Scottish Law Commission

promoting law reform

(SCOT LAW COM No. 260)

Report on Aspects of Leases: Termination

report

Report on Aspects of Leases: Termination

Laid before the Scottish Parliament by the Scottish Ministers under section 3(2) of the Law Commissions Act 1965

October 2022

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

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SCOTTISH LAW COMMISSION

Item No 3 of our Tenth Programme of Law Reform

Report on Aspects of Leases: Termination

To: Keith Brown MSP, Cabinet Secretary for Justice and Veterans

We have the honour to submit to the Scottish Ministers our Report on Aspects of Leases: Termination

(Signed) ANN PATON, *Chair*
DAVID BARTOS
GILLIAN BLACK
CATHERINE DOWDALLS
FRANKIE McCARTHY

Charles Garland, *Interim Chief Executive*
26 September 2022

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Abbreviations

1870 Act. Apportionment Act 1870.

1886 Act. Removal Terms (Scotland) Act 1886.

1907 Act. Sheriff Courts (Scotland) Act 1907.

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

1985 Act. Law Reform (Miscellaneous Provisions) (Scotland) Act 1985.

1989 Report. Scottish Law Commission, Report on *Recovery of Possession of Heritable Property* (Scot Law Com No 118, 1989), available at https://www.scotlawcom.gov.uk/files/5712/8015/1761/26-07-2010_1442_969.pdf.

1991 Act. Agricultural Holdings (Scotland) Act 1991.

1995 Act. Requirements of Writing (Scotland) Act 1995.

2003 Act. Agricultural Holdings (Scotland) Act 2003.

2003 Report. Scottish Law Commission, Report on *Irritancy in Leases of Land* (Scot Law Com No 191, 2003), available at https://www.scotlawcom.gov.uk/files/3812/7989/6877/rep191.pdf.

2010 Act. Interpretation and Legislative Reform (Scotland) Act 2010.

Bell's Principles. G J Bell, *Principles of the Law of Scotland* (10th edn, 1899).

BGB. Bürgerliches Gesetzbuch, the statute setting out German private law which forms the civil code of Germany.

DP or **Discussion Paper.** Scottish Law Commission, Discussion Paper on *Aspects of Leases: Termination* (SLC DP No 165, 2018), available at https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf.

Erskine. J Erskine, *Institute of the Law of Scotland* (1773).

Gerber. KS Gerber, *Commercial Leases in Scotland: A Practitioner's Guide* (4th edn, 2021).

Gill. The Rt. Hon. Lord Gill, *Agricultural Tenancies* (4th edn, 2017).

GVA. Gross value added, a measure of the value of goods and services produced in a country, less the cost of inputs and raw materials.

McAllister. L Richardson and C Anderson, *McAllister's Scottish Law of Leases* (5th edn, 2021).

Paton & Cameron. G C H Paton and J G S Cameron, *The Law of Landlord and Tenant in Scotland* (1967).

PSG. Property Standardisation Group, formed in 2001 to produce agreed forms of documents and procedures for Scottish commercial property transactions. See http://www.psglegal.co.uk/.

Rankine. J Rankine, *A Treatise on the Law of Leases in Scotland* (3rd edn, 1916).

Rennie et al. R Rennie with M Blair, S Brymer, F McCarthy and T Mullen, *Leases* (2015).

Stair. Viscount Stair, *Institutions of the Law of Scotland* (2nd edn, 1681).

SOLAR. The Society of Local Authority Lawyers & Administrators in Scotland.

Glossary

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

Bill consultation. The Commission consulted on a draft Leases (Automatic Continuation etc.) (Scotland) Bill between December 2021 and January 2022. The consultation documents and draft Bill may be found at https://www.scotlawcom.gov.uk/publications/archive/discussion-papers-and-consultative-memoranda/. A final draft, amended to take account of the responses received, forms Appendix A to this Report.

Break clause. A term commonly found in commercial lease agreements, allowing either the tenant or the landlord (or both) to bring the lease to an end at a particular date before its agreed termination date. Typically such terms require the party seeking to bring the lease to an end to give written notice of their exercise of that right to the other party.

Common law. The body of legal rules derived from custom, Roman law, the writings of **Institutional writers** and the reasoning of judges in court cases that create precedents. It stands in contrast to **statute law**, where the rules are set down in Acts of the UK or Scottish Parliaments or regulations, orders or rules made in the exercise of powers granted by such Acts. Scots law exists as both common law and statute law.

Creditor. A person (natural or legal) to whom another person (a **debtor**) owes an obligation (for example, a debt).

Debtor. A person (natural or legal) who owes an obligation (for example, a debt) to another person (a **creditor**).

Draft Bill. The draft Bill in Appendix A of this Report.

Feudal system. The system of land ownership which existed in Scotland until 28 November 2004. It was characterised by **heritable property** being owned by a vassal (feuar) whose ownership involved obligations being owed by them to the feudal superior of the property.

Formal writing. Formal writing is writing in a document which complies with sections 2 or 9B of the Requirements of Writing (Scotland) Act 1995. Section 2 applies to traditional paper documents and requires them to be signed by the parties. Section 9B applies to electronic documents and requires them to be electronically authenticated by the parties. A **lease** for a period of over one year must be in formal writing in order for the **tenant** to be able to acquire a **real right** in the property let.

Ground annual. A non-feudal perpetual yearly payment due by an owner of **heritable property** to the holder of a contract of ground annual – the creation of which has been prohibited since 1974.

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

Head lease. A **lease** granted by an owner of **heritable property** under which a **sub-lease** has been granted. It can include a **sub-lease** under which a sub-sub-lease has been granted.

Heritable property. Generally speaking, land or buildings, but also includes **leases** where the tenant has a **real right** in the property let. Sometimes referred to as "immoveable property", "real property", or "real estate". The right to fish salmon in inland waters is a type of heritable property separate from the land forming either the shore or the river bed.

Heritable security. A **real right** in security over **heritable property.** Popularly known as a mortgage, it allows the creditor who holds it to take possession of and sell the **heritable property** over which it is held if their debtor fails to comply with their obligations, for example to repay a sum lent. A heritable security over a lease can exist only where the lease is a long **lease** which has been registered in the **Land Register** or **Register of Sasines**.

Heritable title. Ownership of **heritable property**.

Institutional writers. Certain writers from the 17th to early 19th centuries who have produced works which are judicially recognised as authoritative sources of law. Their works generally follow the style and structure of the Institutes of Justinian in **Roman law**. Examples include Stair, Bankton, Erskine and Bell.

Irritancy. Unilateral termination of the **lease** by the landlord to take effect before the **ish**. The conditions for irritancy are set out in the lease. Often they involve breach by the **tenant** of their obligations under the **lease** but they can involve other occurrences such as insolvency of the tenant. In rare cases, the mere occurrence of an event is specified to give rise to irritancy without the landlord having to take any action. Typically no compensation is due to the tenant upon irritancy.

Ish. Literally, the time fixed for the tenant's departure (issue) from the let property under the **lease.** Typically it is expressed as a date but it can be expressed as a time on a date. The ish is either expressed in the lease or it is implied by the general law. Sometimes it is known as the expiry date or the termination date of a lease. In this Report, including the draft Bill, the ish is generally referred to as the "termination date".

Keeper of the Registers. The Keeper of the Registers of Scotland, in whose name all acts and decisions in relation to the registers are made. The Keeper heads the office of the Registers of Scotland and is responsible for the registers which it holds, such as the **Land Register of Scotland** or the **Register of Sasines**.

Land. "Land" includes buildings. It also covers land covered by water, such as riverbeds and the seabed (within the territorial limits).

Landlord. The party to the contract of **lease** who grants the **lease**. Usually this is the owner of **heritable property** which is the subject of the **lease**. Also known as the "lessor". In a **sub-lease** the tenant is the landlord in relation to the sub-tenant.

Land Register of Scotland. The register of ownership of **land**. It is also used for registering **heritable securities** and long **leases**. Established by the Land Registration (Scotland) Act 1979 to replace, on a phased basis, the **Register of Sasines**, it is now regulated by the Land Registration etc. (Scotland) Act 2012. Sometimes abbreviated to "Land Register".

Lease. A contract under which one person, the **landlord**, grants to another, the **tenant,** the right to use **heritable property** for a fixed time in return for a regular, periodical payment known as rent. Fishing and, it is thought, hunting, rights over heritable property can themselves be let in leases coexisting with leases of the heritable property itself. The tenant acquires a **real right**, if they take possession of the property leased. If the lease is a long **lease** (over 20 years) the tenant acquires a real right by registering the lease in the **Land Register**.

Leasehold interest. The **tenant's** rights under a lease. Also known as the **Tenant's interest.** The expression originates from the law of England and Wales.

Licence. A contract under which a person, the licensor, who is entitled to occupy **heritable** property, grants to another, the licensee**,** the right to use **heritable property** for no fixed duration or for a period terminable at any time by the licensor or without the payment of rent. Unlike a tenant, a licensee cannot obtain a **real right**.

Notice of intention to quit. Notification given by a **tenant** to a **landlord**, indicating their intention to remove from the let property at the end of the **lease.** Such notice must be given in accordance with the provisions of that lease and, where relevant, the rules in **common law** or **statute law**. Such notice brings the lease to an end at its **ish** and prevents the operation of **tacit relocation**.

Notice to quit. Notification given by a **landlord** to a **tenant,** indicating that the tenant should remove from the property let at the end of the **lease**. Such notice must be given in accordance with the provisions of that lease and, where relevant, any **common law** or **statutory** requirements. Such notice brings the **lease** to an end at its **ish** and prevents the operation of **tacit relocation**.

Ordinary Cause Rules. The rules which apply to court procedures in the sheriff court where the value of the claim is over £5000. They are contained in a schedule of the Sheriff Courts (Scotland) Act 1907. Different versions of the rules have appeared in the schedule since 1907. The most recent version, regularly amended, is from 1993.

Personal right. A right against a particular person. Contracts create personal rights to enforce obligations of the other contracting person, but such rights can also have non-contractual sources (such as the rights under **common law** to obtain recompense for unjustified enrichment or to obtain compensation (damages) for negligently caused physical damage or injury). A personal right stands in contrast to a **real right**.

Proprietor. The owner of property.

Real right. A direct right in **land** (or moveable property). In contrast to a **personal right** it is enforceable against persons in general. Real rights divide into (i) the right of ownership and

(ii) the subordinate real rights such as **servitudes** and, to a more limited extent, the **tenant's interest** where the tenant has taken possession, or in respect of long **leases**, has registered the lease.

Register of Sasines. Established by the Registration Act 1617. It is a register of documents transferring ownership, creating long **leases**, and creating **heritable securities**. It has been replaced largely by the **Land Register.** No new documents can be registered in it.

Registers of Scotland. Also called "RoS". A non-ministerial Government department that is headed by the **Keeper of the Registers** of Scotland. See https://www.ros.gov.uk/. It holds numerous registers, two of which are the **Land Register** and the **Register of Sasines**.

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

Security of tenure. The statutory right of a **tenant** to occupy the property let beyond the **ish** despite the giving of a valid **notice to quit**.

Standard security. The most common and effectively now the only form of **heritable security**. It is known colloquially as a mortgage.

Statute law. The legal rules which are set down in Acts of the UK or Scottish Parliaments or regulations, orders or rules made under those Acts.

Sub-lease. A **lease** by a **tenant** of part or all of leased property to another person (**sub-tenant**). Sub-leases without the consent of the **landlord** are frequently prohibited in a **lease**. A **sub-lease** can exist as between a **sub-tenant** and a sub-sub tenant and so forth down a sub-letting chain.

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

Summary Cause Rules. The rules which apply to procedures in the sheriff court where the value of the claim is over £3000 and up to £5000. There are some circumstances where these rules apply to claims of up to £3000, including proceedings by **landlords** for recovery of possession of **heritable property**.

Tacit relocation. The continuation of a **lease** beyond its **ish** by operation of the **common law.** It can arise either (1) at the ish or (2) after the ish with retrospective effect back to the ish. In (1) it arises because neither party has taken the necessary steps before the **ish** to terminate the arrangement, such as the giving of a **notice to quit** or **notice of intention to quit** and at the **ish** the **tenant** has not given up possession with the consent of the **landlord**. In (2) it arises because the landlord has not taken reasonable steps (such as raising court proceedings) to remove the tenant within a reasonable period of time of the **ish**, or the landlord acts inconsistently with the lease having ended at the **ish** (such as demanding or accepting payments of rent): see Chapter 2. The Report recommends the replacement of tacit relocation with a statutory concept known as "automatic continuation".

Tenancy. A **lease**.

Tenant. A person who, in terms of a **lease**, occupies **heritable property** belonging to a **landlord** to whom they pay rent. The occupation of heritable property by a tenant of fishing, shooting or mineral rights is limited to the purposes for which the lease of such rights exists.

Tenant's interest. The whole of the **tenant's** rights and obligations under a lease which are potentially transmissible to another tenant and are enforceable against the **landlord**, any successor of the **landlord** and, in certain instances, against third parties.

Violent profits. All profit that a **landlord** could have made from possessing **heritable property** during its unlawful occupation plus compensation for any damage caused to the property during that period. The rule of thumb is that violent profits are double the market rent if the **tenant** did not have probable cause (that is, a good though possibly incorrect argument) to remain or the market rent if the tenant did have probable cause to remain.

Chapter 1 Introduction

Introduction

1.1 This Report recommends a number of reforms to the Scots law of leases. Our aim is to modernise, clarify and simplify certain important rules which apply to their termination. However, as we explain below,[1] we are not concerned with all leases. Our principal concern is with those which are often described as "commercial" leases; broadly, those which are neither residential nor agricultural.[2]

1.2 A lease is an agreement under which one party, the landlord, grants to another, the tenant, the right to use land[3] or buildings for a definite period of time[4] in return for regular periodic payments, commonly described as rent. Although a lease is a contract, Scots law provides that in most cases a tenant may enforce their right of use against persons other than the landlord, and in particular against any successors of the landlord.[5] This characteristic, often described as the "real right of the tenant", differentiates leases from other types of contract. In most cases the landlord is the owner of the land or buildings, but in the case of a sub-lease the landlord is themselves also a tenant. In that instance, the owner is commonly described as the "head landlord". The landlord in the sub-lease is described as the "head tenant", "principal tenant", or "mid-landlord".[6]

1.3 Leases are entered into for an infinite variety of uses and for widely differing durations. At root, leases have been – and continue to be – governed by common law rules. Until the late 19th century, the common law allowed parties substantial freedom to fix the terms and conditions of their lease. From this point, however, and in response to social and economic pressures, Parliament began to legislate to regulate the terms and conditions of leases of agricultural, residential and crofting property. The effect of that legislation has been to modify or supersede various common law rules in their application to such leases. At the same time, the common law rules have remained largely untouched for those leases which do not fall

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[1] See paras 1.10 to 1.12.
[2] DP, para 1.7.
[3] There can also be leases of rights to hunt (through shooting) on land or to fish on a river or body of fresh water.
[4] If the agreement is for an indefinite period, and allows a party to terminate it at an unspecified time of their choosing while the property is being used, the contract is likely to be a licence rather than a lease. Similarly, if the use of the property in question is to be shared with a person who is not granted use under the agreement, there is more likely to be a licence rather than a lease: see Rennie et al, paras 2-10 to 2-18. A licence does not protect the licensee against removal at the instance of a successor of the licensor. Leases of private residential dwellings under the Private Housing (Tenancies) (Scotland) Act 2016 are for an indefinite period, and but for s 4(a) of that Act would not be treated as leases.
[5] This continuing enforceability by a tenant in possession against successors of the landlord was introduced by the Leases Act 1449, which remains in force. At the time of its introduction, the 1449 Act was a pioneer of a principle now accepted in all European-based legal systems.
[6] Rennie et al, para 18-40; Gerber, para 15-19.

under bespoke legislation. These leases have, by and large,[7] been left to be governed by whatever terms and conditions parties agree upon. Given that these terms and conditions are frequently governed by commercial considerations, these leases are generally regarded as "commercial leases", even if in a particular instance the rent and other terms do not reflect what might be considered commercially reasonable.[8]

1.4 It has been argued by surveyors and investors that the absence of legislative interference in parties' negotiated terms makes Scotland a more attractive target for investment in commercial property. They contrast this with the substantial body of landlord and tenant legislation in England and Wales which, they argue, reduces flexibility. However, in the absence of legislation in Scotland, it is important that prospective parties to a commercial lease share an understanding of how these operate and the underlying law. Where that law is not clear or readily accessible, this results in unnecessary cost for both landlord and tenant. Aside from monetary cost in terms of legal fees, this can involve delay and inconvenience for entrepreneurs. Needless disputes and litigation can occur. Investment in Scotland, from the point of view of both landlords and tenants, may be deterred.

Background

1.5 Commercial leases are fundamental to the Scottish economy. Most businesses, large or small, operate at least to some extent from let premises. Such commercially let premises form an integral part of the commercial property sector. This sector is one of the essential building blocks of the Scottish economy and a key driver of growth and productivity. According to analysis conducted by the Fraser of Allander Institute, in 2018 it contributed almost £4.8 billion to Scottish GVA.[9]

1.6 Consultation on our Eighth and Ninth Programmes of Law Reform elicited a number of submissions proposing that we should examine the law relating to commercial leases, and particularly the problems which arise at their termination.[10] Accordingly, the Ninth Programme included a proposal to consider such issues as part of a broader review of the proprietary aspects of commercial leases.[11] This was then carried forward into our Tenth Programme.[12] In the Tenth Programme, we indicated that we would be focusing on specific issues relating to the termination of commercial leases, namely the doctrine of tacit relocation, notices to quit (including those under the Sheriff Courts (Scotland) Act 1907), apportionment of overpaid rent, the Tenancy of Shops (Scotland) Act 1949, and the doctrine of *confusio*, which sets out the legal effect of a tenant acquiring the landlord's rights in a lease. We formed an Advisory Group to assist us in understanding how the current law in these areas works in practice and in

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[7] The Tenancy of Shops (Scotland) Act 1949 and ss 4 to 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 can be seen as exceptional interferences in parties' free bargaining over the terms of such leases. In addition, practitioners have viewed the termination provisions of the Sheriff Courts (Scotland) Act 1907 as imposing statutory restrictions on the means by which such leases are terminated.

[8] Rennie et al, para 24-01.

[9] Fraser of Allander Institute, *The Economic Contribution of the Commercial Property Sector* (2018) ch 3, available at https://fraserofallander.org/wp-content/uploads/2021/05/2018-03-Economic-Contribution-of-Commercial-Property.pdf. This report was commissioned by the Scottish Property Federation.

[10] Scottish Law Commission, Eighth Programme of Law Reform (Scot Law Com No 220, 2010), para 1.14 and Ninth Programme of Law Reform (Scot Law Com No 242, 2015), paras 2.21 to 2.25.

[11] Scottish Law Commission, Ninth Programme of Law Reform (above), paras 2.21 to 2.25.

[12] Scottish Law Commission, Tenth Programme of Law Reform (Scot Law Com No 250, 2018), paras 2.10 to 2.16.

developing our ideas for its reform. The Group comprised legal practitioners, surveyors and a legal academic. We are extremely grateful to them for their invaluable assistance over the course of the project.

The Discussion Paper and subsequent developments

1.7 In May 2018, a Discussion Paper was published asking how we should reform or clarify the law of Scotland in relation to the termination of commercial leases.[13] The questions were focused principally on reform of the common law rules of tacit relocation. Consultation ran for four months until September 2018. During that period, the project team delivered seminars on the Discussion Paper to many Scottish law firms, surveyors and organisations with an interest in the law relating to commercial property. Our figures indicate that we met with at least 700 solicitors and 130 surveyors. We received 39 responses to the Discussion Paper.[14] Responses came from a broad spectrum of society, including representative organisations such as the Law Society of Scotland, the Faculty of Advocates, the Royal Institution of Chartered Surveyors and the Scottish Property Federation, as well as a range of legal firms, academics, businesses and interested individuals.

1.8 After analysing the responses and discussing various issues arising from them with our Advisory Group, we concluded that the existing common law rules of tacit relocation formed an uncertain and ill-defined foundation on which to base any reforms. We therefore adopted as a starting point the policy that the common law should be replaced with a fresh statutory scheme to clarify, reform and partially codify the existing law. In formulating this proposal, we had the support of the Advisory Group.

1.9 In December 2021, we invited comments on a draft Leases (Automatic Continuation etc.) (Scotland) Bill, and in particular on certain of its provisions which had been developed since the publication of the Discussion Paper. We received 25 responses from a wide range of practitioners, academics and representative groups. These contained many valuable suggestions, often of a technical but nevertheless important nature. Following the conclusion of the Bill consultation, we instructed revisions to the draft Bill. A final version of this forms Appendix A of this Report.

Leases covered by this Report

1.10 We have considered carefully how we demarcate the leases to be covered by this Report.[15] In the Discussion Paper, we suggested that we were concerned with commercial leases, being leases of property which is neither agricultural nor residential.[16] As a broad description, this is accurate enough; but there is another sense of the term “commercial”, as referring to a lease whose key terms legislative intervention has not sought to regulate.[17] In the main, such legislative intervention has been restricted to residential, agricultural and crofting leases. Most residential leases are currently regulated by the Private Housing

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[13] Available at https://www.scotlawcom.gov.uk/files/4215/2699/8107/Discussion_Paper_on_Aspects_of_Leases_-_Termination_DP_No_165.pdf.
[14] Available at https://www.scotlawcom.gov.uk/files/2715/7565/1420/Collated_Responses.pdf.
[15] We refer here to chapters 2 to 7 of this Report. Chapter 8 of this Report (*Confusio* and leases) covers all leases of whatever type.
[16] DP, para 1.7.
[17] Para 1.3 (above).

(Tenancies) (Scotland) Act 2016, the Housing (Scotland) Act 2001, the Housing (Scotland) Act 1988 and the Rent (Scotland) Act 1984.[18] Agricultural leases are regulated by the Agricultural Holdings (Scotland) Acts 1991 and 2003. Leases of smallholdings (in so far as they still exist) are subject to the Small Landholders (Scotland) Acts 1886 to 1931. Crofts are governed by the Crofters (Scotland) Act 1993, the Crofting Reform (Scotland) Act 2010 and the Crofting (Amendment) (Scotland) Act 2013.[19] Furthermore, termination of allotment leases by or to local authorities is governed by Part 9 of the Community Empowerment (Scotland) Act 2015. Given that these pieces of legislation have already made specific provision for termination of the leases they cover, we have excluded such leases from the recommendations in this Report.

1.11 It should be noted, however, that there do exist leases of a rural or agricultural nature that are not covered by the legislation just mentioned. These include forestry leases, leases of shootings, and leases of fishing rights. Leases of land for use in fish farming appear also not to be covered.[20] A lease of land for the purposes of agriculture but not for a trade or business is not regulated by the 1991 or 2003 Act.[21] Similarly, to give but two examples, holiday lettings and certain student lettings are not covered by the legislation mentioned above which regulates residential leases. The recommendations in this Report cover all of these types of lease, together with others (such as wind farm or telecommunications leases)[22] which are not covered by the bespoke legislation mentioned in the previous paragraph.

1.12 We considered restricting our recommendations to a new statutory category of “commercial” leases but rejected that approach. This is for a number of reasons. The creation of a new statutory category would carry with it the complexities of its definition.[23] That definition would still require to exclude from its scope the leases covered by the legislation mentioned above. There would also be the consequence of creating a “rump” of leases which would not fall within the new “commercial” category and which would remain governed by the unsatisfactory legal regime we wish to reform.[24] Taking these factors together, the creation of a new statutory category of lease would add an additional layer of complexity to the law, reducing certainty for advisers and increasing the potential for disputes. That would be contrary to our aim of clarifying and simplifying the law.

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[18] Although tenancies of residential property not covered by those Acts can exist (eg student or holiday lets).
[19] A further review of the relevant legislation by the Scottish Government is in process: https://www2.gov.scot/Topics/farmingrural/Rural/crofting-policy/Crofting-legislation.
[20] The definition of “agriculture” in the 1991 Act (which applies also to the 2003 Act) appears to be land-based. As a matter of ordinary language, “agriculture” stands in contrast to “fishing”. The view of Lord Gill is that fish farming (whether marine or freshwater) is excluded from the definition of agriculture: Gill, para 3-11. A contrary view in relation to freshwater fish farming is taken by Rennie et al, para 30-29.
[21] 1991 Act, s 1(1); 2003 Act, s 91.
[22] While leases for the keeping of electronic communications apparatus are regulated by the Electronic Communications Code (contained formerly within Sch 2 to the Telecommunications Act 1984 (as amended by the Communications Act 2003), and from 28 December 2017 within Sch 3A to the 2003 Act), the Code does not modify or exclude the common law under which such leases are terminated on their ish. Rather, Pt 5 of the most recent version of the Code provides for security of tenure for the tenant after the lease has been terminated on its ish following the exclusion of tacit relocation under the common law. Our recommendations do not affect such security of tenure and therefore telecommunications leases are covered by them.
[23] An example exists in s 23 of the Landlord and Tenant Act 1954, which applies in England and Wales and contains an elaborate definition of occupation for the purposes of carrying on a business. This has given rise to a complex body of case law: see Gary Webber and Daniel Dovar, *Business Premises: Possession and Lease Renewal* (6th edn, 2019), paras 2-01 to 2-39.
[24] Examples include leases of shootings and fishing rights, as well as student and holiday accommodation: see para 1.11.

Structure and content of this Report

1.13 This Report is divided into eight chapters. Chapter 2 addresses the common law rules of tacit relocation and the difficulties they cause. It recommends that these rules be set out in a statutory code with appropriate reforms to them and using modern terminology. Chapter 3 looks at notices to quit and of intention to quit, and recommends that the code establish modern rules to govern their form and content, the manner in which they may be communicated and the persons to whom they must be given. Chapter 4 considers miscellaneous rules relating to the termination of leases generally, and makes further recommendations intended to clarify the law and make it more straightforward to apply. It also includes proposals for the transition to the statutory code. Chapter 5 analyses responses to the Discussion Paper in relation to the law of irritancy. It proposes that pre-irritancy warning notices be made capable of delivery by sheriff officer, and makes further recommendations to protect the interests of lenders relying on a lease as a heritable security. Chapter 6 deals with the apportionment of rent paid in advance, and recommends the introduction of an implied term obliging a landlord to repay overpaid rent covering periods after the ending of a lease. Chapter 7 addresses the responses received in relation to the possible repeal of the Tenancy of Shops (Scotland) Act 1949. Finally, Chapter 8, which addresses all types of lease (including those residential, agricultural and crofting leases which are otherwise excluded from this Report), sets out the contrasting views which we have obtained on the law on *confusio*, considers the difficulties with the present law, and highlights possible options for future reform. For the reasons explained in Chapters 7 and 8, we do not recommend any change at this stage to the current law in those areas.

1.14 There are two Appendices to this Report. Appendix A contains the draft Leases (Automatic Continuation etc.) (Scotland) Bill. Appendix B lists (a) those who responded to our Discussion Paper; (b) those who responded to our draft Bill consultation; and (c) the members of our Advisory Group.

Legislative competence and human rights

1.15 In terms of section 29 of the Scotland Act 1998, a provision is outside the legislative competence of the Scottish Parliament if, among other things, it relates to reserved matters (as defined in Schedule 5 of that Act) or if in certain circumstances it seeks to modify a law the subject matter of which is a reserved matter. The recommendations contained in this Report relate to rules of the Scots private law of property. The law of property is not a matter reserved for the United Kingdom Parliament in terms of Schedule 5 of the 1998 Act. Nor do our recommendations seek to modify legal rules the subject matter of which are reserved matters.

1.16 A further aspect of legislative competence in terms of section 29 is that an Act of the Scottish Parliament must be compatible with the European Convention on Human Rights, and must not modify European Union law that has continued to have effect after the ending of the transitional period following the United Kingdom's departure from the European Union. We take the view that the recommendations in this Report, if enacted, would be compatible with the requirements of the Convention, and would not modify retained EU law.

1.17 In all the circumstances, we are satisfied that our recommendations are within the legislative competence of the Scottish Parliament.

Business and Regulatory Impact Assessment (BRIA)

1.18 In line with Scottish Government requirements for proposed legislation,[25] we have prepared a business and regulatory impact assessment in relation to our recommendations. We asked consultees for information or data on the possible economic impact of our proposed reforms, and are grateful for their responses. The BRIA's principal conclusions are that:

- The existing law relating to the termination of those leases covered by the draft Bill is widely regarded as uncertain, inaccessible and outdated. In this respect, it is unfit for the realities of modern commercial practice, and lags behind that of many comparable jurisdictions.

- In addition to parties themselves, this affects a range of practitioners (including legal professionals, surveyors, letting agents, dispute resolvers, and commercial mortgage lenders) and, since commercial letting is integral to the commercial property sector, the Scottish economy as a whole.

- There is broad support amongst key stakeholders for reform and modernisation.

- The introduction of our draft Bill would, to a significant extent, remedy the principal deficiencies in the existing law, offering greater certainty, greater accessibility, and modernisation. Our proposed codification – bringing together in one place a clear set of rules, using modern terminology – would bring the law into line with contemporary practice, and render it substantially more user-friendly.

1.19 Whilst the introduction of our draft Bill would give rise to an initial period of adaptation for those directly affected, and some retraining costs for practitioners, these could be expected to be outweighed in the long run by reduced spending on professional advice and expensive litigation, as well as savings resulting from the greater flexibility afforded to parties in bringing their leases to an end.

Acknowledgements

1.20 We are grateful to all those who have responded to our consultations or who have otherwise assisted us. In particular, we are grateful to the members of our Advisory Group, whose names are listed in Appendix B. We also thank Jennifer Henderson (Keeper of the Registers of Scotland), Diane Machin (Deputy Principal Clerk of Session), and Elaine Lorimer (Chief Executive of Revenue Scotland), as well as their staff, for their assistance.

[25] See https://www.gov.scot/publications/bria-guidance/.

Chapter 2 Tacit relocation

Introduction

2.1 In this chapter, we consider the current law of tacit relocation as it applies to leases covered by this Report.[1] We look at the history and policy behind the current law. We identify a number of difficulties and uncertainties in that law and recommend its replacement with a statutory scheme which incorporates various reforms.

What is tacit relocation?

2.2 The meaning of "tacit relocation" is not readily understandable to modern eyes or ears. "Relocation", in ordinary language, suggests moving from one place to another. But in "tacit relocation" that is not what it means. The true meaning lies, partly, in the antiquated use of the word "location". Being derived from Latin (and Roman law) and in the present context, "location" means the letting out of land or buildings or the hiring out of any other thing.[2]

2.3 "Relocation" might therefore be thought to involve re-letting. Indeed, under Roman law, "relocation" involved the implied granting of a fresh lease (a new contract of "*locatio conductio*") at the end of a lease.[3] However here again all is not what it seems. After some doubt over the matter, Scots law has moved away from Roman law in this respect. It is now settled that, in the Scots law of leases, "relocation" is the continuation (or prolongation) of an existing lease, and not re-letting or renewal of a lease.[4]

2.4 In contrast to "relocation", the adjective "tacit" is more readily understandable as "silent". However, here too there is a speciality. Complete silence of the parties is not necessary for a lease to be continued beyond its termination date. Rather, the silence must exist in certain specific respects and occur in one of two time frames.

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[1] The leases covered by this Report are identified at paras 1.10 and 1.11.
[2] Literally it means the "placing out" of a thing (whether immoveable or moveable) for hire. In Latin (and in Roman law) this was expressed as "*locatio conductio*". As Stair put it in the 17th century, "location" involves land or any other thing being set by one person (the "locator") to another (the "conductor") for the enjoyment of its fruit or profit (Stair, 1.15.1 and 2.9.1).
[3] J A C Thomas, *Textbook of Roman Law* (1976), p 295. The implied granting of a fresh lease remains the case for tacit relocation under the law of South Africa (G Glover, *Kerr's Law of Sale and Lease* (4th edn, 2014), pp 370 and 572 and other jurisdictions such as France (Code Civil, Art 1738) and Canadian Quebec (Civil Code, Arts 1878 and 1879). However, in France, if a lease is governed by the Code de Commerce it is prolonged rather than re-granted (Code de commerce, Arts L145-9 and L145-10).
[4] *Cowe v Millar* 21 December 1921, only reported in I Connell, *Agricultural Holdings (Scotland) Acts* (2nd edn, 1923), Appendix iv p 346, 358 (Lord President Clyde); *Douglas v Cassillis & Culzean Estates* 1944 SC 355, 361 (Lord Justice-Clerk Cooper); S Halliday, "Tacit Relocation" 2001 Juridical Review, p 202; Rennie et al, p 145.

Tacit relocation on the basis of parties' conduct during period of lease

2.5 Silence occurs during the first time frame if:

- neither the landlord nor the tenant has given appropriate and timeous[5] notice of termination (in this Report, termed "notice to quit" when from a landlord and "notice of intention to quit" when from a tenant) prior to the termination date of the lease;[6] and

- the tenant does not give up possession to the landlord with the landlord's consent at the termination date.[7]

With such silence the lease relocates tacitly beyond the termination date.

Tacit relocation on basis of parties' conduct after expiry of lease

2.6 The second time frame begins immediately after the termination date of the lease. Silence can take place in this second time frame regardless of whether either party had given valid notice of termination prior to the termination date. Again the requirement of "silence" should not be taken literally. It occurs during this second time frame if the tenant remains in possession of the let property and the landlord fails to take steps to remove the tenant within a reasonable period. In that situation, the "silence" of the landlord in the face of the tenant's continuing possession is seen as an acceptance of the relocation (continuation) of the lease by both parties with retrospective effect from immediately after the termination date.[8] However, a landlord's unreserved acceptance of rent relating to a period after the termination date,[9] or other conduct by them during this time frame which is incompatible with the lease having ended on that date, will also give rise to relocation with retrospective effect.[10]

Effect of tacit relocation

2.7 The effect of tacit relocation is that if the lease is for more than one year it continues for a further year and then from year to year until appropriate notice of termination is given or the tenant departs at the termination date with the landlord's consent.[11] If the lease is for less than one year, it continues for its original period and so on successively until appropriate notice is given[12] or agreed departure takes place. These default periods of continuation may be modified by a term of the lease (providing, for example, that the parties agree that if the lease is not terminated at the expiry of its original term it will continue on a month-to-month basis).

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[5] The default period of notice is 40 clear days before the date on which the lease ends.

[6] The time at which a lease expires is known as the "ish". In this Report, we use the plain English "termination date" instead.

[7] Bankton, *An Institute of the Laws of Scotland* (1752), 2.9.32 to 2.9.36; Erskine, 2.6.35; and *Dundee City Council v Dundee Valuation Appeal Committee* 2012 SC 463.

[8] Erskine, 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.

[9] *Milner's Curator Bonis v Mason* 1965 SLT (Sh Ct) 56.

[10] Erskine, 2.6.35; *Milner's Curator Bonis v Mason* 1965 SLT (Sh Ct) 56.

[11] Stair, 2.9.23; Bell's Principles, § 1265.

[12] Rankine, p 602; *Hamilton District Council v Maguire* 1983 SLT (Sh Ct) 76.

During the periods of continuation, the terms of the lease (except for duration) continue to apply, except for terms which are inconsistent with the period of continuation.[13]

Contracting out of tacit relocation?

2.8 If in a lease the parties disapply tacit relocation will the law give effect to their wishes? The present law is unclear.

The need for notice

2.9 In the sheriff court case of *McDougall v Guidi*,[14] it was decided that a term in a lease of urban property which stated that the lease "shall not be capable of renewal or continuation by tacit relocation" was sufficient to exclude continuation of a lease beyond its termination date even where neither landlord nor tenant had given timeous notice to quit or of intention to quit.[15] The court's approach accords with principle: if the theoretical justification for tacit relocation is that the parties' "silence" as to the termination of the lease gives rise to an inference of their consent to its continuation in the absence of such notice,[16] we see no reason why this inference should not be excluded by a clear term of the lease which shows a lack of such consent. Indeed, as long ago as in the 17th century, Stair indicated that parties can agree to a "summary removing" without notice which excludes tacit relocation if immediate steps are taken to remove the tenant after the termination date.[17] In line with Stair's understanding of the law many present-day leases still contain terms such as:

> "the tenants bind and oblige themselves and their foresaids[18] to flit and remove themselves, their servants, goods and gear of and from the premises at the expiry of the lease, and that without any previous warning or process of removing[19] to be used against them"; or
>
> "the tenants bind and oblige themselves at the termination date without any warning or process of removal to that effect to remove themselves and their sub-tenants and any other occupier from the property".

2.10 Such "no warning" clauses are of longstanding pedigree. Nevertheless, even by the 18th century, Erskine had cast doubt on their effectiveness.[20] In the same vein, leading textbooks of the 20th century such as Rankine[21] and Paton and Cameron[22] indicate that despite

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[13] *Commercial Union Assurance Co v Watt & Cumine* 1964 SC 84.
[14] 1992 SCLR 167. As a decision of the Sheriff Principal of Glasgow and Strathkelvin the case lacks the character of a binding precedent at least beyond Glasgow Sheriff Court.
[15] Notice to quit had been given by the landlord but it was not timeous.
[16] *Rockford Trilogy Ltd v NCR Ltd* [2021] CSIH 56; 2022 SC 90, para 11 (Second Division).
[17] Stair, 2.9.38 and 4.26.14.
[18] Typically the "foresaids" are the particular tenants' successors as tenants in the lease (eg assignees).
[19] If a lease has ended and a tenant has not moved out of the property a court process of removing (recovery of possession of heritable property) is always necessary: Stair, 2.1.22. To remove an ex-tenant without a court process would amount to the delict (civil wrong) of ejection (if force was used) or intrusion: Stair, 2.9.26 to 27; see also *The Laws of Scotland (Stair Memorial Encyclopaedia*) Vol 19 para 156.
[20] Erskine, 2.6.50.
[21] Rankine, p 556. Rankine's view, however, is based on views that Stair expressed in relation to the effect of a non-warning clause on a lease covered by the Act of 1555. That Act did not extend to non-rural leases, and Stair's views were never intended to apply to leases of non-agricultural premises, such as houses, shops, and workshops.
[22] Paton & Cameron, p 223.

a term in a lease excluding its necessity, valid notice to quit should be given in order to allow the landlord to commence court proceedings for the removal of the tenant immediately after the termination date and to avoid relocation. Modern texts, whilst in principle accepting the possibility of parties disapplying tacit relocation, including the need for a notice of termination, have kept away from making definitive assertions that this is the law.[23] One textbook expresses the view that while a term in a lease excluding tacit relocation is valid and enforceable, a term in the form of a "no warning" clause is invalid and ineffective.[24]

2.11 The consequence of all this uncertainty is that in practice notice to quit or of intention to quit is given and scrutinised when it might be totally unnecessary. A flaw in such notice can influence parties' negotiating positions over a fresh lease even though its giving is not required as a matter of strict law. Such a situation is clearly unsatisfactory.

Post-termination date retrospective relocation

2.12 Thus far we have considered parties contracting out of tacit relocation occurring through no valid notice having been given by either party prior to the termination date of the lease. However, as we have seen, relocation can also occur retrospectively as a result of parties' behaviour after the termination date.[25] This form of relocation protects the tenant from being treated as a squatter or intruder with consequent liability for violent profits.[26] Given the protection to the tenant that this aspect of tacit relocation offers, and that it relates to behaviour of a consensual nature of both parties after the termination date, it seems doubtful whether parties can contract out of it in advance in the lease itself. Again, however, the position is not clear.

History and policy

2.13 The principal policy behind tacit relocation appears to have been the desire to promote soil cultivation.[27] Agricultural leases under the Agricultural Holdings (Scotland) Act 1991 continue to be governed by tacit relocation,[28] but agricultural leases under the Agricultural Holdings (Scotland) Act 2003 have their own tailor-made provisions for their continuation

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[23] See for example the uncertainty expressed in *SME Reissue Landlord and Tenant*, para 389. Rennie et al observe that it is "difficult to see" why parties cannot agree to exclude tacit relocation (para 11-08). McAllister states that "in theory" it should be possible for parties to "agree something different" to tacit relocation (para 10.23).

[24] Gerber, para 19-04. The view is based on the sheriff court case *Cesari v Anderson* (1922) 38 Sh Ct Rep 137. However, that was a case involving the special summary warrant procedure created by s 37 of the Sheriff Courts (Scotland) Act 1907, rather than the ordinary common law action for removal. The 1907 Act is discussed in paras 3.10 to 3.26 of the DP.

[25] See para 2.6.

[26] Violent profits comprise all profit that the landlord could have made from the possession plus damages for any damage caused to the property during the period of unlawful occupation (*Gardner v Beresford's Trustees* (1876) 4 R 1091, 1092 (Lord President Inglis); *Nabb v Kirkby* 2008 SCLR 65, para 66 (Sheriff Principal Lockhart)). The rule of thumb is that violent profits are double the market rent if the tenant did not have probable cause to remain or the market rent while the tenant did have probable cause to remain (Erskine, 2.5.64; *Carnegy v Scott* (1830) 4 W & S 431 affirming *Brisbane's Trustees v Lead* (1828) 7 S 65).

[27] *MacDougall v Guidi* 1992 SCLR 167 (where the sheriff adopted the view in R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990), p 356); Thomas, *Textbook of Roman Law* (above), pp 295 to 296. Once a tenant was allowed to remain farming after the end of a lease it was undesirable to force the tenant to abandon the land, particularly when the landlord had security for their rent over the crops or animals.

[28] Agricultural Holdings (Scotland) Act 1991, s 3. The warning periods for the exclusion of tacit relocation in agricultural leases are substantially greater than those for other leases.

beyond the ish.[29] It is wholly understandable that leases relating to agricultural subjects should provide enhanced protection for tenants. Their livelihood depends on being able to work the land, typically on an annual cycle. This has been recognised since Roman times.

2.14 While agricultural or rural leases under Roman law continued for a further year to allow completion of the annual cycle, other (urban) leases simply renewed from day to day and were terminable on reasonable notice.[30] However, in the middle ages, when the Roman law principle of tacit relocation was introduced (in a modified form) into Scots law,[31] most leases were agricultural. Given the familiarity with agricultural leases, it appears to have been a short step for the common law to apply a principle designed for agricultural leases to non-agricultural ones. Thus Scots common law has not applied any distinction in periods of relocation: a non-agricultural lease for a period of one year or more is continued for a further year even if the tenant's business does not require it. The same periods applied (and continue to apply) to residential leases entered into before 30 November 2017, albeit that residential leases have additional requirements as to notices to quit.[32] However, since that date, private residential leases under the Private Housing (Tenancies) (Scotland) Act 2016 are for an indefinite period (having no termination date), and as a consequence tacit relocation does not apply.

2.15 Onto the Roman law concept of relocation based on post-termination date behaviour, Scots law came to apply a policy that, prior to the termination date, a tenant should be given some opportunity of finding alternative property on which they can work and live or from which they can trade. The common law gave effect to that policy by requiring the landlord to give a warning (or notice) to the tenant, the absence of which would lead to the continuation of the lease if the tenant did not leave at the end of the lease. The method of giving the warning depended on the location of the property. For non-agricultural leases, chalking on the door was a common method in many burghs.[33]

2.16 This policy of protecting the tenant was accompanied by a policy that a landlord should have a similar opportunity of obtaining a fresh tenant. Accordingly, the common law came to require a tenant to provide a similar warning to a landlord, albeit that it could be given in any informal manner.

2.17 Nevertheless, the common law did recognise that the policies underlying tacit relocation were inapplicable to some types of lease. Accordingly, tacit relocation does not apply to them.[34] Their common feature is that they are typically short-term leases where the parties would expect the tenant to require no warning before the end of the lease or where the continuation of the lease beyond its original duration would be impractical given the purpose

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[29] Agricultural Holdings (Scotland) Act 2003, ss 4(3), 8 and 8A to 8D, as inserted by the Land Reform (Scotland) Act 2016, s 87. Unfortunately the 2003 Act does not make clear the extent to which some aspects of the common law doctrine of tacit relocation are excluded. To the extent for example that the Act provides for periods of prolongation that differ from those of the doctrine, the doctrine is excluded. However, there are aspects of the doctrine – such as post-termination date relocation – that are not obviously excluded by the Act, and this has given rise to debate: see for example *J & S Wight Ltd v McGowan* 2017 SLCR 66, paras 62 to 64 (Land Court).

[30] R Hunter, *A Treatise on the Law of Landlord and Tenant* (3rd edn, 1860), p 507; Thomas, *Textbook of Roman Law* (above), pp 295 to 296.

[31] The Roman law principle applied to post-termination date behaviour only. It also involved the re-granting (renewal) of a fresh lease and not a continuation of the existing one.

[32] Rent (Scotland) Act 1984, s 112.

[33] *Robb v Menzies* (1859) 21 D 277.

[34] Rankine, pp 599 to 600; Rennie et al, para 11-07; and see DP, paras 2.9 and 2.10.

of the lease. Examples of the former are holiday lets and lets of student accommodation, while examples of the latter are fishing or shooting lets for a season or for part of a season when the fishing or shooting is allowed.[35]

Comparative commentary

2.18 Our Discussion Paper contains a summary of how tacit relocation, or its equivalent, operates in South Africa, Germany, France, Australia, Canada and England and Wales.[36]

2.19 Each of these jurisdictions has a rule providing for the continuation or renewal of a lease where the tenant remains in possession after the termination date upon certain criteria being fulfilled.

2.20 French law provides for the continuation of commercial leases of a duration of nine years or more on the basis of neither landlord nor tenant having given notice to the other by at least six months prior to the termination date.[37] The law of England and Wales provides for continuation of certain leases beyond that date if the let property is occupied for the carrying on of a business and neither party has given appropriate notice to the other.[38] Otherwise, non-residential leases are renewed (rather than continued) in the same terms if the tenant is allowed to remain after the termination date.[39] With the exception of the two jurisdictions just referred to, none of the other legal systems which we surveyed provides for renewal or continuation of a lease merely on the basis of the parties' inactivity prior to the termination date. Each allows parties to contract out of tacit relocation.

2.21 The conclusion from our comparative survey is that Scots law is unusual in two regards: first, in having a rule of tacit relocation on the basis of parties' inaction prior to the original termination date of a lease; and, second, in making no provision for parties to disapply the rules of tacit relocation.

Terminology

2.22 The Scottish Law Commission's role is to recommend reforms to improve, simplify and update the law. A key part of this is to express our recommendations in plain English wherever possible. The law of leases is ancient – the real right of tenants under short leases[40] is still governed by the Leases Act 1449 – and much of the terminology surrounding that law is obscure. In this Report, we propose plain English alternatives to two key terms which might confuse or mislead the non-specialist reader.

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[35] Neither party would expect a continuation into another part of the open season when fishing or shooting might be let to another user and still less into the close season when the fishing or shooting would be a criminal offence.
[36] DP, paras 2.18 to 2.39.
[37] Code de commerce, Art L145-9. The continuation is for an indefinite period with the lease being terminable on at least six months' notice prior to the last day of March, June, September or December.
[38] Landlord and Tenant Act 1954, s 24.
[39] Code civil, Art 1738.
[40] These are leases for periods of up to 20 years.

"ish" v "termination date"

2.23 The end of the period of a lease is traditionally referred to as the lease's "ish".[41] The term is well understood by lawyers and surveyors whose practice includes advising on leases. Whether it is understood more widely is doubtful. In the draft Bill and throughout this Report we favour reference to the day upon which a lease expires by the plain English "termination date".[42]

"tacit relocation" v "automatic continuation"

2.24 As we have discussed,[43] "tacit relocation" is a doctrine characterised by antiquated terminology that even if understood literally does not convey an accurate understanding of its legal meaning. As Brodies commented in response to our Discussion Paper, clarification and simplification of the rules relating to tacit relocation and possibly its renaming in plain English would be welcomed. The clarification and simplification of the rules themselves will be dealt with later in this chapter and in Chapters 3 to 4. As a preliminary matter, we propose that the term "tacit relocation" should be retired in favour of a plain English term which better reflects the reality of the doctrine. We propose the expression "automatic continuation". The expression was used in the draft Bill that we consulted on. None of those responding to that consultation expressed any difficulty with our proposal.

Problems with tacit relocation

2.25 The automatic operation of tacit relocation can cause problems. Being part of Scots common law, its existence is usually not evident from the face of the lease. Nor is it evident from any legislation. Many tenants will be unaware that the law requires them to give notice some time before the termination date of their lease in order to prevent the landlord from tying them into that lease for a further period. A typical example of the sort of situation cited by consultees is:

> L leases property A for a period of five years to T at a rental of £20,000 per annum. The lease commences on 1 April 2010. In the last year of the lease T has noted that the business is becoming increasingly successful and would benefit from larger premises. T investigates larger premises and agrees to take lease from L2 of property B from 1 April 2015 at an annual rental of £25,000. On 31 March 2015 T goes to see L and attempts to hand back the keys of property A. L rejects the keys and advises T that, as T has not given 40 days' notice of intention to terminate the lease of property A, the lease of property A has been extended for another year by virtue of the doctrine of tacit relocation. L advises T that in addition to the rent of £20,000, T will also be liable for all the other obligations and outgoings relating to property A for another year. T consults a solicitor who confirms that, notwithstanding that the lease of property A makes no mention of 40 days' notice, L is indeed correct. So T is, unexpectedly, liable for both property A and property B for the period of one year.

2.26 Consultees have given us many such examples of businesses reading their lease, not realising the existence of tacit relocation and assuming that they can walk away from the

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[41] Literally it is the time fixed for the tenant's departure (issue) from the property.
[42] The draft Bill continues to mention the "ish" in s 24(1) and (2). This is in order to allow for the termination of a lease at a time on the termination date that is earlier than midnight of that date.
[43] Paras 2.2 to 2.6.

premises at the termination date without having to do anything other than hand back the keys on the last day. These businesses often commit themselves to a new lease of alternative premises without realising that, through their silence, they have already committed themselves to a further year of rent on their current premises. This is not appreciated until the landlord or their agent refuses to take the keys, saying that as there has been no notice the lease has been prolonged for another year.

