

## NOTES ON THE DRAFT LEASES (AUTOMATIC CONTINUATION ETC.) (SCOTLAND) BILL

### *General*

The draft Leases (Automatic Continuation etc.) (Scotland) Bill restates and reforms the common law of tacit relocation of leases. It also makes a number of miscellaneous provisions relating to the start, end and length of a lease.

As part of the Scottish Law Commission's aim to promote clarity in the law, the term "tacit relocation" is replaced with the more accurate and descriptive "automatic continuation".

### STRUCTURE OF THE BILL

The Bill has four parts:

**Part 1** (section 1) defines the leases to which the Bill applies.

**Part 2** (sections 2 to 26) sets out new rules for the automatic continuation of leases at their termination dates.

**Part 3** (sections 27 to 33) contains miscellaneous rules relating to the termination of leases and their implied duration.

**Part 4** (sections 34 to 37) defines "lease" to include "sub-lease" and contains provision about commencement of the Bill. It also introduces the schedule which contains consequential, transitional and saving provision.

## PART 1

### LEASES TO WHICH THIS BILL APPLIES

**Section 1** (exclusion of certain residential and agricultural leases) defines the leases to which the Bill applies.

The Bill applies to any lease other than

- (a) a residential lease,<sup>1</sup>
- (b) an agricultural lease,<sup>2</sup>
- (c) a lease of a croft, a small landholding or a local authority allotment.<sup>3</sup>

Each of these excluded leases already has special statutory rules governing its automatic continuation which take into account the particular nature of the type of lease in question. The Commission does not propose to interfere with these existing statutory rules, and so these leases are excluded from the application of the Bill.

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<sup>1</sup> As defined in s1(2).

<sup>2</sup> As defined in s1(3).

<sup>3</sup> As defined in s1(4).

## PART 2

### AUTOMATIC CONTINUATION OF LEASE BEYOND TERMINATION DATE

#### *Circumstances in which lease continues or terminates*

**Part 2** replaces the existing common law of tacit relocation with a new statutory regime for the automatic continuation of leases.

In line with the Commission's aim to simplify, modernise and improve the law, the Bill refers to the day on which a lease's term ends as the "termination date", rather than referring to a lease's "ish".<sup>4</sup>

#### *Parties' Power to Contract out of Rules on Automatic Continuation*

Part 2 gives the parties certain powers to contract out of various parts of the new statutory regime of automatic continuation. The extent of these powers is set out in sections 4 and 17.

**Section 4** (termination in accordance with term of lease) provides that a lease to which the Bill applies may include a term the effect of which is that the lease will not continue automatically after its termination date. If a lease includes such a term, it will come to an end on its termination date.<sup>5</sup> Any such term must be constituted in writing as required by section 1(2) of the Requirements of Writing (Scotland) Act 1995 (as amended by section 25 of the Bill), even if the lease itself does not require to be so constituted.

Termination of a lease under section 4 may be overridden by the parties' behaviour after the termination date as set out under section 6.

**Section 17** (variation of notice requirements) sets out the rules on giving notice which parties may modify or disapply in their lease if they have not contracted out of the giving of notices altogether under section 4.

A lease may modify or disapply any requirement or effect of the following sections for the giving of notice to quit, or of intention to quit, in relation to the lease:<sup>6</sup>

Section 9 (notice from the landlord: notice to quit)<sup>7</sup>

Section 11 (notice from the tenant: notice of intention to quit)<sup>8</sup>

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<sup>4</sup> The term "ish" is retained, but is saved for technical use: "termination date" is defined in s24(1), in relation to a lease, as meaning the date of the ish of the lease; s24(2)(c) makes provision for the case in which the ish falls at a time on the termination date other than the end of that date.

<sup>5</sup> In this respect section 4 confirms the position on contracting out of tacit relocation expressed in the sheriff court decision *MacDougall v Guidi* 1992 SCLR 167. But see also section 6, which provides for automatic continuation of a lease on the basis of parties' behaviour after the termination date.

<sup>6</sup> S17(1).

<sup>7</sup> Apart from s9(1) – which requires that notice to quit be in writing – and the error-relieving provisions in s9(4)-(6).

<sup>8</sup> Apart from s11(1)(a) – which requires tenants' notices for leases of over one year to be in writing – and the error-relieving provisions in s11(6) and (7)

Section 12 (when notice is to be given)<sup>9</sup>

Section 13 (how written notice is to be delivered)

Section 15 (when written notice is taken to be received)

Section 16 (notice where there are multiple landlords or tenants)<sup>10</sup>

In order to be effective, any term in a lease which modifies or disapplies a requirement or effect of one of these sections must be in writing in accordance with section 1(2) of the Requirements of Writing (Scotland) Act 1995, even if the lease itself does not require to be so constituted.<sup>11</sup>

### **Automatic continuation of lease**

**Section 2** (automatic continuation of lease) re-states one of the basic rules of tacit relocation by providing that a lease continues beyond its termination date unless:

- it ends on that date in accordance with section 3(1) (termination of lease by notice or consensus); or
- it ends on that date because parties have contracted out of the giving of notice under section 4 (termination in accordance with terms of lease).

This basic rule in section 2 does not apply to certain types of lease. These types of lease never require notices to exclude automatic continuation. They are set out in section 5(2) and (3).

This basic rule must also be read subject to the other basic rule of tacit relocation which is sought to be re-stated under section 6.

### **Termination of lease by notice or consensus**

**Section 3** (termination of lease by notice or consensus) provides that a lease will end on its termination date (and so automatic continuation will be avoided) if:

- (a) the landlord gives the tenant valid notice to quit,<sup>12</sup>
- (b) the tenant gives the landlord valid notice of intention to quit,<sup>13</sup> or

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<sup>9</sup> Where the lease varies the last day for giving notice under the lease under section 12(1) by making that day earlier or later, it must provide for the same day to apply to notice to quit and to notice of intention to quit: s17(3).

<sup>10</sup> Apart from s16(3) – which provides that, where there are multiple landlords or tenants under the lease, notice given by one landlord or tenant has effect as if given by them all.

<sup>11</sup> See the amendment made to s1(2) of the 1995 Act by s25 of the Bill and, in relation to a term which is inconsistent with (but does not expressly modify) such a requirement or effect, s17(5),(6).

<sup>12</sup> S3(1)(a); s3(2)(a) provides that a notice to quit is valid only if it complies with the requirements of sections 9, 12, 13, 14 and 16(2)(b) as they may be varied in relation to the lease under section 17.

<sup>13</sup> S3(1)(b); s3(2)(b) provides that a notice of intention to quit is valid only if it complies with the requirements of sections 11, 12, 13, 14 and 16(1)(b) as they may be varied in relation to the lease under section 17.

- (c) the tenant gives up possession of the subjects of the lease with the acquiescence of the landlord and in circumstances which indicate that both parties intend the lease to end on that date.

Section 3 also provides that notice is valid only if it is given according to the rules on notices, as varied by the parties under section 17 (if they are default rules).

### **Leases which terminate automatically**

**Section 5** (leases which terminate automatically) restates and clarifies the present law whereby certain types of lease end automatically upon their termination date and do not relocate tacitly. Section 5 distinguishes between leases which do not continue automatically under any circumstances (section 5(3)) and those which can continue automatically but only under section 6 on the basis of parties' behaviour after the termination date (section 5(2)).

