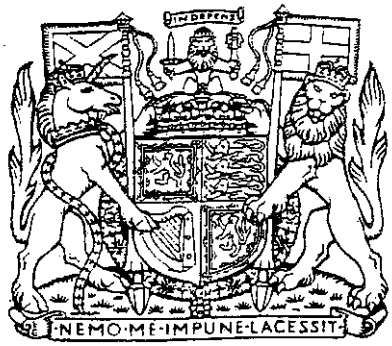

SCOTTISH LAW COMMISSION

MEMORANDUM NO . 52
IRRITANCIES IN LEASES

APRIL 1981

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

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IRRITANCIES IN LEASES

CONTENTS

CHAPTER 1 - INTRODUCTION AND SCOPE OF OUR REFERENCE

1.01 On 21 September 1976 the Commission received from the Secretary of State for Scotland a reference under section 3(1)(e) of the Law Commissions Act 1965 in the following terms:-

> "Without prejudice to the Commission's freedom to offer advice on any possibilities of reform of this branch of the law, I should be glad if the Commission would, in the light of Dorchester Studios (Glasgow) Limited v. Stone and Another, and the observations made in the judgments in that case, consider and advise on the operation of irritancy clauses in leases of commercial and industrial property (including leases of land for commercial or industrial development), and on related matters."

In Dorchester Studios (Glasgow) Limited v. Stone and Another[1] the House of Lords refused to allow an irritancy,[2] incurred by the tenant's failure to pay an instalment of rent on the due date required under the lease, to be purged[3] by an offer of payment of the arrears in full made shortly after that date, and before action to enforce the irritancy was brought. Although they had no doubt that it was a well established doctrine of the law of Scotland that a conventional irritancy of the kind in question could not be purged after it had been incurred, both Lord Kilbrandon and Lord Fraser of Tullybelton recommended that the doctrine be re-examined by this Commission from the policy point of view.[4]

1.02 Our reference is concerned with the operation of irritancy clauses in leases of commercial and industrial property, and our first task has been to define those terms

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[1] 1975 S.C. (H.L.) 56.

[2] "Irritancy" means annulment or termination. The word is, however, also commonly used to denote an event specified in a lease as justifying termination. Thus where a lease contains a provision for termination in the event of non-payment of rent, such non-payment may itself be described as an "irritancy", and the clause in which the provision is made is described as an "irritancy clause". We follow that usage in this Memorandum. An irritancy can be enforced only by the party aggrieved by the contravention of a stipulation in the lease. It cannot be used by a defaulting tenant as a means of terminating his obligations under the lease.

[3] The "purging" of an irritancy denotes the remedying of the act or omission which has constituted the irritancy.

[4] 1975 S.C. (H.L.) 56 Lord Kilbrandon at p.67, Lord Fraser of Tullybelton at p.73.

for the purposes of this Memorandum and the provisional proposals which we advance.

1.03 We have interpreted our reference as being restricted to leases of heritable property, and for this reason we have not considered irritancy clauses in leases of moveable property such as machinery and plant. We have considered whether our provisional proposals below should extend to agricultural leases, and have come to the view that they should for the following reasons. First, an agricultural lease may be regarded as a species of commercial lease, and second the common law as to irritancies may apply to an agricultural lease even although it is regulated by the Agricultural Holdings Acts which only apply to leases for agriculture for the purposes of a trade or business. We consider, therefore, that reform of the law on irritancies as it is applied to agricultural leases can properly be regarded as a "related matter" for the purpose of our reference. We think also that our provisional proposals should apply to leases of game and sporting rights, leases of minerals and leases of timber, provided, in each case, that the transaction is truly one of lease rather than of sale or licence. We do not, however, consider that our proposals should apply to small landholders, statutory small tenants, crofters or cottars whose statutory rights, although superimposed on rights enjoyed under leases, are truly rights sui generis. We are not concerned in this Memorandum with leases of residential property.

1.04 Irritancies may arise either because the parties to the contract of lease have expressly provided for them in the lease, or because the irritancy is implied by law.[5] Irritancies of the first type are "conventional" irritancies and irritancies of the latter type are "legal" irritancies. We consider that our reference is directed at the operation of conventional irritancy clauses, and the provisional

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[5] Probably the only circumstance in which an irritancy could be so implied would be the non-payment of rent under a lease in which the parties had made no contractual provision for the consequence of such non-payment.

proposals in this Memorandum are therefore restricted to irritancies which are, like the irritancy for late payment of rent in Dorchester Studios, agreed upon by the parties themselves as part of the contract of lease. The law leaves the parties free to stipulate for such conventional irritancies as they think fit, the only factor limiting their choice being the requirement that their stipulations must be lawful. Thus contracts of lease may contain, and as we show in paragraph 2.02 below, do contain, stipulations for the irritancy of a lease by reason of events both related and unrelated to the lease, and by reason of remediable events no less than irremediable events.[6]

1.05 Layout of the Memorandum

In Chapter 2 we set out the present law on irritancies in leases, and examine the content of a paradigm irritancy clause. Various criticisms of the existing law are raised in Chapter 3, and Chapter 4 contains a brief examination of the English law on forfeiture. In Chapter 5 we set out the policy considerations which have influenced our proposed reforms of the law, and Chapter 6 contains our main proposal for reform, which is that a tenant should be given prior notice by a landlord specifying an impending irritancy, and be given a reasonable time to remedy the matter so specified. Chapter 7 contains subsidiary proposals for the protection of third parties such as sub-tenants and secured creditors, and in Chapter 8 we propose that the notice system should be extended to apply to action by a landlord to terminate a lease on the grounds of material breach of contract. In Chapter 9 we consider what forum would be appropriate for considering questions arising out of our proposals and in Chapters 10 and 11 we discuss certain miscellaneous questions arising from our main and subsidiary proposals, and minor reforms.

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[6] Irritancy clauses sometimes provide for an irritancy to be incurred under a lease by virtue of a default under another contract unrelated to the lease and to which the tenant may not be a party.

CHAPTER 2 - THE PRESENT LAW

2.01 The parties to a lease are free to make any lawful stipulation for the irritancy of the lease and for that reason it is obvious that the contents of irritancy clauses may vary from lease to lease. However, our examination of the irritancy clauses in a sample of commercial leases leads us to believe that irritancy clauses are surprisingly uniform in content. An irritancy clause in the following form appears not uncommon:-

"If at any time during the currency of the lease the tenants shall allow the rent, or any part thereof, to remain unpaid for twenty-one days after the days appointed for payment thereof in terms of the lease, whether the same shall have been lawfully demanded or not, or if the tenants shall at any time fail to implement or shall contravene any of the conditions, provisions, restrictions and others contained in the lease, or in the event of the tenants going into liquidation (other than a voluntary liquidation for the purpose of reconstruction or amalgamation), or having a receiver appointed in respect of any part of their undertaking, or in the event of this lease having been assigned to an individual or to a partnership, if he or they shall sign a Trust Deed for behoof of creditors or become notour bankrupt, then, and in any of these events, the tenants shall forfeit all right and title under these presents and the landlords shall be entitled to forthwith terminate the lease and treat the lease and all transmissions thereof with all that has followed or can competently follow thereon as void and null, and that without the necessity of any declarator, process or removal, or other procedure at law, and the premises shall thereupon revert to the landlords, and it shall be lawful for the landlords or any person or persons duly authorised by the landlords in that behalf to enter upon the possession of the premises, or any part thereof, in name of the whole and to uplift rents, eject tenants and occupiers and thereafter use, possess and enjoy the same free of all claims by the tenants as if these presents had never been granted, without prejudice to any right of action or remedy of the

landlord in respect of the premature termination of the lease or of any antecedent breach by the tenants of any of the stipulations contained in the lease, which irritancy is hereby declared to be pactional and not penal and shall not be purgeable at the Bar".