2.27 However, it is not just the unadvised tenant, or even the badly advised tenant, that suffers from the opaque nature of tacit relocation. Consultees have also given us examples of solicitors south of the border being caught out by tacit relocation. This can occur when an English tenant, with a lease of a property in Scotland, goes firstly to its English solicitor to ask for advice on the lease. The English solicitor may look at the lease (which will generally contain words such as "at the termination date without any warning or process of removal to that effect the tenant must remove themselves and their sub-tenants and any other occupier from the property"), note there is no requirement for notice and consider that all is well. Subsequently, and possibly within the 40-day period for notice, the English solicitor may contact a Scottish solicitor, only to be told that they are too late to give notice of intention to quit.

2.28 Further, in the case of large property-owning organisations, substantial and costly resource requires to be employed in the management of leases generally, but particularly in the avoidance of tacit relocation through the giving of notices. Consultees advise us that if landlords had the ability to negotiate and enter into leases which terminate without notice at the end of the fixed term, there would be a saving in costs.

Benefits of tacit relocation

2.29 While recognising the problems that tacit relocation can cause, there are benefits. In some cases, it will suit both the landlord and the tenant to continue the lease for another year without the need to involve professional advisers with the resultant costs. Specific examples given to us include lower value leases of industrial units or telecommunications leases where the original duration of the lease is a fairly short period. Such leases may run on for a number of years based on tacit relocation, and both landlord and tenant are content with this situation.

2.30 It has also been commented that another benefit is that the sudden ending of a lease without any understanding of the consequences is avoided.[44] Furthermore, if tacit relocation operates then a landlord cannot simply allow the tenant to remain, possibly demand rent from them and then claim violent profits on the basis that the tenant has not removed. Tacit relocation also reduces the likelihood of commercial property being left vacant.

[44] Law Society of Scotland.

Options for reform

2.31 In our Discussion Paper, while we acknowledged that there are many possible options for reform of tacit relocation, we canvassed two specific ones.

Option 1: Disapplication of tacit relocation from commercial leases

2.32 The first option was to disapply tacit relocation from commercial leases where it occurs owing to the absence of appropriate notice prior to the termination date. We noted that the lack of widespread knowledge of tacit relocation might mean that, if it were retained, landlords would continue to issue leases which made no mention of the need to give notice to quit and tenants would continue to be surprised by leases continuing by default. We also noted that the disapplication of tacit relocation based on the absence of appropriate and timeous notice might simplify the law.

2.33 Of the 34 consultees who responded to this proposal, 12 were in favour of disapplying this basis for tacit relocation. These included the Senators of the College of Justice and the Faculty of Advocates, along with the Property Litigation Association. Also in favour of disapplication were CMS, DLA Piper, DWF, Anderson Strathern and the Scottish Property Federation, with Pinsent Masons declaring a majority of their commercial property solicitors, although not all, in favour of disapplication. The University of Glasgow were in favour of disapplying the need for notices to prevent tacit relocation.

2.34 The Faculty of Advocates gave three reasons for their view. First, prospective parties to a lease can be ignorant of the existence and consequences of tacit relocation. Secondly, tacit relocation gives rise to a number of consequential requirements, for example the necessity for notices to quit, which in turn can create complexity, uncertainty, expense and the risk of professional failure. Thirdly, in respect of commercial contractual arrangements, Scots law has always placed emphasis on parties' express contractual terms, and retention of tacit relocation might be seen as swimming against that tide.

2.35 The Senators of the College of Justice observed that not all commercial leases are drafted by solicitors and that parties might be unaware of the doctrine of tacit relocation. On this basis, they were persuaded that the benefits of disapplication of tacit relocation outweighed any disadvantages.

2.36 The Property Litigation Association said that Scots law should be based on contractual terms and tacit relocation (based on the absence of notices) seems to fly in the face of that. (A similar point was made by Craig Connal KC, who also supported option 1). The Property Litigation Association also echoed the comments of the Faculty of Advocates in relation to complexity, uncertainty and expense and mentioned the risks for parties who are not given legal advice.

2.37 The University of Glasgow's response suggested that the application of tacit relocation should be restricted to circumstances in which, by their actions, parties have indicated positively that they wish the lease to continue. On their view, any unilateral action by one party which demonstrates an intention to end the lease on the specified end date – for example, where the tenant moves out, or the landlord refuses rent – should prevent tacit relocation from arising.

2.38 However, the majority of consultees were not in favour of disapplying tacit relocation based on the absence of appropriate pre-termination notice. These included TSB, the Royal Institution of Chartered Surveyors and all responses from individual surveyors, the majority of large and medium-sized legal firms including Brodies, Burness Paull, Shepherd and Wedderburn, Dentons, MacRoberts, and Shoosmiths, and most of the academic contributors.

2.39 Some consultees suggested that tacit relocation owing to the absence of any notice can reduce costs. Shepherd and Wedderburn suggested that in a significant number of cases it suits both parties that the lease can roll over for a further year without the need to involve lawyers and incur costs in achieving that result. They gave the example of the many telecommunication leases which can be of fairly short original duration but which may be running on tacit relocation at any given point of time. As the rents in these leases are low, they felt that both landlords and tenants welcomed the operation of tacit relocation and the ability to keep costs down rather than having to engage professional advisers whenever a lease terminates. Dentons echoed this view, as did SOLAR and Urquharts.

2.40 TSB said that "[a]s a commercial organisation with a large retail property portfolio in Scotland, TSB values the flexibility which tacit relocation provides it in permitting 12 month extensions to commercial leases." Boots appeared to be in favour of retention of tacit relocation through the absence of notices, but thought that if the current system of tacit relocation is to continue to apply in some form there should be a mechanism to adjust the rent for the period of tacit relocation to the open market rent in place of the passing rent. Such a proposal, although of interest, is outwith the scope of this project.

2.41 Burness Paull stated that a complete disapplication of the need to give notice seemed extreme, as agents and valuers are accustomed to it, and that it is a valuable safety net around the point when a lease is coming to an end. Gillespie MacAndrew said that clients based south of the border preferred the certainty and simplicity of tacit relocation to the complexities of the Landlord and Tenant Act 1954 in England. Neil Wilson also referred to the many instances in his experience of tacit relocation operating as a valuable safety net where both landlord and tenant have overlooked the imminent occurrence of a lease end date.

2.42 Dr Craig Anderson of Robert Gordon University argued that the giving of notices promotes certainty and reduces the likelihood of commercial property being left vacant while a landlord, who has not had any indication until the termination date that the relationship is ending, finds a new tenant. In his view, the existence of tacit relocation triggered by the absence of any timeous notice reduces the likelihood of either party being caused difficulties through the sudden need to find a new tenant or new premises. The University of Aberdeen expressed the view that the Discussion Paper did not quite establish that there is a consistent body of opinion such as to favour the abolition of such an ancient and deep-rooted part of the Scots law of leases.

2.43 We then asked whether, if tacit relocation (owing to the absence of pre-termination notice) were disapplied, parties should have the power to agree that tacit relocation should apply, or in other words to "opt in" to tacit relocation based on the absence of such notices. Of the 32 responses to this question, fifteen were of the view that parties should have the right to opt in. Those in favour of such an opt in included a broad cross section of consultees including the Senators of the College of Justice, the Property Litigation Association and many solicitors and surveyors.

2.44 Most of the consultees who supported disapplying tacit relocation were in favour of allowing parties to opt in. One exception was the Faculty of Advocates, who argued that given that the jurisprudential basis for tacit relocation was presumed consent, it would be inappropriate for there to be a right to opt in to tacit relocation. In the Faculty's view, if parties wish to contract for an extended duration of their lease, they should do so by way of express terms within the lease or by formal variation of the lease. Another was the University of Glasgow who accepted that, in line with the principle of contractual autonomy, parties should be entitled to agree express provisions for tacit relocation-like consequences in the event that they do not act to terminate the lease at the ish, but noted that since tacit relocation should apply only where parties had not made such express provision it seemed illogical that they be given a right to opt in to tacit relocation as such. A number of those who answered no to option one also expressed support for an opt-in if, against their preference, tacit relocation in the absence of notices were disapplied.

2.45 We then addressed the remaining applicability of tacit relocation, should the reformed law disapply it on the basis of no notice having been given. We put forward the situation where, after the termination date, the parties acted as though the lease was continuing. We asked whether consultees wanted a statutory scheme to be put in place to regulate what would happen in this scenario.[45] Of the 32 responses to this question, 14 favoured setting up a statutory scheme of tacit relocation, while six were against. Twelve either thought this was not applicable as they preferred disapplication of tacit relocation in its entirety, or thought that the operation of the existing common law rules, perhaps with an altered period of continuation, should apply.

Option 2: Clarification of the right to contract out of tacit relocation

2.46 The second option in the Discussion Paper was that the law be clarified to make it clear that parties to a commercial lease have the right to contract out of tacit relocation. Our view was that if parties have to consider at the outset whether or not to contract out of tacit relocation, then there is a greater likelihood of them actively addressing what should happen at the end of the lease. For example, parties could specify their own terms for continuation in the event that notice was not given by a particular time prior to the end of the lease. If what should happen at the end of the lease was considered and dealt with in the lease itself, many difficulties concerning tacit relocation would disappear.

2.47 We asked whether parties to a commercial lease should have the right to contract out of tacit relocation (by which we meant tacit relocation owing to the absence of pre-termination notice).[46] Of the 34 consultees who responded to this question, a clear majority agreed that parties to a commercial lease should have such a right. Shoosmiths commented that although they were attracted to the potential clarity and consistency of disapplication of tacit relocation, they preferred the flexibility and lighter touch of allowing parties to choose to opt out and address the issue in the lease. Shepherd and Wedderburn also favoured allowing parties to address the issue at the start of the lease. Brodies supported the option to contract out and said that it should not be necessary to use a prescribed form of words to be effective, but that parties should have to make it expressly clear that they are contracting out to avoid this being done by stealth. They also wanted clarity that short-term rolling extensions would continue to

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[45] DP, para 2.50 (question 3).
[46] DP, para 2.52 (question 4).

be competent. Burness Paull wanted a requirement for such a contracting out to be contained in a clear statement on the face of the lease.

2.48 The Federation of Small Businesses commented that it would make sense to allow fixed term leases to be created and to allow for contracting out of the need for notices. Dentons suggested that any legislation should make it clear that in the case of existing leases the parties would be entitled to vary their lease in order to contract out.

2.49 Turning to the post-termination aspect of tacit relocation, we asked consultees whether if parties to a lease contract out of continuation through lack of notice, make no provision for what happens at the end of the lease, and then act as if the lease continues after the termination date, tacit relocation should apply as the default situation.[47]

2.50 A number of views were expressed in response to this question. Roughly two-thirds of respondents considered that tacit relocation should apply in some form where a lease made no provision for what should happen at the end of the lease and the parties acted as if the lease was continuing. The Senators of the College of Justice suggested that if contracting out is the preferred option, the contracting-out clause should address what is to happen if both parties wish the lease to continue. If the contracting-out clause did not cover this issue, and parties acted as if the lease was continuing after the termination date, the Senators saw no alternative to tacit relocation applying as the default situation, although in their view this would deprive the contracting-out clause of much of its purpose and effect. Brodies suggested that the situation described should not be allowed to arise, as contracting out should be effective only if provision was made in the lease for what is to happen at the end of the lease, such as, for example, that the tenant must remove without notice.

2.51 A minority of consultees were of the view that tacit relocation should not apply. Shepherd and Wedderburn recognised that this is a potentially problematic area, but observed that it seems illogical to have a situation where parties contract out of tacit relocation but can still be subject to it. They suggested that if parties have made a conscious decision that tacit relocation is not to apply, then the lease should set out clearly what is to happen at termination. Failing this, the lease should come to an end on the termination date and if the tenant does not leave, the landlord should have an absolute right to evict. The Faculty of Advocates commented that if parties expressly contract out of “tacit relocation” it is counter-intuitive for tacit relocation to apply in any respect. Indeed, they suggested that express contracting out would contradict any intention for the lease to be continued under any circumstances.

Abolishing tacit relocation: conclusion

The need for notice

2.52 Strong arguments have been made by those involved in the court process for abolishing tacit relocation on the basis of no appropriate and timeous pre-termination notice having been given. However, the majority of surveyors, solicitors and businesses favour the retention of a law which allows a lease to continue automatically in this scenario, though with clarification that parties may disapply that law from their lease. In other words, the law should be clear that parties can agree to exclude the need for notices to prevent a lease from

[47] DP, para 2.52 (question 5).

continuing automatically beyond its termination date. We are persuaded that this is the optimal route to follow. As observed by a number of consultees, the giving of notice can provide a valuable warning (or safety net) to both tenants and landlords of the consequences of failing to negotiate an extension or a new lease prior to the termination date. Tenants are given a clear warning to find alternative premises. Landlords are given a warning that they cannot rely on the tenant remaining. However, if parties wish to dispense with any such warning, they should be free to do so in their lease. Such contracting out could be effected in the original lease, but equally it could be achieved at any point during the lease through a variation of its terms.

Post-termination retrospective relocation

2.53 There was clear support for the retention of the post-termination aspect of tacit relocation,[48] namely that if after the termination date both landlord and tenant behave as if the lease is continuing, the lease should continue on its existing terms in so far as these are compatible with the period of continuation (as fixed by the general law or as varied by the parties' agreement). This aspect of tacit relocation goes to the historical roots of the doctrine.[49] It continues to be reflected in other comparable jurisdictions such as France, Germany, South Africa and Quebec. No reason was presented to us as to why an ex-tenant should be liable for violent profits as an unlawful occupier in the face of a failure by the landlord to take reasonable steps within a reasonable period of time to remove them, or where the landlord accepts rent.[50] With regard to parties contracting out of this aspect of tacit relocation, while there is an argument that parties should be allowed to decide that the lease cannot continue under any circumstances, the consequences of such contracting out must be kept in view. One effect would be that a tenant who remained in possession would be made liable to the landlord for violent profits even if the landlord was wholly inactive in seeking to have them removed over many months or even years. Thus a term which allowed such contracting out could, in effect, burden the tenant with a penal element in the lease, without the tenant having been made aware of it on the face of the lease and without any control by the court. That we find unattractive. A penalty provision should not be capable of introduction under the guise of a term excluding tacit relocation. In addition, it might seem odd if parties were allowed to agree in advance that any behaviour after the termination date, which to all intents and purposes might demonstrate their consent to a continuation of the lease, such as the acceptance of rent, were not to be regarded as such. In conclusion, we are persuaded that the law should continue to provide for a lease to be continued automatically in the event of the tenant remaining beyond the termination date and the landlord behaving inconsistently with the termination of the lease. Furthermore, our view is that parties should not be allowed to contract out of continuation on such a basis.

Contracting out: formalities required

2.54 It is important that all parties be clear that no warning to remove or of removal need be given – and therefore by implication that court proceedings can follow after the termination

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[48] As described at para 2.6.
[49] See paras 2.13 to 2.14.
[50] It is conceivable that the acceptance of rent could result in the creation of a fresh lease governed entirely by the common law. However, it is doubtful that this would correspond to the intention of either party.

date without warning. The need for clarity and transparency in the contracting-out process was highlighted by a number of consultees. We agree, and take the view that a requirement that the contracting out be in writing will encourage parties to give greater consideration to what is to happen at the end of a lease and to make suitable express provision for that matter. Accordingly, while leases of one year or less may be constituted informally,[51] any contracting out of tacit relocation should be in writing irrespective of the duration of the lease. Except for leases of one year or less, the writing required will be formal writing that complies with sections 2 or 9B of the Requirements of Writing (Scotland) Act 1995.[52]

Tacit relocation: automatic continuation and a new code

2.55 The object of these reforms is clarification of the law. In considering how these reforms might best be implemented, we have been struck by the obscurity of the doctrine of tacit relocation and the lack of clarity as to its proper scope and meaning. The rules of tacit relocation are contained within a number of mostly old, disparate and poorly accessible sources. That cannot be helpful for parties or their advisers. Amending such unwritten rules runs the risk that the reform is misunderstood, misapplied or simply does not achieve its objective. If anything, adding a significant statutory overlay to such rules would add to rather than diminish complexity. For that reason, we are of the view that clarification can only be achieved through the replacement of the common law of tacit relocation with a statutory code. That code will provide parties and their advisers with a comprehensive statement of the law incorporating both the unreformed parts of the common law of tacit relocation together with the reforms that we recommend.

2.56 An important aspect of the code should be the use of the modern expression "automatic continuation". We also propose that the statute should distinguish between continuation of a lease on the basis of parties' specific acts or omissions (a) before and on the ish;[53] and (b) after the ish.

2.57 In respect of the conduct before and on the termination date, the statute should provide for automatic continuation of the lease upon its expiry if valid notice to quit or of intention to quit has not been given and the tenant has not removed with the consent of the landlord, unless the parties have contracted out of such automatic continuation or the need to give notices. As explained above,[54] such contracting out should be in writing. The exercise of such a statutory power to contract out of automatic continuation will be to give "no warning" clauses in leases legal effect.[55]

2.58 In respect of parties' conduct after the termination date, the statute should reflect the existing common law.[56] That is that if the tenant does not vacate the let property at the expiry of the lease, and the landlord does not take reasonable steps to remove them or otherwise acts inconsistently with the lease having ended, the lease will continue automatically. Given

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[51] In other words, by word of mouth or unsigned written document: Requirements of Writing (Scotland) Act 1995, s 1(1).
[52] In other words, in a signed paper document or documents or an electronically authenticated electronic document.
[53] While it would be unusual, it is possible for a lease to terminate at a time on the termination date prior to midnight. Here we use the expression "ish" to indicate the precise time at which a lease terminates.
[54] Para 2.54.
[55] See para 2.9.
[56] See para 2.6.

the strength of consultees' support for this rule and for the reasons already discussed, parties should not be entitled to contract out of automatic continuation arising on the basis of their conduct after the termination date.

2.59 In the event of leases with multiple landlords, all landlords must fail to take steps to remove the tenant, or act inconsistently with the lease having ended, in order for the lease to continue automatically on the basis of conduct after the termination date. The action of one landlord will suffice to prevent such continuation. If there are multiple tenants, only those who do not remove are liable to have the lease continued in respect of them. In that event any rights and obligations under the lease that are inconsistent with the lease continuing solely against the remaining tenant or tenants will fall away.[57] This would leave the remaining tenant or tenants solely liable for the tenant's obligations after the termination date with no right of relief against the departed former co-tenants.

2.60 The statutory provisions for automatic continuation should not extend to leases to which tacit relocation does not currently apply. Student and holiday lets, or lets of fishing or shooting rights for a period of less than one year, would not be covered by automatic continuation in any circumstances.[58] Such tenants do not require notice to relocate a business. Moreover, it is reasonable for tenants under such leases to realise that their possession might be followed immediately by that of others of a similar nature and that the landlord might suffer actual loss through their remaining in possession. Automatic continuation would not extend to leases granted for the lifetime of the tenant as these cannot be inherited in any event.[59] Nor should automatic extension apply to leases granted only with the authority of the court (where the court can impose conditions).[60]

2.61 The present law recognises leases of short duration – presently meaning leases of up to 28 days[61]– as ending at their termination date without a requirement for notice. The new statutory code should not require notice to quit or of intention to quit for such leases. Indeed as we explain later in the Report we recommend that no notice should be required for all leases of less than 3 months.[62] However, it is possible that a tenant in such a lease might remain after its expiry with the apparent consent of the landlord. In such circumstances it would be inappropriate to have the tenant treated as a trespasser who is liable to violent profits,[63] particularly as the period of automatic continuation of their lease would be no longer than the original short duration of the lease. For that reason, we think that the code should allow a lease which terminates without notice to continue automatically until either the tenant leaves or the landlord takes steps to remove them.

[57] See para 2.72.
[58] Rennie et al, para 11-07; McAllister, para 10.21. However, leases of the land itself for shooting or fishing would be covered. Also excluded from tacit relocation (and automatic continuation) is the unusual case of a lease of land for use only for grazing or mowing for up to one year which is not covered by either the 1991 or 2003 Acts (*Macharg, Petr.* (1805) Mor. App. Removing 4).
[59] Rankine, pp 593 to 594.
[60] Rankine, p 599. Typically such leases are granted by a trustee in sequestration or heritable creditor in possession of the property let.
[61] The minimum period of notice is 28 days before the termination date: Removal Terms (Scotland) Act 1886, s 5.
[62] See para 3.68.
[63] See para 2.12.

2.62 The current common law also allows a lease to end on its termination date without notice where the tenant has issued the landlord with a formal letter of removal, separate from the lease, in which the tenant undertakes to leave on the termination date.[64] We are unaware of this procedure being used by tenants or relied on by landlords in modern day practice. It does not appear to have any particular utility. Prior to the termination date, either party can give timeous notice to bring the lease to an end on that date. Even if the time limit for notice has expired, the tenant can leave on the termination date with the acquiescence of the landlord and in that way end the lease on that date. A provision disapplying the letter of removal procedure was included in the draft Bill submitted for consultation. No-one responding to the Bill consultation sought retention of this outdated procedure.

2.63 The statutory provisions should ensure that, as under the current law,[65] cautionary obligations guaranteeing the performance by the tenant (or landlord) of their obligations under the lease do not extend to such performance during any period of automatic continuation unless the cautionary obligation (guarantee) so provides.

2.64 We therefore recommend that:

1. **There should be a statutory code (statement of the law) setting out the law by which a lease continues automatically beyond its termination date.**

(Draft Bill, sections 2 to 6 and 25)

2. **The code should apply to all leases (including sub-leases) except residential, agricultural, crofting, small landholding and allotment leases.**

(Draft Bill, sections 1 and 32)

3. **The code should disapply the common law rules of tacit relocation from the leases to which it applies.**

(Draft Bill, section 25)

4. **The code should exclude from the scope of automatic continuation all leases which are excluded from the equivalent common law rules of tacit relocation.**

(Draft Bill, section 2(1)(b) and (2) and schedule 1)

5. **The code should provide that the lease may include a term providing that it will not continue automatically beyond its termination date even if no notice has been given. This term should require to be constituted in writing, irrespective of the length of the lease, and should be permitted either at the time of entering into the lease or subsequently.**

(Draft Bill, sections 4 and 24)

[64] Rankine, pp 554 to 555. There is also a statutory letter of removal under s 34 of the 1907 Act which has the effect of a statutory decree of removal thereby allowing the landlord to arrange for sheriff officers to remove the tenant without any court proceedings. We recommend the disapplication of this section later in this chapter.
[65] Rankine, pp 414 and 602.

6. **The code should provide that automatic continuation occurring by virtue of conduct after the termination date shall not be subject to exclusion by agreement of the parties.**

(Draft Bill, section 23(1))

7. **The code should provide that where a lease continues automatically after its termination date, any cautionary obligation (guarantee) in relation to the performance of any obligation of the tenant or landlord under the lease during the period of such continuation shall not apply, except in so far as the cautionary obligation provides otherwise.**

(Draft Bill, section 22)

Tacit relocation: period of continuation

2.65 In our Discussion Paper we did not ask a specific question about altering the default period for which a lease continues by tacit relocation. However, during many helpful discussions with solicitors and surveyors at seminars during our consultation period, this possibility was discussed. This in turn resulted in some consultees expressing views on this in their responses to the Discussion Paper. We followed this up with further consultation with our Advisory Group. Views both from consultees and the Advisory Group were mixed. A substantial number of consultees reiterated the desire for contractual autonomy to achieve a period which fits with the specific circumstances of individual leases. However, this still leaves open the question of a default period where parties have not agreed a specific period.

2.66 A variety of views were expressed as to what the default period should be. Solicitors suggested periods ranging from three to twelve months. The University of Glasgow suggested that a two month period might be appropriate, while recognising that practitioners may be better placed to advise on an appropriate time period.

2.67 Given the absence of a clear consensus on adjusting the current one year default period of continuation we are not persuaded that there should be any change in that period for leases for over one year. Leases for one year or less should retain their current default period of continuation being that of their original duration.

2.68 As already noted,[66] parties are free at present to provide in a lease for it to continue for a period or periods of time which differ from the default periods for continuation at common law. An ability to modify the period should be allowed expressly in the new legislation. However, to allow an unrestricted ability to modify the period could result in parties agreeing continuations of one day, and the whole rationale of automatic continuation being undermined through the back door. We think that there should be limits to the parties' power to modify the period of continuation.

2.69 Commercial leases, typically of smaller premises, may contain a term continuing the lease on a month-to-month basis in the absence of appropriate notice before the termination date. We think that a period of four weeks is a reasonable minimum period of continuation

[66] Para 2.7.

which parties should be allowed to provide for without undermining the essence of automatic continuation. This will accommodate month-to-month continuations. Any agreed period which is less than four weeks should be legally ineffective.

2.70 It is not the practice for parties to agree periods of automatic continuation greater than the duration of the lease. Such a practice would leave the termination date as essentially a species of break date. If parties wish to have a lease continue for a period longer than the default period of continuation, it is more appropriate that this be expressed in the duration of the lease rather than as a variation of the default rule of continuation. Alternatively, the lease could provide for a party to have an option to extend it for a period extending beyond the termination date. For these reasons, parties should not be entitled to provide that the period of the lease following an automatic continuation be greater than the statutory default period of continuation.

2.71 We therefore recommend that:

8. The code should provide that, in a lease which is continued automatically beyond its termination date, the default period of continuation is:

(a) for leases of one year or more, one year;

(b) for leases of less than a year, a period equal to the period of the lease.

(Draft Bill, section 7)

9. The code should provide that parties to a lease may agree to reduce but not extend these default periods. The minimum to which these periods may be reduced should be 28 days (for leases granted for a period of more than 28 days) or 7 days (for leases granted for a period of 28 days or less).

(Draft Bill, section 7)

Tacit relocation: effect on other provisions of lease

2.72 It is settled law that during the period of relocation a lease continues on the same terms as before the termination date except to the extent that those terms are inconsistent with the lease continuing for the period of relocation.[67] So, for example, if a lease is automatically continued for a year, the rent during automatic continuation will be the same but a term which provided for a five-yearly rent review would cease to apply as inconsistent with the period of continuation. That rule should be reflected in the code. Given the great variety of contractual terms that can exist in a lease, we do not think it feasible to state the rule other than at the high level stated in the leading case of *Commercial Union Assurance Co v Watt & Cumine*.[68]

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[67] *Commercial Union Assurance Co v Watt & Cumine* 1964 SC 84 (a tenant's option to renew a 20 year lease was inconsistent with the yearly relocation of the lease beyond its contractual termination date – the option was held to have flown off upon relocation).
[68] 1964 SC 84.

Another example of the falling away of provisions inconsistent with the continuation will be where one of a number of tenants continues to possess after the termination date, the others remove, and the landlord takes no steps to remove the remaining tenant.[69]

2.73 Accordingly we recommend that:

10. The code should provide that during any period of automatic continuation the lease continues on the same terms as before the termination date, except to the extent that those terms are inconsistent with the lease continuing by virtue of automatic continuation.

(Draft Bill, section 7(4))

[69] See para 2.59.

Chapter 3 Notices to quit and of intention to quit

General

3.1 Under our proposals, in the event that parties contract out of the need for a notice (or warning) to quit or of intention to quit, the lease will terminate at its termination date.[1] A tenant who remains in possession after that date may be removed from the let property, if necessary by court process, and may be liable to the former landlord for violent profits in respect of their post-termination occupation.[2] In the event that parties do not contract out of the need for such notice this chapter will be relevant.

3.2 In this chapter we propose a statutory code for the notice (warning) that requires to be given in order to prevent a lease from continuing automatically beyond its termination date. This code is intended to replace the existing common law and any existing statutory provisions that relate to when such a warning has to be given and the form of such a warning. The code also includes non-exhaustive provisions on the methods by which the notice can be given and repeals or excludes the current statutory provisions on methods of giving notice under the leases covered by this Report.[3] One of the methods made available by the code involves the giving of notice to an electronic address if the would-be recipient has consented to this.

Notice: distinction between landlords and tenants

3.3 In the Discussion Paper,[4] we wondered whether it would be better to have the same rules for notices by landlords and by tenants. While consultees agreed with such a proposal, on reflection we consider that the obligatory form and content for tenants' notices should differ from and be less demanding than those by landlords to tenants. This is for a number of reasons.

3.4 First, the current common law requirements for notice from tenants to landlords are less stringent than those for notice to quit from landlords to tenants.[5] In contrast to the landlords' notice, compliance with local custom has never been required for a tenant's notice.[6] Under the current law[7] – which the parties can agree to disapply or modify – notice can be given by a tenant orally[8] or in writing.[9] It is sufficient that such notice is timeous and indicates

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[1] For some leases no warning is ever required: see para 2.17.
[2] If the landlord does not take reasonable steps to remove the tenant, the lease will continue without the tenant being liable to violent profits: see para 2.12.
[3] See paras 1.10 to 1.12.
[4] DP, para 4.5.
[5] *McIntyre v McDonald* (1831) 5 W & S 299, 302 (Lord Lyndhurst) and (1829) 8 S 237, 240 (Lord Glenlee).
[6] See Rankine, p 559.
[7] Erskine, 2.6.44.
[8] See for example *Gilchrist v Westren* (1890) 17 R 363.
[9] The writing can be informal (*Tod v Fraser* (1889) 17 D 226) or formal (as in a letter of removal under s 35 and rule 34.6(2) of the Ordinary Cause Rules in the first schedule to the 1907 Act).

that the tenant does not consent to remaining as such under the terms of the current lease beyond its termination date.[10]

3.5 Secondly, a landlord's notice has the objective, in addition to preventing tacit relocation, of laying the foundation for court proceedings for removal in the event that the tenant does not quit the property. The law relating to notices to quit has been described as an aspect of the law of removings.[11] As a consequence of this secondary role, typically the landlord's notice requires the tenant to remove. In contrast, a tenant's notice does not require the landlord to do anything. It simply indicates that the tenant is unwilling to remain beyond the termination date.

3.6 Thirdly, a landlord's notice has the potential consequence of terminating the tenant's business at the property. It is perhaps less likely that a tenant's notice would have such an effect on the landlord.[12] It is not irrelevant that the requirements for tenants' notices in the agricultural holdings legislation have been less demanding than those for landlords' notices.[13]

3.7 Fourthly, the landlord is more likely to have a retained agent or legal adviser during the period of the lease than the tenant. With an agent or legal adviser, the landlord is likely to be in a better position than the tenant to comply with the formalities of a notice. This is particularly so for small business tenants. Such tenants will be focussed on running their business at the property. They should not be prejudiced through an inadvertent failure to keep to a level of formality in the giving of notice which is designed for a legally advised landlord.

Notice: terminology

3.8 As we are recommending a new statutory code for automatic continuation, we have considered how the notice to prevent automatic continuation should be labelled. We were initially minded to use "notice to quit" both for a notice by the landlord and a notice by the tenant. However, as noted already, given that the purposes of the notices will differ, to designate both as "notice to quit" would be both literally inaccurate and potentially misleading, in that use of the same name might suggest that the same content and formalities were required. We also considered the all-embracing expression "notice of termination". However, that could equally mislead as to the necessary content and formality. Furthermore, as leases usually provide for a termination date, it might be thought by a lay party that to give notice of termination was superfluous. We propose, therefore, that the expression "notice to quit" should be used in respect of a landlord's notice to a tenant and the expression "notice of intention to quit" in respect of a tenant's notice to a landlord. These descriptions also have the benefit of

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[10] *Rockford Trilogy Ltd v NCR Ltd* [2021] CSIH 56; 2022 SC 90, para 13 (Second Division); *Signet Group plc v C & J Clark Retail Properties Ltd* 1996 SC 444, 448G (Extra Division, Lord Weir).

[11] *Stephen v Cawdor English Marriage Settlement Trust Trustees* [2007] CSIH 42; 2007 SC 679, para 31 (Lord Justice-Clerk Gill).

[12] Notice from the tenant will alert the landlord to impending liability for the costs, including business rates, of occupation (which the lease is likely to have transferred to the tenant) together with the loss of income from the tenant that is being used to pay creditors (such as a lender who assisted in the purchase of the property).There is the possibility of business rates relief of varying levels for a landlord in a property vacated on the termination date.

[13] Agricultural Holdings (Scotland) Act 1991, s 21 and Agricultural Holdings (Scotland) Act 2003, ss 8C (ish) and 8D (breaks).

having been used, without any criticism, in legislation covering agricultural leases.[14] Their use also preserves a unity of general concepts and expressions in the law of leases in general.

Notice: form of landlords' and tenants' notice

Notice to quit

3.9 Under the common law, notice to quit does not require to be in writing.[15] Only if it is intended that a special court procedure for removal under sections 34 to 37 or 38 of the 1907 Act is to be followed is a written notice to quit necessary.[16] That position was not altered by the Requirements of Writing (Scotland) Act 1995.[17] In response to the Discussion Paper[18] consultees were clear that notice to quit should be in writing. Such a requirement would minimise the scope for arguments over whether due notice had been given. One consultee opposed a requirement of writing suggesting that whilst best practice would involve writing, a clearly given unwritten notice should not be denied effect. However, in common with the overwhelming views expressed on the matter, and for the reduction of doubt and uncertainty for tenants in particular, we are of the view that for all leases where notice to quit is required, that notice should be in writing.[19] Given our recommendation that parties be allowed to contract out of giving notice altogether, prejudice in the rare case where a landlord has given clear and unequivocal oral notice is outweighed by the more general prejudice that would be caused through costly litigation or arbitration over doubtful cases of oral notice.

Notice of intention to quit

3.10 We turn to notice of intention to quit. Under the present law no writing is necessary for a tenant's notice unless the lease provides otherwise.[20] We consider that oral notice should continue to suffice for leases with a duration of one year or less. Such leases do not require to be in writing at all.[21] They can be for a few months and involve little more than an oral agreement and the payment of rent. To oblige a tenant of, say, a one or two-month lease to be subjected to automatic continuation of the lease in the absence of a written notice of intention to quit would be contrary to the tenant's expectation and productive of injustice. From the landlord's point of view, in a lease for up to one year they should be alert to the termination date and the possible need for a replacement tenant regardless of any notice from the tenant. If they need notice under such a lease to be in writing, that should be agreed expressly in the lease.

3.11 Leases of over one year will generally involve a longer-term investment by the landlord. It may be more difficult for such a landlord to obtain a tenant on equivalent commercial terms

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[14] 1991 Act, s 21(2).
[15] Rankine, pp 559 to 563.
[16] *Craighall Cast-Stone Company Ltd v Wood Brothers* 1931 SC 66.
[17] A notice to quit is not a "contract or unilateral obligation for the . . . variation or extinction of a real right in land" under section 1(2)(a)(i) of the 1995 Act. Nor (if the view is taken that a lease is covered by section 1(2)(b) of the 1995 Act) does notice make "extinct" a tenant's "real right in land". Rather, such a right is made extinct by the term (express or implied) of the lease that fixes its termination date. Accordingly, whether a lease falls within section 1(2)(a)(i) or section 1(2)(b) of the 1995 Act, writing is not required under the 1995 Act. This reasoning applies equally to a tenant's notice of intention to quit.
[18] DP, para 4.4 (question 7).
[19] The writing can be in more than one document provided that they are intended to be read together: *Barns-Graham v Lamont* 1971 SC 170 (notice document read together with covering letter sent at the same time).
[20] *Gilchrist v Westren* (1890) 17 R 363.
[21] Requirements of Writing (Scotland) Act 1995, s 1(7).

and standing as the current tenant under the current lease. It is therefore appropriate that just as such leases require to be in writing, so tenants' notice of intention to quit under them should be in writing also.

3.12 Accordingly we recommend that:

11. Notice to quit should be given only in writing. Notice of intention to quit in leases for more than one year in duration should be given only in writing. In leases for up to one year notice of intention to quit may be given in writing or orally.

(Draft Bill, sections 8(1) and 10(1))

12. Notice that does not comply with a requirement to be given in writing should be ineffective in preventing automatic continuation of the lease at its termination date.

(Draft Bill, section 3(1)(a) and (b) and (2))

Notices: statutory form or list of essential requirements

3.13 We asked consultees whether they would wish to see a prescribed statutory form of notice, whether by a landlord or tenant, or whether they would prefer that the legislation set out the essential requirements of a notice, thus giving the drafter of the notice some flexibility.[22] Of the 34 responses to these questions, 27 were against a legally obligatory form while 31 responses wanted to see legislation specify the essential requirements. Some consultees drew a distinction between a prescribed statutory style, the use of which is obligatory, and a statutory model style which could be adapted according to circumstances.

3.14 Five consultees did think a prescribed statutory form would be helpful in order to avoid legal disputes. Of the 27 against a prescribed statutory form, the Law Society of Scotland, SOLAR and Shoosmiths pointed out that a prescribed statutory form was unlikely to be able to cover all possible situations. Lionel Most thought that a prescribed form could be too prescriptive and lead to unnecessary litigation on technical grounds.

3.15 On the other hand, there was support for a statutory model, or non-obligatory style. The Law Society of Scotland thought that a model style of notice would assist in minimising errors and failures of notices for minor errors. They thought that it might assist landlords and tenants who do not wish to obtain legal advice. CMS and the Scottish Property Federation thought that the legislation should specify essential requirements, but that the inclusion of an example would be helpful. Shepherd and Wedderburn stated that it would be useful to have examples of what notices would look like, perhaps with delegated authority for an appropriate body to update the style without the need for further legislation. Professor Gretton was of the view that a statutory style which was effective but not compulsory could form a "safe harbour" which might be of particular use where a landlord or tenant was acting without legal advice or where a small firm was involved. The University of Glasgow suggested that practitioners would

[22] DP, para 4.7 (questions 9 and 10).

develop their own standardised form, perhaps through the PSG, without the need for it to be embedded in legislation.

3.16 The Property Litigation Association said that a prescribed form or a list of essential requirements would be helpful, together with an "or substantially equivalent" proviso to ensure that minor discrepancies between the notice and the prescribed form or list did not invalidate the notice. They went on to say that trivial errors of a kind which would not confuse the reasonable recipient should not invalidate a notice.

3.17 We are conscious of the disputes that arise if some aspect of a compulsory statutory style is not adhered to.[23] In light of this and the submissions made to us we are persuaded that there should not be a prescribed statutory form of notice to quit.

3.18 We have considered carefully the views in favour of a non-compulsory statutory style. While we appreciate the practice-based reasoning behind those views, we are not in favour of that approach. This is for a number of reasons. Firstly, the presence of a non-compulsory style within the statute might mislead users into thinking that it was required as a matter of law. Secondly, even if it was recognised that the style was not compulsory, through being included in the statute it might have influence in questions over whether the essential requirements for a notice were or were not satisfied. That influence could result in a gloss being placed onto the wording of the essential requirements and lead users to an interpretation of the requirements that was unwarrantably restrictive. Thirdly, we propose special rules in relation to the invalidation of notices through error or insufficient description. A statutory style might interfere with the proper application of those rules. Fourthly, styles should be capable of being updated readily in response to court decisions. This is best done by frequent users themselves or bodies of professionals, such as the PSG, rather than by legislators. Finally, in relation to notice of intention to quit, we envisage notice being given orally for leases of up to one year. A statutory style would be quite inappropriate in relation to that.

3.19 For these reasons, there should be a short statutory list of essential requirements for notice to quit and notice of intention to quit. These should be few in number. However, non-compliance with any essential requirement should invalidate a purported notice. We discuss provisions providing a measure of relief from non-compliance later in this Report.

3.20 Meanwhile we recommend that:

13. The code should set out the essential elements which notice to quit and notice of intention to quit must contain, but should not set out a compulsory (or optional) form of wording.

(Draft Bill, sections 8(2) and 10(2) and (3))

14. Notice that does not contain each essential element should be ineffective in preventing automatic continuation.

(Draft Bill, section 3(1)(a) and (b) and (2))

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[23] As in *Scott v Livingstone* 1919 SC 1 where a notice to quit under the 1907 Act was held not to be "as nearly as may be" to the prescribed statutory form.

Notice to quit: content

3.21 We asked consultees what they considered should be the essential requirements to be contained in a notice to quit. In the Discussion Paper, we suggested the following essential requirements:[24]

1. the name and address of the party giving the notice;
2. a description of the leased property;
3. the date upon which the tenancy comes to an end; and
4. wording to the effect that the party serving the notice intends to bring the commercial lease to an end.

We also asked whether consultees thought it essential to refer to the lease, or if there was any other content which they thought essential.

Name and postal address of landlord or agent notifying on their behalf

3.22 There was broad consensus among consultees that the notice should contain the name of the party by whom it is given. Most consultees thought that it should also include their postal address. Some consultees doubted whether the address of the landlord should be an essential requirement. It was pointed out that it may well be a solicitor giving the notice, and therefore the address of the landlord (as opposed to that of the solicitor) would not be necessary. In the Discussion Paper, we noted that inclusion of the address would be convenient for the tenant in case there was any challenge to the notice.[25] However, having the address as an essential requirement would mean that if a notice, valid in every other respect, happened, due to oversight or lack of knowledge of the statutory requirement, to lack the address, it would have to be treated as invalid. Under the current law, an address is required only in the event that the landlord wishes to have the option of using the special court procedures in the 1907 Act to remove the tenant.[26] In general, those procedures are not used by landlords,[27] and in this Report we recommend their disapplication.[28] Typically other notices relating to termination of a lease do not have the address of the giver as an essential requirement.[29] Notices to quit under tenancies created by the Agricultural Holdings (Scotland) Act 2003 do not have the address as an essential requirement.[30] Finally while practice in the giving of notices to quit by electronic means may vary at present time, we do expect that giving notices by such means will increase in the future. Having a postal address as an essential requirement for a notice given electronically might well be seen as increasingly anachronistic. In the light of all of these factors, the benefit in having the address as an essential requirement appears outweighed by the prejudice to the landlord through the absence of what might be

[24] DP, para 4.8.
[25] DP, para 4.8.
[26] DP, paras 3.21 to 3.26.
[27] The standard procedure is a summary cause for recovery of possession of heritable property under s 35(1) of the Sheriff Courts (Scotland) Act 1971 and rule 4.5 of the Summary Cause Rules.
[28] See paras 3.126 to 3.127.
[29] For example, pre-irritancy warning notices under s 4(4) of the 1985 Act or break notices in the style leases put forward by the PSG.
[30] These are the limited and short limited duration tenancy, the modern limited duration tenancy and the repairing tenancy.

seen as a technical formality restricted to notices to quit in commercial leases. Accordingly, while a well-drafted notice to quit should include some form of address for the landlord or their agent, we do not recommend the inclusion of the postal address of the landlord or the landlord's agent as an essential requirement for its validity.

3.23 We asked whether, if the notice is served by an agent, the notice should contain (a) the name and address of the agent; and (b) the name and address of the party on whose behalf the notice is served. Most consultees agreed with both of these requirements. Several consultees noted that if a notice was to be served by an agent it should be on behalf of a disclosed principal, albeit without a need for the principal's address. The Senators of the College of Justice, Dr Craig Anderson and the University of Aberdeen went further and noted that while disclosure of the principal in the notice is, and should be, best practice they would not regard such content as an essential requirement in that failure to include it would lead to invalidity of the notice. With regard to the name and address of the agent, it was pointed out by Shepherd and Wedderburn and Lindsays that if the notice is given by an agent, it will generally be on their letterhead, so that will take care of the requirement of name and address in relation to the agent.

3.24 While it may be best practice for an agent to include both the name and address of a disclosed principal, neither the current law of agency, nor arguably the current style notices under the 1907 Act,[31] require the principal's address. In relation to the provisions for notices under the agricultural holdings legislation, it has been held that a notice to quit[32] or of intention to quit[33] may be given on behalf of an undisclosed principal, with the principal being allowed to prove their authorisation of the notice by oral evidence. Furthermore, many notices are given by agents who are not legally qualified. Tenants may be well aware that they are receiving notices from agents. It is not evident that any failure to disclose the principal should be a ground for invalidity of the notice. For these reasons we are not persuaded that where a notice is given on behalf of a party by an agent, disclosure of the party's name or their address should be an essential requirement, the absence of which should invalidate the notice. Nevertheless, we do regard it as important for all parties to be clear as to the identity of the person who has given the notice, whether as landlord or on behalf of the landlord. In common with most consultees, we do not think that the inclusion of that person's name would be unduly burdensome as an essential requirement.

3.25 We therefore recommend that:

15. The code should provide that notice to quit must contain the name of:

(a) the landlord; or

(b) where notice is given by another person on behalf of the landlord, that person.

(Draft Bill, section 8(2)(c))

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[31] Sheriff Courts (Scotland) Act 1907, sch 1, rules 34.6 and 34.7 and forms H2 and H4; Act of Sederunt (Summary Cause Rules) 2002, sch 1, rule 30.6 and forms 3a and 3b; *Seggie v Haggart* 1926 SLT (Sh Ct) 104.
[32] *Walker v Hendry* 1925 SC 855 (co-landlord on behalf of undisclosed co-landlord in agricultural tenancy).
[33] *Graham v Stirling* 1922 SC 90 (co-tenant on behalf of undisclosed co-tenant in agricultural tenancy).

Description of let property

3.26 All consultees agreed that there should be a description of the leased property. Some noted that a conveyancing description should not be required, nor should the description need to be identical to the description of the property in the lease. We agree with both comments. Several consultees opined that a postal address should suffice. We agree that a postal address may well suffice. The description should be such that the property is identifiable. If a postal address is not available, or is for any reason insufficient (perhaps because the subjects form an undeveloped plot of land), then the party giving the notice should be required to give a recognisable description of the leased property. It may in some circumstances be appropriate to attach a plan. If the notice contains a description of the lease then, in most cases, it will be acceptable to refer to the property as described in the lease. If there is more than one lease which is between the same parties and dated and registered on the same date, then clearly it will be necessary to distinguish the properties by differing descriptions.[34] One consultee stated that the notice should contain the title number if it is registered in the Land Register. While we agree that this is undoubtedly good practice, we are not persuaded that it should be essential. Another consultee asked that we make it clear that the description of the leased property does not require to refer to pertinents.

3.27 It seems to us that it should be kept in mind that notices to quit should be capable of being drafted by a party who is not a solicitor. Extensive conveyancing descriptions are unnecessary. It should also be unnecessary for the recipient to be troubled in having to resort to documents other than the notice or the lease to enable them to identify the property in question. The test should be that the description in the notice is sufficient if it would leave a reasonable person in receipt of the notice, whose knowledge includes that of the tenant, able to identify the property from which they are being required to remove.

3.28 We therefore recommend that:

16. The code should provide that a notice to quit must contain a description of the let property (whether directly or simply by reference to the lease itself) sufficient to enable a reasonable recipient, whose knowledge includes that of the tenant, to identify the property from which the tenant is required to remove.

(Draft Bill, section 8(2)(d) and (4))

End date and intention to terminate

3.29 All consultees agreed that the notice to quit should contain the date upon which the lease comes to an end. Some wanted there to be some latitude in respect of this date in case there was any confusion about days to be included in a calculation.[35] Some suggested that as long as the lease was described in the notice, then one could refer to the lease coming to an end in accordance with a date specified in, or capable of being calculated with reference

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[34] By way of an example, a landlord and tenant may have entered into a lease of each floor of a six storey building by way of six individual leases, one for each floor. They may all be dated on the same day. In due course one party may wish to terminate the leases of floors one, three and five. In this case the notices to quit will clearly require to refer to the floor concerned as well as a description of the lease.

[35] For example, Urquharts suggested a deemed addition of the words “or thereby” to any date specified.

to, the lease. Others considered that a specific termination date is essential so that the recipient has certainty. We agree with this view. It provides specific information to the tenant upon which the tenant should be entitled to rely without having to consult another document. In our view, a notice to quit should be required to state the termination date of the lease to which it relates.

3.30 All consultees agreed that the notice should contain wording to the effect that the party giving the notice intends to bring the lease to an end. However, some consultees expressed concern that the wording should be clear in indicating that the lease will end rather than merely that the landlord "intends" to end the lease. We acknowledge these concerns. It is important that statements of mere "intent to terminate" are avoided, particularly given that the lease already has a termination date. From the point of view of the tenant, the best way of being told that the lease is ending is to be informed that they must leave the property on the termination date. The requirement to leave should be unconditional.[36] This prevents any misunderstanding as to the landlord's position. It also provides a basis for the raising of any court proceedings for the removal of the tenant should that be necessary. Lastly, the requirement that a notice require the tenant to leave is in line with the history of the law in this area[37] and existing styles of notice.[38] However, a notice that requires removal from only part of the leased property should continue to be invalid.[39]

Additional information

3.31 Some consultees suggested that it should be made clear that a notice to quit may contain further information, and that such further information does not invalidate the notice. For example, a tenant may wish to give a forwarding address, or a landlord may wish to attach a schedule of dilapidations. In our view, so long as the notice contains the essential requirements set out above, there is nothing to prevent the party serving the notice from including extra information. The inclusion of such additional information will not invalidate the notice.[40] We do not consider it necessary to include any statement to this effect in the Bill.

Reference to lease

3.32 In Discussion Paper, we noted the suggestion that a notice should identify the lease which is being terminated.[41] We also observed that leases may be lost, and some may never have been reduced to writing in the first place. In response to our question on whether a reference to the lease should be an essential requirement for a notice to quit, it was noted by

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[36] As it must be at common law: *Murray v Grieve* (1920) 36 Sh Ct Rep 126.
[37] See for example *Patten v Morrison* 1919 SLT (Sh Ct) 193; *George M Brown Ltd v Collier* 1954 SLT (Sh Ct) 98.
[38] Sheriff Courts (Scotland) Act 1907, first sch, rule 34.7 and form H4; Act of Sederunt (Summary Cause Rules) 2002, rule 30.6 and form 3b.
[39] *Gates v Blair* 1922 SC 430, 433 (Lord President Clyde). A notice to quit Units 3 and 4 when the lease was of Units 1, 3, and 4 should continue to be invalid under the code: cf *Tyco Fire and Integrated Solutions (UK) Ltd v Regent Quay Development Co Ltd* [2016] CSIH 73; 2016 Hous LR 118. In *Tyco* the essential requirements of the break notice were satisfied despite its inadequate description of the let property.
[40] Additional information in this context does not include statements that cast doubt on the genuineness of the notice. For example, a statement in a notice that "this notice is not to be taken seriously" is likely to make it invalid. See also *French v Elliot* [1960] 1 WLR 40, 50 (Paull J) (unnecessary and allegedly erroneous reason for notice irrelevant to its validity) and *Mannai Investment Co Ltd v Eagle Star Life Assurance Ltd* [1997] AC 749 (notice not invalidated by erroneous statement of unnecessary termination date).
[41] DP, para 4.8; form H2 in the Ordinary Cause Rules requires the notice of removal to describe the lease.

a number of consultees that best practice is to refer to the lease if it is available. The majority of consultees expressed the view that reference to the lease should not be essential in a notice to quit. We take the view that the lease should be identifiable by the tenant from the description in the notice of the property let. There may also be difficulties for the landlord in identifying the lease if it is purely an oral agreement or has arisen through implication.[42] The notice should not be at risk of invalidity owing to the lease not being adequately described. We agree with the majority of consultees on this matter.