The leases which end automatically on their termination dates in terms of this section are:

- (a) a lease which gives rise to a tenancy mentioned in paragraphs 16 to 19 of schedule 1 of the Private Housing (Tenancies) (Scotland) Act 2016,<sup>14</sup>
- (b) a judicial lease,<sup>15</sup>
- (c) a lease for a period of 28 days or less,<sup>16</sup>
- (d) a lease granted for the lifetime of the tenant,
- (e) a student let,<sup>17</sup>
- (f) a holiday let,<sup>18</sup>
- (g) a lease for a period of one year or less of land which is let for the purpose of its being used only for grazing or mowing during some specified period of the year,
- (h) a lease for a period of less than one year of (i) a right to fish for or take fish in inland waters, if the right includes the right to fish for or take salmon, trout or other freshwater fish in respect of which there is a close season or (ii) a right to take or kill birds, deer or wild animals if the right includes the right to take or kill any bird, deer or wild animal in respect of which there is a close season.

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<sup>14</sup> Leases to homeless persons; to persons on probation or released from prison; to asylum seekers; and to displaced persons if the lease is for a period of one year or less. These can continue under section 6.

<sup>15</sup> That is, a lease granted by the authority of the Court of Session, sheriff, Accountant of Court, or Accountant in Bankruptcy where an estate has been sequestrated. As we observed in the Discussion Paper (at para 2.10, fn 28), these are now unknown in practice. These can continue under section 6.

<sup>16</sup> These can continue under section 6

<sup>17</sup> In terms of para 5(1) of sch 1 of the Private Housing (Tenancies) (Scotland) Act 2016.

<sup>18</sup> In terms of para 6 of sch 1 of the Private Housing (Tenancies) (Scotland) Act 2016.

## **Automatic continuation of lease on the basis of parties' behaviour after termination date**

Under the present law, tacit relocation may also take place where the tenant has remained in possession of the subjects of the lease after the expiry of the lease and the landlord has either failed to take reasonable steps to remove the tenant within a reasonable time<sup>19</sup> or has accepted rent in respect of a period after the expiry of the original term of the lease,<sup>20</sup> regardless of whether either party gave notice prior to the expiry of the lease.

**Section 6** (automatic continuation of lease on basis of parties' behaviour after termination date) continues this rule by providing that the ending of a lease on its termination date is of no effect if the tenant remains in possession after that date and the landlord does not take steps to remove the tenant within a reasonable period following the termination date or otherwise acts inconsistently with the lease having ended. In such circumstances, the lease is to be treated as if it had continued after its termination date.

This rule does not apply to a lease which falls within section 5(3) (liferents, student and holiday lets and short-term grazing and sporting lets).

Parties may not disapply this rule.<sup>21</sup> If the parties' behaviour following the termination date gives rise to an inference that the lease has continued, we consider that it would be wrong to expose the tenant to the risk of being treated as a squatter or intruder and potential liability for violent profits.<sup>22</sup>

(For the application of section 6 to cases in which there is both a head lease and a sub-lease, see section 21.)

**Section 7** (application of section 6 to leases with multiple landlords or tenants) modifies the rule of automatic continuation under section 6 where there are multiple landlords or tenants under a lease.

Where there are multiple landlords, a lease will continue under section 6 only where each of the landlords fails to take steps to remove the tenant from the subjects of the lease within a reasonable period following the termination date or otherwise acts inconsistently with the lease having ended.<sup>23</sup>

Where there are multiple tenants, the lease will continue under section 6 where at least one of the tenants remains in possession of the subjects of the lease after the termination date and the landlord fails to take steps to remove that tenant (or those tenants) within a reasonable period following the termination date or otherwise acts

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<sup>19</sup> Erskine Institute of the Law of Scotland, 2.6.35; *Robertson v Drysdale* (1834) 12 S 477; *Taylor v Earl of Moray* (1892) 19 R 399; and *Bruce v Bruce* (1610) Mor 15314.

<sup>20</sup> Erskine, Institute of the Law of Scotland, 2.6.35; *Milner's Curator Bonis v Mason* 1965 SLT (Sh Ct) 56.

<sup>21</sup> S6(4).

<sup>22</sup> Violent profits comprise all profit that the landlord could have made from possession of the subjects plus damages for any damage caused to the subjects during the period of unlawful occupation. A rule of thumb is that violent profits are double the market rent.

<sup>23</sup> S7(1).

inconsistently with the lease having ended. But the lease will only continue in respect of the tenant or tenants who remain in possession of the subjects of the lease after the termination date.<sup>24</sup>

### *Effect of automatic continuation*

#### **Period and effect of automatic continuation of lease**

**Section 8** (period and effect of automatic continuation of lease) applies to leases which are automatically continued under either section 2 or section 6. It sets out rules governing the length of an automatic continuation of a lease and the terms of the continued lease.

If the period of the lease is one year or longer, the period for which it is continued is one year, or such shorter period (of not less than 3 months) as may be provided for in the lease.<sup>25</sup>

If the period of the lease is more than 28 days but less than one year, the period for which it is continued is the period equal to the period of the lease, or such shorter period (of not less than 28 days) as may be provided for in the lease.<sup>26</sup>

If the period of the lease is 28 days or less, the period for which it is continued is equal to the period of the lease.<sup>27</sup>

Section 8(3) provides that where a lease automatically continues after its termination date it continues on the same terms as immediately before its termination date, except to the extent that those terms are inconsistent with the period for which the lease is continued. (So, for example, the terms of a lease of more than a year which included an option to renew for a further 20 year term would continue as immediately before the termination date, but that option would no longer apply, being incompatible with the yearly renewal in terms of section 8.) This restates the effect of tacit relocation at common law.<sup>28</sup>

### *Notice to prevent automatic continuation*

Sections 9 to 19 make provision about the notices which may be sent by the landlord or tenant in order to prevent automatic continuation of a lease under section 2.

Separate provision is made for notices served by a landlord (“notices to quit”) and notices served by a tenant (“notices of intention to quit”), with landlords’ notices subject to greater requirements of formality than those given by tenants.

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<sup>24</sup> S7(2).

<sup>25</sup> S8(2)(a).

<sup>26</sup> S8(2)(b).

<sup>27</sup> S8(2)(c). The continuation in such leases will be on the basis of the parties’ behaviour after the termination date as notices are not required for such leases.

<sup>28</sup> *Commercial Union Assurance Co v Watt & Cumine* 1964 SC 84.

Under the common law, regardless of the length of the lease, notices to quit may be given orally for urban subjects<sup>29</sup> and notices of intention to quit need not be in writing. Sections 9 and 11 reform what is required for such notices. They introduce a greater level of formality in the interests of certainty.

### **Notice from the landlord: notice to quit**

**Section 9** (notice from the landlord: notice to quit) sets out what has to be communicated for a landlord's notice to be valid.<sup>30</sup>

Subsection (1) provides that the notice must be in writing. Parties may not contract out of this requirement.<sup>31</sup>

Subsection (2) specifies the information which must be included in the notice.