2.02 It will be seen that an irritancy clause of the kind set out above has the following characteristics as regards the enforceability of the irritancy:-

(a) The irritancies (viz: the events identified as sufficient to justify irritancy of the lease) are not limited to breaches by the tenant of his obligations under the lease itself (such as obligations to pay rent and other periodical sums,[1] or to observe the undertakings imposed on the tenant under the lease in regard to the subjects of lease), but extend to extraneous occurrences such as the alteration of the financial status of the tenant occasioned by insolvency.

(b) No distinction is drawn, in respect of the events mentioned in the clause, between events which are, and events which are not, prejudicial or materially prejudicial to the landlord. The landlord is entitled to apply the sanction of irritancy to any breach by the tenant of his obligations under the lease, however minor or inadvertent that breach may be.

(c) No entitlement is conferred on the tenant to receive prior warning from the landlord of an irritancy or impending irritancy, nor is the tenant entitled to an opportunity to remedy a remediable irritancy within a given period. As regards due payment of rent, for example, there is no requirement that the tenant must

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[1] Such as, for example, payment of insurance premiums, service charges, rates or other similar impositions.

have received a prior demand for rent before irritancy can be applied as the sanction for its non-payment.[2]

2.03 We have been concerned above to emphasise the literal effect of the common provisions in an irritancy clause. We do this because, as we explain below, the law insists upon that literal effect in interpreting irritancy clauses, and not because we wish to suggest that all landlords make it their invariable practice to enforce such irritancy clauses to the letter. We do not doubt that practical considerations, quite apart from reasonableness on the part of landlords, will often act as a restraint on the rigorous application of irritancy clauses. Indeed the facts in Dorchester Studios are themselves an illustration of such self-imposed restraint on the part of a landlord: for in that case the landlords gave prior warning to the tenants (although they do not appear to have been obliged to do so under the lease) of the requirement to pay the rent on the due date. Mitigation by a landlord of the rigour of irritancy clauses is, however, a matter for the discretion of the landlord. It cannot be relied on by the tenant, nor can the tenant guarantee to a third party (such as a prospective lender to whom he desires to offer his tenant's interest as the subject of a standard security) that the landlord will in any future circumstances be required to apply an irritancy clause other than according to its literal terms.

2.04 The irritancy clause which we set out above not only identifies the relevant irritancies, but contains important provisions with regard to the procedures available to the landlord for the removal of the tenant following such an event. We discuss the latter provisions in paragraph 10.01 below. We now pass to examine the way in which the present law regards the enforceability of an irritancy clause.

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[2] The model clauses which appear in the style of full repairing and insuring lease prepared by the Law Society of Scotland's Styles Committee make irritancy conditional upon the tenant having had an opportunity to remedy a breach of his obligation within a reasonable period after a request to that end is made by the landlord. See Workshop, Journal of the Law Society of Scotland, May 1980. If the clauses we have seen are typical, then it must be assumed that tenants rarely succeed in persuading landlords to qualify an irritancy clause in that way.

2.05 In Dorchester Studios the House of Lords had no hesitation in reaffirming what they described as the well-established rule of Scots law that an irritancy clause, however harsh its effect, falls to be enforced literally in accordance with its terms.[3] Lord Kilbrandon doubted whether such a rule accorded with the needs of social policy, but was in no doubt that the law of Scotland enabled a landlord to irritate a lease by reference to a breach of an irritancy clause regardless of questions of actual prejudice to the landlord.[4] Lord Fraser recognised that the rule could result in a lease being irritated by reason of one day's delay in paying rent. He did not, however, consider that it was unfair in principle to hold a landlord and tenant exactly to their contractual bargain in that way, provided that oppressive use of the irritancy was not in point.[5]

2.06 On this basis the House of Lords rejected in Dorchester Studios any argument that the eventual payment of the rent, albeit belated, could, by removing the financial prejudice occasioned to the landlord, excuse the tenant from the irritancy of the lease incurred upon the failure to pay on the due date specified under the lease. The "distinctive Scottish common law doctrine" of irritancy, as the House of Lords saw it, enabled the landlord to enforce an unambiguously expressed irritancy, so that it was irrelevant to enquire whether the default occasioning the irritancy had in fact been remedied or whether such enforcement could have been contemplated by the parties.

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[3] The interest which the case excited may seem surprising in the light of the fact that the House of Lords reaffirmed existing authorities, some of which were relatively recent, e.g. McDouall's Trustees v. MacLeod 1949 S.C. 593, Lucas's Executors v. Demarco 1968 S.L.T. 89. The case was, however, the first one to obtain wide publicity after the drafting of commercial leases had developed as a recognised specialist technique, and this may explain the vigour with which it was discussed in comparison with the preceding cases.

[4] 1975 S.C. (H.L.) 56 at p.67.

[5] 1975 S.C. (H.L.) 56 at p.72. See paras. 2.07-2.10 for the circumstances which may constitute such "oppressive" use.

2.07 Such literal enforcement of an irritancy clause was stated to be subject to one qualification: namely the equitable power of the court to relieve a tenant in cases of abuse or oppressive use of an irritancy. The authorities, however, disclose that the Scottish courts have interpreted oppressive use or abuse in an extremely narrow way in the context of irritancy of leases.

2.08 The narrow basis of that interpretation is perhaps most clearly identified in Lucas's Executors v. Demarco.[6] In that case, Lord Guthrie stated that "oppression" in this context inferred impropriety of conduct on the part of the landlord and that "abuse of irritancy" could not be established unless the landlord had invoked the terms of the contract to procure an unfair consequence. Hence the act of enforcing an irritancy clause could not in itself be oppressive unless surrounding circumstances made it so.[7] This equiparation of oppression and impropriety may serve to explain why we have found no reported cases in which it has successfully been argued that enforcement of an irritancy has been oppressive.[8] A commentator on Dorchester Studios observed, in relation to the equitable power to relieve from oppressive use of irritancy, that, "although the power has been acknowledged to be waiting in the wings, in all of the modern cases it has never been allowed on stage to affect the action."[9] We think that the present interpretation of oppression makes it likely that the power will seldom if ever be exercised.

2.09 Whilst irritancy clauses and penalty clauses are similar in their effect they can be distinguished in law. The distinction, as Gloag explains it, is that under an irritancy

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[6] 1968 S.L.T. 89.

[7] 1968 S.L.T. 89 at p.96.

[8] We understand that there has been at least one arbitration in which an arbiter has found in favour of a tenant on the basis that the landlord's attempt to irritate a lease was oppressive. The landlord in question abandoned his appeal against the arbiter's decision.

[9] Journal of the Law Society of Scotland, January 1976, p. 5.

clause the party "loses only the rights which belong to him solely under the contract which, ex hypothesi, he has failed to implement"; whereas in a penalty clause the party "is deprived of property or money to which he has a title independently of that contract."[10] It must be noted, moreover, that the law relating to penalty clauses may be restricted in its operation to those instances where the penalty is incurred for an actual breach of contract whereas irritancies may arise as a result of extraneous events such as supervening insolvency of the tenant.[11]

2.10 It will be seen, therefore, that the risks (from the tenant's point of view) inherent in an irritancy clause of the kind set out in paragraph 2.01 above are risks against which, in the absence of circumstances which amount to "oppression", no protection can be expected from the common law. The common law does not for example require, as a precondition of the enforcement of such an irritancy clause, that warning be given to the tenant of the occurrence of any of the events referred to in it, or that an opportunity be given to the tenant to remedy, if he can, any relevant breach of his obligations. Nor can a tenant hope to succeed in any argument that enforcement of an irritancy clause is rendered oppressive by reason merely of that lack of warning or opportunity to remedy.