Identification of tenant

3.33 Other than the Law Society of Scotland and SOLAR, consultees did not consider that the name of the tenant should be an essential requirement.[43] What is important is that notice is given to the tenant (or their duly authorised agent) whether or not the tenant is named in the written document.[44] We do not consider that there should be a requirement for the notice to be addressed to the tenant by name. A notice addressed simply "Dear tenant" should suffice,[45] provided it is received by the tenant by the last day for giving notice under the lease. As a practical matter, this will commonly involve the notice being sent in an envelope addressed to the tenant by name. Where there is an error in the name of the tenant to whom the notice is addressed, this should not invalidate the notice unless a reasonable recipient of the notice would, in the circumstances, be unaware that it was intended to be given to the tenant.[46]

3.34 We therefore recommend that:

17. The code should provide that notice to quit:

(a) must state (in whatever terms) that the tenant is required to give up possession of the let property on the termination date of the lease;

(b) must specify the termination date of the lease;

(c) need not specify the name or address of the tenant.

(Draft Bill, sections 8(2)(a) and (b) and 12)

[42] As in *Glen v Roy* (1882) 10 R 239.

[43] CMS and the Scottish Property Federation expressed the view that the landlord should require to be named in a tenant's notice of intention to quit.

[44] It should not be material whether the notice is "given to" the tenant directly or indirectly so long as it reaches the tenant. We are conscious that there is authority that for notice to be "given to" an intended recipient by post it must in some way, whether on its face, on the envelope containing it or in a recorded delivery evidence of sending, identify the intended recipient: *Ben Cleuch Estates Ltd v Scottish Enterprise* [2008] CSIH 1; 2008 SC 252, para 61 (Extra Division); *Batt Cables Plc v Spencer Business Parks Ltd* [2010] CSOH 81; 2010 SLT 860, para 32 (Lord Hodge). We think that this confuses the process of "giving" notice with the separate question of what information has to be notified. Giving notice involves the provision of information. If the information reaches the tenant, whether directly or indirectly that should be seen as the giving of notice for the purposes of the code as in *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67; [2019] 1 WLR 104.

[45] As is the case under the law of England and Wales: *Doe ex dem Matthewson v Wrightman* (1801) 4 Esp. 5.

[46] Avoiding the result in *West Dunbartonshire Council v William Thompson and Son (Dumbarton) Ltd* [2015] CSIH 93; 2016 SLT 125 . This is similar to the rule on interpretation of unilateral juridical acts in article II-8:201 of the Principles, Definitions and Model Rules of European Private Law's Draft Common Frame of Reference.

Notice of intention to quit: content

3.35 Under the present law, a notice of intention to quit does not require to communicate more than that the tenant intends to quit or depart from the let subjects at the expiry of the lease or does not consent to the lease continuing on its existing terms beyond its expiry.[47] That has been described as a moderate standard.[48]

3.36 We have discussed how a tenant's notice of intention to quit differs from a landlord's notice to quit.[49] These differences indicate that there should be more essential requirements for a landlord's notice than that from a tenant. We have taken account of this in our recommendations of essential requirements for the notice from a tenant that is necessary to prevent automatic continuation of the lease beyond its termination date.

Requirement of writing

3.37 As already noted, in our view tenants under leases of up to one year should be allowed to continue to give notices to quit orally or through informal writings.[50] Written notice of intention to quit should be required only in relation to leases granted for a period longer than one year.

Name and postal address of tenant or agent notifying on their behalf

3.38 We have discussed whether the name and address of the landlord or the agent giving the notice should be essential for notice to quit.[51] Our reasoning in relation to notices to quit applies equally to tenants' notices when they are given in writing.

Description of let property

3.39 A notice of intention to quit, whether given orally or in writing, should be required to include a sufficient description of the subjects of the lease. As in the case of a landlord's notice to quit, a description will be sufficient if a reasonable recipient of the notice whose knowledge included that of the landlord would be able to identify the subjects of the lease from that description.

End date and intention to depart

3.40 Given that the landlord is likely to be aware or should be aware of the termination date of the lease, we do not regard it as essential that the tenant's notice should state an intention to depart on a specific date. It should suffice that the tenant or their agent indicates[52] that the tenant intends to give up possession of the let property at the end of the lease. That should be enough for the landlord to be alert to the possibility of having to find a fresh tenant.

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[47] *Rockford Trilogy Ltd v NCR Ltd* [2021] CSIH 56; 2022 SC 90, para 13 (Second Division).
[48] *Graham v Stirling* 1922 SC 90, 105 (Lord President Clyde): and see *Gilchrist v Westren* (1890) 17 R 363.
[49] Paras 3.3 to 3.7.
[50] Para 3.10.
[51] Paras 3.22 to 3.24.
[52] It should not be necessary for the tenant to repeat the exact words of the statutory requirement, as long as their intention or lack thereof is expressed: *Barns-Graham v Lamont* 1971 SC 170.

3.41 It is appropriate at this point to address the decision of the Inner House in *Rockford Trilogy Ltd v NCR Ltd*[53] which was delivered after the publication of our Discussion Paper. In that case, the tenant had made a statement in an email in the course of ongoing negotiations about the possible renewal of the lease that "[T]he only way [the tenant] would consider remaining in the building is if the dilapidations are capped at £300k together with the nil rent proposed for 12 months'. The Inner House held that this wording was sufficient to exclude tacit relocation.[54].

3.42 In the draft Bill which formed the subject of our Bill consultation, we suggested a rule for the required content of a notice of intention to quit which went some way towards accommodating the decision in *Rockford* by allowing the tenant to state either that they intended to give up possession of the subjects of the lease on the termination date or that they did not intend to remain in possession on the existing terms and conditions. However, the core of the decision in *Rockford*, that all that need be communicated in order to avoid tacit relocation is a lack of consent to the continuation of the lease, regardless of the form of this communication, is inconsistent with the approach which we propose in this Report of prescribing a minimum level of formality which must be met in a notice of intention to quit.

3.43 Respondents to our Bill consultation expressed differing views upon our proposed approach. DLA were in favour of allowing increased flexibility and expressly wished to have our scheme allow notice of intention to quit to be given in the course of ongoing email correspondence as in *Rockford*. Aside from that view, all agreed that a greater degree of formality that that allowed in *Rockford* was appropriate. There was less consensus regarding our proposal that a statement by a tenant that they would not remain upon the existing terms and conditions could amount to notice of intention to quit. Burness Paul suggested that this could lead to confusion, since such a statement could be seen as an invitation to negotiate rather than as a clear statement of intention that the lease would not be continuing beyond the termination date. In his case commentary on the *Rockford* decision, Dr Craig Anderson remarked that it is easy to envisage a situation in which a party, in saying that they are not prepared to remain on the present terms, is merely expressing a negotiating position and is caught out by the other party taking them at their word.[55]

3.44 The purpose of a tenant's notice is to allow the landlord to make arrangements on the basis that the existing tenant will not remain beyond the termination date. Typically this involves the seeking out of a new tenant. For this reason, it is important that the notice be clear and unconditional. The tenant's statement in *Rockford* was made in the course of negotiations. It was made in conditional terms. Given that aspect, it might be thought understandable that the landlord did not view it as notice of intention to quit. The decision in *Rockford* can be seen as creating doubt over whether a landlord can take it that the tenant will be leaving at the termination date. We think it appropriate that our reform should remove this potential doubt by requiring that a notice of intention to quit state (in whatever terms) that the tenant intends to give up possession at the end of the lease. Accordingly, our draft Bill diverges

[53] [2021] CSIH 56; 2022 SC 90.
[54] [2021] CSIH 56; 2022 SC 90, para 13.
[55] Dr Craig Anderson, "*Rockford Trilogy Ltd v NCR Ltd* [2021] CSIH 56; 2022 S.L.T. 536" 2022 SLT (News) 111 at 112.

from the approach taken in *Rockford* by providing that the tenant's notice of intention to quit must be unconditional, as is presently the case with a landlord's notice to quit.

Identification of landlord

3.45 In their responses, CMS and the Scottish Property Federation indicated that a notice should require to identify the landlord who is to receive the tenant's notice of intention to quit. The Law Society of Scotland and SOLAR were of the same view. No other consultees supported this approach. In our view, the reasoning in relation to this issue in respect of notice to quit[56] applies with even greater force to notice given by a tenant. Indeed given that tenants are more likely to be giving notice without the benefit of representation and dealing with landlords' agents rather than landlords themselves, the risk of an error in identification unprejudicial to the landlord but fatal to the validity of the notice would be greater. We are not persuaded that having the name or address of the landlord in a notice of intention to quit should be an essential requirement for its validity. It should suffice that the notice be received by the landlord even if they are not named. If the landlord is named, the notice should not be rendered invalid by an error in the landlord's name unless a reasonable recipient of the notice would, in the circumstances, be unaware that it was intended to be given to the landlord.[57]

3.46 We therefore recommend that:

18. The code should provide that a notice of intention to quit:

(a) must state (in whatever terms) that the tenant intends to give up possession of that property at the end of the lease;

(b) must identify the let property (whether directly or by reference to the lease itself) sufficiently to allow a reasonable person whose knowledge includes that of the landlord to identify the property from which the tenant intends to remove;

(c) need not specify the termination date of the lease;

(d) need not specify the name or address of the landlord.

(Draft Bill, sections 10(2) and (5) and 12)

19. The code should provide that notice of intention to quit, if given in writing, must contain the name of:

(a) the tenant; or

(b) where the notice is given by another person on behalf of the tenant, that person.

(Draft Bill, section 10(3))

[56] Para 3.33.
[57] Cf the equivalent proposal for notices to quit in para 3.33.

Erroneous or loose wording in notice

3.47 A number of consultees made the point that notices need to be clear and obvious in their terms and intention. Others emphasised the need for a balanced approach, whereby the content of a notice gives the recipient fair notice of the necessary information, but an error in detail which does not impact on that fair notice should not make the notice invalid. It was represented to us that the current "mini-industry" which has grown up around seeking to discredit the validity of notices should be discouraged. We agree with these points, particularly having regard to the fact that notices may often be drafted by parties who have had no legal training. Having said that, we are realistic. It is inevitable that whenever it is in a party's interests to challenge the validity of a notice, that party will seek to do so if there is a stateable argument that the notice has not complied with essential statutory requirements.

3.48 The fewer essential requirements that there are for a notice, the less risk there is of the notice being invalid. Unlike the position for residential leases,[58] or for many notices under English and Welsh statute law, the essential requirements which we propose do not include the use of a statutory form of wording that might not be complied with to the letter. However, it has been observed that the giving of notices between landlord and tenant is an area where it is desirable to have bright lines over the validity of a notice.[59] It is not unreasonable for invalidity to follow if the few essential statutory requirements that we recommend are not complied with.

3.49 Nevertheless, notices might contain errors to a greater or lesser extent. A notice to quit Unit 22 Glasburgh Industrial Estate may refer to Unit 21. The name of a party can be misstated or misspelled. Most notably, the termination date, which requires to be stated in a notice to quit, can be misstated. A landlord may mistakenly give notice to quit on 22 July when the termination date is 21 July or vice-versa. Alternatively, the year may be misstated as 2023 when the correct year is 2024.

Error in termination date

3.50 Errors in the termination date can be dealt with first. The current law differentiates between notices or warnings that give a date to quit erroneously ahead of the termination date and those that give an erroneous date shortly after the termination date. Those in the former category are seen as fundamentally invalid.[60] This is because they ask the tenant to leave the property at a time when the tenant is still entitled to be there under the lease. The law has been more lenient towards those in the latter category.[61] There is little prejudice to the tenant in being asked to leave later than the actual termination date provided that their possession beyond the termination date does not lead to liability for violent profits or to tacit relocation. If

[58] Cf notices to leave under s 62(1) of the Private Housing (Tenancies) (Scotland) Act 2016 which require to be in the form set out in sch 5 to the Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2017 (SSI 2017/297).

[59] In *Balgray Ltd v Hodgson* [2016] CSIH 55; 2016 SLT 839 (Extra Division), it was observed at para 33 that in this area of the law parties need to know their respective positions and thus need to be able readily to ascertain whether or not a notice has been given.

[60] *Earl of March v Dowie* (1754) Mor 13843; *Anderson v Scott* 1939 SLT (Sh Ct) 28; *James Grant & Company Ltd v Moran* 1948 SLT (Sh Ct) 8.

[61] *Campbell's Trs v O'Neill* 1911 SC 188, 198 (Lord President Dunedin); *Callander v Watherston* 1970 SLT (Land Court) 13; *Stephen v Cawdor English Marriage Settlement Trust Trustees* [2007] CSIH 42; 2007 SC 679, para 37 (Lord Justice-Clerk Gill).

anything, the prejudice is to the landlord in allowing a tenant to remain on the property beyond the termination date of the lease.

3.51 We think that this division is reasonable. A landlord should take care in not requiring the tenant to leave *early*.[62] The law should not permit a landlord to issue such a demand. In reaching this view, we are conscious of errors such as where on 20 October 2024 notice is given to the tenant to leave on 31 January 2024 (rather than 2025). However, we have not been able to identify a remedy that would allow relief from such an error but not from more plausible yet still erroneous dates, such as 21 January 2025 (rather than 31 January). On the other hand, notice to quit a few days *after* the correct termination date (perhaps on 1 February 2025 rather than 31 January for a lease for one year from 1 February 2024) causes no harm. It seems reasonable that it should be valid to exclude automatic continuation. Accordingly, we suggest some leeway for an erroneous date in the notice that post-dates the termination date. A date within the period of seven days beginning with the day after the termination date appears reasonable. A notice with a date more than seven days beyond the termination date could mislead the tenant into thinking that they are entitled to remain longer than the landlord could possibly intend. In our view, a notice to quit which requires the tenant to give up possession of the subjects on a date up to seven days after the termination date should not be invalid for that error. The termination date would remain unchanged.

3.52 Allowing notice which effectively invites a tenant to remain on the property for a period after the termination date but without automatic continuation invites legal consequences for both landlord and tenant in relation to whatever may occur in that period. Accordingly, there should be consequential provisions to clarify the legal position during that grey period. The rules that we have in mind provide the tenant with a right to remain during that period, together with certain immunities from legal liabilities that might otherwise arise. This is not unreasonable, as the tenant's continued possession can be put down to the erroneous date in the notice. The legal position consequent to this right can be expressed in both a negative and positive manner. Firstly, the tenant should not be liable to pay the landlord in respect of the tenant's possession in the excess period. Secondly, the landlord should continue to comply with their obligations under the lease and indemnify the tenant in respect of any obligation they, the landlord, would have owed to a third party in connection with the property during the excess period. We have in mind liabilities such as business rates, but there will be others such as common charges. The tenant's own obligations to the landlord under the lease will have ceased at the termination date. The tenant would continue to be liable under the law of delict in respect of any damage they might cause to the property. Such liability would continue to be insurable at the instance of either party. If, however, the lease ended on the termination date for some reason other than the notice to quit, the tenant's limited right to remain would not arise.

3.53 These rules should apply to sub-leases as they do to head leases but, given the fundamental principle that a sub-lease cannot extend beyond the termination date of the head lease,[63] the rights of the landlord must prevail in any conflict with a sub-tenant who remains

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[62] We suggest in chapter 4 a summary court procedure to allow the date of entry and thus the termination date to be established if for whatever reason it is unclear. Alternatively more than one notice may be given: *Stephen v Cawdor English Marriage Settlement Trust Trustees* [2007] CSIH 42; 2007 SC 679, para 37 (Lord Justice-Clerk Gill). If the landlord requires to commence removal proceedings they must choose which notice to found upon.
[63] See para 3.118.

on the property after the termination of the head lease. Accordingly, this exceptional legal regime cannot benefit a sub-tenant for any period beyond the termination date of the head lease.

Error in description of let property or obligatory name

3.54 Turning to errors in respect of names and descriptions which we regard as essential requirements for notice,[64] we consider that a different form of relief should apply. In responding to our Discussion Paper, Professor Gretton observed that notices to quit often give names in abbreviated form or simply get them garbled and suggested that possibly there should be a provision invoking a "reasonable recipient test".[65]

3.55 At common law, errors such as the spelling of the name of the let subjects, can be dealt with by use of the common law principle *falsa demonstratio non nocet*.[66] However, given the creation of a statutory code, and in the interests of clarity, it is appropriate that a statutory test for the disregarding of such errors be applicable in place of the common law approach.

3.56 It may also be that under the existing law inaccurate expressions in notices to quit might be capable of being rectified under section 8(1)(b) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 or under the common law[67] in order to make them give effect to the intention of the granter of the notice (though we are unaware of the point having been tested).[68] In our view, leaving errors to be rectified under section 8 is not appropriate. Firstly, the process requires a formal application to the court for the wording of the document to be rectified. Parties and their advisers would like to be able to form a view as soon as practicable after a notice is received. Secondly, whether rectification is or is not available depends to an extent on whether the effect of the rectification would be to materially prejudice the interests of a party who acted or refrained from acting reasonably in reliance on the words sought to be rectified.[69] With notices to quit or of intention to quit parties and their advisers will wish to have some notion as to the validity of the notice before taking any action or taking no action in reliance on the notice.

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[64] We are conscious that we are concerned here with the content of the notice and not the separate, and prior, question of whether it has been "given to" the intended recipient: see s 3(1) of the draft Bill. That was the question raised in cases such as *Ben Cleuch Estates Ltd v Scottish Enterprise* [2008] CSIH 1; 2008 SC 252; *Batt Cables Plc v Spencer Business Parks Ltd* [2010] CSOH 81; *West Dunbartonshire Council v William Thompson and Son (Dumbarton) Ltd* [2015] CSIH 93; 2016 SLT 125; and *Balgray Ltd v Hodgson* [2016] CSIH 55; 2016 SLT 839 and see also the English Supreme Court case *UKI (Kingsway) Ltd v Westminster City Council* [2018] UKSC 67; [2019] 1 WLR 104 where (contrary to *Ben Cleuch Estates, Batt Cables, and Balgray*) it was held that notice addressed to "Owner" could be given to the intended recipient via a third party that had not been authorised by the intended recipient to receive it (or by the giver to give it).

[65] Cf *Mannai Investment Company Ltd v Eagle Star Life Assurance Company Ltd* [1997] AC 749. *Mannai* was not concerned with errors in essential requirements of a notice but with errors in other non-essential statements in the document containing the notice.

[66] Literally "a false description does not injure"; that is, a mere incorrect description will not invalidate a document if the intended description is clear from the context in which the document was granted.

[67] *Hudson v St John* 1977 SC 255, where rectification was achieved through declarator of the meaning of and partial reduction of a unilateral trust deed.

[68] *Bank of Ireland v Bass Brewers Ltd,* Lord Macfadyen, Outer House, 1 June 2000, unreported at [22] (rectification of unilateral consent notified under contractual provision).

[69] 1985 Act, s 9(1) to (3). At common law, declarator of the correct meaning or effect of the document might be unobtainable if a third party would be prejudiced by it.

3.57 We have sought to devise a statutory provision that allows obvious or minor errors to be excused while not encouraging error-strewn or vague notices. This is not straightforward. Any provision that relies on wording such as "minor error" will simply add to the uncertainty. While some errors will be clearly "minor" others will not. Only the court's view on what is "minor" will be determinative, and obtaining that view can be a lengthy, costly and often unpredictable process.

3.58 We are conscious that any provision that allows errors to be excused involves at its root an interpretation of the wording in the notice. Notices to quit and of intention to quit are unilateral documents. Accordingly, it seems appropriate that the provision take inspiration from the common law rules in relation to the interpretation of unilateral documents that have legal effect. In that respect, as the Commission has observed before,[70] there is already a rule in Scots law that the words of an alleged promise should be interpreted objectively on the basis of what a reasonable recipient with the knowledge of the background would have understood by the document in question.[71] We think that this approach can provide the basis of a rule which may relieve the giver of a notice from errors in the notice that relate to the description of the property or the giver's name or address. We suggest a rule to the effect that an error in the information included to satisfy the essential requirements of name, address and description of the property let should be excused if a reasonable recipient in the position of the tenant would, in all the circumstances, know that the information was erroneous and what the correct information was.[72] We think that this strikes the balance between accuracy and excusability at the correct level. We included such a rule in the draft Bill contained in the Bill consultation. It was supported by consultees.

3.59 In response to the Bill consultation the Faculty of Advocates suggested clarification on whether the common law principle of *falsa demonstratio non nocet* should continue to apply for errors covered by the remedial rule that we propose. We are unaware of any cases of rectification of notices either by statutory means under section 8 the 1985 Act or by the common law processes of declarator and partial reduction. In these circumstances, and in the interests of clarity, we are of the view that rectification of any error in the information covered by the remedial rule should be excluded whether based on any common law rule or the 1985 Act.

Contractual modification of essential content

3.60 We intend the requirements for the content of both types of notice to be as unburdensome as possible, consistent with fulfilling their essential functions. However, given the few essential requirements involved and their importance, parties should not be allowed to contract out of or alter them. The situation with a tenant's notice of intention to quit differs in one respect. For leases of up to one year, it is not an essential requirement that notice be

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[70] Scottish Law Commission, Report on *Review of Contract Law: Formation, Interpretation, Remedies for Breach, and Penalty Clauses* (Scot Law Com No 252, 2018), para 7.42.

[71] *Regus (Maxim) Ltd v Bank of Scotland plc* [2013] CSIH 12; 2013 SC 331, para 38 (Lord President Gill), following *Ballast plc v Laurieston Properties Ltd* [2005] CSOH 16, paras 142 and 143 (Lady Paton).

[72] For examples of relief that would be granted under the rule in relation to the identification of the party giving the notice see *Prudential Assurance Co Ltd v Smith* 1995 SLT 369 and *Lay v Ackerman* [2004] EWCA Civ 184; [2004] L & TR 29.

given in writing. We think that, as under the present law, parties should have the flexibility to impose the need for writing if they wish to avoid the uncertainty of an oral notice.

3.61 Accordingly we recommend that:

20. The code should provide that, where an erroneous termination date is specified in a notice to quit, the notice is not invalidated if the erroneous date falls:

(a) after the actual termination date; and

(b) before the end of the 7-day period beginning with the day after the actual termination date.

(Draft Bill, section 8(5))

21. In such a case, and where the notice to quit is the only reason the lease ends on its termination date:

(a) the tenant (but not any sub-tenant) should be entitled (despite the lease having ended) to remain in possession of the let property during the period between the termination date and the erroneous date specified in the notice; and

(b) during that period:

(i) the tenant should not be liable to the landlord for violent profits, unjustified enrichment, or damage to the let property sustained during that period (except for damage intentionally or negligently caused by the tenant); and

(ii) the landlord should be required to comply with the landlord's obligations under the lease as if the lease had not ended, and indemnify the tenant for the expense of fulfilling any obligation owed by the tenant to another person in connection with the let property which arises during that period and which would be owed by the landlord to that other person if the landlord were in occupation of the let property when the obligation arises.

(Draft Bill, sections 9 and 19(5))

22. The code should provide that, where information is included in a notice to quit or of intention to quit in order to comply with the requirement:

(a) to include the name of the person giving the notice; or

(b) to identify the let property,

and that information is erroneous, the notice is not invalid if a reasonable recipient would know, in all the circumstances, both that the information

was erroneous and the correct information that should have been included.

(Draft Bill, sections 8(6) and 10(7))

23. The code should exclude from such information any rule of law by which a court may order rectification of, or otherwise provide relief from, an error in the information.

(Draft Bill, sections 8(7) and 10(8))

24. Parties should not be entitled to modify or disapply:

(a) any requirement that notice be given in writing;

(b) the provisions in the code relating to the granting of relief from an error in the termination date stated in a notice to quit; or

(c) the provisions in the code granting relief from errors in the name of the giver of the notice or in the description of the property let.

(Draft Bill, section 23)

Period of notice

New default periods of notice

3.62 The Discussion Paper set out the common law and historical background of the time before the termination date by which a warning (notice) requires to be given by a landlord to a tenant and vice-versa.[73] The common law provides default rules on the period of notice. Parties may modify them through an express term in the lease itself specifying a longer period of notice for leases of over four months[74] or longer or shorter periods for leases of up to four months.[75] We asked consultees whether they considered the current common law period of 40 days' notice for commercial leases of more than four months to be sufficient notice and, if not, what would be an appropriate period.[76]

3.63 All surveyors who responded, the majority of solicitors, TSB and Boots said that 40 days' notice should not remain as the default period of notice (in the event parties do not contract out of the giving of notice altogether). A landlord's notice allows the tenant time to remove from the premises and, if desired, to find fresh premises for their business. A tenant's notice allows time for the landlord to find a new tenant. The Faculty of Advocates noted that the length of any period of notice might be dependent on a number of factors, including the nature of the lease, the period of time the tenant has been in occupation, the extent of the subjects let, the steps that are reasonably required to relocate or re-let and/or the time

[73] DP, paras 3.4, 3.7, 3.8 and 4.10 to 4.13.
[74] There is some doubt over whether parties to a lease of over four months can contract for a period of notice of less than the common law 40 days.
[75] Section 5 of the 1886 Act provides periods of notice for leases of up to four months which apply in the absence of "express stipulation".
[76] DP, para 4.21.

necessary to repair any dilapidation of the property. TSB felt that the 40-day period is too heavily weighted in favour of the landlord, and advised that they would find vacating a branch and fitting out and opening a fresh branch in 40 days extremely difficult. Boots advised that they invariably require a period of at least six months' notice in order to have a reasonable period of time within which to put in place all necessary arrangements to cover finding a new store, transferring any pharmacy licence, fitting out the new store, stripping out the store being vacated and obtaining all necessary planning and building warrant consents. Both Boots and TSB noted that 40 days would hardly give sufficient time for a landlord to find an alternative tenant in any event. Many other types of tenant have licensing requirements which mean that 40 days' notice is entirely insufficient.[77]

3.64 Some consultees expressed support for 40 days. This was based on the period being well known to practitioners.[78] That will be so, but we do not regard the current notoriety of that period as being a factor of sufficient weight to overcome the need for the law to modernise in order to reflect the needs of tenants and landlords of the present day.

3.65 When consultees were asked to identify reformed periods of notice, no clear preference was expressed. There was virtual consensus that the period should vary with the duration of the lease. We asked consultees whether the periods of notice should differ between leases of a year or more and those of less than a year or whether the differentiation should occur at two or even three years or, indeed, at any other juncture. Of the 31 responses, 18 felt that the differentiation between periods of notice should occur at one year. A number of consultees, including solicitors, all surveyors and business representatives, suggested that for termination of a lease for less than one year, no notice at all should be required. The majority, however, favoured having a notice period for such leases, albeit shorter than that for leases of one year or more.

3.66 With regard to the default period of notice for leases of a year or more, consultees divided more or less evenly into three groups, favouring respectively (1) a six-month period, (2) a three-month period, and (3) retention of the commonly used 40-day period.[79] Other options still are followed in some of the jurisdictions we have surveyed. While six months' notice is required in England and Wales,[80] the same period is required in France only for leases of nine years or more.[81] In Germany, no notice is required to bring a fixed-term lease to an end at the expiry of its term.[82] Our view is that the default period of notice should give tenants sufficient time to find fresh premises, but at the same time should not oblige parties to decide whether they wish the lease to continue on its existing terms too far in advance of its agreed termination date. To this end, we see considerable force in the view expressed by Burness Paull that a default three-month period would strike an appropriate balance. At one end of the scale, the current standard 40-day period is out of line with other major jurisdictions[83] and, as

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[77] Examples, in addition to pharmacy licences (as mentioned by Boots), include licences of premises for the sale of alcohol, food business registration, and taxi operators' licences.
[78] The Scottish Property Federation took the view that 40 days remained appropriate as a default period, but did not give any reasons for this.
[79] A further option would be to remove the need for notices entirely. However, we rejected this possibility in Chapter 2: see para 2.52.
[80] Landlord and Tenant Act 1954, s 25(2) (for notice to tenants).
[81] See para 2.20.
[82] BGB, § 542(2).
[83] DP, paras 4.15 to 4.17.

suggested by several consultees, is likely to cause tenants significant practical difficulties when the lease expires. At the other, we consider that a six-month period – preferred by both Boots and TSB, for the reasons set out above[84] – would fail to take sufficient account of the inevitable vicissitudes of the market, whereby many businesses may find difficulty in making a major financial commitment so far ahead of the termination date. We are persuaded that a default notice period of three months would achieve an appropriate middle ground. Indeed, as noted in the Discussion Paper, a period of 90 days was suggested as far back as 1950.[85]

3.67 A broad cross-section of consultees suggested that for leases of less than a year, no notice at all should be required. However, this was not accompanied by any reasoning as to why such leases should be singled out for the exclusion of the automatic continuation for lack of notice. Of those consultees who considered that there should be some period of notice for such leases, the majority favoured a period which was one half of the length of the lease. That does not provide a solution for leases for an odd number of days. Furthermore, if there is to be a default period of notice of three months for leases of a year or more, a lease of less than a year should not have a longer period of notice.

3.68 Our proposed default period of notice of three months has the benefit of clarity. We see force in applying the three month period to as many leases as possible. We are also persuaded that the period of notice should never be more than half of the duration of the lease itself. This leads us to the view that the optimal approach is to have a three month period of notice for all leases of six months or longer. For shorter leases of more than 28 days but less than six months, we were originally minded to propose that the default period of notice should be a period of clear days equal to one half of the duration of the lease. In the event that half of the duration gives rise to a fraction of a day, we suggested that the period of notice should be rounded up to the nearest full day. This was reflected in the terms of the draft Bill upon which we consulted in December 2021 and January 2022. A number of those who responded to our Bill consultation found the rules for calculating the period of notice unclear. On reflection, we agree that a rule which requires parties to a short lease to calculate a period of days by reference to the duration of the lease is unduly onerous and likely to be productive of error. Instead of requiring such a calculation, we propose that as a default rule one month's notice should be required for leases with a duration of three months or more but less than six months and that no notice should be required for leases of up to three months.

Months and days

3.69 We consider that the definition of "month" as a calendar month, as provided by the Interpretation and Legislative Reform (Scotland) Act 2010,[86] is helpful and should apply for the purpose of calculating the minimum three month notice period. For leases of six months or longer the default position should be that the notice should be given not later or not less than three months prior to the termination date. Under our preferred formulation a notice given on 28 February in relation to a termination date of 31 May would be valid while a notice given on 1 March in relation to that same termination date would not. The use of months is

[84] See para 3.63.
[85] DP, para 4.12, referring to Scottish Home Department Board of Trade, *Final Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland*, Cmd 7903 (1950), para 48.
[86] Section 25(1) and sch 1.

straightforward and avoids potential errors present in the calculation of say 90 days. We are unaware of this approach having caused any difficulty in relation to its use for notices under the agricultural holdings legislation,[87] its predecessors or, in England and Wales, under the Landlord and Tenant Act 1954.[88] Surveyors responding to our consultation also expressed a preference for months rather than days.

3.70 The same considerations apply to our proposals in relation to leases of between three and six months. There is less likelihood of error in calculating a month's notice than in calculating a period of days. The variation in the length of the months will result in slightly longer or shorter periods of notice, reckoned in days, depending upon the termination date of the lease in question, but this variation is a price worth paying for the simplicity of being able to reckon the notice period without the need to refer to the calendar or to calculate fractions of the period of the lease. Under our proposal, for example, a four-month lease with a termination date of 28 February could be brought to an end by a notice received on 28 January, while a similar lease with a termination date of 31 March would require notice to be received on or before 28 February (or 29 February in a leap year).

Extent of let property

3.71 Under the 1907 Act, the length of the notice period required to remove a tenant varies depending on the extent of the property. For example, different rules apply to property greater than two acres in extent.[89] We asked consultees whether the same rules on the period of notice should apply irrespective of the extent of the property. All consultees thought that the notice period should apply irrespective of the extent of the property concerned. We agree. The size or extent of a property should be irrelevant in fixing the length of the period of notice.

Form of court proceedings for removal of tenant

3.72 We asked in the Discussion Paper whether the periods should apply irrespective of the form of court proceedings to be followed if a tenant refused to move notwithstanding service of appropriate notice.[90] Consultees agreed unanimously. We concur. No statutory provision is required for this outcome.

3.73 Accordingly we recommend that:

25. The code should provide that, for leases of six months or longer in duration, notice to quit or of intention to quit must be received by the tenant or landlord (as the case may be) no later than the day which is three months before the termination date.

(Draft Bill, section 13)

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[87] 1991 Act, s 21(3); 2003 Act, ss 8(4), and (5), 8B(2)(b), 8C(2)(b), 8D(3)(b) and (5)(b).
[88] Section 25(2), under which a notice must be given "not less than 6 months" before the termination date: *Hogg Bullimore & Co v Co-operative Insurance Society Limited* (1985) 50 P & CR 105 applying *Schnabel v Allard* [1967] 1 QB 627 (Court of Appeal). These authorities were not mentioned in *Esson Properties Ltd v Dresser UK Ltd* 1997 SC 304 where in the Outer House Lord Penrose held, perhaps surprisingly, that a break notice given on 31 October was less than nine months before the following 31 July.
[89] 1907 Act, ss 34, 36, and 37.
[90] DP, para 4.21 (questions 15 and 16).

26. It should provide that, for leases of less than six months in duration , notice to quit or of intention to quit must be received by the tenant or landlord (as the case may be) no later than the day which is one month before the termination date.

(Draft Bill, section 13)

27. It should provide that, for leases of less than three months in duration, no notice to quit or of intention to quit is required to prevent automatic continuation.

(Draft Bill, section 2(2)(a))

Methods of giving written notice

3.74 In our Discussion Paper, we asked consultees whether service of notices to quit or of intention to quit should be governed by section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010. We also asked whether consultees considered that notices should be capable of being served in ways not provided for in that section.[91]

3.75 Section 26 specifies methods by which a document can be served on a person. It also provides for rebuttable presumptions as to the time at which a document served by certain of those methods is received.

3.76 The methods of service specified by section 26 are (a) delivery "personally to the person", (b) the sending by registered or recorded delivery post, and (c) the sending by electronic communications, provided that the sender and the recipient have agreed in writing beforehand that the document may be sent by being transmitted to an electronic address and in an electronic form specified by the recipient.[92]

3.77 In response to our consultation, a number of large firms of solicitors stated that notices should be served in the manner specified in the lease or, where the lease is silent, in accordance with the 2010 Act. Craig Connal KC was of the view that, given the pace of change in methods of communication, legislative provision on methods of service is likely to become outdated almost as soon as it is brought in. For that reason, he preferred to avoid legislation specifying methods for serving notice, even as a default rule which would apply where the lease is silent.

3.78 The Law Society of Scotland suggested that consideration be given to permitting service on a tenant personally at the let premises and, in appropriate situations, by advertisement. Other consultees considered that delivery by sheriff officer should be permitted, as it is under the existing law.[93] Service by electronic means was generally accepted as appropriate, provided that the lease allows for it. A note of caution was sounded, however, in that electronic transmission is not infallible and email addresses frequently change. One consultee suggested that electronic service should require to be followed up with

[91] DP, para 4.39 (question 36).
[92] 2010 Act, s 26(2)(c) and (3).
[93] Both the common law and rule 34.8 of the Ordinary Cause Rules in the first schedule to the 1907 Act permit service by sheriff officer.

a hard copy. Others indicated that particular forms of electronic service might become rapidly outdated with technological developments. The Senators of the College of Justice considered that any widening of the means of service beyond those allowed in the 2010 Act would not be appropriate, given the importance of the notices in question.

3.79 In our Bill consultation, the draft Bill proposed a comprehensive and exhaustive list of methods by which written notice could be served. This reflected the approach currently taken by the 1907 Act in relation to notices to quit and of intention to quit.[94] The methods in the list were inspired by section 26 of the 2010 Act, but with the addition of delivery by sheriff officer.

3.80 In response, a number of consultees thought that the approach taken by the draft Bill was unduly restrictive. The Law Society of Scotland, a number of leading firms of solicitors, Professor MacQueen and the Scottish Property Federation all suggested that notices should be capable of being given by private courier, whether or not the recipients were individuals. CMS, Iain Doran, and Shepherd and Wedderburn were of the view that the provisions for notification by electronic means were too restrictive, given the ubiquitous nature of communications by email. DLA Piper shared that view in relation to tenants' notices. They pointed to a recent case in which a notice of intention to quit sent in the course of email correspondence was held to be valid.[95] Burness Paull's litigation department noted that there should be some provision for changes of email address from those originally agreed in writing. A party would be unlikely to bind themselves to the use of a particular email address, given that they might wish to change it in future. Amir Ismail agreed, and expressed scepticism over ensuring receipt of email communications in the face of security settings or spam filters.

3.81 We see force in these views. The common law does not provide for an exhaustive list of methods by which break notices or irritancy notices must be given.[96] Moreover, it has always permitted a tenant's notice to be given by any method, subject to parties' agreement to the contrary. As was observed in 1984:

> Although in practice difficulties of proof may tend to arise if less formal methods of giving notice are enfranchised the case for accepting any form of transmission to the addressee, provided receipt of the notice is either admitted or can be proved by competent and adequate evidence, seems a strong one.[97]

3.82 In these circumstances, our concluded view is that where notice to quit or of intention to quit is given in a traditional (non-electronic) document, parties should be free to choose their preferred method of ensuring its receipt by the addressee. This does not require legislation and our revised draft Bill does not, therefore, set out an exhaustive list of methods for service.[98]

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[94] *Department of Agriculture v Goodfellow* 1931 SC 556 where the word "may" in what is now rule 34.8(1) of the Ordinary Cause Rules was interpreted as "shall". These exhaustive methods apply to notices to quit for agricultural leases under the 1991 Act but not to notices to quit under the leases created under the 2003 Act.

[95] *Rockford Trilogy Ltd v NCR Ltd* [2021] CSIH 56; 2022 SC 90.

[96] Pre-irritancy warning notices under s 4 of the 1985 Act have a special status which is reflected in a statutory provision making recorded delivery service an exhaustive (and mandatory) method of notification.

[97] A G M Duncan, *Research Paper on Actions of Ejection and Removing* (1984) (published in connection with Scottish Law Commission, Consultative Memorandum on *Recovery of Possession of Heritable Property* (SLC CM No 59, 1984), para 3.24.

[98] This will allow a recipient's clear acknowledgement of receipt to be taken into account as evidence of service: *Guthrie v Stewart* 1926 SC 743.

Instead, it provides that if service takes place by one of a number of specified methods, the serving party benefits from a presumption that service has taken place at a specified time. Service by some other means (such as hand-delivery) remains available but the serving party does not benefit from any such presumption. In the event of a dispute, they would require to prove both the fact and timing of the service.[99]

3.83 We turn now to electronic communications, including communications by fax.[100] It is undoubtedly the case that at present most business correspondence is conducted by email or other electronic means. At the same time, we are conscious that not everyone has access to or the capability to access the same electronic means of communication. This is important. If a party does not consent to notice being given electronically, then notice by such means should not be forced upon them. The centrality of consent is a feature common to the national laws governing electronic transmission in various Commonwealth jurisdictions, such as Australia,[101] Canada and its provinces,[102] New Zealand,[103] and Singapore.[104] It is also a feature of the Uniform Electronic Transactions Act (1999),[105] which has been adopted in 49 of the 50 states of the United States, and is mentioned in the Commonwealth Model Law on Electronic Transactions.[106] Importantly, it is also common to these regimes that consent may be inferred from the prior conduct of the recipient.

3.84 These laws offer some guidance as to how the service of notices by electronic means might best be regulated under our proposed scheme. The electronic provisions in section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 – which require prior written agreement in every case – are too rigid to accord with the realities of modern commercial practice. Electronic communication should broadly be enabled, with the sending party given confidence that a notice served electronically will have legal effect. This should not, however, come at the expense of the recipient's autonomy. Accordingly, a simple "reasonableness" test will not suffice.[107] It could see parties being obliged to set up and monitor electronic addresses against their wishes. More generally, such a broad test could create undesirable uncertainty as to the criteria for whether giving notice to a particular electronic address or in a particular form is or is not "reasonable". It should not be left to the courts to decide such criteria following expensive litigation.

3.85 Our view is that the validity of service by electronic means should be based on consent, whether express or implied. Where parties have engaged in a course of communication using a particular email address, it should be possible for them to infer that consent has been given to notice being served electronically at that address.[108] It should not be possible to infer from

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[99] See paras 3.90 to 3.94.
[100] Initially known as "facsimile transmission" under which a document is transmitted through a telephone line to an electronic machine which emits a paper copy of the document.
[101] For example, Electronic Transactions (Queensland) Act 2001, ss 11 and 12.
[102] Uniform Electronic Commerce Act (Consolidation, 2011), s 6; see also, for example, Electronic Transactions Act (British Columbia), s 4.
[103] Contract and Commercial Law Act 2017 s 220 (re-enacting Electronic Transactions Act 2002, s 16).
[104] Electronic Transactions Act 2010, s 5.
[105] s 5.
[106] Issued by the Commonwealth Secretariat (2017), s 17.
[107] This is the test in s 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015.
[108] For example, *St John's Holdings LLC v Two Electronics LLC,* April 14, 2016 (No 16 MISC16-000090) (Massachusetts Land Court) where consent to a writing being sent by email and then SMS text message was inferred.

the same course of communication, however, that consent has been given to notice being served electronically at any other address.

3.86 Furthermore, it should be required that consent is present at the time when the notice is sent. If a party has consented to receiving notice electronically but later withdraws that consent, either expressly or impliedly (for example, by ceasing as a matter of practice to use email as a means of communication), electronic service should not be forced upon them. By the same token, where a party has initially consented to electronic service at a particular address but subsequently re-directs the sender to a different address, or simply begins using a different address as a matter of practice, electronic service at the original address should not be forced upon them. In the vast majority of cases, the question of consent at the time of sending should not pose the sender any difficulty. It is not necessary or appropriate that parties should be obliged to notify a replacement email address. In the interests of clarity, however, it is appropriate that consent, once given, should be presumed not to have been withdrawn. This should suffice to encourage parties to clearly communicate any change of electronic address.

3.87 There is one exception to the necessity for actual consent. If the addressee acknowledges receipt of notice given by electronic means, albeit that it was not sent to an electronic address or in the form consented to, it is evident that the notice has reached them. In these circumstances, it would seem absurd and appear artificial if the addressee was permitted nevertheless to challenge receipt of notice on the basis of their lack of consent. Accordingly, if the addressee acknowledges receipt in writing of a notice given by electronic means, they should be treated as having consented to that notice.

3.88 These provisions strike a fair balance, in our view, between the interests of senders and recipients. Given the rapidity of developments in communications technology, and the need to protect personal autonomy in the midst of this fast-moving area, we do not believe that parties should be permitted to contract out of these provisions. It would be unsatisfactory if, for example, a party in a weaker negotiating position could be contractually bound to serve or receive notices at a particular electronic address and in a particular electronic form.

3.89 Accordingly we recommend that:

28. The code should provide that notice is given by electronic means only if:

(a) the recipient has given consent (expressly or impliedly) to the notice being given by being sent by those means;

(b) the consent has not been withdrawn (expressly or impliedly from the recipient's course of conduct);

(c) where the consent has not been given (or has been withdrawn), the recipient has acknowledged receipt of the notice in writing on or before the last day for its receipt.

(Draft Bill, section 11)

29. There should be a rebuttable presumption that withdrawal of consent to the giving of notice by electronic means under the code has not taken place.

(Draft Bill, section 11(5))

30. Parties should not be permitted to modify or disapply the provisions of the code relating to how written notice is given by electronic means.

(Draft Bill, section 23)

Timing of when notice takes effect

3.90 Under the current law, notice takes effect when it is received by the party to whom it is given (or their agent who has authority to receive it) irrespective of the manner by which it is sent or delivered.[109] The so-called postal rule, whereby written notice is given when it is sent rather than received, does not apply to notices to quit or notices of intention to quit, whether under the 1907 Act[110] or at common law.[111] Receipt occurs when the addressee is able to reasonably access the notice in accordance with sound business practice and the intention of the parties.[112] For example if a notice is sent by post, receipt will usually occur upon delivery of the letter through the letter box.[113] This is on the basis that sound business practice will entail the making of arrangements to uplift the post on a regular basis. Different considerations might apply for example if the recipient was an individual and the making of arrangements was impracticable in exceptional circumstances.

3.91 It is not practicable to legislate for the timing of receipt of a notice in all circumstances. All that is appropriate for the code that we propose are provisions that establish rebuttable presumptions as to when notice is received if certain methods of service are used.

3.92 In the Discussion Paper, we asked consultees whether the giving of written notices should be governed by the Interpretation and Legislative Reform (Scotland) Act 2010. Section 26(5) and (6) of the 2010 Act provide for a presumption as to the time at which notices sent by recorded delivery post within the UK and by electronic communications generally, are received. The presumption is that if sent in either manner the notice is received 48 hours after sending. That presumption can be rebutted. In response to the Discussion Paper, consultees did not express any difficulty with these provisions. However, in response to the Bill consultation, some consultees expressed the view that the period to allow presumed receipt

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[109] In *Lambert v Smith* (1864) 3 M 43 notice was given orally to the recipient's wife at their house. The court drew a distinction between the leaving of a written notice at the house and the oral transmission. While the written notice would be received through its mere deposit in the house, the oral notice required further transmission to the recipient himself. The wife was not seen as the husband's agent in that case.

[110] The 1907 Act makes no provision as to when a notice to quit or of intention to quit is given. The timing of the giving of a notice by post under the 1907 Act is governed by s 7 of the Interpretation Act 1978. Section 7 provides that "unless the contrary be proved" notice is given "at the time at which the letter would be delivered in the ordinary course of post".

[111] *Carmarthen Developments Ltd v Pennington* [2008] CSOH 139, paras 13 to 15 (Lord Hodge).

[112] *Carmarthen Developments Ltd v Pennington* (above), para 33.

[113] Or uplift of a mail bag from the Post Office as occurred in *Carmarthen Developments Ltd v Pennington* (above). However, the position may be different where the person giving the notice is aware that the recipient will not be able to obtain access, whether directly or through an agent to the property where the notice was delivered.

of electronic communications was too long, and that this could act to discourage the giving of notice electronically. We agree.

3.93 Section 26(5) of the 2010 Act provides that traditional documents are to be taken as received 48 hours after sending by a postal service that provides for recording of the delivery of the document unless the contrary is proved. This is reasonable except where the 48-hour period ends on a day where delivery by the postal service is unlikely. Here we have in mind bank holidays, Saturdays and Sundays. We do not think that it should be for a recipient to lead evidence to prove they had not received the document on Christmas Day, if that occurred 48 hours after sending. This is recognised, for example, in the PSG style leases, which provide for deemed service only on a "business day".[114] However, use of the 48-hour presumption for electronic documents appears unrealistic. Generally, electronic documents are delivered to their electronic addresses on the date when they are sent. In our view, it is reasonable for that to be reflected in the statutory presumption as to the timing of receipt of such documents, while making the same allowance for bank holidays and weekends. People cannot or should not be expected to check their email inboxes on those days.

3.94 Section 7 of the Interpretation Act 1978 provides that traditional documents sent by post are, unless the contrary intention appears in any statutory provision, taken to be served at the time when they would be delivered in the ordinary course of post, unless the contrary is proved. Given that section 7 does not apply to Acts of the Scottish Parliament[115] and that its provisions are not repeated in the 2010 Act, we think that it is reasonable for the Bill to contain such a provision. Furthermore, the procedures for service by sheriff officer are set out in statutory provisions that apply to court procedures and service of notices under the 1907 Act.[116] Given that we recommend the disapplication of the 1907 Act from notices under the new statutory code, the code itself should set out the procedure for service of notices by a sheriff officer that, if followed, has the effect of deeming the notice to be received on the day of such service whenever it may be.

3.95 Accordingly we recommend that:

31. The code should provide that if a notice to quit or of intention to quit is given in a traditional document and if it is:

(a) sent from within the UK by recorded delivery post by to a listed address;

(b) sent from within the UK by non-recorded delivery post by to a listed address;

(c) sent from outside the UK to a listed address; or

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[114] See for example cls 6.5.3 and 6.5.4 of the PSG model commercial lease (office), available at http://www.psglegal.co.uk/leases.php. "Business day" is defined as "a day on which clearing banks in [Edinburgh, Glasgow and London] are open for normal business": cl 1.

[115] An equivalent provision did apply to Acts of the Scottish Parliament passed prior to the coming into force of the 2010 Act by virtue of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379), sch 1, para 4.

[116] Ordinary cause rule 5.4 (applied by Ordinary cause rule 34.8) and Summary cause rule 5.4 (applied by Summary cause rule 30.7).

(d) delivered by a sheriff officer,

it is taken to have been received on the day on which it is delivered.

(Draft Bill, section 14(1))

32. **For the purposes of the previous recommendation notice should be presumed to have been delivered:**

(a) where it is posted from within the UK by a recorded delivery service to a listed address, on the second day after the day on which it is posted (or, where that day is a non-working day, on the next working day thereafter); and

(b) where it is posted from within the UK by a non-recorded delivery service to a listed address, on the day on which the document would be delivered in the ordinary course of the service (or, where that day is a non-working day, on the next working day thereafter).

(Draft Bill, section 14(1))

33. **For the purposes of these last two recommendations, a "listed address" should be:**

(i) the last UK postal address given to the sender by the recipient for the purpose of serving notice by post;

(ii) where the recipient is a body corporate or other legal person with a registered UK office, the postal address of that office; or

(iii) where the recipient has neither such address, the last UK postal address for the recipient of which the sender is aware (irrespective of whether the recipient has a more recent UK address of which the sender was not, but could reasonably have been expected to become, aware).

