,—

(*a*) in the case of an agricultural lease";

(*c*) after subsection (5) there shall be inserted the following subsections—

"(5A) Any notice under subsection (3) above shall be duly given to the person concerned if it is delivered to him, or left at his proper address, or sent to him by post in a recorded delivery letter or a registered letter.

(5B) In the case of an incorporated company or body, any such notice shall be duly given if it is given to the secretary or clerk of the company or body.

Paragraph 9

The provision made in (a) implements Recommendation 107 in part.

The provision made in paragraph (b) implements Recommendation 109 as regards leases of agricultural holdings, and replaces the existing section 90(4).

Paragraph 10

The amendment in (a)(i) implements Recommendation 83 as regards leases of agricultural holdings by amending the existing definition of "landlord".

The definitions inserted by (a)(ii) have already been noted in the appropriate contexts.

The provision made in (b) applies Recommendation 84 in relation to leases of agricultural holdings by inserting appropriate references to the sub-tenant into the existing provision made in section 93(7) of the 1949 Act.

The provision made in (c) implements Recommendation 49 in relation to leases of agricultural holdings, since any creditor entering into possession of the leased property on default by the debtor becomes in effect a new party to the lease.

The Succession (Scotland) Act 1964

Paragraph 11

The amendment made in (a) is consequential to the new section 20(7) of the 1949 Act substituted by Schedule 2, paragraph 1(c) in implementation of Recommendation 61.

The amendments made in (b) implement Recommendation 51.

The provision made in (c) implements Recommendations 107 and 108 in part, providing for the manner of giving notice of termination of a lease under section 16(3) of the 1964 Act.

Sch. 3

(5C) For the purposes of this section, the proper address of a person is—

(*a*) in the case of a secretary or clerk to a company or body, that of the registered or principal office of the company or body;

(*b*) in any other case, the person's last known address.".

The Conveyancing and Feudal Reform (Scotland) Act 1970 (c.35)

12. In Schedule 3—

(*a*) in paragraph 10 (remedies of creditor if debtor is in default under standard security) after sub-paragraph (1) there shall be inserted the following sub-paragraphs—

"(1A) He may remove from the security subjects, the debtor, the proprietor or any other occupant deriving right or having permission from the debtor or the proprietor.

(1B) For the purposes of sub-paragraph (1A) above, if the debtor or proprietor is an entitled spouse or an entitled partner as defined respectively in sections 1 and 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981, then, notwithstanding anything in that Act, the non-entitled spouse or non-entitled partner shall be regarded as deriving right from the debtor or the proprietor.";

(*b*) in paragraph (a) of the provision relating to interpretation after "10(1)" there shall be inserted "10(1A)".

The Conveyancing and Feudal Reform (Scotland) Act 1970

Paragraph 12

The insertions made in this paragraph implement Recommendation 95. The principal effect of the insertions is to cure an omission in the list provided in paragraph 10 of Schedule 3 to the 1970 Act of the remedies available to a creditor where the debtor is in default under a standard security.

Section 29(2).

SCHEDULE 4

REPEALS

Chapter	*Short title*	*Extent of repeal*
1594 c.27.	The Ejection Caution Act 1594	The whole Act.
49 & 50 Vict. c.50.	The Removal Terms (Scotland) Act 1886.	The whole Act.
7 Edw. 7 c.51.	The Sheriff Courts (Scotland) Act 1907.	Sections 34 to 38A. In Schedule 1, Rules 103 to 107 and in the Appendix forms L, M and N.
12 & 13 Geo. 6 c.75.	The Agricultural Holdings (Scotland) Act 1949.	Section 31. Section 60(2). In section 90(3) the words "and of section twenty six of the Interpretation Act 1889". In section 93(1), in the definition of "tenant" the words from "and includes" to the end and in the definitions of "Whitsunday" and "Martinmas" the words from "in relation" to "forty-eight".
1964 c.41.	The Succession (Scotland) Act 1964.	In section 16, in subsection (2)(c) the words "or section 20 of the Act of 1949" and in subsection (8) the words "is an interest under an agricultural lease and".
1971 c.58.	The Sheriff Courts (Scotland) Act 1971.	In section 35(1)(c) the words "heritable or".