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[10] Gloag, Contract, 2nd edition, p.664.

[11] See Granor Finance Limited v. Liquidator of Eastore Ltd 1974 S.L.T. 296.

CHAPTER 3 - CRITICISM OF THE EXISTING LAW

3.01 Criticism of the existing law is, not surprisingly, concerned solely with its effect on tenants who accede, willingly or unwillingly, to unqualified irritancy clauses in commercial leases. That criticism can, we think, be summarised as follows. The basic criticism of the existing law is that it can and does operate in a way which effectively penalises a tenant. If the tenant is denied the ability to purge an irritancy by remedying any prejudice to the landlord which was occasioned by the breach of the obligation referred to in the irritancy clause, then the extreme sanction of irritancy may be incurred in circumstances where no commensurate prejudice (or possibly no actual prejudice) to the landlord has occurred, or where such prejudice as has occurred could have been avoided. Such a result is seen as unacceptable from the point of view of the tenant, and as unnecessary for the legitimate protection of the landlord. It can also be seen as a development of the law over the last century or so in an unnecessarily harsh direction.[1]

3.02 Those who criticise the present interpretation of irritancy clauses in contracts of lease from this point of view can support their criticism by reference to the fact that the judicial view of the objectives of an irritancy clause has been quite different in the case of feu contracts.[2] In Cassels v. Lamb Lord Kinnear identified the proper objective of an irritancy in

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[1] Thus in Hannan v. Henderson (1879 7 R. 380) Lord Deas was able to say -
"I think a conventional irritancy must be based on a fair and reasonable stipulation looking to the terms of the contract and the whole circumstances of the case."

[2] When Lord Kilbrandon identified a distinctive Scottish common law doctrine in Dorchester Studios the distinction he had in mind was that between Scottish law and English law, and not that between the Scottish doctrine as to leases and the Scottish doctrine as to feus. Lord Fraser referred to the different development of the law as to irritancy of feus, but did not go beyond saying that such a difference was to be expected because of the property incidents of a feu.

a feu contract as being to operate as a compulsitor for the performance of the vassal's obligations, and held that the purging of the default after it had occurred achieved the objective of the irritancy clause.[3] There is therefore a discrepancy between the judicial view of the proper objective of an irritancy clause in leases and feus respectively, and it is argued[4] that this discrepancy cannot be justified by reference to the differences which admittedly exist between the nature of a feu contract and a contract of lease or other contract.

3.03 A second criticism is that the law operates not only to penalise tenants themselves, but also to penalise third parties whose rights derive from the tenant's interest under the lease, and whose derivative rights will automatically be affected if that interest is terminated by irritancy. The derivative right of a sub-tenant, for example, will fall on the irritancy of the head lease,[5] and a creditor who has taken a standard security over the tenant's interest under a commercial lease may find that his security interest becomes valueless if, as is very likely, the insolvency which leads to its enforcement also leads to simultaneous irritancy of the lease. Moreover, it is argued, the fact that a standard security is vulnerable in this way to a supervening irritancy may make it difficult for a tenant under a commercial lease to persuade a lender to accept the tenant's interest, where it constitutes an interest in land, as appropriate security, unless the landlord can be persuaded to give satisfactory assurances to the creditor.

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[3](1885) 12 R.722 at p.777.

[4]See e.g. Dr W W McBryde, "Breach of Contract" (1979) Juridical Review at pp. 60-63.

[5]Nevertheless a decree of removing solely against a principal tenant may not as such entitle a landlord to evict a sub-tenant who has not received notice from the landlord or the principal tenant. In such circumstances the decree of removing against the principal tenant may not entitle the owner to evict the sub-tenant who, not having received notice has not been called as a defender in the action; nor can the sub-tenant be dispossessed by an action of ejection proceeding without any period of notice.

3.04 The criticisms above relate to the particular incidents of the contract of lease. There is, however, a more general criticism of the existing law advanced, or at any rate adumbrated, by Lord Kilbrandon in Dorchester Studios. This is the criticism that the law as to irritancy of commercial leases is inappropriate in circumstances where leasehold tenure has replaced feudal tenure as the method of obtaining the use of commercial property. It is doubtful whether this is truly an independent criticism of the existing law, as opposed to an argument that the reform of the contractual incidents of leases has been rendered more urgent by the present day importance of leasing. But it was because of what he called the present day importance of leasing that Lord Fraser also suggested that a reference might be made to us to examine the law on irritancies.[6]

3.05 Lastly there is the criticism that irritancy provisions in commercial leases have become contrats d'adhesion effectively imposed upon tenants by landlords, and in particular by institutional landlords such as local authorities, pension funds, insurance companies or others who hold leases as investments. We are advised that in practice it may be difficult to negotiate the removal of irritancy provisions which may be exorbitant in character. This makes it important to examine their implications with some care.

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[6] 1975 S.C. (H.L.) 56 at p.73.

CHAPTER 4 - ENGLISH LAW

4.01 In Dorchester Studios Lord Edmund-Davies remarked that those brought up in the bland climate of English statute law, with its provisions against forfeiture of tenancy, were viewing an unfamiliar landscape in hearing an appeal on the application of the Scottish doctrine of non-purgation of conventional irritancies.[1] We think, however, that a comparison between the approaches of English law and Scots law, contrasting though they are, may be helpful in considering options for the reform of Scots law.[2] Certain of the English statutory provisions on the subject provide a useful guide in formulating analogous Scottish proposals, and those provisions are conveniently expressed in straightforward language which can be readily understood.[3]

4.02 We set out below a summary of the salient characteristics of English law relating to the forfeiture of leases. Although, as we have mentioned above, it is English statute law rather than common law which provides a model for any proposals in relation to Scots law, we think it is necessary to make some reference to the common law, since the provisions of English law in relation to forfeiture for non-payment of rent derive from the common law (now supplemented by statute),[4] whereas the provisions of section 146 of the Law of Property Act 1925, to which we refer below, apply to forfeiture on grounds other than the non-payment of rent.

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[1] 1975 S.C. (H.L.) 56 at p.67.

[2] A helpful explanation of the origin and effect of the English provisions on forfeiture can be found in the lecture (prepared for a Scottish legal audience) by Mr D.G. Lloyd, Solicitor of Messrs Linklaters & Paines, London, to the Law Society of Scotland's PQLE Conference on Commercial Leases, in March 1980, and published as part of the conference papers.

[3] Many companies and institutions operate as landlords both in England and in Scotland and it is, therefore, reasonable to suppose that for them the relevant provisions of English law will serve as a familiar point of reference.

[4] Now the Common Law Procedure Act 1852, ss. 210-212, the Supreme Court of Judicature (Consolidation) Act 1925, s.46, the County Courts Act 1959, s.191 and the Administration of Justice Act 1965, s.23.

4.03 English law, in contrast to Scottish law, leans against forfeiture of leases as a general principle. Moreover English law, again in contrast to Scots law, regards the proper object of forfeiture as being to secure the performance of obligations by the tenant. However, the extent of the remedies against forfeiture in English law and the means of obtaining those remedies differ, depending on whether the breach of obligation relates to the payment of rent or breach of some other obligation under a lease. Where the breach consists in a failure to pay rent timeously equitable rules (now supplemented by statute) permit a tenant to have an action for possession discontinued at any time before the trial of the action by paying the arrears of rent and any appropriate costs. Indeed, relief may be granted by the court from an order for possession obtained by a landlord as late as six months after the order has been made where the tenant has paid the arrears and has persuaded the court that it is just and equitable for the relief to be granted.