(Draft Bill, section 14(3) and (4))

34. **Notice to quit or of intention to quit given by electronic means with the prior consent of the recipient should be presumed to have been received, on the day on which it is sent (or, where that day is a non-working day, on the next working day thereafter).**

(Draft Bill, section 14(1))

35. **Parties should be permitted to modify or disapply these provisions of the code by way of a written term in the lease.**

(Draft Bill, section 23)

36. The code should set out procedures for the giving of notice in a traditional document by a sheriff officer, compliance with which will allow receipt of the document to be deemed to have been on the date that the notice was given by the officer.

(Draft Bill, section 15)

Contractual modification of period of notice or of when notice takes effect

3.96 We asked consultees whether parties should be able to contract out of the rules to provide a longer or a shorter period of notice. In both cases of a longer or a shorter period, the majority of consultees wanted the ability to contract out. It was noted that longer periods of notice might be suitable for larger premises, where the tenant has built up goodwill, or for longer length leases. While it was acknowledged that public interest would support steps taken to protect the position of the weaker party in negotiation, it was pointed out that it could not be said as a generality whether the landlord or the tenant was in the weaker situation in negotiation. Much would depend on the property in question and market forces in general. These could favour the landlord or the tenant.

3.97 While the majority in favour of contracting out to achieve a shorter period of notice was smaller than that for contracting for a longer period, it was still substantial. Consultees pointed out that if parties were to be allowed to contract out of tacit relocation, then logically they should be allowed to contract out of the proposed default notice period. Consultees were opposed to the suggestion in the Discussion Paper that contracting out to achieve a shorter period should only be permitted after the tenant had taken possession.[117] There was virtually unanimous agreement that contracting out agreements should be in writing. We agree.

3.98 We have already taken the view that parties should have the freedom to contract out of the requirement for any notice to prevent automatic continuation. As Professor Gretton observed in responding to the Discussion Paper, if the requirement for notices can be excluded by agreement *a fortiori* it must be possible for parties to agree a shorter or longer notice period to suit their respective needs. We endorse that view. However, just as parties' freedom to contract out of the giving of notices must be exercised equally in respect of both tenant and landlord,[118] so their freedom to modify the statutory periods of notice should not be capable of being used as a means of effectively disapplying notice for one party but not the other. Thus an agreement which seeks to keep a three-month notice period for a tenant's notice but have a one-week notice period for a landlord's notice should be ineffective in modifying the statutory provisions.

3.99 Under the present law parties are entitled to, and on occasion do, exclude or modify the default rules as to when a notice is received.[119] Corresponding to our view as to party autonomy over the duration of the period of notice, parties' freedom to modify the default rules on the timing of receipt should be reflected in the code. Thus parties should also be entitled to agree to exclude or modify the statutory presumptions as to when a notice is received by

[117] DP, paras 4.33 to 4.35.
[118] Draft Bill, s 4.
[119] An example is the substitution of presumed receipt with deemed receipt after a fixed period of time which applies irrespective of whether the notice ever reaches the intended recipient.

its addressee. For example, they should be entitled to contract into the postal rule,[120] exclude the possibility of rebutting the statutory presumptions as to when a notice is received, or create their own rule for receipt of electronic communications.

3.100 In the light of this, we recommend that:

37. Parties should be permitted to modify or disapply (by way of a written term in the lease) the provisions in the code governing:

(a) the day by which notice to quit or of intention to quit must be received (whether by making that day earlier or later), provided that the same day applies to both notice to quit and notice of intention to quit; and

(b) the day when notice (whether given in a traditional document or by electronic means) is or is presumed to have been, received.

(Draft Bill, section 23)

Withdrawal of notice to quit or of intention to quit

3.101 While a party giving a notice cannot withdraw it after it has been expressly accepted by the recipient,[121] the question of whether an unaccepted notice can be withdrawn without the consent of the recipient does not appear to be settled. In the Discussion Paper, we asked consultees whether there was need for a statutory statement to the effect that a notice may only be withdrawn with the consent of both parties. We had 32 responses to this question, and 25 of the responses stated that they felt it was necessary to have such a statement. The majority of responses point to it being generally accepted in practice that a party cannot withdraw such a notice without the consent of the other. It was suggested that it would be useful to have the law reflect understanding in practice. The Faculty of Advocates considered that such agreement or consent should be in writing. We agree, but with the qualification that if what is involved is an oral notice of intention to quit by a tenant the oral consent of the landlord should suffice. Further, if in some unusual case parties wish to provide for unilateral withdrawal, we see no reason why they should not do so in the lease.

3.102 We therefore make the following recommendation:

38. The code should provide that notice to quit or of intention to quit may be withdrawn (and thus rendered ineffective in bringing the lease to an end) only with the consent of the recipient. If notice has been given in writing, both the withdrawal itself and the agreement of the recipient must be constituted in writing. Parties should be entitled to modify or disapply this provision by way of a written term in the lease.

(Draft Bill, sections 16 and 23)

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[120] This is the rule under which a notice is deemed to be received upon posting.
[121] *Gilmour v Cook* 1975 SLT (Land Court) 10.

Notice to quit or of intention to quit binding on successors

3.103 Consultees asked that it be made clear that notices, once served, are binding on successors in title to both the interest of landlord and that of tenant. The case of *Grant v Bannerman*[122] is authority for the purchaser of a leased property not being entitled to rely on a notice to quit given by the seller without an assignation from the seller of the benefit of the notice. That case decided that the clause of assignation of writs in the disposition was insufficient to pass on the rights flowing from a notice to quit without a further assignation of the interest in the notice.

3.104 Our 1989 Report recommended that where a landlord gives notice to quit and after that transfers their interest in the property, the notice should be deemed to have been given by the transferee.[123] In respect of tenants' notices, the 1989 Report recommended that where a tenant assigned their interest, their notice would continue to enable the removing of either the tenant or the assignee.[124] Implementation of these recommendations would mean that, as a matter of practice, where a property was sold while leased the purchaser would have to oblige the seller to disclose to them all notices by or to the seller, and in the case of an assignation of the lease the assignee would have to seek to impose a similar obligation on the assigning tenant. As such is the normal practice in any event,[125] we consider that implementation of the substance of our previous recommendations would be appropriate. This could be expressed by a provision that the validity of a notice to quit or notice of intention to quit would not be affected by a change in the identity of the landlord or the tenant after the giving of the notice.

3.105 Our 1989 Report also addressed the situation where a landlord or a tenant dies after serving such a notice. The view taken by our predecessors in 1989 was that a notice served by a party who then died, if effective, should continue to remain effective after the death.[126] We endorse that view.

3.106 The entitlement of the giver of a notice to enter into an agreement with the other party or parties to the lease to withdraw the notice should also transfer to a party's executors or successors on death or singular successors following a transfer.

3.107 We therefore recommend that:

39. The code should provide that, once notice to quit or of intention to quit has been given:

(a) its validity is unaffected by any subsequent change in the identity of the landlord or tenant under the lease; and

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[122] (1920) 36 Sh Ct Rep 59, followed in *George M Brown Ltd v Collier* 1954 SLT (Sh Ct) 98.
[123] 1989 Report, paras 4.75 to 4.81.
[124] 1989 Report, para 4.85.
[125] See J M Halliday, *Conveyancing Law and Practice in Scotland* by I J S Talman (ed) (2nd edn, 1997) Vol 2, paras 30-56 and 30-168 style 30D conditions 1 and 12.
[126] 1989 Report, para 4.81.

(b) any such successor as landlord or tenant is entitled to agree to its withdrawal.

(Draft Bill, sections 16(4) and 18)

Multiple landlords or tenants

3.108 In response to our question on whether consultees had encountered particular issues with the service of notices on multiple landlords or multiple tenants,[127] the majority said that they had not encountered any problems. Some consultees explained instances where issues had arisen. The Law Society of Scotland said that they were aware of potential difficulties with the service of notice to multiple parties, for example to syndicates and trusts where a party to a lease comprises a number of separate individuals operating as a group under the syndicate or trust deed. Another area of difficulty was where trustees were party to a lease and there had been changes in the identity of the trustees without the lease documentation reflecting the position.

Notice by one co-tenant or one co-landlord

3.109 Where there is more than one co-tenant, the position at common law is that notice of intention to quit given by one of them is sufficient to exclude tacit relocation and to terminate the lease at its termination date.[128] The rationale is that as tacit relocation is based on the silent consent of all parties to a lease, a valid notice by one of two co-tenants is enough to exclude the silent consent to its continuation. We agree with this rationale. While it will be unusual, it is open for parties to contract out of the common law rule. Given the comprehensive nature of the code that we propose, this rule and power to contract out should be enacted in statute.

3.110 The position with co-landlords appears to differ.[129] The default position at common law is that all co-landlords must concur in the removal of a tenant.[130] The reasoning appears to be that as a co-owner has delegated their indefeasible rights of possession to the tenant under the lease in exchange for payment, a fellow co-owner cannot interfere unilaterally with such delegation. The requirement of concurrence can also be seen as an aspect of the right of a co-owner to veto the actions of other co-owners in relation to the management of common property.[131] Given that tacit relocation must be excluded before a tenant can be removed, it

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[127] DP, para 4.37 (question 33).
[128] *Smith v Grayton Estates Ltd* 1960 SC 349; 1961 SLT 38.
[129] Co-landlords can exist in two situations, or even in a combination of the two. Firstly landlords who own separate *pro indiviso* (indivisible) shares of the ownership (or in a sub-lease of the head lease) of the whole let property are "co-landlords" in this sense. Thus the whole property let can be owned by two owners both of whom have a half "share" of the whole property. Such shared co-ownership stands in contrast to the joint ownership of bodies of trustees for example where individual trustees do not own shares of ownership separate and separable from those of their fellow trustees. Whether individual trustees can give notice will depend on the provisions of the trust deed failing which the Trusts (Scotland) Act 1921. Secondly, separate landlords who are sole owners of separate distinct parts of the let property are also "co-landlords" in this sense. This situation can arise either at the outset of the lease or more probably during the period of the lease when the ownership of parts of the let property is transferred to different persons. Thus in a lease of two units one unit can be transferred to a different landlord.
[130] Erskine, 2.6.53; *Murdoch v Inglis* (1671) 3 Brown's Supplement 297 (where one co-owner allowed the tenant to remain and the other objected); *Bruce v Hunter* Faculty Collection 16.11.1808; *Secretary of State for Scotland v Prentice* 1963 SLT (Sh Ct) 48.
[131] J Rankine, *The Law of Land-Ownership in Scotland* (4th edn, 1909), p 587; Bell's Principles, § 1075.

would be odd if the default position for removal did not apply to the termination of the lease on its termination date. In short, the current law appears to be that a landlord's notice must be given by or at least on behalf of all co-landlords in order to exclude tacit relocation. Nevertheless, there have been *obiter dicta*[132] and academic commentary[133] which favour the view that the position for co-landlords is the same as for co-tenants.

3.111 It is also of interest to note that in relation to residential tenancies formed on or after 1 December 2017, statute now provides that it is sufficient for one of a number of co-landlords to give a notice to leave and to seek removal of a tenant.[134] This has the effect of overriding the apparent common law position for such leases. The question is whether a similar change in the law is desirable for commercial leases. We take the view that as a matter of principle such a change is appropriate. The delegation of possessory rights to a tenant, to which all co-proprietors agree at the outset of the lease or to which they succeed on death or lifetime transfer, is conditional. The condition is that it extends to the expiry of the lease. If co-landlords cannot agree on the continuation of the lease beyond the termination date, we think it should be open for one of the co-landlords to serve a notice to quit that would be effective to prevent automatic continuation and allow removal.

Notice to co-landlords or co-tenants

3.112 Many consultees noted difficulties with service on multiple landlords in particular, and especially where one landlord or more is based outwith the United Kingdom. As the law stands, notices must be served on all landlords or tenants,[135] regardless of location, unless the lease provides for some other arrangement, such as the nomination of a single authorised recipient. We are not presently persuaded to recommend any change to this aspect of the law, but take the view that a statutory restatement should be included in our proposed code.

3.113 Accordingly we recommend that:

40. The code should provide that notice to quit given by one of a number of co-landlords, or notice of intention to quit given by one of a number of co-tenants, is sufficient to prevent automatic continuation (whether or not the consent of the other landlord(s) or tenant(s), as the case may be, has been given). Parties should be entitled to modify or disapply this provision by way of a written term in the lease.

(Draft Bill, sections 17 and 23))

41. It should provide that notice to quit must be given to all co-tenants, and notice of intention to quit to all co-landlords. Parties should, however, be entitled to modify or disapply this requirement by way of a written term in the lease.

(Draft Bill, sections 17 and 23)

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132 *Walker v Hendry* 1926 SC 855, 875 (Lord Justice-Clerk Alness).
133 S Halliday, "Tacit Relocation" 2002 JR 201, 213-214.
134 Private Housing (Tenancies) (Scotland) Act 2016, ss 52(1) and 62(2).
135 19 *Stair Memorial Encyclopaedia*, para 380. Such a provision would ordinarily be constituted in formal writing.

3.114 One way in which any difficulty in giving notice to multiple tenants or landlords can be mitigated is if all such parties have a postal address in the United Kingdom to which a notice could be posted. Proposals to assist in the availability of a UK postal address for service of a notice relating to the termination of a lease are described in Chapter 4 of this Report.

Sub-tenants

3.115 We also asked whether consultees had noted any concerns with service of notices on sub-tenants.[136] Again a majority had encountered no problem. Nevertheless, several concerns were raised as to the lack of clarity of the law on whether a notice to quit required to be served on a sub-tenant in order to bring the sub-lease to an end at the termination date of the head lease. This is not surprising, as the legal effect of the absence of such notification is not entirely clear.

3.116 At least until the early 19th century, the law was that tacit relocation did not apply where the tenant had sub-let the property and the sub-tenant was in natural possession.[137] Given that a sub-lease cannot, as a matter of law, extend beyond the expiry of the head lease, the effect of the exclusion of tacit relocation in such circumstances was that in order to remove both tenant and sub-tenant the head landlord did not require to give a notice to quit at all, whether to the tenant or to the sub-tenant who was in physical possession.[138] Nevertheless, in practice it appears that landlords gave notice to quit to sub-tenants and this was found sufficient for the removal of both tenant and sub-tenant.[139]

3.117 Such a practice was criticised by jurists. Hume suggested that the notice should be given to the tenant, with whom the head landlord had the contractual relationship.[140] Rankine stated that the old practice of excluding tacit relocation altogether where a sub-tenant was in possession was not supported by reason or "modern authority".[141] He expressed the view that to prevent tacit relocation and secure removal of both tenant and sub-tenant, notice to quit did require to be given to the tenant, though not to the sub-tenant. He also expressed the view that if notice was given to the tenant but not the sub-tenant and tacit relocation was avoided for the head lease, it was avoided equally for the sub-tenancy given that it was accessory to the head lease. Nevertheless, in at least one instance where notice was given to the head tenant and not to the sub-tenant the court refused to remove the sub-tenant, although it reserved its view on where this left the sub-tenant's ongoing right against the head landlord.[142]

3.118 We consider that this uncertain state of the law is unsatisfactory. It is clearly a default rule of law that a sub-lease cannot extend beyond the termination date of the head lease,[143] at least in the absence of the head lease itself continuing beyond that date by tacit relocation. It also appears to be the current law that a sub-lease cannot have a termination date after that of the head lease.[144] Given that a sub-lease is a creature of the head lease, that is logical.

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[136] DP, para 4.38 (question 34).
[137] *Lady Lawriston v Her Tenants* (1632) Mor 13810; *Richard v Kirkland* (1663) Mor 13812; Stair, 2.9.23; Erskine, 2.6.36; R Bell, *Treatise on Leases* (2nd edn, 1805), p 517.
[138] *Lady Lawriston v Her Tenants* (1632) Mor 13810.
[139] *Duke of Queensberry v Barker* 7 July 1810 Faculty Collection; *Robb v Menzies* (1859) 21 D 277.
[140] G C H Paton (ed), *Baron David Hume's Lectures, 1786-1822: Vol 4* (1955), pp 105-106.
[141] Rankine, pp 599-600.
[142] *Robb v Brearton* (1895) 22 R 885.
[143] Rankine, p 191.
[144] Rankine, p 191; Paton & Cameron, p 166.

However, the current law is vague over the effect that tacit relocation of a head lease has on a sub-lease where there has been no notice to quit to the sub-tenant and no notice of intention to quit from them. Given the original exclusion of tacit relocation altogether where a sub-lease existed, that is unsurprising. However, this vagueness should not be carried over into the code that we propose.

3.119 We consider that the new code should provide that both head lease and sub-lease can continue automatically beyond the termination date of the head lease if all parties to both the head lease and sub-lease continue to behave after that date as they did before it. In practical terms, the paradigm is that if no notices are given, the sub-tenant remains in occupation beyond the termination date of the head lease, and rent continues to be paid by sub-tenant to tenant and by tenant to head landlord, the status quo prior to that date should be recognised as continuing as a matter of law. Only if one of the three parties takes action to prevent this from occurring should the head lease or sub-lease come to an end at their mutual termination date. The type of action that we have in mind includes the giving of a notice by sub-tenant or tenant or court proceedings to recover possession being raised by the landlord or tenant.

3.120 Turning to notice to quit, while the landlord's responsibilities are owed to the tenant and not the sub-tenant, we consider that it is unsatisfactory that the tenant should receive notice to quit but the sub-tenant receive no warning of the impending termination of the head lease and therefore of their need to leave the property. The property is occupied by the sub-tenant, and it is their business that is principally at risk. We consider that a modern code should provide some protection for the sub-tenant in such circumstances. Our 1989 Report expressed a similar view.[145] However, our recommendations differ from those made in 1989.

3.121 Where there is a sub-tenant in possession of the let property, there should be a statutory obligation on the tenant to provide the sub-tenant with a copy of the notice to quit or their notice of intention to quit (or to notify the sub-tenant of any oral notice) as soon as practicable after it has been received or given. In addition, automatic continuation of the head lease beyond its termination date may be prevented by other legal acts. These are the variation of the head lease to exclude the need for notices, the entering into of a new lease to take effect at the termination date, or conversely the withdrawal of a notice. Given that the continuation of the sub-lease will be prevented by these acts, we think that these events too should be notifiable by the tenant to the sub-tenant.

3.122 The question arises as to what remedy should be available to the sub-tenant if the tenant has breached their statutory duty to notify, or if there is apparent invalidity of the notice or other legal act that has been notified pursuant to the statutory duty. Our view is that the sub-tenant should not be entitled to interfere with the private contractual relations of the landlord and tenant. Accordingly the tenant's breach of the duty to notify the sub-tenant should not affect the validity of the head lease, sub-lease or anything to which the requirement to notify relates. Rather, any breach by the tenant of their statutory duty to notify will render them liable in damages to the sub-tenant for any loss that the sub-tenant might sustain through the failure, for example in being unable to find alternative premises for its business. The sub-

[145] 1989 Report, para 4.22.

tenant should not be entitled to challenge any notice, withdrawal, lease or term in the lease that is notified to the sub-tenant by the tenant.

3.123 Provisions giving effect to these various recommendations in relation to sub-leases were included in the draft Bill considered in the Bill consultation process. Consultees did not raise any issues in connection with them. We therefore recommend that:

42. The code should enact the general principle that, where a head lease ends on its termination date, any sub-lease (over all or part of the subjects of the head lease) having the same termination date also ends on that date. For the avoidance of doubt, it should further provide that, where the termination date of a sub-lease purports to fall after that of the head lease, the termination date of the sub-lease is deemed to be the same as that of the head lease.

(Draft Bill, section 19)

43. It should provide that a sub-tenant is not entitled to challenge the validity of any:

(a) notice to quit or of intention to quit given under the head lease;

(b) term of the head lease which provides that it will not continue after its termination date; or

(c) new lease entered into between the head landlord and tenant over the subjects of the sub-lease.

(Draft Bill, section 19(6))

44. It should be provided that, where a head lease and sub-lease terminate on the same date, the head lease nevertheless continues automatically (except where the head lease is one from which automatic continuation is in any event excluded) by virtue of the post-termination conduct of the parties if:

(a) the sub-tenant remains in occupation of the let property after the termination date with the consent of the tenant, or the tenant resumes and remains in occupation after that date; and

(b) the head landlord does not take steps to remove the tenant (and therefore the sub-tenant) within a reasonable period following the termination date or otherwise acts inconsistently with the lease having ended.

(Draft Bill, section 20)

45. It should be provided that, where a head lease and sub-lease terminate on the same date, the sub-lease nevertheless continues automatically (except where the sub-lease is one from which automatic continuation is excluded) by virtue of the post-termination conduct of the parties if:

(a) the head lease is itself continued automatically by virtue of such conduct;

(b) the sub-tenant remains in occupation of the subjects of the sub-lease after the termination date; and

(c) the head tenant does not take steps to remove the sub-tenant within a reasonable period following the termination date or otherwise acts inconsistently with the sub-lease having ended.

(Draft Bill, section 20)

46. It should be provided (in respect of head leases which are capable of being continued automatically) that a head tenant must, as soon as reasonably practicable after:

(a) receiving written notice to quit or giving written notice of intention to quit, give any sub-tenant a copy of the notice;

(b) orally giving or withdrawing notice of intention to quit, notify any sub-tenant of that fact;

(c) the constitution in writing of an agreement to withdraw notice to quit or of intention to quit, or to vary the head lease such that notice need not be given to prevent automatic continuation, give any sub-tenant a copy of the document;

(d) entering into a new lease with the head landlord over the subjects of the sub-lease which will take effect immediately after the termination date of the head lease, notify any sub-tenant in writing that a new lease has been so constituted.

(Draft Bill, section 21)

47. It should be provided that, where the head tenant fails to comply with any of the duties owed to the sub-tenant under the previous recommendation:

(a) the validity of the head lease, the sub-lease and anything of which notification should have been given is unaffected; but

(b) the head tenant is liable to the sub-tenant for any loss caused to the sub-tenant by their failure.

(Draft Bill, section 21(2))

Disapplication and repeal of current legislation

Sheriff Courts (Scotland) Act 1907

3.124 In our Discussion Paper, we devoted a chapter to the history and evolution of the law relating to notices to quit.[146] We summarised the original practices, the legislation dating back to 1555, and the case law. We gave a detailed account of sections 34 to 37 and 38 of the Sheriff Courts (Scotland) Act 1907, and the issues which have arisen as a result of those provisions. As we noted in the Discussion Paper,[147] sections 34 to 37 and 38 did not alter the requirements for notices to prevent tacit relocation and for ordinary actions of removing of tenants but only created requirements for notices if they were to be used for court proceedings to remove tenants through the use of the special types of procedure provided for in those sections.

3.125 Owing to their poor drafting, sections 34 to 38 of the 1907 Act have attracted criticism almost from their very enactment.[148] Thus their restriction to the special (and rarely used) proceedings for removal has remained unclear to both practitioners and parties over the years. As a consequence, and out of an abundance of caution, a practice developed of following them in the giving of notice. We asked consultees whether the 1907 Act should regulate notices to quit for commercial leases.[149] The response was unanimous. All 33 consultees who responded to this question agreed that the provisions of the 1907 Act should not regulate the giving of notices to quit for commercial leases. Consultees said that sections 34 to 38 of the 1907 Act were confusing, not fit for purpose and incoherent.

3.126 The redundancy of sections 34 to 37 and 38 in respect of remedies for landlords seeking to remove tenants was noted as long ago as 1957 by the then Law Reform Committee for Scotland.[150] We agree with the Committee. There is no purpose whatever for these provisions to apply to the leases with which this Report is concerned. They are not necessary to provide court procedure for the removal of tenants. There are other clear and adequate remedies available to landlords seeking to remove tenants. These exist in the summary cause procedure[151] in the sheriff court (which is due to be replaced by the simple procedure[152]) and, where that does not apply, in sheriff court ordinary cause procedure.[153]

3.127 The full repeal of these sections[154] and their ancillary ordinary cause rules[155] was recommended by this Commission in its 1989 Report on Recovery of Possession of Heritable

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146 DP, ch 3.
147 DP, paras 3.21 to 3.26.
148 *Campbell's Trustees v O'Neill* 1911 SC 188, 191 to 192 (Lord Johnston) with whom the other judges of the First Division agreed. See also Rankine, p 571.
149 DP, para 3.30 (question 6).
150 *Second Report of the Law Reform Committee for Scotland: the Procedural Law Relating to Actions of Removing and Actions of Ejection*, Cmnd 114 (1957).
151 Sheriff Courts (Scotland) Act 1971, s 35(1)(c) and Act of Sederunt (Summary Cause Rules) 2002, sch 1 rules 4.1(2), 4.3(a)(ii) and 4.3(b) and form 3. Summary cause procedure applies provided that the claim for removal is not accompanied by a claim for more than £5000.
152 Courts Reform (Scotland) Act 2014, s 72(3)(e). This provision is not yet in force.
153 Courts Reform (Scotland) Act 2014, ss 38(1) (applying Sheriff Courts (Scotland) Act 1907, s 5(4)), and s 38(2)(f); *Creston Land and Estates PLC v Brown* 2000 SC 320, following *Milmor Properties Ltd v W & T Investment Co Ltd* 2000 SLT (Sh Ct) 2.
154 And the revocation of the sheriff court rules relating thereto.
155 These are now Ordinary Cause rules 34.5 to 34.9 in the first schedule of the 1907 Act.

Property.[156] It is not surprising that they have been disapplied from agricultural leases under the Agricultural Holdings (Scotland) Act 2003.[157] That is an attractive way forward. The disapplication should apply also to the provisions in the Summary Cause Rules which are based on the provisions in the 1907 Act.

3.128 We therefore recommend that:

> **48. Sections 34 to 37 and 38 of the Sheriff Courts (Scotland) Act 1907, and rules 34.5 to 34.9 of schedule 1 thereto, should not apply to leases to which the code applies. Rule 30.5(1) of the Act of Sederunt (Summary Cause Rules) 2002 should not apply to leases to which the code applies.**

(Draft Bill, schedule 2, paragraphs 2 and 6)

Removal Terms (Scotland) Act 1886

3.129 In Chapters 3 and 4 of the Discussion Paper, we drew attention to the terms of the Removal Terms (Scotland) Act 1886.[158] This Act is still in force.[159] In 1886 it was common, even for non-agricultural leases, to have entry or termination on Whitsunday or Martinmas. Section 4 of the Act applies only to leases which provide for entry or removal on Whitsunday or Martinmas. It provides that those dates shall be taken to be 28 May or 28 November (as the case may be) and that on those dates a tenant should be allowed to enter or obliged to remove at noon. It does not apply to other termination dates. Section 4 is out of line with modern practice. Given that the code that we propose is intended to provide notice periods in advance of all termination dates, section 4 would serve no further purpose for the leases covered by the code. Section 5 of the 1886 Act provides for periods of notice for leases for periods not exceeding four months. Section 6 provides for the giving of notices to quit[160] by registered letter. This content is superseded by the new code that we propose. Accordingly, sections 4 to 6 of the 1886 Act should not apply to leases covered by the new code. Transitional provisions will provide for a smooth transition from the current law to the new code.[161]

3.130 Accordingly we recommend that:

> **49. Sections 4 to 6 of the Removal Terms (Scotland) Act 1886 should not apply to leases to which the code applies.**

(Draft Bill, schedule 2, paragraph 1)

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[156] 1989 Report, para 11.26.
[157] Sheriff Courts (Scotland) Act 1907, s 37A.
[158] DP, paras 3.6 to 3.8 and 4.22.
[159] Section 4 of the 1886 Act has been amended by the Removal Terms (Scotland) Act 1886 Amendment Act 1890.
[160] Referred to in s 6 of the Act as a “notice of removal”.
[161] See schedule 2 of the draft Bill.

Act of Sederunt of 1756

3.131 The Discussion Paper referred to the Act of Sederunt of 1756,[162] which provides for the removal of tenants in various circumstances. The scope of leases covered by the Act of Sederunt is not wholly clear. However, there is consensus that it is limited to leases of agricultural property.[163] A few of these are covered by this Report. Two of its provisions are relevant for present purposes. Regulation 1 is spent.[164] Regulation 2 allows a landlord to raise court proceedings at least 40 days before the Whitsunday occurring on or before the ish as a form of *de facto* notice to quit. Given that it and regulation 1 cover matters dealt with by the modern scheme of notices that we propose, we recommend that:

> **50. The Act of Sederunt of 1756 (as re-enacted in chapter 15 of the Codifying Act of Sederunt 1913) should not apply to leases to which the code applies.**

(Draft Bill, schedule 2, paragraph 7)

Abolition of common law on notices

3.132 Notwithstanding the provisions of the 1907 Act, the common law on landlords' notices to quit and tenants' notices of intention to quit[165] still applies. At common law, such notices must be definite and unconditional in their content but may be oral in their form and are subject to local custom in their service.[166] Our aim is to provide a comprehensive code for the automatic continuation or termination of commercial leases at their termination date.

3.133 Accordingly we recommend that:

> **51. The common law rules concerning the giving of notice to quit and of intention to quit, and any other rule of law by which a party may unilaterally bring a lease to an end on its termination date (by letter of removal or otherwise), should not apply to leases to which the code applies.**

(Draft Bill, section 25)

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[162] Re-enacted in the Codifying Act of Sederunt of 1913, Book L, ch XV. DP, paras 3.4 to 3.5.
[163] The preamble to the Act of Sederunt refers to the need for reform arising out of the "prejudice to agriculture" generated by the pre-existing regime which was available under the 1555 Act Anent Warning of Tenants (now repealed). Thus in regulation 5 it provides for a legal irritancy where the tenant neglects the land "at the usual time of labouring" which is plainly an agricultural reference. The weight of authority supports the view that it has no wider application: see Gill, para 33.02; Rankine, p 533; R Bell, *A Treatise on Leases* (3rd edn, 1820), p 489; *Wright v Wightman* (1875) 3 R 68, 70 (Lord Ormidale). Its scope is wider than that of the 1991 or 2003 Acts and therefore there may be some leases covered by it which fall within the scope of this Report.
[164] It allowed a landlord in a lease with a "no warning" clause to serve the tenant with letters of horning 40 days before Whitsunday in the year of the ish and then obtain warrant to evict the tenant within six days after the ish. Letters of horning were abolished as a competent procedure by s 89 of the Debtors (Scotland) Act 1987.
[165] Sometimes labelled notices of removal.
[166] For example, chalking on the door of premises let in a burgh (*Robb v Menzies* (1859) 21 D 277).

Chapter 4 Miscellaneous matters

Introduction

4.1 In our consideration of aspects of the law governing the termination of leases we have been struck by the unsatisfactory nature of a miscellaneous collection of legal rules that play a role in the process of termination. Whilst these rules are important, their utility is presently undermined by vagueness, inaccessibility or an unsuitability for the rigours of modern commercial practice.

4.2 In this regard, three particular areas of law have come to our attention:

- the legal rules fixing the date of entry, duration and termination date of a lease in the absence of express provision by the parties;
- the UK postal addresses to which a landlord or tenant may send termination notices; and
- the giving of termination notices where the identity of the party upon whom service must be made has changed or where that party has died.

Giving notice to quit where termination date unknown

4.3 In the Discussion Paper, we looked at situations where a landlord requires to give notice to quit but no written lease is available from which they can readily ascertain the termination date on which the tenant must leave the property.[1] This might be because the lease has been lost or because the original lease was constituted orally.

4.4 Under the present law the court has a power to fix the duration and termination date of a lease.[2] The termination date can be established through obtaining from the court a decree of declarator fixing the termination date. Where no duration has been agreed, there is a common law presumption that the lease is for one year from the date of entry.[3] If the date of entry cannot be established, it is presumed to be the date of the Whitsunday or Martinmas immediately following the date of the lease.[4] However, there is also case law that could be

[1] DP, para 4.29.
[2] *Redpath v White* (1737) Mor 15196; *Wilson v Mann* (1876) 3 R 527, 533 (Lord Neaves). The power is sometimes referred to as "*arbitrum judicis*".
[3] Stair, 2.9.16; Erskine, 2.6.24; *Gray v Edinburgh University* 1962 SC 157, 165 (Lord Justice-Clerk Thomson).
[4] Rankine, p 338; Erskine, 2.6.24. For the purpose of defining entry under the presumption, s 4 of the Removal Terms (Scotland) Act 1886 specifies Whitsunday to be 28 May at noon and Martinmas to be 28 November at noon.

read as supporting a presumption that the date of entry is the date of the lease itself.[5] The law is unclear. In any event, for most commercial leases at the present time a presumption that entry took place on the Whitsunday or Martinmas after the date of the lease is wholly unrealistic and artificial.

Presumed duration and termination date

4.5 In the Discussion Paper, we asked consultees whether, in cases where the termination date cannot be ascertained but the date of entry is known, a statutory presumption should be adopted that the lease is for one year.[6] We also asked whether, in cases where the date of entry is unknown, there should be a statutory presumption that the lease was entered into on a particular date, such as 28 May or some other date.[7]

4.6 Whilst several consultees thought that the existing common law presumption that a lease is for one year was sufficient, a clear majority felt that a statutory provision to that effect would provide useful clarification. From this it appears that knowledge of the existing position is not as widespread as it could be.

4.7 In most cases, it should be possible for a court to establish the duration of a lease as agreed to by the parties. This might be based on the evidence of witnesses, or through interpretation of the lease itself.[8] In the event, however, that such a determination cannot be made, it is appropriate that an implied duration is set out in statute. In our view, this implied duration should be one year beginning with the date of entry, in line with the existing common law position.

4.8 With regard to a statutory presumption as to the date of entry, a majority of consultees who responded on this point supported having such a statutory provision. Furthermore, most were content with the proposal for a presumed date of entry of 28 May. Other than the Senators of the College of Justice, who suggested 1 January, no consultee raised an alternative date. From the few consultees who were opposed to a statutory presumption, the only reason given was that the date of entry should be determinable from the original parties' interaction with public bodies administering statutory liabilities such as business rates or council tax.

4.9 Under the common law, there is a lack of clarity as to what the presumption is. The suggestion that entry is presumed on Whitsunday or Martinmas, or whichever of those dates immediately follows the date of the lease, originates from a time when most leases were agricultural and when entry in non-agricultural leases was as a matter of custom taken at Whitsunday. From the responses of consultees we did not detect any great attachment to these dates in the modern era for the leases covered by our Report. Nevertheless, faced with

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[5] *Christie v Fife Coal Co* (1899) 2 F 192, 197 (Lord Justice-Clerk Macdonald); *Seton v White* (1679) Mor 15173; *Oliphant v Peebles* (1629) Mor 11435; *Watters v Hunter* 1927 SC 310, 316 (Lord President Clyde). In *Christie*, the Lord Justice-Clerk (Macdonald) noted (in passing) at 197 that, if a lease contained all details except for a date of entry, it was implied that entry was at the date of the lease, unless the lease was an agricultural one where different dates of entry could be expected. There is no other authority supporting a distinction between agricultural and non-agricultural leases in this respect.

[6] DP, para 4.29 (question 25).

[7] DP, para 4.29 (question 26).

[8] See for example *Hyams v Brechin* 1979 SLT (Sh Ct) 47, 49.

having to fix a single date, both our Advisory Group and a majority of consultees who responded on this point indicated a preference for 28 May.

4.10 In most cases, the agreed date of entry should be capable of being determined by a court on the evidence available. However, it is conceivable that the evidence might be insufficient or unreliable, particularly where the lease has been ongoing for many years through tacit relocation. Accordingly, it is appropriate that a clear fall-back position should be provided by statute. Together with the presumed duration of a year, this would ensure that in all cases a termination date can be established for the purposes of giving notice to quit. In order to avoid any confusion, the statutory rules should supersede the common law rules on these matters, such as they appear to be, where the tenant has taken possession of the let property.

4.11 In our view, the date of entry should be presumed, in the first instance, to be the date on which the tenant actually took possession of the let property. That date might be ascertainable from various sources of evidence, including possibly from public bodies administering business rates or council tax. Where that date cannot be established, the date of entry should be presumed to be the date of the lease. Where neither of these dates can be established, the date of entry should be presumed to be 28 May. As a backstop, therefore, the termination date of the lease would be treated (where a duration of one year is also implied) as falling on 27 (or 28) May.[9]

4.12 In practice, it is necessary for a court to go one step further and specify the *year* of entry under the lease. In our view, this should be presumed to be the earliest calendar year in which rent has been paid under the lease. There should always be some evidence of when rent was paid.[10] Evidence of the earliest rental payment should allow the court to specify the year as well as the date of entry.

4.13 The existing procedures for having a court fix the date of entry under a lease (and thus determine its termination date) are potentially lengthy, and of little assistance to a party wishing to serve notice in a few weeks' time. Even if the lease contained an arbitration agreement, the arbitral procedure might lack the necessary rapidity for an award which fixed the date of entry. We are of the view that there should be available, in addition, a summary sheriff court procedure by which parties may apply for a determination of the date of entry.[11] The expeditious determination of that date, when taken together with the presumed duration of the lease, should alleviate the need to serve multiple notices to quit, each specifying a different termination date.

4.14 Once the date of entry is fixed by a court, tribunal or arbitrator, it is important that it should be preserved for the knowledge of succeeding assignees or landlords, so far as possible. For that reason, the relevant adjudicating body should have a power to order that the lease, in so far as it comprises any written document, be endorsed with the missing date

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[9] The termination date of a lease entered into for one year from 28 May will fall on 27 May in the following year. In practice, however, notices to quit often specify the termination date as falling on the anniversary of the date of entry, and are not held invalid on that basis.
[10] See for example *Watters v Hunter* 1927 SC 310, 316 to 317.
[11] We have in mind a summary application under the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999 (SI 1999/929).

of entry. If the lease is in the form of an electronic document the parties can give effect to such an order by altering the document, accompanied by any electronic signature that might be required.[12]

4.15 Accordingly we recommend that:

52. Statute should provide that where a lease (to which the statutory code applies) does not provide for the period of the lease (expressly or by implication), or any period so provided for cannot be established, the period of the lease should be one year beginning with the date of entry.

(Draft Bill, section 26(2))

53. Statute should provide that where a lease (to which the statutory code applies) does not provide for the date of entry (expressly or by implication), or where any date so provided for cannot be established, the date of entry under the lease is to be treated as if it were:

(a) the date on which the tenant entered into possession of the property, or

(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 calendar year in respect of which rent was paid under the lease.

(Draft Bill, section 26(3) and (4))

54. Statute should provide for a summary sheriff court procedure by which the date of entry under such a lease may be established in a binding declaration.

(Draft Bill, section 26(5))

55. Where the date of entry under a lease is determined by a court, tribunal or arbitrator (under whatever procedure), the relevant adjudicating body should have the power under statute to order that the lease, insofar as it is constituted in writing, is endorsed with the missing date of entry.

(Draft Bill, section 26(6) and (7))

56. The existing common law rules by which the duration of, or date of entry under, such a lease is to be presumed (where the tenant has entered into possession of the subjects) should be disapplied from leases covered by the statute.

(Draft Bill, section 26(1) and (8))

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[12] Such as the advanced electronic signature required by the Requirements of Writing (Scotland) Act 1995, s 9B and the Electronic Communications (Scotland) Regulations 2014 (SSI 2004/83), reg 2.

UK postal addresses for serving termination documents

Importance of postal communications

4.16 The last few decades have seen a revolution in communications. Until the 1990s, most communications were by post or made orally, with some electronic inroads in the 1980s through facsimile transmission (fax). Written documentation in paper form was predominant. Beginning in the 1990s, electronic communications in the form of email began to be used, and moving into the current century have become the predominant means of formal communication. Often emails have attachments in the form of electronic documents in one format or other.[13] Other forms of electronic communication, such as mobile phone text (SMS[14]) messages, have also come to be ubiquitous.

4.17 Nevertheless, despite these changes to communications, both in response to our Discussion Paper and in discussions with our Advisory Group, professional practitioners who advise on and draft leases and lease-related documentation have been clear that postal communication remains vitally important in the process of termination of leases. Concerns continue to be expressed over the reliability and transparency of electronic transmission. A server or computer system may break down, or the recipient of an electronic document may find themselves unable to render its format readable. With postal communication comes greater certainty and, if carried out in the United Kingdom, verifiability. This is felt to be especially desirable in respect of business-critical matters, such as the termination of a commercial lease. Indeed, in the style leases published by the PSG, service of a formal notice by email or fax is not permitted.[15]

Finding a postal address

4.18 The aim of any communication is for a message to reach its intended recipient. In the case of postal communication, this means delivery at an address to which the recipient has reasonable access. It can be difficult for a serving party to find a postal address to which they can serve a written notice or other document under a lease. This is particularly so when the intended recipient is not a company registered in a part of the United Kingdom.[16] For that reason leases often provide that such a document can be served on the "last known address" of the intended recipient.[17]

4.19 In the Bill consultation our draft Bill sought to provide for a non-exhaustive list of postal addresses at which any "termination document" could be served. By "termination document" we meant any document the giving of which either brings a lease to an end or is a necessary step towards that outcome. This was a category that included all break- and irritancy-related notices as well as notices to quit and of intention to quit. While the provision attracted broad

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[13] The most popular formats are the portable document format ("pdf") and the Microsoft Word format.
[14] Short Message Service. There are also electronic multi-media messaging service (MMS) messages which in addition to text can communicate pictures, videos and audio recordings.
[15] See http://www.psglegal.co.uk/leases.php. This covers break notices and irritancy-related notices, as well as notices (of intention) to quit.
[16] Section 1139(1) of 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. That office can be found on the publicly accessible part of the Register of Companies (Companies Act 2006, s 1139(3)).
[17] See for example cl 6.5.2 of the PSG model commercial lease (office), available at http://www.psglegal.co.uk/leases.php.

support in principle, some consultees pointed out practical difficulties. For instance, with the exception of the "last known address" of the intended recipient (available only in the absence of a more recent alternative), the addresses listed were arranged non-hierarchically. Both Brodies and the Law Society of Scotland were concerned that this could give rise to uncertainty as to the availability of a particular address, and thus see parties serving on multiple addresses unnecessarily.

4.20 Upon further reflection, we do not consider that it is necessary to prescribe the addresses to which notices may be sent. For pre-irritancy warning notices, there is already a list of mandatory addresses for service under section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 which should continue to apply to such notices. For notices to quit and notices of intention to quit, rather than specifying the addresses to which notices may be sent we recommend that legislation provide that if service takes place by one of a number of specified methods, the serving party should benefit from a presumption that service has taken place at a specified time.[18]

Parties without a UK address

4.21 The difficulties with postal communication can be most acute in relation to parties who have no address in the United Kingdom. The efficacy of overseas postal services varies greatly (for example in delivery times and in the sender's ability to verify receipt), meaning that senders must rely on more expensive means of serving notice such as the equivalent of delivery by a sheriff officer. A member of our Advisory Group advised us of the difficulty, for instance, in serving notice on parties in Central America or in the Caribbean Islands, whilst one respondent to our draft Bill consultation made a similar point with specific reference to Panama.[19]

4.22 These difficulties are not limited to serving notice to, or of intention to, quit. All "termination documents"[20] are equally affected. Indeed, the difficulties associated with the service of irritancy-related notices on overseas tenants are given some recognition by the current law, whereby the statutory requirement to serve a pre-irritancy warning notice is excluded where the tenant does not have a UK address known to the landlord and has not provided one for the purpose of service.[21] In practice, however, the requirement to serve a pre-irritancy warning notice is often imposed on a landlord by the lease itself regardless of the statutory exemption.[22]

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[18] See paras 3.82 and 3.90 to 3.94.
[19] Amir M Ismail.
[20] This expression covers any document which brings the lease to an end or which is a necessary step to that end – a category that includes break notices and irritancy-related notices.
[21] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 4(5). No such exclusion applies to irritancy notices themselves in such circumstances, nor to any other form of notice terminating a lease, such as a break notice, which must simply be served abroad.
[22] See for example cl 6.1.1 of the PSG model commercial lease (office), available at http://www.psglegal.co.uk/leases.php.

Statutory obligation to provide a UK address

4.23 We have noted the difficulties in serving a termination document by post on a party that does not have a UK postal address.[23] These are not unknown in other areas of letting. Section 48(1) of the Landlord and Tenant Act 1987 applies to residential leases in England and Wales. It was enacted to deal with the difficulties that residential tenants were experiencing in giving notice by post when their landlord had no UK address. It imposes a duty on residential landlords to notify tenants of an address in England or Wales at which notices may be served. It appeared to us that there was merit in a similar obligation being imposed on landlords and tenants of commercial leases in Scotland where the lease did not mention any UK postal address of a party.[24] This would prevent a foreign recipient party from disappearing and thereby intentionally or unintentionally obstructing the termination of the lease.

4.24 In the Bill consultation we asked whether there was support for a similar approach for leases covered by the Report. Consultees expressed broad agreement with a statutory duty on non-UK parties to provide a UK address for postal service. While one consultee suggested that this would be unduly burdensome for foreign investors,[25] we think that such investors would be likely to have a UK-based agent at some stage of the lease whose address can be given (and used later even if the agency ceases until a new address is notified). In these circumstances, we do not see this as likely to deter foreign investors. We propose therefore that each party should be under a statutory obligation to notify the other in writing of a UK postal address to which any termination document may be sent. Notification can be of an address for a category of document that includes all termination documents or it can be of different addresses for different types of termination document (provided all types are covered). The statutory obligation to notify would apply from the moment that the party under it becomes a party to the lease. Given the importance of a UK address, parties should not be allowed to contract out of the obligation.

4.25 There are, however, some situations in which this obligation should not apply. These fall into three groups. First, the obligation should not apply to UK parties. The identification of a UK party is not straightforward. For that reason, we favour an approach that excludes the obligation from all parties for whom a UK address is included in the lease itself[26] or in an assignation of the lease or any other document which has the purpose of transferring a party's interest in the lease. In this latter category we have in mind documents such as dispositions of the let property. We accept that this does not take account of a party ceasing to have a UK address during the course of the lease. However, we hope that the presence of such an address in a document that governs the lease, and that should be available to the serving party, can assist in enabling effective postal service to the last known address in the UK of the

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[23] Para 4.21.

[24] The presence of a UK postal address in a lease has the advantage of providing other parties with a "last known address" to which they may be able to serve a termination document even if the recipient no longer has a presence at that address (if the lease or statute allows it).

[25] Burness Paull's real estate department.

[26] As noted at para 4.27, the obligation is applicable only to leases granted for more than one year (ie leases that require to be constituted in formal writing to give rise to real rights). It is conceivable, though in practice highly unlikely, that a party to such a lease that is based in the United Kingdom does not have a UK address set out in the lease. In that unusual event, the statutory obligation would apply to such a party, despite their UK connection.

party if the lease or a statutory provision so allows.[27] In addition, parties to the lease who are corporate bodies or other legal persons[28] with a registered office in the United Kingdom should be seen as UK parties. Their registered office will usually be available for service and, since the address of that office can be readily discovered, notification of a further address under the statutory obligation is unnecessary.

4.26 Secondly, where a party to a lease has died, we propose, separately, that service of a termination document can be made on the deceased (as though they were still alive) until an executor has been confirmed to their estate[29] and has notified their name and an address in the United Kingdom to the serving party. In such circumstances, imposition of the statutory obligation on the executor is unnecessary.[30]

4.27 Thirdly, the obligation should not apply to leases of one year or less in duration. Since these leases need not be constituted in writing,[31] it is quite possible for parties to enter into a lease without any thought being given to postal addresses for giving notice. Other than in respect of pre-irritancy warning notices and notices to quit, the law allows notice under an oral lease to be given orally and without a termination document unless the lease provides otherwise. It would be therefore be inappropriate to impose a statutory obligation on a party to such a lease to give written notification of a UK address. If parties wish, they can agree to the inclusion of such an obligation in the lease.

Postal delivery to notified address

4.28 If the document is posted to the address notified under the obligation, the rebuttable presumption (under the common law) that the document when posted is duly delivered to the address and the addressee in the ordinary course of post[32] should apply unless modified by the terms of the lease. Often leases contain a term under which the rebuttable presumption is replaced with a rule that the posted document is deemed to have been received by the addressee upon the expiry of a certain period after posting.[33] If the lease contains such a term we would expect it to take effect upon the document being posted to the address notified pursuant to the statutory duty.

Updating of address

4.29 Where an address has been provided for the purposes of serving termination documents, it is important that the address is kept up to date. To this end, we have considered whether statute should oblige parties to notify one another of any changes. We have

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[27] Many leases contain provisions allowing service on the last known address of a party. The presence of a UK address in the lease, or in an assignation or other document transferring the lease that has been given to the serving party, will allow the operation of such provisions.
[28] For example, limited partnerships under the Limited Partnership Act 1907.
[29] See paras 4.48 to 4.53. Another possibility is that before an executor is confirmed a heritable creditor takes possession of the let property or the tenant's interest and thereby becomes party to the lease. In that instance, the ability to serve on the deceased would end upon the creditor's notification of their name and address.
[30] In the event that there is more than one executor and one of the executors is resident abroad, service can be made on the deceased rather than on the overseas-based executor.
[31] 1995 Act, s 1(7).
[32] *Chaplin v Caledonian Land Properties Ltd* 1997 SLT 384, 386J-K (Lord Rodger); *Peter J Stirling Ltd v Brinkman (Horticultural Service) UK Ltd* [2020] CSOH 79, paras 41 to 47 (Lord Clark); and see *Lambert v Smith* (1864) 3 M 45, 46 (Lord Benholme), 47 (Lord Neaves) and 48 (Lord Justice-Clerk Inglis).
[33] See for example cl 6.5.4 of the PSG model commercial lease (office), available at http://www.psglegal.co.uk/leases.php.

concluded, however, that to require this of parties in every case is likely to be unduly burdensome. Instead, we are proposing that statute should expressly *permit* parties to update the address supplied, straightforwardly by way of a further notification. Even without imposing an additional duty, this ought to encourage attentiveness on the part of landlords and tenants. If a party has provided an address notified under the statutory duty, the serving party should be entitled to serve on the notified address until a new address has been notified in the same way.