Schedule 4

General

This Schedule makes various repeals in implementation of or consequential to various Recommendations of the Report.

The Ejection Caution Act 1594

This Act makes provision for the lodging of caution for violent profits by a defender in an action of ejection. The Act is repealed in consequence of clause 20(1) and Recommendation 100 and in part implementation of Recommendation 113.

The Removal Terms (Scotland) Act 1886

The terms of this Act are overtaken by the Recommendations generally concerning the giving of notice of termination of non-agricultural leases (Recommendations 1-9, see clause 1). The repeal of the Act is specifically in implementation of Recommendations 9 and 113 in part.

The Sheriff Courts (Scotland) Act 1907

The provisions of the Act repealed govern the termination of non-agricultural leases. These provisions are overtaken by clause 1 and the Recommendations generally concerning the giving of notice of termination in relation to non-agricultural leases ie Recommendations 1-9. The repeal of these provisions is specifically in part implementation of Recommendation 113.

The Agricultural Holdings (Scotland) Act 1949

Section 31 is an obsolete provision. The repeal of the section implements Recommendation 45.

Section 60(2) appears to be an obsolete provision. The repeal is suggested in the last footnote to paragraph 2.62 of the Report.

In section 90(3), the words specified appear unnecessary. The repeal of these words implements Recommendation 108 in part.

In section 93(1), the words specified in the definition of "tenant" appear unnecessary. The repeal of these words is suggested in the footnote to paragraph 6.23 of the Report. In the definitions of "Whitsunday" and "Martinmas", the repeal of the words specified implements Recommendation 10.

The Succession (Scotland) Act 1964

In section 16(2)(c) the repeal of the words specified is consequential to the provision in Schedule 3, paragraph 11(a) that these words shall cease to have effect (the latter provision being consequential to Recommendation 61, implemented in Schedule 2, paragraph 1(c)).

In section 16(8) the repeal of the words specified is effected by clause 21(6)(a), clause 21(6) itself being in implementation of Recommendation 55.

The Sheriff Courts (Scotland) Act 1971

In section 35(1)(c) the repeal of the words specified is consequential to the provision made in clause 14(1)(b), which implements Recommendation 87 regarding the terminology to be adopted for any proceedings for possession of heritage.

Appendix B

List of those who submitted written comments on Consultative Memorandum No 59.

(Note: in the case of some of the organisations listed below, the views which were expressed were those of individuals, or groups of individuals, within the organisation in question, and were not necessarily the views of the organisation itself.)

Building Societies Association
R C Connal
Convention of Scottish Local Authorities
Law Society of Scotland
G J Junor
J Macdonald
National Farmers' Union for Scotland
Sheriffs' Association
Society of Directors of Administration
Society of Writers to HM Signet
University of Aberdeen, Faculty of Law

Appendix C

List of those who submitted written comments on the Consultation Paper on Termination of Leases: Contracting out of the statutory notice provisions.

(Note: in the case of some of the organisations listed below the views which were expressed were those of individuals, or groups of individuals, within the organisation in question, and were not necessarily the views of the organisation itself.)

R C Connal
Crofters' Commission
Department of Agriculture and Fisheries for Scotland
A G M Duncan
The Rt Hon the Lord Emslie, QC, Lord President of the Court of Session and
The Rt Hon Lord Ross, QC, Lord Justice-Clerk
Faculty of Advocates
M F Fleming
Law Society of Scotland
T Mackay
National Farmers' Union for Scotland
J J Robertson
Scottish Development Agency
Scottish Development Department
Scottish Landowners' Federation
Sheriffs' Association
Society of Directors of Administration
Society of Writers to HM Signet
University of Aberdeen, Faculty of Law

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