4.04 Equitable doctrines did not, historically, provide corresponding relief in the case of breaches of obligations in leases other than those for the payment of rent, and statute has made appropriate provision in section 146 of the Law of Property Act 1925, which applies to regulate the consequences of a breach of any obligation under a lease other than a breach by non-payment of rent. The provisions of the section protect a tenant in several ways. First, the section prohibits forfeiture unless the lessor has first served upon the lessee a notice specifying the breach in question, and requiring the lessee to remedy that breach, if it is capable of remedy, and to pay compensation in respect of the breach. Second, the section does not permit forfeiture of a lease to take place if the lessee remedies that breach to the satisfaction of the lessor. Third, the lessee is entitled, even where the conditions for forfeiture to the landlord have been satisfied, to apply to the court for relief from a forfeiture so incurred, and the court is empowered to grant that relief if in all the circumstances it thinks fit to

do so, although any relief so granted may be made subject to conditions by the court.[5] These protective provisions do not however apply to forfeiture on bankruptcy in certain leases where there is or may be an element of delectus personae such as leases of agricultural land, public houses or mines or minerals.[6]

4.05 The Law of Property Act 1925 also makes provision for the protection of sub-lessees and mortgagees of tenants, and we discuss that aspect of the statute below.[7]

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[5]Law of Property Act 1925, s.146(2).

[6]Law of Property Act 1925, s.146(9).

[7]See para. 7.04.

CHAPTER 5 - POLICY CONSIDERATIONS

5.01 We hope that it may assist readers in evaluating the provisional proposals for reform of the law which we advance later in this Memorandum, if we first set out those general policy factors which have guided us in formulating the proposals.

5.02 We have considered it essential, in considering how the law on irritancies in leases might be reformed, not to lose sight of the fact that commercial leases, although they may confer rights of great value and great importance, are contractual agreements. We have seen our primary task as being to make proposals which while they ensure that such contracts cannot be terminated in a penal way, are, at the same time, consistent with the requirement that contractual terms be observed by the parties to the contract. Lord Justice-Clerk Thomson in McDouall's Trustees v. MacLeod drew a distinction between the exercise of a power so as to "lubricate the operation of a contract", on the one hand, and so as to "alter the terms of the contract on the other."[1] We have borne that distinction in mind.

5.03 Second, our emphasis on the fact that a commercial lease is a contract between the actual parties to it has influenced our approach to the problems which may affect third parties arising out of irritancy of that contract. We think that those problems are real ones, and we make proposals to remedy them below, but we think that the consequential effects of irritancies on third parties such as secured creditors and sub-tenants are of subordinate importance in identifying the proper basis for the reform of the law on irritancies as it affects the landlord and the tenant.

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[1] 1949 S.L.T. 449 at p. 454.

5.04 Lastly, we have taken the view that reform of the law on irritancies, if it is to be practical and systematic, must take account of methods for the termination of a commercial lease which might be resorted to if the present law on irritancies were to be altered. For that reason we deal below with the possibility that landlords may in the event of a breach of a term of a lease seek to rescind the lease as an alternative to irritating it.[2]

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[2]See paras. 8.01-8.02.

CHAPTER 6 - PROPOSALS FOR REFORM

6.01 We have stated our belief that the law on irritancies should not be open to the objection that it can operate in a way which effectively penalises the tenant. We have no doubt that the existing law can so operate because it can result in the extreme sanction of irritancy of a lease being applied in circumstances where no warning of the impending irritancy has been given, and no reasonable opportunity has been offered to the tenant to remedy the relevant breach of the lease giving rise to the irritancy. We do not think it realistic to leave it to tenants to prevent such a contingency by negotiating suitable qualifications to irritancy clauses: in many cases the point would not be conceded by the landlord or the landlord's advisers. Nor do we think that the equitable power of the courts is capable of being developed so as to aid tenants, since even in extremely harsh cases the enforcement of the irritancy as such is not likely to constitute oppression. Nor do we think that a successful objection could be taken to the enforcement of an irritancy on the ground that the irritancy clause was a penalty clause. We have concluded, therefore, that the problems which are created by the present non-purgeability of conventional irritancies should be resolved by some suitable statutory provision which would make enforcement of an irritancy conditional upon the giving of an opportunity to the tenant to remedy the relevant breach within an appropriate time.

6.02 Our basic task has therefore been to formulate proposals for a practical procedure to ensure that tenants are given prior warning of impending irritancy, and an opportunity to prevent that irritancy by remedying the situation which has created the risk of irritancy.

6.03 The proper objective of an irritancy clause in a lease, as we conceive it, is the objective which the courts have already identified in relation to irritancies in feudal grants: namely, to act as a compulsitor to performance of the relevant contractual obligations. If, however, the landlord

chooses to invoke an irritancy clause there may be no warning and the tenant cannot take steps to perform his contractual obligation. Moreover, as we have already explained,[1] it will not necessarily be the case that the tenant against whom an irritancy is invoked has breached a contractual obligation directly binding on him. In our view these differences between irritancy and other contractual remedies, and the fact that irritancy may not be the sole remedy available to the landlord, strengthen the argument that the existing common law doctrine requires reform. One option for reform which we considered was the application to leases of the rules relating to purgeability of irritancies in feudal grants. Those rules enable an irritancy to be purged at any time before decree of declarator of irritancy is pronounced and they extend (in cases where the irritancy in question relates to breach of an obligation ad factum praestandum) to enabling the court to defer enforcement of the irritancy until an appropriate time has elapsed for the remedying of the breach.[2] We do not think, however, that such a solution would adequately deal with the problems which arise in the case of leases. In the first place, such a rule would be bound to operate in an arbitrary manner, in so far as the time available to the tenant to remedy an irritancy would be dictated by the hazards of the time table in the process. In the second place, it would achieve the desired objective of giving prior warning of impending irritancy to the tenant only in so far as the intimation of an action would be taken as such warning. In the third place, that warning would be given only to the tenant and would not extend, as we suggest below that it should, to appropriate third parties deriving right from the tenant.[3]

6.04 We think that the objectives which we have in mind can be better achieved by introducing a procedure (analogous to

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[1] See para. 1.04 note 6.

[2] See Anderson v. Valentine 1957 S.L.T. 57.
Precision Relays Limited v. Beaton and Anr. 1980 S.L.T. 206.

[3] See para. 6.06.

the notice procedures which operate in England under section 146 of the Law of Property Act 1925) whereby the landlord would be obliged to give prior warning of an impending irritancy and to require it to be remedied. Our basic proposal, therefore, is that enforcement of an irritancy should be conditional upon the giving by the landlord of notice (a) specifying the irritancy (b) requiring the irritancy to be remedied in an appropriate way and (c) allowing a reasonable time to the tenant to take remedial action.

6.05 Several practical questions necessarily arise in relation to such a proposal as follows:-

(a) Should the notice be given to any persons other than the tenant himself?

(b) Are there any steps which a tenant should be obliged to take (or payments which a tenant should be obliged to make) in addition to simply remedying the irritancy?

(c) If the event which has occurred is by its nature incapable of remedy (for example an insolvency of the tenant or a past dealing by the tenant with the subjects of let in breach of the terms of the lease) what notice, if any, should require to be given?