Remedies for breach of obligation

4.30 We have given careful consideration to the remedies for breach of the statutory obligation to provide a UK address. In England and Wales, section 48 of the Landlord and Tenant Act 1987 contemplates a retention of rent by the tenant while the landlord's obligation to provide an address for service remains unfulfilled. Once the obligation is complied with the rent falls due. In the Bill consultation we invited comment on the availability of a similar remedy to tenants under the leases covered by our Report. The Scottish Property Federation and Anderson Strathern expressed the view that retention of rent would not be a proportionate commercial remedy for what could be a simple administrative error. The Law Society of Scotland, Brodies, Pinsent Masons, Shepherd and Wedderburn and Amir Ismail also expressed concerns about the proportionality of the remedy in relation to the breach. However, a majority of consultees who responded on this issue were content with the remedy. It is important to note that retention of rent is not the sole remedy for the tenant. Tenants will be at liberty not to exercise the remedy at all. Alternatively, they may retain only a small portion of the rent. However, there must be some potential sanction against a landlord who does not comply. If a tenant retains payment of rent even to some extent, we would expect the landlord to inquire about the reasons for non-payment and to be informed that this is due to their failure to provide a UK address. Where the address is later provided, a reasonable period of time should be permitted for payment of the retained rent before the tenant can themselves be held in breach of contract. We propose a period of 14 days.

4.31 While the retention of rent provides a powerful incentive for the landlord to provide an address for service, it cannot ensure that the tenant has an address in the UK to which service can be made. A time limit for service of a break notice may be fast approaching leaving little time for retention to take effect. A tenant might regard the withholding of any rent as an excessive step. Accordingly further remedies are necessary.

4.32 Damages are not an appropriate remedy. If limited to the additional costs of service abroad, the sums involved might be relatively small and not cost-effective to pursue. If damages extended to other losses, such as those consequential to being unable to serve a notice timeously, their calculation and proof would be likely to be very complex. Instead there are two remedies that appear feasible.

4.33 First, if the party in breach is the tenant, the landlord should be enabled to serve notice at the let premises. This is of assistance only where the let premises are, or include, a building to which postal delivery can be made and to which the tenant will have access, but generally this will be the case. Consultees have indicated to us their preference for such a remedy. We agree with it.

4.34 Secondly, whether the party is a landlord who is unable to serve at the let property or a tenant, there should be available as a last resort some other means of service in the UK. Some consultees suggested service by publication in a newspaper. However, that can bring its own procedural difficulties. Where it is used in the service of court documents, service is usually delayed for some months after publication. Instead, we propose that parties should be permitted to post a termination document to the Extractor of the Court of Session. This is a means of service that is available for heritable creditors in calling up standard securities.[34] It has also been made available for service of documents in relation to the termination of very long leases under the Long Leases (Scotland) Act 2012.[35] It has the benefit of allowing postal service of the document to take place in exactly the same manner as would have been available had the UK address been provided. We have consulted the General Department of the Court of Session and no practical difficulties in permitting such notifications on the Extractor as a last resort have been identified.

4.35 In order to ensure that postal service on the Extractor is used as a last resort, a filtering process will be necessary. We envisage two elements to this.

4.36 First, the serving party should endeavour to use electronic means for service of the document provided that such service would not be legally ineffective and is reasonably practicable. Some leases contain provisions barring the use of electronic communications for the notification of termination documents in general. In addition, statute can prevent the service by electronic means of termination documents such as pre-irritancy warning notices.[36] In these situations electronic service would be legally ineffective and therefore insistence on electronic service would be inappropriate. In other situations there may be technical obstacles to electronic service. The serving party may lack an electronic address. There may be problems with the server or electronic machinery enabling the giving of notice. However, it should be for the serving party to establish the circumstances in which it was not reasonably practicable to send the document electronically.

4.37 Second, if the serving party is the landlord, postal service on the let property should not have been possible. The impossibility that we envisage is where the property is a plot of ground or a building that has fallen into dilapidation and owing to such physical obstacles the postal service is not able to deliver the document to the property.

4.38 Accordingly we recommend that:

57. Statute should provide that a party to a lease (to which the statutory code applies) must notify the other of a UK postal address to which termination documents may be sent, unless specified circumstances apply. It should also expressly provide that a new address for that purpose may be notified in place of one previously notified under this provision.

(Draft Bill, section 27)

[34] Conveyancing and Feudal Reform (Scotland) Act 1970, s 19(6).
[35] Long Leases (Scotland) Act 2012, s 74(1)(c).
[36] 1985 Act, s 4(4). Notices to quit and of intention to quit can be served electronically under Part 2 of the draft Bill only provided that the would-be recipient has given the requisite consent: see paras 3.83 to 3.88.

58. To comply with the obligation to notify a UK postal address, the notification should require to be given in writing and state (in whatever terms) that the specified address may be used for the purpose of sending termination documents. It should be permissible for different addresses to be notified for different types of termination document, and for notification to be given in more than one document.

(Draft Bill, section 27(4))

59. Statute should specify that the obligation to notify a UK postal address does not apply:

(a) to a party for whom a UK postal address is included in the lease itself (whether or not specified as an address to which termination documents may be sent);

(b) to a party for whom a UK postal address (whether or not specified as an address to which termination documents may be sent) is included in a document disponing the subjects of the lease and granted after the lease was granted or assigning or otherwise transferring an interest in the lease (to that party) which has been registered or a copy of which has been given to the other party;

(c) to a corporate body or other legal person with a registered office in the UK;

(d) where the duration of the lease is one year or less;

(e) to a confirmed executor over an estate which includes an interest in the lease; or

(f) to a heritable creditor who has entered into possession of the interest of a party to the lease who has died.

(Draft Bill, section 27(3))

60. Statute should provide that where the obligation to notify a UK postal address is breached by a party to a lease, the other party is entitled:

(a) where the other party is the tenant, to withhold payment of the whole or part of any sum due to be paid during the period of non-compliance (which, if the landlord later complies with the obligation, must be paid within 14 days);

(b) where the other party is the landlord, to send the termination document by post to the let property (until 14 days after compliance); and

(c) in either case, to send the termination document by post to the Extractor of the Court of Session (until 14 days after compliance), if

(i) it would be legally ineffective or not reasonably practicable to send the document electronically; and

(ii) where the other party is the landlord, documents cannot be delivered to the let subjects.

(Draft Bill, section 28)

61. A termination document posted to the let property by the landlord or to the Extractor of the Court of Session (the obligation to notify a UK postal address having been breached) should be treated as if it had been sent by post to a UK address notified as one to which any termination document can be sent.

(Draft Bill, section 28(8))

62. Breach of the obligation to notify a UK postal address should not give rise to an entitlement to damages.

(Draft Bill, section 28(2))

63. Parties should not be permitted to disapply the obligation to notify a UK postal address, nor the remedies available for breaching it.

(Draft Bill, section 27(6))

64. The availability in law of an overseas address for service of termination documents should be immaterial to the existence of the obligation to notify a UK postal address.

(Draft Bill, section 27(5))

65. These provisions should apply to all 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 ("termination documents").

(Draft Bill, section 27(2))

Service of notice upon change or death of tenant or landlord

Change of landlord or tenant

4.39 Difficulties with service of termination documents can arise where, unbeknown to the serving party, there has been a change in the party upon whom the document requires to be served.[37] This is especially true where that party is the landlord. In the event of a change of tenant, an assignation will have been intimated and likely agreed to by the landlord and this will enable the landlord to obtain a name and postal address for the new tenant. In the event of a change of landlord, however, there is no reason why the tenant should necessarily have

[37] In this instance we are not concerned with changes in party to a lease by virtue of their death.

been made aware of it, particularly where the landlord employs an agent who acts for both the former and the new landlords. Thus, the tenant might unwittingly serve notice on a party who has ceased to be the owner and thus landlord of the let property.

4.40 In the case of agricultural tenancies, legislation provides for such an eventuality. Under section 84(4) of the Agricultural Holdings (Scotland) Act 1991, unless or until the tenant has received notice that the former landlord has ceased to be such, as well as notice of the name and address of the new landlord, any notice served on the former landlord is deemed to have been served on the new landlord.[38] In our 1989 Report on *Recovery of Possession of Heritable Property*,[39] we recommended the enactment of a provision along these lines for all leases.[40] This was not implemented due to a lack of Parliamentary time.

4.41 In the Bill consultation we asked whether a similar provision should be introduced in respect of changes of both landlords and tenants under leases covered by this Report. While consultees expressed broad support for the proposal, Burness Paull's real estate department took the view that the provision was unnecessary as changes in landlord were apparent from the Land Register of Scotland or the Register of Sasines both of which are accessible to the public. Either register could be checked to ensure that the notice was sent to the correct person. Burness Paull's real estate and litigation departments together with Shepherd and Wedderburn suggested that if there were to be a provision, notification under it to the former landlord should be time-limited in some way. The Law Society of Scotland made a similar proposal in respect of changes of parties who were trustees. Urquharts pointed out that a situation could arise where a tenant was aware that the landlord had changed but had not received the name and address of the new landlord but could still serve notice on the former landlord. The Faculty of Advocates favoured the proposal but only in respect of changes of landlord.

4.42 We acknowledge that where a landlord is the registered owner of the let property, any change in owner can be identified from the Land Register or Register of Sasines. We understand that if a party is legally represented, their solicitor may check the registers to ensure that the document is served on the correct person. However, as for agricultural leases, many tenants will give notice themselves, or rely on agents who are not legally qualified. We do not think that they should be prejudiced through not carrying out pre-notice checks. Furthermore, there can be a gap in time between the checking and the updating of the register during which the new owner may not be apparent. Finally our proposal would cover situations where parties do not require to appear as owners in any register but nevertheless become landlords under the lease.[41]

4.43 None of the consultees indicated any difficulty with the proposed provision applying to changes of landlord. On the issue of timing, we are unable to see why there should be a cut-off point beyond which service on the former landlord should no longer be competent despite the tenant not having been given the name and postal address for the new landlord. These are not burdensome requirements. We would expect the name and postal address to be given

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[38] The omission of the provision from the 2003 Act has been described as a serious omission (Gill, para 54-11).
[39] 1989 Report, Pt V; see especially paras 5.62 to 5.87 (focussing on the death of a tenant or sub-tenant).
[40] 1989 Report, Pt XI; paras 11.14 to 11.17. The 1989 Report considered s 90(4) of the Agricultural Holdings (Scotland) Act 1949 which was re-enacted in s 84(4) of the 1991 Act.
[41] For instance, a new head tenant in relation to a sub-tenant (following assignation of the head lease) or a heritable creditor taking civil possession in relation to a tenant.

as a matter of good practice. However, if they are not given, and the tenant is kept unaware of such essential requirements for service, they should not be prejudiced through invalidation caused by the expiry of an arbitrarily fixed time limit. We accept that a situation could arise where a tenant is aware of a change in landlord but under the proposed provision remains entitled to serve on the former landlord. However, that entitlement would be a consequence of the new landlord having failed to notify their name and postal address. In that respect a postal address is necessary in order to ensure that the tenant has at least some physical place at which service on the landlord might be possible.

4.44 The scope of the provision would be restricted to excluding challenges to a termination document based solely on the service of the document on a person who was no longer a party at the time of service. Accordingly, challenges based on other grounds, including the method and timing of service, should remain open to the new landlord. Furthermore, given that there is a public interest in tenants' notices not being invalidated through an undisclosed transfer of the landlord's interest, parties should not be entitled to contract out of the provision that we propose.

4.45 For the reasons given above,[42] landlords are much less likely to be unaware of the name and address of any new tenant. The equivalent provision in the 1991 Act does not cover changes of tenant. We did consider the possibility of a landlord being unaware of a tenant incorporated in Scotland being dissolved with the tenant's interest vesting in the King's and Lord Treasurer's Remembrancer on behalf of the Crown.[43] However, in the event of such dissolution there exists a process for the restoration of the company to the register, which could enable a termination document served on it to have full retrospective effect. In the circumstances, we have been persuaded that there is no material benefit for landlords in the provision applying to changes of tenant.

4.46 Accordingly we recommend that:

66. Statute should provide that, where the interest of a landlord (in a lease to which the statutory code applies) has been transferred to a new landlord, the tenant may give any termination document to the former landlord unless or until the tenant has been informed in writing by the new landlord of the name of, and a postal address for, the new landlord.

(Draft Bill, section 29)

67. Statute should provide that:

(a) a termination document given to the former landlord prior to such written notification will be treated as having been served on the new landlord; and

(b) nothing in such deemed service should affect any ground of challenge to the document or its service other than it not having been served on the new landlord.

(Draft Bill, section 29(2) and (7))

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[42] Para 4.39.

[43] While less likely, striking off can occur also for landlords who are registered companies.

68. These provisions should apply to all documents the giving of which has the effect of bringing the lease to an end or which is a necessary step before a lease can be brought to an end ("termination documents").

(Draft Bill, section 29(8))

Death of tenant or landlord

4.47 Whilst many parties to commercial leases are corporate bodies, some are individuals. Where a landlord or tenant is an individual, and that individual dies, difficulties can arise for the other party in serving notice. A lease does not come to an end upon the death of the landlord, nor upon that of the tenant.[44] Once an executor has been confirmed to the deceased's interest in the tenancy or the let subjects, it is vested in the executor with retrospective effect from the date of death.[45] Until confirmation occurs, however, ownership of the deceased's interest is in an uncertain state, and it is unclear upon whom notice ought to be served. This gap in the law has long been apparent, and indeed was considered by the Commission in our 1989 Report on *Recovery of Possession of Heritable Property*.[46] The existence of the gap is unsatisfactory, and we have taken the opportunity to address it.

4.48 In our 1989 Report we gave careful consideration to a solution. The 1989 Report concluded that where either party to a lease has died, and the surviving party has yet to receive notification that an executor has been confirmed (or, as the case may be, that a heritable creditor has taken possession), the surviving party should be entitled to serve notice on the deceased party as if they were still alive.[47] Whilst this recommendation was ultimately never implemented,[48] the suggested remedy remains, in our view, an appropriate one. As soon as the surviving party receives notification that an executor or heritable creditor is in place, together with their address in the United Kingdom, any difficulty in serving notice which is caused through the death should disappear.[49] While the service would be on the deceased party it would be effective against the executor or heritable creditor whether at the time of service they have or have not become parties to the lease through confirmation or taking possession of the let property. Given the general benefit of the provision to the public parties should not be permitted to contract out of it.

4.49 As with the provision allowing service on a former landlord, nothing in the provision that we propose should exclude any ground for challenge other than that the document was given to a person who owing to their decease was no longer a party. Aside from the challenges that could be made to the giving of the document during the deceased's party's lifetime, this could include a challenge to a notice terminating the lease given under section 16(3) and (4) of the Succession (Scotland) Act 1964.

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[44] There is an exception where the lease has been granted for the duration of the tenant's lifetime, that is a "liferent lease".
[45] Succession (Scotland) Act 1964, s 14.
[46] 1989 Report, Pt V; see especially paras 5.62 to 5.87 (focussing on the death of a tenant or sub-tenant).
[47] 1989 Report, paras 5.67 and 5.70.
[48] This appears to have been due to a lack of legislative time for enactment.
[49] Upon taking lawful possession of the secured subjects, a heritable creditor would be deemed to have been assigned all rights and obligations of the deceased in relation to the lease: Conveyancing and Feudal Reform (Scotland) Act 1970, s 20(5).

4.50 There is one area where the situation during the lifetime of the deceased party cannot be replicated readily following their death. This is the ascertainment of the date of receipt of a termination document which is sent to an electronic address. At common law, such a document is deemed to be served at the time when it is received. The statutory code that we propose introduces a rebuttable presumption that receipt takes place on the day of sending provided that it is a working day, or the first working day thereafter.[50] However, a document emailed to a deceased party will never be received by them. Thus the requirement of receipt is not capable of being applied. Parties can provide in the lease that electronic service is deemed to take place on a particular date regardless of receipt. Such a provision can continue to be effective for electronic documents. However, a lease might not have any such term. In these circumstances, a special provision on the timing of receipt of electronic documents is required. We recommend that in relation to the timing of electronic service of the document on the deceased the service should be deemed to take place on the earliest working day on which, had the deceased still been alive, it would have been reasonable to expect the deceased to have received the document.

4.51 In contrast to the position where parties change other than upon the death of a party, the statutory duty to provide an address in the United Kingdom does not apply to executors or heritable creditors. However, this should not prejudice the serving party, as until a UK address is provided it will remain open to them to serve on the deceased as if they were still alive.

4.52 In some cases it may be that an executor is confirmed, but not specifically to the deceased's interest in the tenancy or the let property. Whilst, in principle, that tenancy or property will not vest in the executor, they will nevertheless owe a duty to the beneficiaries to confirm to it in order that it may be transferred. The executor will have the power to add the item to the confirmed estate by means of a supplementary confirmation, and having a notice served on them would prompt them to do so. It remains appropriate therefore that all notices are served on the executor following notification of their confirmation. Conversely, it may be that the executor is the serving party. Where notice is served by the executor before their confirmation to the tenancy or to the let subjects, it will be ratified with retrospective effect upon their subsequent confirmation.[51]

4.53 Accordingly we recommend that:

69. Statute should provide that where a party to a lease has died, a termination document may nevertheless be:

(a) sent to a postal or electronic address which, immediately before the deceased's death, the sender could have used for service of the document by virtue of any common law rule, statutory provision or term of a lease or other agreement between the parties; or

(b) left at a postal address of the same description,

as if the deceased was alive, until the serving party is notified in writing

[50] Para 3.93; draft Bill, s 14(1).

[51] *Chalmers' Trs v Watson* (1860) 22 D 1060; *Mackay v Mackay* 1914 SC 200.

(i) by the executor of the fact that an executor has been confirmed over the estate of the deceased, or by a heritable creditor that they have taken possession of the deceased's interest in the tenancy or the let subjects; and

(ii) the name of, and a UK postal address for, the executor or heritable creditor, as the case may be.

(Draft Bill, section 29(3), (5)(a), and (8))

70. **Statute should provide that a termination document served accordingly on the deceased party is to be treated as having been served on the executor (irrespective of whether they have been confirmed) or heritable creditor (irrespective of whether they have taken possession), as the case may be:**

(a) where it is sent to a postal address, on the day on which, if the deceased were still alive, the document would have been taken to have been received by them by virtue of any common law rule, statutory provision or term of the lease or other agreement;

(b) where it is sent to an electronic address, on the earliest working day on which, if the deceased were still alive, it would have been reasonable to expect them to receive the document; or

(c) where it is left at the postal address on the day that it is left there.

(Draft Bill, section 29(4) and (5)(b))

71. **Statute should provide that nothing in these provisions affects any ground on which a termination document may not be effective other than the requirement to give it to the other party to the lease.**

(Draft Bill, section 29(7)

72. **These provisions should apply to leases to which the statutory code applies and to all 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 ("termination documents").**

(Draft Bill, section 29(8))

73. **The parties should not be permitted to modify or disapply these provisions in the lease.**

(Draft Bill, section 29(6))

Application to existing leases, accrued rights, and existing proceedings

4.54 We have considered how, if at all, the code for automatic continuation that we recommend in chapters 2 and 3 and the miscellaneous provisions that we recommend in this chapter should apply to leases already in existence at the time when the draft Bill that implements them comes into force ("the commencement date"). Such leases may have been in existence for many years and indeed for decades. Our aim is to modernise and clarify the law. It is inherently unsatisfactory for both practitioners and the public to be faced with different laws which apply to a lease depending on whether it was commenced before the commencement date. Confusion could arise as to which law governed a particular lease. The unsatisfactory current law could continue for some leases for many years. In these circumstances, we are of the view that any legislation that implements our recommendations in chapters 2, 3, and this chapter should apply to all leases existing at the commencement date except in limited circumstances.

4.55 We appreciate that until the eve of commencement day, leases will have been governed, and parties will be operating, on the basis of the law as it exists at present. In certain circumstances it may be disruptive and unfair to parties to have a sudden disappearance of that law. In our view the primary legislation itself should make clear the circumstances when the pre-commencement law should be applied by the courts after the commencement date.[52] In that respect a distinction should be drawn between the effect of events in relation to the lease that took place before the commencement date and those on or after the commencement date.

4.56 If a lease had a termination date before the commencement date, the question of whether it has continued automatically beyond that day (including the validity of or necessity for, any notice to quit or of intention to quit) should continue to be determined by the pre-commencement law. Equally, the period for which it was continued should continue to be fixed by that law.

4.57 If the lease has a termination date in a period of six months beginning with the commencement date, any notice given in relation to that termination date should continue to be governed by the pre-commencement law. This is to ensure that notice which would have been perfectly valid under the pre-commencement law, such as a notice to quit given no later than 40 clear days before the termination date, will not be invalidated by the three month period of notice that we recommend coming into force on the commencement date. Another example is the saving of an oral notice of intention to quit where the new code would require it to be in writing. Equally, if the new code imposes an obligation that does not exist under the pre-commencement law such as the copying by a tenant to a sub-tenant of a notice to quit from a head landlord, that obligation should not apply during the six month period. It is unlikely that the period of notice under an existing lease will exceed six months. Accordingly that appears to us to be a reasonable period for the old law to be saved without causing undue delay in the introduction of the benefits of the new law or causing confusion through the existence of parallel regimes of pre-commencement and new law.

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[52] Practitioners should not have to go to the trouble of seeking out separate statutory instruments with transitional and saving provisions and having to read those with the primary legislation. The primary legislation should act as a "one-stop shop" in providing the necessary information.

4.58 Consistently with the need for the new law to avoid prejudice to the parties in existing leases, any right or obligation acquired, accrued or incurred under the lease before the commencement date should be unaffected by the new law. For example, liability for rent incurred prior to the commencement date should remain untouched. The pre-commencement law should continue to be applied for the purpose of any legal proceeding or remedy relating to such a right. The new law is intended to replace the pre-commencement law underlying a lease, including any implied terms. It is not intended to validate (or invalidate) the arrangements that the parties have expressed in their lease. For example in the unlikely event that the lease has an express term providing for a three week period of notice for a lease of over six months, that period should continue to be valid notwithstanding our recommended minimum period of twenty-eight days.

4.59 If an existing lease has a termination date more than six months after the commencement date, the recommendations in chapters 2 and 3 should apply to it, subject to its express terms.

4.60 If the duration or date has already been determined by a court, tribunal, or arbitrator before the commencement date or court, tribunal or arbitral proceedings have been raised before the commencement date, the pre-commencement law should continue to apply or be applied.

4.61 We take the view that a six-month period should elapse between the Royal Assent for the legislation and the commencement date. This should suffice for practitioners and parties to acquaint themselves with the new law and to adjust their practices accordingly. Having regard to our desire that the legislation provide a “one-stop shop" for practitioners, its provisions should express a fixed period of time that should elapse between the Royal Assent and the commencement date.

4.62 Accordingly we recommend that:

74. The legislation implementing our recommendations should provide that all of its provisions, including those mentioned in chapters 2 and 3 of this Report, should come into force six months from the date of Royal Assent.

(Draft Bill, section 34)

75. The legislation implementing the recommendations in chapters 2 and 3 of this Report should provide for:

(a) them to apply to all leases existing on the date that it comes into force (“the commencement date”) except in circumstances which it specifies;

(b) the question of whether an existing lease with a termination date before the commencement date has continued automatically beyond that date (including the validity of, or necessity for, any notice to quit or of intention to quit and the period of continuation) to be determined by the pre-commencement law;

(c) the validity of any notice given in relation to a termination date in an existing lease that occurs on or after and no later than six months after the commencement date to continue to be governed by the pre-commencement law;

(d) the validity or invalidity of any express term in an existing lease should continue to be governed by the pre-commencement law;

(e) any right or obligation acquired, accrued or incurred under the lease before the commencement date to be unaffected by the law implementing those recommendations;

(Draft Bill, schedule 2, paragraphs 8, 9, and 11)

76. Any legislation implementing the recommendations in chapter 4 of this report should provide for them to apply to all leases existing at the commencement date except that recommendations 52 to 56 on the implied durations and dates of entry of a lease should not be applicable:

(a) where the duration or date has already been determined by a court, tribunal, or arbitrator before the commencement date; or

(b) where court, tribunal or arbitral proceedings in which such a matter is to be determined have been raised before commencement date.

(Draft Bill, schedule 2, paragraphs 10 and 11)

Chapter 5 Irritancy

Introduction

5.1 The subject of irritancy of leases has been considered by the Commission in the past. In 2003, we published our Report on *Irritancy in Leases of Land*.[1] That Report recommended various reforms to the law under which a lease is brought to an end by virtue of irritancy. The principal recommendations were the creation of a distinction between remediable and non-remediable breaches giving rise to irritancy,[2] that it be necessary to give pre-irritancy warning notices for all remediable breaches,[3] a minimum 28-day period for the purging of a remediable breach,[4] and the possibility for a tenant to seek an extension of time from the court to allow the purging of a non-monetary remediable breach.[5] If a tenant of an assignable lease should become insolvent we recommended that the landlord be obliged to offer a moratorium to the insolvency practitioner to enable the sale or other transfer of the tenant's interest before any irritancy could take effect.[6] Where neither a moratorium or warning notice was necessary for irritancy, and the irritancy in the notice was a manifestly excessive response to the event triggering it, we recommended that the court should have a power to declare the irritancy ineffective or to delay its effect.[7] In order to provide greater protection from irritancy for tenants' creditors holding security over registered leases we proposed that landlords copy irritancy-related notices to such creditors. Unfortunately, none of the 2003 Report's recommendations have been implemented.

5.2 During the scoping work for our Discussion Paper, we were advised by a number of solicitors and surveyors that the existing law of irritancy is working well. The view was expressed that irritancy is used as a remedy of last resort, and that there was no clamour for reform. As noted in the Discussion Paper, a significant period of time has passed since the 2003 Report, during which the Scottish commercial property landscape has undergone significant change.[8] Nevertheless, it is important that the law in this area should accommodate relations between landlords and tenants regardless of market conditions at any given time. In the Discussion Paper we drew attention to various parts of the 2003 Report including that covering creditor protection.[9]

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[1] 2003 Report. That Report – in contrast to the current Report, which does not cover most residential and agricultural leases – was concerned with irritancy in leases generally, including agricultural and residential leases.
[2] 2003 Report, paras 3.23, 3.26 and 3.27.
[3] 2003 Report, paras 3.24 and 3.25.
[4] 2003 Report, paras 3.30 to 3.42.
[5] 2003 Report, paras 3.36 to 3.41.
[6] 2003 Report, paras 3.43 to 3.47.
[7] 2003 Report, paras 3.62 to 3.63.
[8] DP, para 7.3.
[9] DP, paras 7.28 to 7.23.

Consultation

5.3 In the Discussion Paper we invited the views of consultees as to whether the law of irritancy required reform at present, and if so what aspects required reform, specifically in respect of commercial leases.[10]

5.4 About half of consultees were of the view that no reform was required. These consultees observed that, in general terms, the law of irritancy works well. It was noted that (1) landlords do not in practice resort to irritancy unless they have another tenant ready to take over; (2) irritancy on grounds other than non-payment of a defined sum is extremely rare; (3) irritancy is generally not available upon the corporate insolvency of the tenant;[11] (4) there is generally no capital value in the tenant's interest under a lease and therefore it is not attractive for security purposes; and (5) lease durations have generally become shorter, diminishing the necessity for irritancy to bring a lease to an end. It was acknowledged that there will be occasions where the tenant's interest will attract significant value, such as in the case of a ground lease. However, in these situations it was expected that the tenant would have been well enough advised to protect the capital value during the negotiation of the lease.

5.5 Extensive discussions with solicitors, surveyors and representative organisations following the publication of the Discussion Paper confirmed our understanding[12] that landlords were disinclined to irritate leases, since upon recovery of the property they would assume responsibility for all costs relating to it. We were given numerous examples of landlords being happier to have a tenant occupying a property – without paying rent, either wholly or partly – whilst they sought a new tenant, than to irritate the lease and have the property lying empty, with the resultant liabilities. Prior to the COVID-19 pandemic, some surveyors and solicitors told us that they had not been asked to enforce an irritancy provision for at least ten years. That being said, stakeholders were of the view that irritancy remains an important remedy of last resort where a landlord requires to remove a defaulting tenant. Furthermore, in situations where a tenant has disappeared, irritancy permits the landlord to terminate the lease and let the property afresh.

5.6 Nevertheless, some consultees did suggest that the existing law could be improved in a number of discrete areas. Firstly, it was suggested that the methods available for serving pre-irritancy warning notices under section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 could be updated and expanded. Such notices can presently be sent by recorded delivery post only and if sent by some other means are likely to be held invalid, even if actually received by the tenant.[13]

5.7 Secondly, consultees proposed that provision should be made for a place at which irritancy notices may be served where no such place is mentioned in the lease.

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[10] DP, para 7.27 (questions 41 and 42).
[11] Insolvency Act 1986 Sch B1 para 43(5) (as inserted by the Enterprise Act 2002 Sch 16 para 1) prohibits a landlord in Scotland from exercising a right of irritancy in relation to premises let to a company in administration except with the consent of the administrator or the court.
[12] DP, para 7.24.
[13] Or indeed, even in the event of a postal strike: *Kodak Processing Companies Ltd v Shoredale Ltd* [2009] CSIH 71; 2010 SC 113, paras 28 and 29 (Lord Osborne).

5.8 Thirdly, it was suggested that the 14-day notice period for payment of money due under the lease under threat of termination by irritancy should be extended to 21 or 28 days.

5.9 Fourthly, a number of practitioners suggested that there should be a requirement to warn heritable creditors of the tenant holding security over the lease that a threat of irritancy has been made. A suggestion to that effect, albeit in relation to a reformed scheme of pre-irritancy warning notices in general, was made in our 2003 Report.[14] The object would be to allow heritable creditors to take steps to prevent the termination of the lease and, with it, their security. At present the general law does not oblige landlords to notify a tenant's heritable creditors of their intention to irritate a registered lease, though they may be obliged to do so by virtue of a term of the lease.[15]

5.10 Finally, some solicitors expressed the view that although practitioners, landlords and tenants in standard form leases may have become comfortable with the law as it stands, the law does not provide sufficient protection for sub-tenants upon irritancy or renunciation of a head lease. While the negotiation of a sub-tenancy may involve a sub-tenant requesting an irritancy protection agreement from the landlord,[16] many landlords will refuse, thereby leaving the sub-tenant's business at risk.

5.11 Some solicitors supported the recommendation in the 2003 Report to abolish the legal irritancy where rent has not been paid for two years,[17] and some suggested that the period should be shortened. However, in some of the seminars we held with solicitors, we were advised that they do still come across leases where there is no irritancy clause, and cautioned against abolition of the legal irritancy.

5.12 The Senators of the College of Justice and the University of Glasgow favoured the reforms suggested in our 2003 Report. The Senators considered that the proposals in our 2003 Report struck a fairer balance between the respective interests of landlord and tenant than the current law, which they regarded as being weighted towards the landlord. The University of Glasgow noted that the commercial climate prevailing at the time of their response[18] meant that issues with the current law lay dormant, but pointed to the inevitability of that climate changing. They supported the approach of the 2003 Report, considering that its recommendations for greater controls over irritancy would bring termination through irritancy closer to termination through rescission. The Faculty of Advocates considered that any reform of irritancy should be approached on a comprehensive basis, whilst the Royal Institution of Chartered Surveyors similarly favoured a full-scale review. The Scottish Property Federation expressed the view that there are issues with the current law that deserve further consideration in their own right at a later date.

Scope for reform

5.13 There does not appear to be any general appetite for comprehensive reform of the law relating to irritancy of leases, nor for the implementation of our 2003 recommendations in respect of commercial leases. We remain of the view that a comprehensive reform of the law

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[14] 2003 Report, para 3.72.
[15] See para 5.26.
[16] By which the landlord undertakes to deal directly with the subtenant in the event that the tenant defaults.
[17] 2003 Report, para 3.15.
[18] March 2019.

of irritancy is in principle desirable. However, this is not the time for that route. Nevertheless, some limited reforms have been suggested. In the remainder of this chapter we consider each of these in turn to assess whether the reform is required and, if so, what form it should take.

Pre-termination warning notices: methods of service

5.14 Under the existing law,[19] a landlord may not rely on an irritancy provision in a lease in the event of the tenant's non-performance of a monetary obligation unless the landlord has served on the tenant a notice (known as a pre-irritancy warning notice) requiring that payment be made within a specified period[20] and expressly stating that failure to comply may result in termination of the lease.[21] The tenant must then have in fact failed to comply with the notice before the landlord can terminate the lease.[22] Significantly, recorded delivery post is the only means by which the warning notice may be served on the tenant.[23] The rationale for this is that, unlike most other methods of transmission, recorded delivery post ensures that a record is generated of the dates of posting and delivery of the notice against which the tenant's compliance can be determined.[24]

5.15 The benefits of recorded delivery post continue to have force. Nevertheless, its availability as the sole method for service is unduly restrictive when a similar degree of certainty can be achieved by other means.[25] Notably, in our 2003 Report we proposed that service by a sheriff officer should be available for service of irritancy-related notices.[26] We remain of that view in respect of pre-irritancy warning notices under the 1985 Act.

5.16 In the period since that legislation was enacted, several further methods of transmission have gained currency which are similarly cheap, reliable and readily available. In particular, the ubiquity of email communication has been recognised in statute. In private residential leases, if the sender and recipient have pre-agreed in writing that the document may be sent by being transmitted to a specified electronic address and in a specified electronic form, notices terminating the lease may be given by those means.[27] However, the PSG's style commercial property leases expressly exclude email (and fax) as a valid means of serving "formal notices", including those relating to irritancy.[28] Our Advisory Group was similarly opposed to service by email in this context. The view was expressed that, given the extraordinary nature of irritancy and the particular gravity of its consequences for a tenant and their business, a landlord bears a special responsibility for ensuring that an irritancy-related notice is duly delivered. Email communication was thought to present a number of potential

[19] Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 4(1) and (2).
[20] Not less than 14 days after service of the warning notice, or such longer period as is specified in the lease: 1985 Act, s 4(3).
[21] 1985 Act, s 4(2)(a).
[22] 1985 Act, s 4(2)(b).
[23] 1985 Act, s 4(4); *Kodak Processing Companies Ltd v Shoredale Ltd* [2009] CSIH 71; 2010 SC 113.
[24] As well as being cheap, reliable and readily available to the layperson: *Kodak Processing Companies Ltd v Shoredale Ltd* (above), paras 28 and 29 (Lord Osborne).
[25] And given the practical impediments to postal delivery which may from time to time arise, such a postal strike: *Kodak Processing Companies Ltd v Shoredale Ltd* (above).
[26] 2003 Report, para 3.70.
[27] See s 26(2)(c) of the Interpretation and Legislative Reform (Scotland) Act 2010, which applies to notices given under ss 48 to 50 of the Private Housing (Tenancies) (Scotland) Act 2016. This is reflected in cl 4 of the Scottish Government Model Private Residential Tenancy Agreement, available at https://www.gov.scot/publications/scottish-government-model-private-residential-tenancy-agreement/. Most private residential leases have incorporated cl 4 since the 2016 Act came into force.
[28] See for example cl 6.5.5 of the Model Commercial Lease of Whole Building (Office), available at http://www.psglegal.co.uk/leases.php.

difficulties in this respect. Email addresses might change or cease to operate; email servers might be disrupted; or messages might simply get lost in cyberspace. While electronic service was thought sufficient for notices designed to prevent automatic continuation at the agreed expiration of a lease, where such a notice might be expected, it was thought inappropriate for potentially unexpected premature termination through irritancy. We are persuaded by the arguments outlined against service of pre-irritancy warning notices by electronic means. Accordingly we do not recommend that this should be permitted.

5.17 During our discussions with the Advisory Group it was noted that parties could always provide in their lease that a warning notice be given by email as well as by recorded delivery post or sheriff officer. We agree that this is an option that is available to parties and recommend that it be set out in statute in section 4 of the 1985 Act.

5.18 During the Bill consultation the Law Society of Scotland, together with various firms of solicitors, expressed the view that delivery by private courier should also be permitted. It was noted that time and expense could be saved if such service were permitted. We can see the attraction of allowing such delivery. However, there are other factors to be taken into account. Firstly, the methods of service of pre-irritancy warning notices under the 1985 Act are mandatory. It is not permissible for parties to contract out of them.[29] As we observed in considering the question of contracting-out in the 2003 Report,[30] this is because of the potency of the landlord's power to terminate the lease through irritancy. It would be inconsistent to provide that parties can contract out of delivery of warning notices by courier but not out of the other means of serving such notices, such as by recorded delivery post.

5.19 Secondly, private couriers are typically companies who hire or employ individuals to carry out the delivery. The individuals making the delivery are not covered by any code of conduct. Their standards of service may vary. If required to testify to the delivery, the individual who made the delivery might be difficult to trace. With this variability of service and uncertainty over proof of delivery, there is greater scope for questioning of the delivery of the document, with consequent uncertainty for the irritancy process. It does not appear to us to be desirable for statute to impose such uncertainties on parties. For these reasons we are not persuaded that service by private courier should be permitted for pre-irritancy warning notices. In contrast, delivery by sheriff officer carries with it a certain assurance of the quality of the service provided. This is important given that a pre-irritancy notice might have very serious consequences for the tenant and their business. A sheriff officer is an individual who is an officer of the court who holds a commission from the sheriff principal of the sheriffdom in which they operate.[31] The sheriff officer must adhere to a Code of Practice,[32] breach of which can give rise to disciplinary proceedings. They require to be trained and then to comply with continuous professional development requirements.

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[29] 1985 Act, s 6(1).
[30] 2003 Report, para 3.76.
[31] Act of Sederunt (Messengers-at-Arms and Sheriff Officers Rules) 1991 (SI 1991/1397), reg 8.
[32] See the Code of Practice of the Society of Messengers-at-Arms and Sheriff Officers available at https://smaso.org.uk/smaso/constitution-and-code-of-practice/.

5.20 We therefore recommend that:

77. Section 4(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 should be amended to allow service of a pre-irritancy warning notice by sheriff officer.

(Draft Bill, section 30(1) and (2))

78. Section 4 of the 1985 Act should be amended so that it provides that a pre-irritancy warning notice sent by recorded delivery post is sufficiently served if it is delivered to:

(a) the last UK postal address given by the tenant to the landlord for the purpose of sending the notice; or

(b) where the tenant is a body corporate or other legal person with a registered office in the UK, the address of that office; or

(c) where the tenant does not have an address mentioned in paragraph (a) or (b), the last UK postal address for the tenant of which the landlord is aware (irrespective of whether the tenant has a more recent UK address of which the landlord is not, but could reasonably be expected to become, aware).

(Draft Bill, section 30(1) and (2))

79. In respect of delivery by sheriff officer, the 1985 Act should be amended in order to provide for the methods of service which a sheriff officer may use.

(Draft Bill, section 30(3))

80. The 1985 Act should permit parties to agree that the notice must, in addition to being served by recorded delivery post or by sheriff officer, be served by such other method as is specified in the lease.

(Draft Bill, section 30(2))

Irritancy-related notices: place of service

5.21 Where there has been a monetary breach of a lease which is capable of giving rise to an irritancy, typically two notices require to be served to achieve termination of the lease. The first is a pre-termination notice, which warns the tenant that the lease may be terminated in the event of continuing non-payment following the expiry of a specified period. Service of this first notice is a statutory pre-condition for termination.[33] It applies only where the tenant has provided the landlord with a UK address for service, or where the landlord is aware of a UK address for the tenant.[34] If, however, the statutory condition is imported into the lease (as is

[33] 1985 Act, s 4(1) and (2).
[34] 1985 Act, s 4(1) and (5).

often the case), the need to serve a warning notice becomes a contractual condition, and applies even where no UK address for service has been provided by the tenant and the landlord is otherwise unaware of one.

5.22 The second notice which requires to be served is the irritancy notice itself.[35] It is this notice which has the effect of terminating the lease. In the vast majority of leases, service of an irritancy notice is a contractual condition that must be fulfilled for termination to be effected. Typically, the lease itself sets out procedures for the service of both types of notice through their sending or delivery to an address in the UK. Service may be enabled on the "last known address" of the tenant in the UK, even where the tenant maintains no connection to that address. However, consultees have identified that a difficulty arises where either the lease makes no such provision or where the landlord is simply unaware of any UK address for the tenant whatsoever.

5.23 In our 2003 Report, we suggested that the landlord should have available, as a fall-back option, service on the tenant at the let premises, provided that the premises had a postal address.[36] We continue to see the force in that suggestion. In giving effect to it, one option would be to simply amend the 1985 Act so as to include such an address. However, the difficulty identified relates not merely to irritancy-related notices but also to other termination documents, such as break notices and notices to quit or of intention to quit. Accordingly, in Chapter 4 of this Report we recommended the creation of a statutory obligation on a tenant or landlord not based in the UK to provide the other with written notification of a UK postal address.[37] Breach of that obligation by the tenant would permit the landlord to serve irritancy-related notices by post to the let premises.

Pre-termination notices: duration of remediation period

5.24 The current law provides that, for irritancies or material breaches of a commercial lease involving a failure to make a monetary payment, the landlord's pre-termination notice must require the tenant to make payment within a period of not less than 14 days immediately following the service of the notice.[38] In our 2003 Report, we suggested that this period was too short, particularly when account was taken of weekends and holiday periods.[39] We suggested instead a period of 28 days. We note also that in France, one month's notice must be given before a commercial landlord may terminate a lease before the termination date when founding on an irritancy or resolutive clause.[40]

5.25 It was suggested to us by some consultees that the use of electronic payments, currently prevalent in commercial practice, meant that the 14-day period was not as challenging as it once was. That observation has some force. In the circumstances we think

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[35] An irritancy notice is required under the common law. Any requirements as to its form or content are typically set out in the lease.
[36] 2003 Report, para 3.70.
[37] See paras 4.23 to 4.27.
[38] 1985 Act, s 4(2) and (3).
[39] 2003 Report, para 3.30. In *CIN Properties Ltd v Dollar Land (Cumbernauld) Ltd* 1992 SC (HL) 104 a pre-termination notice which had been sent immediately before the Christmas period was upheld, with drastic consequences.
[40] Code de commerce, Art L145-41.

that alteration of the 14-day period should await further consultation, possibly as part of a more general reform of the law of irritancy. We therefore make no recommendation on this matter.

Pre-termination notice to heritable creditors

5.26 Lenders to tenants under a registered lease may hold a heritable security over the tenant's interest in the lease which they can call up should be tenant default in repayment. One of the risks for such lenders is that the lease is terminated due to irritancy or material breach by the tenant. For that reason, many such registered leases include provisions designed to give a creditor holding security over the lease an opportunity to call it up and to sell and transfer the tenant's interest before the landlord terminates it through irritancy.[41] In our 2003 Report we suggested that the landlord should be legally obliged to serve a copy of a pre-irritancy warning notice or irritancy notice on the secured creditor and that failure to do so should be a ground for challenge to the notice itself.[42] Practitioners have expressed renewed support for that proposal. An equivalent obligation on the landlord is already included in the current PSG styles for commercial leases, together with a time limit for compliance.[43] However, the styles also provide that the creditor, who is a third party in relation to the lease, should not have the right to enforce the obligation.[44] This creates a curious situation whereby the party for whose benefit the obligation to notify exists can do nothing to enforce it.

5.27 Having recommended that a copy of the relevant notice be served on the heritable creditor, our 2003 Report also recommended that any recipient of the notice, including the creditor, should be entitled to challenge the validity of the notice on the grounds that it was ineffective owing to non-compliance with any statutory or common law requirements or any provision of the lease.[45] These requirements could relate to the substantive grounds for irritancy (or material breach) of the lease as well as to procedural steps in relation to the form or service of the notice.

5.28 We can see no reason not to adhere to these 2003 recommendations. Indeed, they should apply to all irritancy-related notices (whether they are given under sections 4 and 5 of the 1985 Act or under a provision of the lease itself) and the landlord should be given greater leeway to carry out a search of the property registers in order to identify any heritable securities.[46] The methods of service of these notices on heritable creditors should mirror those for service on tenants. These recommendations should apply to all irritancy-related notices served on or after the legislation implementing them comes into force.[47] Landlords who serve notices on tenants before that point will not be affected by the obligations under the recommendations nor will such notices be open to challenge at the instance of creditors.

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[41] J M Halliday, *Conveyancing Law and Practice in Scotland* by I J S Talman (ed) (2nd edn, 1997) Vol 2, paras 44-35 and 52-65, and see the suggested style at p 818. The "Halliday style" allows the creditor a generous period of one year for disposal of the lease in respect of all irritancy events. By comparison, the current PSG styles allow the creditor an equivalent period of six months, but only upon the tenant's becoming insolvent (or apparently insolvent) or going into administration or receivership: see for example cl 6.1.3(b) of the Model Commercial Lease of Whole Building (Office), available at http://www.psglegal.co.uk/leases.php.

[42] 2003 Report, para 3.72.

[43] See for example cls 6.1.1 (monetary breaches) and 6.1.2 (non-monetary breaches) of the Model Commercial Lease of Whole Building (Office) (fn 41 above).

[44] See for example, cl 6.6 of the Model Commercial Lease of Whole Building (Office) (above).

[45] 2003 Report, para 3.74.

[46] In the 2003 Report, we recommended service on a heritable creditor only if their security had been registered at least seven days prior to the date of service: see 2003 Report, para 3.72.

[47] Commencement day under the draft Bill is six months after it receives Royal Assent.

5.29 We therefore recommend that:

81. A landlord should not be entitled to rely on a monetary breach of a lease for the purpose of terminating it or treating it as terminated unless, at the same time as or as soon as reasonably practicable after serving any irritancy-related notice (including pre-irritancy warning notices and irritancy notices) on the tenant, they serve a copy of the notice on qualifying heritable creditors. A "qualifying heritable creditor" is one who (i) has a standard security over the lease which has been registered in the Land Register or recorded in the General Register of Sasines before the start of the 10-day period ending with the day on which the notice is served on the tenant, and (ii) either has a UK postal address known to the landlord or has provided a UK postal address to the landlord for the purpose of serving the relevant copies.

(Draft Bill, section 30(3))

82. Statute should provide that, where a copy of any irritancy-related notice is to be served on a creditor, the methods by which it may be served are the same as those permitted for service on the tenant.

(Draft Bill, section 30(3))

83. A qualifying heritable creditor should be entitled to challenge the validity of any irritancy-related notice, and the irritancy of a lease itself, on the grounds:

(a) that the landlord failed to comply with the requirement to serve them with a copy of any irritancy-related notice, or failed to comply with the requirement to give the tenant a pre-irritancy warning notice in respect of a monetary breach; or

(b) that the landlord failed to comply with a procedural requirement in the lease before terminating it; or

(c) in respect of non-monetary breaches, that a fair and reasonable landlord would not, having regard to the interests of the creditor, have relied on the irritancy clause or material breach to terminate the lease.

(Draft Bill, section 30(3))

Pre-termination notice to sub-tenant

5.30 Many leases have sub-tenants. The law is clear that irritancy of the head lease has the effect of terminating any sub-leases automatically.[48] This is an exception to the real right that sub-tenants otherwise enjoy. Such termination can be sudden and unexpected. It can result in significant prejudice to a sub-tenant for which they are not responsible. On the other hand, this can be seen as an inherent risk of being a sub-tenant. Indeed landlords may well prefer

[48] *Grant v Earl of Morton* (1789) 3 Pat 145 (HL).

to have a sub-tenant rather than an assignee for that very reason. In order to avoid the risk of sudden eviction, a sub-tenant may seek to obtain an irritancy protection agreement from the head landlord. Under such an agreement, the landlord is obliged to grant a lease to the sub-tenant within a certain period of time after the irritancy of the head lease, provided that the sub-tenant has not caused the irritancy (directly or indirectly) and requests that the landlord make the grant. The lease granted will reflect the terms of the terminated sub-lease. However, a landlord may refuse to grant such an agreement. Furthermore, such agreements are not binding on singular successors of the landlord.[49] In many cases, therefore, the sub-tenant must simply decide whether to assume the risk that the head leases is irritated. In the event that it is, there is no scope for the sub-tenant to seek relief from the court, as is available under the law of England and Wales.[50]

5.31 A few consultees proposed that irritancy-related notices should be served on the sub-tenant as well as the head tenant, giving the sub-tenant an opportunity to remedy the head tenant's breach and save both tenancies. Such a proposal is superficially attractive. However, it contemplates a sub-tenant taking steps under the head lease in order to preserve it. This would represent an interference by the sub-tenant with the head tenant's rights and obligations. Difficult questions would arise as to the effect of such interference, with regard both to any consequential claims between the head tenant and sub-tenant and to the landlord's relations with the sub-tenant. With regard to the former, it is not clear, for example, whether the sub-tenant would have a claim in unjustified enrichment against the head tenant for payments made to remedy the latter's breach and "save" the head lease. Were the sub-tenant to make such payments on a frequent basis, would there come a point at which the sub-tenant effectively becomes the head tenant from the landlord's point of view? In respect of non-monetary breaches, difficult questions would arise for the court as to whether irritancy could be deemed "fair and reasonable" in the event that a lease is effectively maintained for a sub-tenant, with the head tenant being content to see it irritated. In any event, most consultees were satisfied with the current law. We therefore propose no change in the law relating to irritancy and sub-tenants.

[49] This is because there is no lease between the head landlord and the sub-tenant. While the agreement might oblige the landlord to impose the same terms on a singular successor, there can be no guarantee that the successor will accept this. If the successor refuses, the obliged landlord may well become liable to the sub-tenant in damages, but the sub-tenant is nevertheless rendered vulnerable to removal at the instance of the successor.
[50] Law of Property Act 1925, s 146(2).

Chapter 6 Apportionment of rent

Introduction

6.1 At the scoping stage of our work we were asked by a number of stakeholders to consider the English case of *Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and another*.[1] Stakeholders were keen to know whether this case would be followed north of the border.

6.2 The tenant in *Marks and Spencer* had validly exercised their right under a break clause to terminate the lease, having already made an advance quarterly rent payment which covered periods falling both before and after the date of termination of the lease under the clause. The tenant sought recovery of the element of rent which covered the post-termination period.

6.3 It was argued that there were two possible grounds for repayment. The first was by way of section 2 of the Apportionment Act 1870.[2] The second was that the lease contained an implied term obliging the landlord to repay the post-termination element of rent. Both grounds for repayment were rejected by the Supreme Court. The court concluded that the 1870 Act applied only to leases which provide for rent payable in arrears (and not rent payable in advance),[3] and that no term could be implied of the kind described.[4] The tenant was thus unable to recover the excess advance payment.