The notice must state the name and postal address of the person giving the notice. Where the notice is given by the landlord, this must be the name and address of the landlord. Where the notice is given by another person (such as the landlord's agent) the name and address must be of that person.<sup>32</sup>

The notice must include a sufficient description of the subjects of the lease, whether by defining them directly or by referring to the lease.<sup>33</sup> A description of the subjects of the lease is sufficient if a reasonable recipient of the notice whose knowledge included that of the tenant would be able to identify the subjects from that description.<sup>34</sup> (So, for example, if the landlord and tenant had habitually referred to the subjects of the lease as "the workshop", it would be sufficient for the notice to use that term in describing the subjects, rather than specifying the postal address of the subjects or providing a fuller description.)

The notice must state that the tenant is required to give up possession of the lease on the specified termination date.<sup>35</sup> It is not sufficient for a notice merely to require the tenant to give up possession on the termination date without specifying that date in the notice.<sup>36</sup>

It is possible that a notice may contain errors. The present law distinguishes between errors relating to the date for removal and other errors. Errors in the date for removal by the tenant will usually be fatal.<sup>37</sup> Other errors may or may not be curable through common law rules of interpretation such as *falsa demonstratio non nocet*.

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<sup>29</sup> Discussion Paper, para 4.5.

<sup>30</sup> In terms of s3(1)(a), with the effect that the lease will end on its termination date in terms of s2(1)(a).

<sup>31</sup> S17(2).

<sup>32</sup> S9(2)(a).

<sup>33</sup> S9(2)(b).

<sup>34</sup> S9(3).

<sup>35</sup> S9(2)(c), (d).

<sup>36</sup> The termination date in a case in which the lease does not provide for the period of the lease, or where any period so provided for cannot be established, may be determined in accordance with s27.

<sup>37</sup> *James Grant & Co Ltd v Moran* 1948 SLT (Sh Ct) 8.

Subsection (4) provides that an error in the name and address of the sender of the notice, or in the description of the subjects of the lease, will not make a notice invalid if a reasonable recipient of the notice would, in all the circumstances, know that the information included in the notice was erroneous in that respect and the correct information that should have been included in the notice.<sup>38</sup> (So, for example, if the landlord's name is given as "Melville Holdings Ltd" but the tenant knows the landlord to be Melville Properties Ltd, the notice will not be rendered invalid by the error. Similarly a notice requiring the tenant to remove from Unit 2, Glasburgh Industrial Estate would not be invalid if the tenant rented Unit 1 and would have been aware that the notice should have referred to that unit instead.)

Subsection (5) provides some leeway for errors in the date for removal. If the notice specifies a date before the termination date of the lease, the notice will be invalid. If the date specified in the notice falls after the termination date of the lease and before the end of the period of 7 days beginning with the day after the termination date, then the error will not make the notice invalid.<sup>39</sup> Section 10 has consequential provisions dealing with the tenant's continuing occupation until the termination date specified in the notice.

These error-saving provisions render it unnecessary for a landlord to have recourse to the procedure under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents). Accordingly, notices to quit are excluded from the application of that section.<sup>40</sup>

### **Effect of error in termination date in notice to quit**

**Section 10** (effect of error in termination date in notice to quit) makes consequential provision for the case where the date specified in a notice to quit is erroneous but the notice is valid under the leeway provision in section 9(5) and the giving of the notice is the only reason the lease in respect of which the notice is given ends on its termination date (so, for example, section 10 will not apply where the lease in respect of which the notice was given is a sub-lease which would have ended on the termination of the head lease regardless of the service of the notice).<sup>41</sup> The period after the actual termination date and up to and including the date stated in the notice is described as the "post-termination period".

Subsection (2) gives the tenant a right to remain in possession of the subjects of the lease during the post-termination period.

Possession of the subjects of the lease beyond its termination date would ordinarily expose the tenant to a claim from the landlord for violent profits or unjustified enrichment, and also expose the tenant to liability for any damage which might be sustained by the subjects during that period of possession. Subsection (3) excludes the tenant from any such liability to the landlord in relation to possession during the post-termination period.

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<sup>38</sup> S9(4).

<sup>39</sup> S9(5); for the effect of a notice containing such an error, see s10.

<sup>40</sup> S9(6).

<sup>41</sup> See s20 for provision relating to the termination of sub-leases.



Subsection (4) requires the landlord to comply with the landlord's obligations under the lease during the post-termination period as if the lease had not ended, and to fulfil, or reimburse the tenant for the expense of fulfilling, any obligation owed by the tenant to another person in connection with the subjects of the lease which arises during that period. (So, for example, a landlord would be obliged to continue to permit access to the subjects of the lease during the post-termination period and would be obliged to meet the expense of any liability for business rates which the tenant might incur as a result of the tenant's continued possession of the subjects during that period.)

### **Notice from the tenant: notice of intention to quit**

**Section 11** (notice from the tenant: notice of intention to quit) sets out the requirements for a tenant's notice of intention to quit.

Subsection (1) provides that notice of intention to quit must be in writing if the lease was granted for a period longer than one year, but may otherwise be given orally. This reflects the law that leases granted for a period of longer than one year must be constituted in writing.<sup>42</sup>

Subsections (2) and (3) set out the required content of notice of intention to quit. Regardless of whether the notice is given orally or in writing, it must include a sufficient description of the subjects of the lease<sup>43</sup> and must state the tenant's intention to give up possession of these subjects at the end of the period of the lease or that the tenant does not intend to remain in possession of those subjects after the end of that period on the same terms and conditions as those of the lease.<sup>44</sup> If the notice is given in writing, it must also include the name of the tenant (or, where the notice is given by another person on behalf of the tenant, that person). Unless it is sent by electronic communication, it must also include that person's postal address.<sup>45</sup>

A description of the property for the purposes of a notice of intention to quit is sufficient if a reasonable recipient of the notice whose knowledge included that of the landlord would be able to identify the subjects from that description.<sup>46</sup>

In contrast with a landlord's notice to quit, which must specify the termination date of the lease,<sup>47</sup> a notice of intention to quit need not specify when the period of the lease will end.<sup>48</sup>

Subsection (6) provides that an error in the description of the subjects of the lease or in the name or address of the person giving the notice does not make the notice invalid if a reasonable recipient of the notice would, in all the circumstances, know

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<sup>42</sup> Requirements of Writing (Scotland) Act 1995, s1(2).

<sup>43</sup> S11(2)(a).

<sup>44</sup> S11(2)(b).

<sup>45</sup> S11(3).

<sup>46</sup> S11(4).

<sup>47</sup> S9(2)(c).

<sup>48</sup> S11(5).

that the information included in the notice was erroneous in that respect and what the correct information was.

This error-saving provision renders it unnecessary for a tenant to have recourse to the procedure under section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents). Accordingly, notices of intention to quit are excluded from the application of that section.<sup>49</sup>

### **When notice is to be given**

**Section 12** (when notice is to be given) replaces the existing law with a clear set of default rules determining the last day for giving notice under a lease. A lease may modify or disapply this date, but where it does so it must provide for the same last day to apply to both landlords' notices to quit and tenants' notices of intention to quit.<sup>50</sup>

Subsection (1) provides that notice to quit, or of intention to quit, must be given on or before the last day for giving notice under the lease to which it relates. Subsection (5) provides that notice is "given" when it is received. Section 15 provides further detail on when a notice is taken to have been "received".

Subsections (2) to (4) set out default rules for determining the last day for giving such notice.