(d) What criteria should apply to determine the reasonableness of time allowed to a tenant to remedy a breach, and at what stage should that time be fixed?

6.06 Should the notice be given to any persons other than the tenant himself?

In many instances third parties may be affected by the irritancy of a lease, no less than the tenant himself. As we have noted[4] the entitlements of sub-tenants may depend upon the entitlement of the head tenant, and a standard security over a tenant's interest under a lease may be rendered valueless if that interest is terminated by irritancy. We have, therefore, considered whether such third parties should receive notice of

[4]See para. 3.03.

an impending irritancy in the same manner as the tenant. We think that sub-tenants and creditors should receive such notice, because they have a legitimate interest in receiving notice of an impending irritancy whose effects they may wish to prevent. A precedent for informing sub-tenants and creditors already exists in relation to an action of removing against a tenant for breach of the prohibitions against the grant of long leases of residential property contained in Part II of the Land Tenure Reform (Scotland) Act 1974. There, an onus is placed on the landlord to intimate an action to any heritable creditors identified from a search in the Register of Sasines for twenty years, and to any sub-tenants identified from such a search, or from an examination of the valuation roll, or otherwise.[5] In many instances the landlord may know of the existence and identity of sub-tenants and creditors, but we consider that it would be unduly onerous to place on the landlord the duty of discovering the existence and identities of all third parties with a relevant interest. We are tentatively of the view, therefore, that it should be a prerequisite of a sub-tenant's or creditor's entitlement to receive notice of an impending irritancy from the landlord that they have informed the landlord previously of their interest, unless that interest was in fact known to the landlord. A further question arises as to what effective sanction can be imposed on a landlord who successfully irritates a lease after having given notice to the tenant, but who has failed to serve a notice on third parties who qualify for such notice. We suggest that it should be incumbent on the landlord when an action of removing and declarator of irritancy is raised to state in his pleadings that he has served notice on all third parties who have notified their interests, or whose existence is in fact known to him, or that there are no such third party interests. If it transpires that the landlord's averment was untrue we consider that the decree should be subject to reduction, but

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[5] Land Tenure Reform (Scotland) Act 1974, s.10(2). cf. Rent (Scotland) Act 1971, s.121 which obliges a principal tenant of a dwelling house let on, or subject to, a particular tenancy to furnish the owner with details of any sub-let.

only at the instance of a third party who should have received notice but did not. In the event of a change of ownership of the subjects of let we consider that there should be a duty owed by the first landlord to his successor to transmit intimations of third party interests and that the third party should be entitled to assume that transmission will be made to a successor landlord of an intimation given to a predecessor landlord. Readers' comments are invited on these suggestions.

6.07 Are there any steps which a tenant should be obliged to take, or payments which he should be obliged to make, in addition to the basic step of remedying the irritancy?

If a notice procedure is introduced we consider it reasonable that the landlord's expenses incurred in the preparation and serving of that notice should be met by the tenant,[6] in addition to his remedying the irritancy. We would welcome readers' views on this question, and also on whether the landlord should, in the notice, be entitled to demand damages or compensation to be paid to him by reason of the irritancy. We think that it would be unwise to complicate our proposed procedure by providing for the inclusion of such a demand, and we propose that in the event of a landlord seeking damages he should rely on his common law rights.

6.08 If the event which has occurred is by its nature irremediable what notice, if any, should be given?

As we have stated in paragraph 6.04 we envisage the landlord's notice as calling on the tenant to remedy the contravention of the conditions of the lease which has given rise to the impending irritancy. Clearly in some cases, such as the bankruptcy of the tenant, it will not be possible for him to

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[6] Additional costs may arise in the course of ascertaining the irritancy itself, for example, by the employment of a surveyor or factor. We consider that the landlord's right to reimbursement of such additional costs can rest on the terms of the relevant lease. In modern commercial leases it is common practice for the landlord to stipulate, for example, in relation to the non-repair or non-maintenance of the subjects of let, that he may recover from the tenant the cost of employing a surveyor to assess what maintenance or repair is required.

take any remedial action. The question arises, therefore, whether the notice procedure should be followed in cases of an irremediable breach. We think that notice should be served on the tenant in all cases, in that it will at least inform him of his position vis-a-vis the landlord. We envisage that the time limit for remedy stipulated in the notice in such cases would be minimal. This is the practice followed in England, apparently quite successfully.

6.09 What criteria should apply to determine the reasonableness of time allowed to a tenant to remedy a breach, and at what stage should it be fixed?

In considering the time which should be permitted to a tenant to remedy an irritancy in accordance with a notice, we have come to the conclusion that it is appropriate to distinguish between cases where the irritancy consists of non-payment of rent, and cases where the irritancy arises from non-performance of obligations which do not sound in money, such as failure to carry out repairs. In the case of rent (or other payments due in terms of the lease) we think it is appropriate to impose a fixed period for payment, and we propose four weeks from the date of delivery of the notice. In other cases, we incline to the view that the landlord ought first be required to insert a specified period in the notice, the length of which would vary with the nature of the breach.[7] If the tenant considered that the period specified by the landlord was not reasonable, we suggest that he should be permitted to apply to the court[8] within that period, and the court should be empowered either to confirm the time limit or vary it. In the case of dispute as to statements in a notice, we consider that the period should run from the date of determination of the dispute. We invite readers' views on these proposals.

[7] Section 13 of the Agriculture (Miscellaneous Provisions) Act 1976, which relates to repairs, specifies that an arbiter may specify a reasonable time for a tenant to remedy a contravention of any term or condition of his lease which relates to repairs, or substitute what he considers a reasonable time for that fixed by the landlord in any notice to a tenant to remedy such a contravention.

[8] See Chapter 9 for the meaning of "court".

6.10 Our proposals in paragraphs 6.04-6.09 above are directed to regulation of the procedural aspects of irritancy, and if we are right in supposing that in many cases they may reflect what landlords would permit in practice, they are unlikely to be controversial in landlords' eyes. But should reform of the law on irritancies go further than the procedural improvements proposed above, and admit the possibility, in certain circumstances, of preventing the enforcement of an irritancy notwithstanding that the tenant has not, or cannot, remedy the relevant default in accordance with the procedures which we suggest?

6.11 We refer in paragraph 5.02 above to the difficulty of drawing a line between "lubricating the working of a contract" and "altering its terms". Our proposals in paragraphs 6.04-6.09 above could fairly be described as lubricating the terms of an irritancy clause; but proposals to empower the court to remove or mitigate the effect of a properly incurred irritancy would involve conferring on it a discretion to alter, retroactively, the terms of such an irritancy clause by refusing to allow it to be enforced according to its terms, or by dispensing with it altogether. Nevertheless, we think that circumstances may arise in which it could be argued that a residual discretion in the court to exercise such a dispensing power would be appropriate. It is possible, for example, to imagine a lease in which there was no delectus personae, and under which the tenant had a right to assign his interest without reference to the landlord. If such a lease contained a provision for its irritancy in the event of the insolvency of the tenant then our proposals in paragraph 6.04 would not operate (the irritancy being irremediable in fact) to prevent that irritancy being enforced. It would follow that the lease would come to an end; the tenant's trustee or liquidator would lose any right to come in place of the tenant and to turn to account the latter's power to assign; and the landlord would be entitled to vacant possession of the let subjects, although the landlord in such a case would in no way be prejudiced by the substitution of the trustee for the tenant. It might be argued

that in such a case it would be appropriate for the court to be able to remove or mitigate the effect of the irritancy. Indeed, it might be argued that such a residual discretion should be available for application in other cases where the enforcement of the irritancy might impose disproportionate hardship on the tenant.