Discussion Paper

6.4 In our Discussion Paper, we sought to answer the question posed by consultees: would the decision in *Marks and Spencer* be followed in Scotland? We pointed out that there is little Scottish case law on the operation of the 1870 Act, though we noted the 1909 case of *Balfour's Executors v Inland Revenue*.[5] There it was held that – for the purpose of calculating the amount of estate duty to be paid upon the death of a landowner – the amount of rent due should be calculated (in accordance with section 2 of the 1870 Act) on a day-to-day basis from the date the rent fell due until the date of the landowner's death. As the Lord President (Dunedin) put it, "[t]he moment that you come to a concluded period, that period is gone and done with; but then, the moment you have passed that period the new period begins to run,

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[1] [2015] UKSC 72; [2016] AC 742; see also DP, paras 5.5 to 5.10.
[2] Section 2 of the Act provides that "provides that "[a]ll rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."
[3] *Marks and Spencer* [2015] UKSC 72; [2016] AC 742, para 44 (Lord Neuberger).
[4] *Marks and Spencer* (above), paras 49 to 56 (Lord Neuberger).
[5] 1909 SC 619; DP, paras 5.17 to 5.19.

and that period is to be apportioned from day to day".[6] Importantly, however, *Balfour's Executors* was a case in which the lease provided for rent payable in arrears.[7] There does not appear to be any Scottish authority for apportionment of rent payable in advance under the 1870 Act.[8]

6.5 We considered whether the common law doctrine of unjustified enrichment might provide an alternative route to recovery of overpaid rent. In the case of *QuirkCo Investments Ltd v Aspray Transport Ltd*,[9] it was confirmed that the rules of "unjust enrichment" under the law of England and Wales do not operate to allow circumvention of the scheme of obligations and entitlements contained in a valid contract.[10] A similar approach was applied to the rules of unjustified enrichment under Scots law in *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd*.[11] There the sub-tenant of a shopping centre, whose sub-lease had been terminated through irritancy, sought recompense for certain gains subsequently made at their expense by their former landlord.[12] The House of Lords held, however, that the gains were justified by the operation of the irritancy clause in the sub-lease, and that the sub-tenant was not entitled to recompense.[13]

6.6 Ultimately, the 1870 Act is a UK statute, while the common law rules by which implied terms are governed in Scots law coincide with those in England and Wales. This makes it highly unlikely that the Supreme Court's decision in *Marks and Spencer* would be departed from by a Scottish court.[14] Our view of the law is that – unless the lease makes express provision to the contrary – a tenant in Scotland cannot at present recover overpaid rent in the event of early termination.[15]

6.7 In the Discussion Paper, we asked consultees whether they agreed with this view.[16] The vast majority did. Some reserved their view. Only two disagreed. Urquharts took issue with the Supreme Court's interpretation of the 1870 Act. The Faculty of Advocates drew attention to the possible application of the Act in the Scottish case of *Butter v Foster*.[17] That case involved two leases, the first of a farm and the second of a mansion-house and shootings. While these leases were ongoing, the landlord sold the estate which included the let properties. The contract of sale provided that the purchaser should have the right to rents from the estate following their date of entry.[18] Under the second lease the tenant paid rent in advance. Following their entry under the sale, the purchasing landlord sought payment from the selling landlord of the portion of rent paid in advance which applied to the period after their

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[6] *Balfour's Executors v Inland Revenue* 1909 SC 619 at 623.
[7] The court did not draw any distinction between rent payable in advance and rent payable in arrears, though this is perhaps unsurprising given that rent being payable in arrears ("backhand rent") was customary in the early twentieth century. Rent payable in advance ("forehand rent") did not become commonplace until the 1970s. Since then, legislation has simply failed to follow developments in the market, and indeed the 1870 Act itself is now little-known amongst commercial practitioners.
[8] DP, para 5.20.
[9] [2011] EWHC 3060 (Ch).
[10] *QuirkCo Investments Ltd v Aspray Transport Ltd* [2011] EWHC 3060 (Ch), para 63 (HH Judge Keyser QC).
[11] 1998 SC (HL) 90.
[12] The gains were rental income from sub-sub-tenants.
[13] The House of Lords (operating in its judicial capacity) was the predecessor of the UK Supreme Court.
[14] DP, para 5.20.
[15] DP, para 5.26.
[16] DP, para 5.26 (question 37).
[17] 1912 SC 1218.
[18] DP, 1219.

entry. The purchaser founded on the contractual right, as well as on the 1870 Act.[19] The court found that the purchaser was entitled to payment from the seller of the rent they had received in respect of the post-entry period, given that the rent was running "*de die in diem*".[20] However, the court did not indicate whether its finding was based on the contractual term, the 1870 Act, or both. Moreover, the existence of the contractual term was capable of providing a free-standing ground for payment. For these reasons, we do not regard the case as a firm foundation for an interpretation of the 1870 Act in Scots law which, contrary to *Marks and Spencer*, allows a tenant to recover rent paid in advance in the event of early termination of the lease.

6.8 We also asked consultees whether an amendment to the 1870 Act was desirable to remedy the tenant's inability to recover overpaid rent and, if so, whether it would be desirable for Scots law to differ in this respect from the rest of the United Kingdom.[21] Whilst consultees were split on this latter question, most were in favour of amending the 1870 Act for the purposes of clarification, with only two expressing opposition.

6.9 Nevertheless, having given the issue further thought, our analysis is that amendment of the 1870 Act would not provide an appropriate solution. As the case of *Balfour's Executors* indicates, the purpose of the Act – insofar as it applies to leases – was not primarily to deal with overpayments of rent. Rather, it was enacted to establish to whom rent payable in arrears should be paid where there is a change of landlord during a period in respect of which rent is payable but before it falls due. The difficulty which the *Marks and Spencer* decision has revealed does not, therefore, lie with the 1870 Act. Our view is that the result sought by consultees would be achieved more appropriately through the statutory implication of a term into the lease which deals with the issue of overpayment.

A new implied term

6.10 In considering what this implied term might look like, the template leases published by the PSG provide a useful starting point.[22] These template leases already impose an obligation on the landlord to "refund any Rent and Insurance Costs paid in advance by the Tenant in relation to the period falling after the End Date within [10] Business Days after the End Date", except where the lease ends by virtue of an irritancy clause or is disclaimed by the Crown or by a liquidator or trustee in bankruptcy of the tenant.[23] The purpose of this obligation is to address the perceived unfairness arising from the *Marks and Spencer* decision.

6.11 However, these template leases merely provide suggested terms which parties do not require to follow. Parties, and even some practitioners, might be unaware of them. They cannot be regarded as a universal solution. Our view, therefore, is that a term, similar to that pioneered by the PSG, should be implied in all leases covered by this Report, subject to its exclusion by parties' agreement. This would achieve parity between a landlord's entitlement to rent in arrears and their entitlement to rent in advance.

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[19] DP, 1221.
[20] From day to day: 1912 SC 1218, 1224 to 1225. No further elaboration of the reasons for the decision was given.
[21] DP, para 5.29 (questions 38 and 39).
[22] See DP, paras 5.23 to 5.25 for discussion.
[23] See for example cl 5.3 of the PSG model commercial lease (office), available at http://www.psglegal.co.uk/leases.php.

6.12 This implied term should be of no effect where the lease is terminated by the landlord by virtue of an irritancy clause. As the *Dollar Land* case demonstrates, broader issues can arise under such circumstances than that of mere apportionment of overpaid rent. Given its very general purpose of redressing unearned windfalls, however, the implied term should have effect by default in all other instances.

6.13 No special provision requires to be made for the case in which the tenant becomes insolvent or where the lease is disclaimed by the Crown. Here, the landlord will be entitled to set their obligation to repay the unearned windfall off against any claim they might have against the tenant's insolvent estate.[24]

6.14 If enacted, the statutory implied term would distinguish Scots law from the laws of other parts of the United Kingdom. Consultees' views were evenly balanced on whether it was desirable for Scots law to differ from those other laws in its application of the 1870 Act. Ultimately, we do not anticipate that our proposed implied term would result in undue difficulty for Scottish parties or their representatives. We are unaware of any such difficulty having arisen with the similar term in the PSG template leases. Indeed, it appears entirely reasonable that the onus should be on the landlord to seek to exclude their obligation to make repayment, thereby gaining a potential windfall, rather than on the tenant to take steps to secure the obligation in order to protect themselves against a potential loss. In any case, the inclusion of such a term in the lease will ultimately remain – both north and south of the border – a matter to be negotiated by the parties.

Pre-commencement leases

6.15 Our proposed term would be implied in leases agreed after the statutory provision introducing it comes into force. In the meantime, however, at least some practitioners – despite the *Marks and Spencer* decision – are likely to remain unaware that rent paid in advance by their clients is not recoverable in the absence of express provision in the lease. This has led us to consider whether leases entered into before the new law takes effect should be brought retrospectively within its scope.

6.16 Our conclusion, however, is that this would not be appropriate. In our view, a landlord's entitlement to receive and retain rent is a possession in terms of Article 1 of Protocol No. 1 to the European Convention on Human Rights ("A1P1"), with which all Acts of the Scottish Parliament are required to comply.[25] If the implied obligation was imposed on pre-commencement leases, some statutory provision would be required to allow the landlord an option to keep that entitlement. While it might be feasible to create such a provision, given the extent of the mischief we think it would impose unduly complex and disproportionate measures on parties. In addition, it would be unclear whether such a measure would be compliant with A1P1 until the matter was tested in court. In the meantime, we hope that our recommendation will highlight the need for parties to seek to include an express obligation in their lease for the repayment of overpaid rent.

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[24] *Munro v Fraser* (1858) 21 D 103 (liability to repay overpaid rent set off against damages for dilapidations).
[25] Scotland Act 1998, s 29(2)(d).

6.17 Accordingly we recommend that:

84. Statute should provide that leases (to which the statutory code applies) include an implied term obliging the landlord to repay any rent or other payment made in advance by the tenant in respect of a period falling after the termination of the lease. Repayment should require to be made within 10 working days after the termination of the lease. The implied term should be of no effect where the lease is terminated by the landlord by virtue of an irritancy clause.

(Draft Bill, section 31(1) to (4))

85. Parties should be entitled to include a term in the lease disapplying the implied term or modifying the conditions for repayment under it.

(Draft Bill, section 31(5))

86. The implied term should apply only to leases entered into after the statutory provision which introduces it comes into force.

(Draft Bill, section 31 and schedule 2, paragraph 10(1))

Chapter 7 Tenancy of Shops (Scotland) Act 1949

Introduction

7.1 As a general rule, service of a valid notice to quit by a landlord under a commercial lease has the effect of bringing the lease to an end at the date specified in the notice. Leaving aside the possibility of retrospective (post-termination date) tacit relocation,[1] this rule has only one exception. This lies in the Tenancy of Shops (Scotland) Act 1949. The Act applies only to "shops", though this expression is broadly defined to include all retail premises and warehouses, as well as premises selling intoxicating liquors and barbering or hairdressing services.[2]

7.2 The 1949 Act enables tenants who are in actual occupation of such premises and who have received a notice to quit to apply to the sheriff for a renewal of the lease. The maximum period of renewal is one year,[3] although there is no limit on the number of renewals that can be sought.[4] Tenants who have sub-tenants are excluded from applying.[5] The Act also provides that an application for renewal must be refused where the sheriff is satisfied that:[6]

(a) the tenant is in material breach of any obligation under the lease;

(b) the tenant is insolvent;

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

(d) the landlord has offered the tenant suitable alternative accommodation, on reasonable terms and conditions;

(e) the tenant has given notice of intention to quit, in consequence of which the landlord has contracted to sell or let the premises or has taken any other steps which would result in serious prejudice were the landlord unable to obtain possession; or

(f) in all the circumstances "greater hardship" would be caused by renewal than non-renewal.[7]

7.3 If the tenant is entitled to put in an application and none of these listed grounds for refusal is established, the granting of the application depends on whether the sheriff finds

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[1] See para 2.6.
[2] 1949 Act, s 3(2) (incorporating provisions in the Shops Acts, 1912 to 1936); see also DP, para 6.5.
[3] 1949 Act, s 1(2); see also DP, para 6.4.
[4] 1949 Act, s 1(4).
[5] *Ashley Wallpaper Company Ltd v Morison Associated Companies Ltd* 1952 SLT (Sh Ct) 25.
[6] 1949 Act, s 1(3).
[7] The 1949 Act does not specify whose hardship is to be considered.

renewal of the lease "reasonable" "in all the circumstances".[8] However, the Act does not provide any guidance on how the court is to decide whether renewal is "reasonable".

7.4 As a consequence individual sheriffs have differed in their perceptions of how their discretion as to "reasonableness" is to be exercised. In *Edinburgh Woollen Mill v Singh*,[9] the sheriff viewed the discretion as restricted to empowering the court to act to allow a trader time to relocate their business to another property, to preserve their business and to prevent them from being forced out of business altogether through a loss of premises from which to trade. However, in *Select Service Partner v Network Rail Infrastructure*,[10] the sheriff rejected any such limitation on the discretion and, among other factors, took into account whether it was reasonable for a landlord to seek to replace as a tenant a national food-based chain with an international coffee shop chain.[11]

7.5 As discussed below, a strong case can be made that the 1949 Act in its existing form is unsatisfactory. However, our view is that further consultation is required on the options for reform (including but not limited to outright repeal). For that reason, this Report does not make recommendations in respect of the Act.

Historical background

7.6 Any option for reform of the 1949 Act must be considered against the background to it becoming law. That background is unusually complex. In the immediate post-war period, small shopkeepers were faced with a shortage of available retail premises, whilst at the same time many landlords were seeking to acquire premises for development. The result was that a great number of tenants faced eviction and, as a consequence, loss of livelihood.

7.7 In response, the UK Government commissioned no fewer than three independent reports. The first of these, the Taylor Report,[12] was published in November 1947. The authoring committee took the view that legislation was not immediately required, but nevertheless recommended that the situation be kept under review and made proposals for legislation in the event that a future need arose. Those proposals soon proved prophetic. Following reports of evictions at Whitsunday in 1947 and 1948, the Government established a further committee, to be chaired by H W Guthrie QC (later Lord Guthrie). Its interim report,[13] submitted in December 1948, recommended the introduction of "a temporary form of protection" until the Committee's work was complete.[14] Action was swiftly taken, and on 29 March the following year the Tenancy of Shops (Scotland) Act 1949 received Royal Assent. This was just in time to protect tenants whose leases were due to terminate at Whitsunday.

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[8] 1949 Act, s 1(2) and (3). Subs (2) provides that the sheriff "may determine" that the tenancy be renewed "on such terms and conditions as he shall in the all the circumstances think reasonable". Subs (3) provides that the sheriff "may if in all the circumstances he thinks it reasonable to do so, dismiss any application".
[9] 2013 SLT (Sh Ct) 141.
[10] 2015 SLT (Sh Ct) 116.
[11] 2015 SLT (Sh Ct) 116, para 45 (Sheriff NMP Morrison QC).
[12] Scottish Home Department, *Report of the Committee of Inquiry into the Tenure of Shop Premises in Scotland*, Cmd 7285 (1947).
[13] Scottish Home Department Board of Trade, *Interim Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland*, Cmd 7603 (1949).
[14] Ibid, para 14.

As recommended by the Guthrie Committee, however, the Act was passed only on a temporary basis, with the possibility of renewal a year later.

7.8 In November 1949, the Guthrie Committee issued its final report,[15] concluding that the 1949 Act had resulted in "the minimum necessary amount of intervention".[16] The Committee was not persuaded, however, that a more permanent measure was justified, since the mischief addressed by the Act was likely to be temporary. Instead, it recommended that the legislation expire in 1955. It also suggested that, in the case of notices to quit, the minimum notice period should increase from 40 to 90 days to allow tenants more time to find fresh premises in the event of an eviction.[17]

7.9 Despite the Guthrie Committee's recommendation, renewal of the 1949 Act continued on an annual basis into the early 1960s.[18] In November 1963, during a Parliamentary debate on the Expiring of Laws Continuance Bill,[19] several opposition Labour MPs expressed support for making the Act permanent to provide shopkeepers with greater certainty. Lady Tweedsmuir MP, then Parliamentary Under-Secretary of State for Scotland, responded by indicating the Government's intention to do just that. Two key grounds were highlighted:[20] the scarcity of available shop premises (albeit due to planned city centre redevelopments), and the insufficient 40-day notice period. The 1949 Act was duly made permanent by virtue of the Tenancy of Shops (Scotland) Act 1964.

7.10 At this stage, no consideration was given to amending the Act to restrict its application to the small shopkeepers for whose benefit it was originally enacted. In the early 1960s the tenants who were thought to gain benefit from the Act were small businesses operating on informal year-to-year leases who might have nowhere else to go upon being given a notice to quit. However, between the 1990s and early 2000s, it was realised that large retailers approaching the end of multi-year leases could potentially rely on the 1949 Act as a tool for negotiating better renewal terms.[21]

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[15] Scottish Home Department Board of Trade, *Final Report of the Committee of Inquiry into the Tenure of Shops and Business Premises in Scotland*, Cmd 7903 (1950).
[16] Ibid, paras 34 and 35.
[17] Ibid, para 48. This proposal was never implemented. In this Report, we propose that no notice should be required for leases of less than three months; that the default notice period for leases of three months or more but less than six months should be one month; and that the default period of notice for leases of six months or more should be three months: see paras 3.66 to 3.68.
[18] In 1958, a committee chaired by I H Shearer QC (later Lord Avonside) issued a further report: Scottish Home Department, *Report of the Committee on the Tenancy of Shops (Scotland) Act, 1949*, Cmnd 472 (1958). It recommended (at para 24) that the 1949 Act be continued for up to five years, but on the sole basis that it provided relief to tenants from the excessively short 40-day notice period.
[19] *Hansard*, HC Vol 685, col 347ff Deb (27 November 1963).
[20] *Hansard*, HC Vol 685, col 364ff Deb (27 November 1963); and repeated by Lord Craigton in the House of Lords (*Hansard,* HL Vol 257, col 1062 (30 April 1964)).
[21] See for example R Turnbull "The Tenancy of Shops (Scotland) Act 1949 – Time for Renewal?" (2005) Greens Property Law Bulletin, expressing concern that a sheriff might not find in favour of a large tenant and that there was a "danger" that the Act might be of use only to small businesses.

Consultation

Discussion Paper

7.11 In our Discussion Paper, we set out a number of potential grounds for repealing the 1949 Act,[22] including:

(i) that the Act is being relied on by tenants other than the small shopkeepers for whose benefit it was enacted;

(ii) that the Act is being relied on for purposes beyond those for which it was designed, namely as a tool for negotiating better renewal terms;

(iii) that the Act is an anomaly within an otherwise highly flexible Scottish system, and can act as a disincentive to potential investors in Scottish commercial property;

(iv) that the Act assumes the stronger bargaining position of landlords, which is by no means guaranteed in an unpredictable commercial letting market;

(v) the apparent decline in the number of cases arising under the Act; and

(vi) that the market conditions under which the Act was enacted and then made permanent no longer apply.

7.12 We asked consultees a single question: should the 1949 Act be repealed? Of the 33 consultees who expressed a view, 30 answered in the affirmative. These included all respondent solicitors[23] and surveyors, all respondent academics but one, and the Faculty of Advocates. Two consultees expressed opposition to simple repeal,[24] whilst one was undecided.[25]

7.13 The 1949 Act was variously described by consultees as "a historical anachronism", "out of date", "no longer achieving its aims" and as having "no relevance to modern commercial leases". It was pointed out that the inconsistent treatment in law of "shops" and other premises is irrational. Consultees were of the view that what had once been a useful safeguard for tenants was now a source of confusion and uncertainty, and noted that the Act did not protect sub-tenants. At consultation events, it was explained that parties operating in the commercial leasing sector generally accept – unlike those in the residential sector – that a lease subsists for a defined period, and that its termination at its agreed end date is an eventuality which must be prepared for.

7.14 However, both the Federation of Small Businesses and Boots expressed opposition to simple repeal. The Federation of Small Businesses – while accepting that the 1949 Act has become detached from its original purpose – stressed that it nevertheless offers a limited form of protection to "certain tenants" in an otherwise unregulated landscape. They cautioned

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[22] See DP, paras 6.9 to 6.27.
[23] Though the Law Society of Scotland pointed out the apparent benefit to pharmacies in relation to dispensing licences.
[24] Boots and the Federation of Small Businesses (FSB).
[25] The University of Aberdeen.

against repeal without a more comprehensive solution first being put in place. Boots (the only retailer to express a view on the matter) submitted that, whilst market conditions have changed considerably since 1949, all retail tenants – large and small – should be afforded some form of protection against hardship caused by a landlord seeking vacant possession. They pointed to the fact that communities rely on the facilities provided by their organisation. In their view, far from being repealed, the Act should be strengthened.

Mini-consultations

7.15 Whilst consultees from the legal and surveying communities were overwhelmingly in favour of repeal, it was nevertheless significant that a representative body of the very businesses the Act was passed to protect, together with a national retailer currently falling within its scope, were opposed. Moreover, since March 2020 the retail landscape had been transformed by the effects of the COVID-19 pandemic. Owing to these concerns, we were prompted to carry out two further consultations in the second half of 2020, targeted specifically at the retail community.

7.16 A total of 20 stakeholders were contacted, evenly split between representatives of small and larger retailers. Consultees were asked:

> Should the 1949 Act be:
>
> (a) amended so that it applies only to a tenant for whom the let premises are the sole shop (retail or warehouse outlet) of the business conducted from that shop (with an anti-avoidance measure);
>
> (b) amended in some other way; or
>
> (c) repealed?

7.17 Four representatives of small retailers responded. Three of these – the Federation of Small Businesses, the Scottish Grocers' Federation, and the British Independent Retailers Association – were strongly opposed to wholesale repeal, whilst the Farm Retail Association was unable to obtain its members' views.

7.18 The Scottish Grocers' Federation noted that:

> From an occupiers' perspective – and this is the perspective of our members – the 1949 Act is very limited in its scope but nevertheless does give some legal recourse to retail tenants who are perhaps being dealt with harshly by landlords – for example by seeking an above market rent increase or denied renewal because the landlord wants to start a similar business.
>
> While limited in scope the 1949 Act is better than nothing in this regard and can be used to temper a landlord's unreasonable behaviour. So to repeal it and not replace it with something else to address that risk could be seen as a backward step and a very one-sided approach.

7.19 The Federation of Small Businesses were of the view that the commercial property market has not, as some have suggested, tilted in favour of tenants, noting that they "continue to receive multiple reports from members of landlords behaving inflexibly".

7.20 Both the Scottish Grocers' Federation and the Federation of Small Businesses expressed support, however, for restricting the category of tenants entitled to apply for renewal under the Act. Their view was that the Act should be brought into line with its original purpose of protecting small retailers. The British Independent Retail Association was opposed to any amendment of the 1949 Act whatsoever, let alone repeal.

7.21 Five larger retailers or their representative bodies responded. None supported repeal, but consensus was otherwise limited. The Scottish Motor Trade Association favoured amendment to afford a "manageable level of local protection to small business tenants", whereas both Boots and Greggs favoured retention of the protection currently on offer. Neither SSP Group plc[26] nor the Scottish Wholesale Association expressed a preference for either option. Instead, SSP suggested that the Act be amended to apply to all tenants in Scotland "where there is no suitable accommodation for the Tenant's business within the vicinity of the property… unless the landlord requires the unit for redevelopment or its own purposes", whilst the Scottish Wholesale Association were of the view that further consultation is necessary.

Possible routes forward

7.22 Taking account of the responses to both our Discussion Paper and the subsequent mini-consultations, we have considered a number of possible routes forward.

(a) Repeal the 1949 Act

7.23 Repeal, with its removal of any special protection of tenants of shop leases, was the only option canvassed in the Discussion Paper. As discussed above, all but three of the 33 respondents agreed with outright repeal. In the mini-consultation, however, none of the eight respondents from the retail community agreed with repeal unaccompanied by any replacement legislation.

7.24 While large retail tenants were opposed to repeal, they do stand in a quite different position to the small business tenants that the Act was enacted to protect. In many instances they will be in at least as strong a bargaining position as their landlords. We are not persuaded that the Act is required to protect their interests. However, given the responses of the representatives of small retailers who are most likely to be prejudiced by a repeal of the Act, we have been persuaded not to recommend repeal of the Act without any replacement provisions.

(b) Retain the 1949 Act with its current provisions

7.25 Amongst those consultees who were opposed to repeal, several were of the view that the 1949 Act should be retained in its existing form. These included, amongst representatives of larger retailers, Boots and Greggs, as well as the British Independent Retailers Association (BIRA). BIRA, despite representing smaller businesses, had no qualms about the Act being used by big businesses. Boots, Greggs and BIRA (as well as SSP, who favoured amendment of the 1949 Act) referred to the Act conferring only limited security of tenure by comparison to the equivalent English and Welsh scheme under the Landlord and Tenant Act 1954.

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[26] SSP Group plc operates a range of international food and beverage outlets in airports and railway stations.

7.26 Our view, however, is that this analogy does not stand up to scrutiny, since there are several important differences between the 1949 and 1954 Acts.[27] First, the English and Welsh legislation applies to all business premises, and not merely to "shops".[28] Second, the 1954 Act allows parties to exclude its application.[29] The Scottish legislation makes no such provision, and although we have been unable to identify any case law on the issue it is likely that any term in a lease excluding the entitlement to apply for renewal under the 1949 Act would be held ineffective by the courts. Third, the 1954 Act contemplates renewal over a number of years, whereas the 1949 Act contemplates only temporary renewals of up to one year (though without limiting the number of such renewals which may be applied for). The two Acts are therefore likely to carry differing weight within renewal negotiations.

7.27 More generally, our view is that several good arguments can be made for departing from the 1949 Act as it currently stands. First, the freedom and flexibility conferred on commercial parties to negotiate the terms and conditions of their leases in the absence of legislative complexity has traditionally been regarded as an important advantage of the Scots law of leases. The 1949 Act represents a derogation from that approach based on justifications which are not (or following the implementation of recommendations of this Report on periods of notice should no longer be) relevant.

7.28 Second, the discretionary nature of the 1949 Act (and the inconsistency with which it has been applied) gives rise to considerable uncertainty where an application is made for renewal. Moreover, given the difficulty of appealing against a discretionary ruling, the courts are unlikely to produce any binding precedent restricting the Act to small shopkeepers or to indicate any preference for them in assessing whether renewal of a lease is "reasonable".

7.29 Third, we note the overwhelming support from the legal and surveying professions for repeal, together with the support for reform expressed by both the Federation of Small Businesses and the Scottish Grocers' Federation.

(c) Reform the 1949 Act

7.30 A middle ground between the "repeal" and "do nothing" options would be to reform the 1949 Act. Several possible amendments suggest themselves.[30]

(i) Limitation to one or two "shops"

7.31 We suggested in our mini-consultation that the Act could be restricted in its application to tenants with only one shop (whether retail premises or a warehouse outlet), with accompanying anti-avoidance measures to prevent this restriction from being circumvented

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[27] It is also worth noting that the 1954 Act has itself come under criticism in recent years*:* see for example M Pawlowski and J Brown "Part II of the Landlord and Tenant Act 1954: Repeal or Further Reform? Part 1" (2015) Landlord and Tenant Review 162; and M Pawlowski and J Brown "Part II of the Landlord and Tenant Act 1954: Repeal or Further Reform? Part 2" (2015) Landlord and Tenant Review 185.

[28] Landlord and Tenant Act 1954, s 23.

[29] 1954 Act, ss 38 and 38A.

[30] Those considered here are by no means exhaustive. One further option might be expressly clarify what is meant by "reasonableness" under s 1 of the 1949 Act.

by corporate groups. This suggested solution was designed to reflect the original aim of the 1949 Act of protecting small shopkeepers. It attracted mixed views from consultees.

(ii) Limitation to principal means of livelihood

7.32 Another way in which the scope of the 1949 Act could be drawn back to its original aim is for applications to be restricted to tenants (or, in the case of legal persons, "members" of tenants[31]) whose shop constitutes a "principal source of livelihood". This expression has been used in connection with inheritance of agricultural leases in England and Wales.[32]

(iii) Limitation to single-shop tenants eligible for small business rate relief

7.33 The Federation of Small Businesses suggested in consultation that entitlement to apply for renewal under the 1949 Act could be restricted to single-shop tenants who are eligible for non-domestic rates relief through the Small Business Bonus Scheme and who satisfy any additional criteria laid down by the Scottish Ministers. This raises the question of whether the private law of leases should be bound up with public law taxation measures, which may be varied in line with political expediency.

Conclusion

7.34 We are presently making no recommendations in respect of the Tenancy of Shops (Scotland) Act 1949. For several reasons, we have reached the view that further consultation is required on the possible routes forward. First, our consultation efforts to date have revealed a lack of consensus amongst key stakeholders as to whether the 1949 Act should be repealed, reformed, or retained in its existing form. Second, any options for reform should be submitted for full public consultation. Third, the ultimate impact of the COVID-19 pandemic on both landlords and tenants in the commercial sphere ought to be fully factored into any recommendations. It has not been possible to undertake this work within the scope of the current project. Nevertheless, we are confident that the efforts we have made in this area to date might usefully form the basis for future work.

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[31] For example, a partner in a partnership, or a member of an LLP or limited company.
[32] Agricultural Holdings Act 1986, s 36(3).

Chapter 8 *Confusio* and leases

Introduction

8.1 In response to our consultations on both the Eighth and Ninth Programmes of Law Reform,[1] it was suggested to us that the law involving the doctrine of *confusio* as it applies to leases is unclear. In contrast to the law dealt with in the other parts of this Report, the legal rules on *confusio* have remained the same for all types of lease whether they be agricultural, residential, crofting or otherwise. Accordingly the legal rule of *confusio* applies to all leases, whether of a small flat, a large farm, a Hebridean croft, a shopping centre, an industrial or office unit or any other land or building.

8.2 In Chapter 8 of the Discussion Paper we sought to set out the concept of *confusio* as it affects leases and its historical background. The responses that we received to the proposals in the Discussion Paper indicate the existence of different schools of thought as to the effect of *confusio* on leases; differing views on whether there should be statutory codification of the legal rules in this area; and, if so, what such a statutory statement of the law should entail.

8.3 Current case law precedents and academic opinions can be difficult to understand and have on occasion given unclear and sometimes contradictory messages as to what the law is. In addition reform of the law in this area may be required in order to assist with the use of leases[2] as collateral or security in the raising of finance for development. For these reasons we do think that a statutory codification of the law would be desirable in order to provide a firm legal foundation for landlords and tenants. However, given the complexity of both the existing law and potential reform in this area and the extent of disagreement between stakeholders, our view is that further consultation is required before we can make recommendations for any statutory provisions. Accordingly, we have decided not to make any recommendations for legislative reform at this stage.

Confusio: the basic meaning

8.4 In the Discussion Paper, we explored aspects of the history of the doctrine of *confusio* and the development of the doctrine in Scots law as applied to the contract of lease. Having considered the responses to that account of the doctrine and reassessed the legal position as set out in the Discussion Paper, it is fair to conclude that the doctrine of *confusio* is an unusually complex one. This chapter is not the place for a full description of *confusio* and its effects. However, what follows is intended to set out the differing meanings of *confusio* and its possible effect in different situations. It may also provide a starting point for further consideration of the doctrine and possible law reform in the future.

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[1] See https://www.scotlawcom.gov.uk/law-reform/previous-programmes-of-law-reform/
[2] These are leases for periods of over 20 years which are registered in the Land Register of Scotland or the Register of Sasines.

Termination of legal obligation

8.5 *Confusio* is one of the means by which a person is freed from their existing legal obligation.[3] It occurs where, after an obligation has arisen but before it has been performed, the same person in the same capacity becomes both the person entitled to have the obligation performed (the creditor) and the person who has to perform the obligation (the debtor). If that situation arises, the general rule is that both the obligation and the right to enforce it cease to exist automatically at the moment when the unified identity arises. Such termination of an obligation is known as dissolution by *confusio*.[4]

8.6 If in an obligation a person becomes both creditor and debtor but in different legal capacities, *confusio* does not apply. Thus if the debtor owes an obligation to a trustee acting under a trust and subsequently becomes a trustee in the same trust, the obligation is not terminated.[5]

8.7 *Confusio* applies to all legal obligations owed by one person to another under an ordinary contract or unilateral promise such as a guarantee of the performance of an obligation.[6] Thus where an individual J owed an obligation to pay his sisters H and C a sum of money under an agreement with them and then J inherited H and C's whole estates, J's obligation to pay H and C was dissolved by *confusio*.[7] Put the other way H and C's rights to be paid by J were dissolved by *confusio*. The same consequence would have applied if H and C had sold and assigned their debt to J.

8.8 A lease is a type of contract.[8] Ordinarily rights under a contract are enforceable only against other contracting parties. In a lease, however, certain rights of the tenant under the lease can be enforced not merely against the landlord but also against persons not party to the contract.[9] It is debatable whether this characteristic removes the contract of lease from the general rule of *confusio* as it applies to contractual obligations.[10] There is, however, a binding

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[3] Thus *confusio* is covered by the Institutional Writers in their titles dealing with liberation from obligations (Stair, Book 1, Title 18) or dissolution of obligations (Erskine, Book 3, Title 4) or extinction of obligations (Bell's Principles, Book First, Pt 3).
[4] Erskine, 3.4.23.
[5] The same applies to a debtor of a deceased person becoming an executor of the deceased. If, however, the debtor succeeds to (inherits) the debt, the debt is dissolved: *Elder v Watson* (1859) 21 D 1122.
[6] DP, para 8.20.
[7] *Elder v Watson* (1859) 21 D 1122.
[8] One consequence of its contractual nature is that a lease is binding between the original landlord and original tenant regardless of its duration and regardless of whether it is in formal writing under the Requirements of Writing (Scotland) Act 1995: *Gray v MacNeil's Executor* 2017 SLT (Sh Ct) 83.
[9] These rights (sometimes described as "real rights") include the right to possess the let property, provided that the tenant has taken possession of the property or, in a lease for a period of over 20 years, provided that the leases has been registered in the Land Register of Scotland. These rights can be enforced by the tenant against third parties through the remedies of interdict, restoration of possession (under s 45 of the Court of Session Act 1988 or s 38 of the Courts Reform (Scotland) Act 2014), and damages: See Rankine, pp 709 to 713; R Hunter, *A Treatise on the Law of Landlord and Tenant* (1860) Vol 2, pp 186 to 194.
[10] In D J Cusine (ed) *The Conveyancing Opinions of Professor J M Halliday* (1992) p 377, p 378. Professor Halliday's private opinion, expressed in 1982 and published posthumously, was that registration of a lease of over 20 years removes its obligations from the extinctive effect of *confusio* and that the granting of a sub-lease will prevent *confusio* from extinguishing obligations under the head lease. However, writing for publication in his subsequent book, Professor Halliday expressed the opinion that the landlord's acquisition of the tenant's interest almost certainly extinguished the lease and that in the converse situation it was highly probable that the result would be the same: J M Halliday, *Conveyancing Law and Practice in Scotland* (1st edn, 1987) Vol 3, para 30-52; J M Halliday, *Conveyancing Law and Practice in Scotland* by I J S Talman (ed) (2nd edn, 1997) Vol 2, para 46-60.

case precedent which may suggest that obligations under a lease terminate upon a tenant becoming owner of the let property.[11]

Multiple tenants or multiple landlords

8.9 The effect of *confusio* where the obligation is held jointly by co-debtors or is owed to a number of co-creditors is even less clear. If in the case set out above J had inherited only a half share of H and C's estates, it is possible that his obligation would have been terminated only to the extent of one half of the amount due.[12] The other half would have remained due by J to the executor acting on behalf of those inheriting the other half of H and C's estates. How that approach affects obligations which are not readily severable into separate parts is not clear. Nor is it self-evident that in the converse situation where H and C owe the obligation jointly and severally to J, J dies and H inherits the whole of J's estate, that C's consequent obligation to H would be restricted to one half of the original joint obligation to J. Given that multiple tenants and landlords are not uncommon particularly in the residential sector, these are important issues.

***Confusio*: a further meaning**

8.10 However, the expression *confusio* is not always used to mean the termination of a legal obligation. In the House of Lords case of *Clydesdale Bank plc v Davidson*,[13] the contract involved owners A, B, and C agreeing that C should have an exclusive right of occupation of a farm. The House of Lords rejected the argument that the existence of C as both a debtor and part-creditor prevented any enforceable contractual obligations from arising. At the same time, it held that the contract was not one of lease. In concluding that the contract, while containing enforceable obligations, could not be a lease, Lord Hope of Craighead noted that this was because "the principle of *confusio*" would result in C's lesser real right (as tenant) being absorbed into C's greater real right (as co-owner) thereby resulting in the extinction of the lesser right.[14] This additional (or alternative) meaning of *confusio* does not appear to be tied to the same person becoming debtor and creditor in a contract. Nevertheless it has been applied in subsequent cases relating to leases.[15]

Suspensive effect of *confusio*?

8.11 In the Discussion Paper we noted that *confusio* might have a suspensive rather than extinctive effect on an obligation.[16] Our views have evolved. The case of *Murray v Parlane's*

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[11] *Campbell v McKinnon* (1867) 5 M 636. In his article "Extinction of Leases Confusione" 2015 JR 79, Craig Anderson argues that the case was decided on the closely related concept of implied renunciation by the tenants who acquired ownership of the let property. Where the tenant acquires the landlord's interest (and *confusio* occurs) the effect has been categorised as a form of tacit or implied renunciation of the lease eg Stair, 2.9.36.
[12] Erskine, 3.4.23. Erskine was not cited in this respect to the court in *Serup v McCormack* 2012 SCLR 189 (SLC/73/10). In *Serup* the court held that all obligations under the lease were terminated when the sole tenant J acquired a half share of the let property.
[13] 1998 SC (HL) 51.
[14] 1998 SC (HL) 51, 56 (Lord Hope of Craighead). The idea of *confusio* involving the absorption of the tenant's right by the right of ownership was mentioned by Lord Curriehill in *Lord Blantyre v Dunn* (1858) 11 D 1188, 1198 but did not form the basis of the decision in that case.
[15] *Howgate Shopping Centre v Catercraft Services Ltd* 2004 SLT 231; and *Serup v McCormack* 2012 SCLR 189 (SLC/73/10).
[16] DP, para 8.26.

Trustees involved a contract of ground annual.[17] Despite the debtor's having received an assignation of the right to payment from the creditor, it was held in *Murray's* case that the debtor's liability to pay under the ground annual was a perpetual burden on the property akin to a feudal obligation, and therefore had not been terminated by *confusio* upon the debtor's receipt of the assignation. While the court did not say so in terms, the obligation had been suspended until the perpetual nature of the liability had been terminated through a special procedure of consolidation. Another area where *confusio* appears to have had a suspensive effect was where an heir of entailed heritable property acquired the creditor's right of a debt owed by the heir.[18] Contracts of ground annual, feudal rights and entailed property no longer form part of Scots law following their abolition by the Abolition of Feudal Tenure etc. (Scotland) Act 2000.

8.12 A lease differs from the contract of ground annual that was considered in *Murray's* case. It contains many more obligations than merely the payment of money. It is not apparent what would happen to those obligations in the event of *confusio* having a suspensive rather than extinctive effect. For example, what would happen in relation to the giving of notices during the period of suspension is unclear. A passing (obiter) view has been expressed that *confusio* results in complete extinction rather than suspension.[19]

8.13 Nevertheless it has been suggested that where the lease is registered and a standard security has been granted over the lease, *confusio* will result in a suspensive rather than extinctive effect.[20] The reasoning is that in such a situation the law should not allow a debtor tenant to free itself of the security by acquiring the landlord's interest. Whether or not that is the current law, there may be policy reasons for why that should be the law in any future reform of *confusio* in relation to leases. Further to the possibility of adopting such a policy we have given consideration to how the suspensive effect of a lease might work in such a situation.[21]

Consolidation

8.14 In the Discussion Paper we compared *confusio* with consolidation.[22] We also discussed consolidation in relation to servitudes and real burdens.[23] We suggested, tentatively, that the merging of real rights under a lease under the current law is more akin to consolidation of the feudal rights of superior and vassal than *confusio*.[24] Nevertheless there is a fundamental distinction between a lease and a feudal relationship. The former is a contract of limited duration, whereas the latter is a form of ownership of unlimited duration. On reflection, we accept that there appears to be nothing under the existing law to support the position that where a tenant happens to acquire the landlord's interest in a lease (or vice versa)

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[17] (1890) 18 R 287. The case was followed in another ground annual case *Healy and Young v Mair's Trs* 1914 SC 893.

[18] Erskine, 3.4.27.

[19] *Howgate Shopping Centre Ltd v Catercraft Services Ltd* 2004 SLT 231, para 61 (Lord Macfadyen). This is consistent with the decision in *Campbell v McKinnon* (1867) 5 M 636.

[20] C Waelde (ed), *Professor McDonald's Conveyancing Opinions* (1998) pp 198, 202. While Professor McDonald writes of a sub-lease, he sees this as analogous to the presence of a standard security. His view of a sub-lease resulting in suspension of the head lease was rejected – by implication – in *The Howgate Shopping Centre Ltd v Catercraft Services Ltd* 2004 SLT 231, para 60 (Lord Macfadyen).

[21] A basic outline is given in para 8.22.

[22] DP, paras 8.3 to 8.8.

[23] DP, paras 8.9 to 8.15.

[24] DP, paras 8.40 to 8.43.

there must be a procedure of consolidation before the obligations under the lease are terminated.

Clarification of the law: response from consultees

8.15 In the Discussion Paper we asked whether a clear statement of the law in respect of *confusio* was required. Of the 34 consultees who responded to this question, 30 declared that a clear statement of the law was required. These included the Senators of the College of Justice, the Law Society of Scotland, the Royal Institution of Chartered Surveyors, the Scottish Property Federation, all the submissions from businesses and individual surveyors. All firms of solicitors, except one, agreed that a clear statement was required. The one firm which did not agree stated that they had conflicting views but tended to favour the view that the law does not require to be amended or restated. The Faculty of Advocates agreed that a clear statement was required but restricted their answer to commercial leases. The Law Society of Scotland noted that their members experience difficulties with the doctrine of *confusio* arising in practice. It was also pointed out to us that the commercial property branch of the profession tends to rely on the 1982 opinion of Professor Halliday,[25] and that this is an unsatisfactory state of affairs.

8.16 The other three responses were from individual solicitors who practice in the area of rural property and agricultural leases. They stated that there was no need for clarification of the law. They considered that the law was clear, and that in the event that the interests of landlord and tenant came into the same person *confusio* operated to extinguish the lease automatically.

Discussion

8.17 It is apparent that there is disagreement between legal practitioners over the effect of *confusio* on leases. Many commercial lease practitioners have relied on Professor Halliday's 1982 opinion to the effect that the extinctive effect of *confusio* does not apply to registered (and possibly other) leases or leases that have sub-leases. On the other hand, agricultural lease practitioners have taken the view that *confusio* will extinguish a lease even if one of the tenants becomes no more than a co-owner of the let property.[26]

8.18 In our view, a statutory restatement of the law on the effect of *confusio* on leases is desirable. It is unsatisfactory for different branches of the legal profession to be taking such diametrically opposed views over the effect of *confusio* on leases. Clients are entitled to unequivocal and consistent advice on the issue.

Law to be clarified

8.19 While it is desirable to have a statutory re-statement (or codification) of the law, the question remains as to what the law is – or should be – that should be put into statutory form. In the Discussion Paper we asked whether consultees considered that a positive action

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[25] D J Cusine (ed), *The Conveyancing Opinions of Professor J M Halliday* (1992), p 379. The opinion, given privately, was published posthumously and predated his book. See fn 10 above.

[26] Ie the situation in *Serup v McCormack* 2012 SCLR 189 (SLC/73/10) where the extinctive effect of *confusio* was upheld.

showing the intent of the parties such as the registration of a minute should be required before the interests of landlord and tenant are consolidated.

8.20 In answer to this question there was again division between commercial property lawyers and agricultural lawyers, with the former being in favour but the latter against. The views of the agricultural lawyers were, in essence, that the suggestion that *confusio* should not apply to leases seems to fly in the face of contract law. Practical difficulties in relation to leases under the 1991 and 2003 Agricultural Holdings (Scotland) Acts were also noted. Craig Anderson, from Robert Gordon University, also opposed the proposal, commenting that if the law required a consolidating procedure *confusio* would be redundant.

Law to be clarified: conclusion

8.21 In our view it would be going too far and too fast to recommend a statutory restatement of the law in this area at this stage. Even though the current law does not require a consolidation procedure in order to extinguish a lease upon the tenant acquiring the landlord's interest and vice versa, there remains significant controversy over what the current law is on the effect of *confusio*. Furthermore the effect on *confusio* of the existence of a standard security over the lease remains untested. That is an important matter from the point of view of raising finance for development by a tenant in a ground lease. The interests of agricultural and residential tenants also require further consideration.

8.22 With the assistance of our Advisory Group, we explored various possible solutions for clarification of the effect of *confusio* on a registered lease[27] with a standard security over it. We made a number of suggestions, including the extinguishment of both lease and security, transfer of the security from the lease to the let property itself or the creation of a "shadow lease". The Group expressed the unanimous view that the security should be preserved if at all possible. There was little appetite for the security to be transferred from the lease to the property. Under the "shadow lease" option, upon the common identity of the landlord and tenant occurring[28] in a registered lease burdened with a standard security the lease would become a statutory "shadow" lease with the landlord and tenant as the same person. Complex rules consequential on the same person being landlord and tenant would have to be devised, but detailed discussions with the Advisory Group suggested these to be achievable. A full public consultation on them would, however, be both desirable and necessary.

Conclusion

8.23 Given the importance of and uncertainty over the standard security issue, we do not think it appropriate to recommend a statutory restatement, clarification or reform of the law of *confusio* on leases without a full consultation on specific proposals for the rules to be included. We therefore make no recommendation on legislation for *confusio* at this stage.

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[27] This is a lease for a period of over 20 years which is registered in the Land Register of Scotland or the Register of Sasines. Few, if any, agricultural leases are registered.

[28] Including by renunciation.

Chapter 9 List of recommendations

1. There should be a statutory code (statement of the law) setting out the law by which a lease continues automatically beyond its termination date.

(Paragraph 2.64; draft Bill, sections 2 to 6 and 25)

2. The code should apply to all leases (including sub-leases) except residential, agricultural, crofting, small landholding and allotment leases.

(Paragraph 2.64; draft Bill, sections 1 and 32)

3. The code should disapply the common law rules of tacit relocation from the leases to which it applies.

(Paragraph 2.64; draft Bill, section 25)

4. The code should exclude from the scope of automatic continuation all leases which are excluded from the equivalent common law rules of tacit relocation.

(Paragraph 2.64; draft Bill, section 2(1)(b) and (2) and schedule 1)

5. The code should provide that the lease may include a term providing that it will not continue automatically beyond its termination date even if no notice has been given. This term should require to be constituted in writing, irrespective of the length of the lease, and should be permitted either at the time of entering into the lease or subsequently.

(Paragraph 2.64; draft Bill, sections 4 and 24)

6. The code should provide that automatic continuation occurring by virtue of conduct after the termination date shall not be subject to exclusion by agreement of the parties.

(Paragraph 2.64; draft Bill, section 23(1))

7. The code should provide that where a lease continues automatically after its termination date, any cautionary obligation (guarantee) in relation to the performance of any obligation of the tenant or landlord under the lease during the period of such continuation shall not apply, except in so far as the cautionary obligation provides otherwise.

(Paragraph 2.64; draft Bill, section 22)

8. The code should provide that, in a lease which is continued automatically beyond its termination date, the default period of continuation is:

   (a) for leases of one year or more, one year;

(b) for leases of less than a year, a period equal to the period of the lease.

(Paragraph 2.71; draft Bill, section 7)

9. The code should provide that parties to a lease may agree to reduce but not extend these default periods. The minimum to which these periods may be reduced should be 28 days (for leases granted for a period of more than 28 days) or 7 days (for leases granted for a period of 28 days or less).

(Paragraph 2.71; draft Bill, section 7)

10. The code should provide that during any period of automatic continuation the lease continues on the same terms as before the termination date, except to the extent that those terms are inconsistent with the lease continuing by virtue of automatic continuation.

(Paragraph 2.73; draft Bill, section 7(4))

11. Notice to quit should be given only in writing. Notice of intention to quit in leases for more than one year in duration should be given only in writing. In leases for up to one year notice of intention to quit may be given in writing or orally.

(Paragraph 3.12; draft Bill, sections 8(1) and 10(1))

12. Notice that does not comply with a requirement to be given in writing should be ineffective in preventing automatic continuation of the lease at its termination date.

(Paragraph 3.12; draft Bill, section 3(1)(a) and (b) and (2))

13. The code should set out the essential elements which notice to quit and notice of intention to quit must contain, but should not set out a compulsory (or optional) form of wording.

(Paragraph 3.20; draft Bill, sections 8(2) and 10(2) and (3))

14. Notice that does not contain each essential element should be ineffective in preventing automatic continuation.

(Paragraph 3.20; draft Bill, section 3(1)(a) and (b) and (2))

15. The code should provide that notice to quit must contain the name of:

(a) the landlord; or

(b) where notice is given by another person on behalf of the landlord, that person.

(Paragraph 3.25; draft Bill, section 8(2)(c))

16. The code should provide that a notice to quit must contain a description of the let property (whether directly or simply by reference to the lease itself) sufficient to enable a reasonable recipient, whose knowledge includes that of the tenant, to identify the property from which the tenant is required to remove.

(Paragraph 3.28; draft Bill, section 8(2)(d) and (4))

17. The code should provide that notice to quit:

(a) must state (in whatever terms) that the tenant is required to give up possession of the let property on the termination date of the lease;

(b) must specify the termination date of the lease;

(c) need not specify the name or address of the tenant.

(Paragraph 3.34; draft Bill, sections 8(2)(a) and (b) and 12)

18. The code should provide that a notice of intention to quit:

(a) must state (in whatever terms) that the tenant intends to give up possession of that property at the end of the lease;

(b) must identify the let property (whether directly or by reference to the lease itself) sufficiently to allow a reasonable person whose knowledge includes that of the landlord to identify the property from which the tenant intends to remove;

(c) need not specify the termination date of the lease;

(d) need not specify the name or address of the landlord.