If the period of the lease is 6 months or longer, the period of notice required is three calendar months.<sup>51</sup> For example, for a 6 month lease with a termination date on 1 October, the notice must have been received no later than 1 July.

If the period of the lease is less than 6 months, the period of notice is half of the period of the lease.<sup>52</sup> No notice is required for leases of 28 days or less (section 5(2)).

### **How written notice is to be delivered**

Under the present law, the sheriff court's Ordinary Cause Rules provide that any notice under sections 34 to 38 of the Sheriff Courts (Scotland) Act 1907 may be given by posting the notice by registered post or first class recorded delivery, or by delivery by a sheriff officer.<sup>53</sup> There are no prescribed requirements for delivery of written notices at common law. The draft Bill disapplies sections 34 to 37 and 38 and the relevant Ordinary Cause Rule.<sup>54</sup>

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<sup>49</sup> S11(7).

<sup>50</sup> S17(3). The variation must be in writing, as required by section 1(2) of the Requirements of Writing (Scotland) Act 1995 as amended by section 25 of the Bill.

<sup>51</sup> S12(2)(a), (3).

<sup>52</sup> S12(4). It is rounded up to the nearest whole day.

<sup>53</sup> Sheriff Courts (Scotland) Act 1907, schedule 1, Ordinary Cause Rule 34.8, as substituted by S.I. 1996/2445.

<sup>54</sup> S35 and schedule, para 2.

**Section 13** (how written notice is to be delivered) sets out fresh default rules for delivery of written notices. Subsection (1) provides that such notice must be given either (a) in a traditional document<sup>55</sup> or (b) by electronic means.

Where the notice is given in a traditional document it must be delivered to its recipient by one of the methods set out in subsection (2). These are:

- (a) being sent by recorded delivery post (whether by the person giving notice or by a sheriff officer);
- (b) being delivered in Scotland by a sheriff officer;
- (c) being delivered by hand to the recipient by the person giving the notice, if they are both individuals.

Notice may only be delivered by hand between the person giving notice and the recipient, where both are individuals. Notice may not be delivered by hand by the agent of the person giving notice, nor may it be delivered to the agent of the recipient.<sup>56</sup> This is to avoid disputes over the authority of an individual to deliver or take physical receipt of a notice on behalf of another.

Subsections (4) to (6) govern the giving of notice by electronic means. The permitted electronic means are:

- (a) electronic communication given by being transmitted to an electronic address and in an electronic form previously agreed in writing by the giver of the notice and the recipient<sup>57</sup> (for example, by email to an address specified in the lease);
- (b) fax;<sup>58</sup> and
- (c) delivery (by any of the methods which might be used for a traditional document) of a document stored electronically on a device (such as a disc, a memory stick or some other removable or portable media) or in another form which requires the use of electronic apparatus by the recipient to render the document intelligible.<sup>59</sup> This is permitted only where, before it is given, the person giving the notice and the recipient have agreed in writing that notices may be given in this manner.<sup>60</sup> The person giving the notice must do so in such a way that it would be clear to a reasonable recipient that the document is stored on the device (for example, by labelling a memory stick).<sup>61</sup>

**Section 14** (delivery of notice by sheriff officer) provides detail of the way in which notice may be delivered by a sheriff officer for the purposes of section 13(2)(b).

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<sup>55</sup> Defined in s13(8) as a document written on paper, parchment or some similar tangible surface.

<sup>56</sup> S13(3).

<sup>57</sup> S13(4)(a), (5).

<sup>58</sup> S13(4)(b).

<sup>59</sup> S13(4)(c).

<sup>60</sup> S13(6).

<sup>61</sup> S13(7).

## **When written notice is taken to be received**

**Section 15** (when notice is taken to be received) sets out default rules governing when notices are to be taken to be received, and thus given, for the purposes of ascertaining the last day for the giving of notice under section 12.

A document containing notice to quit or notice of intention to quit is, unless the contrary is shown, taken to be received by the recipient on the day on which it is delivered.<sup>62</sup> Where the document is delivered by recorded delivery post, this will be presumed to be on the second day after it is sent.<sup>63</sup> Where the document contains notice of intention to quit given in writing under section 11(1)(b) and is sent from within the UK by ordinary post to an address for the recipient set out in section 28(3) (address in UK for termination documents), it is presumed to be delivered on the day on which it would be delivered in the ordinary course of a postal service.<sup>64</sup>

## **Notice where there are multiple landlords or tenants**

**Section 16** (notice where there are multiple landlords or tenants) contains default rules for the case in which there are multiple landlords or tenants. These reform the existing common law rule for multiple landlords (under which all landlords must give notice) and re-state the existing common law rule for multiple tenants (under which notice from one tenant is sufficient).

Where there is more than one landlord under a lease, notice to quit may be given by one of the landlords to the tenant, with or without the consent of the other landlord or landlords.<sup>65</sup> In this case, the notice will have effect as if it were given by all of the landlords.<sup>66</sup>

Where there is more than one landlord under a lease, notice of intention to quit given by the tenant must be given to each landlord.<sup>67</sup>

Where there is more than one tenant under a lease, notice of intention to quit may be given by one of the tenants to the landlord, with or without the consent of the other tenant or tenants.<sup>68</sup> In this case, the notice will have effect as if it were given by all of the tenants.<sup>69</sup>

Where there is more than one tenant under a lease, notice to quit given by the landlord must be given to each tenant.<sup>70</sup>

## **Withdrawal of notice**

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<sup>62</sup> S15(1).

<sup>63</sup> S15(3)(a).

<sup>64</sup> S15(3)(b), (4).

<sup>65</sup> S16(1)(a).

<sup>66</sup> S16(3)(a).

<sup>67</sup> S16(1)(b).

<sup>68</sup> S16(2)(a).

<sup>69</sup> S16(3)(b).

<sup>70</sup> S16(2)(b).

Under the present law, it has been held that a notice to quit cannot be repudiated after it has been expressly accepted,<sup>71</sup> but the question of whether a notice can otherwise be withdrawn without the consent of the recipient does not appear to have been settled. In practice it has been accepted that such notice can only be withdrawn with the consent of both parties.<sup>72</sup> The draft Bill seeks to place this practice on a clear statutory basis.

**Section 18** (withdrawal of notice) provides that notice to quit or of intention to quit may be withdrawn by the person who gave the notice only with the agreement of the person to whom it was given.<sup>73</sup>

If the notice required to be given in writing, the withdrawal must be in writing too.<sup>74</sup>

Notice to quit or of intention to quit withdrawn in accordance with section 18(1) is of no effect (and does not bring the lease to which it relates to an end under section 3(1)).<sup>75</sup>

If the parties to the lease change after the notice has been given and before it has been withdrawn, the agreement required for the withdrawal of the notice is that of the new landlord or tenant (as the case may be).<sup>76</sup>

### **Notice unaffected by change of landlord or tenant**

Under the present law a notice to quit or notice of intention to quit is not automatically effective for successors in title to the interest of the landlord or tenant who gave notice where the successor acquires the interest after the notice has been given but before the termination date.<sup>77</sup>

**Section 19** (notice unaffected by change of landlord or tenant) provides that the validity of notice to quit, or of intention to quit, is not affected by a change in the identity of the landlord or of the tenant under the lease to which the notice relates after the notice is given.