6.12 The notice procedures contained in section 146 of the Law of Property Act 1925 are supplemented by a wide discretionary power in the court to relieve a tenant from forfeiture if, in the circumstances, the court thinks fit to do so, and subject to such conditions as the court thinks fit. This discretionary power is expressly disapplied in the case of forfeiture of a lease by reason of a tenant's bankruptcy where delectus personae is relevant, but we understand that the English courts are not reluctant to grant relief in cases where the section is applicable, if they think, for example, that undue financial hardship would be occasioned by forfeiture.

6.13 We recognise that the conferring upon the Scottish courts of such discretionary powers would constitute an innovation both in the theory and in the practice of the law relating to irritancies, and we have stated above our general belief that regard should be paid, in any reformed law of irritancies, to the fact that parties to a contract of lease must be expected to abide by its terms. However, in order to elicit comment we tentatively suggest that the court should, in appropriate circumstances, have a discretionary power to remove or mitigate the effects of an irritancy where a landlord's notice has not been complied with. If such a power is thought desirable we invite views on whether it should be of general application, or whether its ambit should be restricted to irritancies in leases in which there is no element of delectus personae and which arise from "external" events such as bankruptcy or the doing of diligence rather than from a failure by the tenant to remedy some act or omission of his

own which has given rise to the irritancy. We would also welcome comment on the question whether the discretion should only be exercised in circumstances where its exercise would not cause material prejudice to the landlord.

6.14 Our proposals that a landlord should be required to give a tenant an opportunity to remedy his failure where any irritancy has occurred proceed on the assumption that the performance by the tenant of his obligations within a reasonable period may be regarded as sufficiently approximate to the performance required by the lease to justify suspension or removal of the landlord's right instantly to enforce an irritancy. It is necessary, however, to consider whether circumstances might arise in which this assumption could not properly be made and, if so, whether a tenant should in such circumstances be entitled to an opportunity to remedy. In certain leases (particularly agricultural leases) the element of delectus personae may be considerable, and it might be considered unfair that a landlord was unable to enforce an irritancy for, say, late payment of rent against a tenant who had taken advantage of the notice procedure on several occasions and had become in effect a persistent late payer of rent. As Lord Justice-Clerk Thomson observed in McDouall's Trustees v. MacLeod[9]:

> "Dilatoriness in rent paying is of greater significance than just that the money arrives late. It may well be indicative of an inability to meet other obligations of the lease and of a financial stringency which may make the defaulter an unsatisfactory tenant."

There could also conceivably be circumstances in which the breach of the lease giving rise to the irritancy, albeit remediable, was nevertheless of such a kind that it would be considered unreasonable that the landlord should be deprived of his right to irritate the lease immediately. We think therefore that it should be possible for the court, on the application of the landlord, to dispense with the notice

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[9] 1949 S.C.593 at p.598

procedure where there were special circumstances such as, in the court's opinion, to justify that dispensation. We invite comment on this proposal. We also invite views as to whether, in the case of failure in the payment of rent and possibly other failures in other periodic payments by a tenant, the power to dispense should be exercisable only where advantage has been taken of our procedures by the tenant on a specified number of previous occasions. We suggest, in order to elicit comment, that if such advantage has been taken on two previous occasions the landlord should have a right to apply to the court for dispensation on the third such occasion.

CHAPTER 7 - PROTECTION OF THIRD PARTY INTERESTS

7.01 In our proposals we have taken into account the existence of third parties by providing for notice of an impending irritancy to be served on them if they have notified the landlord of their interest. When third parties are put on notice they will have an opportunity, if they wish, of taking remedial action to prevent an irritancy which would adversely affect their interest. However, circumstances may arise in which a remedy cannot be provided, for example, where there has been an irremediable breach; or the third party, whilst perhaps not wishing to lose his own rights, may not wish to preserve those rights by assisting the tenant. In such circumstances the present law could operate to abrogate the third party's rights as a necessary consequence of the irritancy of the tenant's rights.[1]

7.02 We do not have any evidence of what the present practice is as regards the effect of irritancies on rights derived from the irritated lease. In some cases it may be that, when the head tenant's lease is irritated, sub-tenants or secured creditors enter into either formal or informal arrangements with the landlord to preserve their position. We would welcome information on this point. However, we think it is necessary, whatever may be the current practice, to consider whether in addition to the procedural protection proposed above, the law should provide a substantive protection to such third parties. Such a provision seems desirable for two reasons. First, any existing practice whereby sub-tenants are permitted to retain their rights in the event of the head lease being irritated is not based on legal entitlement. Second, since a secured creditor is likely to assume at present that on a conventional irritancy being enforced in the future he may lose his ability to take possession, this may restrict the ability of a tenant to use his tenant's interest as security for borrowings.

7.03 If a substantive remedy is to be found for sub-tenants and secured creditors then it would, we think, require to

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[1] See para. 3.03.

take the form of a power to substitute the sub-tenant or creditor[2] for the defaulting tenant as a party to the original lease entered into between the latter and the landlord.[3] Such a substitution would have the effect of applying all the terms of the original lease to the "substituted" lease, save that a sub-tenant of the defaulting tenant would not be able to obtain a "substituted" lease of any longer duration than the unexpired duration of his sub-tenancy. It is also necessary to consider whether such a remedy should be of general application, or whether it should be restricted, for example, to circumstances where the irritancy of the head lease has been occasioned by the bankruptcy or liquidation of the tenant.[4]

7.04 In the case of forfeitures of English leases section 146 of the Law of Property Act 1925 makes provision for such a substitution by empowering the court to make an order, where there is a forfeiture of a lease, vesting the leased property or any part thereof in an under-lessee or mortgagee, on such conditions as the court in the circumstances of each case thinks fit, and in particular subject to any conditions imposed by the court as to execution of documents, payment of rent, the giving of security, and the payment of costs, expenses or compensation.

7.05 We have come to the view that any comparable substitution procedure in Scotland should similarly be made to depend upon the discretion of the court exercised in the circumstances of each case. We think that such a discretionary procedure is required in order to enable proper account to be taken of the delicate balance to be struck in each case

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[2] Creditor here denotes a creditor holding a standard security over a tenancy or a sub-tenancy.

[3] In the case of protected or statutory tenancies of dwelling-houses s.17(2) of the Rent (Scotland) Act 1971 provides that on the determination of the tenancy any sub-tenant to whom the dwelling-house or any part of it has been lawfully sub-let shall be deemed to become the tenant of the landlord on the same terms as he would have had from the tenant if the tenant's protected or statutory tenancy had continued. Termination of a tenancy by an irritancy is however probably not the circumstance which the section contemplates.

[4] See para. 7.09.

between the interests of the sub-tenants and secured creditors on the one hand, and the interests of the landlord, as the party contracting with the original tenant, on the other hand. The nature of that balance can be more clearly seen if the different circumstances in which the remedy might be sought are considered.

7.06 In the "simple" case of an irritancy of a lease in respect of which there was a sub-tenancy of the whole subjects of let, or in respect of which the whole tenant's interest had been subject to a standard security, the availability to the sub-tenant or secured creditor of an order substituting himself as tenant of the landlord would require, at the least, consideration of the following matters; first, any grounds on which the landlord could reasonably object to the substitution of a new tenant; second, any conditions which might require to be imposed on the substituted tenant in order to meet those objections; third, the terms on which the sub-tenant or creditor would require to remedy the default which had led to the irritancy or would require to reimburse the landlord for expenses incurred by him in the irritancy proceedings.