(Paragraph 3.46; draft Bill, sections 10(2) and (5) and 12)

19. The code should provide that notice of intention to quit, if given in writing, must contain the name of:

(a) the tenant; or

(b) where the notice is given by another person on behalf of the tenant, that person.

(Paragraph 3.46; draft Bill, section 10(3))

20. The code should provide that, where an erroneous termination date is specified in a notice to quit, the notice is not invalidated if the erroneous date falls:

(a) after the actual termination date; and

(b) before the end of the 7-day period beginning with the day after the actual termination date.

(Paragraph 3.61; draft Bill, section 8(5))

21. In such a case, and where the notice to quit is the only reason the lease ends on its termination date:

(a) the tenant (but not any sub-tenant) should be entitled (despite the lease having ended) to remain in possession of the let property during the period between the termination date and the erroneous date specified in the notice; and

(b) during that period:

(i) the tenant should not be liable to the landlord for violent profits, unjustified enrichment, or damage to the let property sustained during that period (except for damage intentionally or negligently caused by the tenant); and

(ii) the landlord should be required to comply with the landlord's obligations under the lease as if the lease had not ended, and indemnify the tenant for the expense of fulfilling any obligation owed by the tenant to another person in connection with the let property which arises during that period and which would be owed by the landlord to that other person if the landlord were in occupation of the let property when the obligation arises.

(Paragraph 3.61; draft Bill, sections 9 and 19(5))

22. The code should provide that, where information is included in a notice to quit or of intention to quit in order to comply with the requirement:

(a) to include the name of the person giving the notice; or

(b) to identify the let property,

and that information is erroneous, the notice is not invalid if a reasonable recipient would know, in all the circumstances, both that the information was erroneous and the correct information that should have been included.

(Paragraph 3.61; draft Bill, sections 8(6) and 10(7))

23. The code should exclude from such information any rule of law by which a court may order rectification of, or otherwise provide relief from, an error in the information.

(Paragraph 3.61; draft Bill, sections 8(7) and 10(8))

24. Parties should not be entitled to modify or disapply:

(a) any requirement that notice be given in writing;

(b) the provisions in the code relating to the granting of relief from an error in the termination date stated in a notice to quit; or

(c) the provisions in the code granting relief from errors in the name of the giver of the notice or in the description of the property let.

(Paragraph 3.61; draft Bill, section 23)

25. The code should provide that, for leases of six months or longer in duration, notice to quit or of intention to quit must be received by the tenant or landlord (as the case may be) no later than the day which is three months before the termination date.

(Paragraph 3.73; draft Bill, section 13)

26. It should provide that, for leases of less than six months in duration , notice to quit or of intention to quit must be received by the tenant or landlord (as the case may be) no later than the day which is one month before the termination date.

(Paragraph 3.73; draft Bill, section 13)

27. It should provide that, for leases of less than three months in duration, no notice to quit or of intention to quit is required to prevent automatic continuation.

(Paragraph 3.73; draft Bill, section 2(2)(a))

28. The code should provide that notice is given by electronic means only if:

(a) the recipient has given consent (expressly or impliedly) to the notice being given by being sent by those means;

(b) the consent has not been withdrawn (expressly or impliedly from the recipient's course of conduct);

(c) where the consent has not been given (or has been withdrawn), the recipient has acknowledged receipt of the notice in writing on or before the last day for its receipt.

(Paragraph 3.89; draft Bill, section 11)

29. There should be a rebuttable presumption that withdrawal of consent to the giving of notice by electronic means under the code has not taken place.

(Paragraph 3.89; draft Bill, section 11(5))

30. Parties should not be permitted to modify or disapply the provisions of the code relating to how written notice is given by electronic means.

(Paragraph 3.89; draft Bill, section 23)

31. The code should provide that if a notice to quit or of intention to quit is given in a traditional document and if it is:

(a) sent from within the UK by recorded delivery post by to a listed address;

(b) sent from within the UK by non-recorded delivery post by to a listed address;

(c) sent from outside the UK to a listed address; or

(d) delivered by a sheriff officer,

it is taken to have been received on the day on which it is delivered.

(Paragraph 3.95; draft Bill, section 14(1))

32. For the purposes of the previous recommendation notice should be presumed to have been delivered:

(a) where it is posted from within the UK by a recorded delivery service to a listed address, on the second day after the day on which it is posted (or, where that day is a non-working day, on the next working day thereafter); and

(b) where it is posted from within the UK by a non-recorded delivery service to a listed address, on the day on which the document would be delivered in the ordinary course of the service (or, where that day is a non-working day, on the next working day thereafter).

(Paragraph 3.95; draft Bill, section 14(1))

33. For the purposes of these last two recommendations, a "listed address" should be:

(i) the last UK postal address given to the sender by the recipient for the purpose of serving notice by post;

(ii) where the recipient is a body corporate or other legal person with a registered UK office, the postal address of that office; or

(iii) where the recipient has neither such address, the last UK postal address for the recipient of which the sender is aware (irrespective of whether the recipient has a more recent UK address of which the sender was not, but could reasonably have been expected to become, aware).

(Paragraph 3.95; draft Bill, section 14(3) and (4))

34. Notice to quit or of intention to quit given by electronic means with the prior consent of the recipient should be presumed to have been received, on the day on which it is sent (or, where that day is a non-working day, on the next working day thereafter).

(Paragraph 3.95; draft Bill, section 14(1))

35. Parties should be permitted to modify or disapply these provisions of the code by way of a written term in the lease.

(Paragraph 3.95; draft Bill, section 23)

36. The code should set out procedures for the giving of notice in a traditional document by a sheriff officer, compliance with which will allow receipt of the document to be deemed to have been on the date that the notice was given by the officer.

(Paragraph 3.95; draft Bill, section 15)

37. Parties should be permitted to modify or disapply (by way of a written term in the lease) the provisions in the code governing:

(a) the day by which notice to quit or of intention to quit must be received (whether by making that day earlier or later), provided that the same day applies to both notice to quit and notice of intention to quit; and

(b) the day when notice (whether given in a traditional document or by electronic means) is or is presumed to have been, received.

(Paragraph 3.100; draft Bill, section 23)

38. The code should provide that notice to quit or of intention to quit may be withdrawn (and thus rendered ineffective in bringing the lease to an end) only with the consent of the recipient. If notice has been given in writing, both the withdrawal itself and the agreement of the recipient must be constituted in writing. Parties should be entitled to modify or disapply this provision by way of a written term in the lease.

(Paragraph 3.102; draft Bill, sections 16 and 23)

39. The code should provide that, once notice to quit or of intention to quit has been given:

(a) its validity is unaffected by any subsequent change in the identity of the landlord or tenant under the lease; and

(b) any such successor as landlord or tenant is entitled to agree to its withdrawal.

(Paragraph 3.107; draft Bill, sections 16(4) and 18)

40. The code should provide that notice to quit given by one of a number of co-landlords, or notice of intention to quit given by one of a number of co-tenants, is sufficient to prevent automatic continuation (whether or not the consent of the other landlord(s) or tenant(s), as the case may be, has been given). Parties should be entitled to modify or disapply this provision by way of a written term in the lease.

(Paragraph 3.113; draft Bill, sections 17 and 23))

41. It should provide that notice to quit must be given to all co-tenants, and notice of intention to quit to all co-landlords. Parties should, however, be entitled to modify or disapply this requirement by way of a written term in the lease.

(Paragraph 3.113; draft Bill, sections 17 and 23)

42. The code should enact the general principle that, where a head lease ends on its termination date, any sub-lease (over all or part of the subjects of the head lease) having the same termination date also ends on that date. For the avoidance of doubt, it should further provide that, where the termination date of a sub-lease purports to fall after that of the head lease, the termination date of the sub-lease is deemed to be the same as that of the head lease.

(Paragraph 3.123; draft Bill, section 19)

43. It should provide that a sub-tenant is not entitled to challenge the validity of any:

(a) notice to quit or of intention to quit given under the head lease;

(b) term of the head lease which provides that it will not continue after its termination date; or

(c) new lease entered into between the head landlord and tenant over the subjects of the sub-lease.

(Paragraph 3.123; draft Bill, section 19(6))

44. It should be provided that, where a head lease and sub-lease terminate on the same date, the head lease nevertheless continues automatically (except where the head lease is one from which automatic continuation is in any event excluded) by virtue of the post-termination conduct of the parties if:

(a) the sub-tenant remains in occupation of the let property after the termination date with the consent of the tenant, or the tenant resumes and remains in occupation after that date; and

(b) the head landlord does not take steps to remove the tenant (and therefore the sub-tenant) within a reasonable period following the termination date or otherwise acts inconsistently with the lease having ended.

(Paragraph 3.123; draft Bill, section 20)

45. It should be provided that, where a head lease and sub-lease terminate on the same date, the sub-lease nevertheless continues automatically (except where the sub-lease is one from which automatic continuation is excluded) by virtue of the post-termination conduct of the parties if:

(a) the head lease is itself continued automatically by virtue of such conduct;

(b) the sub-tenant remains in occupation of the subjects of the sub-lease after the termination date; and

(c) the head tenant does not take steps to remove the sub-tenant within a reasonable period following the termination date or otherwise acts inconsistently with the sub-lease having ended.

(Paragraph 3.123; draft Bill, section 20)

46. It should be provided (in respect of head leases which are capable of being continued automatically) that a head tenant must, as soon as reasonably practicable after:

(a) receiving written notice to quit or giving written notice of intention to quit, give any sub-tenant a copy of the notice;

(b) orally giving or withdrawing notice of intention to quit, notify any sub-tenant of that fact;

(c) the constitution in writing of an agreement to withdraw notice to quit or of intention to quit, or to vary the head lease such that notice need not be given to prevent automatic continuation, give any sub-tenant a copy of the document;

(d) entering into a new lease with the head landlord over the subjects of the sub-lease which will take effect immediately after the termination date of the head lease, notify any sub-tenant in writing that a new lease has been so constituted.

(Paragraph 3.123; draft Bill, section 21)

47. It should be provided that, where the head tenant fails to comply with any of the duties owed to the sub-tenant under the previous recommendation:

(a) the validity of the head lease, the sub-lease and anything of which notification should have been given is unaffected; but

(b) the head tenant is liable to the sub-tenant for any loss caused to the sub-tenant by their failure.

(Paragraph 3.123; draft Bill, section 21(2))

48. Sections 34 to 37 and 38 of the Sheriff Courts (Scotland) Act 1907, and rules 34.5 to 34.9 of schedule 1 thereto, should not apply to leases to which the code applies. Rule 30.5(1) of the Act of Sederunt (Summary Cause Rules) 2002 should not apply to leases to which the code applies.

(Paragraph 3.128; draft Bill, schedule 2, paragraphs 2 and 6)

49. Sections 4 to 6 of the Removal Terms (Scotland) Act 1886 should not apply to leases to which the code applies.

(Paragraph 3.130; draft Bill, schedule 2, paragraph 1)

50. The Act of Sederunt of 1756 (as re-enacted in chapter 15 of the Codifying Act of Sederunt 1913) should not apply to leases to which the code applies.

(Paragraph 3.131; draft Bill, schedule 2, paragraph 7)

51. The common law rules concerning the giving of notice to quit and of intention to quit, and any other rule of law by which a party may unilaterally bring a lease to an end on its termination date (by letter of removal or otherwise), should not apply to leases to which the code applies.

(Paragraph 3.133; draft Bill, section 25)

52. Statute should provide that where a lease (to which the statutory code applies) does not provide for the period of the lease (expressly or by implication), or any period so provided for cannot be established, the period of the lease should be one year beginning with the date of entry.

(Paragraph 4.15; draft Bill, section 26(2))

53. Statute should provide that where a lease (to which the statutory code applies) does not provide for the date of entry (expressly or by implication), or where any date so provided for cannot be established, the date of entry under the lease is to be treated as if it were:

(a) the date on which the tenant entered into possession of the property, or

(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 calendar year in respect of which rent was paid under the lease.

(Paragraph 4.15; draft Bill, section 26(3) and (4))

54. Statute should provide for a summary sheriff court procedure by which the date of entry under such a lease may be established in a binding declaration.

(Paragraph 4.15; draft Bill, section 26(5))

55. Where the date of entry under a lease is determined by a court, tribunal or arbitrator (under whatever procedure), the relevant adjudicating body should have the power under statute to order that the lease, insofar as it is constituted in writing, is endorsed with the missing date of entry.

(Paragraph 4.15; draft Bill, section 26(6) and (7))

56. The existing common law rules by which the duration of, or date of entry under, such a lease is to be presumed (where the tenant has entered into possession of the subjects) should be disapplied from leases covered by the statute.

(Paragraph 4.15; draft Bill, section 26(1) and (8))

57. Statute should provide that a party to a lease (to which the statutory code applies) must notify the other of a UK postal address to which termination documents may be sent, unless specified circumstances apply. It should also expressly provide that a new address for that purpose may be notified in place of one previously notified under this provision.

(Paragraph 4.38; draft Bill, section 27)

58. To comply with the obligation to notify a UK postal address, the notification should require to be given in writing and state (in whatever terms) that the specified address may be used for the purpose of sending termination documents. It should be permissible for different addresses to be notified for different types of termination document, and for notification to be given in more than one document.

(Paragraph 4.38; draft Bill, section 27(4))

59. Statute should specify that the obligation to notify a UK postal address does not apply:

(a) to a party for whom a UK postal address is included in the lease itself (whether or not specified as an address to which termination documents may be sent);

(b) to a party for whom a UK postal address (whether or not specified as an address to which termination documents may be sent) is included in a document disponing the subjects of the lease and granted after the lease was granted or assigning or otherwise transferring an interest in the lease (to that party) which has been registered or a copy of which has been given to the other party;

(c) to a corporate body or other legal person with a registered office in the UK;

(d) where the duration of the lease is one year or less;

(e) to a confirmed executor over an estate which includes an interest in the lease; or

(f) to a heritable creditor who has entered into possession of the interest of a party to the lease who has died.

(Paragraph 4.38; draft Bill, section 27(3))

60. Statute should provide that where the obligation to notify a UK postal address is breached by a party to a lease, the other party is entitled:

(a) where the other party is the tenant, to withhold payment of the whole or part of any sum due to be paid during the period of non-compliance (which, if the landlord later complies with the obligation, must be paid within 14 days);

(b) where the other party is the landlord, to send the termination document by post to the let property (until 14 days after compliance); and

(c) in either case, to send the termination document by post to the Extractor of the Court of Session (until 14 days after compliance), if

(i) it would be legally ineffective or not reasonably practicable to send the document electronically; and

(ii) where the other party is the landlord, documents cannot be delivered to the let subjects.

(Paragraph 4.38; draft Bill, section 28)

61. A termination document posted to the let property by the landlord or to the Extractor of the Court of Session (the obligation to notify a UK postal address having been breached) should be treated as if it had been sent by post to a UK address notified as one to which any termination document can be sent.

(Paragraph 4.38; draft Bill, section 28(8))

62. Breach of the obligation to notify a UK postal address should not give rise to an entitlement to damages.

(Paragraph 4.38; draft Bill, section 28(2))

63. Parties should not be permitted to disapply the obligation to notify a UK postal address, nor the remedies available for breaching it.

(Paragraph 4.38; draft Bill, section 27(6))

64. The availability in law of an overseas address for service of termination documents should be immaterial to the existence of the obligation to notify a UK postal address.

(Paragraph 4.38; draft Bill, section 27(5))

65. These provisions should apply to all 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 ("termination documents").

(Paragraph 4.38; draft Bill, section 27(2))

66. Statute should provide that, where the interest of a landlord (in a lease to which the statutory code applies) has been transferred to a new landlord, the tenant may give any termination document to the former landlord unless or until the tenant has been informed in writing by the new landlord of the name of, and a postal address for, the new landlord.

(Paragraph 4.46; draft Bill, section 29)

67. Statute should provide that:

(a) a termination document given to the former landlord prior to such written notification will be treated as having been served on the new landlord; and

(b) nothing in such deemed service should affect any ground of challenge to the document or its service other than it not having been served on the new landlord.

(Paragraph 4.46; draft Bill, section 29(2) and (7))

68. These provisions should apply to all documents the giving of which has the effect of bringing the lease to an end or which is a necessary step before a lease can be brought to an end ("termination documents").

(Paragraph 4.46; draft Bill, section 29(8))

69. Statute should provide that where a party to a lease has died, a termination document may nevertheless be:

(a) sent to a postal or electronic address which, immediately before the deceased's death, the sender could have used for service of the document by virtue of any common law rule, statutory provision or term of a lease or other agreement between the parties; or

(b) left at a postal address of the same description,

as if the deceased was alive, until the serving party is notified in writing

(i) by the executor of the fact that an executor has been confirmed over the estate of the deceased, or by a heritable creditor that they have taken possession of the deceased's interest in the tenancy or the let subjects; and

(ii) the name of, and a UK postal address for, the executor or heritable creditor, as the case may be.

(Paragraph 4.53; draft Bill, section 29(3), (5)(a), and (8))

70. Statute should provide that a termination document served accordingly on the deceased party is to be treated as having been served on the executor (irrespective of whether they have been confirmed) or heritable creditor (irrespective of whether they have taken possession), as the case may be:

(a) where it is sent to a postal address, on the day on which, if the deceased were still alive, the document would have been taken to have been received by them by virtue of any common law rule, statutory provision or term of the lease or other agreement;

(b) where it is sent to an electronic address, on the earliest working day on which, if the deceased were still alive, it would have been reasonable to expect them to receive the document; or

(c) where it is left at the postal address on the day that it is left there.

(Paragraph 4.53; draft Bill, section 29(4) and (5)(b))

71. Statute should provide that nothing in these provisions affects any ground on which a termination document may not be effective other than the requirement to give it to the other party to the lease.

(Paragraph 4.53; draft Bill, section 29(7)

72. These provisions should apply to leases to which the statutory code applies and to all 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 ("termination documents").

(Paragraph 4.53; draft Bill, section 29(8))

73. The parties should not be permitted to modify or disapply these provisions in the lease.

(Paragraph 4.53; draft Bill, section 29(6))

74. The legislation implementing our recommendations should provide that all of its provisions, including those mentioned in chapters 2 and 3 of this Report, should come into force six months from the date of Royal Assent.

(Paragraph 4.62; draft Bill, section 34)

75. The legislation implementing the recommendations in chapters 2 and 3 of this Report should provide for:

(a) them to apply to all leases existing on the date that it comes into force ("the commencement date") except in circumstances which it specifies;

(b) the question of whether an existing lease with a termination date before the commencement date has continued automatically beyond that date (including the validity of, or necessity for, any notice to quit or of intention to quit and the period of continuation) to be determined by the pre-commencement law;

(c) the validity of any notice given in relation to a termination date in an existing lease that occurs on or after and no later than six months after the commencement date to continue to be governed by the pre-commencement law;

(d) the validity or invalidity of any express term in an existing lease should continue to be governed by the pre-commencement law;

(e) any right or obligation acquired, accrued or incurred under the lease before the commencement date to be unaffected by the law implementing those recommendations;

(Paragraph 4.62; draft Bill, schedule 2, paragraphs 8, 9, and 11)

76. Any legislation implementing the recommendations in chapter 4 of this report should provide for them to apply to all leases existing at the commencement date except that recommendations 52 to 56 on the implied durations and dates of entry of a lease should not be applicable:

(a) where the duration or date has already been determined by a court, tribunal, or arbitrator before the commencement date; or

(b) where court, tribunal or arbitral proceedings in which such a matter is to be determined have been raised before commencement date.

(Paragraph 4.62; draft Bill, schedule 2, paragraphs 10 and 11)

77. Section 4(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 should be amended to allow service of a pre-irritancy warning notice by sheriff officer.

(Paragraph 5.20; draft Bill, section 30(1) and (2))

78. Section 4 of the 1985 Act should be amended so that it provides that a pre-irritancy warning notice sent by recorded delivery post is sufficiently served if it is delivered to:

(a) the last UK postal address given by the tenant to the landlord for the purpose of sending the notice; or

(b) where the tenant is a body corporate or other legal person with a registered office in the UK, the address of that office; or

(c) where the tenant does not have an address mentioned in paragraph (a) or (b), the last UK postal address for the tenant of which the landlord is aware (irrespective of whether the tenant has a more recent UK address of which the landlord is not, but could reasonably be expected to become, aware).

(Paragraph 5.20; draft Bill, section 30(1) and (2))

79. In respect of delivery by sheriff officer, the 1985 Act should be amended in order to provide for the methods of service which a sheriff officer may use.

(Paragraph 5.20; draft Bill, section 30(3))

80. The 1985 Act should permit parties to agree that the notice must, in addition to being served by recorded delivery post or by sheriff officer, be served by such other method as is specified in the lease.

(Paragraph 5.20; draft Bill, section 30(2))

81 A landlord should not be entitled to rely on a monetary breach of a lease for the purpose of terminating it or treating it as terminated unless, at the same time as or as soon as reasonably practicable after serving any irritancy-related notice (including pre-irritancy warning notices and irritancy notices) on the tenant, they serve a copy of the notice on qualifying heritable creditors. A "qualifying heritable creditor" is one who (i) has a standard security over the lease which has been registered in the Land Register or recorded in the General Register of Sasines before the start of the 10-day period ending with the day on which the notice is served on the tenant, and (ii) either has a UK postal address known to the landlord or has provided a UK postal address to the landlord for the purpose of serving the relevant copies.

(Paragraph 5.29; draft Bill, section 30(3))

82. Statute should provide that, where a copy of any irritancy-related notice is to be served on a creditor, the methods by which it may be served are the same as those permitted for service on the tenant.

(Paragraph 5.29; draft Bill, section 30(3))

83. A qualifying heritable creditor should be entitled to challenge the validity of any irritancy-related notice, and the irritancy of a lease itself, on the grounds:

(a) that the landlord failed to comply with the requirement to serve them with a copy of any irritancy-related notice, or failed to comply with the requirement to give the tenant a pre-irritancy warning notice in respect of a monetary breach; or

(b) that the landlord failed to comply with a procedural requirement in the lease before terminating it; or

(c) in respect of non-monetary breaches, that a fair and reasonable landlord would not, having regard to the interests of the creditor, have relied on the irritancy clause or material breach to terminate the lease.

(Paragraph 5.29; draft Bill, section 30(3))

84. Statute should provide that leases (to which the statutory code applies) include an implied term obliging the landlord to repay any rent or other payment made in advance by the tenant in respect of a period falling after the termination of the lease. Repayment should require to be made within 10 working days after the termination of the lease. The implied term should be of no effect where the lease is terminated by the landlord by virtue of an irritancy clause.

(Paragraph 6.17; draft Bill, section 31(1) to (4))

85. Parties should be entitled to include a term in the lease disapplying the implied term or modifying the conditions for repayment under it.

(Paragraph 6.17; draft Bill, section 31(5))

86. The implied term should apply only to leases entered into after the statutory provision which introduces it comes into force.

(Paragraph 6.17; draft Bill, section 31 and schedule 2, paragraph 10(1))

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Appendix A

Leases (Automatic Continuation etc.) (Scotland) Bill

[DRAFT]

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Leases (Automatic Continuation etc.) (Scotland) Bill
[DRAFT]

An Act of the Scottish Parliament to make provision about the circumstances in which certain leases continue or end on their termination dates; to make provision about other matters relating to the beginning, length or ending of those leases; and for connected purposes.

PART 1

LEASES TO WHICH THIS ACT APPLIES

1 Exclusion of certain residential and agricultural leases

(1) This Act applies to a lease which is not one (or more than one) of the following—

(a) a residential lease,

(b) an agricultural lease,

(c) a lease of—

(i) a croft,

(ii) a small landholding, or

(iii) an allotment.

(2) In subsection (1)(a), "residential lease" means a lease which gives rise to—

(a) a private residential tenancy within the meaning of the Private Housing (Tenancies) (Scotland) Act 2016,

(b) a tenancy which would be a private residential tenancy within the meaning of that Act but for one of the following paragraphs of schedule 1 of that Act—

(i) paragraph 1(1) (low rent),

(ii) paragraph 7 (resident landlord),

(iii) paragraph 12 (police housing),

(iv) paragraph 13 (military housing),

(v) paragraph 15 (sublet, assigned, etc. social housing),

(vi) paragraph 16 (homeless persons),

(vii) paragraph 17 (persons on probation or released from prison etc.),

(viii) paragraph 18 (asylum seekers),

(c) a Scottish secure tenancy within the meaning of the Housing (Scotland) Act 2001,

(d) a short Scottish secure tenancy within the meaning of that Act,

(e) an assured tenancy (including a short assured tenancy) within the meaning of Part 2 of the Housing (Scotland) Act 1988, or

(f) a regulated tenancy within the meaning of the Rent (Scotland) Act 1984.

(3) In subsection (1)(b), "agricultural lease" means a lease—

(a) to which the Agricultural Holdings (Scotland) Act 1991 applies, or

(b) which gives rise to—

(i) a short limited duration tenancy within the meaning of section 93 of the Agricultural Holdings (Scotland) Act 2003,

(ii) a limited duration tenancy within the meaning of that section,

(iii) a modern limited duration tenancy within the meaning of that section,

(iv) a repairing tenancy within the meaning of that section, or

(v) a tenancy to which section 3 of the Agricultural Holdings (Scotland) Act 2003 applies (leases for grazing or mowing).

(4) In subsection (1)(c)—

"croft" has the meaning given by section 3 of the Crofters (Scotland) Act 1993,

"small landholding" means land which is subject to a lease to which the Small Landholders (Scotland) Acts 1886 to 1931 apply,

"allotment" means—

(a) an allotment within the meaning of section 107 of the Community Empowerment (Scotland) Act 2015,

(b) an allotment site within the meaning of section 108 of that Act.

NOTE

Section 1 provides that the Bill applies to all leases (including sub-leases) other than the types of lease excluded under paragraphs (a) to (c) of subsection (1) and further defined in subsections (2) to (4). It implements Recommendation 2 (see paragraphs 1.10 to 1.12).

It should be noted that the definition of "residential lease" in subsection (2) does not include the types of lease set out in paragraphs 5 and 6 of schedule 1 of the Private Housing Tenancies (Scotland) Act 2016 (student lets by institutional landlords and holiday lets). Accordingly, the Bill applies to these leases (though the majority of the provisions of Part 2 do not apply to them, by virtue of sections 2(2) and 5(1) and schedule 1).

Similarly, the definition of "agricultural lease" in subsection (3) does not extend to leases of agricultural land other than for the purposes of a trade or business, since these are not leases to which the Agricultural Holdings (Scotland) Act 1991 applies nor leases giving rise to a tenancy within the meaning of section 93 of the Agricultural Holdings (Scotland) Act 2003. The Bill therefore applies to such leases

Subsection (1) is expressed in the present tense. Whether the Bill does or does not apply to a lease depends on whether it is a lease excluded under subsection (1) at the time when the question is considered. For example, a lease might begin as an agricultural lease within the definition in subsection (3) – and thus be excluded by the Bill – but, while it is ongoing, cease to be covered by that definition and thus fall within the scope of the Bill. This is consistent with the approach which is presently taken to agricultural tenancies (for example in *Wetherall v Smith* [1980] 1 WLR 1280 at 1299F).

PART 2

AUTOMATIC CONTINUATION OF LEASE BEYOND TERMINATION DATE

Circumstances in which lease continues or terminates

2 Automatic continuation or termination of lease

(1) A lease to which this Act applies continues after its termination date unless—

(a) it ends on that date in accordance with—

(i) section 3(1) (termination of lease by notice or consensus), or

(ii) section 4(2) (termination in accordance with term of lease), or

(b) it is a lease which ends on that date in accordance with subsection (2).

(2) A lease ends on its termination date if it—

(a) is for a period of less than three months, or

(b) falls within schedule 1.

(3) But see also section 5, which provides for circumstances in which the ending of a lease (other than a lease which falls within schedule 1) on its termination date is of no effect.

(4) Nothing in this Part affects any ground on which a lease may end other than the occurrence of its termination date.

(5) The operation of this section on a lease (the "head lease") is unaffected by the existence of a sub-lease over all or part of the subjects of the head lease.

NOTE

Section 2 is concerned with the circumstances in which a lease will end or continue upon its termination date (other than on the basis of the parties' conduct after the termination date, as to which see section 5). None of its requirements or effects may be varied (section 23(1)).

Under the present law, there is some doubt as to whether parties may agree, by way of a term in a lease, that the lease will end on its termination date without need for notice (see paragraphs 2.9 to 2.11, 2.46 to 2.54 and 2.57). Subsection (1)(a)(ii), read together with section 4, puts this beyond doubt (implementing Recommendation 5).

Under the present law, a lease of less than 28 days will end on its termination date without notice (see paragraph 2.61). Subsection (2)(a) provides that no notice is required for leases of less than 3 months (implementing Recommendation 27).

A number of types of lease are presently excluded from tacit relocation. These are a lease granted for the lifetime of the tenant, a student let, a holiday let, a lease granted with the authority of the court, a short-term grazing or mowing lease and a lease (of less than a year) of a right to fish or hunt where there is a close season (see paragraph 2.60). These leases, which are listed in schedule 1, end on their termination dates by virtue of subsection (2)(b) (implementing Recommendation 4).

Subsection (4) states that nothing in Part 2 of the Bill affects any ground upon which a lease may end other than the occurrence of its termination date. Such grounds might include, for example, the service of a break notice (or notice of resumption), irritancy of the lease or renunciation or relinquishment of the lease.

Subsection (5) removes any lingering doubt which might arise from old authorities about whether automatic continuation can apply where a tenant has sub-let the subjects of the lease and the sub-tenant is in natural possession (as to which, see paragraphs 3.116 to 3.119).

For the definition of "termination date", see section 24(1), (2)(c) and (3)

3 Termination of lease by notice or consensus

(1) A lease to which this Act applies ends on its termination date if—

(a) the landlord gives the tenant valid notice to quit,

(b) the tenant gives the landlord valid notice of intention to quit, or

(c) the tenant gives up possession of the subjects of the lease—

(i) with the acquiescence of the landlord, and

(ii) in circumstances which indicate that both parties intend the lease to end on that date.

(2) For the purposes of—

(a) subsection (1)(a), notice to quit is valid only if it complies with—

(i) the requirements of sections 8, 11, 13 and 17(2)(b), or

(ii) those requirements as varied in relation to the lease under section 23,

(b) subsection (1)(b), notice of intention to quit is valid only if it complies with—

(i) the requirements of sections 10, 11, 13 and 17(1)(b), or

(ii) those requirements as varied in relation to the lease under section 23.

(3) See section 17 for provision about the giving of notice where there is more than one landlord or tenant under a lease.

NOTE

Section 3 provides that a lease ends on its termination date if the landlord gives the tenant valid notice to quit (subsection (1)(a)); the tenant gives the landlord valid notice of intention to quit (subsection (1)(b)); or the tenant gives up possession of the let subjects with the acquiescence of the landlord and in circumstances which indicate that both parties intend the lease to end on that date (subsection (1)(c)). In requiring valid notice, complying with the requirements set out in subsection (2), it implements Recommendation 14 (see paragraph 3.19).

The circumstances referred to in subsection (1)(c)(ii) will typically be where the tenant returns the keys to the subjects of the lease on the termination date and these are accepted by the landlord. They would also include the situation where the keys are offered and accepted a few days earlier or later than the termination date, but on both parties' understanding that the lease is to end on the termination date. They do not include the renunciation of a lease which has the effect of terminating the lease on a date other than the termination date.

Subsection (2) provides that notice is valid to prevent automatic continuation only if it complies with sections 8, 11, 13 and 17(2)(b) in respect of a landlord's notice and sections 10, 11, 13 and 17(1)(b) for a tenant's notice. Sections 13 and 17 contain default requirements for notice which may be modified or disapplied by a written term of a lease in accordance with section 23.

None of the requirements or effects of section 3 may be varied (section 23(1))

4 Termination in accordance with term of lease

(1) A lease to which this Act applies may include a term (however expressed) a purpose of which is to provide that the lease will not continue after its termination date by virtue of section 2(1).

(2) A lease which contains such a term ends on its termination date.

(3) A term of a lease which has the purpose mentioned in subsection (1) must be in writing.

(4) Nothing in subsection (1) affects any term (or purported term) of a lease agreed before this section comes into force.

NOTE

Section 4 implements Recommendation 5 by providing for a lease to end without notice in accordance with a term of the lease, removing the uncertainty regarding the effectiveness of such a term under the present law (see paragraphs 2.8 to 2.11, 2.46 to 2.54 and 2.57). None of its requirements or effects may be varied (section 23(1)).

Subsection (1) makes it clear that there is no required form of wording for such a term. (Compare the suggestion, noted at paragraph 2.10, that under the present law a term of a lease excluding tacit relocation would be enforceable but a term in the form of a "no warning" clause would not.)

Recommendation 5 includes the recommendation that any term of a lease providing that the lease will end on its termination date without the need for notice should require to be constituted in writing, irrespective of the length of the lease. This recommendation is given effect by subsection (3). Where the lease is for a period of one year or more, the writing will be required to comply with the requirements of section 1(2) of the Requirements of Writing (Scotland) Act 1995.

5 Automatic continuation of lease on basis of parties' behaviour after termination date

(1) The ending of a lease, other than a lease which falls within schedule 1, on its termination date by virtue of this Part is of no effect if—

(a) the tenant remains in possession of the subjects of the lease after that date, and

(b) the landlord—

(i) does not take steps to remove the tenant from those subjects within a reasonable period following the termination date, or

(ii) otherwise acts inconsistently with the lease having ended.

(2) Where the ending of a lease is of no effect by virtue of subsection (1), the lease is to be treated as if it had continued after its termination date.

(3) Subsection (1) does not apply if the tenant's possession after the termination date is—

(a) on the basis of a new lease or other agreement with the landlord, or

(b) in other circumstances which indicate that, on the termination date, both parties intended the tenant's continued possession to be on a basis other than continuation of the lease after that date.

NOTE

Section 5 reproduces the effect of the existing rule of tacit relocation on the basis of parties' conduct after the termination date (see paragraph 2.6). As noted at paragraph 2.53, and in implementation of Recommendation 6, none of its effects may be varied (section 23(1)). A lease is continued automatically where the tenant remains in possession of the let subjects after the termination date and the landlord either fails to take steps to remove the tenant within a reasonable period, or otherwise acts inconsistently with the lease having ended (typically by accepting rent) (subsection (1)). What is or is not a reasonable period will depend on the specific circumstances under consideration.

This rule does not apply to a lease which falls within schedule 1 (liferents, student and holiday lets, judicial leases, and short-term grazing, mowing and sporting lets) (see paragraph 2.60 and Recommendation 4). For the application of this section to leases with multiple landlords or tenants, see section 6.

Where there is a head lease and a sub-lease with the same termination date and the head lease is not to continue automatically after that date under section 2, see section 20.

6 Application of section 5 to leases with multiple landlords or tenants

(1) Where there is more than one landlord under a lease, the condition in paragraph (b) of section 5(1) is met only if each of the landlords behaves as mentioned in that paragraph.

(2) Where there is more than one tenant under a lease—

(a) section 5(1)(a) applies to the lease as if the reference to the tenant were a reference to at least one of the tenants,

(b) any continuation of the lease after its termination date by virtue of section 5(2) is of no effect in relation to any tenant who does not remain in possession of the subjects of the lease after that date.

NOTE

Section 6 makes provision about how the rule of automatic continuation under section 5 operates where there are multiple landlords or tenants under a lease. (See paragraph 2.59). None of its requirements or effects may be varied (section 23(1)).

Subsection (1) provides that where there are multiple landlords, a lease will continue under section 5 only where each of the landlords behaves as mentioned in subsection (1)(b) of that section – in other words, where none of the landlords takes steps to remove the tenant from the let subjects within a reasonable period, or each of them otherwise acts inconsistently with the lease having ended.

So, for example, if one landlord raises a court action to recover possession, that will suffice to exclude automatic continuation under section 5(1)(b)(i). If one landlord accepts rent on behalf of all other landlords, then that acceptance will be counted as the behaviour of all of the landlords and that will suffice for continuation under section 5(1)(b)(ii). If a landlord accepts rent only on their own account, the lease will not automatically continue by virtue of section 5(1)(b)(ii), read with section 6(1). In this scenario, the other landlord(s) would continue to be entitled to raise a court action seeking recovery of possession (provided that it is done within a reasonable period after the termination date).

Subsection (2) provides that where there are multiple tenants, the lease will continue under section 5 where *at least one* of the tenants remains in possession of the let subjects after the termination date and the landlord either fails to take steps to remove that tenant (or those tenants) within a reasonable period, or otherwise acts inconsistently with the lease having ended. The lease will only continue in respect of the tenant or tenants who remain in possession after the termination date. The continuation of the lease in this manner may involve the remaining tenant bearing the whole of the obligations under the lease, including payment of the rent, without the right of relief against their co-tenant that they would have had until the termination date.

Where the interest of the landlord or the tenant under a lease is held jointly by two or more trustees of a trust, the trustees are not to be treated as being more than one landlord or tenant for the purposes of this section: see section 24(4).

Effect of automatic continuation

7 Period and effect of automatic continuation of lease

(1) This section applies to a lease which continues after its termination date by virtue of section 2(1) or 5(2).

(2) If the period of the lease before its termination date is—

(a) one year or longer, the period for which it is continued is—

(i) one year, or

(ii) such shorter period of not less than 28 days as may be provided for in the lease,

(b) more than 28 days but less than one year, the period for which it is continued is—

(i) the period equal to the period of the lease, or

(ii) such shorter period of not less than 28 days as may be provided for in the lease,

(c) 28 days or less, the period for which it is continued is—

(i) the period equal to the period of the lease, or

(ii) such shorter period of not less than 7 days as may be provided for in the lease.

(3) But subsection (2)(c)(ii) does not apply to a lease which—

(a) was granted for a period of more than 28 days, and

(b) before its termination date, was for a period of 28 days by virtue of subsection (2)(a)(ii) or (b)(ii).

(4) The lease otherwise continues on the same terms as immediately before its termination date, except to the extent that those terms are inconsistent with the lease continuing by virtue of section 2(1) or (as the case may be) 5(2).

(5) A term of a lease which makes provision as mentioned in subsection (2)(a)(ii), (b)(ii) or (c)(ii) must be in writing.

NOTE

Section 7 implements Recommendations 8, 9 and 10 (see paragraphs 2.65 to 2.73). None of its requirements or effects may be varied (section 23(1)).

Subsection (2)(a)(ii), (b)(ii) and (c)(ii) allow a provision in a lease to specify a period of continuation which differs from the default period of continuation and which is shorter than the original period of the lease. This period may not be less than 28 days (for leases which were originally granted for a period of more than 28 days) or seven days (for leases which were originally granted for a period of 28 days or less). A provision which purports to specify a shorter period of continuation, or which is not in writing (as required by subsection (5)) will be ineffective and the period of continuation will therefore be the default set out in subsection (2)(a)(i), (b)(i) or (c)(i) as the case may be. A lease which was originally granted for a period of more than 28 days, but which is continuing for a period of 28 days, may not be automatically continued for a period of less than 28 days (subsection (3)).

Subsection (4) provides that a lease which continues automatically beyond its termination date by virtue of section 2(1) or 5(2) continues on the same terms as immediately before, except to the extent that those terms are inconsistent with the lease continuing. For example, a 10-year lease which includes an option to renew for a further 10 years will continue on the same terms as before, except that an unexpired renewal option will no longer apply (being inconsistent with section 7(2)(a), which has the (default) effect of turning the lease into a one-year lease).

8 Notice from the landlord: notice to quit

(1) Notice to quit must be given in writing.

(2) The notice must—

(a) state (in whatever terms) that the tenant is required to give up possession of the subjects of the lease on the termination date of the lease,

(b) specify the termination date of the lease,

(c) include the name of—

(i) the landlord under the lease, where the notice is given by the landlord, or

(ii) where the notice is given by another person on behalf of the landlord, that person, and

(d) sufficiently identify the subjects of the lease (whether directly or by reference to the lease).

(3) The notice does not comply with subsection (2)(a) if it states (in whatever terms) that the requirement mentioned in that subsection is subject to a condition.

(4) For the purposes of subsection (2)(d), the notice sufficiently identifies the subjects of the lease if a reasonable recipient of the notice whose knowledge included that of the tenant would be able to identify the subjects from the notice.

(5) An error in the date specified in the notice in order to comply with subsection (2)(b) does not make the notice invalid if the date so specified falls—

(a) after the termination date of the lease, and

(b) before the end of the period of 7 days beginning with the day after the termination date.

(6) An error in the information included in the notice in order to comply with paragraph (c) or (d) of subsection (2) does not make the notice invalid if a reasonable recipient of the notice would, in all the circumstances, know—

(a) that the information included in the notice was erroneous in that respect, and

(b) the correct information that should have been included in the notice in order to comply with that paragraph.

(7) The following do not apply to information included in the notice in order to comply with subsection (2)—

(a) section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents),

(b) any rule of law by virtue of which a court may order the rectification of, or otherwise provide relief from, an error in a document.

NOTE

Section 8 implements Recommendations 11 to 13 and 15 to 17 in respect of the form and content of a notice to quit (see paragraphs 3.9 and 3.12 to 3.31) and Recommendations 20, 22 and 23 in relation to errors in such a notice (see paragraphs 3.47 to 3.59). None of its requirements or effects may be varied (section 23(1)).

Subsection (1) provides that notice to quit must be given in writing (implementing Recommendation 11).

Subsection (2) sets out the elements which the notice must contain.

The reference in subsection (2)(a) to the notice's stating "in whatever terms" that the tenant is required to give up possession reflects the Bill's approach of specifying the required content of a notice rather than requiring a particular form of wording (see paragraphs 3.13 to 3.19, 3.29 to 3.30 and Recommendations 13 and 17(a)).

Subsection (2)(b) requires that the notice specify the termination date of the lease (implementing Recommendation 17(b)). For the effect of an error in the specified date, see subsection (5).

Subsection (2)(c) requires the notice to include the name of the person by whom it is given, implementing Recommendation 15 (see paragraphs 3.22 to 3.24). For the effect of an error in this information, see subsection (6).

Subsection (2)(d) requires the notice sufficiently to identify the subjects of the lease (whether directly or by reference to the lease). Subsection (4) enacts the "reasonable recipient" test of whether a description of the subjects of the lease is sufficient, as discussed in paragraphs 3.26 and 3.27. Together, these provisions implement Recommendation 16. For the effect of an error in this information, see subsection (6).

Under the existing law, a notice to quit must be unconditional (see paragraph 3.30). Subsection (3) reproduces this requirement for a notice to quit under section 8.

Subsections (5) to (7) make provision in respect of errors in the content of a notice. Under subsection (5), an error in the termination date specified in the notice does not invalidate the notice if the date specified is after the (actual) termination date and before the end of the 7-day period beginning with the day after that date. See section 9 for further provision in respect of the parties' rights during this period.

Subsection (6) provides that an error in the name of the person giving the notice or in the identification of the let subjects does not invalidate the notice if a reasonable recipient would, in all the circumstances, know both that the information provided was erroneous and the correct information that should have been provided.

The reliefs provided in subsections (5) and (6) are exhaustive in relation to the errors that they cover. Accordingly subsection (7) provides that, in respect of those errors, neither section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents) nor any other error-relieving rules of law apply.

9 Effect of error in termination date in notice to quit

(1) This section applies where—

(a) the date specified in notice to quit in order to comply with section 8(2)(b) (the "notified date") is erroneous but the notice is valid (see section 8(5)), and

(b) the giving of the notice is the only reason the lease in respect of which the notice is given ends on its termination date.

(2) Despite the lease ending on its termination date, the tenant may remain in possession of the subjects of the lease during the post-termination period (but see section 19(5) if the lease is a sub-lease).

(3) The tenant is not liable to the landlord for any of the following in relation to the tenant's possession of the subjects of the lease during the post-termination period—

(a) violent profits,

(b) unjustified enrichment,

(c) damage to the subjects sustained during that period, other than damage caused by the tenant (whether intentionally or through negligence).

(4) The landlord must—

(a) comply with the landlord's obligations under the lease during the post-termination period as if the lease had not ended,

(b) fulfil, or reimburse the tenant for the expense of fulfilling, any obligation owed by the tenant to another person ("P") in connection with the subjects of the lease which—

(i) arises during that period, and

(ii) would be owed by the landlord to P if the landlord were in occupation of the subjects when the obligation arises.

(5) In subsections (2) to (4), "post-termination period" means the period—

(a) beginning with the day after the termination date of the lease,

(b) ending with the notified date.

NOTE

Section 9 implements Recommendation 21 (see paragraphs 3.51 to 3.53). It applies where the only defect in the notice lies in an error in the termination date which may be relieved. Its effects may not be varied (section 23(1)).

The obligation placed upon the landlord by subsection (4)(b) relates only to obligations arising during the post-termination period (defined in subsection (5)) which would have been owed by the landlord to another person had the landlord been in occupation of the subjects. This includes, most obviously, the payment of business rates and common charges relating to the building, but would not include other voluntary obligations entered into by the tenant to which the landlord was not a party.

10 Notice from the tenant: notice of intention to quit

(1) Notice of intention to quit—

(a) must be given in writing if the period for which the lease was granted is longer than one year,

(b) may be given in writing or orally if that period is one year or less.

(2) The notice must—

(a) state (in whatever terms) that the tenant intends to give up possession of the subjects of the lease at the end of the period of the lease, and

(b) sufficiently identify the subjects of the lease (whether directly or by reference to the lease).

(3) If the notice is given in writing, it must include the name of—

(a) the tenant, if it is given by the tenant, or

(b) where it is given by another person on behalf of the tenant, that person.

(4) The notice does not comply with subsection (2)(a) if it states (in whatever terms) that the intention mentioned in that subsection is subject to a condition.

(5) For the purposes of subsection (2)(b), the notice sufficiently identifies the subjects of the lease if a reasonable recipient of the notice whose knowledge included that of the landlord would be able to identify the subjects from the notice.

(6) The notice need not specify when the period of the lease will end.

(7) An error in the information included in the notice in order to comply with subsection (2)(b) or (3) does not make the notice invalid if a reasonable recipient of the notice would, in all the circumstances, know—

(a) that the information included in the notice was erroneous in that respect, and

(b) the correct information that should have been included in the notice in order to comply with that subsection.

(8) The following do not apply to information included in the notice in order to comply with subsection (2) or (3)—

(a) section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents),

(b) any rule of law by virtue of which a court may order the rectification of, or otherwise provide relief from, an error in a document.

NOTE

Section 10 implements Recommendations 11, 13, 18 and 19 in respect of the form and content of a notice of intention to quit (see paragraphs 3.10 to 3.19 and 3.35 to 3.45) and Recommendations 22 and 23 in relation to errors in such a notice (see paragraphs 3.47 to 3.49 and 3.54 to 3.59). None of its requirements or effects, other than that of subsection (1)(b), may be varied (section 23(1)).

Subsection (1) provides that notice to of intention to quit must be given in writing, unless the period for which the lease was granted is one year or less, in which case notice may be given orally or in writing (implementing Recommendation 11). A written term of a lease for less than 12 months may provide that a notice of intention to quit must be in writing (section 23(1)).

Subsections (2) and (3) set out the elements which the notice must contain generally, and if it is in writing.

The reference in subsection (2)(a) to the notice's stating the tenant's intention "in whatever terms" reflects the Bill's approach of specifying the required content of a notice rather than requiring a particular form of wording (see paragraphs 3.13 to 3.19 and Recommendations 13 and 18(a)).

Subsection (2)(b) requires the notice sufficiently to identify the subjects of the lease (whether directly or by reference to the lease). Subsection (5) enacts the "reasonable recipient" test of whether a description of the subjects of the lease is sufficient (see paragraph 3.39). For the effect of an error in this information, see subsection (7).Subsection (6) provides that the notice need not specify when the period of the lease will end. Together, these provisions implement Recommendation 18.

Subsection (3) requires the notice to include the name of the person by whom it is given, if the notice is given in writing, implementing Recommendation 15 (see paragraphs 3.22 to 3.24). For the effect of an error in this information, see subsection (7).

Subsection (4) requires that the tenant's statement of intention to give up possession of the subjects of the lease at the end of the period of the lease be unconditional. This represents a limited departure from the existing common law, as explained by the Inner House in *Rockford Trilogy Limited v NCR Limited* [2021] CSIH 56; 2022 SC 90 (see paragraphs 3.41 to 3.44).

Subsection (7) provides that an error in the name of the person giving the notice or in the identification of the let subjects does not invalidate the notice if a reasonable recipient would, in all the circumstances, know both that the information provided was erroneous and the correct information that should have been provided. This implements Recommendation 22.

The reliefs provided in subsection (7) are exhaustive in relation to the errors that they cover. Accordingly subsection (8) provides that, in respect of those errors, neither section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (rectification of defectively expressed documents) nor any other error-relieving rules of law apply. This implements Recommendation 23.

11 Consent required to use electronic means to give notice in writing

(1) Notice which may or must be given in writing under section 8(1) or 10(1) must not be given by sending it to an electronic address, or by using any other electronic means, unless the condition in subsection (2) is met.

(2) The condition is that before the notice is given A has given (and not withdrawn) consent to the notice being given—

(a) in the form in which it is sent, and

(b) by being sent to the electronic address, or by the other means, used.

(3) For the purposes of subsection (2)—

(a) consent may be express or implied,

(b) withdrawal of consent may be—

(i) express, or

(ii) implied from A's course of conduct.

(4) Despite subsection (1), notice sent to an electronic address or given by other electronic means without the condition in subsection (2) being met is to be treated as having been sent or given in compliance with that paragraph if A acknowledges receipt of the notice in writing to B on or before the last day for giving the notice (as provided for in section 13).

(5) Where a question arises as to whether consent to a notice being sent to an electronic address, or given using other electronic means, had been withdrawn by A before the notice was so sent or given, it is to be presumed that the consent was not withdrawn unless the contrary is shown.

(6) In this section—

"electronic address" means any address or number used for the purposes of sending or receiving documents or information by electronic means (for example, an e-mail address or fax number),

"A" is the tenant or, as the case may be, landlord to whom notice is sent,

"B" is the tenant or, as the case may be, landlord by whom notice is sent.