### *Head leases and sub-leases*

In most respects, the legal relationship between a landlord and tenant is the same regardless of whether the landlord is the owner of the subjects of the lease or possesses those subjects as a tenant. But the sub-tenant's right can, as a matter of principle, be no greater than that of the tenant under the head lease.<sup>78</sup> The practical application of this principle has given rise to various uncertainties which sections 20 to 22 seek to clarify.

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<sup>71</sup> *Gilmour v Cook* 1975 SLT (Land Court) 10.

<sup>72</sup> Discussion Paper, para 4.31.

<sup>73</sup> S18(1).

<sup>74</sup> S18(2).

<sup>75</sup> S18(3).

<sup>76</sup> S18(4).

<sup>77</sup> *Grant v Bannerman* (1920) 36 Sh Ct Rep 59.

<sup>78</sup> *Nemo plus iuris ad alium transferre potest quam ipse habet.*

## Termination of sub-lease

**Section 20** (termination of sub-lease) makes statutory the rule that where a sub-lease has a termination date which is the same as, or later than, that of the head lease, the sub-lease will end on the termination date of the head lease if the head lease ends on that date. It is intended to remove any doubt that a landlord under the head lease may remove a sub-tenant without having to give the sub-tenant a notice to quit.<sup>79</sup>

In relation to a sub-lease with a purported termination date after that of the head lease, the termination date of the sub-lease is treated as being the same as that of the head lease.<sup>80</sup>

Subsection (6) provides that the sub-tenant may not, in any proceedings before a court or tribunal,<sup>81</sup> challenge the validity of any –

- (a) notice to quit given by the landlord under the head lease to the tenant,
- (b) notice of intention to quit given by the tenant to the landlord,
- (c) term of the head lease under section 4(1) (termination in accordance with term of lease),
- (d) new lease entered into by the landlord and the tenant over the subjects of the sub-lease.

## Automatic continuation of head lease and sub-lease

Section 6(1) allows automatic continuation to occur on the basis of parties' behaviour after the termination date. If there is a sub-lease and the head landlord, tenant, and sub-tenant all continue to behave after the termination date as they did before it, there must be provision in relation to the automatic continuation of both leases.

**Section 21** (automatic continuation of head lease and sub-lease) makes provision which applies in place of section 6(1) where there is a sub-lease, the termination date of the head lease and the sub-lease are the same date (whether by virtue of section 20(2) or otherwise), and both leases end on that date by virtue of Part 2 of the Bill.<sup>82</sup>

Where there is a sub-lease, there are two ways in which the tenant under the head lease might continue to have possession following the termination date. The tenant might continue to have civil possession of the subjects of the lease by virtue of the sub-tenant's continuing natural possession of those subjects. Alternatively, the sub-tenant might vacate the subjects on the termination date and the tenant resume

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<sup>79</sup> The doubt arises from *Robb v Brearton* (1895) 22 R 885.

<sup>80</sup> S20(2). This has implications for section 12 (when notice is to be given), as the last day for giving notice under the sub-lease will fall to be reckoned by reference to the termination date of the head lease rather than the purported termination date of the sub-lease.

<sup>81</sup> S20(7).

<sup>82</sup> S21(1).

natural possession of those subjects. In either of these cases, subsection (3) provides that the ending of the head lease<sup>83</sup> is of no effect if the landlord under that lease does not take steps to remove the tenant from those subjects within a reasonable period following the termination date or otherwise acts inconsistently with the lease having ended (for example, by accepting rent in respect of a period after the termination date).

Where a sub-lease has the same termination date as the head lease, the sub-lease can only continue after that date if the head lease also continues. In that case, subsection (4) provides that the ending of the sub-lease<sup>84</sup> is of no effect if the sub-tenant retains possession of the subjects of the sub-lease after the termination date and the tenant under the head lease does not take steps to remove the sub-tenant from those subjects within a reasonable period following that date or otherwise acts incompatibly with the sub-lease having ended.

### **Information to be given by tenant to sub-tenant**

**Section 22** (information to be given by tenant to sub-tenant) places a requirement upon the tenant under the head lease to provide the sub-tenant with specified information regarding the head lease to give the sub-tenant warning about the likely termination of the head lease and their own entitlement to remain on the subjects.

The specified information, as set out in subsection (1), is any notice to quit or notice of intention to quit in relation to the head lease;<sup>85</sup> any withdrawal of such a notice;<sup>86</sup> the constitution of any term of the lease to the effect that the lease will not continue after its termination date;<sup>87</sup> the fact of the constitution of any new lease between the landlord and the tenant including the subjects of the sub-lease which begins immediately following the termination date of the head lease.<sup>88</sup>

In each case, the relevant information must be provided as soon as reasonably practicable.<sup>89</sup>

Where the tenant fails to comply with a requirement of section 22, the failure does not affect the validity of the head lease, the sub-lease or anything to which the requirement relates, but the tenant is liable to the sub-tenant for any loss caused to the sub-tenant by that failure.<sup>90</sup>

### *Cautionary obligations*

#### **Effect of continuation of lease on caution for obligations under lease**

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<sup>83</sup> Other than a lease which falls within section 5(3), i.e. a lease granted for the lifetime of the tenant, a student let, a holiday let, a short-term grazing or mowing let or a short-term let of fishing or hunting rights.

<sup>84</sup> Other than a lease which falls within section 5(3): see preceding note.

<sup>85</sup> S22(1)(a), (b)(i).

<sup>86</sup> S22(1)(b)(ii), (c)(i).

<sup>87</sup> S22(1)(c)(ii).

<sup>88</sup> S22(1)(d).

<sup>89</sup> S22(1).

<sup>90</sup> S22(2).

Under the current law, the continuation of a lease by tacit relocation does not extend any guarantee by a third party guarantor (a “cautionary obligation”) in relation to either the tenant’s or the landlord’s obligations under the lease.

**Section 23** (effect of continuation of lease on caution for obligations under lease) applies this rule to automatic continuation of a lease under the Bill, providing that a cautionary obligation in relation to an obligation of the tenant or the landlord under a lease does not continue to apply after the termination date unless a condition of the cautionary obligation provides otherwise.

### *Definitions*

#### **Interpretation of this Part**

**Section 24** (interpretation of this part) contains definitions and other interpretive provisions applying to Part 2 of the Bill.

### *Consequential provision*

#### **Formalities for exclusion of automatic continuation or variation of notice requirements**

**Section 25** (formalities for exclusion of automatic continuation or variation of notice requirements) amends section 1(2) of the Requirements of Writing (Scotland) Act to require formal writing for the constitution of a term of a lease under section 4(1) (termination in accordance with term of lease) or section 17(1) (variation of notice requirements) even if formal writing is not required for the lease itself.

#### **Disapplication of common law rule of tacit relocation and other rules relating to the termination of leases**

**Section 26** (disapplication of common law rule of tacit relocation and other rules relating to the termination of leases) disapplies the existing common law of tacit relocation in relation to a lease to which the Bill applies together with any other rule of law by which a party may bring a lease to an end unilaterally at the termination date without the consent of the other party (e.g. tenants’ letters of removal).