7.07 The balance between the landlord's interest and the other interests would necessarily be more complex in cases where a sub-tenancy extended to part only of the original subjects of let or where there were multiple sub-tenancies. In such cases the evaluation of the landlord's grounds for objecting to a substitution of the sub-tenant or sub-tenants would require to take into account the fact that the substitution in question was a substitution of a lease (or leases) of a part of a property unit in place of a single lease of a whole property unit, and this might in turn require the imposition of special conditions reflecting that consequence. Conversely, as regards the sub-tenants themselves, problems might arise as to the proper basis of allocation, or the responsibility for remedying the default of the original tenant, or for reimbursing expenses incurred by the landlord. In cases of this kind English judges have emphasised the wisdom and necessity of conferring a wide discretion on the court.[5]

[5] See Chatham Empire Theatre (1955) Ltd. v. Ultrans Ltd. [1961] 1 WLR 817.

7.08 We have stated above that we envisage any substitution of a sub-tenant or secured creditor as being a substitution on the terms of the original lease which has been terminated. Thus any substituted tenancy would take effect as a tenancy on the same terms as to assignability and subletting as those contained in the original lease. In the case of a secured creditor restrictions on assignability or subletting might well conflict with the creditor's desire to turn his interest to account, but we envisage that the right to assign or sublet, if not contained in the terms of the original lease, would require to be obtained by negotiation with the landlord. The creditor or sub-tenant should not expect to be put in any better position than the original tenant.

7.09 We invite comment on the general question of whether it it is thought that some substantive protection should be available to sub-tenants and secured creditors in the event of the head tenant's lease being irritated. If such protection is thought desirable views are invited on the following questions.

(a) Is it appropriate that the remedy should take the form of discretionary orders by the court granting substituted leases in favour of sub-tenants and creditors?

(b) If so, should the remedy be of general application, or should it be restricted, for example, to circumstances where the irritancy of the head lease has been occasioned by the insolvency of the tenant?

(c) Is it agreed that the court could vest the head lease, either in whole or in part, in a sub-tenant or creditor?

CHAPTER 8 - ACTIONS BY LANDLORDS BASED ON BREACH OF CONTRACT

8.01 We have been concerned hitherto with the effect of provisions inserted in a commercial lease reserving to the landlord the right to terminate the lease in certain specified events. Such express provision is now almost invariably made. It is important, however, to bear in mind that if such provision was not made the remedy of termination of the lease might still be available to a landlord under the common law of contract in the event of a material breach of the tenant's obligation. Thus, for example, in Blair Trust Company v. Gilbert[1] an agricultural lease contained a stipulation that the tenant should reside on the farm, but this stipulation was not the subject of an irritancy. The tenant, during the currency of the lease, was convicted of culpable homicide and was sentenced to a period of imprisonment. Thereafter, the landlords raised an action for declarator that the tenant had forfeited his right to remain in possession of the farm. The action was successful, as the court took the view that the contravention was a material breach of contract which entitled the landlord to rescind the lease.

8.02 We think it is necessary, in considering reform of the law relating to conventional irritancies, to have regard to the possibility that the common law remedy of rescission might be relied upon by landlords to achieve those same ends which our proposals in respect of conventional irritancies are designed to counteract: namely, the application of the extreme sanction of termination to a remediable breach. It might be, for example, that in commercial leases landlords would seek the insertion, and tenants would feel constrained to accept the insertion, of provisions deeming any breach of the terms of the lease, whether remediable or not, to be a material breach of contract. In the case of leases containing such provisions landlords might then seek the common law remedy of rescission of the lease in circumstances where the default in question, had it been the subject of an irritancy clause, would have

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[1] 1940 S.L.T. 322.

required the application of the procedures proposed above as regards opportunity to remedy the default. The extent to which the courts would allow rescission for breach or material breach of a lease without a prior "ultimatum procedure" is presently the subject of debate in the law of contract."[2] We are not concerned here with that debate but only with the question whether the same "ultimatum procedure" which we have proposed for the enforcement of a conventional irritancy should apply also to where termination of a commercial lease is sought as a remedy for a breach of the contract of lease. We think that systematic reform of the law requires that there should be consistency of procedure, and we therefore propose that the notice procedure outlined in paragraph 6.04 should extend to circumstances where the landlord seeks to terminate a commercial lease on the grounds that the tenant is in breach of contract. We would welcome comment on this proposal.

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[2]See for example Dr W.W. McBryde, "Breach of Contract" (1979) Juridical Review p.123.

CHAPTER 9 - FORUM

9.01 We have referred in Chapters 6 and 7 to references to the court in our proposals for reform. This has led us to consider what might be the most appropriate forum for proceedings if the various procedures we have suggested were to be adopted. We have come to the view that the Lands Tribunal for Scotland would be particularly suitable. It already has expertise in the field of conveyancing; its procedures are relatively informal; and the financial burden on litigants would not be unduly high. We therefore propose that the Lands Tribunal be given jurisdiction in respect of the procedures outlined in this Memorandum. However, if agricultural leases falling under the Agricultural Holdings (Scotland) Act 1949 are, as we propose, to be included in the proposed reform, we think that the Scottish Land Court would be the appropriate forum in cases involving such leases. Comment is invited.

CHAPTER 10 - MISCELLANEOUS QUESTIONS

10.01 Necessity for Declarator of Irritancy

We have referred in paragraph 2.04 to the mechanics whereby a landlord can remove a tenant when an irritancy has been incurred. Our paradigm irritancy clause[1] states that in the event of an irritancy "the landlords shall be entitled to forthwith terminate the lease ... and that without the necessity of any declarator, process or removal, or other procedure of law..." Notwithstanding this declaration, unless the tenant is willing to remove himself from the subjects of let voluntarily, the landlord will require to raise an action of removing, perhaps combined with a declarator of irritancy. The necessity for a declarator of irritancy in an action of removing on the ground that a conventional irritancy has been incurred is a matter for the discretion of the court,[2] although it appears that such declarator is unnecessary if the facts which bring the irritancy into operation are either admitted by the defender, or are so simple and notorious that they admit of instant verification.[3] However, we understand that it has become common practice to seek a declarator in virtually all cases, since a declaratory conclusion appears to take the action outwith the ambit of the summary cause. We further understand that the latter is not viewed by practitioners as being a particularly suitable mode of proceeding when complex questions of fact and law arise. While we consider it desirable that all actions of extraordinary removing based on an irritancy should be preceded by a declarator of irritancy, it may be that in view of current practice formal regulation of the matter is unnecessary. Comment is invited.

10.02 Should reform of the existing law be retrospective?

We do not think that our proposals could be retrospective in the sense of applying our procedures to actions commenced

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[1] See para. 2.01.

[2] Duke of Argyll v. Campbeltown Coal Co. 1924 S.C. 844.

[3] See Duke of Argyll v. Campbeltown Coal Co. supra
Lord Skerrington at p. 852, Lord Sands at p.853.
Rankine, The Law of Leases in Scotland, (3rd edn.) p. 546.
Paton and Cameron, Landlord and Tenant, pp. 236, 237.

before the date of their coming into force. Nor do we think that our notice procedure should be made to apply to irritancies occurring before the date of the relevant legislation. But we think that the large number of existing leases makes it essential, for practical reasons, that legislation should apply our proposals to leases entered into before, as well as after, the date the legislation comes into force. Comment is invited on whether reform of the law should have such retroactive effect.