(7) Section 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 (delivery of traditional documents by electronic means) does not apply to a document containing notice to quit or notice of intention to quit.

NOTE

Section 11 implements Recommendations 28 and 29 (see paragraphs 3.83 to 3.88). None of its requirements or effects may be varied (section 23(1).

As well as the giving of written notice to an electronic address (defined in subsection (6)), section 11 governs the giving of written notice by using any other electronic means (subsection (1)). This deliberately broad formulation is intended to cover notice given by messaging apps and by other routes yet to be invented.

Subsection (7) provides that section 4 of the Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 does not apply to notices given under the Bill. Section 4 of the 2015 Act makes provision for the delivery of traditional documents (as defined in section 1A of the Requirements of Writing (Scotland) Act 1995) by electronic means. It permits such delivery either where there is an accepted method agreed between the parties, or "by such means (and in such form) as is reasonable in all the circumstances." We consider that such a test of mere reasonableness would be inappropriate in the cases of notices under the Bill: see paragraph 3.84.

12 Further provision about giving of notice

(1) Notice to quit or of intention to quit given in writing need not include the name of, or be addressed by name to, the tenant or (as the case may be) the landlord.

(2) But if the notice does include that name, or is so addressed, it is not invalid by reason of an error in the name unless a reasonable recipient of the notice would, in the circumstances, be unaware that it was intended to be given to that person.

(3) For the purposes of this Part—

(a) notice is given to a person when it is received by that person,

(b) it does not matter whether the notice is received directly from the person giving it or from a third party.

NOTE

Section 12 implements Recommendations 17(c) (see paragraph 3.33) and 18(d) (see paragraph 3.45). Its effect may not be varied (section 23(1)). It makes it explicit that a notice to quit or notice of intention to quit need not include the name of, or be addressed by name to, the intended recipient (subsection (1)) but that if this is included, an error in the name will not invalidate the notice if a reasonable recipient would, in all the circumstances, be aware that it was intended to be given to that person (subsection (2)). It also provides that notice is given to a person when it is received by that person and that it does not matter whether the notice is received directly from the person giving it or from a third party (subsection (3)).

13 Day by which notice must be received

(1) Notice to quit, or of intention to quit, must be received on or before the last day for giving notice under the lease to which it relates.

(2) The last day for giving notice is—

(a) if the period of the lease is 6 months or longer, the day which is three months before the termination date of the lease,

(b) if the period of the lease is less than 6 months, the day which is one month before the termination date of the lease.

(3) For the purposes of subsection (2), the day which is three months or (as the case may be) one month before the termination date is—

(a) the day which—

(i) falls in the third or (as the case may be) first month ("month A") before the month in which the termination date falls, and

(ii) is the same day of the month as the termination date, or

(b) if month A does not have such a day, the last day of month A.

(4) See section 14 for provision about circumstances in which notice given in writing is taken to be received on a particular day.

NOTE

Section 13 sets out default rules governing the day by which notice given under section 3(1) must be received. It implements Recommendations 25 and 26 (see paragraphs 3.66 to 3.70).

In implement of Recommendation 37(a) a lease may vary the last day for giving notice under subsection (1) (section 23(1)(a)). Any such variation must be in writing (section 22(3)) and must provide for the same last day to apply to both landlords' and tenants' notices (section 22(2)).

Subsection (3) provides that the day which is three months (or as the case may be, one month) before the termination date is the same day of the month that is three months (or one month) before the termination date but that if there is no such day, the last day of that month.

For example if a lease for a period of 5 years has a termination date of 30 September 2030 the last date for receipt of notice is 30 June 2030. If a lease for the same period (duration) has a termination date of 31 May 2030, the last day for receipt of notice is 28 February 2030, being the last day of the third month before the month in which the termination date falls.

The "period of a lease" has the meaning given in section 24(2)(a) and (b).

14 Day on which notice given in writing is taken to be received

(1) Notice to quit or notice of intention to quit given in writing as mentioned in the first column of the table is taken to be received as mentioned in the corresponding entry in the second column of the table.

Notice given:	*Is taken to be received on:*
By sending it, in a traditional document, from within the United Kingdom to a listed address using a recorded delivery service.	The day of delivery to the listed address. That day is, unless the contrary is shown, taken to be— (a) the second day after the day on which the document is sent, or (b) where that second day is a non-working day, the next working day after that second day.
By sending it, in a traditional document, from within the United Kingdom to a listed address by pre-paying and posting it using a non-recorded delivery service.	The day of delivery to the listed address. That day is, unless the contrary is shown, taken to be— (a) the day on which the document would be delivered in the ordinary course of the non-recorded delivery service used, or (b) where that day is a non-working day, the next working day after that day.

By sending it, in a traditional document, from outside the United Kingdom to a listed address.	The day of delivery to the listed address.
By a traditional document containing the notice being delivered by a sheriff officer in accordance with section 15.	The day on which the document is so delivered.
By sending it, on a working day, by electronic means in compliance with section 11(1) (other than compliance by virtue of section 11(4)).	Unless the contrary is shown, the day on which the notice is sent.
By sending it, on a non-working day, by electronic means in compliance with section 11(1) (other than compliance by virtue of section 11(4)).	Unless the contrary is shown, the next working day after the day on which notice is sent.

(2) Nothing in this section affects when notice given other than as mentioned in the first column of the table is, or is taken to be, received.

(3) For the purposes of subsection (1), notice is sent to a listed address if it is sent—

(a) to—

(i) the last postal address in the United Kingdom notified in writing by A to B as an address to which notice to quit or notice of intention to quit (or a category of documents including such notice) may be sent, or

(ii) where A is a body corporate or other legal person with a registered office in the United Kingdom, either the address mentioned in sub-paragraph (i) or the postal address of that registered office, or

(b) where A does not have an address mentioned in paragraph (a), to the last postal address in the United Kingdom of A of which B is aware.

(4) For the purposes subsection (3)(b), it does not matter whether A has a more recent address in the United Kingdom of which B was not, but could reasonably have been expected to become, aware before the document was sent.

(5) In this section—

(a) a reference to a recorded delivery service is to a postal service which provides for sending and delivery to be recorded (and reference to a non-recorded delivery service is to be construed accordingly),

(b) a reference to a working day is a reference to any day other than a Saturday, a Sunday or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland (and a reference to a non-working day is to be construed accordingly),

(c) "traditional document" means a document written on paper, parchment or some other similar tangible surface,

(d) "A" and "B" have the meanings given by that section.

(6) Section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (service of documents) does not apply to a document containing notice to quit or of intention to quit.

NOTE

Section 14 implements Recommendations 31 to 34 (see paragraphs 3.90 to 3.94). It provides non-exhaustive rules for determining the time at which notice to quit or of intention to quit is given (subsection (2)). In implement of Recommendation 37(b) the effects of this section may be varied by a written term in a lease (see paragraph 3.99 and section 23(1)).

Subsection (6) disapplies section 26 of the Interpretation and Legislative Reform (Scotland) Act 2010 (service of documents) in relation to a document containing notice to quit or of intention to quit. That section would otherwise have applied a presumption that a notice sent by recorded delivery post from within the UK, or sent by electronic communications, was received 48 hours after sending. (See paragraphs 3.92 and 3.93).

15 Delivery of notice in writing by sheriff officer

(1) For the purposes of section 14(1), notice to quit or of intention to quit given in a traditional document is delivered by a sheriff officer in accordance with this section if—

(a) the document is delivered in accordance with subsection (2), and

(b) after the sheriff officer delivers it, the sheriff officer prepares a certificate of delivery in relation to the document in accordance with subsection (4).

(2) The document is delivered in accordance with this subsection if it is—

(a) where the recipient is an individual, delivered by hand by the sheriff officer—

(i) to the recipient,

(ii) at the recipient's residence, to another person who lives there, or

(iii) at the recipient's place of business, to an employee of the recipient or a person authorised to receive the document,

(b) where the recipient is not an individual, delivered by hand by the sheriff officer at the recipient's place of business, to an employee of the recipient or a person authorised to receive the document, or

(c) where the sheriff officer has unsuccessfully attempted to deliver the document in accordance with—

(i) paragraph (a), left in or at the recipient's residence or place of business in a manner in which it is likely to come to the recipient's attention,

(ii) paragraph (b), left in or at the recipient's place of business in such a manner.

(3) In subsection (2), a reference to the recipient of a document does not include a reference to the recipient's agent.

(4) The certificate of delivery must—

(a) be in writing,

(b) set out—

(i) how the document was delivered in accordance with subsection (1),

(ii) the date on which the document was so delivered,

(iii) the name of any person other than the recipient to whom the document was delivered, and

(iv) if the document was delivered in accordance with subsection (1)(c), the other ways in which the sheriff officer attempted to deliver the document, and why those attempts were unsuccessful, and

(c) be signed by the sheriff officer.

(5) The certificate of delivery is sufficient evidence of the matters set out in it.

NOTE

Section 15 implements Recommendation 36 (see paragraph 3.94). Its requirements may not be varied (section 23(1)).

16 Withdrawal of notice

(1) Notice to quit or of intention to quit may be withdrawn only with the agreement of—

(a) in the case of notice to quit, the tenant,

(b) in the case of notice of intention to quit, the landlord.

(2) The withdrawal of the notice and the agreement to the withdrawal must be in writing if the notice is—

(a) notice to quit,

(b) notice of intention to quit and was given in writing.

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

(4) Where, after the notice is given, the interest in the lease of a party to it is transferred to another person ("the successor"), the successor may withdraw or (as the case may be) agree to the withdrawal of the notice in accordance with this section.

(5) See section 17 for provision about the withdrawal of notice where there is more than one landlord or tenant under a lease.

NOTE

Section 16 implements Recommendations 38 and 39(b) (see paragraphs 3.101 to 3.106). Its requirements and effects may not be varied (section 23(1)).

17 Giving and withdrawal of notice where there are multiple landlords or tenants

(1) Where there is more than one landlord under a lease—

(a) 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,

(b) notice of intention to quit given by the tenant must be given to each landlord.

(2) Where there is more than one tenant under a lease—

(a) 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,

(b) notice to quit given by the landlord must be given to each tenant.

(3) Notice given as mentioned in—

(a) subsection (1)(a) may be withdrawn only with the agreement of the other landlord or each of the other landlords (in addition to the agreement of the tenant as required by section 16(1)(a)),

(b) subsection (1)(b) may be withdrawn only with the agreement of each landlord.

(4) Notice given as mentioned in—

(a) subsection (2)(a) may be withdrawn only with the agreement of the other tenant or each of the other tenants (in addition to the agreement of the landlord as required by section 16(1)(b)),

(b) subsection (2)(b) may be withdrawn only with the agreement of each tenant.

(5) Notice given by—

(a) one landlord in accordance with subsection (1)(a) has effect as if it were given by all of the landlords,

(b) one tenant in accordance with subsection (2)(a) has effect as if it were given by all of the tenants.

(6) Section 16(2) applies to an agreement under subsection (3) or (4) as it applies to an agreement under section 16(1).

NOTE

Section 17 implements Recommendations 40 and 41 (see paragraphs 3.108 to 3.112). Its requirements and effects may be varied by a written term in a lease (section 23(1)).

Where the interest of the landlord or the tenant under a lease is held jointly by two or more trustees of a trust, the trustees are not to be treated as being more than one landlord or tenant for the purposes of this section: see section 24(4).

18 Notice unaffected by change of landlord or tenant

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.

NOTE

Section 18 implements Recommendation 39(a) (see paragraphs 3.103 to 3.106). Its effect may not be varied (section 23(1)).

Head leases and sub-leases

19 Termination of sub-lease

(1) This section and sections 20 and 21 apply where there is a sub-lease over all or part of the subjects of another lease (the "head lease").

(2) If the purported termination date of the sub-lease is a date falling later than the termination date of the head lease, the termination date of the sub-lease is to be treated as being the same date as the termination date of the head lease (and any reference in this Part to the period of the lease is to be construed accordingly).

(3) Where the termination date of the sub-lease is the same as the termination date of the head lease (whether by virtue of subsection (2) or otherwise), the sub-lease ends on that date if the head lease ends on that date.

(4) Subsection (3) applies whether or not the sub-lease would otherwise have continued after its termination date by virtue of section 2(1) (but see also section 20).

(5) Nothing in section 9 allows a sub-tenant to remain in possession of the subjects of a sub-lease after the head lease comes to an end.

(6) The sub-tenant may not, in any proceedings before a court or tribunal, 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),

(d) new lease entered into by the landlord and the tenant over the subjects of the sub-lease.

(7) In subsection (6), "tribunal" includes a sole arbitrator or panel of arbitrators determining a dispute in accordance with an arbitration agreement within the meaning of section 4 of the Arbitration (Scotland) Act 2010.

(8) In this section and sections 20 and 21—

(a) "head lease" does not include a lease granted in accordance with section 17(1) of the Land Tenure Reform (Scotland) Act 1974 (interposed leases),

(b) a reference to the head lease, sub-lease, landlord, tenant or sub-tenant is to be construed in accordance with subsection (1).

NOTE

Section 19 implements Recommendations 42 and 43 (see paragraphs 3.115 to 3.123). Its effects may not be varied (section 23(1)).

Subsection (2) removes a doubt as to the duration of a sub-lease that has a termination date that appears to fall after that of the head lease.

For the effect of parties' conduct following the termination date in cases where there is a sub-lease, see section 20.

20 Automatic continuation of head lease and sub-lease

(1) This section applies where—

(a) the termination date of the head lease and the sub-lease are the same date (whether by virtue of section 19(2) or otherwise), and

(b) both leases end on that date by virtue of this Part.

(2) Section 5(1) does not apply to the ending of the head lease or the sub-lease on that date.

(3) The ending of the head lease, other than a lease which falls within schedule 1, is of no effect if—

(a) the tenant under that lease—

(i) remains in civil possession and the sub-tenant remains in natural possession of the subjects of the lease after that date, or

(ii) resumes natural possession of those subjects and remains in possession of them after that date, and

(b) the landlord under that lease—

(i) does not take steps to remove the tenant from those subjects within a reasonable period following the termination date, or

(ii) otherwise acts inconsistently with the lease having ended.

(4) The ending of the sub-lease, other than a lease which falls within schedule 1, is of no effect if—

(a) the sub-tenant remains in possession of the subjects of the sub-lease after that date,

(b) the tenant under the head lease—

(i) does not take steps to remove the sub-tenant from those subjects within a reasonable period following the termination date, or

(ii) otherwise acts inconsistently with the sub-lease having ended, and

(c) the ending of the head lease is of no effect by virtue of subsection (3).

(5) Where this section applies, in the application of section 5(2) and (3) or 6 to—

(a) the head lease, a reference to section 5(1) is to be read as if it were a reference to subsection (3),

(b) the sub-lease, a reference to section 5(1) is to be read as if it were a reference to subsection (4).

NOTE

Section 20 implements Recommendations 44 and 45 (see paragraph 3.119). Its requirements and effects may not be varied (section 23(1)).

Compare section 5, which makes analogous provision in a case where the head lease and sub-lease have different termination dates.

21 Information to be given by tenant to sub-tenant

(1) The tenant under the head lease must, as soon as reasonably practicable after—

(a) the notice is given, give the sub-tenant a copy of any document containing—

(i) notice to quit given by the landlord to the tenant,

(ii) notice of intention to quit given by the tenant to the landlord,

(b) it happens, notify the sub-tenant that the tenant has orally—

(i) given the landlord notice of intention to quit,

(ii) withdrawn notice of intention to quit,

(c) the document is constituted, give the sub-tenant a copy of—

(i) any agreement to the withdrawal of notice in accordance with section 16(1),

(ii) any term of the head lease under section 4(1),

(d) a new lease between the landlord and the tenant is constituted, notify the sub-tenant of that fact in writing if—

(i) the new lease is over the subjects of the sub-lease, and

(ii) the date of entry under the new lease immediately follows the termination date of the head lease.

(2) Where the tenant fails to comply with a requirement of this section—

(a) that failure does not affect the validity of the head lease, the sub-lease or anything to which the requirement relates,

(b) the tenant is liable to the sub-tenant for any loss caused to the sub-tenant by that failure.

(3) This section does not apply where the head lease—

(a) is for a period of less than three months, or

(b) falls within schedule 1.

(4) In this section, a reference to notice or a document is a reference to notice or a document which relates to the subjects of the sub-lease.

NOTE

Section 21 implements Recommendations 46 and 47 (see paragraphs 3.120 to 3.123). Its requirements and effects may not be varied (section 23(1)).

Cautionary obligations

22 Effect of continuation of lease on caution for obligations under lease

(1) This section applies where—

(a) a lease continues after its termination date by virtue of section 2(1) or 5(2), and

(b) on that date, there is a cautionary obligation in relation to an obligation of the tenant or the landlord under the lease (the "principal obligation") which also continues after that date.

(2) The cautionary obligation does not apply to the performance of the principal obligation after the termination date unless the terms of the cautionary obligation provide otherwise.

NOTE

Section 22 implements Recommendation 7 (see paragraph 2.63). Its effect may not be varied (section 23(1)).

Contracting out of Part

23 Restriction on modification or disapplication of this Part

(1) A lease to which this Part applies—

(a) may vary any requirement or effect of section 10(1)(b), 12, 13, 14, 16 or 17 in relation to the lease,

(b) may not vary any other requirement or effect of this Part in relation to the lease.

(2) The lease—

  (a) may vary the last day for giving notice under the lease under section 13(1) by making that day earlier or later,

  (b) where it does so, must provide for the same day to apply to notice to quit and to notice of intention to quit.

(3) A term of a lease which varies any requirement or effect of a provision mentioned in subsection (1)(a) must be in writing.

(4) A term of a lease is of no effect to the extent that it—

  (a) purports to vary any requirement or effect of a provision of this Part other than one mentioned in subsection (1)(a), or

  (b) is contrary to subsection (2)(b).

(5) Where a term of a lease is inconsistent with (but does not expressly vary) a requirement or an effect which may be varied under subsection (1)(a), the term of the lease—

  (a) if it is in writing, is to be treated as varying that requirement or (as the case may be) the effect of that section to the extent of that inconsistency,

  (b) otherwise, is of no effect to the extent of that inconsistency.

(6) In this section, "vary" means modify or disapply.

NOTE

Section 23 makes provision regarding the modification or disapplication of the other provisions of Part 2 of the Bill. It implements Recommendations 6 (see paragraph 2.58), 24 (see paragraph 3.60), 30 (see paragraph 3.88), 35 (see paragraphs 3.90 to 3.94), 37 (see paragraphs 3.96 to 3.99), 38 (see paragraph 3.101), 40 and 41 (see paragraph 3.109 to 3.112).

In terms of subsection (1)(a), a lease may vary any requirement or effect of:

- section 10(1)(b) (form of notice to quit in relation to leases of one year or less);
- section 12 (further provision about the giving of notice);
- section 13 (day by which notice must be received);
- section 14 (day on which notice given in writing is taken to be received);
- section 16 (withdrawal of notice);
- section 17 (giving and withdrawal of notice where there are multiple landlords or tenants).

The requirements and effects of the other provisions of Part 2 of the Bill may not be varied (subsection (1)(b)). Any term of a lease will be of no effect to the extent that it purports to vary such a requirement or effect (subsection (4)(a)).

If a term of a lease varied the last day for giving notice under the lease, the same day must apply for both landlords' and tenants' notices (subsection (2)), otherwise it will be of no effect (subsection (4)(b)).

A term of a lease which varies any requirement or effect of a provision of Part 2 must be in writing (subsection (3)). For the form of writing required in relation to a lease of more than a year, see section 1(2) and (6) of the Requirements of Writing (Scotland) Act 1995.

Definitions

24 Interpretation of this Part

(1) In this Part, unless the context requires otherwise—

"notice" means notice to quit or notice of intention to quit,

"notice of intention to quit" means notice given under section 3(1)(b),

"notice to quit" means notice given under section 3(1)(a),

"termination date", in relation to a lease, means the date of the ish of the lease (including the ish following a period for which the lease continues by virtue of section 2(1) or 5(2)).

(2) In this Part—

(a) a reference to the period of a lease is a reference to—

(i) where the lease is continuing by virtue of section 2(1) or 5(2), the period for which the lease so continues,

(ii) otherwise, the period for which the lease was granted,

(b) where the period for which a lease was granted is varied, a reference to the period for which a lease was granted is a reference to that period as varied,

(c) where the ish of a lease occurs at a time on the termination date other than the end of that date, a reference to the lease ending on, or continuing after, its termination date is a reference to the lease ending at, or continuing after, that time.

(3) Where a lease has different termination dates for different parts of the subjects of the lease—

(a) this Part applies to the lease as if each of those dates were the termination date of a lease over the part of those subjects to which the date relates, and

(b) in the application of this Part to such a date, any reference to—

(i) the subjects of the lease is to be construed as a reference to the part of those subjects to which the date relates,

(ii) the lease is a reference to the lease insofar as it relates to that part of those subjects.

(4) Where the interest of the landlord or the tenant under a lease is held jointly by two or more trustees of a trust, a reference in this Part to the landlord or (as the case may be) the tenant is a reference to the trustees as a whole (and, in particular, the trustees are not to be treated as being more than one landlord or tenant for the purposes of sections 6 and 17).

NOTE

Section 24 contains provision relating to the interpretation of Part 2 of the Bill.

In subsections (1) and (2) the reference to the ish is to the moment at which the lease provides that the tenant ceases to have a right to use the subjects of the lease: see paragraphs 2.23 and 2.24.

Disapplication of certain common law rules

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

(1) The rule of law by which a lease may continue after its termination date by tacit relocation, and any rule of law concerning the giving of notice by a party to a lease to the other party to prevent the lease so continuing, do not apply to a lease to which this Act applies.

(2) Any other rule of law by which a party to a lease may bring the lease to an end on its termination date (by letter of removal or otherwise) without the agreement of the other party to the lease does not apply to a lease to which this Act applies.

(3) Nothing in subsection (2) affects any rule of law enabling a party to a lease to bring the lease to an end on grounds other than the occurrence of its termination date.

NOTE

Section 25 disapplies the existing common law concerning the ending of leases on their termination dates and tacit relocation in relation to the leases to which the Bill applies. It implements Recommendations 1, 3 and 51 (see paragraphs 2.55, 2.62 and 3.132).

PART 3

MISCELLANEOUS PROVISION RELATING TO START, END OR LENGTH OF LEASE

Default duration and date of entry

26 Duration of lease and date of entry in absence of agreement

(1) This section applies where the tenant under a lease to which this Act applies has entered into possession of the subjects of the lease.

(2) 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.

(3) Subsections (4) and (5) apply where the lease does not provide for the date of entry (expressly or by implication) or any date so provided for cannot be established.

(4) The date of entry under the lease is to be treated as if it 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.

(5) A party to the lease may apply to the sheriff to determine the date of entry under the lease.

(6) Where, in any proceedings before a court or tribunal (whether under subsection (5) or otherwise), the court or tribunal determines the date of entry under the lease, the court or tribunal may order that the lease is to be endorsed with the date of entry.

(7) In subsection (6), "tribunal" includes a sole arbitrator or panel of arbitrators determining a dispute in accordance with an arbitration agreement within the meaning of section 4 of the Arbitration (Scotland) Act 2010.

(8) Any rule of law by which the period of, or date of entry under, a lease is to be implied does not apply where this section applies.

NOTE

Section 26 makes provision for determining the period and date of entry under a lease in the absence of agreement. It implements Recommendations 52 to 56 (see paragraphs 4.3 to 4.14).

An application to the sheriff under subsection (5) would be by way of summary application in terms of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules) 1999 (SI 1999/929).

Documents leading to termination of lease

27 Notification of postal address in United Kingdom for termination documents

(1) A party ("A") to a lease to which this Act applies—

(a) must, unless subsection (3) applies, notify the other party to the lease ("B") of a postal address in the United Kingdom to which any termination document in relation to the lease to be sent to A by post may be sent,

(b) may from time to time notify B of a new address in place of one previously notified under this section.

(2) In this section, "termination document" means a document the giving of which by a party to the lease to another party to the lease—

(a) has the effect of bringing the lease to an end (whether immediately or in the future), or

(b) is a necessary step before the lease is brought to an end by one of the parties.

(3) This subsection applies where—

(a) a postal address for A in the United Kingdom (whether or not specified as an address to which termination documents may be sent) is included in the lease,

(b) a postal address for A in the United Kingdom (whether or not specified as an address to which termination documents may be sent) is included in a document —

(i) disponing the subjects of the lease to A and granted after the lease was granted, or

(ii) assigning or otherwise transferring an interest in the lease to A,

which has been registered in the Land Register or recorded in the Register of Sasines, or a copy of which has been given to B,

(c) A is a body corporate or other legal person with a registered office in the United Kingdom,

(d) A is—

(i) a person who has been confirmed as an executor over an estate which includes an interest in the lease, or

(ii) a heritable creditor who has entered into possession of the interest of a party to the lease who has died, or

(e) the lease is not one for which a written document is required by section 1(2) of the Requirements of Writing (Scotland) Act 1995.

(4) Notification under subsection (1)—

(a) must be in writing,

(b) must state (in whatever terms) that any termination document, or a category of documents including all termination documents, to be sent to B by post may be sent to that address,

(c) may—

(i) notify different addresses for different types of termination document,

(ii) be given in one or more document.

(5) This section applies despite any enactment or rule of law, or term of the lease or other agreement between the parties, that a termination document may or must be sent to A at an address outwith the United Kingdom (and any termination document sent to an address notified under subsection (1) is not invalid only by reason of any such enactment, rule, term or agreement).

(6) The parties to a lease may not disapply the effect of this section or section 28 in relation to the parties or the lease.

NOTE

Section 27 places a requirement on a party to a lease, in certain circumstances, to provide the other party with a UK postal address to which termination documents may be sent. It implements Recommendations 57 to 59, 63 to 65 and 68 (see paragraphs 4.23 to 4.29).

The definition of "termination document" in subsection (2) is intended to include all break- and irritancy-related notices as well as notices to quit and notices of intention to quit.

Parties may not disapply the effect of this section or section 28 (subsection (6)).

28 Effect of failure to notify United Kingdom address under section 27

(1) This section applies where a party to a lease ("A") fails to comply with the requirements of section 27(1)(a) (the "notification requirements").

(2) A is not liable to the other party to the lease ("B") for any loss sustained by B as a result of that failure.

(3) Where B is the tenant, B—

(a) may withhold payment of the whole or part of any sum due to be paid during the non-compliance period in accordance with the lease by A to B,

(b) must pay any sum withheld under paragraph (a) to A before the end of the 14 day post-compliance period.

(4) Subsections (5), (6) and (7) apply to a termination document to be sent by B to A by post during the non-compliance and 14 day post-compliance periods.

(5) Where B is the landlord, B may send the document to the subjects of the lease if documents can be delivered to those subjects by post.

(6) Subsection (7) applies where—

(a) if B is the tenant, either—

(i) the document will not be legally effective if it is sent by electronic means, or

(ii) it is not reasonably practicable to send it by electronic means,

(b) if B is the landlord—

(i) B is unable to send the document in accordance with subsection (5) because documents cannot be delivered to the subjects of the lease by post, and

(ii) either—

(A) the document will not be legally effective if it is sent by electronic means, or

(B) it is not reasonably practicable to send it by electronic means.

(7) B may send the document by post to the Extractor of the Court of Session.

(8) A document sent in accordance with subsection (5) or (7) is to be treated as if it had been sent by post to an address for A notified under section 27(1).

(9) Where a question arises as to whether the condition in subsection (6)(a) or (b)(ii) was met in relation to a document sent to the Extractor of the Court of Session under subsection (7), it is to be presumed that the condition was not met unless the contrary is shown.

(10) In this section—

(a) "termination document" has the meaning given by section 27(2),

(b) the "non-compliance period" is the period beginning with the first day on which A is subject to the notification requirements and ending with the day on which A complies with those requirements,

(c) the "14 day post-compliance period" is the period of 14 days beginning with the day after the day on which the non-compliance period ends.

NOTE

Section 28 provides for the remedies available where a party fails to comply with the notification requirements in section 27. It implements Recommendations 60 to 62 (see paragraphs 4.30 to 4.37).

29 Effect of termination document given after death or change of party to lease

(1) Subsection (2) applies where—

(a) the interest of the landlord ("the former landlord") in a lease to which this Act applies has been transferred to another person ("the new landlord"), other than as a result of the death of the former landlord,

(b) the tenant has not been notified in writing by the new landlord of the name of, and a postal address (whether or not in the United Kingdom) for, the new landlord, and

(c) the tenant gives a termination document in relation to the lease to the former landlord.

(2) The termination document is to be treated as having been given to the new landlord.

(3) Subsection (4) applies where—

(a) a party ("P") to a lease to which this Act applies has died,

(b) the other party to the lease ("the sender") has not been notified in writing by—

(i) P's executor, of the fact that the executor has been confirmed over P's estate and the name of, and a postal address in the United Kingdom for, the executor, or

(ii) a heritable creditor of P, of the fact that the creditor has entered into possession of P's interest in the lease and the name of, and a postal address in the United Kingdom for, the creditor, and

(c) the sender sends a termination document in relation to the lease to, or leaves the document at, a proper address for P (as if P were still alive).

(4) The document is to be treated as having been given to the executor or (as the case may be) the heritable creditor on—

(a) where it is sent to a postal address, the day on which, if P were still alive, the document would have been taken to be received by P by virtue of any relevant rule,

(b) where it is sent to an electronic address—

(i) the day on which, if P were still alive, the document would have been taken to be received by P by virtue of any relevant rule, or

(ii) where there is no such day, the earliest day on which, if P were still alive, it would have been reasonable to expect P to receive the document and which is a working day, or

(c) the day on which it is left at a postal address.

(5) For the purposes of—

(a) subsection (3)(c), a proper address for P is a postal or electronic address which, immediately before P's death, the sender could have used to give the document to P by virtue of any relevant rule,

(b) subsection (4), it does not matter whether the executor has been confirmed or (as the case may be) the heritable creditor has entered into possession of P's interest in the lease on the day mentioned in subsection (4)(a), (b) or (c).

(6) The parties to a lease may not disapply the effect of this section in relation to the lease.

(7) Nothing in subsection (2) or (4) affects any ground on which a termination document may not be effective other than the requirement to give it to the other party to the lease.

(8) In this section—

"electronic address" means any address or number used for the purposes of sending or receiving documents or information by electronic means (for example, an e-mail address or fax number),

"relevant rule", in relation to a termination document, means any—

(a) enactment or rule of law, or

(b) term of the lease or other agreement between the parties to the lease,

relating to the giving of the document,

"termination document" has the meaning given by section 27(2),

"working day" means any day other than a Saturday, a Sunday or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.

NOTE

Section 29 makes provision for the effect of a termination document given after the death of a party to the lease or another change in the parties to a lease. It implements Recommendations 66 to 68 (see paragraphs 4.39 to 4.45) and 69 to 73 (see paragraphs 4.47 to 4.52). Its effect may not be disapplied by the parties (subsection (6)).

Where the termination document is a notice to quit or notice of intention to quit, "any relevant rule" for the purposes of subsection (4) would include any applicable provision of section 14 (day on which notice given in writing is taken to be received), whether or not varied by a written term of the lease (section 23(1)).

Irritancy notices

30 Service of irritancy notice and copies to be given to heritable creditors

(1) The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (the "1985 Act") is amended as follows.

(2) In section 4 (irritancy clauses etc. relating to monetary breaches of lease), for subsection (4) substitute—

"(4) A notice served under subsection (2) must be—

(a) sent by post to the tenant, by recorded delivery, or

(b) delivered in Scotland by a sheriff officer (see section 5B).

(4A) A notice sent in accordance with subsection (4)(a) is sufficiently served if it is delivered to—

(a) the last postal address in the United Kingdom given by the tenant to the landlord for the purpose of sending the notice,

(b) where the tenant is a body corporate or other legal person with a registered office in the United Kingdom, the address of that office,

(c) where the tenant does not have an address mentioned in paragraph (a) or (b), the last postal address for the tenant in the United Kingdom of which the landlord is aware.

(4B) For the purposes of subsection (4A)(c), it does not matter whether the tenant has a more recent address in the United Kingdom of which the landlord is not, but could reasonably be expected to become, aware before sending the notice.

(4C) The lease may provide that the notice must, in addition to being served in accordance with subsection (4), be served by such other method as is specified in the lease.".

(3) After section 5 insert—

"5A Irritancy of lease where there is a heritable creditor

(1) This section applies where there is a creditor in a standard security over a lease and either—

(a) 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

(b) such consent was so required and was given.

(2) The landlord must, at the same time as, or as soon as reasonably practicable after, serving any irritancy-related notice on the tenant, serve a copy of the notice on the creditor if—

(a) the security was registered before the start of the period of 10 days ending with the day on which the notice is served on the tenant, and

(b) the creditor has—

(i) a postal address in the United Kingdom known to the landlord, or

(ii) provided a postal address in the United Kingdom to the landlord for those purposes.

(3) The copy of the notice served under subsection (2) must be—

(a) sent by post to the creditor, by recorded delivery, or

(b) delivered in Scotland by a sheriff officer (see section 5B).

(4) A copy of a notice sent in accordance with subsection (3)(a) is sufficiently served if it is delivered to—

(a) the last postal address in the United Kingdom given by the creditor to the landlord for the purpose of sending the copy of the notice,

(b) where the creditor is a body corporate or other legal person with a registered office in the United Kingdom, the address of that office,

(c) where the creditor does not have an address mentioned in paragraph (a) or (b), the last postal address for the creditor in the United Kingdom of which the landlord is aware.

(5) For the purposes of subsection (4)(c), it does not matter if the creditor has a more recent address in the United Kingdom of which the landlord is not, but could reasonably be expected to become, aware before serving the copy of the notice.

(6) If the landlord fails to comply with any requirement of subsection (2) in relation to the lease, the landlord is not entitled to rely, for the purpose of terminating the lease or treating it as terminated, on any irritancy clause in the lease, or material breach of the lease, to which the requirement relates.

(7) The creditor may, in civil proceedings, challenge—

(a) the validity of any irritancy-related notice relating to the lease,

(b) the termination of the lease in reliance on an irritancy clause or a material breach of the lease, on the grounds that—

(i) the landlord failed to comply with a requirement of subsection (2) or section 4 in relation to the termination of the lease,

(ii) the landlord failed to take a step required by the lease to be taken before terminating the lease or treating it as terminated, or

(iii) 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.

(8) Subsection (7)(b)(iii) does not apply where the landlord has relied on the irritancy clause or material breach as a result of a failure by the tenant of the type mentioned in section 4(1)(a) (irritancy clauses etc. relating to monetary breaches of lease).

(9) In this section—

"civil proceedings" includes proceedings before an arbitrator or a panel of arbitrators in relation to an arbitration agreement within the meaning of section 4 of the Arbitration (Scotland) Act 2010,

"irritancy clause" means a provision of a lease which purports to terminate it, or enables the landlord to terminate it, in the event of an act or omission by the tenant or of a change in the tenant's circumstances,

"irritancy-related notice" means a document the giving of which by the landlord to the tenant under a lease—

(a) results in the termination of the lease (whether immediately or in the future) under an irritancy clause or as a result of a material breach of the lease, or

(b) is a necessary step before the lease is terminated in accordance with such a clause or as a result of such a breach,

"material breach", in relation to a lease, means an act or omission of the tenant, or a change in the tenant's circumstances, which is, or is deemed by a provision of the lease to be, a material breach of the lease,

"registered" means registered in the Land Register of Scotland or recorded in the Register of Sasines.

5B Sections 4 and 5A: delivery by sheriff officer

(1) For the purposes of sections 4(4)(b) and 5A(3)(b), a document is delivered by a sheriff officer if it is—

(a) where the recipient is an individual, delivered by hand by the sheriff officer—

(i) to the recipient,

(ii) at the recipient's residence, to another person who lives there, or

(iii) at the recipient's place of business, to an employee of the recipient or a person authorised to receive the document,

(b) where the recipient is not an individual, delivered by hand by the sheriff officer at the recipient's place of business, to an employee of the recipient or a person authorised to receive the document, or

(c) where the sheriff officer has unsuccessfully attempted to deliver the document in accordance with—

(i) paragraph (a), left in or at the recipient's residence or place of business in a manner in which it is likely to come to the recipient's attention, or

(ii) paragraph (b), left in or at the recipient's place of business in such a manner.

(2) In subsection (1), a reference to the recipient of a document does not include a reference to the recipient's agent.

(3) After the sheriff officer delivers the document, the sheriff officer must prepare a written document (a "certificate of service")—

(a) setting out—

(i) how the document was delivered in accordance with subsection (1),

(ii) the date on which the document was so delivered,

(iii) the name of any person other than the recipient to whom the document was delivered, and

(iv) if the document was delivered in accordance with subsection (1)(c), the other ways in which the sheriff officer attempted to deliver the document, and why those attempts were unsuccessful, and

(b) signed by the sheriff officer.

(4) A certificate of service is sufficient evidence of the matters set out in it.".

NOTE

Section 30 amends provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 relating to irritancy of leases. It implements Recommendations 77 to 83 (see paragraphs 5.14 to 5.19 and 5.21 to 5.28).

Apportionment of rent

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

(1) A lease to which this Act applies is to be treated as including a term which makes the provision set out in subsections (2) to (4).

(2) Subsection (3) applies where—

(a) the lease ends other than by virtue of an irritancy clause,

(b) the tenant under the lease, on or before the day on which the lease ends—

(i) pays rent, or

(ii) makes any other payment,

due under the lease to the landlord, and

(c) the rent paid, or other payment made, relates wholly or partly to a period falling after the lease ends.

(3) The landlord must, no later than 10 working days after the day on which the lease ends, pay to the tenant a sum equal to the total of—

(a) that part of the rent paid as mentioned in subsection (2)(b) which relates to the period falling after the lease ends, and

(b) that part of any other payment made as mentioned in that subsection which relates to that period.

(4) In this section—

"irritancy clause" means a term of a lease which terminates the lease, or enables the landlord to terminate it, in the event of an act or omission by the tenant or of a change in the tenant's circumstances,

"working day" means any day other than a Saturday, a Sunday, or a day which, under the Banking and Financial Dealings Act 1971, is a bank holiday in Scotland.

(5) A lease may include—

(a) a term disapplying subsection (1) in relation to the lease,

(b) a term modifying subsections (2) to (4) as they are to be included in the lease.

NOTE

Section 31 makes provision regarding the apportionment of rent. It implements Recommendations 84 to 86 (see paragraphs 6.10 to 6.16).

PART 4

FINAL PROVISIONS

32 Meaning of "lease"

In this Act, unless the context requires otherwise, a reference to a lease includes a reference to a sub-lease (and any reference to the landlord or the tenant under a lease is to be construed accordingly).

33 Consequential, transitional and saving provision

Schedule 2 contains transitional and saving provision and provision consequential on this Act.

34 Commencement

(1) This Part, other than section 33, comes into force on the day after Royal Assent.

(2) The other provisions of this Act come into force at the end of the period of six months beginning with the day of Royal Assent.

NOTE

Section 34 provides for the substantive provisions of the Bill to come into force six months after the day of Royal Assent. It implements Recommendation 74 (see paragraph 4.61).

35 Short title

The short title of this Act is the Leases (Automatic Continuation etc.) (Scotland) Act 2022.

SCHEDULE 1
(introduced by section 2)

LEASES WHICH TERMINATE AUTOMATICALLY UNDER SECTION 2(2)(B)

1 (1) A lease falls within this schedule if it is one (or more than one) of the following—

(a) a lease granted for the lifetime of the tenant,

(b) a lease which gives rise to a tenancy mentioned in—

(i) paragraph 5(1) of schedule 1 of the Private Housing (Tenancies) (Scotland) Act 2016 (student let),

(ii) paragraph 6 of that schedule (holiday let),

(c) a lease granted with the authority of—

(i) the court,

(ii) the Accountant of Court, or

(iii) the Accountant in Bankruptcy,

(d) a lease which is—

(i) for a period of one year or less, and

(ii) of land which is let for the purpose of its being used only for grazing or mowing during some specified period of the year (whether or not the lease expressly so provides),

(e) 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.

(3) In this schedule—

"close season" means an annual period during which it is an offence—

(a) in relation to fish, to fish for or take the fish in circumstances in which it is not an offence to do so during the rest of the year,

(b) in relation to birds, deer or wild animals, to take or kill the birds, deer or wild animals in circumstances in which it is not an offence to do so during the rest of the year,

"court" means Court of Session or sheriff,

"deer" has the meaning given by section 45(1) of the Deer (Scotland) Act 1996,

"freshwater fish", "inland waters", "salmon" and "trout" have the meanings given by section 69(1) of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003,

"wild animal" has the meaning given by section 27(1) of the Wildlife and Countryside Act 1981.

(4) Nothing in paragraph 1(a) affects any right or obligation of the tenant's executor in relation to the subjects of the lease following termination of the lease.

NOTE

Schedule 1 sets out a number of categories of lease which, while falling within the scope of the Bill (section 1(1)), are excluded from automatic continuation in any circumstances (section 2(2)(b), 5(1)). It implements Recommendation 4 (see paragraphs 2.17 and 2.60).

SCHEDULE 2

(introduced by section 33)

CONSEQUENTIAL, TRANSITIONAL AND SAVING PROVISION

PART 1

MODIFICATION AND DISAPPLICATION OF ENACTMENTS

Removal Terms (Scotland) Act 1886

1 After section 3 of the Removal Terms (Scotland) Act 1886 insert—

"**3A Disapplication of Act to certain leases**

This Act does not apply in relation to a lease to which the Leases (Automatic Continuation etc.) (Scotland) Act 2022 applies.".

Sheriff Courts (Scotland) Act 1907

2 (1) The Sheriff Courts (Scotland) Act 1907 is amended as follows.

(2) After section 37A insert—

"**37B Exception for certain leases**

Sections 34 to 37 and 38 do not apply to or in relation to a lease to which the Leases (Automatic Continuation etc.) (Scotland) Act 2022 applies.".

(3) In schedule 1 (Ordinary Cause Rules), in rule 34.5, after paragraph (1) insert—

"(1A) Paragraph (1) does not apply in relation to a lease to which the Leases (Automatic Continuation etc.) (Scotland) Act 2022 applies.".

Tenancy of Shops (Scotland) Act 1949

3 In section 1 of the Tenancy of Shops (Scotland) Act 1949, after subsection (7) insert—

"(8) In this section, a reference to notice of termination of tenancy given by—

(a) the landlord is a reference to notice to quit given under section 3(1)(a) of the Leases (Automatic Continuation etc.) (Scotland) Act 2022 (the "2022 Act"),

(b) the tenant is a reference to notice of intention to quit given under section 3(1)(b) of that Act.

(9) Section 5(1) of the 2022 Act (automatic continuation of lease on basis of parties' behaviour after termination date) does not apply in relation to any period during which the tenant continues in occupation of the premises by virtue of subsection (5).".

Abolition of Feudal Tenure etc. (Scotland) Act 2000

4 In section 67(3) of the Abolition of Feudal Tenure etc. (Scotland) Act 2000, after paragraph (a) (and before the word "or" immediately following that paragraph) insert—

"(aa) any lease being continued by virtue of section 2(1) or 5(2) of the Leases (Automatic Continuation etc.) (Scotland) Act 2022;".

Long Leases (Scotland) Act 2012

5 In section 72 of the Long Leases (Scotland) Act 2012, after "tacit relocation" insert "or by virtue of section 2(1) or 5(2) of the Leases (Automatic Continuation etc.) (Scotland) Act 2022".

Act of Sederunt (Summary Cause Rules) 2002

6 In the Act of Sederunt (Summary Cause Rules) 2002 (S.S.I. 2002/132), in rule 30.5, after sub-paragraph (1) insert—

"(1A) Sub-paragraph (1) does not apply in relation to a lease to which the Leases (Automatic Continuation etc.) (Scotland) Act 2022 applies.".

Codifying Act of Sederunt 1913

7 Sections 1 and 2 of chapter XV of Book L of the Codifying Act of Sederunt 1913 (SR & O 1913/638) do not apply in relation to a lease to which this Act applies.

NOTE

Part 1 of schedule 2 contains consequential provision. It implements Recommendations 48 to 50 (see paragraphs 3.124 to 3.131).

PART 2

TRANSITIONAL AND SAVING PROVISION

8 (1) Part 2 of this Act, and the modifications and disapplications of enactments made by Part 1 of this schedule, apply to a lease which was entered into before commencement day and which subsists on that day, subject to the following provision.

(2) If, on the day before commencement day, the lease is continuing by tacit relocation—

(a) the period for which the lease continues is unaffected by the coming into force of Part 2 of this Act,

(b) during that period, a reference in that Part to—

(i) the period of the lease is a reference to that period,

(ii) the termination date of the lease is a reference to the last day of that period.

(3) Sub-paragraphs (4), (5) and (6) apply where—

(a) on commencement day, the lease has a termination date falling before the end of the period of 6 months beginning with commencement day, and

(b) after that day, a party to the lease gives notice to the other party in relation to that termination date.

(4) Sections 3(2) and 8 to 18 do not apply in relation to the notice, and the notice is to be treated as if it were given under the pre-commencement law as it applied to the lease immediately before commencement day.

(5) Accordingly—

(a) the notice is valid for the purposes of section 3(1) if it would have been valid under the pre-commencement law, and

(b) the lease ends on its termination date by virtue of that section if it would have ended by virtue of the notice being given under the pre-commencement law.

(6) Where the lease is a head lease within the meaning of section 19(1), the requirements of section 21(1)(a), (b) and (c)(i) do not apply in relation to the notice.

(7) Where the lease is a head lease within the meaning of section 19(1), the requirements of—

(a) section 21(1)(c)(ii) do not apply to a term of the lease constituted during the period of 6 months beginning with the day after commencement day,

(b) section 21(1)(d) do not apply in relation to a new lease between the landlord and the tenant if the date of entry under the new lease falls before the end of that period.

(8) Where, on commencement day, the lease includes an express term which is valid on the day before commencement day under the pre-commencement law but would, if agreed on or after commencement day, be contrary to a provision of Part 2 of this Act, the term does not become invalid as a result of that provision coming into force.

(9) The modification of section 1 of the Tenancy of Shops (Scotland) Act 1949 by paragraph 3 does not affect the application of that section in relation to any notice of termination of tenancy given before commencement day.

(10) Nothing in Part 2 of this Act affects—

(a) the validity, invalidity, effect or consequence of any notice given, or anything else done, by a party to the lease before commencement day in relation to the termination date of the lease where that date occurs on or after commencement day,

(b) any existing right in relation to the lease,

(c) any legal proceeding or remedy that relates to such a right, and such proceeding or remedy may be instituted, continued or enforced as if this Act had not come into force.

(11) In sub-paragraph (10)—

(a) "notice" means notice to quit or notice of intention to quit under the pre-commencement law,

(b) "existing right" means a right, interest, title, immunity, privilege, obligation or liability acquired, accrued or incurred before commencement day.

9 (1) This paragraph applies to a lease which—

(a) has a termination date falling before commencement day, and

(b) is a lease to which this Act would apply if it subsisted on that day.

(2) Any question as to whether the lease continues after its termination date is to be determined in accordance with the pre-commencement law.

(3) For the purposes of determining such a question, regard may be had to the behaviour of the parties to the lease after commencement day.

10 (1) Part 3 of this Act, other than section 31, applies to a lease entered into before commencement day and which subsists on that day, subject to the following provision.

(2) Nothing in section 26 affects the period of, or date of entry under, a lease where that period or date has been determined by a court or tribunal in accordance with the pre-commencement law.

(3) Section 26 does not apply in relation to proceedings before a court or tribunal raised before commencement day.

(4) Accordingly, the pre-commencement law applies for the purpose of the determination by a court or tribunal of any question as to the period of, or date of entry under, a lease which is the subject of or arises in, or in relation to, such proceedings.

(5) The modifications of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 made by section 30 are of no effect in relation to—

(a) a notice served under section 4(2) of that Act before that day, or

(b) any other irritancy-related notice within the meaning of section 5A(9) of that Act (as inserted by section 30(3)) served before that day.

11 In this Part of this schedule—

"commencement day" means the day on which this schedule comes into force,

"pre-commencement law" means the law applying before that day.

"tribunal" has the meaning given by section 26(7).

NOTE

Part 2 of schedule 2 contains transitional and saving provision. It implements Recommendations 75 and 76 (see paragraphs 4.54 to 4.60).

Appendix B

List of respondents to the Discussion Paper on Aspects of Leases: Termination

Dr Craig Anderson

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Mike Blair

Boots

Brodies

Professor Stewart Brymer OBE WS

Burness Paull

CMS

Craig Connal KC

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Federation of Small Businesses

Gillespie Macandrew

Professor George Gretton

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Law Society of Scotland

Lindsays

Macroberts

Odell Milne

Lionel Most

Pinsent Masons

Property Litigation Association

Registers of Scotland

Royal Institution of Chartered Surveyors (RICS)

Scottish Property Federation

Senators of the College of Justice

Shepherd and Wedderburn

Shoosmiths

Society of Local Authority Lawyers and Administrators in Scotland (SOLAR)

TSB Bank

University of Aberdeen

University of Glasgow

Urquharts

Neil Wilson

Eric Young

Appendix C

List of respondents to the draft Leases (Automatic Continuation etc.) (Scotland) Bill consultation

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Scottish Law Agents Society

Scottish Property Federation

Senators of the College of Justice

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Shoosmiths

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Urquharts

Appendix D

List of Advisory Group members

The composition of the Advisory Group has fluctuated but the following individuals have been members for at least some of the lifetime of the project:

Craig Anderson	Robert Gordon University
Morag Angus	Surveyor, Scottish Government
Iain Doran	Solicitor, CMS
Denis Garrity	Advocate
Paul Haniford	Solicitor, Dentons; PSG
Odell Milne	Solicitor, Brodies
Lionel Most	Solicitor
Brian Reeves	Surveyor, Brian Reeves & Co
Jon Robertson	Solicitor, Turcan Connell
James Roscoe	Solicitor, Brodies
Ann Stewart	Solicitor, Shepherd & Wedderburn; PSG
Catherine Stone	Solicitor, Lloyds Banking Group
Richard Whyte	Solicitor, Brodies
Eric Young	Surveyor, Orinsen

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