## **PART 3**

### **MISCELLANEOUS PROVISION RELATING TO START, END OR LENGTH OF LEASE**

**Part 3** of the draft Bill makes provision in relation to several matters which are relevant to the termination of leases more generally. During the course of the Commission’s project, the existing rules in relation to these matters have been identified as vague, inaccessible, or otherwise unsatisfactory. In line with the Commission’s task of improving, simplifying and updating the law, Part 3 seeks to resolve these difficulties by way of codification and, where necessary, reform.



## *Default duration and date of entry*

### **Duration of lease and date of entry in absence of agreement**

**Section 27** (duration of lease and date of entry in absence of agreement) allows the duration of a lease or the date of entry under a lease to be ascertained if the lease itself does not provide for these matters (either expressly or by implication), or where any such provision cannot be established (for example, because the lease has been lost or stolen, or because it was not made out in writing).

This enables the termination date of a lease to be calculated for the purpose of giving notice under section 9 or section 11.<sup>91</sup>

Subsection (2) provides that where the lease does not provide for the period of the lease (expressly or by implication) or any period so provided for cannot be established, that period is one year beginning with the date of entry under the lease. This reflects the existing common law presumption.<sup>92</sup>

Subsection (3) provides that, where the date of entry cannot be established, it is to be treated as if were:

- (a) the date on which the tenant entered into possession of the subjects of the lease,
- (b) if that date cannot be established, the date on which the lease was granted, or
- (c) if that date cannot be established, 28 May in the earliest year in respect of which rent was paid under the lease.

With respect to (c), the date of 28 May reflects the existing meaning of Whitsunday.<sup>93</sup> This third option functions as a backstop, since in any case there should, at a minimum, be sufficient evidence to determine when rent has been paid.

Subsection (4) provides for an application (subject to summary procedure<sup>94</sup>) to be made to allow the sheriff court to determine the date of entry under the lease. This is in addition to existing procedures by which a date of entry may be declared by a court or tribunal (including an arbitral tribunal).<sup>95</sup> The aim is to allow uncertainty over the date of entry and thus the termination date of a lease to be removed before the last date for the giving of a notice to quit or notice of intention to quit.

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<sup>91</sup> Since this is the purpose of s27, s27(1) provides that it applies only where the tenant has in fact entered into possession of the subjects.

<sup>92</sup> Stair 2.9.16; Erskine 2.6.24; *Gray v Edinburgh University* 1962 SC 157 at 165 (Lord Justice-Clerk Thomson).

<sup>93</sup> Term and Quarter Days (Scotland) Act 1990, s1(1)(a).

<sup>94</sup> Rule 1.4 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999/929.

<sup>95</sup> Such as a sheriff court ordinary cause action of declarator or a summary cause action of removing.

Subsection (5) provides that if a date of entry is determined, whether under the new procedure or by a court or tribunal<sup>96</sup> in proceedings more generally, the court or tribunal may order the lease to be endorsed with the date of entry.<sup>97</sup> Insofar as the lease is made out in writing, its endorsement is intended to preserve knowledge of the determined date of entry for the benefit of succeeding parties.

Where section 27 applies, any existing common law presumptions as to the period and entry date of a lease are disapplied.<sup>98</sup>

### *Documents leading to termination of lease*

At present there is no legal requirement that a lease specify an address for service of documents which terminate it or which are necessary steps in its termination. The Companies Act 2006 provides that a document may be served on a registered company by leaving it at, or sending it by post to, the company's registered office.<sup>99</sup> Where the recipient is not a registered company, however, the sender is left, in the absence of an address specified in the lease, to rely on their own private knowledge, or alternatively to carry out their own investigations to identify a postal address. Even where the lease does specify an address, that address may be superseded during the course of the lease. Further difficulties are posed where the recipient has only an address outwith the United Kingdom, postal service upon which may entail additional expense, inconvenience and inefficiency.

Sections 28 to 30 make provision about the addresses to which documents may be sent where postal service is permitted or required. Section 29 imposes a duty on parties in (written) leases of over one year to notify each other of a United Kingdom address for service in certain circumstances.

### **Address in United Kingdom for termination documents**

**Section 28** (address in United Kingdom for termination documents) allows for the sending of "termination documents" by post to addresses in the United Kingdom. Termination documents – documents the giving of which has the effect of bringing a lease to an end or which is a necessary step before a lease can be brought to an end<sup>100</sup> – include notices to quit and notices of intention to quit, as well as break notices and all notices leading to irritancy.

Section 28 provides that, where a termination document may or must be delivered by post, delivery may be made to any of several possible addresses, namely:

- (a) a postal address in the United Kingdom which the lease provides may be used for sending the document, or a category of documents including the document, to the recipient,

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<sup>96</sup> As defined in s27(6).

<sup>97</sup> S27(5).

<sup>98</sup> S27(7).

<sup>99</sup> Companies Act 2006, s1139(1). Under s1139(3), the relevant address(es) for this purpose are to be found in the publicly available part of the companies register.

<sup>D</sup> S28(1).

- (b) where the recipient has notified the sender in writing of an address in the United Kingdom which may be used for the sending of termination documents,<sup>101</sup> the most recent such address,
- (c) where the recipient is a body corporate with a registered or principal office in the United Kingdom, the address of that office, and
- (d) a postal address in the United Kingdom which—
  - (i) is the last residential or business address of the recipient of which the sender is aware, and
  - (ii) is a more recent address of the recipient than any of those mentioned in paragraph (a), (b) or (c).

This is a non-exclusive list. The addresses specified are available in addition to any other addresses for service which parties may wish to specify in the lease. The only limitation is that parties may not agree that service be made exclusively on a foreign address.<sup>102</sup> This is in line with the broader aim of enabling leases to be terminated efficiently.

Delivery may be made to an address mentioned in paragraph (d) even if the addressee has a more recent residential or business address, provided that the sender was not actually aware of that more recent address before sending the document. This is so irrespective of whether the sender could reasonably have been expected to become aware of that more recent address.<sup>103</sup>

### **Provision of address in United Kingdom**

**Section 29** (provision of address in United Kingdom) imposes a duty on parties to (written) leases of over one year to notify each other of a United Kingdom address to which termination documents<sup>104</sup> may be sent by post.<sup>105</sup>

The duty does not apply:

- (a) where the lease already includes a postal address for that party in the United Kingdom (whether or not specified as an address to which termination documents may be sent); or
- (b) where that party is a body corporate with a registered or principal office in the United Kingdom.

In these cases the duty is unnecessary as the sending party will have an address to which they can send the document under section 28.

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<sup>101</sup> In accordance with s29(1).

<sup>102</sup> S28(5).

<sup>103</sup> S28(4).

<sup>104</sup> As defined in s28(1).

<sup>105</sup> S29(1)(a),(3)(c)

Parties may later supply a replacement address for the same purposes,<sup>106</sup> for example where the address originally supplied becomes superseded. This is to encourage parties to keep their notified address up to date.