10.03 Contracting out

If parties were free to contract out of the notice procedure we have proposed, we consider that its utility could be substantially diminished. The landlord, with his superior bargaining power, could force the tenant to accept a contracting out clause in his lease, and we have doubts as to whether the supervision of the court would effectively control matters. Whilst we do not as a matter of principle favour permitting parties to contract out, we consider that if such a provision is thought desirable it might be on the lines of section 3(4) of the Crofters (Scotland) Act 1955, which provides that any contract or agreement made by a crofter by virtue of which he is deprived of any right conferred on him by the Act shall to that extent be void, unless the contract or agreement has been approved by the Land Court. We would appreciate comment.

CHAPTER 11 - OTHER REFORMS

11.01 Although there appears to be no reported authority directly in point it seems clear that when a landlord is in breach of his own obligations under a lease he is not entitled to invoke an irritancy clause against the tenant. Such a situation arose in British Transport Commission v. Forsyth[1] where a landlord attempted to irritate an agricultural lease on the ground that his tenant had used part of the subjects of let without consent for the purpose of carrying on business as a second hand car dealer and scrap merchant. The tenant argued for his part that the landlord was in breach of his own obligations by virtue of having neglected the repair of the farmhouse to such an extent that it had been declared uninhabitable. Although the tenant was successful in resisting irritancy on other grounds, an obiter dictum of the sheriff makes it clear that he would not have permitted the landlord to irritate the lease when he was himself in breach of a material condition. We consider that this proposition is sufficiently well founded on the principle of mutuality of obligations in the general law of contract[2] not to require clarification, but readers' comments are invited.[3]

11.02 A second question relates to acquiescence on the part of the landlord. The law at present is not clear, but it may permit a landlord who has accepted rent in the knowledge that the tenant is in breach of a condition of the lease to take steps later to irritate the lease on the grounds of that breach. We consider that unless the rent accepted relates to a period prior to that in which the breach occurred it should not be permissible for a landlord who accepts rent in such circumstances to irritate the lease on the grounds of that breach.

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[1] 1963 S.L.T. (Sh. Ct.) 32.

[2] See Turnbull v. Maclean & Co. (1874) 1R 730; Johnston v. Robertson (1861) 23D 646. See also Dr W.W. McBryde, "Breach of Contract" (1979) Juridical Review p. 64.

[3] It should be borne in mind that commercial leases are generally so drawn that there are no significant obligations on the landlord, so that such a defence will rarely be available to a tenant under such a lease.

Summary of Proposals and Propositions for Consideration

1. It is proposed that enforcement of a conventional irritancy in a commercial lease should be conditional upon the giving by the landlord of notice (a) specifying the irritancy (b) requiring the irritancy to be remedied and (c) allowing a specified reasonable time to the tenant to take remedial action. (Para. 6.04)

2. It is proposed that copies of such notice should require to be served on any sub-tenants or secured creditors of the tenant who have themselves intimated their existence to the landlord or whose existence is otherwise known to the landlord. (Para. 6.06)

3. It is proposed that in an action of removing and declarator of irritancy a landlord should be required to aver that he has served copy notices on all third parties who are entitled to receive such notification, or that there are no such third parties known to him. If the landlord thereafter obtains decree, and it transpires that a third party so entitled did not receive notification, the decree should be subject to reduction at the instance of such a third party. (Para. 6.06)

4. It is proposed that a landlord who has received intimation of a third party interest should be obliged to transmit any such intimation to any successor, and the third parties should be entitled to rely on such transmission of intimation having been made by a landlord to his successor. (Para. 6.06)

5. It is proposed that a tenant should be required to meet the landlord's expenses incurred in the preparation and serving of a notice, but claims by the landlord for damages or compensation arising out of the irritancy should depend upon the common law and the provisions of the lease. (Para. 6.07)

6. It is proposed that notice should be given by the landlord in accordance with the above procedures notwithstanding that the irritancy is in fact irremediable. (Para. 6.08)

7. It is proposed that where an irritancy consists in the non-payment of rent or other monetary sums due under the lease the time limit for the remedying of the irritancy should be a fixed period of four weeks from the date of delivery of the notice. (Para. 6.09)

8. It is proposed that where the irritancy arises from a matter other than failure to make a monetary payment the landlord should specify in his notice what he regards as a reasonable period for remedial action. If dispute arises as to whether that period is a reasonable one the tenant should be entitled to apply to the court, and the court should be empowered to confirm or vary the period. Any application by a tenant should require to be made prior to the expiry of the original period specified in the notice. (Para. 6.09)

9. It is proposed that if dispute arises over the accuracy of statements in a notice the period for remedial action should run from the date on which that dispute is determined. (Para. 6.09)

10. Comment is invited as to whether the court should have a discretionary power to refuse or mitigate the enforcement of an irritancy clause notwithstanding that the events giving rise to the irritancy are irremediable and, if so, whether this discretionary power should be available in all cases or should apply only in those cases where -

(a) the irritancy arises from an external event, such as bankruptcy or diligence, as opposed to failure by a tenant to remedy a breach of the lease; and

(b) there is no element of delectus personae involved? (Para. 6.13).

11. Comment is invited as to whether the court should be required to refuse to exercise any such discretionary power where it considers that the exercise of such a discretion would cause material prejudice to the landlord. (Para. 6.13).

12. Comment is invited as to whether a landlord should be able to apply to the court for dispensation from compliance with the notice procedure where circumstances of the kind envisaged in paragraph 6.14 arise and are such as, in the court's opinion, to justify dispensation. (Para. 6.14)

13. Is it agreed that where such dispensation is sought on the grounds of previous failure to pay rent timeously the dispensation should be available only in cases where the tenant has relied on the notice procedure to avert an irritancy for non-payment on two previous occasions? (Para. 6.14)

14. Is it agreed that substantive as well as procedural protection should be available to sub-tenants and secured creditors who might be affected by an irritancy of a head lease? (Para. 7.09)

15. Is it agreed that such protection should take the form of a discretion in the court to vest the head tenant's interest in the third party subject to such conditions as to remedying of the irritancy or otherwise as the court thinks fit? (Para. 7.09)

16. If the preceding proposition is agreed

(a) Should the court have the discretionary power in all cases, or only in circumstances where the irritancy of the head lease has been occasioned by the insolvency of the head tenant?

(b) Should the courts have power to vest the head lease either in whole or in part in the third party?
(Para. 7.09)

17. Comment is invited as to whether the precondition of compliance with the notice procedure outlined in Proposition 1 should apply to circumstances where a landlord seeks to terminate a lease on the grounds that the tenant is in breach of contract. (Para. 8.02)

18. It is proposed that the court having jurisdiction in respect of the procedures outlined in the Memorandum should be the Lands Tribunal for Scotland, save in the case of agricultural leases where it should be the Scottish Land Court. (Para. 9.01)

19. Comment is invited as to whether legislation should provide that every action of extraordinary removing based on an irritancy must be preceded by a declarator of irritancy. (Para. 10.01)

20. Comment is invited as to whether the legislation to implement the proposals in the Memorandum should apply to leases entered into before as well as after the legislation comes into force. (Para. 10.02)

21. Comment is invited as to whether it should be permissible for landlord and tenant to contract out of the notice procedure proposed in Proposition 1. If so, should the validity of any such contracting out be dependent upon the consent of the court? (Para. 10.03)

22. Comment is invited as to whether legislation should clarify or confirm the principle that a landlord is not

entitled to enforce an irritancy when he is in breach of his own obligations. (Para. 11.01)

23. It is proposed that if a landlord accepts rent from a tenant he should not be permitted to irritate the lease on the grounds of a breach which was known to him at the time he accepted the rent. (Para. 11.02)