Notification must be in writing, and specify explicitly that the address mentioned may be used for the purpose of sending any termination document or a category of documents including all termination documents.<sup>107</sup>

Parties are not permitted to contract out of the requirements of section 29.<sup>108</sup>

### **Effect of failure to provide United Kingdom address**

**Section 30** (effect of failure to provide United Kingdom address) makes provision for breach of the duty under section 29. Several consequences are set out, some of which apply to tenants only, some to landlords only, and some to both tenants and landlords. Parties are not permitted to contract out of the effect of section 30.<sup>109</sup>

Firstly, if the landlord does not notify the tenant of a UK address, the tenant may withhold payment of any sum due to be paid during the period in which the landlord's obligation remains unfulfilled.<sup>110</sup> Once the landlord has fulfilled their obligation by notifying the tenant of a UK address, any sum withheld by the tenant must be paid within 14 days.<sup>111</sup>

Secondly, if the tenant does not notify the landlord of a UK address, the landlord may send the termination document to the let premises.<sup>112</sup> This is only possible, of course, where the let premises are, or include, a building to which postal delivery can be made.

Thirdly, if either party is failing to supply a UK address, the other party may – as a last resort – send a termination document by post to the Extractor of the Court of Session.

This last avenue is available only where the party giving the document is unable to send the document by post to any of the addresses set out in section 28,<sup>113</sup> to send the document by electronic communication,<sup>114</sup> to have it delivered by a sheriff officer,<sup>115</sup> or (if they are the landlord) to send the document to the subjects of the lease.<sup>116</sup>

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<sup>106</sup> S29(1)(b).

<sup>107</sup> S29(2)

<sup>108</sup> S29(4).

<sup>109</sup> S29(4).

<sup>110</sup> S30(3)(a) and 9(a).

<sup>111</sup> S30(3)(b). This 14-day period begins with the day after that on which the landlord complies with the notification requirements: s30(9)(b).

<sup>112</sup> S30(5). This 14-day period begins with the day after that on which the tenant complies with the notification requirements: s30(9)(b).

<sup>113</sup> S30(6)(a)(i).

<sup>114</sup> S30(6)(b).

<sup>115</sup> S30(6)(c).

<sup>116</sup> S30(6)(a)(ii).

The second and third avenues apply both during the period in which the recipient has failed to supply an address, and during the 14 days after an address has been supplied.<sup>117</sup> The 14 day period is intended to ensure that a notice served on the let premises or on the Extractor by an individual in one part of an organisation is not invalidated through the address having been supplied to another part of the organisation.

The sending of a termination document under the second or third avenue is to be treated as if it had been sent by post to an address mentioned in section 28(3).<sup>118</sup>

Damages are excluded as a remedy.<sup>119</sup> If damages were limited to the additional costs of service abroad, it is unlikely that the sums involved would be significant enough to be pursued cost-effectively. If damages were extended to losses consequential to being unable to serve a notice timeously due to the lack of a UK address, calculation and proof would likely be highly complex.

### **Giving of termination document after change or death of landlord or tenant**

Notices terminating a lease (or leading up to its termination) must be given to a party under the lease. Under the present law, difficulties in giving a valid notice arise where:

- unbeknown to the sender there has been a change in the other party to the lease (this occurs mainly where there is a change in the landlord but no notification is made to the tenant who seeks to terminate the lease);
- a party to the lease is an individual who has died but the other party has not been made aware of the confirmation of an executor to the deceased party's estate.<sup>120</sup>

In both cases there is a risk of a termination notice being rendered invalid.

**Section 31** (giving of termination document after change or death of landlord or tenant) makes provision for service of termination documents<sup>121</sup> in the event of a change in the identity or the death of the landlord or tenant upon whom service is to be made.

Subsection (1) provides that where there is a change in the identity of the landlord or tenant upon whom service is to be made, the serving party may – until notified in writing of the change, and of the name and UK postal address of the new landlord or tenant – serve any termination document on the former landlord or tenant.

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<sup>117</sup> S30(4).

<sup>118</sup> S30(8).

<sup>119</sup> S30(2).

<sup>120</sup> A lacuna which the Commission identified in its Report on *Recovery of Possession of Heritable Property* (Scot Law Com No 118, 1989): see paras 5.62-5.87. The solution adopted in the draft Bill was likewise proposed by the Commission in 1989: *ibid* at paras 5.67-5.70.

<sup>121</sup> As defined in s28(1).

Subsection (4) applies where the termination document may be sent by post. It provides that in the event of the death of the landlord or tenant to whom a termination document is to be given, the party giving the document may – until notified in writing (a) that an executor has been confirmed over the estate of the deceased party, or that a heritable creditor has entered into possession of the deceased party's interest in the subjects of the lease, and (b) of the name and UK postal address of the executor or heritable creditor – send any termination document by post to the deceased party.<sup>122</sup>

Subsection (4) is required because until an executor has been confirmed or a creditor has taken possession there is no landlord or tenant in the lease.

In both cases (change of identity or death) the termination document is to be treated as if served on the new party, executor or heritable creditor.<sup>123</sup>

### *Irritancy notices*

#### **Service of irritancy notice and copies to be given to heritable creditors**

**Section 32** (service of irritancy notice and copies to be given to heritable creditors) amends the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985<sup>124</sup> to expand the means by which pre-irritancy warning notices can be served, to make provision for their service on creditors having a heritable security over a registered lease, and to allow such creditors title to challenge any irritancy of the registered lease.

#### Service of pre-irritancy warning notice

Subsection (2) replaces section 4(4) of the 1985 Act with a new section 4(4) with a list of permissible methods for service of an pre-irritancy warning notice. The methods are:<sup>125</sup>

(a) sending by recorded delivery post to the tenant by the landlord or a sheriff officer, by recorded delivery,

(b) delivery in Scotland by a sheriff officer,<sup>126</sup> or

(c) delivery by hand to the tenant by the landlord, if they are both individuals (hand delivery either by or to an agent is excluded<sup>127</sup>)

Parties may contract to the effect that the notice must, in addition to being served by one of these methods, be served by another method specified in the lease.<sup>128</sup>

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<sup>122</sup> S31(3), (4).

<sup>123</sup> S31(2), (5).

<sup>124</sup> S32(1).

<sup>125</sup> LR(MP)(S)A 1985, new s4(4) (as inserted by s32(2) of the draft Bill).

<sup>126</sup> Thereby removing the effect of *Kodak Processing Companies Ltd v Shoredale Ltd* 2010 SC 113

<sup>127</sup> LR(MP)(S)A 1985, new s4(4B) (as inserted by s32(2) of the draft Bill).

<sup>128</sup> LR(MP)(S)A 1985, new s4(4C) (as inserted by s32(2) of the draft Bill).

A new section 4(4A) further provides that the notice may be sent to the last address given to the landlord by the tenant for the purpose of service of such a notice, or to any of the addresses for the tenant mentioned in section 28 or under section 30.<sup>129</sup>

Subsection (3) introduces a new section 5B into the 1985 Act. This provides for the methods of service that can be used by a sheriff officer.

#### Irritancy of lease where there is a heritable creditor

Under the present law, a creditor whose loan is secured by a standard security over a lease is exposed to the risk that their security will be lost by the irritancy of the lease. It is thus common practice to provide in the lease that the creditor may realise the security before the landlord terminates the lease. However, there is presently no means by which a creditor may effectively require the landlord to warn them of the threatened irritancy in time to allow the security to be realised.

Subsection (3) introduces new section 5A into the 1985 Act which provides that, where a landlord serves any irritancy-related notice<sup>130</sup> on a tenant, they must also serve a copy of the notice on any creditor in a standard security over the lease.<sup>131</sup> This is so where the consent of the landlord at the time the security was granted was not required under the lease for the granting of the security, or where such consent was so required and was given.<sup>132</sup> Service on the creditor must be at the same time as, or as soon as reasonably practicable after, service on the tenant.<sup>133</sup>

There are two exceptions to this requirement. First, if the security was registered only within the 10 days prior to notice being served on the tenant, a copy of the notice need not be served on the creditor.<sup>134</sup> Second, if the creditor has not provided the landlord with a UK postal address for the purposes of serving notice, and the landlord is not otherwise aware of a UK postal address for the creditor, again a copy of the notice need not be served.<sup>135</sup>

A copy of the notice must be served on the creditor using the same methods as are permitted for service on the tenant.<sup>136</sup>

If the landlord fails to comply with a requirement to serve on the creditor, the landlord is not entitled to rely, for the purpose of terminating the lease or treating it as

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<sup>129</sup> LR(MP)(S)A 1985, new s4(4A) (as inserted by s32(2) of the draft Bill).

<sup>130</sup> As defined in LR(MP)(S)A 1985, new s5A(8) (as inserted by s32(3) of the draft Bill).

<sup>131</sup> LR(MP)(S)A 1985, new s5A(2) (as inserted by s32(3) of the draft Bill).

<sup>132</sup> LR(MP)(S)A 1985, new s5A(1) (as inserted by s32(3) of the draft Bill).

<sup>133</sup> LR(MP)(S)A 1985, new s5A(2) (as inserted by s32(3) of the draft Bill).

<sup>134</sup> LR(MP)(S)A 1985, new s5A(2)(a) (as inserted by s32(3) of the draft Bill).

<sup>135</sup> LR(MP)(S)A 1985, new s5A(2)(b) (as inserted by s32(3) of the draft Bill).

<sup>136</sup> LR(MP)(S)A 1985, new s5A(3)(a) (as inserted by s32(3) of the draft Bill). Delivery may be made to this address even if the creditor has a more recent address, provided that the landlord was not aware of that more recent address before serving the copy of the notice. This is so irrespective of whether the landlord could reasonably have been expected to become aware of that more recent address: *ibid* s5A(4); new s5A(3)(b); new s5A(3)(c); and new s5B.

terminated, on any irritancy clause in the lease or material breach<sup>137</sup> of the lease to which the requirement relates.<sup>138</sup>

Where the landlord either fails to serve a copy of the notice on a creditor, or fails to serve it by one of the permitted methods, the creditor may challenge the termination of the lease in reliance on an irritancy clause or a material breach of the lease.<sup>139</sup>

More generally, a creditor has title to make such a challenge on the grounds that the landlord failed to take a step required by the lease to be taken before terminating the lease or treating it as terminated,<sup>140</sup> or that a fair and reasonable person in the position of the landlord would not, having regard to the interests of the creditor, have relied on the irritancy clause or material breach to terminate the lease or treat it as terminated.<sup>141</sup> A creditor is also given title to challenge the validity of any irritancy-related notice relating to the lease.<sup>142</sup>

### *Apportionment of rent*

#### **Repayment of rent and other payments relating to period after lease ends**

Under the present law if a tenant has paid rent in advance in respect of a period which post-dates the termination of the lease, they can only recover such rent if the lease under which the payment was made expressly obliges the landlord to repay it.<sup>143</sup> If the lease has no such express obligation the landlord is left with a windfall of rent and any claim by the tenant for unjustified enrichment appears to be excluded.

**Section 33** (repayment of rent and other payments relating to period after lease ends) makes provision for the scenario in which a lease is brought to an end (other than by virtue of an irritancy clause), but where the tenant has already made an advance payment to the landlord in excess of that which is due for the period when the lease is operating.

Subsections (1) and (3) provide that a lease has an implied term obliging the landlord to repay to the tenant any rent or other payment relating the period after the termination of the lease within 10 working days of the termination of the lease.<sup>144</sup> Where the lease is terminated by the landlord under an irritancy clause, the implied term is of no effect.<sup>145</sup>

Parties are permitted to contract out of the effect of section 33, partly or wholly, by express provision in the lease. Modification may be made either to the circumstances in which the implied term comes into effect or to the terms in which

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<sup>137</sup> As defined in LR(MP)(S)A 1985, new s5A(8) (as inserted by s32(3) of the draft Bill).

<sup>138</sup> LR(MP)(S)A 1985, new s5A(6) (as inserted by s32(3) of the draft Bill).

<sup>139</sup> LR(MP)(S)A 1985, new s5A(7)(b)(i) (as inserted by s32(3) of the draft Bill).

<sup>140</sup> LR(MP)(S)A 1985, new s5A(7)(b)(ii) (as inserted by s32(3) of the draft Bill).

<sup>141</sup> LR(MP)(S)A 1985, new s5A(7)(b)(iii) (as inserted by s32(3) of the draft Bill).

<sup>142</sup> LR(MP)(S)A 1985, new s5A(7)(a) (as inserted by s32(3) of the draft Bill).

<sup>143</sup> *Marks and Spencer v BNP Paribas Securities Services Trust Co (Jersey) Ltd and Another* [2015] UKSC 72

<sup>144</sup> S33(3). "Working day" is defined in s33(4).

<sup>145</sup> S33(2)(a). "Irritancy clause" is defined in s33(4).



the landlord must make repayment.<sup>146</sup> Alternatively, parties may disapply the implied term entirely.<sup>147</sup>

## PART 4

### FINAL, INCLUDING CONSEQUENTIAL, TRANSITIONAL AND SAVING PROVISION

**Section 35** introduces the schedule of the draft Bill which contains consequential, transitional and saving provision.

**Section 36** (commencement) provides in subsection (2) that the substantive provisions of the draft Bill are to come into force at the end of 6 months beginning with the day of the Royal Assent. The day that those provisions come into force is described in the schedule as “commencement day”.

The **Schedule** of the draft Bill itself has two Parts. **Part 1** comprises paragraphs 1 to 7. They deal with the amendment, disapplication or repeal of statutory provisions as a consequence of the substantive provisions of the draft Bill. **Part 2** comprises paragraphs 8 to 11 of the schedule. They contain transitional provisions for leases entered into before the commencement day and provisions saving the present (pre-commencement) law for such leases for a limited period.

Paragraph 8(1) sets out a general rule that Part 2 of the draft Bill together with Part 1 of its schedule will apply to all leases subsisting on or after the commencement day, regardless of whether they pre-date that day. This general rule is then made subject to transitional and saving provisions.

In particular, for leases with a termination date (ish) falling on or after commencement day but before the end of 6 months beginning with the commencement day, the pre-commencement (i.e., current) law applies to any notice to quit, or of intention to quit, given in relation to that termination date before or after commencement day. The period of 6 months is seen as a reasonable period for the present law and the provisions of the new Bill to run in parallel.

Paragraph 10 provides that Part 3 of the draft Bill will apply to all leases subsisting on or after the commencement day regardless of whether they pre-date that day.

This general rule is excluded in relation to:

- the repayment of rent provision in section 33 (which applies only to post-commencement leases);
- pre-irritancy warning notices under the 1985 Act served before commencement day.

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<sup>146</sup> S33(5)(b).

<sup>147</sup> S33(5)(a).

Paragraph 10 also saves the current law where it, rather than section 27, has been used for the determination of the duration or date of entry of a lease before the commencement date.